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Non-jury Trial of Civil Litigation: Justifying a Complexity Exception to the Seventh Amendment

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COMMENTS

NON-JURY TRIAL OF CIVIL LITIGATION: JUSTIFYING A COMPLEXITY EXCEPTION TO THE SEVENTH AMENDMENT*

The seventh amendment to the United States Constitution states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[1] When Congress enacted the Federal Rules of Civil Procedure, the right to jury trial at common law remained undisturbed.[2]

As the complexity of civil litigation has increased, however, support has grown for an interpretation of the seventh amendment which would allow a court to deny a timely demand for trial by jury in a highly complicated lawsuit.[3] The Court of Appeals for the Third Circuit recently held in *In re Japanese Electronic Products Antitrust Litigation*[4] that "due process precludes trial by jury when a jury is unable to perform [its] task with a reasonable understanding of the evidence and the legal rules."[5] This decision came after a Ninth Circuit ruling to the contrary.[6]

The purpose of this Comment is to demonstrate that under exceptional circumstances[7] a court may deny a jury trial without violating the seventh amendment. Part I focuses on the inadequacies of jurors as factfinders

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1. U.S. CONST. amend. VII.

2. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a). "[C]ases triable by jury prior to the passage of the Federal Rules remained jury actions, and causes previously heard in equity continued to be adjudicated by the courts." Note, *Jury Trials in Complex Litigation*, 53 ST. JOHN'S L. REV. 751, 763 (1979).

3. "Notwithstanding the rhetoric extolling the importance of the jury in our democratic society, some commentators have attacked the right to a jury trial, *especially in civil cases*, as prolonging a system in which incompetents are assigned to tasks they are unlikely to perform well." Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 20 (1978) (emphasis added).

4. 631 F.2d 1069 (3d Cir. 1980).

5. *Id.* at 1084.

6. *In re* United States Financial Sec. Litig., 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) [hereinafter cited as United States Financial].

7. *See* notes 11-18 *infra* and accompanying text.

and decisionmakers in a complex civil case. Part II of this article discusses recent decisions in which lower federal courts have approved the complexity exception to the seventh amendment jury mandate in some instances.[8] Emphasis is placed on the language of *Ross v. Bernhard*,[9] a Supreme Court decision frequently cited in support of the complexity exception. In Part III, an examination of the seventh amendment from a historical perspective yields the conclusion that striking a demand for jury trial in complex civil cases is consistent with the practices of the English courts of equity during the eighteenth century.[10] Finally, Part IV of this Comment discusses how the demands of due process reinforce the argument in favor of bench trials in complex civil cases.

I. JURY INCOMPETENCE

A. *Complexity Defined*

Prior to any discussion of a jury's inability to serve as factfinder in a complex civil case, it is necessary to define the term "complexity" as it relates to judicial proceedings. In a broad sense, "[a] suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner."[11] Several factors merit consideration before a judge can conclude that a particular case is beyond the capabilities of a jury.[12] These factors can be divided into three categories: the overall dimensions of the trial, the nature of the proposed evidence, and the difficulty of the applicable law.[13]

With respect to the first factor, the judge should consider the number of parties, claims, witnesses[14] and exhibits,[15] and estimate the probable

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8. *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) [hereinafter cited as Japanese Elec. Prods.]; ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978) (seventh amendment issue held moot because trial court directed verdict), *aff'd sub nom.* Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980) [hereinafter cited as ILC Peripherals]; *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976).

9. 396 U.S. 531 (1970).

10. A modern-day litigant is not entitled to a jury trial if, at the time the seventh amendment was added to our Constitution, his case would have been tried in equity. *See* notes 87-133 *infra* and accompanying text.

11. 631 F.2d at 1079.

12. *See* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 898-99 (1979).

13. Brief for *Amicus Curiae* IBM Corp. at 46-48, Rosen v. Dick, 639 F.2d 82 (2d Cir. 1980).

14. *See, e.g.*, ILC Peripherals, *supra* note 8, at 444. There, the judge ruled that, in the event of a retrial on remand, plaintiff's jury demand would be stricken because, *inter alia*, eighty-seven witnesses testified in the original proceeding.

length of trial.[16] As far as evidentiary matters are concerned, the trial court should determine whether the average juror could comprehend testimony dealing with those sophisticated concepts crucial to the case.[17] Finally, the trial court should anticipate the difficulty an average juror would experience when attempting to interpret and apply unfamiliar, complicated law to a confusing set of facts.[18] If proper analysis of these criteria reveals that a jury could not reach a rational decision, then the proceeding may be regarded as a complex case.

B. *Disadvantages of Trial by Jury*

1. Problems with Composition

Although the civil jury format has enjoyed a prominent position throughout the history of the Anglo-American judicial system,[19] trial by jury poses serious problems in the realm of complex cases.[20] One concern is the difficulty of selecting qualified individuals for jury service. Two commentators have concluded that those best equipped to weigh the evi-

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15. *See, e.g., In re* Boise Cascade Sec. Litig., 420 F. Supp. at 101 (court sustained defendants' motion to strike the jury demand, noting that over 900,000 documents had been produced by the parties); ILC Peripherals, *supra* note 8, at 444 (judge decided to deny a jury trial if remanded partly because of the introduction of 2300 exhibits during the initial trial).

16. *See, e.g., In re* Japanese Elec. Prod., *supra* note 8, at 1073 (in reversing district judge's ruling that a complexity exception is without merit, circuit court noted that trial was expected to last one year); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 63 (S.D.N.Y. 1978) (court's conservative estimate of four months for trial was a major factor in the decision to deny jury trial); ILC Peripherals, *supra* note 8, at 444 (judge's ruling that there would be no jury in the event of a retrial was influenced by the five month duration of the original trial); *In re* Boise Cascade Sec. Litig., 420 F. Supp. at 104 (court granted defendant's motion to strike a jury demand because, *inter alia*, the estimated length of trial was 4 to 6 months). *But see* United States Financial, *supra* note 6, at 416 n.13 (court reversed the trial judge's order denying a jury in spite of an estimated duration of two years for trial).

17. *See, e.g.*, ILC Peripherals, *supra* note 8, at 446 (court noted that certain accounting practices and engineering principles were beyond the understanding of a typical jury).

18. *See, e.g.*, Japanese Elec. Prods., *supra* note 8. In this proceeding the court observed that "when the jury is unable to determine the normal application of the law to the facts of a case and reaches a verdict on the basis of nothing more than its own determination of community wisdom and values, its operation is indistinguishable from arbitrary and unprincipled decisionmaking." 631 F.2d at 1085. *See also* SEC v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977) (court observed that issues governing the interpretation and application of the securities laws were so complex as not to be suited for jury trial).

