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SMITH v. UNIVERSITY OF DETROIT: IS THERE A VIABLE ALTERNATIVE TO *BEACON THEATRES?*

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I. INTRODUCTION

In 1791, when the Seventh Amendment[1] took effect there were courts of law and there were courts of equity. The law courts tried cases before juries, while the courts of equity did not. In order to protect the right to a jury trial, the Seventh Amendment simply "preserved" its status as it existed in 1791.[2] Clearly, the drafters of the Seventh Amendment assumed that "law is law and equity is equity, and ne'er the twain shall merge." But merge they did and with the addition of modern joinder rules broke the camel's back of straightforward historical analysis under the Seventh Amendment.

The federal courts have the light of *Beacon Theatres*[3] to guide them in cases where legal and equitable claims exist. That doctrine is not likely to produce the same role for juries as would have resulted in the trial of a

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1. U.S. CONST. amend. VII. The author is aware that the "blue book" requires that terms such as "Seventh Amendment" not be capitalized. *See A Uniform System of Citation* 32 (14th ed. 1986) (example given: "fifth amendment"). Unless lawyers have declared their independence from the rules of English grammar, the blue book is simply wrong. *See, e.g., The Chicago Manual of Style* 206 (13th ed. 1982) (example given: "Fifteenth Amendment").

2. The Seventh Amendment provides:

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

U.S. CONST. amend. VII (emphasis added). *See also infra* note 92 and accompanying text (citing law review article discussing history of Seventh Amendment). Since the role of juries varied widely in the colonies, the practice in England in 1791 is commonly considered to be the relevant comparison. *See generally* Kotler, *Reappraising the Jury's Role as Finder of Fact,* 20 GA. L. REV. 123 (1985) (interesting discussion of ways in which the role of jury has changed since 1791); Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation,* 128 U. PA. L. REV. 829, 830-838 (1980); Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold,* 128 U. PA. L. REV. 965, 966-973 (1980).

3. 359 U.S. 500 (1959). *See also* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). *Beacon Theatres* held that any part of a modern case which would have been triable to a jury in 1791 must be tried to a jury, if one has been demanded, prior to the trial of any non-jury triable matters which, by operation of res judicata, might foreclose the jury's role if tried first. *Beacon Theatres,* 359 U.S. at 510-11. *Cf. infra* notes 21 and 58 and accompanying text (discussing narrow and as yet unused exception to this holding).

similar case in 1791. Indeed, *Beacon Theatres* vastly expands the range of jury triable cases at the clear and significant expense of the equitable cleanup doctrine.[4] Yet, particularly because it may be argued that the right to a *non-jury* trial is not constitutionally protected,[5] *Beacon Theatres'* failure to keep true faith with history may be forgiven.

The states, however, are not bound by the Seventh Amendment.[6] In interpreting their own jury trial guarantees, some state courts have followed *Beacon Theatres,* [7] but many have taken different paths and continue to seek the ancient balance between chancellor and jury. *Smith v. University of Detroit*[8] is the result of that search, and the Gordian knot of contradictions inherent in it. This article will explore that decision and its many unfortunate ramifications, and will conclude that the time has come to abandon the search for such alternatives.

II. *BEACON THEATRES V. WESTOVER*

In *Beacon Theatres* the plaintiff sought to enjoin Beacon from interfering in its contractual relationships by suggesting that those contracts were violative of Beacon's rights under the antitrust laws.[9] Plaintiff also somewhat needlessly sought a declaratory judgment, the Court's discussion of which is not relevant to the analysis presented here.[10] Beacon, in turn, counter-

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4. *Beacon Theatres,* 359 U.S. at 516-17 (Stewart, J., dissenting) (alluding to equitable cleanup doctrine). Justice Stewart then characterized the majority's decision as follows: "The Court today sweeps away these basic principles as 'precedents decided under discarded procedures.' " *Id.* at 518.

5. *Id.* at 510: "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court,. . ." *See* Hurnitz v. Hurnitz, 136 F.2d 796, 798-99 (D.C. Cir. 1943); The Genesee Chief v. Fitzhugh, 19 U.S. 233, 242-43 (1851); *cf. infra* notes 50-52 and accompanying texts (state constitutional provisions interpreted to preserve both right to jury and right to non-jury trials).

6. *See, e.g.,* Colgrove v. Battin, 413 U.S. 149, 169 n.4 (1973) (rule of *Beacon Theatres* not binding on state courts); First National Bank of Olathe v. Clark, 602 P.2d 1299, 1302 (Kan. 1979) (same). The questions raised in *Byrd v. Blue Ridge Rural Elec. Co-op, Inc. and Dice v. Akron, Canton and Youngstown Railroad Co.* are not relevant to the question addressed by this article. *See Byrd,* 356 U.S. 525 (1958); *Dice,* 342 U.S. 359 (1952).

7. *See infra* note 43 (citing minority of states that follow *Beacon Theatres*).

8. 145 Mich. App. 468, 378 N.W.2d 511 (1985).

9. *Beacon Theatres,* 359 U.S. at 503 (1959).

10. *Id.* at 502. The injunction against Beacon's threats of suits would have necessarily decided the same issues. Fox, the plaintiff, may have sought the declaratory judgment in order to increase its likelihood of obtaining the injunction. The threats, alone, might not have created sufficient "irreparable harm" to warrant an injunction. Once declaratory relief is granted, an injunction effectuating that relief becomes more automatic. In all probability, however, Beacon's threats to companies that Fox dealt with would have been sufficient to warrant an injunction, and the decision to seek declaratory relief appears unnecessary.

Assuming that Fox needed declaratory relief, however, the Court's discussion of the significance of the declaratory relief was entirely unnecessary. The Court held that Beacon's counterclaim mandated a jury trial on the issues raised by the declaratory claim. *Id.* at 508. Thus, the fact that the Court also held that the declaratory claim, itself, merited a jury trial,

claimed for monetary damages under the antitrust laws,[11] and demanded a jury trial.[12]

Curiously, the *Beacon Theatres* Court did not discuss how a similar case that presents claims both at law and equity would have been tried under the procedures in existence in 1791.[13] The Seventh Amendment's command that the right to a jury trial "be preserved" has generally been held to require such an inquiry.[14] Only after the Court has concluded that the historical inquiry is not possible will a "second-best" approach based on approximation be utilized.[15] Had the Court done the historical analysis in *Beacon Theatres,* however, it would have concluded that basing its decision on historical reconstruction of the unmerged system was impossible. Thus, the Court would have proceeded to an approximation-based analysis in any event.

In 1791, simultaneous claims at law and equity between two parties could have been handled in any of three ways. First, the equitable cleanup doctrine might have been employed.[16] The equitable cleanup doctrine per-

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was dicta.

The court's ruling concerning declaratory relief was that declaratory relief is neither legal nor equitable. *Id.* at 508-09. It is necessary to look beyond the declaratory action to the action that would have been brought had declaratory relief been unavailable. In *Beacon Theatres* the declaratory action was an anticipation of an antitrust damages suit by Beacon (which was also the counterclaim), and was therefore held to be jury triable. *Id.* at 503.

Statements in *Beacon Theatres* that declaratory judgments are not equitable actions, however justified in the jury trial context, should not be taken literally. In other contexts, declaratory actions are considered equitable. For example, the availability of declaratory relief is governed by the same equitable considerations as the availability of injunctive relief.

11. *Id.* at 503. Indeed, as the Court noted, Beacon's counterclaim was compulsory; forced on Beacon by Rule 13(a) and not a tactical ploy to obtain a jury. *Id.* at 508. *See* FED. R. CIV. P. 13(A) (Federal Rule compelling counterclaim).

12. The *Beacon Theatres* Court only cursorily demonstrated that an antitrust action is jury triable. *Beacon Theatres,* 359 u.s. at 504. *But see* Davis v. Marathon Oil Co., 57 F.R.D. 23, 24 (N.D. Ohio 1972). Of course, if antitrust actions are not jury triable, *Beacon Theatres* was incorrectly decided as to its own facts.

13. The dissent criticized the Court for its failure to do so. *Beacon Theatres,* 359 U.S. at 514, 516, 518 (Stewart, J., dissenting). The dissent, however, does not pursue its historical analysis far enough to ascertain that the historical inquiry would have been fruitless. At one point, the dissent appears to assume that the equitable cleanup doctrine, which is not mentioned by name, would have applied. *Id.* at 516. Yet the dissent concedes, "All depends upon the context in which they [mixed claims] arise." *Id.*

14. *See, e.g.,* Pernell v. Southall Realty, 416 U.S. 363 (1974) (case presenting both law and equity claims requires a Seventh Amendment inquiry into procedures in existence in 1791).

15. *See, e.g.,* Curtis v. Loether, 415 U.S. 189 (1974).The historical inquiry into race discrimination actions was obviously fruitless as slavery was legal in 1791. The *Curtis* Court therefore had to determine the right to jury trial by the approximation-based method of looking to the relief sought. Such analysis is an approximation because money damages were sometimes awarded by equity courts in 1791, and non-monetary relief (such as replevin) was available at law. The actual practice was the product of numerous historical accidents rather than a clear analytical or functional division based on the relief sought.

