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TAKING THE "COMPLEXITY" OUT OF COMPLEX LITIGATION: PRESERVING THE CONSTITUTIONAL RIGHT TO A CIVIL JURY TRIAL

I. INTRODUCTION

The liberalization of civil procedure rules,\(^1\) a dramatic increase in the number of new causes of action,\(^2\) and a twentieth-century technological explosion have all resulted in civil litigation taking on a different form than what was typical in common law courts in 1791.\(^3\) Modern trials may involve complex issues, as well as multiple parties and a vast quantity of evidence.\(^4\)

1. In 1938, with the promulgation of the Federal Rules of Civil Procedure, the procedural rules in civil cases were greatly liberalized. For example, the Rules established a uniform system of "notice" pleading—requiring only fair notice of a claim or defense—for all suits in federal court. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 238 (1985). By simplifying pleading, the drafters of the Rules hoped that cases would turn on their substantive merits. Id. at 237.

2. Congress has created a large number of new civil claims in the last 30 years, and courts have also created new types of suits, most notably constitutional claims and expanded notions of products liability that did not previously exist. RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 2 (1992). Interestingly, some attribute the increase in the number of suits to a new attitude of "litigiousness" in the citizens of the United States. Jack H. Friedenthal, A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure, 69 CALIF. L. REV. 806, 818 (1981) (concluding that this "litigiousness" is fueled by large awards in some cases and "plaintiffs who sometimes treat the judicial system as if it were a gigantic slot machine"). Additionally, the growth in complex litigation has also been explained as a result of conscious government policy. See Marc S. Galanter, The Life and Times of the Big Six: or, The Federal Courts Since the Good Old Days, 1988 WIS. L. REV. 921. Federal courts have found themselves involved with public law litigation that is more complex than the typical intersection collision or breach of contract case. For example, current constitutional cases often seek the reform of public institutions such as jails, schools, and hospital facilities. MARCUS & SHERMAN, supra, at 3.

3. See Douglas King, Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial, 51 U. CHI. L. REV. 581, 584 (1984) (arguing that a proper analysis of the scope of the constitutional right to a civil jury trial must include not only an examination of the nature of the rights asserted and remedies requested, but also an inquiry into the procedural complexity of the case; concluding that under such an analysis, an extraordinarily complex case may be outside the ambit of the Seventh Amendment). 1791, the date of the adoption of the Bill of Rights, is the date that courts look to determine whether a civil jury trial right exists. If a civil jury trial right would have existed in 1791, then the right exists today. See infra note 9 and accompanying text.

4. See, e.g., In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (estimating that the fact finder would need to read over 100,000 pages of paper and that trial would take at least two years in a complex securities case in which 18 cases had been consolidated and five classes certified); In re Japanese Elec. Products Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (involving a complex antitrust case with a nine-year discovery period yielding 20 million documents, including 100,000 pages of depositions, and estimating that the trial would last at least one year); In re Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976) (involving a complex securities fraud case
Further, some trials can take months, or even years, to complete. This combination of factors results in cases so complicated that they are difficult for both attorneys and courts to manage and for any of the trial participants, including juries, to understand.

Historically, the seventh amendment right to a civil jury trial has been regarded as one of the cornerstones of the American legal system. As Alexis de Tocqueville wrote, "It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influences may be upon the decision of the court, it is still greater on the destinies of society at large." This statement reflects the importance that has always been attributed to the role of the jury, not only in the justice system, but also within the social constructs that govern our daily lives. Federal courts have interpreted the Seventh Amendment as preserving the right to a civil jury trial where the right would have been available at English common law in 1791. The problem that this historically focused application poses is that many modern cases do not resemble any of the causes of action cognizable in 1791.

The constitutional conflict that arises in complex civil cases reflects the tension between the fifth amendment due process right to a fair proceeding with assets of over one billion dollars, financials covering a five-year period, over 50,000 hours in pretrial preparation, and more than 900,000 documents).

5. Joel B. Harris & Lenore Liberman, Can the Jury Survive the Complex Antitrust Case?, 24 N.Y.L. SCH. L. REV. 611, 620 (1979) (discussing the rationale for the current anti-jury trend and questioning whether a jury can render a rational verdict in complex antitrust cases).

6. The Seventh Amendment to the Constitution provides that "[i]n Suits at common law . . . 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, that according to the rules of the common law." U.S. CONST. amend. VII.

7. Harris & Liberman, supra note 5, at 611. See Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935), where the Supreme Court stated: [T]rial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law . . . . Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Id.


9. In re Japanese Elec. Products Antitrust Litig., 631 F.2d 1069, 1078 (3d Cir. 1980) (noting that the Supreme Court's basic tool of construction in interpreting the Seventh Amendment has been history: "The right of trial by jury thus preserved is the right which existed under English common law when the Amendment was adopted." (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935))).

10. See supra note 2 and accompanying text.

11. The Fifth Amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend V.
and the seventh amendment right to a civil jury trial. The Fifth Amendment has been interpreted as requiring that jurors must be able to "decide the facts in an informed and capable manner" and "understand and address rationally the issues of a case." The Seventh Amendment requires that "the right of trial by jury shall be preserved . . . ." The conflict arises when jurors are faced with complex cases that, under the Seventh Amendment, they are required to decide, but may involve difficult issues that could threaten the litigants' rights to a fair proceeding under the traditional notions of due process.

Applying a "complexity exception" to the Seventh Amendment, some federal courts have mistakenly taken the right to a civil jury trial away from litigants in cases deemed to be too complex for juries to decide. Though courts have used three different rationales as a basis for denying the right to a civil jury trial in complex cases, all three turn on a fundamental due process concern: the ability of jurors to understand the factual evidence and legal issues in a case. Invoking a "complexity exception," some courts have cited *Ross v. Bernhard,* in which the Supreme Court said in a footnote that "the practical abilities and limitations of juries" should be taken into account in determining whether the right to a jury trial exists. Other courts have used an historical equity argument to the effect that if a remedy at law would not have been available in 1791, it should not be available now, and thus no right to a civil jury trial exists. Still other courts have used a fifth amendment due process

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12. See, e.g., *In re Japanese Elec. Products Antitrust Litig.*, 631 F.2d 1069, 1086 (3d Cir. 1980) (holding that the fifth amendment due process interest can outweigh the seventh amendment right to a civil jury trial in some complex cases); *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979) (concluding that no case is so complex that the seventh amendment right to a civil jury trial should be undermined by the possibility of an irrational verdict).


15. U.S. CONST. amend VII.

16. See Harris & Liberman, supra note 5, at 620 (noting that a serious clash exists between the historical reverence paid to the jury vis a vis the Seventh Amendment and the need to ensure that the parties' claims are determined in a fair and rational manner).

17. See infra notes 93-110, 123-28 and accompanying text.

18. *Ross v. Bernhard*, 396 U.S. 531 (1970) (holding that the right to trial by jury preserved by the Seventh Amendment extends to a stockholders derivative suit with respect to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury trial). In so holding, the Court stated that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Id.* at 538. The Court followed this statement with a footnote with the following analysis: "As our cases indicate, the legal nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." *Id.* at 538 n.10.

19. *Ross v. Bernhard*, 396 U.S. at 538 n.10. See also infra note 93.

20. See infra notes 100, 108 and accompanying text.
approach, holding that if a case is beyond the understanding and comprehension of the jury, the litigants are not being afforded a fair trial under traditional notions of due process.\(^{21}\) Courts have also combined these three approaches to determine whether a jury trial is appropriate in complex civil cases.\(^{22}\) As all of these analyses rest on a jury’s ability to understand a case, they all rely on the due process consideration of whether the litigants are being afforded the right to a fair proceeding. While some courts have invoked this “complexity exception” to the constitutional right to a civil jury trial,\(^{23}\) others have rejected the notion of such a complexity exception,\(^{24}\) emphasizing the importance of the Seventh Amendment.\(^{25}\)

The federal appellate courts are split on whether a complexity exception to the Seventh Amendment exists. The Third Circuit has held that due process concerns outweigh the seventh amendment right to a civil jury trial in some complex cases.\(^{26}\) Conversely, the Ninth Circuit has found that the Seventh Amendment is not subject to any complexity exception and that due process concerns cannot justify striking juries from civil cases.\(^{27}\) Aside from the oblique reference in dictum in \textit{Ross}, the Supreme Court has never addressed whether a complexity exception actually exists.\(^{28}\)

The problem is that courts and attorneys are not always willing to do what

\(^{21}\) See \textit{In re Japanese Elec. Products Antitrust Litig.}, 631 F.2d 1069, 1086 (3d Cir. 1980) (holding that the Seventh Amendment does not guarantee the right to a jury trial when the lawsuit is so complex that the jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the facts). See infra notes 123-28 and accompanying text.

\(^{22}\) See, e.g., Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (holding that a jury trial in an antitrust case was beyond the practical abilities and limitations of juries and finding that the practical abilities and limitations factor was simply a restatement of the courts traditional equity power); SEC v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977) (holding that where the SEC’s complaint alleged violation of the securities laws and prayed for injunctive relief, accounting of all investor funds and all oil and gas proceeds, and disgorgement of all monies illegally received by the defendants from the investors, the claims were equitable in nature, and thus the defendants had no statutory or constitutional right to a jury).

\(^{23}\) See infra notes 93-110, 123-28 and accompanying text.

\(^{24}\) See infra notes 129-39 and accompanying text.

\(^{25}\) See \textit{In re IBM Peripheral EDP Devices Antitrust Litig.}, 459 F. Supp. 626, 629 (N.D. Cal. 1978) (denying the defendant corporation’s motion to strike the plaintiff’s jury demand); see also infra notes 129-39 and accompanying text.

\(^{26}\) \textit{In re Japanese Elec. Products Antitrust Litig.}, 631 F.2d 1069 (3d Cir. 1980).

\(^{27}\) \textit{In re United States Fin. Sec. Litig.}, 609 F.2d 411 (9th Cir. 1979) (holding that there is no complexity exception to the seventh amendment right to a jury trial in civil cases, and therefore, the district court erred in striking demands for a jury trial on the ground of complexity of the applicable laws and legal theories, despite the fact that it was estimated that a fact finder would need to read over 100,000 pages of paper and that trial would take at least two years).

\(^{28}\) The Supreme Court has never directly addressed the "complexity exception" and has never reaffirmed footnote 10 in \textit{Ross v. Bernhard}.
is within their power to help juries understand cases and perform their function. Instead, courts strike juries, despite the Seventh Amendment, from cases in which remedies are available and measures may be taken to address the difficulties inherent in complex civil jury trials. This Note concedes that cases can be complex to the extent that they may indeed be troublesome for jurors to decide. However, a balancing test of the Fifth Amendment and Seventh Amendment is unnecessary. Neither of these important rights needs to be sacrificed when methods exist to cure the due process problems.

