

Notes

IS THERE A JURY TRIAL RIGHT IN TITLE VII ACTIONS?

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INTRODUCTION

Since Congress enacted Title VII of the Civil Rights Act of 1964,¹ courts have been virtually unanimous in denying jury trials in private actions based on illegal job discrimination.² In doing so, they have relied on two arguments. The first is based on the statute's language. The second emphasizes the equitable nature of the available remedy. Recently, however, in *Beesley v. Hartford Fire Insurance Co.*,³ the United States District Court for the Northern District of Alabama refused to follow this considerable precedent.⁴ The court's refusal highlights the need for a careful reappraisal of this issue.

This Note demonstrates that courts have consistently engaged in a truncated analysis of whether the statute authorizes jury trials in Title VII civil actions. It also illustrates the courts' failure to rigorously analyze whether there is a constitutional right to a jury trial under Title VII. This Note then discusses the various arguments courts have used to deny jury trials in Title VII civil actions, each of which is contrary to existing Supreme Court precedent. Next, this Note concludes that jury trials cannot be withheld from Title VII civil actions on any principled grounds. Finally, this Note explores the reasons why courts consistently deny jury trials in Title VII civil actions and why they might be beginning to re-examine those prior holdings.

BACKGROUND

The Development of Current Judicial Attitudes Toward Title VII Jury Trials

Although the Supreme Court has not yet specifically ruled on the question of whether there is a jury trial right in Title VII actions, various holdings

1. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h (1988)).

2. *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1240 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970).

3. 723 F. Supp. 635 (N.D. Ala. 1989).

4. *Id.*

support the view that there is such a right.⁵ In dicta, however, the Court has adhered to the orthodox view that there is no jury trial right in Title VII civil actions.⁶

This orthodoxy developed in the lower courts. These courts, however, failed to rigorously analyze Title VII's meaning by applying recognized rules of statutory construction. For the most part, the courts engaged in perfunctory and incomplete statutory analyses and failed to use traditional statutory construction methods to thoroughly parse the statute's language. Instead, these courts focused primarily on the 88th Congress' intent in enacting Title VII.⁷ Furthermore, courts consistently manipulated the constitutional analysis in order to avoid adverse controlling United States Supreme Court holdings.

How Courts Construed The Statute: The Test

Courts traditionally conducted a two-step analysis when determining whether jury trials are available under Title VII.⁸ The first stage of the analysis has two inquiries.⁹ The first involves construing the statute's language through the application of certain standard principles, or rules, of statutory construction.¹⁰ If that effort fails to yield an unambiguous meaning, the focus shifts to Congress' intent.¹¹ The inquiry ends if this bifurcated statutory analysis finds that Title VII authorizes jury trials. If, however, the analysis determines that Title VII does not allow jury trials in civil actions or is silent on the

5. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (an action seeking a money judgment is a legal action); *Tull v. United States*, 481 U.S. 412 (1987) (jury trial required for liability phase even if penalty is assessed by judge); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (award of back pay in Title VII action is not discretionary once injury is proven); *Curtis v. Loether*, 415 U.S. 189 (1974) (jury trial required under a statute creating legal rights enforceable in an ordinary court of law).

6. See, e.g., *Lehman v. Nakshian*, 453 U.S. 156, 167 (1981) ("on Title VII ... there was no right to trial by jury"); *Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978); *Curtis*, 415 U.S. at 196 ("the courts of appeals have held that jury trial is not required in [Title VII]"). But see *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331 (1990), in which the Court noted that "[t]his court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial." *Id.* at 1335 n.1.

7. See, e.g., *Culpepper*, 296 F. Supp. 1232; Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167 (1969).

8.

If 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.

42 U.S.C. § 2000e-5(g) (1988).

9. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.01 (4th ed. rev. 1984).

10. *Id.* §§ 45.05, 45.07.

11. *Id.*

issue, the second and most important stage of analysis follows. The court determines whether the seventh amendment to the United States Constitution applies to Title VII civil actions.¹²

Statutory Construction

Many courts neglect to use the statutory construction method,¹³ preferring instead to employ the search for legislative intent. However, some eminent jurists¹⁴ found the statutory construction method to be a more reliable indicator of a statute's meaning.

The task of statutory construction uses intrinsic, rather than extrinsic, evidence.¹⁵ With a few exceptions, statutory construction analysis is limited to the statute's actual words, or that which is contained within the four corners of the document. This method utilizes established, traditional rules to parse the statute's language.¹⁶

A starting point in statutory construction is the "plain meaning"¹⁷ or "literal meaning"¹⁸ of the word in question. If a word has more than one plain or literal meaning, the statutory interpreter can look to the common law for guidance.¹⁹

Another way to divine the meaning of a word is to look at the word in its "pertinent context."²⁰ Only if certain things are expressly granted in a statute can one infer that the statute's drafters meant to exclude something else by not mentioning it.²¹

Another recognized rule of construction is that a general phrase following a listing of specific members of a class refers to all other members of that class.²² In order for this rule to be valid, the members of the preceding list must all belong to the same class.²³ If they do not, then the general phrase refers to the closest specific term of its kind.²⁴

A third commonly used rule is that Congress is presumed to have knowledge of other statutes of a similar nature and the courts' interpretations of

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

13. N. SINGER, *supra* note 9, § 45.07.

14. Justices Holmes, Jackson, and Frankfurter all preferred to interpret a statute by construing its language rather than by ascertaining the legislature's intent. *Id.*

15. *See generally id.* § 47.

16. *Id.* §§ 47.01, 47.38.

17. *Id.* § 46.01.

18. *Id.*

19. *Id.* § 50.01.

20. *Id.* § 47.02.

21. *Id.* § 47.23.

22. *Id.* § 47.17. This rule is known as *ejusdem generis*.

23. *Id.*

24. *Id.* § 47.33. Referential phrases refer only to the last antecedent. The last antecedent is the most recent phrase, clause, or word that can be an antecedent without doing damage to the sentence's meaning.

them.²⁵ If statutes are similar in nature, the courts should interpret them so they do not conflict with one another.²⁶ On the other hand, the rule of construction known as *in pari materia* provides that statutes dealing with the same subject will be construed together.²⁷

Another statutory construction principle appropriate in this context interprets the statute in its entirety.²⁸ Because "a statute is passed as a whole and not in parts,"²⁹ it should be construed as a whole.³⁰

Congressional Intent

The search for congressional intent involves interpreting the legislative history of the statute. This record includes the remarks of individual legislators concerning the statute. More importantly, it includes the committee reports about the statute when it was a bill and the testimony, if any, of experts testifying before the pertinent committee.

Determining If The Seventh Amendment Applies

The constitutional analysis starts by defining "suits at common law."³¹ The definitive authority on this point is Justice Story.³² According to his interpretation, the phrase does not mean the common law as it was in 1791, but "suits in which *legal* rights"³³ are involved, as opposed to equitable or admiralty rights.³⁴ The first step in deciding whether the seventh amendment guarantees a jury trial in Title VII civil actions is, therefore, to determine whether any legal rights are involved.³⁵

25. This rule is known as *noscitur a sociis*, "something is known by its associates." W. STASKY, LEGISLATIVE ANALYSIS AND DRAFTING 88 (2d ed. 1984).