16. The descriptions in this article of three major ways in which simultaneously pending matters of law and equity would have been adjudicated in 1791 are a substantial oversimpli-

mitted the chancellor to exercise what today would be termed a form of ancillary or pendent jurisdiction[17] over related legal claims. Once equity's jurisdiction over part of a case was established, equity would decide the entire controversy; even if matters cognizable at law were also involved.[18] Of the three alternate ways of proceeding in 1791, using the equitable cleanup doctrine, and thereby superseding a jury trial with trial before a

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fication of that practice. They are analytically accurate for the purposes of this article, but should not be used or other purposes. The actual practice in England was still developing and changing in 1791 and the use of the three approaches described here focuses only on practices which appear to have remained reasonably stable during the time period immediately preceding 1791. for example, Holdsworth describes the interrelationship between law and equity at this time as

> . . . a partnership, based upon a division of the jurisdiction of the court of Chancery under the well-known three heads of auxiliary, concurrent, and exclusive. That classification, implicit in the equitable jurisdiction all through the eighteenth century, was made explicitly by Fonblanque in his *Treatise of Equity,* the first edition of which was published in 1793-1794.

W. HOLDSWORTH, XII A HISTORY OF ENGLISH LAW 602 (1938) (footnote 1 omitted). Holdsworth is using this description for a different purpose, yet his three heads of jurisdiction correspond to the three procedures described in this article.

It should be noted that the interrelationship of law and equity varied so much over time as to render the analysis presented here utterly inaccurate during other time periods. the Chancellor originally was an integral (administrative) part of the law courts, charged with creating new writs when existing ones proved too restrictive. *See* A. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS, 151-52 (1902); F. POLLOCK & F. MAITLAND, 1 THE HISTORY OF ENGLISH LAW, 170-71, 196 (2d ed., 1898, reprint 1968). Apparently, the Chancellor sat judicially for the first time in 1397, although after that date the Chancellors still performed non-judicial duties. A. CARTER, at 152; F. POLLOCK & F. MAITLAND, at 191-3, 197; J. REEVES, 1 HISTORY OF THE ENGLISH LAW 59 (2d ed. 1787, reprint 1969); W. WINDEYER, LECTURES ON LEGAL HISTORY 153 (2d rev. ed. 1957, reprint 1974).

The equitable cleanup doctrine frequently operated by means of an injunction by which the chancellor restrained the courts of law from proceeding. *See, e.g.,* A. CARTER, at 156-7; W. WINDEYER, at 260, 262, 282. At times, equity would act *after* law had decided the case, effectively reversing the decision at law. *See infra* notes 23-24 and accompanying text. (As this practice was still in effect in 1791, it may be argued that collateral estoppel might not be permitted to bind a subsequent equitable proceeding.) For the limited purposes of this article, this alternative is also fungible with the equitable cleanup doctrine, and is therefore not separately discussed and analyzed.

17. *See, e.g.,* Apollo v. Kim Anh Pham, 192 N.J. Super. 427, ____, 470 A.2d 934, 936 (Ch. Div. 1983) ("[A]n issue which is normally triable to a jury may be ancillary and incidental to. . . equitable jurisdiction, thus allowing the issue to be determined by the court without a jury.") *See infra* notes 18, 19 and accompanying text (discussing use of equitable cleanup doctrine).

18. *See, e.g.,* Thornbrugh v. Poulin, 697 S.W.2d 416, 418 (Mo. Ct. App.1984) ("[T]he 'equitable clean-up doctrine' applies in Missouri, which means that where a petition requests both legal and equitable relief,. . . the trial court, sitting without a jury, has jurisdiction to hear and decide legal issues, as well as the equitable ones."); Thompson v. First Miss. Nat'l. Bank, 427 So.2d 973, 975-76 (Miss. 1983). "It is well established that, where there is in a case one issue of exclusive equity cognizance, such an issue can bring the entire case within [the] subject matter jurisdiction of the chancery court and that court may proceed to adjudicate all legal issues as well. . . ." *Thompson,* 427 So.2d at 975.

chancellor was, by far, the most commonly used.[19] Thus, the ultimate holding of *Beacon Theatres—that any* part of a case which is determined to be legal in nature must be tried first[20]—which effectively eliminated the equitable cleanup doctrine,[21] will, in the majority of cases, produce a result with regard to the jury trial question which is simply not historically accurate.

Yet, the application of the equitable cleanup doctrine in 1791 was anything but a certainty. In order to understand why other alternate means of resolving parallels questions at law and at equity existed, it is necessary to recreate the political climate of such an unmerged system. In that unmerged system the chancellors felt the need to avoid entirely usurping law.[22] The most familiar ramification of this obscure form of comity between

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19. *See, e.g.,* Langevin v. Hillsborough County, 114 N.H. 317, ____, 320 A.2d 635, 636 (1974). ("It is well established. . . that a court of equity which has taken jurisdiction of a cause for any purpose *will ordinarily retain jurisdiction* for all purposes and decide all issues which are involved. . . between the parties.") (emphasis added). The degree to which equitable interference with law, which was the result of the cleanup doctrine, became quite widespread is the best indicator of the prevalence of that approach over the others. *See infra* notes 22-24 (discussing use of cleanup doctrine to supersede use of jury trial). The use of injunctions to restrain proceedings at law so that equity might decide the entire case became so routine that such injunctions came to be known as the "common injunction." *See, e.g.,* L. CURZON, ENGLISH LEGAL HISTORY 109 (2d ed. 1979).

20. *See supra* note 3. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). The *Dairy Queen* Court reinforced this aspect of *Beacon Theatres,* holding that even "minor" or "incidental" claims at law must be tried first. *Dairy Queen,* 369 U.S. at 479. Federal practice thus has the advantage of an absolutely clear "bright line" approach.

21. The opinion in *Beacon Theatres* left open the possibility that the cleanup doctrine would have to be used in cases where the circumstances require permanent equitable relief prior to a jury trial. *Beacon Theatres,* 359 U.S. at 510. This exception is not relied on in any reported case.

Indeed, use of the exception would have to be a very rare event. Preliminary relief, pursuant to Fed. R. Civ. Pro., Rule 65 will ordinarily permit equity to act promptly without compromising the role of the jury. In granting preliminary equitable relief, rather than permanent equitable relief, a court only finds a *high probability* of success on the merits. This is not a true finding, but rather an estimate, and it has no res judicata value when the jury later hears the case. Thus, *Beacon Theatres* has no effect on the availability of preliminary equitable relief, and vice versa. In order to bring the exception into play, *permanent* equitable relief must be required prior to the time when it is feasible to hold a jury trial. Ironically, the *University of Detroit* case may have fit this exception, and the early trial at equity might have been acceptable in the federal courts. *See* Smith v. University of Detroit, 145 Mich. App. 468, 478, 378 N.W.2d 511, 516 (Mich Ct. App. 1985); *infra* note 59 (discussing *Smith* as an exception to *Beacon Theatres*).

22. *See* KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND (1977); Jones, *Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth I,* 5 AMER. J. LEGAL HIST. 12, 19 (1961); Dawson, *Coke and Ellesmere Disinterred: the Attack on the Chancery in 1616,* 36 U. ILL. L. REV. 134 (1941); XII W. HOLDSWORTH, *supra* note 19 at 588-89, 597; A. CARTER, *supra* note 16 at 156-160; 1 F. POLLOCK & F. MAITLAND, *supra* note 16 at 171, 197; Arnold, *supra* note 2 at 845; L. CURZON, *supra* note 16 at 97, 99, 108-111; W. WINDEYER, *supra* note 16 at 153, 260, 262.

A full history of the interrelationship between law and equity is beyond the scope of this article. In terms of a brief overview, however, there are four major historical periods. First,

law and equity is the requirement that one's remedy at law must be shown

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law and equity begin to separate in the period from the early 1200's to about 1485. W. WINDEYER, *supra* note 16 at 153 n.9. Windeyer suggests that there was strife between the two almost from the start. Yet most other authors characterize this period as one where the two parallel organs of government cooperated. *See e.g.*, 1 F. POLLOCK & F. MAITLAND, *supra* note 16 at 171 ("As yet there would be no jealousy between the justices and the chancellor. . ."); L. CURZON, *supra* note 19 at 108 ("At this stage equity was not considered as a rival system to the common law.").

From about 1485 (particularly after 1530) to the year 1597 a second major phase occurred when equity experienced a great expansion at the expense of law. There is little doubt that the common law judges resented the chancellors bitterly during this period. Pollock & Maitland, in typical British understatement, say of this time, "[T]he days when the chancellor would often sit among the justices were passing away, the days for stiff official correspondence between the courts and chancery had come." 1 F. POLLOCK & F. MAITLAND, *supra* note 19 at 197. Carter is more explicit about the bitterness, as are Curzon, and Windeyer. *See* A. CARTER, *supra* note 16 at 158-59; L. CURZON, *supra* note 19 at 109 ("by the end of the fifteenth century jealousy and hostility were beginning to dominate the attitude of common lawyers to a system which was seen to be emerging as a powerful rival."); W. WINDEYER, *supra* note 16 at 260 ("But in the sixteenth and early seventeenth centuries, the common law judges did not regard the Court of Chancery as a partner and an assistant. They looked on it as a rival . . . whose legitimacy they denied, and whose growing power they feared.").

