

NOTES

Nullifying the Constitution: Federal Asbestos Tort Reform and the Abrogation of Seventh Amendment Rights

The crisis in asbestos personal injury litigation is well documented.¹ In the 1960s, litigants inundated the civil system with claims that became increasingly panoptic in response to a growing rate of insolvent defendants.² It was not long before almost every major industry felt the effect of this burgeoning litigation and bankruptcy rates began to soar.³ Seeking to control the impending ramifications of an overburdened court system, Congress proposed the Fairness in Asbestos Injury Resolution (FAIR) Act of 2005.⁴ FAIR expedites recovery to certain classes of asbestos victims and rids civil dockets of asbestos claims, but in doing so, it also contravenes the purpose of the Seventh Amendment.⁵

1. See S. REP. NO. 108-118, at Part IV.B (2003) (detailing overburdened court system). See generally STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION (2005) [hereinafter RAND REPORT] (discussing changing dynamic of asbestos litigation over time). The ubiquitous use of asbestos products increased the volume of injuries. *Id.*; Matthew J. Chase, *Fairness in Asbestos Injury Resolution Act of 2003: Saving the "Elephantine Mass"*, 79 ST. JOHN'S L. REV. 195, 196 (2003) (detailing large quantity of claims within courts); Patrick M. Hanlon, *Asbestos Legislation: Federal and State*, A.L.I., Nov. 13-14, 2003 at 549, 552, available at SJ031 ALI-ABA 549, 552 (Westlaw) [hereinafter *Asbestos Legislation*] (providing statistics of claims currently pending).

2. See S. REP. NO. 108-118, at Pt. IV (discussing overburdened court dockets). The lack of solvent defendants, arbitrary compensation, and lawsuits by parties not sick are reasons to furnish victims with reliable means of compensation. *Id.*; see also Chase, *supra* note 1, at 195-97 (outlining devastating effect of asbestos litigation on industry).

3. See S. REP. NO. 108-118, at Pt. IV (claiming asbestos litigation responsible for bankruptcy of close to seventy corporations).

4. FAIR Act of 2005, S. 852, 109th Cong. (2005) (proposing act as way to rectify growth in asbestos claims).

5. See S. REP. NO. 108-118, at Pts. V-VI (explaining claim filing process under Act); see also *Immigration and Naturalization Service (INS) v. Chadha*, 462 U.S. 919, 944 (1983) (prioritizing constitutional rights over convenience and efficiency). The Court articulated "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944; see also *Curtis v. Loether*, 415 U.S. 189, 198 (1974) (declaring inconveniences and inefficiencies do not overcome Seventh Amendment guarantees).

I. INTRODUCTION

The need for asbestos-related legislative action is undisputed.⁶ Over 700,000 asbestos claims have already been filed with little sign of abatement.⁷ At present, the almost 300,000 claims before the courts imperil the system's ability to provide victims with timely relief, and inadequate compensation is all but certain with over seventy defendant corporations now in bankruptcy.⁸ Such discouraging developments led the United States Supreme Court to push for a national alternate dispute resolution forum to assist with the overwhelming asbestos caseload, often referred to as an "elephantine mass."⁹

Congress responded with an amended form of the 2003 FAIR Act, proposed by Senator Patrick Leahy.¹⁰ The bill is novel in that it completely preempts personal injury tort claims involving asbestos related injuries.¹¹ Claimants seeking to recover must file with an administrative bureaucracy, established solely to assess and distribute damages.¹² This administrative body serves as trustee for a national trust fund financed by asbestos defendants through annual payments based on income and liability percentages.¹³ In order to recover,

6. See S. REP. NO. 108-118, at Pt. IV (outlining need for legislation); Victor E. Schwartz et al., *Congress Should Act to Resolve the National Asbestos Crisis: The Basis in Law and Public Policy for Meaningful Progress*, 44 S. TEX. L. REV. 839, 859-61 (2003) (detailing asbestos lawsuit statistics).

7. See *The Fairness in Asbestos Injury Resolution Act of 2005: Hearing on S.852 Before Senate Judiciary Committee on Federal Asbestos Compensation Legislation*, 109th Cong. (2005) (statement of Mr. Craig Berrington, Gen. Counsel American Ins. Assoc.), available at 2005 WL 61512 (highlighting more claims filed in 2003—over 100,000—than any previous year); see also 60 AM. JUR. TRIALS *Asbestos Injury Litigation* § 73 (2005) (discussing asbestos exposure to American workers). An estimated 733,000 structures were exposed to asbestos, or approximately twenty percent of all U.S. public and commercial buildings. 60 AM. JUR. TRIALS *Asbestos Injury Litigation*, § 1.

8. See S. REP. NO. 108-118, at Pt. IV.D (2003) (detailing effect on economy); Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 254-62 (2005) (illustrating asbestos litigation epidemic); Chase, *supra* note 1, at 195-97 (assessing litigation crisis).

9. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) (acknowledging nationwide administrative claims scheme as reasonable solution to helping asbestos victims); see also *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 140 (2003) (agreeing that legislation provides answer to crisis as suggested in *Ortiz*); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (reiterating *Amchem* Court's proposal for national legislation); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS CASES AND MATERIALS 1254-60 (10th ed. 2000) (discussing no-fault compensation schemes as potential future of tort law); Francis E. McGovern, *Asbestos Litigation I: A Defined Contribution Plan*, 71 TENN. L. REV. 155, 158-60 (2003) (proposing potential legislation to cure asbestos crisis).

10. See FAIR Act of 2005, S. 852, 109th Cong. (2005) (depicting history of Act); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. § 40101 (2000)) [hereinafter 9/11 Bill] (exemplifying recent legislation passed in response to nationwide pressure).

