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Equity, Law and the Seventh Amendment

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The Seventh Amendment requires that the civil jury trial right be "preserved" in "Suits at common law." Those bits of constitutional text have long set the justices on a path of historical reconstruction. For roughly two centuries, the Supreme Court has determined the scope of the civil jury trial right in federal court by reference to historic English courts. But no one is happy with the current test. In one widely used variant, it requires an inquiry into analogous 1791 actions, followed by an inquiry into the legal or equitable provenance of the remedy sought, and then a weighing that favors the second of these two incommensurable inquiries. The test is anachronistic and internally incoherent, and it leads to anomalous results.

This Article critiques the current approach and offers a new test for the scope of the Seventh Amendment civil jury trial right. This test would presume a civil jury trial right, but with three categorical exceptions. One exception is for areas of substantive law developed exclusively in equity, another is for remedies developed in equity, and the third is for case-aggregating devices developed in equity (e.g., the class action). The historical inquiry that is required would be somewhat stylized. But it is more manageable than the current approach, and it would allow judges to determine the scope of the civil jury trial right with greater predictability and accuracy.

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Introduction

Some legal norms have their shape fixed in the past. One example is the civil jury trial right under the Seventh Amendment to the U.S. Constitution.[1] In "Suits at common law," instructs the Seventh Amendment, "the right of trial by jury shall be preserved."[2] In a series of cases over the last half century, the U.S. Supreme Court has considered what counts as "Suits at common law."[3] Through the 1980s, the Court considered whether the claim was analogous to one that would have been brought at law or in equity in 1791, and whether the remedy sought was legal or equitable.[4] Since then, the

1. *See* David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 449 (1971) ("[W]e do not see how an historical inquiry can be avoided when a seventh amendment question is raised.").

2. U.S. CONST. amend. VII. For relatively recent discussion of the scope of the Seventh Amendment right to a civil jury trial, see Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673 (2013); Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811 (2014); Suja A. Thomas, *A Limitation on Congress: "In Suits at common law,"* 71 OHIO ST. L.J. 1071 (2010); and Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893 (2016).

3. *See* Wooddell v. Int'l Bhd. of Elec. Workers, Loc. 71, 502 U.S. 93, 98 (1991); Chauffeurs Loc. No. 391 v. Terry, 494 U.S. 558, 564, 573 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 49 (1989); Tull v. United States, 481 U.S. 412, 426–27 (1987); Pernell v. Southall Realty, 416 U.S. 363, 384–85 (1974); Curtis v. Loether, 415 U.S. 189, 191–92 (1974); Ross v. Bernhard, 396 U.S. 531, 542–43 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477, 479–80 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508 (1959).

4. *See, e.g.*, *Terry*, 494 U.S. at 564–73.

justices have not separated the two inquiries, but they have maintained their historical focus.[5]

The Court's approach has attracted vigorous criticism. Justice Brennan said the inquiry into analogous claims from 1791 made judges undertake a pointless "rattling through dusty attics of ancient writs."[6] The remedies treatise of Professors Dan Dobbs and Caprice Roberts says: "This kind of approach is less than speculation about historical facts; it is the imaginative construction of legal culture that never existed."[7] Professor David Sklansky refers to "the Supreme Court's tortured efforts in Seventh Amendment cases to determine which modern actions would have been brought at common law in 1791 and which would have been brought at equity."[8] From these "tortured efforts" he draws a general lesson: Beware "[t]he dangers of pegging constitutional interpretation to eighteenth-century legal distinctions."[9] And a federal district court said that distinguishing law and equity "'for the purposes of delimiting the jury trial right continues to be one of the most perplexing questions of trial administration.'"[10]

This Article reconsiders the Court's approach to the Seventh Amendment jury trial right. It offers a different set of criticisms, arguing that the current judicial inquiry is anachronistic and historically impoverished. Yes, the history can be hard. But instead of arguing for less history, this Article shows that these problems of difficulty and indeterminacy can be partially ameliorated by recovering a stylized historical distinction: the distinction between those areas inside and outside of equity's "exclusive jurisdiction."[11]

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5. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707–09 (1999); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347–52 (1998); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376–81 (1996); *see also* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1200 (2021) (following, in passing, the *Monterey* approach).

6. *Terry*, 494 U.S. at 575 (Brennan, J., concurring in part and concurring in the judgment).

7. DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.6(3), at 119 (3d ed. 2018); *see also* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1028 (1992) ("Asking how 1791 England would deal with a 1991 multi-district patent infringement case is a little like asking how the War of the Roses would have turned out if both sides had airplanes.").

8. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1811 (2000).

9. *Id.*

10. SFF–TIR, LLC v. Stephenson, 262 F. Supp. 3d 1165, 1201 (N.D. Okla. 2017) (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9 FEDERAL PRACTICE AND PROCEDURE § 2302, at 17–20 (3d ed. 2008)).

11. The only recent scholarship to explicitly discuss the equitable jurisdictions in relation to the Seventh Amendment is Thomas, *supra* note 2, at 1095, 1101–02. Professor Thomas recognizes that trusts were in the exclusive jurisdiction, but that fact does not otherwise affect her analysis. The distinction is implicit in Lemley, *supra* note 2, at 1678 ("Some actions in England . . . were entirely equitable. But for a number of actions, plaintiffs could proceed either in law or in equity, depending on what sort of remedy they sought . . . ."). Other recent scholarship invokes the equitable

The "exclusive jurisdiction" of equity concerned those areas where the courts of equity developed the entire field.[12] The paradigm example is the law of trusts.[13] Other examples are the redemption of pledged assets[14] and undue influence.[15]

Outside of the exclusive jurisdiction, the courts of law and equity worked side by side, with equity offering additional remedies (and sometimes substantive doctrines) as correctives to deficiencies in the common law. This mode of equity's operation, called the "concurrent jurisdiction," covered most fields. It included most of what we would now call tort and contract.[16]

The distinction between these separate "jurisdictions" of equity was adopted as the organizing principle for Justice Story's *Commentaries on Equity Jurisprudence*,[17] and it was recognized in the nineteenth and twentieth centuries by American courts.[18] It is true that the distinction is not a reliable

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jurisdictions but not in relation to the Seventh Amendment. *See* Jeffrey Steven Gordon, *Our Equity: Federalism and Chancery*, 72 U. MIAMI L. REV. 176, 188 (2017); P.G. Turner, *Equity and Administration*, *in* EQUITY AND ADMINISTRATION 1, 5 (P.G. Turner ed., 2016); James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 212 n.237 (2016); Lionel Smith, *Common Law and Equity in R3RUE*, 68 WASH. & LEE L. REV. 1185, 1194–95 (2011).

12. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33, at 32–33 (1836) ("The jurisdiction of a Court of Equity is sometimes concurrent with the jurisdiction of a Court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it.").

13. *See id.* § 29, at 28 (explaining how trusts are "without any cognizance at the Common Law" but are "cognizable in Courts of Equity"); Etting v. Marx's Ex'r, 4 F. 673, 679 (C.C.E.D. Va. 1880) ("It is elementary law that trusts are exclusively within the cognizance of equity."); John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1320 (2003) ("The trust remedy tradition grew up in equity and remains, in the words of the *Restatement of Trusts*, 'exclusively equitable.'") (quoting RESTATEMENT (SECOND) OF TRUSTS § 197 (AM. L. INST. 1959)). *But cf.* STORY, *supra* note 12, § 60, at 67 (noting that bailments and actions for money had and received could be considered exceptions to equity's exclusive jurisdiction over trusts).

14. *See infra* note 103 and accompanying text.

15. *See infra* note 104 and accompanying text.

16. *See* E. BLYTHE STASON, BURKE SHARTEL & JOHN W. REED, INTRODUCTION TO LAW AND EQUITY 86 (1953) ("By far the greatest share of the chancellor's activities dealt with situations in which common law and equitable remedies substantially overlapped."); Langbein, *supra* note 13, at 1358 (recognizing that fraud was in the concurrent jurisdiction). For a summary of the content of equity's exclusive and concurrent jurisdictions, albeit with sharp criticism of drawing the distinction, see Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 665 (2007). Equity's "auxiliary jurisdiction," of less concern here, "comprised the various procedures and mechanisms employed by the Court of Chancery to assist parties who were litigating in other courts." PETER W. YOUNG, CLYDE CROFT & MEGAN LOUISE SMITH, ON EQUITY 99 (2009). Discovery and perpetuation of testimony are chief examples. *Id.*

17. *See* STORY, *supra* note 12, at vi. On the distinction before Story, and its aptness as a description of 1791 practice, see *infra* notes 109–111 and accompanying text.

18. *See* Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855); *see also* HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY § 40, at 61 (1936) (noting, despite the lessened importance of the separation of law and equity, that the distinction between equitable jurisdictions "forms a convenient division which has become familiar, and which still has some influence in the decision of certain cases"). The Court expressly declined to rely on the distinction between the equitable

guide to how equity developed over time.[19] It is more of a snapshot—and the period it is a snapshot of is one that is relevant for the Seventh Amendment. Moreover, the exclusive–concurrent distinction offers to the contemporary interpreter a sensible way of sorting what would otherwise be an unruly mass of equitable doctrines.

One conceptual move in this Article might not seem obvious—looking to equity to help determine the boundaries of "Suits at common law." But in doing so, this Article is following a long tradition of recognizing that the Seventh Amendment uses the term common law "in contradistinction to equity."[20] It is true that the line between "civil jury trial right" and "no civil jury trial right" does not perfectly track the line between law and equity. There were admiralty suits, which were not "Suits at common law."[21] There were prerogative writs, which were issued at common law but did not necessarily involve a jury.[22] Under the Amendment, even for a legal action, the "value in controversy" must exceed twenty dollars.[23] But once we put aside the prerogative writs and suits of trivial value, the general rule is that on dry land we are drawing the boundary between "law" and "equity." Which side we draw it from does not matter.

Building on the distinction between the exclusive and concurrent jurisdictions of equity, this Article argues for a new Seventh Amendment test. There are certain categories of suits that were equitable in 1791 and are still identifiable today. These were not, and are not, "Suits at common law," and so in these categories there should be no federal constitutional right to a jury trial. Three such categories are described here: (1) plaintiff's suit is in equity's exclusive jurisdiction;[24] (2) plaintiff seeks an equitable remedy; and (3) plaintiff employs an equitable device for aggregating cases, such as interpleader or class action. Apart from these categories, there should be a

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jurisdictions in *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 571 n.8 (1990), but its reasoning has been eroded by subsequent cases, *see infra* notes 58–63, 200–202 and accompanying text.

19. Macnair, *supra* note 16, at 664–67.

20. Parsons v. Bedford, 28 U.S. (3 Peters) 433, 441, 446 (1830) (per Story, J.); *see* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) ("determin[ing] whether a statutory action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty"); Tull v. United States, 481 U.S. 412, 417 (1987); Cap. Traction Co. v. Hof, 174 U.S. 1, 13 (1899); JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 230 n.12 (2006); Philip Hamburger, *The Inversion of Rights and Power*, 63 BUFF. L. REV. 731, 761 (2015); Shapiro & Coquillette, *supra* note 1, at 449.

21. *Parsons*, 28 U.S. at 446–47.

22. On the prerogative writs, see generally SIR JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 153–55 (5th ed. 2019); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 444–45 (2009). The relationship between the jury and the prerogative writs is a topic not considered in this Article, but the relationship is more complex than it may seem. *See, e.g.*, S.S. Merrill, Law of Mandamus § 290, at 353–54 (1892) (discussing juries in mandamus proceedings).

23. U.S. CONST. amend. VII.

24. *See infra* subpart III(B).

presumption of a right to a jury trial. That presumption would be rebuttable, though in practice it would be rebutted only rarely.

This reformulated test for the civil jury trial right has the effect of switching out a task that is hard and indeterminate for a task that is somewhat easier and more determinate. That is, it switches out the task of sorting between the various analogies for the plaintiff's claim in 1791 law for the task of deciding whether the plaintiff's suit falls in one of these three categories. This task is easier for several reasons, including (1) the greater determinacy about the contents of these categories, and (2) the fact that most cases are clearly inside or outside these categories. There are fewer edge cases.

Another consequence of this test is that there would be no constitutional jury trial right in class actions, even when the remedy sought is damages. The historical reason, spelled out more fully below,[25] is that the class-like devices for aggregating cases are creatures of equity.[26] When equity aggregated multiple "law" actions together into a single equitable suit, the result was not among the "Suits at common law." It was a suit in equity in 1791, and nothing about the Seventh Amendment compels a jury trial right in such suits today.

Finally, the analysis here sheds light on an important constitutional question that is almost certain to arrive at the Supreme Court in the next several years—whether the Seventh Amendment should be incorporated against the states. The existing answer from the Court's decisions is "no."[27] But the Court has recently incorporated a provision of the Bill of Rights that had previously been a holdout,[28] and the same thing could happen with the Seventh Amendment civil jury trial right. At least the Supreme Court has given no reason to distinguish that right. But this Article gives reason to doubt the wisdom of incorporating the civil jury trial right because it would tie the states to a strong distinction between law and equity, preventing future experimentation and development.

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25. *See infra* subpart III(D).

26. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940) ("The class suit was an invention of equity . . . ."); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366 (1921) ("[C]lass suits were known before the adoption of our judicial system, and were in use in English chancery."). *See generally* Samuel J. Stoljar, *The Representative Action: An Equitable Post-Mortem*, 3 U.W. AUSTL. ANN. L. REV. 479 (1956); Joshua D. Stadtler, Note, Ortiz *Got It Wrong: Why the Seventh Amendment Does Not Protect the Right to Jury Trial in Class Action Suits under FRCP 23*, 61 HASTINGS L.J. 1561 (2010).

27. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 719 (1999) (calling it "settled law that the Seventh Amendment does not apply" in state courts); *see also* sources cited *infra* note 77.

28. *See* Timbs v. Indiana, 139 S. Ct. 682, 688–91 (2019) (incorporating the Excessive Fines Clause); *see also* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (incorporating the Second Amendment).

This Article proceeds as follows. Part I considers why the Seventh Amendment test is historical, emphasizing the text of the Amendment. Part II describes the current approach to determining the scope of the Seventh Amendment civil jury trial right, both in the variant applied in the most recent U.S. Supreme Court cases[29] and in the variant that was applied in the Court's earlier cases and remains prevalent in the lower courts.[30] Part III criticizes the current approach. Part IV proposes a revised test. Part V answers four hypothetical critics: the Jury Maximalist, the Jury Minimalist, the Historical Purist, and the Functionalist. Part VI briefly draws out the implications for the question of whether the civil jury trial right of the Seventh Amendment should be incorporated against the states.

Equity is an enduring part of our law, not least because the Seventh Amendment requires federal courts today to draw a line between what does and does not count as a suit at common law. With the passage of time, that task has become more difficult but no less pressing. At the same time, there has been a resurgence of interest in equity in the courts[31] and in the academy.[32] Even so, the new sophistication about equity has not yet affected the analysis of the Seventh Amendment. It should.

I. Why the Scope of the Civil Jury Trial Right Is Determined by History

In federal courts, the Seventh Amendment "preserve[s]" the civil jury trial right for "Suits at common law."[33] There was no uniformity in practice among the states at the Founding.[34] Nor was there any consensus about the contours of the jury trial right that was to be "preserved," and the phrasing of the Seventh Amendment appears to have been "deliberately imprecise."[35] According to George Washington, the Constitutional Convention in

29. On the *Monterey* test, see *infra* notes 58–65 and accompanying text.

30. On the *Terry* test, see *infra* notes 55–57 and accompanying text.

31. *E.g.*, Liu v. SEC, 140 S. Ct. 1936, 1942 (2020). *See generally* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015) (discussing the Supreme Court's "new equity cases" that distinguish legal and equitable remedies).

32. *See, e.g.*, PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk, Irit Samet & Henry E. Smith, eds., 2020); IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET (2018); EQUITY AND LAW: FUSION AND FISSION (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019); Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 NOTRE DAME L. REV. (forthcoming 2022); Jennifer Nadler, *What Is Distinctive About the Law of Equity?*, 41 OXFORD J. LEGAL STUD. 854 (2021); James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723 (2020); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

33. U.S. CONST. amend. VII; *see also* FED. R. CIV. P. 38 ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.").

34. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 336 (1966).

