

CIVIL PROCEDURE
CASES, PROBLEMS, AND EXERCISES
Fourth Edition

CHAPTER 12

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444 Cedar Street, Suite 700

St. Paul, MN 55101

1-877-888-1330

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Printed in the United States of America

ISBN: 978-1-63460-017-0

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CHAPTER 12

JURY TRIAL



A. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL IN FEDERAL CIVIL CASES

The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment is actually one of three separate provisions in the Constitution dealing with juries. Article III, § 2 and the Sixth Amendment require a jury in criminal cases. The Seventh Amendment, by contrast, applies only to *civil* cases. Because there are a number of significant differences between the Seventh Amendment and these two other provisions, be careful not to confuse them. Precedent decided under the Sixth Amendment may or may not apply to the Seventh. You will learn more about the criminal trial jury provisions in courses such as Criminal Procedure.

One of the most important differences between the Seventh Amendment and these other provisions is that the Seventh Amendment applies only to cases being tried in *federal* court. The right to a jury trial in civil cases is one of the few provisions in the Bill of Rights that has been interpreted not to apply to the states. There is accordingly no Seventh Amendment right to a jury in state courts, even when those state courts are hearing federal or constitutional claims. However, that the Seventh Amendment does not apply does not mean state courts operate without juries. Most state constitutions contain their own right to a jury trial (although not necessarily in the same situations as the Seventh Amendment). If a state constitution requires a jury, courts of that state will provide a jury in all covered cases regardless of whether the claim arises under state or federal law.

In addition to state constitutions, statutes may also afford litigants the right to a jury trial. Congress in particular has created a statutory right to juries in connection with several federal claims. When a federal statute requires a jury, the Seventh Amendment is not a factor. A party

may be able to demand a jury in such a case even if the case is being litigated in state court.

Merely because a statute or constitutional provision provides a right to a jury in certain cases does not guarantee a jury will be empanelled in the case. As discussed in part B of this Chapter, a party must file a timely demand for a jury. In addition, even if there is a timely demand, a court will empanel a jury only if there are contested factual issues in the case. *Garvie v. City of Fort Walton Beach*, 366 F.3d 1186 (11th Cir. 2004); *Harris v. Interstate Brands Corp.*, 348 F.3d 761 (8th Cir. 2003). The role of the jury, after all, is to determine the facts, not the law.

1. APPLYING THE SEVENTH AMENDMENT: A HISTORICAL ANALYSIS

A careful reading of the Seventh Amendment reveals two unusual features. First, unlike most of the other civil rights set out in the Constitution, the Seventh Amendment does not *create* a right. Rather, it *preserves* a right. Preservation is measured as of 1791, the year in which the amendment was ratified. Second, the Seventh Amendment does not require a jury in all civil cases, but only in “Suits at common law” involving more than \$20. Those two restrictions are actually related. In the late 1700s, a litigant in the English courts was entitled to a jury only if he was litigating a “suit at common law.” Therefore, the Amendment provides that when federal courts were hearing suits at common law, they would continue to provide a jury.

But what is a suit at common law? In your other courses, you probably use the term “common law” as a synonym for judge-made rules of law, as distinguished from “positive” law that comes from statutes, regulations, or a constitution. In the Seventh Amendment, however, the term has a very different meaning. The term “Suits at common law” is in fact a *jurisdictional* term rather than a distinction between legislation and judge-made law. A case is a suit at common law for purposes of the Seventh Amendment if in 1791 it would have been heard by a certain court, which historically was referred to as a “Law” or “Common Law” court. Note that a Law court could hear not only claims involving judge-made law, but also claims arising under statutes.

Applying this analysis requires a basic grounding in the English legal system in the eighteenth century. Actually, you have been exposed to some aspects of that system before, in the discussion of common-law pleading in Chapter 6. As you will recall, one key feature of the English system was that it was divided into several different court systems. In actual practice, there was a mind-numbing array of judicial and quasi-

judicial bodies.¹ For our purposes, however, we need to focus on only three of these courts, and of these one needs only brief mention. Three of the most important royal courts were the courts of Law, Chancery (or Equity), and Admiralty. Of these three, only Law made use of juries. Therefore, interpreting the Seventh Amendment requires knowledge of what sorts of cases would be heard in these three courts.²

Determining whether a case would be heard in Admiralty is relatively simple. Although admiralty jurisdiction in the United States is significantly broader than it was in England, the courts' jurisdiction is defined along geographic lines. Admiralty courts deal with claims (including both tort and contract) that occur on the high seas and navigable rivers and lakes. To this day, the Seventh Amendment does not require a jury for admiralty claims. *Curtis v. Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 7 L.Ed. 732 (1807). However, several federal statutes that govern admiralty cases provide a *statutory* right to a jury.³

The more difficult question—and the one that has proven most troubling to the courts—is determining whether a given claim would be heard in Law or Equity. Unlike Admiralty, courts of Law and Equity had a jurisdiction that overlapped to a significant extent. At first, this overlapping jurisdiction led to a power struggle between the two systems. During the reign of James I, however, English lawmakers reached a compromise that gave the Law courts primacy over private disputes. From that date on, a party could sue in Equity only if he could demonstrate that he could not obtain adequate relief in Law. In other words, although the same disputes could potentially be heard in Law or Equity, a party suing in Equity had to demonstrate that Equity afforded him some advantage not available in Law. At the risk of oversimplification, these advantages fell into three categories: differences in remedies, procedures, and underlying substantive rights.

Remedy. Perhaps the most important difference between Law and Equity concerned the remedies available in the two systems. The writ system used in Law limited the remedies a Law court could provide. Law's main remedy was *compensatory damages*. Certain specific remedies were also available in Law, including *ejectment* (removing someone

¹ History buffs may enjoy the colorful description of bodies such as the “sewer courts” in William Blackstone, *Commentaries on the Laws of England* 30 (1771), and the comprehensive organizational chart in the Introduction to Harold Potter, *A Short Outline of English Legal History* (3d ed. 1933, 2004 reprint).

² As noted in Chapter 6, the North American colonies, and the states after independence, did not slavishly imitate the English system. It is especially noteworthy that in the federal system there were not separate courts of Law, Equity, and Admiralty. Instead, the same federal court would hear different sorts of cases at different times. However, because the purpose of the Seventh Amendment was to preserve the tradition established in the English courts, the historical practice in the United States is not controlling.

³ See the Jones Act, 46 U.S.C. § 688(a), and 28 U.S.C. § 1873.

wrongfully occupying land) and *replevin* (return of personal property to the rightful owner).

A hallmark of Equity, by contrast, was its ability to devise a remedy to fit the situation. Many of the specific remedies you may have encountered in your other courses were devised in Equity. Although an exhaustive list of equitable remedies is beyond the scope of this book, the main remedies available only in Equity included:

- *injunction* (probably the most important)
- *specific performance* of a contract
- *accounting* of profits from defendant's wrongful use of plaintiff's property
- *restitution* (often used in cases of unjust enrichment)
- *rescission* of a contract because of fraud, mistake, or other defect in formation
- *reformation* of a contract or conveyancing instrument such as a deed
- *constructive trust*, under which defendant is ordered to hold property for plaintiff's benefit

Although damages were usually the province of Law, in some situations Equity could also award damages. For example, under the *equity clean-up doctrine* a court of Equity could award compensatory damages if such damages were incidental to equitable relief. Therefore, if P sued D for an injunction based on nuisance, the court of Equity could both grant the injunction and award P damages for the period prior to the injunction. No jury would be involved. Similarly, if a party sued based on a substantive right recognized only in Equity (as discussed below), the court could award damages.

To check your understanding of these differences, determine whether a jury would hear the following cases in 1791.

1. L leases the upstairs of her home to T. T plays his trombone quite loudly at odd hours, which clearly violates the lease. L sues T for damages for the noise.

2. Same, except that L sues T not for damages, but for an order requiring T to stop playing his trombone at odd hours.

3. Same as #1, except that L wants the court to order T to vacate the premises because of breach of the lease.

4. Same as #1, except that L wants the court to declare the lease null and void because T lied to L about T's plans to use the space as a practice room.

5. L leases the upstairs of her home to T. T holds trombone concerts in the leased space at odd hours, which clearly violates the lease. L sues T to recover the profits T earned from this wrongful use of the space.

Procedure. A second problem with Law was that the writs also limited the procedure. One of the most significant limitations was that no discovery was available in Law. The modern concept of discovery, as well as related procedures such as the “creditor’s bill,” evolved in Equity as ways to ameliorate these limitations in Law. Equity was also much more liberal than Law when it came to the joinder of claims and parties. Certain joinder devices such as the class action and interpleader were originally available only in Equity.