11. See S. REP. NO. 108-118, at Pt. V (explaining claims process under proposed legislation); see also Hanlon, *Asbestos Legislation*, *supra* note 1, at 556 (indicating claims process under S. 1125 replaces personal tort claims in state and federal courts). See generally 60 AM. JUR. TRIALS *Asbestos Injury Litigation*, § 73 (2005) (detailing components of asbestos personal injury suit). Under the no-fault system, the FAIR Act replaces a plaintiff's ability to demonstrate causation, among other issues. *Id.*; Mark A. Hofman, *Asbestos Trust Fund Draws Insurer Fire*, BUS. INS., June 6, 2005, at 3, available at 2005 WLNR 9097769, (explaining defendants' need for preempted claims).

12. See S. REP. NO. 108-118, at Pt. V.A-C (describing how proposed legislation functions).

13. See S. REP. NO. 108-118, at Pt. V.A (detailing application of trust fund concept). Defendants are

claimants must satisfy certain medical criteria, and damages are awarded or limited according to the illness incurred.¹⁴

The FAIR Act bandages a wounded area of civil jurisprudence.¹⁵ It provides expeditious relief to asbestos victims, guarantees funding in place of insolvent defendants, reduces liability for potential defendants, and allows insurance companies to accurately assess the potential liability within an industry.¹⁶ These remedies are bittersweet, however, because the assignment of asbestos claims to administrative agencies, where litigants are not afforded fact-finding juries, is incompatible with the Seventh Amendment.¹⁷

This Note will illustrate the applicability of the Seventh Amendment to personal injury asbestos tort actions.¹⁸ It will explain that this constitutional guarantee prohibits Congress from using non-Article III tribunals to abrogate jury trials in the context of asbestos tort cases.¹⁹ Moreover, this Note will prove that by undermining the Seventh Amendment, the FAIR Act sets alarming precedent and further threatens the role of the jury in American jurisprudence.²⁰

II. HISTORY

The Seventh Amendment was originally enacted to safeguard against

responsible for funding the trust. *Id.* at Pt. V.A.1. The amount owed per defendant is determined by classifications based on past and potential liability, within the market share. *Id.* A defendant's classification determines the annual percentage paid to the fund out of business profits. *Id.* The newly established agency is responsible for classifying defendants. *Id.* at Part V; *see also* Hanlon, *Asbestos Legislation*, *supra* note 1, at 562-65 (outlining trust funding process).

14. *See* S. REP. NO. 108-118, at Part V.C (2003) (explaining claims process). Claimant categories are based on alleged illnesses. *Id.* Potential recovery is contingent on what disease was contracted. *Id.* Additional variables, such as smoking, may reduce a claimant's award. *Id.*; *see also* Patrick M. Hanlon, *The Proposed Federal Asbestos Trust Fund*, A.L.I. Nov. 11-12, 2004 at 479, 489, *available at* SK040 ALI-ABA 479 (outlining damages payout structure). An individual with asbestosis can recover up to \$1.1 million, but if that individual is a smoker she can receive no more than \$600,000. Hanlon, *supra*, at 489 tbl. 1.

15. *See* S. REP. NO. 108-118, at Pts. I, IV.C (portraying crisis in field of asbestos litigation and detailing remedies under FAIR Act).

16. *See* S. REP. NO. 108-118, at Pt. I (announcing purpose of FAIR Act).

17. U.S. CONST. amend. VII (describing constitutionally guaranteed right of jury trial). The Seventh Amendment provides:

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

Id.

18. *See infra* Part. II.A (outlining history requirements for Seventh Amendment protections).

19. *See infra* Part III.C (arguing for constitutional protection in accordance with limits of Seventh Amendment).

20. *See* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989) (expressing concern over Congress's potential power to preempt jury fact-finding in non-Article III tribunals).

potential governmental oppression in the courtroom.²¹ Congress passed a constitutional amendment ensuring citizens' direct participation in the legal process as a means to keep tenured judges from becoming "kings of the courtroom."²² Indeed, the Supreme Court has emphatically maintained the amendment's importance, declaring that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."²³ The vagueness of the amendment's language, however, has forced courts to define the limits of its rights over the two centuries following its enactment.²⁴

The amendment explicitly guarantees a trial by jury only in "[s]uits at common law."²⁵ The initial question then is whether a suit is of this type.²⁶ In an attempt to clarify this language, the Court developed a historical test, categorizing suits by comparing them to actions brought in eighteenth century England.²⁷ Generally speaking, if the action is one that was brought at law, as opposed to in equity, the test is satisfied and the Seventh Amendment applies.²⁸

21. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670-71 (1973) (discussing antifederalists' arguments in favor of Seventh Amendment). The Seventh Amendment sought to provide "protection of debtor defendants[,] the frustration of unwise legislation . . . the vindication of the interests of private citizens in litigation with the government[,] and the protection of litigants against overbearing and oppressive judges." *Id.*

22. See Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1013 (1994) (discussing historical importance of Seventh Amendment); see also Amicus Curiae Brief of Ass'n of Trial Lawyers of America in Support of The Petitioners, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (No. 96-270) [hereinafter ATLA Brief] (detailing importance of Seventh Amendment in early American history); Wolfram, *supra* note 21, at 667-725 (outlining antifederalist concerns for needing protection against government in civil realm). Because federal judges enjoy tenure, use of juries in both civil and criminal actions should be afforded as an additional protection for accused citizens. Wolfram, *supra* note 21, at 667-725.

23. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (affirming importance of jury trials); see also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (quoting language in *Dimick* to justify granting certiorari after trial judge denied jury trial).

24. See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 186 (2000) (discussing lack of specificity in Seventh Amendment and need for development of comprehensive case law). The courts are often unclear and inconsistent in their Seventh Amendment analysis, but have finally settled on several undisputed principals. *Id.*

25. U.S. CONST. amend. VII.

26. See Moses, *supra* note 24, at 187-92 (discussing questions arising from language of the amendment). Moses describes the fundamental problems that arise from the ambiguous terminology "suits at common law." *Id.* The Court debated whether the language referred to common law in the United States or England, as well as the relevant time period. *Id.* The Court's decisions vary throughout history, highlighting the uncertainty of Seventh Amendment law. *Id.*

27. See Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 227-28 (2002) (explaining phases of test developed by Court).

