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JUDGE ACKER'S LAST STAND: THE NORTHERN DISTRICT OF ALABAMA'S LONESOME BATTLE FOR THE RIGHT TO TRIAL BY JURY UNDER TITLE VII

INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ prohibits discriminatory employment practices² and provides remedies which include reinstatement³ and the recovery of back wages.⁴ The Act and its legislative

1. 42 U.S.C. §§ 2000e to 2000e-17 (1980).

2. 42 U.S.C. § 2000e-2 (1980). Title VII bans discrimination on the basis of race, color, religion, sex or national origin, and prohibits segregation of work areas. *Id.* § 2000e-2(a).

3. Reinstatement is an equitable order returning a wrongfully discharged employee to his or her former position, with constructive or full seniority. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (restoring seniority). Difficult issues arise in the common situation where the employer has replaced the employee entitled to reinstatement. *See Note, Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441-67 (1989).

4. *See infra* note 23 and accompanying text for Title VII remedies. President Bush recently vetoed the Civil Rights Act of 1990, which would have substantially enlarged the right to a jury trial in Title VII actions. The amendments would have provided plaintiffs with the right to pursue compensatory and punitive damages while specifically granting either party the right to a jury trial when such relief is sought. *See H.R. CONF. REP. ON S. 2104*, 101st Cong., 2d Sess., 136 CONG. REC. H8045 (daily ed. Sept. 16, 1990). At the time of publication, Congress and the White House are negotiating for a compromise version of the bill. *See Significant Differences Remain Between Vetoed Civil Rights Bill and White House Proposal*, Daily Lab. Rep. (BNA) No. 214 (Nov. 5, 1990). Should subsequent efforts of amendment succeed in expanding remedies under Title VII, the seventh amendment analysis in this Note will still apply to situations where either no compensatory damages (beyond back pay) can be claimed, or where a plaintiff's claim for damages is dismissed on a motion for summary judgment.

history do not clearly indicate whether Congress meant for juries to hear Title VII cases.⁵ Notwithstanding this uncertainty, federal judges from the outset denied jury trials⁶ as a matter of course under the seventh amendment.⁷ The courts continue to rule in virtual uniformity against granting jury trials,⁸ relying on precedent born of a time of great social upheaval and racial tension.⁹ This Note will demonstrate that the time has come to harmonize seventh amendment jurisprudence under Title VII with legal and social reality.¹⁰

5. See *infra* notes 25-28 and accompanying text discussing legislative history concerning the right to a jury trial.

6. See *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979); *Grayson v. Wickes Corp.*, 607 F.2d 1194, 1196 (7th Cir. 1979); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed under rule 60*, 494 U.S. 1006 (1971); *Harkless v. Sweeney Indep. School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969), *aff'd*, 110 S. Ct. 2316 (1990). These courts reasoned that the nature of Title VII's remedies and their interrelationship show that Congress wanted judges to determine relief in all Title VII cases. *Cf. Ochoa v. American Oil Co.*, 338 F. Supp. 914 (S.D. Tex. 1972) (criticizing the prevailing view at length, but denying jury in conformity with binding precedent). See *infra* notes 40-43 and accompanying text criticizing the reasoning in these cases.

7. U.S. CONST. amend. VII. The seventh amendment guarantees the right to jury trials as it existed at the time of ratification in 1791. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989). Either party to an action in federal court may petition for a jury trial on any claim arising at law. *Id.*

8. See *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988) (jury heard section 1981 claim, and judge heard Title VII claim); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988) (plaintiff's Title VII and 42 U.S.C. § 1983 claims tried together, but only latter claim submitted to jury); *Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412 (7th Cir. 1988) (jury heard Title VII claim in advisory capacity only); *Swentek v. USAIR, Inc.*, 830 F.2d 552 (7th Cir. 1987) (jury heard tort claims, and judge heard Title VII claim); *Wilson v. City of Aliceville*, 779 F.2d 631, 635 (11th Cir. 1986) (same); see also P. COX, EMPLOYMENT DISCRIMINATION ¶ 21.05, at 21-23 (1987) (no right to jury trial "[a]s the relief under Title VII is equitable").

9. See generally M. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 106-251 (1987) (discussing racial violence in the South during the early to mid-1960s).

Although the crisis management of the Kennedy years had kept major race riots from thwarting judicial enforcement of the Constitution, persistent attacks on voter registration workers and random acts of terrorism increasingly threatened constitutional rights. Intensifying as 1964 progressed, by midsummer these would push some parts of the South to the edge of anarchy.

Id. at 128.

10. Other commentators have rejected the majority view which denies jury trials in Title VII cases. See Note, *Jury Trial Right Under Title VII: The Need for Judicial Reinterpretation*, 6 CARDOZO L. REV. 613 (1985) [hereinafter Note, *Jury Trial*]; Case Comment, *Right to Jury Trial in Suits for Back Pay: Title VII or Section 1981?*, 12

In *Beesley v. Hartford Fire Insurance Company*,¹¹ the District Court for the Northern District of Alabama broke ranks with the rest of the federal judiciary, granting a jury trial to a sex-discrimination plaintiff in a suit for back pay¹² and reinstatement under Title VII. The court stated that the seminal cases on point rested largely on a conceptually flawed determination that back pay constitutes a species of equitable relief.¹³ Furthermore, Judge Acker indicated that recent Supreme Court decisions seriously undermine the majority view.¹⁴ Lastly, the court held that changed historical conditions¹⁵ militate in favor of abandoning, once and for all, the "self-perpetuating myth" that Title VII precludes trial by jury.¹⁶

This Note concludes that *Beesley* was correctly decided. Part I reviews the history of Title VII and discusses early cases denying jury trials. Part II provides an overview of traditional seventh amendment analysis. Part III argues that traditional remedial doctrines and recent refinements in seventh amendment methodology by the Supreme Court require courts to grant a jury trial, upon request of either party, when a plaintiff seeks to recover back pay under Title VII.¹⁷ Part IV proposes

MEMP. ST. U.L. REV. 355 (1982). *But see* Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167 (1969); Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401 (1973).

11. 717 F. Supp. 781 (N.D. Ala. 1989), *aff'd on reconsideration*, 723 F. Supp. 635 (N.D. Ala. 1989).

12. Back pay in this Note refers to wages that the court presumes an employee would have earned but for the discriminatory termination.

13. *Beesley*, 723 F. Supp. at 646. *See infra* notes 77-105 and accompanying text discussing nature of back pay claim.

14. *Id.* *See infra* notes 114-56 and accompanying text discussing cases undermining the majority view; *see also* notes 171-83 discussing the *Beesley* court's reasoning.

15. *See infra* note 199 describing changed conditions in the South. The first *Beesley* opinion detailed profound social changes that took place within the Northern District of Alabama since 1964. *Beesley* 717 F. Supp. at 782. Upon rehearing of the jury issue, Judge Acker evidently felt that his judgment rested solidly on the law, and omitted any policy-based justifications for allowing jury trials.

16. *Beesley*, 723 F. Supp. at 643.

17. This Note's construction of Title VII colors the reading of many other federal statutes by implication. *See Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983) ("[Title VI remedies,] like those under Title VII, are essentially equitable in nature, and the 'procedures' available do not include juries"). Title VI of the Civil Rights Act bans discrimination by entities receiving federal assistance. 42 U.S.C. § 2000d-d-6 (1988). Title VI, in turn, influences handicap discrimination cases under the Rehabilitation Act of 1973, section 504 of which adopts "the remedies, procedures and rights set forth in Title VI." 29 U.S.C. § 794(a)(a)(2) (1980). *See Shuttleworth v. Broward County*, 649 F. Supp. 35, 38 (S.D.

a test to resolve seventh amendment problems that require complicated remedies analyses. Coming full circle, Part VI revisits *Beesley v. The Hartford Fire Insurance Co.* and discusses its progeny.

I. TITLE VII: FROM ENACTMENT TO JUDICIAL (RE)CONSTRUCTION

A. *Legislative History*

The Civil Rights Act of 1964 addressed a wide range of evils associated with race discrimination in America.¹⁸ Title VII of the Act sought to improve the deplorable economic state of blacks, attributed to widespread discrimination practiced by private employers.¹⁹ En-

Fla. 1986) (limiting relief to back pay, reinstatement and attorney's fees). *But see* Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983) (damages recoverable), *aff'd*, 732 F.2d 146 (3d Cir. 1984). Compare also the Age Discrimination in Employment Act of 1967 (ADEA) which bans discrimination against the elderly. 29 U.S.C. §§ 621-634 (1988). *See* Polstorff v. Fletcher, 430 F. Supp. 592, 594 (N.D. Ala. 1977) ("It is untenable that an action for reinstatement and lost earnings on account of unlawful discrimination should be equitable under Title VII, but legal under the ADEA."). The ripples of Title VII jurisprudence also reach statutes as diverse as the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1980). *See* Kross v. Western Elec. Co., 701 F.2d 1238 (7th Cir. 1983) (citing Title VII case law denying jury trial).

Title VII similarly influences how courts read and apply state civil rights acts. *See* Olin v. Prudential Ins. Co. of Am., 798 F.2d 1, 7 (1st Cir. 1986) (Massachusetts case relying on Title VII precedent to strike demand for jury); Continental Title Co. v. District Court, 645 P.2d 1310, 1317-18 (Colo. 1982) (same); Bruncz v. Houdaille Indus., Inc., 13 Ohio App. 3d 106, 468 N.E.2d 370 (1983) (relief under Ohio statute is equitable in nature; therefore, there is no right to a jury trial). *But see* Reiner v. New Jersey, 732 F. Supp. 530, 531-33 (D.N.J. 1990) (finding a right to jury trial under New Jersey fair employment practices law).

18. *See, e.g.*, Title I, 42 U.S.C. §§ 1971-1973 (1977) (voting rights); Title II, 42 U.S.C. §§ 2000a to 2000a-6 (1988) (prohibits discrimination or segregation in public places); Title VI, 42 U.S.C. §§ 2000d to 2000d-6 (1988) (prohibits discrimination in programs receiving federal funds).

19. During Senate consideration of the Civil Rights Act, Senator Case noted that the unemployment rate for non-whites was more than double that of whites. 110 CONG. REC. 7241 (1964) (statement of Sen. Case). He described the dilemma as follows: "Of course, discriminatory hiring practices are not in themselves the whole explanation for the deprivation of the Negro. The Negro American is short-changed all along the line." *Id.* Courts agree on the basic purpose of Title VII, and express it either with reference to the problem or the solution. In one view, the enactors of Title VII sought to "battle the plight of the Negro in our economy." *Ende v. Board of Regents*, 565 F. Supp. 501, 507 (N.D. Ill. 1983) (citing *United Steelworkers of Am. v. Weber* 443 U.S. 192, 202 (1979)). In the other view, the goal was to "make whole" victims of employment discrimination. *Darnell v. City of Jasper*, 730 F.2d 653, 655 (11th Cir. 1984). The latter version betrays the view that Title VII only provides equitable relief. Courts understand a "make whole" remedy to mean an equitable restoration of the status quo. *See*

acted under Congress' Article I power to regulate interstate commerce,²⁰ Title VII forbade discriminatory employment practices by employers with more than fifteen employees and after 1972, by government agencies.²¹ Upon a complainant's exhaustion of administrative remedies, Title VII allows for private actions against allegedly discriminatory employers.²² Relief consists of reinstatement, with or without back pay.²³ Courts rarely award compensatory and punitive damages

Firefighter's Local Union No. 1784 v. Stotts, 467 U.S. 561, 612 (1984) (Blackmun, J., dissenting); *Leach v. Pan Am. World Airways*, 842 F.2d 285, 288 (11th Cir. 1988).

20. See MEMORANDUM ON THE CONSTITUTIONALITY AND LEGALITY OF H.R. 7152, 88th Cong., 2d Sess., pt. 2, at 1528 (1964). Congress similarly grounded Title II of the Civil Rights Act on the commerce clause. Title II bans discrimination in places of public accommodation. *Id.* By passing over the more appropriate fourteenth amendment, section 5 of which authorizes Congress to pass legislation protecting the civil rights of Americans, Congress evidently sought to insulate the Act from hostile judicial challenges premised on the theory that the fourteenth amendment does not reach private actions. See Letter from Gerald Gunther to the Department of Justice (June 5, 1963), reprinted in G. GUNTHER, CONSTITUTIONAL LAW 158 (11th ed. 1985) (arguing for the constitutionality of Title II under the fourteenth amendment).

21. Title VII prohibits discriminatory hiring, dismissal or promotion as follows: It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1980). Title VII also covers actions of trade unions. In 1972, Congress extended Title VII to cover "governments, government agencies, [and] political subdivisions." *Id.* § 2000e(a). Unlike the rest of Title VII, Congress grounded these amendments on the fourteenth amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (extension held to be constitutional).