This Note will analyze the case law that addresses the complexity exception and will discuss methods for handling complex cases while leaving the Seventh Amendment right to a civil jury trial intact. This Note suggests that even in complex cases, traditional juries are usually capable of finding the facts and applying the law if judges make full use of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. This Note proposes that, as a last resort, where a judge determines that a case is simply too complex for a traditional jury—even after considering the full panoply of available procedures and less intrusive measures—a specially qualified jury must be impaneled. In either situation, the important features of the civil jury as envisioned by the Framers and incorporated into the Bill of Rights will be preserved.39

Section II of this Note will discuss the historical background of the seventh amendment right to a civil jury trial, emphasizing the importance of the civil jury trial to the American system of government.30 Then Section III will address both the application and rejection of the complexity exception by the federal courts, focusing on the inherent tension between the Fifth Amendment Due Process Clause and the Seventh Amendment guarantee of a civil jury trial in complex litigation.31 Finally, Section IV will outline the ways in which courts can address and solve the due process problems in complex cases without sacrificing the right to a civil jury trial.32

II. HISTORY OF THE SEVENTH AMENDMENT

A. The Constitutional Convention and the Ratification Process

The Seventh Amendment to the Constitution provides that "[i]n Suits at common law... 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

29. See infra notes 138-221 and accompanying text.
30. See infra notes 33-68 and accompanying text.
31. See infra notes 69-137 and accompanying text.
32. See infra notes 138-223 and accompanying text.
according to the rules of the common law.” 33 From early in its history, the United States demonstrated its attachment to trial by jury as the form of civil trial that both the people and politicians favored. 34 William Blackstone recognized the jury as the “principal criterion of truth in the law of England,” and he also noted that the right to a trial by jury was “the most transcendent privilege which any subject can . . . wish for.” 35 Justice Story also emphasized the importance of the guarantee of jury trials at common law, commenting on the Seventh Amendment:

"It is a most important and valuable amendment, and places upon the high ground of constitutional rights the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." 36

The recorded discussion at the Constitutional Convention regarding the right to a civil jury trial was limited. 37 A civil jury trial provision to Article III was proposed but ultimately rejected, primarily because the delegates believed that

33. U.S. CONST. amend. VII. With the promulgation of the Federal Rules of Civil Procedure in 1938, Congress reinforced the Seventh Amendment with Rule 38(a), which provides in pertinent part that: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a).
34. Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 639, 656 (1973) (examining the historical materials related to the Seventh Amendment in an attempt to determine what its proponents sought to accomplish by the adoption of the right to civil jury trial in the Bill of Rights).
35. 3 WILLIAM BLACKSTONE, COMMENTARIES *348, *379.
36. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 633 (1833) (reviewing the constitutional history of the colonies and states before the adoption of the Constitution).
37. On September 12, 1787, at the Constitutional Convention in Philadelphia, Hugh Williamson of North Carolina raised the first objection to the lack of a civil jury trial provision in the Constitution. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., rev. ed. 1937) [hereinafter CONVENTION RECORDS]. Elbridge Gerry of Massachusetts supported Williamson's objection, arguing that the jury system was necessary to protect the people from corrupt judges. SOURCES OF OUR LIBERTIES 404 (Richard L. Perry & John C. Cooper eds., 1959) [hereinafter SOURCES]. Nathaniel Gorham opposed a civil jury provision on the ground that it would be too difficult to draft a provision which would differentiate between equity proceedings, in which juries were not used, and legal proceedings in which they were. Id. at 404-05. Gorham believed that Congress would provide a suitable law on the subject. Id. at 405. George Mason retorted that he appreciated Gorham's concerns, but he believed that a general provision on the subject could be drafted. Id.
the differing practices in the states made framing a general rule impossible.\textsuperscript{38} Contention over the right to a civil jury trial provision in the federal constitution reached full force during the Federalist/Antifederalist debates in the states over the adoption of the Bill of Rights. The Antifederalists wanted the jury to have a strong and independent role in the judicial process and thought that this would be accomplished by a place in the Bill of Rights.\textsuperscript{39} The Federalists were opposed to a constitutional provision for a civil jury trial for a number of reasons. Roger Sherman of Connecticut, a Federalist, argued that because the state bills of rights were not going to be repealed by the U.S. Constitution, juries would still be able to sit in federal courts in those states; thus, a federal constitutional provision was unnecessary.\textsuperscript{40} However, this argument was based on an incorrect understanding of the relationship between state law and federal courts.\textsuperscript{41} The Federalists also opposed a constitutional right to a jury trial because they thought it would be difficult to draft sufficient constitutional language that would distinguish intelligently between cases in which a jury should sit and those in which it should not.\textsuperscript{42} In addition, it was argued that it would be wiser to leave the matter to Congress for “flexible regulation and future adjustment.”\textsuperscript{43} This argument, however, neglected that one of the rationales underlying the right to a civil jury was to guard against unwanted legislation.\textsuperscript{44} Ultimately, the proponents of the Constitution defended the omission of a guarantee to a jury trial on the basis of technical draftsmanship.\textsuperscript{45} The Federalists repeatedly assured the Antifederalists that this issue would be

\textsuperscript{38} SOURCES, supra note 37, at 430.

On September 15, 1787, Charles Pinckney of South Carolina and Elbridge Gerry proposed specific language to add a civil jury trial provision to Article III. CONVENTION RECORDS, supra note 37, at 628. Elbridge Gerry was one of only three delegates (George Mason and Edmund Randolph of Virginia being the other two) who refused to sign the Constitution. Gerry stated that one of the reasons for his refusal to sign was that “the rights of the Citizens were . . . rendered insecure . . . by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star-chamber as to Civil cases.” Id. at 633. See also CHARLES WARREN, THE MAKING OF THE CONSTITUTION 705-07 (1937).

\textsuperscript{39} See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed., 1891) [hereinafter STATE DEBATES].

\textsuperscript{40} CONVENTION RECORDS, supra note 37, at 588. For a commentary of the debates in state ratification proceedings, see STATE DEBATES, supra note 39, at 18.

\textsuperscript{41} Wolfram, supra note 34, at 662. Wolfram concludes that the premise of Sherman’s argument would have been ignored by the federal courts if the first Congress had not given federal courts the right to jury trial. Antifederalist George Mason (of Virginia) had already recognized that this would be the probable interpretation of the supremacy clause. Id. at 663.

\textsuperscript{42} CONVENTION RECORDS, supra note 37, at 587-88. This argument implies that the then existing division between cases tried by juries and those tried by judges were not acceptable. Wolfram, supra note 34, at 663.

\textsuperscript{43} Wolfram, supra note 34, at 664.

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 666.
addressed by Congress as one of the first items of business.\textsuperscript{46}

The Antifederalists were extremely concerned with the omission of a bill of rights.\textsuperscript{47} George Mason, who left the convention before its adjournment, had already decided that the resulting Constitution would be "incurably pernicious."\textsuperscript{48} The first and most prominent objection to the proposed Constitution that Mason cited was the lack of a bill of rights, one of the most important of the omitted rights being the right to a civil jury trial.\textsuperscript{49} Historians agree that the attack by the Antifederalists on the proposed Constitution based on its omission of a bill of rights struck a responsive chord in the public.\textsuperscript{50} The Federalists also responded to this sentiment by attempting to assuage the libertarian fears of members of the public through writings that accompanied the process of ratification, promising a prompt adoption of a bill of rights once the new government took its place.\textsuperscript{51}

The ratification process brought to light the strong public concerns about government, its relationship to the citizen, and the importance of the civil jury in preserving that relationship.\textsuperscript{52} Patrick Henry made a motion in the Virginia convention to refer twenty amendments to the other states for acceptance before

\begin{enumerate}
\item Wolfram, supra note 34, at 666.
\item See infra notes 48-68 and accompanying text.
\item Wolfram, supra note 34, at 667.
\item ROBERT A. RUTLAND, GEORGE MASON 91 (1961).
\item Wolfram, supra note 34, at 668. See also IRVING BRANT, THE BILL OF RIGHTS 39 (1965); ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 122-24, 140 (1991); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 509-10 (1937). Alexander Hamilton devoted \textit{Federalist} No. 83 to attempting to persuade his fellow New Yorkers that the omission of a civil jury trial provision from the proposed Constitution, then awaiting New York's ratification, was not a serious objection to the Constitution:

\begin{quote}
The objection to the plan of the convention, which has met with most success in this state, is relative to \textit{the want of a constitutional provision} for the trial by jury in civil cases. . . . But I must acknowledge, that I cannot readily discern the inseparable connexion between the existence of liberty, and the trial by jury in civil cases.
\end{quote}

\item Wolfram, supra note 34, at 669. In James Madison's speech to the first Congress proposing the first amendments to the Constitution, he acknowledged the politically volatile nature of the absence of protections such as a guarantee of civil jury trial:

\begin{quote}
I believe the great mass of people who opposed it dislike it because it did not contain effectual provisions against the encroachment on particular rights and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.
\end{quote}
1 ANNALS OF CONG. 433 (1789).
\item Wolfram, supra note 34, at 669.
\end{enumerate}
ratification, and his motion lost by only eight votes. Ultimately, the Virginia convention did recommend amendments, including the following language: “That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and [ought] to remain sacred and inviolable.” Those who favored the civil jury were not “misguided tinkerers” with procedural devices; rather, they were libertarians who believed that important areas of protection for litigants would be placed in grave danger unless juries were required to sit in civil cases. Thus, it is irrelevant whether juries are the quickest or most efficient fact-finding bodies in complex cases, because efficiency is not the chief concern of the Seventh Amendment.

B. Interpreting the Seventh Amendment

The Seventh Amendment, as it was ultimately incorporated into the Bill of Rights, states: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .” Courts have determined that the right to a civil jury trial exists in cases where

53. Edith G. Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 298 (1966) (finding that the Seventh Amendment was not intended to codify a rigid form of jury practice because there was no consistent practice in 1790 to be codified).
55. Wolfram, supra note 34, at 672. Wolfram also posits that the implications of this seem rather clear for modern procedural reformers who would abolish or restrict the civil jury in the interest of efficiency in judicial administration. Wolfram believes that regard for our constitutional beginnings requires that these reformers accept the challenge of the original conceptions and attempt to demonstrate either that the threats the jury was to meet in 1791 are not important enough to require the constitutional solution of mandatory jury trial or that the jury in fact did not perform, or no longer performs, the function ascribed to it by the originators of the Seventh Amendment. Id. at 672 n.88.
56. This is acceptable as long as due process is not jeopardized. Methods to address the due process concerns are addressed in Section IV of this note.