28. See Wolfram, *supra* note 21, at 639-40 (articulating historical test used by Court); see also Morris S. Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 830 (1980) (referencing historical test); Paul K. Sun, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial by Jury*, 1988 DUKE L.J. 539, 541-42 (1988) (describing use of

Seventh Amendment analysis must also include a discussion of Article III and Congress's ability to remove causes of action to non-Article III tribunals.²⁹ During the 1970s and 1980s, the Supreme Court defined a "public rights" exception, which specifies instances when Congress may force parties into venues not ordained by Article III.³⁰ If Congress considers certain rights "public," then it may transfer jurisdiction without infringing on the Seventh Amendment.³¹

A. *The Evolution of the Historical Analysis*

When Congress enacted the Seventh Amendment, the nexus between English and American common law was strong.³² For the most part, immigrants modeled the civil jury system after English practices.³³ The individual colonies implemented the jury differently, thus providing little clarity with respect to those rights actually preserved in the Seventh

historical test).

29. See U.S. CONST. art. III, § 2, cl. 3 (outlining power of judiciary). The third clause of the second section of Article III provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Id. The language "trial of all crimes" is interpreted to grant a right to juries that parallels the Seventh Amendment. See Colleen P. Murphy, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459, 1460 (1986) (discussing relationship between Article III protection and Seventh Amendment protection).

30. See Sun, *supra* note 28, at 549-51 (summarizing emergence of public rights doctrine in late 20th Century). A line of cases, beginning in the late 1970s and continuing into the next decade, attempted to solidify the public rights doctrine in piecemeal. *Id.*; see also *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 857 (1986) (allowing Congress to grant jurisdiction to administrative agency over certain state law claims); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985) (finding Congress has power to require binding arbitration with limited judicial review); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (concluding Congress' transfer from Article III to non-Article III courts impermissible); *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n.*, 430 U.S. 442, 455 (1977) (allowing some cases to go to administrative agency rather than jury trial).

31. See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855) (outlining right of Congress to assign jurisdiction). Justice Curtis, for the majority, states

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id.

32. See THE FEDERALIST NO. 83 (Alexander Hamilton) (explaining some similarities between courts of England and United States).

33. Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 576 (2003) (discussing origins of American courts).

Amendment.³⁴ As a result, courts were unable to reference a unified practice from within the American system, leading them to reference the practices of the English courts for proper interpretation.³⁵

United States Supreme Court Justice Joseph Story was the first to plant the seeds of this test early in Seventh Amendment jurisprudence.³⁶ In his interpretation, “the common law here alluded to is not the common law of any individual state . . . but it is the common law of England, the grand reservoir of all our jurisprudence.”³⁷ Analogizing contemporary cases with eighteenth century English practice proved difficult because the English system bore inconsistencies demanding resolution.³⁸

The English system limited the jury to cases only at law, leaving cases in equity to operate absent jury oversight.³⁹ Equity courts were instituted to supplement courts of law by compensating litigants with flexible remedies and allowing for less structured proceedings.⁴⁰ A common law court was characterized by its ability to grant monetary damages, while a court of equity issued injunctions, granted restitution, reformed contracts, and provided numerous other non-legal remedies.⁴¹ Under Justice Story’s rubric, an

34. U.S. CONST. amend. VII (using vague terminology). The Amendment indicates the right to jury trial will be “preserved.” *Id.*; see also Sun, *supra* note 28, at 541 (illustrating fundamental analysis stemming from language in Seventh Amendment). The use of the word “preserved” is interpreted to refer to English law. See Sun, *supra* note 28, at 541; see also Wolfram, *supra* note 21, at 641, 679-704 (discussing how different states approach jury trials). Wolfram outlines the many different practices and interpretations of the right among the states prior to the ratification of the Seventh Amendment. Wolfram, *supra* note 21, at 641; see also THE FEDERALIST NO. 83 (Alexander Hamilton) (further discussing incongruity among state practices with regard to jury trials).

35. See *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (explaining incongruity among state practices as one reason to look at English law); Sun, *supra* note 28, at 541 (discussing *Wonson* language); Wolfram, *supra* note 21, at 641 (discussing early Seventh Amendment case law).

36. See *Wonson*, 28 F. Cas. at 750 (laying framework for historical test).

37. *Id.* (demonstrating need to reference English law).

38. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 289 (1966) (suggesting no consistent practice from English law to codify). Henderson discusses the inadequacy inherent in relying on the English historical model. *Id.* at 289-90. The enactment of the Seventh Amendment was more an adoption of general principles than specific practices in England. *Id.* at 290. *But cf.* Wolfram, *supra* note 21, at 640 (adhering to historical interpretation of Seventh Amendment). Wolfram restates the widely accepted principle that “[i]f a jury would have been impaneled in this kind of case in 1791 English practice, then generally a jury is required by the seventh amendment.” *Id.*

39. See Margreth Barrett, *The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims*, 39 HASTINGS L.J. 125, 130-31 (1987) (discussing application of historical analysis); Sward, *supra* note 33, at 581 (detailing state of English courts at time of Seventh Amendment’s enactment); James L. Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, The Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 468-69 (2004) (differentiating between legal claims and equitable or admiralty claims under English common law).

40. See William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert NonJury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981)(detailing English common-law system circa 1791); Sward, *supra* note 33, at 577 (outlining evolution of English equity courts).

41. See Sward, *supra* note 33, at 578 (providing examples of available equitable remedies and importance to English common law).

