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A Reexamination of the Constitutional Right to a Jury Trial under Title VII of the Civil Rights Act of 1964

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NOTES AND COMMENTS

A REEXAMINATION OF THE CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

I. INTRODUCTION

The seventh amendment[1] guarantee of a jury trial extends to civil causes of action created by Congress when the new rights are somewhat analogous to an 18th century right and when the statutory remedy is legal in nature.[2] This simple statement, however, belies the actual difficulty of the inquiry, particularly because questions of legislative intent are added to an already demanding analysis. An apt example is employment discrimination actions requesting back pay under Title VII of the Civil Rights Act of 1964 (Title VII).[3] Despite dissatisfaction among commentators[4] and some judges,[5] the foregone conclusion has circulated among the federal courts that Title VII affords no right to a jury trial.[6] Little analysis has accompanied this conclusion, with some courts simply citing decisions in other circuits without comment.[7] Of the courts that have addressed the issue, few have found a historical analogue from

1. U.S. CONST. amend. VII.

2. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.1, at 410-11 (3d ed. 1985).

3. 42 U.S.C. § 2000e-1-17 (1988). Title VII proscribes discrimination in employment. Specifically, an employer may not "fail or refuse to hire or discharge any individual, or otherwise discriminate with respect to his compensation, terms, conditions, or privileges of employment on the basis of race, sex, religion, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

4. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 526-31 (1975); Comment, *Jury Trial Right Under Title VII: The Need for Judicial Reinterpretation*, 6 CARDOZO L. REV. 613 (1985).

5. Ochoa v. American Oil Co., 338 F. Supp. 914 (S.D. Tex. 1972); Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N.D. Ala. 1989), *reh'g granted*, 723 F. Supp. 635 (N.D. Ala. 1989).

6. Among the first courts to decide the issue were Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). Later decisions included Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); and EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).

7. *See, e.g.*, Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978).

which to "preserve" the right to jury trial.[8] Others have construed Title VII's back pay award as an equitable remedy through a variety of rationales: (1) Title VII back pay is a form of equitable restitution rather than legal damages,[9] (2) the discretionary nature of Title VII back pay makes it equitable,[10] and (3) Title VII back pay is an "integral part of an equitable remedial scheme."[11]

Even though courts have reached a consensus in their conclusion, two recent Supreme Court decisions have provoked a renewed debate of the jury trial issue. Prior to *Patterson v. McLean Credit Union*,[12] an employee subjected to racial harassment in the workplace could allege violations of both Section 1981[13] and Title VII in a complaint.[14] By linking

8. Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1241 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970). Other courts have simply not discussed a historical analogue presumably for the same reason. *But see* Ochoa v. American Oil Co., 338 F. Supp. 914 (S.D. Tex. 1972). In *Ochoa*, the court found that a Title VII action was analogous to an action for breach of contract for wrongful discharge. After concluding that a right to jury trial existed, the court nevertheless held that a jury trial was not available because of the prior binding force of Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). For a discussion of possible historical analogues, see *infra* notes 115-46 and accompanying text.

9. EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971). *See* Curtis v. Loether, 415 U.S. 189, 197 (1974). *See also infra* notes 180-193 and accompanying text.

10. Discussing the discretionary nature of Title VII back pay, Justice Rehnquist stated:

> [t]o the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial.

Ablemarle Paper Co. v. Moody, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring). *See* Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); Culpepper v. Reynolds Metal Co., 296 F. Supp. 1232, 1241 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970). *See also infra* notes 160-79 and accompanying text.

11. This phrase originated in Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966) (Section 1981 and 1983 action), and was eventually adopted with little or no discussion of its meaning in Johnson v. Georgia Highway Express, Inc. 417 F.2d 1122, 1125 (5th Cir. 1969), and Harmon v. May Broadcasting Co., 583 F.2d 410, 410-11 (8th Cir. 1978). *See also infra* notes 180-93 and accompanying text.

12. 109 S. Ct. 2363 (1989).

13. Section 1981 states in part:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactations of every kind, and to no other.

42 U.S.C. § 1981 (1988) (emphasis added).

14. Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781, 782 (N.D. Ala. 1989), *reh'g granted*, 723 F. Supp. 635 (N.D. Ala. 1989). In *Beesley*, the court stated:

> [i]n recent years many a Southern black plaintiff claiming to be the victim of an act of race discrimination by his private employer has simultaneously invoked 42 U.S.C. § 1981 and Title VII. The obvious reason for traveling the dual path toward judicially mandated equal treatment has been to obtain a jury trial instead of a bench trial.

these causes of action, the plaintiff obtained a jury trial because Section 1981 generally provides a right to jury trial.[15] According to *Patterson*, however, Section 1981 is limited to racial harassment arising literally from the making or enforcement of an employment contract.[16] As a result, a large class of employment discrimination victims can no longer join a Section 1981 action with a Title VII action in order to obtain a jury trial. Without the use of this tactic, Title VII plaintiffs have begun to raise the right to jury trial issue again.[17] Shortly after *Patterson*, the Court further stimulated the debate in *Teamsters, Local No. 391 v. Terry*[18] by classifying back pay under the Labor Management Relations Act[19] as legal, constitutionally guaranteeing a jury trial.[20]

Upon closer inquiry, the issue of a jury trial under Title VII is not as clear as the consensus among the federal courts implies. Although the language and legislative history of Title VII do not provide a clear answer, the jury trial issue should not rest on the statute itself because the seventh amendment was intended to create a right that could not be abrogated by Congress. Under a seventh amendment analysis, a right to jury trial is guaranteed because Title VII actions are similar to several common law contract and tort actions and because Title VII back pay serves the same purpose as traditional contract damages.

II. CONGRESSIONAL INTENT

Before determining whether a constitutional right to a jury trial exists under the seventh amendment, the wording of the statute, its legislative history, and the policies that guided the statute's passage must be analyzed to determine if the constitutional issue can be avoided.[21]

Id.

15. Back pay was deemed a legal remedy, and thus a right to jury trial existed in Santiago-Negron v. Castro-Davila, 865 F.2d 431 (1st Cir. 1989); Thomas v. Resort Health Related Facility, 539 F. Supp. 630 (D.C.N.Y. 1982); Setser v. Novack Inv. Co., 483 F. Supp. 1147 (E.D. Mo. 1980), *rev'd*, 638 F.2d 1137 (8th Cir. 1981), *vacated in part*, 657 F.2d 962 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981). *But see* Williams v. Owensborough-Illinois, Inc. 665 F.2d 918 (9th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982); Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980).

16. *Patterson*, 109 S. Ct. at 2372-73.

17. *See, e.g.*, Walton v. Cowin Equip. Co., 733 F. Supp. 327 (N.D. Ala. 1990); Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N.D. Ala. 1989), *reh'g granted*, 723 F. Supp. 635 (D. Ala. 1990).

18. 110 S. Ct. 1339 (1990). In addition, in March of 1990, the Court reiterated that it "has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to jury trial." Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1335 n.1 (1990).

19. 29 U.S.C. § 185 (1988).

20. In doing so, the Court expressly distinguished back pay under Title VII, leaving that question unanswered. 110 S. Ct. 1339, 1346 (1990).

21. The Supreme Court has long followed the " 'cardinal principle that this Court will first

A. *Statutory Construction*

Absent an explicit reference to trial procedure, the search for legislative intent through statutory construction must rely upon Title VII's ambiguous enforcement provision. Under the enforcement provision, if the *court* finds an unlawful employment practice, the *court* may grant relief by reinstating the plaintiff or by giving back pay.[22] Arguably, the use of the word *court* signifies that Congress intended for judges to try Title VII actions without a jury.[23] While it is true that the word *court* may be interchanged with the word *judge* in certain instances,[24] it is frequently used in statutes, including those dealing with antidiscrimination, in ways that cannot be construed to mean the judge alone.[25] In addition, when

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ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' " Lorillard v. Pons, 434 U.S. 575, 577 (1978) (quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971)).

22. 42 U.S.C. § 2000e-5(g) (1988). The full text provides that:

> [i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Id.

23. *See* Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1239 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970).

24. For example, one legal definition of "court" in BLACK'S LAW DICTIONARY 352-53 (6th ed. 1990) states that "[t]he words 'court' and 'judge,' or 'judges,' are frequently used in statutes as synonymous." *Id.* at 353.