26. *Id.*

27. N. SINGER, *supra* note 9, § 51.02.

28. *Id.* § 46.05.

29. *Id.*

30. *Id.*

31. U.S. CONST. amend. VII. *See supra* note 12.

32. *Parsons v. Bedford*, 3 Pet. 433, 447 (1830) ("By *common law*, [the Framers] meant ... not merely suits, ... which the *common law* recognized ..., but suits in which *legal* rights were to be ascertained and determined.") (emphasis in original).

33. *Id.* at 446-47 (emphasis in original).

34. *Id.*

35. A central ambiguity inheres in the inquiry into whether a remedy is legal. This ambiguity lies in the quality that makes a remedy legal: is a remedy legal because a court or a legislature calls it legal or is it legal because of some inherent quality? An analogous concept is that of "intent to trespass": does the trespasser have to intend to commit trespass or just intend to enter onto the premises? Conversation with Professor Dan Dobbs, University of Arizona College of Law (Nov. 5, 1990).

*The Development of the Supreme Court's Seventh Amendment Analysis*³⁶

In *Beacon Theatres v. Westover*³⁷ the Supreme Court held that legal claims must be tried prior to equitable claims when both are based on the same facts.³⁸ In other words, the preclusive effect of collateral estoppel cannot deprive a party of its right to a jury trial.

The companion case to *Beacon Theatres* was *Dairy Queen v. Wood*,³⁹ in which the Court held that if a cause of action contained both legal and equitable issues, the case must be tried to a jury.⁴⁰ The presence of any legal claim, even if dwarfed by the equitable nature of the action or the number of equitable claims, guarantees the parties the right to a jury trial. A judge could no longer rule that the legal claims were "incidental" to the equitable claims.⁴¹

The combination of these decisions simplified the analytical task. Not only did legal rights have to be tried to a jury, but they had to be tried prior to any equitable claims. The only remaining inquiry was whether legal rights existed.⁴²

The Supreme Court's Legal Rights Analysis

Recent Supreme Court decisions further clarify the existing law with regard to identifying legal rights.⁴³ The Supreme Court has developed a two-pronged inquiry for this task.⁴⁴ The first prong involves comparing the action

36. Before the Federal Rules of Civil Procedure merged law and equity, legal claims and equitable claims were tried separately. In fact, some states had different courts for each type of claim. After the merger, separate trials were no longer required. However, judges still had to identify which claims were legal and which were equitable in order to determine whether a jury was needed and, if one was needed, which issues it would decide.

To deal with this problem, the courts used a combination of an historical test and an analogical test. The historical test required the judge to consider what had been done in the pre-merger days in the type of situation before the court. If that inquiry was unhelpful, the judge would then try to analogize the case to pre-merger conditions.

According to Professor Dobbs this combination of approaches presented problems. Above all, even before the Federal Rules merged law and equity, law had been adopting many of equity's remedies. This made it hard to determine just what had been law and what had been equity in the past. Moreover, problems arose even when the court could easily determine which issues were legal and which were equitable.

One of those problems occurred when one set of facts contained both legal and equitable issues. Commonly, one party would file a claim, either legal or equitable, and the other would counterclaim, either in equity or law. The party claiming in equity would get a court order enjoining the adjudication of the legal issue pending the resolution of the equitable issue. The doctrine of collateral estoppel would then operate to give preclusive effect to the equitable issue's resolution in the subsequent legal action. The end result was that parties were deprived of their right to a jury. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.6, at 68-73 (1973).

37. 359 U.S. 500 (1959).

38. *Id.* at 510-11.

39. 369 U.S. 469 (1962).

40. *Id.* at 470.

41. *Id.* at 470-73.

42. See *infra* text accompanying notes 52-54 for a discussion of *Dairy Queen's* holding that legal rights are involved when monetary relief is sought.

43. See, e.g., *Granfinanciera*, 492 U.S. 33; *Tull*, 481 U.S. 412. See also *Albemarle Paper*, 422 U.S. at 442-43 (Rehnquist, J., concurring) (back pay is automatically a legal right if it is defined as damages).

44. *Granfinanciera*, 492 U.S. at 42.

in question to actions brought before the merger of law and equity.⁴⁵ The second prong, which is the more important, examines the nature of the remedy.⁴⁶

Based on the results of this test, the nature-of-the-remedy prong seems to be presumptively determinative.⁴⁷ The nature of the action must be conclusively equitable before the Court will deny a jury trial when a legal remedy is involved.⁴⁸

The nature-of-the-action inquiry is subdivided into two parts. First, actions involving statutory and public rights were traditionally brought in equity courts.⁴⁹ Thus, the seventh amendment does not guarantee jury trials in their adjudication. Second, if the proceeding is in a non-article III court,⁵⁰ the seventh amendment does not apply.⁵¹

A. What Are Legal Remedies?

The Supreme Court has held that to determine whether a claim is legal or equitable, one must look at the nature of the remedy sought.⁵² If the remedy involves monetary compensation, it is a legal remedy.⁵³ Simply put, monetary remedies are legal remedies.⁵⁴

Other legal remedies include make-whole and economic remedies and those designed to put the victim back into the position she would have been in but for the injury. The Supreme Court has described Title VII generally, and

45. *Id.* See also *supra* note 36.

46. See *Granfinanciera*, 492 U.S. at 42. Legal actions involve a "legal" remedy. The key to determining whether a remedy is legal or equitable is to examine the method of enforcement. Equitable remedies are enforced by the court's contempt powers. Legal remedies are enforced by writs of execution and levies. Thus, the type of enforcement indicates the type of remedy. See D. DOBBS, *supra* note 36, § 2.6.

47. See *Dairy Queen*, 369 U.S. at 476 ("insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal"); *Albemarle Paper*, 422 U.S. at 442-43 (Rehnquist, J., concurring) ("To the extent that [back pay] awards ... follow as a matter of course from a finding of wrongdoing, ... the provisions of the Seventh Amendment [apply].").

48. If a legal remedy is involved, the party opposing a jury trial carries a heavy burden of proof in establishing that the action's equitable nature makes the seventh amendment inapplicable. See, e.g., *Katchen v. Landy*, 382 U.S. 323 (1966) (bankruptcy court can deny jury trial because bankruptcy is traditionally an equitable action); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (seventh amendment inapplicable to rights created by statute).

49. See, e.g., *Jones & Laughlin Steel*, 301 U.S. 1 (seventh amendment does not apply to statutory proceedings); *Agwilines, Inc. v. NLRB*, 87 F.2d 146 (5th Cir. 1936) (seventh amendment does not apply to the enforcement of public rights).

50. Broadly put, non-article III courts are presided over by judges not appointed for life or good behavior. A current issue in bankruptcy adjudications, such as *Granfinanciera*, 492 U.S. 33, is whether juries are constitutionally permitted because bankruptcy judges do not enjoy the same lifetime tenure as do federal district judges.