Underlying all of the reasons why the Antifederalists were in favor of a civil jury trial provision was the notion that jury-tried cases would come out differently than those tried by judges. Wolfram, supra note 34, at 671. The judge’s role in deciding cases is to apply the law, whereas the jury can decide not to apply the law if they feel that such an approach is appropriate and will serve justice. This is often referred to as “black-box justice.” The Antifederalists were not advocating that juries would be more efficient or procedurally superior. Id. They were not arguing for the institution of civil jury trial in the belief that jury trials were short, inexpensive and would result in the same decisions that judges would produce. Id. The inconveniences of trial by jury were accepted precisely because in important instances, the jury would reach a result that the judge would not or could not reach. Id.
57. U.S. CONST. amend. VII.
the right would have existed in English common law in 1791. Nonetheless, courts have also held that the purpose of the Seventh Amendment was to preserve the substance of the jury trial right rather than the exact details of the procedure as it existed in 1791. Justice Brandeis, in describing the seventh amendment right to jury trial, stated: "New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right."

The difficulty of applying the historical test in complex cases is that many of the causes of action brought in modern times do not resemble anything cognizable to litigation brought before 1791. However, reasonable changes in the administration of a jury trial have been allowed so long as they do not conflict with the fundamental meaning of the Seventh Amendment. Because the Antifederalists won the constitutional battle when the Seventh Amendment

58. See United States v. Wonson, 28 F. Cas. 745 (C.C.D. Mass. 1812 (No. 16,750)). Justice Story first laid out the historical test for applying the Seventh Amendment:

Beyond all question, the common law here alluded to [in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

Id. at 750.

See also Parsons v. Bedford, 3 Pet. 433 (1830). Justice Story described the distinction between equitable and legal actions:

By common law, [the Framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.

Id. at 446-47.

59. See, e.g., Galloway v. United States, 319 U.S. 372, 390-92 (1943) (concluding that the Seventh Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791 because the Amendment was designed to preserve the institution of jury trial in only its most fundamental elements).

60. Ex parte Peterson, 253 U.S. 300, 309-10 (1920) (holding that while auditors were not appointed either in England or in any of the colonies in connection with trial by jury, their employment does not violate the Seventh Amendment, because it does not obstruct the right and because the amendment "does not require that old forms of practice and procedure be retained" (emphasis added)).

61. See supra note 2.

was incorporated into the Bill of Rights, their arguments should be given due weight in determining the purpose behind the Seventh Amendment and should be resorted to as an aid in resolving interpretative problems that arise under its language.\textsuperscript{63} Juries in civil cases were intended to guard private litigants against the oppression of judges.\textsuperscript{64} Another important function of the civil jury cited by the Antifederalists was to provide the average citizen with a sympathetic forum in suits against the government.\textsuperscript{65} Civil juries were also intended to serve as a check on Congress' broad powers.\textsuperscript{66} In addition, the Antifederalists argued that a trial by jury was a safeguard against an oppressive exercise of the power of the government to tax.\textsuperscript{67}

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\textsuperscript{63} Wolfram, supra note 34, at 673. Thus, in analyzing the existence or application of a complexity exception in light of Seventh Amendment concerns, we should look to see if the interests of the framers of the Seventh Amendment are being abrogated.

\textsuperscript{64} Id. at 708. For example, Elbridge Gerry opposed the absence of a jury trial guarantee because "the rights of the Citizens were not rendered secure [by] establish[ing] a tribunal without juries, which will be a Star-chamber as to Civil cases." \textit{Convention Records}, supra note 37, at 633.

\textsuperscript{65} See \textit{Pennsylvania and the Federal Constitution} 1787-1788, at 133 (J. McMaster & F. Stone eds., 1888). A writer who called himself "a Democratic Federalist" reminded readers of a recent outrageous search by a constable who ended up paying a large amount in damages as a result of a jury award in a civil action. The writer criticized that had a "lordly court of justice," sitting without a civil jury, ruled on its own, the court would likely be "ready to protect the officers of government against the weak and helpless citizens . . . . What refuge shall we then have to shelter us from the iron hand of arbitrary power?" \textit{Id}.

\textsuperscript{66} See id., at 539. In the \textit{Philadelphia Independent Gazetteer}, an anonymous Antifederalist objected to the extensive spending and taxing powers of Congress and the absence of a guarantee of a civil jury trial provision:

\begin{quote}
The Congress, by the proposed system, have the power of borrowing money, to what amount they may judge proper, consequently to mortgage all our estates, and all our sources of revenue. The exclusive power of emitting bills of credit is also reserved to Congress. They have, moreover, the power of instituting courts of justice without trial by jury, except in criminal cases, and under such regulations as Congress may think proper to decide, not only in such cases as arise out of all the foregoing powers, but in the other cases which are enumerated in the system.
\end{quote}

\textsuperscript{67} See \textit{State Debates}, supra note 39, at 218. In the Virginia ratification debates, James Monroe illustratively argued against the broad powers given to Congress in the Constitution without the protection of a Bill of Rights, specifically if Congress should pass a taxation law and under the Necessary and Proper Clause:

\begin{quote}
[S]uppose they should be of the opinion that the right of the trial by jury was not one of the requisites to carry it into effect; there is no check in this Constitution to prevent the formal abolition of it . . . . They are not restrained or controlled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect. By this general, unqualified power, they may infringe not only on the trial by jury, but the liberty of the press . . . . Our great unalienable rights ought to be secured from being destroyed by such unlimited powers, either by a bill of rights, or by an express provision in the body of the Constitution.
\end{quote}

\textit{Id}. 

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What is clear from the arguments of the Antifederalists is that they desired a strong and significantly independent role for the jury so it could serve as a check on the government. Thus, while contemplating the controversial complexity exception and its place in seventh amendment jurisprudence, we must keep in mind the fundamental importance of the civil jury to the legal process instituted by the framers of the Constitution. When courts strike juries from complex cases, the litigants are deprived of a constitutionally guaranteed check on the power of the judiciary. This is an important concern that is as valid today as it was in 1791 and should not be casually overlooked.

III. CURRENT INTERPRETATION OF THE COMPLEXITY EXCEPTION

Although no specific definition of complex litigation exists, certain factors are determinative of whether a court will view a case as complex. Three characteristics tend to distinguish complex cases from “ordinary” litigation: first, complex cases may involve difficult legal or factual issues of a kind that have not been seen in court until recently, often a result of scientific or technological advances; second, complex cases may involve a great number of parties having the procedural effect of making the case more difficult; and third, a great amount of money involved may prompt litigation efforts of such magnitude that the case becomes complex. Courts analyze these factors in their decisions regarding complex cases. For example, the Third Circuit has set out three guidelines to determine if a case is “too complex” for a jury: the overall size of the case, the conceptual difficulty of legal issues involved in the case, and the difficulty involved in segregating distinct aspects of the case.

Based on the increased complexity of civil litigation, courts have abrogated the constitutional right to a civil jury trial in certain cases. Generally, this has been done on one of three bases: (1) footnote ten in the Ross v. Bernhard...
Supreme Court decision listing “the practical abilities and limitations of jurors” as one of three factors to be used in determining whether there is a right to a jury trial; an equity analysis, such that if an adequate remedy at law is not available, the case would not have been tried to a jury in 1791 England and therefore should not be tried to a jury in the present; and a due process analysis, posturing that if a case is so complex that a jury cannot reasonably understand the factual or legal issues presented, the litigants are not receiving a fair trial under traditional notions of due process.

All of the arguments for and against the complexity exception revolve around on the court’s view of the function of the jury. As the case law demonstrates, the reasoning between the historical, jurisprudential, and constitutional dimensions often overlaps. The crux of the problem is that courts are not always willing to do what is within their power to assist juries in deciding complex cases. Instead, courts abolish the constitutional right to a civil jury trial in these cases, even though remedies are available to cure the problems inherent in complex civil jury trials.


In 1970, the Supreme Court decided Ross v. Bernhard, a stockholder’s derivative suit, and found that “[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.” The Court explained this in footnote 10, stating: “As our cases indicate, the ‘legal’ nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries.” The third prong of this footnote, “the practical abilities and limitations of juries,” has been used as a basis for courts to claim that certain cases are too complex for juries to decide. However, “the practical abilities and limitations of juries” was never
actually referred to in *Ross* as playing a part in the ultimate decision. Since *Ross* itself was an aberration in the general trend of the expansion of the right to jury trial, it is wrong to attach to a portion of a footnote such a broad restriction of the right to a jury trial as has been read into it by some federal courts. A single footnote should not be manipulated to create an “exception” to a constitutional right.

A number of federal courts have addressed the “practical abilities and limitation of juries” factor of the *Ross* footnote and have held that the issues were not too complex and that a jury trial was required. For example, in