Substantive Rights. Finally, the writ system that governed the Law courts only allowed for recovery if certain predicate facts existed. In some cases, a party had a claim that fell outside the writs. If that party’s case was nevertheless appealing, he could sue in Equity and hope that that court, in its discretion, would find in his favor. Some modern causes of action, such as cancellation of a contract because of fraud or mistake, and for breach of fiduciary duty, originated in Equity. If a party sued upon a claim cognizable only in Equity, Equity could award damages even though it tried the case without a jury.

2. PROBLEMS IN APPLYING THE HISTORICAL APPROACH TO A MODERN PROCEDURAL SYSTEM

Applying the Seventh Amendment was relatively straightforward until the mid-1800s. The American legal system then began to change in various ways that made it increasingly difficult to apply the historical test. The first change was the increasing tendency for legislatures to create new *statutory* rights. If Congress or a state legislature creates a claim that did not exist in 1791, application of the historical test is indeterminate, as such as a claim was not traditionally heard in either Law or Equity. Can a claim that did not exist in 1791 nevertheless qualify as a “Suit at common law?”

The second change was the merger of Law and Equity, which occurred in the federal courts in 1938 with the enactment of the Federal Rules. After merger, a party could combine both legal and equitable claims and defenses in the same proceeding. The Federal Rules also provided a uniform procedure, including many of the historically equitable procedural devices such as discovery, for all cases. Does merger create a right to a jury on equitable claims, and/or take away the right to a jury on legal claims? This section discusses how courts have adapted the Seventh Amendment to these changes.

a. Statutory Claims

INTRODUCTORY PROBLEM

Congress decides to expand its “No Child Left Behind” [“NCLB”] law, which originally only applied to elementary education. The new provisions extend the statute to high schools and colleges. To encourage schools and parents to take an active role in ensuring quality education for America’s youth, the modified law provides a number of statutory claims to students who think they have been shortchanged by the educational process.

Rocky recently was denied admission to the Northern Minnesota State University Law School. Sure that this denial was due to a deficiency in his undergraduate education, Rocky brings two separate cases under the NCLB statute. First, Rocky sues Whatsamatta U, his undergraduate *alma mater*, under NCLB § 21. Section 21 allows a student to sue any school that provides the student a “defective education.” The statute allows the student to recover the difference between the value of a proper education and the value of the education he or she actually received. Rocky seeks one million dollars in this first case.

Rocky’s second case is against Boris Badenov. Rocky lost his parents at a young age, and Boris was appointed Rocky’s legal guardian until Rocky turned 21. In a money-saving move, Boris chose to send Rocky to Whatsamatta U instead of the academically stronger University of Frostbite Falls. Because Rocky blames Whatsamatta U for all his troubles, he sues Boris under NCLB § 22 for \$500,000 in damages. Section 22 creates a statutory claim against “parents or legal guardians” who fail to satisfy their “fiduciary duty” to ensure their wards receive a good education. Although state-law precedent would also afford Rocky a right to sue for breach of fiduciary duty, Rocky sues under NCLB to obtain a federal forum.

Rocky asks for a jury in both cases, but both defendants object. Whatsamatta U claims Rocky’s case against it cannot be a “Suit at common law” because no such claim existed in 1791. Boris, although recognizing that every jurisdiction in 1791 allowed a damages claim against a legal guardian for breach of fiduciary duty, nevertheless argues Rocky is not entitled to a jury in his action. Will the court empanel a jury in either (or both) cases?

CITY OF MONTEREY V. DEL MONTE DUNES AT MONTEREY, LTD.

526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999)

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–A–2.

This case began with attempts by the respondent, Del Monte Dunes, and its predecessor in interest to develop a parcel of land within the jurisdiction of the petitioner, the city of Monterey. The city, in a series of

repeated rejections, denied proposals to develop the property, each time imposing more rigorous demands on the developers. Del Monte Dunes brought suit in the United States District Court for the Northern District of California, under 42 U.S.C. § 1983. After protracted litigation, the case was submitted to the jury on Del Monte Dunes’ theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate postdeprivation remedy for the loss. The jury found for Del Monte Dunes, and the Court of Appeals affirmed.

The petitioner contends that the regulatory takings claim should not have been decided by the jury and that the Court of Appeals adopted an erroneous standard for regulatory takings liability. . . .

IV

. . . [T]he answer [to whether a jury should have been empaneled] depends on whether Del Monte Dunes had a statutory or constitutional right to a jury trial, and, if it did, the nature and extent of the right. Del Monte Dunes asserts the right to a jury trial is conferred by § 1983 and by the Seventh Amendment.

Under our precedents, “before inquiring into the applicability of the Seventh Amendment, we must ‘first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.’” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998).

The character of § 1983 is vital to our Seventh Amendment analysis, but the statute does not itself confer the jury right. Section 1983 authorizes a party who has been deprived of a federal right under the color of state law to seek relief through “an action at law, suit in equity, or other proper proceeding for redress.” Del Monte Dunes contends that the phrase “action at law” is a term of art implying a right to a jury trial. We disagree, for this is not a necessary implication.

In *Lorillard v. Pons*, 434 U.S. 575, 583, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978), we found a statutory right to a jury trial in part because the statute authorized “legal . . . relief.” Our decision, however, did not rest solely on the statute’s use of the phrase but relied as well on the statute’s explicit incorporation of the procedures of the Fair Labor Standards Act, which had been interpreted to guarantee trial by jury in private actions. We decline, accordingly, to find a statutory jury right under § 1983 based solely on the authorization of “an action at law.”

As a consequence, we must reach the constitutional question. The Seventh Amendment provides that “in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .” Consistent with the textual mandate that the jury

right be preserved, our interpretation of the Amendment has been guided by historical analysis comprising two principal inquiries. “We ask, first, 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.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996). “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.” *Ibid.*

A

With respect to the first inquiry, we have recognized that “suits at common law” include “not merely suits, which the common law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.” *Parsons v. Bedford*, 3 Peters 433, 447 (1830). The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action “‘analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.’” *Feltner, supra*, at 348 (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 42 (1989)).

1

. . . It is undisputed that when the Seventh Amendment was adopted there was no action equivalent to § 1983, framed in specific terms for vindicating constitutional rights. It is settled law, however, that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to “sound basically in tort,” and seek legal relief. *Curtis [v. Loether]*, 415 U.S. 189, 195–96, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)].

As Justice Scalia explains, there can be no doubt that claims brought pursuant to § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law. Recognizing the essential character of the statute, “‘we have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability,’” *Heck v. Humphrey*, 512 U.S. 477, 483, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (quoting *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986)), and have interpreted the statute in light of the “background of tort liability,” *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Our settled understanding of § 1983 and the Seventh Amendment thus compel [*sic*] the conclusion that a suit for legal relief brought under the statute is an action at law.

Here Del Monte Dunes sought legal relief. It was entitled to proceed in federal court under § 1983 because, at the time of the city’s actions, the State of California did not provide a compensatory remedy for temporary regulatory takings. The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. Because its statutory action did not accrue until it was denied just compensation, in a strict sense Del Monte Dunes sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy. See, e.g., *Teamsters v. Terry*, 494 U.S. 558, 570, 108 L. Ed. 2d 519, 110 S.Ct. 1339 (1990) (“Generally, an action for money damages was ‘the traditional form of relief offered in the courts of law’”) (quoting *Curtis, supra*, at 196).

Even when viewed as a simple suit for just compensation, we believe Del Monte Dunes’ action sought essentially legal relief. “We have recognized the ‘general rule’ that monetary relief is legal.” *Feltner*, 523 U.S. at 352 (quoting *Teamsters v. Terry, supra*, at 570). Just compensation, moreover, differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, “the question is what has the owner lost, not what has the taker gained.” *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). As its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy. The Court has recognized that compensation is a purpose “traditionally associated with legal relief.” *Feltner, supra*, at 352. Because Del Monte Dunes’ statutory suit sounded in tort and sought legal relief, it was an action at law.

2

In attempt to avoid the force of this conclusion, the city urges us to look not to the statutory basis of Del Monte Dunes’ claim but rather to the underlying constitutional right asserted. At the very least, the city asks us to create an exception to the general Seventh Amendment rule governing § 1983 actions for claims alleging violations of the Takings Clause of the Fifth Amendment. Because the jury’s role in estimating just compensation in condemnation proceedings was inconsistent and unclear at the time the Seventh Amendment was adopted, this Court has said “that there is no constitutional right to a jury in eminent domain proceedings.” *United States v. Reynolds*, 397 U.S. 14, 18 (1970). The city submits that the analogy to formal condemnation proceedings is controlling, so that there is no jury right here. . . .