35. OLDHAM, *supra* note 20, at 5.

Philadelphia left the civil jury trial right "as a matter of future adjustment" because of "the difficulty of establishing a mode, which should not interfere with the fixed modes of any of the States."[36]

Even so, the Amendment does say the civil jury trial right is "preserved." The use of this word has led the vast majority of judges and scholars considering the provision to conclude that the scope of the federal constitutional right to a jury trial is largely, or even entirely, determined by historical considerations, not functional ones.[37] Fleming James, Jr. has said,

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36. Letter from George Washington to the Marquis de Lafayette (Apr. 28, 1788), *in* 9 THE WRITINGS OF GEORGE WASHINGTON 354, 357–58 (1835); *see also* James Wilson, *Address to a Meeting of the Citizens of Philadelphia on October 6, 1787*, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 101, 101 (Max Farrand ed., 1966) ("The convention found the task too difficult for them; and they left the business as it stands — in the fullest confidence, that no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people . . . ."); Debates of the Pennsylvania Convention (Dec. 7, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 522 (Merrill Jensen ed., 1976) ("I admit that it would have been impossible to have accommodated the trial by jury to all the states . . . ." (statement of William Findley)) [hereinafter 2 DOCUMENTARY HISTORY]; Debates of the Pennsylvania Convention (December 8, 1787), *in* 2 DOCUMENTARY HISTORY, *supra*, at 525, 527 ("The Federal Convention found the task too great for them to ascertain the mode of trial in civil cases." (statement of Robert Whitehill)); Debates of the Massachusetts Convention (Jan. 30, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1365, 1368 (John P. Kaminsky & Gaspare J. Saladino, eds., 2000) ("[I]t had been clearly shewn, that no words could be adopted, apt to the situations and customs of each state in this particular." (quoting Christopher Gore)); *id.* at 1370 ("[I]t was out of the power of the Convention: The several States differ so widely in their *modes* of trial . . . , that the Convention have very wisely left it to the federal legislature to make such regulations, as shall as far as possible, accommodate the whole." (statement of Thomas Dawes)); Justus Dwight Journal (Jan. 29, 1788), *in* 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1799, 1815 (John P. Kaminsky & Gaspare J. Saladino, eds., 2001) ("Mr [sic] Gorham that the several States were divided as to that & it Could not be put in."); *cf.* THE FEDERALIST NO. 83, at 503 (Alexander Hamilton) (emphasizing variation among states as a reason "that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States").

37. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999) ("[O]ur interpretation of the [Seventh] Amendment has been guided by historical analysis . . . ."); Chauffeurs Loc. No. 391 v. Terry, 494 U.S. 558, 593 (1990) (Kennedy, J., dissenting) ("We cannot preserve a right existing in 1791 unless we look to history to identify it."); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344 (1979) (Rehnquist, J., dissenting) ("Because the Seventh Amendment demands preservation of the jury trial right, our cases have uniformly held that the content of the right must be judged by historical standards."); Curtis v. Loether, 415 U.S. 189, 193 (1974) (acknowledging that "the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791"); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."); Dimick v. Schiedt, 293 U.S. 474, 476 (1935) (noting that for Seventh Amendment analysis "resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791"); Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 243 (1922) ("The right of trial by jury is preserved exactly as it was at common law."); RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 584 (6th ed. 2013) ("By its terms, the Amendment appears to dictate a form of historical inquiry . . . ."); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 706 n.361

"For good or evil, both the constitutions and the charters of the merged procedure embody the policy judgment, quite deliberately made, to leave the extent of jury trial about where history had come to place it."[38] It is therefore generally agreed for the Seventh Amendment—by scholars employing a range of interpretive methodologies—that courts are not to ask in the first instance what the jury trial right should be, but what the jury trial right was.

Moreover, the Seventh Amendment uses not only "preserved" but also what is now a historical category: "Suits at common law." If the civil jury trial right were only "preserved," then it might be preserved in various ways. It might be preserved in spirit more than in letter. But the Amendment provides that the civil jury trial right is preserved within a historic, technically defined category.[39]

There is, however, a notable exception to the majority view that the Seventh Amendment requires a historical analysis. In Professor Akhil Amar's view, the Amendment ties the civil jury trial right in federal court not

(1982) (criticizing the "esoteric research" required by the "historical test," but also calling it "scarcely avoidable" because of the constitutional text); Renée Lettow Lerner, *The Resilience of Substantive Rights and the False Hope of Procedural Rights: The Case of the Second Amendment and the Seventh Amendment*, 116 NW. U. L. REV. 275, 277 (2021) ("[T]he Seventh Amendment by its terms requires an originalist interpretation ('shall be preserved') . . . ."); John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 1 (1967) ("The wording of the seventh amendment suggests . . . an historical inquiry."); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 596 (2006) ("It is, indeed, difficult to discover many interpretations of the Seventh Amendment that are not based in history."); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 872, 875–93 (2013) ("[D]espite its detractors, the Seventh Amendment historical test represents one of the few areas in which a constitutional decision rule based on history and common law has been most fully realized."); Shapiro & Coquillette, *supra* note 1, at 448–50 ("Difficult as it may be, then, we believe some effort must be made to determine the state of the law in the late eighteenth and early ninetenth [sic] centuries – to determine, in other words, what it was that the seventh amendment was seeking to preserve."); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 531 (1975) (arguing that the use of the term "preserved" in the Seventh Amendment "at least arguably authorizes an exact replication of the historical right"); Adam N. Steinman, *Appellate Courts and Civil Juries*, 2021 WIS. L. REV. 1, 9 (2021) (tracing the Court's historical test to "the text of the Seventh Amendment"); Tidmarsh, *supra* note 2, at 1902 ("[T]he text of the Seventh Amendment . . . invites a historical analysis."); Wanling Su, *What Is Just Compensation?*, 105 VA. L. REV. 1483, 1490–91 (2019) ("The Seventh Amendment preserves the right to a jury as it existed under English common law when the Amendment was adopted in 1791."); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639–40, 649 (1973) ("[J]udicial and academic writings on the right to jury trial afforded by the seventh amendment have uniformly agreed on one central proposition: in determining whether the seventh amendment requires that a jury be called to decide the case the court must be guided by the practice of English courts in 1791.").

38. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 668 (1963).

39. On the question of whether the historical approach should be considered functional, or at least not anti-functional, see *infra* subpart V(D).

to historical English practice but to current state court practice.[40] That is, the federal courts must preserve whatever the currently existing civil jury trial right is in the courts of the relevant state.

This state-court view of the Seventh Amendment does have support in the Founding Era debates, though that support "is hardly overwhelming."[41] Moreover, it is difficult to square the state-court view with the apparent understanding at the Founding that federal equity power would be independent (i.e., not determined by the equity powers of the courts of the state in which the federal court was sitting).[42] After all, the federal equity power and the federal civil jury trial right are reversible. It would be anomalous to have the jury trial right determined by state law but the scope of equity determined by federal law because it would lead to situations where state law could grant a jury trial to decide matters of federal equity. It would be more rational if both the civil jury trial right and the scope of equity, or neither, were determined by state-court practice.[43]

The best explanation for this seeming muddle of inconsistent statements and assumptions is probably that the Founders thought of the civil jury trial right not as a matter of positive enactment so much as a matter of general law, which might then be enforced and secured in different ways by different sovereigns.[44] That explanation does not tidy up all of the data, but it does suggest why the ratifiers would not have perceived a sharp choice between looking to English practice and to state practice. To ask which of these alternatives the ratifying generation chose—preserving the English civil jury trial right or preserving the state one—might be anachronistic.

Nevertheless, the federal courts of the early Republic were forced to choose. And they chose the historic English practice.[45] Although the Court

40. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89 (1998); *see also* Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 231–32 (2001) (concluding that the amendment has no "substantive rule"); Daniel J. Hulsebosch, *Civics 2000: Process Constitutionalism at Yale*, 97 MICH. L. REV. 1520, 1543 (1999) (reviewing Amar, *supra*, and concluding that Congress determines the scope of the right).

41. Wolfram, *supra* note 37, at 712; *see also* Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 612–15 (2001).

42. Woolhandler & Collins, *supra* note 41, at 616–17.

43. For exceptions, see *supra* notes 21–23 and accompanying text.

44. For recent analyses of general law, see Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433; Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

45. The earliest leading case to adopt this view of the Seventh Amendment was concerned with the Re-Examination Clause. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.) ("Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.").

has tacked in various directions over time, it has generally kept the lodestar of preserving the common law jury trial right from the Founding.[46]

The dominance of history in the judicial interpretation of the Seventh Amendment can be illustrated from an opinion by Justice Brennan. In many areas of constitutional law, including personal jurisdiction, substantive due process, the Establishment Clause, and the Eighth Amendment, he was famous for appealing to the considerations of the present, not those of the past.[47] But for the Seventh Amendment he emphasized the historic distinction between law and equity.

In *Chauffeurs Local No. 391 v. Terry*,[48] Justice Brennan and Justice Kennedy disagreed about the historical inquiry. In that case, the Court's inquiry had two parts—first asking whether the "claim" would have been brought at law or in equity, then whether the "remedy" sought was legal or equitable. Justice Brennan criticized the inquiry into claims, preferring instead to ask only about the remedy: "Requiring judges, with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary and secondary sources to determine which of a hundred or so writs is analogous to the right at issue has embroiled courts in recondite controversies better left to legal historians."[49]

But Justice Brennan insisted that he was not criticizing reliance on history to determine the scope of the Seventh Amendment jury trial right. Responding to criticisms made by Justice Kennedy's separate opinion, he wrote:

> I believe that it is imperative to retain a historical test for determining when parties have a right to jury trial for precisely the same reasons JUSTICE KENNEDY does. It is mandated by the language of the Seventh Amendment and it is a bulwark against those who would restrict a right our forefathers held indispensable. Like JUSTICE KENNEDY, I have no doubt that courts can and do look to legal history for the answers to constitutional questions, and therefore the Seventh Amendment test I propose today obliges courts to do exactly that. . . . [T]he historical test I propose, focusing on the nature of the relief

46. *See, e.g.*, Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.").

47. *See, e.g.*, Burnham v. Super. Ct. of Cal., 495 U.S. 604, 629–30 (1990) (Brennan, J., concurring in the judgment) (personal jurisdiction); Michael H. v. Gerald D., 491 U.S. 110, 136–41 (1989) (Brennan, J., dissenting) (substantive due process); Marsh v. Chambers, 463 U.S. 783, 813–17 (1983) (Brennan, J., dissenting) (Establishment Clause); Furman v. Georgia, 408 U.S. 238, 258–70, 277–79, 295–300 (1972) (Brennan, J., concurring) (Eighth Amendment).

48. 494 U.S. 558 (1990).

49. *Id.* at 576 (Brennan, J., concurring in part and concurring in the judgment).

> sought, is not only more manageable than the current test, it is more reliably grounded in history.[50]

Although the proposal in this Article is not Justice Brennan's,[51] the goal is the same: to offer a test that is both "more reliably grounded in history" and "more manageable than the current test."[52]

II. The Current Approach

Over the last half century, the Supreme Court has taken a resolutely historical approach to the scope of the jury trial right under the Seventh Amendment. But that apparent consistency belies doctrinal change. In particular, the Court developed a two-part test grounded in claims and remedies; that development culminated in *Chauffeurs Local No. 391 v. Terry*. Subsequently, the Court has not employed that test, but has instead pursued a single inquiry into whether the suit would have been brought at law or in equity in 1791, with a secondary inquiry into whether a jury needs to decide the question to maintain the substance of the right. That line of development culminated in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[53] and it was recently reaffirmed in passing in *Google v. Oracle*.[54] In the lower courts, however, the practice is confused, and both tests are used.

A. The Terry *and* Monterey *Tests*

In cases from the late 1960s through the 1980s, the Court developed a two-part test.[55] First, is the claim analogous to one that would have been brought at law or in equity in 1791? Second, is the remedy sought legal or equitable? If the claim and remedy were both legal, there would be a civil jury trial right. If they were both equitable, there would be none. If the two steps gave different answers, the Court said that the second, remedial step

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50. *Id.* at 578–79 n.7 (citation omitted); *accord* Colgrove v. Battin, 413 U.S. 149, 156 (1973) (per Brennan, J.) (referring to "the historical objective of the Seventh Amendment").

51. For a brief critique of his remedies-only proposal, see *infra* note 204.

52. *Terry*, 494 U.S. at 579 n.7 (Brennan, J., concurring in part and concurring in the judgment).

53. 526 U.S. 687 (1999).

54. 141 S. Ct. 1183, 1200 (2021) (considering whether a defense was legal or equitable and whether a jury trial was necessary "to preserve the substance of the common-law jury trial right as it existed in 1791" (citation and alterations omitted)).

55. *Terry*, 494 U.S. at 565; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989); Tull v. United States, 481 U.S. 412, 417–18 (1987); Curtis v. Loether, 415 U.S. 189, 195–96 (1974); Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). *Ross* suggested a third consideration, "the practical abilities and limitations of juries." *Ross*, 396 U.S. at 538 n.10. That line has had almost no development outside of the context of administrative courts. *See* Tidmarsh, *supra* note 2, at 1896 n.11; *see also In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 424–26 (9th Cir. 1979). *But see* Kelly Servs., Inc. v. De Steno, 760 F. App'x 379, 384–86 (6th Cir. 2019) (relying on impracticability for a jury, as well as "pre-merger custom," to affirm a district court's decision not to allow a jury to determine the amount of attorneys' fees).

should be given more weight.[56] For ease of reference, this test will be called the *Terry* test, after the last case in which the U.S. Supreme Court applied it with any thoroughness, *Chauffeurs Local No. 391 v. Terry*.[57]

The *Terry* test, however, has not been applied by the Court in its more recent cases on the civil jury trial right: *Markman v. Westview Instruments, Inc.*,[58] *Feltner v. Columbia Pictures Television, Inc.*,[59] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[60] and *Google v. Oracle*.[61] Instead, these cases have conspicuously merged the two inquiries into one. As one of these cases puts it, the inquiry is "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was."[62] Notably absent are any references to the remedy being more important.[63] Indeed, the Court has placed the emphasis not on the

56. *Terry*, 494 U.S. at 565; *Granfinanciera*, 492 U.S. at 42; *Tull*, 481 U.S. at 421. After *Terry* one commentator noted: "The Court's emphasis on remedy as an inquiry distinct from examination of the historical mode of proceeding is a relatively new development which obscures the significance of subject matter and procedure in the historical separation of law and equity." John C. McCoid, II, *Right to Jury Trial in Bankruptcy:* Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 28 (1991). For the Court's subsequent retreat on this point, see *infra* notes 63–64 and accompanying text.

57. The only subsequent case applying the *Terry* test was *Wooddell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93 (1991), and its analysis was cursory. *See id.* at 97–98.

58. 517 U.S. 370 (1996).

59. 523 U.S. 340 (1998).

60. 526 U.S. 687 (1999). Only one justice suggested something like the older, separate inquiries into "claim" and "remedy." *Id.* at 726–27 n.1 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he relief sought is an important consideration in the Seventh Amendment inquiry, but contrary to JUSTICE SOUTER's belief it is a consideration separate from the determination of the analogous common-law cause of action.").

61. 141 S. Ct. 1183 (2021).

62. *Monterey*, 526 U.S. at 708 (quoting *Markman*, 517 U.S. at 376).

63. *See* Tidmarsh, *supra* note 2, at 1896–97; *see also* DOBBS & ROBERTS, *supra* note 7, § 2.6(3), at 108 (recognizing a shift away from placing more weight on the remedy); *id.* § 2.6(3), at 113 ("The implications of *Feltner* include that the Supreme Court prefers heavy emphasis on historical analysis rather than the nature of the remedy."); Miller, *supra* note 37, at 888 (recognizing "what amounts to a restatement of the historical test" in *Markman* and *Monterey*); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 198, 224 (2000) (recognizing the shift in *Markman*); *cf.* Caprice L. Roberts, *Remedies, Equity &* Erie, 52 AKRON L. REV. 493, 527 n.204 (2018) (recognizing a shift between *Terry* and *Feltner*). Much of the recent scholarship on the Seventh Amendment has failed to recognize this shift in the Court's approach. *E.g.*, OLDHAM, *supra* note 20, at 16; Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1675 (2020); Meyler, *supra* note 37, at 599; Ann M. Scarlett, *Jury Trial Disparities Between Class Actions and Shareholder Derivative Actions in State Courts*, 72 OKLA. L. REV. 283, 291 (2020); Thomas, *supra* note 2, at 1107; *cf.* Lemley, *supra* note 2, at 1679 (recognizing that some Supreme Court cases emphasize the remedy and others do not, but without indicating for readers the progression away from a remedy-centric analysis). The shift is unmistakable when contrasting, for example, the Supreme Court's decision in *Monterey* with the decision below in the court of appeals. *See Monterey*, 95 F.3d at 1427 ("More important than the nature of the claim is the second inquiry: the type of remedy sought.").

remedy but on whether the "claim" or "cause of action" is legal or equitable.[64] With this unified inquiry, the Court has paired a new part two: "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."[65] For ease of reference this will be called the *Monterey* test.

