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John J. Watkins

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THE RIGHT TO TRIAL BY JURY IN ARKANSAS AFTER MERGER OF LAW AND EQUITY

*John J. Watkins**

I. INTRODUCTION

In November 2000, Arkansas voters approved Amendment 80, which rewrote virtually the entire judicial article of the Arkansas Constitution of 1874. One of the amendment's "fundamental purposes [was] the merger of law and equity,"¹ a feat accomplished by abolishing courts of chancery and establishing circuit courts as the state's trial courts of general jurisdiction.² This process also eliminated the separate probate courts. In the words of the Arkansas Supreme Court, Amendment 80 was "a watershed event in the history of the Judicial Department of this state."³

Previously, subject matter jurisdiction had been divided among the circuit, chancery, and probate courts, and these jurisdictional lines "forced cases to be divided artificially and litigated separately in different courts."⁴

* William H. Enfield Professor of Law, University of Arkansas School of Law. The author gratefully acknowledges a research grant from the University of Arkansas School of Law in connection with the preparation of this article.

1. *In re* Implementation of Amendment 80: Admin. Plans Pursuant to Admin. Order No. 14, 345 Ark. Adv. app. (June 28, 2001) (per curiam) [hereinafter *In re* Implementation of Amendment 80]; see also *Clark v. Farmers Exch., Inc.*, 347 Ark. 81, 83 n.1, 61 S.W.3d 140, 141 n.1 (2001) (stating that "law and equity have been merged"). The merged system is to be contrasted with and distinguished from the prior practice in Arkansas during the period in which separate chancery courts had not been created in all counties. In those counties, the circuit court "was a court of dual jurisdiction, the judge presiding in one division or 'on the law side' as a judge of a superior court of common law, and also sitting in chancery as judge of a court of equity." *Morgan Utils., Inc. v. Perry County*, 183 Ark. 542, 547, 37 S.W.2d 74, 77 (1931). With the merger of law and equity, "there are not separate law and equity 'sides' of the circuit court." *In re* Implementation of Amendment 80, *supra*.

2. ARK. CONST. amend. 80, § 6(A) ("Circuit Courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution."). The amendment also establishes courts of limited jurisdiction, known as district courts, as of January 1, 2005, and permits the continuation of city courts. *Id.* §§ 7, 19(B)(2). Amendment 80 did not affect the exclusive jurisdiction of county courts over county taxes, roads, and similar matters. *Id.* at art. VII, § 28.

3. *In re* Implementation of Amendment 80, *supra* note 1.

4. *Id.* Because a circuit court could not grant an injunction, *Ark. State Game & Fish Comm'n v. Sledge*, 344 Ark. 504, 512, 42 S.W.3d 427, 431 (2001), and a chancery court could not award punitive damages, *Stolz v. Franklin*, 258 Ark. 999, 1008, 531 S.W.2d 1, 7 (1975), a plaintiff could either (1) proceed in the chancery court for injunctive relief and compensatory damages, thus waiving any claim for punitive damages, or (2) seek injunctive relief in chancery court and punitive as well as compensatory damages in circuit court, a tactic that not only added to the expense of litigation but also posed potential preclusion problems. See, e.g., *Nichols Bros. Invs. v. Rector-Phillips-Morse, Inc.*, 33 Ark. App. 47, 801 S.W.2d 308 (1990) (fraud claim in circuit court could have been litigated under cleanup

The consolidation of subject matter jurisdiction in general⁵ and the merger of law and equity in particular raise questions with respect to the right to trial by jury. Because the Seventh Amendment of the United States Constitution does not apply to the states,⁶ the parameters of this right are defined solely by Arkansas law.

Under Article II, Section 7 of the state constitution, "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy."⁷ This provision was not amended or repealed by Amendment 80; however, the Arkansas Supreme Court will be required to determine its application in the new judicial system that the amendment created. This article discusses one aspect of that issue: the right to trial by jury in circuit court after the merger of law and equity.⁸

doctrine in prior chancery action and was therefore barred). By contrast, today's circuit courts have available any remedy or combination of remedies. See ARK. R. CIV. P. 18(a), amended by Implementation of Amendment 80: Amendments to Rules of Civil Procedure & Inferior Court Rules, 345 Ark. Adv. app. (May 24, 2001) (per curiam) (stating party "may join . . . as many claims, legal or equitable, as the party may have against an opposing party"); *Clark*, 347 Ark. at 83 n.1, 61 S.W.3d at 141 n.1 ("Because law and equity have been merged, the circuit courts can award not only legal remedies, but also traditional equitable remedies.") This has long been the case in other states. *E.g.*, *Rexnord, Inc. v. Ferris*, 657 P.2d 673 (Or. 1983) (trial court can award injunctive relief and punitive damages in same action).

Another difficulty under the former system was presented by the limited jurisdiction of the probate court. For example, such a court could not hear a tort counterclaim by the estate of an incapacitated person, *In re Estate of Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992), or decide dispute over title to real property between a decedent's personal representative and a "stranger" to the estate, *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976). These matters, which would have been heard in the circuit and chancery courts, respectively, can now be decided in a single proceeding.

5. Section 6(B) of Amendment 80 authorizes the supreme court to promulgate rules governing the organization of circuit courts into "subject matter divisions." Pursuant to this authority, the court has required each circuit court to establish the following divisions: criminal, civil, juvenile, probate, and domestic relations. Administrative Order No. 14, para. 1(a), 344 Ark. app. 744, 747 (2001). However, "[t]he designation of divisions is for the purpose of judicial administration and caseload management and is not for the purpose of subject-matter jurisdiction." *Id.*

6. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916).

7. ARK. CONST. art. II, § 7. The only reference to jury trials in Amendment 80 appears in a section authorizing the supreme court to "prescribe the rules of pleading, practice and procedure for all courts," with the proviso that these rules must "preserve the right of trial by jury as declared in this Constitution." *Id.* at amend. 80, § 3.

8. By statute, there is no right to jury trial in municipal courts, now known as district courts. ARK. CODE ANN. § 16-17-703 (LEXIS Repl. 1999). This statute also provides that "[i]n order that the right to trial by jury remain inviolate, all appeals from judgment in municipal court shall be de novo to circuit court." *Id.* Because a jury trial can be demanded in the de novo proceeding, the right to trial by jury "is sufficiently protected by the right to take

The language of Article II, Section 7—"shall remain inviolate"—plainly suggests that the scope of the right to trial by jury is to be determined on the basis of history, and prior to Amendment 80 Arkansas maintained either separate courts of law and equity or single trial courts with distinct law and equity "sides." In the merged system, the question is whether the constitution requires a jury trial in cases which, prior to merger, would have been heard without one. There is no problem, of course, if the case presents only equitable issues—no constitutional right to a jury trial exists in this situation.⁹ A much more difficult question is the scope of the right in "mixed" cases involving both legal and equitable issues, and the answer hinges on whether the supreme court adopts a rigidly historical view of Article II, Section 7, or chooses a more flexible approach. There is support in the case law for both positions.

II. HISTORICAL BACKGROUND

Blackstone wrote that "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law."¹⁰ Although doubt remains as to the jury's origins,¹¹ the early English jury was "a body of

the case to a circuit court." *State v. Roberts*, 321 Ark. 31, 35, 900 S.W.2d 175, 176 (1995). The requirement that one who appeals to circuit court pay a filing fee is not an unconstitutional burden on the right to jury trial. "The fee is not being imposed because [the appellant] wants a jury trial. It is simply a filing fee that is collected no matter whether he is tried by a jury or by the judge or even if the prosecution ends without any trial at all." *Neeley v. Barber*, 288 Ark. 384, 386, 706 S.W.2d 358, 359 (1986).

9. *E.g.*, *McKee v. Am. Trust Co.*, 166 Ark. 481, 266 S.W. 293 (1924) (action for injunctive relief); *Hinkle v. Hinkle*, 55 Ark. 583, 18 S.W. 1049 (1892) (action for specific performance of contract). By contrast, there is a right to trial by jury if the only issues are legal. *E.g.*, *McClanahan v. Gibson*, 296 Ark. App. 304, 756 S.W.2d 889 (1988) (tort action for damages); *Weaver v. Ark. Nat'l Bank*, 73 Ark. 462, 84 S.W. 510 (1905) (suit on promissory note where issues "were purely legal"); *see also Ashley v. Little Rock*, 56 Ark. 370, 375, 19 S.W. 1058, 1059 (1892) (right to jury trial "extends to all cases in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered"). The Fifth Circuit has described the inquiry as follows:

In an action where a single claim is presented and a single remedy demanded, the action can rationally be classified as one which historically would have been either legal or equitable. In such a case, the proper approach to deciding whether a [party] has a right to a jury trial is whether the action is "legal" or "equitable." Similarly, where the case presents several claims or demands more than one remedy, . . . the matter is no more difficult than in a simple suit if the claims, or the remedies, are either all legal or all equitable.

Swofford v. B&W, Inc., 336 F.2d 406, 409 (5th Cir. 1964) (internal citations and emphasis omitted).

10. 3 WILLIAM BLACKSTONE, COMMENTARIES *379.

11. The traditional view is that the jury was brought to England by the Normans. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 50 (1898); Rich-

neighbours . . . summoned by some public officer to give upon oath a true answer to some question."¹² William the Conqueror used this technique in 1086 "to extract from his conquered subjects the great fund of information compiled in Domesday Book."¹³ The jury's role was largely confined to such administrative matters until Henry II came to the throne in 1154. He "made the group inquest a standard feature of certain criminal and civil proceedings."¹⁴

The jury was apparently first used in civil adjudication with respect to complaints of tenants who claimed to have been "disseised, that is dispossessed, of [their] free tenement unjustly."¹⁵ This procedure—the "assize of novel disseisin"—was an alternative to trial by battle and thus attractive to the litigants.¹⁶ Use of the jury as a fact-finding body was subsequently extended to "a great variety of civil and criminal proceedings during a period of innovation and experiment that lasted far into the thirteenth century."¹⁷ The Magna Carta, signed by King John in 1215, provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any wise destroyed, save by the lawful judgment of his peers or the law of the land."¹⁸

During its early years, the jury's function was "to serve as a means of gathering evidence by calling those who were familiar with the facts in issue,"¹⁹ and for that reason jurors were drawn from the area where the land at issue was located or the events in question took place.²⁰ Over time, however, the jury was "transform[ed] . . . from a body of witnesses to a body before whom witnesses should appear and present evidence."²¹ By the mid-1500s, the roles of jurors and witnesses were completely separate in most cases.²²

ard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 6-7 (1993).

12. 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 138 (2d ed. 1898).

13. JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 119 (1960).

14. *Id.* at 121.

15. 1 POLLOCK & MAITLAND, *supra* note 12, at 146. The first recorded use of a jury in an English court occurred between 1083 and 1086 in a civil case involving a disputed land title. *Id.* at 143-44.

16. The jury's popularity was speeded along by the Lateran Council of 1215, when it issued an ecclesiastical condemnation of trials by battle and ordeal. DAWSON, *supra* note 13, at 121-22.

17. *Id.* at 121.

18. 1 POLLOCK & MAITLAND, *supra* note 12, at 171-72.

19. Arnold, *supra* note 11, at 7.

20. THAYER, *supra* note 11, at 90-91.

21. Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 439 (1961); see also 2 POLLOCK & MAITLAND, *supra* note 12, at 622-26.

22. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated*

This development may have been hastened by the rise of the chancery courts, in which witnesses offered testimony during trials.²³ In the thirteenth century, the King and his Privy Council entertained petitions when a remedy in the common law courts was unavailable. Throughout most of the fourteenth and fifteenth centuries, the King's chancellor, a member of the Council, acted on these petitions along with or under the direction of the Council. The precise point at which the chancellor began to act independently is not clear, but by the sixteenth century he headed a separate chancery court.²⁴ By 1550, this court acted in cases in which the strict rules of the common law would lead to inequitable results.²⁵ Although the chancellor heard other cases as well,²⁶ it was his intervention, usually by injunction, in the name of equity that "invoked the greatest enmity of the common law judges."²⁷ The dispute came to a head during the reign of James I, who "decided the matter in favour of the Chancery."²⁸

Chancery jurisdiction came to be classified as exclusive, concurrent, and auxiliary. In the first category, equity created and enforced rights unknown in the courts of law. Examples include uses and trusts. In the exercise of concurrent jurisdiction, the chancellor fashioned new remedies to enforce rights recognized at common law but for which the law courts did not afford an adequate legal remedy. In contract cases, for instance, equity would act when the remedy at law—damages—was deemed inadequate. Auxiliary jurisdiction existed when the substantive right was recognized at common law but equitable relief was necessary because the law courts had no procedure for proof of the right. The bill of discovery is an example.²⁹ In 1892, the Arkansas Supreme Court described the jurisdiction of the state's

History, 44 HASTINGS L.J. 579, 586-87 (1993).

23. Pope, *supra* note 21, at 441.

24. The first lawyer to serve as Lord Chancellor was Sir Thomas More in 1529. Equity "took a great stride forward during his administration." Garrard Glenn & Kenneth R. Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 779 (1945) (quoting 1 SCOTT ON TRUSTS § 1.1 (1939)). The succeeding chancellors have been described as "men of lesser importance." THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 697 (5th ed. 1956).

25. Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 216-28 (1995).

26. During this period the chancery court also dealt with uses of land, enforcement of contracts, and matters of account. *Id.* at 224.

27. *Id.*

28. HAROLD GREVILLE HANBURY, *MODERN EQUITY: THE PRINCIPLES OF EQUITY* 12 (1935).

29. See HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 40 (1936); 1 JOHN NORTON POMEROY, *EQUITY JURISPRUDENCE* § 136 (4th ed. 1918); EDMUND H.T. SNELL, *PRINCIPLES OF EQUITY* 13-14 (Robert Megarry & P.V. Baker eds. 1973).

equity courts "[a]s practically the same as that of the Federal courts, and the High Court of Chancery in England."³⁰

As the great dispenser of justice, the chancellor sat without a jury. And under what came to be known, at least in the United States, as the cleanup doctrine,³¹ he could hear "matters which were ordinarily the subject of jurisdiction at law"³² and would have been tried to a jury. This was so whether equity jurisdiction was exclusive,³³ concurrent,³⁴ or auxiliary.³⁵ When the chancery court "obtained jurisdiction over some portion or feature of a controversy, it [would] . . . proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted [was] of the kind which might be conferred by a court of law."³⁶

In America, the right to a jury trial was first codified in the 1641 Massachusetts Body of Liberties.³⁷ "[D]epriving us, in many cases, of the benefits of Trial by Jury" was among the grievances later set forth in the Declaration of Independence,³⁸ and the right to a jury trial "was probably the only one universally secured by the first American state constitutions."³⁹ Despite

30. *Ashley v. Little Rock*, 56 Ark. 370, 375, 19 S.W. 1058, 1059 (1892).

31. See, e.g., 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2302.1 (1995); A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

32. 13 HALSBURY'S LAWS OF ENGLAND 10 (1910).

33. E.g., *Yates v. Hambly*, 26 Eng. Rep. 618 (Ch. 1742) (redemption of mortgage, ejectment).

34. E.g., *Denton v. Stewart*, 29 Eng. Rep. 1156 (Ch. 1786) (specific performance, damages).

35. E.g., *Parker v. Dee*, 22 Eng. Rep. 910 (Ch. 1674) (discovery).

36. 1 POMEROY, *supra* note 29, § 231.

37. Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1008 (1992). However, the Virginia Company's 1606 charter from James I incorporated the right to jury trial, and by 1624, juries were available for all civil and criminal cases in Virginia. Arnold, *supra* note 11, at 13; Landsman, *supra* note 22, at 592.

38. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776), reprinted in 1 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 5 (1909). A year earlier, the Second Continental Congress had challenged Parliament's adoption of statutes "depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (1775), reprinted in *SOURCES OF OUR LIBERTIES* 295 (Richard L. Perry & John C. Cooper eds., 1959).

39. LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 281 (1960). The Articles of Confederation, which did not provide for a national judiciary, gave Congress the authority to set up courts for the trial of piracies and felonies on the high seas and to establish an appeals court for dealing with prizes and captures. ARTICLES OF CONFEDERATION art. IX (U.S. 1777), reprinted in 1 THORPE, *supra* note 38, at 12-15. The power to create courts for piracies and felonies was never exercised. Prize cases were initially contested in the state courts, whose judgments were appealable to

this backdrop, "it is remarkable to observe the Constitutional Convention of 1787 winding toward the conclusion of its business . . . without making any provision for civil jury trial in the new federal courts."⁴⁰ Records of the convention reflect that the issue was considered only in its last five days. Elbridge Gerry of Massachusetts (whose motion to have a committee prepare a bill of rights had previously been defeated) and Charles Pinckney of South Carolina had moved to amend the proposed judicial article by adding that "a trial by jury shall be preserved as usual in civil cases," but the motion failed in the face of objections that "[t]he constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States."⁴¹

During the debate over ratification, the Constitution was criticized for inadequately protecting individual liberties, among them the right to a jury trial in civil cases. As Professor Charles W. Wolfram has pointed out, the Anti-Federalists advanced several arguments in favor of trial by jury: "the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges."⁴² Underlying these arguments, Professor Wolfram added, is the promise that the jury, "through its ability to disregard substantive rules of law, . . . would reach a result that the judge either could not or would not reach."⁴³

the appellate body created by Congress. During its existence, the appeals court heard fifty-two appeals and issued eight opinions. DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 100-01 (1970). The statute creating this tribunal provided that "the mode of trial shall be in accordance with the usages of nations, and not by jury." *Id.* at 100. However, several prize cases were tried to juries in the state courts even though they "came within the admiralty jurisdiction and would not have been tried to a jury either in England or under the later practice in the federal courts after adoption of the seventh amendment." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973).

40. Wolfram, *supra* note 39, at 656. The delegates may have largely ignored the jury trial issue because of more urgent concerns. They were "deeply troubled by recent events in the country," including the Massachusetts taxpayer revolt known as Shays' Rebellion, and were "committed to creating a strong national government that would put an end to the threat of anarchy." Landsman, *supra* note 22, at 597. Moreover, "[a]fter months of debate and tinkering with the broad shape and powers of the federal government, the delegates were doubtless under a great deal of pressure to complete the task they had been sent to perform." Arnold, *supra* note 11, at 15.

41. James Madison, *Debates in the Federal Convention*, reprinted in 2 MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 628 (1911) (emphasis in original). The debate is set out in *Colgrove v. Battin*, 413 U.S. 149, 153-55 & n.8 (1973). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-44 (1979) (Rehnquist, J., dissenting) (summarizing history of the Seventh Amendment).

42. Wolfram, *supra* note 39, at 670-71.

43. *Id.* at 671.

The First Congress responded to the criticism by proposing the constitutional amendments that became the Bill of Rights.⁴⁴ James Madison introduced two suggested amendments to Article III to address trial by jury. The first dealt with appellate review and stated, in part, that "nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law."⁴⁵ The second provided that "[i]n suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."⁴⁶ The latter was apparently based on the declaration of rights that Madison's home state of Virginia had adopted at its ratification convention.⁴⁷

As refined during the legislative process, the Madison proposals became what is now the Seventh Amendment:

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.⁴⁸

What little exists by way of legislative history sheds no light on the amendment's meaning, and almost nothing is known about the debates over the Bill of Rights in the state legislatures that ratified it.⁴⁹

As noted previously, the states had adopted their own constitutional provisions regarding trial by jury. With respect to their court systems, the states did not uniformly follow the English model by creating separate courts of law and equity.⁵⁰ One explanation for the departure is that equity

44. See 1 Stat. 97 (1789).

45. 1 ANNALS OF CONGRESS 452 (1789).

46. *Id.* at 453.

47. Wolfram, *supra* note 39, at 728 n.258. The Virginia declaration stated that "in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and [is] to remain sacred and inviolable." 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 658 (Philadelphia, J.B. Lippincott Co., 2d ed. 1891).

48. U.S. CONST. amend. VII.

49. Wolfram, *supra* note 39, at 726-30.

50. During the debate over ratification of the Constitution, Alexander Hamilton offered this description of state court systems:

In [New York] our judicial establishments resemble more nearly, than in any other, those of Great Britain. We have courts of common law, courts of probates . . . [,] a court of admiralty, and a court of chancery. . . . In New-Jersey, there is a court of chancery which proceeds like ours, but neither courts of admiralty, nor of probates. . . . In Pennsylvania . . . there is no court of chancery . . . [,] and its common law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated

was viewed with hostility by many Americans, who feared the power of judges and considered equity a prerogative of the kind that had no place in a democratic society.⁵¹ Subsequently, this stigma seemed to disappear, and more states established separate chancery courts or created within their trial courts a division or "side" with equity jurisdiction.⁵² The latter system prevailed in the federal courts.⁵³

After a period of inefficiency and scandal, Parliament abolished the separate chancery court in England, consolidating it and all other courts into a single tribunal—the High Court of Justice—with both law and equity powers.⁵⁴ In the United States, the movement toward merging the law and chancery courts began in earnest with New York's famous Field Code of 1848.⁵⁵ Its two most prominent features were the abolition of the common law forms of action and the merger of law and equity.⁵⁶ The code was

Pennsylvania. Maryland approaches more nearly to New-York, as does also Virginia. . . . North Carolina bears most affinity to Pennsylvania; South-Carolina to Virginia. . . . In Georgia there are none but common law courts. . . . In Connecticut they have no distinct courts, either of chancery or of admiralty [and their] . . . common law courts have admiralty, and to a certain extent, equity jurisdiction. . . . Rhode Island is I believe in this particular pretty much in the situation of Connecticut. Massachusetts and New-Hampshire, in regard to the blending of law, equity and admiralty jurisdictions are in a similar predicament.

THE FEDERALIST NO. 83, at 565-66 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

51. Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 22-23 (1921); Robert von Moschisler, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 288 (1927).

52. See 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 57, 58 (6th ed. 1853); see also GEORGE L. CLARK, EQUITY § 6 (1919) (describing equity jurisdiction in the several states); 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 179-82, n.(d) (11th ed. 1867) (same).

53. See, e.g., *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 241 (1922); *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 594, 595 (1904); *Scott v. Nealy*, 140 U.S. 106, 110-11 (1891). Equity Rule 22 provided that "[i]f at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential." Rules of Practice for the Courts of Equity of the United States, 226 U.S. app. 629, 654 (1912).

54. Judicature Act of 1873, 36 & 37 Vict., c. 66; see *Pugh v. Heath*, 7 App. Cas. 235, 237 (1882) ("The Court is now not a Court of Law or a Court of Equity; it is a Court of complete jurisdiction.").

55. Texas, upon its admission to the Union in 1845, was the first state to merge law and equity. Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 244 n.1 (1945). The New York code was largely the work of David Dudley Field, one of three commissioners appointed pursuant to a statute and directed to "revise, reform, simplify, and abridge" the practice and pleadings of the state's courts. CHARLES E. CLARK, LAW OF CODE PLEADING § 7 (2d ed. 1947) (quoting N.Y. CONST. art. 6, § 2 (1846)); see also Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

56. See, e.g., Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 10

enormously influential and served as the model for procedural reform across the country.⁵⁷ At the federal level, merger was accomplished in 1938 when the Federal Rules of Civil Procedure went into effect.⁵⁸

In Arkansas, the right to trial by jury has been established since the territorial period that began in 1803, when France ceded to the United States the lands commonly known as the "Louisiana Purchase."⁵⁹ Arkansas was part of the Louisiana Territory from 1803 to 1812, part of the Missouri Territory from 1812 to 1819, and a separate territory from 1819 until statehood in 1836.⁶⁰ An analysis of the right to jury trial in the Arkansas Territory requires examining the acts of Congress creating not only that territory, but also the territories of Louisiana and Missouri.