84. *See* *Cox v. C.H. Masland & Sons*, Inc., 607 F.2d 138, 143 (5th Cir. 1979) (concluding, in an action by a discharged employee against an employer alleging a breach of a collective bargaining agreement and against the union alleging a breach of a duty of fair representation, that all three prongs of the *Ross* test were met, and specifically that a jury could adequately perform the duty of finding the facts and making a damage award where appropriate); *Barber v. Kimbrell's*, Inc., 577 F.2d 216, 225-26 (4th Cir. 1978) (discussing the first and second prongs of the *Ross* test and concluding that a jury must be impaneled for the purpose of determining the amount of damages under the Truth in Lending Act), cert. denied, 439 U.S. 934 (1978); *United States v. Anderson*, 584 F.2d 369, 373 (10th Cir. 1978) (concluding that the factual determination of tax liability presents no difficulty for jury trial and is appropriate for jury resolution); *Pons v. Lorillard*, 549 F.2d 950, 953-54 (4th Cir. 1977) (holding that a monetary award for back wages is a traditional legal remedy and that the computation of such an award would not be beyond the practical capabilities of a jury, and therefore, the three prongs of the *Ross* test were met), aff'd, 434 U.S. 575 (1978); *Minnis v. International Union*, 531 F.2d 850, 852-53 (8th Cir. 1975) (finding no reason why a properly instructed jury could not adequately perform its duty of finding the facts and making a damage award where appropriate in an action for failure to provide fair representation); *United States v. J.B. Williams Co.*, 498 F.2d 414, 428-29 (2d. Cir. 1974) (concluding that while “the practical abilities and limitations of juries” may present problems in a complex accounting action or in estimating damages awarded in lieu of the injunction in an intricate securities case, those problems do not arise when the jury is supposed to decide whether a television commercial has made any forbidden representations); *Farmers-People's Bank v. United States*, 477 F.2d 752, 757 (6th Cir. 1973) (finding that the practical abilities and limitations of juries would present no difficulties when the central issue for the jury is the bank’s actual notice or knowledge of the employer’s intent not to pay or its inability to pay its particular taxes); *Rogers v. Loether*, 467 F.2d 1110, 1118 (7th Cir. 1972) (finding that the practical abilities and limitations of juries test presents no obstacle to the determination of the issues presented in a civil rights case), aff'd, 415 U.S. 189 (1971); *Jones v. Orenstein*, 73 F.R.D. 604 (S.D.N.Y. 1977) (holding that the jury demand of the plaintiffs in a class action wherein they alleged that the defendants gave false and misleading information and concealed information which should have been disclosed with regard to financial condition, sales, and earnings of the corporation was not subject to being quashed on the basis of limitations on the jury’s capabilities and practical abilities where there was no indication that certain judicial tools available to the court would make the court a superior trier of fact); *Marshall v. Electric Hose & Rubber Co.*, 413 F. Supp. 663, 667 (D. Del. 1976) (stating that questions confronting a jury in a racial discrimination case “are far more suitable for jury determination than complicated commercial issues
Jones v. Orenstein, the court upheld the right to a jury trial, reasoning that nothing available to the judge would make the judge a superior trier of fact. In Barber v. Kimbrell's, Inc., the Fourth Circuit questioned the legal significance of the third prong of the Ross footnote. The court stated that the issues were not so complex that they could not effectively and efficiently be decided by a jury. The court emphasized that it relied primarily on the first two prongs of the Ross test, specifically noting that the Supreme Court had not that routinely arise in derivative and antitrust litigation," and therefore, the difficulty of presenting the issues to a jury does not preclude a trial by jury); Cleverly v. Western Electric Co., 69 F.R.D. 348, 351-52 (W.D. Mo. 1975) (determining that computation of back pay, the issue of willfulness, and the computation of liquidated damages in an age discrimination case are within the practical abilities and limitations of juries); Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1125 (E.D. Mich. 1974) (holding that the third factor of the Ross test, which considers the practical abilities and limitations of juries, suggests that the plaintiffs should not be precluded from having a jury trial on an action against the employer for a breach of collective bargaining and against the union for a breach of a duty to fairly represent the union members; stating that while the facts may be somewhat complex, they are no more complicated than antitrust and derivative suits which have been found suitable for jury determination); Chilton v. National Cash Register Co., 370 F. Supp 660, 662, 666 (S.D. Ohio 1974) (applying the three-pronged Ross analysis in determining that the plaintiff had a right to jury trial on certain claims concerning lost wages and benefits); Van Ermen v. Schmidt, 374 F. Supp. 1070, 1075 (W.D. Wis. 1974) (interpreting the third prong of the Ross test as a reaffirmation of the traditional common law practice of equity taking jurisdiction when transactions between parties were too complicated for jury determination; refusing to elevate the risk of jury prejudice to a determining factor of seventh amendment protection without further direction from the Supreme Court); Richards v. Smoltich, 359 F. Supp. 9, 11-12 (N.D. Ill. 1973) (holding that a case involving a factual situation of the planning and execution of a drug raid with the alleged resulting infringements of the plaintiff's rights should certainly be within the abilities of a jury); Ochoa v. American Oil Co., 338 F. Supp. 914, 921 23 (S.D. Tex. 1972) (concluding that in an extraordinary case, the complexity of issues may be so great that only a court of equity may unravel them, thus implying an inadequate remedy at law, but it is highly questionable whether a court may properly inquire into the practical abilities and limitations of juries in deciding whether the right to jury trial exists in a given case, especially in view of the power given the district court to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury to adequately handle the case alone).


87. Id. This action was brought by shareholders against defendant corporation, directors and officers for giving false and misleading information and for concealing information. Id. at 605. While upholding the jury trial right, the court noted that the defendants would still be able to move for relief in the event that the verdict was erroneous. Id. at 606. The court also reasoned that there were no indications that certain judicial tools available to a court, would make the court a superior trier of fact. The court mentioned access to daily transcripts, admission of deposition testimony into evidence rather than reading to a jury, and periodic review of selected portions of testimony as examples. Id.


89. Id. at 225 n.25. The court concluded that a damage award in a class action brought under the Truth in Lending Act must be decided by a jury. Id. at 226.

90. Id. at 225 n.25.
reiterated the third prong in any later cases and concluding that this raised doubts as to the continued vitality of the "practical abilities" factor.

Nonetheless, other courts have cited the Ross footnote as a justification to strike juries from trials deemed "too complex" or beyond the "practical abilities and limitations of juries." In Bernstein v. Universal Pictures, Inc., a federal district court held that an antitrust action was beyond the practical abilities and limitations of the jury because of the sheer size of the litigation and the complexity of the relationship among the parties. Similarly, in Rosen v. Dick, a federal district court cited the Ross test, stating that the issues between the parties were so complex and required such a lengthy trial that the court would strike an otherwise proper jury demand. The court specifically noted that preliminary estimates indicated that the trial would last at least four

91. The Supreme Court has still not once reiterated or explained the "practical abilities and limitations of juries" that was mentioned in Ross. See Curtis v. Loether, 415 U.S. 189 (1974) (discussing the pre-merger custom and remedy sought but not mentioning the "practical abilities and limitations of juries" prong of the Ross test when deciding that a jury trial was appropriate in an action for damages in the federal court under § 812 of the Civil Rights Act of 1968).


93. See In re Japanese Elec. Products Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); Hyde Properties v. McCoy, 507 F.2d 301, 306 (6th Cir. 1974) (finding in an interpleader action that "the issues between the parties were both complex and likely to be confusing in light of the underlying facts and circumstances" and holding that no right to a jury trial exists); Rosen v. Dick, 83 F.R.D. 540, 540 (S.D.N.Y. 1979) (concluding that, in an action by a trustee in reorganization against directors of the company undergoing reorganization and the accounting firm, the issues between the plaintiff and the defendant firm would be tried to the court without a jury, especially in consideration of a companion case where the jury had been unable to resolve these issues after a seven-month trial); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (holding that a jury trial in an antitrust case involving an alleged conspiracy to restrain trade by depriving lyricists and composers of music of the copyright to the music and lyrics written by them for motion pictures and television shows produced by the defendant was beyond the practical abilities and limitations of juries); Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49, 53 (S.D. Ga. 1968) (holding that a jury is "at best ill-equipped" to determine such sophisticated issues as unequal opportunity in job classifications and in promotions, the establishment of new seniority lists, dealing with historically segregated departments and the equalization of pay in separate job classifications but comparable work).

94. 79 F.R.D. 59 (S.D.N.Y. 1978). Bernstein was an antitrust case involving an alleged conspiracy to restrain trade by depriving lyricists and composers of music of the copyright to the music and lyrics written by them for motion pictures and television shows produced by the defendant. The court combined the Ross footnote with an equity analysis and found that the practical abilities and limitations factor of the Ross test was actually a restatement of the federal courts' traditional equity power. The court interpreted that factor as stating that where the remedy sought necessarily involved the determination of complexities that only a court of equity could unravel, the practical abilities and limitations of juries were also necessarily involved and must be considered in evaluating the right to a jury trial. Id. at 67-68.

95. Id. at 70.


97. Id. at 544.
months and that the case would involve complex issues of accounting practice beyond the normal comprehension of a jury, of a type similar to another case in which the same court found a jury unable to resolve those issues after a seven-month trial.98

In sum, many federal courts have incorrectly relied on a comment in a single footnote in a Supreme Court case that has never been reaffirmed to take away the constitutional right to a civil jury trial.99 Even if the Ross footnote is taken at face value, the “practical abilities and limitations of juries” factor essentially invokes a due process analysis. Due process problems, however, can be remedied through active judicial management and attorney involvement, thereby avoiding the serious seventh amendment implications in striking juries from complex cases.

B. The Historical Equity Argument

Several cases have found that where a just resolution of a complex case is beyond a jury’s abilities, the remedy at law is inadequate and determination of the issues by the court is appropriate.100 Courts have based this on language from Beacon Theatres, Inc. v. Westover101 and Dairy Queen, Inc. v. Wood,102 to the effect that inadequacy of the legal remedy is the touchstone of equity jurisdiction. In Bernstein v. Universal Pictures, Inc.,103 the court found that the practical abilities and limitations factor of the Ross test was simply a

98. Id. at 543-44.
99. See In re United States Fin. Sec. Litig., 609 F.2d 411, 425 (9th Cir. 1979) (stating that “[a]fter employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a rapid departure from its prior interpretation of a constitutional provision in a footnote”).
100. Mark L. Collins, The Fifth Amendment Right to Due Process Prevails over the Seventh Amendment Right to Jury Trial in Complex Litigation, 26 VILL. L. REV. 720, 725 (1981) (analyzing the impact of the Third Circuit’s decision in In re Japanese Electronic Products Antitrust Litigation). See SEC v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977) (holding that where the SEC’s complaint alleged violation of the securities laws and prayed for injunctive relief, accounting of all investor funds and all oil and gas proceeds, and disgorgement of all monies illegally received by the defendants from the investors, the claims were equitable in nature, and thus the defendants had no statutory or constitutional right to jury).
101. 359 U.S. 500 (1959) (concluding that only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims, and finding that these circumstances were not present in this suit under the Sherman and Clayton Acts).
102. 369 U.S. 469 (1962) (holding that in a trademark infringement case in which the court upheld the defendant’s right to a jury trial, that in order for the plaintiff to maintain the action in equity, the plaintiff must show that the accounts between the parties were of such a complicated nature that only a court of equity could unravel them and that it would be a rare case in which that burden could be met).
103. 79 F.R.D. 59 (S.D.N.Y. 1978).
restatement of the federal courts' traditional equity power.\textsuperscript{104} The court reasoned that where the remedy sought necessarily involves the determination of complexities that only a court of equity could satisfactorily unravel, the "practical abilities and limitations of juries" are also necessarily implicated and must be considered in evaluating the right to a jury trial.\textsuperscript{105} The court in Bernstein further reasoned that, although the action would normally be triable to a jury, the necessity of presenting proof regarding the individual contracts of the class members and accounting for damages in each instance rendered the case so complex that it was beyond the ability of the jury; therefore, the issues were not "legal" under the third prong of the Ross footnote.\textsuperscript{106}

ILC Peripherals v. International Business Machines Corp.\textsuperscript{107} also applied an historical test and found that a jury trial was not appropriate.\textsuperscript{108} The court stated that Beacon Theatres and Dairy Queen demonstrate that the inadequacy of legal remedies is the primary basis for granting equity jurisdiction, and that the complexity of a case is relevant to this inquiry.\textsuperscript{109} ILC Peripherals combines the Ross analysis and the equity analysis for the proposition that where the issues in a case are beyond "the practical abilities and limitations of a jury," the legal remedy is inadequate and equity jurisdiction will attach.\textsuperscript{110}

Clearly, both the Ross and equity analyses are entangled with due process

\textsuperscript{104} Id. at 67.
\textsuperscript{105} Bernstein, 79 F.R.D. at 68.
\textsuperscript{106} Id. at 70.
\textsuperscript{107} 458 F. Supp. 423 (N.D. Cal. 1978) (holding, in an action brought for monopolization or attempted monopolization of various markets in the computer industry, that in the event of remand for retrial, the plaintiff's jury demand would be stricken since the magnitude and complexity of the suit rendered it, as a whole, beyond the ability and competency of any jury to understand and decide rationally).
\textsuperscript{108} Id. at 447-49. See In re Boise Cascade Sec. Litig. 420 F. Supp. 99 (W.D. Wash. 1976) (unreported decision) (finding that in a complex securities fraud litigation involving assets of over one billion dollars, financials covering a five-year period, over 50,000 lawyer man-hours in pretrial preparation, and more than 900,000 documents, that a jury would be incapable of rendering a fair decision); contra Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224, 228 (N.D. Ill. 1977) (stating that equity jurisdiction may not be invoked because of the complexity and difficulty of issues of liability as distinguished from the complexity of assigning an adequate remedy, but rather, the test for the availability of equity jurisdiction remains whether the plaintiff has an adequate remedy at law); cf. Hyde Properties v. McCoy, 507 F.2d 301, 306 (6th Cir. 1974) (finding that the issues in an interpleader action were "both complex and likely to be confusing in light of the facts and the underlying circumstances . . . ." and holding that no right to a civil jury trial exists); In re Japanese Elec. Products Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (rejecting the historical approach and applying the Due Process Clause); In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (considering complexity to be a factor only in the equitable accounting situation mentioned in Dairy Queen, which results in a very narrow exception).
\textsuperscript{110} Id. at 447.
considerations. The cases in which courts have directly confronted the Fifth Amendment are at the crux of the complexity exception controversy. The solution to misplaced application of the complexity exception lies in addressing the concerns raised by the Due Process Clause of the Fifth Amendment in complex litigation.