From 1598 to 1616 the relations between law and equity entered a third phase which was the climax of the conflict that had been building. In 1598, law won the first skirmish. With the Chancellor "omitted and excluded" from the decision in *Finch v. Throgmorton,* the power of equity to reverse decisions at law was swept away. KNAFLA, *supra* at 159 (quoting "omitted and excluded" from one of the original reports of the decision). For a period this decision substantially reduced the power and docket of the chancellor, but when the common law lawyers attempted to extend the holding further, a widespread debate in the legal community Knafla describes as a "war of tracts" ensued. KNAFLA, *supra* at 159. After a number of smaller conflicts, the focus of the matter returned to the original question of the use of the common injunction by equity to effectively reverse a decision at law. In 1603 Lord Chancellor Ellesmere resumed the practice of the common injunction. KNAFLA, *supra* at 163. In 1604 Lord Chief Justice Coke, speaking for the law courts condemned the expansion of equity. *Id.* Lord Chief Justice Coke condemned it again in 1611. L. CURZON, *supra* note 19 at 110. From 1615 to 1616 the focus of events turned to a series of cases where Coke and Ellesmere came into direct conflict. Carter describes the most notable of these as follows:

> In 1616 matters came to a head in the great battle between Coke and Lord Ellesmere on the subject if injunctions. In a case in which, tried before Coke, a verdict had been obtained by a gross fraud, the Chancellor perpetually enjoined the successful party from proceeding to execute his judgment . The verdict had been gained by decoying away a necessary witness of the defendant and making the judge believe he was dying. The witness was taken to a tavern, and a bottle of sack ordered for him: as soon as he put it to his mouth the emissary went back to court, and when the witness was called the emissary swore that 'he had just left the witness in such a state that if he were to continue in it a quarter of a hour longer he would be a dead man.' The Chancellor on learning this granted an injunction.

A. CARTER, *supra* note 16 at 159.

The law courts in general, and Coke in particular were so infuriated that lawyers and suitors who sought equity were thereafter barred from appearing before the courts of law, and some were indicted. Ellesmere appealed to the King. Curzon describes the result as a complete victory for equity:

> James I referred the dispute to Bacon, his Attorney-General, and a group of lawyers. (The dispute had been exacerbated by Coke's personal dislike of Ellesmere,

to be inadequate before equitable jurisdiction will attach to a claim.[23] Without such a requirement equity, whose procedures were more flexible and reasonable, would have been resorted to in almost every case. The result would have been the extinction of the courts of law.

The second alternate way of proceeding in 1791 in cases that involved both law and equity was a process of equitable restraint which was motivated largely by such political considerations.[24] In certain types of cases and under certain circumstances which have now become obscure the chancellor would require that the parties' rights first be established in a trial at law.[25] Only after the law courts had reached their decision would an equitable remedy be made available. In such cases the effect on the right to jury trial was exactly opposite of that achieved under the equitable cleanup doctrine. The equitable cleanup doctrine produced a bench trial which superseded the role

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and by Beacon's personal hostility to Coke.) *Bacon and the lawyers decided in favor of Chancery.* They declared that the issue of injunctions, about which coke had complained, was based on strong precedent, and that there were cases of common law judges having advised parties to an action to make application to Chancery for such an injunction. James I (always anxious to support those who looked favorably on his claims to exercise the royal prerogative) ordered, on July 14th, 1616, that the chancellor had no need to refrain from giving relief in equity.

Coke was humbled, and dismissed later in 1616. Chancery had proved too strong for him.

L. CURZON, *supra* note 19 at 111 (emphasis in original).

The fourth phase in the relations of law and equity begins surprisingly shortly after this great victory for equity with the establishment of an equilibrium through comity that is referred to in this article. In 1618 Lord Bacon (who was impeached for unrelated reasons in 1621) became Lord Chancellor. Bacon had been a common lawyer, and he promptly began what Curzon terms a "reconciliation between the Court of Chancery and its common law opponents." L. CURZON, *supra* note 19 at 115. *See also* W. WINDEYER, *supra* note 16 at 262-3. Ellesmere had obtained a great victory over the common law judges, but that victory had produced so much resentment that Bacon and his successors had to give most of it back to obtain peace. Bacon and his successors created the complex system which limited the availability of equity, yet kept its power to effectively overrule law. In the period between 1621 and 1791 the powers law and equity each ebbed and flowed somewhat as the balance shifted in favor of one or the other, but the comity-based system survived. It is described by Holdsworth as follows:

Their solution of the problem of relation of law to equity was not a fusion, but a partnership, based upon a division of the jurisdiction of the court of Chancery under the well-known three heads of auxiliary, concurrent, and exclusive. That Classification, implicit in the equitable jurisdiction all through the eighteenth century, was made explicitly by Fonblanque in his *Treatise of Equity,* the first edition of which was published in 1793-1794. the principles of equity coming under these three heads were so developed that a conflict between the rules of law and equity was avoided.

XII HOLDSWORTH, *supra* note 16 at 601-602.

23. *See Beacon Theatres,* 359 U.S. at 506-7 ("The basis of injunctive relief in the federal courts has always been . . . inadequacy of legal remedies.")

24. *See supra* note 23 and accompanying text (discussing process of equitable restraint).

25. *See, e.g.,* XII HOLDSWORTH, *supra* note 16 at 598 (particularly at n. 1, citing 1798 case which is particularly likely to reflect practice at the time Seventh Amendment took effect); Arnold, *supra* note 2 at 835-37 846-47; W. WINDEYER, *supra* note 16 at 268.

of the jury, while the second, less frequently used alternative produced a jury trial which essentially[26] superseded the non-jury trial.

The third way in which a matter involving both law and equity might have proceeded in 1791 was simply to allow both cases to proceed simultaneously.[27] When this occurred, the common issues of fact were resolved by whichever factfinder—chancellor or jury—happened to go first. This, in turn, would depend on relatively extraneous factors such as docket delays which were subject to some manipulation by counsel.

With a modern mixed law and equity case in a system where law and equity have been merged, attempting to reconstruct the ancient system to accurately ascertain whether a jury trial would have occurred is simply not possible. At the outset it would have to be determined whether both types of claims would have been brought in 1791. Merger and modern pleading and joinder rules[28] make bringing a case with both law and equity claims a relatively simple matter. The complexity of doing so under ancient practice, together with the possible need for bringing two separate cases, tended to cause counsel to forego some such extra claims.[29]

Further, it is not possible to simply ask today's counsel which course would have been taken. The availability of a jury trial may have been a factor in such decisions in 1791, but it was certainly not the only factor.[30] All sorts of other technical requirements and limitations existed which put a price on the selection of either law or equity. To obtain an accurate decision by counsel it would be necessary to resurrect and apply the entire ancient system in order to truly know if the price of obtaining or avoiding a jury would have been paid.[31]

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26. While the chancellor could not award equitable relief if the jury found for the defendant, and in that sense he was bound by their decision, a jury decision in favor of the plaintiff did not mean that equitable relief must follow. Even after the plaintiff's right was established at law, the appropriateness of equitable relief still remained for the chancellor to decide.

27. *See* W.WINDEYER, *supra* note 16 at 283. Only a few commentators refer to this practice, and it was likely the least used of the three alternatives discussed in this article.

28. *See, e.g.,* FED. R. CIV. P 2,7,8,9,13,14,15,18,20. Also, the federal compulsory counterclaim rule in Rule 13 not only permits, but requires joinder of claims in ways which might operate to deprive a litigant of the right to a jury trial under the practices that existed in 1791. *See also supra* note 12 (discussing Beacon's compulsory counterclaim).

29. *See, e.g.,* Curtis v. Loether, 415 U.S. 189, 190 (1974). In *Curtis v. Loether,* the plaintiff originally sought only equitable relief, but later amended the complaint under rule 15 (in a way that was not likely in 1791) to add a minor claim for damages which probably would not have been brought at all in 1791. *See also* FED. R. CIV. P. 15.

30. *See* Pernell v. Southall Realty, 416 U.S. 363, 371-376 (1974) (discussing development of various writs and equitable procedures). In *Pernell,* the U.S. Supreme Court's discussion reveals that, at various times in the development of the newer writs, it was necessary to make certain allegations or forego certain aspects of relief in order to use some of the available writs. *Id.* at 373-74. Also, actions at law permitted no discovery, which might be needed in a particular case and might motivate counsel to forego a jury.

31. If counsel were required merely to imagine the ancient complex system and make a hypothetical choice, such choices could not be relied on as counsel would know that the "price" of obtaining (or avoiding) a jury will not actually have to be paid.

Then it would be necessary to determine whether the equitable cleanup doctrine or one of the less frequently used alternatives would have been employed. To perform such a decision it would be necessary to generate the institutional and political tensions of an operating unmerged system. This would mean not only resurrecting the ancient system for individual cases where legal and equitable claims are simultaneously present, but resurrecting that system in *all* cases in order to produce the necessary ongoing interaction between law and equity.[32]

The system followed in the federal courts prior to *Beacon Theatres* had the same effect on the right to a jury trial as an unrestricted[33] equitable cleanup doctrine.[34] The means by which it operated, however, were most similar to the third way in which the courts of 1791 dealt with simultaneously pending issues of law and equity. The federal courts treated each claim as a separate case, according the law portion a jury trial and the equity portion a bench trial. In such a system, however, collateral estoppel[35] makes a fallacy out of the apparent evenhandedness. Whichever part of the case happened to be tried first effectively determined all common issues.

In 1791 two separate courts acting independently produced an essentially random mixture of jury of bench trials when this mode of proceeding was employed. The merger of law and equity, however, meant that one judge would play both roles. Using a discretionary power designed for other purposes,[36] the merged judge replaced chance with conscious choice in

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32. *Cf.* text accompanying *infra* note 74.

33. The use of the term "unrestricted" is intended to convey the fact that the institutional considerations which kept the equitable cleanup doctrine in check were lacking and, thus, the doctrine or similar procedures could be employed freely.