Although condemnation proceedings spring from the same Fifth Amendment right to compensation which, as incorporated by the

Fourteenth Amendment, is applicable here, a condemnation action differs in important respects from a § 1983 action to redress an uncompensated taking. Most important, when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability simply is not an issue. As a result, even if condemnation proceedings were an appropriate analogy, condemnation practice would provide little guidance on the specific question whether Del Monte Dunes was entitled to a jury determination of liability. . . .

Our conclusion is confirmed by precedent. Early authority finding no jury right in a condemnation proceeding did so on the ground that condemnation did not involve the determination of legal rights because liability was undisputed. . . .

In these circumstances, we conclude the cause of action sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests. . . .

B

Having decided Del Monte Dunes' § 1983 suit was an action at law, we must determine whether the particular issues of liability were proper for determination by the jury. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). In actions at law, issues that are proper for the jury must be submitted to it "to preserve the right to a jury's resolution of the ultimate dispute," as guaranteed by the Seventh Amendment. 517 U.S. at 377. We determine whether issues are proper for the jury, when possible, "by using the historical method, much as we do in characterizing the suits and actions within which [the issues] arise." *Id.* at 378. We look to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted. Where history does not provide a clear answer, we look to precedent and functional considerations.

I

Just as no exact analogue of Del Monte Dunes' § 1983 suit can be identified at common law, so also can we find no precise analogue for the specific test of liability submitted to the jury in this case. We do know that in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases. This allocation preserved the jury's role in resolving what was often the heart of the dispute between plaintiff and defendant. Although these general observations provide some guidance on the proper allocation between judge and jury of the liability issues in this case, they do not establish a definitive answer.

2

We look next to our existing precedents. Although this Court has decided many regulatory takings cases, none of our decisions has addressed the proper allocation of liability determinations between judge and jury in explicit terms. This is not surprising. Most of our regulatory takings decisions have reviewed suits against the United States, suits decided by state courts, or suits seeking only injunctive relief. It is settled law that the Seventh Amendment does not apply in these contexts. . . .

3

In actions at law predominantly factual issues are in most cases allocated to the jury. The allocation rests on a firm historical foundation, and serves “to preserve the right to a jury’s resolution of the ultimate dispute.”

Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that “there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Consistent with this understanding, we have described determinations of liability in regulatory takings cases as “‘essentially ad hoc, factual inquiries,’” *Lucas [v. South Carolina Coastal Council]*, 505 U.S. 1003], 1015 (1992) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)), requiring “complex factual assessments of the purposes and economic effects of government actions.”

In accordance with these pronouncements, we hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question. . . . [I]n actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury.

The jury’s role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine presents a more difficult question. Although our cases make clear that this inquiry involves an essential factual component, it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law.

In this case, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city’s decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. As the Court of Appeals recognized, this question was “essentially fact-bound [in] nature.” 95 F.3d at 1430. Under these circumstances, we hold that it was proper to submit this narrow, factbound question to the jury. . . .

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join all except Part IV–A–2 of JUSTICE KENNEDY’s opinion. In my view, all § 1983 actions must be treated alike insofar as the Seventh Amendment right to jury trial is concerned; that right exists when monetary damages are sought; and the issues submitted to the jury in the present case were properly sent there. . . .

The Seventh Amendment inquiry looks first to the “nature of the statutory action.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998). The only “statutory action” here is a § 1983 suit. The question before us, therefore, is not what common-law action is most analogous to some generic suit seeking compensation for a Fifth Amendment taking, but what common-law action is most analogous to a § 1983 claim. The fact that the breach of duty which underlies the particular § 1983 claim at issue here—a Fifth Amendment takings violation—may give rise to another cause of action besides a § 1983 claim, namely a so-called inverse condemnation suit, which is (according to Part IV–A–2 of JUSTICE KENNEDY’s opinion) or is not (according to JUSTICE SOUTER’s opinion) entitled to be tried before a jury, seems to me irrelevant. The central question remains whether a § 1983 suit is entitled to a jury. . . .

JUSTICE SOUTER, with whom JUSTICE O’CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

. . . Respondents had no right to a jury trial either by statute or under the Constitution; the District Court thus erred in submitting their claim to a jury. In holding to the contrary, that such a right does exist under the Seventh Amendment, the Court misconceives a taking claim under § 1983 and draws a false analogy between such a claim and a tort action. I respectfully dissent from the erroneous Parts III and IV of the Court’s opinion. . . .

[Justice Souter first argued that the closest historic analogy was a condemnation proceeding.]

The reason that direct condemnation proceedings carry no jury right is not that they fail to qualify as “Suits at common-law” within the meaning of the Seventh Amendment’s guarantee, for we may assume that they are indeed common law proceedings. The reason there is no right to jury trial, rather, is that the Seventh Amendment “preserves” the common law right where it existed at the time of the framing, but does not create a right where none existed then. There is no jury right, then, because condemnation proceedings carried “no uniform and established right to a common law jury trial in England or the colonies at the time . . . the Seventh Amendment was adopted.” 5 J. Moore, J. Lucas, & J. Wicker, *Moore’s Federal Practice* P38.32[1], p. 38–268 (2d ed. 1996). See, e.g., *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430

[U.S. 442, 458 \(1977\)](#) (“Condemnation was a suit at common law but constitutionally could be tried without a jury”). . . .

NOTES AND QUESTIONS

1. As discussed above, Congress can—and sometimes has—created a right to a jury trial in connection with a new statutory claim. Therefore, before turning to the constitutional issue, the Court first considers whether § 1983, the statute creating the underlying claim, requires for a jury trial. It concludes the statute does not. And yet, the statute explicitly allows aggrieved parties to bring an “action at law.” Do you understand why the Court concludes that this language—which is virtually identical to the language in the Seventh Amendment—is not enough to guarantee a jury trial?

2. After concluding that § 1983 did not itself require a jury, the Court turns to the issue of whether the Seventh Amendment requires a jury in an action arising under that statute. As *City of Monterey* and several other Supreme Court cases have concluded, the simple fact that a claim is based on a statute rather than judge-made law is not controlling. Instead, the Court looks to the *nature* of the statutory cause of action. In your own words, restate the two-part test the Court uses when dealing with a statute.

3. The first part of the test attempts to analogize the statutory claim to an action that existed in 1791. If the analogous action would have been heard in Law, the statutory claim falls under the Seventh Amendment. Where Justices Kennedy and Souter differ is whether a traditional eminent domain proceeding is the closest analogue. Government exercises its power of eminent domain when it takes private property. In *City of Monterey*, plaintiff was claiming that the City for all practical purposes condemned its property by refusing to allow development. Given this basic similarity, how can Justice Kennedy conclude eminent domain is not the best analogue?

4. The eminent domain proceeding was in some respects a historic anomaly. Although such actions were tried in Law, they were tried *without a jury*. Therefore, as there was no right to a jury in such a case in 1791, no jury is required by the Seventh Amendment.

5. Justice Kennedy found that a tort claim was the more appropriate analogy. But that finding alone did not resolve the question. Do you see why not? In 1791, where would a party sue to recover for a tort? Why did Justice Kennedy take such pains to point out that the plaintiff was in essence seeking damages?

6. In earlier opinions, the Supreme Court has indicated that when applying the test for statutory claims, the nature of the relief is “more important” than the historical analogue. See, e.g., *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990). Does Justice Kennedy’s opinion reject that view?

One problem with focusing exclusively on the type of relief sought is that in some situations the same remedy could be provided in both systems. As discussed above, for example, Equity could award damages when hearing a claim, such as breach of fiduciary duty, that was recognized only in Equity. Suppose Congress passed a statute simply codifying the historic action for breach of fiduciary duty. If plaintiff sued for damages under that statute, would the claim be heard by a jury because the “nature of the relief”—damages—was legal? See *In re Hutchinson*, 5 F.3d 750 (4th Cir. 1993).