C. Fifth Amendment Due Process

Recently, courts have found that a conflict exists between the Fifth Amendment and the Seventh Amendment in complex civil cases. In complex cases, the evidence and legal issues involved are lengthier, more complicated, and, naturally, more difficult to understand. Procedural due process requires that litigants receive a fair trial, and this right may become jeopardized as the issues and facts in a trial become more difficult to understand. Federal courts have attempted to balance the two competing interests and have reached different conclusions on the outcome.

The Ninth Circuit has flatly rejected the complexity exception. In In re U.S. Financial Securities Litigation, the court suggested that use of the Ross footnote as a means to deny the right to jury trial was unfounded. The court then expressed its confidence that no case is so complex that a party’s due process right to a fair trial is undermined by the possibility of the rendition of an irrational verdict. The court reasoned that with available procedural

111. U.S. CONST. amend. V. The amendment provides in pertinent part, “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”
112. U.S. CONST. amend. VII. The amendment provides in pertinent part, “In Suits at common law . . . 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.”
113. Peters v. Kiff, 407 U.S. 493 (1972) (holding that there is a due process dimension to the right to a competent tribunal). See also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979) (stating that the function of the legal process as embodied in the Constitution and in the realm of factfinding is to minimize the risk of erroneous decisions); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that the quantum and quality of the process due in a particular situation depends on the need to serve the purpose of minimizing the risk of error).
114. It is important to note, however, that as issues and facts become more complex, it is not only the jury, but also the judge, that may have more difficulty with comprehending what is at stake. How much more process is “due” from a single judge’s analysis of a complex fact record than the collective wisdom and memory of a panel of jurors?
115. In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979).
116. 609 F.2d 411 (9th Cir. 1979).
117. Id.
118. Id. at 432.
devices\textsuperscript{119} and competent attorneys, proficient at organizing voluminous, esoteric information,\textsuperscript{120} a jury is fully able to understand the case before it.\textsuperscript{121} In making that finding, the Ninth Circuit quite eloquently defended the jury:

The jury system has never been without its critics, which have included some of this country’s most eminent judges. The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in other areas of public service.\textsuperscript{122}

The Third Circuit reached a contrary conclusion and held that the complexity exception does apply in certain cases. In \textit{In re Japanese Electronic Products Antitrust Litigation},\textsuperscript{123} the court held that due process requires the denial of a jury trial where the complexity of a case renders a jury unable to resolve rationally the issues with a “reasonable understanding of the facts and law as applied to those facts.”\textsuperscript{124} The court refused to rely on an historical

\begin{enumerate}
\item\textsuperscript{119} Id. at 428. These devices include: motions under Federal Rule of Civil Procedure 12 to test the sufficiency of an adversary’s pleadings; motions under Federal Rule of Civil Procedure 56 which may entitle a party to have a judgment entered as a matter of law; stipulations by the parties as to the facts or admissibility of evidence in order to reduce the time necessary to present a case at trial; orders for separate trials under Federal Rule of Civil Procedure 42(b); appointments of special masters under Federal Rule of Civil Procedure 53(b); and simplifications of evidence through the use of summaries according to Federal Rule of Evidence 1006. \textit{Id.}
\item\textsuperscript{120} This note recognizes that attorneys may not always be inclined to organize information for the court. See \textit{infra} notes 158-59 and accompanying text.
\item\textsuperscript{121} \textit{In re United States Fin. Sec. Litig.}, 609 F.2d 411, 427, 431 (9th Cir. 1979).
\item\textsuperscript{122} Id. at 429-30.
\item\textsuperscript{123} 631 F.2d 1069 (3d Cir. 1980).
\item\textsuperscript{124} Id. However, at the district court level, the court denied the defendant’s motion to strike the jury trial demands on the ground that complexity was “not a constitutionally permissible reason for striking plaintiff’s jury demands.” \textit{Zenith Radio Corp. v. Matsushita Elec. Indus. Co.}, 478 F. Supp. 889, 942 (E.D. Pa. 1979).

Applying the standard from \textit{Japanese Products}, the Fifth Circuit reversed a trial court’s application of the complexity exception when the trial court granted the defendant’s motion to strike the plaintiff’s jury demand merely because the trial court found that the complexity of the case was such as to make it “most difficult for the jury to reach a rational decision.” \textit{Cotten v. Witco Chemical Corp.}, 651 F.2d 274, 276 (5th Cir. 1981) (holding that the trial court’s finding that the complexity of an action alleging that the defendants had violated the Sherman Act and the Robinson-Patman Act and had engaged in a variety of other tortious conduct was such as to make it “most difficult” for the jury to reach a rational decision was an insufficient basis to support an order granting the defendants’ motion to strike the plaintiff’s jury demand), \textit{cert. denied}, 455 U.S. 909
\end{enumerate}
basis, rejecting the suggestion that a jury should be stricken from a complex case simply because a chancellor in 1791 would have considered the suit subject to removal from law to equity. The court did, however, accept the argument that the due process concern of fairness in the decision-making process could override the seventh amendment guarantee of a civil jury. The court reasoned that in cases where "[t]he complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules," the due process interest in a fair and accurate decision-making process outweighs the seventh amendment right to a jury trial. The court concluded that in some complex cases, the interests protected by procedural due process carry greater weight than those served by the constitutional guarantee of a civil jury trial.

Certainly, that two constitutional rights would be unnecessarily balanced against each other at the cost of one of the rights, especially when less drastic means could be used to resolve the conflict, is not what the Framers envisioned when drafting the Bill of Rights. Using the language of the Fifth Amendment to discourage the use of the civil jury trial is a dangerous practice with potentially far-reaching consequences. The jury exists to protect the individual from the power of the judge, and the judge should not be able to override this protection by such expedient means. To allow this would eviscerate the Seventh Amendment. Instead of using the complicated issues in cases as an excuse to strike jury demands, judges and attorneys can and must simplify the complexities and help juries to understand the complex cases they face. Only in this way will they remain true to the command of the Seventh Amendment.

D. No Complexity Exception

As indicated by the Ninth Circuit decision in In re U.S. Financial Securities Litigation, a few courts have recognized the importance of the Seventh

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(1982). The Fifth Circuit found that if an exception to the seventh amendment guarantee to a civil jury trial exists, it is only to be applied when the trial judge finds that the case is so complex that a jury could not render a rational decision based upon a reasonable understanding of the evidence and applicable rules of law. Id.


[In essence the argument is a deduction of the likely reaction of an English chancellor to a hypothetical complex suit filed at law in 1791. The principal bases for the deduction are the chancellor's attitudes toward juries and his concern for justice and efficiency . . . . We choose not to pioneer in this use of history.]

Id.

127. Id. at 1088.
128. Id. at 1086.
129. See supra notes 115-22 and accompanying text.
Amendment and have adhered to the view that there is no complexity exception. In Radial Lip Machine, Inc. v. International Carbide Corp., the court rejected the plaintiff's argument that a bench trial would be a fairer and more efficient way to decide the case due to the complexity of the legal and factual issues involved. The court stated that it could not read decisions resting on a liberal interpretation of the "practical abilities and limitations of juries" factor in the Ross test as creating a broad exception to the Seventh Amendment. Similarly, in In re IBM Peripheral EDP Devices Antitrust Litigation, the court found that the issues involved in a complex computer antitrust case were not beyond the capabilities of an ordinary jury, and therefore a jury trial would not be constitutionally inappropriate. The court stated that the command of the Seventh Amendment was clear and a jury trial was required. Likewise, the Ninth Circuit rejected the idea of a complexity exception in Davis & Cox v. Summa Corp., in which the court held that the trial court erred in striking the defendant's demand for a jury trial based on the fact that the jury had to consider 160 pages of instructions. In its holding, the court stated that no complexity exception to the Seventh Amendment exists.

130. See, e.g., Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977); In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980); In re IBM Peripheral EDP Devices Antitrust Litig., 459 F. Supp. 626 (N.D. Cal. 1978); Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978) (holding that the determination of treble damages in a civil antitrust suit was for the court, not the jury), aff'd in part and rev'd in part, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); New York v. Pullman, Inc., 662 F.2d 910 (2d Cir. 1981) (finding that the presentation of scientific testimony and the effectiveness of retrofitting certain defective railroad cars, rather than completely replacing the defective parts, did not render the case so complex as to warrant application of the complexity exception to the right to a jury trial, even if such an exception were to be recognized), cert. denied, 454 U.S. 1164 (1982); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985).

131. 76 F.R.D. 224 (N.D. Ill. 1977) (denying the plaintiff's motion to strike the demand for a jury trial).

132. Id. at 226-27.

133. Id. at 227.

134. 459 F. Supp. 626 (N.D. Cal. 1978) (denying the defendant corporation's motion to strike the plaintiff's jury demand).

135. Id. at 629.

136. Id. "This Court recognizes the difficulties that a lengthy, complex jury trial entails, but despite these difficulties, the command of the Seventh Amendment is clear." Id. The court also rejected the argument that submission of the issue to a nonrepresentative, incompetent factfinder would violate due process, emphasizing that a jury trial would not be constitutionally inappropriate. Id.

137. 751 F.2d 1507 (9th Cir. 1985) (holding that the trial court erred in striking defendant's demand for a jury trial since there is no complexity exception to the Seventh Amendment).

138. Id. at 1516.

139. Id. See also In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (rejecting Ross as a mandatory test which must be inquired into and concluding that no case was so complex that it was beyond the jury's ability), discussed at supra notes 115-122 and accompanying text.
Methods, practices, and procedures already exist to address the problems that juries face in complex cases. By implementing procedural devices already in place, courts can satisfy the requirements of both the Fifth Amendment and the Seventh Amendment, without unnecessarily balancing one against the other. Thus, jurors can decide complex cases without violating due process and retain their important role as a check on the government.