Notwithstanding the newer Supreme Court cases, many, probably most, lower federal courts continue to apply the *Terry* test.[66] And these courts routinely follow *Terry* and its antecedents in saying that the second, remedial part of the test is more important.[67] Yet that practice is far from uniform. Some lower federal courts apply the Court's more recent *Monterey* test.[68]

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64. *See* Tidmarsh, *supra* note 2, at 1896 (noting that in the Court's cases since *Terry*, "the importance of the first factor's pure historical inquiry is on the rise"). For critique of the idea that equity has causes of action, see Bray & Miller, *supra* note 32.

65. *Monterey*, 526 U.S. at 708 (quoting *Markman*, 517 U.S. at 376); *see also Google LLC.*, 141 S. Ct. at 1200.

66. *E.g.*, Hughes v. Priderock Cap. Partners, LLC., 812 F. App'x 828, 833–36 (11th Cir. 2020) (per curiam); TCL Commc'n Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson, 943 F.3d 1360, 1371–74 (Fed. Cir. 2019); Havlish v. 650 Fifth Ave. Co., 934 F.3d 174, 183–84 (2d Cir. 2019); Hard Candy, LLC v. Anastasia Beverly Hills, Inc., 921 F.3d 1343, 1354 (11th Cir. 2019); Full Spectrum Software, Inc. v. Forte Automation Sys., Inc., 858 F.3d 666, 675 (1st Cir. 2017); Teutscher v. Woodson, 835 F.3d 936, 943 (9th Cir. 2016); Hawkins *ex rel.* MedApproach, L.P. v. MedApproach Holdings, Inc., No. 13-CV-5434-ALC, 2021 WL 4199996, at *2 (S.D.N.Y. Sept. 15, 2021); Abraham v. Leigh, No. 17 CIV. 5429 (KPF), 2021 WL 2941652, at *1 (S.D.N.Y. July 13, 2021); Ak-Chin Indian Cmty. v. Maricopa-Stanfield Irrigation & Drainage Dist., No. CV-20-00489-PHX-JJT, 2021 WL 2805609, at *7 (D. Ariz. July 6, 2021); *In re* JRjr33, Inc., No. 18-32123-SGJ-7, 2020 WL 7038302, at *7 (Bankr. N.D. Tex. Nov. 30, 2020); Fair Isaac Corp. v. Fed. Ins. Co., 468 F. Supp. 3d 1110, 1114 (D. Minn. 2020); McClanahan v. Wilson, No. 17-1720, 2019 WL 3456623, at *3 (M.D. La. July 31, 2019); *In re* Broughton, No. 16-cv-00302-RE, 2017 WL 6373976, at *2 (E.D.N.C. Dec. 13, 2017); Palmer v. Reali, No. 15–994, 2017 WL 4319320, at *2 (D. Del. Sept. 28, 2017); SFF-TIR, LLC v. Stephenson, 262 F. Supp. 3d 1165, 1224 (N.D. Okla. 2017); United States *ex rel.* Bunk v. Gosselin Worldwide Moving, N.V., No. 02-cv-1168, 2017 WL 1370718, at *2 (E.D. Va. Apr. 7, 2017); Koninklijke Philips N.V. v. Hunt Control Sys., Inc., No. 11-3684, 2016 WL 6892079, at *2 (D.N.J. Nov. 21, 2016); Sivolella v. AXA Equitable Funds Mgmt., LLC, No. 11-4194, 2013 WL 4096239, at *3 (D.N.J. July 3, 2013), *report and recommendation adopted*, No. 11-4194, 2013 WL 4402331 (D.N.J. Aug. 15, 2013); United Mine Workers of Am. v. Am. Com. Lines Transp. Servs., L.L.C., No. 08CV1777, 2010 WL 2245084, at *4 (E.D. Mo. June 2, 2010); F.P. Woll & Co. v. Fifth & Mitchell St., Corp., No. Civ. A. 96–5973, 2005 WL 1592948, at *2 (E.D. Pa. July 1, 2005); *see also* Burch v. P.J. Cheese, Inc., 861 F.3d 1338, 1347 n.15 (11th Cir. 2017) (dicta).

67. *E.g.*, *TCL Commc'n*, 943 F.3d at 1372; *Hard Candy, LLC*, 921 F.3d at 1359; *Teutscher*, 835 F.3d at 943; *Fair Isaac Corp.*, 468 F. Supp. 3d at 1114; *Palmer*, 2017 WL 4319320, at *4; *SFF-TIR*, 262 F. Supp. 3d at 1167, 1199, 1234. *But cf. Havlish*, 934 F.3d at 184 (finding no cause of action at common law in step one and concluding that because there was no right to "preserve," "it is irrelevant that the more important remedy factor points in favor of a jury trial").

68. *E.g.*, Carroll v. Douglas Cnty., Nebraska, No. 8:21-CV-233, 2021 WL 4504334, at *6 (D. Neb. Oct. 1, 2021); JL Beverage Co. v. Beam Inc., No. 11–cv–00417, 2017 WL 5158661, at *1 (D. Nev. Nov. 7, 2017); Arctic Cat, Inc. v. Sabertooth Motor Grp., LLC, No. 13-146, 2016 WL 4212253, at *4 (D. Minn. Aug. 9, 2016); *In re* Flex Fin. Holding Co., No. 13-21483, 2015 WL

Others ostensibly apply the *Terry* line of precedents but bend them in the direction of the later cases (consciously or not).[69] Still others apply the *Monterey* test with vestiges of *Terry*.[70] The lower court practice is a morass.

One explanation for the lower courts' failure to follow the newer approach is that the *Terry* test became enshrined in circuit precedent.[71] Once that happened, only an express repudiation of the *Terry* test could fully dislodge it, and no such repudiation can be found.[72] Instead, the Court has reformulated its test in a way that is incompatible with *Terry* but without remarking on the incompatibility.[73]

Another explanation is that the lower courts might perceive the newer test as restricted to intellectual property law.[74] But that would be a mistake. The ground of the Court's analysis in *Markman* and *Feltner* was not an

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1756819, at *2 (Bankr. D. Kan. Apr. 13, 2015). *In re Flex* is also an example of judicial recognition that the civil jury trial right can extend to declaratory judgment actions.

69. *See, e.g.*, J.R. Simplot v. Chevron Pipeline Co., 563 F.3d 1102, 1115 (10th Cir. 2009) (referring to "[t]he nature of the issues presented and the remedies sought" and citing *Terry* but not separating the analysis into two steps); *In re* Melilo, No. 15-3880, 2015 WL 6151230, at *4 (D.N.J. Oct. 19, 2015) (applying *Granfinanciera* but as if it were a single test about actions); Bank of N.Y. Mellon v. WMC Mortg., LLC, No. 12cv7096, 2015 WL 4164691, at *3–4 (S.D.N.Y. July 10, 2015) (applying two-part test from *Granfinanciera*, while also noting that "it may be unnecessary to discuss the second prong of the *Granfinanciera* analysis in those instances in which the claim existed in 1791 and the historical record makes it clear that the action would have been brought in law or equity in eighteenth-century England"); Client Funding Sols. Corp. v. Crim, 943 F. Supp. 2d 849, 855–58 (N.D. Ill. 2013) (concluding there was no jury trial on a breach of fiduciary duty claim because the remedies inquiry was in "equipoise"); *see also* AcryliCon USA, LLC v. Silikal GmbH, 985 F.3d 1350, 1373–74 (11th Cir. 2021) (considering whether the cause of action and remedy were both legal, with a dash of *Monterey*).

70. *See, e.g.*, United States v. E.R.R. LLC, 417 F. Supp. 3d 789, 793 (E.D. La. 2019) (applying the *Monterey* test but pointing to "two important factors"—the nature of the cause of action and the nature of the remedy—and noting that the remedy is more important); Navarro v. Procter & Gamble Co., 529 F. Supp. 3d 742, 751–52 (S.D. Ohio Mar. 29, 2021) (outlining the two steps in *Monterey* and then rephrasing the question as if it were about whether the remedy is legal or equitable); Bethea v. Merchs. Com. Bank, No. 11–51, 2015 WL 1577976, at *2–3 (D.V.I. Apr. 2, 2015) (applying *Monterey*, but also relying on *Tull* for the proposition that the relief sought is more important). In *Fair Isaac Corp. v. Federal Insurance*, the court cites *Monterey*, but the two steps it identifies are instead those of *Terry*. *Fair Isaac*, 468 F. Supp. 3d at 1114.

71. *See, e.g.*, Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc., 778 F.3d 1059, 1075 (9th Cir. 2015) (quoting the *Terry* two-part test from an earlier Ninth Circuit case applying *Tull*).

72. This is not a case where the principle of *Agostini v. Felton*, 521 U.S. 203 (1997), would require lower courts to adhere to the Supreme Court's undermined precedent. *See id.* at 237 (reaffirming that a lower court should apply Supreme Court's direct precedent even if it "'appears to rest on reasons rejected in some other line of decisions'" (citation omitted)). *Felton*, *Markman*, and *Monterey* cannot reasonably be characterized as "some other line of decisions," *id.*, since they are concerned with the very same question as *Terry*.

73. A rare appellate decision that does remark upon the difference between the *Terry* and *Monterey* tests is Judge Taranto's opinion in *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc.*, 895 F.3d 1304, 1319–20 (Fed. Cir. 2018).

74. In addition, *Markman* did not involve a remedy question.

intellectual property doctrine but rather the Seventh Amendment.[75] And *Monterey* was a § 1983 case.

Whatever the reason, because of the Court's unremarked shift, some lower courts now apply the *Terry* test, some the *Monterey* test, and some an accidental combination of both tests.

B. Why the Federal Approach Is Called "Dynamic"

The current approach to the Seventh Amendment—whether the *Terry* variant or the *Monterey* variant—demands a historical investigation. Even so, in some scholarship, the federal approach to the Seventh Amendment is not called the "historical test" but rather the "dynamic test."[76] That terminology is used because of how the federal approach differs from that of some state courts, and it is worth a moment's discussion of the federal and state approaches to see the choices that each embodies.

Although the Seventh Amendment has not been held to be incorporated against the states,[77] nearly every state has an analogous provision in its constitution.[78] Three states (West Virginia, Alaska, and Hawaii) have the

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75. *See* DOBBS & ROBERTS, *supra* note 7, § 2.6(3), at 113; Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996). The Court's brief analysis in *Google LLC v. Oracle Am., Inc.*, was also grounded on the Seventh Amendment. *See* 141 S. Ct. 1183, 1200 (2021).

76. *E.g.*, EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 433–34 (2020); John J. Watkins, *The Right to Trial by Jury in Arkansas After Merger of Law and Equity*, 24 U. ARK. LITTLE ROCK L. REV. 649, 673 (2002). In the Seventh Amendment context, the terms "historical" and "dynamic" are given widely varying senses in the cases and scholarly literature. There is also no agreement about whether a historical or dynamic approach leads to a more expansive jury trial right. *Compare* Redish, *supra* note 37, at 531 (arguing for a more historical approach on the ground that it will be less jury protective), *with* James, *supra* note 38, at 664 (noting that "a static historical test" could prevent both restrictions and enlargements of the right).

77. *See* Osborn v. Haley, 549 U.S. 225, 252 n.17 (2007) (noting "the Seventh Amendment . . . is inapplicable to proceedings in state court"); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 719 (1999) (calling it "settled law that the Seventh Amendment does not apply" in state courts); Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996) (noting that "[t]he Seventh Amendment . . . governs proceedings in federal court, but not in state court"); Chi., Rock Island & Pac. Ry. Co. v. Cole, 251 U.S. 54, 56 (1919) (noting that "[t]here is nothing . . . in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court"); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 219 (1916) (acknowledging the "express and settled doctrine that the [Seventh] Amendment does not relate to proceedings in [state] courts"); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874) (declaring the Seventh Amendment "does not apply to trials in State courts"). *But cf.* McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation."). For a post-*McDonald* appellate decision holding that pre-*McDonald* Seventh Amendment incorporation cases are still binding, see *González-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015) (per curiam).

78. *See generally* Eric J. Hamilton, Note, *Federalism and the State Civil Jury*, 65 STAN. L. REV. 851 (2013) (analyzing the right to trial by jury in state constitutions). *See also* James, *supra* note 38,

word *preserved* in their civil jury provisions; most other state constitutions say that the right is "inviolate," maintained "as heretofore," or "held sacred."[79]

Some state courts adopt a test—often called the "historical test"—that looks to the cases in which a civil jury would have been available in the relevant year and preserves the jury trial right in those cases.[80] But new kinds of claims, which are often the creation of statute, are not within the jury trial right. In effect, the law side is frozen, and all new development can be seen as an expansion of equity.[81]

By contrast, the federal approach (also adopted by some states) is called "dynamic" because it adapts and expands to ensure the jury trial right is not shouldered aside by the creation of new causes of action and new remedies.[82] Neither the law side nor the equity side is frozen. Instead, each new development is analogized to what preceded it: some new developments are considered legal, others equitable. This theoretically vigorous protection of the jury trial right is diminished in practice, however, by the legal transformations of the last century that have taken decision-making authority and opportunity from the jury and placed it in the hands of the judge.[83]

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at 655 (recognizing that the right to trial by jury has been preserved by nearly every state constitution).

79. Hamilton, *supra* note 78, at 855. These differences in wording do not have much effect. *Id.* at 885. On the importance of the differences in dates of ratification for the state constitutional provisions, compare *id.* at 856 (concluding that state judicial "interpretations generally preserve the right as it was at common law") with Lerner, *supra* note 2, at 837–38 ("State courts generally rejected the idea that English practice controlled state rights to civil jury trial."). On ways the supposedly "inviolate" state rights have been qualified, see Lerner, *supra* note 2, at 821–24.

80. *See, e.g.*, Hiatt v. Yergin, 284 N.E.2d 834, 843–44 (Ind. Ct. App. 1972) (analyzing the historical application of right to trial by jury under the 1852 constitution); Colclasure v. Kansas City Life Ins., 720 S.W.2d 916, 917–18 (Ark. 1986) (analyzing the historical application of right to trial by jury under the 1874 constitution); Martin v. Heinold Commodities, Inc., 643 N.E.2d 734, 752–55 (Ill. 1994) (analyzing the historical application of right to trial by jury under the 1970 constitution).

81. Roughly two decades before *Beacon Theatres*, this could be described as "[t]he usual view." Note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282, 283 n.5 (1942). For a defense, see Redish, *supra* note 37, at 531.

82. *See, e.g.*, *Monterey*, 526 U.S. at 708–09; Curtis v. Loether, 415 U.S. 189, 193 (1974) ("Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time."); Plimpton v. Town of Somerset, 33 Vt. 283, 291–92 (1860) ("All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article."); Currie, *supra* note 37, at 706–07; Hamburger, *supra* note 20, at 761. Since *Beacon Theatres*, the federal approach has been adopted by nearly half the states. *See* Hamilton, *supra* note 78, at 868.

83. *See* Lerner, *supra* note 2, at 817 ("By emphasizing expensive pretrial discovery that encourages settlement, the Federal Rules have continued the process of killing civil jury trial."); Thomas, *supra* note 2, at 1081, 1102 (discussing the distribution of jurisdiction between the jury and judge over time). The migration of authority from jury to judge began, of course, long before

III. The Historical Weakness of the Current Approach

This Part makes three criticisms of the current approach to the Seventh Amendment. The focus of this critique is on the two-part *Terry* test described in Part II, which is more prevalent in the lower courts. The three criticisms are:

First, the *Terry* test is grounded on the distinction between "claims" and "remedies," but for equity that distinction is anachronistic. The result is that the test requires courts to ask historical questions that have no answer.

Second, equity operated in different modes, sometimes creating the entirety of the substantive law (its "exclusive jurisdiction") and sometimes, more often, correcting or modifying the results that would be reached by the common law (the "concurrent jurisdiction"). This distinction is basic to determining what were, and what for Seventh Amendment purposes are, "Suits at common law." Yet it is ignored by the *Terry* test and was even rejected in the Court's plurality opinion in *Terry*.

Third, equity developed special procedures for aggregating legal claims, including the class action. Suits using these procedures should not be treated as "Suits at common law" for Seventh Amendment purposes. But this point, too, is elided by the *Terry* test.

These criticisms are focused on the *Terry* test. The *Monterey* analysis of the Seventh Amendment jury trial right is not as vulnerable to them—partly because it does not sharply distinguish claims and remedies, and partly because the *Monterey* analysis has simply not been given much content by the Court. After the critique in this Part, the following Part will take up the reconstructive work of fashioning a better approach, which can be characterized as a way to fill out the content of the *Monterey* analysis (though it goes beyond that).

A. The Anachronism of "Claims" and "Remedies"

What is equity?[84] Part of what makes this question daunting, especially for Seventh Amendment purposes, is that equity did not have the same organizing principles as law. At law there were writs. Those writs can be listed, and each was roughly analogous to what would now be called a

last century. *See* CHARLES T. MCCORMICK, LAW OF DAMAGES (1935), *reprinted in* SHERWIN & BRAY, *supra* note 76, at 32–34.