In 1804, Congress split the Louisiana Purchase area into two territories.⁶¹ The lower portion, what is now the State of Louisiana, was designated as the Territory of Orleans,⁶² with the remaining lands called the District of Louisiana.⁶³ The name of the latter was changed to the Territory of Louisiana in 1805.⁶⁴ Congress provided for trial by jury in both. With respect to the Territory of Louisiana, the statute provided that "in all civil cases of the value of one hundred dollars, the trial shall be by jury, if either of the parties require it."⁶⁵

(1925) ("The union of law and equity is justly considered to be the foundation principle of the Code reform.").

57. See CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* §§ 122, 140 (1897).

58. See FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'"). As the Supreme Court observed, "[u]nder the rules, law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court." *Ross v. Bernhard*, 396 U.S. 531, 540 (1970). See generally 4 WRIGHT & MILLER, *supra* note 31, § 1042.

59. Treaty Ceding Louisiana, Oct. 21, 1803, U.S.-Fr., reprinted in 3 THORPE, *supra* note 38, at 1359.

60. Gitelman, *supra* note 25, at 235-36.

61. Act of Mar. 26, 1804, ch. 38, 2 Stat. 283.

62. *Id.* § 1, 2 Stat. at 283.

63. *Id.* § 12, 2 Stat. at 287. New Orleans was the capital of the Territory of Orleans, and the District of Louisiana was put under control of the territorial government of Indiana. Because Indiana was in the early stages of territorial development and did not have an elected legislature, "the people living in what are now the states of Arkansas and Missouri were subject to laws enacted by the governor and three judges meeting in Vincennes, on the Wabash River in which is now southwest Indiana." S. CHARLES BOLTON, *ARKANSAS 1800-1860*, at 24 (1998).

64. Act of Mar. 3, 1805, ch. 31, § 1, 2 Stat. 331.

65. Act of Mar. 26, 1804, ch. 38, § 12, 2 Stat. at 287. As to the Territory of Orleans, the statute provided that "in all cases criminal and civil in the superior court, the trial shall be by a jury, if either of the parties require it." *Id.* § 5, 2 Stat. at 284.

When the Territory of Orleans became the State of Louisiana in 1812, the Territory of Louisiana was redesignated as the Missouri Territory.⁶⁶ The act of Congress expressly provided for trial by jury in criminal cases⁶⁷ but not in civil matters. However, the statute also stated that “the people of the said territory shall always be entitled to . . . judicial proceedings according to the common law and the laws and usages in force in the said territory.”⁶⁸ The phrase “judicial proceedings according to the common law” may have been intended to include the right to trial by jury in civil cases.⁶⁹ In any event, the “laws and usages in force” in the Louisiana Territory called for a jury trial in civil cases—which Congress had expressly provided,⁷⁰ as had the territorial legislature⁷¹—and the right continued to be guaranteed in the renamed territory.

In 1819, Congress carved the Arkansas Territory out of the Missouri Territory⁷² and continued in effect the laws of the latter “until modified or repealed by the legislative authority” of the new government.⁷³ As its first

66. Act of June 4, 1812, ch. 95, § 1, 2 Stat. 743. The following year, the Missouri territorial legislature “created a separate Arkansas County with its administrative center at Arkansas Post.” BOLTON, *supra* note 63, at 25.

67. Act of June 4, 1812, ch. 95, § 14, 2 Stat. at 747.

68. *Id.*

69. Similar language appeared in the Northwest Ordinance of 1787, which granted inhabitants of the Northwest Territory the right to “judicial proceedings according to the course of the common law.” Act of July 13, 1787, art. II, *reprinted in* 2 THORPE, *supra* note 38, at 960-61. However, the ordinance also expressly provided that “[t]he inhabitants of the said territory shall always be entitled to the benefits of . . . trial by jury.” *Id.* It has been suggested that the phrase guaranteeing “judicial proceedings ‘according to the course of the common law’” included the right of trial by jury. *People v. Bigge*, 285 N.W. 5, 7 (Mich. 1939) (Potter, J., concurring); *see also Weaver v. Ark. Nat’l Bank*, 73 Ark. 462, 463, 84 S.W.2d 510, 510 (1905) (issues in suit on promissory note “were purely legal, and appellant had a constitutional right to trial by the course of the common law, including trial by jury”). Some courts read the two quoted phrases together; that is, trial by jury must be according to the common law. *E.g.*, *Reynolds v. State*, 61 Ind. 392 (1878); *La Bowe v. Balthazor*, 193 N.W. 244 (Wis. 1923).

70. Act of Mar. 26, 1804, ch. 38, § 12, 2 Stat. at 287. It should also be noted that this statute was not completely superseded by the Missouri legislation. *See* Act of June 4, 1812, ch. 95, § 16, 2 Stat. at 747 (repealing “so much of” 1804 act “as is repugnant to this act”).

71. The territorial statute had provided that “in civil cases the trial shall be by a jury, if either of the parties require it, and in all cases where neither of the parties shall require a jury, the law and the fact shall be determined and damages assessed by the court.” *Eckrich v. St. Louis Transit Co.*, 75 S.W. 755, 760 (Mo. 1903) (quoting Act of Oct. 1, 1804, 1 Terr. Laws 56).

72. Act of Mar. 2, 1819, ch. 49, § 1, 3 Stat. 493. The new territory included but was larger than what had been Arkansas County of the Missouri Territory. MORRIS S. ARNOLD, *UNEQUAL LAWS UNTO A SAVAGE RACE* 174-77 (1985). Specifically, it covered much of what is now Oklahoma and shared a boundary with Mexico. The modern western boundary was “established as Congress created the Indian Territory that would become Oklahoma.” BOLTON, *supra* note 63, at 11.

73. Act of Mar. 2, 1819, ch. 49, § 10, 3 Stat. at 495.

act, that government expressly adopted the territorial laws of Missouri.⁷⁴ Thus, by the time that Congress made Arkansas a state in 1836,⁷⁵ the right to trial by jury in civil cases had long been established within its boundaries.⁷⁶ For example, a compilation of the laws of the Arkansas Territory, published in 1835, included the following:

If any party to a suit now depending or hereafter to be commenced in any court of record in this territory shall at any time before the trial of such cause by himself or counsel, require a trial by jury, the court before whom the suit is depending shall cause a jury to be empannelled for the trial thereof.

In all cases where neither party shall require a jury, the law and the facts may be determined by the court; or the court if they shall think proper may refer such cause to three or more indifferent and competent persons, whose report, if approved of by the court, shall have the same effect as a verdict given by twelve men.⁷⁷

74. Act of Aug. 3, 1819, 1819 Ark. Terr. Acts 70, reprinted in WILLIAM E. WOODRUFF, LAWS OF THE TERRITORY OF ARKANSAS 1819-1820 (1824). The act, adopted by the territorial secretary and the three judges of its superior court, provided that "all the laws and parts of laws now in existence in the territory of Missouri, which are of a public and general and not of a local nature, and which are not repugnant to the provisions of the original law of this territory . . . shall be and continue in force" in the Arkansas Territory. *Id.* The secretary of the new territory, Robert Crittenden, acted in place of its governor, James Miller, who did not arrive in the capital, Arkansas Post, until December 26, 1819. See BOLTON, *supra* note 63, at 27-28. Crittenden was the dominant political figure for the first five years of the territory's history. Miller, who resigned in December 1824, was present in the territory less than half the time he held the governor's office. *Id.* at 28-29. Two of the original superior court judges left Arkansas before assuming the bench, having found "frontier life in the territory too rugged and severe." Oscar Fendler, *The Arkansas Judicial System at the Crossroads*, 17 ARK. L. REV. 259, 261 (1963).

75. Act of June 15, 1836, ch. 99, § 1, 5 Stat. 50.

76. The conditions under which jurors performed their duties during the territorial period were rather primitive. Professor Bolton has provided the following description of a jury trial in a criminal case at Perryville:

The town contained only one store, and the court was held in the home of the postmaster, who was also a ferryman. The judge, a prosecuting attorney, and at least one other lawyer had ridden out from Little Rock to conduct the legal proceedings. They sat around two tables pushed together for the occasion, and the jury of local landowners occupied a bench along one wall. After hearing the evidence and arguments in an assault cause, the twelve men retired to deliberate in a stable. Normally they would have gone outside, but it was raining.

BOLTON, *supra* note 63, at 44.

77. J. STEELE & J. M'CAMPBELL, LAWS OF ARKANSAS TERRITORY 328 (1835); see also HENRY S. GEYER, DIGEST OF LAWS OF THE TERRITORY OF MISSOURI 256 (1818). There are a number of reported cases in which trial had been by jury. *E.g.*, Collins v. Johnson, 6 F. Cas. 131 (Ark. Terr. 1835) (No. 3,015a) (debt); Scott v. Doe, 21 F. Cas. 826 (Ark. Terr. 1835) (No. 12,528a) (ejectment); Dillingham v. Skein, 7 F. Cas. 707 (Ark. Terr. 1832) (No. 3,912a) (open account); Mirick v. Hemphill, 17 F. Cas. 476 (Ark. Terr. 1832) (No. 9,647a) (detinue);

Another statute provided that, in justice of the peace courts, "if the sum demanded [in small debt cases] exceed ten dollars either party shall have a right upon application therefor to a trial by jury . . . of six good and lawful free white male persons."⁷⁸

Apart from statutory guarantees, the Seventh Amendment was applicable in the territories. Although this issue had not been definitively resolved when Arkansas became a state in 1836, the Constitution seems clear on the point. Article IV, Section 3 gives Congress authority to "make all needful Rules and Regulations" for the territories, and the Bill of Rights is "a limitation on all congressional power."⁷⁹ As Justice Story wrote in his 1833 *Commentaries on the Constitution*, Congress "may confer upon [a territory] general legislative powers, subject only to the laws and constitution of the United States."⁸⁰ This view was adopted by the United States Supreme Court as early as 1850 in *Webster v. Reid*.⁸¹

Scull v. Roane, 21 F. Cas. 894 (Ark. Terr. 1831) (No. 12,570c) (assumpsit); Woodruff v. Bentley, 30 F. Cas. 521 (Ark. Terr. 1831) (No. 17,986a) (detinue); Scull v. Higgins, 21 F. Cas. 894 (Ark. Terr. 1829) (No. 12,750a) (breach of contract); Davis v. Pitman, 7 F. Cas. 163 (Ark. Terr. 1826) (No. 3,647a) (trespass); Murphy v. Tindall, 17 F. Cas. 1040 (Ark. Terr. 1822) (No. 9,952a) (replevin); Blakely v. Ruddell, 30 F. Cas. 967 (Ark. Terr. 1822) (No. 18,241) (trover). In other cases, the parties had a right to a jury but consented to a bench trial. *E.g.*, Hartfield v. Patton, 11 F. Cas. 698 (Ark. Terr. 1835) (No. 6,158a) (covenant); Pelham v. Pace, 19 F. Cas. 125 (Ark. Terr. 1833) (No. 10,911a) (assumpsit); Archer v. Morehouse, 30 F. Cas. 952 (Ark. Terr. 1832) (No. 18,225) (debt).

78. STEELE & M'CAMPBELL, *supra* note 77, at 370; *see* Miles v. James, 17 F. Cas. 284 (Ark. Terr. 1831) (No. 9,543a) (justice of the peace erred in trying case without jury where plaintiff had sought \$17.95). Having been decided four years before the 1835 compilation of Arkansas territorial laws was published, the *Miles* case quoted from a compilation of Missouri laws prepared in 1818. *See* GEYER, *supra* note 77, at 387. The Arkansas Superior Court cited Mr. Geyer's digest in other cases as well. *See, e.g.*, Bentley v. Sevier, 30 F. Cas. 963 (Ark. Terr. 1834) (No. 18,233); Janes v. Buzzard, 13 F. Cas. 346 (Ark. Terr. 1834) (No. 7,206b); Murphy v. Byrd, 17 F. Cas. 1032 (Ark. Terr. 1833) (No. 9,947a); Campbell v. Clark, 4 F. Cas. 1160 (Ark. Terr. 1828) (No. 2,355a).

79. David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 WM. & MARY L. REV. 1441, 1481 (1998).

80. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 667 (1833).

81. 52 U.S. (11 How.) 437 (1850). There, Justice McLean relied on the Seventh Amendment to invalidate an act of the Iowa territorial legislature providing for bench trials in civil actions involving certain property. *Id.* at 460. The Court also relied on the statute establishing the Iowa Territory, which "by express provision and by reference, extended the laws of the United States, including the [Northwest] Ordinance of 1787, over the Territory, so far as they are applicable." *Id.* As mentioned previously, the ordinance guaranteed inhabitants of the territory the right to trial by jury. *See supra* note 69. Six years later, in the *Dred Scott* case, Chief Justice Taney concluded that the Constitution in general, and the Bill of Rights in particular, bound Congress in legislating for the territories. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-51 (1856). None of the Justices indicated any disagreement with the Chief Justice on this point, and the dissenters expressly agreed with him. Justice McLean, the author of *Webster*, asserted that "the Constitution was formed for our whole country." *Id.* at

Since becoming a state in 1836, Arkansas has had five constitutions, dated 1836, 1861, 1864, 1868, and 1874.⁸² The first was framed to satisfy the requirements for statehood, and the second was designed primarily to take the state into the Confederacy. The 1864 constitution formalized the federal military government set up toward the end of the Civil War, while the 1868 document—known as the “carpetbag constitution”—was the framework for Reconstruction. The constitution of 1874, adopted largely as a reaction to the carpetbag regime, remains in effect today, though it has been significantly amended over the years.⁸³

Each of the constitutions guaranteed the right to trial by jury, using similar but not identical language. The pertinent provisions are as follows:

- 1836: “[T]he right of trial by jury shall remain inviolate.”⁸⁴
 1861: “[T]he right of trial by jury shall remain inviolate to free white men and Indians.”⁸⁵
 1864: “[T]he right of trial by jury shall remain inviolate.”⁸⁶
 1868: “[T]he right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy; but a jury may be waived by the parties in all cases in the manner prescribed by law.”⁸⁷

544 (McLean, J., dissenting). Justice Curtis’s dissent also took the position that the positive limitations expressed in the Constitution applied to the territories. *Id.* at 614 (Curtis, J., dissenting).

As the end of the nineteenth century approached, the Court observed that whether “the provisions of the Constitution . . . relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question.” *Thompson v. Utah*, 170 U.S. 343, 346 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37 (1990); *see also Rassmussen v. United States*, 197 U.S. 516, 527 (1905) (stating Constitution is “self-operative” in its application to territories of the United States); *Black v. Jackson*, 177 U.S. 349, 363 (1900) (finding Seventh Amendment “applies to judicial proceedings in the Territories of the United States”); *Springville City v. Thomas*, 166 U.S. 707, 708-09 (1897) (Seventh Amendment “secured unanimity finding a verdict as an essential feature of trial by jury in common-law cases” and Congress cannot give a territory “the power to change the constitutional rule”); *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) (holding that Seventh Amendment “is in full force in Montana, as in all other organized territories of the United States); *Power v. Williams*, 205 N.W. 9, 12 (N.D. 1925) (“[T]he constitutional right of trial by jury in civil cases was secured by the Seventh Amendment . . . against encroachment in the territory of Dakota.”).

82. Each is reproduced in the “constitutions” volume of the *Arkansas Code Annotated*.

83. KAY COLLETT GOSS, *THE ARKANSAS STATE CONSTITUTION: A REFERENCE GUIDE* 1-9 (1993); Robert A. Leflar, *Constitutional Revision in Arkansas*, 24 *ARK. L. REV.* 155, 155-59 (1970).

84. *ARK. CONST.* of 1836 art. II, § 6.

85. *ARK. CONST.* of 1861 art. II, § 6.

86. *ARK. CONST.* of 1864 art. II, § 6.

87. *ARK. CONST.* of 1868 art. I, § 6.

1874: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."⁸⁸

In addition, the 1868 constitution provided that

[n]o right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law.⁸⁹

Almost identical language appears in the present constitution.⁹⁰ The purpose of these provisions was "to enlarge the rights of the citizens by extending the right of trial by jury to a class of cases wherein it did not before exist."⁹¹

For more than 140 years, civil procedure in Arkansas was governed by statute. In its initial session after statehood, the General Assembly in 1837 required a jury trial as to "[a]ll issues of fact joined in any suit at law," unless "neither party shall demand a trial by jury" or the parties had agreed "to refer the matter in dispute to arbitrators."⁹² The Civil Code of 1869,

88. ARK. CONST. of 1874 art. II, § 7. This section was amended in 1928 by adding a new clause providing that

in all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same.

Id.; see Publisher's Notes, ARK. CONST. amend. 16; S.J. Res. 4, 46th General Assemb. (Ark. 1927) (resolution directing that amendment be placed before the voters). The amendment came after the supreme court struck down a statute that had allowed a verdict based on the concurrence of nine of the twelve jurors. *Minnequa Cooperage Co. v. Hendricks*, 130 Ark. 264, 268-69, 197 S.W. 280, 281-82 (1917).

89. ARK. CONST. of 1868 art. V, § 48.

90. ARK. CONST. of 1874 art. XII, § 9.

91. *Ex parte Reynolds*, 52 Ark. 330, 335, 12 S.W. 570, 571 (1889) (quoting *Reckner v. Warner*, 22 Ohio St. 275, 291 (1872)). However, the court held in *Reynolds* that the right to a jury trial extends only to the final assessment of the amount of compensation, and that the legislature may prescribe a different method for ascertaining the amount to be deposited as security. *Id.* at 335-39, 12 S.W. at 571-73. In addition, this specific jury trial guarantee applies only to condemnation actions by private corporations and not, for example, to such actions by levee districts. *Young v. Red Fork Levee Dist.*, 124 Ark. 61, 69, 186 S.W. 604, 607 (1916).

92. ARK. REV. STAT. ch. 116, § 98 (1837). Several other statutes provided for trial by jury in particular situations. *E.g.*, *id.* at ch. 4, § 101 (demand for allowance against estate exceeding twenty dollars); *id.* at ch. 13, §§ 32-33 (attachment); *id.* at ch. 63, §§ 9, 18 (forcible entry and detainer); *id.* at ch. 78, §§ 2, 4 (insanity); *id.* at ch. 92, § 4 (mandamus); *id.* at

which modernized civil procedure in the state, also provided for trial by jury: "[i]ssues of fact, arising in actions by proceedings at law for the recovery of money, or of specific, real or personal property, shall be tried by a jury, unless a jury trial is waived."⁹³

The Civil Code did not merge law and equity,⁹⁴ which had been divided since the territorial period. From 1819 to 1836, the Arkansas Territory had a single trial court, but it had separate law and equity "sides."⁹⁵ This model was continued after statehood under the 1836 constitution, but that document also provided that the General Assembly "when they deem it expedient may establish separate Courts of Chancery."⁹⁶ The legislature did not exercise this authority until 1855, when it created a chancery court for Pulaski County.⁹⁷ Similar language authorizing but not requiring separate chancery courts appeared in the 1861 and 1864 constitutions,⁹⁸ as well as in

ch. 107, § 15 (partition); *id.* at ch. 126, §§ 14-18, 37-39 (replevin); *id.* at ch. 157, §§ 32-33 (validity of will).

93. ARKANSAS CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES, tit. 9, ch. 2, art. 1, § 337 (1869) [hereinafter CIVIL CODE]. All other issues of fact, "whether arising in proceedings at law, or equitable proceedings," were tried to the court, "subject to its power to order any issue or issues to be tried by jury." *Id.* § 338. The right to a jury could be waived by consent or by failing to appear at trial. *Id.* at art. 3, § 363. Also, by submitting to trial of all issues by a court of equity and not seeking a transfer to law, a litigant waived his right to a jury trial. *McIlvenny v. Horton*, 227 Ark. 826, 828, 302 S.W.2d 70, 71 (1957); *Love v. Bryson*, 57 Ark. 589, 594, 22 S.W. 341, 342 (1893).

94. The code's drafters looked not to the pathbreaking Field Code of New York as a model, but rather to the Kentucky Code, which had retained the division between law and equity. T.D. CRAWFORD, ANNOTATED CIVIL CODE OF ARKANSAS v (1934); HEPBURN, *supra* note 57, § 114; *see also* W. Surety Co. v. Gates, 254 Ark. 478, 482, 494 S.W.2d 479, 482 (1973) (Fogleman, J., concurring) (Civil Code of 1869 "was an adoption of the Kentucky Code"); *Holliday Bros. v. Cohen*, 34 Ark. 707, 716 (1879) (sections of Civil Code dealing with attachment "are parts of the Kentucky system, and were brought over, *verbatim*"); *Young v. King*, 33 Ark. 745, 746 (1878) ("Such also appears to be the practice under the Kentucky Code, from which ours was copied."). Professor Gitelman, noting that there was no stated explanation for choosing the Kentucky Code as a model, has suggested that the thirteen-year existence of the Pulaski County chancery court influenced the decision: "[I]f Arkansas had adopted the New York model entirely, an existing institution would have been closed down completely." Gitelman, *supra* note 25, at 240.

95. Gitelman, *supra* note 25, at 235-36; Edwin H. Greenebaum, *Arkansas' Judiciary: Its History and Structure*, 18 ARK. L. REV. 152, 155 (1964); *see, e.g., Drope v. Miller*, 7 F. Cas. 1108 (Ark. Terr. 1827) (No. 4,092a). By statute, the court was to exercise chancery jurisdiction "[i]n all cases where a remedy cannot be had in the ordinary course of the common law proceeding." STEELE & M'CAMPBELL, *supra* note 77, at 108.

96. ARK. CONST. of 1836 art. VI, § 1.

97. ARK. REV. STAT. ch. 28, § 1 (1857) (approved Jan. 15, 1855). As Professor Gitelman has noted, the General Assembly's action was politically motivated, the result of a standoff between the state and the trustees of the Real Estate Bank of Arkansas. An action to create a receivership for the public bank, which was insolvent, was the first order of business for the new chancery court. Gitelman, *supra* note 25, at 237-38.

98. ARK. CONST. of 1861 art. VI, § 1; ARK. CONST. of 1864 art. VII, § 1.

the 1874 version.⁹⁹ The constitution of 1868 did not expressly mention chancery courts but vested the state's judicial power in "the Senate sitting as a court of impeachment, a Supreme Court, Circuit Courts, and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."¹⁰⁰

Pulaski County had the state's only chancery court for thirty years, and during that time the circuit courts in other counties had separate law and equity sides.¹⁰¹ In 1885, the legislature created the First Chancery District for Pulaski, Faulkner, and Lonoke counties.¹⁰² By 1901, there were six such districts,¹⁰³ and in 1903 the General Assembly established chancery districts throughout the state.¹⁰⁴ Thus,

when England and a majority of the American states had abolished separate chancery courts and had either completely merged law and equity under the New York model or had single courts with a law side and an equity side as under the federal model, Arkansas entered the twentieth century carrying the full weight of the anomaly of separate courts of equity.¹⁰⁵

The Civil Code, as amended from time to time, "served as the basic Arkansas procedure law until 1979,"¹⁰⁶ when Arkansas Rules of Civil Procedure went into effect. These rules were based on the Federal Rules of Civil Procedure, with modifications to accommodate the dual system. The starkest example was Rule 2. The corresponding federal rule effectuated the merger of law and equity by providing that "[t]here shall be one form of action to be known as 'civil action.'"¹⁰⁷ In the Arkansas version, however, this sentence was followed by another: "Actions in equity shall be brought in the Chancery Court and actions at law shall be brought in the Circuit

99. ARK. CONST. of 1874 art. VII, § 1, *repealed by* ARK. CONST. amend. 80.

100. ARK. CONST. of 1868 art. VII, § 1.

101. *See Morgan Util., Inc. v. Perry County*, 183 Ark. 542, 547, 37 S.W.2d 74, 77 (1931) (the circuit court "was a court of dual jurisdiction, the judge presiding in one division or 'on the law side' as a judge of a superior court of common law, and also sitting in chancery as judge of a court of equity").