American needed to demonstrate a cause of action similar to an action brought in English common law courts to attain Seventh Amendment protection, as opposed to those brought in equity.⁴² Justice Story memorialized this analysis with his decision in *Parsons v. Bedford*,⁴³ when he remarked that the Seventh Amendment only applied to “suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.”⁴⁴

In 1935, the Court articulated the modern historical test in *Baltimore & Carolina Line, Inc. v. Redman*.⁴⁵ The *Redman* Court determined that “[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.”⁴⁶ It further held that the date of enactment was the measuring point for calculating that right.⁴⁷ While the *Redman* Court provided a stepping stone to later Seventh Amendment jurisprudence, much sculpting occurred in the latter half of the twentieth century.⁴⁸

The evolving nature of American jurisprudence required a pragmatic approach, making the Court acknowledge the applicability of Seventh Amendment rights to causes of action that were not specifically tried at law in England, but were similar enough in character to those that were.⁴⁹ For

42. See *Parsons v. Bedford*, 28 U.S. 433, 446 (1830) (emphasizing lack of juries for equitable cases); see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (reiterating modern historical test). The first prong of the modern historical test retains the analysis from centuries prior and asks whether a cause of action was tried at law at the time the Seventh Amendment was enacted. *Monterey*, 526 U.S. at 708; Sward, *supra* note 33, at 578-79 (pointing to limitations of English common-law juries). American cases similar to English jury cases were afforded Seventh Amendment protection, but were also limited by certain practices of English courts; the jury was limited only to a fact-finding role. Sward, *supra* note 33, at 578-79.

43. 28 U.S. 433 (1830).

44. See *Parsons*, 28 U.S. at 447 (attaching Seventh Amendment to common-law causes of action).

45. 295 U.S. 654 (1935). The test articulated in *Redman* formed the basis for the historical test used for decades. *Id.* See generally *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (applying modernized historical test); *Woodell v. Int'l Bhd. Of Elec. Workers, Local 71*, 502 U.S. 93 (1991) (using historical test derived from *Redman*); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990) (discussing historical analysis); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (Discussing analysis espoused in *Tull*); *Tull v. United States*, 481 U.S. 412 (1987) (refining *Redman* test).

46. *Redman*, 295 U.S. at 657 (referring to amendment's enactment in 1791).

47. See *Moses*, *supra* note 24, at 188 (discussing *Redman* decision). The *Redman* decision settled several key issues as it introduced the analysis that would perpetuate throughout future Seventh Amendment case law. *Id.*

48. See generally *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (refining historical test in patent suit); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (applying test to Bankruptcy Act); *Tull*, 481 U.S. 412 (applying historical test to Clean Water Act); *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (applying historical test to OSHC review).

49. See *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974) (indicating Seventh Amendment may attach to suits “unheard of at common law”); see also *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (applying Seventh Amendment to types of cases closely analogous to those at common law). The *Curtis* Court held that the Seventh Amendment jury “must be available if the action involves rights and remedies of the sort typically enforced in an action at law.” *Curtis*, 415 U.S. at 195; see also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476-

example, the Court in *Curtis v. Loether*⁵⁰ broadened the *Redman* Court's analysis by granting Seventh Amendment protection to claims that asserted "legal rights and remedies, enforceable for damages in the ordinary courts of law."⁵¹ The *Curtis* Court introduced functional criteria to distinguish cases at common law, extended Seventh Amendment protection to statutory causes of action, and incorporated the strong support of jury rights prevalent in contemporary Seventh Amendment cases.⁵² *Beacon Theatres, Inc. v. Westover*⁵³ presented an example of the favorable treatment afforded to juries.⁵⁴ The Court considered claims under antitrust law that incorporated both legal and equitable demands for relief.⁵⁵ The legal claims and the attached right to a jury took precedence over determination of the equitable claims, as the Court held that juries must first consider legal claims before the court moved on to equitable claims.⁵⁶

In the wake of *Curtis*, the Seventh Amendment applied to actions closely equivalent to suits at English common law, but the exact extent to which

77 (1962) (categorizing claim as "legal" by analogizing remedy sought to those available in English courts). The developing inference stressed how a cause of action need not be identical as long as certain tell-tale similarities, such as monetary damages, were present between a cause of action at English common law and the one at issue. *Dairy Queen*, 369 U.S. at 476-77.

50. 415 U.S. 189 (1974).

51. See *Curtis*, 415 U.S. at 193 (citing *Parsons v. Bedford*, 28 U.S. 433, 447 (1830)); see also *Pernell*, 416 U.S. at 375 (discussing expansion of historical test to include cases involving rights and remedies untraditionally enforced); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (focusing on relief sought and categorizing relief in the form of monetary damages as "legal"). There was no need to point to a specific cause of action at English common law to categorize the action. *Monterey*, 526 U.S. at 710. The *Monterey* Court stated, "[b]ecause Del Monte Dunes' statutory suit sounded in tort and sought legal relief, it was an action at law." *Id.* at 711; see also *Wright*, *supra* note 39, at 467 (depicting historical test to include cases at least analogous to claims at common law).

52. See *Moses*, *supra* note 24, at 193-94 (discussing refinements to historical test). *Curtis* extended the Seventh Amendment to statutory actions while reiterating the notion that the right applies to actions beyond those considered in eighteenth century England. *Id.*; see also *Sun*, *supra* note 28, at 544 (outlining line of cases that bolstered right to jury). See generally *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (reaffirming decision in *Beacon Theatres*); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (placing Seventh Amendment jury guarantee above equitable considerations when multiple claims presented).

53. 359 U.S. 500 (1959).

54. See generally *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (upholding jury right for petitioner's counterclaims).