34. *See, e.g.,* American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937); Enelow v. New York Life Ins. Co., 292 U.S. 379 (1935); Prudential Ins. Co. of America v. Saxe, 134 F.2d 16 (D.C. Cir. 1943); beaunit Mills v. Eday Fabric Sales Corp., 124 F.2d 563 (2d Cir. 1942); Reliance Life Ins. Co. of Pittsburgh Everglades Discount Co., 204 F.2d 937 (5th Cir. 1953); State Farm Mutual Auto Ins. Co. v. Mossey, 195 F.2d 56 (7th Cir. 1952).

35. The term collateral estoppel is employed throughout this article because it is the most commonly used term in the various cases dealing with the question of common issues in a bifurcated proceeding of any type. The Michigan court of Appeals in *Smith v. University of Detroit* insisted that the correct term is the "law of the case." Smith v. University of Detroit, 145 Mich. App. 468, 478, 378, N.W.2d 511, 516 (1985). A more precise term albeit one which is largely unknown to the practicing bar, is direct estoppel. *See* Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 n.4 (5th Cir. 1974); Estevez v. Nabers, 219 F.2d 321, 324 (5th Cir. 1955); Myers v. Ampex, Inc., 498 F.2d 1092, 1093 (5th Cir. 1974). Collateral estoppel is applicable when a recurring issue of fact arises in two separate causes of action, and is thus the correct term only in an unmerged system. The law of the case refers to prior rulings of law in the same case and is thus inapposite. Direct estoppel is applicable to recurring issues of fact in the same case.

36. *See* FED. R. CIV. P., Rules 20, 42. Federal Rules 20 and 42 provide trial judges with the power to sever a case into convenient parts and try the parts in a reasonable sequence. *See also* Bechtel Corp. v. Local 215, Laborers' International Union of North America, 544 F.2d 1207 (3rd Cir. 1976) (separating and trying each part of a case in sequence). *Compare* FED R. CIV. P. 20 & 42 *with* FED. R. CIV. P. 39.

selecting the trier of fact who would be first in time and therefore first in res judicata.

There is a popular joke which states, "Those of you who think they know everything are particularly annoying to those of us who do." The joke is amusing because it contains a certain degree of truth. In the case of judges, that truth often takes the form of knowing themselves to be better factfinders than juries.[37] To no great surprise, the pre-Beacon *Theatres* discretionary choice as to which portion of the case would be tried first almost invariably meant that equity took precedence.[38] Injecting an equitable claim into a case became a tactical means of depriving your opponent of a jury trial.[39]

Viewed in this light, *Beacon Theatres'* "overkill" requirement that law always go first was a reasonable response to changed circumstances. It gives juries more of a role than they had in 1791, but it may have been the only way to ensure that they do not get less. *Beacon Theatres,* then, is a satisfactory but not ideal resolution of a difficult problem, and the only real question remaining is whether better alternative solutions exist.

III. *BEACON THEATRES* IN THE STATE COURTS

The Seventh Amendment, and therefore the rule of *Beacon Theatres,* is not binding on the states.[40] Indeed, some states have not merged law and equity, and do not have the problem.[41] In other states the question has not

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37. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531, 538 n. 10 (1970); ("practical abilities and limitations of juries"); *In re* Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980) (holding that limitations on jurors' abilities may amount to denial of due process in complex case, although bench trial would not); Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603) ("the Court was better able to judge than a jury of ploughmen" (opinion by Lord Ellesmere); FRANK, COURTS ON TRIAL 124 (1949) (citing numerous statements by judges as support for his position that jury is an anachronism).

In view of the now infamous footnote in *Ross,* a surprising contrary provision is found in New Jersey practice. *Ross,* 396 U.S. at 538 n. 10. In New Jersey's unmerged judicial system, if a matter is pending in the Chancery Court and it is complex, the complexity of the issue warrants according it a jury trial] *See* Apollo v. Kim Anh Pham, 192 N.J. Super. 427, ____, 470, A.2d 934, 937 (N.J. Super. Ct. 1983) ("The court further finds that the issues are not so complex as to warrant a trial by jury pursuant to the court's discretionary power under R. 4:35-2.").

38. *See supra* note 34 (citing cases where the trial court's discretion regarding case sequence has resulted in bench trial).

39. It likewise should be conceded that after *Beacon Theatres,* injecting a claim, counterclaim, crossclaim, etc., at law had become a tactical means of depriving your opponent of a non-jury trial. This result, however, is more acceptable in view of the fact that the Seventh Amendment does not protect the right to a non-jury trial.

40. *See, e.g.,* Colgrove v. Battin, 413 U.S. 149, 169 n.4 (1973); First Nat'l Bank of Olathe v. Clark, 226 Kan. 619, ____, 602, P.2d 1229, 1302 (1979).

41. Delaware, for example, has an entirely unmerged system of law and equity courts which functions almost exactly as courts did in 1791. Because Delaware is the legal home of so many corporations, the unmerged system is especially likely to be preserved. Stockholder derivative actions and a large number of other such corporate matters, being equitable in

arisen or has not been clearly resolved.[42] A substantial minority of states follow *Beacon Theatres* by choice.[43]

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nature, are tried in the Chancery courts. As a result of the unmerged system, the Delaware Chancellors have become considerably more proficient at such matters than those judges with a full-range docket. Further, restricting such matters to Chancery court means that jury trials will not be available. The lack of jury trials is one of the many questionable pro-corporation advantages that cause so many corporations to make Delaware their home. *Cf.* Ross v. Bernhard, 396 U.S. 531 (1970) (stockholder derivative actions may be at law and require jury trial, depending on nature of claims). *Ross* appears to be a completely unwarranted extension of *Beacon Theatres* under current analysis.

Pennsylvania, Mississippi, and New Jersey have largely unmerged systems and, like Delaware, have not faced the *Beacon Theatres* question for that reason. In all of these states, including Delaware, however, the *Beacon Theatres* question is not entirely irrelevant. Modern joinder and pleading rules, and other modern procedural innovations are in effect, and create situations where equity courts today usurp the right to a jury trial in ways that could not have occurred in ancient times. The formal separation of law and equity seems to have prevented recognition of this fact.

42. Indeed, a number of states appear to have entirely misunderstood the holding of *Beacon Theatres. See* Temperance Ins. Exch. v. Carver, 83 Idaho 487, P.2d 824, 827-28 (1961). The Idaho Supreme Court *Temperance* cites *Beacon Theatres* with approval, yet appears to hold that declaratory judgment actions, being "[r]ights and remedies created by the legislature subsequent to the adoption of the constitution," are exempt from the right to jury trial. *Id.* Similarly, Colorado and Oregon, both of which do not follow *Beacon Theatres*, nonetheless have cited it in their most recent decisions in a context which suggests that the courts believed that they were following *Beacon Theatres. See* Soneff v. Harlan, 712 P.2d 1084, 1088 (Colo. App. 1985); Rexnord v. Ferris, 294 Or. 392, ____ n.4, 657 P.2d 673, 679 n.4 (1983).

In Louisiana the right to a jury trial is governed by a statute which only loosely parallels the distinction between law and equity, and is therefore not entirely comparable to *Beacon Theatres*. In any event, no Louisiana case has yet dealt with the question of concurrent jury-triable and non-jury-triable claims. *See generally*, Babineaux v. Pernie-Bailey Drilling Co., 261 La. 1080, ____, 262 So.2d 328, 334-35 (1972); Bonneau v. Blalock, 484 So.2d 275, 276 (La. App. 1986).

Perhaps the most unusual experience has been that of Arizona. At one time Arizona provided for jury trials in both actions at law and actions at equity. *See infra* note 78 and accompanying text. The statute involved was amended at various times between 1921 and 1956. Some time during that period the right to a jury trial for equitable matters was eliminated for no known reason, yet Arizona courts continued using juries in equity cases because they were unaware of the change. *See* Weaver v. Weaver, 131 Ariz. 586, ____, 643 P.2d 499, 501 (1982) (Gordon, J., concurring). As a result of this confusion, no case has arisen in Arizona presenting the *Beacon Theatres* problem

43. The following eleven states use the *Beacon Theatres* analysis: Alabama, Alaska, Florida, Georgia, Hawaii, Kentucky, Montana, Rhode Island, Utah, Vermont, and West Virginia. Two of these states, Georgia and Kentucky, had adopted the practice prior to the decision in *Beacon Theatres. See, Ex parte* Davis, 465 So.2d 392, 394 (Ala. 1985); Shope v. Sims, 658 P.2d 1336, 1340 (Alaska 1983); Chenery v. Crans, 497 So.2d 267, 268 (Fla. Dist. Ct. App. 1986); Life for God's Stray Animals, Inc. v. New North Rockdale County Homeowners' Assoc., 253 Ga. 551, ____, 322 S.E.2d 239, 241 (1984) *cert. denied sub nom.* Fields v. Rockdale County, 107 S. Ct. 571 (1986); Board of Directors v. Regency Tower Venture, 635 P.2d 244, 249 (Hawaii App. 1981); Roberts v. Jiks' Executrix, 307 S.W.2d 171, 174 (Ky. 1957) (subsequently followed in B.F.M. Buildings, Inc. v. Trice, 464 S.W.2d 617, 620 (Ky. 1971)); Breese v. Steel Mountain Enterprises, Inc., 716 P.2d 214, 216 (Mont. 1986); Rowell v. Kaplan, 235 A.2d 91, 96 (R.I. 1967); International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418, 421 n.2 (Utah 1981); Merchants Bank v. Thibodeau, 465

A substantial majority of states, on the other hand, have intentionally chosen not to follow *Beacon Theatres.*[44] Each of these states has its own constitutional provision which, like the Seventh Amendment, uses historically oriented language "preserve[ing]" the right to a jury trial.[45] Courts in these states have thus been asking the same question as the federal courts, but finding a different answer.