102. 1885 Ark. Acts 171.

103. Gitelman, *supra* note 25, at 240 n.68.

104. 1903 Ark. Acts 166 (codified at ARK. CODE ANN. § 16-13-301 (LEXIS Repl. 1999), *superseded by* ARK. CONST. amend. 80, § 6(A)). Votes on the bill were close in both houses—it passed 17-14 in the Senate, with four senators not voting, and 46-43 in the House, with eleven representatives not voting. Gitelman, *supra* note 25, at 243 n.70.

105. Gitelman, *supra* note 25, at 244.

106. DAVID NEWBERN, ARKANSAS CIVIL PRACTICE AND PROCEDURE § 1-1 (2d ed. 1993).

107. FED. R. CIV. P. 2.

Court.”¹⁰⁸ The supreme court deleted the latter in 2001 following the adoption of Amendment 80.¹⁰⁹

With respect to trial by jury, the rules say relatively little. Under Rule 38, “[a]ny party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor.”¹¹⁰ This provision simply “recognizes the constitutional right to trial by jury”¹¹¹ and does not purport to define the dimensions of that right. Rule 38 also states that “[t]he failure of a party to file a demand as required by this rule . . . constitutes a waiver by him of trial by jury.”¹¹² The supreme court has upheld this provision as consistent with Article II, Section 7.¹¹³ Under Rule 39, “[i]ssues not demanded for trial by jury . . . shall be tried by the court,” although the judge may, in his or her discretion, upon motion, order a jury trial “in an action in which such a demand might have been made of right.”¹¹⁴ Where there is no right to a jury trial, Rule 39 allows the court “upon motion or of its own initiative, [to] try any issue with an advisory jury or, with the consent of all parties, [to] order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.”¹¹⁵

108. ARK. R. CIV. P. 2.

109. *In re* Implementation of Amendment 80: Amendments to Rules of Civil Procedure & Inferior Court Rules, 345 Ark. Adv. app. (May 24, 2001) (per curiam).

110. ARK. R. CIV. P. 38(a).

111. Reporter’s Notes, ARK. R. CIV. P. 38. Under the corresponding federal rule, “[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.” FED. R. CIV. P. 38(a).

112. ARK. R. CIV. P. 38(c). The demand must be made “in writing at any time after the commencement of the action and not later than 20 days prior to the trial date.” *Id.* at R. 38(a).

113. *Venable v. Becker*, 287 Ark. 236, 238, 697 S.W.2d 903, 904 (1985) (the constitution states that “a jury trial may be waived by the parties in all cases in the manner prescribed by law,” and “Rule 38 is the law”).

114. ARK. R. CIV. P. 39(b); *see* *Duncan v. McGaugh*, 19 Ark. App. 276, 279, 719 S.W.2d 710, 712 (1986) (holding that circuit court did not abuse its discretion in refusing to grant appellants request for trial by jury).

115. ARK. R. CIV. P. 39(c). Prior to adoption of the Rules of Civil Procedure, “jury verdicts in chancery court [were] considered as advisory only and not binding upon the court.” Reporter’s Notes, ARK. R. CIV. P. 39 (citing *City of Magnolia v. Davies*, 188 Ark. 19, 64 S.W.2d 85 (1933); *Sullivan v. Wilson Mercantile Co.*, 172 Ark. 914, 290 S.W. 938 (1927)); *see also* *Evans v. Weise*, 234 Ark. 137, 140, 350 S.W.2d 616, 618 (1961); *Hinkle v. Hinkle*, 55 Ark. 583, 587, 18 S.W. 1049, 1049 (1892). Arkansas Rule of Civil Procedure 39(c), which tracks its federal counterpart, changed this practice in one respect: the verdict of an advisory jury is binding if all parties consent. With such consent, “it is possible to have a binding jury verdict in equity proceedings.” Reporter’s Notes, ARK. R. CIV. P. 39. Absent the consent of all parties, however, the jury’s verdict is simply advisory. As a federal court has observed with respect to the latter situation, an advisory jury “does no more than *advise* the judge; the ultimate responsibility for finding the facts remains with the court.” *Frostie Co. v. Dr. Pepper Co.*, 361 F.2d 124, 126 (5th Cir. 1966) (emphasis in original). Federal cases also hold that the trial judge’s decision to impanel an advisory jury is wholly discretionary, and

III. MODE OF TRIAL PRIOR TO MERGER

A variety of scenarios could arise under the pre-merger practice. For example, the plaintiff often needed both legal and equitable remedies in order to obtain complete relief. Sometimes he or she could choose among remedies. In other situations the plaintiff might assert an action at law, only to face a suit by the defendant in chancery to enjoin the legal proceeding. As Professor Fleming James pointed out, “[t]he differences among these [scenarios] were important because different patterns of trial and trial sequence were applied.”¹¹⁶ The patterns identified by Professor James have implications for the right to a jury trial under the merged system and therefore are discussed here.

A. Plaintiff Injects Both Legal and Equitable Claims

1. *Plaintiff Had to Resort to Equity First to Get Any Relief or to Obtain Full Relief*

Here the equitable issue would be tried first. Under the cleanup doctrine, the chancery court would award legal relief as well, at least if the plaintiff so requested. To take Professor James’s example, suppose that A and B were parties to a contract which, as written, did not support a right claimed by A. However, A wished to argue that because of mutual mistake, the contract did not embody the actual agreement of the parties. The common law would not remedy this type of mistake; consequently, A would be forced to seek reformation of the contract in equity. If the chancellor found mutual mistake, he would not only reform the agreement, but also determine A’s rights thereunder and, if appropriate, award legal relief. In the event that A also had rights under the contract as written, he or she would assert the legal claim in equity along with the suit for reformation. If A brought the legal claim separately at law, the chancellor would enjoin prosecution of that action until the question of mutual mistake was determined.¹¹⁷

the exercise of that discretion is not reviewable by an appellate court. *See, e.g., Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 14 (4th Cir. 1972).

116. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 670 (1963).

117. *Id.* at 670-71. A temporary injunction would also issue if B had sued A at law under the terms of the contract. *Id.* at 670.

2. *Equitable Relief Was Necessary for Plaintiff's Complete Protection, but Equity Refused to Give Such Relief Unless and Until a Preliminary Legal Issue Had Been Determined at Law by a Jury*

In this situation, there would be two trials: one to a jury and the other, if plaintiff was successful in the first, to the chancellor on the issues that pertained to the propriety of equitable relief. Professor James offered the following illustrations:

Where A claimed that B's structure encroached on A's land but B also claimed title to the land under the structure, equity would not order the structure removed until the title dispute was settled at law. If A won the law action, equity would order B to remove the structure if it was impractical for the sheriff to remove it under a writ of execution. Again, where A claimed that B owed him a legal debt and wished to reach B's equitable assets, or property conveyed by B to C to defraud B's creditors, equity would grant no relief if B disputed the debt until A had reduced his debt claim to a judgment at law. Then, at least if execution could not be satisfied, equitable relief would be forthcoming on a proper showing.¹¹⁸

Between these extremes was "a host of others in many of which either kind of relief depended on the resolution of an issue which either tribunal would try."¹¹⁹ Professor James considered these cases as "too heterogeneous [sic] to be called a pattern,"¹²⁰ but discussing two of them is helpful for purposes of this article.

3. *Plaintiff Could Proceed in Either Law or Equity and Thus Choose the Mode of Trial*

Suppose, for example, that A wished to sue B for copyright infringement and that the applicable statute entitled the plaintiff to an injunction, compensatory damages, and punitive damages. A could sue B in equity for injunctive relief and, invoking the cleanup doctrine, for compensatory damages. The chancellor would make the key factual determination, i.e., whether B had violated the statute. Alternatively, A could sue B in a court of law for compensatory and punitive damages, with a jury deciding whether there had been a violation. Either way, a second suit would be necessary if A wanted complete relief; equity refused to enforce a penalty and would thus not award punitive damages, and law could not grant an injunction. Because determination of the common factual issue in the first action

118. *Id.* at 671.

119. *Id.*

120. *Id.* at 675.

would bind the parties in the second, A could choose the factfinder by choosing the initial forum. If punitive damages were not available under the statute, A could obtain complete relief in chancery by virtue of the cleanup doctrine. However, the plaintiff in this situation also had the option of seeking damages at law and an injunction in equity, with the order of suit determining who would decide the common issue of fact.¹²¹

4. *Plaintiff Was Required to Choose Between Legal and Equitable Remedies, and That Choice Would Determine the Forum and Thus the Mode of Trial*

If, for instance, B breached an agreement with A by refusing to convey certain land, then A would be entitled to either specific performance of the contract or damages for its breach, but not both. A's election of the remedy would place the action in one court or the other and govern the mode of trial on issues that would be presented in a claim for either type of relief, such as the making of the contract, performance of conditions precedent, and breach.¹²²

B. Equitable Defense Is Raised to Legal Claim

Certain defenses, equitable in nature, could not be successfully asserted to defeat a legal claim because they were not recognized at law. As a result, the defendant in an action at law would be forced to raise the issue in equity. By way of illustration, assume that A sued B at law on a specialty contract. B, as obligor, claimed that he was induced by fraud to execute it in favor of A. However, B could not assert this defense in a law court; rather, he would be required to go into equity and seek cancellation of the contract. The chancellor would temporarily enjoin the legal action pending resolution of the fraud question.¹²³

If he found no fraud, the chancellor would dismiss the suit, dissolve the injunction, and leave the matter in the hands of the law court. If he found fraud, however, the chancellor would issue a decree canceling the contract and making the injunction permanent. Where there were residual legal is-

121. *Id.* at 671-72.

122. James, *supra* note 116, at 672. If A initially chose equitable relief, the chancellor might conclude that specific performance was impossible or unsuitable. Dismissal of the suit for want of equity jurisdiction usually followed, with A free to pursue his remedies in a court of law. In rare cases, however, the chancellor retained jurisdiction, decided the merits, and awarded damages. *See, e.g.,* Denton v. Stewart, 29 Eng. Rep. 1156 (Ch. 1786). Professor James noted that in eighteenth century England this "substituted legal relief" was apparently confined to "the case of impossibility arising after suit" but has "enjoyed considerable growth since then." James, *supra* note 116, at 673.

123. James, *supra* note 116, at 679.

sues, as would be the case when the instrument was reformed rather than canceled, the chancellor would dispose of them under the cleanup doctrine as incidental to the equitable relief.¹²⁴

Several other defenses developed in equity, including mistake, estoppel, setoff, unclean hands, undue hardship, and part performance sufficient to take a contract out of the Statute of Frauds.¹²⁵ As Professor James pointed out, however, "[m]any matters which were cognizable only in equity in remote times came to be recognized as defenses by courts of law—worked into law as we say—in the course of time."¹²⁶

C. Equitable Claim, Legal Counterclaim

If A's equitable claim against B did not overlap factually with B's legal claim against A, then each would be litigated separately in different courts—unless B sought to use his claim for damages as a setoff against A's claim.¹²⁷ The matter became more complicated when the claims of A and B had common factual issues. Professor James describes two situations that fell into this category.

1. *Plaintiff Sought Substantial Equitable Relief, i.e., Foreclosure of a Mortgage, Specific Performance of a Contract*

If the defendant had a legal claim against the plaintiff arising from the same operative facts as the plaintiff's claim, the defendant had a choice whether to assert that claim in the equity suit or bring it in a separate action at law. For example, suppose that A, a contractor, brought suit in equity to foreclose a mechanics' lien for the amount he claimed due for the installation of a furnace in B's building. However, B considered the installation defective and contemplated an action against A for breach of contract. B could assert that cause of action as a counterclaim in the chancery suit, in which case the issues concerning A's performance would be tried to the court. Alternatively, B could fail to controvert A's performance in chancery and then sue A at law for damages, thereby obtaining a jury trial. Although B's chancery pleading in which there was no denial of A's performance would be admissible against B as an admission, B would be free to explain to the jury why he had not controverted performance in the prior action.

124. *Id.*

125. See John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59, 66-68 (1961); Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53, 70; Spencer R. Liverant & Walter H. Hitchler, *A History of Equity in Pennsylvania*, 37 DICK. L. REV. 156, 167-71 (1933).

126. James, *supra* note 116, at 679.

127. *Id.* at 681 & n.159.

Moreover, neither claim nor issue preclusion would prevent B from litigating the performance issue at law.¹²⁸

2. *Plaintiff Sought Equitable Relief Principally to Defeat a Contemplated Legal Action by Defendant*

In this situation, the chancery court would sometimes, but not always, enjoin the defendant from subsequently bringing the legal action. Although this relief was coercive in form, it was in effect a declaration of the rights of the parties that would dispose of a potential legal claim against the equity plaintiff on grounds that he or she could have been defensively in the action at law. Whether to grant such relief was largely discretionary with the chancellor and depended on the circumstances. If the injunction were granted, issues that would have otherwise been litigated at law by a jury would be decided by the chancellor, much as if the legal action had been asserted as a counterclaim in equity.

By way of illustration, consider the facts of *American Life Insurance Co. v. Stewart*,¹²⁹ decided by the Supreme Court shortly before the Federal Rules of Civil Procedure took effect. There a life insurance policy would have become incontestable by its terms "two years from its date of issue," except for nonpayment of premiums. The insured died, and the beneficiary had the luxury of postponing an action on the policy until after the contestability period had expired. The insurance company, claiming fraud by the insured in the application for the policy, brought suit to cancel the policy before it became incontestable. The beneficiary moved to dismiss for want of equity and, shortly thereafter, began an action at law to recover on the policy. The insurance company responded by asking the court to enjoin prosecution of the pending legal action.

In situations such as this, the chancellor could either retain the case on the docket until the insurer's fraud defense was actually tried by the jury in the law action or enjoin prosecution of the law action and try the fraud issue itself.¹³⁰ In *American Life*, the trial judge chose the latter course of action and ruled in favor of the insurance company, but the court of appeals reversed. The Supreme Court upheld the trial judge, rejecting the beneficiary's argument that equity lost jurisdiction when a legal remedy later became available to the insurance company, i.e., a defense of fraud in the action on the policy.¹³¹ In such instances the equity court could, in its discre-

128. *Id.* at 681-83.

129. 300 U.S. 203 (1937).

130. James, *supra* note 116, at 683.

131. 300 U.S. at 215-16.

tion, enjoin the later action at law "in order to allow the whole dispute to be determined in one case in one court."¹³²

D. Declaratory Relief

As suggested in the preceding category, equity would on occasion grant relief that had the effect of a binding declaration of the rights of the parties. In many situations, however, equity would not grant such relief, as when the putative defendant in an action for breach of contract or personal injuries sought a determination in chancery of an issue that was available as a defense at law. This remedy—interposing the defense in the legal action—was considered adequate.¹³³ Modern statutes made declaratory relief available in all types of situations, including those in which equity would not entertain a suit to establish nonliability.¹³⁴

E. Procedural Device Available Only in Equity

Professor James did not discuss this scenario, perhaps because he believed it to be covered by the cleanup doctrine. The shareholders' derivative suit is a good illustration. At common law, a corporation had a legal right to sue its directors for misuse of corporate assets or usurpation of corporate opportunities. But the corporation, being under the directors' control, would not do so. Disgruntled shareholders turned to the chancery courts, which gave them standing to sue on behalf of the corporation if they could establish certain preliminary facts, i.e., that they had demanded that the corporation vindicate its own rights. Then, having taken the case to create such standing for the shareholders, the court would proceed, without a jury, to adjudicate the merits, even if the only relief sought was legal in nature.¹³⁵

The shareholders' derivative suit is a specialized type of representative or class suit, "an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties . . . is impracticable."¹³⁶ Another effort

132. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 505 (1959).

133. James, *supra* note 116, at 685.

134. The Uniform Declaratory Judgment Act, approved in 1922 by the National Conference of Commissioners on Uniform State Laws, was adopted by most states. For the Arkansas version, see ARK. CODE ANN. §§ 16-111-101 to -111 (Michie 1987) (enacted in 1953). Congress passed the federal declaratory judgment act in 1934. See 28 U.S.C. §§ 2201-2202 (1994).

135. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 341 (1855).

136. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). The class action grew out of the "bill of peace," which allowed the chancery court to hear an action by or against representatives of a group if the plaintiff could establish that the number of persons involved was so large as to

of equity to settle in one case all aspects of a single controversy was interpleader, which enables a person facing inconsistent claims to the same property or obligation (the "stakeholder") to bring the adverse claimants into a single action in which the rights of all parties are determined.¹³⁷ Because a class suit and bill of interpleader could be brought only in equity, there was no jury determination of issues which, under other circumstances, would have been heard by a jury at law.¹³⁸

IV. THE FEDERAL EXPERIENCE AFTER MERGER

Since the merger of law and equity in 1938, the Supreme Court has struggled "to develop an interpretation of the Seventh Amendment that is both consistent with its historical basis, and capable of integrating modern procedural developments."¹³⁹ The Court's approach has been described as "dynamic,"¹⁴⁰ which is to say that it does not inflexibly follow history. As a result, the Court has held that there is a right to a jury trial in cases presenting both legal and equitable issues that would have been tried without a jury on the equity "side" of the federal district prior to merger.

A. Pre-Merger Case Law

The first clause of the Seventh Amendment provides that the right to trial by jury "shall be preserved" in "suits at common law."¹⁴¹ The word "preserved" suggests that the right to a jury trial is frozen in time as of 1791, when the Seventh Amendment was ratified. The Supreme Court initially agreed with this static view: "In order to ascertain the scope and meaning of the Seventh Amendment," the Court said in a 1935 case, "resort

make joinder impossible or impracticable, that all members of the group possessed a joint interest in the matter to be adjudicated, and that the named parties adequately represented those absent from the action. See *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805). See generally Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515 (1974); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

137. Interpleader was available in narrow circumstances under the ancient common law, but the device became obsolete and was taken over by the courts of equity. See generally Ralph V. Rogers, *Historical Origins of Interpleader*, 51 YALE L.J. 924 (1942). Until the middle of the eighteenth century, the chancellor would send contested issues of fact to the law courts for jury trial. Geoffrey C. Hazard, Jr. & Myron Moskowitz, *An Historical and Critical Analysis of Interpleader*, 52 CAL. L. REV. 706, 716 n.38 (1964).

138. See, e.g., *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 244 (1922) (interpleader); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1853) (class suit).

139. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 11.5 (3d ed. 1999).

140. *Id.*

141. U.S. CONST. amend. VII, cl. 2 (also limiting the right to cases "where the value in controversy shall exceed twenty dollars").

must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."¹⁴²

But how does one determine "the appropriate rules" of the common law? One possibility would be to examine the practice of the states in 1791. That is, a case in federal court would be tried by jury if, in the state where the court sat, that mode of trial was employed in similar cases. The obvious problem with this approach is that a constitutional right would be tied to "the widely divergent definitions among the states as to what was a suit at common law."¹⁴³ As Alexander Hamilton argued, it would be "capricious" to base the federal right to a jury trial "on the accidental situation of the court and parties."¹⁴⁴

Not surprisingly, the Supreme Court took a different tack. Justice Story, in an 1812 opinion on circuit, asserted that "[b]eyond all question, the common law here alluded to is not the common law of any individual state . . . , but it is the common law of England, the grand reservoir of all our jurisprudence."¹⁴⁵ Because this conclusion was "obvious to every person acquainted with the history of the law," Story said that there was no need for him to "expound the grounds" for it.¹⁴⁶ Such an exposition would have been difficult, for there is nothing in the legislative history of the Seventh Amendment or in other sources suggesting that the phrase "common law" was intended to refer to the common law of England.¹⁴⁷

Nonetheless, the Court subsequently adopted Justice Story's approach in cases which, like the one before him, involved the Seventh Amendment's re-examination clause and its phrase "according to the rules of the common

142. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Patton v. United States*, 281 U.S. 276, 288 (1930); *Liberty Oil*, 260 U.S. at 243; *Thompson v. Utah*, 170 U.S. 343, 350 (1898), *overruled on other grounds* by *Collins v. Youndblood*, 497 U.S. 37 (1990).

143. Klein, *supra* note 37, at 1018.

144. THE FEDERALIST NO. 83, *supra* note 50, at 567-68. Hamilton's comment came in response to Anti-Federalist proposals, during the ratification period, for jury trials "as heretofore" or in "actions at common law." Hamilton assumed that these proposals would link the federal guarantee to the varying practices among the states; that is, "causes in the federal courts should be tried by jury, if in the state where the courts sat, that mode of trial would obtain in a similar case in the state courts." *Id.* at 567. Among his concerns was that in states where the line between law and equity was "less precise" than in England, the federal courts would be required to employ juries in traditionally equitable cases. *Id.* at 571. Hamilton considered equity cases inappropriate for trial by jury because of the chancellor's discretion to deal with "extraordinary" cases and because the "intricate" matters heard in equity often required "long, deliberate and critical investigation as would be impracticable to men called from their occupations" to serve as jurors. *Id.* at 569.

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

146. *Id.*

147. Klein, *supra* note 37, at 1022.

law.”¹⁴⁸ The Court also looked to the English practice in construing the term “suits at common law” in the amendment’s first clause. In *Liberty Oil Co. v. Condon National Bank*,¹⁴⁹ for example, Chief Justice Taft wrote that the Seventh Amendment must be construed in light of “the practice in the courts of law and chancery in England when our Constitution and the Seventh Amendment were adopted.”¹⁵⁰

The plaintiff in that case, *Liberty Oil Co.*, brought an action at law against the defendant bank to recover funds deposited there in connection with the plaintiff’s purchase of certain real property. The bank disclaimed any interest in the funds and asked the district court to direct that the sellers, as the other potential claimants to the money, be made parties. The court entered an order of interpleader, thereby granting defendant’s request for relief historically equitable in nature. Consequently, the Chief Justice held, the district judge should have transferred the case to the court’s equity side, where the equitable issue would be tried first to the court and any remaining legal issues then tried to a jury. That being so, “[t]he right of trial by jury is preserved exactly as it was at common law . . . under the system of separate courts.”¹⁵¹

Long before *Liberty Oil*, the Court made plain that the term “common law” is used in the Seventh Amendment “in contradistinction to equity, and admiralty, and maritime jurisprudence.”¹⁵² Thus, if a case would have been heard in the English chancery courts in 1791, there was no right to a jury trial under the Seventh Amendment.¹⁵³ This rigid historical approach also extended to cases arising under statutes. For example, *NLRB v. Jones & Laughlin Steel Corp.*¹⁵⁴ stemmed from an administrative proceeding initi-

148. See, e.g., *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 378-79 (1913); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899).

149. 260 U.S. 235 (1922).

150. *Id.* at 244. More recently, however, the Court has suggested that something more than the English practice may be relevant: “Our formulations of the historical test do not deal with the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time. No such complications arise in this case.” *Markham v. Westview Instruments, Inc.*, 517 U.S. 370, 376 n.3 (1996).

151. *Liberty Oil*, 260 U.S. at 243. The precise issue before the Supreme Court was whether appellate review was by writ of error or by appeal. *Id.* at 240 (holding that the case was equitable and proper review was by appeal).

152. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

153. See, e.g., *Pease v. Rathbun-Jones Eng’g Co.*, 243 U.S. 273, 278-79 (1917) (Seventh Amendment does not require jury trial when a court of equity disposes of incidental legal issues that would otherwise be heard in an action at law); cf. *Bank of Hamilton v. Dudley’s Lessee*, 27 U.S. (2 Pet.) 492, 524 (1829) (claim for cost of improvements to leased premises is a suit at common law and must be tried by jury).

154. 301 U.S. 1 (1937).

ated by a labor union pursuant to the National Labor Relations Act of 1935. The National Labor Relations Board (NLRB) found that Jones & Laughlin had violated the act by engaging in unfair labor practices by discriminating against members of the union, discharging workers because of their union membership, and coercing and intimidating its employees in an effort to interfere with their self-organization. The board found in favor of the union and ordered the company to cease and desist from these activities and to reinstate certain employees with back pay. When Jones & Laughlin failed to comply with this order, the NLRB petitioned for enforcement in the United States Court of Appeals for the Fifth Circuit. The court denied the petition, but the Supreme Court granted certiorari and reversed.

The company, in resisting enforcement of the order, argued that its Seventh Amendment right to trial by jury had been violated because the board's back pay order was the equivalent of a money judgment. The Court rejected this contention in two paragraphs at the end of a lengthy opinion by Chief Justice Hughes. The Seventh Amendment does not apply where the proceeding is not in the nature of a suit at common law, and the case at bar as "a statutory proceeding" and "unknown to the common law."¹⁵⁵

B. The Modern Cases

Rule 38 of the Federal Rules of Civil Procedure provides in part that "[t]he right of trial by jury as declared by the Seventh Amendment . . . shall be preserved to the parties inviolate"¹⁵⁶ and thus "does not undertake to define the cases in which there is a right to jury trial."¹⁵⁷ Although this provision neither diminished nor enlarged the right to trial by jury,¹⁵⁸ the merger of law and equity in the federal courts¹⁵⁹ has in effect expanded that right in cases with legal and equitable elements.

155. *Id.* at 48. The Court also rejected the company's jury trial argument on the separate ground that the Seventh Amendment is inapplicable when "recovery of money damages is an incident to [nonlegal] relief even though damages might have been recovered in an action at law." *Id.* at 48. (citing *Pease*, 243 U.S. at 279 ("A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation."); *Clark v. Wooster*, 119 U.S. 322, 325 (1886) ("[T]he mere fact that the ground for [equitable] relief expired . . . would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort.")). In *Jones & Laughlin*, the NLRB's order reinstating dismissed employees was analogous to injunctive relief, and the award of back pay was incidental to that relief and thus within the cleanup doctrine.

156. FED. R. CIV. P. 38(a).

157. 9 WRIGHT & MILLER, *supra* note 31, § 2301.

158. *Id.* (citing *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986); *Institutional Drug Distrib., Inc. v. Yankwich*, 249 F.2d 566 (9th Cir. 1957)); see also *James*, *supra* note 116, at 667 (drafters of federal rules, like those of the civil codes, "took a neutralist position with respect to jury trial").

159. See FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil

These “mixed” cases arise in several situations, largely on account of the liberal joinder provisions of the Federal Rules, which allow legal and equitable claims to be brought and resolved in one action.¹⁶⁰ Prior to merger, these actions would have been heard in a court of equity under the cleanup doctrine, but the Supreme Court has not considered itself bound rigidly by history. Its leading decisions are, in chronological order, *Beacon Theatres, Inc. v. Westover*,¹⁶¹ *Dairy Queen, Inc. v. Wood*,¹⁶² and *Ross v. Bernhard*.¹⁶³ Following a discussion of these cases is a brief examination of other Supreme Court rulings.

1. *Beacon Theatres, Inc. v. Westover*

Fox West Coast Theatres Corp., the owner of movie theatres in California, had entered into contracts with various motion picture distributors giving it exclusive rights to show first-run films in the “San Bernadino competitive area.” The agreements also provided for “clearance,” i.e., a period of time during which no other theatre operator could exhibit the same movies. Fox sued Beacon Theatres, which had built a drive-in theatre eleven miles away, for a declaratory judgment that the exclusivity agreements did not violate the federal antitrust laws. Fox also asked for an injunction to prevent Beacon from instituting a threatened antitrust suit on the basis of the agreements until the claim for declaratory relief was decided. Beacon counterclaimed, asserting the antitrust action that Fox wanted to enjoin, and demanded a jury trial. The district court granted Fox’s motion to strike the demand, viewing the complaint as essentially equitable in nature and directing that the issues it raised (including those in common with the counterclaim) be tried to the court before a jury determined the remaining issues raised by Beacon’s counterclaim. As a result, issues critical to the counterclaim—including whether Beacon was in substantial competition with Fox in the San Bernadino area and whether the clearances were reasonable—would be decided by the court.¹⁶⁴

action.”).

160. See *id.* at R. 18(a) (“A party asserting a claim to relief . . . may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.”). Initially, this provision mentioned only legal and equitable claims. The reference to maritime claims was added in 1966, when the Rules of Civil Procedure were made applicable in admiralty cases. See generally Leavenworth Colby, *Admiralty Unification*, 54 GEO. L.J. 1258 (1966); Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 MAINE L. REV. 1 (1965).

161. 359 U.S. 500 (1959).

162. 369 U.S. 469 (1962).

163. 396 U.S. 531 (1970).

164. *Beacon Theatres*, 359 U.S. at 502-04.

The United States Court of Appeals for the Ninth Circuit refused a writ of mandamus. While recognizing that the trial judge's determination of the common issues would be preclusive with respect to Beacon's counterclaim,¹⁶⁵ the appellate court concluded that there was no Seventh Amendment violation because a chancellor could have done precisely the same thing prior to merger:

[T]he Rules of Civil Procedure . . . were not designed to make any substantial change in the right to jury trial or to alter any pre-existing right of the trial judge to determine in his discretion whether trial of the suit in equity shall be prior to the submission of the issues in the legal action in any case where, as here, both types of action are presented by the pleadings.¹⁶⁶

The Supreme Court granted certiorari and reversed. Justice Black, writing for the majority, emphasized that "[t]he basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies" and that the meaning of these terms "must be determined, not by precedents decided under discarded procedures, but in light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules."¹⁶⁷ He continued:

[T]he expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, *Quia Timet* and Injunction must be reconsid-

165. *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 874 (9th Cir. 1958) (if the substantial competition issue is tried first by the court, "the determination of that issue by the court will operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of [Beacon's] treble damage claim").

166. *Id.* at 875. The Ninth Circuit relied on *American Life Insurance Co. v. Stewart*, 300 U.S. 203 (1937), for the proposition that a court of equity could retain jurisdiction, even though a legal remedy subsequently became available, and had discretion to enjoin the later lawsuit in order to allow the entire dispute to be resolved in one court. *Beacon Theatres*, 252 F.2d at 876. The court also said that "[n]o authority need be cited" for the proposition that "a party who is entitled to maintain a suit in equity for an injunction may have the issues therein determined by the court without a jury notwithstanding they involve a trial and determination of legal rights." *Id.* at 874.

167. *Beacon Theatres*, 359 U.S. at 506-07.

ered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules.¹⁶⁸

In undertaking this reevaluation, Justice Black concluded that a trial judge's discretion to decide the equitable claim first "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial."¹⁶⁹ That discretion is indeed narrow: "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."¹⁷⁰ This is so because "the right to jury trial is a constitutional one . . . , while no similar requirement protects trial by the court."¹⁷¹ Presumably, *Beacon Theatres* could have been decided on the ground that the district court abused its discretion by trying the equitable claim first, because "Fox may have been simply trying to circumvent Beacon's jury right by 'jumping the gun' with an equitable action."¹⁷² But the Court embarked on a rather different course, one that Professor James found disturbing because the stated grounds for the decision "are cloudy and ambiguous and susceptible of an interpretation which would go far to abolish the historical test altogether and extend jury trial over most of the former domain of equity."¹⁷³

While this statement is something of an exaggeration, the *Beacon Theatres* decision has been applied by the lower federal courts beyond its fact pattern, i.e., the plaintiff asserts an equitable claim and the defendant a compulsory counterclaim legal in nature. The same result has been reached when the counterclaim is permissive,¹⁷⁴ and there is a right to a jury trial on common issues when the plaintiff brings a legal claim and the defendant raises an affirmative defense cognizable only in equity.¹⁷⁵ The rationale of *Beacon Theaters* has also been employed when the plaintiff, as allowed by

168. *Id.* at 509.

169. *Id.* at 510.

170. *Id.* at 510-11.

171. *Id.* at 510. Justice Stewart, joined by Justices Harlan and Whittaker, dissented. In Justice Stewart's view, the merger of law and equity did not change anything insofar as the Seventh Amendment was concerned. He argued that nothing in the Federal Rules of Civil Procedure deprive district courts of their discretion to "order the trial of a suit in equity in advance of an action at law between the same parties, even if there is a factual issue common to both." *Id.* at 517 (Stewart, J., dissenting). Neither the rules nor the Declaratory Judgment Act "create a right of trial by jury where that right 'does not exist under the Constitution,'" and the rules "were not intended to undermine the basic structure of equity jurisprudence developed over the centuries." *Id.* at 518-19.

172. James, *supra* note 116, at 687.

173. *Id.*

174. 9 WRIGHT & MILLER, *supra* note 31, § 2305.

175. See, e.g., *Granite States Ins. Co. v. Smart Modular Tech., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) (equitable estoppel).

Rule 18(a) of the Federal Rules of Civil Procedure, asserts both legal and equitable claims that have common issues of fact.¹⁷⁶

2. Dairy Queen, Inc. v. Wood

The owners of the trademark "Dairy Queen" sued the licensee of the trademark for breach of the licensing agreement.¹⁷⁷ According to the complaint, the licensee had failed to make the agreed-upon payments for use of the trademark and had continued to use it—and to collect money for that use—after its right to do so had terminated. The owners sought a declaration that the contract was null and void, an accounting of the profits unlawfully obtained by the licensees, and a permanent injunction to restrain the licensees from using the trademark. The district court struck the licensee's demand for a jury trial, describing the owners' case as "purely equitable" or in any event one within equity jurisdiction if viewed as "a claim to injunctive relief coupled with an incidental claim for damages."¹⁷⁸ The United States Court of Appeals for the Third Circuit denied mandamus without opinion,¹⁷⁹ but the Supreme Court reversed.

Again writing for the Court,¹⁸⁰ Justice Black characterized the owners' demand for monetary relief as legal in nature, rejecting their contention that the "accounting" label made it equitable. This was not a case in which the accounts were so complicated that "only a court of equity can satisfactorily unravel them"—indeed, it will be a "rare case" in which the jury cannot handle the task alone.¹⁸¹ Justice Black emphasized that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."¹⁸²

So viewed, the case was one in which the plaintiff owners sought both legal and equitable remedies for a single wrong, with the former "incidental" to the latter and thus within the cleanup doctrine. Justice Black's opinion reflects the strong federal preference for trial by jury and condemns the cleanup doctrine as constitutionally unacceptable:

[W]e may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—that based upon the view that

176. See, e.g., *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 954 (2d Cir. 1988); *Pfizer, Inc. v. Perrigo Co.*, 988 F. Supp. 686, 696 (S.D.N.Y. 1997).

177. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473-74 (1962).

178. *McCullough v. Dairy Queen, Inc.*, 194 F. Supp. 686, 687-88 (E.D. Pa. 1961).

179. *Dairy Queen*, 369 U.S. at 470.

180. Justice Stewart, who dissented in *Beacon Theatres*, concurred in the result without opinion. Justice Harlan, who had joined the Stewart dissent, concurred with a brief opinion. Justices Frankfurter and White did not participate. *Id.* at 480.

181. *Id.* at 478.

182. *Id.* at 477-78.

the right to trial by jury may be lost as to legal issues where those issues are characterized as “incidental” to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts.¹⁸³

Thus, the defendant licensees were entitled to a jury trial “on factual issues related to the question of whether there has been a breach of contract.”¹⁸⁴ Because these legal issues “are common with those upon which [plaintiffs’] claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of [plaintiffs’] equitable claims.”¹⁸⁵

The “previous decisions” to which Justice Black referred are *Scott v. Neely*,¹⁸⁶ an 1891 case from which he quoted, and *Cates v. Allen*,¹⁸⁷ a decision reaffirming *Scott* two years later. The Court in *Scott* “held that a court of equity could not even take jurisdiction of a suit ‘in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.’”¹⁸⁸ This holding, Justice Black said, was based on “the historical separation between law and equity and the duty of the Court to insure ‘that the right to a trial by jury in the legal action may be preserved intact.’”¹⁸⁹ Although the Federal Rules of Civil Procedure ended this “historical separation” by merging law and equity, they “did not . . . purport to change the basic holding of *Scott* that the right to trial by jury of legal claims must be preserved.”¹⁹⁰

The Court’s reliance on *Scott* and *Neely* is problematic. As Professor James pointed out, these cases represent only one of the patterns followed by equity, the one discussed previously in Part III.A.2 of this article. Moreover, “what is said is true, historically, *only of that pattern.*”¹⁹¹ In the patterns represented by *Dairy Queen* and *Beacon Theatres*, Professor James

183. *Id.* at 470.

184. *Id.* at 479.

185. *Dairy Queen*, 369 U.S. at 479. The Court was careful to point out that the order-of-trial rule “does not . . . interfere with the District Court’s power to grant temporary relief pending a final adjudication on the merits.” *Id.* at 479 n.20. A preliminary injunction had been issued by the district court in this case. See *McCullough v. Dairy Queen, Inc.*, 194 F. Supp. 686, 686-87 (E.D. Pa. 1961).

186. 140 U.S. 106 (1891).

187. 149 U.S. 451 (1893).

188. *Dairy Queen*, 369 U.S. at 471 (quoting *Scott v. Neely*, 140 U.S. 106, 117 (1891)).

189. *Id.* (quoting *Scott*, 140 U.S. at 110).

190. *Id.* at 471-72. As Justice Black pointed out, Rule 38(a) expressly provides that the right to trial by jury “as declared by the Seventh Amendment . . . shall be preserved to the parties inviolate.” *Id.* at 472 (quoting FED. R. CIV. P. 38(a)).

191. James, *supra* note 116, at 688 n.189 (emphasis in original).

wrote, "equity would frequently have tried without a jury the very kinds of legal issues which were presented in those cases."¹⁹²

3. Ross v. Bernhard

Stockholders of the Lehman Corporation brought a derivative action in federal district court alleging gross negligence, abuse of trust, breach of fiduciary duty, waste, conversion of corporate assets by the board of directors, and breach of contract and fiduciary duty by the corporation's brokers. The plaintiffs sought an accounting and repayment to the corporation of excessive brokerage commissions. The district court held that the right of the plaintiffs to a jury trial was to be determined as if the corporation were itself the plaintiff but certified the question to the court of appeals.¹⁹³ The Second Circuit Court of Appeals reversed, holding that because a derivative action is entirely equitable in nature, there is no right to a jury trial on any issue.¹⁹⁴

The Supreme Court, in an opinion by Justice White, agreed with the district court: "the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."¹⁹⁵ Although he conceded the historically equitable nature of the derivative suit, Justice White stressed that the corporation is the real party in interest and the shareholder a nominal plaintiff. The proceeds "belong to the corporation," and the "heart of the action is the corporate claim."¹⁹⁶ "If it presents a legal issue, one entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court."¹⁹⁷ Put another way, "legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit."¹⁹⁸

The difficulty with this approach was identified by Justice Stewart in dissent.¹⁹⁹ A derivative suit, he pointed out, "has in practice always been treated as a single cause tried exclusively in equity."²⁰⁰ By way of example, he cited *United Copper Securities Co. v. Amalgamated Copper Co.*,²⁰¹ in

192. *Id.*

193. *Ross v. Bernhard*, 275 F. Supp. 569, 570-71 (S.D.N.Y. 1967).

194. *Ross v. Bernhard*, 403 F.2d 909, 914-15 (2d Cir. 1968).

195. *Ross v. Bernhard*, 396 U.S. 531, 532-33 (1970).

196. *Id.* at 538-39.

197. *Id.* at 539.

198. *Id.* at 538.

199. He was joined by Chief Justice Burger and Justice Harlan. *Id.* at 543 (Stewart, J., dissenting).

200. *Id.* at 546.

201. 244 U.S. 261 (1917).

which Justice Brandeis noted “the long-settled rule under which stockholders may [enforce rights of the corporation] only in a court of equity.”²⁰² Justice Stewart criticized the majority for disregarding “history, logic, and over 100 years of firm precedent,”²⁰³ adding that the decision “can perhaps be explained as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions.”²⁰⁴

The *Ross* decision cannot logically be confined to derivative suits. Indeed, Justice White said that “it now seems settled in the lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present.”²⁰⁵ He added in a footnote that interpleader and intervention, both historically equitable devices, “are used under the [Rules of Civil Procedure] without depriving the parties employing them of the right to a jury trial on legal issues.”²⁰⁶ Consequently, it appears that the Court’s decision in *Liberty Oil Co. v. Condon National Bank*²⁰⁷— that there was no constitutional right to a jury trial in interpleader suits—has been effectively overruled.²⁰⁸ To again quote Justice White, “courts and commentators have now come to the conclusion that the right to a jury should not turn on how the parties happen to be brought before the court.”²⁰⁹

The *Ross* decision is also important because it emphasizes that the right to a jury trial under the Seventh Amendment “depends on the nature of the issue to be tried rather than the character of the overall action.”²¹⁰ A well-known footnote in the opinion elaborates:

As our cases indicate, the “legal” nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.²¹¹

The third factor has led to a debate in the courts and the legal literature as to whether there is a “complexity exception” to the Seventh Amend-

202. *Id.* at 265.

203. *Ross*, 396 U.S. at 544 (Stewart, J., dissenting).

204. *Id.* at 551.

205. *Id.* at 541.

206. *Id.* at 541 n.15.

207. 260 U.S. 235 (1922).

208. *Hyde Props. v. McCoy*, 507 F.2d 301, 305 (6th Cir. 1974); see also 9 WRIGHT & MILLER, *supra* note 31, § 2307 (*Ross* is “controlling not only for derivative actions but also for the other procedural devices that the Civil Rules borrowed from equity”).

209. *Ross*, 396 U.S. at 541 n.15.

210. *Id.* at 538.

211. *Id.* at 538 n.10.

ment,²¹² but the Supreme Court has not yet settled the matter. In *Markman v. Westview Instruments, Inc.*,²¹³ the Court concluded that judges, rather than juries, are more qualified to interpret a patent claim, the portion of the patent document that "defines the scope of the patentee's rights."²¹⁴ Although the Court assessed the relative abilities of judges and juries to decide this highly technical question,²¹⁵ *Markman* "does not establish an outright complexity exception."²¹⁶ Indeed, the Court said that "[w]e need not . . . consider here whether our conclusion that the Seventh Amendment does not require terms of art in patent claims to be submitted to the jury supports a similar result in other types of cases."²¹⁷

4. Other Decisions

The Supreme Court has had a particularly difficult time determining whether there is a right to trial by jury when Congress has created a statutory cause of action. No problems occur when the statute specifically provides for a jury trial, for Congress may grant such a right even though the Seventh Amendment does not.²¹⁸ But what if the statute is silent on the question? The Seventh Amendment right attaches when a statute simply codifies a common law cause of action,²¹⁹ but the situation becomes murky when a statute creates rights and liabilities unknown at common law.

212. Compare *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (recognizing complexity exception grounded in due process) with *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979) (refusing to recognize complexity exception); see also Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT. L. REV. 865 (1998); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

213. 517 U.S. 370 (1996).

214. *Id.* at 372.

215. *Id.* at 388-90.

216. 9 WRIGHT & MILLER, *supra* note 31, § 2302.1 (Supp. 2000). As Professors Wright and Miller noted, *Markham* does not discuss, or even cite, the *Ross* footnote. They added that "the language of the opinion suggests that the functional inquiry [as to whether judges or juries are better equipped to decide the issue] is only relevant when the historical inquiry provides no answers." *Id.*

217. *Markham*, 517 U.S. at 383 n.9.

218. *E.g.*, *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 459-60 (1851) (upholding constitutionality of statute providing for right to jury trial in admiralty proceeding).

219. Justice Story made the point early on: the Seventh Amendment "may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

With respect to the latter, one possible solution would be to hold, in rather straightforward fashion, that there can be no right to a jury trial because the statute was not a creature of the common law. A statement by the Supreme Court in a case mentioned previously, *NLRB v. Jones & Laughlin Steel Corp.*,²²⁰ suggests such an approach: the Seventh Amendment does not apply in a statutory proceeding “unknown to the common law.”²²¹ But this case was subsequently recast as one involving a different question, *i.e.*, the power of Congress to assign cases to non-Article III courts or administrative agencies.²²² In any event, the Court has rejected a rigidly historical approach in favor of a more complex inquiry. As Justice Kennedy explained in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*:²²³

We ask, first, whether we are dealing with a cause of action that either was tried at law [in the eighteenth century] or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.²²⁴

In the *Monterey* case, the plaintiff developers brought an action under 42 U.S.C. § 1983 claiming that the city, by denying their proposals to develop a parcel of land, had effected a regulatory taking without paying compensation. They sought damages for the unconstitutional denial of such compensation. The Court held that a § 1983 action for a violation of constitutional rights, which had no equivalent at common law, “sound[s] in tort” and that the plaintiffs’ claim for “monetary relief” is legal in nature. Thus, “a suit for legal relief brought under the statute is an action at law.”²²⁵

But to say that plaintiffs had a right to a jury trial is not to say that they were entitled to have a jury decide every issue. Here the jury had been asked to determine the city’s liability for the alleged taking by answering two

220. 301 U.S. 1 (1937); *see supra* text accompanying notes 154-55.

221. *Jones & Laughlin*, 301 U.S. at 48.

222. *See Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 455 (1977) (*Jones & Laughlin* and other cases “stand clearly for the proposition that when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law’”); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (*Jones & Laughlin* “stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication”).

223. 526 U.S. 687 (1999).

224. *Id.* at 708 (internal citation and quotations omitted). Although the Court was fragmented as to the result, it was unanimous with respect to the applicable test. *See id.* at 723 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 733 (Souter, J., concurring in part and dissenting in part).

225. *Id.* at 710.

questions: whether the developers had been deprived of "all economically viable use" of their property and whether the city's rejection of their building plans "substantially advance[d] a legitimate public purpose."²²⁶ In holding that the developers had a right to a jury trial on these issues, the Court first pointed out that "in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases."²²⁷ Moreover, the two issues were "predominantly factual" and "essentially fact-bound," respectively, and thus for the jury.²²⁸

The fact that four Justices dissented in *Monterey* suggests that the Court's method of analysis in this area is far easier to state than to apply. Justice Souter, joined by Justices O'Connor, Ginsburg, and Breyer, agreed with the Court's "test" but dissented from its application.²²⁹ He argued that the "closest analogue" to the claim for regulatory taking is an action for condemnation and that "the right to compensation for such direct takings carried with it no right to a jury trial."²³⁰ Even though condemnation proceedings are "suits at common law" within the meaning of the Seventh Amendment, Justice Souter said that there is no right to trial by jury because they "carried no uniform and established right to a common law jury trial in England or the colonies at the time . . . the Seventh Amendment was adopted."²³¹

Another example of the difficulty in employing this approach is *Tull v. United States*,²³² in which the Court held that the Seventh Amendment requires a jury trial in liability determinations in actions by the government for civil penalties under the Clean Water Act. This action was analogous to a legal action for debt, the Court said, and a civil penalty was a remedy that could be enforced only in courts of law.²³³ However, the Court held that there was no right to a jury trial with regard to the *assessment* of the penalty, a process that involved "multiple factors" and "highly discretionary calculations" of the kind "traditionally performed by judges."²³⁴ Justice Scalia, joined by Justice Stevens, dissented in part, arguing that both issues should be tried by the jury. "[T]he Court creates a form of civil adjudication I have never encountered," Justice Scalia wrote. "I can recall no precedent

226. *Id.* at 700.