19. C. JOINER, CIVIL JUSTICE AND THE JURY 39 (1962).

20. "When [Blackstone and Holdsworth] glorified the jury system . . . it is improbable that they had anticipated the possibility of jurors facing protracted antitrust litigation involving giant corporations or federal agencies arguing complex market theory." Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243, 252 (1980).

dence in a complex case are least likely to be chosen for jury duty.

> There is no doubt that persons who might be best able to deal with the difficult issues involved in these complex cases, such as management personnel, accountants, business people and engineers, will invariably be excused from service at lengthy trials because of undue hardship. Employed persons cannot abandon their careers for large periods of time and few employers would tolerate such absences.[21]

In addition, it is very difficult to maintain a continuous jury in protracted civil litigation.[22] The longer a trial continues, the more likely it is that a particular member of the jury will be unable to serve throughout the entire proceeding because of death, infirmity, permanent withdrawal from the jurisdiction or some other obstacle. It has been suggested that additional jurors or alternates can remedy this situation, but these additions could create new problems, particularly in supervising and guaranteeing the attendance of the extra jurors.[23]

A third cause for concern lies in the service of reluctant jurors in protracted, complex trials. Unwilling individuals whom the court inconveniences by compelling their lengthy service will feel resentment and frustration after sacrificing months of their time. Their negative attitude may lead to a biased or irrational decision.[24] The Third Circuit found this phenomenon particularly disturbing.[25]

2. Problems in Decisionmaking

Although a jury may, in rare situations, consist wholly of individuals of high intelligence, critics remain concerned about the jury's inability to review the evidence and render a fair decision in a complex proceeding. In the words of one member of the San Francisco Bar:

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21. Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.L. SCH. L. REV. 611, 625 (1979); *accord*, Japanese Elec. Prods., *supra* note 8, at 1086; SHEPARD'S MANUAL OF FEDERAL PRACTICE § 7.19 (Supp. 1980).

A litigant who demands trial by jury is entitled to a factfinding body composed of members "selected at random from a fair cross section of the community." 28 U.S.C. § 1861 (1976). However, when individuals with more impressive demographic profiles are normally excluded from service, neither side enjoys the benefit of this statutory protection. Although the party demanding a jury may not object due to some perceived tactical advantage in having laymen resolve a complex dispute, the outcome violates the spirit of the law.

22. Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 778 (1978).

23. *Id.*

24. *Id.* at 776-77. *See* notes 26-37 *infra* and accompanying text.

25. "A long trial can . . . strain [a juror's] commitment to the jury's task." 631 F.2d at 1086.

> It is difficult to imagine a less appropriate mechanism for the determination of facts in a protracted and complicated suit than the civil jury. Because of the quantitative scale of most antitrust, securities and class action cases, and because the intellectual effort called for defies comprehension by a jury wholly inexperienced in the resolution of such matters, a jury is simply unqualified to participate in such cases.[26]

Jurors have admitted that their lack of legal and technical training impairs their ability to reach rational decisions. The court in *ILC Peripherals Leasing Corp. v. IBM Corp.*[27] focused on the frustration of the jurors themselves in their efforts to resolve the case at bar.[28] After deliberating for nineteen days, the jury was hopelessly deadlocked. Accordingly, the trial judge declared a mistrial, granted defendant's motion for a directed verdict, and entered an order to the effect that in the event of a retrail on remand, plaintiff's jury demand would not be honored. Judge Conti noted the jurors' apparent difficulty in grasping the concepts of the case. He asked the foreman whether such cases should be tried before a jury. The foreman responded, "[i]f you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that."[29]

The use of a jury in a complex civil case is not without its proponents. The Court of Appeals for the Ninth Circuit, in a strongly-worded portion of its opinion in *In re United States Financial Securities Litigation*[30] declared that the criticism of civil juries "unnecessarily and improperly demeans the intelligence of the citizens of this Nation."[31] In that court's view, the burden is on the attorneys[32] and the trial judge[33] to conduct the

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26. Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 208 (1976). "No matter how kindly one views the jury there is no question that at times its verdict represents fiction and not fact." 5 MOORE'S FEDERAL PRACTICE ¶ 38.02 (2d ed. 1980). *See* Brief for *Amicus Curiae* IBM Corp. at 29, Japanese Elec. Prods.; *accord,* J. FRANK, COURTS ON TRIAL 119 (1949).

27. 458 F. Supp. 423 (N.D. Cal. 1978).

28. *Id.* at 444.

29. *Id.* at 447.

30. 609 F.2d 411 (9th Cir. 1979).

31. *Id.* at 430.

32. "Whether a case involves computer technology, aircraft design, or accounting, attorneys must still educate the uninitiated about the matters presented in their case." *Id.* at 431. Judge Higginbotham of the Northern District of Texas believes that a jury actually imposes a discipline on the lawyers to become well-versed in their arguments.

> The process of distilling complex material into a comprehensible form operates less effectively in bench trials than in jury trials . . . . The virtue of forcing counsel to organize a complex mass of information into a form understandable by the uninitiated is that counsel ultimately must understand the issues and evidence in the case well enough to teach. If counsel cannot comprehensibly present their case to lay per-

proceedings in a manner designed to foster rational factfinding. The Ninth Circuit referred to several pretrial devices which can be useful in simplifying a complex case: dismissal for failure to state a claim upon which relief can be granted,[34] granting summary judgment[35] or separate trials, encouraging settlements, appointing a master,[36] and obtaining summaries of and stipulations as to the evidence.[37] Nevertheless, some cases remain too complex for jury determination regardless of a court's pursuit of simplification.[38] Given these circumstances, the only realistic alternative is to strike the demand for jury trial and try the case with the judge sitting as factfinder.[39]

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sons, is it likely that counsel do, in fact, understand their case?

Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 54 (1977).

The implication of Judge Higginbotham's rhetorical question may be refuted by a simple analogy. A university physics professor may be able to explain a highly advanced concept to a group of physics majors such that the students grasp it. However, a group of seventh graders may find it impossible to follow the same explanation because the concept cannot be reduced to "simple" form. Is there any doubt that this failure to comprehend is due to the concept and not to the professor?

33. The Ninth Circuit suggests that the judge can direct the course of a complex case through the use of the MANUAL FOR COMPLEX LITIGATION, a publication specifically developed for difficult trials. 609 F.2d at 427.

34. FED. R. CIV. P. 12(b)(6).

35. FED. R. CIV. P. 56.

36. "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . . ." FED. R. CIV. P. 53(b); *cf.* Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (The court concluded that "any role that a Special Master might be able to play in this case is so peripheral that the underlying complexities will necessarily remain.").