IV. A PROPOSAL FOR MANAGING COMPLEX CASES WITHOUT SACRIFICING EITHER THE FIFTH OR SEVENTH AMENDMENT GUARANTEES

The fundamental problem that the courts are addressing is the fear that juries are incapable of properly determining the issues raised in complex cases.\textsuperscript{140} It has been argued that in the balance between the Fifth Amendment and the Seventh Amendment, the Fifth Amendment appears to have the edge.\textsuperscript{141} However, such a balancing of the Seventh Amendment against the Fifth Amendment is improper and unnecessary. Neither of these rights can be sacrificed when means exist to cure the due process problems. The due process concerns in complex litigation can be addressed and solved, thus negating any need to weigh one right against the other. Both the right to a jury trial and the right to due process are guaranteed by the Constitution. They in large part define the relationship between the individual and society and can be preserved by employing a variety of available strategies and methods to help juries better understand complex cases.\textsuperscript{142}

The historical foundations of the Seventh Amendment demand that, when deciding how to handle complex cases, the means that are the least restrictive on the right to a civil jury trial should be exercised. This can be accomplished by utilizing mechanisms that are currently in place to solve due process problems, thereby preserving the jury and its functions as a check on the

\textsuperscript{140} Harris & Liberman, \textit{supra} note 5, at 620.

\textsuperscript{141} \textit{Id.} at 624. The authors argue first that the Seventh Amendment is not absolute. Since it is not incorporated into the Fourteenth Amendment and applicable to the states, it may be somewhat less fundamental than other procedural rights guaranteed by the Constitution, including the fifth amendment due process right to a fair trial. The authors also consider the practical limitations: that it is difficult to impanel a jury for a lengthy trial; and that concerns over judicial management and efficiency add to the impracticality of utilizing juries; a greater risk of mistrial or reversal adds to the waste of judicial resources and leads to undue expense. \textit{Id.}

\textsuperscript{142} As noted by the Federal Judicial Center in the \textit{Manual for Complex Litigation, Second}, the debate over the complexity exception will in all likelihood continue until the Supreme Court rules definitely on the issue. The FJC offers the \textit{Manual} to help litigants handle complex cases, and states that the various procedures and techniques described in the \textit{Manual}, when "appropriately selected and creatively adapted according the circumstances of the litigation," should help in virtually all cases, "\textit{no matter how complex}," in assisting juries to understand the evidence and applicable rules of law. \textit{Manual for Complex Litigation, Second,} § 21.62 (1986) (emphasis added) [hereinafter \textit{MCL, 2D}].
judiciary. Judge Gibbons, who dissented in *In re Japanese Electronics Antitrust Litigation*,\(^\text{143}\) pointed out that "the Bill of Rights . . . was designed to promote values other than efficiency."\(^\text{144}\) The Seventh Amendment right to a civil jury functions as a critical check on the power of the federal government,\(^\text{145}\) and it also serves as a representative of citizens in judicial proceedings\(^\text{146}\) and as a guarantee of a judgment of the litigants' peers.\(^\text{147}\) Through innovative and active use of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, the due process problems that are present in complex litigation can be solved.

**A. A New Look at the Old Rules: Fully Utilizing Judicial Management Techniques**

Both lawyers and judges agree that early, active involvement by the judiciary is critical in managing complex litigation.\(^\text{148}\) The Federal Rules of Civil Procedure, notably Rules 16,\(^\text{149}\) 26,\(^\text{150}\) 37,\(^\text{151}\) and 42,\(^\text{152}\) grant supplemental authority to the inherent power of the court to manage litigation.\(^\text{153}\) For example, Rule 16 gives judges broad discretion to hold pretrial conferences,\(^\text{154}\) and Rule 37 provides the guidelines for enforcing violations of discovery orders.\(^\text{155}\) The importance of judicial management of the federal courts' heavy caseloads was recently addressed when Congress passed the Civil Justice Reform Act, as Title I of the Judicial Improvements Act

\(^{143}\) 631 F.2d at 1091.

\(^{144}\) *Id.* Judge Gibbons would have solved the complexity problem by severing the claims. He found that "there is no case in which properly separated claims for relief cognizable at common law would be so complex that trial by jury would amount to a violation of due process." *Id.* at 1093.

\(^{145}\) *See supra* notes 33-68 and accompanying text.

\(^{146}\) *See infra* notes 222-24 and accompanying text.

\(^{147}\) *See infra* notes 222-24 and accompanying text.


\(^{149}\) Rule 16 provides guidelines for pretrial conferences, scheduling, and management, which are in the court's discretion to direct. *FED. R. CIV. P.* 16.

\(^{150}\) Rule 26 is the general provision governing discovery. *FED. R. CIV. P.* 26.

\(^{151}\) Rule 37(a) provides the guidelines for motions for orders compelling discovery, and Rule 37(b) describes sanctions that a court can levy upon failure to comply with an order. *FED. R. CIV. P.* 37.

\(^{152}\) Rule 42 gives courts discretion to consolidate litigation or to grant separate trials. *FED. R. CIV. P.* 42.

\(^{153}\) MCL, 2D, *supra* note 142, § 20.1

\(^{154}\) *FED. R. CIV. P.* 16. Pretrial conferences facilitate just, speedy, and inexpensive resolution of litigation by developing plans that include schedules and other procedures for identifying and resolving disputed issues of law, and by clarifying and narrowing disputed issues of fact. MCL, 2D, *supra* note 142, § 21.24. If these plans are followed, the issues at trial will be clearly defined and more easily understood by the jury.

\(^{155}\) *FED. R. CIV. P.* 37.
Active and creative participation by the attorneys involved in complex cases is also very important. In addressing the complexity of securities issues in In re U.S. Financial Securities Litigation, the Ninth Circuit noted that "by the time [complex] cases go to trial, what had initially appeared as an impossible array of facts and issues has been synthesized into a coherent theory by the efforts of counsel." Even when there is a lot at stake, the attorneys should be prepared to stipulate to matters not in genuine dispute, and to avoid all unnecessary contentiousness. Realistically, however, this practice may be inconsistent with the adversarial system, and attorneys in all likelihood will not simplify matters if it will be contrary to the interests of their clients. At this point, the judge's role in managing complex litigation becomes of magnified importance, both actually to control the litigation and also to serve as a check on the actions of attorneys who may feel that it is in their best interest to complicate matters in order to confuse the jury.

To assist in clarifying the issues in complex litigation, the court should establish a schedule for the filing of all pleadings. Motions for summary

156. See Judicial Improvements Act, 104 Stat. 5089 (1990) (encompassing the Civil Justice Reform Act as Title I of the law); BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION, REPORT OF A TASK FORCE (Brookings 1989) (recommending ways to achieve efficiency and justice in civil actions brought in federal court). This report was eventually incorporated in large part into the Civil Justice Reform Act.

157. MCL, 2D, supra note 142, § 20.21.

158. 609 F.2d 411 (9th Cir. 1979).

159. Id. at 427. The court also states that:

The assumption that attorneys cannot develop and present complex cases to a jury underestimates the abilities of the bar, especially the experienced and capable counsel associated with the present litigation . . . . The attorney must organize and assemble a complex mass of information into a form which is understandable to the uninitiated.

Id.

160. MCL, 2D, supra note 142, § 20.21.

161. The Federal Rules of Civil Procedure provide a number of ways for judges to check attorneys' actions. For example, Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

In addition, Rule 26(g) of the Federal Rules of Civil Procedure essentially requires attorneys to "stop and think" before preparing requests for or responses to discovery, and to weigh potential benefits against the cost. MCL, 2D, supra note 142, § 20.21.

162. MCL, 2D, supra note 142, § 21.32.
judgment under Rule 56 play an increasingly significant role in defining, narrowing, and resolving the issues. A number of other judicial methods—from conducting preliminary hearings to determine the admissibility of evidence under Federal Rule of Evidence 104, to probing into the likelihood of success on claims in order to encourage voluntary abandonment of tenuous claims or defenses—may be used to help clarify issues before trial.

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163. MCL, 2D, supra note 142, § 21.34.
164. MCL, 2D, supra note 142, § 21.33. The following techniques were recommended by the Manual:

1. Non-binding statements of counsel, such as those that may be required at the initial conference. These may be updated periodically by written reports or oral statements at later conferences.

2. Voluntary abandonment of tenuous claims or defenses by the parties, often after probing by the court into the likelihood of success and the potential disadvantages of pursuing such contentions.

3. Requiring counsel to list the essential elements of the cause of action. This discipline, designed to clarify the claims, may assist in identifying elements in dispute and frequently results in abandonment of essentially duplicative theories of recovery.

4. Formal amendments to the pleadings, including those resulting from an order under Federal Rule of Civil Procedure 12 striking allegations or requiring a more definite statement.

5. Use of the court's powers under Federal Rule of Civil Procedure 16(c)(1) to eliminate insubstantial claims or defenses (see, e.g., Diaz v. Schwerman Trucking Co., 709 F.2d 1371 (11th Cir. 1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983); Holcomb v. Aetna Life Ins. Co., 255 F.2d 577, 580-81 (10th Cir.), cert. denied, 358 U.S. 879 (1958).) The 1983 revision to the Rule was intended to confirm the power of the court to act without formal motion.

6. Contention interrogatories, especially when served after adequate opportunity for discovery.

7. Rulings on motions for full or partial summary judgment. Rule 56(d) permits the court, even when such a motion is denied, to define the issues that remain in genuine dispute.


9. Requiring with respect to one or more issues that the parties present a detailed outline of their contentions, with supporting facts and evidence. When these statements are required after completion of discovery, the court typically orders, well in advance of trial, that the parties will be precluded at trial from raising other issues or contentions and from offering additional evidence absent good cause.

10. Requiring the parties to present in advance of trial proposed instructions in jury cases, or proposed findings of fact and conclusions of law in non-jury cases.


12. Conducting a separate trial under Federal Rules of Civil Procedure 42(b) of issues that may render unnecessary or substantially alter the scope of further discovery or trial on one or more other issues. Special verdicts and interrogatories from the jury may be helpful and on some issues the parties may waive jury trial.

13. Certifications under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure
Special referrals to masters, magistrates, and court-appointed experts all facilitate the fact-finding process by having relevant complicated issues studied before trial by someone selected by the court based on that person's objectivity, expertise, or other special qualifications. Special referral procedures should be adequate in the majority of cases to help the fact-finder to understand the issues to be resolved. These procedures do not undermine the litigants' right to a resolution through the adversarial system, but rather, serve to make the system more effective when complicated issues are involved.

Due process concerns in civil litigation are directly addressed by implementing techniques designed to make the judicial system more effective. Some attorneys may view the use of masters, magistrates, and court-appointed experts as infringing on their prerogatives and encroaching on the right to a jury trial. When used properly, however, these mechanisms do not encroach on the Seventh Amendment, but instead simply assist the jury so that it is able to act more effectively and exercise its seventh amendment power more justly. A much greater encroachment on the right to a jury trial results when complicated issues are not resolved before trial and the court decides that a case is too complex and strikes the jury from the trial.