22. 42 U.S.C. § 2000e-6 (1980). Within 180 days of the allegedly discriminatory act, the employee must file a complaint with the Equal Employment Opportunity Commission (EEOC), established separately under Title VII. *Id.* § 2000e-5(e). The Commission next notifies the employer and initiates its investigation. *Id.* § 2000e-5(b). If the EEOC declines to issue a complaint, it mails out a "right to sue" letter, releasing the employee to institute a private action. *Id.* On claims found meritorious, the EEOC must first try to reach voluntary settlement with the employer, and, failing that, may sue on the employee's behalf in federal district court. *Id.* See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1983 & Supp. 1983-88).

23. 29 U.S.C. § 2000e-5(g) (1980). The remedial section of Title VII provides as follows:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay or any other equitable relief as the court deems appropriate.

under Title VII.²⁴

The text of Title VII and congressional debates leading to its passage leave open the issue of jury availability.²⁵ Some portions of the legislative history certainly suggest an intent to deny the right to jury.²⁶

Id. Title VII limits the back pay period to two years, and subtracts interim earnings. *Id.*

In fashioning equitable relief, courts sometimes award compensation for the anticipated loss of future earnings, known as "front pay." *See, e.g., Waldorf v. Board of Comm'rs*, 857 F.2d 1047, 1054 (5th Cir. 1988) (back pay, front pay and attorney's fees awarded). Front pay awards are appropriate where reinstatement is not possible, as where the employer "has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984) (age discrimination case), *vacated on other grounds*, 469 U.S. 1154 (1985). *But see Foit v. Suburban Bancorp.*, 549 F. Supp. 264, 267 (D. Md. 1982) (no front pay because earning potential too speculative for age discrimination victim).

Title VII courts classify front pay awards as a form of "other equitable relief." *But see Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 647 (N.D. Ala. 1989) (it is "just as unrealistic and disingenuous" to label front pay equitable, as it is to label back pay equitable).

24. *See Shah v. Mt. Zion Hosp. & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981) (neither compensatory nor punitive damages are available under Title VII); *DeGrace v. Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980) (same).

25. *See supra* note 21 discussing the Title VII remedies provision. While it has never passed on jury trials under Title VII, the Supreme Court in *Curtis v. Loether*, 415 U.S. 189 (1974) compared Title VII to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1977). The *Curtis* Court started with Title VIII's legislative history, finding it opaque on the right to jury trial. *Curtis*, 415 U.S. at 191-92. The Court did cite evidence that Congress feared that juries would undermine Title VIII's goals. *Id.* Justice Marshall held that because Title VIII specifically furnished "appropriate legal and equitable relief," Title VIII also created the right to a jury trial for actions at law. *Id.* at 197. Title VII, in contrast, provided only equitable relief by direct reference. *Id.*

26. *See* 88 CONG. REC. 7214 (1964) (joint statement of Sen. Clark and Sen. Case). The senators stated that "The suit would *ordinarily* be heard by the judge sitting without a jury in accordance with the customary practices for suits for injunctive relief." (emphasis added) *Id.* The following exchange in the Senate also contains a modicum of vagueness:

Mr. Ervin: Under Title VII, an order can be entered ordering a man to pay back wages to a person who had never done a day's work for him. . . . Title VII contains no requirement for a jury trial under any circumstances? Mr. Case: So far as the act itself is concerned, there is no provision for jury trial. Of course, whether a jury trial would be required would depend upon the Supreme Court in developing its decision of the day before yesterday in [United States v.] Barnett [376 U.S. 681 (1964)]. A jury trial might be provided if the penalty were heavy enough. Mr. Ervin: No jury trial is provided. Mr. Case: No jury trial is provided under the terms of this section.

88 CONG. REC. 7255 (1964). Senator Case differentiated between "provide" and "re-

However, the statute itself is silent on the availability of juries. One author finds Title VII's legislative history equivocal and inconclusive.²⁷ Others maintain that Congress consciously rejected jury trials for enforcement proceedings.²⁸ As discussed below, the Supreme Court has made it clear that congressional intent does not dispose of the seventh amendment issue.²⁹

B. *Judicial Activism and Racially Biased Juries*

The first courts to adjudicate the federal anti-discrimination laws³⁰

quire," without saying "prohibit," thus leaving room for judicial definition of the vague remedies provision. Senator Case also improperly invoked *Barnett*, a case inapposite to Senator Ervin's concern. *Barnett* involved a civil action for contempt, not relevant to private suits for back pay. See *United States v. Barnett*, 376 U.S. 681, 683 (1964).

27. See Note, *Jury Trial*, *supra* note 10, at 632. As a preliminary matter, the author notes that the drafters of the Civil Rights Act purposely obscured its procedural language in order to minimize controversy and assure its passage. *Id.* at 622 n.50. On Title VII, the Senate significantly rejected a proposal for masters to determine questions of fact raised by pleadings, which would have foreclosed jury hearing. *Id.* at 634 n.106. Congress also opted against administrative enforcement, thereby putting Title VII within the compass of the seventh amendment. *Id.* at 638.

28. See Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167 (1969). First, Congress modeled Title VII on section 10(c) of the National Labor Relations Act (NLRA), knowing the latter forecloses jury trials. *Id.* at 170. Second, Congress separately provided for jury trials in criminal contempt cases under Title VII, but made no mention of juries in the remedies section. *Id.* Finally, Title VII empowers the "court," meaning judge, to order affirmative action. *Id.*

None of the above reasons withstands close scrutiny. First, Congress was fully aware of how the NLRA forecloses jury trials, namely because administrative boards (and not courts, as with Title VII) adjudicate these cases. See *infra* notes 44, 149 explaining that the seventh amendment only applies to federal courts of general jurisdiction. Second, the Supreme Court gives little weight to the *expressio unis est exclusio alterius* maxim for seventh amendment purposes. See *infra* note 154 rejecting *expressio unis* argument. Finally, the statutory term "court" includes juries as well as judges. See *infra* note 41 citing cases rejecting the narrow interpretation.

Better proof of an intent to deny the right to jury arises from the language of the provision itself, giving enumerated remedies "and other equitable relief" (emphasis added). See *supra* note 23 for text of the remedies language of Title VII. Under the *ejusdem generis* doctrine of statutory construction, equitable relief would include back pay. See *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 309 (6th Cir. 1975) (applied this reasoning), *vacated on other grounds*, 431 U.S. 951 (1977).

29. See *infra* notes 135-36 and accompanying text discussing the relationship between congressional intent and the seventh amendment analysis.

30. Apart from Title VII, numerous cases arose under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3603 (1988), which banned housing discrimination. The 1960s also witnessed the rejuvenation of the forgotten post-Civil War Civil Rights Acts. See Civil Rights Act of 1866, 42 U.S.C. § 1981 (deprivation of rights enjoyed by

undoubtedly sought to escape the problem of biased juries. Many early actions arose in the South, where racial hostility and mostly-white venires were commonplace.³¹ The following excerpt from a 1972 case eloquently states the fears of at least part of the federal judiciary at that time:

If a jury could be resorted to in actions brought under this statute, the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views.³²

Not surprisingly, defendants rather than plaintiffs petitioned for jury trials in the vast majority of early cases.³³ A simple solution lay in denying the right to trial by jury.³⁴

That the same courts customarily turned down petitions for jury trials under statutes such as 42 U.S.C. § 1981,³⁵ which contain no lan-

whites); Civil Rights Act of 1871, 42 U.S.C. § 1983 (discrimination by persons acting "under the color of law").

31. Describing the situation in 1964, one southern judge recently noted that "the jury wheel in the Northern District of Alabama did not accurately reflect the racial and gender makeup of the district." *Beesley v. Hartford Fire Ins. Co.*, 717 F. Supp. 781, 782 (N.D. Ala. 1989). The *Beesley* court noted significant changes in the intervening years, however, concluding that "Southern juries of 1989 look and act much differently than did 1964's Southern juries." *Id.* at 782-83.

32. *Lawton v. Nightingale*, 345 F. Supp. 683, 684 (N.D. Ohio 1972) (42 U.S.C. § 1983 case). *See also Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 49, 53 (S.D. Ga. 1969) (jury would "thwart the will of Congress and to an extent frustrate the purposes of the legislation"). Justice Marshall also recognized the risk of prejudice, but warned that it could not "overcome the clear command of the Seventh Amendment." *Curtis v. Loether*, 415 U.S. 189, 198 (1974). He noted that judges counteract bias by directing verdicts, granting judgments notwithstanding the verdict, or ordering retrials. *Id.*

33. Even a cursory glance at the Title VII case law shows that the situation has completely reversed itself, with plaintiffs now seeking juries in most instances. *Compare Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) (defendant requested jury) *with Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986) (plaintiff requested jury).

34. *See supra* note 6 citing early Title VII cases denying jury petitions.

35. 42 U.S.C. § 1981, which is the modern equivalent of the Civil Rights Act of 1866, provides:

All persons within the jurisdiction of the United States shall have the same right in every State or Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

guage purportedly limiting relief to reinstatement,³⁶ confirms the fear-of-bias hypothesis.³⁷ To eliminate the threat of bigoted juries,³⁸ these judges simply transposed their Title VII reasoning onto § 1981 actions before them.³⁹

C. *The Reasoning of the Courts*

In applying the seventh amendment to the new statutory right of

42 U.S.C. § 1981 (1980).

Some Title VII plaintiffs have obtained jury trials by attaching pendent state law contractual or tort claims. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 290 (Supp. 1983-1988) (varying degrees of success in appending state law claims to Title VII action).

36. See *infra* note 48 and accompanying text explaining that the nature of remedies largely determines the availability of a jury.

37. Courts that denied the right to jury trial under the post-Civil War Civil Rights Acts include the following: *Harkless v. Sweeny Indep. School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970) (42 U.S.C. § 1983 case), *cert. denied*, 400 U.S. 991 (1971); *Marr v. Rife*, 363 F. Supp. 1362, 1364 (S.D. Ohio 1973) (42 U.S.C. § 1982 case); *Williams v. Travenol Laboratories, Inc.*, 344 F. Supp. 163, 165 (N.D. Miss. 1972) (42 U.S.C. § 1983 case).

Some courts later reversed their position, allowing jury trials in section 1981 cases for back pay. See *Setser v. Novack Invest. Co.*, 638 F.2d 1137 (8th Cir. 1981), *vacated in part on other grounds*, 657 F.2d 962 (8th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 1064 (1981). The *Setser* court reached the anomalous result of granting a jury trial in an action for back pay only, while denying the same under Title VII. See Comment, *Right To Jury Trial in Suits for Back Pay: Title VII or Section 1981?*, 12 MEM. ST. U.L. REV. 355 (1982) (pointing out this discrepancy).

Unlike Title VII, section 1981 does not limit damages to back pay. When Title VII plaintiffs with pendent section 1981 claims formerly sought damages beyond back pay, the defendant could request a jury to hear issues common to the legal and equitable claims. Later, plaintiffs obtained juries by this means. See *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (jury findings on section 1981 claim binding on court deciding Title VII claim); *Stephan v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276 (11th Cir. 1989) (same); *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988) (same, 42 U.S.C. § 1983).

The Supreme Court effectively blocked this "end run" around Title VII in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), a 5-to-4 decision restricting section 1981 to suits where the victim has not yet been hired. Justice Kennedy based the majority's decision on a literal reading of section 1981, which by its terms applies to the right to "make and enforce contracts." See *infra* notes 180-81 discussing *Patterson*. Recently vetoed legislation would have restored the right to maintain an action under section 1981 for discrimination throughout the period of employment. See *supra* note 4.

38. Some congressmen similarly feared that biased juries would sabotage the extensive provisions of the Civil Rights Act. This explains, in part, why much of the Act is enforced via injunction. See *Curtis v. Loether*, 415 U.S. 189, 191-92 (1974) (mentioning congressional fear of biased juries under Title VII).

39. See *supra* note 17 citing cases that rely on Title VII methodology in order to resolve seventh amendment problems.

action, the courts focused on the literal language of 42 U.S.C. § 2000e-2, which sets forth the remedies available in Title VII actions.⁴⁰ First, the courts noted that Title VII explicitly empowers courts to fashion equitable remedies, but makes no mention of legal relief.⁴¹ Equally important was the relationship between back pay and the grant of equitable powers. The courts described back pay as “intertwined” with or “incidental” to reinstatement, effectively subordinating the former remedy to the latter.⁴² Lastly, some courts noted that Title VII makes back pay awards discretionary, hence requiring exclusive judicial administration.⁴³

40. See *supra* note 23 discussing Title VII remedies. Some courts resolved the seventh amendment issue with reference to remedies only, avoiding the requisite historical analysis. In *Marr v. Rife*, 363 F. Supp. 1362, 1364 (S.D. Ohio 1973), the court stated that “we do not find it necessary to search out common law analogues to the cause of action . . . because courts have generally construed Section 1982 and similar civil rights provisions to provide broad equitable relief. . . .” But see *infra* note 47 and accompanying text discussing the three-part seventh amendment test for determining the right to a jury trial.