25. Title VII itself uses the word "court" in different senses within the enforcement provisions. In one provision, jurisdiction is conferred upon "district courts," obviously referring to the "institution" rather than the "judge." 42 U.S.C. § 2000e-5(f)(3) (1988). Another provision, 42 U.S.C. § 2000e-5(f)(1) (1988), refers to the power of the "court" to stay proceedings, obviously referring to the "judge". In other sections of Title VII, the word "judge" is explicitly used. 42 U.S.C. § 2000e-5(f)(4)-(5) (1988). If Congress intended civil actions to be tried by a judge alone, it follows that the drafters would have specifically referred to a "judge" in subsection (g) also. In Olearchick v. American Steel Foundries, 73 F. Supp. 273, 280 (W.D. Pa. 1947), a district court interpreted section 216 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b), which stated that "the court . . . shall . . . allow a reasonable attorney's fees" to "include[ ] and mean[ ] the court and jury, if the case is tried before a jury." In Rucker v. Wabash R.R., 418 F.2d 146 (7th Cir. 1969), the word "court" in a state statute was defined to include jurors. In doing so, the court stated that "[t]he term 'court' need not always be construed as referring to the judge in the performance of his duties. It also has an institutional meaning and may sometimes refer to the deliberative body of jurors." *Id.* at 152.

the right to jury trial is at issue, the Supreme Court has afforded little significance to the use of *court* in statutory schemes.[26] For example, in *Curtis v. Loether*,[27] the plaintiff attempted to persuade the Court that jury trials could not be granted under Title VIII of the Civil Rights Act of 1968[28] because it contained language similar to that of Title VII, and particularly because the word *court* was used.[29] Although the trial court explicitly agreed with the plaintiff's arguments,[30] the Court rejected this conclusion by ignoring the statutory language issue altogether.[31]

B. *Legislative History*

As with the language of the statute, the turbulent passage[32] of Title VII furnishes sparse and somewhat illusory legislative history on the issue of jury trials. The bill[33] containing Title VII moved through the House of Representatives with only cursory examination of particular

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"Court" has been considered to have a meaning other than judge-only in other contexts as well. For example, a constitutional "court" includes the jury. State *ex rel* Harp v. Vanderburg Circuit Court, 85 N.E.2d 254, 257 (1949); McDonald v. Swope, 79 F. Supp. 30, 35 (7th Cir. 1948); *In re* Caruba, 51 A.2d 446, 458 (N.J. Ch. 1947); Peisker v. Chavez, 123 P.2d 726, 728-729 (1942).

26. *See* Lorillard v. Pons, 434 U.S. 575 (1978).

27. 415 U.S. 189 (1974).

28. 42 U.S.C. § 3612 (1988).

29. Brief for Petitioner at 9-14, Curtis v. Loether, 415 U.S. 189 (1974) (No. 72-1035). Section 3612(c) provides in part:

> The *court* may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorneys fees in the case of a prevailing plaintiff.

42 U.S.C. § 3612(c) (1981), *amended by* 42 U.S.C. § 3613(c) (1988).

30. Rogers v. Loether, 312 F. Supp. 1008, 1010 (E.D. Wis. 1970).

31. 415 U.S. at 191-92. *See also* Declaratory Judgment Act, 28 U.S.C. § 2201 (1982). Section 2201 provides that "any court of the United States . . . may declare the rights and other legal relations of any interested party . . . ." Despite the use of "court," the Supreme Court has focused on the nature of the underlying claim, not the provision for "courts" awarding relief. Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

32. The attempted filibuster in the Senate reveals the passionate setting of the bill's passage. For instance:

> Not only did the bill's supporters present the affirmative case; they also harassed the filibustering opponents by interrupting their speeches in an almost unprecedented fashion. A good illustration is contained in the close Humphrey questioning of Senator Allen Ellender [Dem., La.], in which the latter actually was led to concede that some southern Negroes were kept from voting because of their race.

2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1090 (B. Schwartz, ed. 1970) [hereinafter STATUTORY HISTORY]. *See generally* C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

33. H.R. 7152, 88th Cong., 1st Sess. (1963).

provisions[34] and with no discussion of jury trial procedure. In comparison, the amount of Floor Debate in the Senate increased significantly,[35] but the issue of jury trials in the context of Title VII's civil action still did not receive dispositive attention. In two brief exchanges during an attempted filibuster, opponents of the bill mentioned the jury trial procedure for civil actions; but the theatrical exchanges add little insight to congressional intent.[36] Perhaps the clearest indication of intent came when the Senate Floor Managers of the bill developed and inserted into the Congressional Record a memorandum overviewing the basic provisions of Title VII.[37] When addressing the trial procedure for civil actions, the memorandum stated that suits "would *ordinarily* be heard by

34. Under a House rule, debate over the entire Act was limited to ten hours, with final action to take place within twelve days. *See* 2 STATUTORY HISTORY, *supra* note 32, at 1089. Only the House Committee on the Judiciary gave a report on H.R. 7152. H.R. REP. No. 914, 88th Cong., 1st Sess. (1963). One congressman summed up the committee proceedings by complaining that the bill was "rammed through the Judiciary Committee in a star chamber proceeding without debate, without an opportunity to offer amendments and with only a 2-minute discussion, 1 minute for Chairman Cellar and 1 minute for his counterpart . . . ." 2 STATUTORY HISTORY, *supra* note 32, at 1098 (Sen. W. Colmer, D., Miss.) Another member reported that "[t]he Judiciary Committee or its subcommittees held no hearings on the language of title VII" and that "Committee members had no part in producing the phraseology title VII contains." H.R. REP. No. 914, 88th Cong., 1st Sess. 57 (1963) (Additional views of Hon. George Meador). *See also* H.R. REP. No. 570, 88th Cong., 1st Sess., (1963).

35. The Senate debate lasted for 534 hours, 1 minute and 37 seconds. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 11.

36. The first instance was a colloquy between Senators Talmadge and Sparkman in connection with the power of the Attorney General under Title VII to bring suit before a three-member judicial panel:

> Mr. Talmadge. In other words, all the provisions of this bill would subject every American citizen to the whims and caprices of the Attorney General, and lead to government by injunction; is that not correct?
>
> Mr. Sparkman. The Senator is correct—without trial by jury.
>
> Mr. Talmage. Without trial by jury.
>
> Mr. Sparkman. Without trial by jury.

2 STATUTORY HISTORY, *supra* note 32, at 1066. The Senators continued the discussion by ironically comparing the power of the Attorney General under the Act with the powers used by Hitler and Mussolini in the 1930's. *Id.* at 1167-68. Even if the theatrical nature of this exchange is discarded, the Senators were clearly referring only to suits brought by the Attorney General and not suits brought by the victims of discrimination.

The right to jury trial issue appeared once again during a question and answer session with one of the Senate sponsors. During the session, the outspoken opponent to the bill, Sen. Ervin from North Carolina, asked about the right to a jury trial under the Constitution, pointing out that the award of back pay would often exceed the $20 amount in the seventh amendment. The Senate sponsor, Sen. Case, responded that "[s]o far as the act itself is concerned, there is no provision for jury trial. Of course, whether a jury trial would be required would depend upon the Supreme Court . . . ." 110 CONG. REC. 7255 (1964). The remark is of little value because it soon becomes evident that Sen. Case was confusing the right to a jury trial in the civil action with the much-debated issue of a jury trial under criminal contempt provisions. *See id.* at 7253-57.

37. On April 8, 1964, Senators Clark (D., Pa.) and Case (R., N.J.) introduced the memorandum on Title VII of the House-approved H.R. 7152. 110 CONG. REC. 7212-15 (1964), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 35, at 3039-45.

the judge sitting without a jury in accordance with the customary practice for suits for injunctive relief."[38] This lone statement, however, does not represent what Congress as a whole desired regarding jury trials in actions requesting back pay awards. Rather, it could reasonably imply either that those who developed the memorandum incorrectly viewed the monetary back pay award as injunctive relief, or that they unrealistically believed that *ordinarily* only injunctive relief, as opposed to back pay, would be sought.

The jury trial issue was not raised again until 1972 when congressional leaders sought ways to solidify Title VII. As part of a largely political[39] and strategic move, opponents of Title VII offered a series of amendments of their own that restricted, rather than solidified, enforcement.[40] One by one the opponents' amendments were voted down, including a proposal for jury trials. When the jury trial amendment came to the floor, congressional leaders supplied two shrift and vague reasons to vote against it: (1) granting a jury trial in Title VII actions would be unique in the "antidiscrimination field," an idea grounded on the fear of juror bias,[41] and (2) a jury trial may unnecessarily prolong the amount of time for a plaintiff to receive relief.[42] These policy reasons, however, no longer remain persuasive.

C. *The Policies Behind Denying a Jury Trial*

Little evidence exists of any *explicit* reason or policy behind the jury trial omission.[43] To fill the void, several commentators have suggested

38. *Id.* at 7214, LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 35, at 3044 (emphasis added).

39. The political nature of the amendment can be seen in a speech made by the sponsor of the amendment proposal who urged that a jury trial should be provided regardless of the seventh amendment's division between legal and equitable proceedings. S. 908, 92nd Cong., 2d Sess., 118 CONG. REC. 4919-20 (1972) (Ervin, D., N.C., sponsor).

40. *Id.* In addition to the jury trial provision, some of the amendments included a proposal to eliminate educational institutions from the scope of Title VII and inserting a clause that would not allow preferential treatment under affirmative action plans. 118 CONG. REC. 4915-20 (1964).