51. *Id.* at 53-54.

52. *Dairy Queen*, 369 U.S. 469.

53. The only possible exception would be if the computation of damages would be too difficult for a jury. *Id.* at 478.

54. *Id.* at 477. Cf. *Beesley*, 723 F. Supp. at 647 (quoting *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989)). The court noted that the Eleventh Circuit recognizes that back pay is equivalent to compensatory damages, at least absent an *in personam* order. *Id.*

the back pay remedy specifically, as having one or more of these characteristics.⁵⁵

B. What Are Legal Actions?

Although the remedy prong is presumptively dispositive, that presumption can be rebutted by a strong showing that the nature of the action is traditionally equitable.⁵⁶ For instance, an action concerning a purely statutory right is outside the reach of the seventh amendment.⁵⁷ "Public" rights, those which belong to or exist against the government, are also outside the seventh amendment's purview.⁵⁸

C. Public and Statutory Rights

Congress has the authority to specifically exclude juries when a public right is involved.⁵⁹ The determination of whether a right is public involves the same inquiry as does the determination of whether Congress can "assign adjudication of [a] cause of action to a non-article III tribunal."⁶⁰ If the statutory cause of action under review is "not a 'public right' for article III purposes,"⁶¹ then the seventh amendment requires a jury trial if the cause of action is legal.⁶²

A public right need not involve the government as a party.⁶³ The critical issue is whether the cause of action "arises in the context of a federal regulatory scheme that ... occupies the field."⁶⁴ Therefore, "[i]f a statutory right is not closely intertwined with a federal regulatory program ... and if [it] neither belongs to nor exists against the Federal Government,"⁶⁵ and if it is legal, the seventh amendment guarantees a right to a jury trial.⁶⁶

When is a statutory right a legal one? Statutory rights are congressionally created rights. In the seventh amendment context, the dispositive characteristic of these rights is that they did not exist at the common law.⁶⁷ In short, Congress created the right in question. If such a right is at issue, the seventh amendment does not guarantee a jury trial in its adjudication.⁶⁸

55. *Albemarle Paper*, 422 U.S. at 418-19. See also *Beesley*, 723 F. Supp. at 645. The *Beesley* court noted that Justice Stewart "used the terms 'legal injury' and 'compensation' to describe 'backpay'."

56. *Granfinanciera*, 492 U.S. at 41-42.

57. See, e.g., *Katchen*, 382 U.S. 323; *Jones & Laughlin Steel*, 301 U.S. 1.

58. *Granfinanciera*, 492 U.S. at 53.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 54.

64. *Id.* (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-94 (1985) (Brennan, J., concurring)).

65. *Id.*

66. *Id.* at 55.

67. This is important because of the amendment's wording: "In suits at common law...." U.S. CONST. amend. VII.

68. An example is the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988). It waives the sovereign immunity of the federal government to tort liability. Because the right to sue the sovereign in tort did not exist at common law, Congress may withhold the right to a jury trial from such tort claims. Congress has, in fact, done so.

The Supreme Court, however, has ruled that statutory rights that are loosely analogous to old common law causes of action come within the protection of the seventh amendment.⁶⁹ Therefore, if any of the statutory rights created by acts of Congress is analogous to a common law cause of action, the seventh amendment guarantees a jury trial.

D. Administrative Proceedings

Part of the inquiry into the nature of the right involved is an examination of the proceeding's nature.⁷⁰ *Katchen v. Landy*⁷¹ and *NLRB v. Jones & Laughlin Steel Corp.*⁷² indicate that the congressionally chosen forum can determine whether a jury trial right exists. For instance, Congress can create rights similar but not identical to common law (legal) rights and exclude juries by assigning their adjudication to a non-jury forum.⁷³

The Court used this reasoning to distinguish *Curtis v. Loether*⁷⁴ from *Katchen* and *Jones & Laughlin Steel*. The *Curtis* Court held that the constitutional guarantee of a jury trial did not apply in *Katchen* and *Jones & Laughlin Steel*, partly because Congress had assigned the cause of action to a non-jury forum.⁷⁵ Congress had the power to do so because there were functional reasons for excluding juries.⁷⁶

The Court concluded its discussion of non-jury fora in *Curtis* by stating a formula for determining when the seventh amendment guarantees jury trials.

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.⁷⁷

The seventh amendment thus applies whenever common law legal rights are involved. The Supreme Court uses the previously mentioned two-pronged test to determine whether legal rights are at issue. The Court first examines the nature of the action and then the nature of the remedy. The first inquiry compares the action to those that existed at common law. The Court then looks at whether the litigant is claiming monetary damages.

STATUTORY INTERPRETATION OF TITLE VII

In their handling of the jury trial issue in Title VII actions, most courts have attempted to construe or interpret the statute in a perfunctory and almost

69. See *Curtis*, 415 U.S. at 194.

70. Walker, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 495, 508 (1966). This analysis clarifies any tension with *Jones & Laughlin Steel*, 301 U.S. 1.

71. 382 U.S. 323.

72. 301 U.S. 1.

73. See *Katchen*, 382 U.S. 323; *Jones & Laughlin Steel*, 301 U.S. 1.

74. 415 U.S. 189.

75. *Id.* at 194-95.

76. The Court noted that administrative tribunals are founded on a concept of expertise, a concept with which jury trials are incompatible. *Id.* at 194 n.8.

77. *Id.* at 195.

off-hand manner.⁷⁸ Instead of employing statutory construction, they have focused on legislative intent.⁷⁹ Relying only on legislative intent without first construing the statute is error.⁸⁰ In order to highlight this error, this Note will first discuss congressional intent regarding jury trials in Title VII civil actions.

Congressional Intent

Courts often use extrinsic evidence to ascertain congressional intent regarding a statute.⁸¹ In their search of Title VII's legislative history, courts and commentators have found little or no evidence of Congress' will regarding jury trials.⁸² Perhaps the best clue is a colloquy between Senators Ervin and Case.⁸³ Senator Ervin asked if Title VII contained a requirement for a jury trial and Senator Case replied that "[s]o far as the Act itself is concerned, there is no provision for jury trial."⁸⁴ He added, however, that the final determination of the issue would be up to the Supreme Court.⁸⁵

At least one commentator interpreted this exchange as proof that Congress did not intend to grant a jury trial right under Title VII.⁸⁶ This interpretation ignores Senator Case's observations that the Supreme Court's views on the issue would be dispositive and that a jury trial would be required "if the penalty were heavy enough."⁸⁷ A more accurate interpretation is that Congress left the final determination to the courts.

The fact that the Civil Rights Act of 1964 was debated with a tremendous awareness of the necessity for creating a legislative history provides additional

78. See, e.g., *Culpepper*, 296 F. Supp. at 1239-40.

79. See, e.g., *id.* at 1239; *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 49 (S.D. Ga. 1969).

80. The phrase "legislative intent" is used here synonymously with legislative history. While courts often look for congressional intent in a statute's language, when they do so they are construing the statute. A more accurate way to talk about the two types of inquiries is to focus on what kind of evidence courts utilize. Statutory construction analysis uses intrinsic evidence while a legislative intent analysis (legislative history) utilizes extrinsic evidence. See N. SINGER, *supra* note 9, § 45.14.