41. Since Title VII provides that “courts” dispense relief, the argument follows that Congress established equity jurisdiction. The more enlightened view rejects the generic, statutory term “court” used in this way. See *Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 639 (N.D. Ala. 1989) (citing cases rejecting a restrictive reading of Title VII).

Unlike Title VII, some civil rights laws expressly provide for legal and equitable relief. Significantly, many courts rejected the right to jury trial under Title VIII of the Civil Rights Act of 1968 until the Supreme Court held in *Curtis v. Loether*, that courts must grant the right to jury in actions for damages under that title.

42. In *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969), the court held back pay to be an “integral part of the statutory equitable remedy” of reinstatement. In a suit for damages under section 1982 and injunction under Title VIII, another court refused the defendant’s request for a jury, holding that the “incidental money damages” were needed to effectuate equitable relief. *Marr v. Rife*, 363 F. Supp. 1362 (S.D. Ohio 1973). See *infra* notes 137-38 and accompanying text criticizing this reasoning.

43. See *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1241 (N.D. Ga. 1969) (noting that back pay is optional and therefore equitable), *rev’d on other grounds*, 421 F.2d 888 (5th Cir. 1970). The Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), however, limited lower courts’ discretion to deny back pay for violations of Title VII. The Court pointed out that Congress modeled the remedies language on that in the National Labor Relations Act (NLRA), 29 U.S.C. § 160 (1980), under which courts award back pay “as a matter of course.” *Moody*, 422 U.S. at 419-20. Noting the “make whole” nature of Title VII remedies, the Court concluded, “backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes” of ending discrimination and compensating victims. *Id.* at 421. See also *Sellers v. Delgado Community College*, 839 F.2d 1132, 1136 (5th Cir. 1988) (noting that back pay will only be denied in “exceedingly rare” circumstances).

II. SEVENTH AMENDMENT JURISPRUDENCE: AN OVERVIEW

The seventh amendment secures the right to a trial by jury in federal courts⁴⁴ where the controversy is legal in nature.⁴⁵ The Supreme Court in *Bernhard v. Ross*⁴⁶ restates modern seventh amendment analysis as a three-part test, requiring courts to look at: (1) the historical nature of the action, (2) the nature of the remedies involved and (3) the relative capacity for juries to comprehend the issues.⁴⁷ The Supreme Court considers remedies analysis to be the most important part of the test.⁴⁸

Historical analysis requires that courts compare the action to actions at common law, and then find the best analogy.⁴⁹ This often results in

44. U.S. CONST. amend. VII. The seventh amendment provides:

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 reexamined in any Court of the United States, than according to the rules of the common law.

Id.

45. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Congress may avoid the seventh amendment question by assigning rights of action to a non-article III forum, such as an administrative tribunal or a special court of equity. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (seventh amendment does not apply to NLRB hearings). Congress may make such an assignment only where the controversy involves "public rights." See *infra* note 149 discussing public rights in seventh amendment analysis.

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

47. *Id.* at 538 n.10. *Bernhard* states the test as follows: "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 of juries." *Id.* The third prong has received only occasional attention by the courts. See *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting that the Court has not used jury capacity "as an independent basis for extending the right to jury trial"). Also, federal courts have access to special devices for handling complex technical issues, such as court-appointed masters and experts. See FED. R. CIV. P. 53.

48. See *Chauffeurs, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1345 (1990) (stating that the remedy sought is more important than the issues involved in determining whether an action will resolve legal rights (citing *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989)); *Tull*, 481 U.S. at 417-18.

49. Where statutorily-based actions did not exist at common law, this prong of the test requires the court to indulge its imagination by seeking out common law analogues. The search need not yield an exact match. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8, at 350 (1977) (courts "fit [the new remedy] into the nearest historical analogy to determine whether there is a right to a jury trial"). Cases holding that the seventh amendment does not apply to actions which did not exist in 1791 misread *Bernhard's* learning. See *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (seventh amendment applies to new, statutory actions).

a stalemate because in 1791 courts of law and chancery exercised concurrent jurisdiction over many issues.⁵⁰ Part two of the test seems perfunctory because remedies are easy to pigeonhole in the normal case.⁵¹ Where courts harbor doubt, they may defer to legislative guidance because cause-creating statutes often list available remedies or describe the relief as being legal or equitable.⁵² The Constitution, however, places limits on Congress' ability to restrict the right to jury trial.⁵³ In addition, the Supreme Court directs federal courts to "liberally constru[e]" statutes in order to preserve the right to a jury trial.⁵⁴

50. "The borrowing by each jurisdiction from the other was not accompanied by an equivalent sloughing off of functions. This led to a very large overlap between law and equity." F. JAMES & G. HAZARD, *supra* note 49, at 354.

51. D. DOBBS, REMEDIES 70 (1973) ("In a large number of cases this is a very simple operation and hardly subject to any dispute."). See also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476 (1962) ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention.").

52. Title VIII, for instance, allows courts to "grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1000 punitive damages. . . ." 42 U.S.C. § 3612 (1988). The Age Discrimination in Employment Act (ADEA) goes one step further, affirmatively stating that jury trials are available:

In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of this chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 626(c)(2)(1985). The Civil War era statutes are more cryptic in regard to juries. See *supra* note 35 for text of 42 U.S.C. § 1981.

53. Where it provides for a judicial rather than administrative forum, Congress "probably may not deprive the parties to the action of a right to jury trial." F. JAMES & G. HAZARD, *supra* note 49, at 349. See also *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) (noting that Congress chose a court of general jurisdiction over an administrative forum); *Curtis*, 415 U.S. at 195 (same). Recent Supreme Court rulings have gone further yet, impliedly diminishing the importance of legislative intent. See *infra* notes 114-56 and accompanying text discussing recent cases. But see Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401 (1973) (for the proposition that Congress should be allowed to limit the right to a jury trial where this would further justice).

54. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2794 (1989) (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932)). Similarly, the rules of procedure should be read to presumptively entitle jury trials to parties to federal statutory actions. See FED. R. CIV. P. 38 ("[t]he right to 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.") (emphasis added).

III. A NEW ANALYSIS OF TITLE VII UNDER THE SEVENTH AMENDMENT

A. *The Historical Analogues*

The seventh amendment analysis customarily commences with the historical inquiry. Naturally, how one defines the action at hand determines where one will look in the common law.⁵⁵ Courts seeking analogues to employment discrimination have not adequately addressed the choice between civil rights and wrongful termination as separate lines of investigation.⁵⁶ Perhaps the summary nature of seventh amendment analysis on this topic accounts for the dearth of study.⁵⁷ At any rate, either route should end in the finding of an action at law.

Many commentators compare Title VII to suits for breach of implied contract.⁵⁸ At common law, a wrongfully discharged employee could treat the contract as continuing and recover putative wages, less mitigation, in a court of law.⁵⁹ To function, this approach must clear

55. Compare *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) (comparing racial discrimination in housing to both innkeepers' duty to provide shelter and dignitary torts) with *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 917 (S.D. Tex. 1972) (framing the issue of racial discrimination in employment as follows: "whether discharge of an employee (for any legally wrongful reason) would support an action for recovery of back pay tried to a jury at common law").

56. Title VII holds a central position in a comprehensive civil rights scheme. See *supra* note 19 and accompanying text discussing congressional concern with economic discrimination against blacks.

57. Courts today often view the remedies as patently equitable or read the act as renouncing jury trials on its face. The court's conclusory discussion in *Wilson v. City of Aliceville*, 779 F.2d 631, 635 (11th Cir. 1986) typifies the prevailing judicial attitude: "Since Title VII cases are entirely in equity there is no right to a jury trial, even when the claimant seeks back pay." *Id.* See *supra* note 8 citing cases denying right to trial by jury. This reasoning apparently obviates the historical inquiry. Recent Supreme Court precedent, however, stresses the ongoing need to engage in historical analysis under the seventh amendment. See *infra* notes 123-26, 151 and accompanying text discussing an historical analysis under recent cases; cf. *infra* note 166 discussing Justice Brennan's criticism of an historical analysis test. No authorities today assert that one prong of the test drops out because the other yields a clear answer.

58. See, e.g., *Ochoa*, 338 F. Supp. at 917; Note, *Jury Trial*, *supra* note 10, at 629-31. The *Ochoa* court identified two possible common law actions comparable to a Title VII suit: *indebitatus assumpsit* and breach of contract by wrongful discharge. *Ochoa*, 338 F. Supp. at 918-19.

59. Note, *Jury Trial*, *supra* note 10, at 629-30 n.85. The willingness of a discharged employee to work was "equivalent to performance." *Id.* (quoting 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1358 (3d ed. 1968)).

the hurdle of the common law's presumption of employment at will.⁶⁰ In equity, recovery on wrongful discharge best corresponds to an action for restitution.⁶¹

A second, relatively unexplored approach⁶² would treat Title VII as a citizen's suit to recover on a civil rights⁶³ violation. The common law actions⁶⁴ most analogous to Title VII involve what have come to be

60. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (administrative agency order of reinstatement with back pay was "unknown to the common law").

61. See *infra* notes 82-83 and accompanying text discussing restitution.

62. The rationale behind focusing on the contractual aspect of Title VII may stem from the Supreme Court's notice that "the fact that the *subject matter* of a modern statutory action and an 18th-century English action are close equivalents 'is irrelevant for Seventh Amendment purposes,' because 'that Amendment requires trial by jury in actions unheard of at common law.'" *Tull v. United States*, 481 U.S. 412, 420 (1987) (quoting *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974)) (emphasis added). However, the civil rights alternative does more than compare subject matter. The old and new actions compared herein sound essentially in tort. See *infra* notes 65-72 and accompanying text analogizing Title VII claims to constitutional torts.

63. In his treatise on claims in equity, Professor DeFuniak defined civil rights as rights with respect to other members of civil society, as distinguished from political rights, which exist in relation to government. W. DEFUNIAK, *HANDBOOK OF MODERN EQUITY* 140 (1956).

The philosophy of modern civil rights developed relatively late in comparison to the common law. According to Kenneth Minogue, the concept of human rights "is as modern as the internal combustion engine, and from one point of view, it is no less a technological device for achieving a common human purpose." Minogue, *The History of the Idea of Human Rights*, in *THE HUMAN RIGHTS READER 3* (W. Laqueuer & B. Rubin eds. 1979). Minogue traces the modern phenomenon from John Locke's cautious defense of property interests through its revolutionary triumph in America and France, where it became enshrined in statements of "universal significance." In the nineteenth century, civil rights parted ways with universal reason, reemerging as national rights and minority rights.

In contrast to Minogue's view of rights as vast organizing principles, Maurice Cranston defines rights from the positive law tradition as things "someone actually has," or things enforceable in courts of law. Cranston, *What Are Human Rights?*, in *HUM. RTS. READER*, *supra*, at 17. The English Bill of Rights, and especially the United States Constitution, "translate[d] moral rights into positive rights by making them enforceable in American positive law." *Id.* at 23.

64. Although certain rights arose legislatively by Parliamentary decree, these never encompassed "civil rights" as understood today. See Z. CHAFE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* (1956) (tracing the origins of freedom of debate in Congress and the prohibition of bills of attainder and freedom of movement, starting from English statutory and common law). Class or nationality-based rights circulated as slogans, without legal affect, in the radical writings of Tom Paine and the myth of the "rights of freeborn Englishman" which were embraced by spontaneous revolutionary movements during the early industrial revolution. See generally E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963).

In America, what may be termed proto-civil rights actions arose at common law

known as "constitutional torts."⁶⁵

The first cases to combine tort with civil rights principles involved voting rights.⁶⁶ In *Swafford v. Templeton*,⁶⁷ the Supreme Court reversed dismissal for lack of jurisdiction in a suit brought to recover damages for deprivation of a citizen's right to vote in national elections.⁶⁸ Speaking for the Court, Justice White stated that "the right which it was claimed had been unlawfully invaded was one in the *very nature of things* arising under the Constitution and the laws of the United States".⁶⁹ While the plaintiff asserted his claim directly under

before and after the War for Independence. See W. NELSON, *THE AMERICANIZATION OF THE COMMON LAW* (1975). Prior to the abolition of slavery in Massachusetts, slaves in that state brought civil actions against their masters in order to secure their freedom, on the ground that slavery violated the laws of man and nature. These cases, dating from the 1760s, arose at law and were tried by juries. *Id.* at 101-02. Similarly, religious dissenters at this time filed actions for damages against tax collectors of the establishment, Congregationalist church. *Id.* at 107-08.