Joint trials, the severance of claims and issues, special verdicts, and the Rule 706 to obtain early appellate resolution of critical issues.
and interrogatories can all be used to meet the “just, speedy, and inexpensive” standard as required by Rule 1 of the Federal Rules of Civil Procedure. Defendants may suggest a single trial involving all of the issues and parties, hoping that the length and complexity of such a trial will confuse the fact-finder, or at least lead to a compromise verdict. Thus, the judge must take an active role in determining how the trial will be structured, while carefully preserving the litigants’ seventh amendment rights.

Judges also have the ability to control the presentation of the evidence, thereby clarifying the issues for the jury. Several of the most important policy objectives of the trial process are embodied in the Federal Rules of Evidence. These rules provide that “the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . .” This broad directive also serves as a major untapped

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173. FED. R. CIV. P. 42(b). The Rule states:
   (b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States.

174. FED. R. CIV. P. 49(a). The Rule provides in pertinent part:
   The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact . . . the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

175. MCL, 2D, supra note 142, § 21.63. Rule 1 provides in pertinent part, “These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.”

176. MCL, 2D, supra note 142, § 21.63.
177. MCL, 2D, supra note 142, § 21.63.
178. FED. R. EVID. 611 provides for the mode and order of interrogation and presentation of witnesses and evidence. Rule 611 states that the court shall “exercise reasonable control” in this procedure so as to:
   (1) make the interrogation and presentation effective for the ascertainment of the truth,
   (2) avoid needless consumption of time, and
   (3) protect witnesses from harassment or undue embarrassment.

179. See FED. R. EVID. 611(a).
180. FED. R. EVID. 611(a); see Mark A. Frankel, A Trial Judge’s Perspective on Providing Tools for Rational Jury Decisionmaking, 85 NW. U. L. REV. 221 (1990) (describing a Wisconsin trial judge’s reflections on the importance of expanding the procedural tools available to jurors struggling with critically important factual determinations).
reservoir of legal authority that may be utilized to enable jurors to play a more effective fact-finding role in the courtroom.\textsuperscript{181}

Judges and attorneys may be reluctant to give jurors the same tools\textsuperscript{182} that judges use in bench trials for a number of reasons: the tremendous inertia of long-standing legal tradition, a basic distrust of juries, and trial attorneys' and judges' fear of loss of control of the trial process.\textsuperscript{183} However, in light of the criticism of jury performance in complex cases, this long-standing tradition of jury passivity should be questioned.\textsuperscript{184} Arguments in favor of allowing jurors to question the witnesses and take notes during the trial are particularly compelling in long, complex cases.\textsuperscript{185} Reports have indicated that most lawyers exposed to jury questioning have either dropped their initial resistance or even become active supporters.\textsuperscript{186} In addition, jurors have become very excited about the questioning procedure.\textsuperscript{187} By empowering jurors with the opportunity to ask questions, they become more attentive, even if they choose not to exercise the questioning option.\textsuperscript{188} Also, enhancement of juror satisfaction is an important part of encouraging and rewarding citizen participation in the democratic process.\textsuperscript{189} A more active jury fulfills a "jurisprudential conceptualization" of the jury as a responsible decisionmaker and also enhances the likelihood of actually being an accurate decisionmaker.\textsuperscript{190} A number of techniques are available to attorneys to help

\begin{itemize}
  \item \textsuperscript{181} Id. at 221.
  \item \textsuperscript{182} These techniques include taking notes, reviewing the applicable law, and asking questions. See Frankel, \textit{supra} note 180, at 222.
  \item \textsuperscript{183} Frankel, \textit{supra} note 180, at 222.
  \item \textsuperscript{184} Id. Judge Frankel maintains that the jury's traditionally passive role was unduly restricted in the name of maintaining jury impartiality. In fact, Judge Frankel finds it highly ironic that our legal system gives so much credit and deference to a jury's final decision, yet seems to have so little confidence in the ability of juries to arrive at this "sacrosanct result" using impartial, non-adversarial and thoughtful means. \textit{Id.} at 223.
  \item \textsuperscript{185} MCL, 2D, \textit{supra} note 142, § 22.42.
  \item \textsuperscript{186} See Frankel, \textit{supra} note 180, at 222. Judge Frankel also suggests that the two objections to juror questioning most often articulated by trial lawyers, namely, that it transforms jurors from neutral factfinders into partisan advocates and that having unpredictable input will disrupt attorneys' trial strategy, are unsubstantiated.
  \item \textsuperscript{187} Id. at 224.
  \item \textsuperscript{188} Id.
  \item \textsuperscript{189} Id. As Judge Frankel notes, we owe our juries all of the help they can reasonably be given, consistent with the adversary process. By doing this, we are ultimately fostering the democratic ideals embodied in the jury system. \textit{Id.} at 225.
  \item \textsuperscript{190} Steven I. Friedland, \textit{The Competency and Responsibility of Jurors in Deciding Cases}, 85 NW. U. L. Rev. 190, 207 (1990) (advocating a more active role for the jury during the trial process). Friedland lists a number of reasons in his advocacy of adopting a less restricted, more active jury model: the representative function that juries serve; the "voice of the community idea" that is embodied in the Sixth Amendment fair cross-section impartiality requirement; the significance of jury decisions and the centrality of those decisions to the judicial system forces recognition of the
\end{itemize}
them present the issues and evidence to the jury in an understandable and expeditious fashion. These techniques include the use of glossaries, indexes, and other demonstrative aids, exhibits, summaries or extractions of deposition, and sequencing of evidence and arguments. Thus, if it is in the best interest of one of the parties to confuse the jury, the other side has good reason to prevent confusion and is in the best position to do so.

The challenges raised by the presentation of complex cases to juries can be addressed in specific ways. For example, a number of additional jurors may serve as alternates to minimize the risk of mistrial because of disqualification of jurors during trial. One of the arguments against the use of juries in long, complex civil cases is that a true cross-section is not found because so many potential jurors will seek to be excused. This proposition, however, lacks substantiation. A judge could nevertheless address this concern during voir dire by making introductory comments designed to reduce requests by potential jurors to be excused.

Also, different kinds of jury instructions can help focus the issues and evidence for jurors at every stage of the trial. Preliminary instructions cover the conduct of the trial, scheduling, precautions to prevent mistrial, pretrial

jury as an essential political institution; a more active jury model maintains the democratic tradition of citizen participation; active juries serve as even a better check on judges' power; active juries oppose the considerable power of trial lawyers; jury participation may prove cathartic and instill in the jury an understanding of the importance of its responsibility. Id. at 206-08.

191. MCL, 2D, supra note 142, § 22.3.
192. MCL, 2D, supra note 142, § 22.31.
193. MCL, 2D, supra note 142, § 22.32.
194. MCL, 2D, supra note 142, § 22.33.
195. MCL, 2D, supra note 142, § 22.34. Litigants can employ a variety of methods to sequence evidence and arguments: present the evidence by issues, present the arguments by issues, use interim arguments and statements, examine witnesses jointly.
196. FED. R. CIV. P. 47(b) permits up to six alternate jurors.
197. MCL, 2D, supra note 142, § 22.41. 28 U.S.C. § 1870 permits additional peremptory challenges in multi-party cases. Additional challenges will be allowed in many complex cases, particularly if there are many parties with individual attorneys. MCL, 2D, supra note 142, § 22.41.
198. Friedland, supra note 190, at 196. Friedland notes that the net result of adherence to the constitutional requirement of impartiality often has been the subjugation of the accuracy goal. He believes that as cases become more complex, the effects of this subjugation become even more apparent. Id. at 195.
199. MCL, 2D, supra note 142, § 22.41.
200. MCL, 2D, supra note 142, § 22.41. Judges can emphasize the responsibilities of citizenship and describe the case in such a way that stresses the challenge and opportunity for unique service by the jurors, the fact that virtually all of the jurors will have some hardship or inconvenience if selected, the need for a cross-sectional representation, and also the prospect that only a certain percentage of those going through voir dire will actually serve on the jury. Id.
procedures, the functions of the jury, and preliminary comments on legal principles and factual issues. Limiting and interim instructions given during trial restrict evidence to its proper scope. Final instructions help the jury by focusing on the issues that they must decide, the standards to apply, and how the decisions are to be made. Lastly, supplemental instructions are used in much the same way as final instructions, and the judge should, after consulting the attorneys, determine what response should be made to requests from the jury. All of these methods can be used by the court to provide assistance to the jury throughout the trial process.

Courts may also make use of the special verdict under Federal Rule of Civil Procedure 49(a). Detailed descriptions of legal principles required for general verdicts may be unnecessarily confusing to jurors in complex cases. Special verdicts will assist the jury by narrowing the issues to be decided. That judges provide juries with such tools is required by the Seventh Amendment, because to forfeit the jury when unnecessary is in direct contravention of the Constitution.

B. A Final Option: Impaneling a Special Jury

The most acceptable remedy and presumptive choice for courts faced with complex trials is to implement available procedures in order to effectively manage complex cases while leaving the current jury system intact. However, even if judges remain troubled by due process concerns in complex cases, despite the active use of the tools provided by the rules of evidence and procedure, they need not resort to striking a jury claim in even the most extreme circumstances. In these cases, instead of striking juries based on the complexity of cases, the Seventh Amendment requires that judges should retain the important characteristics of the civil jury right by impaneling special juries.

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201. MCL, 2D, supra note 142, § 22.431.
202. Limiting and interim instructions are given pursuant to Rule 105 of the Federal Rules of Evidence, which provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105.
203. MCL, 2D, supra note 142, § 22.433. Written copies of the final instructions can be provided to the jury, or the instructions can be transcribed on tape for used during deliberation.
204. MCL, 2D, supra note 142, § 22.434.
205. Rule 49(a) provides in pertinent part:
(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence . . . .
This approach ensures that the guarantees of both the Fifth and Seventh Amendments are addressed.

The judge must first decide if a case is complex such that it merits special treatment. If the judge decides that a case is this complex, a close review of the full panoply of procedural strategies and methods available to clarify the case for the jury is triggered. In most complex cases, these mechanisms will be sufficient to meet the due process concerns. However, if the judge is nevertheless still concerned that the case is so complex “that a jury could not render a rational decision based upon a reasonable understanding of the evidence and applicable rules of law,” even if the judge were actively to implement the procedural devices described earlier, then the judge should, as a last resort, impanel a special jury. Under no circumstances should the judge simply strike the jury altogether. Prior to impaneling the special jury, the judge should specifically enumerate the due process problems and analyze why existing procedures would not be sufficient to address those concerns.

Once the judge decides that a special jury is necessary, the jury should then be picked from a special master jury wheel. The special master jury wheel would include individuals who have been specially qualified as experts in the subject matter of the litigation, applying the standard under Federal Rule of Evidence 702.