81. *Id.* § 48.01. Extrinsic evidence is typically evidence not found within the statute's four corners and includes the legislative history of the bill, which is what was said about it in hearings and floor debates. In this context, congressional intent means legislative history. See *supra* note 80.

82. See, e.g., *Culpepper*, 296 F. Supp. at 1239 n.5; Comment, *supra* note 7, at 170.

83. At one point during the floor debates, the following exchange occurred:

Mr. ERVIN. Under Title VII, an order can be entered ordering a man to pay back wages to a person who had never done a day's work for him. The amount of back wages may largely exceed the jurisdictional amount requiring a jury trial in common law cases under the Constitution. Title VII contains no requirement for a jury trial under any circumstances?

Mr. CASE. So 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.... A jury trial might be provided if the penalty were heavy enough.

Mr. ERVIN. No jury trial is provided.

Mr. CASE. No jury trial is provided under the terms of this section.

110 CONG. REC. S7255 (daily ed. April 8, 1964), quoted in Comment, *supra* note 7, at 171.

84. *Id.*

85. *Id.*

86. See Comment, *supra* note 7, at 171.

87. 110 CONG. REC. S7255.

support for that conclusion.⁸⁸ The omission of any specific directive also lends weight to this alternate interpretation of Senator Case's remarks. Congress' intent is ambiguously expressed at best.⁸⁹ As the Ervin-Case exchange demonstrates, the existing evidence supports both views.⁹⁰

Courts Incorrectly Analyzed the Statute

The Ambiguous Language of Section 2000e-5(g)

The relevant part of Title VII⁹¹ contains three ambiguities. First, the statute refers to "the court" as the decisionmaker without mentioning juries.⁹² The second ambiguity is the lack of express language characterizing legal relief.⁹³ Third, Congress added the general phrase "or any other equitable relief" after the list of available remedies.⁹⁴

When construing this statute the courts have emphasized the first two of these ambiguities. They have concluded that "court" means judge⁹⁵ and the absence of the words "legal relief" means that none is available.⁹⁶ Although no

88. "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history', or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 444 (1966).

89. See, e.g., *Culpepper*, 296 F. Supp. at 1239.

90. The fact that this exchange represents the best evidence of Congress' intent regarding jury trials in Title VII actions makes the articulation of that intent doubly risky. First, this piece of evidence, alone, obviously does not provide overwhelming authority. Second, according to Justice Scalia, the nature of this evidence is particularly unreliable. What Members of Congress may say in floor debates bears little or no relation to why those same members vote a particular way on a bill. What one or two people say during floor debate cannot be made to stand for something as nebulous as Congress' will. A better, more reliable source for that elusive object is the records of committee hearings and their reports. Address by Justice Antonin Scalia, University of Arizona College of Law (Oct. 17, 1990).

91.

If 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 backpay ..., or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1988).

92. *Id.* See also *Culpepper*, 296 F. Supp. at 1239.

93. See *Lorillard*, 434 U.S. at 584.

94. 42 U.S.C. § 2000e-5(g) (1988).

95. See, e.g., *Culpepper*, 296 F. Supp. at 1239. The court reasoned that no jury trial was required in Title VII actions because the statute uses the word "court" and does not describe the available relief as "legal."

Actually, the reverse of the *Culpepper* court's reasoning is more persuasive. Statutes generally do not characterize their legal relief as "legal relief." Monetary remedies typically are legal remedies, absent an *in personam* order. See *supra* notes 53-54 and accompanying text. One would certainly expect and require statutory authority for the kind of remedy in which the court orders a party to pay a particular sum of money. The need for express statutory authority stems from the consequences of that party's refusal to pay. Exercise of the court's contempt powers in jailing the recalcitrant party would be equivalent to imprisonment for debt, a practice this country has long eschewed. Conversation with Professor Dan Dobbs, University of Arizona College of Law (Nov. 5, 1990).

96. See *Lorillard*, 434 U.S. at 584.

court seems to have dealt with the phrase "or any other equitable relief," it, at least arguably, seems to refer to all of the previously listed remedies. Although these interpretations have some merit, none has been tested by a rigorous application of statutory construction principles.

An alternate, if not more persuasive, interpretation exists for each. One or more of the rules of statutory construction discussed above⁹⁷ help interpret each of the three ambiguities. These established rules of construction⁹⁸ reveal a colorable argument that section 2000e-5(g) authorizes jury trials in Title VII civil actions.

Plain Meaning and Pertinent Context

The first ambiguity is the word "court." To interpret what the word "court" means in the statute, one should apply the "plain meaning" or "literal meaning" rule of construction. In the present context, the word can have one of two meanings. It can either refer to the judge alone or it can mean the judge and the jury together.⁹⁹ In other words, "court" refers to the trier of fact, whether judge or jury.

Precedent exists for the proposition that "court" means both the judge and the jury.¹⁰⁰ Additionally, the Federal Rules of Civil Procedure contemplate that "the court" consists of the judge and jury combined.¹⁰¹

In the Title VII area, however, courts have looked at the context of "court" and found it to mean the judge only.¹⁰² They support this position by concluding that because the statute is equitable in nature, "court" must mean a judge without a jury.¹⁰³ Unfortunately, one of the reasons advanced for Title VII actions being equitable is that the word "court" as used in the statute refers to a judge only. This reasoning is circular. The best that can be said about the plain meaning and relevant context of "court" as used in Title VII is that, like the congressional intent evidence, it is ambiguous.

The Statute as a Whole

The fact that the statute does not expressly mention "legal relief" is the enforcement section's second problematic aspect.¹⁰⁴ The United States Supreme Court addressed this issue¹⁰⁵ in responding to the argument that the Age Discrimination in Employment Act (ADEA)¹⁰⁶ did not authorize jury trials

97. See *supra* text accompanying notes 13-30.

98. See N. SINGER, *supra* note 9, §§ 46, 47.

99. See *Beesley*, 723 F. Supp. at 638-39.

100. See *Lorillard*, 434 U.S. 575; *State ex rel. Harp v. Vanderburgh Cir. Ct.*, 227 Ind. 353, 85 N.E.2d 254 (1949); *Peisker v. Chavez*, 46 N.M. 159, 123 P.2d 726 (1942).

101. See Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503, 531 (1973).

102. See, e.g., *Culpepper*, 296 F. Supp. at 1239-40.

103. *Id.*

104. Although the courts have had problems with this lack of specific language, they should not. The nature of a remedy cannot be effected by the legislature's characterization of it. *Dairy Queen v. Wood*, 369 U.S. 469. This point reflects the ambiguity about whether remedies are legal because they are called legal or because of some inherent quality. See *supra* note 35.