65. The term "constitutional tort," coined by Professor Shapo, describes the type of quasi-tort, quasi-constitutional cases that arose in the early 1960s under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1980). See Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L. REV. 277 (1965). Professor Shapo warned that *Monroe v. Pape*, which resuscitated the long-dormant section 1983 action, threatened to engulf all policemen's torts against blacks as civil rights violations. Shapo urged that courts shed the constitutional pretense and apply traditional tort principals. Shapo further asserted that voting rights cases, like *Nixon v. Herndon*, 273 U.S. 536 (1927), prefigured modern constitutional torts. Shapo, *supra*, at 282-83. In *Nixon*, Justice Holmes held that a black man could recover damages under the fourteenth amendment against election officials who enforced a Texas law barring blacks from voting in Democratic primaries. *Nixon*, 273 U.S. at 541.

66. See *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900). See *infra* notes 67-71 and accompanying text discussing these cases.

Using post-1791 case law for seventh amendment analysis creates a problem, given that the Court only authorizes use of pre-1791 cases. This rule should be modified in appropriate instances, such as where American law fundamentally departs from English laws. Nowhere is this more the case than with the nations' respective Constitutions. The English Constitution consists of the uncollected decisions of the judiciary. See generally J. MACY, *THE ENGLISH CONSTITUTION* (1897), reprinted by Fred B. Rothman & Co. (1988). The American Constitution, by contrast, is a written document enumerating, in greater or lesser detail, specific rights and liberties.

In practice, some courts resort to newer precedent for their seventh amendment analyses, discussing federal cases prior to the merger of law and equity in 1932. See, e.g., *Woods v. Dunlop Tire Corp.*, 673 F. Supp. 117, 118 (W.D.N.Y. 1987) (suit under consideration "has no historical parallel prior to the merger of courts of law and of equity").

67. 185 U.S. 487 (1902).

68. *Id.* at 494. The plaintiff sued state election officials, who apparently did not raise the defense of constructive sovereign immunity. *Id.* at 491.

69. *Id.* at 493 (emphasis added). The Court relied on a criminal case, *Ex parte*

the Constitution,⁷⁰ the Court had no occasion to question that document as a source of civil liability. By clear implication, this constitutionally-derived tort arose at law.⁷¹

Similar to Constitutional torts, scholars have identified common law actions protective of “privacy and personhood.”⁷² Assuming that civil rights encompass a species of the right to be “let alone”⁷³ or the right

Yarbrough, 110 U.S. 655, 664 (1884), which involved a conspiracy to deprive a citizen of his vote, for the notion that the right to vote for a member of Congress is “fundamentally based upon the Constitution.” *Swafford*, 185 U.S. at 492.

70. By contrast, the plaintiff in *Wiley v. Sinkler*, 179 U.S. 58 (1900), argued his case under the Constitution and under a federal law imposing civil liability on persons who deprived a citizen of his right to vote. For analogical purposes, a private action under Title VII represents a breach of fourteenth amendment “values,” despite the statute’s foundation in the commerce clause. *See supra* note 20 arguing that Congress based Title VII on the commerce clause in order to avoid judicial challenges premised on the theory that the fourteenth amendment does not reach private actions.

The analogy is inexact also in that no private action may arise from a private person’s violation of another’s fourteenth amendment rights. *See Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring) (“rights secured by the fourteenth amendment are rights to protections against unfair or unequal treatment by the State, not by private parties”); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875 unconstitutional). Comparisons, however, need not be exact in seventh amendment analysis. *See supra* note 49 and accompanying text arguing that courts make analogies rather than search for exact equivalents at common law. Hence, the civil rights violation and tort nexus suffices for present purposes. *See supra* note 64 discussing proto-civil rights torts at common law.

The post-1791 development of constitutional torts is also a non-problem, and similarly disappears. The analogy shifts from ancient common law tort liability to modern, civil rights tort law. *See infra* note 72 and accompanying text discussing common law remedies to protect privacy and personhood.

71. In *Wiley v. Sinkler*, 179 U.S. 58 (1900), also involving the right to vote for a member of Congress, the Court made reference to juries. Against the defendant’s argument that the court would not allow plaintiff to recover the minimum amount in controversy required for federal jurisdiction, the Court remarked that calculation of damages “in such an action is peculiarly appropriate for the determination of a jury.” *Id.* at 65. The availability of a jury in *Wiley* indicates that the action arose at law. *See supra* notes 44-45 and accompanying text noting that jury trials are available for actions at law.

72. Professor Tribe notes that the common law contains “a potpourri of writs and actions of varying vintage which bear on aspects of privacy and personhood as currently conceived.” L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1310 (2d ed. 1988). The better-known examples include defamation, assault and battery and invasion of privacy. *Id.* In *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974), Justice Marshall made a similar comparison, stating that an action to redress racial discrimination “may also be likened to an action for defamation or intentional infliction of mental distress.” *Id.* The *Curtis* Court did not engage in extended historical analysis because the statute in question explicitly provided for recovery of damages. *Id.* at 196.

73. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) *citing* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The

to be considered a complete member of society,⁷⁴ a suit to vindicate such a right might sound equally in equity or law, depending on the remedy sought.⁷⁵ This inquiry must wait until we consider the nature of the remedy at issue, which comes next in the seventh amendment analysis.⁷⁶

B. *The Nature of the Remedy*

Title VII protects civil rights guaranteed by the fourteenth amendment,⁷⁷ directing courts to use their full equitable powers⁷⁸ to eliminate employment discrimination.⁷⁹ Title VII also provides for back pay.⁸⁰

right to privacy underlies the entire line of cases finding implied fundamental rights, including the right to marry, procreate and choose to have an abortion.

74. The Declaration of Independence lays the conceptual basis for such a "right" in its famous credo: "All men are created equal." See *supra* note 72 and accompanying text discussing the rights of personhood.

75. For example, an invasion of privacy can represent a "constitutional tort," an action which is at law. See *supra* note 65 discussing constitutional torts. The Supreme Court recognizes a limited constitutional right to privacy via implied fundamental rights that arise under the due process clause of the fourteenth amendment. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (upholding the right to read obscene materials in one's home). But see *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (rejecting the claim for a constitutional right "for homosexuals to engage in acts of consensual sodomy"). In modern equity, the right to privacy exists as the right to "publicity," viz. reaping benefits from the commercialization of one's name. Where appropriate, courts will also enjoin actual or threatened invasions not necessarily arising from publication. See *W. DEFUNIAK*, *supra* note 63, at 133-34.

76. Necessarily, the remedy and the action-at-law-versus-equity analyses intersect where one term must be used to define the other.

77. As a practical exigency, Congress enacted Title VII pursuant to the commerce clause. See *supra* note 23 discussing the reasons for choosing the commerce clause. Other civil rights laws derived their authority directly from the fourteenth amendment, notably the post-Civil War Civil Rights Acts, codified at 42 U.S.C. §§ 1981-1983 (1980).

78. Even before Congress enacted Title VII, courts had largely abandoned the common law rule limiting equity to the protection of property rights. See generally *W. DEFUNIAK*, *supra* note 63, at 70-74, 122-52. According to DeFuniak, when equity developed and emerged, "rights of property rather than human rights were paramount." *Id.* at 10. At common law today, personal rights protectable in equity include civil rights and the right to privacy. *Id.* at 140. The right to privacy is, simply put, the right to be left alone. *Id.* at 129. See generally Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

79. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) ("Congress' purpose in investing a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the 'fashion[ing] [of] the most complete relief possible'").

80. See *supra* note 23 for text of remedies section of Title VII.

Given that federal courts may enjoin civil rights violations under Title VII, and that Title VII also allows monetary recovery, the classification issue at hand requires defining the nature of what appears to be a legal remedy within an equitable scheme of relief.

1. Back Pay As Restitution?

Of the equitable remedies, ordering payment of back wages most nearly resembles equitable restitution.⁸¹ Most definitions of restitution⁸² require wrongful gains, in addition to injury in fact.⁸³ Employers who discriminate on the basis of race usually do so out of bigotry

81. See, e.g., *Rogers v. Loether*, 467 F.2d 1110, 1121 (7th Cir. 1972) (back pay regarded as "an appropriate exercise of a chancellor's power to require restitution"), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974); *Bittner v. Sadoff & Rudoy Ind.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980) (ERISA case, citing *Rogers v. Loether*). The Supreme Court also recognized, without expressly endorsing, this view in dicta. See *Curtis*, 418 U.S. at 197 (noting that courts consider back pay as a "form of restitution").

Other courts interpret back pay as equitable, without defining it as restitution. See *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) (back pay is "either equitable [or] legal relief incidental to an equitable cause of action"); *Robinson v. Lorillard*, 444 F.2d 791, 802 (4th Cir. 1971) ("The back pay award is not punitive in nature but equitable — intended to restore the recipients to their rightful economic status.").

82. Black's Law Dictionary defines restitution as follows:

Act of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification. Restoration of status quo and [sic] is amount which would put plaintiff in as good a position as he would have been if no contract had been made and restores to plaintiff value of what he parted with in performing contract. . . . In torts, restitution is essentially the measure of damages, while in contracts a person aggravated by a breach is entitled to be placed in the position in which he would have been if the defendant had not breached.

BLACK'S LAW DICTIONARY 682 (abridged 5th ed. 1983).

83. Courts award restitution "only in order to deprive the defendant of an enrichment obtained at the plaintiff's expense." G. PALMER, LAW OF RESTITUTION 1, 133 (1978). The notable exception arises from a breach of fiduciary duty involving parties. *Id.* The authors of the proposed Restatement (Second) of Restitution, defined the "general principle" of unjust enrichment as follows, "A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other owes restitution to him in the manner and amount necessary to prevent unjust enrichment." RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tent. Draft No. 1, 1983). See also P. BIRKS, INTRODUCTION TO THE LAW OF RESTITUTION (1985) 313 ("[Plaintiff's] *prima facie* title to restitution rests on the statement that the defendant has enriched himself by committing a wrong against him."); Professor Moore, stating that "restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains or to restore to status quo, or both." 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[2], at 206 (1988) (emphasis added).

rather than economic interest.⁸⁴ Indeed, large companies know all too well the risks that attend employment discrimination.⁸⁵

The authorities on restitution do not consider back pay awards as a proper subject of restitution.⁸⁶ Professor Dobbs expressly defines back pay as a legal remedy.⁸⁷ Although he never mentions back pay in his treatise, Professor Palmer gives two examples of restitution where, as with Title VII, the victorious plaintiff obtains a benefit which he or she did not previously have. These examples warrant separate consideration.

In the first case, a third party wrongly receives a benefit owed to the plaintiff.⁸⁸ Here, justice requires restitution to the deprived party. In the typical employment situation, however, white third party beneficiaries will not be liable for their employer's wrongful deeds.⁸⁹ More

84. However, some employers might genuinely wish to disadvantage non-majority employees in order to increase efficiency by reducing inter-employee discord. See Baker, *A Voluntary Approach to Equal Opportunity*, in *THE NEGRO AND EQUAL EMPLOYMENT OPPORTUNITY* 115 (H. Northrup & R. Rowan eds. 1965) (discussing a strike in the early 1960s by 200 International Harvester employees over the promotion of a black welder). The armed forces currently employ this reasoning in order to exclude admitted homosexuals from their ranks. See *Woodward v. United States*, 871 F.2d 1068 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990); *Ben-Shalom v. Secretary of the Army*, 826 F.2d 722 (7th Cir. 1987), *cert. denied*, 110 S. Ct. 1296 (1990).

85. Employment discrimination suits are extremely costly to defend. See *Affirmative Action Here To Stay Despite "Stotts," Conference Told*, Gov't Empl. Rel. Rep. (BNA) 429 (Mar. 25, 1985) (up to \$75,000 for a "simple" case; hundreds of thousands of dollars for a complex one); see also Fisher, *Businessmen Like to Hire By the Numbers*, *FORTUNE*, Sept. 16, 1985, at 26 ("[p]ersuasive evidence indicates that most large corporations want to retain their affirmative action programs, numerical goals and all").

86. In his chapter on "Torts or Equitable Wrong," Professor Palmer identifies the subjects for restitution as conversion; trespass to land; interference with contract relations; patent infringement; appropriation of intellectual property; interference with personality; enrichment at plaintiff's expense and fiduciary impropriety (e.g., insider trading). G. PALMER, *supra* note 83, at 121. The Restatement of Restitution is similarly devoid of any reference to back wages for wrongful termination.

87. D. DOBBS, *supra* note 51, at 69 n.18 (1973). Criticizing the rationale from *Harless v. Sweeny Indep. School Dist.*, 427 F.2d 319 (5th Cir. 1970), which held that "intertwined" claims for back pay and restitution under Title VII amount to a single equitable remedy, Professor Dobbs stated, "[I]n no way does the money claim seem 'equitable.' It is precisely the claim available as damages to any wrongfully discharged employee." D. DOBBS, *supra* note 51, at 69 n.18.