7. *Restitution*. One of the most persistent and vexing problems in the first part of the test is distinguishing damages from the equitable remedy of restitution. Damages and restitution both involve the payment of money to plaintiff because of harm defendant caused plaintiff. Although the precedent on this issue is complex and often inconsistent, the Supreme Court has held that a claim involves restitution when it requires defendant to disgorge property *in its possession or control* that should rightly go to plaintiff. See generally *Chauffeurs*, 494 U.S. at 571 (money that union members failed to receive because of union’s breach of duty of fair representation is damages rather than restitution because it was not “money wrongfully held by the Union”); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (restitution involves “restoring the status quo and ordering return of that which rightfully belongs to” plaintiff). The most difficult issue seems to be when a party seeks backpay in a discrimination case. Depending on the statute in question, the lower courts have held backpay awards to be either legal or equitable. Compare *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1187 (11th Cir. 1985) (backpay under 42 U.S.C. §§ 1981 and 1983 is equitable) with *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 325 (4th Cir. 1993) (backpay under Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, is legal).

8. The second part of the test, discussed in Part IV.B of the majority opinion, considers whether use of a jury to decide the question is “proper.” Like the first part, this part also looks to history and custom. If there is a history of having juries decide analogous questions, then it is more likely to be proper to have a jury decide the question at hand. Why did the Court conclude this part of the test was satisfied? Given that juries historically did *not* decide compensation in eminent domain proceedings, doesn’t history suggest that this sort of issue is not a proper one for the jury?

Is the majority’s ruling on the second part of the test based on the simple fact that the jury is deciding facts rather than law? But deciding facts is what juries *do*. Can you conceive of a situation where it would not be proper to have the jury decide facts? Consider *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). In that case, plaintiff sued defendant for damages for patent infringement. To recover for infringement, plaintiff had to show defendant made, used, or sold something that fell within plaintiff’s rights under the patent. The Supreme Court held that while the jury could determine damages, the *judge* would determine the scope of plaintiff’s patent rights. In reaching this conclusion, the Court noted

that in 1791 there was nothing analogous to the modern process by which a court determines the scope of a patent. That lack of historical tradition, coupled with the complex scientific questions involved in determining the extent of the rights granted by the patent, led the Court to conclude it would not be proper for the jury to decide the question of patent scope. Note, however, that the Court did not suggest an issue could be taken from a jury simply because it is complex. Instead, it is also necessary that the issue be of a type not historically assigned to a jury.

b. Problems Arising from the Merger of Law and Equity

INTRODUCTORY PROBLEM

Candid Cameras operates a camera shop in the local shopping mall. Candid leases its space from Molly, the mall's owner. The lease provides that Candid may use the space only for the "sale of cameras and photographic equipment." However, it also provides that Molly cannot recover damages if Candid violates the use restriction. Instead, her remedy is limited to declaring the lease terminated, and taking the space back from Candid. A different lease provision prevents Molly from leasing space in the mall to a tenant who sells goods "similar to" those sold by Candid.

The Molly-Candid lease is old, predating the advent of digital photography. When digital cameras first became popular, Candid began to stock photo-editing computer software and computer add-ons specifically designed for photo editing. Now that digital photography is all the rage, Candid has decided to quit carrying cameras altogether, and concentrate on the sale of photo-editing software and computer add-ons. However, Candid has two concerns. First, Candid is worried this change in the nature of its store might put it in violation of the use restrictions in its lease. Although the only remedy for such a violation would be loss of its space, Candid would rather keep its lucrative location in the mall. Second, Candid has learned that Molly is negotiating with a prospective tenant who plans to open a store selling computer software (including photo-editing software) and accessories. In Candid's opinion, Molly would violate the exclusivity provision in the Molly-Candid lease should she enter into a lease with this prospective tenant.

These concerns lead Candid to sue Molly in federal court. Candid files two claims. First, it asks for a declaratory judgment stating that because photo-editing software and related computer accessories qualify as "photographic equipment," Candid would not violate the use restrictions in the lease if it quits selling cameras and sells only such software and accessories. Second, Candid asks for an injunction barring Molly from entering into a lease with the prospective tenant. Molly files a counterclaim in the action, in which she claims that Candid violated its obligation, explicitly set out in the lease, to participate in the mall's annual Black Friday sale. Molly seeks damages under this counterclaim.

Molly files a timely demand for a jury. The case has boiled down to the following issues:

1. Would Candid breach the use restriction in the lease if it quit selling cameras and sold only photo-editing software and computer accessories for photo editing?
2. Would Molly violate the exclusivity provision in the lease if she entered into a lease with the prospective tenant?
3. If Molly would violate the exclusivity provision in the lease by leasing space to the prospective tenant, is Candid entitled to an injunction?
4. Did Candid violate the terms of its lease by refusing to participate in the Black Friday sale?
5. If Candid did violate its lease by refusing to participate, what are Molly's damages?

Will a jury decide any or all of these issues?

The historical test for applying the Seventh Amendment assumes a clear line between Law and Equity. Although the federal system and some states did not maintain separate *courts* of Law and Equity in the eighteenth century, they did usually require that legal and equitable claims be presented in separate *cases*. Even if a person's legal and equitable claims arose from the same event, they had to be tried in different proceedings, one with a jury and the other without. The main exception—a fairly limited one at that—was the equity clean-up doctrine, which allowed a party to bring legal claims as an incident to a case that was predominantly equitable. Even under this doctrine, however, the entire case was tried in equity without a jury.

Today, most systems have “merged” Law and Equity, and allow for all legal and equitable claims and defenses to be tried together. In the federal courts, this merger occurred in 1938. The unitary civil action presents a real problem for a court trying to apply the Seventh Amendment. What should a court do if a jury traditionally would have tried only parts of the case? Should the court try to determine if the legal or equitable portion of the case predominates, and grant or deny a jury accordingly? Or is a more discriminating approach possible?

**MARSEILLES HYDRO POWER, LLC v.
MARSEILLES LAND AND WATER COMPANY**

299 F.3d 643 (7th Cir. 2002)

POSNER, CIRCUIT JUDGE.

The plaintiff (“the power company”) owns a disused hydroelectric plant built in 1912. When functional the plant was powered by water from a canal, owned by the defendant (“the canal company”), that connects the plant to the Illinois River. A contract between the parties’ predecessors required the owner of the plant to pay rent to the owner of the canal and required the latter to keep the canal in good repair. The requirement had no practical significance when the plant was not being used. But the current owner of the plant, that is, the power company, decided to put the plant back into service and so it became concerned about the state of the canal and in particular feared that the canal’s wall was about to collapse. The canal company refused to repair it, and so the power company brought this suit to enforce the canal company’s duty under the contract and moved for a preliminary injunction; but before the motion could be heard, the canal wall collapsed. [The power company brought three claims. First, it sought an injunction to keep the canal company from preventing the power company from entering the canal company’s land to repair the canal. Second, it asked the court to grant it a lien on the canal company’s land to pay for these repairs. Finally, it asked the court for a declaratory judgment that the power company was relieved of its obligation to pay rent to the canal company because of the latter’s failure to keep the canal in repair.] The canal company counterclaimed for the rent due under the contract, rent that the power company refused to pay until the canal was repaired. After a bench trial, the judge awarded judgment for the power company both on its complaint and on the canal company’s counterclaim. The judgment seems (the reason for this hedge will appear momentarily) to include an order injunctive in character that entitles the power company to enter upon the canal company’s property for the purpose of repairing the canal wall and to obtain a lien on the property for the cost of the repair. . . .

[T]he canal company’s principal argument, and the only one we strictly need to consider, is that it was entitled to a jury trial. Rule 38(b) of the civil rules gives a party only ten days* “after the service of the last pleading directed to the issue” (that is, “any issue triable of right by a jury,” *id.*) to demand a jury trial on that issue. [The court’s discussion of whether the demand for a jury was timely is set out in part B of this Chapter, in the main text.]

The power company and the judge were confused by the word “issue” in Rule 38(b). They think it means that if an issue *could* give rise to a

* The Rule was amended after this case to extend this period to 14 days. [Eds.]

claim for damages, either party can demand that it be tried to a jury. That is not correct. If the only relief sought is equitable, such as an injunction or specific performance (a type of affirmative injunction), neither the party seeking that relief nor the party opposing it is entitled to a jury trial. Rule 38(a), so far as applicable to this case, creates a right to a jury trial merely coextensive with the Seventh Amendment, which in turn confines that right to “Suits at common law.” A suit seeking only equitable relief is not a suit at common law, regardless of the nature of the issues likely or even certain to arise in the case, most of which indeed might be legal, such as whether the canal company broke its contract with the power company, an issue normally determined by the common law of contracts rather than by some principle of equity jurisprudence. . . .