105. See *Lorillard*, 434 U.S. at 584.

106. 29 U.S.C. §§ 621-634 (1988).

because Title VII did not.¹⁰⁷ Comparing the ADEA to Title VII, the Court stressed that the ADEA's enforcement section¹⁰⁸ specifically provides for legal relief while Title VII's enforcement section¹⁰⁹ does not. The purpose of this dictum, the only Supreme Court pronouncement on this aspect of the construction of Title VII, was to distinguish Title VII (which the Court said did not have a jury trial right) from the ADEA (which the Court decided did have a jury trial right).¹¹⁰

Although this holding supports the view that the statute's failure to mention legal relief means none is available, that is not the only logical conclusion. An alternative view is that the absence of express language granting legal relief does not mean that legal relief is denied. This view is especially persuasive in light of this issue's constitutional implications.¹¹¹ Because Title VII does not specifically mention equitable relief until the phrase "or any other equitable relief,"¹¹² it hardly follows that the statute grants only equitable relief.

Ejusdem Generis

The third ambiguity is the phrase "or any other equitable relief." It immediately follows a listing of available remedies. This list includes "reinstatement or hiring ..., with or without back pay...."¹¹³ Although none have specifically pointed to this phrase, the courts have plausibly argued that all of the previously listed remedies are equitable.¹¹⁴ This argument is based on the rule that a qualifying phrase following a listing of specific items refers to all of the listed items.¹¹⁵ This rule supports the idea that the phrase "or any other equitable relief" converts back pay into equitable relief.

An alternative explanation exists, however. The list preceding the general phrase contains three terms. The first two are equitable¹¹⁶ but the third¹¹⁷ is, arguably, legal.¹¹⁸ If back pay is a legal remedy, the only way to avoid doing damage to the sentence's meaning¹¹⁹ is to construe the referential phrase as referring back to the first two remedies. The phrase, therefore, would refer only to the equitable remedies and would not convert back pay into an equitable remedy.¹²⁰

107. *Lorillard*, 434 U.S. at 583-84.

108. 29 U.S.C. § 626(b) (1988).

109. 42 U.S.C. § 2000e-5(g) (1988).

110. *Lorillard*, 434 U.S. 583-84.

111. See *supra* text accompanying notes 31-58. If a type of relief, back pay in this case, is legal, then Congress cannot deny a party a jury trial by simply omitting the words "legal relief" from the statute.

112. 42 U.S.C. § 2000e-5(g) (1988).

113. *Id.*

114. See, e.g., *Johnson*, 417 F.2d at 1125.

115. See N. SINGER, *supra* note 9, § 47.17.

116. The statute's language provides for "reinstatement or hiring...." 42 U.S.C. § 2000e-5(g) (1988).

117. The statute continues "with or without backpay...." *Id.*

118. See *infra* text accompanying notes 138-58.

119. See *supra* note 56.

120. Professor Dobbs argues that a contrary reading of the statute, that all of the remedies preceding the phrase "or any other equitable relief" are equitable, would mean that Congress intended to treat money claims as equitable. This raises a constitutional issue. Constitutional issues are usually avoided if possible by statutory construction unless the contrary construction is

Statutes Similar in Nature Should Not Have Conflicting Constructions

Other statutory construction rules have appropriate applications to this statute. In particular is the rule that courts should interpret statutes that are similar in nature so as not to conflict with one another. A number of statutes similar to Title VII specifically provide for jury trials.¹²¹ Opponents of a jury trial right under Title VII, therefore, argue that because Congress neglected to specifically grant a jury trial in Title VII civil actions after specifically mentioning it in these other statutes, it meant to withhold the right.¹²²

Although this reasoning might work in some circumstances, in this instance it is faulty.¹²³ The congressional grant of jury trials in those similar statutes¹²⁴ can be explained on other than the implied grounds. Juries are constitutionally required in criminal contempt actions. When the government waives part of its sovereign immunity to tort liability, it may grant or deny jury trials as it wishes because the right to sue the government did not exist before the statute. Suits by seamen for injuries received at sea are normally admiralty actions, which are exempt from the seventh amendment's requirement. In other words, these statutes' specific grants of jury trials do not reflect on the failure to include such language in the provisions for Title VII civil actions.

In Pari Materia

On the other hand, the Supreme Court's interpretation of other general statutes supports finding a right to a jury trial in a Title VII action. The Supreme Court has granted the right to jury trials under certain civil rights statutes that do not specifically mention jury trials.¹²⁵ Section 1983¹²⁶ actions, for example, are triable to a jury. This action allows a plaintiff to recover for job loss resulting from a civil rights deprivation effected under color of state law.¹²⁷ The same facts that would allow a plaintiff to file a section 1983 claim could also support a Title VII action.

The counter argument is that section 1983 actions based on employment discrimination and triable to a jury specifically seek money damages in addition to back pay. In other words, the argument goes, these actions resemble suits in tort. This argument actually supports granting jury trials in Title VII actions. The reason is that back pay is a money damages claim no different from any

compelling. But, such a construction is not at all compelling in this case. D. DOBBS, *supra* note 36, § 6.10(5) (Supp. 1989).

121. See, e.g., Comment, *supra* note 7, at 170; 42 U.S.C. § 2000(h) (1988) (criminal contempt under Title VII); 28 U.S.C. § 959(a) (1988) (suits against trustees, receivers, or managers); 46 U.S.C. app. § 688 (1988) (actions by seamen for injury or death under the Jones Act, 38 Stat. 1164 (1915)).

122. See Comment, *supra* note 7, at 170.

123. See *supra* note 50.

124. See *supra* note 63.

125. *Lorillard*, 434 U.S. 575 (construing the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634).

126. 42 U.S.C. § 1983 (1988).

127. *Id.*

other claim for money damages and should be treated similarly. In other words, it is a legal remedy.¹²⁸

A recent Supreme Court civil rights opinion provides additional support for this position. In *Patterson v. McLean Credit Union*,¹²⁹ the Court eliminated racial harassment of employees as a cause of action under 42 U.S.C. § 1981. The Court felt justified in doing so partly because Title VII also offered a remedy for this complaint.¹³⁰

According to the *Beesley* court,¹³¹ after *Patterson*, a jury trial is included among the Title VII remedies available to plaintiffs claiming racially motivated employment discrimination.¹³² The *Beesley* court reasoned that the Supreme Court, in eliminating racial harassment from section 1981, argued that Title VII provides adequate remedies for the same complaint.¹³³ Title VII, therefore, must also provide a jury trial in order to make its remedy equal to the old section 1981 remedy.

Results of Statutory Construction

Considered as a whole, Title VII supports the argument that 42 U.S.C. § 2000e-5(g) allows jury trials. The Supreme Court has declared Title VII's purpose is to make whole those who have been the victims of unlawful job discrimination.¹³⁴ The Court has also written that "Title VII deals with legal injuries of an economic character...."¹³⁵ Because jury trials are constitutionally authorized in legal causes of action,¹³⁶ these statements buttress the claim that jury trials are available in Title VII civil actions.