55. See *Beacon Theatres*, 359 U.S. at 501 (outlining treble damages counter-claim issue considered by Court).

56. See *id.* at 510-11 (demonstrating strong preference to jury trial). The Court's language in *Beacon Theatres* suggested preserving Seventh Amendment guarantees should be paramount when it stated, "[t]his long-standing principle of equity dictates that only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id.*; see also *Ross v. Bernard*, 396 U.S. 531, 540 (1970) (expanding jury rights by extending jury to derivative action when corporate claim is legal). The *Ross* Court addressed the issue of merger between equity and legal courts and determined, as in *Beacon* and *Dairy Queen*, that asserting claims for equitable relief alongside legal claims did not vitiate a litigant's right to jury. *Ross*, 396 U.S. at 540; *Dairy Queen*, 369 U.S. at 470-73 (reiterating logic in *Beacon*); *Beacon*, 359 U.S. at 510-11 (discussing Seventh Amendment applicability in cases involving multiple issues).

actions needed to be similar became an issue in need of resolution.⁵⁷ In *Pernell v. Southall Realty*,⁵⁸ the Court demonstrated the historical test's flexibility when it analogized the statutory right of ejectment with the common-law right to recover property.⁵⁹ In its holding, the Court extended the civil jury to a much broader range of cases including claims never heard in English common law courts.⁶⁰ For example, the right to a civil jury attached when "the action involve[d] rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty."⁶¹

*Wooddell v. International Brotherhood of Electrical Workers, Local 71*⁶² affirmed the use of the historical test.⁶³ The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) afforded union members a statutory cause of action granting monetary damages against union officials and employers for violations of union agreements.⁶⁴ After filing claims in district court against their union for violating rights protected by the LMRDA, several members argued for their right to a jury trial under the Seventh Amendment.⁶⁵ The standard historical test was applied, first comparing this particular action with "actions brought in the courts of England prior to the merger of the courts of law and equity."⁶⁶ The Court then looked to whether the remedy pursued was legal or equitable in nature, ultimately stressing the greater importance of this second inquiry.⁶⁷

Wooddell illustrated the Court's shifting emphasis from a consideration of those actions occurring at law in England circa 1791 to an examination of the actual nature of the remedy sought in the modern proceeding.⁶⁸ The decision

57. See *Moses*, *supra* note 24, at 193-94 (discussing expansion of historical analysis). Once the Court recognized a right to jury in cases untouched by English common law but closely analogous to such actions, litigants began searching for analogues that fit their case in an attempt to wedge the Seventh Amendment into their present actions. *Id.*

58. 416 U.S. 363 (1974).

59. *Id.* at 375-76 (stating outcome of case). Although the statutory right of ejectment was not a suit heard at English common law, the Court reasoned it was similar to the right to recover possession of real property which was recognized under English law. *Id.*

60. *Id.* at 375 (reasoning ejectment suit similar to common law suit in England).

61. *Id.* (defining applicability of Seventh Amendment).

62. 502 U.S. 93 (1991).

63. *Id.* at 97 (using *Tull* to analyze whether case at bar gets jury); see also *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (explaining historical test).

64. See *Wooddell*, 502 U.S. at 95-96 (outlining facts of case).

65. See *id.* at 95-96 (discussing origin of complaint).

66. See *id.* at 97 (describing Court's analysis).

67. See *id.* (emphasizing inquiry into remedy sought). The Court stated that "[t]he second inquiry is the more important in our analysis." *Id.*; see also *Chaffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (placing greater importance on remedy sought rather than strict historical analysis).

68. See *Moses*, *supra* note 24, at 193-94 (detailing shifting analysis to broader historical test). *Moses* outlines the case law moving towards a more remedy-oriented historical test. *Id.*; see also *Tull v. United States*, 481 U.S. 412, 422 (1987) (discussing remedy aspect of analysis). But see *Terry*, 494 U.S. at 573-92 (plurality opinion) (demonstrating dissolution of previous unanimity with respect to historical analysis); *Moses*, *supra* note 24, at 195-97 (using *Terry* as example of Court fracturing on historical analysis' emphasis on

explained the widely acknowledged notion that “money damages [were] the traditional form of relief offered in the courts of law.”⁶⁹ In upholding the union members’ right to a civil jury, the Court stressed the resemblance of their action to personal injury actions.⁷⁰ This was dispositive because “[a] personal injury action is of course a prototypical example of an action at law, to which the Seventh Amendment applies.”⁷¹

In 1996, Justice Souter wrinkled the fabric of the historical test even further, amending it to allow judges sole judgment over patent infringement claims without yielding to Seventh Amendment oversight.⁷² The decision in *Markman v. Westview Instruments, Inc.*⁷³ left the first prong of the test intact by continuing to require consideration of whether a right existed under English common law at the time of enactment in 1791.⁷⁴ The second prong, however, was novel in its required consideration of whether the “particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”⁷⁵ Essentially, Justice Souter added an inquiry into “whether a particular issue occurring within a jury trial . . . is itself necessarily a jury issue.”⁷⁶ This strand of the test called for something the Court had not done in the past, allowing a judge to inquire into subsidiary issues within the cause of action itself to see whether each individual element had a history of being submitted to the jury.⁷⁷ The logical effect of this decision was to narrow the scope of the Seventh Amendment with regards to particular elements in an action.⁷⁸ Souter’s analysis, for example, required a litigant to demonstrate that every factual issue within her cause of action was traditionally heard by a jury.⁷⁹ Simply demonstrating that juries traditionally heard the damages aspect of a case would not be sufficient to encompass a jury right with respect to

remedy).

69. *Wooddell v. Int’l. Bhd. of Elec. Workers*, 502 U.S. 93, 97 (1991) (finding money damages legal).

70. *See id.* at 98 (analogizing claim to personal injury action).

71. *Id.* (discussing applicability of Seventh Amendment to personal injury suits).

72. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391 (1996) (stating holding of case).

73. 517 U.S. 370 (1996).

74. *Id.* at 376 (following traditional historical test); *see also Tull v. United States*, 481 U.S. 412, 417-18 (1987) (reiterating historical test).

75. *Markman*, 517 U.S. at 376 (injecting different language from established historical test analysis); *see also Wooddell v. Int’l Bhd. of Elec. Workers*, 502 U.S. 93, 97 (1991) (applying traditional historical test).

76. *Markman*, 517 U.S. at 377 (articulating second prong of analysis).