84. For entry points to the literature on this question, see F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 1–22 (A.H. Chaytor & W.J. Whittaker eds., John Brunyate rev., 2d ed. 1936); Bray & Miller, *supra* note 32; Paul B. Miller, *Equity as Supplemental Law*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 32, at 92; Nadler, *supra* note 32; Irit Samet, *Equity*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 373 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020); Smith, *supra* note 32.

"claim" or "cause of action."[85] But equity had no writs. It did not have, in a strict sense, something like a cause of action.[86]

The key is to see that equity was not a freestanding system; its jurisprudence was defined by its relationship with law. As Professor Frederic William Maitland put it, "[W]e ought to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code, an appendix, a gloss, which used to be administered by courts specially designed for that purpose . . . ."[87] The common law could have existed without equity (and did). But "[e]quity without common law would have been a castle in the air, an impossibility."[88]

One way this supplementary conception of equity manifested itself was in the development of "heads of equitable jurisdiction." These were reasons for the chancellor to involve himself in a dispute.[89] One head of equitable jurisdiction, which can even be considered the chief head subsuming others, was "no adequate remedy at law." For example, at law a plaintiff might be limited to a suit for damages, but that remedy might be inadequate—the chancellor could offer specific performance.[90]

Another head of equitable jurisdiction was "multiplicity of suits," that is, that equity could prevent a ruinous sequence of suits between the same parties or a number of suits between one party and many others. This head of equitable jurisdiction is discussed below.[91]

The chancellors did not separate their work into "claims" and "remedies." In fact, outside of those areas where equity developed the entire field,[92] one could see a "claim" and a "remedy" in equity as being two sides of the same coin. The plaintiff's "claim" was that there was a defect in law for which equity needed to provide a "remedy," using that term in a broad sense to include the full array of equitable responses.

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85. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784–89 (2004) (highlighting that plaintiffs could obtain a legal remedy under the common law only if there was already an applicable form of proceeding). "Cause of action" is particularly apt for code pleading states.

86. *See generally* Bray & Miller, *supra* note 32.

87. MAITLAND, *supra* note 84, at 18; *see also* STORY, *supra* note 12, § 33, at 32 ("Perhaps the most general . . . description of a Court of Equity, in the English and American sense, is, that it has jurisdiction in cases of rights recognised and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.").

88. MAITLAND, *supra* note 84, at 19. Maitland's view was that this supplementary conception of equity applied to trusts, as well as to the concurrent jurisdiction. *Id.*; *see also* Miller, *supra* note 84, at 104–05 (describing development of equity as supplemental law).

89. *See* Bray & Miller, *supra* note 32 (manuscript at 22).

90. For diverging views on the vitality of the "no adequate remedy at law" doctrine in contemporary American law, see *infra* note 114.

91. *See infra* notes 144–145 and accompanying text.

92. *See infra* subpart III(B).

It is even somewhat anachronistic to speak of equitable substantive law (outside of trust and a handful of other exclusively equitable areas). There were equitable doctrines of contract or nuisance, for example. But those doctrines were not available as a kind of alternative body of law—it wasn't, "I have a contract claim, and I'll go through door B to have it resolved under equity rules."[93]

Consider, for example, a contract doctrine such as the rule against enforcement of penalties (and thus of liquidated damages that were regarded as penalties). This doctrine developed from plaintiffs going to equity and seeking a remedy—an injunction restraining the defendant (who was the plaintiff at law) from enforcing the contract.[94] Here equity's substantive law became visible only in retrospect. It was the sum total of the discernable rules that emerged from plaintiffs in equity asking for injunctions against the procurement or enforcement of legal judgments. Thus, equity's substantive law (again, outside of exclusively equitable areas like trusts) was developed largely as an accumulation of equitable responses to defects in the common law.

The irony, then, is that even though equity acted in a corrective fashion—and thus was denied the coherence that comes from being a primary body of rules—the chancellor's work attained a different coherence that was denied to the work of the law judges. Unlike the writs at common law, in which precedents traditionally existed within the silo of each writ,[95] equity permitted a chancellor to analogize what he did in one area to what he had already done in another.[96] Concepts like conscience would be invoked across

93. *See* Michael Lobban, *Contractual Fraud in Law and Equity, c1750–c1850*, 17 OXFORD J. LEGAL STUD. 441, 443–44 (1997) (noting that by the late eighteenth century "[d]octrinal differences" between law and equity "were minimized," with the ground of difference being attention to "distinct problems" and use of "different procedures"). For a contrasting view of law and equity as different rules for playing a game, see SARAH WORTHINGTON, EQUITY 3–6 (2d ed. 2006).

94. For a brief sketch of the development, see BAKER, *supra* note 22, at 347–57. On the difficulty of untangling the responses of the courts of law and equity as late as the sixteenth century, see SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME VI, 1483–1558, at 822–23 (2003).

95. MAITLAND, *supra* note 84, at 3. Maitland describes the writs as the organizational structure for the common law into the nineteenth century, though that assessment is debatable. *See* LANGBEIN, *supra* note 22, at 841 ("By Blackstone's day, a single writ, trespass, had been manipulated to cover most of private law, which made the inherited writ-based scheme of organization obsolete." (endnote omitted)). And Lord Mansfield was notably less keen than some other jurists on keeping precedents in their pigeonholes. *See* Christian R. Burset, *Redefining the Rule of Law: An Eighteenth-Century Case Study*, AM. J. COMP. L (forthcoming Dec. 2022) (manuscript at 23–24, 27–30), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803975 [https://perma.cc/92SQ-VAFF].

96. Examples include the equitable maxims and equitable defenses, which could be invoked across many different kinds of suits. On the maxims, see, e.g., Smith, *supra* note 32, at 1123–28; Roger Young & Stephen Spitz, Essay, *SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175 (2003).

these different areas, tying them together.[97] The maxims and defenses were cross-cutting. And the procedures developed in equity could be deployed, as a general rule, no matter what the basis for the suit or the remedies sought.[98]

This account of equity's operation sits uneasily with the *Terry* test, which is widely used in the lower federal courts. That test requires a separate inquiry into "claims" and "remedies" (in the narrow sense, e.g., injunctions). This separation of equitable "remedies" from equitable "claims" has no basis in history or logic.

This anachronism is not harmless. When courts are analyzing the scope of the jury trial right for a modern cause of action—one that did not exist in 1791—they have to analogize it to things that did exist then.[99] This task is not always easy.[100] It ideally requires historical knowledge as well as historical imagination—not a surface grasp of the historical materials, but the kind of familiarity that allows intuitive judgments about how a new development would have been assimilated. At least it is true that the more one knows about equity and the common law, the easier the task is. But only if we ask the right questions. If we ask patently unhistorical questions, such as whether the "claim" or "cause of action" is equitable (in an area in which equity did not develop the substantive law), we are looking for something that isn't there. This task is not just difficult, but impossible. We should be unsurprised that judges will vary dramatically in how they handle this task. Knowing more about equity and the common law will not make the task easier.

B. The Failure to Reckon with Equity's Exclusive Jurisdiction

Although federal courts routinely make the distinction between equitable "claims" and "remedies," they fail to make another, better grounded distinction. This is the distinction between the different "jurisdictions" of equity.

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97. For different views of conscience in equity, compare SAMET, *supra* note 32, at 42–47, 56–57, with Richard Hedlund, *The Theological Foundations of Equity's Conscience*, 4 OXFORD J.L. & RELIGION 119, 124–26 (2015).

98. On the looser organizational structure of equity, with its cross-cutting focus on the grievance, see Bray & Miller, *supra* note 32.

99. *See* Tidmarsh, *supra* note 2, at 1900.

100. For differing views on its difficulty, compare Shapiro & Coquillette, *supra* note 1, at 450 (referring to "the frequently inconclusive character of the evidence" but nevertheless urging persistence in historical inquiry), with Tidmarsh, *supra* note 2, at 1899 (referring to only "rare instances" in which "the historical evidence is so lacking that no conclusion about the proper analogue between a modern jury-triable question and eighteenth-century English practice can be drawn").

The "exclusive jurisdiction" referred to those areas in which equity developed the entire body of law.[101] The exclusive jurisdiction included trust law,[102] the equity of redemption,[103] and undue influence.[104]

Outside of the exclusive jurisdiction, equity would supplement the law, correcting and remedying its deficiencies. Most of equity's work was in this supplemental mode, in what was called the "concurrent jurisdiction." One scholar summarized it this way: "The concurrent jurisdiction refers to the case where the plaintiff has a legal right and yet goes to Equity for some remedy that the common law cannot provide. Injunctions and specific performance are the core examples."[105]

The third jurisdiction was the "auxiliary," which allowed a litigant at law to resort to equity for its distinctive procedures, such as securing evidence that could then be introduced in a suit at law.[106] This last jurisdiction of equity is noted here for comprehensiveness, but it is the distinction between the exclusive jurisdiction and concurrent jurisdiction that is most valuable for Seventh Amendment purposes.[107]

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101. *See* Gordon, *supra* note 11, at 188 ("In general, the exclusive jurisdiction included cases where a plaintiff had sued on an equitable right, which the common law refused to recognize."). Professor Suja Thomas reads the exclusive jurisdiction too narrowly when she concludes that "only in cases of trusts and then, only for certain of those cases, did courts of equity have exclusive jurisdiction." Thomas, *supra* note 2, at 1101–02. Professor Macnair gives the following summary of the exclusive substantive jurisdiction: "trusts (mortgages, assignment of chattels in the bankruptcy context and assignments of choses in action, being treated as species of trust), penalties and forfeitures, infants, lunatics and married women, set-off and arbitration awards." Macnair, *supra* note 16, at 665. Macnair notes that the jurisdiction over infants and lunatics and that over the dowries of married women derived not from Chancery's English (equity) side but from its Latin (common law) side. *Id.* at 666.

102. *See* 4 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 24.1, at 1654 (5th ed. 2007) ("Trusts are, and always have been, the bailiwick of the courts of equity."). On the relationship between trust law and modern fiduciary law, see *infra* subpart III(C).

103. *See* MCCLINTOCK, *supra* note 18, § 40, at 61, 62; D.P. Waddilove, *Why the Equity of Redemption?*, *in* LAND AND CREDIT: MORTGAGES AND ANNUITIES IN THE MEDIEVAL AND EARLY MODERN EUROPEAN COUNTRYSIDE 117, 117–18 (Chris Briggs & Jaco Zuijderduijn eds., 2018). James Barr Ames classified the equity of redemption within equity's exclusive jurisdiction but treated it as belonging to a more general category in the exclusive jurisdiction of "Bills for Restitution," which would "compel the surrender by the defendant of property wrongfully obtained from the plaintiff, or of property properly acquired but improperly retained because of some misconduct after its acquisition." James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 106–07 (1908).

104. *E.g.*, Curtice v. Dixon, 62 A. 492 (1905). On the scope of undue influence and its extension beyond the common law action for damages in deceit, see J.D. HEYDON, M.J. LEEMING & P.G. TURNER, MEAGHER, GUMMOW & LEHANE'S EQUITY: DOCTRINES AND REMEDIES §§ 15-005 to -030, at 481–85 (5th ed. 2015).

105. Smith, *supra* note 11, at 1195.

106. *See, e.g.*, STORY, *supra* note 12, § 33, at 33.

107. For critique of the auxiliary jurisdiction as a useful category, see HEYDON, *supra* note 104, § 1-105, at 12. Nevertheless, even though the argument in this Article does not rely on the auxiliary jurisdiction, it does not wholly ignore the procedures developed in equity. As argued below, when

This distinction between equity's jurisdictions was popularized by Justice Joseph Story in his *Commentaries on Equity*.[108] Professor D.E.C. Yale has followed the "trichotomy of equity" upstream from Story.[109] Yale finds the first explicit statement of equity's three jurisdictions by the treatise writer John de Grenier Fonblanque in 1793,[110] though the distinction in practice is considerably older and antedates the ratification of the U.S. Constitution.[111] The distinction between the equitable jurisdictions was used by various courts in the United States,[112] and to this day it appears explicitly in some state statutes and trial rules.[113]

This distinction offers an important insight into how equity operated. Consider, for example, the requirement that equity will act only if there is "no adequate remedy at law." That principle is a fundamental doctrine of equitable remedies[114]—but only in the concurrent jurisdiction.[115] Furthermore, some of the emphases that are conventionally associated with equity are rooted in its operation in the concurrent jurisdiction. One is the emphasis on equity's remedial capacities, including a conception of the equitable defenses that centers on the commitments the courts are making

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plaintiffs use certain case-aggregating procedures that equity developed—especially interpleader and the class action—they are not bringing "Suits at common law" within the meaning of the Seventh Amendment. *See infra* subpart III(D).

108. STORY, *supra* note 12, § 33, at 32–33.

109. David Yale, *A Trichotomy of Equity*, 6 J. LEGAL HIST. 194, 195 (1985); *see* 1 HENRY BALLOW, A TREATISE OF EQUITY 10–11 n.*(f)* (John Fonblanque ed., 1793) ("The jurisdiction exercised by courts of equity may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law.").

110. Yale, *supra* note 109, at 195.

111. Yale finds the three areas of equitable jurisdiction "in recognisable form" in John Mitford's 1780 treatise on Chancery. *Id.* at 196–97. For a contrary view on Mitford, see Macnair, *supra* note 16, at 664 n.24. Other commentators describe the trichotomy as "implicit in the equitable jurisdiction all through the eighteenth century," W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 24 (1929), and as providing the "three main heads" under which Chancery acted as a court "at the end of eighteenth and beginning of the nineteenth century," WALTER ASHBURNER, PRINCIPLES OF EQUITY 1–2 (1902).

112. *See supra* note 18 and accompanying text.

113. *See* IND. CT. R. 38(A) ("Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court . . . ."); IOWA CODE § 611.4 ("The plaintiff may prosecute an action by equitable proceedings in all cases where courts of equity, before the adoption of this Code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive.").

114. For diverging views on the adequacy requirement, compare Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 544, 550, 580–81 (2016), with DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 3–4 (1991). For suggestions that the requirement is constitutionally required, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 97 n.108 (1923) and John Michael Townsend, Comment, *Right to Trial by Jury in Declaratory Judgment Actions*, 3 CONN. L. REV. 564, 571 n.22 (1971).

115. *See* Smith, *supra* note 11, at 1195; 41 OHIO JUR. 3D EQUITY § 35 (2021).

when they give equitable remedies.[116] Another is the emphasis on equity as flexible and case-specific.[117]

On each of these points there is a sharp contrast with the exclusive jurisdiction. In the exclusive jurisdiction, it has traditionally been a non sequitur to ask whether there is a remedy at law. In the exclusive jurisdiction, there is no sharp distinction between equitable remedies and everything else. The entire field of trust law has been shaped by equitable principles. Equitable defenses apply no matter what remedy is sought.[118] And the idea that equity is flexible and case-specific has less merit in the exclusive jurisdiction. Large swathes of fiduciary law are made up of settled rules, often quite technical, that do not depend on case-specific adjustment by the judge.[119]

A failure to recognize this distinction leads, for example, to the mistaken idea that a loss-based award of money is always "legal"—even when it is awarded against a trustee.[120] One result of this mistake is that juries are now sometimes awarding equitable compensation against trustees even though there is no historical basis at all for the notion that a suit against a trustee for breach of fiduciary duty should be among the "Suits at common law."[121] But more on this momentarily.

C. *The Problem of 1791 Equivalents for Contemporary Claims: Fiduciary Law as an Illustration*

There is an interaction between the two defects in the *Terry* test just raised (i.e., separating equitable "claims" and "remedies," and ignoring equity's exclusive jurisdiction). This subpart explores why a *Terry*-imposed

116. Bray, *supra* note 114, at 581–82, 584–86.

117. Smith, *supra* note 11, at 1195.

118. For a recent case recognizing that ERISA claims are equitable and thus subject to equitable defenses, see *Ayers v. Life Insurance Co. of North America*, 869 F. Supp. 2d 1248, 1266–67 (D. Or. 2012).

119. *See* Miller, *supra* note 84, at 108–09; Smith, *supra* note 11, at 1195 ("There is no whiff of judicial discretion anywhere in the basic principles of the law of express trusts; it is all a matter of rights."). *But cf.* Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, 261, 272–75 (Andrew S. Gold & Paul B. Miller eds., 2014) (arguing that fiduciary law mirrors the flexibility of equity).

120. For discussion, see Samuel L. Bray, *Fiduciary Remedies*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 449 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019). A related question is raised in the Supreme Court cases interpreting "equitable relief" in ERISA. In earlier cases, the Court treated loss-based monetary awards as not being "equitable relief." *See, e.g.*, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210, 218 (2002). *But see* Langbein, *supra* note 13 (criticizing this line of cases). For a more recent decision that recognizes that loss-based monetary awards in the exclusive jurisdiction are "traditionally equitable relief," see CIGNA Corp. v. Amara, 563 U.S. 421, 441–42 (2011).