37. 609 F.2d at 428. It has been argued that the trial court can minimize the risk of an irrational decision by granting a motion for a directed verdict or for judgment notwithstanding the verdict. The Third Circuit rejects these remedies as ineffective. "[T]he court can only ensure that the jury will return one of a range of possible verdicts that the court finds reasonably but *minimally* supported by the evidence." 631 F.2d at 1087-88 (emphasis added).

38. Brief for *Amicus Curiae* IBM Corp. at 11, Rosen v. Dick, 639 F.2d 82 (2d Cir. 1980). Evidence suggests that even explanatory testimony of experts does not reliably help lay jurors to understand concepts crucial to their verdicts. Note, *supra* note 12, at 909-10.

39. "The most effective method of dealing with the problem . . . would be to change the jury — to employ special juries competent to decide extraordinarily complex cases." Note, *supra* note 12, at 915. However, the use of special juries may run afoul of constitutional mandates regarding jury selection. *Id.* at 916-17. "Absent [a group of expert investigators], theory would say that the next best factfinder is the judge due to his experience in dealing with facts, with the credibility of the diverse persons who appear as witnesses, and with the stratagems and wiles of practicing lawyers." 5 MOORE'S FEDERAL PRACTICE ¶ 38.02 (2d ed. 1980).

C. *Advantages of Bench Trials*

There are several reasons why a judge is preferable to a jury as factfinder in a complex case. Usually, he is more intelligent than the typical juror. Moreover, a judge receives valuable training and experience before and during his tenure on the bench.[40] "[His] experience can enable him to digest a large amount of evidence and legal argument, segregate distinct issues and evidence relevant to each issue, assess the opinions of expert witnesses, and apply highly complex legal standards to the facts of the case."[41]

In addition to these personal and professional attributes, the trial judge has at his disposal various aids which enable him to wade through the complex civil case.[42] These tools include law clerks and a secretarial staff, trial transcripts for review, procedural controls over the trial, and the opportunity to question witnesses with respect to confusing testimony.[43] Juries are either unable or unwilling to use these resources. Although a bench trial may not be the ideal manner in which to try a complex case,[44] clearly the judge is in a better position than a jury to render a rational verdict.

Some commentators fear that acceptance of a complexity exception will give trial judges unbridled discretion to strike jury demands in allegedly complex cases.[45] These observers argue that this perceived harm is compounded because a decision to strike a jury demand will be completely unreviewable.[46] The dissenting judge in *Japanese Electronic Products* asserted that the remedy of mandamus is inadequate because "formalistic application of the factors [concerning the determination of complexity] will result in holding that the trial court acted within bounds of its permissible discretion."[47] Judge Gibbons argued that, if the decision to strike the jury demand is challenged through an appeal, the circuit court will be reluctant to order a retrial in an otherwise error-free proceeding after a

40. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 8 (1966); Harris & Lieberman, *supra* note 21, at 622.

41. 631 F.2d at 1087. *But cf.* United States Financial, *supra* note 6, at 431 (The court observed that "[w]hile we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case.").

42. Harris & Liberman, *supra* note 21, at 622.

43. *Id.* at 623.

44. *See* note 39 *supra.*

45. *See* Note, *supra* note 2, at 771. Opponents of a complexity exception argue that such discretion was "not intended by the framers of the seventh amendment." *Id.*

46. 631 F.2d at 1093 (Gibbons, J., dissenting).

47. *Id.*

verdict has been rendered.[48]

Apprehension that a complexity exception will be tantamount to an erosion of seventh amendment rights is unfounded. Most judges favor using a jury whenever possible.[49] Furthermore, judges are usually familiar with the relative strengths and weaknesses of juries and can make informed decisions regarding the propriety of seating a jury in a particular case.[50] "If the courts restrain themselves in this determination—and *there is no reason to believe they will not*—then the number of such exceptional cases will remain limited, and will not affect the basic right to a jury trial in the vast number of ordinary civil cases."[51]

II. The Impact of Ross v. Bernhard[52]

Two federal district courts[53] have struck demands for jury trials based upon their respective applications of the three-pronged test enunciated by the Supreme Court in *Ross v. Bernhard*.[54] Although the results in these cases seem proper, it appears that these courts failed to appreciate the true significance of the *Ross* analysis. It is necessary to examine the development of the *Ross* test as well as its application in subsequent cases in order to understand that the *Ross* test is not a new approach but a unified restatement of rules applied throughout Anglo-American legal history.[55]

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48. *Id.* The dissenting opinion fails to note that the trial judge can certify the question for an *interlocutory* appeal pursuant to 28 U.S.C. § 1292(b) (1976). This procedure was invoked by the district courts in *Japanese Elec. Prods.* and *United States Financial. See* Note, *supra* note 12, at 914.

49. Note, *supra* note 12, at 913.

50. 631 F.2d at 1088.

51. Harris & Liberman, *supra* note 21, at 637 (emphasis added). The Third Circuit acknowledged that courts should employ a "high standard" and deny juries only when due process clearly requires a non-jury trial. 631 F.2d at 1088.

52. 396 U.S. 531 (1970).

53. ILC Peripherals, *supra* note 8; *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976).

54. 396 U.S. at 538 n.10. The test is designed to determine the "legal" or "equitable" nature of an issue and is revealed in the text accompanying note 67 *infra*.

55. *See* Part III *infra*. Several commentators and courts argue that the *Ross* test provides a new method of addressing the central question. However, the author subscribes to a different interpretation. "The proper analysis evidences . . . that the considerations of the *Ross* test were always part of the English common law procedure." Comment, *The Right to Trial by Jury: Old English Law Supports a Complexity Exception to the Seventh Amendment*, 11 Seton Hall L. Rev. 31, 54 (1980).

A. *The Beacon Theatres, Dairy Queen, Ross Trilogy*

The Court expanded the right to jury trial under the seventh amendment in a series of cases. The first of these, *Beacon Theatres, Inc. v. Westover*,[56] involved the antitrust laws. The plaintiff sought declaratory judgment and injunctive relief, claims traditionally within a court's equity jurisdiction. The defendant counterclaimed, raising issues at law. Some of these issues were identical to claims in the original complaint. Beacon invoked its right to a jury trial of the legal issues in its counterclaim. The plaintiff argued that no right to a jury attached since the issues were originally raised in a suit at equity. The district court denied a jury trial of those issues common to the complaint and the counterclaim before rendering judgment on the latter. In reversing this decision, the Supreme Court held that the defendant did not lose the right to jury trial on those common issues merely because the plaintiff arrived at the courthouse first.[57]

The Court later decided *Dairy Queen, Inc. v. Wood*.[58] In that case, the plaintiff alleged that the defendant had breached their contract for the use of a trademark. The plaintiff sought temporary and permanent injunctions against defendant's use of the trademark, an accounting of money allegedly due the plaintiff, a judgment for that amount and an injunction *pendente lite* against certain other activity. The district court struck defendant's demand for a jury trial because, *inter alia*, it deemed the action purely equitable.[59] That decision was overturned by the Supreme Court. Although the complaint sought an "accounting" (an equitable remedy), the Court held that "the constitutional right to trial by jury cannot be made to depend on the choice of words used in the pleadings."[60] The Court held that the essence of the action was a suit for money judgment and that the district court erred in denying a jury trial.[61]

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56. 359 U.S. 500 (1959).