227. *Id.* at 718.

228. *Id.* at 720-21.

229. *Monterey*, 526 U.S. at 734-35 (Souter, J., concurring in part and dissenting in part).

230. *Id.* at 739.

231. *Id.* at 738 (internal quotation omitted); see also *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 458 (1977) ("Condemnation was a suit at common law but constitutionally could be tried without a jury."); *United States v. Reynolds*, 397 U.S. 14, 18 (1970) ("[T]here is no constitutional right to a jury in eminent domain proceedings.").

232. 481 U.S. 412 (1987).

233. *Id.* at 420-22.

234. *Id.* at 427.

for judgment of civil liability by jury but assessment of amount by the court.”²³⁵

The Court has also split in considering a different question, i.e., whether a determination by the judge in an equitable proceeding has preclusive effect in a subsequent legal action. This issue arose in *Parklane Hosiery Co. v. Shore*,²³⁶ a stockholder’s class action for damages against a corporation and its officers and directors based on the issuance of an allegedly false and misleading proxy statement. Before this case went to trial, the Securities and Exchange Commission (SEC) sued the same defendants on the basis of the proxy statement, seeking injunctive relief. In the latter proceeding, the district court held that the proxy statement was indeed materially false and misleading. The plaintiff in the class action then moved for partial summary judgment, arguing that the defendants were collaterally estopped from relitigating the falsity issue that had been resolved against them in the suit brought by the SEC. The district court denied the motion on the ground that application of collateral estoppel in this context would deny defendants their Seventh Amendment right to a jury trial. The Seventh Circuit reversed, and the Supreme Court upheld the appellate court’s decision.

Writing for the majority, Justice Stewart first concluded that this “offensive” use of collateral estoppel by a litigant who was not a party to the prior action should be permitted in the federal courts.²³⁷ He then determined that using collateral estoppel in this fashion would not violate the Seventh Amendment, even though litigants in the defendants’ position would have had trial by jury in 1791, when the doctrine of mutuality prevented collateral estoppel from being employed offensively.²³⁸ “The law of collateral estoppel, like the law in other procedural areas defining the scope of the jury’s function, has evolved since 1791,” Justice Stewart said. “[T]hese developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791.”²³⁹ The sole dissenter was then-

235. *Id.* at 428 (Scalia, J., concurring in part and dissenting in part).

236. 439 U.S. 322 (1979).

237. *Id.* at 326-33.

238. Under the doctrine of mutuality, collateral estoppel was permitted only when the parties in the first action were identical to, or in privity with, the parties in the subsequent action. See *Smith v. Kerochen*, 48 U.S. (7 How.) 198, 217-18 (1849); *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 113-14 (1821). This remained so in the federal courts until 1971, when the Supreme Court abrogated it with respect to defensive collateral estoppel. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 401 U.S. 313 (1971). The Arkansas Supreme Court abolished mutuality in *Fisher v. Jones*, 311 Ark. 450, 457, 844 S.W.2d 954, 958 (1993), but has not yet decided whether to permit offensive collateral estoppel. The court observed in *Fisher* that use of the doctrine offensively “is more controversial, and not at issue in this case.” *Id.* at 456, 844 S.W.2d at 958.

239. *Parklane Hosiery*, 439 U.S. at 337. It is somewhat ironic that Justice Stewart relied in part on *Beacon Theatres*, a case in which he had dissented. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 512 (1959) (Stewart, J., dissenting).

Justice Rehnquist: "the development of nonmutual estoppel is a substantial departure from the common law and its use in this case completely deprives [defendants] of their right to have a jury determine contested issues of fact."²⁴⁰

V. WHAT ABOUT ARKANSAS?

Because the Seventh Amendment applies only in the federal courts, the states are free to go their own way insofar as the right to trial by jury is concerned. Not surprisingly, they have not taken the same path. Commentators have suggested that a majority of states follow the flexible approach on facts similar to those of *Beacon Theatres* and *Dairy Queen*,²⁴¹ but a substantial minority adhere to a rigidly historical view.²⁴² In the latter group of states, the action as a whole is characterized as essentially equitable or legal in nature; if it is equitable, the trial court may decide any incidental legal

240. *Parklane Hosiery*, 439 U.S. at 350 (Rehnquist, J., dissenting).

241. See, e.g., 1 DAN B. DOBBS, *REMEDIES* § 2.6(4), at 172-73 (2d ed. 1993); Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461, 1501 n.224 (1995). Cases that follow *Beacon Theatres* include: *Shope v. Sims*, 658 P.2d 1336, 1340 (Alaska 1983); *Cerrito v. Kovitch*, 457 So. 2d 1021, 1022-23 (Fla. 1984); *Harada v. Burns*, 445 P.2d 376, 382 (Haw. 1968); *Higgins v. Barnes*, 530 A.2d 724, 725-26 (Md. 1987); *Evans Fin. Corp. v. Strasser*, 664 P.2d 986, 989 (N.M. 1983); *Johnson v. S.C. Nat'l Bank*, 354 S.E.2d 895, 897 (S.C. 1986); *First W. Bank v. Livestock Yards Co.*, 466 N.W.2d 853, 856-57 (S.D. 1991); *Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 661-62 (Utah 1990); *Wood v. Wood*, 693 A.2d 673, 675 (Vt. 1997). Decisions recognizing a right to trial by jury in the fact pattern presented by *Dairy Queen* include: *Selby Constructors, Inc. v. McCarthy*, 154 Cal. Rptr. 164, 169-70 (Ct. App. 1979); *Chenery v. Crans*, 497 So. 2d 267, 269 (Fla. App. 1986); *Life for God's Stray Animals, Inc. v. New N. Rockdale County Homeowners Ass'n*, 322 S.E.2d 239, 241 (Ga. 1984); *Gray v. City of Billings*, 689 P.2d 268, 272 (Mont. 1984); *Rexnord, Inc. v. Ferris*, 657 P.2d 673, 679 n.4 (Or. 1983); *Bendick v. Cambio*, 558 A.2d 941, 945 (R.I. 1989); *Perilli v. Bd. of Educ.*, 387 S.E.2d 315, 317 (W. Va. 1989).

242. Cases contrary to *Beacon Theatres* include: *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 869 P.2d 554, 565 (Idaho 1993); *First Nat'l Bank of Olathe v. Clark*, 602 P.2d 1299, 1303 (Kan. 1979); *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 678 A.2d 683, 689-93 (N.J. 1996); *Murphy v. Murphy*, 595 N.W.2d 571, 575 (N.D. 1999); *Rosenberg v. Rosenberg*, 419 A.2d 167, 168-69 (Pa. Super. Ct. 1980). Decisions that do not follow *Dairy Queen* include: *Motor Vehicle Mfrs. Ass'n v. O'Neill*, 523 A.2d 486, 493 (Conn. 1987); *Hiatt v. Yergin*, 284 N.E.2d 834, 847-49 (Ind. Ct. App. 1972); *Clark*, 602 P.2d at 1303; *Linville v. Wilson*, 628 S.W.2d 422, 425-26 (Mo. Ct. App. 1982). For a particularly curious case, see *Smith v. University of Detroit*, 378 N.W.2d 511 (Mich. Ct. App. 1985) (when issue of fact is common to legal and equitable claims, jury and judge make separate factual determinations, leading to the possibility of contradictory findings). In Tennessee, there is no right to trial by jury in "essentially equitable actions" unless they were triable to a jury when the state constitution was adopted in 1796, but the legislature has "provide[d] a broad statutory right to a jury trial in equity cases." *Sasser v. Averitt Express, Inc.*, 839 S.W.2d 422, 434 (Tenn. App. 1992).

issues pursuant to the cleanup doctrine.²⁴³ The jury is still out, so to speak, with respect to *Ross v. Bernhard*. As the Iowa Supreme Court recently observed, “[w]hether the plaintiff in a shareholder’s derivative suit is entitled to a jury is a fairly unsettled question across the country.”²⁴⁴

For its part, the Arkansas Supreme Court will not be writing on an entirely blank slate in determining the effect of merger on the right to trial by jury. Pre-merger decisions generally reflect the sort of rigidity that would suggest rejection of *Beacon Theatres* and its progeny. On the other hand, there is some indication that the court may not be entirely hostile to a more flexible approach. These decisions are discussed after a brief examination of the historical test that has emerged for construing Article II, Section 7 of the Arkansas Constitution.

A. The Historical Test: In General

In guaranteeing that the right to trial by jury “shall remain inviolate,”²⁴⁵ the drafters of the 1836 Constitution appear to have had preservation in

243. See, e.g., *O’Neill*, 523 A.2d at 493; *Howell v. State Farm Fire & Cas. Co.*, 530 N.E.2d 318, 319 (Ind. Ct. App. 1988); *Clark*, 602 P.2d at 1303; *Boardwalk Props., Inc. v. BPHC Acquisition, Inc.*, 602 A.2d 733, 739-40 (N.J. Super. Ct. 1991); *Barnhart Drilling Co. v. Petroleum Fin., Inc.*, 807 P.2d 411, 415 (Wyo. 1991). This approach also prevailed in the federal courts prior to *Beacon Theatres* and its progeny. See 9 WRIGHT & MILLER, *supra* note 31, § 2302.

244. *Weltzin v. Nail*, 618 N.W.2d 293, 296 (Iowa 2000). The court, which rejected *Ross*, said later in its opinion that the “national trend appears to agree with the *Ross* dissent.” *Id.* at 301. The cases, however, are rather evenly divided. Those adopting the *Ross* approach include: *Fin., Inv. & Rediscount Co. v. Wells*, 409 So. 2d 1341, 1344 (Ala. 1982) (on rehearing); *Hashem v. Taheri*, 571 A.2d 837, 839-40 (Md. App. 1990); *Scott v. Woods*, 730 P.2d 480, 486 (N.M. Ct. App. 1986); *Fedoryszyn v. Weiss*, 310 N.Y.S.2d 55, 57 (N.Y. Sup. Ct. 1970); *Hyatt Bros., Inc. v. Hyatt*, 769 P.2d 329, 333-36 (Wyo. 1989). Among the cases holding that there is no right to a jury trial are: *Rankin v. Frebank Co.*, 121 Cal. Rptr. 348, 359 (Ct. App. 1975); *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425, 427 (Fla. App. 1985); *Demoulas v. Demoulas Super Mkts., Inc.*, 677 N.E.2d 159, 178 (Mass. 1997); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315, 316-17 (S.C. 1978). See generally Jean E. Maess, Annotation, *Right to Trial by Jury in Stockholder’s Derivative Action*, 32 A.L.R.4th 111 (1984).

245. This phrase appears in several state constitutions. E.g., ALA. CONST. art. I, § 11; ARIZ. CONST. art. II, § 23; CONN. CONST. art. I, § 19; GA. CONST. art. I, § 1, ¶ XI; IDAHO CONST. art. I, § 7; IND. CONST. art. I, § 20; IOWA CONST. art. I, § 9; MINN. CONST. art. I, § 4; MISS. CONST. art. III, § 31; NEB. CONST. art. I, § 6; N.J. CONST. art. I, ¶ 9; ORE. CONST. art. I, § 17; R.I. CONST. art. I, § 15; S.D. CONST. art. IV, § 6; TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15; WASH. CONST. art. I, § 21; WIS. CONST. art. I, § 5. Variations are used in other states. E.g., FLA. CONST. art. I, § 22 (“shall be secure to all and remain inviolate”); KAN. CONST. Bill of Rights, § 5 (“shall be inviolate”); KY. CONST. Bill of Rights, § 7 (“shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution”); MONT. CONST. art. II, § 26 (“is secured to all and shall remain inviolate”); NEV. CONST. art. I, § 3 (“shall be secured to all and remain inviolate forever”); N.D. CONST. art. I, § 13 (“shall be secured to all, and remain inviolate”); OHIO

mind; that is, they sought to ensure that the right, as it had existed in the Arkansas Territory, was not diminished or eroded by the new state's legislature and courts.²⁴⁶ Their view of the existing right, however, is unclear. Case law in other jurisdictions suggests that it may have included the right to trial by jury at common law,²⁴⁷ any such right created by territorial statutes,²⁴⁸ and the practice under the Seventh Amendment.²⁴⁹ The early Arkansas cases focus on the common law.²⁵⁰

CONST. art. I, § 5; ("shall be inviolate"); OKLA. CONST. art. II, § 19 ("shall be and remain inviolate"); S.C. CONST. art. I, § 14 ("shall be preserved inviolate"). Some states expressly refer to the right as it had previously existed. *E.g.*, ILL. CONST. art. I, § 13 ("as heretofore enjoyed shall remain inviolate"); MO. CONST. art. I, § 22(a) ("as heretofore enjoyed shall remain inviolate"); N.M. CONST. art. II, § 12 ("as it has heretofore existed shall be secured to all and remain inviolate"); N.Y. CONST. art. I, § 2; ("in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever"); PA. CONST. art. I, § 6 ("shall be as heretofore, and the right thereof remain inviolate").

246. *See* *Steelevest, Inc. v. Scansteel Serv. Ctr., Inc.*, 908 S.W.2d 104, 108 (Ky. 1995) (the term "inviolate" means that the right to jury trial "cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action"); *State ex rel. Mullen v. Doherty*, 47 P. 958, 959 (Wash. 1897) ("The effect of the declaration of the constitution . . . is to provide that the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate."); *see also* *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 148 (Minn. 2001) (effect of constitutional provision that right to trial by jury "shall remain inviolate" is "to recognize the right of trial by jury as it existed in the Territory of Minnesota at the time of the adoption of the state constitution") (quoting *Whallon v. Bancroft*, 4 Minn. 109, 113 (1860)); *Power v. Williams*, 205 N.W. 9, 11 (N.D. 1925) ("[T]he 'trial by jury,' which the framers of the [state] Constitution intended should remain inviolate, was the trial by jury as it existed at and prior to adoption of . . . the Constitution.").

247. *E.g.*, *Hammons v. Ehney*, 924 S.W.2d 843, 849 (Mo. 1996) ("[T]his Court has stated multiple times that the right [of trial by jury] applied to actions that existed at common law before adoption of the first constitution."); *Shaw v. Shaw*, 133 N.W. 292, 293 (S.D. 1911) ("[T]he constitutional provision of this state 'that trial by jury shall remain inviolate' . . . applies to law cases triable by jury as a matter of right as theretofore existed in the territory of Dakota prior to the going into effect of the Constitution of this state."); *State v. Dusina*, 764 S.W.2d 766, 768 (Tenn. 1989) ("[T]he constitution preserves the right of trial by jury as that right existed at common law insofar as that law had been adopted and was in force in North Carolina when the territory embraced in Tennessee was ceded by North Carolina to the United States government.").

248. *E.g.*, *State v. Bennion*, 730 P.2d 952, 957 (Idaho 1986) (holding that state constitution "preserves the right to jury trial as it existed at the common law and under the territorial statutes"); *see also* *Baldwin Sod Farms, Inc. v. Corrigan*, 746 So. 2d 1198, 1204 (Fla. App. 1999) (holding that constitutional provision that the "right to trial by jury shall be secure to all and remain inviolate" applies to "those categories of actions in which the right to a jury trial was enjoyed as of 1845, the date that Florida's first constitution became effective").

249. *E.g.*, *Md. Nat'l Ins. Co. v. Dist. Court*, 455 P.2d 690, 692 (Okla. 1969); *Power*, 205 N.W. at 12-13. As the Oklahoma Supreme Court made plain in the *Maryland National* case, the Seventh Amendment does not apply of its own force, but rather because of its application in the territory prior to statehood and the terms of the state constitution. 455 P.2d at 692. Thus, the states need not follow post-statehood federal decisions interpreting the Seventh

Because the phrase "shall remain inviolate" appears in each of the subsequent constitutions, one can argue that the scope of the right to jury trial in Arkansas today turns on its scope in 1836, immediately prior to statehood.²⁵¹ The 1868 Constitution, however, included an additional phrase that was repeated in the 1874 document: the right of trial by jury "shall extend to all cases at law."²⁵² The published proceedings of the 1868 constitutional convention shed no light on the reasons behind this addition.²⁵³ In an 1870 case, *State v. Johnson*,²⁵⁴ the supreme court asked whether the new language added anything, but did not directly answer the question.²⁵⁵ Later decisions, however, view the phrase "at law" as a reference to the common law. For example, the court observed that "the constitutional right to trial by jury is

Amendment. In Oklahoma, for example, the right to a jury trial in cases involving both legal and equitable issues depends on which predominates. *Butcher v. McGinn*, 706 P.2d 878, 880 (Okla. 1985). This approach contrasts sharply with the Supreme Court's Seventh Amendment analysis in the *Beacon Theatres* and *Dairy Queen* cases. Of course, a state is free to adopt current Seventh Amendment thinking if it so chooses. *E.g.*, *Odden v. O'Keefe*, 450 N.W.2d 707, 709 (N.D. 1990) (finding rationale of Ninth Circuit decision "persuasive").

250. *E.g.*, *Larillian v. Lane*, 8 Ark. 372, 374 (1848) (holding that the constitutional right of trial by jury refers to "the jury trial as known and recognized by the common law"); *Wallace v. Henry*, 5 Ark. 105, 108 (1843) (pointing out that statute requiring jury in action on written instrument where amount of damages was uncertain "does not materially change the common law"); *Willson v. Light*, 4 Ark. 158, 158-59 (1843) (holding that each party is entitled to trial by jury on appeal to circuit court from justice of peace in suit to recover on a note).

251. *See Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 11 (Mo. 1992) (holding that because the right to trial by jury "has remained the same through the four Missouri constitutions," the right protected by the present constitution "is that which existed at common law before adoption of the first constitution") (quoting *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. 1979)). In *Hammons*, 924 S.W.2d at 843, the Missouri Supreme Court expressly rejected other decisions of the court of appeals holding that the reference point was 1945, when the current constitution was adopted. *Id.* at 848-49; *see also Corrigan*, 746 So. 2d at 1204 (constitutional provision that the "right to trial by jury shall be secure and remain inviolate" applies to "those categories of actions in which the right to a jury trial was enjoyed as of 1845, the date that Florida's first constitution became effective"). Even when constitutional provisions change over time, courts have occasionally found a common thread running back to the territorial period. *E.g.*, *People v. Antkoviak*, 619 N.W.2d 18, 28-36 (Mich. Ct. App. 2000).

252. ARK. CONST. of 1874 art. II, § 7; ARK. CONST. of 1868 art. II, § 6.

253. There appears to have been no debate on the trial by jury provision, which was proposed by the Committee on Preamble and Bill of Rights. DEBATES AND PROCEEDINGS OF THE CONVENTION 354 (James M. Pomeroy ed., 1868). The Committee on the Constitution, Its Arrangement and Phraseology, placed the provision in a different section but made no change in its language. *Id.* at 584. The constitutional text drafted by the latter committee was approved by the delegates. *Id.* at 684.

254. 26 Ark. 281 (1870).

255. *Id.* at 289. The court not only discussed the common law at some length, *id.* at 290-93, but also relied on a case arising under the 1836 Constitution, *State v. Ashley*, 1 Ark. 279 (1839), in support of its conclusion that there had been no violation of the right to trial by jury. *Johnson*, 26 Ark. at 289.

confined to cases which by the common law were so triable.”²⁵⁶ Put somewhat differently, “[t]he right of trial by jury extends to all cases in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered.”²⁵⁷ In two of the three other states that use the “cases at law”

256. *Wheat v. Smith*, 50 Ark. 267, 275, 7 S.W. 161, 164 (1887); *accord Granquist v. Randolph*, 326 Ark. 809, 813, 934 S.W.2d 224, 226 (1996); *Dunn v. Davis*, 291 Ark. 492, 495, 725 S.W.2d 853, 855 (1987); *Civil Serv. Comm'n v. Matlock*, 205 Ark. 286, 290, 168 S.W.2d 424, 426 (1943); *Sharum v. Meriwether*, 156 Ark. 331, 334, 246 S.W. 501, 502 (1923); *Mo. Pac. R.R. Co. v. Conway County Bridge Dist.*, 134 Ark. 292, 298, 204 S.W. 630, 631 (1918); *Furth v. State*, 72 Ark. 161, 166, 78 S.W. 759, 760 (1904); *State v. Churchill*, 48 Ark. 426, 436, 3 S.W. 352, 357 (1886); *Williams v. Citizens*, 40 Ark. 290, 297 (1883); *see also McClanahan v. Gibson*, 296 Ark. 304, 305, 756 S.W.2d 889, 889 (1988) (holding that because tort action “is one of those cases” that was “triable [to a jury] at common law,” plaintiff had constitutional right to trial by jury regardless of amount in controversy); *Grimmett v. Digby*, 267 Ark. 192, 194, 589 S.W.2d 579, 581 (1979) (holding that constitutional right to trial by jury “would . . . prevent the General Assembly from giving the Claims Commission exclusive jurisdiction of tort claims against state employees or officers”); *Rastle v. Marion County Rural Sch. Dist.*, 260 Ark. 740, 742, 543 S.W.2d 923, 925 (1976) (“suit for breach of contract is a common-law action, triable by jury,” while “action for mandamus is a special proceeding, to be tried by the court”); *Naperskie v. Trevillion*, 202 Ark. 638, 641, 151 S.W.2d 992, 994 (1941) (holding that a defendant, who was in default in tort action, had right to have jury assess damages); *Axley v. Hammond*, 185 Ark. 939, 946, 50 S.W.2d 608, 611 (1932) (“The right to trial by jury would not remain inviolate if, in [a slander] action only cognizable in a court of law, the defendant could interpose defenses and cause a transfer to a court of [equity], and thereby deprive the plaintiff of the right to trial by jury.”); *Pearman v. Pearman*, 144 Ark. 528, 531, 222 S.W. 1064, 1065 (1920) (holding that if defendant is in possession of the disputed land, plaintiff has an adequate legal remedy in ejectment, and to allow plaintiff to seek equitable relief in this situation would deprive defendant of right to trial by jury); *Starks v. Couch*, 109 Ark. 534, 536-37, 160 S.W. 853, 853-54 (1913) (stating that because replevin cases were triable by a jury at common law, circuit court erred in refusing demand for jury trial in appeal of such a case from justice court); *First Nat'l Bank of Lake Providence v. Reinman*, 93 Ark. 376, 381, 125 S.W. 443, 445 (1910) (holding that the transfer to chancery of suit to recover against defendant as indorser on note violated plaintiff's right to jury trial); *La. & Northwest R.R. Co. v. State*, 75 Ark. 434, 444, 88 S.W. 559, 562 (1905) (“In quo warranto proceedings at common law, brought to vacate charters, trial by jury seems universally to have been accorded to determine the facts.”); *Weaver v. Ark. Nat'l Bank*, 73 Ark. 462, 463, 84 S.W. 510, 510 (1904) (“The issues in suit on promissory note were purely legal, and appellant had a constitutional right to trial by course of the common law, including trial by jury.”); *Cole v. Mettee*, 65 Ark. 503, 507-08, 47 S.W. 407, 408 (1898) (holding that there was no basis to transfer action for ejectment to equity docket, where no equitable relief was sought by either party; such transfer deprived parties of their right to trial by jury); *Crow v. Reed*, 38 Ark. 482, 485 (1882) (“A trial of exceptions [to a guardian's account] by a jury, in the probate court, is not contemplated by law.”).