121. *See* Bray, *supra* note 120, at 450.

question—what are the 1791 equivalents for contemporary claims—can be so difficult.

Any historically minded test for the scope of the civil jury trial right involves two tasks. One is historical investigation about the scope of the jury trial right in 1791. The other is taking the results of that investigation and finding equivalents in the present. The first of these tasks is past-oriented; the second is a bridging exercise that links the past and the present.

The metaphor of translation is conventional here,[122] and for good reason. The same steps are required for a translator: understanding a text and finding equivalents for its terms and structure in the receiving language. "Source text" and "from source text to receiving language" in the translation context are equivalent to "past" and "from past to present" in the Seventh Amendment context.

Ordinarily, the problem of contemporary equivalents will be invisible. Consider the injunction. An injunction given now is in various ways not like an injunction in 1791. An injunction now is not issued by a single chancellor in London but rather by a multitude of state and federal judges. There were no national injunctions in 1791; there are now. Now injunctions are drafted by prevailing parties. And so on.[123]

Yet we have no trouble at all in gliding from the injunction in 1791 to the injunction today. We call the eighteenth-century and twenty-first-century suits both "suits for an injunction," and because the former were not "Suits at common law" for Seventh Amendment purposes, neither are the latter.

This conclusion is easy, but it comes not from anything intrinsic to the remedy, as if the injunction were a natural kind. Rather the conclusion comes from how we see legal practices. We see a continuity of practice, as well as a continuity of naming, and from it we deem there to be an identity of practice. Perhaps this difference-smoothing is inherent in law for reasons of

122. *See, e.g.*, Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 18 n.117 (2019) (referring to "the translation of the Seventh Amendment to 1979" in *Parklane Hosiery*); Miller, *supra* note 37, at 893 (considering what "is required to successfully translate a piece of eighteenth-century script into a workable legal norm"); Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 414 (1995) ("The task of translating historical practice into the modern procedural context has not proven to be easy.").

123. *Cf.* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 844 (1994) (Scalia, J., concurring) ("We will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement.").

legitimacy, attention, and rhetorical authority.[124] But I need advance no such claim. The only claim I need to make here is that within the legal interpretive community of the United States—within our tradition of interpretation—it is an accepted and legitimate move to see continuity in practice and read it as identity of practice.[125]

But how far can this kind of difference-smoothing go? How do we identify the contemporary equivalents of 1791 practices for purposes of the Seventh Amendment?

Consider an example. Trust law was in the exclusive equitable jurisdiction, and from trust law has grown the larger domain of "fiduciary law." Is all of fiduciary law within equity's exclusive jurisdiction for purposes of the Seventh Amendment?

The growth of fiduciary law has been impressive, and courts have repeatedly broadened the definition of who can be a fiduciary. From the sapling of trust law has grown a flourishing tree.[126] When we look at the remedies available for breach of fiduciary duty, we can see growth but also continuity, including remedies (e.g., accounting for profits, injunction) that are means by which courts require fiduciaries to fulfill their fiduciary duties.[127]

Two facts make the question of fiduciary law's status more complicated, however, than the "injunction of 1791" versus "injunction of today." First, many would now locate agency within fiduciary law, and agency is undeniably legal in its origins.[128] Thus, fiduciary law may seem like a contemporary amalgamation of law and equity, and thus not within the

124. Even legal revolutionaries tend to say, "We stand in the legal revolutionary tradition." *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 110 (2019) ("Prison abolitionists can follow this tradition by instrumentally using the Constitution to build a society based on principles of freedom, equal humanity, and democracy—a society that has no need for prisons.").

125. This conclusion allows the common law to change. *See* Nathan B. Oman, *General Principles and Local Custom*, *in* THE OXFORD HANDBOOK OF NEW PRIVATE LAW 159, 168–69 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020). On legal categories, see generally Lee Anne Fennell, *Sizing Up Categories*, THEORETICAL INQ. L., Jan. 2021, at 1.

126. *See* Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 120, at 41 ("A trust is the quintessential fiduciary relationship. . . . Trust fiduciary law has had a strong influence on the fiduciary principles applicable in bankruptcy, charity, corporation, investment advice, and pension law, among others.").

127. *See generally* Bray, *supra* note 120 (discussing the close relationship between fiduciary duties and remedies, and the importance of fiduciary remedies to the growth of fiduciary law).

128. Holter v. Moore & Co., 681 P.2d 962, 966 (Colo. App. 1983) ("[T]he remedies of principals against agents who have breached their fiduciary obligations are generally at law."); Lord Peter Millett, *Bribes and Secret Commissions Again*, 71 CAMBRIDGE L.J. 583, 586 (2012) ("Before 1890 the common law and equity agreed that, where an agent (at common law) or a fiduciary (in equity) takes advantage of his position to make a profit for himself, the profit is the property of the principal."). On equity's concurrent jurisdiction in agency, see ASHBURNER, *supra* note 111, at 117.

exclusive jurisdiction of equity. Second, fiduciary law is in vogue among scholars, with many analogizing other areas to fiduciary law and suggesting that their own fields are really "fiduciary."[129] Surely not all of these fields newly deemed "fiduciary" are outside of the jury trial right, but how does one know?

Yet it becomes easier to draw the line once we see the working of the scholarly subconscious. Fields come and fields go. As parts of a field crumble off, like a cookie, the field might face dissolution. (This happened with equity in the twentieth century.[130]) As new fields emerge, to gain the mass needed to survive, they can redraw lines to pull in adjacent or related areas of inquiry. Several fields with overlapping areas are currently in some state of flux, self-definition, or revival. These include fiduciary law, agency, restitution and unjust enrichment, remedies, and equity. As the body of scholars who define themselves as working on fiduciary law grows, one effect has been the enfolding of agency law, which has long been a separate field—a field with its own restatement, a field with a separate history of development by the courts of law.

Agency law does share some principles with fiduciary law, but there are marked differences: agency has traditionally had juries, punitive damages, more emphasis on self-help, a paradigm case of a suit by a third party against an agent rather than a suit by a beneficiary against a trustee, and a tendency to rely on remedial principles developed in other areas of law (e.g., contract, tort).[131] It is therefore best not to see agency as a distinct field, but as one that might be characterized as contract law infused with fiduciary principles. Thus, agency law can be distinguished from fiduciary law, as it has been historically and in the precedents of the Supreme Court.[132]

As soon as the distinction is drawn between agency (legal) and fiduciary law sans agency (equitable), the Seventh Amendment analysis becomes clearer. Fiduciary law is an outgrowth of trust law, not only in continuity with equity but also pervasively dominated by it.[133] Fiduciary law, though

129. *See* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020) (critiquing the view that the Constitution is a fiduciary instrument).

130. In Zechariah Chafee's memorable description, "Equity in American law schools seems to be suffering the fate of the Austrian Empire." ZECHARIAH CHAFEE, JR., CASES ON EQUITABLE REMEDIES, at v (1938).

131. *See* Bray, *supra* note 120, at 450.

132. *See, e.g.*, Chauffeurs Loc. No. 391 v. Terry, 494 U.S. 558, 567–69 (1990) (plurality opinion); *id.* at 585–88 (Kennedy, J., dissenting); *see also In re* Evangelist, 760 F.2d 27, 29 (1st Cir. 1985) (Breyer, J.) ("Actions for breach of fiduciary duty, historically speaking, are almost uniformly actions 'in equity'—carrying with them no right to trial by jury." (citing RESTATEMENT OF RESTITUTION, introductory note at 9 (1937))); RESTATEMENT (SECOND) OF AGENCY § 399 cmt. e (1958).

133. For analysis with respect to remedies, see Bray, *supra* note 120. Although modern fiduciary law is a descendant of equity, there is an older lineage of accountability at common law. *See* Joshua Getzler, *Fiduciary Principles in English Common Law*, *in* THE OXFORD HANDBOOK OF

developed far beyond the 1791 state of trust law, is an organic development from it, one in continuity with it. Thus, fiduciary law may be characterized as still belonging to the exclusive jurisdiction. But agency is not and never was in the exclusive jurisdiction. And the metaphorical extensions of the fiduciary concept—such as the calls for thinking about constitutional law as fiduciary law—are merely rhetorical. They do not disturb the Seventh Amendment analysis.

As for the loose extensions of the fiduciary concept into tort law, that imprecision should be resisted. Other scholars have reached this conclusion through attention to differences between tort and fiduciary law.[134] To their arguments can be added another one not yet in the literature: a crisper distinction between fiduciary law and tort law makes it easier to demarcate the scope of the civil jury trial right.

In short, as long as we allow for some dynamism and growth, as the Supreme Court's approach to the Seventh Amendment does,[135] then fiduciary law sans agency should be seen as exclusively equitable. There should therefore be no right to a jury under the Seventh Amendment in a suit for breach of a fiduciary duty, regardless of the remedy sought. But even though that answer should be obvious under any historical inquiry, it is not obvious, and is sometimes missed, because of how the inquiry is framed by *Terry*.

D. The Disappearance of Equity's Case-Aggregating Procedures

Plaintiffs could also sue in equity to take advantage of its distinctive procedures. Equity's procedure was inquisitorial.[136] It offered much more powerful devices for discovery, though those devices also had their own limitations.[137] And often equity offered "procedures" or "remedies"—the classifications can be somewhat anachronistic—that restrained the courts of law. For example, the chancellor allowed a person who was already a party in a suit at law (or who expected to be a party in a suit at law) to bring a

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FIDUCIARY LAW, *supra* note 120, at 471, 474; S.J. Stoljar, *The Transformations of Account*, 80 L.Q. REV. 203 (1964).

134. *See, e.g.*, John C.P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort*, *in* EQUITY AND LAW: FUSION AND FISSION, *supra* note 32, at 309, 310.

135. *See supra* notes 76–82 and accompanying text.

136. *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005). For qualifications, see Lobban, *supra* note 93, at 446.

137. *See* Patricia I. McMahon, *Rediscovering the Equitable Origins of Discovery: The "Blending" of Law and Equity Prior to Fusion*, *in* EQUITY AND LAW: FUSION AND FISSION, *supra* note 32, at 280; *see also* James, *supra* note 38, at 662. "The conventional view is that the Rules chose equity over the common law. With respect to discovery, however, the better view is that the Rules combined the powers of the common law and of equity without sufficient attention to the limits in either system . . . ." Samuel L. Bray, *Equity: Notes on the American Reception*, *in* EQUITY AND LAW: FUSION AND FISSION, *supra* note 32, at 31, 43 n.56 (citation omitted) (citing McMahon, *supra*).

separate suit in equity to use its capacities for producing and preserving evidence.[138]

In addition, the chancellor was willing to aggregate claims that would otherwise have had to be brought one at a time in courts of law.[139] With a bill of peace, for example, a chancellor might resolve a dispute involving multiple plaintiffs against a single defendant.[140] "The class suit," too, "was an invention of equity."[141] In a line of cases beginning in the early eighteenth century, equity "permitted a few parties to represent the many; representative parties could sue, or be sued, on behalf of or on account of themselves and others."[142] Equity also developed interpleader.[143] All of this is uncontroversial.

These aggregative techniques were justified by appealing to another one of the heads of equitable jurisdiction, namely, "multiplicity of suits." Note that when aggregating multiple suits that could be brought at law, the chancellor did not need to give distinctively equitable remedies or apply distinctively equitable rules. He could decide the case according to legal rules and give legal remedies for the violation of legal rights, but the case could nevertheless be brought in equity on the ground that "multiplicity of suits" was a head of equitable jurisdiction. To underscore this point, even if the remedy sought was legal, and even if the substantive basis was entirely legal,

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138. *See* Arizona v. California, 292 U.S. 341, 347 (1934) ("Bills to perpetuate testimony had been known as an independent branch of equity jurisdiction before the adoption of the Constitution."); *see also* Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 MICH. L. REV. 1571, 1591–92 (1983).

139. In general, "the chancellor could handle multiple parties and the possibility of multiple suits in a way that the law courts had not developed." James, *supra* note 38, at 662.

140. *See* 2 JAMES BARR AMES, A SELECTION OF CASES IN EQUITY JURISDICTION WITH NOTES AND CITATIONS 55 (1929) (presenting *How v. Tenants of Bromsgrove* (1681)).

141. Hansberry v. Lee, 311 U.S. 32, 41 (1940) ("The class suit was 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 in conformity to the usual rules of procedure is impracticable."); *see also* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1854) ("[A] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all . . . ."); Stoljar, *supra* note 26 (reviewing equitable background of class suits); William Weiner & Delphine Szyndrowski, *The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935 (1987) (same); Stadtler, *supra* note 26, at 1565–71 (same). Professor Stoljar does note the existence of slender antecedents of the class action outside of equity. Stoljar, *supra* note 26, at 479–80. There is, however, no more historical untidiness here than in the areas in the exclusive jurisdiction. *Cf. supra* note 104 (discussing undue influence).

142. Stoljar, *supra* note 26, at 479.

143. *See* McCoid, *supra* note 37, at 17–19. Devices we would now consider "remedies" also showed the aggregating abilities of equity. For example, with a decree quieting title or an injunction prohibiting trespass, the chancellor might act to resolve a dispute that might have generated a large number of suits at law between the same two parties.

the suit was brought in equity.[144] Such a case—using the aggregative devices of equity—could not be brought at law. It was not a "Suit[] at common law."[145]

Most of equity's procedural devices have been fused with those of law, and so it is often impractical to delineate a separate zone of "equitable procedures" that are outside of the "Suits at common law" in which the Seventh Amendment preserves the jury trial right. But the case-aggregating devices developed in equity—especially interpleader and the class action—still have a discrete existence in the law today. No heavy lifting is required to carry over their equitable identity from 1791 to the present.

There is an instructive Supreme Court case that predated the Federal Rules of Civil Procedure but nonetheless anticipated and discussed the impact of the eventual procedural merger of law and equity. In *Liberty Oil Co. v. Condon National Bank*,[146] the Court held that a defendant's answer, by seeking relief in the nature of a bill of interpleader, had the effect of transforming a legal action (money had and received), making it "take[] on" an "equitable character."[147] The Court expressly contemplated the union of legal and equitable procedure and said that its result was consistent with what the outcome would be if there were "one form of civil action."[148] In other words, nothing about the Court's conclusion would have changed even if the Federal Rules of Civil Procedure had been adopted.[149]

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144. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 243, at 255 (1st ed. 1881) ("In fact, the 'multiplicity of suits,' which is to be prevented, *constitutes the very inadequacy of legal methods and remedies* which calls the concurrent jurisdiction into being under such circumstances, and authorizes it to adjudicate upon purely legal rights, and confer purely legal reliefs." (emphasis in original)). This is recognized, for example, in *Smith v. Swormstedt*:

> For convenience, therefore, and to prevent a failure of justice, *a court of equity* permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. *The legal and equitable rights and liabilities of all being before the court* by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

Smith, 57 U.S. at 303 (emphasis added). For a similar point about interpleader, see Zechariah Chafee, Jr., *Modernizing Interpleader*, 30 YALE L.J. 814, 820 (1921) (recognizing that interpleader "is often the means of getting a purely legal issue into equity," including "disputes about ownership, etc., which are ordinarily jury questions").

145. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 244 (1922) (concluding that the case "became a bill of interpleader in equity," which "takes the issue here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment").

146. 260 U.S. 235 (1922).

147. *Id.* at 242; *see also id.* at 244 ("[W]e find that by defendant's answer and the court's order it became a bill of interpleader in equity.").

148. *Id.* at 242–44.

149. *Cf.* Woolhandler & Collins, *supra* note 41, at 682 ("Judge Clark and other drafters of the Federal Rules did not intend them to alter the pre-merger division of authority between law and equity; indeed, maintaining the status quo probably was necessary to avoid significant opposition to the new Rules.").

For a historically minded test for the Seventh Amendment, there should be no jury trial right in a class action or an interpleader suit, regardless of the substantive claim or remedy sought.[150] These were not "Suits at common law." Nevertheless, this is not the result the Supreme Court has reached. The Court has twice taken the position that class actions are not per se equitable for purposes of the Seventh Amendment (though both statements are arguably dicta).[151] As long as that position holds, suits that were cognizable only in equity are being incorrectly treated as "Suits at common law."

IV. A Revised Approach

This Part proposes a revised test. Like the two-part *Terry* test that remains in use in the lower federal courts,[152] this inquiry is a structured one. But it is more historically grounded and somewhat easier for courts to apply. In addition, the structure gives more guidance to courts than is offered by the unified *Monterey* analysis that has been employed in the Court's most recent decisions about the Seventh Amendment.[153]

The gist of the test proposed here is that the civil jury trial right should be presumed, but with three categorical, pro tanto exceptions: (1) plaintiff's suit is in equity's exclusive jurisdiction (e.g., trust law); (2) plaintiff seeks an equitable remedy (e.g., injunction); or (3) plaintiff employs an equitable device for aggregating cases (e.g., class action). This Part concludes with a discussion of how the courts could work from the current doctrine on the Seventh Amendment toward the proposed test.