57. *Id.* at 508-11. The effect of this ruling was to severely restrict the "equitable clean-up doctrine." Prior to *Beacon Theatres*, a party could be denied trial by jury whenever the equity court was regarded as having quasi-ancillary jurisdiction over subordinate legal issues which were part of an equitable action.

It is important to note that the Court did not address the problem of complexity in *Beacon Theatres*. It discussed issues which had already been categorized as either legal or equitable in nature. *In re* United States Financial Sec. Litig., 75 F.R.D. 702, 710 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

58. 369 U.S. 469 (1962).

59. An accounting constitutes an equitable remedy which triggers equity jurisdiction. *See* notes 100 & 101 *infra* and accompanying text.

60. 369 U.S. at 477-78.

61. *Id.* at 478-79.

Thus, the Supreme Court served notice that it would look behind the language of a complaint to ascertain whether one is entitled to a jury trial.[62]

Ross v. Bernhard[63] was the final decision in this line of cases. The plaintiffs brought a derivative action against the directors of a closed-end investment company. Historically, shareholders were not permitted to sue corporate officers and directors in actions at law.[64] Nevertheless, the Court ruled that the "right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."[65] The majority opinion noted that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[66] The Court expounded upon this general assertion in what has become known as "Footnote 10": "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, *the practical abilities and limitations of juries.*"[67] These factors constitute the *Ross* test.

Reaction to this formula has been mixed. Some argue that the consideration of jury limitations in *Ross* was not a departure from the historical test[68] which has been used in the past to interpret the seventh amendment.[69] They point out that *Ross* was decided at a time when the Court

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62. "[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Id.* at 477-78. Again the Court did not address the question of whether a complexity exception to the seventh amendment exists.

63. 396 U.S. 531 (1970).

64. *Id.* at 534. In time, however, equity courts began allowing shareholders to pursue a remedy in a derivative action. *Id.*

65. *Id.* at 532-33.

> "The historical rule preventing a court of law from entertaining a shareholder's suit on behalf of the corporation is obsolete; it is no longer tenable for a district court, administering both law and equity in the same action to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors."

Id. at 540.

66. *Id.* at 538.

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

68. The historical test in essence includes considerations of the first and second factors in *Ross*. A detailed discussion of the historical test is found in Part III *infra*.

69. "[T]his fleeting expression . . . of infidelity to the centrality of the traditional historical test in seventh amendment determinations would hardly justify an announcement that the historical test has been superseded in the federal courts." Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 645 (1973); *accord*, United States Financial, *supra* note 6, at 425; C. WRIGHT, LAW OF FEDERAL COURTS § 92 (3d ed. 1976) (quoting Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irration-*

was expanding the rights of litigants under the seventh amendment. "Since *Ross* itself was a landmark in this trend it seems incongruous to seize upon [Footnote 10] as a basis for a rather broad restriction of the right to jury trial."[70] Critics point out that the Court failed to apply the third factor in deciding *Ross* itself and in subsequent cases employing the *Ross* analysis.[71]

Others believe that the third element of the *Ross* test opens the door to a complexity exception. According to the Third Circuit, the Supreme Court has recognized the possibility that a jury's limitations may restrict the types of suits which fall within the scope of the seventh amendment.[72] Under certain circumstances a weighing of the *Ross* criteria will result in constitutionally permissible bench trials.[73] Of course, jury limitations comprise but one factor in this balancing process; however, the third prong of Footnote 10 may determine its outcome if the judge decides the case is too complex.[74]

A third interpretation of the *Ross* test suggests that the Court has now given constitutional status to policy arguments concerning jury limitations in complex civil cases.[75] The district court's decision in *In re Boise Cascade Securities Litigation*[76] advances this perspective. Certain shareholders brought a securities fraud action against a company that had acquired the corporation in which the plaintiffs owned an interest. The de-

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ality of Rational Decision Making, 70 NW. U.L. REV. 486, 526 (1976)).

70. 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[10], at 117 (2d ed. 1980); *see* Note, *supra* note 2, at 769.

71. For cases employing the *Ross* test, see for example Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974). However, neither of these cases required consideration of the "practical abilities and limitations of juries" because the Court did not regard the issues as too complex. As one commentator concludes: "[T]he Court never addressed the question of whether the right to jury trial could be constitutionally *restricted* by a test including nonhistoric factors." Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 11 (1976) (emphasis added). The author takes exception to Kane's reference to jury limitations as "nonhistoric factors"; *see* text accompanying notes 132-33 *infra*.

72. 631 F.2d at 1080.

73. Note, *Constitutional Law—Seventh Amendment—Right to a Jury Trial in Complex Litigation*, 1979 WIS. L. REV. 920, 934.

74. Brief for *Amicus Curiae* IBM Corp. at 27-28, Japanese Elec. Prods.

75. Note, *supra* note 22, at 792. This view gives more weight to the *Ross* test than does the second interpretation. The flaw in this reasoning is that the third prong of *Ross* is not a novel interpretation of the seventh amendment. On the contrary, concern over jury limitations was at the very heart of an equity court's decision to exercise its concurrent jurisdiction over an action, thus removing it from the category of "suits at common law." *See* Part III *infra*.

76. 420 F. Supp. 99 (W.D. Wash. 1976).

fendant's motion to strike the jury demand was granted. After determining that the case was beyond a jury's comprehension,[77] the court wrote that the third prong of *Ross* recognizes that the interests of justice are best served when a jury's limitations are weighed.[78] The judge was of the opinion that the third prong of the test is of "constitutional dimensions" and must be seen as a limitation to the right to jury trial under the seventh amendment.[79]

Following the decision in *Boise Cascade,* the district court in California issued its opinion in *ILC Peripherals Leasing Corp. v. IBM Corp.*[80] The plaintiff had alleged a violation of the antitrust laws. After the court declared a mistrial due to a jury deadlock, it directed a verdict for the defendant and ruled that in the event of another trial a jury would not hear the case.