88. G. PALMER, *supra* note 83, at 4.

89. Some whites benefit indirectly from employer discrimination. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 485 (1980) ("some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from [government] contracting opportunities"). Title VII, however, does not create co-employee liability. See *supra* note 21 quoting Title VII.

relevant might be the second situation, where the defendant has received no benefit.⁹⁰

The cancellation of an anticipated gain also is included where the successful party avoids liability on an unperformed obligation on the basis of fraud, duress, or mistake. The principles underlying relief are much the same whether the gain under the *contract* has been realized or is only prospective.⁹¹

Adapting Palmer's example to the Title VII scenario, the "anticipated gain" would be expected profits from a discriminatory workplace, the "successful party" would be an employee who recovers expected wages rather than "avoiding liability," and "fraud" would correspond to a prohibited practice under Title VII. The linguistic contortions required to fit a Title VII action into Professor Palmer's framework obscure the ratio decidendi for recovery in either case. While the Palmer example entails equitable avoidance of contractual obligation, Title VII involves direct recovery on a "contract," assumed for seventh amendment purposes.⁹² The positive recovery of anticipated wages operates differently than the double negative of avoiding liability, resulting in restitution in the latter case only.

2. Back Pay as Legal Relief: The LMRA and ADEA Analogies

The federal judiciary's approach to back pay under different statutory schemes might serve as a useful model for a new seventh amendment analysis of Title VII. Despite some differences,⁹³ employee actions under section 301 of the Labor Management Relations Act of

90. See *supra* note 85 and accompanying text explaining employers do not profit from discriminatory employment practices when they are forced to defend costly discrimination suits.

91. G. PALMER, *supra* note 83, at 4-5 (emphasis added).

92. Ordinarily, the Title VII plaintiff will not have been employed under a contract. If formerly employed under a contract, however, the Title VII plaintiff might have a pendent state law claim in breach of contract. A growing number of state courts also permit actions for wrongful termination on public policy grounds. See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 298-99 (Supp. 1983-88).

93. Title VII actions are contractual by analogy. Section 301 actions, on the other hand, sound in contract. See *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.7 (section 301 is "essentially an action for damages" for breach of contract). Cf. *infra* note 96 arguing that bargaining agreements are not contracts per se. Section 301 and Title VII also differ with respect to parties. Employees suing employers under section 301 must join unions as defendants in the majority of cases. See *infra* note 95 discussing actions between union and employer.

1947 (LMRA) share much in common with Title VII suits.⁹⁴ Both statutes create private rights of action⁹⁵ without common law equivalents.⁹⁶ Moreover, courts limit relief in both to back pay under ordinary circumstances.⁹⁷ Lastly, the text of neither statute refers to jury trials, directly or indirectly.⁹⁸ It is significant, therefore, that back

94. 29 U.S.C. § 185 (1982). One must distinguish between section 301 actions and actions under the National Labor Relations Act (NLRA). Although both often result in awards of back pay and reinstatement, courts hear the former, whereas the latter arise under the exclusive jurisdiction of the National Labor Relations Board (NLRB), an administrative tribunal exempt from the seventh amendment. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937) (noting that there is no right to jury trial for actions under the NLRA). Section 301 actions typically involve breaches of collective bargaining agreements, whereas NLRA actions concern unfair labor practices.

95. Section 301 allows unions and employers to sue one another in federal district court for violating terms of their collective bargaining agreement. 29 U.S.C. § 185 (1980). Because most bargaining agreements contain extensive arbitration clauses, most section 301 actions by individual employees alleging wrongful termination include claims against the union for breach of the duty of fair representation. Without doing so, the exclusivity clause would bar most suits. *See infra* note 103 citing hybrid section 301/fair representation suits. *See generally* R. GORMAN, LABOR LAW-BASIC TEXT 721-22 (1976). In most cases, though, "the bulk of the damages will be assessed against the employer rather than the union, since the major harm to the employee is his severance from work." *Id.* at 723.

96. At common law prior to 1791, there was no right of action to redress civil rights violations, in employment or elsewhere. *See supra* notes 65-76 and accompanying text discussing the development of civil rights in the law and common law analogies to Title VII. Likewise, the common law presumed employment-at-will unless the master and servant bound one another contractually. *See Jones & Laughlin*, 301 U.S. at 48. Collective agreements, however, were considered unenforceable "executory" contracts. *See* C. GREGORY & H. KATZ, LABOR AND THE LAW 339 (1979) (bargaining agreements were "illegitimate hybrids, with no proper name or significance, legally speaking"). Even under the NLRA, not all terms of the agreement create contractual rights between the employer and the union. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (comparing collective bargaining agreements to trade agreements and carriers' tariffs).

97. *See supra* notes 23-24 and accompanying text discussing remedies available under Title VII. The typical section 301 action against employers sounds in contract, governed by traditional rules limiting liability. *See* *Elect. Workers, Local No. 12 v. A-1 Elect. Serv., Inc.*, 535 F.2d 1 (10th Cir. 1976) (damages to place employee in as good a position as if no breach had occurred); *Woods v. Dunlop Tire Corp.*, 673 F. Supp. 117 (W.D.N.Y. 1987) (granting a jury trial to plaintiff seeking back pay, reinstatement and restoration of benefits). Although fair representation actions resemble torts, courts rarely award punitive damages against unions. *See* *International Brd. of Elect. Workers v. Foust*, 442 U.S. 42, 50-52 (1979) (denying recovery because punitive damages could harm union's future ability to protect workers' rights). "Compensatory damages" against unions usually consist of back pay. *See* *Bowen v. United States Postal Serv.*, 459 U.S. 212, 227 n.16 (1983) (union's share of damages in hybrid action "normally will be limited and finite").

98. *See supra* notes 23-24 discussing remedies available under Title VII.

pay under section 301 constitutes damages rather than a form of restitution, even when the plaintiff additionally seeks reinstatement or other equitable relief.⁹⁹ Although the Supreme Court recently distinguished between legal and equitable forms of back pay, other language in the same opinion problematizes the Court's conclusion.¹⁰⁰

The Age Discrimination Employment Act of 1967 (ADEA)¹⁰¹ occupies a middle position between Title VII and section 301, being a discrimination statute¹⁰² and expressly providing for relief at law.¹⁰³

99. See *Nedd v. United Mine Workers*, 556 F.2d 190, 206 (3d Cir. 1977); *Nicely v. USX*, 709 F. Supp. 646 (W.D. Pa. 1989) (jury award of back pay); *Woods v. Dunlop Tire Corp.*, 673 F. Supp. 117 (W.D.N.Y. 1987) (jury trial granted in suit for lost wages and benefits, reinstatement and restoration of seniority rights). *But see* *Leach v. Pan Am. World Airways*, 842 F.2d 285 (11th Cir. 1988) (no jury trial because legal and equitable remedies of hybrid action are inseparable); *King v. Fox Grocery Co.*, 678 F. Supp. 1174 (W.D. Pa. 1988) (same, although conceding that back pay under section 301 is not so easily characterized as an equitable remedy).

In *Chauffeurs, Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990), the Supreme Court resolved the split in jurisdictions, holding that plaintiffs in hybrid section 301 and duty of fair representation suits for back pay were entitled to a trial by jury. Although the plaintiff sought back pay only (employer had gone out of business), the "intertwined" equitable remedy of reinstatement would not have diminished his seventh amendment right. *Id.* at 1348.

100. *Terry*, 110 S. Ct. at 1348-49. For purposes of differentiating types of back pay, the Court assumed *arguendo* that no right to a jury trial exists under Title VII. Responding to the union's argument that, since back pay is equitable under Title VII, it also must be so under section 301, Justice Marshall noted that Congress characterized back pay as "equitable relief." *Id.* at 1348. Citing his own dicta in *Curtis v. Loether*, 415 U.S. 189 (1974), Justice Marshall continued that back pay recoverable under Title VII would "generally be restitutionary in nature." *Terry*, 110 S. Ct. at 1349. Justice Marshall's earlier finding regarding back pay under section 301, reproduced as follows, flatly contradicts this latter depiction of the Title VII remedy as "restitutionary":

[W]e have characterized damages as equitable when they are restitutionary, such as in "action[s] for disgorgement of improper profits" *The backpay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from [ex-employer] had the Union processed the employees' grievances properly. Such relief is not restitutionary.*

Id. at 1348 (citations omitted) (emphasis added). Title VII plaintiffs identically seek wages "they would have received," but for the employers' unlawful actions.

101. 29 U.S.C. §§ 621-634 (1980).

102. See *Polstorff v. Fletcher*, 430 F. Supp. 592, 594 (N.D. Ala. 1977) ("The purposes of Title VII and the ADEA, discouragement of discrimination in employment, are substantially similar."); see also Note, *Administrative Res Judicata and the Age Discrimination in Employment Act*, 89 COLUM. L. REV. 1111, 1123-25 (1989) (discussing similarity between ADEA and Title VII).

103. The ADEA permits recovery of back pay and, in cases involving intentional discrimination, additional "liquidated" damages equal to the back pay award. 29 U.S.C. § 626(b) (1980). Furthermore, the Act provides that "the court shall have juris-

Under the ADEA, many courts allow juries to determine recovery of back pay.¹⁰⁴ Because the ADEA and Title VII share the same basic goals, reasons of policy (were they relevant to seventh amendment analysis) cannot account for the incongruous division of labor regarding who determines recovery. The methodologically troublesome conclusion must be that back pay is a chameleon-like remedy, whose nature changes with the words surrounding it. Significantly, back pay looks legal when placed beside the ADEA's provision for legal and equitable relief.¹⁰⁵

3. *The Remedies: "Clean-Up" Doctrine or Equitable Co-Dependents?*

For seventh amendment purposes, the Supreme Court cautions against artificially isolating remedies from the context in which they arise.¹⁰⁶ Consequently one must look at back pay within Title VII's remedial scheme and in context of the statute as a whole.

Interrelation of remedies is relevant insofar as the Supreme Court recognizes that not all commands to pay constitute legal remedies.¹⁰⁷ The issue may be stated as follows: Are the remedies conceptually au-

diction to grant such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter." *Id.*

104. The Supreme Court resolved a split in circuits on the availability of a jury trial under the ADEA in *Lorillard v. Pons*, 434 U.S. 575 (1978). Writing for an unanimous Court, Justice Marshall held that although the ADEA contains no express provision for a jury, Congress must have assumed its availability. This was so because Congress adopted the remedies from the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1988), which the courts have read to allow jury trials in suits for back wages. *Lorillard*, 434 U.S. at 582-83. Justice Marshall compared Title VII's provision for "equitable" relief to the ADEA's provision for "legal or equitable relief." *Id.* at 584. Finally, he noted that the ADEA provides that defendants "shall be liable for damages," as opposed to Title VII's payment of back pay by means of "equitable discretion." *Id.*

Shortly after *Lorillard*, Congress amended the ADEA to reflect the Court's holding, explicitly providing for jury trials in ADEA actions. 29 U.S.C. § 626(c)(2) (1980). That Congress changed the ADEA, while leaving Title VII unmodified, may be explained by the fact that many Title VII plaintiffs at this time obtained juries by pleading pendent claims under 42 U.S.C. § 1981 or attaching state law counts. See *supra* note 35 discussing jury trials granted for combined section 1981 and Title VII cases.

105. Were back pay "by nature" truly equitable, juries would neither rule on, nor calculate recovery.

106. See *infra* note 127 and accompanying text noting the Supreme Court's recognition of the false separation of remedy from cause in the historical segment of seventh amendment analysis.

107. See *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (restitution is equitable, but money award in housing discrimination constitutes damages). In the usual case, monetary awards constitute relief at law. See *Dairy Queen v. Wood, Inc.*, 369 U.S. 469

tonomous, or are they so inextricably intertwined as to be separately meaningless?¹⁰⁸ If they stand alone, then the Court's repudiation of the "clean-up" doctrine¹⁰⁹ requires naming back pay and reinstatement as legal and equitable remedies respectively.¹¹⁰ If they constitute parts of a single remedy, then courts assume both to be equitable.¹¹¹

The dictates of common sense favor separability, given that Title VII plaintiffs may sue for either back pay or reinstatement, or both.¹¹² The discrimination victim will not always wish to return to his or her former job, especially if a superior alternative avails itself before litigation. The most logically sound view defines back pay as a limited form of damages.¹¹³

(1962) (suit for damages not converted to equitable claim by labeling underlying action an "accounting").

108. The Supreme Court formerly tested the relation of remedies under the seventh amendment by "ranking" their importance. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), the Court stated that the seventh amendment "has no application to cases where recovery of money damages is an incident to equitable relief." The Court in *Bernhard v. Ross*, 396 U.S. 531 (1970) effectively renounced this doctrine by considering claims separate from one another. More recently, the Court considered remedies separately for this analysis. See *infra* notes 114-56 and accompanying text discussing recent cases.

109. Under the equitable "clean-up doctrine," chancery courts historically assumed discretionary jurisdiction over incidental legal claims. This obviated the need to go through the duplicative and burdensome process of instituting a separate action in a court of law. See generally D. DOBBS, *supra* note 51, at 83-85. The Supreme Court repudiated this theory in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959) and its progeny, providing either party the right to jury on any legal claim in a suit for legal and equitable relief under the Sherman and Clayton Acts. *Id.* at 508. See *supra* notes 46-51 and accompanying text discussing modern seventh amendment analysis.