77. *See Paul F. Kirgis, The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1136-39 (2003) (analyzing decision in *Markman*); *Moses*, *supra* note 24, at 224-25 (explaining impact of *Markman* decision on historical test); *Schaffner*, *supra* note 27, at 241-46 (detailing *Markman* ruling).

78. *See Moses*, *supra* note 24, at 224-25 (discussing *Markman* Court’s treatment of subsidiary issues). If determination of fault, for example, was not a task that must fall to the jury to preserve the right, then the Seventh Amendment would not apply to this particular task. *Id.* at 226. The right to jury was extended to very specific tasks within a law suit rather than the whole suit itself. *Id.*

79. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996) (clarifying historical analysis). The Court explained that when analyzing whether an issue goes to the jury, the context of preserving the “right to a jury’s resolution of the ultimate dispute” must be examined. *Id.* at 377.

actual patent infringement because courts do not leave every fact up to the jury.⁸⁰ Scholars interpreted Souter's language to allow potential abrogation of Seventh Amendment rights for all issues that cannot be proven to be heard by juries in 1791, thereby threatening the availability of civil juries.⁸¹

Just two years after the *Markman* decision, the Court considered whether juries were entitled to assess damages in a copyright suit.⁸² Applying the historical test as articulated in *Markman*, the Court held that the right to a jury trial included the right to have juries determine the amount of statutory damages awarded to the copyright owner.⁸³ "It has long been recognized that 'by the law the jury are judges of the damages.'"⁸⁴ The Court previously arrived at a contrary conclusion in *Tull v. United States*,⁸⁵ when it determined there was no Seventh Amendment guarantee to have juries determine damages under the Clean Water Act.⁸⁶ In *Feltner*, the Court distinguished *Tull* by looking to historical evidence.⁸⁷ In *Tull*, little evidence existed that juries assessed monetary damages payable to the government, while in *Feltner*, there was ample evidence that juries set the amount of damages to successful plaintiffs in private tort actions.⁸⁸ Accordingly, the *Feltner* plaintiffs' damages were considered a subsidiary issue encompassing the right to a civil jury under the Seventh Amendment.⁸⁹

B. Carving Out an Exception: the "Public Rights Doctrine" and Article III Jurisprudence

The historical test helps when considering whether the right to a jury

80. See *Markman*, 517 U.S. at 378 (amending historical test). Only those fundamental issues are "placed beyond the reaches of the legislature." *Id.*; see also *Tull v. United States*, 481 U.S. 412, 426 (1987) (supporting *Markman* analysis); Moses, *supra* note 24, at 227-28 (commenting on *Markman* Court's language).

81. See Moses, *supra* note 24, at 228 (analyzing possible ramifications to *Markman* historical test). The language of the decision creates the possibility of more judges determining issues throughout a broad range of cases. *Id.*

82. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998) (outlining issues before Court).

83. See *id.* at 353 (expressing holding of case).

84. *Id.* at 353 (quoting Lord Townshend v. Hughes, (1677) 86 Eng. Rep. 994, 994-95); see also *Dimmick v. Schiedt*, 293 U.S. 474, 480 (1935) (stating damages assessment historically within province of the jury). *But cf.* *Tull v. United States*, 481 U.S. 412, 426 (1987) (holding damages not required to go to jury to preserve Seventh Amendment rights).

85. 481 U.S. 412 (1987).

86. See *id.* at 422 (stating holding of case); see also *Feltner*, 523 U.S. at 354 (distinguishing facts in *Tull* decision).

87. See *Feltner*, 523 U.S. at 355 (comparing current action with historical tradition). The Court articulated sufficient support in the historical record that issues of damages were traditionally submitted to juries. *Id.*

88. See *Feltner v. Columbia Pictures, Television, Inc.*, 523 U.S. 340, 355 (1998) (discussing historical record). The Court stated there "is overwhelming evidence that the consistent practice at common law was for juries to award damages." *Id.*; see also *Duke of York v. Pilkington*, (1790) 89 Eng. Rep. 918 (K.B.) (addressing jury awards in slander actions).

89. See *Feltner*, 523 U.S. at 355 (stating holding of case).

attaches, but satisfying this standard may not be enough if Congress is able to narrow the scope of that right.⁹⁰ As early as 1856, the Court formally recognized the legislative and executive branches' need to occasionally operate outside the structures of the Seventh Amendment.⁹¹ Articles I and II of the Constitution specifically outlined these branches of government and bestowed upon them broad powers to conduct their affairs.⁹² Article III further established the judicial branch and broadly defined its powers, granting jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made."⁹³ The Seventh Amendment jury guarantee applied, in some form, to certain actions within the purview of an Article III court.⁹⁴ A critical issue arises, however, when the legislative or executive branches exercise its broad grant of power and act to implement policies that in turn raise problems in need of a solution.⁹⁵ The question is whether Congress has the power to enact its own dispute resolution scheme to carry out objectives, or whether it must rely on Article III courts to do so.⁹⁶ The "Public Rights Doctrine" was developed as the working standard to determine whether Congress overstepped its bounds by usurping the role of the Article III courts.⁹⁷ The doctrine was derived from the theories of sovereign

90. See Murphy, *supra* note 29, at 1467 (discussing impact of Article III jurisprudence on Seventh Amendment jury); Sun, *supra* note 28, at 549-50 (illustrating emergence of public rights doctrine); G. Ray Warner, *Rotten to the "Core": An Essay on Juries, Jurisdiction and Granfinanciera*, 59 UMKC L. REV. 991, 1000 (1991) (highlighting overlap between Seventh Amendment case law and Article III public rights doctrine); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 679 (2001) (suggesting judicial deference to agencies).

91. See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855) (depicting public rights theory). The Court stated:

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id.

92. See U.S. CONST. art. I, § 8, cl. 8 (outlining power of legislature). "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*; U.S. CONST. art. II (outlining executive powers).