A. The Proposed Test

The starting point for the new test is that there is some merit in each aspect of the Court's tests for determining what are "Suits at common law" for purposes of the jury trial right.

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150. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 566 (4th ed. 2010) (concluding that it "is utterly contrary to the practice of 1791" to think that "[a] substantive legal claim, brought in an equitable procedure, such as a class action, a shareholder's derivative suit, or interpleader, is triable to a jury").

151. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 845–46 (1999) ("[T]he certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members."); Ross v. Bernhard, 396 U.S. 531, 540–41 (1970) (recognizing that "before-merger class actions were largely a device of equity, and there was no right to a jury even on issues that might, under other circumstances, have been tried to a jury," yet nevertheless suggesting that now "class action plaintiffs may obtain a jury trial on any legal issues they present"); *see also* Kremers v. The Coca-Cola Co., 714 F. Supp. 2d 912, 918 (S.D. Ill. 2009) (adducing similar authority); Scarlett, *supra* note 63 (arguing in favor of *Ross*). For further discussion, see *infra* note 197 and accompanying text.

152. *See supra* notes 55–57 and accompanying text.

153. *See supra* notes 58–65 and accompanying text.

First, that question can be answered by looking at its inverse, i.e., by asking what were suits in equity in 1791.[154]

Second, that inquiry should in part be about remedies because a suit for an equitable remedy was not a suit at common law.

Third, differential remedies do not exhaust the law–equity distinction (an insight that was reflected imperfectly in the older *Terry* test's search for legal and equitable "claims").

Fourth, some attempt at analogizing, or translating, between past and present is necessary. The only ways to avoid it would be by freezing the "law" side, which over time would sideline the jury trial right; or by freezing the "equity" side, which would provide a jury trial right in the entire field of statutorily created private rights.

Finally, the *Terry* test has the merits of a structured inquiry, such as relative ease in comparing judicial reasoning across cases. But the structure of the *Terry* test, with its separation of "claims" and "remedies," is anachronistic and illogical.[155] The *Monterey* test avoids those problems yet offers judges little guidance about its crucial question: "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was."[156]

The test proposed here has a default rule: Presume that the suit is one "at common law" with a right to a jury trial. This default rule is not itself found in the practice of 1791. Nevertheless, it accords with the historic principle, still deeply rooted in our legal system, that law is primary and equity is secondary and exceptional.[157] (Or, to put the point from the perspective of an equity lawyer, the exclusive jurisdiction was small and the concurrent jurisdiction was large.) It accords with the historic principle that the plaintiff could choose where to sue.[158] It also accords with the Supreme Court's decisions emphasizing that the jury trial right should be protected "in doubtful cases."[159]

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154. *See supra* notes 20–23 and accompanying text.

155. *See supra* subpart III(A).

156. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999) (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996)).

157. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (noting the Court's "characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). On equity as second-order, see Smith, *supra* note 32. On equitable remedies as "conceptually exceptional," not just historically but also in contemporary law, see Bray, *supra* note 31, at 1037–39.

158. *See* Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986, 988 (1980) ("[F]or the plaintiff is the master of his cause of action; once it is characterized as legal by him, the ordinary attributes of a trial of law, including the availability of a jury, necessarily follow.").

159. WRIGHT & MILLER, *supra* note 10, § 2302.1, at 36.

But this presumption of the civil jury trial right is not absolute. It has three categorical exceptions:

First, a suit in equity's exclusive jurisdiction is not a "Suit[] at common law."[160] Thus, for example, if the plaintiff sues for breach of fiduciary duty by a trustee, there is no right to a jury trial. This is true no matter what remedy is sought, even if it is a money award equivalent to the loss from improper administration of the trust (variously called "equitable compensation," "surcharge," "equitable damages" or simply "damages"[161]).

Second, a suit for an equitable remedy is not a "Suit[] at common law." Thus, there is no jury trial right when the plaintiff seeks one of the equitable remedies, such as injunction, accounting for profits, constructive trust, equitable lien, subrogation, equitable rescission, specific performance, or reformation.[162]

Third, a suit that employs an equitable device for aggregating cases is not a "Suit[] at common law."[163] The prototypical example is the class action; another is interpleader.

All three exceptions are pro tanto: there is no jury trial right to the extent that the plaintiff is suing in the exclusive jurisdiction, for an equitable remedy, or by means of an equitable case-aggregating device. For example, if the plaintiff sues the defendant for breach of contract and seeks damages and an injunction, there would be no right to a jury trial about the injunction, but otherwise there would be a presumption of a jury trial right.[164]

Note that when some parts of the plaintiff's case are to be tried to the court and some to a jury, there would be no change to the existing federal practice. That practice is for the jury to adjudicate any facts common to the legal claim and the equitable claim,[165] and for the jury to go first to avoid any prejudice to the jury trial right.[166]

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160. *See supra* subpart III(B).

161. *See* Sitkoff, *supra* note 126, at 58 (calling this remedy "surcharge" and glossing it as "a make-whole measure of compensatory damages").

162. Bray, *supra* note 114, at 551–58.

163. *See supra* subpart III(D); *see also infra* notes 195–197 and accompanying text.

164. *See* Tull v. United States, 481 U.S. 412, 425 (1987) ("[I]f a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.'" (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974))).

165. Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990) ("When legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.'" (quoting *Curtis,* 415 U.S. at 196 n.11)).

166. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962) ("Since these issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims."); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959) ("[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal

The result of the three exceptions is to narrow the space in which the presumption of a jury trial operates: non-class cases, outside of equity's exclusive jurisdiction, in which the plaintiff seeks a legal remedy.[167]

Within that space, the presumption of a jury trial is defeasible: a plaintiff or defendant could show that the suit should not count as being among "Suits at common law" for purposes of the jury trial right. Examples would include admiralty suits, as well as some suits for prerogative writs. But this will usually be difficult to show. In theory and in fact, the presumption of the jury trial will usually mean that in this space—non-class, concurrent jurisdiction, legal remedy—there is a jury trial right.

B. Administering the Proposed Test

The proposed test is not exactly easy to administer. As long as the test is historically inflected, it will require historical investigation, and it will require that some equivalence be shown between historical and contemporary phenomena. Nevertheless, the proposed test is easier to administer for two reasons: (1) it has a default rule, which facilitates decision-making under uncertainty; and (2) it shifts the focus from one-off analogies to categories that are by comparison relatively discrete and stable, with fewer edge cases.

First, the proposed test is easier to administer because it offers a default rule in cases of uncertainty. Where there is uncertainty, there is a presumption of a jury trial right. Then, in the three equitable categories, that presumption is rebutted and replaced with an irrebuttable presumption of no jury trial right.

An interesting question that cannot be resolved here is whether legal tests are generally better when they have some slope, inclining the decisionmaker toward one result unless there is a reason to shift. That may be the case, and it seems in keeping with the traditional view of statutory interpretation, in which statutes were regarded as "penal" and construed strictly, or as "remedial" and construed liberally.[168]

Regardless, with respect to the Seventh Amendment, although the degree of difficulty can be overstated,[169] there will always be a residue of

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Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (footnote omitted)).

167. Legal remedies include damages and legal awards of restitution (also known as recovery in quasi-contract).

168. *Cf.* Tomás Gómez-Arostegui, *What History Teaches Us About U.S. Copyright Law and Statutory Damages*, 5 WIPO J. 76, 81 (2013) (exploring operation of presumption that "penal" legislation is narrowly construed).

169. *See* Tidmarsh, *supra* note 2, at 1902 (noting that "the relevant evidence (English legal practice) is bounded in scope, has been methodically analyzed by generations of historians, and avoids the value-laden inquiries into 'intent' or 'public meaning' that often plague historically grounded interpretive or constructive inquiries into other constitutional texts"); *see also supra* note 100 (noting different views of the difficulty of the inquiry).

historical and analogical uncertainty. Having a default rule helps grease the wheels for reaching a decision.[170]

Second, the proposed test shifts the focus of the inquiry from claim-specific analogies to broader categories. The *Terry* test asks explicitly about analogous claims. What courts then do is compare the features of the plaintiff's claim with possible analogies: "Such and such a claim under a modern statute is like Legal Claim A from 1791 in this respect, but it is like Equitable Claim B from 1791 in that respect" and so on. But there are always multiple analogies. For example, in *Pernell v. Southall Realty*,[171] when the Court tried to find a historical analogue for the District of Columbia's statutory action to recover possession of real property, it wound up discussing the assize of novel disseisin;[172] writs of entry, including the writ of entry *ad terminum qui praeterit*;[173] ejectment;[174] and criminal proceedings under the forcible entry and detainer statute of Henry VI.[175]

By shifting the central question from one explicitly about analogy, inviting many contenders, to one that is more categorical—does this suit fit in equity's exclusive jurisdiction, is it a suit for an equitable remedy, or does it use an equitable device for aggregating cases—the question becomes more manageable.

There is still work for judges to do. The content of the three categories—exclusive jurisdiction, equitable remedies, and equitable aggregating devices—will require decisions. Consider, for example, the content of the exclusive jurisdiction. Its leading headings can be summarized this way[176]:

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170. Another scholar's proposal also has a presumption in favor of the jury trial right, and it, too, is supported by an argument for easier decision-making. *See* Kenneth S. Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 487–88 (2010) .

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

172. *Id.* at 370–72.

173. *Id.* at 372–73.

174. *Id.* at 373–74 ("Had Southall Realty leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant.").

175. *Id.* at 376–81. The court had the benefit of an unusually thorough historical brief prepared in part by a young attorney named Michael Boudin. *See* Brief for Petitioner at 25–31, *Pernell*, 416 U.S. 363 (describing the historical context of different types of real property suits in England).

176. Note that the following summary does not include bankruptcy. The Supreme Court has at various times said that bankruptcy was within equity's exclusive jurisdiction, but it was an administrative procedure that could engender suits in Chancery and the courts of law. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 107 (Thomas A. Green, Hendrik Hartog & Daniel Ernst eds., 2004); *see also* McCoid, *supra* note 56. There is variation in lists of what belongs in equity's exclusive jurisdiction, not least because there was variation over time and because the chancellors did not see their work in terms of these distinctions. For Professor Macnair's list of the contents of equity's exclusive substantive jurisdiction, see *supra* note 101.

- trust law;[177]
- the equity of redemption,[178] which involved the redemption of pledged assets (including but not limited to mortgages on real property); and
- undue influence.[179]

Some treatise writers—especially John Norton Pomeroy—used idiosyncratic definitions of the equitable jurisdictions.[180] And this variation in usage has been the basis for criticism of distinctions between the equitable jurisdictions.[181] In addition, there was development over time in the contents and contours of the jurisdictions.[182] So I do not mean to imply that they are completely fixed and fully ascertainable: what the equitable jurisdictions are is a kind of constructed history—an artificial history—of equity.[183] It might therefore seem that this is just a swapping of one historical inquiry for another, both difficult and indeterminate.

But the shift to categories does make the proposed test easier to use. There will be agreement about the paradigm instances, such as trust law.

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177. On the relationship between trust law and modern fiduciary law, see *supra* subpart III(C).

178. *See supra* note 103 and accompanying text.

179. *See supra* note 104 and accompanying text.

180. Pomeroy treats any remedy given only by equity as within the exclusive jurisdiction, such as injunctions, which has the effect of dramatically expanding the "exclusive jurisdiction" concept and making it useless. *See* MCCLINTOCK, *supra* note 18, § 40, at 61 n.15 (noting that Pomeroy's approach "transfer[s] most of the cases to the exclusive jurisdiction"). Sometimes courts have adopted Pomeroy's view. *See, e.g.*, Overfield v. Pennroad Corp., 146 F.2d 889, 894, 916–17 (3d Cir. 1944); FEC v. Christian Coal., 965 F. Supp. 66, 71 (D.D.C. 1997); Wilson v. Shores-Mueller Co., 40 F. Supp. 729, 732 (N.D. Iowa 1941). At other times, more wisely, courts have rejected it. *See, e.g.*, Cope v. Anderson, 331 U.S. 461, 463–64 (1947) ("[I]t is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the legal obligation here asserted."); Nemkov v. O'Hare Chi. Corp., 592 F.2d 351, 354 (7th Cir. 1979); Winne v. Queens Land & Title Co., 149 N.Y.S. 664, 665 (N.Y. App. Div. 1914). For a differently idiosyncratic definition of "concurrent," see WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY *3 (Wm. A. Herrick ed., 1871).

181. *See, e.g.*, HEYDON, *supra* note 104, § 1-105, at 12 (articulating several criticisms of the distinctions between the equitable jurisdictions). As even the most incisive critics of the classification recognize, most of the difficulties involve distinguishing the concurrent and auxiliary jurisdictions. *See id.* Thus, "[t]he distinction which is of the greatest continuing importance is the distinction between the exclusive jurisdiction, on the one hand, and jurisdiction in aid of legal rights, on the other hand." *Id.* § 1-110, at 12. The same conclusion was reached in Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 569–70 n.34 (1913).

182. *See* Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 56 (1980) (noting that "there were seepages from exclusive into concurrent equity [jurisdiction]"); *see also* James, *supra* note 38, at 658 (observing that throughout "the course of time many matters and issues worked over into law from equity"); Tidmarsh, *supra* note 2, at 1899 (observing that "the boundary between common law and equity was ever shifting").

183. For criticism of the three jurisdictions, *see* Macnair, *supra* note 16, at 665–66. On equity's artificial history, see Bray, *supra* note 31, at 1014–23.

There is a limited menu of other possible areas in equity's exclusive jurisdiction. The variation in commentators' lists tends to be the inclusion or exclusion of one or another discrete category.[184] In other words, there is modest indeterminacy at the level of categories. By contrast, under the current test, there is pervasive indeterminacy at the level of claims.

The same point can be made about the contents of the other categories, namely equitable remedies and equitable case-aggregating devices. For remedies, there are a few gray areas for classifying remedies as legal or equitable, including the borderline of legal and equitable restitution.[185] But usually it will be clear whether the remedy sought is legal or equitable. Nor will there often be debate about whether the suit is a class action or an interpleader action.

That difference in the level at which the indeterminacy is found turns out to be consequential. This is because with the proposed test there will be fewer "edge cases"—most cases are clearly inside or outside equity's exclusive jurisdiction, most remedies are clearly legal or equitable, and most suits clearly do or do not involve one of equity's case-aggregating devices. But with the current test, as long as one has sufficient historical imagination, the number of potential edge cases is vast. There is simply more room for error.

In addition, with the proposed test, it will be easier to liquidate through precedent any indeterminacy about whether a category is considered to be in equity's exclusive jurisdiction.[186] It is harder for precedent to resolve the indeterminacy about claims because the scope of each precedent is smaller: a precedent is controlling for this one claim, not for a broader category.

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184. It is possible that even this variation does not reflect a difference in judgment but rather results from the fact that: (1) some commentators are taking into account the development of equity through the nineteenth and twentieth centuries and some are not; and (2) the vantage point of the different commentators is, by turns, English, Australian, Canadian, or American.

185. Money-based restitution is usually legal, the domain of what has traditionally been called quasi-contract. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmts. a, d (AM. L. INST. 2011). Complication chiefly arises because of accounting for profits, which is an equitable remedy traditionally available in the exclusive jurisdiction (for breach of fiduciary duty) and in the concurrent jurisdiction (incident to another equitable remedy, or in cases of extraordinarily complicated accounts). *See* Bray, *supra* note 120, at 449–50, 465. *Disgorgement* is an umbrella descriptive term, not the name of a remedy. Some of the remedies for which the term is used are legal while others are equitable. *See id.* at 454, 465; *see also* Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71, 87–88 (2018). Rescission comes in two forms, "equitable rescission" and "rescission at law." *E.g.*, *Nadinic v Drinkwater* [2017] 94 NSWLR 518 ¶¶ 28–29 (Court of Appeal) (Austl.); Knaebel v. Heiner, 663 P.2d 551, 554 (Alaska 1983).

186. *Cf.* York v. Guar. Tr. Co. of N.Y., 143 F.2d 503, 526 (2d Cir. 1944) (Frank, J.) (concluding that whether a case is within the exclusive or concurrent jurisdiction is determined "by federal decisions as to the federal equity jurisdiction existing at the time of the adoption of the Constitution or of the enactment of the Judiciary Act of 1789"), *rev'd on other grounds*, 326 U.S. 99 (1945).

C. *Getting from Here to There*

If the U.S. Supreme Court were to adopt the test proposed in this Article, the justices would need to retrace their steps. Here are some suggestions about how that could be done.