The court determined that considerations of the pre-merger custom[81] and the remedy sought[82] alone would have supported arguments for trial by jury.[83] Despite these considerations, however, the court labeled the issues "equitable" in nature because of their complexity and the perceived inability of a jury to render a fair verdict in the case.[84]

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77. *Id.* at 103.

78. *Id.* at 104.

79. *Id.* at 105.

80. 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. IBM Corp., 639 F.2d 1188 (9th Cir. 1980).

81. With reference to private antitrust actions, the Supreme Court in *Fleitman v. Walsbach Street Lighting Co.,* 240 U.S. 27, 29 (1916), indicated that "when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury. . . . 458 F. Supp. at 445.

82. "These same comments [*see* note 81 *supra*] are applicable to the consideration of the second factor deemed significant in *Ross v. Bernhard.*" 458 F. Supp. at 445.

83. It should be recalled that these two elements are generally regarded as a restatement of the historical test. *See* note 68 *supra* and accompanying text.

84. 458 F. Supp. at 445. "In this case, more is involved than simply complicated facts. The accounting and especially the engineering concepts are far beyond the experience and understanding of an ordinary jury." *Id.* at 446.

Another district court took an altogether different approach to the characterization of issues. In Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977), the court indicated that there are two possible interpretations of the *Ross* text. One view is that the courts should consider jury limitations at the threshold stage when the question is whether a right to jury trial exists for the type of claim being asserted. If a claim is regarded as "legal" in nature (such as the suit for treble damages in *ILC Peripherals*), then individual attention is not given to the complexity of a given case. The *Radial Lip* court adopted this interpretation.

The other view of Footnote 10, according to *Radial Lip,* is that the courts should consider the complexity of issues in every case to determine whether the jury can comprehend them.

As the following section demonstrates, however, these district courts did not have to rely solely upon *Ross* to justify their rulings. Application of the historical test which embraces the "practical abilities and limitations of juries"[85] would have provided adequate grounds for striking jury demands.

III. The Historical Test

The seventh amendment provides for jury trial only in those instances where, if viewed historically, the issue or claim would have been tried in a court of law.[86] The courts customarily examine the issue's classification in 1791, the year of the amendment's adoption.[87] Moreover, the right to a jury trial in a civil case is determined by the practices of the courts in *England* during the latter part of the eighteenth century.[88] Confronted with a case involving complicated facts and intricate laws, the modern trial judge should determine whether a chancellor would have enjoined a party from proceeding at law in lieu of a suit in equity involving the same dispute.[89] If this would have been the case in 1791, there is no right to

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Apparently, this position was adopted by the *ILC Peripherals* court, but the *Radial Lip* court deemed it overly broad. 76 F.R.D. at 226-27. *See generally* Note, *supra* note 12, at 911.

It has been argued, however, that whenever the first two prongs of *Ross* would require an impractical result (*e.g.*, trying a claim for treble damages before a jury when the cause of action is a massive antitrust claim), the Court will then decide whether the issues are legal or equitable by considering jury limitations. Brief for *Amicus Curiae* IBM Corp. at 26, Japanese Elec. Prods.

85. The author contends that in addition to the customary treatment of a claim and the type of remedy sought, jury limitations influenced eighteenth century equity courts in their decision to exercise jurisdiction over a suit originally brought in a common law court.

86. C. Wright & A. Miller, Federal Practice and Procedure § 2302 (1971).

87. Dimick v. Schiedt, 293 U.S. 474, 476 (1935); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 Colum. L. Rev. 43, 44 (1980).

88. Baltimore and C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). One commentator observes that " '[b]eyond all question, the common law here alluded to is 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.' " Wolfram, *supra* note 69, at 641 (quoting United States v. Wanson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812)).

89. If equity had concurrent jurisdiction of complex cases, thus giving the chancellor the discretion to bring [the parties] into the court of chancery [through the issuance of an injunction], and if the chancellor in fact exercised that discretion to take jurisdiction over a particular case, then the litigation became a proceeding in equity and, being no longer a 'suit at common law,' was removed from the scope of the seventh amendment. As the Supreme Court held in Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855), the seventh amendment, correctly interpreted, embraces neither the "exclusive jurisdiction of courts of equity, *nor that which they have exercised as concurrent with courts of law.*"

jury trial in the modern proceeding.

A. *Introduction*

By decree of James I, the chancery received the power to enjoin parties from suing at law and from executing judgments obtained in courts of law.[90] This enabled the courts of chancery to ensure that procedures at law did not work injustice on the parties.

The common law courts developed their own devices for promoting the fair treatment of litigants. One such device was the special jury, whose members possessed extraordinary trade or professional qualifications.[91] A special jury was convened whenever "the causes were of too great nicety for the discussion of ordinary freeholders."[92] One commentor contends that the English courts recognized that certain disputes were beyond the grasp of the common jury and solved that problem by retaining the jury but modifying its composition.[93]

Another device used by common law judges was the removal of certain difficult issues from the jury. For example, the courts regarded the question of whether a seller's covenant not to compete was reasonable as one of law for the court's resolution in restraint of trade cases, rather than a question of fact for a jury.[94] It is apparent that even on the law side of the English courts, the conventional jury played a limited role.

B. *Equitable Jurisdiction in England*

1. Inadequacy of Remedies at Law — the Action of Account

Although the most common determinant of equitable jurisdiction was the nature of the remedy sought,[95] the courts also considered the inadequacy of the remedy at law.[96] Disputes which may have involved issues

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Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold,* 128 U. PA. L. REV. 965, 974 n.45 (1980) (emphasis added).

90. P. DEVLIN, NOTE ON THE SUIT AT COMMON LAW IN ENGLAND AT THE TIME OF THE SEVENTH AMENDMENT (1791) ¶ 15 (1979).

91. P. DEVLIN, TRIAL BY JURY 18 (3d ed. 1966).

92. 2 W. BLACKSTONE, COMMENTARIES 357 (Tucker 3d ed. 1803), *cited in* Oakes, *supra* note 20, at 256. By statute in 1730, England gave either side the right to a special jury. Oakes, *supra* note 20, at 256. Eventually this practice was discontinued. J. FRANK, *supra* note 26, at 143.