A common approach among states that do not follow *Beacon Theatres* is to employ an unrestrained version of the equitable cleanup doctrine.[46] Since there are no separate law courts in these states, the institutional and political interaction between law and equity which kept the cleanup doctrine

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A.2d 258, 260 (Vt. 1983); West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 211 S.E.2d 349, 353 (W. Va. 1975).

44. Only eleven states follow *Beacon Theatres. See supra* note 43. In addition to Michigan's practice as set forth in the *University of Detroit* decision, thirty-one states have practices which differ from that required by *Beacon Theatres. See infra* notes 46-49, 78 and accompanying texts.

45. *See, e.g.,* ALA. CONST. §11 ("The right of trial by jury . . . shall be preserved inviolate."); ALA. CONST. art. I§16 ("the right of trial by a jury . . . is preserved to the same extent as it existed at common law."); ARIZ. CONST. art 2 §23 (The right of trial by jury shall remain inviolate."); ARK. CONST. art.II §7 ("The right of trial by jury shall remain inviolate and shall extend to all cases at law. . . ."); IND. CONST. art. I §20 ("In all civil cases the right of trial by jury shall remain inviolate. . . .); §20 of the ME. CONST. art. I ("In all civil suits, and all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. . . ."); MD. DECLARATION OF RIGHTS art. XXIII ("The right of trial by jury of all issues of fact in civil proceedings in the several courts of Law in this State . . . shall be inviolably preserved."); MO. CONST. art. I §22(a) ("the right of trial by jury as heretofore enjoyed shall remain inviolate."); OR. CONST. art. VIII §3 ("the right of jury trial shall be preserved. . . ."); R.I. CONST. art. I, §15 ("the right of trial by jury shall remain inviolate. . . ."); S.C. CONST art. I §14 ("the right of jury trial shall remain inviolate. . . ."); S.D. CONST. art. VI §6 ("the right of trial by jury shall remain inviolate. . . ."); WASH. CONST. art. I §21 ("the right of trial by jury shall remain inviolate. . . ."); WIS. CONST. art. I §5 ("the right of trial by jury shall remain inviolate. . . ."). *See also* MICH. CONST. *infra* note 50.

A few states have provisions which less clearly refer to a historical analysis. *See, e.g.,* KAN. CONST. Bill of Rights §5 ("the right of trial by jury shall be inviolate. . . ."); MISS. CONST. art. III, §31 ("the right to a trial by jury is an inviolate right.").

46. The following ten states continue to employ the equitable cleanup doctrine despite the fact that their courts of law and equity have been merged: Arkansas, Idaho, Illinois, Indiana, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, and Wyoming. *See* Colclasure v. Kansas City Life Ins. Co., 290 Ark. 585, ____, 720 S.W.2d 916, 917 (1986); Duff v. Seubert, 110 Idaho 865, ____, 719 P.2d 1125, 1127 (1985); Daley v. Warren Motors, Inc., 136 Ill. App. 3d 505, ____, 91 Ill. Dec. 145, ____, 483 N.E.2d 427, 431 (1985); Matter of Trust of Loeb, 492 N.E.2d 40, 43 (Ind. App. 1986); Automatic Retailers of America, Inc. v. Evans Cigarette Service Co., 269 Md. 101, 105, 304 A.2d 581, 584 (1973); Matsushita Electric Corp. of America v. Sonus Corp., 362 Mass. 246, ____, 284 N.E.2d 880, 884 (1972) (pre-merger decision; compare Greenberg v. Greenberg, 406 N.E.2d 731, 732 (Mass. App. 1980) (explicitly declining to decide the question of whether Massachusetts' adoption of new rules of procedure which merged law and equity had altered the use of the cleanup doctrine)); Thornbrugh v. Poulin, 679 S.W.2d 416, 418 (Mo. Ct. App. 1984); Miller v. School District, 208 Neb. 290, ____, 303 N.W.2d 483, 487 (1981); Langevin v. Hillsborough County, 320 A.2d 635, 636 (N.H. 1974); True v. Hi-Plains Elevator Machinery, Inc., 577 P.2d 991, 1004 (Wyo. 1978).

in check in 1791 is not operating. As a result, the powers of equity are almost certainly being employed to usurp the right to jury trial as they were in the federal courts prior to *Beacon Theatres.*

A less common approach employs most of *Beacon Theatres* but fails to follow the Supreme Court's clarification of *Beacon* in *Dairy Queen v. Wood.*[47] That is to say that the rule of *Beacon Theatres* remains unless the part of the case which is at law can be characterized as a minor or incidental.[48] Thus, if a court in such a state believes that the "essential nature" of the suit is equitable, the cleanup doctrine or any other analysis which permits equity to go first will be used.[49] The danger of usurpation

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47. The following eight states fall within this category: Kansas, Minnesota, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *See* First Nat'l Bank v. Clark, 226 Kan. 619, ____, 602 P.2d 1299, 1303 (1979); Sina v. Schifsky, 208 N.W.2d 302, 303 (Minn. 1973); Sanguinetti v. Strecker, 577 P.2d 404, 409 (Nev. 1978) (dictum); General Electric Credit Corp. v. Richman, 338 N.W.2d 814, 818 (N.D. 1983); Murello Construction Co. v. Citizens Home Savings Co., 29 Ohio App. 3d 333, ____, 505 N.E.2d 637, 638 (1985); Butcher v. McGinn, 706 P.2d 878, 880 (Okl. 1985); Rexnord v. Ferris, 294 Or. 392, ____ n.4, 657 P.2d 673, 679 n.4 (1983); Skoglund, 312 N.W.2d 29, 30 (S.D. 1981).

48. *See, e.g.,* Rowell v. Kaplan, 103 R.I. 60,____, 235 A.2d 91, 97 (1967) (test for jury trial is whether complaint is "basically equitable in nature").

49. Three states, California, Colorado, and Washington, leave the sequence of trial in the trial judge's discretion, which is the practice that the federal courts employed prior to the decision in *Beacon Theatres. See* Raedeke v. Gibraltar Savings & Loan Ass'n., 10 Cal.3d 665, 671, 111 Cal. Rptr. 693, 696, 517 P.2d 1157, 1160 (1974); Soneff v. Harlan, 712 P.2d 1084, 1088 (Colo. App. 1985); Willapa Trading Co., Inc. v. Muscanto, Inc., 45 Wash. App. 779, ____, 727 P.2d 687, 692 (1986).

A similar approach is used in Connecticut where the "relative importance" of the claims is used by trial judges to determine which claim should be tried first. *See* United States Trust Co. v. Bohart, 197 Conn. 34 ____, 495 A.2d 1034, 1041 (1985). Likewise, the Iowa courts are instructed to determine which claims to try first by asking which sequence of trial would be most efficient. *See* Matter of Estate of Brady, 308 N.W.2d 68, 71 (Iowa 1981).

New York and Wisconsin share a rule which is erroneously based on the assumption that the cleanup doctrine was *always* used when concurrent legal and equitable claims were pending in unmerged courts. *See supra* notes 21-27 and accompanying texts. Therefore, New York and Wisconsin equate any *voluntary* joinder of a legal claim into an action with equitable claims as a waiver of the right to a jury trial. If, for example, a plaintiff joins legal and equitable claims, no right of jury trial is available. Likewise, if a defendant files a permissive counterclaim that is legal in nature there is no right to a jury trial if equitable claims are elsewhere in the case. However, if a defendant files a compulsory counterclaim which is legal in nature in a case which would not otherwise be jury triable, both parties have a right to demand a jury as to the compulsory counterclaim. *See* John W. Cowper Co. v. Buffalo Hotel Development Venture, 99 A.D.2d 19, ____, 471 N.Y.S.2d 913, 915 (App. Div. 1984); Mortgage Associates, Inc. v. Monona Shores, Inc., 47 Wis.2d 171, ____, 177 N.W.2d 340, 346 (1970). South Carolina follows *Beacon Theatres* as to mixtures of claims filed by the plaintiff, but follows the New York and Wisconsin practice as to counterclaims, distinguishing between permissive and compulsory ones and implying a waiver for permissive ones. *See* Johnson v. South Carolina Nat'l Bank, 354 S.E.2d 895, 897 (S.C. 1987). Finally, New Mexico presents an even more unusual variation. In Scott v. Woods, 105 N.M. 177, ____, 730 P.2d 480, 486 (N.M. App. 1986), a New Mexico mid-level court adopted *Beacon Theatres.* In State ex. rel. McAdams v. District Court, 105 N.M. 95, ____, 728 P.2d 1364, 1366 (1986), however, the New Mexico Supreme Court stated that it would follow New York's and Wisconsin's approach as to

of the jury's role may be somewhat reduced under such analysis, but the crucial requirement that the court determine which parts of the case are "important" is a very slippery notion susceptible to considerable abuse.