110. See *supra* notes 49-57 and accompanying text discussing seventh amendment analysis. The Court's rejection of the clean-up doctrine disposes of the claim that "incidental" legal claims become equitable by their coincidence with greater equitable claims. See *supra* note 42 discussing the reasoning employed in early Title VII cases.

111. One example might be where a chancellor enjoins a swindler from disseminating an untruthful advertisement, and orders restitution to his cheated victims. Other familiar examples arise in the "traditionally equitable" fields of bankruptcy, trusts and estates. But see *infra* note 149 and accompanying text indicating that a suit for damages in bankruptcy can arise at law under some circumstances. Query, had Congress in Title VII provided for "legal remedies, including back pay and reinstatement," who would order the employer to rehire the unlawfully dismissed employee? Clearly, the legal nature of one remedy would not permit jury determination of the injunctive measure, notwithstanding that Congress affixed a descriptive label.

112. Indeed, the prevailing notion that back pay helps to implement reinstatement and make plaintiffs "whole" poses an antinomy and begs a question irrelevant to seventh amendment analysis, namely, which remedy "came first."

113. Legislatures or courts may limit recovery to back pay for policy reasons, much

IV. RECENT SUPREME COURT DECISIONS AND JURY TRIALS UNDER TITLE VII

The recent Supreme Court decisions in *Tull v. United States*¹¹⁴ and *Granfinanciera, S.A. v. Nordberg*¹¹⁵ represent powerful statements in defense of the seventh amendment right to jury trials.¹¹⁶ Taken together, the two cases suggest that either party to a Title VII action would be entitled to a trial by jury, as of right, where the plaintiff seeks to recover back pay.

In *Tull v. United States*,¹¹⁷ the United States sued a developer under provisions of the Clean Water Act¹¹⁸ that ban the destruction of wetlands without a federal permit.¹¹⁹ Denying defendant's petition for jury trial, the district court found for the government, assessing civil fines totaling \$325,000 (of over \$22 million sought), and ordered the defendant to restore those ruined tracts still in its possession to their pristine state.¹²⁰ On appeal of the decision to deny the right to a jury trial, the Fourth Circuit affirmed, holding that the civil penalties were subordinate to the equitable relief sought.¹²¹ The Supreme Court

as they set ceilings on civil fines or abolish punitive damages. See, e.g., *Knierim v. Izzo*, 22 Ill.2d 73, 88, 174 N.E.2d 157, 165 (1961) (holding that punitive damages are not recoverable under a theory of intentional infliction of emotional distress). As for Title VII, Congress may have felt that permitting compensatory and punitive damages would deter plaintiffs from settling claims through conciliation, in hope of striking a litigation bonanza. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2375 (1989) ("although there is some necessary overlap between Title VII and 1981, [the Court] is reluctant to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in the later statute").

114. 481 U.S. 412 (1987).

115. 109 S. Ct. 2782 (1989).

116. The Supreme Court recently decided a third case broadly endorsing the right to trial by jury. See *Chauffers, Local 391 v. Terry*, 110 S. Ct. 1339 (1990). *Terry* involved an employee's right to jury trial under section 301 of the Labor Management Relations Act, where legal and equitable remedies are intertwined. See *supra* notes 99-100 discussing *Terry*.

117. 615 F. Supp. 610 (E.D. Va. 1983), *aff'd* 769 F.2d 182 (4th Cir. 1985), *rev'd and remanded*, 481 U.S. 412 (1987).

118. 33 U.S.C. §§ 1251-1387 (1988).

119. The Clean Water Act prohibits unauthorized discharge of dredge or fill into "navigable waters," which include wetlands. 33 U.S.C. §§ 1311, 1344, 1362(7) (1988). Section 1319 provides for injunctive relief and civil penalties not to exceed \$10,000 per day. 33 U.S.C. § 1319(b), (d) (1988).

120. *Tull*, 615 F. Supp. at 626-27 (1983).

121. 769 F.2d 182, 187 (1985). In so holding, the Fourth Circuit emphasized the

granted certiorari to resolve a conflict among the circuits.¹²²

Justice Brennan in his majority opinion began by reciting the familiar rules of seventh amendment analysis, namely the historical and remedies analyses.¹²³ In the Court's view, the civil penalty suit "clearly" corresponded to an action at law in debt.¹²⁴ Retreating, however, the Court admitted that the analogies offered by both parties¹²⁵ were "appropriate" and turned to the remedies analysis.¹²⁶

In its remedies analysis, the Court decided first whether the relief sought by the government was punitive (legal) or restorative (equitable) in nature. Citing legislative purpose, Justice Brennan stated that the civil fine provision sought to punish polluters and deter those who would degrade wetlands. Therefore, the fine represented a penalty, akin to punitive damages, which only a court of law could enforce at common law.¹²⁷ On the facts of the case, the Court easily rejected the government's argument that the fines served to disgorge improper

discretionary nature of the assessment of penalties under section 1319 of the Clean Water Act.

122. *Tull*, 481 U.S. at 417.

123. *Id.* at 417, 418. Citing *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), the Court reemphasized that the remedies analysis is "[m]ore important' than finding a precisely analogous common law action." *Tull*, 481 U.S. at 421. The Court pointedly rejected what it termed the government's attempt to divide the statute "into a cause of action and a remedy, and analyz[e] each component as if the other were irrelevant." *Id.* at 421 n.6. By this means, the government had sought to create an insurmountable hurdle by separately finding the cause and remedy to be equitable.

124. *Tull*, 481 U.S. at 418. The Court ruled that the action was "clearly analogous to the 18th-century action in debt, and federal courts have rightly assumed that the Seventh Amendment *required* a jury trial." *Id.* at 420 (emphasis added). The government had argued that the statutory action best comported with an action by the Sovereign to abate a public nuisance. *Id.*

125. The petitioner analogized the suit to an action in debt at common law. *Id.* at 418. The government, on the other hand, compared the suit to an equitable action to abate a public nuisance. *Id.* at 420.

126. The Court here did not so much abandon the "best analogy" test for a standard of "irrefutable superiority" as reaffirm that courts must examine both prongs of the *Bernhard* test, and not quit early if either yields a clear result. In so doing, Justice Brennan in *Tull* tacitly reformulates the two-part analysis as a kind of balancing test. *Id.* at 421. Justice Brennan articulated the test later in *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989), as follows:

If, on balance, these two factors indicate that a party is entitled to a jury trial under the seventh amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder.

Id.

127. *Tull*, 481 U.S. at 422.

gains and, as such, constituted a form of restitution.¹²⁸ The Court also rejected the government's contention that the legal remedy was "intertwined" with the equitable one.¹²⁹

As a final issue, the Court questioned whether Congress could permissibly assign the computation of civil penalties to judges, consistent with the seventh amendment. The Court held that it could as a matter of policy,¹³⁰ recognizing that the grant would not detract from the jury's ultimate authority.¹³¹ Justice Scalia's dissent in part, joined by Justice Stewart, argued that the Court had not gone far enough to protect the seventh amendment right.¹³² Justice Scalia would have permitted juries to assess fines as well.¹³³

Tull bears relevance to the Title VII jury issue on several points. First, the majority repudiated the argument that discretionary monetary awards signify equitable relief.¹³⁴ As a necessary corollary, the Court overrode legislative intent to the degree in which Congress sought to create equitable remedies by means of assigning computation. More than this, the Court rejected *sub silentio* the government's argument from legislative history that Congress intended to create an equitable remedy.¹³⁵ In doing so, the Court minimized legislative his-

128. *Id.* at 424. The multi-million dollar fine requested suggested to the Court that the government was after more than illgotten gains. *Id.* at 423.

129. *Id.* In so holding, the Court noted that the district court emphasized the discretionary nature of the penalty assessment under section 1319 of the Clean Water Act. *Id.* at 422 n.8. Moreover, the Court explained that the district court had fashioned a "package of remedies" whose monetary and injunctive parts represented a logical whole. 481 U.S. at 416 (quoting *Tull v. United States*, 769 F.2d 182, 187 (4th Cir. 1985)).

Significantly to the Court, the defendant had sold most of the lands, and was at liberty to restore only a fraction of the total area it had degraded. *Tull*, 481 U.S. at 424. Justice Brennan's statement of the case raises the suspicion that the government included equitable relief as a pretext to bar defendant's right to jury.

130. *Id.* at 426-27. Congress properly assigned highly difficult, discretionary fines to the courts, given that it could have legislatively set the fines in the first instance. *Id.*

131. *Id.* As Justice Brennan put it, "a determination of a civil penalty is not an essential function of a jury trial." *Id.* at 426.

132. *Id.* at 427, 428 (Scalia, J., dissenting).

133. *Id.*

134. *Id.* at 422 n.7. Justice Brennan rejected the government's argument that a discretionary penalty required judicial application. The Court stated: "The government distinguishes this suit from other actions to collect a statutory penalty on the basis that the statutory penalty here is *not fixed* or readily calculable from a fixed formula. We do not find this distinction to be significant." *Id.* (emphasis added).

135. See Brief of the United States at 31, *Tull v. United States*, 481 U.S. 412 (1987)

tory as a guide to seventh amendment analysis, at least where the face of the statute in question yields no easy answer.¹³⁶

Secondly, the Court refused to deny jury trials where the legal remedy is arguably "incidental" to the equitable one.¹³⁷ By the time of *Tull*, one could fairly say that the incidental, *ergo* equitable, argument had become a dead letter.¹³⁸

(No. 85-1259). The government quoted statements of an alleged congressional intent to limit relief to "disgorgement." According to Senator Muskie, the bill's sponsor:

the [EPA's] current enforcement policy is to seek court imposed penalties for non-compliance with Clean Water Act requirements in amounts commensurate with the economic benefit of delayed compliance, among other factors. This policy embodies congressional intent on the criteria that should be considered by courts in imposing civil penalties under existing provisions of the act.

123 CONG. REC. 39,190 (1977) (remarks of Sen. Muskie). The government's brief focused heavily on the discretionary nature of the relief, believing, with the dissent, that a jury must not hear the underlying case if Congress required the court to calculate and assess the penalties. See *Tull*, 481 U.S. at 428 (Scalia, J., dissenting) ("I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court.")

136. Interestingly, Justice Brennan stated in a footnote that the Court would avoid the constitutional question if it could resolve the issue through statutory construction. *Tull*, 481 U.S. at 417 n.3 (citing *Curtis v. Loether*, 415 U.S. 189 (1974), which had reached the constitutional question on a statute similar to Title VII). Justice Brennan then concluded that nothing in the act or its legislative history "implies any congressional intent to grant defendants the right to a jury trial. . . ." *Id.* (emphasis added). It is not clear if the Court meant by this that it would refrain from considering intent to deny jury trials, if the Court only looks at the question from the perspective of the moving party, or if it looks in both directions.

137. *Id.* at 424. The Court noted that the government could seek legal or equitable relief under separate subsections of the remedies provision, but if it chose to pursue both, a jury would be provided "on the legal claim, including all issues common to both." *Id.* at 425 (quoting *Curtis*, 415 U.S. at 196 n.11). A tension between this holding and lines that precede it (noting that courts of chancery at common law could provide monetary awards "incidental to or intertwined with injunctive relief") exists only insofar as the Court, in rejecting the government's claim, stated as one of three "flaws" the fact that a \$22 million penalty "hardly can be considered incidental to the modest equitable relief in this case."

138. The Court recently addressed the "intertwining remedies" issue in the labor law context. See *Chauffeurs, Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990). See *supra* note 94 discussing action under section 301 of the LMRA. Superficially, the Court's reliance on *Tull* for the notion that a monetary award "incidental to or intertwined with injunctive relief may be equitable" suggests a reverse in doctrine. *Terry*, 110 S. Ct. at 1348. Justice Brennan in *Tull*, however, further stated that the right to jury trial "cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *Tull*, 481 U.S. at 425. Taken together, the two passages from *Tull* signify that incidental claims can be equitable, but not on account of being intertwined with or incidental to something else.