41. S. 908, 92d Cong., 2d Sess., 118 CONG. REC. 4920 (1972). *See infra* notes 45-65 and accompanying text.

42. S. 908, 92d Cong., 2d Sess., 118 CONG. REC. 4919-20 (1972). *See infra* notes 66-77 and accompanying text.

43. Some members of Congress expressed concerned about possible bias as the enforcement provision of Title VII was developed. When H.R. 7152, 88th Cong., 1st Sess. (1963), surfaced, a controversy arose as to the enforcement provision, which provided for cease and desist orders to be issued by a central board. When voicing their objection to a board enforced provision, the members stated that "[t]he historic safeguard of a trial before an *impartial* judiciary would be abandoned" if the cease and desist procedure was adopted. Eventually, a compromise was reached where enforcement would come through actions in federal courts. It is unclear whether the members were concerned about the impartiality of an executive appointed board or whether the members were

that juror bias would undermine the enforcement of Title VII, particularly in the South.[44] A second reason occasionally mentioned is that a jury trial could delay the possibility of relief for the discrimination victim.

1. Juror Bias

Support for the juror bias theory may be gathered by examining the structural mechanisms inserted by Congress to create effective and nonbiased enforcement of Title VII. Spurred by volatile historical forces of the early 1960's,[45] Congress introduced stronger civil rights bills, including nationwide fair employment legislation in the form of Title VII.[46] Increasingly aware that Title VII would not be effective in a justice system in which Blacks played no part,[47] Congress sought mechanisms to

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concerned about juror bias. H.R. REP. NO. 570, 88th Cong., 1st Sess. 15 (1963) (Additional Views of Reps. Frelinghuysen and Griffin) (emphasis added).

The more well-known policy reason, that of juror bias, may stem from the fact that almost all of the statutes in the antidiscrimination field originally did not contain jury provisions. Since the time of their original enactment, however, the Supreme Court has found that several anti-discrimination statutes possess a constitutional jury trial right. *See* Curtis v. Loether, 415 U.S. 189 (1974) (holding that Title VIII of the Civil Rights Act of 1968 contains a constitutional right to a jury trial); Lorillard v. Pons, 434 U.S. 575 (1978) (holding that the legislative history of the Age Discrimination in Employment Act supports the right to jury trial).

44. C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 9.9, at 578 (1st ed. 1980); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 878 (1972); Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503, 537-40 (1973); Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167 (1969). *See also* Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966); Lawton v. Nightingale, 345 F. Supp 683, 684 (N.D. Ohio 1972) (Section 1983 action; "[t]he person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views.").

Another reason occasionally given is that the issues in a class action suit may be too complex for jurors. Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N.D. Ala. 1989), *reh'g granted*, 723 F. Supp. 635, 650-52 (N.D. Ala. 1989).

45. A concise background of the Civil Rights Act of 1964 can be found in 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 32, at 1017-20. In it, Prof. Schwartz attributes the passage of the Act to the civil rights activity in Birmingham, the death of President Kennedy, and the political conversion of President Johnson in his support of civil rights. *Id.*

46. *Id.* at 1018.

47. The Civil Rights Commission of 1961 found that minorities had never sat on a jury in some jurisdictions. COMMISSION ON CIVIL RIGHTS REPORT: JUSTICE 89-104 (1961). The Commission recommended new federal legislation after noting that minority exclusion persisted despite repeated decisions by the Supreme Court, beginning with Strauder v. W. Virginia, 100 U.S. 303 (1879) (holding that race-based exclusions from jury service violated the fourteenth amendment equal protection clause). *Id. See also* F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 322-52 (1978). For an exposition of jury selection abuses, see *Hearings on S. 3296 Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 256 (1966).

provide effective enforcement without relying on the discretion of a system historically entrenched against civil rights. This search resulted in the creation of an independent Commission which would handle the preliminary employment discrimination complaints.[48] Other, more subtle attempts surfaced in the form of exclusive federal court jurisdiction[49] and the widespread use of injunctive relief throughout the Act.[50] The pursuit of adequate enforcement, however, necessarily precluded giving much attention[51] to the mandates of the seventh amendment since a biased jury could potentially undercut the effectiveness of Title VII.

Yet, the juror bias thought to undermine the enforcement of Title VII has been eliminated to some extent by the use of procedural devices. First, Congress enacted the Federal Jury Selection and Services Act of 1968[52] to provide an alternative to voter registration rolls when impaneling jurors. Because voter rolls are thought to be unrepresentative of the community,[53] the Act provides that federal courts "shall prescribe some other source . . . where necessary to foster the policy of [community cross-section representation]."[54] Stricter restrictions on exemptions from federal jury service for "undue hardship," as well as better compensation further guarantees representative impanelment.[55] At the voir dire phase,[56] a trend has emerged to require an explicit, non-racial reason for using peremptory challenges on prospective jurors who are minorities.[57]

48. 42 U.S.C. §§ 2000e-4 & 5 (1988).

49. 42 U.S.C. § 2000e-5(f)(3) (1988).

50. *See, e.g.*, 42 U.S.C. § 2000e-2 (1988). This section gives the court power to grant preventive relief, permanent or temporary injunctions, and restraining orders. *See also* H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 46-50 (1964) (complaints by one member of the Judiciary Committee that the Act creates government by injunction).

51. *See, e.g.*, 110 CONG. REC. 7253-57 (1964) (confusion over the nature of the right to jury in civil actions, as opposed to criminal actions). The lack of attention may result, in part, from the erroneous belief that a uniquely modern statutory scheme such as the civil rights act would not fall under the dictates of the seventh amendment. The Supreme Court in Curtis v. Loether, 415 U.S. 189 (1974), however, made it clear that the constitutional right extended to civil rights statutes.

52. 28 U.S.C. § 1861-1878 (1988). *But see* Kairys, Kadane, & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 778 (1977) ("at present, only two federal district courts . . . use multiple lists").

53. *See* J. GUINTHER, THE JURY IN AMERICA 49 (1988).

54. 28 U.S.C. § 1863(b)(2) (1988). Critics charge that the Act has been applied requiring an incorrect standard, thus making it virtually ineffective. *See, e.g., Jury Representativeness: A Mandate for Multiple Source Lists, supra* note 52.

55. Jury System Improvement Act of 1978, 28 U.S.C. § 1869 (Supp. 1980).

56. Another curb on jury bias is the discretion of the judge to conduct voir dire, rather than counsel. FED. R. CIV. P. 47(a). *See* Hicks v. Mickelson, 835 F.2d 721, 725-26 (8th Cir. 1988).

57. The trend began in the criminal setting with the Supreme Court decision in Batson v. Kentucky, 476 U.S. 79 (1986). Since then, two circuits extended the holding of *Batson* to civil actions. *See* Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1201 (7th Cir. 1990); Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989). The fifth circuit initially adopted the *Batson* standard, but after a hearing en banc, overruled itself. Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *rev'd*,

Finally, at the trial stage, the Supreme Court[58] has recognized that juror bias does not control the jury trial issue because the judge can undermine prejudice of juries by directing a verdict,[59] granting summary judgment,[60] or by ordering a new trial.[61] Additionally, the trial judge has the power to grant special verdicts[62] and can control abuse through jury instructions.[63]

Perhaps the most persuasive practical evidence for the proposition that juror bias should no longer play a role in the right to jury trial issue is that employment discrimination plaintiffs themselves do not necessarily perceive the jury as biased. Plaintiffs complaining of discrimination request juries under Title VII and Section 1981 at least as often as defendants.[64] The inference from a plaintiff's request for a jury is that even when the jury does not perfectly match the cross-section of the community, the decision coming from those jurors may still be fair. A discrimination victim's desire for a jury may also reflect a realization that jurors have an equal or weightier bias against the large corporate defendant.[65] If the policy against jury trials in antidiscrimination actions was developed to protect discrimination victims, yet discrimination victims no longer perceive the need for protection, the policy should no longer be given the same credence.

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895 F.2d 218 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 41 (1990). The Eighth Circuit Court of Appeals has also expressed in dicta that *Batson* may extend to civil actions. Wilson v. Cross, 845 F.2d 163, 165 (8th Cir. 1988). At least one Federal District Court has applied the *Batson* holding in a civil action. Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986). In the future, it is likely that *Batson* will serve as a "precedential framework" when similar issues arise in the "civil sphere" in the remaining circuits. J. GUINTHER, *supra* note 53, at 50.

58. Curtis v. Loether, 415 U.S. 189, 198 (1974). In *Curtis*, the petitioner argued that the right to jury trial should not be given under Title VIII of the Civil Rights Act of 1968 because evidence existed that Congress did not provide for jury trials because of the possibility of juror bias. The Court rejected this contention by listing several procedural safeguards and by emphasizing that the "clear constitutional principles" overrode the policy considerations. *Id.*

59. FED. R. CIV. P. 50.

60. *Id.* 56.

61. *Id.* 59.

62. *Id.* 49.

63. 28 U.S.C. §§ 1861-74 (1976).

64. The court in Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N.D. Ala. 1989), *reh'g granted*, 723 F. Supp. 635 (N.D. Ala. 1989), allowed a jury trial in a Title VII action partly based on the observation that there were "23 cases pending in this very court in which the *plaintiff* had . . . requested a jury trial." *Id.* at 637 n.1.