IV. *SMITH V. UNIVERSITY OF DETROIT*

The Michigan Constitution's provision that the right to a jury trial "shall remain"[50] appears to be a historically-based command like that of the Seventh Amendment. While the language used does not cry out for an alternative interpretation, the circumstances of its enactment may.[51] In any event, Michigan has interpreted its provision as preserving *both* the right to a jury trial and the right to a non-jury trial equally, thereby removing the logical fulcrum of *Beacon Theatres'* analysis.[52] If the right to a non-jury trial is protected as well it is not acceptable to err on the side of jury trials as the federal courts do. Although the drafters of the Michigan constitution undoubtedly did not foresee such a result, their decision to preserve both jury and non-jury trials comes rather close to creating both an irresistible force and an immovable object. At the very least, as the *University of Detroit* case would prove, they created both a rock and a hard place, and put them in close proximity so litigants could be caught between the two.

Smith v. University of Detroit was a race discrimination action brought by Black former law students at the University of Detroit who had been dismissed from the University for failure to maintain the required "C"

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counterclaims (applying it to a crossclaim which is always permissive), but that the New Mexico rule as to original claims is the practice described in *supra* note 47 and accompanying text. *McAdams* is slightly earlier than *Scott*, but it comes from the definitive New Mexico court and the two are so close in time that the *Scott* court was undoubtedly unaware of the *McAdams* opinion. Notably, *Scott* does not cite *MdAdams*, and it is unlikely that a lower court would attempt to overrule such a recent supreme court decision, especially without even referring to it. Accordingly, I conclude that *McAdams* states the rule in New Mexico.

50. MICH. CONST. art. 1, §14 ("the right of trial by jury shall remain").

51. The Michigan Supreme Court had ruled that both the right to jury and non-jury trials were equally sacred in 1952, only seven years before *Beacon Theatres*. *See* State Conservation Dep't v. Brown, 335 Mich. 343, 55 N.W.2d 859 (1952). Michigan's constitution was redrafted in 1963, only four years after *Beacon Theatres*, and it carried forward from the 1908 constitution the exact language concerning jury trials at issue in *Brown*. It is thus probable that the drafters of the 1963 constitution had a conscious opportunity to opt for *Beacon Theatres* over *Brown*, but failed to do so, although no materials are available through which this question can be answered with certainty.

52. In *Smith v. University of Detroit*, the Michigan Court of Appeals quoted from 2 HONIGMAN & HAWKINS, MICHIGAN COURT RULES ANNOTATED (2d ed. Supp. 1984) at 149 as follows: "[Michigan Supreme Court] Justice Black's opinion emphasizes that in Michigan there is a constitutional right to a decision by the chancellor on issues of fact in equity claims, which is as sacred as the right to jury trial of fact issue [sic] in law claims." Smith v. University of Detroit, 145 Mich. App. 468, 478, 3378 N.W.2d 511, 516 (Mich. Ct. App. 1985) (discussing the post-Beacon *Theatres* decision in *Abner A. Wolf, Inc. v. Walch*, 385 Mich. 253, 188 N.W.2d 544 (1971)).

average.[53] The complaint sought a wide range of equitable relief including an injunction reinstating the plaintiffs and an order setting up a committee of Black attorneys to grade minority students' papers.[54] It also sought monetary damages and attorneys' fees.[55] The complaint was pled exclusively under Michigan's Elliot-Larsen Act, [56] rather than similar federal statutes, undoubtedly because of differences in the racial composition between the state and federal bench and jury pool.[57]

The trial judge held an almost immediate trial on the equitable issues. The matter was accelerated on the trial calendar because of the inherent difficulties in delaying such a decision.[58] At the close of the plaintiffs'

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53. Smith v. University of Detroit, 145 Mich. App. 468, 474, 3378 N.W.2d 511 512 (Mich. Ct. App. 1985).

54. *Id.* at 474, 378 N.W.2d at 512, 513. *The University of Detroit* Court does not refer to the request for the special grading procedure, although it is set forth in the complaint. Telephone interview with Keefe Brooks, Esq. (April 14, 1987) (one of the attorneys for the defendant).

55. *University of Detroit,* 145 Mich. App. at 475, 378 N.W.2d at 513.

56. *Id.* at 474, 378 N.W.2d at 512. *See* MICH. COMP. LAWS § 37.2402(1) (1985) (MICH. STAT. ANN. § 3.548(402)(1) (Callaghan (19__)).

57. For example, a jury in Wayne County Circuit Court is drawn from Wayne County, Michigan. Wayne contains the city of Detroit, which is predominantly black, and the very much smaller, predominantly white cities of Grosse Pointe, Dearborn, and Hamtramck. The United States District Court for the Eastern District of Michigan, on the other hand, draws jurors from the entire eastern half of Michigan, which is a very much larger area, and an area which is mostly white, even though it included Detroit.

See Telephone interview with Keefe Brooks, Esq. (April 14, 1987), *supra* note 54. In the telephone interview, Mr. Brooks suggested that an alternative reason for forcing the case into state court was that the case law under comparable federal statutes would have made plaintiffs' success even less likely. This, however, is not a reason to avoid federal court as carefully as plaintiffs did. Even a federal court case could include pendent claims under the Elliot-Larson Act, and those claims would have to be tried under Michigan law.

58. In the context of *Smith v. University of Detroit,* it was imperative that the trial court act quickly to grant or deny equitable relief for a number of reasons. First, the plaintiffs, by virtue of temporary restraining order, were occupying seats which could otherwise be made available to other applicants. Second, if only a "preliminary" decision was made and the plaintiffs were allowed to remain in school, it would likely be "permanent" in effect, in any event. If the students were readmitted for long enough to graduate and pass the bar exam, it is difficult to believe that any court, acting in equity, would order them de-certified at that late point. *Cf.* DeFunis v. Odegard, 418 U.S. 903 (1974).

Thus, *Smith v. University of Detroit* might well have fit the exception to *Beacon Theatres* that would allow a non-jury trial of the equitable issues to proceed before the part at law in a federal court even though the federal courts protect jury trials more than the state courts of Michigan do. *See supra* note 21 (discussing *Beacon Theatres'* exception).

In connection with the trial judge's decision to birfurcate the trial and accelerate the trial of the equitable claims it should be noted that the plaintiffs had not filed a jury demand at the time (or for almost three weeks afterward) the trial court issued that order. Thus, it may be said that the Court of Appeals' decision was incorrect for the simple reason that, at the time the order was issued the ruling was unimpeachable. It seems doubtful that a jury demand filed weeks later should be able to retroactively apply to orders entered when no such demand was even contemplated. Because this aspect of the case is unique to the events in *University of Detroit,* it will not be considered further in this article.

proofs, the trial judge found no credible evidence of discrimination,[59] and denied the relief requested without even requiring the defendant to put on proofs.[60] The plaintiffs did not appeal this conclusion.[61] The trial judge then dismissed the entire action because the effect of collateral estoppel meant that non-discrimination had been established between the parties and nothing remained for presentation to a jury.[62] Plaintiffs, conceding that they would never be allowed back into law school, appealed this latter aspect of the ruling on the ground that a jury should still be able to award them damages.[63] Amazingly, the Michigan Court of Appeals agreed and reversed.[64]

The Court of Appeals' rationale in *University of Detroit* was fairly straightforward. Since both jury and non-jury trials were equally sacred, both would take place. Collateral estoppel was not a matter of constitutional magnitude, and could, therefore, be sacrificed.[65] An irresistible force can meet an immovable object with no difficulty if they exist in different planes.

The Michigan Supreme Court in *University of Detroit* denied leave to appeal twice,[66] apparently treating the decision as one of little or no moment.[67] In view of the fact that a middle level court had just placed

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59. The main event which had caused the plaintiffs to fail was the law school's adoption of a "mandatory" grading curve. *University of Detroit,* 145 Mich. App. at 474, 378 N.W.2d at 512 (there is some dispute at to the accuracy of that description of the law school's grading practices.) The *University of Detroit* court found, however, that it was a legitimate response to a serious problem with regard to the performance of the law school's graduates on a number of recent bar exams rather than a discriminatory act. *Id.* at 474-75, 378 N.W.2d at 514 (University *of Detroit* court affirming trial court's findings).

60. *University of Detroit,* 145 Mich. App. 468, 474, 378 N.W.2d 511, 513 (1985). Dismissal pursuant to G.C.R. 504.2 is identical to the more familiar provision for involuntary dismissal in Rule 41(b), Fed. R. Civ. Pro.

61. *University of Detroit,* 145 Mich. App. at 475, 378, N.W.2d at 514 (1985).

62. *Id.* at 477, 378 N.W.2d at 515.

63. *Id.* at 474-75, 378 N.W.2d at 514.

64. *Id.* at 478, 378 N.W.2d at 515-516. Even more amazingly, the concurring opinion of Judge Kallman concludes with the following comment:

> While it appears to defy logic and common sense, I agree with the majority's interpretation of Justice Black's opinion in *Abner Wolf, Inc. v. Walch,* 385 Mich. 253, 188 N.W.2d 544 (1971), and the commentary in 2 Honigman & Hawkins, Michigan court Rules Annotated (2d ed.), 1984 pocket part, p. 146. It would appear that this is a problem which should be addressed by the Michigan Legislature.

Id. at 482, 378 N.W.2d at 517. Beyond the fact that Judge Kallman concedes that he is joining an opinion which defies "logic and common sense," he appears to be asking for legislation to reverse a constitutional provision.

The only other case to discuss the possibility of requiring two potentially inconsistent trials—one before the court and one before the jury—rejected the suggestion because it would *cause* "due process problems" and work "an injustice to one of the parties." Rosenberg v. Rosenberg, 419 A.2d 167, 168 (Pa. Super. 1980).