93. Oakes, *supra* note 20, at 256.

94. P. DEVLIN, *supra* note 91, at ¶ 79; *see, e.g.,* Davis v. Mason, 5 T.R. 118, 101 Eng. Rep. 69 (K.B. 1793).

95. Harris & Liberman, *supra* note 21, at 627.

96. *Id.*

normally considered "legal" were heard in chancery due to certain problems with common law procedures.[97]

According to Lord Devlin,[98] the action of account was one in which the chancellor commonly recognized the limitations of common law juries and exercised equity's concurrent jurisdiction over the case.[99] If the transactions between the parties were so complicated that a jury would have been unable to unravel their accounts, the chancellor looked beyond the initial characterization of an issue in order to afford just and complete relief.[100]

Twentieth century critics of the use of juries in complex civil cases have drawn an analogy involving the action of account and the modern, complex proceedings.[101] The district court in *Bernstein v. Universal Pictures, Inc.*[102] struck a jury trial demand based on this analogy. *Bernstein* was a class action against certain producers and distributors of motion pictures and television shows. The court recalled that traditional equity powers include the authority to strike a jury demand in the interest of justice.[103] In the opinion of the trial judge "[t]his equitable power was not limited to the old common law 'action of account,' or by modern notions of accounting procedures."[104] The *Bernstein* court thus recognized a similarity between the need for a bench trial in actions of account two hundred years ago and the need for striking a jury demand in a highly technical antitrust proceeding today.[105]

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97. *See* Comment, *supra* note 54, at 40; Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C.L. REV. 511, 525-26 (1979).

98. Lord Devlin is a Lord of Appeal and a leading authority on the jury's role in the English judicial system. He has received honorary degrees from Oxford and Cambridge Universities and has written several books and articles in this area.

99. Devlin, *supra* note 87, at 65. "[I]t is unquestionable that by 1791 accounts were being taken in equity simply because they were complicated." *Id.* at 68; *see* J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 452 (11th ed. 1873).

100. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 200 (2d ed. 1948). "Even where there is no equitable duty to account, a bill . . . may be maintained if the court regards the remedy at law as inadequate because the account is so complicated that the procedure at law is not adapted to secure an accurate result." *Id.* at § 202. Equity's jurisdiction extends to many cases where the account is legal in nature and the items comprising the account are predicated on legal obligations. J. STORY, *supra* note 99, at § 442.

101. *See* Comment, *supra* note 55, at 41.

102. 79 F.R.D. 59 (S.D.N.Y. 1978).

103. *Id.* at 66.

104. *Id.* at 67 (citing Fowle v. Lawrason, 30 U.S. (5 Pet.) 495 (1831)).

105. The district court in *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), used this rationale to conclude that the inability of a jury to handle a complex case constitutes an inadequate remedy at law which, therefore, triggers equitable

The parallel drawn between an action of account and a complex civil case has been challenged on several grounds. One objection centers on the nature of the remedy sought in the latter situation. Historically, damages is a legal remedy.[106] However, characterization of the remedy was not the sole factor in deciding whether to exercise equity's concurrent jurisdiction.[107] A related criticism, peculiar to antitrust actions, is that equity has been reluctant to entertain actions involving imposition of penalties.[108] Lord Devlin counters this objection by pointing out that courts of equity were free to entertain such suits when the obstacle of self-incrimination was removed.[109]

Another criticism of the *Bernstein* analogy is that jury incompetence formed a basis for equitable jurisdiction only in cases that involved the purest form of an action on account. Therefore, it is argued that an accounting was a special type of action which simply cannot be likened to a modern complex case.[110] The Ninth Circuit adopted this position.[111] However, during the eighteenth century, the chancery courts entertained a range of cases in which a request for an accounting based upon, for example, tort or contract damages bore little resemblance to the pure form of the action of account.[112]

The Illinois district court perceived another flaw in the accounting/complex case analogy. In *Radial Lip Machine, Inc. v. International Carbide Corp.*,[113] the court distinguished between complex issues surrounding the computation of damages and complicated facts concerning the determination of liability.[114] While a court of equity may hear a case on the basis of the former, arguably it does not have jurisdiction as a result of

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jurisdiction. This view was rejected on appeal. United States Financial, *supra* note 6. "[T]he issues presented here are of a legal nature. The fact that resolution of the issues will involve an examination of . . . accounts, and accounting procedures, cannot transform the case into an action for an equitable accounting." 609 F.2d at 423.

106. Oakes, *supra* note 20, at 295-96.

107. *See* notes 95-97 *supra* and accompanying text.

108. The remedy in an antitrust suit is treble damages. *See* Oakes, *supra* note 20, at 259 n.85.

109. Equitable procedures require that responses to discovery be under oath. P. DEVLIN, *supra* note 90, at ¶ 88. Equity follows the legal principle that no one is obliged to incriminate himself through his own testimony. *Id.* When the obstacle of self-incrimination no longer exists, as in the case where the party seeking the aid of equity consents to the discovery or the penalty, equitable jurisdiction can be exercised. *Id.* at ¶¶ 89, 93.

110. Note, *supra* note 97, at 526-27.

111. 609 F.2d at 424.

112. Brief for *Amicus Curiae* IBM Corp. at 26, Rosen v. Dick, 639 F.2d 82 (2d Cir. 1980).

113. 76 F.R.D. 224 (N.D. Ill. 1977).

114. *Id.* at 228.

the latter.[115]

It should be noted, however, that in *Ochoa v. American Oil Co.*[116] the district court stated that, in extraordinary cases where only a court of equity acting without a jury could unravel highly complex issues, the basis for equitable jurisdiction is the inadequacy of remedies at law.[117] Significantly, the court failed to limit its reasoning to the determination of damages alone.[118] Furthermore, the "inadequacy" exception has embraced both the procedural as well as the remedial aspects of an action. Since the inability of a jury to resolve a complex case is a procedural shortcoming of the adjudicatory process, it is a proper ground for invocation of the inadequacy exception.[119]

2. Other Grounds for Equitable Jurisdiction

Although most of the authority that can be cited to justify a complexity exception falls within the common law action of account model,[120] there

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115. *Id.* The *Radial Lip* court cited Judge Sobeloff's opinion in Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir. 1971), in support of this distinction. In *Tights* the Fourth Circuit argued that the Supreme Court, in United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906), had rejected the argument that equity could take jurisdiction whenever there were complex issues concerning liability. 441 F.2d at 340-41. The *Tights* court misconstrued the opinion in *Bitter Root*. The relevant language of the Court in *Bitter Root* appears below:

> The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a *difficulty* in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort feasors, and the various devices alleged to have been resorted to . . . by way of organizing different corporations, in order . . . to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction *on that account.*

200 U.S. at 472 (emphasis added).

It is clear from this passage that the Court rejected only the notion that a "difficult" case may be heard in equity. The Court later interpreted the *Bitter Root* decision as holding that "mere complication of facts alone and *difficulty* of proof are not a basis of equity jurisdiction." Curriden v. Middleton, 232 U.S. 633, 636 (1914) (emphasis added).