Lastly, the *Tull* court quoted *Porter v. Warner Holding Co.*,¹³⁹ limiting restitution to “restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.”¹⁴⁰ In the context of *Porter*, the word “and” can only be read as joining, not distinguishing segments.¹⁴¹ That is, the “and” means “by,” not “or.”¹⁴² Through its reference to *Porter*, the *Tull* court implicitly defined restitution in its properly narrow sense.¹⁴³

The Supreme Court in *Granfinanciera, S.A. v. Nordberg*¹⁴⁴ adjudicated issues in a field also far removed from employment discrimination, namely “traditionally equitable” bankruptcy proceedings. In *Granfinanciera*, the trustee for a bankrupt coffee company sued two South American entities to void allegedly fraudulent transfers of money, made before it filed for bankruptcy under Chapter 11.¹⁴⁵ The bankruptcy court denied defendants’ motion for jury trial, which the district court and Eleventh Circuit affirmed on appeal.¹⁴⁶ Following a bench trial, the district court entered judgment for the plaintiff. The Supreme Court granted certiorari to determine whether the seventh amendment applied to this type of proceeding.¹⁴⁷

In an opinion joined by six other justices,¹⁴⁸ Justice Brennan held

139. 328 U.S. 395 (1946). In *Porter*, the government sued under the Emergency Price Control Act of 1942 to enjoin landlord overcharges and order excess rent returned to tenants. *Id.* at 395.

140. *Tull*, 481 U.S. at 424 (citing *Porter*, 328 U.S. at 402).

141. The isolated passage in *Porter* quoted by the Court obscures this distinction. In *Tull*, the Court quotes, “restitution is limited to ‘restoring the status quo and ordering the return’” *Id.* at 424. The original text reads as follows: “When the Administrator seeks restitution . . . he asks the court to act in the public interest by restoring the status quo and ordering the return” *Porter*, 328 U.S. at 402.

142. *Porter* stands for the idea that restitution has a specific and clear meaning. It does not comprise a free-ranging redistribution of money to restore the status quo, but rather the repatriation of wrongful profits.

143. *See supra* notes 81-99 and accompanying text discussing restitution and back pay.

144. 109 S. Ct. 2782 (1989).

145. *Id.* at 2787.

146. *Id.* at 2787-88. The Eleventh Circuit reasoned: 1) whereas the bankruptcy code specifically allowed for jury trials only for tort actions, the constructive fraud provision of the Bankruptcy Act of 1982 under which plaintiff brought action was silent on jury trials, 2) actions to void fraudulent conveyances, and bankruptcy proceedings in general, are by nature equitable and 3) Congress designated fraudulent conveyance actions as “core proceedings,” to be tried by judges without juries. *Id.*

147. *Id.* at 2788.

148. Justice Scalia concurred separately, Justice White filed a dissent, and Justice

that defendants sued for fraudulent conveyances in bankruptcy actions, who have made no claims against the bankruptcy estate, are entitled to jury trials under the seventh amendment. The seventh amendment dictated this result, despite the fact that Congress designated such actions as “core” proceedings to be tried to judges alone, and that bankruptcy courts are non-article III tribunals.¹⁴⁹

The Court in *Granfinanciera* picked up where *Tull* left off, further refining seventh amendment analysis and reemphasizing its importance. Justice Brennan began by holding that the statute’s ambiguous references to trial by jury justified deciding the case directly under the seventh amendment.¹⁵⁰ In its historical analysis, the Court demanded more precision than respondent pled, rejecting in course its overly broad analogy to equitable actions voiding fraudulent transfers.¹⁵¹ The Court similarly rejected the respondent’s self-serving definition of the monetary remedy as “avoidance” and “restitution,” rather than damages.¹⁵²

Moving to the statutory issue, Justice Brennan noted the constitutional restraints on Congress against eliminating the right to jury by transferring a right of action to an administrative or non-article III

Blackmun filed a dissent joined by Justice O’Connor. Both dissents agreed with the majority up to the point where *Granfinanciera* became disanalogous to Title VII. Namely, the dissents’ disagreement arose where the Court determined whether Congress could assign the action to a non-Article III tribunal.

149. Article III of the Constitution establishes the system of federal courts, to which the seventh amendment expressly applies. Congress may create specialized, “non-Article III” tribunals to hear statutory causes of action which involve “public rights.” *Granfinanciera*, 109 S. Ct. at 2796. Public rights originally meant that the government was a party to the action, but administrative tribunals today cover many zones of private intercourse affecting commerce. See generally Saphire & Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U.L. REV. 85 (1988) (discussing threat of “legislative courts” to Article III values).

150. *Granfinanciera*, 109 S. Ct. at 2789. In contrast to its detailed analysis of historical analogues, the Court relegated to a footnote the Bankruptcy Act’s mention of jury trials. *Id.* at 2789 n.3. The Court also declined to discuss respondent’s supportive citations to legislative history. Brief for Respondent at 3-6, *Granfinanciera*, S.A. v. Nordberg, 109 S. Ct. 2782 (1989) (No. 87-1716). As a threshold matter, then, the Court impliedly held that the language of an act and its legislative history would not foreclose separate seventh amendment analysis, at least where ambiguities exist.

151. *Granfinanciera*, 109 S. Ct. at 2791. While courts of equity traditionally provided relief in suits to void fraudulent preferences, these actions generally concerned real property and not specie. *Id.*

152. *Id.* at 2794 n.7. This sleight of hand amounted to a “strained attempt to circumvent precedent.” *Id.*

tribunal, such as courts of bankruptcy.¹⁵³ In this instance, Congress overstepped its constitutional authority by designating all fraudulent transfer actions equitable “core” proceedings, irrespective of the relationship between the trustee and the defendant.¹⁵⁴

Most important to the Title VII issue, *Granfinanciera* rejected classification as a means to subvert the right to a jury trial. As to the distinction between “core” and “non-core” proceedings, the Court pronounced:

This purely taxonomic change cannot alter our seventh amendment analysis. Congress cannot eliminate a party’s seventh amendment right to a jury trial by merely relabelling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or specialized court of equity.¹⁵⁵

Similarly, Congress cannot defeat the right to jury trial under Title VII by expressly permitting recovery of damages, followed by the words, “and other equitable relief.”¹⁵⁶ As in *Tull*, the Court closely scrutinized congressional determinations. In both cases, the Court gave no effect to indications that Congress rejected the right to trial by jury.

V. PROPOSAL

The right to jury trial does not, and should not, turn on the social desirability of protecting one class of persons against another. The right is too precious to subordinate to politics.¹⁵⁷ Similarly, how par-

153. *Id.* at 2795. The Court stated that Congress could only deny the right to jury “in actions at law . . . where ‘public rights’ are litigated.” *Id.* (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 450, 458 (1977)). The Court defined “public rights” as statutory rights that are “integral parts of a public regulatory scheme, assigned to administrative bodies or special courts of equity.” *Id.* at 2799 n.10. The Court then held that the plaintiff’s action to recover a fraudulent conveyance was not a “public right,” because the action was peripheral to the bankruptcy proceeding (defendant was not a creditor). *Id.* at 2798. Justice Scalia dissented insofar as he thought public rights could only exist where the government was a party in the suit. *Id.* at 2802 (Scalia, J., concurring in part and dissenting in part).

154. *Id.* at 2800. The Court also rejected an *expressio unis* construction of the Bankruptcy Code. The Code only grants the right to jury trial for personal injury or wrongful death actions against the bankruptcy estate. *Id.* at 2789 n.3.

155. *Id.* at 2800.

156. *See supra* note 23 for text of Title VII.

157. The right to trial by jury played a central role in the American system of justice from the start. *See* W. NELSON, *supra* note 64, at 96 (“For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights.”).

ties to civil actions articulate the relief they seek bears no relevance to the seventh amendment issue.¹⁵⁸ The proposed test that follows, suggested by *Granfinanciera, S.A. v. Nordberg*¹⁵⁹ and *Tull v. United States*,¹⁶⁰ assumes that the Supreme Court preserves the right to trial by jury where the problem admits of no easy resolution under traditional seventh amendment analysis.¹⁶¹ Title VII presents one such case, where a controverted remedy stands beside an equitable remedy.

Under the proposed test,¹⁶² the court would find a right to trial by jury where the statute grants one or where the legislative history clearly shows that Congress meant to provide such a right. Otherwise, the court would first subject each "cause" (defined as an action for a particular remedy)¹⁶³ to a strict, historical analysis. Next, the court would separately analyze each remedy. In doing so, the court would use an "as likely legal than not" standard.¹⁶⁴ If the remedy is clearly legal, either party would have the right to jury. If the remedy is indeterminate and the cause historically equitable, no jury would be available. Where both are indeterminate, the court would award the tie to

158. See *supra* note 152 and accompanying text discussing Court's rejection of an argument based on artfully defined remedies.

159. See *supra* notes 144-56 and accompanying text discussing *Granfinanciera*.

160. See *supra* notes 116-43 and accompanying text discussing *Tull*.

161. See *supra* note 54 and accompanying text explaining the presumption in favor of jury trial.

162.

Proposed Seventh Amendment Analysis

HISTORICAL ANALOGUE

		indeterminate	legal
REMEDY	indeterminate	*	no jury
	legal	jury	jury

* = either jury, or jury *unless* legislative history indicates that there should be no right to trial by jury

163. In a merged system of law and equity, the remedy and cause are the same thing, defined from either end of the lawsuit.

164. If the remedy resembles more closely a remedy traditionally in equity, it would be equitable. If not, it would be legal. Toss-up cases provisionally would go to a finding of a remedy at law, until the court completes its historical analysis.

the right to jury trial.¹⁶⁵ The court would, under no circumstances, resort to policy considerations to break ties.

The proposed test would dispense with Justice Brennan's vague "balancing test," which makes little sense in that one half weighs considerably more than the other.¹⁶⁶ Because of its diminished role for legislative intent, the test would also encourage Congress to identify more clearly the seventh amendment implications of the statutory rights of action it creates.

VI. THE RENEGADE NORTHERN DISTRICT OF ALABAMA

The Northern District of Alabama after *Beesley v. Hartford Fire Insurance Company*¹⁶⁷ stands alone as the only federal court to consistently grant jury trials in Title VII actions for back pay.¹⁶⁸ Notwithstanding its tepid reception,¹⁶⁹ *Beesley* and its progeny warrant close inspection due to the continued general absence from Title VII decisions of any systematic seventh amendment analysis.¹⁷⁰ The

165. An alternative method to break the tie would be to find for a right to jury trial, unless the legislative history clearly indicated that there should be no such right. Another possible "tie-breaker" might be the third factor in *Bernhard*, viz. the relative capacity of a jury to understand and fairly rule on the issues of fact presented by the individual case. See *supra* note 47 and accompanying text describing the *Bernhard* seventh amendment test.

166. See *supra* note 48 and accompanying text explaining that remedy analysis is more important than historical analysis. Justice Brennan later advanced a streamlined seventh amendment analysis. Speaking for himself, Justice Brennan would have abandoned that much of the historical analysis which analogizes modern claims to pre-1789 forms of action. *Chauffeurs, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1350 (1990) (Brennan, J., concurring in part and concurring in judgment) ("there remains little purpose to our rattling through dusty attics of ancient writs"). Justice Brennan would have applied historical analysis to the remedy alone, before turning to the more important, modern remedies analysis. In essence, Justice Brennan reformulated the seventh amendment test as a two-part remedies analysis.

167. 717 F. Supp. 781 (N.D. Ala.), *motion to vacate denied*, 723 F. Supp. 635 (N.D. Ala. 1989).

168. Following *Beesley*, the Northern District granted requests for jury trials under Title VII in two reported decisions, *Walker v. Anderson Elect. Connectors*, 736 F. Supp. 253 (N.D. Ala. 1990) and *Walton v. Crown Equip. Co.*, 733 F. Supp. 327 (N.D. Ala. 1990).

169. Other districts have found *Beesley's* rationale unpersuasive. See *Kozam v. Emerson Elec. Co.*, 739 F. Supp. 307 (N.D. Miss. 1990); *Zowayyed v. Lowen Co.*, 735 F. Supp. 1497 (D. Kan. 1990); *Mann v. J.E. Baker Co.*, 733 F. Supp. 885, 892 (M.D. Pa. 1990) ("[w]e adhere to the belief that there is no right to a jury trial in Title VII cases").

170. Amongst others, *Kozam*, 739 F. Supp. 307, rejected *Beesley* without supplying

court in *Beesley* undertook a seventh amendment analysis from the ground up. Under the remedies test, Judge Acker debunked the received wisdom on back pay, adopting the amicus view that this remedy “is clearly a measure of defendant’s loss more akin to damages than it is to restitution.”¹⁷¹ For historical analogues, the court settled on the “number of tort actions” at common law identified by Justice Marshall in *Curtis v. Loether*.¹⁷²

The court also described Supreme Court decisions which problematized the prevailing judicial attitude towards Title VII remedies.¹⁷³ Despite a steady stream of Supreme Court dicta pointing in the opposite direction,¹⁷⁴ the court found that the Court’s holdings interpreting other federal statutes supported Anita Beesley’s position that jury trials were available under Title VII.

The Northern District started its survey with *Curtis v. Loether*,¹⁷⁵ which recognized the right to trial by jury under a statute substantially similar to Title VII.¹⁷⁶ Next, Judge Acker held that the Court in *Albermarle Paper Co. v. Moody*¹⁷⁷ tacitly endorsed the right to jury trial

an alternative seventh amendment analysis. The district court deferred to the “well established” rule in the fifth circuit that no right to a jury trial exists. *Id.* at 314.