The complaint in this case sought an injunction against the canal company’s preventing the power company from going on the canal company’s land to repair the canal at the latter’s expense, as well as specific performance (the granting of a lien), also a form of equitable relief. If that were all, it would be clear there was no right to a jury trial. But declaratory relief was also sought. Despite the equitable origins of such relief, the Supreme Court has said that actions for declaratory judgments are “neither legal nor equitable.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988). (So much for the historical test for Seventh Amendment rights.) Rule 57 of the civil rules provides that “the procedure for obtaining a declaratory judgment pursuant to [the Declaratory Judgment Act, 28 U.S.C. § 2201] shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39.” In other words, casting one’s suit in the form of a suit for a declaratory judgment, or adding a claim for a declaratory judgment to one’s other claim or claims for relief, does not create a right to a jury trial. Rather, as the Third Circuit put it nicely in *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1189 (3d Cir. 1979), “If the declaratory judgment action does not fit into one of the existing equitable patterns but is essentially an inverted law suit—an action brought by one who would have been a defendant at common law—then the parties have a right to a jury. But if the action is the counterpart of a suit in equity, there is no such right.” We prefer the formulation that we just quoted from *Owens-Illinois* to that in *Petition of Rosenman & Colin*, 850 F.2d 57, 60 (2d Cir. 1988): “the nature of the underlying dispute determines whether a jury trial is available.” The “nature of the underlying dispute” here is breach of contract, but a plaintiff who is seeking equitable relief and not damages cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment. Otherwise anyone seeking an injunction could obtain a jury trial.

So neither the power company nor the canal company had a right to demand a jury trial on the basis of the complaint. Any such right would have had to arise later. It did arise later; it arose when the canal company counter-claimed for the withheld rent. Founded on an alleged breach of contract by the power company, the counter-claim was a claim for damages and hence—despite its being a counterclaim rather than a free-standing lawsuit, since a counterclaim *is* a suit, only joined for economy with an existing suit—it was a suit at common law within the meaning of the Seventh Amendment. The canal company’s demand for a jury, filed within ten days after the counterclaim, was the earliest either party could have demanded a jury trial. At that point the fact that there was a common issue underlying both the equitable and the legal claims, namely the duty if any of the power company to pay rent, and under that issue perhaps the deeper issue of which party had actually broken the contract, became significant. Common issues, if triable at all in the sense that their resolution requires resolving a material dispute of fact, as was the case here, must be tried to a jury in order to prevent a judge’s determination from foreclosing a party’s right to have the issues in a common law suit tried by a jury. So the demand for a jury trial was timely and its rejection error; and until the jury trial to which the canal company is entitled is completed issuance of an injunction is premature. . . .

Reversed and remanded.

NOTES AND QUESTIONS

1. Note that a right to a jury can arise because of a claim in the complaint, or, as in *Marseilles Hydro*, from a counterclaim asserted in the answer. The right may similarly stem from a cross-claim or third-party claim.

2. In *City of Monterey* in the prior subsection, the plaintiff sought a jury based on a claim in its complaint. In *Marseilles Hydro*, the defendant sought a jury based on a counterclaim in its answer. Does this mean that only the party stating a legal claim has the right to insist on a jury trial? Suppose the demand for a jury in *Marseilles Hydro* had been filed by the plaintiff and opposed by the defendant. Same result? See Federal Rule 38(b).

3. *Marseilles Hydro* also illustrates how a court deals with a case involving a mixture of legal and equitable claims. This analysis is often called the *Beacon Theatres* test, after the 1959 Supreme Court case of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), that established the basic approach. Prior to *Beacon Theatres*, a court would attempt to determine whether the case, as a whole, was “essentially” legal or equitable, and would either deny or grant a jury for the entire case accordingly. The *Beacon Theatres* test rejects this all-or-nothing approach, and instead requires the court to divide the case into its various claims. Under this analysis, the jury will decide all issues relating to the legal claims, while the judge will decide the equitable issues. That rule seems at first

glance to be eminently logical and relatively simple. The problem, however, is that in many cases the legal and equitable claims will share one or more factual issues. In *Marseilles Hydro*, for example, plaintiff's equitable claim for an injunction and defendant's legal counterclaim shared the issue of whether the plaintiff was required to pay rent. Does the judge or the jury decide these shared issues?

4. Courts applying the *Beacon Theatres* test sometimes state that the jury must decide all issues relevant to the legal claims "first," after which the judge decides any remaining, purely equitable, issues. But technically the case need not proceed in that order. A judge could decide all the purely equitable questions first, and then let the jury decide the solely legal and shared issues. Regardless of whether the judge or the jury decides first, the judge is bound by the jury's findings on the legal and shared issues. The findings on the shared issues often will dictate whether a party succeeds on its equitable claims.

5. *Declaratory Judgments*. The first steps in the *Beacon Theatres* test are to determine exactly what claims have been filed in the lawsuit and to label those claims as legal or equitable (or maritime, which fall within admiralty jurisdiction). In *Marseilles Hydro*, applying that analysis to the plaintiff's injunction and specific performance claims, and to defendant's damages counterclaim, is easy. Plaintiff's claims are equitable, while the counterclaim is legal.

But plaintiff also presented a third claim: a request for a declaratory judgment. Declaratory judgments did not exist in 1791, and thus cannot automatically be classified as legal or equitable. The court's opinion sets out the accepted approach for dealing with these claims. This approach recognizes that declaratory judgments exist mainly to allow a party who anticipates being sued on a claim to "accelerate" that dispute and have it decided now rather than later. Therefore, the analysis of a declaratory judgment looks beyond the form of the case, and instead asks what suit would have occurred at some later date if the party had not sought the declaration. If the later suit would involve a legal claim, the declaratory judgment will also be considered legal; while if the later suit would have been equitable, no jury will be used on the declaratory judgment claim. Do you agree with Judge Posner's conclusion that the declaratory judgment in this case is equitable? Had plaintiff not sought the declaration, what would eventually have happened?

Note that you encountered a similar test for declaratory judgments if you studied subject matter jurisdiction in Chapter 4. When determining whether a declaratory judgment presents a federal question, courts look past the declaratory judgment and ask if the suit that would eventually have occurred would have been a federal question. See Note 7 following the *Mottley* case in Chapter 4.B.1.

6. A federal statute, [28 U.S.C. § 2201](#), allows declaratory judgments. Given that the right to seek a declaratory judgment arises under a federal

statute, why doesn't the court apply the two-part test for statutory claims discussed in the prior section?

7. Rule 39(c) also allows a federal court to use an *advisory jury* to decide claims that cannot be tried as of right to a jury. Unlike a jury's findings on legal issues, findings by an advisory jury are merely recommendations that the judge can accept or reject as she sees fit. In *Marseilles Hydro*, the court could have assigned all factual determinations to the jury. Although the findings on the legal issues would be binding, the findings on the solely equitable issues would have been recommendations.

c. The Effect of the Federal Rules on Historically Equitable Claims

The Law courts in 1791 were limited in several ways that could lead to serious practical problems for litigants. A party who needed to use discovery, or who wanted to file the case as a class action or interpleader case, could only find relief in Equity, as those procedures were not available in Law. The Federal Rules, however, borrowed many of the more useful features of Equity practice and made them available in all cases. Does the fact that discovery, class actions, and the like are now available in traditionally legal cases affect the right to a jury trial?

ROSS V. BERNHARD

396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970)

MR. JUSTICE WHITE delivered the opinion of the Court.

[Plaintiffs, stockholders of an investment company, brought a shareholders derivative action against the directors of the company, alleging that the directors harmed the company by violating certain federal laws. Plaintiffs sought damages and asked for a jury. The Court held that the Seventh Amendment required a jury, even though a shareholder's derivative action could historically be brought only in Equity.]

However difficult it may have been to define with precision the line between actions at law dealing with legal rights and suits in equity dealing with equitable matters, some proceedings were unmistakably actions at law triable to a jury. . . . [A] corporation's suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted.

The common law refused, however, to permit stockholders to call corporate managers to account in actions at law. . . . Early in the 19th century, equity provided relief both in this country and in England. . . . The remedy made available in equity was the derivative suit, viewed in this country as a suit to enforce a corporate cause of action against officers, directors, and third parties. . . .

Derivative suits posed no Seventh Amendment problems where the action against the directors and third parties would have been by a bill in equity had the corporation brought the suit. Our concern is with cases based upon a legal claim of the corporation against directors or third parties. Does the trial of such claims at the suit of a stockholder and without a jury violate the Seventh Amendment?