This bifurcated¹³⁷ statutory analysis demonstrates the plausibility of the argument that Title VII authorizes jury trials. The search for congressional intent yielded conflicting results.¹³⁸ On the other hand, the statutory construction analysis supported the jury trial argument. In none of the cases denying jury trials to Title VII litigants did the courts analyze the statute's language in detail. Furthermore, these courts eschewed other appropriate tools of statutory interpretation, such as comparing Title VII to other civil rights statutes and examining the statute's purpose as a whole. This statutory analysis suggests that there is no principled basis for denying jury trials in Title VII civil actions.

128. See *supra* notes 52-55 and accompanying text.

129. 491 U.S. 164 (1989).

130. *Id.* at 180.

131. 723 F. Supp. 635.

132. "Thus, after *Patterson* there is no longer any question but that Title VII provides monetary relief for *harassment* based on race/sex. Plaintiffs, therefore, no longer need to tack on a § 1981 claim in order to obtain a jury trial." *Id.* at 646 (emphasis in original).

133. *Id.*

134. *Albemarle Paper*, 422 U.S. at 418.

135. *Id.*

136. See *infra* pages 671-74.

137. Statutory interpretation should involve construction of the statute's language followed (if needed) by a search for the enacting legislature's intent. See *supra* text accompanying notes 9-11.

138. See *supra* pages 665-66.

CONSTITUTIONAL ANALYSIS

The statutory analysis did not yield a clear expression of Congress' intent on the jury trial question. The inquiry would have ended had the statutory analysis uncovered an express grant of a jury trial. A constitutional analysis would follow if the statute clearly denied jury trials or was silent or ambiguous on the question. Although the statutory construction analysis provides evidence supporting the presence of a jury trial right, that evidence is not unambiguous. To fully investigate the issue, therefore, this Note will explore whether the seventh amendment to the United States Constitution requires a jury trial in Title VII civil actions.

Title VII and the Seventh Amendment

In denying jury trials in Title VII civil actions, some courts have held that back pay is an equitable remedy akin to restitution.¹³⁹ Another argument used has been that back pay, though legal, is incidental to the generally equitable nature of the statute.¹⁴⁰ Courts have also advanced the justification that the right involved is statutory and/or public rather than derived from common law.¹⁴¹ Finally, courts have held that back pay is an equitable remedy because the court has discretion to award it.¹⁴² This section begins with the argument that, according to Supreme Court rulings and common law, back pay is a legal remedy.¹⁴³

The Legal Nature of Back Pay

*Dairy Queen*¹⁴⁴ indicates that whenever a remedy seeks monetary relief, that remedy is legal.¹⁴⁵ Back pay is indisputably a form of monetary relief. In its 1978 interpretation of the Age Discrimination in Employment Act of 1967 (ADEA),¹⁴⁶ the Supreme Court stated that, since it concerned monetary relief, the back pay award authorized in the statute was a legal remedy.¹⁴⁷ The Court reasserted this position more recently. In *Tull v. United States*¹⁴⁸ and in *Granfinanciera, S.A. v. Nordberg*,¹⁴⁹ the Court reaffirmed that the seventh amendment guarantees jury trials when plaintiffs seek remedies involving money.

139. See, e.g., *Culpepper*, 296 F. Supp. at 1241.

140. *Swofford v. B. & W. Inc.*, 336 F.2d 406 (5th Cir. 1964). The court denied that *Dairy Queen v. Wood* "converts any money request into a money claim triable by jury." *Id.* at 414 (emphasis in original).

141. See, e.g., *Culpepper*, 296 F. Supp. at 1241.

142. *Id.*

143. *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988), adds a new dimension to the debate. The court held that an employee could sue his former employer under Title VII for damages resulting from the employer's post-termination retaliatory conduct. *Bailey's* significance lies in the fact that it did not involve back pay. It involved monetary compensation for the plaintiff's loss caused by his being blacklisted, a legal claim. The court found that Title VII provides a remedy for such a claim.

144. 369 U.S. 469.

145. *Id.* at 476. See also *supra* pages 661-62.

146. 29 U.S.C. §§ 621-634 (1988).

147. *Lorillard*, 434 U.S. at 583 & n.11.

148. 481 U.S. 412.

149. 492 U.S. 33.

The award of back pay is also compatible with other characteristics of legal remedies. The Supreme Court has described back pay as economic in nature,¹⁵⁰ as a "make-whole" remedy,¹⁵¹ and as designed (along with Title VII generally) to put the victim of unlawful job discrimination back in the position he or she would have been in but for the discrimination.¹⁵² These dicta all arose in the context of cases litigating the jury trial issue in related civil rights legislation.¹⁵³

These other enforcement provisions are similar to Title VII's, although none is identical. For instance, the ADEA's enforcement provision provides that "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate."¹⁵⁴ Title VII's enforcement provision provides that "the court ... may order such affirmative action as may be appropriate."¹⁵⁵ Title VIII's enforcement provision provides that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction ... and may award ... actual damages."¹⁵⁶ Furthermore, each statute suggests the same list of "appropriate" relief: back pay, hiring, and reinstatement.¹⁵⁷ The important point is that the Supreme Court has addressed the jury trial issue carefully in these other contexts and the rationale for allowing a jury trial applies equally well to Title VII.¹⁵⁸

Further support for the idea of back pay as monetary damages comes from the statute itself, which contains a clause establishing a duty to mitigate the back pay liability.¹⁵⁹ This language is very similar to a plaintiff's duty to mitigate damages in a wrongful discharge suit, a legal action. The logical conclusion is that back pay is damages.

Back Pay Is Not Restitution, Incidental to the Equitable Remedies, or Discretionary

Some courts have argued that back pay is really restitution, a traditional equitable remedy. This argument likens back pay to the chancellor's order

150. *Lorillard*, 434 U.S. at 583; *Albermarle Paper*, 422 U.S. at 418-19. See also *supra* note 55.

151. *Albermarle Paper*, 422 U.S. at 419.

152. *Id.* at 418-19. See also *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990). This was another case affected by *Patterson*. The court vacated punitive damages awarded under section 1981 but "affirm[ed] the award of \$10,000 in compensatory damages under [Title VII]." 891 F.2d at 1535-36.

153. See *Lorillard*, 434 U.S. 575 (ADEA private civil action); *Albermarle Paper*, 422 U.S. 405 (discussion of back pay remedy in Title VII action); *Curtis*, 415 U.S. 189 (Title VIII of the Civil Rights Act of 1968).

154. 29 U.S.C. § 626(b) (1988).

155. 42 U.S.C. § 2000e-5(g) (1988).

156. 42 U.S.C. § 3612 (1988). See also *Curtis*, 415 U.S. at 189-90.

157. See Comment, *Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEX. L. REV. 483, 506 (1975).

158. Consider *Lorillard v. Pons*, 434 U.S. 575, where the Court distinguished Title VII from Title VIII on the jury issue by pointing out that Title VIII specifically mentioned "legal relief" while Title VII did not. *Id.* at 584. However, Congress cannot circumvent the reach of the seventh amendment simply by omitting some magic words from a statute.