257. *Ashley v. Little Rock*, 56 Ark. 391, 396, 19 S.W. 1058, 1059 (1892); *accord, Starks*, 109 Ark. at 537, 160 S.W. at 854; *see also McKee v. Am. Trust Co.*, 166 Ark. 480, 489, 266 S.W. 293, 296 (1924) (finding that the defendant was not entitled to trial by jury in action by state bank commissioner seeking injunction for violation of statute prohibiting unauthorized corporation from using “trust company” as part of its name); *Goodrum v. Planters & Merchs.*

terminology,²⁵⁸ the constitutional guarantee is also applicable to cases which by statute were tried by juries in the territorial period.²⁵⁹

The Arkansas case law described above does not suggest that the benchmark for the common-law right is 1874 rather than 1836; indeed, in construing Article II, Section 7, the supreme court from time to time relied on cases arising under previous constitutions.²⁶⁰ Moreover, it is not clear from the decisions whether the common law is that which was applied in Arkansas or the version that prevailed at the pertinent time in England.²⁶¹ The supreme court has not discussed these issues in any depth, but a 1986 case looks to the common law of Arkansas in 1874.²⁶² Most likely, however, the result in any given case would be the same no matter how these questions are resolved.²⁶³

Bank of England, 102 Ark. 326, 343, 144 S.W. 198, 206 (1912) (holding the defendant did not have right to trial by jury in proceeding to foreclose mortgage, "a subject-matter over which the chancery court had jurisdiction"); *Kirkland v. State*, 72 Ark. 171, 177, 78 S.W. 770, 772 (1904) (finding no right to jury trial in "suits in equity to abate a public nuisance"); *Furth*, 72 Ark. at 166, 78 S.W. at 760 (stating there is no right to jury trial in summary proceeding under statute authorizing seizure and destruction of gambling devices "to suppress the nuisance of gambling"); *Hinkle v. Hinkle*, 55 Ark. 583, 587, 18 S.W. 1049, 1049 (1892) ("In chancery cases there is no right to the trial of any issue by a jury."); *Churchill*, 48 Ark. at 436, 3 S.W. at 357 ("There is no right of trial by jury in cases which would have been cognizable in courts of equity at and before the adoption of our constitution.").

258. The three states are Minnesota, South Dakota, and Wisconsin. See MINN. CONST. art. I, § 4; S.D. CONST. art. IV, § 6; WIS. CONST. art. I, § 5.

259. *Smith v. Bailen*, 258 N.W.2d 118, 120 (Minn. 1977); *Shaw v. Shaw*, 133 N.W. 292, 293 (S.D. 1911). In Wisconsin, the supreme court has relied on territorial statutes in determining that there is no right to a jury trial in a particular case. E.g., *Killingstad v. Meigs*, 133 N.W. 632, 633 (Wis. 1911).

260. E.g., *Kirkland*, 72 Ark. at 177, 78 S.W. at 772 (citing *Neel v. State*, 9 Ark. 259 (1845)); *Wheat*, 50 Ark. at 275, 7 S.W. at 164 (citing *Johnson*, 26 Ark. at 281).

261. As mentioned previously, this question also arose with respect to the Seventh Amendment, which has been construed in light of the English practice at the time of its adoption in 1791. See *supra* text accompanying notes 141-50.

262. *Colclasure v. Kan. City Life Ins. Co.*, 290 Ark. 585, 588, 720 S.W.2d 916, 917 (1986) ("Our current constitution was ratified in 1874, and, by that time, our common law was replete with decisions upholding the clean-up doctrine."). The court also held prior to merger that equity jurisdiction was "fixed and permanent" as of 1874 and could not be "enlarged or diminished." *German Nat'l Bank v. Moore*, 116 Ark. 490, 493, 173 S.W. 401, 402 (1915); *accord Bates v. Bates*, 303 Ark. 89, 91, 793 S.W.2d 788, 790 (1990); *Titan Oil & Gas, Inc. v. Shipley*, 257 Ark. 278, 290-91, 517 S.W.2d 210, 218 (1974); *Nethercutt v. Pulaski County Special Sch. Dist.*, 248 Ark. 143, 147, 450 S.W.2d 777, 779 (1970); *Patterson v. McKay*, 199 Ark. 140, 141, 134 S.W.2d 543, 545 (1939); *Marvel v. State ex rel. Morrow*, 127 Ark. 595, 598, 193 S.W. 259, 260 (1917); *Walls v. Brundidge*, 109 Ark. 250, 261, 160 S.W. 230, 233 (1913); *Hester v. Bourland*, 80 Ark. 145, 150, 95 S.W. 992, 993 (1906); *Powell v. Miller*, 30 Ark. App. 157, 161, 785 S.W.2d 37, 39 (1990). This was the approach taken in construing the 1836 constitution as well. See *Hempstead & Conway v. Watkins*, 6 Ark. 317, 357 (1845).

263. In *Colclasure*, for example, the court cited cases dating to 1837 in holding that the

B. Examples of Rigid View

Perhaps the most pertinent illustration of the strict historical approach is *Colclasure v. Kansas City Life Insurance Co.*,²⁶⁴ which involved a constitutional challenge to the cleanup doctrine. In that case, decided in 1986, the plaintiff brought a foreclosure action in chancery. The defendants' separate action in circuit court for breach of contract was transferred to chancery and treated as a compulsory counterclaim. Because Arkansas follows the traditional view that mortgage foreclosure is an equitable proceeding,²⁶⁵ the plaintiff's action in chancery was proper. Under the cleanup doctrine, the chancery court also had jurisdiction over the legal counterclaim.²⁶⁶

The supreme court rejected the defendants' argument that application of the cleanup doctrine violated Article II, Section 7. "Our current constitution was ratified in 1874, and, by that time, our common law was replete with decisions upholding the clean-up doctrine," Justice Dudley wrote for a unanimous court. "The constitution was obviously drafted with full knowledge of the clean-up doctrine, and the two are fully compatible."²⁶⁷

If the same case were brought in circuit court after merger, one could argue that there should be no right to a jury trial on any issues because the entire case would have been litigated in chancery, without a jury, before merger. Justice Stewart's dissenting opinion in *Beacon Theatres* takes this position with respect to the Seventh Amendment. He argued that the Federal Rules of Civil Procedure, which merged law and equity, did not "create a right to trial by jury where that right does not exist under the Constitution" and "were not intended to undermine the basic structure of equity jurisprudence developed over the centuries."²⁶⁸

cleanup doctrine was well-established by 1874 and thus did not violate Article II, Section 7. 290 Ark. at 588, 720 S.W.2d at 917 (citing *Saunders v. Wood*, 15 Ark. 24 (1854); *Price v. State Bank*, 14 Ark. 50 (1853); *Dugan v. Cureton*, 1 Ark. 31 (1837)). Territorial decisions do not appear to address the doctrine, but refer to the ability of a chancery court to "do full justice," *Reno v. Wilson*, 20 F. Cas. 533, 534 (Ark. Terr. 1830) (No. 11700a), and suggest that it could resolve legal issues when "the bill allege[d] the necessity of coming into chancery for a discovery." *Blakeley v. Biscoe*, 30 F. Cas. 966, 967 (Ark. Terr. 1831) (No. 18239).

264. 290 Ark. 585, 720 S.W.2d 916 (1986).

265. *Id.* at 587, 720 S.W.2d at 917.

266. *Id.* at 587-88, 720 S.W.2d at 917; see *Towell v. Shepherd*, 286 Ark. 143, 146, 689 S.W.2d 564, 565 (1985) (holding that exercise of jurisdiction under cleanup doctrine is proper only when determination of legal issues is "incidental or essential" to determination of equitable issues).

267. *Colclasure*, 290 Ark. at 588, 720 S.W.2d at 917 (citing *Saunders*, 15 Ark. 24; *Price*, 14 Ark. 50; *Dugan*, 1 Ark. 31). For a post-1874 case, see *State v. Churchill*, 48 Ark. 326, 3 S.W.2d 352 (1887).

268. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 518-19 (1959) (Stewart, J., dissenting).

A second Arkansas case is suggestive of Justice Stewart's dissent in *Ross*, a shareholder derivative suit. In *Hames v. Cravens*,²⁶⁹ Robinson and Hames (husband and wife) owned one percent and forty-nine percent, respectively, of the stock in a closely held Arkansas corporation. Cravens—who owned the other fifty percent—and Hames were the corporation's only directors. Robinson and Hames filed suit against Cravens in circuit court, alleging fraud and breach of fiduciary duty with respect to certain proprietary information. Cravens moved to dismiss, arguing that the case was actually a derivative suit to redress harm to the corporation, not to the plaintiffs individually. The circuit court agreed and dismissed the case for want of subject matter jurisdiction because derivative suits must be brought in chancery.²⁷⁰

The supreme court affirmed, 4-3. Writing for the majority, Chief Justice Arnold said that “a shareholder's derivative suit is an equity action maintainable in the chancery court,”²⁷¹ where, of course, there would have been no jury. Arguably, the same result should follow in the merged system. Because a derivative suit could have been heard only in chancery prior to merger, the argument goes, there is no right to a jury trial if the same action were brought today in circuit court. As Justice Stewart pointed out in his *Ross* dissent, a derivative suit “has always been treated as a single cause of action tried exclusively in equity.”²⁷² He criticized the holding in that case—that there is a Seventh Amendment right to jury trial on legal issues in derivative suits—as inconsistent with “history, logic, and over 100 years of firm precedent.”²⁷³

The dissenting opinion in *Hames* argued for a more flexible approach. It was written by Justice Newbern, who has since retired, and joined by Justices Brown and Corbin. Citing *Ross* with apparent approval,²⁷⁴ Justice Newbern emphasized that the underlying claim in *Hames* was legal in nature, as well as the fact that a closely held corporation was involved.²⁷⁵ In this situation, he contended, the court should depart from the traditional view that derivative suits must be maintained in courts of equity:

In Arkansas, our archaic division of law and equity courts leaves us with cases like this one in which the fundamental claim may be one at law, but it is thrown into an equity court, regardless of the remedy

269. 332 Ark. 437, 966 S.W.2d 244 (1998).

270. *Id.* at 440, 966 S.W.2d at 246.

271. *Id.* at 441, 966 S.W.2d at 246 (citing *Red Bud Realty Co. v. S.*, 153 Ark. 380, 241 S.W. 21 (1922)); *see also* *Magale v. Fomby*, 132 Ark. 289, 294, 201 S.W. 278, 279 (1918) (stating that a shareholder derivative suit “is cognizable in a court of chancery”).

272. *Ross v. Bernhard*, 396 U.S. 531, 546 (1970) (Stewart, J., dissenting).

273. *Id.* at 544.

274. *Hames*, 332 Ark. at 445, 966 S.W.2d at 249 (Newbern, J., dissenting).

275. *Id.* at 446-48, 966 S.W.2d at 249-50.

sought, because two hundred years ago the law courts were not flexible enough to allow such a case to be heard where it belonged.

There is a means to end this artificial situation when the standing question has to do with a close corporation.²⁷⁶

At least one Arkansas case can be read as holding that a derivative action is appropriate if the underlying claim is legal rather than equitable. In *Hooper v. Ragar*,²⁷⁷ a limited partner brought a derivative suit in circuit court against the general partners for fraud and retention of secret profits in connection with the sale of partnership real estate. The jury returned a verdict in favor of the plaintiff. On appeal, the defendants argued that the circuit court lacked subject matter jurisdiction, but apparently did not base this contention on the derivative nature of the suit. Instead, they disputed the plaintiff's characterization of the cause of action, asserting that it was essentially one for an accounting and settlement of partnership affairs and thus within chancery jurisdiction.²⁷⁸

The supreme court rejected this argument and refused to hold that the complaint stated an exclusively equitable cause of action.²⁷⁹ Although the court did not discuss the derivative nature of the suit, its opinion suggests that jurisdiction was proper in circuit court because the plaintiffs artfully drafted their complaint to state a claim for fraud rather than an accounting.²⁸⁰ As Professor Matthews has pointed out, the *Hooper* decision can be viewed as supporting the proposition that a shareholder's derivative suit could be brought in circuit court "if the underlying corporate claim is susceptible of characterization as a legal one."²⁸¹

Another area in which the Arkansas Supreme Court has taken a strict view of history involves statutory causes of action unknown at common law. Simply put, "if an action is purely of statutory origin, it is not one arising from the common law and no jury is required."²⁸² A number of cases

276. *Id.* at 446, 966 S.W.2d at 249.

277. 289 Ark. 152, 711 S.W.2d 148 (1986).

278. *Id.* at 153-54, 711 S.W.2d at 149-50.

279. *Id.* at 154, 711 S.W.2d at 150.

280. *Id.*, 711 S.W.2d at 150.

281. Mary Elizabeth Matthews, *The Shareholder Derivative Suit in Arkansas*, 52 ARK. L. REV. 353, 395 (1999). She concluded that the law is "unclear" as to jurisdiction in derivative suits and observed that "[t]his uncertainty seems to be just one facet of a continuing struggle on the part of the Arkansas courts to define the parameters of chancery jurisdiction." *Id.* at 396.

282. NEWBERN, *supra* note 106, § 24-2. However, the General Assembly is free to create a statutory right to trial by jury and has on occasion done so. *E.g.*, ARK. CODE ANN. § 14-17-211 (Michie Repl. 1998) (stating that appeals from county planning boards are tried de novo in circuit court, with right to trial by jury); *id.* § 14-56-425 (Michie Repl. 1998) (allowing appeals from municipal planning boards to be tried de novo in circuit court, with right to trial by jury); *id.* § 16-111-107 (Michie 1987) (allowing for jury trial in declaratory judgment

reflect this principle,²⁸³ but only one will be discussed here. In *Dunn v. Davis*,²⁸⁴ the plaintiff filed a "complaint in bastardy" alleging that the defendant was the father of her child. The circuit court, sitting without a jury in accordance with a statute,²⁸⁵ found that he was indeed the father. Among other things, the defendant argued on appeal that the circuit court erred in refusing his demand for a jury trial. The supreme court unanimously rejected this argument. In his opinion for the court, Justice Glaze said:

We have held that the constitutional right to trial by jury does not secure the right in all possible instances but only in those cases that were so triable at common law. Bastardy proceedings did not exist at common law, and this proceeding is a statutory one which is not in the nature of a suit at common law. Our legislature has provided that trials in bastardy pro-

actions when the issue would be tried by a jury in other civil actions); *id.* § 18-43-110 (Michie 1987) (providing for jury trial in action on laborer's lien); *see also* *Hardin v. Norsworthy*, 204 Ark. 943, 946, 165 S.W.2d 609, 611 (1942) (pointing out that "[t]his is not a common law action wherein trial by jury is guaranteed, nor is there a statutory provision according such right"); *Sharum v. Meriwether*, 156 Ark. 331, 246 S.W. 501 (1923) (finding that the statute governing proceedings in probate court provided for jury determination of insanity); *Chipman v. Perdue*, 135 Ark. 559, 205 S.W. 892 (1918) (holding that by statute, claimant against estate of decedent was entitled to jury trial); *Wernimont v. State ex rel. Little Rock Bar Ass'n*, 101 Ark. 210, 142 S.W. 194 (1911) (finding that a statute providing for disbarment proceedings against attorneys specified trial by jury). When the constitution does not guarantee trial by jury, the scope of the right is "dependent upon the language of the statute which confers it." *Sharum*, 156 Ark. at 334, 246 S.W.2d at 502.

283. *E.g.*, *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 33-34, 741 S.W.2d 233, 237-38 (1987) (holding there is no right to jury trial in action under attorney's lien statute); *Whitlock v. G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 160, 672 S.W.2d 48, 49 (1984) (stating there is no right to trial by jury in action seeking judicial review of state agency decision) *Jones v. Reed*, 267 Ark. 237, 248-49, 590 S.W.2d 6, 13 (1979) (same); *Scherz v. People's Nat'l Bank*, 214 Ark. 796, 798-99, 218 S.W.2d 86, 87-88 (1949) (reaffirming holding in *Sharum*, 156 Ark. at 334, 246 S.W. at 502, that constitution does not require jury trial in competency proceedings); *Civil Serv. Comm'n v. Matlock*, 205 Ark. 286, 290, 168 S.W.2d 424, 426 (1943) (holding that neither party was entitled to jury trial in statutory proceeding authorizing appeal to circuit court from decision of municipal civil service commission); *St. Louis Iron Mountain & S. Ry. Co. v. Hays & Ward*, 128 Ark. 471, 477, 195 S.W. 28, 31 (1917) (finding no right to jury trial in action under attorney's lien statute); *Kirkland v. State*, 72 Ark. 171, 177-78, 78 S.W. 770, 772 (1904) (finding jury trial not required in summary proceeding initiated pursuant to statute for the seizure and destruction of illegal liquor); *Williams v. Citizens*, 40 Ark. 290, 296-97 (1883) (stating no right to trial by jury in statutory proceeding in circuit court to review county judge's rejection of petition to prohibit sale of liquor within certain area); *Govan v. Jackson*, 32 Ark. 553, 557 (1877) (finding election contest is statutory proceeding in which constitution does not require jury trial).

284. 291 Ark. 492, 725 S.W.2d 853 (1987).

285. The complaint had initially been filed in the county court, which at the time had jurisdiction in bastardy cases. Pursuant to a statute then in effect, appeal was taken to circuit court for trial de novo. The statute expressly provided that trial was to be without a jury. *Id.* at 495, 725 S.W.2d at 855.

ceedings in circuit court be conducted without a jury, and we hold that law is constitutional.²⁸⁶

The court cited but did not distinguish or overrule an earlier case taking a rather different approach. In *Waddell v. State*,²⁸⁷ a paternity case was tried to the circuit court without a jury. On appeal, the supreme court held that defendant's motion for jury trial had been erroneously denied. The court pointed out that prior to its repeal in 1955, a statute had provided for jury trials in bastardy proceedings in county court. The court then said:

At common law there was no provision to affiliate a bastard child, but the common law in that respect has been changed by statute. Generally, no one has a constitutional right to a trial by jury of any action not so triable when the Constitution was adopted. . . . However, the right exists not only in cases in which it existed at common law and at the time of the adoption of the constitutional provisions preserving it, but it exists in cases substantially similar thereto, in which it would have existed had they been known to the common law.

The weight of authority is that a party is entitled to a jury trial in a bastardy proceeding when the request for such a trial is made.²⁸⁸

The third sentence of this quotation is consistent with the federal approach, which, as described previously, asks whether "a cause of action . . . was tried at law [in the eighteenth century] or is at least analogous to one that was."²⁸⁹ The *Dunn* decision reflects a markedly different view.²⁹⁰

286. *Id.* at 495, 725 S.W.2d at 855 (internal quotation and citations omitted).

287. 235 Ark. 293, 357 S.W.2d 651 (1962).

288. *Id.* at 294, 357 S.W.2d at 652. As early as 1877, the court suggested that the right to trial by jury applies in statutorily-created actions that "are of similar or analogous nature" to those that existed at common law. *Govan v. Jackson*, 32 Ark. 553, 577 (1877); *accord Kirkland*, 72 Ark. at 177, 78 S.W. at 772.

289. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (quoting *Markman v. Westover Instrumentalities, Inc.*, 517 U.S. 370, 376 (1996)).

290. The strict approach taken in *Dunn* could lead to the conclusion that the constitutional right to trial by jury does not extend to actions for contribution and wrongful death. At English common law, there was no contribution among joint tortfeasors. *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799). This was also the case in Arkansas. *Criner v. Brewer*, 13 Ark. 225, 226-27 (1853); *see also W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 422, 643 S.W.2d 526, 533 (1983); *Lacewell v. Griffin*, 214 Ark. 909, 912, 219 S.W.2d 227, 228-29 (1949); *Commercial Cas. Ins. Co. v. Leonard*, 210 Ark. 575, 576-78, 196 S.W.2d 919, 920 (1946); *McCulla v. Brown*, 178 Ark. 1011, 1016, 13 S.W.2d 314, 317 (1929); *Robert L. Jones, Jr., Note*, 1 ARK. L. REV. 190 (1947). In 1941, the legislature changed the law by enacting the Uniform Contribution Among Tortfeasors Act. *See ARK. CODE ANN.* §§ 16-61-201 to -212 (Michie 1987 & LEXIS Supp. 2001). Because contribution in this situation is statutory in nature and was unknown at common law, one could argue that there is no right to trial by jury under Article II, Section 7. *See Orejel v. York Int'l Corp., Inc.*, 678 N.E.2d 683, 690 (Ill. App. 1997) ("[T]he Contribution Act is a new statutory right created by the legislature and, as such, does not confer the [constitutional] right to a jury trial."). Under

Finally, there is the numbers question. In 1934, the supreme court held without much discussion that civil litigants have “the constitutional right to a trial by a jury of twelve persons.”²⁹¹ Sixty years later, the court held that a twelve-member jury is constitutionally required in criminal cases as well.²⁹²

a more flexible approach, a court would ask whether analogous causes of action would have been tried to a jury prior to adoption of the state constitution. *E.g.*, *Thermos Co. v. Spence*, 735 A.2d 484, 486-89 (Me. 1999).

The common law also did not recognize a right of recovery for the death of a human being killed by the negligence or wrongful act of another. *Baker v. Bolton*, 170 Eng. Rep. 1033 (H.L. 1808). This case “became the basis for the so-called American common law rule that there could be no recovery for wrongful death in the absence of a statute.” STUART M. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 1:1 (2d ed. 1975). In England, such a statute—Lord Campbell’s Act—was passed in 1846 and created a cause of action in favor of certain survivors for wrongful death. *See* 9 & 10 Vict. Ch. 93 (1846). This act became the model for American legislation, and in 1883 the Arkansas General Assembly adopted its version. *See* 1883 Ark. Acts 53; W.W. MANSFIELD, *DIGEST OF THE STATUTES OF ARKANSAS*, ch. 119, §§ 5225-5226 (Mitchell & Bettis 1884). As the Arkansas Supreme Court explained: “Prior to 1883, a cause of action for injuries resulting in death did not survive the deceased person or exist at common law, and our legislature enacted the above act obviously to give a cause of action to the widow and next of kin and the personal representative of the deceased person.” *Vines v. Ark. Power & Light Co.*, 232 Ark. 173, 175, 337 S.W.2d 722, 723 (1960). The present wrongful death act is codified at Arkansas Code Annotated section 16-62-102 (Michie 1987 & LEXIS Supp. 2001). Since 1883, the statutes have contemplated trial by jury. *See id.* § 16-62-102(f) (“The jury, or the court in cases tried without a jury, may fix such damages as will be fair and just compensation.”); MANSFIELD, *supra*, § 5226 (“[T]he jury may give such damages as they shall deem a fair and just compensation.”); *Fordyce v. McCants*, 51 Ark. 509, 515, 11 S.W. 694, 695-96 (1889) (holding that trial court erred in jury instruction as to damages). Because the wrongful death action was unknown at common law, however, there is presumably no constitutional right to a jury trial. *See Leiker v. Gafford*, 778 P.2d 823, 848 (Kan. 1989); *Greist v. Phillips*, 906 P.2d 789, 796-97 (Or. 1995).