65. *Id.* at 480, 378 N.W.2d at 516 (asserting that "collateral estoppel" is not the correct term; "law of the case" is proper). *But see supra* note 35 (citing "collateral estoppel" as most common used term).

66. Telephone interview with Keefe Brooks, Esq. (April 14, 1987), *supra* note 54.

67. *See* G.C.R. 1963, 852.1(3) (defining the grounds to be considered in evaluating a motion for leave to appeal to the Supreme court). "The subject matter of the appeal involves

Michigan in a position previously unknown in the history of Anglo-American jurisprudence, the court's decision strains credulity. If only to affirm such a unique decision, leave should have been granted to give the holding a proper home.[68]

The *University of Detroit* decision, however, was flawed in at least three ways. First, as a practical matter, inconsistent decisions at law and equity do not coexist. to illustrate this point, let us use a variant of the situation presented by the *University of Detroit* case. Although the case settled[69] prior to the jury trial, imagine that the jury trial occurred and produced a finding of discrimination and an award of damages. If any damages were to be awarded, the jury would have to award a large amount of damages to each plaintiff because each plaintiff has lost a lifetime of opportunity to practice law.[70] The university would then be faced with a choice of whether to enter into a settlement "mitigating" the damages by surrendering its former victory at equity, or to stand its ground and pay damages the measure of which would be the damages' ability to undo the equitable victory. The damages would be compensation for not being allowed to complete law school. In either case, the result is the opposite of that achieved when collateral estoppel is applied, but no less unfair. Whichever verdict is rendered *second* cancels the verdict which proceeded to decision first. There is no feasible way to have two inconsistent verdicts and let each party obtain the benefit of their victory. Unfortunately, the University and the students both exist in the same plane of reality, and an irresistible force cannot meet an immovable object.

Second, the *University of Detroit* decision means that the parties must endure two full-length trials. Accordingly, it is neither a surprise nor a

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legal principles of major significance to the jurisprudence of the State." *See also* G.C.R. 1963, 852.1(1).

68. *See generally* Linzer, *The Meaning of Certiorari: Denials,* 79 COLUMN L. REV. 1227 (1979); Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543 (1985); Ulmer, *The Decision to grant Certiorari as an Indicator to [sic] Decision "On the Merits,"* 4 POLITY 429 (1972); Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals,* 26 VAND. L. REV. 681 (1984) (particularly text accompanying and immediately subsequent to n. 510).

69. Telephone interview with Keefe Brooks, Esq. (April 14, 1987), *supra* note 54.

70. Assuming, hypothetically, that the jury finds the University liable, the jury would then have to find that the plaintiffs would have been capable of graduating from law school and passing the bar exam; matters which, I assume, the University would contest. However, assuming hypothetically that the jury so finds, and awards damages, the fact that equitable relief had been denied would have to become an element of damages. It might appear, at first blush, to be possible to construe the Court of Appeals' remand as one that does not permit the denial of injunctive relief to be undone in such a manner. Under that analysis, the plaintiffs would only be entitled to damages until the injunction should have set in (if it had been granted). In that case, the only damages would be nominal ($1.00) because a person who will not graduate from law school suffers no loss by being expelled a month or two earlier. The Court of Appeals gave no consideration whatsoever to the question of damages, so we are left to assume that they intended that the jury assess the damages that result from the judicial finding at equity. Otherwise the issue of damages would negate the remand.

coincidence that the University settled in the actual case. The past ten years have been lean years for private urban universities and for the midwestern part of the country. The first trial lasted over four weeks[71] and the University is likely to have spent from $100,000 to $300,000 in attorneys fees only to be proven innocent. Clearly the threat of a second trial, which would have to be of equal length since the jury has heard none of the earlier testimony, adds a tremendous weapon to the nuisance settlement arsenal of any plaintiff.

Third, the theoretical basis of the Court of Appeals' decision is fatally flawed. *Preserving* both jury and non-jury trials is not the same as *having* both jury and non-jury trials. Preserving a right simply means keeping at least as much of the right as previously existed. There never was a right to both types of trials or an absolute right to either. What existed, and what was preserved, was an interplay between the two which would produce the selection of *one.*

V. A CRITICAL ANALYSIS OF THE ALTERNATIVES FOR PRESERVING THE RIGHT TO A JURY TRIAL

There appear to be only six possible alternative approaches available to a court that seeks to, in some sense of the word, preserve the right to a jury trial. First, a court could admit that the merger of law and equity and modern pleading and joinder rules have made historically accurate preservation impossible. Such a court would then do best to follow *Beacon Theatres* and expand the jury trial at the expense of equity. This approach appears to be the lesser of a number of evils.

Second, a court that had abandoned the quest for historical accuracy might preserve both law and equity by using both modes of trial and discarding collateral estoppel. Yet, collateral estoppel, though not a doctrine of constitutional magnitude, is a law of nature which cannot be overcome. As we have seen, it is not possible to have two results in one controversy—one will inevitable overrule the other. The only real choice available to the courts in this Euclidean universe is whether the decision which is rendered first or the decision which is rendered second will govern. As such, the *University of Detroit* decision produced a false alternative which must be discarded for the purposes of future analysis.

A third alternative to *Beacon Theatres* might be to use the equitable cleanup doctrine as the federal courts essentially did prior to *Beacon Theatres,*[72] and as some states continue to.[73] This approach overshoots the true role of equity and deprives the parties of a jury trial in a small but significant number of cases. Those states which unwisely continue this

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71. *See University of Detroit,* 145 Mich. App at 473, 378 N.W.2d at 513.

72. *See supra* note 34. The federal courts used a different means, discretionary control over the court's docket, to achieve the same result. *See also supra* notes 36 and 38.

73. *See supra* note 46 (state constitutional provisions referring to history of right to jury trial).

practice are ignoring the impact of merger and modern procedural rules. In such states, joining a claim, counterclaim, or crossclaim for equitable relief is now a cost-free tactical move for those who wish to avoid a jury.

A fourth alternative goes almost as far as *Beacon Theatres,* but permits use of the equitable cleanup doctrine when the case is dominantly equitable or the legal issues are merely incidental.[74] Such an approach is not quite so readily criticized as is the use of the unrestrained equitable cleanup doctrine. If it functioned properly, this alternative might approach historical accuracy better than any other. Yet the operative test, which requires the courts to form an opinion as to the essential nature or dominant thrust of a case, can be easily manipulated by judges who believe that they are better factfinders than juries. In practice such a system is likely to be similar to the unrestrained use of the equitable cleanup doctrine.

A fifth alternative, which has received little or no consideration, would be to hold the merger of law and equity and modern procedural rules unconstitutional under the Seventh Amendment or its state counterparts.[75] If these devices have made it impossible to accurately "preserve" the right to a jury trial, then logically it is the procedural innovations that should be sacrificed. The *Beacon Theatres* analysis evades this problem[76] because the right to a jury trial is preserved, or even over-preserved, and the right to a non-jury trial is the only right that is sacrificed at the alter of modern practice. In states such as Michigan that have chosen to interpret their constitutional guarantee as preserving both jury and non-jury trials equally, this fifth alternative is almost unavoidable. The only way to preserve the true balance between law and equity is to maintain both systems and place the same inconvenience and restrictions on their use as would have existed long ago.

A final alternative would be to consider rewriting the Seventh Amendment and its state counterparts. This alternative would open up for discussion the basic policy questions lurking beneath the controversy. This alternative has received little real consideration[77] because it would not be for the courts

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74. *See supra* notes 47-48 and accompanying text (citing cases that fail to follow *Beacon Theatres'* clarification expressed in *Dairy Queen*).

75. *See In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 1091-93 (1980) (Gibbons, J. dissenting) An analogous argument is found in Gibbons' dissent. Judge Gibbons argues that the provisions in the Federal Rules of Civil procedure that permitted the joinder and consolidation of a massive, confusing case would have to give way before the Seventh Amendment right to a jury trial if a case is perceived to be so complex that a jury trial would violate the due process guarantee of the Fifth Amendment. *Id.* at 1093.

76. An alternate analysis, which could be used to avoid such a drastic conclusion is found in the line of cases which stress that only the "core" of the right to a jury trial was preserved by the Seventh Amendment rather than its precise form in 1791. *See* Colgrove v. Battin, 413 U.S. 149, 160 (1973) (reducing the jury from twelve to six persons). Such analysis, however, can be a dangerous "slippery slope" whereby the right, itself, gradually disappears.

77. *But see* James, *Right to Jury Trial in Civil Actions,* 72 YALE L. J. 655, 690-691 (1963) (discussing author's view of the most rational way to rewrite Seventh Amendment). This article, although it expressly disclaims that it is discussing established practice, was

to do, and lawyers and judges tend to focus their attention on the alternatives available through the judicial process. Under this alternative, the law/equity distinction would not be dispositive. Unless we are to abandon jury trials entirely, we should move toward embracing jury trials entirely. Why, for example, is a jury inappropriate for factfinding in cases seeking injunctive relief?[78]

The various arguments for and against juries have little or nothing to do with the difference between law and equity. For example, juries often

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inadvertently adopted as established practice in the ubiquitous "complexity" footnote in *Ross v. Bernhard.* See Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

Lawyers generally give little consideration to arguments in favor of redrafting constitutional amendments as we are trained to focus on achieving results for a particular client, and the process of constitutional amendment takes too long to be of help in such cases.