171. *Beesley*, 723 F. Supp. at 644 (quoting amicus brief for plaintiff). See *supra* notes 77-105 and accompanying text discussing nature of back pay claim.

172. *Beesley*, 723 F. Supp. at 643. See *infra* note 25 discussing *Curtis*.

173. The Court’s decisions in *Tull v. United States*, 481 U.S. 412 (1987) and *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989), “represent the present Supreme Court’s crescendo of renewed recognition of the power and importance of the Seventh Amendment. . . .” *Beesley*, 723 F. Supp. at 643. See *supra* notes 119-60 and accompanying text discussing *Tull* and *Granfinanciera*. As against this relatively guarded language, Judge Acker held in the first *Beesley* opinion that the pair “by clear and necessary implication overruled all prior circuit and district court decisions” denying the right to a jury trial in Title VII actions. *Beesley*, 717 F. Supp. at 784.

174. See *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981) (“And of course, . . . there is no right to a trial by jury in cases arising under Title VII.” [citing cases]); *Lorillard v. Pons*, 434 U.S. 575, 583-85 (1978); *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Shortly after the Northern District of Alabama rendered its decision in *Beesley*, the Court in *Teamsters, Local 391 v. Terry*, 110 S. Ct. 1339, 1348 (1990) repeated this dictum to distinguish section 301 actions for back pay from Title VII actions for back pay. Nonetheless, the Northern District of Alabama chose not to reverse *Beesley* in *Walton v. Cowin Equip. Co.*, 733 F. Supp. 327 (N.D. Ala. 1990). See *infra* notes 188-94 and accompanying text discussing *Walton*.

175. 415 U.S. 189 (1974).

176. See *supra* note 25 discussing *Curtis v. Loether*. According to the court, the similarities between Title VII and Title VIII “far outweighed” the differences. *Beesley*, 723 F. Supp. at 641.

177. 422 U.S. 405 (1975).

under Title VII by its references to back pay as “compensation” (rather than restitution) and relief for a “legal injury.”¹⁷⁸ Judge Acker made the same observation¹⁷⁹ with respect to *Patterson v. McLean Credit Union*.¹⁸⁰ Dicta in *Patterson* equating section 1981 remedies with Title VII remedies suggested that “the Court must have meant that those remaining Title VII remedies include the remedy of trial by jury.”¹⁸¹

Having concluded that the seventh amendment provides for a jury trial in Title VII actions for back pay, the *Beesley* court supplied a further policy argument for its outcome. Judge Acker took judicial notice of changed historical conditions in Alabama,¹⁸² which undermined the rationale of well-meaning federal judges who shielded discrimination victims from juries of their peers.¹⁸³

In two subsequent decisions penned by Judge Acker, the Northern District of Alabama reexamined its holding in *Beesley*. In *Walton v. Cowin Equipment Co.*,¹⁸⁴ the defendant in a Title VII action asserted

178. *Beesley*, 723 F. Supp. at 644 (citing *Albemarle*, 422 U.S. at 418-21). The Court also compared Title VII's remedial scheme to that of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1988), under which plaintiffs are entitled to jury trials in suits for back pay. *Id.* See *supra* note 109 discussing back pay under the FLSA.

References to back pay as “compensatory damages” in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), a case interpreting Title VI of the Civil Rights Act, might similarly support an argument for jury trial under Title VI and, consequently, under section 504 of the Rehabilitation Act. See *supra* note 17 discussing Title VI and section 504. But see *George v. Brock*, 827 F.2d. 1426 (10th Cir. 1987) (no right to jury trial under Rehabilitation Act).

179. *Beesley*, 723 F. Supp. at 646.

180. 109 S. Ct. 2363 (1989). See *supra* note 37 discussing *Patterson*.

181. *Beesley*, 723 F. Supp. at 646. Before *Patterson*, section 1981 had provided many Title VII plaintiffs with a pendent claim triable to a jury. See *supra* note 37 discussing *Patterson*'s effect on section 1981 actions.

Judge Acker's reading of *Patterson* is flawed by his inaccurate description of jury trial as a “remedy” and by his inconsistent and self-serving approach towards Supreme Court dicta. See *Beesley*, 723 F. Supp. at 643 (“there has never been a holding by the Supreme Court on the subject”). More troubling, he seems to endorse for purposes of relying on *Patterson* the very seventh amendment analysis-by-labels which elsewhere he (properly) rejects. *Id.* at 638-39 (rejecting reference to “court” in Title VII as meaning “judge”).

182. The first *Beesley* opinion detailed profound social changes that took place within the Northern District of Alabama since 1964. *Beesley*, 717 F. Supp. at 782. Upon rehearing the jury issue, Judge Acker evidently felt that his judgment rested solidly on the law, and omitted this justification for allowing jury trials.

183. See *supra* note 32 and accompanying text discussing early Title VII case law.

184. 733 F. Supp. 327 (N.D. Ala. 1990).

that an Eleventh Circuit case, *Sherman v. Burke Contracting, Inc.*,¹⁸⁵ effectively overruled *Beesley*.¹⁸⁶ Although *Sherman* repeated the majority view on jury trials for Title VII,¹⁸⁷ Judge Acker adroitly ducked the full blow of that case's holding.¹⁸⁸ In its defense, the Northern District used as further ammunition two Supreme Court opinions subsequent to the *Sherman* decision. The Court in both *Teamsters, Local No. 391 v. Terry*¹⁸⁹ and *Lytle v. Household Manufacturing, Inc.*¹⁹⁰ assumed for purposes of the decision that there is no right to jury trial under Title VII, but expressly stated no opinion on the right.

In *Walker v. Anderson Electrical Connectors*,¹⁹¹ the Northern District reexamined its holding in *Beesley* yet again, now equipped with the Supreme Court's decision in *Yellow Freight Systems v. Donnelly*.¹⁹² Judge Acker's opinion in *Walker* consisted of a five-part argument, concluding that *Donnelly* vindicates the Northern District's findings in *Beesley*. Firstly, *Donnelly* dramatically showed that the prevailing judicial attitude on any Title VII issue does not guarantee that construction's ultimate correctness.¹⁹³ Secondly, Title VII is as mute on the

185. 891 F.2d 1527 (11th Cir. 1990).

186. *Walton*, 733 F. Supp. at 328.

187. The *Sherman* court stated, in dicta, that "[plaintiff] had no right to a jury trial of his section 2000e-2(a)(1) claim [because] [t]he law provides that such a claim lies in equity . . ." *Sherman*, 891 F.2d at 1529 n.4. *Sherman* held that *Patterson v. McLean* required the court to set aside punitive damages awarded by a jury in a combined Title VII and section 1981 action, because the plaintiff failed to state a post-*Patterson* claim under section 1981, and because Title VII does not authorize such relief. *Id.* at 1535. The court let stand back pay damages amounting to \$10,000. *Id.*

188. In an act of judicial defiance comparable to General Custer's last stand, Judge Acker stated that *Sherman*'s dicta would not bind his court. Apart from the fact that *Sherman* did not expressly rule on the jury issue, Judge Acker first noted *Sherman*'s description of back pay as "compensatory damages." *Walton*, 733 F. Supp. at 331. He then cited *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988), where the court awarded what could only be described as damages in an action "implied" by Title VII to an ex-employee whose former employer had blacklisted him. *Walton*, 733 F. Supp. at 332. Moreover *Sherman*, as with *Bailey*, must have awarded damages in some form because the \$10,000 recovery went beyond the plaintiff's lost wages. *Id.*

189. 110 S. Ct. 1339 (1990).

190. 110 S. Ct. 1331 (1990).

191. 736 F. Supp. 253 (N.D. Ala. 1990).

192. 110 S. Ct. 1566 (1990). The *Donnelly* Court unanimously held that state courts exercise concurrent jurisdiction with federal courts over Title VII claims. *Id.*

193. *Walker*, 736 F. Supp. at 255. Prior to *Donnelly*, most authorities thought that federal courts enjoyed exclusive jurisdiction over Title VII cases. See, e.g., B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 679 (1983) ("the plaintiff may forego the Title VII cause of action and proceed in state court").

topic of exclusive jurisdiction as on jury trials.¹⁹⁴ Thirdly, the Court in *Donnelly* emphasized that only *affirmative* congressional action could “divest state courts of their presumptively concurrent jurisdiction.”¹⁹⁵ Fourthly, the implicit holding in *Donnelly* that state courts can fairly adjudicate Title VII claims, without the federal judiciary’s “alleged expertise” in the field of civil rights, undercuts the argument that juries also lack competence to decide such matters.¹⁹⁶ Lastly, in view of the preclusive effect of state court proceedings over Title VII actions¹⁹⁷ and the comment in *Donnelly* that state court procedures (which include jury trials under many state civil rights laws) are compatible with Title VII procedures, the Court laid the cornerstone for a construction of Title VII that recognizes the right to trial by jury.

CONCLUSION

The Supreme Court has never held that jury trials are never available in Title VII actions for back pay. The recent rulings in *Tull* and *Granfinanciera* go beyond merely summarizing the Court’s prior application of the seventh amendment to statutory rights of action. They substantively alter the historical and remedies analyses, tilting the balance in favor of jury trials in situations that do not lend themselves to ready determinations. Most importantly, congressional intent to grant or deny the right to jury is no longer sacrosanct. Indeed, it may only operate unidirectionally to support a decision to grant a trial by jury.

Although Title VII has remained the same,¹⁹⁸ society has undergone

194. *Walker*, 736 F. Supp. at 255.

195. *Id.* (quoting *Donnelly*, 110 S. Ct. at 1568). Unless Congress expressly and permissibly limits a right, the Court will default to the constitution and adopt the statutory construction which best preserves the constitutional interest at stake. Parties to suits in federal court are presumptively entitled to jury trials. See *supra* note 54 and accompanying text discussing presumption favoring jury trials.

196. *Id.* at 255-56 (citing *Donnelly*, 110 S. Ct. at 1570).

197. See B. SCHLEI & P. GROSSMAN, *supra* note 193, at 1050-51 (state fair employment act decision on merits collaterally estops subsequent adjudication under Title VII). See also *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982) (state court decision entitled to full faith and credit).

198. Justice Brennan defined the meaning of legislative silence in the face of judicial interpretation: “[W]e have often taken Congress’ subsequent inaction as probative to varying degrees, depending on the circumstances of its acquiescence.” *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2385 (1989) (Brennan, J., dissenting). As applied to Title VII, Congress tacitly approved of the denial of jury trials through the early 1970s, when the fear of racial bias remained high. By the late 1970s and 1980s, congressional “acquiescence” meant something entirely different, because by then plaintiffs

a remarkable transformation since the dark days of 1964.¹⁹⁹ The drafters of Title VII rendered the enforcement language vague, allowing the courts to define its procedures.²⁰⁰ Exploiting this vagueness, the Northern District of Alabama in *Beesley v. Hartford Fire Insurance Co.*²⁰¹ improved Title VII and depoliticized seventh amendment analysis in the process. In doing so, the court correctly stated the law under Title VII and the seventh amendment.²⁰²

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could secure jury trials by pleading pendent claims under 45 U.S.C. § 1981. In the wake of the Court's decision in *Patterson*, effectively eliminating the section 1981 option, Congress considered, as part of the failed 1990 Civil Rights Act, provisions restoring broad rights under that section, and permitting jury trials under Title VII. See *supra* note 4 discussing the Civil Rights Act of 1990.

199. The recent election of America's first black governor in Virginia points to a larger trend, observable in different areas of public and private life since at least the mid-1970s. See Barone & Borger, *The End of the Civil War*, U.S. NEWS & WORLD REP., Nov. 20, 1989, at 45. As early as 1973, Justice Powell noted the success of school desegregation in the South since the Court renounced "separate but equal" in *Brown v. Board of Education*, 347 U.S. 438 (1954), stating that while "substantial progress toward achieving integration has been made in Southern States. . .", schools in many Northern and Western cities remain de facto segregated. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 218 (1973) (Powell, J., concurring in part and dissenting in part). But see Newman & Wilson, *Promise and Performance of Arbitration from a Union Point of View*, Gov't Empl. Rel. Rep. (BNA) at 1205 (June 6, 1983) ("The simple fact is that employment discrimination has been illegal under the Civil Rights Act for over 19 years, but employment discrimination continues to be rampant.").

200. See *supra* note 27 discussing Title VII drafted to be purposely vague.

201. See *supra* notes 167-83 and accompanying text discussing *Beesley*.

202. *Beesley's* ruling advances the cause of civil rights by infusing public morality into the adjudicative process. Taken to its extreme, however, *Beesley* could cause untoward effects on other civil rights laws. For instance, if back pay must always constitute relief at law, then government employees suing the state under 42 U.S.C. § 1983 will never be permitted to recover monetary judgments. See *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989) (the eleventh amendment bars recovery of damages against the government).

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