206. The solution proposed in this note could be implemented in a number of ways. For example, Congress could amend the Jury Service & Selection Act, 28 U.S.C. §§ 1861-1875, or the Supreme Court could adopt this recommendation as a rule of law when it addresses the issue of whether a complexity exception to the Seventh Amendment exists.

207. Deciding whether a case is complex is a matter within the judge’s discretion, but should be determined by looking at the difficulty of the legal issues involved and the overall size of the suit. See supra notes 69-73 and accompanying text.

208. See infra notes 122-127 and accompanying text.

209. This procedure could be implemented by amending the Jury Service and Selection Act; see supra note 204 and accompanying text; see also infra note 218 and accompanying text.

210. Rule 702 provides that, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702. As explained in the Advisory Committee’s Note to the Rule, “the expert is viewed, not in a narrow sense, but as a person qualified by ‘knowledge, skill, experience, training, or education . . . ,’ and the rule is interpreted broadly. 56 F.R.D. 183, 282. The Advisory Committee further stated that encompassed in the rule are not only “experts,” but also the larger group defined as “skilled” witnesses. Id.

In using Rule 702 to specially qualify the jury pool, it would be most appropriate to apply the broadest interpretation of the Rule, namely, that the purpose is to impanel a jury that is “skilled” in the area of law in which the case deals. Thus, the jurors in a complex securities case would not necessarily have to have completed a certain level of education, or hold a certain degree, but they only would need to show that they possess a requisite amount of skill in the area of securities which would enable them to understand the issues and facts better than the average person.
The key to the current jury selection procedure is found in two principles: random selection and objectivity, both of which are incorporated into the special master jury wheel concept. Jurors will be randomly selected from a group of more qualified citizens, but randomly selected nonetheless. The selection procedure is objective because a cognizable group is not being singled out; by specially qualifying the jurors under Rule 702, no discrimination based on level of education or formal training will occur.

While complex cases do not often fit neatly into the historical application of the jury trial right under the Seventh Amendment, special juries interestingly do have a longstanding tradition in the English common law. The historical record indicates that special juries were used commonly in England in 1791 in cases that were outside the experience of ordinary jurors. The English parliament legitimized the use of the special jury in 1730 when it passed a law that gave litigants the right to move for a special jury. In the latter half of the eighteenth century, special juries were used with greater frequency when Lord Mansfield began to use a trained corps of merchants regularly as jurors in commercial cases. Lord Mansfield's practice developed between 1756 and 1788, and apparently it was used for some time after this date. Because special juries were being used routinely in 1791, the historical analog that serves as a reference point in seventh amendment jurisprudence validates current use of special juries. Special juries have also been utilized in the United States.

211. United States v. Briggs, 366 F. Supp. 1356 (N.D. Fla. 1973) (stating that if these two principles are met, then the fair cross-section principle of the Act is also assured); see also infra note 218 and accompanying text.

212. Note, The Case for Special Juries in Complex Litigation, 89 YALE L.J. 1155, 1163 (1980) (hereinafter Special Juries) (discussing the ways in which special juries are superior to judges or traditional juries for the resolution of complex matters and examining the constitutional dimensions of trial by a special jury). See James B. Thayer, The Jury and Its Development (pt. 2), 5 HARV L. REV. 295, 300 (1892) (describing the power of selecting special juries as choosing those especially qualified for a given service in particularly complicated cases).


216. Special Juries, supra note 212, at 1164-66. The important point to gather from this is that special juries were being actively used in 1791, the date of the passage of the Bill of Rights and the date that is referred to in order to determine whether a civil jury trial right exists.

but because the historical test requires a comparison of English law in 1791, the use of special juries in the United States is relevant more as indicative of the perception of consistency with constitutional requirements.

In addition, special juries address the concerns of the Antifederalists by retaining the most significant qualities of the jury as preserved in the Seventh Amendment. A group of citizens with no connection to the judicial process will serve as an adequate check on the government. The fact that a special jury is more knowledgeable in a certain field does not mean that it will be less of a check on the judicial process than its less skilled counterpart—the traditional jury.

In addition to meeting seventh amendment requirements, the special jury meets the fifth amendment constitutional entitlements to a jury drawn from a cross-section of the community and to a jury that satisfies the due process

218. Special Juries, supra note 212, at 1166 n.67.
219. See supra notes 33-68 and accompanying text.
220. See Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946). The cross-section requirement, which appears to be a strong argument against the use of special juries, does have its limits. See Special Juries, supra note 212, at 1168 n.78. The author points out that all of the cross-sectionality cases addressed efforts to identify and exclude from jury service those who belonged to a particular group for reasons unrelated to the ability of the jury to perform their duties. See, e.g., Hernandez v. Texas, 347 U.S. 475, 480-81 (1954) (persons of Mexican descent); Thiel, 328 U.S. at 221 (persons earning a daily wage).

A legitimate interest has been found where the state excludes from jury service persons who are not equal to the tasks that will be required of them. Cobbs v. Robinson, 528 F.2d 1331, 1336 (2d Cir.) (holding that the attempt to include persons of better than average intelligence on grand juries is not proscribed by the Constitution), cert. denied, 424 U.S. 947 (1975). Thus, the cross-section requirement allows reasonable classifications based on the ability of the individuals to perform efficiently and intelligently on the jury. Special Juries, supra note 212, at 1168. See e.g., Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331-33 (1970) (ordering county officials to administer permissible qualifications of honesty, intelligence, integrity, good character, and sound judgment in Alabama jury selection system so as not to exclude black citizens from juries). For example, the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1875 (1976), disqualifies from jury service those individuals who cannot read, write, speak or understand English; those who are not United States citizens; and those whose mental or physical infirmities make satisfactory jury service impossible. 28 U.S.C. § 1861. See United States v. Davis, 546 F.2d 583 (5th Cir. 1977) (holding that the major policy of the Act is that juries shall be selected at random from a fair cross-section of the community); United States v. McDaniels, 370 F. Supp. 298 (E.D. La. 1973) (concluding that the important general principles embodied in the Act as originally passed in 1968 were: (1) random selection of juror names from voter lists of district or division in which court is held, and (2) determination of juror qualifications, excuses, exemptions, and exclusions on the basis of objective criteria only), aff'd, 509 F.2d 825 (5th Cir. 1975), cert. denied, 423 U.S. 857 (1975). See also United States v. Miller, 771 F.2d 1219 (9th Cir. 1985) (holding that the test for a constitutionally selected jury is the same whether the challenge is brought under the Sixth Amendment or under the Jury Selection and Service Act since the Act codifies Supreme Court decisions interpreting the fair cross-section requirement of the Fifth and Sixth Amendments in the
requirements of rationality and impartiality. The fear that jurors will not understand the facts and issues poses the gravest constitutional problem in complex cases. The Fifth Amendment requires that jurors must be able to "decide the facts in an informed and capable manner" and to "understand and address rationally the issues of a case." The rationality requirement can be met in all but the rarest of cases through active judicial implementation of the Federal Rules of Civil Procedure and the Federal Rules of Evidence as discussed earlier. In the unusual case in which the court concludes that these rules and active judicial management will not sufficiently address the due process concerns, the court must then impanel a special jury. The special jury, because it consists of jurors who possess knowledge in the specific area of the litigation, will be better able to meet the rationality requirements of "deciding facts in an informed and capable manner" and "understanding and addressing rationally the issues of a case." These proposals address the due process problems that serve as the basis for courts invoking the so-called "complexity exception" to the Seventh Amendment, without wrongfully eradicating an important constitutional right.

The Constitution requires only that no cognizable group in the community be systematically excluded from jury service. See Duren v. Missouri, 439 U.S. 357, 364 (1979) (holding that the exemption on request of women from jury service violates the fair cross-section requirement of the Sixth Amendment); United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972), cert. denied, 410 U.S. 989 (1973). Not allowing exclusion of those based on their inability to understand the facts and legal issues in a case would be in direct conflict with the due process requirement of rationality.

221. See Peters v. Kiff, 407 U.S. 493 (1972) (holding that there is a due process dimension to the right to a competent tribunal). The Fifth Amendment directs that a trial must be held before a panel of impartial and indifferent jurors. United States v. Wood, 299 U.S. 123, 145-46 (1936) (finding that the ascertainment of impartiality is not chained to an ancient or technical formula, but respects substance and essence and requires determination of the prospective juror's state of mind). Note that although the Seventh Amendment does not mention impartiality as an essential characteristic of a civil jury, the Supreme Court has said, "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). The problem of jury impartiality can be solved as it is with traditional juries, by using the challenge for cause.


V. CONCLUSION

As our society continues to become increasingly complex, so will the matters that are haled into our courts. The Constitution mandates that juries decide these matters in order to serve as a check on the government, contribute community values, and legitimize the decisions in which these complex cases result. As stated in a recent Brookings report: "Law is the glue that holds our society together. Thus, confidence in the legal system is essential. Citizens are more likely to have confidence if the judicial system affords them a meaningful opportunity to participate . . . ." The drafters of the Seventh Amendment recognized the importance of the qualities that the civil jury offered, which is why they fought so hard to make sure that it had its place in the Bill of Rights. The Seventh Amendment cannot be sacrificed, even in the name of another constitutional provision.

We must therefore address the tension that continues to exist between the Fifth and Seventh Amendments in complex litigation. By using available methods, such as the Federal Rules of Evidence and the Federal Rules of Civil Procedure, judges and litigants can and must manage cases in a way in which jurors are afforded all necessary assistance to understand and decide complex cases. In the extraordinary case where stronger measures are required, courts must resort to special juries instead of completely striking the jury from the case. By utilizing the least restrictive means of enabling the jury to serve its

224. See supra text accompanying notes 33-68.
225. See Oliver W. Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 457 (1899) (stating that a jury can "insure that the decisions will reflect contemporary community values in courts otherwise dominated by judges with life tenure").
226. Charting a Future for the Civil Jury System, Report from an American Bar Association/Brookings Symposium 8-11 (Brookings Inst. 1992). Also noted as important functions of the civil jury were that the jury is a valuable tool for decisionmaking and arriving at a fair resolution of disputed facts, and that the jury also provides an important check on the bureaucratization and professionalization of the legal sense, in other words, the jury brings common sense, fairness and simplicity to the process.
227. Id. at 11. Judge Gibbons, dissenting in In re Japanese Elec. Products Antitrust Litig., 631 F.2d at 1091, also recognized the importance of the legitimizing function that the jury performs: [T]he judicial process can do no more than legitimize the imposition of sanctions by requiring that some minimum standards of fair play, which we call due process, are adhered to. 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 law. In the process of gaining public acceptance for the imposition of sanctions, the role of the jury is highly significant. The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process . . . . Any erosion of citizen participation in the sanctioning system is in the long run likely . . . to result in a reduction in the moral authority that supports the process.

Id. at 1093.
function, due process concerns are addressed without sacrificing the right to a civil jury trial.

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