78. Although a jury would be ill-suited to draft the actual order, juries are quite capable of making the underlying factual findings. For example, the jury could determine whether the defendant is violating the plaintiff's rights. It seems obvious that this must be so, or else, under *Beacon Theatres,* how can juries decide the same questions when the juries are common to claims for damages pending in the same action?

In modern practice, the three states of North Carolina, Texas, and Virginia presently provide jury trials on demand for the underlying facts in equity matters. *See* Orange County v. North Carolina Department of Transportation, 265 S.E.2d 890, 913 (N.C. App. 1980); Jeter v. Associated Rack Corp., 607 S.W.2d 272, 277-78 (Tex. Civ. App. 1980); Standardsville Volunteer Fire Co., Inc. v. Berry, 331 S.E.2d 466, 471 (Va. 1985). Further, Tennessee, which used to grant jury trials by right in all equitable cases pursuant to a statute which is no longer in effect, still grants jury trials in some types of equitable cases. *See* Ashe v. State, 518 S.W.2d 360, 361 (Tenn. 1975); *compare* Moore v. Mitchell, 205 Tenn. 591, 595, 329 S.W.2d 821, 823 (1959). Also, Arizona used to allow jury trials in all equitable cases prior to a similar statutory change. *See* Weaver v. Weaver, 131 Ariz. 586, ____, 643 P.2d 499, 501 (1982) (Gordon, J., concurring). In addition, jurisdictions which do not allow juries on demand in equitable cases usually allow advisory juries at the trial court's discretion. Professor (now Judge) Arnold demonstrates that some of the original 13 colonies had no equity courts and handled all matters before juries. *See* Arnold, supra note 2 at 832-38. In *The Federalist* No. 83, Alexander Hamilton set forth a contrary argument:

> [T]he circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.
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> . . . [T]he attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

The Federalist No.83 at 569-70 (A. Hamilton) (J. Cooke ed. 1961). Yet Hamilton spoke for those who opposed the Seventh Amendment and his views cannot be counted as representative of the times. Furthermore, this argument concerning the "nice" or elusive nature of equity certainly cannot withstand challenge. Juries that award such elusive things as compensation for the loss of an arm would probably find equity simple.

are criticized for being unduly susceptible to sympathy-based decisions.[79] Typically, large corporate defendants and insurance companies endeavor to avoid juries for this reason. Assuming that judges are not affected by similar "fireside equities,"[80] and that responding to sympathy is inappropriate,[81] this problem is no more or less present in equity.

Juries also are said to be less accurate factfinders than judges.[82] Indeed, one noted historian of the law actually mocks the idea of juries as accurate factfinders:

> Trial by jury, as a method of determining facts is antiquated . . . and inherently absurd—so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him.[83]

Yet this criticism is no less valid in actions for money damages, and no more valid at equity. If the weaknesses in the jury system are not outbalanced by the institutional value of using juries, then juries ought not be available at law as well.

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79. *See, e.g.,* Kotler, *Reappraising the Jury's Role as Finder of Fact,* 20 GA. L. REV. 123, 129-31 (1985); Note, *Gender Dynamics and Jury Deliverations,* 96 YALE L. J. 593 (1987); Note, *Adultery, Law, and the State: A History,* 38 HASTINGS L. J. 195 (1986); Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611 (1985); Note, *Anonymous Juries,* 54 FORDHAM L. REV 981 (1986); Schuck, *The Role of Judges in Settling Complex Cases: the Agent Orange Example,* 53 U. CHI. L. REV. 337 (1986) (text preceding n.30); Zacharias, *The Politics of Torts,* 95 YALE L. J. 968 (1985).

What little careful research has been done suggests that jury sympathy is a greatly overrated factor. *See, e.g.,* Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion,* 64 N.C. L. Rev. 993 (1986); Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception,* 66 B.U. L. Rev. 155, 205, n.238 (1986).

There are many arguments both for and against the civil jury. *See* Luneburg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation,* 67 VA. L. REV. 887, 888-99 (1981).

80. The author suggests from experience as an attorney that judges are at least as susceptible to such factors as juries. *See also* Comment, *The Appearance of Fairness Doctrine: A Conflict in Values,* 61 WASH. L. REV. 533 (1986); Louis, *supra* note 79; CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES, 180-181 (1982); Fuller, *Legal Fictions,* 25 ILL. L. REV. 363 (1930); Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731 (1987).

81. *Compare infra* text accompanying note 84 (suggesting that one of the benefits of the jury system is that juries reflect the values of the community, which is to say that they inject a degree of sympathy).

82. *See supra* note 37 (discussing cases that cite to limitations of juries). It may surprise many readers to know that the present author regards juries as seriously inferior factfinders.

83. *See In re* U.S. Financial Securities Litigation, 609 F.2d 411, 429 n.66 (9th Cir. 1979) (quoting Carl Becker). There is much truth in this assertion, although the same analysis would produce a scathing criticism of the judiciary if applied to bench trials. The typical "mechanic in a garage" would probably ask an automotive engineer instead.

In favor of juries, it is commonly said that they reflect the values of the community,[84] they expose citizens to the operation of the government,[85] they serve as a check on judicial bias and arbitrariness,[86] and that they legitimize the adjudicative process. As Judge Gibbons most eloquently noted,

> It is often said that the judicial process involves the search for objective truth. We have no real assurance, however, of objective truth whether the trial is to the court or to a jury. the judicial process can do no more than legitimize the imposition of sanctions. . . . In this legitimizing process, the Seventh Amendment is not a useless appendage to the Bill of Rights, but an important resource in maintaining the authority of the rule of the law. . . . The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process.[87]

Like the arguments against juries, none of the arguments in favor of the jury system depend on the distinction between law and equity. If juries serve such vital purposes, juries should also be available in equity.[88] If redrafted jury trial guarantees are to have narrow exceptions, such as the hotly-debated exception for unusually complex cases,[89] these exceptions should be based upon consideration of the practical realities of jury trials. The distinction between law and equity, being little more than an accident of history,[90] should be discarded.

VI. CONCLUSION

When the Constitution was drafted, a provision protecting the right to a jury trial was omitted, at least in large measure, because the drafters

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84. *See supra* notes 79 and 81 and accompanying text. *But see* Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 134 (1985) (arguing that legislature is popularly elected to represent society's views, while a particular jury may contain an unrepresentative mix and not reflect popular values).

85. *E.g.*, Curtis v. Loether, 415 U.S. 189, 198 (1974).

86. *See* Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533 (1986).

87. *In re* Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069, 1091-93 (3d Cir. 1980) (Gibbons, J., dissenting).

88. It may be said, however, that the present practice of using juries only at law serves as a rough compromise between the views of those who do not reward juries as good factfinders and those who do.

89. *See. e.g., In re* Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069, 1091 (3d Cir. 1980) (Gibbons, J. dissenting); *In re* U.S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUMN. L. REV. 43 (1980); Arnold, *supra* note 2 at 829 n.1; Campbell & LePoidevin, *supra* note 2; Luneburg & Nordenberg, *supra* note 79.

90. Indeed, relief which "sounds" equitable is available at law and vice versa. *See* Pernell v. Southall Reality, 416 U.S. 363, 384 (1974) (action developed at law to "eject" a tenant). Further, a court of equity, in a divorce, routinely award monetary payments. Although the line between law and equity is frequently one of monetary relief as opposed to more flexible types of relief, that generalization may be disproven by many exceptions which are simply quirks of history.

could not decide how to effectively draw the line between cases that should receive a jury trial and cases which should not.[91] It would seem that, two hundred years later, little has changed. This article has explored the alternatives that could be used to allocate the role of the jury today and has found none to be entirely satisfactory. Among all of the alternatives available, the approach taken in *Beacon Theatres* appears to be the lesser of a number of evils. *Beacon Theatres* does not protect produce the original balance between law and equity, but it does protect the right to a jury trial. Most of the other choices do not fully protect the role of the jury trial, although some[92] achieve results that are closer to the actual practice in England prior to 1791.

Three unusual alternatives have also been considered. First, the *University of Detroit* case, which requires both types of trials and tolerates inconsistent verdicts was shown to be ill-premised and impossible to execute. Both types of trials were not to be preserved; it was the *balance* between them that was to be preserved. More importantly, inconsistent verdicts cannot exist without nullifying each other, regardless of whether the courts formally ignore collateral estoppel. It has been said that, "res judicata renders white that which is black, and straight that which is crooked."[93] Yet the lack of at least some types of res judicata would leave things black and yet white, straight but also crooked; and would mean that nothing has been decided.

Second, this article has considered the possibility of truly preserving the ancient balance between law and equity by returning entirely to the ancient system . This alternative is almost too painful to imagine for practical reasons, yet, it cannot be dismissed analytically.

Finally, this article has considered the possibility of re-drafting the various jury trial guarantees to eliminate the law/equity boundary created by history. It is difficult to explain why juries cannot be used in matters that we call equitable. Minor exceptions could be made for specific types of matters that are not suited to juries, but these exceptions should be made on a functional, rather than historical, basis.

In the end, unless we are prepared for the major re-definition of the role of juries that might come from a re-drafting of the constitutional guarantees, it would seem that the rule of *Beacon Theatres* is the best, or least worst available solution to the problem of preserving the role of jury trials in modern litigation.

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91. *See generally In re* U.S. Financial Securities Litigation, 609 F.2d 411, 420 n. 30 and 421 n. 32 (9th Cir. 1979). Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 539 (1973);

92. *See supra* notes 48-50, 75 and accompanying text.

93. Jeter v. Hewitt, 63 U.S. (22. How.) 352, 364 (1859).

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