In the Section 1981 context, one commentator noted that "[o]ut of 25 cases found in which there was a motion for jury trial . . . the plaintiffs made the motion in fourteen." *Developments in the Law - Section 1981*, 15 HARV. C.R.-C.L. L. REV. 33, 255 & 255 n.227 (1980).

65. *Id.* at 253.

2. Expediency

Given the already lengthy administrative process required by Title VII, foregoing a jury trial would not expedite relief. When creating Title VII, Congress ignored warnings that the administrative process would delay relief for the discrimination plaintiff.[66] Later, however, Congress permitted Title VII plaintiffs to choose whether or not to exhaust administrative procedures before filing a suit, contrary to normal administrative law principles.[67] Yet, if the plaintiff wishes, he or she may opt to wait almost indefinitely before suing an employer.[68] Even though the current version does not provide a definite time within which a plaintiff must bring suit, "the prospective plaintiff must usually wait a minimum of 180 days from filing his or her charge with the Commission before bringing suit."[69] For practical purposes then, the relatively short delay created by a jury trial does not compare to the already arduous administrative process.[70]

In addition, when faced with the issue of jury trials under other antidiscrimination statutes, the Supreme Court has given little deference to arguments of expediency or delay. In *Lorillard v. Pons*,[71] the Equal Employment Advisory Council, as an amicus curiae, argued that "Congress did not wish to add the attendant delays of jury trial to the problems facing" plaintiffs alleging violations of the Age Discrimination in Employment Act (ADEA).[72] Despite this policy reason, the Court held instead that legislative history supported a jury trial.[73] The plaintiff in *Curtis v. Loether*[74] also attempted to persuade the Court that when enacting Title VIII of the Civil Rights Act of 1968[75] Congress intended to provide quick relief for plaintiffs, thus precluding a jury trial:

> Congress' decision to prohibit juries in Title VIII litigation was intended in part to assure that a final judgment could be rendered as

66. As stated by one member of the Judiciary Committee in a house Report, "this system has all of the disadvantages of a slow and costly court action in which a person denied employment because of his race may have to wait as long as 2 years for relief." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 41. (1963) (Additional Majority Views of Hon. Robert W. Kastenmeier).

67. 2 C. SULLIVAN, M. ZIMMER, & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 11.7.1, at 470 (2d ed. 1988) [hereinafter EMPLOYMENT DISCRIMINATION].

68. *Id.* § 11.7, at 471-72.

69. *Id.* § 11.7.1, at 471.

70. *Id.*

71. 434 U.S. 575, 585 (1977).

72. Brief of the *Amicus Curiae* of the Equal Employment Advisory Council at 9, *Lorillard*, 434 U.S. 575 (1977) (No. 76-1346).

73. 434 U.S. 575 (1977).

74. 415 U.S. 189 (1974).

75. 42 U.S.C. §§ 3601-19 (1988).

> quickly as possible in these cases. Such a congressional command must of course be heeded even in a case where, despite the availability of a non-jury trial, other developments have brought about a delay.[76]

While the Court in *Curtis* acknowledged that jury trials "may delay to some extent the disposition" of the action, it disregarded delay as "insufficient to overcome" the jury trial right.[77]

III. THE ROLE OF LEGISLATIVE INTENT WITHIN THE CONSTITUTIONAL ISSUE

If one still concludes that legislative intent prohibits a jury trial under Title VII, the question becomes what role that intent should play when confronted with the possibility that the seventh amendment would require an opposite conclusion. The question becomes particularly acute under the seventh amendment because it only "preserves" the common law right to jury trial, leaving open to speculation the weight to be given legislative intent in new statutory causes of action. Although Supreme Court decisions do not provide a definitive answer, the proponents of the seventh amendment intended to guard against any congressional attempts to override the jury trial right.

A. *United States Supreme Court Decisions*

In *Pernell v. Southall Realty*,[78] the Supreme Court faced the right to jury question in the context of a District of Columbia statutory scheme that allowed real property owners to repossess land for nonpayment of rent.[79] Congress had recently repealed the statutory provision which preserved the right to jury trial;[80] the negative implication of the repeal was that Congress either struck the provision as unnecessary in light of the constitutional guarantee or simply wished to do away with jury trials under the statutory design.[81] Sweeping aside the question of legislative intent, the court of appeals dealt with the issue solely on constitutional grounds.[82] On certiorari, the Supreme Court also limited itself to the

76. Petitioner's Reply Brief at 5, Curtis v. Loether, 415 U.S. 189 (1974) (No. 72-1035).
77. *Curtis*, 415 U.S. at 198.
78. 416 U.S. 363 (1974).
79. *Id.* at 364.
80. D.C. Code § 13-702 (1969) provided that "[w]hen the amount in controversy in a civil action . . . exceeds $20, and in all actions for the recovery of possession of real property . . . ." Congress repealed § 13-702 with the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, § 142 (5)(A), 84 Stat. 552 (1970).
81. *Pernell*, 416 U.S. at 365-66.
82. Pernell v. Southall Realty, 294 A.2d 490 (D.C. 1972). The court stated that "*irrespective of intent* it is clear that, if the seventh amendment itself guarantees a right to demand a jury in a

purely constitutional analysis, sidestepping a direct confrontation with the arguably contrary legislative intent by acquiescing to the appeal court's analysis.[83]

Later, the Court again tacitly confronted the issue of intent in *Curtis v. Loether*.[84] In *Curtis*, the plaintiff brought an action under Title VIII of the Civil Rights Act of 1968,[85] claiming that the defendants refused to rent an apartment to the plaintiff because of her race.[86] At the trial, the defendants requested and were denied a jury trial.[87] Although Title VIII did not express whether jury trials were available,[88] the weight of legislative history indicated that Congress intended for Title VIII actions to be tried by judges.[89] Rejecting the proffered policy reasons behind the proposed legislative intent,[90] the Court, despite its own admonition to search the legislative history first,[91] limited itself to the "clear" constitutional principles.[92]

Read broadly, *Pernell* and *Curtis* suggest that the constitutional guarantee of a trial by jury overwhelms any contrary congressional design. Unfortunately, neither opinion adequately tested the proposition because neither squarely faced a situation where Congress strongly opposed a jury trial. Moreover, because the Court has chosen to consider the "practical abilities and limitations of the juries"[93] in their constitutional analysis, any conclusions drawn from the implications of these cases need to be balanced against the role of the legislature in defining

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statutory proceeding for summary possession, the trial court erred in denying this right." *Id.* at 491 (emphasis added).

83. *Pernell*, 416 U.S. at 366.

84. 415 U.S. 189 (1974).

85. Civil Rights Act of 1968, tit. viii, § 801, 42 U.S.C. § 3612 (1988).

86. *Curtis*, 415 U.S. at 190.

87. *Id.* at 190-91.

88. At the time of this suit, 42 U.S.C § 3612(c) provided only that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages . . . ." 42 U.S.C. § 3612(c) (1968). Since then, Congress has amended the civil action enforcement provisions to simply provide for "actual and punitive" damages. 42 U.S.C. § 3613(c)(1) (1988).

89. *Compare* Brief for Petitioner at 15-19, Curtis v. Loether, 415 U.S. 189 (1974) (No. 72-1035) *with* Brief for Respondents at 8-9, *Curtis* (No. 72-1035). After labelling both arguments as "plausible," the Court chose to focus on the constitutional issues. *Curtis*, 415 U.S. at 192.

90. The Court stated that "[t]here seems to be some indication that supporters of Title VIII were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil rights damages actions." *Curtis*, 415 U.S. at 191-92 & n.4.

91. *Id.* at 192 n.6.

92. *Id.* at 192.

93. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). *See* Note, *Ross v. Bernard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112 (1971). *Cf.* Tull v. United States, 481 U.S. 412, 418 n.4 (1987) (policy will not provide an *independent* basis for the right to jury trial).

these policy concerns. Thus, the role of legislative intent in a seventh amendment analysis must be determined by referring to the intent of the proponents of the bill of rights.

B. *Intent of the Proponents of the Seventh Amendment*

While a tentative attitude to override a legislative preference may be gleaned from past Supreme Court decisions, the debates during the ratification of the Constitution show that proponents created the seventh amendment, in part, to take away from Congress the power to prohibit juries in civil actions.

At the end of the Constitutional Convention of 1787, the debate over the right to jury trials in civil actions flared when a jury trial guarantee remained omitted from the body of the Constitution.[94] With the omission of the jury trial right as a focal point, the Antifederalists began to rally the people against ratification of the Constitution.[95] One of the reasons behind the Antifederalists' ardent position was fear that Congress would intentionally ignore jury trials in civil actions.[96] The Federalists countered that, among other reasons,[97] an amendment to the

94. The issue first appeared on September 12, 1787, five days before adjournment of the convention, in a meeting of the Committee on Style and Arrangement. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-88 (M. Farrand ed. 1937). *See also* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 656-659 (1973).