291. *W. Union Co. v. Philbrick*, 189 Ark. 1082, 1084, 76 S.W.2d 97, 98 (1934). The court relied heavily on a 1928 constitutional amendment adding to Article II, Section 7 a new clause providing:

[I]n all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury; provided, however, that where a verdict is returned by less than twelve jurors, all the jurors consenting to such verdict shall sign the same.

ARK. CONST. of 1874, art. II, § 7, amended by ARK. CONST. amend. 16. According to the court, “[t]his amendment . . . clearly recognizes that a jury must consist of twelve jurors.” *Philbrick*, 189 Ark. at 1084, 76 S.W.2d at 97. The court also cited its earlier decision in *Minnequa Cooperage Co. v. Hendricks*, 130 Ark. 264, 197 S.W. 280 (1917), which prompted the constitutional amendment. *Philbrick*, 189 Ark. at 1084, 76 S.W.2d at 97. In that case, the court held unconstitutional a statute providing for a verdict based on the concurrence of nine of the twelve jurors. *Minnequa*, 130 Ark. at 268-69, 197 S.W. at 281-82. In a case arising under the 1836 Constitution, the court observed that “[i]t is a well ascertained fact, that the common law jury consisted of twelve men, and as a necessary consequence, since the constitution is silent on the subject, the conclusion is irresistible that the framers . . . intended to require the same number.” *Larillian v. Lane & Co.*, 8 Ark. 372, 374-75 (1848).

292. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 434 (1994) (striking down statute allowing six jurors in misdemeanor cases); *see* Timothy N. Holthoff, Note, *Constitutional Law—*

Justice Hays dissented in the latter case, arguing that "every feature of the jury as it existed at common law was not necessarily included in the term 'jury' found in Article 2, § 7 of the Arkansas Constitution."²⁹³ The majority disagreed and, in the process, expressly rejected the rationale of *Williams v. Florida*,²⁹⁴ in which the Supreme Court of the United States held that the Sixth Amendment did not require a twelve-member jury. The *Williams* opinion described the common-law number as "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance except to mystics."²⁹⁵ Subsequently, the Court held in *Colgrove v. Battin*²⁹⁶ that the Seventh Amendment does not require twelve-person juries in civil cases.

C. Examples of a More Flexible Approach

Among the decisions suggesting a less rigid historical view is *Hopper v. Garner*,²⁹⁷ a usurpation-of-office case²⁹⁸ involving the city attorney of Horseshoe Bend. Hopper filed the action against Garner requesting ouster of Garner from the office of city attorney and the fees and emoluments he received while serving in that capacity. The jury rendered a verdict for Garner. On appeal, Hopper argued that Garner was not entitled to a jury trial under Article II, Section 7. The supreme court disagreed and affirmed.

Justice Imber, for a unanimous court, relied on *Wheat v. Smith*²⁹⁹ in stating that "there was no common law right to a jury trial in usurpation-of-office cases when the plaintiff merely requested ouster of the alleged usurper."³⁰⁰ According to the *Wheat* opinion, "the right did not extend at common law to a civil proceeding in the nature of *quo warranto* against a public officer," and the statute permitting suit for usurpation of office "does not enlarge the right nor attempt to extend it to cases of this or a like nature."³⁰¹ As Justice Imber pointed out, however, the court had suggested in *Wheat* that "such a right might exist if the plaintiff also made a claim for

Twelve Angry People: Arkansas Constitution Guarantees Right to Trial by Jury of Twelve Persons in Criminal Cases, 18 U. ARK. LITTLE ROCK L.J. 489 (1996). In *State v. Cox*, 8 Ark. 436 (1848), the court concluded that the 1836 Constitution guaranteed a criminal defendant "a jury of twelve men." *Id.* at 447.

293. *Byrd*, 317 Ark. at 616, 879 S.W.2d at 439 (Hays, J., dissenting).

294. 399 U.S. 78 (1970).

295. *Id.* at 102 (internal quotation omitted).

296. 413 U.S. 149 (1973).

297. 328 Ark. 516, 944 S.W.2d 540 (1997).

298. ARK. CODE ANN. § 16-118-105(b) (Michie 1987). This provision dates to the Civil Code. See CIVIL CODE, *supra* note 93, §§ 525-530.

299. 50 Ark. 267, 7 S.W. 161 (1887).

300. *Hopper*, 328 Ark. at 521, 944 S.W.2d at 543.

301. 50 Ark. at 275, 7 S.W. at 164.

fees and emoluments.”³⁰² In expressly recognizing the right in *Hopper*, Justice Imber also relied on *Louisiana & Northwest Railroad Co. v. State*,³⁰³ a 1905 decision holding that there was a constitutional right to trial by jury in a usurpation-of-franchise case in which the Attorney General had “requested ouster and the return of the usurped property”—i.e., “the railroad franchise and the contractual rights growing out of it.”³⁰⁴

Apparently anticipating this problem, Hopper argued that there was no factual issue to be resolved by the jury because the parties had stipulated to the amount of fees that Garner had earned.³⁰⁵ Justice Imber responded that this did not matter. “Regardless of whether the amount of fees is liquidated or disputed, the jury must still decide the underlying factual issue of who is rightfully entitled to the office.”³⁰⁶ Consequently, she concluded that “the trial court did not err when it granted Garner his constitutional right to a jury trial in this case.”³⁰⁷

The court did not explain in *Hopper* why the jury must decide the “underlying issue” of entitlement to the office, a question that would have been resolved by a judge had no fees or emoluments been sought. Nor is any explanation offered in the *Wheat* case. The *Louisiana & Northwest Railroad* decision is grounded in the notion that “property in its highest sense is involved” when a lawsuit seeks to terminate a corporate charter or franchise and would impact “the manifold contractual rights growing out of them.”³⁰⁸ This case undoubtedly supports recognition of a right to trial by jury in usurpation of office cases if return of fees or emoluments is sought—such funds constitute “property” even though the office itself does not.³⁰⁹ But it does not inexorably follow that the jury must decide entitlement to the office when a claim for fees or emoluments is made.

The holding in *Hopper* that both issues are to be decided by the jury can be viewed as a preference for trial by jury. *Hopper* is a mixed case in the sense that it involved one issue that, standing alone, would be determined by a judge (entitlement to office) and another that must be decided by a jury (fees and emoluments). The supreme court could presumably have

302. *Hopper*, 328 Ark. at 521, 944 S.W.2d at 543; see *Wheat*, 50 Ark. at 275, 7 S.W. at 164 (noting that “[n]o claim for fees or emoluments was made” in that case).

303. 75 Ark. 435, 88 S.W. 559 (1905).

304. *Hopper*, 328 Ark. at 521, 944 S.W.2d at 543; see *La. & Northwest R.R. Co.*, 75 Ark. at 444, 88 S.W. at 562 (“In quo warranto proceedings at common law brought to vacate charters, trial by jury seems universally to have been accorded to determine the facts.”).

305. *Hopper*, 328 Ark. at 522, 944 S.W.2d at 543.

306. *Id.*, 944 S.W.2d at 543.

307. *Id.*, 944 S.W.2d at 543.

308. 75 Ark. at 444, 88 S.W. at 562.

309. See *id.* at 443-44, 88 S.W. at 562 (pointing out that the United States Supreme Court had held that “a public office was not property” and that neither fees nor emoluments had been involved in *Wheat*).

maintained this division of labor, particularly where, as in *Hopper*, the amount of fees was undisputed. The choice not to do so arguably reflects a preference for jury trial that could inform the court's thinking when it encounters mixed law and equity cases in the merged system.

A preference for trial by jury is expressly stated in *Walker v. First Commercial Bank*.³¹⁰ There the plaintiffs sued the defendant bank in Pulaski County circuit court for lender liability, contending that their coal mining business failed because the bank had made improper management decisions, failed to provide promised long-term financing, and transferred funds without authorization. The complaint included claims for breach of contract, negligence, fraud, duress, and tortious interference. In its answer, the bank asserted an equitable setoff and recoupment for the amount of the unpaid loans owed by plaintiffs. On the basis of the equitable defense, the circuit court transferred the case, over plaintiff's objections, to the chancery court, which ultimately ruled in the bank's favor on the merits.³¹¹

The supreme court, in an opinion by Special Justice Chaney,³¹² unanimously reversed, concluding that the setoff defense was not "exclusively cognizable" in equity.³¹³ "The defense of setoff or recoupment is available in the action at law for the liquidated sum owed by [plaintiffs] to [defendant] for the unpaid loans which arose from the same lending relationship between the parties that gave rise to [plaintiff's] lender liability claim."³¹⁴ Because there was "no peculiar equity . . . that would mandate a transfer to chancery," the plaintiffs "were wrongfully deprived of a jury trial on their lender liability claim as guaranteed to them by Article 2, Section 7."³¹⁵

Justice Chaney also emphasized that the "right to jury trial is a fundamental constitutional right that is protected by the Constitution of Arkansas, and procedural rules will not be applied to diminish [that] right."³¹⁶ He added:

310. 317 Ark. 617, 880 S.W.2d 316 (1994).

311. *Id.* at 619-20, 880 S.W.2d at 317-18.

312. The governor appointed Donald Price Chaney, Jr., as special associate justice for this case to serve in place of Justice Brown, who had recused. This practice was authorized by Article VII, Section 9 of the 1874 Constitution. Amendment 80 repealed that provision, but provides that the governor "shall commission a Special Justice" if a member of the supreme court "is disqualified or temporarily unable to serve." ARK. CONST. amend. 80, § 13(A). The governor may choose among "retired Justices or Judges, active Circuit or District Judges, or licensed attorneys" *Id.* § 13(D).

313. *Walker*, 317 Ark. at 622, 880 S.W.2d at 318. Under a statute that was originally part of the Civil Code, either party in an action commenced at law "shall have the right, by motion, to have any issue, which before the adoption of this code was exclusively cognizable in chancery, tried in the manner prescribed in this code in cases of equitable proceedings." ARK. CODE ANN. § 16-57-106 (Michie 1987); see CIVIL CODE, *supra* note 93, § 10.

314. *Walker*, 317 Ark. at 622, 880 S.W.2d at 319.

315. *Id.*, 880 S.W.2d at 319.

316. *Id.*, 880 S.W.2d at 319. In support of this proposition, the court cited *Bussey v. Bank*

A defendant may not assert an equitable counterclaim merely to avail himself of chancery court jurisdiction and deprive the plaintiff of the right to a trial by jury. It is only where an equitable defense is exclusively cognizable in equity that a transfer to chancery should be authorized, which is not present here.³¹⁷

Setoff and recoupment have different origins.³¹⁸ The latter, which developed at common law, allowed the defendant in an action based on contract to defeat or diminish the plaintiff's recovery by showing facts arising from the transaction sued upon or related to the subject matter of the claim.³¹⁹ Recoupment could be used only defensively, and the defendant "could recover nothing for himself, whether plaintiff's claim stood or fell,"³²⁰ even though "the claim recouped is greater in amount than the plaintiff's claim."³²¹

As setoff initially emerged in equity, it was also a defensive mechanism; by asserting it, the defendant "waived any excess over the plaintiff's claim."³²² In early American law, however, the defendant was often allowed an affirmative recovery,³²³ and this was so in Arkansas.³²⁴ From its incep-

of Malvern, 270 Ark. 37, 603 S.W.2d 426 (Ct. App. 1980), in which the court of appeals rejected the argument that defendants had waived their right to a jury trial. Plaintiff had argued that there had been a waiver because defendants failed to object to the trial judge's erroneous reliance on cases decided before adoption of the Rules of Civil Procedure and did not call to his attention to the change in the law. The court of appeals said:

We believe that the trial court erred in taking the case away from the jury and that this case should be reversed irrespective of the fact that counsel for [defendants] failed to object to the error. We agree with [defendants'] contention that the right to jury trial is a constitutional right which is so fundamental that the rule that cures error when counsel fails to object ought not to be readily applied to the denial of rights protected in the Constitution of Arkansas and described therein as "inviolable." Procedural rules governing jury trials are not intended to diminish the right to a jury trial. These rules should be interpreted so as not to give effect to dubious waivers of rights.

Id. at 43, 603 S.W.2d at 430 (citation omitted). The supreme court expressly approved *Bussey* in two criminal cases holding that a contemporaneous objection is not required. See *Calnan v. State*, 310 Ark. 744, 748-49, 841 S.W.2d 593, 596 (1992); *Winkle v. State*, 310 Ark. 713, 717, 841 S.W.2d 589, 591 (1992).

317. *Walker*, 317 Ark. at 622, 880 S.W.2d at 319.

318. See generally CLARK, *supra* note 55, § 100; FLEMING JAMES, JR., CIVIL PROCEDURE § 10.14 (1965); 3 THEODORE SEDGWICK, A TREATISE ON THE LAW OF DAMAGES §§ 1030-1040 (9th ed. 1913).

319. Originally, recoupment was "a deduction from damages because of part payment, former recovery, or some analogous fact." JAMES, *supra* note 318, § 10.14.

320. *Id.*

321. SEDGWICK, *supra* note 318, § 1049; see, e.g., *Brunson v. Martin*, 17 Ark. 270, 271 (1856) (defendant asserting recoupment "cannot have a balance certified in his favor . . . but he must be content to have it go in abatement, in whole or in part of the plaintiff's demand").

322. JAMES, *supra* note 318, § 10.14.

323. *Id.*; see also SEDGWICK, *supra* note 318, § 1033 (distinguishing setoff and recoup-

tion, equity allowed setoff under some circumstances even though the defendant's claim was unrelated to the plaintiff's—if, for example, the plaintiff was insolvent or mutual debts existed.³²⁵ By virtue of English statutes adopted in the early 1700s, setoff was also allowed in these situations in actions at law.³²⁶ Equity thereafter confined the use of setoff in equitable suits to those situations in which the demands, had they been legal, could have been set off under the statutes, unless special equitable grounds for relief were established.³²⁷ The English statutes, however, did not become part of the common law of Arkansas.³²⁸

Because the constitutional right to trial by jury applies “only to cases at common law in which the issues of fact were triable by jury,”³²⁹ one can argue that the right did not extend to matters asserted via setoff. If that is so, then the *Walker* case represents a departure from a rigidly historical approach to Article II, Section 7. It is true that setoff was available as a defense at law in Arkansas by 1818, thanks to a territorial statute applicable in cases of mutual debt.³³⁰ A similar provision adopted by General Assembly in 1837³³¹ was replaced by a section of the 1869 Civil Code providing that a setoff “can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court.”³³² The latter was amended in 1917 to allow setoff, based on tort as

ment in that “defendant can have a balance certified in his favor” in the former but not the latter).

324. *Brunson*, 17 Ark. at 271 (“[W]here a defendant elects to use his claim by way of recoupment, he cannot have a balance certified in his favor, as in case of set-off.”).

325. CLARK, *supra* note 55, § 100; *see also* *Wheat v. Dotson*, 12 Ark. 699, 703 (1852) (“[R]ecoupment differs from off-set . . . in being confined to matters only arising out of and connected with the contract upon which the suit is brought.”).

326. 4 Anne, c. 17, § 11 (1705) (suits by insolvents); 2 Geo. II, c. 22, § 23 (1729), amended by 8 Geo. II, c. 24 (1735) (mutual debts).

327. CLARK, *supra* note 55, § 100.

328. *Small v. Strong*, 2 Ark. 198, 206 (1840). A territorial enactment from 1816, when Arkansas was part of the Missouri Territory, adopted “[t]he common law of England, which is of a general nature, and all statutes of the British Parliament in aid of, or to supply the defects of, the said common law, made prior to the fourth year of James the First, and of a general nature.” STEELE & M’CAMPBELL, *supra* note 77, at 130. This provision remained in force until statehood, and thereafter the Arkansas General Assembly passed a similar statute. ARK. REV. STAT. ch 28, § 1 (1837). The present codification of the statute, ARK. CODE ANN. § 1-2-119 (Michie Repl. 1996), uses the date March 24, 1606, when the fourth year of the reign of James I began. He became king on March 24, 1603. T.D. CRAWFORD & HAMILTON MOSES, Note to ch. 1432, DIGEST OF THE STATUTES OF ARKANSAS 544 (1921).

329. *Kirkland v. State*, 72 Ark. 171, 177, 78 S.W. 770, 772 (1904).

330. STEELE & M’CAMPBELL, *supra* note 77, at 352-53; *see Small*, 2 Ark. at 206-07.

331. ARK. REV. STAT. ch. 139, § 1 (1837). On the equity side of the circuit court, setoffs were allowed “[i]n suits for the payment or recovery of money . . . in the same manner, and with like effect, as in actions at law.” *Id.* ch. 23, § 5.

332. CIVIL CODE, *supra* note 93, § 119.

well as contract, "in any action for the recovery of money,"³³³ and this provision remains in effect today.³³⁴ As discussed previously, however, the Arkansas Supreme Court has taken the position that there is no constitutional right to a jury trial in statutory proceedings that did not exist at common law.³³⁵

There appear to have been no Arkansas statutes expressly permitting setoff in actions at law on the basis of the plaintiff's insolvency. As early as 1909, however, the supreme court recognized that "the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference."³³⁶ Sixty years later, in *Poultry Growers, Inc. v. Westark Production Credit Ass'n*,³³⁷ the court relied on this principle in holding that the circuit court erred in denying a motion to transfer the case to chancery where the defendants had pleaded equitable setoff.³³⁸ In *Walker v. First Commercial Bank*, insolvency was also the asserted basis for the equitable setoff and transfer from circuit court to chancery, but there the court held that the transfer had "wrongfully deprived" the plaintiffs of their right to a jury trial.³³⁹

The opinion in *Walker* can be read as holding either that (1) setoff is available at law when the plaintiff is insolvent, thus offering the defendant an adequate legal remedy and depriving the chancery court of jurisdiction, or (2) this case really involved recoupment because the bank's claim arose from the same transaction as the plaintiff's claim (the loan) or was at least related to its subject matter (the lending relationship between the parties). With respect to the latter, the court held that the setoff statute "is broad enough to include both setoff and recoupment."³⁴⁰ The court presumably

333. 1917 Ark. Acts 267, sec. 2.

334. ARK. CODE ANN. § 16-63-206(a) (Michie 1987). Paragraph (d) of this statute, under which a defendant who fails to setoff a debt against the plaintiff's demand is "barred from recovering costs" in a subsequent suit on the debt, dates to 1837. ARK. REV. STAT. ch. 139, § 7 (1837).

335. E.g., *Dunn v. Davis*, 291 Ark. 492, 495, 725 S.W.2d 853, 855 (1987); see *supra* text accompanying notes 282-90.

336. *Ewing-Merkel Elec. Co. v. Lewisville Light & Water Co.*, 92 Ark. 594, 597, 124 S.W. 509, 510 (1909) (quoting *N. Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 616 (1894)). The court also adopted the traditional view that "'the non-residence of the party against whom the set-off is asserted is good ground for equitable relief.'" *Id.*

337. 246 Ark. 995, 440 S.W.2d 531 (1969).

338. *Id.* at 1000-01, 440 S.W.2d at 533-34.

339. 317 Ark. 617, 622, 880 S.W.2d 316, 319 (1994).

340. *Id.* at 621, 880 S.W.2d at 318. The court suggested in *Walker* that it had not previously distinguished recoupment and setoff. *Id.* That is not so. For example, in *Brunson v. Martin*, 17 Ark. 270 (1856), the court said that "where a defendant elects to use his claim by way of *recoupment*, he cannot have a balance certified in his favor, as in case of *set-off*." *Id.* at 271 (emphasis in original). In *Wheat v. Dotson*, 12 Ark. 699 (1852), the court stated that

considered this construction necessary because the common law permitted recoupment only as a defensive measure, while setoff is not so limited.³⁴¹

The bank would have no doubt preferred to recover a judgment on its note in *Walker* had the plaintiff's lender liability claim proved unsuccessful.³⁴² Also, recoupment at common law was available only when the plaintiff had sued in contract, while the statute allows setoff "in any action for the recovery of money."³⁴³ More importantly for present purposes, the notion that setoff is available at law is at odds with Arkansas history and requires trial by jury under circumstances in which such a right did not exist at common law. This result, considered in light of the broad language from the opinion quoted above, suggests a preference for trial by jury.³⁴⁴

In addition to the *Hopper* and *Walker* cases, the supreme court has adopted a flexible historical approach with respect to bifurcation of issues for trial, a procedure unknown at common law³⁴⁵ but familiar in courts of

"recoupment differs from off-set . . . in being confined to matters only arising out of and connected with the contract upon which the suit is brought, and in having no regard to whether or not such matters be liquidated or unliquidated." *Id.* at 703.

341. *Brunson*, 17 Ark. at 271.

342. On remand after the supreme court's decision and transfer to circuit court, a jury returned a \$22.5 million verdict for the plaintiffs. The trial judge reduced this amount by a setoff of \$7.3 million and ordered a remittitur of \$7 million, the result being a judgment of \$8.2 million. The supreme court reversed, holding that plaintiff business entities lacked capacity and that the individual plaintiff did not have standing, either as a stockholder or guarantor, to pursue the various causes of action asserted. *First Commercial Bank v. Walker*, 333 Ark. 100, 104, 969 S.W.2d 146, 148 (1998).

343. ARK. CODE ANN. § 16-63-206(a) (Michie 1987). Prior to 1917, the plaintiff's cause of action had to be "founded on contract." CIVIL CODE *supra* note 93, § 119.

344. Perhaps the broadest statement in *Walker* is that "[a] defendant may not assert an equitable counterclaim merely to avail himself of chancery court jurisdiction and deprive the plaintiff of the right to a trial by jury." 317 Ark. at 622, 880 S.W.2d at 319. For this proposition, the court cited *Axley v. Hammock*, 185 Ark. 939, 50 S.W.2d 608 (1932), but that case does not go nearly so far. *Axley* was a slander action in which the defendant asserted a counterclaim for wrongful appropriation of funds and asking for an accounting. On the defendant's motion and over the plaintiff's objection, the circuit court transferred the case to chancery. The supreme court granted the plaintiff's petition for a writ of certiorari, holding that the chancery court "has no jurisdiction in a slander suit." *Id.* at 946, 50 S.W.2d at 611. Moreover, the defendant had set out what appeared to be a permissive counterclaim, and the pertinent statute did not require that the cause of action set out in the counterclaim arise out of the same transaction or occurrence as the plaintiff's action. If the assertion of a permissive counterclaim required a transfer to chancery, the statute "would violate the Constitution." *Id.* at 945, 50 S.W. at 611. It was in this context that the court said that

[t]he right to trial by jury would not remain inviolate if, in an action only cognizable in a court of law, the defendant could interpose defenses and cause a transfer to a court of chancery, and thereby deprive the plaintiff of the right to trial by jury, and the defendant cannot secure a transfer to chancery of a case of which the court of chancery has no jurisdiction.

Id. at 946, 50 S.W.2d at 611.