. . . The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action. . . .

We have noted that the derivative suit has dual aspects: first, the stockholder's right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors or third parties on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial. . . . The heart of the action is the corporate claim. If it presents a legal issue, one entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court. . . .

If under older procedures, now discarded, a court of equity could properly try the legal claims of the corporation presented in a derivative suit, it was because irreparable injury was threatened and no remedy at law existed as long as the stockholder was without standing to sue and the corporation itself refused to pursue its own remedies. . . .

Actions are no longer brought as actions at law or suits in equity. Under the Rules there is only one action—a "civil action"—in which all claims may be joined and all remedies are available. Purely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity, were destroyed. In a civil action presenting a stockholder's derivative claim, the court after passing upon the plaintiff's right to sue on behalf of the corporation is now able to try the corporate claim for damages with the aid of a jury. . . . Under the rules, law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court. . . .

Thus, for example, 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. . . . [I]t now seems settled in the lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present. . . .

After adoption of the rules there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights. Given the availability in a derivative action of both legal and equitable remedies, we think the

Seventh Amendment preserves to the parties in a stockholder's suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its legal claims.

[JUSTICE STEWART's dissent is omitted.]

[DAIRY QUEEN, INC. v. WOOD, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 \(1962\)](#). Plaintiff, owner of the trademark DAIRY QUEEN, had granted Dairy Queen, Inc. a license to use the mark. The license agreement required Dairy Queen to pay royalties based on its sales using the mark. When Dairy Queen stopped paying, plaintiff sued for (i) an injunction preventing Dairy Queen from using the mark, (ii) an injunction barring Dairy Queen from collecting money from "Dairy Queen" stores, and (iii) an accounting to determine exactly how much Dairy Queen owed to plaintiff for breaching the agreement. If granted, the accounting would require Dairy Queen to examine its own records to determine the sales it had made. The court would then enter judgment for plaintiff in that amount. Like an injunction, an accounting was a remedy that in 1791 was available only in Equity.

Although all three of plaintiff's claims were on their face equitable, Dairy Queen demanded a jury. When the trial court denied the jury, the corporation brought a writ of mandamus against Wood, the trial judge. The court of appeals denied the writ, and Dairy Queen appealed to the Supreme Court. The Supreme Court held that a jury should have been empanelled to hear the accounting claim, although not any issues unique to the injunctions:

Petitioner's contention, as set forth in its petition for mandamus to the Court of Appeals and reiterated in its briefs before this Court, is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention. . . . [W]e think it plain that their claim for a money judgment is a claim wholly legal in its nature however the complaint is construed. As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character. . . .

The respondents' contention that this money claim is "purely equitable" is based primarily upon the fact that their complaint is cast in terms of an "accounting," rather than in terms of an action for "debt" or "damages." But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is . . . the absence of an adequate remedy at

law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the “accounts between the parties” are of such a “complicated nature” that only a court of equity can satisfactorily unravel them. In view of the powers given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. But be that as it may, this is certainly not such a case. A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two. The legal remedy cannot be characterized as inadequate merely because the measure of damages may necessitate a look into petitioner’s business records. . . .

NOTES AND QUESTIONS

1. *Ross* is fundamentally different than a case like *Marseilles Hydro*. In *Marseilles Hydro*, the court was dealing with a combination of legal and equitable claims. In *Ross*, by contrast, the court was faced with one claim—which everyone agrees would have been heard in Equity in 1791. The Court nevertheless concludes a jury is required. In *Ross*, as in the *Beacon Theatres* test applied in *Marseilles Hydro*, that conclusion stems in large part from the fact the Federal Rules allow legal and equitable claims to be brought in the same case. What feature or features of the Federal Rules support the Court’s ruling in *Ross*?

2. The Court in *Ross* does not hold that a jury is available in every shareholder’s derivative action. What else must be true before a party has a Seventh Amendment right to a jury in such a case?

3. The *Ross* Court strongly intimates that a jury would also be available in a class action asserting a legal claim, even though class actions were traditionally available only in Equity. The lower courts uniformly agree with this conclusion.

4. Although decided prior to *Ross*, in some respects *Dairy Queen* presents a more difficult logical question. Whereas *Ross* involved an equitable procedural device, *Dairy Queen* involved an equitable remedy. *Ross* held that for purposes of the Seventh Amendment, it was no longer necessary to distinguish between equitable and legal procedural devices, because the Federal Rules make those procedural devices available in all types of cases. Is the Court in *Dairy Queen* saying that it is likewise no longer necessary to think in terms of equitable and legal remedies? Is a party now entitled to a

jury in a case seeking a purely equitable remedy involving the payment of money, like specific performance?

Dairy Queen clearly does not abolish all distinctions between legal and equitable remedies. Note that the Court held a jury was required for the accounting, but not for the two injunction claims. Why is there a difference? Consider the nature of the accounting in *Dairy Queen*. If granted, the accounting would require defendant to examine its records to ascertain its total sales. The license agreement between the parties called for payment of royalties based on sales. What are plaintiff's legal damages for breach of that contract? Does the accounting change what plaintiff will receive if it wins, or simply provide an easier way to determine that amount? Is it really accurate to call the accounting in *Dairy Queen* an equitable "remedy"? Moreover, given the various tools provided plaintiffs under the Federal Rules, such as discovery and special masters, is the equitable remedy of accounting really necessary?

5. Although one could argue that *Dairy Queen* requires that accountings be treated as legal remedies only when the amount being calculated is equivalent to damages, most courts apply the *Dairy Queen* rule to any request for an accounting, at least in trademark cases. 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:124 (4th ed. 2004).

6. As discussed above in note 7 following the *City of Monterey* case, it is often difficult to distinguish the equitable remedy of restitution from damages. However, *Dairy Queen* has no effect on restitution. If the remedy being sought meets the Court's definition of restitution, it is equitable and tried without a jury.

7. Review the list of equitable remedies in Part 1 of this section. Are any of the other listed remedies really legal actions in equitable garb? What about the action for specific performance? Suppose a seller seeks specific performance of a contract in which a buyer agreed to buy real property. Is there any real difference between that remedy and damages?

d. Public Rights

INTRODUCTORY PROBLEM

For the past decade, members of Congress have been flooded with letters from irate law students complaining about differences in the grading curves used at various law schools. Many schools have succumbed to "grade inflation." Students at schools that have refused this temptation feel they are unfairly disadvantaged in the hiring process. Congress's response to this dire threat to national security is to enact the Grading Practices Act, which sets strict standards for law school grades. As part of this comprehensive statutory scheme, Congress also establishes the Grading Practices Administration, or "GPA", a new federal agency charged with enacting regulations on technical grading matters and policing law school compliance

with the Act. The GPA also has the authority to adjudicate claims involving law school grading practices, regardless of whether those claims arise under the Act or under some other law.

Within six months of its creation, the GPA decides to bring two test cases against two of the worst offenders, both of which are private schools. The first case, filed in a federal district court, is against the Hammurabi School of Law. Agency regulations establish a mandatory curve to be used in all Civil Procedure courses. In an attempt to make its students more competitive in the job market, Hammurabi used a higher curve. The GPA asks the court to impose a civil penalty of \$10,000 on the School, as provided by the Grading Practices Act.

The GPA's second case is against the Justinian Law School. The GPA brings this case before the GPA administrative tribunal. The action charges that Justinian's grading practices are so random that they constitute a common-law public nuisance, as they result in unqualified graduates being unleashed on an unsuspecting public. The GPA seeks \$100,000 in damages for this public nuisance.

Although the Grading Practices Act does not mention jury trials, both law schools demand a jury trial in their respective cases. Is there a Seventh Amendment right to a jury in either or both cases?

The Seventh Amendment does not require a jury in a case brought against the United States or a federal official. *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Such actions are not considered "suits at common law" within the meaning of the Seventh Amendment because of the historic principle of sovereign immunity. A suit against the sovereign was traditionally considered to be not a matter of right, but instead something that exists solely at the pleasure of the sovereign. A sovereign may refuse to allow itself to be sued in its own courts, or may place restrictions on a party's ability to bring such a suit. Therefore, when a person sues the United States or a federal official today, the case will be tried by a jury only if the statute creating the claim also provides for jury trials. *See, e.g.*, 28 U.S.C. § 2402 (right to a jury when suing the United States for wrongful assessment of taxes). By the same token, because a person cannot sue a *foreign* government without Congressional authorization, a suit against a foreign government or official does not qualify for a jury under the Seventh Amendment. *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996); *Wilmington Trust v. District Court*, 934 F.2d 1026 (9th Cir. 1991).⁴

⁴ Whether the same rule applies to suits against *state* governments is unclear. The Seventh Amendment applies only to suits in federal court. Because the Eleventh Amendment to the United States Constitution places significant limits on a party's ability to sue a state or state official in federal court, there is little precedent dealing with the issue.