95. I. BRANT, THE BILL OF RIGHTS 39 (1965); J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788, at 158, 255 (1961). *See also* THE FEDERALIST NO. 83, at 558 (J. Cooke ed. 1961) (A. Hamilton).

96. Wolfram, *supra* note 94, at 656-59.

97. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 94, at 587-88. Other articulated reasons included the difficulty in distinguishing between courts of law and courts of equity and an erroneous assumption that the state constitutions could override the U.S. Congress. *Id.* James Madison recorded the following exchange:

> Mr. Williamson, observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.
>
> Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.
>
> Mr. Gerry urged the necessity of Juries to guard agst. corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.
>
> Col: Mason perceived the difficulty mentioned by Mr. Gorham. They jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for that purpose — It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.
>
> Mr. Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col: Mason 2ded the motion.
>
> Mr. Sherman. was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient — There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.

Constitution was unnecessary because the newly-created Congress would immediately enact such a provision.[98]

Rather than leave what was considered a fundamental right[99] to the whims of the federal legislature, the Antifederalists warned citizens that Congress could not be trusted with upholding such an important right. For example, James Monroe characterized the Antifederalists' position in a speech to the Virginia ratification convention.[100] In the speech, Monroe offered a hypothetical where Congress enacts a law of taxation but decides not to provide for a jury trial under the law:

> [S]uppose [Congress] should be of opinion that the right to 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.[101]

As suggested by Monroe's speech, the eventual adoption of the seventh amendment preempted congressional overrides of the right to a jury trial by giving the right unyielding constitutional status. Since the seventh amendment was created to embody a right Congress could not overcome, little deference should be given to the contrary wishes of Congress. Accordingly, the right to a jury trial in Title VII actions must stand or fall on a full constitutional analysis.

V. THE CONSTITUTIONAL ANALYSIS

The first clause of the seventh amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved inviolate . . . ."[102] Read literally,

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The Committee proceeded to vote down the motion for the jury right provision. *Id.* *See also* Wolfram, *supra* note 94, at 659-60.

98. *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 561 (J. Elliot ed. 1836 3d ed.) [hereinafter ELLIOT'S DEBATES]; THE FEDERALIST NO. 83, *supra* note 95, at 559-60.

99. Patrick Henry described the jury trial as "the best appendage of freedom," and "that invaluable blessing." 3 ELLIOT'S DEBATES, *supra* note 98, at 324, 583. Another sobriquet was "that inestimable privilege (the most important which freemen can enjoy,) the trial by jury in all civil cases, has not been guarded by the system." *Id.* at 610-11.

100. 3 ELLIOT'S DEBATES, *supra* note 98, at 218.

101. 3 ELLIOT'S DEBATES, *supra* note 98, at 218.

102. U.S. CONST. amend. VII.

the language only *preserves* the jury trial right as it existed when the seventh amendment was adopted. Accordingly, the right remains static; neither expanding, nor contracting.[103] In application, however, the right to a jury trial has never been limited to only those actions existing in 1791. Rather, the Supreme Court has expanded the seventh amendment analysis beyond the boundaries of the amendment's language so as to give utmost protection to the constitutional right.

The erratic division between equity and law, as well as the constant development of the common law, soon exposed the inherent difficulties of a strictly literal reading of the seventh amendment. While the wording of the seventh amendment presumes that common law jurisdiction was well settled in 1791, in fact, the power of common law and that of equity were very fluid, resulting in a constant borrowing between the two jurisdictions.[104] In addition to the absence of set boundaries, new causes of action continued to evolve as legal principles matured. A tension consequently developed between the adapting nature of law and the Court's task of protecting the constitutional guarantee embedded in the seventh amendment.

In one of the earliest cases involving the seventh amendment, *Parsons v. Bedford*,[105] the Supreme Court resolved the dilemma by upholding the constitutional right whenever legal rights are involved. In particular, the Court stated that:

> The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence .... By *common law*, [the proponents 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 alone were administered .... In a just sense, *the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction,*

103. *See, e.g.*, Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62, 65 (3rd Cir.1943). *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2301 (1971).

104. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 657-663 (1963). Prof. James explains:

> [T]he line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one. There was a continual process of borrowing by one jurisdiction from the other; there were less frequent instances of sloughing off of older functions .... This led to a very large overlap between law and equity.

Id. at 658-59.

105. 28 U.S. (3 Pet) 433 (1830).

> *whatever might be the peculiar form which they may assume to settle legal rights.*[106]

With this quote from *Parsons*, seventh amendment analysis began an irreversible expansion away from the literal language and the mere form of the action to instead focus on whether any legal rights were involved.

The focus on legal rights rather than an exact historical analogue continued with the adoption of the Federal Rules of Civil Procedure. Faced with the merger of law and equity in 1938,[107] the Supreme Court reevaluated the right to jury trial analysis in light of modern joinder rules.[108] In *Beacon Theaters v. Westover*,[109] the Court refused to allow an adjudication of an equitable action prior to the legal action if res judicata would bar the legal action and thus deny the right to a jury trial. Three years later in *Dairy Queen v. Wood*,[110] the Court rejected a balancing test that would weigh the amount of equitable remedies with the amount of legal remedies. More recently, the Court clarified that the right to jury trial need not rest on "what has been called an 'abstruse historical' search for the nearest 18th century analog."[111] Rather, the "characteriz[ation of] the relief sought is 'more important' [in] determining whether the seventh amendment guarantees a jury trial."[112] Thus, Title VII must be analized under two tests. First, under the historical test, a similar 18th-century action of England must be compared to the modern action under which the jury right is requested.[113] Second, the remedy must be classified as legal or equitable.[114]

A. *The Historical Test*

Initially, the seemingly radical nature of civil rights legislation shied courts away from thoroughly searching for a historical analogue to Title

106. *Id.* at 446-47 (as edited in Curtis v. Loether, 415 U.S. 189, 193 (1974) (emphasis partially supplied).

107. *See* FED. R. CIV. P. 38.

108. Beacon Theaters v. Westover, 359 U.S. 500, 509-10 (1959).

109. 359 U.S. 500 (1959).

110. 369 U.S. 469 (1962).

111. Tull v. United States, 481 U.S. 412, 421 (1987) (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10. (1970)).

112. *Id.* (citing Curtis v. Loether, 415 U.S. 189, 196 (1974)).

113. *Id.*

114. *Id.* at 417-18.

VII actions.[115] It was thought that an action attempting to rectify discrimination could not possibly find a parallel in an Anglo-American society that, in 1791, was largely structured by levels of status and position. A strictly literal characterization of Title VII, however, overlooks the true nature of the rights and interests sought to be protected by the Act and demonstrates the practical limitations of the historical test.[116] When the inquiry focuses on the comprehensive purpose behind Title VII, that of combatting and redressing discrimination, analogies can be drawn to tort actions seeking to enforce generally-owed legal duties. When the focus shifts to the particular context in which the injury occurred, that of the employer-employee relationship, analogous contract actions appear that protect the employee's interest in implied promises made within that relationship.

1. Analogies to Tort Actions

Focusing on Title VII's goal of redressing injuries suffered from discrimination,[117] an analogy may be drawn to a number of tort actions, particularly the developing tort of intentional infliction of mental suffering.[118] In the broadest terms, tort "liability must be based upon conduct which is socially unreasonable."[119] In more specific terms, both Title VII and tort law are concerned with conduct which produces mental suffering. In tort law, an action for intentional infliction of mental distress has developed in order to compensate for purely mental injuries.[120]

115. *See* Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 756 (M.D. Ala. 1969).

116. *See supra* notes 102-06 and accompanying text.

117. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (the purpose of Title VII is to redress discrimination).

118. Other possible torts include an action in defamation or a dignitary tort. *See* Curtis v. Loether, 415 U.S. 189, 195-96 n.10 (1974) (citing C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 961 (2d ed. 1969)). An analogy to a dignitary tort could be based upon cases such as Wolfe v. Georgia Ry. & Elec. Co., 2 Ga. App. 499, 58 S.E. 899 (1907) (court held no action existed where a white man was mistaken for a negro by a train conductor); Odom v. East Ave. Corp., 178 Misc. 363, 34 N.Y.S.2d 312 (1942) (court held that an action existed for refusal to serve black plaintiffs); and Smith v. Allwright, 321 U.S. 649 (1944) (cause of action existed for plaintiff alleging harm by denial to vote in Texas election). In Canada, a tort of discrimination was recognized for a short period of time before it was ruled that a statute preempted any common law claim. *See* Note, *The Stillborn Tort of Discrimination: Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology, 37 N.R. 455, 124 D.L.R. (3d) 193 (S.C.C. 1981)*, 14 OTTAWA L. REV. 219 (1982).

119. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6 (5th ed. 1984) [hereinafter KEETON & DOBBS]. Citing Title VII, Keeton & Dobbs stated that "[m]any kinds of employment discrimination are now statutory torts under civil rights acts, including discrimination based on race, sex, and age." *Id.* at § 120, at 1027 n.24.