159. 42 U.S.C. § 2000e-5(g) (1988). "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

requiring a defendant to disgorge profits illegally acquired.¹⁶⁰ Following this view, the *Beesley* court noted that back pay is more closely analogous to damages than restitution.¹⁶¹ Furthermore, it is hard to see how withholding wages from a discriminatee unjustly enriches the employer when the employer must hire someone else and pay them wages. Presumably, the amount of those wages roughly equals the amount of back pay sought. This will usually be the case in a Title VII action because it is based on discrimination, meaning the employer hired or promoted someone other than the plaintiff.¹⁶²

Some courts have also argued, in denying jury trials in Title VII civil actions, that the back pay remedy, although putatively legal in nature, is incidental to the other equitable remedies.¹⁶³ The Supreme Court has clearly rejected this argument.¹⁶⁴ Justice Black emphatically and unambiguously wrote that "the right to trial by jury may [not] be lost as to legal issues [when] those issues are characterized as 'incidental' to equitable issues."¹⁶⁵

Courts also have denied jury trials on the ground that the back pay award is discretionary. Support for this argument lies in the wording of the statute, the relevant part of which provides: "the court *may* ... [order relief] ... which *may* include ... back pay...."¹⁶⁶ Some courts have held that when there is discretion as to whether to apply a remedy, the task is inappropriate for the jury.¹⁶⁷

However, in *Albemarle Paper Co. v. Moody*,¹⁶⁸ a case involving the award of back pay in a Title VII action, the Supreme Court held that the courts do not have discretion to award back pay once the plaintiff proves damages.¹⁶⁹ The Court quoted Chief Justice Marshall to support the argument that the decision to award back pay is not unfettered.¹⁷⁰ Justice Marshall, writing for the Court, explained that the courts should exercise their judgment guided by

160. Such a characterization is necessary because restitution is based on the concept of preventing unjust enrichment. D. DOBBS, *supra* note 36, § 41.

161. *Beesley*, 723 F. Supp. at 644 ("Money recovery called 'damages' is generally based upon plaintiff's loss, while money recovery called restitution is based upon defendant's gain. Viewed in this light back pay is clearly a measure of defendant's loss and more akin to damages than it is to restitution.").

162. This example illustrates that back pay is not unjust enrichment. But, even if it is, it is still not an equitable remedy because of the method of enforcement. Restitution can be given in money or in specie. Restitution given in specie requires enforcement by injunction and is therefore equitable. *See supra* note 95 and accompanying text. If restitution is given in money, it is clearly a legal remedy. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). Calling it restitution does not make it equitable. The enforcement mechanism along with the nature of the remedy determines whether it is legal or equitable.

163. *See, e.g., Hayes*, 46 F.R.D. 49.

164. *Dairy Queen*, 369 U.S. at 470.

165. *Id.*

166. 42 U.S.C. § 2000e-5(g) (1988) (emphasis added).

167. *See, e.g., Tull*, 481 U.S. at 416-17, *reversing* 769 F.2d 192 (4th Cir. 1985). The Court rejected the lower court's conclusion that because the award of fines was discretionary, no jury was needed.

168. 422 U.S. 405.

169. *Id.* at 420-21.

170. "However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Id.* at 416 (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (No. 14,692(d)).

sound legal principles,¹⁷¹ that they must engage in a principled application of the standards involved,¹⁷² and that once unlawful discrimination is proven, back pay will be awarded except in rare circumstances.¹⁷³ The *Beesley* court relied on this reasoning for its finding that when the back pay award lost its discretionary nature after *Albemarle Paper Co.*, "the right to deny a jury trial also disappeared."¹⁷⁴

Even if that argument is not persuasive, an alternative rationale exists for granting jury trials in Title VII civil actions. The *Beesley* court found that *Tull*¹⁷⁵ provides a precedent for allowing juries to try cases involving discretion in the award of damages. The *Tull* Court held that although the relief sought was legal, the judge would assess the penalties after the jury's verdict on the liability issue.¹⁷⁶ The Court decided that the seventh amendment guaranteed a jury trial in the liability phase of a suit brought by the federal government under the Clean Water Act.¹⁷⁷ The Court, however, went on to hold that the amendment did not guarantee a jury trial in the penalty phase because the amount of the fine was within the discretion of the judge.¹⁷⁸

Patent infringement cases provide another example where a jury role is combined with judicial discretion. After the jury determines liability and the amount of actual damages, the judge has discretion to assess punitive damages up to triple the amount of the actual damages.¹⁷⁹ In personal injury liability actions the jury is allowed to decide liability and the amount of punitive damages, which is highly speculative.

Back Pay Is a Common Law Right

As discussed above, the seventh amendment has no application to rights that can be classified as statutory.¹⁸⁰ Statutory rights that more or less codify old common law causes of action, however, are within the purview of the seventh amendment.¹⁸¹ In *Beesley*,¹⁸² the court followed the reasoning of *Curtis*¹⁸³ regarding this issue.¹⁸⁴ For example, a Title VII action seeking back pay can be analogized to a tort suit for wrongful discharge,¹⁸⁵ defamation,¹⁸⁶ or

171. *Id.*

172. *Id.* at 417.

173. *Id.* at 421.

174. *Beesley*, 723 F. Supp. at 645 (emphasis in original).

175. 481 U.S. 412.

176. *Id.* at 427.

177. 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

178. *Tull*, 481 U.S. at 425-27.

179. See Comment, *supra* note 101, at 523-24.

180. See *supra* note 50 and accompanying text.

181. *Curtis*, 415 U.S. at 194.

182. 723 F. Supp. 635.

183. 415 U.S. 189.

184. See *Beesley*, 723 F. Supp. at 643.

185. See, e.g., *Broomfield v. Lundell*, 159 Ariz. 349, 767 P.2d 697 (Ct. App. 1989), and cases cited. The point of *Broomfield* is that a Title VII complaint can be identical to a common law complaint sounding in tort. The *Broomfield* court, construing a statute identical in purpose and content to the Civil Rights Act of 1964, held that the common law action predated the statutory cause. *Id.* at 356-57, 767 P.2d at 704-05.

186. *Curtis*, 415 U.S. at 195 n.10 (racial discrimination is analogous to defamation or intentional infliction of emotional distress).

intentional infliction of emotional distress.¹⁸⁷ The right to a jury trial, therefore, should automatically adhere to Title VII civil actions.

POLICY REASONS BEHIND THE DENIAL OF JURY TRIALS

The preceding sections of this Note show that a persuasive argument exists that the seventh amendment guarantees a jury trial in Title VII civil actions. Certainly, the issue deserves more careful treatment than it has received to date. An implicit policy consideration behind the many stated reasons courts advanced for denying jury trials enabled those courts to indulge in sloppy analysis.