Those favoring a complexity exception would suggest that a truly complex case (*see* notes 11-18 *supra* and accompanying text) presents more than mere difficulty in proving facts; it is one in which it is virtually *impossible* for a panel of laymen to decide. In deciding *Bitter Root*, the Court was not confronted with a "complex" case as the term is used in this Comment.

116. 338 F. Supp. 914 (S.D. Tex. 1972).

117. *Id.* at 921.

118. The *Ochoa* decision was cited by the district court in *In re* United States Financial Sec. Litig., 75 F.R.D. 702, 710 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

119. Note, *supra* note 12, at 905.

120. Harris, *supra* note 21, at 628-29.

are other instances in which the chancellor took jurisdiction over a dispute out of concern for jury limitations. Two such cases are *Towneley v. Clench*[121] and *Gyles v. Wilcox, Barrow & Nutt.*[122] The former involved, *inter alia*, the interpretation of books and deeds. At one point in the opinion, the chancellor deemed himself better qualified to make this interpretation than a "jury of ploughmen."[123]

Reliance on *Clench* by proponents of a complexity exception has drawn criticism from at least one commentator. Professor Arnold notes that the plaintiff never asserted that equitable jurisdiction rested on the complex nature of the dispute.[124] Additionally, the decree did not rely upon the inferiority of a jury as justification for denying the defendant his right to proceed at common law.[125] According to Arnold, equitable jurisdiction actually rested on a two-fold inadequacy of common law procedures, as opposed to the complexity of the case. The procedural problems included the lack of authority to compel the production of documents and to order the appearance of witnesses.[126]

These commentators offer a different theory on the basis for Lord Ellesmere's ruling in *Clench*. They note that he referred to another question raised by the case. In their opinion, this additional inquiry concerned whether a particular will was legally effective.[127] This complex question of law thoroughly justifies the court's refusal to allow an action at law on the

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121. 21 Eng. Rep. 13 (Ch. 1603). According to Lord Devlin, this is the correct name of the case despite the fact that it originally appeared as Clench v. Tomley. P. DEVLIN, *supra* note 91, at A1 n.1.

122. 26 Eng. Rep. 489 (Ch. 1740).

123. 21 Eng. Rep. at 13. "Thus, the English common law, invoking equity jurisdiction, recognized that complex cases could exceed the jury's limitations, thereby rendering the remedy at law inadequate." Note, *The Right to Trial by Jury in Complex Litigation*, 20 WM. & MARY L. REV. 329, 332 (1978).

124. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 844 (1980).

125. *Id.* Professor Arnold adds that Lord Ellesmere's opinion was never cited in subsequent decisions, nor were its principles ever invoked. He suggests that this otherwise obscure case was uncovered by those searching for ancient support for a relatively modern proposition, *i.e.*, a complexity exception to the seventh amendment is constitutionally permissible. *Id.* at 845.

126. Campbell & Le Poidevin, *supra* note 90, at 979. Professor Arnold fails to recognize the distinction between grounds for asserting equitable jurisdiction initially and grounds for refusing to permit a jury to decide a question once equitable jurisdiction has been exercised. No attempt is made to explain why the chancellor refused to permit jury resolution of this dispute once certain documents were produced and certain overseas witnesses deposed. *Id.* at 979-81.

127. *Id.* at 984.

grounds as reported.[128]

In *Gyles* the court considered whether, under the terms of the Copyright Act, one book was a plagiarized version of another. Lord Hardwicke refused to direct an issue on this point, holding that "[t]he 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."[129] A careful study of *Clench, Gyles* and other cases[130] has led Lord Devlin to conclude with certainty that a chancellor would have regarded jury limitations as a major factor to be considered in 1791.[131]

C. *Early Developments in the United States*

Because the colonists had very high regard for trial by jury,[132] eighteenth century juries in this country had greater decisionmaking authority than their modern descendants.[133] Notwithstanding this affinity for the civil jury system, the scope of the seventh amendment must still be measured by the intentions of the framers.[134] It is clear from the language and legislative history of this provision that the framers did not intend to deviate from the English distinction between law and equity.[135] In particular, it should be recalled that the text of the amendment was drafted by Madison,[136] and that a predominantly federalist first Congress adopted

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128. A jury of ploughmen, in order to decide the general question of title in the ejectment proceedings, would have needed instruction in the method of disposing of land by will before the Statute of Uses, the effect of the Statute, the special significance of a death between 1535 and 1540, and the possible ways in which a will might take effect despite the Statute. If this exposition has been lengthy and tedious, it would equally have taxed the mind of a seventeenth century juror.

Id. at 984-85.

129. 26 Eng. Rep. at 490-91.

130. *See* P. DEVLIN, *supra* note 90, where the author has compiled a list of many cases which are discussed in the appendix thereto.

131. Devlin, *supra* note 87, at 107.

132. Arnold, *supra* note 124, at 833.

133. *Id.* "Most of the jury control techniques which modern lawyers take for granted were simply unknown in early American practice, and the other technical devices which have as their aim and effect the control of the jury were unavailable as well." *Id.* at 833-34.

134. Campbell & Le Poidevin, *supra* note 89, at 967.

135. *Id.*

136. An ideological colleague of Madison addressed this question when he wrote:

> [T]he circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them . . . . [T]he litigations usual in chancery frequently

the final version.[137] The federalists did not share the same view of the civil jury format as those anti-federalists who fought for the inclusion of the seventh amendment. Thus, it cannot be said that the founding fathers intended to require a jury in protracted, complicated cases, such as antitrust or securities matters, which are totally beyond a jury's comprehension.[138]

IV. Due Process Considerations

The remaining theory in support of a complexity exception is that jury trials in complex cases violate due process. Rather than invoking the *Ross* test or the historical analysis, the Third Circuit based its decision in *Japanese Electronic Products* on the need to ensure fundamental fairness.[139] In the court's words, "[a] jury that cannot understand the evidence and the legal rules to be applied provides no reliable safeguard against erroneous decisions."[140]

The Third Circuit perceived a conflict between the fifth and seventh amendments[141] and determined that under appropriate circumstances the right to a jury trial must yield to the right to a fair trial.[142] The better

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comprehend a long train of minute and independent particulars.
A. Hamilton, The Federalist No. 83, 549-50 (Mod. Lib. C. Ed.).

137. Brief for *Amicus Curiae* IBM Corp. at 20, Rosen v. Dick, 639 F.2d 82 (2d Cir. 1980). An examination of the history of the amendment yields two conclusions. First, the colonists insisted upon preserving the right to jury trial in certain civil cases. Second, the amendment adhered to the English practice of reserving some factfinding for the chancellor. Campbell & Le Poidevin, *supra* note 89, at 973.