120. *See, e.g.*, Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930) (threat of lynching sufficiently outrageous for recovery). Often, the same facts supporting a Title VII claim also support an

A not-quite perfect classification could categorize injuries resulting from employment discrimination as a subclass or type of mental suffering deserving compensation. The analogy becomes more strained,[121] however, when the nature of the compensation is considered. The relief granted for purely mental injuries almost always consists of monetary awards which attempt to compensate the victim commensurate with the amount of suffering. Title VII back pay awards, on the other hand, only put the victim back in the position previously occupied without regard to the degree of mental suffering involved.[122]

2. Analogies to a Breach of Employment Contract

In England, the paternalistic feudal relationship between lord and tenant provided the foundation for the legal concept of the employer-employee relationship in the 18th century.[123] This conception allowed reciprocal rights and duties to be imposed on the employer and employee which were designed to protect their relationship.[124] These duties were originally codified in the Ordinance of Labourers[125] which provided that

action for intentional infliction of mental distress. *See, e.g.*, Luna v. City & County of Denver, 537 F. Supp. 798 (D. Colo. 1982); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW: FIVE YEAR CUMULATIVE SUPPLEMENT 301 (2d ed. 1989).

121. The analogy required under a seventh amendment analysis may already be strained to some extent since none of the tort actions developed until the late 19th century. Intentional infliction of mental distress did not become actionable "until comparatively recent decades." KEETON & DOBBS, *supra* note 119, at § 12, at 55. The flexibility under the modern seventh amendment analysis would seem to silence any argument based on that contention. *See* Teamsters, Local No. 314 v. Terry, 110 S. Ct. 1339, 1350 (1990) (Brennan, J., concurring) (calling for an elimination of the historical analogue requirement); Curtis v. Loether, 415 U.S. 189, 195-96 n.10 (1974) (suggesting that intentional infliction of mental distress is analogous to the injuries suffered from Title VIII discrimination).

122. *See* Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1260 (1971); 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, at § 14.4.1, at 17.

123. *See, e.g.*, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HAST. L. REV. 1435, 1438-39 (1975).

124. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 413 (1969 ed.) [hereinafter BLACKSTONE'S COMMENTARIES]. In 1765, Blackstone stated that:

> [t]he contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limit, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as when there is work to be done, as when there is not; but the contract may be made for any larger or smaller term.

Id.

The protection of the relationship may have been originally designed to protect the employer after the Black Plague effectively reduced the pool of workers in the fourteenth century. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-60 (3d ed. 1922). However, some have suggested that beginning with the sixteenth century, the primary purpose of the laws shifted to focus on the protection of the employee. *See* R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 17-18 (1946).

125. Ordinance of Labourers, 23 Edward III, c. 2 (1349).

employers could not "put away his cause," and that apprentices could be discharged only for "reasonable cause."[126] The English common law courts continued to protect the relationship by recognizing implied-in-law obligations prohibiting unjust termination by either party.[127] Unlike modern implied employment contracts which are generally terminable-at-will, English law presumed that employment would last for one year.[128] Upon discharge without cause, the employee could choose among a curious mix of procedural devices with each giving a distinct remedy:[129] (1) an action in assumpsit for quantum meruit,[130] (2) an action in indebitatus assumpsit,[131] or (3) an action for breach of contract for wrongful discharge.[132]

Unlike a Title VII cause of action, the assumpsit action remedies the wronged party on the theory of quantum meruit.[133] In an action in assumpsit, the employee willingly rescinds the express or implied-in-fact employment contract and proceeds to sue for the value of services rendered.[134] The action in assumpsit seems tailored to situations where the employee works in exchange for wages to be paid at some time in the future. If the employee is discharged without cause before the wages are given, an action in assumpsit in quantum meruit would lie.[135] The employee could then only collect an award on the value of services already given and would forfeit any right to earnings that would have accrued

126. 1 BLACKSTONE'S COMMENTARIES, *supra* note 124, at 413-14.

127. *See* Note, *supra* note 123, at 1438. English courts imposed a presumption that unwritten contracts for an indefinite period were to last for one year. 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 156 (2d ed. 1913). The employer could discharge the plaintiff prior to the end of the year only if sufficient cause were shown. *Id.* § 183. The United States initially adopted these protective measures but soon substituted them with the doctrine of employment-at-will. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). Many consider Wood's treatise to have played a considerable role in the replacement of the one-year presumption with the modern employment at will theory. *See, e.g.*, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

128. H. WOOD, *supra* note 127, § 134.

129. *See* H. WOOD, *supra* note 127, § 125. *See also* Ochoa v. American Oil Co., 338 F. Supp. 914, 919 (1972) (concluding that a right to jury trial exists under Title VII but bound under appellate court precedent). For a concise development of the various common law actions, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.2 (1973).

130. *See infra* notes 133-37 and accompanying text.

131. *See infra* notes 138-40 and accompanying text.

132. *See infra* notes 141-46 and accompanying text.

133. *See* H. WOOD, *supra* note 127, § 128; RESTATEMENT OF RESTITUTION §§ 4-5 (1937).

134. *See, e.g.*, Archard v. Horner, 172 Eng. Rep. 451 (1828) (holding that a servant could not recover wages due under the whole contract but was limited to the work done during the period actually served).

135. Employees paid on a quarterly basis would often seek to recover the value of work already given after being dismissed in the middle of a quarter. H. WOOD, *supra* note 127, § 128.

during the remaining time.[136] Title VII, on the other hand, gives a broader remedy to the discharged employee. Back pay includes the amount of money that would have been earned *subsequent* to the discharge,[137] not merely the value of services already rendered.

Although the second action, indebitatus assumpsit, stands closer in relation to a Title VII action than quantum meruit, the remedy was founded on the abandoned doctrine of constructive service. Under constructive service, an employee did not rescind the contract but rather stood by ready and willing to work until the end of the employment term.[138] At the end of the employment term, the employee could sue the employer for any wages not yet paid under the entire contract. The constructive service doctrine was unpopular with employees because it required them to stand by without means to live and without a guarantee that the wages would be regained in court. Similarly, courts rejected the doctrine as economically wasteful because the employee had no duty to obtain new employment.[139] This action resembles the Title VII back pay remedy in that it allows the discharged employee the right to obtain relief under the contract for work that was never done. Title VII, on the other hand, does not demand that the employee stand by ready and willing to work.[140]

The final possibility, an action for breach of contract by wrongful discharge, most closely fits a Title VII action[141] and its back pay remedy.

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136. H.WOOD, *supra* note 127, § 128.

137. 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, at § 14.4.2 (1988). *See infra* note 163.

138. *See* Gandell v. Pontigney, 171 Eng. Rep. 119 (1816). There, the plaintiff was improperly dismissed in the middle of a quarter. The plaintiff remained willing and able to work until the end of the agreed upon term and then sued the employer for the money owed during that period. *See also* Spain v. Arnott, 171 Eng. Rep. 638 (1817) (if the contract is for a one year service, "the year must be completed, before the servant is entitled to be paid").

139. *See* Goodman v. Pocock, 15 Q.B. 576 (1850). In America, criticism of economic waste also caused the demise of the constructive service doctrine. *See, e.g.*, Howard v. Daly, 61 N.Y. 362 (1875). In that famous case, a theater engaged a singer to perform during the upcoming season for ten dollars per week. The singer rehearsed but was never given a part in the production or allowed to take part in performances. The singer sued for wages under the contract and on appeal the question arose as to whether the singer had to wait until the end of the season to sue under the contract for wages. The court rejected the doctrine of constructive service stating that the doctrine was "at war with principle [and] with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service . . . ." *Id.* at 373. *See also* 5 CORBIN ON CONTRACTS § 1095 (1964).

140. In fact, 42 U.S.C. § 2000e-5(g) (1988) requires an employee to find interim work: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.*

141. Several courts have found that an action pursuant to Title VII is analogous to the 18th century breach of contract by wrongful discharge. *See, e.g.*, Ochoa v. American Oil Co., 338 F. Supp. 914 (1972). *See also* Cleverly v. Western Electric Co., 69 F.R.D. 348, 351-52 (W.D. Mo. 1975) (an action under the Age Discrimination in Employment Act). Title VII plaintiffs frequently

As noted above, English common law would not let an employer discharge an employee without legal cause. Although a well-defined English class system precluded recognition of discrimination as a wrongful cause for discharge in the 18th century, Title VII can be understood as a modern-day legislative decision extending the situations in which a discharge would be considered without legal cause. A further analogy can be drawn to the remedies available for both actions.[142] Under the common law action, the measure of damages was the wages and benefits due less any wages and benefits earned since the discharge.[143] Undoubtedly aware of the common law approach, Congress gave wrongfully discharged employees the remedy of "back pay" when creating Title VII.[144] Like the common law remedy,[145] the Title VII remedy also specifically included an "avoidable consequences" clause that subtracted any "interim earnings or amounts earnable with reasonable diligence."[146]

B. *Back Pay as a Legal Remedy*

The second, and apparently most important,[147] stage of the constitutional analysis is classifying the remedy as legal or equitable. On the surface, the monetary form of Title VII back pay appears to fit squarely within the confines of the legal category. The Supreme Court, however, has rejected the presumption that a monetary award necessarily makes a remedy legal;[148] thus, a more demanding inquiry is required. A thorough inquiry confirms the proposition that Title VII back pay is a legal rather than an equitable remedy.