First, the Court should emphasize the language of the Seventh Amendment itself. What is "preserved" is the right to civil jury trial in "Suits at common law." It is that textual language that encourages a more precise historical test. This is the ground of authority for adopting the proposed test.

Second, the Court could appeal to older authority that recognized the historical distinctions drawn in this Article. For example, in *Shields v. Thomas*,[187] the Court made several observations congruent with the test proposed here. It said that the Seventh Amendment,

> correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law.[188]

Unpacked, this statement offers support for the following propositions:

(1) There is no constitutional jury trial right in the exclusive jurisdiction of equity: the right "cannot be made to embrace the established, exclusive jurisdiction of courts of equity."[189]

(2) There is no constitutional jury trial right where plaintiff seeks an equitable remedy: the right extends only to "rights and remedies peculiarly legal in their nature."[190]

(3) There is no constitutional jury trial right where the case is founded on one of equity's aggregating devices: the right embraces only suits resolved "by the appropriate modes and proceedings of courts of law."[191]

Third, the Court could draw on one of its own recent ERISA decisions that uses the language of the exclusive jurisdiction. In *CIGNA Corp. v. Amara*,[192] seemingly chastened by scholarly criticism,[193] the Court

187. 59 U.S. (18 How.) 253 (1855).

188. *Id.* at 262.

189. *Id. See also* Talley v. Curtain, 54 F. 43, 48 (4th Cir. 1893) ("If, then, the case comes within the normal jurisdiction of a court of equity of the United States, either because it deals with trusts and equitable assets, or because complainants have no plain, adequate, and complete remedy at law, we escape the provision of the constitution relied on [i.e., the Seventh Amendment].").

190. *Shields*, 59 U.S. at 262.

191. *Id.*

192. 563 U.S. 421 (2011).

193. *See* Langbein, *supra* note 13 (explaining "how the Court's interpretation of ERISA remedy law has gone wrong").

recognized that "prior to the merger of law and equity," trust law remedies—even ones that might resemble common law damages—were "exclusively equitable."[194]

Fourth, the Court would have to reverse itself on the jury trial right in class actions.[195] There is an easy path to doing so because the text, history, and earlier precedents all overwhelmingly support the recognition that a class action was a suit in equity, not one of the "Suits at common law."[196] As Professor Douglas Laycock has said, it "is utterly contrary to the practice of 1791" to think that "[a] substantive legal claim, brought in an equitable procedure, such as a class action, a shareholder's derivative suit, or interpleader, is triable to a jury."[197]

Finally, the Court would want to have recourse to a straightforward proposition that is admitted by "[e]ven the most ardent critic of any historical test," namely "that matters that would have fallen entirely within the jurisdiction of a court of equity or admiralty in 1791 do not come within the definition of a suit at 'common law' under the seventh amendment."[198] With that principle, a word of text, and a page of history, the Court could reformulate its flawed test for the Seventh Amendment jury trial right. And the Court would not even need to wade into the murky waters of whether there is a "complexity exception" to the Seventh Amendment.[199]

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194. *CIGNA Corp.*, 563 U.S. at 442 (citations omitted). For criticism of the federal lower courts' failure to recognize the implication of *Amara* for jury trial rights in ERISA suits, see James F. Parker, Note, *Revival of Substantive Equity: Increased Household Risk, Safety Valve Litigation and Availability of the ERISA Stock Drop Jury*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 425, 462–67 (2015).

195. *See supra* note 151.

196. *See* Stadtler, *supra* note 26, at 1569 ("[F]rom the inception of the federal court system, at least until the adoption of the FRCP in 1938, class suits in the federal courts were 'permitted only in equity.'"). *See generally* Stoljar, *supra* note 26; Stadtler, *supra* note 26. On one pre-*Ross* precedent, see *supra* notes 146–149 and accompanying text.

197. LAYCOCK, *supra* note 150, at 566. In fact, the Court recognized as much in *Ross v. Bernhard*. *See* Ross v. Bernhard, 396 U.S. 531, 540 (1970) (explaining that pre-merger class actions were a device of equity and had no right to a jury trial). But the Court seemed to think that the adoption of the Federal Rules of Civil Procedure changed the scope of the constitutional right, *see id.* at 540–41, a suspect conclusion.

198. Shapiro & Coquillette, *supra* note 1, at 449; *see also* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 103 (2009).

199. In the late twentieth century, there was a vigorous debate over a "complexity exception" to the Seventh Amendment. The debate was most intense in the 1980s, though it has never completely died away. The point in controversy is whether there was, as a historical matter, an exception to the civil jury trial right for cases or claims of unusual complexity. On this question, Professor Morris Arnold argued *no*, Lord Devlin argued *yes*, and the courts have tended to side with Professor (and later Judge) Arnold. *See, e.g.*, Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Devlin, *supra* note 182. The formulation of the question is all-important. If the question is formulated as whether there was, in 1791, a recognized exception to the jury trial right for complex cases, then Professor (and later Judge) Arnold is right: there was no such exception. But a different question could be asked: Were complex cases tried to juries in 1791? The answer to that question is no. The common law had sharp

One more question remains: could a lower federal court employ the test proposed in this Article? Immediately after *Terry*, the answer would have been no. *Terry* prescribed a two-part test, and in a footnote it rejected a distinctive treatment for equity's exclusive jurisdiction.[200] The reason given was that treating the exclusive jurisdiction as wholly equitable would eliminate the need to consider step two, about remedies—in Justice Marshall's words, it would "make the first part of our inquiry dispositive," even though the second part is "more important."[201] That reason has been completely eroded by the Court's decisions since *Terry* because these decisions have abandoned the two-part test and indeed have not emphasized the remedial inquiry at all.[202] The reason the Court gave for not attending to the exclusive jurisdiction now has no weight.

Current law certainly does not require the test proposed in this Article. But apart from the class action analysis,[203] this test is permitted by current law because it can be a way of carrying into effect the Court's unified *Monterey* analysis for determining whether a suit would have been brought at law or equity in 1791. It is, in the words that Justice Brennan used to describe a different proposal, "not only more manageable" but also "more reliably grounded in history."[204]

V. Answering the Critics

This Part answers four critics: the one who wants to maximize the role of the jury, the one who wants to minimize the role of the jury, the one who

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procedural limitations—limitations shaped by, but also running deeper than, the presence of the jury. The result was that every case of serious complexity, e.g., every case involving multiple parties or complicated records, would have gone to equity or admiralty, not to law. Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 584 (1984) ("[T]he common law recognized no complex case exception because the procedural limits within which the jury functioned insured that no complex cases would ever reach the jury."). In other words, there was no complexity exception at the level of legal rules, but within the institutional and doctrinal context of the time, litigants and judges behaved as if there were such an exception.

200. Chauffeurs Loc. No. 391 v. Terry, 494 U.S. 558, 571 n.8 (1990). Earlier in the opinion, in a part commanding only plurality support, Justice Marshall recognized that "an action by a trust beneficiary against a trustee for breach of fiduciary duty" was "within the exclusive jurisdiction of courts of equity." *Id.* at 567 (plurality opinion) (citation omitted) (citing 2 STORY, *supra* note 12, § 960, at 266).

201. *Id.* at 571 n.8.

202. *See supra* note 63 and accompanying text.

203. *See supra* note 195 and accompanying text.

204. *Terry*, 494 U.S. at 578–79 n.7 (Brennan, J., concurring in part and concurring in the judgment). Although this Article has not focused critical attention on Justice Brennan's proposal of a remedies-only test, *see id.* at 574 (Brennan, J., concurring in part and concurring in the judgment), note that that proposal depends on an anachronistically narrow definition of equity as just concerned with "remedies." For scholarship endorsing a remedies-only test, see Thomas, *supra* note 2, at 1107.

wants a perfect historical translation, and the one who wants the scope of the jury trial right to be decided purely on the basis of functional considerations.

A. The Jury Maximalist

For the interlocutor who wants to maximize the role of the jury,[205] there are some things to like in the proposal made in this Article. Going forward there will be an increase in jury trials at the margin, because of the presumption in favor of the jury trial right.

But there are also things not to like. There will be fewer jury trials in two of the equitable categories. That is, the number of jury trials will go from some down to none in equity's exclusive jurisdiction[206] and in cases using the equitable aggregating devices.

To the jury maximalist, the question is what the jury maximalism rests on. Does it rest on fidelity to the Seventh Amendment, or does it rest on an idea—independent of that Amendment—that juries are more legitimate, more expert, or in some other way better than judges? If the ground of the maximalism is the Seventh Amendment,[207] then my proposal should be accepted. What you lose—jury trials in the exclusive jurisdiction and in class actions—is not rightfully yours at all, for these were most certainly not "Suits at common law" in 1791. What you gain, however, is a slope or incline in the law—the presumption—that will help protect the jury trial right going forward. It's a bargain worth making.

If, on the other hand, the ground of the maximalism is freestanding—that juries should be used as much as possible regardless of the Seventh Amendment—the bargain is less attractive, though perhaps it should still be accepted. The policy goal of increasing use of the jury could be achieved through legislation since there is no right not to have a jury trial.[208] We should

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205. A flesh-and-blood instance would be Justice Hugo Black. *See* Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 482 (1956) (concluding that no judge "has been more effective in preserving the American jury's orthodox power than has Justice Black"). Another instance is Justice Thurgood Marshall, who was deeply committed to the civil jury trial right. *See, e.g.*, Colgrove v. Battin, 413 U.S. 149, 166–88 (1973) (Marshall, J., dissenting).

206. The result would change, for example, in *Jo Ann Howard & Associates, P.C. v. Cassity*, No. 09CV01252 ERW, 2013 WL 12321628 (E.D. Mo. Feb. 22, 2013) (holding that plaintiffs had a Seventh Amendment right to a jury trial—despite trustee defendants' argument that the claim was in the exclusive jurisdiction of equity—because the alleged breaches were based on negligence actionable at law and because the remedy sought was "damages").

207. *See, e.g.*, McCoid, *supra* note 37, at 23–24.

208. Although this is the federal rule, some states take a different position. *See, e.g.*, Abner A. Wolf, Inc. v. Walch, 188 N.W.2d. 544, 547 (Mich. 1971) (recognizing a "right to have equity controversies dealt with by equitable methods" (quoting Brown v. Kalamazoo Cir. J., 42 N.W. 827, 830 (Mich. 1889))).

not distort the interpretation of the Seventh Amendment to satisfy this policy goal.[209]

B. The Jury Minimalist

For the jury minimalist,[210] the descriptive landscape is the reverse.

There will be some expansion of the civil jury trial right at the margin because of the presumption in favor of the right. And there will be some contractions of the right, which will cheer the jury minimalist, namely in the exclusive jurisdiction and the case-aggregating devices.

My argument for the jury minimalist is not very reassuring. It is, in essence, "It Could Be Worse." This Article accepts certain givens about the civil jury: (1) we have a Seventh Amendment and it protects the civil jury trial right; (2) that protection is keyed to history (by the word "preserved" and the use of the historical category "Suits at common law");[211] and (3) the historical scope of the jury trial right is not frozen but is allowed to "dynamically" develop over time. Without undoing any of these commitments in present law, it is hard to see how much movement there can be in the direction of jury minimalism. The proposal here is two steps forward, two steps backward for the jury minimalist.

C. The Historical Purist

The *Monterey* test in the Court's most recent cases offers the promise of perfect historical preservation: there is a unified inquiry into whether the cause of action would have been brought at law or in equity.[212] By proceeding without presumptions, categories, wholesale decisions, or anything else that might keep us from finding the best analogy in 1791, we have a test that is not overinclusive or underinclusive. Our results can be right.

The test proposed here gives up on this false promise of historical perfection. It follows the historical practice, though it does so wholesale in important respects (the equitable categories), and most important it adopts a presumption intended to protect the jury trial right and smooth the course of

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209. Admittedly, implicit in my point here is a separation of the Seventh Amendment as positive law from normative or political positions in favor of the jury.

210. There is a long tradition of scholarly skepticism toward jury decision-making in one context or another. *See, e.g.*, CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JURIES DECIDE, at vii (2002); Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867 (1934); *see also* Richard Lorren Jolly, *Toward a Civil Jury-Trial Default*, 67 DEPAUL L. REV. 685, 690–91 (2018) (describing hostility to the jury by the drafters of the Federal Rules of Civil Procedure). And of judicial skepticism. Charles Evans Hughes once advised lawyers, "Get rid of jury trials as much as possible. . . . The ideal of justice is incarnated in the judge." Lerner, *supra* note 2, at 873–74.

211. *See supra* Part I.

212. *See supra* notes 58–65 and accompanying text.

judicial decision-making outside of those categories. The equitable categories are historical, but they are at best an imperfect and stylized representation of what the chancellor did.[213] Nor is the presumption in favor of jury trial directly derived from the history, and so it may seem to be a departure.[214] But the full effect of these changes, given judicial abilities and the state of knowledge of equity in the profession,[215] would likely be a closer approximation of the historical line.

In short, the new test would give us better history. It is not perfect history—the law–equity line of 1791 cannot be translated whole, entire, and without loss into the present. But in actual practice, it is likely to be a closer translation and a more administrable one for judges.

D. The Functionalist

A functionalist has immediate reason to be skeptical. Like most scholars who write about the Seventh Amendment, I do not attempt to argue for what the jury trial right should be as a matter of first principles.[216] Instead, I work within the set of possibilities allowed in some way by the history, given that what the Seventh Amendment does is "preserve" the right as it existed in "Suits at common law." This is also consistent with the general principle that constitutional rights and requirements—from the right of freedom of speech to the requirement that Congress declare war—do not need to be justified on functional grounds, either with respect to their existence or their scope.

It is true that I have argued that the proposed test is more judicially administrable. Other than that, however, I have not argued for it on normative or functional grounds. Nevertheless, I do think functional arguments can be given for excluding the equitable categories from the scope of the Seventh Amendment jury trial right.

First, areas in the exclusive jurisdiction developed different characteristics in their long evolution without the jury. For trust law, for example, these include a relatively high degree of legal complexity, a concern with continuing supervision of trustees, and a desire to combine strict rules with an anti-evasion ethos of interpretive flexibility.[217]

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213. *See* Macnair, *supra* note 16, at 664–66.

214. It is, however, consonant with historical principles. *See supra* notes 157–159 and accompanying text.

215. *See* Bray, *supra* note 137, at 41, 43 ("In [the United States], there has been a general deterioration of equity . . . in part due to a loss of knowledge in the legal profession.").

216. *Cf.* Lemley, *supra* note 2, at 1729 n.261 ("[I]f we were writing on a blank slate we might question the wisdom of giving patent damages issues to juries, [but] the Seventh Amendment provenance of the jury as decider of patent cases involving claims for money damages is impeccable.").

217. *See* Smith, *supra* note 119; *cf.* A-C Co. v. Sec. Pac. Nat'l Bank, 219 Cal. Rptr. 62, 69 (Cal. Ct. App. 1985) ("[T]he flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years

There is a more fundamental point. The division between law and equity did begin purely as a matter of historical contingency. But equity had certain characteristics,[218] and these characteristics meant that certain questions were more likely to be drawn into Chancery, through a process of accretion and avulsion, while other questions were more likely to be drawn into law.[219] A quaint metaphor is the English and American division regarding which side of the road a car goes on. Whether a car goes on the right or the left is arbitrary. Inside of a car, whether the driver is seated on the right or the left is also arbitrary. But once one of these questions has been decided, the answer to the other question is no longer arbitrary.

Thus, one could say that from nonfunctional beginnings the law–equity division was developed by common law judges, chancellors, and litigants with an eye toward functional considerations (among others).[220] This is, of course, not to say that the law–equity division of 1791 represents a first-best allocation to jury and judge in the present. To the contrary, it surely does not, especially without a complexity exception.[221] But the point is that from a functional perspective, the allocations in equity's exclusive jurisdiction are nonrandom.

Second, there are also good reasons to exclude juries from giving equitable remedies. Drafting decisions will not be well made by nonexpert, multimember, temporary bodies.[222] Nor are juries a good fit for the customization pervasive in equitable remedies, for the weighing of managerial commitments the court is making when it gives an equitable

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of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.").

218. E.g., a single expert decisionmaker, inquisitorial procedure, an emphasis on conscience, institutional continuity since there was no jury to dismiss, a lighter sense of precedent, a willingness to constrain the abuse of a legal right, a theory that jurisdictional conflict could be avoided by acting on the person, and only one judge yet an army of subordinate officials.

219. For example, the writ of account was abandoned for equity's accounting of profits because the Chancellor—armed with inquisitorial procedure and contempt enforcement—could overcome the recalcitrant defendant and require the accounting to be performed. *See generally* Getzler, *supra* note 133; Stoljar, *supra* note 133.