138. Kirkham, *supra* note 26, at 209. According to one line of reasoning, the historical test should not be a static inquiry into the past. In light of the Supreme Court's decisions in *Beacon Theatres, Dairy Queen,* and *Ross* it would seem ill-advised to confine equity's jurisdiction to those complex cases which fall within a particular historical category. Note, *supra* note 12, at 906.

139. 631 F.2d at 1084-85.

140. *Id.* at 1084. The court believed that an incompetent jury can undermine the ability of a district court to dispense justice. *Id.* One commentator has written that "[a]t a minimum, a fair trial requires that the finder of fact be able to comprehend the issues of a case and render a rational verdict based upon a reasoned understanding of those issues." Comment, *The Seventh Amendment and Complex Civil Litigation: The Demise of the Complexity Exception to Trial by Jury and the Search for a Viable Due Process Alternative,* 50 Miss. L.J. 572, 600 (1979); *see* Kirkham, *supra* note 26, at 208.

141. 631 F.2d at 1084; *see* Oakes, *supra* note 20, at 246; Note, *supra* note 97, at 524-25.

142. 631 F.2d at 1086. The court arrived at this conclusion after balancing the interests. *Id.* at 1084-86. One writer points out that the seventh amendment is one of a very few provisions of the Bill of Rights which has not been applied to the states through the fourteenth amendment. He suggests that the right to jury trial is not considered to be as important as notions of fundamental fairness through procedural due process. Comment, *supra* note 140, at 615.

reasoned view, however, is that the seventh amendment embraces the concept of due process and that the two amendments are actually in harmony.[143] The Supreme Court implicitly recognized this interpretation in *Ross*.[144]

To determine whether it is appropriate to strike a demand for jury trial in a particular case it is necessary to apply the balancing test enunciated by the Court in *Mathews v. Eldridge*.[145] The initial question in this two-tiered analysis is whether a property interest within the meaning of the Due Process Clause of the fifth amendment is at stake.[146] Clearly, this hurdle is overcome in a complex civil case if the plaintiff seeks damages. In the second tier, three factors must be weighed to determine whether the denial of a jury is constitutionally permissible: (1) the private interest to be affected, (2) the risk of an erroneous deprivation of this private interest if conventional procedures are used, and the probable value of the proposed procedural safeguards, and (3) the Government's interest in avoiding undue burden and expense by using the proposed safeguards.[147] With respect to the first consideration, an adverse judgment could deprive the defendant of just compensation for his injuries. Regarding the second factor, Part I of this Comment demonstrates that in a complex case a judge is a more reliable decisionmaker than a jury.[148] Finally, the use of a judge as a factfinder will actually be in the government's best interests since jury trials run longer than bench trials[149] and may be inconclusive.[150] Judicial resources and taxpayer dollars are preserved when judges replace juries in complex litigation.[151]

Thus, a strong due process argument can be advanced in favor of judicial assumption of factfinding duties in complex litigation.[152] However, the Ninth Circuit refused to accept it,[153] asserting that the two premises

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143. *But see* Note, *supra* note 22, at 798 (arguing that this approach rejects both history and precedent).

144. *See* Note, *supra* note 12, at 910-11.

145. 424 U.S. 319 (1976).

146. *Id.* at 332.

147. *Id.* at 335.

148. *See* notes 19-51 *supra* and accompanying text.

149. "[O]n the average it takes 40 percent longer to try a case to a jury than to a judge." Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159, 161 (1976) (citing H. KALVEN & H. ZEISEL, DELAY IN THE COURT ch. 6 (1959)).

150. *See, e.g.*, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. at 448 (mistrial was declared due to a deadlocked jury).

151. In *ILC Peripherals* the judge noted that the government paid over $32,000 to the members of the jury for their time. *Id.*

152. *See* Comment, *supra* note 140, at 604-12.

153. *In re* United States Financial Sec. Litig., 609 F.2d 411 (9th Cir. 1979), *cert. denied*,

on which the argument rests are erroneous.[154] The author believes the Ninth Circuit underestimated the problems posed by a complex case[155] and overestimated the abilities of the jury which typically hears such a case.[156]

It has also been suggested that the prospective nature of this proposed application of the due process standard weakens the case in favor of the complexity exception.[157] According to this line of thought, a denial of a jury trial is "in the nature of anticipatory relief, since at the time the mode of trial is determined, the injury is merely *threatened.*"[158] The result is that vested seventh amendment rights are revoked due to some anticipated deprivation of due process. Critics believe this to be an unacceptably harsh encroachment on the right to jury trial.[159]

This position ignores the Supreme Court's decision in *Fidelity and Deposit Co. v. United States.*[160] In this case, the Court upheld the use of summary judgment against a claim that this procedural device denies a party the right to trial by jury.[161] In granting partial summary judgment, the trial judge orders removal of certain decisionmaking power from the jury based on his own evaluation of the case.[162] This procedure resembles that of a denial of jury trial which is predicated on the judge's conclusion that a jury could not render a rational decision. Accordingly, "[i]f a judge concludes that a contemporary jury would be unable to perform its factfinding function in a manner consistent with the goals of truth and fairness the jury system was intended to promote, the judge can strike the jury without violating the . . . seventh amendment."[163]

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446 U.S. 929 (1980).

154. *Id.* at 427. The court apparently believed that (1) no case is beyond the comprehension of a jury and (2) that juries are composed of highly capable individuals.

155. *See* notes 26-29 *supra* and accompanying text.

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

157. Note, *supra* note 97, at 533.

158. *Id.* at 534 (emphasis added).

159. *Id.*

160. 187 U.S. 315 (1902).

161. *Id.* at 319-21. Summary judgment is granted whenever there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

162. In effect, the judge determines that a jury could render only one decision.

163. Oakes, *supra* note 20, at 245. Contrary to the holding in Hurwitz v. Hurwitz, 136 F.2d 796, 798-99 (D.C. Cir. 1943), under due process analysis a defendant does have the constitutional right to a trial by a court sitting *without* a jury.

V. Conclusion

This Comment has surveyed the various theories that support a complexity exception to the seventh amendment. Because juries are inappropriate in complex civil trials, the courts must decide upon a legally sound basis for striking jury demands under difficult circumstances. The author submits that the historical test serves this purpose well. Standing by itself, the *Ross* footnote is not as persuasive. Moreover, the due process argument rests upon the unpopular notion that the fifth and seventh amendments can be harmonized. It is incumbent upon the Supreme Court to resolve this controversy. By denying certiorari in cases which have confronted these problems, the Court perpetuates the injustice worked by those district courts that are unwilling to ensure rational decisionmaking through bench trials of complex civil cases.

Barrett E. Pope