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allege a breach of contract claim or wrongful discharge claim in addition to their Title VII claim. Courts often deny the contract claims because of the modern American rule that employment for an unspecified period of time is employment-at-will which may, with or without cause, be terminated by the employer at any time. *See, e.g.*, Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 916-17 (E.D. Mich. 1977).

142. *See infra* notes 149-59 and accompanying text.

143. Emmens v. Elderton, 10 Eng. Rep. 606, 614 (1853) (after dismissal, "the servant or party employed may recover such damages as a jury may think the loss of the situation has occasioned"). *See* 11 WILLISTON ON CONTRACTS § 1358 (1968); St. Clair v. Local 515, 422 F.2d 128, 132 (6th Cir. 1969).

144. 42 U.S.C. § 2000e-5(g) (1988).

145. 11 WILLISTON ON CONTRACTS, *supra* note 143, § 1358; 5 CORBIN, *supra* note 139, § 1095.

146. 42 U.S.C. § 2000e-5(g) (1988).

147. Granfinanciera S.A. v. Nordberg, 109 S. Ct. 2782, 2790 (1989) ("The second stage of this analysis is more important than the first.").

148. Local 391, International Brotherhood of Teamsters v. Terry, 110 S. Ct. 1339, 1347 (1990). The Court stated: "[g]enerally, an action for money damages was 'the traditional form of relief offered in the courts of law.' This Court has not, however, held that 'any award of monetary relief must necessarily be "legal" relief.' " *Id.* (citations omitted).

1. The Legal Nature of Title VII Back Pay

The distinctly legal nature of back pay is illustrated by the expectation interest[149] the remedy seeks to protect. As with the traditional objective behind contract damages,[150] the purpose behind the Title VII remedial scheme is to restore persons aggrieved by the consequences of unlawful employment practices to the position where they would have been but for the unlawful discrimination.[151] In contrast to the interests protected by other remedies, the remedies of Title VII neither require measurement of the victim's reliance on the implied promise not to discriminate,[152] nor focus on the unjust enrichment by the employer.[153] Instead, Title VII seeks to give the employee the value of the expectancy which the implied promise created,[154] that of employment uninterrupted by discrimination. To enforce the employer's implied-in-law promise, and thus to fulfill the employee's expectancy, Title VII provides both specific performance of the obligation in the form of reinstatement and substitutionary relief in the form of back pay.[155]

Title VII back pay serves to restore the wronged employee by substituting a dollar amount in the place of actual wages and other economic benefits. In a typical Title VII case, an individual plaintiff may request

149. The expectancy interest has been described in this way: "It appears as a 'loss' only by reference to an unstated *ought*. Consequently, when the law gauges damages by the value of the promised performance it is not merely measuring a quantum, but is seeking an end, however vaguely conceived this end may be." Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 53 (1936).

150. R. THOMPSON & J. SEBERT, REMEDIES: DAMAGES, EQUITY AND RESTITUTION § 2.02, at 2-11 (1983) ("the objective of contract damages is to place the plaintiff in as good a position as performance of the contract would have . . . .").

151. 118 CONG. REC. 7168 (1972); 118 CONG. REC. 7565 (1972). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (the purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination).

152. Protection of the reliance interest of a promisee on a contract would be measured by determining any losses the plaintiff has incurred by relying on the performance of the contract. RESTATEMENT (SECOND) OF CONTRACTS §§ 344(b), 349, 353 (1979). Title VII fails to take into account any change of position or loss of opportunity by the employee by limiting monetary damages to the amount of "back pay." Note, *supra* note 123, at 1259-60.

153. A theory of restitution cannot underlie Title VII remedies. The goal of restitution is to disgorge a benefit unjustly retained. Employers who discharge or otherwise discriminate against an employee gain no benefit, leaving nothing to be disgorged. *See* RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tentative Draft No. 1, 1983).

154. The distinctions between expectation, reliance, and restitutionary interests are discussed in the seminal article, Fuller & Perdue, *supra* note 149, at 357. The authors state that the expectation interest is protected by putting "the plaintiff in as good a position as he would have occupied had the defendant performed his promise." Fuller and Perdue, *supra* note 149, at 54.

155. 42 U.S.C. § 2000e-5 (g) (1973) states that the "court may . . . order affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ." *Id.*

reinstatement at a rate of pay that takes into account any wage increases occurring during the ensuing litigation. In addition to, or in the alternative of, reinstatement, the plaintiff would likely request back pay during the period after the discharge and before the reinstatement, including any wage increases.[156] Granted, the reinstatement portion of the requested remedy fits the mold of specific performance of an obligation, and therefore would be equitable in nature.[157] The additional claim for back pay, however, does not become equitable by mere close association with specific performance.[158] Rather, Title VII back pay is distinct from specific performance in that it represents not merely the actual back pay or wages, but it includes the monetary value of *all* the economic benefits that would have accrued if the employer had performed its obligations. Thus, like traditional legal damages, back pay functions as a substitute for wages the plaintiff would have actually earned.[159]

2. The Statutory Discretion to Give Back Pay

The discretion to give or withhold a remedy is a traditional principle or characteristic of equity. Citing this principle, some courts have rejected the legal nature of Title VII back pay because the wording of Title VII allows the court to retain discretion over whether or not to award back pay. However, unlike the broad discretion of equity, the discretion to withhold Title VII back pay has been limited in practice so that it is given as a matter of course.

The Supreme Court sharply restricted the discretion to give or withhold backpay in *Albemarle Paper Co. v. Moody*.[160] The statutory language seemingly gives great discretion when deciding whether to award

156. 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, at § 14.4.1. Courts have included in that amount overtime, raises, or promotions that would have accrued plus many other economic benefits. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); and Clairborne v. Illinois Cent. R.R., 583 F.2d 143 (5th Cir. 1978). In some cases the "backpay award is supplemented by an award of 'front pay' to compensate the victim for the future loss of remuneration that will occur before the victim can attain her rightful place." 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, at § 14.4.1.

157. D. DOBBS, *supra* note 129, § 12.2; A. FARNSWORTH, CONTRACTS § 12.4.

158. A. FARNSWORTH, *supra* note 157, § 12.4.

159. Professor Farnsworth distinguishes specific relief from substitution in this manner:

> [r]elief is said to be "specific" when it is intended to give the injured party the very performance that was promised, as when the court orders a defaulting seller of goods to deliver them to the buyer. Relief is said to be "substitutional" when it is intended to give the promisee something in substitution for the promised performance, as when the court awards a buyer of goods money damages instead of the goods.

A. FARNSWORTH, *supra* note 157, § 12.2, at 815. *See also* D. DOBBS, *supra* note 129, § 3.1.

160. 422 U.S. 405 (1974).

backpay under Title VII.[161] The Supreme Court, however, reinterpreted the level of discretion by noting that the language of Title VII's remedial scheme was based upon the National Labor Relation Act,[162] under which courts granted back pay as a matter of routine.[163] The Court went on to restrict the amount of discretion by setting the standard of discretion in light of Title VII's "make whole" purpose.[164] Thus, "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[165] The effect of *Albemarle* has been to grant back pay in Title VII as a matter of course upon a showing of unlawful discrimination.[166]

After *Albemarle*, the level of discretion to give or withhold Title VII back pay no longer compares to the level of discretion of traditional equity. Historically, equity conferred upon the chancellor broad powers of

161. 42 U.S.C. § 2000e-5(g) (1988) provides, in part, that "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay." *Id.*

162. 29 U.S.C. § 160 (1988). Section 160(c) provides that when the Labor Board has found that a person has committed an "unfair labor practice," the Board "shall issue" an order "requiring such person to cease and desist from such unfair labor practice, and to take affirmative action including reinstatement of employees with or without back pay . . . ." *See also* 110 CONG. REC. 6549 (1964) (Comments of Sen. Humphrey).

163. The Court stated "[w]e may assume that [when enacting Title VII] Congress was aware that the [NLRB] Board, since its inception, has awarded backpay as a matter of course — not randomly . . . ." *Albemarle*, 422 U.S. at 419-20. A right to a jury trial does not exist under the NLRA because its enforcement is wrought through an administrative Board rather than a court. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

164. *Albemarle*, 422 U.S. at 418. In further characterizing the nature of the remedy as compensatory. The court stated that Title VII back pay deals with legal injuries of an economic character and "where legal injury is of an economic character . . . the compensation shall be equal to the injury." *Id.* (quoting Wicker v. Hoppock, 6 Wall 94, 99 (1867)).

165. *Id.* at 421.