93. U.S. CONST. art. III, § 2, cl. 1 (outlining judicial power).

94. See *supra* notes 33-86 and accompanying text (outlining applicability of Seventh Amendment through historical test). Generally, Article III courts are bound by the Seventh Amendment when the cause of action at issue satisfies the historical analysis. *Id.*

95. See Klein, *supra* note 22, at 1023-24 (discussing legislature's need for dispute resolution forums).

96. See Klein, *supra* note 22, at 1023-24 (discussing relation between branches of government).

97. See Murphy, *supra* note 29, at 1467 (explaining purpose of public rights doctrine). The Court used the public rights doctrine, which differentiated statutory actions from suits at common law, to distinguish cases that were delegable to non-Article III tribunals. *Id.*; Sun, *supra* note 28, at 550 (detailing origins of public rights theory).

immunity and separation of powers.⁹⁸

*Murray v. Hoboken Land & Improvement Co.*⁹⁹ introduced the public rights distinction, when the Court considered whether the taking of real estate under a distress warrant was an exercise of judicial power improperly sanctioned by Congress.¹⁰⁰ Congress passed legislation enabling the Treasury Department to execute liens on property, and a bona fide purchaser bought the plaintiff's land pursuant to the statute.¹⁰¹ Although the Court recognized Congress' plenary regulatory powers and its sovereign immunity, the Court allowed the Judicial Act of issuing a warrant that seized land.¹⁰² The government could only be sued with its consent, allowing it the ability to condition any consent on the exclusion of certain procedural safeguards.¹⁰³

Suits against the government involved "public rights," and the Court granted Congress broad discretion with respect to these actions.¹⁰⁴ This concept implied that Congress may completely remove actions from the scope of Article III courts, at least in those actions where the federal government is a party.¹⁰⁵ If the government chose the terms under which it could be sued, then it stood to reason it could choose the forum as well.¹⁰⁶

In *Ex parte Bakelite Corp.*,¹⁰⁷ the Court upheld the enactment of "legislative courts" under the Tariff Act of 1922.¹⁰⁸ The Tariff Act was established to remedy unfair competition against domestic industry, enabling the President to

98. See Klein, *supra* note 22, at 1024 (articulating two competing theories for basis of public rights doctrine).

99. 59 U.S. 272 (1855).

100. See *id.* at 274-75 (stating issue before Court).

101. See *id.* (defining structure of Act in question).

102. See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281 (1855) (calling attention to powers Article I gives Congress). The Court referenced the legislature's power to "lay and collect taxes, duties, imposts, and excises." *Id.* The Court described the inherent difference between suits against an agent of government acting under governmental authority and suits involving private parties. *Id.* at 283-84. The United States "may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just." *Id.* at 283.

103. See *id.* at 283-84 (discussing limits of sovereign immunity in context of debtor case); see also Klein, *supra* note 22, at 1025 (explaining consequences of *Murray* decision). The advent of the public rights exception invited Congress to further delegate to tribunals that provided little procedural safeguards. Klein, *supra* note 22, at 1025.

104. See *Murray*, 59 U.S. at 284-85 (articulating public rights doctrine). "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . which Congress may or not bring within the cognizance of the courts . . . as it may deem proper." *Id.* at 284.

105. See *id.* at 284 (addressing implications arising out of Court's language); Klein, *supra* note 22, at 1025 (describing need to limit "public rights" to prevent loophole in Article III jurisdiction). Under the sovereign immunity rationale, "public rights" involved the government as a party to suit. Klein, *supra* note 22, at 1025. *But see* *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932) (suggesting doctrine encompasses actions beyond those in which government is party).

106. See *Murray*, 59 U.S. at 284 (describing leverage afforded government based on sovereign immunity). The government should logically be able to grant consent based upon the forum, in lieu of refusing suit altogether, because the power to avoid suit is so absolute. *Id.*

107. 279 U.S. 438 (1929).

108. See *id.* at 451 (discussing Congressional power to establish "legislative" courts).

levy taxes against articles associated with such unfair competition.¹⁰⁹ Congress directed all challenges to a commission which filed an opinion on the merits of the tariff, and the Court of Customs Appeals considered all appeals.¹¹⁰ *Bakelite* challenged the appellate court's jurisdiction because, as an Article III court, it had authority to hear cases and controversies but not executive actions, such as the tariffs.¹¹¹ The argument was unsuccessful, because Congress created the Court of Customs Appeals for a specific legislative purpose, making the court "legislative" in nature and not subject to the same standards as a constitutional court.¹¹² Under the reasoning in *Murray*, Congress acted within its authority because the tariff challenges were essentially suits against the government.¹¹³ The Court further relied upon a separation of powers theory, concluding the power to create this special tribunal to be within Congress's general power to pay debts of the United States.¹¹⁴

The separation of powers rationale provided additional support for placing the disposition of public rights in the hands of the legislature.¹¹⁵ It easily expanded Congress's ability to evade the judicial branch because it increased the range of potential public rights cases.¹¹⁶ The logical implication was to redefine "public rights" to include cases arising "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."¹¹⁷ This definition suggested Congress could avoid Article III oversight in more than

109. See *id.* at 446 (citing facts of case).

110. See *id.* at 446-47 (describing relevant provisions of Tariff Act of 1922).

111. See *Bakelite*, 279 U.S. at 448 (reciting appellant's argument); Klein, *supra* note 22, at 1025 (outlining relevant history behind *Bakelite* decision).

112. See *Bakelite*, 278 U.S. at 449-50 (explaining differences between "legislative" and "constitutional" courts). Courts ordained by Congress under legislative powers expressed in Article I, rather than Article III, were considered "legislative" and markedly different from those established pursuant to the language of Article III. *Id.* As the Court explained, "[t]heir functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior." *Id.* at 449.