345. Margaret M. Gammill, Note, *Civil Procedure Rule 42(b)—Bifurcation of the Issues*

equity.³⁴⁶ Since the adoption of the Federal Rules of Civil Procedure in 1938, the procedure has been available in the federal courts, regardless of whether the case is legal, equitable, or "mixed." Rule 42(b), as amended in 1966, provides that "[t]he court in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of . . . any separate issue."³⁴⁷ The corresponding Arkansas rule contains this same language.³⁴⁸

The federal rule has withstood a challenge that bifurcation violates the Seventh Amendment. The leading case is *Hosie v. Chicago & Northwestern Railway Co.*,³⁴⁹ a personal injury action in which the trial judge ordered separate trials on the issues of liability and damages.³⁵⁰ In the liability phase of the trial, the jury returned a verdict for the defendant railroad. On appeal, the plaintiff argued, among other things, that the trial court's use of bifurcation violated his constitutional right to trial by jury. The Seventh Circuit disagreed, holding that "the essential character of a trial by jury was preserved." The court added that "the Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue."³⁵¹

In support of this proposition, the court cited *Gasoline Products Co. v. Champlin Refining Co.*,³⁵² which addressed the constitutionality of a partial remand after appeal. The defendant, Champlin, had prevailed on a counter-

of Liability and Damages and Trial, 5 U. ARK. LITTLE ROCK L.J. 405, 406 (1982) (finding no bifurcation of liability and damages at common law). Apparently the only situation in bifurcation was permitted at law was in the action for account-render. By Blackstone's time, however, the procedure had become complicated and "lapsed into disuse." Lewis Mayers, *The Severance for Trial of Liability from Damage*, 86 U. PA. L. REV. 389, 392 (1938). Its decline was "in the main contemporaneous with the development of the equitable action for an account; and Blackstone indeed assigns the procedural superiority of the equitable action as the reason for the decline of the action at law." *Id.*

346. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 715 (2000).

347. FED. R. CIV. P. 42(b). The 1966 amendment added the provision authorizing a separate trial when "conducive to expedition and economy," as well as a clause directing the court, in ordering separate trials, to "always preserv[e] inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or given by a statute of the United States." 9 WRIGHT & MILLER, *supra* note 31, at 426 n.1. The original version of the rule was derived from Federal Equity Rule 29, statutes in New York and California, and two models rules advocated by the American Judicature Society. Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059, 1061 (1962).

348. ARK. R. CIV. P. 42(b). The Arkansas rule lacks a clause corresponding to the federal rule's admonition regarding the right to trial by jury. See *supra* note 347. The Reporter's Notes accompanying the Arkansas rule shed no light on this omission.

349. 282 F.2d 639 (7th Cir. 1960).

350. *Id.* at 640. The trial court acted pursuant to a local rule based on Rule 42(b) but that specifically referred to personal injury cases. *Id.* at 640 & n.1.

351. *Id.* at 643.

352. 283 U.S. 494 (1931).

claim, but the First Circuit Court of Appeals held that the trial judge had given an erroneous instruction on damages. Instead of remanding the entire case for a new trial, the appellate court left intact the liability finding and remanded for a retrial limited to the issue of damages. The Supreme Court agreed with Champlin that the partial remand was invalid because "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."³⁵³

However, the Court squarely rejected the argument that the partial remand was a per se violation of the Seventh Amendment, even though "at common law there was no practice of setting aside a verdict in part."³⁵⁴ The Seventh Amendment, the Court said, "does not exact the retention of old forms of procedure."³⁵⁵ Moreover, it

does not prohibit the introduction of new methods for ascertaining what facts are in issue . . . or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury.³⁵⁶

Relying on *Hosie*, the Arkansas Supreme Court held in *Hunter v. McDaniel Construction Co.*³⁵⁷ that the bifurcation of liability and damages in a personal injury action did not infringe on the right to trial by jury guaranteed by Article II, Section 7.³⁵⁸ In addition to citing *Hosie*, the court pointed out that Arkansas Rule 42(b) is based on the corresponding federal rule and that trying the liability issue separately from damages "is common in the federal practice."³⁵⁹ Three justices dissented on this point, arguing that "[t]he chief evil resulting from the severance of the liability claim from the damage claim is that it is likely to cause the jury to be prone to generally find in favor of the defendant in order to prevent a second trial on the damages."³⁶⁰ This statement reflects the notion, expressed by other critics of bifurcation, that the procedure fundamentally alters the nature of the jury trial that had existed at common law.³⁶¹

353. *Id.* at 500.

354. *Id.* at 497.

355. *Id.* at 498.

356. *Id.*

357. 274 Ark. 178, 623 S.W.2d 196 (1981).

358. *Id.* at 180, 623 S.W.2d at 198.

359. *Id.*, 623 S.W.2d at 198.

360. *Id.* at 183-84, 623 S.W.2d at 200 (Purtle, J., dissenting). Chief Justice Adkisson and Justice Hays joined Justice Purtle's dissent. *Id.* at 184, 623 S.W.2d at 200 (Purtle, J., dissenting).

361. *E.g.*, Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example*

Had the Arkansas Supreme Court applied a strict historical test, it could easily have invalidated Rule 42(b). As *Gasoline Products* indicates, the common law did not permit a verdict to be set aside in part. This has long been the rule in Arkansas; a verdict is "the foundation of the judgment at law and cannot be divided by the court."³⁶² This view has prevailed despite adoption of Rule 59(a) of the Arkansas Rules of Civil Procedure, which, as initially promulgated, provided that a new trial could be granted "on all or part of the issues."³⁶³ The rule was amended in 1994 after the court made clear in *Smith v. Walt Bennett Ford, Inc.*³⁶⁴ that it was unwilling to abandon the concept that the verdict is an indivisible entity.³⁶⁵ That being so, the court's decision in *Hunter* is certainly consistent with the more flexible historical approach to the right to trial by jury employed by the United States Supreme Court.

Finally, mention should be made of cases involving procedural devices that were developed in equity. In contrast to *Hames v. Cravens*, which held that a shareholder derivative suit could be brought only in chancery, the supreme court made plain prior to merger that interpleader, another creature of equity, was available in circuit as well as chancery courts. In *Cessna Finance Corp. v. Skelton*,³⁶⁶ the appellant sought garnishment in circuit court with respect to funds held by the county sheriff, who subsequently filed a separate interpleader action in chancery naming the appellant, as well as others, as possible claimants. The garnishment case was then transferred to chancery on the sheriff's motion. On appeal, the supreme court held that the transfer was proper under "the general rule that interpleader takes precedence over actions filed earlier involving the same subject matter."³⁶⁷ However, the court also stated that "the sheriff could have had his interpleader as

of the Questionable Use of Rule Making Power, 14 VAND. L. REV. 831, 832-34 (1961).

362. *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 608, 864 S.W.2d 817, 827 (1993). Consequently, an appellate court in Arkansas "will not affirm a judgment on the issue of liability and remand for a partial new trial on the issues of damages." *Id.*, 864 S.W.2d at 827; see also *Avery v. Ward*, 326 Ark. 829, 837, 934 S.W.2d 516, 521 (1996); *Johnson v. Gilliland*, 320 Ark. 1, 9, 896 S.W.2d 856, 860 (1995); *Jacuzzi Bros., Inc. v. Todd*, 316 Ark. 785, 791, 875 S.W.2d 67, 70 (1994); *McVay v. Cowger*, 276 Ark. 385, 386, 635 S.W.2d 249, 250 (1982) (collecting cases dating to 1900). However, a new trial can on occasion be avoided by remittitur if the reversible error "relates to a separable item of damages." *Jacuzzi Bros.*, 316 Ark. at 791, 875 S.W.2d at 70.

363. ARK. R. CIV. P. 59(a), reprinted in 3A ARK. STAT. ANN. app. 425 (Bobbs-Merrill Repl. 1979).

364. 314 Ark. 591, 608, 864 S.W.2d 817, 827 (1993).

365. See Addition to Reporter's Notes, 1994 amendment, Ark. R. Civ. P. 59.

366. 287 Ark. 378, 700 S.W.2d 44 (1985).

367. *Id.* at 380, 700 S.W.2d at 46 (citing *Goad v. Goad*, 238 Ark. 12, 377 S.W.2d 822 (1964)).

a defendant in the circuit court garnishment action" pursuant to Rule 22 of the Arkansas Rules of Civil Procedure.³⁶⁸

Intervention, another historically equitable device, was employed before merger to assert claims for damages in circuit court.³⁶⁹ Similarly, class actions, which developed in equity, were routinely brought in circuit court when legal relief was sought.³⁷⁰ This practice in general and the *Cessna* decision in particular suggest, as the Supreme Court held in *Ross*, that the right to jury trial "should not turn on how the parties happen to be brought into court."³⁷¹

VI. CONCLUSION

While some agree with Blackstone's praise of trial by jury,³⁷² the institution has long been criticized; Mark Twain, for example, described "one of those sorrowful farces, in Virginia, which we call a jury trial."³⁷³ Judge Jerome Frank, a noted critic of the system,³⁷⁴ said in an opinion more than fifty years ago that "the jury . . . has infinite capacity for mischief, for

368. *Id.*, 700 S.W.2d at 46. This position is consistent with the Reporter's Notes accompanying Rule 22, which state in pertinent part:

Prior Arkansas law required interpleader actions to be brought in chancery court. The decisions under FRCP 22 make it clear that an interpleader is equitable in nature. Under this rule, however, interpleader actions are not limited to courts of equity.

Reporter's Notes, ARK. R. CIV. P. 22 (citations omitted). Well before adoption of the rules, the Arkansas Supreme Court rejected an argument that interpleader proceedings in chancery resulted in a denial of the right to trial by jury. In *Dennis v. Equitable Life Assurance Society*, 191 Ark. 825, 88 S.W.2d 76 (1935), a widow claiming benefits under her husband's group life insurance policy brought suit against the insurance company in circuit court. The company asked that its answer be treated as an interpleader and moved for a transfer to chancery. The motion was granted, and the chancery court ruled in favor of the widow but did not require the insurance company to pay the statutory penalty or attorney's fees. The widow argued on appeal that she had been denied a jury trial. The supreme court rejected this argument as "without merit," pointing out that the insurance company had "made no dispute as to its liability for the fund, and was not attempting in any respect to defeat a recovery thereof." *Id.* at 833, 88 S.W.2d at 80.

369. *E.g.*, *E. Tex. Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986).

370. *E.g.*, *SEECO, Inc. v. Hales*, 341 Ark. 672, 22 S.W.3d 157 (2000).

371. *Ross v. Bernhard*, 396 U.S. 531, 541 n.15 (1970).

372. *E.g.*, *Arnold*, *supra* note 11, at 2 ("I should begin by admitting that I am for juries. . . . I believe that juries are a good thing in civil cases and in criminal cases, in complex matters as well as simple ones."). See generally J. KENDALL FEW, *IN DEFENSE OF TRIAL BY JURY* (1993) (collecting materials).

373. MARK TWAIN, *ROUGHING IT* 320 (Harriet E. Smith & Edgar M. Branch, eds., 1993). Twain added that trial by jury "would prove the most ingenious and infallible agency for defeating justice that human wisdom could contrive." *Id.* (emphasis in original).

374. See generally JEROME FRANK, *COURTS ON TRIAL* 108-25 (1949).

twelve men can easily misunderstand more law in a minute than the judge can explain in an hour."³⁷⁵ Professor James, writing shortly before the Federal Rules of Civil Procedure brought about the merger of law and equity in the federal courts, argued that the right to trial by jury "should not be expanded" and if anything "should be cut down" because "[t]his method of settling disputes is expensive and dilatory—perhaps anachronistic."³⁷⁶ More recently, juries have been under fire for large verdicts that "establish de facto public policy."³⁷⁷

Since merger of law and equity in the federal courts, however, the Supreme Court has applied the Seventh Amendment with a decided preference toward trial by jury. This rejection of a rigid historical approach is arguably sound. As the authors of a leading federal practice treatise have observed, "one of the drawbacks of defining any right to a jury trial according to 1791 practices is that it allows a constitutional right to be defined in terms of an historical accident."³⁷⁸ Put more colorfully, "[a]sking how 1791 England would deal with a [complex modern] case is a little like asking how the War of the Roses would have turned out if both sides had airplanes."³⁷⁹

On the other hand, employment of some sort of historical test seems necessary if courts are "to honor the language of the constitutional mandate."³⁸⁰ In Arkansas, the attitude of the supreme court toward jury trials will undoubtedly influence its decision as to whether such a test will be applied rigidly or flexibly with respect to the application of Article II, Section 7 in the merged system.³⁸¹ In other contexts, that attitude has not been uniform.³⁸² A second factor could be that while the Arkansas Constitution ex-

375. *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948); see also A.F. Triplett, *Trial by Jury—A Farce*, 7 ARK. L. REV. 215, 222-23 (1953) (criticizing jury as unable to "apply the law properly to the facts which are in dispute," unfamiliar with "technical subject[s]" it may be called upon to decide, untrained to "determine the weight to be given any particular evidence," and "prone to allow sympathy or passion to enter into the verdict").

376. Fleming James, Jr., *Trial by Jury and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 1022, 1026 (1936).

377. Mark Curriden, *Power of Twelve*, A.B.A. J., Aug. 2001 at 36, 37. This article quotes a corporate general counsel as describing juries as "the least informed, the least represented and the least qualified body to determine public policy." *Id.* at 38. According to a law school dean, "[o]ur founding fathers would be stunned and dismayed to learn of the issues that today's juries are deciding." *Id.* at 37.

378. 9 WRIGHT & MILLER, *supra* note 31, § 2302.

379. Klein, *supra* note 37, at 1028.

380. 9 WRIGHT & MILLER, *supra* note 31, § 2302.

381. It has been suggested that "an unarticulated evaluation of the jury system" lies "[b]eneath the surface of the historical arguments" and that courts can be criticized for their "failure to acknowledge frankly the significance of unresolved arguments for and against the jury system and to consider them openly as grounds for expanding or contracting the jury's role." Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1190 (1961).

382. For example, the supreme court has held that a contemporaneous objection is un-

pressly recognizes the right to trial by jury, there is no corresponding right to a nonjury trial.³⁸³ The same is true with respect to the federal constitution,

necessary to preserve for appeal the argument that the right to trial by jury had not been waived. *Calnan v. State*, 310 Ark. 744, 748-49, 841 S.W.2d 593, 596 (1992); *Winkle v. State*, 310 Ark. 713, 717, 841 S.W.2d 589, 591 (1992). This is so despite the court's steadfast adherence to the contemporaneous objection rule and refusal to recognize the so-called "plain error" doctrine that permits appellate review of decisions affecting substantial rights even though the appellant failed to bring the matter to the trial court's attention. *See, e.g., Smith v. State*, 343 Ark. 552, 574, 39 S.W.3d 739, 753 (2001). As the court explained in *Calnan*, there are four exceptions to the contemporaneous objection requirement, one of which applies "when a trial court should intervene on its own motion to correct a serious error." 310 Ark. at 748, 841 S.W.2d at 596. The court found this exception controlling with respect to a purported waiver of the right to trial by jury, a right "so fundamental that if it is denied a serious error results." *Id.* at 749, 841 S.W.2d at 596. Although *Calnan* is a criminal case, the court specifically approved a decision of the court of appeals reaching the same result in a civil action. *See Bussey v. Bank of Malvern*, 270 Ark. 37, 43, 603 S.W.2d 426, 430 (Ct. App. 1980).

On the other hand, the supreme court has rejected attempts of litigants to obtain immediate appellate review of the trial court's denial of their right to trial by jury. Because an order refusing a jury trial does not terminate the action, it is not final and thus unappealable. *Wright v. City of Little Rock*, 245 Ark. 355, 356-57, 432 S.W.2d 488, 489 (1968). Similarly, before merger of law and equity a party had to wait until final judgment to challenge on appeal a transfer from circuit court to chancery or the chancellor's refusal to transfer to circuit court. *Dalrymple v. Simmons First Nat'l Bank*, 296 Ark. 534, 536, 758 S.W.2d 5, 6 (1988); *Smith v. Pinnell*, 107 Ark. 185, 188, 154 S.W. 497, 499 (1913). Moreover, the writ of prohibition is unavailable to secure immediate appellate review of a trial court's decision to proceed without a jury. In *McClendon v. Wood*, 125 Ark. 155, 188 S.W. 6 (1916), the court said that such a ruling "constitutes only an error or an irregularity which must be corrected by appeal," since "[t]he jurisdiction of the court itself is undoubted." *Id.* at 158, 188 S.W. at 7; *accord Hester v. Langston*, 297 Ark. 87, 89, 759 S.W.2d 797, 798 (1988); *see also First Ark. Leasing Corp. v. Munson*, 282 Ark. 359, 361, 668 S.W.2d 543, 544 (1984) (holding that a writ of prohibition "cannot be used as a remedy to transfer between law and equity courts" and proper remedy "is by appeal after the matter proceeds to a final judgment"). These cases do not attach much significance to the right to trial by jury, particularly in light of other decisions allowing use of the writ of prohibition to challenge a trial court's determination that *venue* is proper. *E.g., Ark. Game & Fish Comm'n v. Harkey*, 345 Ark. 279, 283, 45 S.W.3d 829, 832 (2001).

383. There appear to be no Arkansas cases directly on point. At times, however, the Arkansas Supreme Court has overturned a judgment on the ground that the trial judge had erroneously held a jury trial when there was no right to one under Article II, Section 7. *E.g., Civil Serv. Comm'n of Van Buren v. Matlock*, 205 Ark. 286, 168 S.W.2d 424 (1943). In *Matlock*, the Van Buren Civil Service Commission reduced the rank of Mr. Matlock from chief of police to patrolman. He challenged that action in circuit court, as provided by statute. The judge, over the commission's objection, empaneled a jury. Upon a verdict for Matlock, the judge set aside the commission's order. The supreme court reversed, agreeing with the commission that the matter should not have been submitted to a jury: "the proceeding authorized by the act of the legislature under consideration here is not a common-law proceeding, and neither party to such a proceeding was entitled to a jury." *Id.* at 290, 168 S.W.2d at 426. The court added that "appellants had a right, under the law, to have this case heard and determined by the court, and not by a jury, and the lower court erred in submitting the case, over the objection of the appellants, to the jury for trial." *Id.*, 168 S.W.2d at 426. Although

as the Supreme Court pointed out in the course of adopting a flexible approach in *Beacon Theatres*.³⁸⁴

Another consideration might be the distinct roles that law and equity courts have played throughout the state's history. The New Jersey Supreme Court, for example, has taken this factor into account in rejecting the flexible approach reflected in *Beacon Theatres* and *Dairy Queen*: "New Jersey's legal history and traditions . . . have placed a greater emphasis on the distinct roles of its law and chancery courts."³⁸⁵ By contrast, the Maryland Supreme Court adopted the federal model after merger even though "the historical separation of law and equity had been scrupulously maintained in this State."³⁸⁶

In construing other constitutional provisions, the Arkansas Supreme Court has exhibited a willingness to avoid artificially freezing the law as it existed when the Constitution of 1874 was adopted. For example, in *White v. City of Newport*,³⁸⁷ the appellant challenged the constitutionality of the municipal tort immunity statute,³⁸⁸ arguing that in 1874 "a citizen had a common-law right to sue a city for negligence committed while the city was acting in a proprietary capacity."³⁸⁹ The immunity statute, she claimed, ran afoul of the constitutional guarantee of "a certain remedy in the laws for all

the last quoted sentence contains broad language, it does not recognize a constitutional right to a nonjury trial. Rather, the court held that this was not a case in which Article II, Section 7 guaranteed a trial by jury and that the legislature had not provided by statute for that type of proceeding. Submitting the matter to the jury was thus reversible error.

Most state courts have not construed their constitutions to include the right to a nonjury trial. *E.g.*, *Mehau v. Reed*, 869 P.2d 1320, 1330 (Haw. 1994); *State v. Siemer*, 454 N.W.2d 858, 865 (Iowa 1990); *Luppino v. Gray*, 647 A.2d 429, 437 (Md. 1994); *Charles River Constr. Co. v. Kirksey*, 480 N.E.2d 315, 319 (Mass. Ct. App. 1985); *Farese v. McGarry*, 568 A.2d 89, 92 n.1 (N.J. Super. Ct. App. Div. 1989); *see also* Note, *supra* note 381, at 1178-79. However, a few older cases hold that legislatures cannot eliminate the trial of equitable issues by the court. *E.g.*, *Brown v. Kalamazoo Circuit Judge*, 42 N.W. 827 (Mich. 1889); *State v. Nieuwenhuis*, 207 N.W. 77 (S.D. 1926); *Callanan v. Judd*, 23 Wis. 343 (1868). These cases are all based on the notion that "the power of judges to decide issues of fact incidental to equitable actions [is] inherent in the constitutionally vested judicial power." Note, *supra* note 381, at 1178. The *Nieuwenhuis* case was overruled in 1982. *See Black v. Gardner*, 320 N.W.2d 153 (S.D. 1982).

Rule 39(b) of the Arkansas Rules of Civil Procedure provides that "[i]ssues not demanded for trial by jury . . . shall be tried by the court," although the judge may in his or her discretion order a jury trial "in an action in which such a demand might have been made of right." ARK. R. CIV. P. 39(b). Courts in other jurisdictions have held that the first phrase does not mean that there is a constitutional right to a nonjury trial. *E.g.*, *Charles River Constr.*, 480 N.E.2d at 319.

384. 359 U.S. 500, 510 (1959).

385. *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 678 A.2d 683, 689 (N.J. 1996).

386. *Higgins v. Barnes*, 530 A.2d 724, 728 (Md. 1987).

387. 326 Ark. 667, 933 S.W.2d 800 (1996).

388. ARK. CODE ANN. § 21-9-301 (LEXIS Supp. 2001).

389. 326 Ark. at 671, 933 S.W.2d at 802.

injuries or wrongs he may receive in his person, property or character"³⁹⁰ and the prohibition against laws that limit "the amount to be recovered for injuries resulting in death or for injuries to persons or property."³⁹¹ The supreme court disagreed. An "inflexible application" of these provisions "crystallizes all common law rights of action, putting them beyond the reach of legislative change to meet new conditions."³⁹²

A strict historical analysis of Article II, Section 7 would seem at odds with what the supreme court has described as one of the "fundamental purposes" of Amendment 80, *i.e.*, the merger of law and equity.³⁹³ To be sure, use of *any* historical test to determine the scope of the constitutional right to trial by jury assures the continuing relevance of equity practice despite merger; to borrow Professor Chafee's famous phrase, the guarantee of jury trial "is the sword in the bed that prevents the complete union of law and equity."³⁹⁴ However, a flexible historical analysis dulls that sword to some extent and is more consistent with Amendment 80's modernization of the Arkansas judiciary.

390. ARK. CONST. art. II, § 13.

391. ARK. CONST. art. V, § 32. Amendment 26, approved by the voters in 1938, modified this provision by expressly authorizing the General Assembly "to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees." *Id.* at amend. 26; *see* *Young v. G.L. Tarlton, Contractor, Inc.*, 204 Ark. 283, 288, 162 S.W.2d 477, 479 (1942).

392. *White*, 326 Ark. at 671, 933 S.W.2d at 802. The court took the latter quotation from Justice George Rose Smith's dissenting opinion in *Emberson v. Buffington*, 228 Ark. 120, 129, 306 S.W.2d 326, 331 (1957).

393. *In re* Implementation of Amendment 80, *supra* note 1; *see also* *Clark v. Farmers Exch., Inc.*, 347 Ark. 81, 83 n.1, 61 S.W.3d 140, 141 n.1 (2001) (stating that "law and equity have been merged"); *Gray v. City of Billings*, 689 P.2d 268, 272 (Mont. 1984) ("The modern merger of law and equity courts and the liberal joinder provisions of our Rules of Civil Procedure force reevaluation of the traditional justification for permitting an equity court to decide legal issues.").

394. ZECHARIAH CHAFEE, JR. & EDWARD D. RE, *CASES & MATERIALS ON EQUITY* 24 (5th ed. 1967). The Arkansas Supreme Court made this point more than a century ago: "A complete amalgamation of law and equity is impossible so long as the jury trial is retained." *Ashley v. Little Rock*, 56 Ark. 370, 375, 19 S.W. 1058, 1059 (1892).