166. 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, at 1. *See also* Albemarle Paper Co. v. Moody, 422 U.S. at 442-43 (Rehnquist, J., concurring) (noting that to the extent that back pay is given as a matter of course the award becomes legal, thereby justifying a jury demand).

discretion over the remedies available to a wronged party.[167] This discretion was based on notions of "moral law"[168] which eventually developed into established principles.[169] These established principles, in turn, provided a framework from which the discretion of chancellors can be categorized. For instance, the chancellor could deny a remedy to the plaintiff where the plaintiff seeks redress in bad faith,[170] or without "clean hands,"[171] or further, where the remedy would produce a hardship upon the defendant.[172] In contrast, subsequent to *Albemarle*, back pay has been awarded as a matter of course with the only exceptions being where the plaintiff is guilty of laches,[173] or in some instances, where the defendant can show that either a state protective statute[174] or an EEOC advisory letter[175] was relied upon in creating the discriminatory employment policy. Other typically equitable considerations such as the lack of bad

167. SNELL'S PRINCIPLES OF EQUITY 8-9 (26th ed. 1966) [hereinafter SNELL]. During the formative middle ages, equity jurisprudence was a matter of 'conscience.' One court described the level of discretion of Chancellors as:

> Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience.

Gee v. Pritchard, 36 Eng. Rep. 670, 679 (1818) (quoting SELDEN, TABLE TALK). *See also* McElroy v. Masterson, 156 F. 36, 42 (8th Cir. 1907); Chicago Auditorium Ass'n v. Willing, 20 F.2d 837, 838 (7th Cir. 1927).

168. SNELL, *supra* note 167, at 8-9. 1 SPENCE, EQUITABLE JURISDICTION 414 (1846).

169. SNELL, *supra* note 167, at 9-10; G. CLARK, EQUITY § 15 (1954). *See also* Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905).

170. M. BIGELOW, ELEMENTS OF EQUITY FOR THE USE OF STUDENTS 199 (1879).

171. 1 F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE § 258 (1929).

172. *Id.*

173. In *Albemarle*, 422 U.S. at 424, the Supreme Court held that back pay could be denied because of the tardiness of a plaintiff in requesting back pay if the result is that the defendant is prejudiced by it. In comparison, the traditional requirements for a defense of laches to back pay awards is very limited. *See, e.g.*, EEOC v. Massey-Ferguson, Inc., 622 F.2d 271, 275-76 (7th Cir. 1980).

174. *See, e.g.*, Alaniz v. California Processors, Inc., 785 F.2d 1412 (9th Cir. 1986); Le Beau v. Libbey-Owens-Ford Co., 727 F.2d 141 (7th Cir. 1984).

175. *See* 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, at § 14.6.

faith of the defendant[176] or the defendant's lack of intent to discriminate[177] do not prevent the plaintiff from receiving back pay.[178]

Finally, hinging the nature of back pay upon the discretionary language of the statute grants Congress the power to undermine the constitutional right. If the discretion of a court in granting a remedy makes the remedy equitable, then it would follow that the legislature could undermine the right to jury trial by simply making an otherwise legal remedy discretionary. Such a holding would not comport with the original intention behind the creation of the seventh amendment[179] and would lower the status of the jury trial guarantee.

3. Integral Part of an Equitable Remedy

Perhaps the most commonly cited reason for denying a right to a jury trial under Title VII is that back pay constitutes an "integral part of an equitable remedy."[180] Presumably, the phrase signifies that back pay loses its legal characteristics when mixed with the heavy balance of equitable remedies available under Title VII. Such a rationale is a holdover of the "clean up doctrine" of equity courts which gave equity jurisdiction over legal claims, even where those remedies were now available at law. By using this rationale, courts are ignoring the Supreme Court, which has explicitly rejected the "clean-up" doctrine in the seventh amendment analysis.

Before the merger of equity and law, great restraints were applied to slow the seepage of equity jurisdiction, one of which was the "equitable

176. *Albemarle*, 422 U.S. at 422. *See also* Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). The rationale behind the refusal to let the lack of bad faith enter into the determination lies in the compensatory nature of backpay: "[B]ack pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition." Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971).

177. The courts have almost unanimously adopted the rule that the intent required for an "intentional" violation of Title VII is only that the defendant have intended to do the acts that created the discriminatory effect and not that the defendant have intended the effect itself. 2 LARSON, EMPLOYMENT DISCRIMINATION § 50.60 (1979).

178. Other traditionally equitable considerations that cannot enter into the determination include: "(1) the unsettled state of the law; (2) reliance on previous judicial opinions; . . . [(3)] the judicial cost of calculating numerous awards; . . . [and (4)] the absence of specifically identified victims." 2 EMPLOYMENT DISCRIMINATION, *supra* note 67, § 14.3, at 13. Additionally, the equitable argument that back pay should be denied where the amount owing cannot be established with certainty has been rejected. Salinas v. Roadway Express, Inc., 735 F.2d 1574, 1578-79 (5th Cir. 1984).

179. *See supra* notes 94-101 and accompanying text.

180. *See supra* note 11.

clean-up" doctrine. Equity jurisdiction could generally be invoked if the remedy at law would be inadequate.[181] As the common law courts expanded to cover means of relief formerly unknown at law, the natural effect was to decrease the jurisdiction of equity.[182] To maintain equity's power, the rule developed that where jurisdiction has properly attached in equity because of the inadequacy of the remedy at law, equity will retain jurisdiction even though a court of law could grant such a remedy.[183] From this rule, courts fashioned a similar principle when determining whether a right to jury trial existed in actions where both legal and equitable remedies where sought. After balancing the equitable issues with the legal issues, if it appeared that the legal relief requested was incidental to the equitable relief, the right to jury trial did not exist.[184]

The Supreme Court extended the jury trial guarantee by rejecting the "equitable clean-up" doctrine in *Beacon Theaters, Inc. v. Westover*[185] and *Dairy Queen, Inc. v. Wood*.[186] Anticipating a suit for treble damages under an anti-trust action, the plaintiff in *Beacon Theaters* filed a suit seeking declaratory relief, forcing the defendant to assert the antitrust claim as a counterclaim.[187] The trial court directed that the declaratory relief action be tried by the judge alone before allowing the jury to determine the antitrust claims.[188] However, res judicata would probably bar the antitrust claim from being tried in the second suit because the same basic transaction formed both claims, and thus a jury trial would not have been available.[189] Overturning the trial court, the Supreme Court held that the "right to a jury trial of legal issues [cannot] be lost through prior determination of equitable claims."[190] Two years later in *Dairy Queen*, the court expanded *Beacon Theaters* to include situations where the legal and equitable remedies were sought in the same claim. The plaintiff in *Dairy Queen* brought suit to enforce a contract licensing the

181. J. ADAMS, DOCTRINE OF EQUITY 9 (5th ed. 1868). The principle is illustrated by several well-known maxims of equity, such as "equity follows the law." J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 64 (11th ed. 1873).

182. J. STORY, *supra* note 181, § 64*i*.

183. *Id. See* D. DOBBS, *supra* note 129, § 2.7, at 83-85. *See also* G. BISPHAM, THE PRINCIPLES OF EQUITY 18 (5th ed. 1882).

184. *See* Home Ins. Co. of New York v. Virginia-Carolina Chemical Co., 109 F. 681, 691 (C.C.D.S.C. 1901).

185. 359 U.S. 500 (1959).

186. 369 U.S. 469 (1962).

187. 359 U.S. at 503.

188. *Id.*

189. *Id.* at 504.

190. *Id.* at 511.

trademark "Dairy Queen."[191] The plaintiff requested several types of equitable relief, including an accounting of the money owed under the contract.[192] Reading the request for an accounting as a request for legal damages, the court explicitly held that a right to jury trial existed regardless of "whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not."[193] Thus, the fact that Title VII back pay is intermixed with a variety of equitable remedies does not take away the right to jury trial.

V. CONCLUSION

Other than an unusually strict adherence to the doctrine of *stare decisis*, there seems to be no reason for denying a right to jury trial under Title VII. The unconvincing statutory and legislative intent does not overwhelm the constitutional issues given the original intent of the proponents of the seventh amendment to protect the jury trial from the arbitrary whims of Congress. Even if deference is given to the implicit will of Congress in the Title VII context, the proffered policies behind the denial of the jury procedure no longer exist. Further, under a modern seventh amendment analysis, analogies can be made between Title VII actions and a variety of 18th century contractual and tort actions, all of which provided a right to jury trial. Likewise, as a substitute for specific performance, back pay is legal rather than equitable. Finally, other reasons for classifying Title VII back pay as equitable, by pointing to its discretionary nature or to the outdated equitable clean-up doctrine, likewise fail. Thus, a right to jury trial exists under Title VII of the Civil Rights Act of 1964.

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191. 369 U.S. at 473.

192. The court later construed the prayer for the traditionally equitable accounting as a claim for money damages. *Id.* at 475.

193. *Id.* at 473. The court also noted with approval a quote from Thermo-Stitch, Inc. v. Chemi-Cord Processing, 294 F.2d 486, 491 (5th Cir. 1961):

> It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theaters. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theaters, as we construe it.

369 U.S. at 473 n.8.