But what happens when the federal government is the *plaintiff* in a case? Because sovereign immunity is no longer an issue, a suit by the federal government would fall under the command of the Seventh Amendment, at least to the extent the government is bringing a legal claim. Jury trials present no major concerns in many cases, such as when the government sues for damages for breach of contract. In other situations, however, jury trials might interfere with the efficient operation of government. The federal government often relies on *administrative agencies* to oversee specialized areas. These agencies may perform a mix of quasi-legislative, executive, and sometimes even judicial functions. If jury trials were required as a matter of course in matters assigned to agencies, it could significantly impede the operations of some agencies. Do these efficiency concerns outweigh a party's Seventh Amendment rights?

[ATLAS ROOFING CO., INC. V. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 \(1977\)](#). An OSHA inspection of Atlas Roofing's workplace revealed a serious violation. The agency imposed civil penalties on the company. Atlas appealed to the Occupational Safety and Health Review Commission, which upheld the penalty in a hearing conducted without a jury. Atlas sought judicial review in the federal courts. It claimed it was entitled to a jury trial on the question of civil penalties. Arguing that it would have been entitled to a jury had the government sought civil penalties in an action in federal court, Atlas argued that Congress should not be able to strip it of its constitutional right by the expediency of assigning the dispute to an administrative agency rather than a court. The Supreme Court disagreed, finding Atlas had no right to a jury trial:

At least in cases in which "public rights" are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible. . . .

Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency. . . .

[Atlas asserts] that the right to jury trial was never intended to depend on the identity of the forum to which Congress has chosen to submit a dispute; otherwise, it is said, Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts. The argument is well put, but it overstates the holdings of our prior cases and is in any event unpersuasive. Our prior cases support administrative factfinding in only those situations involving “public rights,” e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.

GRANFINANCIERA, S.A. V. NORDBERG

492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)

JUSTICE BRENNAN delivered the opinion of the Court.

[Chase & Sanborn Corporation filed for bankruptcy in 1983. Nordberg was appointed to serve as bankruptcy trustee, the official who oversees marshalling the debtor’s assets and deals with the claims of the creditors against the estate. One of the trustee’s duties is to recover “fraudulent conveyances”: transfers of the debtor’s assets to others on the eve of bankruptcy in an attempt to keep those assets from one or more creditors. Nordberg sued Granfinanciera in the United States District Court for the Southern District of Florida, claiming the transfers to Granfinanciera were fraudulent under 11 U.S.C. § 548.

The case was assigned to Bankruptcy Court—a specialized federal tribunal that hears certain matters connected to bankruptcy cases. Granfinanciera demanded a jury trial, but the Bankruptcy Court refused. Granfinanciera appealed to the District Court, which affirmed the decision without discussing the jury trial issue.]

The Court of Appeals for the Eleventh Circuit also affirmed. The court found that petitioners lacked a statutory right to a jury trial, because the constructive fraud provision under which suit was brought—11 U.S.C. § 548(a)(2)—contains no mention of a right to a jury trial, and 28 U.S.C. § 1411 “affords jury trials only in personal injury or wrongful death suits.” The Court of Appeals further ruled that the Seventh Amendment supplied no right to a jury trial, because actions to recover fraudulent conveyances are equitable in nature, even when a plaintiff seeks only monetary relief, and because “bankruptcy itself is equitable in nature and thus bankruptcy proceedings are inherently equitable.”

We granted certiorari to decide whether petitioners were entitled to a jury trial, and now reverse. . . .

[The Court first applied the two-part test for determining whether a statutory claim qualifies for a jury trial. It found that the common-law courts could and did hear closely analogous actions to recover fraudulent transfers, and used juries to decide such matters. The nature of the relief—payment of the money—was also held to be legal. The Court then turned to the issue of whether the fact that the claim was tried by an “agency”—the Bankruptcy Court—meant the claim could be tried without a jury.]

In *Atlas Roofing*, we noted that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’” We emphasized, however, that Congress’ power to block application of the Seventh Amendment to a cause of action has limits. Congress may only deny trials by jury in actions at law, we said, in cases where “public rights” are litigated: “Our prior cases support administrative factfinding in only those situations involving ‘public rights,’ e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.” *Id.*, at 458.⁸ . . .

Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. . . .

In certain situations, of course, Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. Congress’ power to do so is limited, however, just as its power to place adjudicative authority in non-Article III tribunals is circumscribed. Unless a legal cause of action involves “public rights,” Congress may not deprive parties litigating over such a right of the Seventh Amendment’s guarantee to a jury trial.

In *Atlas Roofing*, we noted that Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its

⁸ Although we left the term “public rights” undefined in *Atlas*, we cited *Crowell v. Benson*, 285 U.S. 22 (1932), approvingly. In *Crowell*, we defined “private right” as “the liability of one individual to another under the law as defined,” *id.*, at 51, in contrast to cases that “arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” *Id.*, at 50.

sovereign capacity. Our case law makes plain, however, that the class of “public rights” whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing’s* discussion suggests. Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as respondent’s right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2), is not a “public right” for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking “the essential attributes of the judicial power.” *Crowell v. Benson*, *supra*, at 51. And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder. In addition to our Seventh Amendment precedents, we therefore rely on our decisions exploring the restrictions Article III places on Congress’ choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial.

In our most recent discussion of the “public rights” doctrine as it bears on Congress’ power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that “a matter of public rights must at a minimum arise ‘between the government and others.’” *Northern Pipeline Construction Co. [v. Marathon Pipe Line Co.]*, 458 U.S. 50, 69 (1982) (opinion of Brennan, J.). We held, instead, that the Federal Government need not be a party for a case to revolve around “public rights.” *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586; *id.*, at 596–599 (1985) (Brennan, J., concurring in judgment). The crucial question, in cases not involving the Federal Government, is whether “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Id.*, at 593–594. If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment’s guarantee of a jury trial.

Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under [11 U.S.C. § 548\(a\)\(2\)](#) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions. In [Northern Pipeline Construction Co.](#), [458 U.S.](#), at 71, the plurality noted that the restructuring of debtor-creditor relations in bankruptcy "may well be a 'public right.'" But the plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. . . . There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which . . . "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy *res*. They therefore appear matters of private rather than public right. . . .

Nor can Congress' assignment be justified on the ground that jury trials of fraudulent conveyance actions would "go far to dismantle the statutory scheme," [Atlas Roofing](#), [430 U.S.](#), at 454, n. 11, or that bankruptcy proceedings have been placed in "an administrative forum with which the jury would be incompatible." *Id.*, at 450. . . .

It may be that providing jury trials in some fraudulent conveyance actions . . . would impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But "these considerations are insufficient to overcome the clear command of the Seventh Amendment." [Curtis v. Loether](#), [415 U.S.](#) 189, 198 (1974). See also [Pernell v. Southall Realty](#), [416 U.S.](#) 363, 383–384 (1974) (discounting arguments that jury trials would be unduly burdensome and rejecting "the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial"). . . .

We do not decide today whether the current jury trial provision—[28 U.S.C. § 1411](#) (1982 ed., Supp. V)—permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions. We do hold, however, that whatever the answers to these questions, the Seventh Amendment entitles petitioners to the jury trial they requested. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

[The concurring and dissenting opinions are omitted.]

NOTES AND QUESTIONS

1. As the *Atlas* and *Granfinanciera* opinions indicate, the question of jury trials in administrative proceedings is actually merely a part of a broader separation of powers issue. One of the unique features of the United States Constitution is that it makes the federal courts an independent third branch of government, as opposed to a ministerial organ that carries out the wishes of the other branches (which is the norm in many other nations). To ensure this independence, Article III of the Constitution provides certain protections to federal judges, including life tenure. The broader issue underlying cases like *Atlas* and *Granfinanciera* is the extent to which Congress may assign adjudication of cases to tribunals that do not have the same protections (Bankruptcy judges, for example, do not enjoy life tenure, but serve for a limited term). You will address this broader issue if you take the upper-level course in Federal Courts. Nevertheless, as the Court in *Granfinanciera* indicates at the end of its opinion, the broader issue intersects the jury trial question in another way. Even if Congress may assign a particular dispute to an agency, it is not clear that an agency has the authority to conduct a jury trial. If it does not, Congress would have no choice but to assign cases in which a jury trial is required to a “normal” Article III court.