220. *Cf.* THE FEDERALIST NO. 83, *supra* note 36, at 505 (Alexander Hamilton) (offering functional reasons to distinguish "the circumstances that constitute cases proper for courts of equity"). Professor Langbein observes:

> The nonjury equity courts, freed from the need to package cases for decision by lay triers, had been able to entertain multiparty and multi-issue cases, which is why substantive fields characterized by multiparty relations such as account, business associations, and estate administration developed in equity rather than at common law.

John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 556 (2012) (footnotes omitted).

221. *See supra* note 199.

222. *See* Bray, *supra* note 114, at 571 (explaining why judges are better suited than juries to grant equitable remedies).

remedy, for the enforcement of equitable remedies with contempt, and so on.[223]

Third, for case-aggregating procedures there are also good reasons to exclude juries. A judge is able to see the whole.[224] A jury cannot. As Lord Devlin put it, "[A] jury has no knowledge of the conventions"[225]—with the result that there may be greater variation in their decisions.[226] Outlier jury verdicts are less troubling when resolving the claims of two parties, but more troubling when the claims of many parties are decided in a single suit.[227]

In addition, moving class actions from juries to judges might affect the development of the law of class actions. In recent years the courts have repeatedly constrained the class action.[228] There might be less pressure to constrain this aggregative device, and more willingness to rely on case-by-

223. *See* LANGBEIN, *supra* note 22, at 274 ("Tailoring specific relief requires factual investigation and raises issues of supervision and adjustment of the decree that are beyond the administrative capability of a jury of laypersons convened for a one-time sitting at an itinerant *nisi prius* trial court."); Abner A. Wolf, Inc. v. Walch, 188 N.W.2d. 544, 547 (Mich. 1971) ("Juries cannot devise specific remedies, or safely deal with complicated interests, or with relief given in successive stages, or adjusted to varying conditions." (quoting Brown v. Kalamazoo Cir. J., 42 N.W. 827, 831 (Mich. 1889))).

224. Historically, equity's characteristic use of a wider-angle lens was not simply a matter of the decisionmaker. Because of the jury, the law evolved toward rigid (and truth-defeating) simplicity. Because of its inquisitorial procedures, equity could access information that law could not. Thus, it was not only the decisionmaker, but also the pleading and discovery rules, that gave equity a broader perspective.

225. PATRICK DEVLIN, TRIAL BY JURY 143 (1956).

226. Concern about the variability of jurors' judgments has been a staple of the literature on punitive damages and noneconomic damages. *See, e.g.*, Shari Seidman Diamond, Michael J. Saks & Stephan Landsman, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1998); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 16–17 (2004). Even scholarship finding that judges and juries are similar in their median punitive damages awards still finds a greater "spread" in jury awards. *See, e.g.*, Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 774–78 (2002) (noting this pattern but taking elaborate pains to dismiss its relevance); *see also* Theodore Eisenberg, Paula L. Hannaford-Agor, Michael Heise, Neil LaFountain, G. Thomas Munsterman, Brian Ostrom & Martin T. Wells, *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 276 (2006) (noting that "the distribution of the jury trial compensatory-punitive damages award level ratios is more 'spread' than the bench trial distribution," while also finding "[m]ore striking . . . the substantial similarity between the distributions" and the fact "that the differences in the bench and jury trial distributions do not achieve statistical significance"). Nevertheless, there is also doubt about how much greater the variation is in the judgments of jurors than in those of judges. *See, e.g.*, Yun-chien Chang, Theodore Eisenberg, Tsung Hsien Li & Martin T. Wells, *Pain and Suffering Damages in Personal Injury Cases: An Empirical Study*, 14 J. EMPIRICAL LEGAL STUD. 199, 234 (2017); Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEXAS L. REV. 571, 587 (2012).

227. *Cf. In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (making a similar argument for multiple juries over a single jury).

228. *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–61 (2011).

case appellate review instead of sharply defined rules, if the merits of a class action were always decided by a judge.

More generally, underlying these categories is a recognition of the systematicity of equity. It wasn't a self-sufficient system like law was—it supplemented the more self-contained system of law.[229] Yet there was still a sense in which equity had systematic tendencies. It developed doctrines that can be seen as interlocking parts, as elements that work well with each other. Elsewhere it has been shown that the equitable remedies, equitable devices for managing the parties, and equitable defenses all work together.[230] And some of the dominant concerns of equity are problems of "polycentricity, conflicting rights, and opportunism."[231] These concerns are also pervasive in equity's exclusive jurisdiction.[232]

Traces of many of these coherences remain in the law of equitable remedies and in the areas in equity's exclusive jurisdiction. When courts are granting equitable remedies or working in the exclusive jurisdiction, they should think of themselves as working "in equity," as acting in a distinctively equitable mode, which will have implications for how they see their role. In this way, the revision to the Seventh Amendment test proposed in this Article can help encourage a self-consciousness by courts in the exclusive jurisdiction.

But as a justification for the proposed test, the preceding points are not sufficient. It is not sufficient to say, "No juries in *X* because judges are better at it," unless we can also say, "There should be juries in *Y* because juries are better at it."

What are juries better at?

Once that question is asked, once we try to do an analysis of comparative expertise, or we to try to assess the relative costs and benefits of jury decision-making, we are immediately on the wrong track.[233] In thirteenth-century

229. *See supra* notes 87–88 and accompanying text.

230. Bray, *supra* note 114.

231. Smith, *supra* note 32, at 1056.

232. *See* Smith, *supra* note 119 (making this argument for fiduciary law).

233. *See* Robert P. Burns, *A Conservative Perspective on the Future of the American Jury Trial*, 78 CHI.-KENT L. REV. 1319, 1349 (2003) (noting that "the common-law trial" is an exercise in a "mode of thought [that] is discontinuous with that at the heart of other major American institutions, the private and public bureaucracies that employ, indeed are constituted, by forms of instrumental rationality"); Wolfram, *supra* note 37, at 644 ("[N]o one has successfully isolated those functions which the jury is supposed to perform under the seventh amendment . . . ."); *see also* DEVLIN, *supra* note 225, at 14 (comparing ordeal and jury). For analysis that does, however, frame the question in terms of what judges and juries are better at, see, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 754 (1999) (Souter, J., concurring and dissenting) ("Scrutinizing the legal basis for governmental action is 'one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis.'" (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996))); Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U.L. REV. 153, 184–85 (1999); *see also* Ellen E. Sward, *Legislative Courts,*

England we could have a discussion about what juries were better at than judges—about the sorts of things in which jurors, who might be selected for their local knowledge, would surpass judges, who might merely be passing through for an assize and know nothing about local circumstances and customs. But we no longer select jurors for their knowledge;[234] knowing the parties or the case is now grounds for disqualification.

To be sure, there are functional advantages to the availability of juries in civil trials. They preserve the distinction between law and fact, and when that distinction is lost, it undermines the clarity of the law.[235] And the need to explain the law to a jury through instructions fosters intelligibility and simplicity, preventing the recondite complexity that comes when judges talk only among themselves.[236] Nevertheless, these functional advantages of having the civil jury are about its existence in the legal system; they are not about the jury being particularly adept at resolving certain kinds of cases.

Thus, the question should not be asked as, "What is the jury good at doing?" A more fruitful question is "What is the jury for?" or "What kind of thing is the jury?" Asked that way, what the jury offers is not technocratic skill, superior performance, low-cost decision-making, or procedural respectability that enhances compliance (à la Tom Tyler). Instead, it offers to citizens participation—involvement—in the law as an expression of their communal life.[237] It is their law. After a big storm that sounded like it knocked down branches or trees, you might walk around your backyard to see what happened—not because you're the best observer, or the lowest-cost observer, but simply because it is your backyard.[238]

Article III, and the Seventh Amendment, 77 N.C.L. REV. 1037, 1056–57 (1999) (listing functional "Seventh Amendment values"); *cf.* Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 237 (2015) (arguing for jury judgment as a democratic and populist check).

234. On the shift in conception of the jury, see BAKER, *supra* note 22, at 75–76 and LANGBEIN, *supra* note 22, at 238–46.

235. *Cf.* BAKER, *supra* note 22, at 93 ("Now that fact and law are no longer decided separately, it is never certain to what extent judgments turn on the facts and to what extent the judge's comments on particular facts are intended to create legal distinctions.").

236. The reader may have observed a similarity between these functional advantages of the jury and the functional advantages of the "no adequate remedy at law" requirement for equitable remedies: in both the advantages are indirect, a kind of by-product of having this institution or doctrine within the larger system of law. *Cf.* Bray, *supra* note 114, at 581 (describing a finding of "no adequate remedy at law" as "crossing a conceptual border," and arguing that the "adequacy requirement maintains the distinctiveness of equitable remedies").

237. *See generally* Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29 (1994) (with reference to the civil jury); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016) (with reference to criminal law); *cf.* Jolly, *supra* note 210, at 700 (describing symbolic significance of civil jury-trial default as a reminder to "litigants that their dispute and its just resolution belong not solely to them").

238. Something like this is often said to be a democratic argument for the jury, but it has nothing to do with democracy. The same argument for the jury would hold in a constitutional monarchy or even potentially in an oligarchy or a dictatorship.

The normative choice made in the Seventh Amendment is that we will let the people keep this participation in the law—in "Suits at common law" the right is "preserved"—but we will also keep the carve-outs from this principle that developed historically for reasons that were partly functional. Thus, no juries in equity, admiralty, and for certain prerogative writs.

For the contemporary "translator" of the 1791 lines, that means a responsibility to preserve the people's participation, standing guard so the passage of time does not eviscerate the civil jury trial right. But it also means an alertness to the historical exceptions and an attentiveness to the functional reasons those exceptions developed—reasons that to some degree persist.

This conclusion supports the Court's general principle of a "dynamic" approach to the Seventh Amendment.[239] Do not freeze law and let all of the expansion go to equity, as with the "historical test" employed in some states[240]—that would inadequately "preserve" the participation of the people through the jury. Nor should we read equity as narrowly as possible, taking suits that clearly would have been brought in equity in 1791 (e.g., class actions, suits for breach of fiduciary duty by a trustee for a monetary remedy) and calling them "legal." To do that shows insufficient respect for the countervailing decision to keep the carve-outs from the jury trial right.

Where the proposal in this Article differs from some of the Court's cases over the last half century is not, then, about whether to have a dynamic approach to the Seventh Amendment. Rather, the argument here is that we should redraw the lines—recognizing that some of what we have put on the law side really belongs on the equity side—and then allow dynamic growth on each side. And ties go to the jury right. It is not a functional test. It is, I expect, a more functional test.

VI. Coda: Implications for Incorporation

The constitutional right to a civil jury trial is, famously, not one of the protections in the Bill of Rights that has been "incorporated" against the states.[241] But the Court has in recent years started to hold applicable to the states some previously unincorporated rights.[242] It is reasonable to expect that there will be renewed consideration of whether the Seventh Amendment civil jury trial right should be incorporated.[243] A thorough answer cannot be

239. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708–09 (1999); Curtis v. Loether, 415 U.S. 189, 193–95 (1974). On the language of "dynamic" versus "historical" tests, see *supra* text accompanying notes 76–82.

240. *See supra* notes 80–81 and accompanying text.

241. *See supra* note 77 and accompanying text.

242. Timbs v. Indiana, 139 S. Ct. 682, 689–91 (2019); McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

243. *Compare* Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 172–75, 191–96 (2012) (supporting incorporation of the

attempted here, but the analysis in this Article does have two implications for the question of incorporation, and they are briefly noted.

First, it would be unwise to incorporate the right while using the Court's current approach to determining its scope. Because the relevant year for the civil jury trial right as incorporated would be 1868, all of the problems of the *Terry* test would apply but without the virtue of having been settled by existing precedents. Nor would the *Monterey* approach give much certainty because it would not be known what answers the court would reach about which actions from 1868 are analogous in a particular case. The greater certainty of the proposed test—because it is categorical and has fewer edge cases, and because precedent will resolve the uncertainties more quickly—is especially valuable if there is a wide swathe of new questions about an incorporated civil jury right. Thus, if the Court is going to recognize the Seventh Amendment civil jury trial right as incorporated, that strengthens the case for the test proposed in this Article.

Second, the analysis in this Article also provides a reason not to incorporate the Seventh Amendment civil jury trial right. That reason is not difficulty but rather flexibility. If the states were required to preserve the civil jury trial right in "Suits at common law," they would be locked into the categories of law and equity. As has long been recognized, it is the civil jury trial right more than anything else that has maintained the law–equity distinction in the United States.[244] The value of that distinction is of course controversial. But incorporating the Seventh Amendment civil jury trial right would maintain that distinction in perpetuity in the states, as a matter of federal constitutional law, notwithstanding any attempt by a state to eliminate the law–equity distinction across its courts.[245] And this Article is a reminder of how rooted in history the Seventh Amendment is. If states are to have real control over the structure of their judicial institutions, they need to decide whether—and how—to retain or inter the law–equity distinction.[246] That control would be substantially diminished if the civil jury trial right were to be incorporated.[247]

Seventh Amendment civil jury trial right), *with* F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 202 (2019) (opposing it).

244. *See* SHERWIN & BRAY, *supra* note 76, at 431.

245. This conclusion is inescapable because the Court insists that "when a Bill of Rights protection is incorporated, the protection applies 'identically to both the Federal Government and the States.'" *Timbs*, 139 S. Ct. at 689–90 (2019) (quoting *McDonald*, 561 U.S. at 766 n.14 (alteration in original)).

246. For a survey of the current variation in the state courts on whether there is a civil jury trial right in class actions and shareholder derivative actions, see Scarlett, *supra* note 63, at 296–333.

247. *See* Chi., Rock Island & Pac. Ry. Co. v. Cole, 251 U.S. 54, 56 (1919) (recognizing the high degree of control states enjoy over "the line between the functions of the jury and those of the Court"); Hessick & Fisher, *supra* note 243, at 204 ("Not incorporating the civil jury right also preserves the ability of the states to develop equity.").

Conclusion

The Supreme Court's approach to the Seventh Amendment has been the subject of scholarly scorn,[248] and it has sometimes vexed the lower courts.[249] This Article offers more measured criticism of the status quo. It also proposes a test that is more historically sound and more judicially administrable.

One distinctive feature of this analysis is the attention to equity's exclusive and concurrent jurisdictions. This analysis does not suggest that every ancient doctrine of equity needs to be dusted off, polished up, and pulled out for daily use. It offers no presumption that equitable doctrines of the past will make sense in our world. But it does suggest the folly of a presumption the other way. The distinction between equity inside and outside the exclusive jurisdiction seems antiquated, and in previous work I have dismissed it.[250] But it is surprisingly helpful for the Seventh Amendment. You don't need many old equity doctrines if you choose carefully.

The hard questions this Article raises are about the scope and character of equity in contemporary American law. Existing legal rules point judges toward equity, making its doctrines still formally binding in the present.[251] Yet judges have to some degree lost familiarity with those doctrines.[252] And for most of the last century, scholars have not had confidence that there is any value and vitality in equity's separate identity. Now the scholarly trend has started to reverse, not only in the United States but also in other common law countries.[253] And although judges' instinctive familiarity with equitable doctrines has not fully returned, in a growing number of cases the U.S. Supreme Court is looking to the tradition of equity.[254]

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248. *See supra* notes 7–9 and accompanying text.

249. *See, e.g.*, Pereira v. Farace, 413 F.3d 330, 337–38 (2d Cir. 2005) (bemoaning the need to "scour through the 'dusty attics'").

250. Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1, 13 (2014) (calling the distinction between equity's jurisdictions "unfortunate," "difficult to apply," and "nearly incoherent"). *Mea culpa.*

251. *See, e.g.*, Grupo Mexicano de Desarrollo, SA v. All. Bond Fund, Inc., 527 U.S. 308, 332–33 (1999) (interpreting the Judiciary Act of 1789).

252. *See* Bray, *supra* note 137, at 41–43. For a sketch of the decline of knowledge of the exclusive and concurrent jurisdictions in the Delaware courts, see *Kahn v. Seaboard Corp.*, 625 A.2d 269, 273 (Del. Ch. 1993). *See also* Kraft v. WisdomTree Invs., Inc., 145 A.3d 969, 979–81 (Del. Ch. 2016) (finding the historic distinction rational but hoisting the white flag anyway).

253. *See supra* note 32 and accompanying text.

254. *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936 (2020); Taggart v. Lorenzen, 139 S. Ct. 1795 (2019); Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2014); CIGNA Corp. v. Amara, 563 U.S. 421 (2011); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).

The Seventh Amendment does not require us to have a theory of why a distinct equity is valuable, but it does require us to draw equity's boundary line. In drawing that line, we should translate the historical practice with sensitivity to judicial competence, and we should give reasons rooted in the present for our reconstructions of the past. A start would be to notice equity's exclusive jurisdiction and case-aggregating devices, and to reform our Seventh Amendment test to take them into account.

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