The federal courts were afraid that local racial prejudice would prevent black plaintiffs from prevailing in Title VII actions based on racially motivated job discrimination.¹⁸⁸ Some courts stated that a jury would "[t]hwart the will of Congress and ... frustrate the purposes of the legislation."¹⁸⁹ Others wrote that juries would delay the redress of civil rights violations.¹⁹⁰

Although not every court expressed these concerns, those that did were among the first to address the jury trial issue. This evidence, especially when considered in light of the other facts about the Title VII suits in which juries were requested, suggests that this policy underlay every court's denial of a jury trial in early Title VII actions. A contemporaneous accounting¹⁹¹ discovered that in virtually every Title VII case in which a jury was requested the venue was in the South, the defendant requested the jury, and a black plaintiff was alleging racially motivated job discrimination.¹⁹²

There are counters to this jury bias argument. For one thing, the argument is undemocratic.¹⁹³ At any rate, various procedural devices are available to deal with this objection.¹⁹⁴ These include change of venue, the court's wide discretion in conducting *voir dire*, and the judge's ability to grant additional peremptory challenges to either party.¹⁹⁵ In addition, the judge may grant either a judgment notwithstanding the verdict or a new trial to offset any jury bias.¹⁹⁶

Policy Reasons Supporting a Jury Trial Right in Title VII Actions

In *Beesley*, the United States District Court for the Northern District of Alabama recently commented on the policy reasons for denying jury trials in

187. *Id.*

188. *Beesley v. Hartford Fire Ins. Co.*, 717 F. Supp. 781, 782 (N.D. Ala. 1989) (The federal judiciary feared that southern juries would not do justice in Title VII cases.).

189. *Hayes*, 46 F.R.D. at 53. *See also* Comment, *supra* note 101, at 538.

190. *See* Comment, *supra* note 101, at 538.

191. Comment, *supra* note 7, at 167.

192. *Id.*

193. Consistent with the democratic principles upon which this country was founded is the idea that only a jury of one's peers can deprive one of life, liberty, or property. There is a decidedly undemocratic or anti-democratic shading to any attempt to depart from that practice. *See* Comment, *supra* note 101, at 538.

194. *Id.*

195. *Id.*

196. *Id.*

Title VII actions.¹⁹⁷ The court wrote that the federal judiciary in the 1960's held the opinion that white "Southern juries would not do their duty."¹⁹⁸ Compounding this problem was the fact that "in 1964, the jury wheel in the [South] ... did not accurately reflect the racial and gender makeup"¹⁹⁹ of a particular district.

The conclusion that racial prejudice informed the decision on jury trials can also be inferred from statistical evidence. As noted above,²⁰⁰ the plaintiff alleging racial discrimination in early Title VII actions did not want a jury. But, Judge Acker noted that the District Court for the Northern District of Alabama had, as of September 19, 1989, twenty-three pending Title VII cases in which the *plaintiff* requested a jury trial.²⁰¹ He observed that in the 1960's employers sought juries and employees avoided them.²⁰² The trend is now in the opposite direction. Employees want juries and employers do not.²⁰³ The reason for this turnaround is that the jury selection process is now much more fair and representative.²⁰⁴ The only policy concern left for the judiciary is to protect employers from unconscionably large awards.²⁰⁵

On the other hand, a major policy concern exists that argues for a jury trial right in Title VII cases. The Supreme Court in *Patterson*²⁰⁶ eliminated a claim of racial discrimination from a section 1981 cause of action.²⁰⁷ In a case arising after *Beesley*,²⁰⁸ the court reasoned that *Patterson* creates a potential equal protection issue.

The plaintiff in *Walton v. Cowin Equipment Co.*, a black female, alleged racial discrimination and sued under section 1981 and Title VII.²⁰⁹ As the court noted, she could have easily claimed sexual discrimination and invoked the Equal Pay Act.²¹⁰ Had she done so, she would have been entitled to a jury trial.²¹¹ "To deny her a jury trial because she is black instead of being simply female, presents a Fifth Amendment 'equal protection' question of significant proportion."²¹²

197. 717 F. Supp. at 782.

198. *Id.*

199. *Id.*

200. *See supra* text accompanying notes 194-98.

201. *Beesley*, 723 F. Supp. at 637.

202. *Beesley*, 717 F. Supp. at 782.

203. *Id.* Before *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), plaintiffs complaining of racially motivated job discrimination filed suit under both Title VII and 42 U.S.C. § 1981 in order to get a jury trial.

204. *Beesley*, 717 F. Supp. at 782.

205. *Id.*

206. 491 U.S. 164.

207. *Id.* at 176.

208. *Walton v. Cowin Equip. Co.*, 733 F. Supp. 327 (N.D. Ala. 1990), *rev'd and vacated*, 930 F.2d 924 (11th Cir. 1991). Although it was reversed, the district court's discussion of the issue remains important.

209. *Id.*

210. *Id.* at 335-36 (discussing the Equal Pay Act, 29 U.S.C. § 206).

211. *Id.*

212. *Id.* at 336. If jury trials are available for Title VII actions involving racial, sexual, and age discrimination, there is little justification left for denying jury trials in any other Title VII action.

The other major reason given by courts for refusing a jury trial, claiming a need for speedy adjudication, is similarly insupportable. Courts circumvented the jury bias issue by claiming instead that juries delayed adjudication in Title VII cases.²¹³ Although jury trials do delay the redress of civil rights violations, only actions seeking back pay would be affected.²¹⁴ Plaintiffs seeking hiring, reinstatement, or promotion would be suing in equity, with no jury guarantee. And, because preliminary injunctions are available even in damage actions, plaintiffs seeking back pay can receive immediate, even if temporary, relief.²¹⁵

The foregoing are valid and worthy reasons for allowing jury trials in Title VII civil actions. The best reason, however, is that the seventh amendment to the Constitution requires jury trials. What the statute says or does not say is largely irrelevant. In fact, if the statute specifically denied the right to a jury trial, this Note's reasoning demonstrates that it would be unconstitutional.

CONCLUSION

Supreme Court precedent in the seventh amendment area forces one to conclude that a jury trial right exists in Title VII civil actions. The Supreme Court's analysis, developed over the last thirty years, demonstrates that an employment discrimination action brought under Title VII is a legal action.

The employment discrimination action is legal in nature. It is analogous to a common law suit in tort for wrongful discharge, defamation, or intentional infliction of emotional distress.²¹⁶ The nature of the remedy is also legal. Back pay is a compensatory damages award, the prototypical legal remedy.²¹⁷ It is distinguishable from the equitable remedy of disgorgement of unjust enrichment.²¹⁸

For policy reasons more moral and political than legal in nature, the first courts to rule on this issue decided that the seventh amendment did not apply. Although such an approach might be justifiable when the legal principles involved are ambiguous, it is error when the applicable rule is clear. Not only is the rule clear in this instance, but the very principles used to deny jury trials now militate in favor of them.

Parties to a civil action brought under Title VII of the Civil Rights Act of 1964²¹⁹ have a right to a jury trial. There is credible, yet not undisputed, evidence that the statute itself grants such a right. It seems clear, however, that the seventh amendment to the United States Constitution grants a right to a jury trial in a Title VII action.

213. See Comment, *supra* note 101, at 538.

214. This is so because back pay is the only legal remedy involved.

215. For instance, if a plaintiff sought back pay and reinstatement, a preliminary injunction could order reinstatement immediately.

216. See *supra* text accompanying notes 185-87.

217. See *supra* text accompanying notes 145-65.

218. See *supra* notes 161-62 and accompanying text.

219. 42 U.S.C. § 2000e (1988).