2. If Congress wants to avoid a jury trial, does it really need to assign cases to agencies? What about the *state* courts? Recall that the Seventh Amendment does not apply to the state courts, even when they litigate claims arising under federal law. Would assigning disputes like those in *Atlas* and *Granfinanciera* to the state courts be a viable option?

3. *Granfinanciera* indicates that considerations of convenience and complexity of the dispute are not by themselves sufficient reasons to deprive a party of a jury trial. However, such considerations are not completely irrelevant. As indicated in the *City of Monterey* case in Part A.2.a of this Chapter, a court will consider the complexity of the case when determining whether a jury trial is required for a statutory claim without a clear historic analogue.

4. Does the Court in either opinion ever adequately explain why the Seventh Amendment does not require a jury trial in cases involving “public rights?” Is the Court somehow making an analogy to the historic notion of sovereign immunity, which applied only in cases brought *against* government?

5. *Atlas* indicates that a claim involving a public right is one “in which the Government sues in its sovereign capacity.” *Granfinanciera* suggests that language is too confining, stating that a case could involve a public right even when it involves a claim brought by a private party. And yet, the Court in *Granfinanciera* holds that the right in that case was a private right. Can you

think of a claim that would be a public right even though filed by one private party against another?

6. As the prior note indicates, having the government as a party is not a necessary condition to finding a public right. Is it even a sufficient condition? Are there ever situations where government brings a suit to enforce purely private rights?

7. Test your knowledge of the public rights exception by answering the following three questions:

a. Suppose Congress decides to give the Environmental Protection Agency the authority to adjudicate all cases involving pollution. The United States sues a large factory for damages, under a theory of common-law public nuisance. The government brings this action before the new EPA tribunal. Why does the Seventh Amendment require a jury in this action?

b. The Federal Communications Commission brings an action in federal district court against a major television network and a famous celebrity to levy civil penalties for certain salty terms the celebrity used during a televised awards ceremony. Why does the Seventh Amendment require a jury in this case?

c. Suppose the United States enters into a contract to buy pencils for use in government offices. The seller falsely represented the pencils were “Made in the U.S.A.” When the United States learns the truth, it sues in federal district court to rescind the contract based on the false representation. Why will there *not* be a jury in this case?

3. THE REEXAMINATION CLAUSE

As you have seen, the Seventh Amendment gives parties a right to a jury in certain types of cases. However, the amendment also provides, “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” This “Reexamination Clause” prevents judges from undercutting the right to a jury by letting the jury hear the case, but then overturning the jury verdict.

The Reexamination Clause does not completely bar a judge from second-guessing a jury. It allows a judge to overturn a verdict, but only to the extent a judge could do so at common law. Like the basic right to a jury trial, then, the Reexamination Clause requires a historical analysis.

At common law, a judge’s authority to take a case away from the jury was fairly limited. First, a judge could decide the case on the pleadings if the pleadings established that one side should prevail as a matter of law. Therefore, the modern Federal Rule 12(b)(6) dismissal and Federal Rule 12(c) judgment on the pleadings clearly pass constitutional muster.

Second, because the role of the jury is to decide disputed facts, a party is entitled to a jury only if there is a genuine dispute as to one or more relevant facts. Under this reasoning, the modern device of summary judgment does not violate the Seventh Amendment. Third, even if the case went to trial, the trial judge at common law could direct the jury to find for one side if the evidence was so completely one-sided that no reasonable jury could fail to find for that side. That practice continues in modern courts as the “directed verdict” or “judgment as a matter of law” (although the trial judge today simply decides the case herself, rather than telling the jury how to decide). Finally, once the case was submitted to the jury and a verdict returned, the judge could grant a new trial if there was a serious procedural error or the verdict was against the great weight of the evidence. The Federal Rule 59 new trial carries forward this practice. Aside from these devices, however, the trial judge could not upset a jury verdict. Nor could a court of appeals question the merits of the jury verdict.

Modern procedure provides a few other checks on the jury in addition to those mentioned above. Today, a federal trial judge can grant a judgment as a matter of law not only before the case is submitted to the jury, but also after the jury reports its verdict. Because of the Seventh Amendment, however, the Federal Rules require a pre-verdict motion for judgment as a matter of law as a prerequisite to a post-verdict motion. This process is described in greater detail in Chapter 11, part B.

Some states give their courts of appeal the authority to overturn juries. When cases involving these state laws are heard in federal court, there is a potential clash between the Reexamination Clause and the federal court’s obligations under the *Erie* doctrine to follow state law. The United States Supreme Court dealt with this problem in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), which is discussed in greater detail in Chapter 5. In *Gasperini*, the Court was faced with a New York law that gave the appellate court the authority to overturn jury verdicts if they deviated materially from the results in similar cases. Although the Court held the federal court could meet its *Erie* obligations and apply the state standard of review without violating the Seventh Amendment, concerns about the Reexamination Clause led it to hold that the standard should be applied in the federal system by the trial court rather than the Court of Appeals.

PROBLEMS

1. P sues D in federal court for damages for injuries sustained when P and D’s yachts collided during a regatta held on Lake Huron. D files a timely demand for a jury trial. Does the Seventh Amendment afford a right to a jury in this case?

2. P leases a notebook computer to D pursuant to a written lease. When D fails to make the required payments for several months, P terminates the lease and orders D to return the computer. D refuses to return the computer. P therefore sues D for an order requiring D to return the computer. P files a timely demand for a jury. Does the Seventh Amendment afford a right to a jury in this case?

3. Same as Problem 2, except that D is the United States government. P files a timely demand for a jury. Does the Seventh Amendment afford a right to a jury in this case?

4. P, a painter, sells a painting of a nude subject to D. D modifies the work by painting fig leaves over certain private parts. In P's opinion, these changes ruin the painting. P accordingly sues D for damages under § 106A of the federal Copyright Act. Section 106A provides artists a cause of action against anyone who damages or defaces their works, even if the defacer owns the work. This statute, which was enacted in 1990, represents a first for Anglo-American law. Traditionally, an artist lost all rights in a physical painting once the painting was sold to another. P files a timely demand for a jury trial. Does the Seventh Amendment afford a right to a jury in this case?

5. S and B have a contract under which S agrees to supply a rare mineral to B. The only source for this mineral is a small nation in Africa. When civil war breaks out in this nation, S is temporarily unable to meet B's demand. S is later able to resume mining, although at a much higher cost of production.

S sues B in state court. S asks the court to reform the contract by increasing the price B must pay to reflect S's higher costs. B counterclaims, seeking damages for the shipments S failed to make, as well as an order requiring S to continue to supply the mineral at the agreed-upon price. S files a timely demand for a jury trial. Does the Seventh Amendment afford a right to a jury on any or all of the issues in this case?

6. Same as Problem 5, except that P sues in federal district court. Does the Seventh Amendment afford a right to a jury on any or all of the issues in this case?

7. The owner of the Springfield Isotopes, a minor league baseball team, has indicated he would like to move the team to another city. In response, the City of Springfield threatens to use its powers of eminent domain to condemn the team and sell it to another person. Owner, worried that this threat will deter potential buyers, sues Springfield in federal court. Owner asks the federal court for a declaratory judgment that any attempted condemnation would exceed the City's constitutional powers. Owner files a timely demand for a jury trial. Does the Seventh Amendment afford a right to a jury on any or all of the issues in this case?

8. When B's lawn mower dies, L loans B his riding mower. After several weeks, L asks B several times to return the mower. B refuses. L later learns that B has set up a lawn mowing service using L's mower. When L

confronts B with this information, B returns the mower. L then sues B for an order requiring B to pay to L all the profits B earned from her wrongful use of the mower. L also asks the court for an order of accounting requiring B to examine her records and reveal how much money she made using the mower.

B files a timely request for a jury trial. Does the Seventh Amendment afford a right to a jury on any or all of the issues in this case?

9. Following a disastrous oil spill from an oil rig situated in United States waters, the federal Environmental Protection Agency sues Scottish Petroleum, Inc., the owner of the rig ["SP"], in federal court. The EPA's action asks the court to impose civil penalties on SP, as authorized by the federal Superfund statute. SP files a timely demand for a jury in the case, even though the Superfund law is silent on the subject of jury trials. Does the Seventh Amendment afford a right to a jury on any or all of the issues in this case?