113. See Klein, *supra* note 22, at 1026 (illustrating sovereign immunity rationale). Klein points out that the Court's decision was well supported by the sovereign immunity rationale argument relied upon in *Murray*. *Id.*

114. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929) (utilizing separation of powers theory to uphold provisions of Tariff Act). This was an act of Congress in association with its power to "pay debts of the United States." *Id.* The ability to establish tribunals to adjudicate monetary claims against the United States was incidental to this broad power. *Id.*

115. See *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (using separation of powers theory to reject Seventh Amendment challenge). The Court upheld the constitutionality of the Longshoremen's and Harbor Worker's Compensation Act, specifically the provision allowing a non-Article III commission to determine damage awards. *Id.* at 38-40.

116. See Klein, *supra* note 22, at 1027 (expounding relationship between separation of powers and sovereign immunity rationales). The sovereign immunity rationale, by its very nature, afforded Congress the ability to delegate suits away from Article III courts only where those actions involve the government as a party. *Id.* at 1026-27. The separation of powers rationale, by contrast, left open the possibility for other causes of action to escape Article III courts. *Id.* at 1027.

117. *Crowell*, 285 U.S. at 50 (illustrating Court's definition in context of its separation of powers rationale).

just those cases where the government was a party, as in cases arising out of the broad powers conferred by Article I.¹¹⁸

With the distinction between public and private rights established, the Court inevitably addressed the parallel relationship between Article III jurisprudence and Seventh Amendment concerns.¹¹⁹ *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review*¹²⁰ was the first case to apply the public/private distinction on Seventh Amendment grounds when questioning the delegation of judicial authority to a non-Article III agency.¹²¹ The Court deferred to the legislative scheme and made clear that when Congress properly delegated a public right to a non-Article III tribunal, the Seventh Amendment would not apply.¹²² Congress imposed safety standards making employers liable for maintaining unsafe working conditions.¹²³ The Occupational Safety and Health Act (OSHA) further established a commission to handle disputes arising out of violations of this Act.¹²⁴ After being penalized, two employers brought a suit alleging their rights to a jury trial were unconstitutionally abrogated when their suits were directed to the commission as opposed to an Article III tribunal.¹²⁵ The Court held the Seventh Amendment did not bar Congressional delegation of suits to an administrative agency “with which the jury would be

118. *Id.* at 50-51 (referring to constitutionality of tribunals established under Congress’s broad Article I powers). The Court acknowledged Congress’s ability to establish “special tribunals” in connection with its powers as to interstate and foreign commerce, taxation, immigration, and public health. *Id.* at 51. Although *Crowell* was significant to the development of the public rights doctrine, its impact on Seventh Amendment jurisprudence was limited to this narrow exception because the Court disposed of the direct Seventh Amendment challenges by classifying the case as an admiralty suit. *Id.* at 45.

119. *See Atlas Roofing Co., Inc. v. Occupational Safety and Health Rev. Comm’n*, 430 U.S. 442, 450 (1977) (discussing Seventh Amendment in context of public rights doctrine); Sun, *supra* note 28, at 550 (examining bridge between Seventh Amendment jurisprudence and Public Rights Doctrine). The merger between these two distinct areas of law appeared inevitable because any issue involving the delegation of an action away from an Article III court naturally encompassed Seventh Amendment considerations. Sun, *supra* note 28, at 550; *see also Crowell*, 285 U.S. at 25 (involving both issues of public rights and Seventh Amendment). Over the course of several decisions, the Court equated the Article III principles with Seventh Amendment law. *See Warner, supra* note 89, at 1000 (analyzing the Seventh Amendment/Article III equation); *see also Granfinanciera v. Nordberg*, 492 U.S. 33, 49-65 (1989) (coalescing theories of public rights and Seventh Amendment to solidify public rights exception to Seventh Amendment). Some scholars argue that the Court did not go this far. *See Warner, supra* note 89, at 1000.

120. 430 U.S. 442 (1977).

121. *See Sun, supra* note 28, at 549 (considering relevance of *Atlas* decision to public rights doctrine).

122. *See Atlas*, 430 U.S. at 444 (expressing holding of case); Moses, *supra* note 24, at 213 (discussing judicial deference to statutory scheme as exception to jury right). The *Atlas* Court solidified the presumption that actions involving public rights may be delegated out of Article III courts, but can also be adjudicated without the protections of the Seventh Amendment. Moses, *supra* note 24, at 213.

123. *See Atlas*, 430 U.S. at 447 (outlining facts of case).

124. *See id.* at 446-47 (detailing provisions of OSHA).

125. *See id.* at 448 (articulating petitioner’s challenge to OSHA commission). Petitioners based their contentions on the Seventh Amendment, arguing that even if Congress constitutionally provided a non-Article III forum for dispute resolution, it may not abrogate their Seventh Amendment right to jury trial in the process. *Id.*

incompatible.”¹²⁶ While the Court seemed to show great deference to the legislative branch, the *Atlas* decision was clearly limited to cases involving “public rights.”¹²⁷ In the wake of *Atlas*, Congress was free to assign the fact-finding role to agencies in cases where newly created statutory public rights were implicated, but the decision explicitly omitted causes of action sounding wholly in private tort.¹²⁸

Atlas bridged the gap between Article III and Seventh Amendment jurisprudence in such a way that the Court’s attempt to further define “public rights” directly affected the scope of the jury trial.¹²⁹ The concept of a “public right” expanded over the next decade to reflect the growth of the administrative state.¹³⁰ In *Thomas v. Union Carbide Agricultural Products Co.*,¹³¹ for example, the Court eviscerated the notion that a public right had to involve the government as a party.¹³² In *Commodity Futures Trading Commission v.*

126. See *id.* at 450 (stating holding of case).

127. See *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 458 (1977) (limiting decision only to cases involving public rights). This distinction was rather important because the Court addressed the potential for the public rights doctrine to swallow the Seventh Amendment. *Id.* As the Court pointed out, “[o]ur prior cases support administrative factfinding in only those situations involving ‘public rights,’ e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases . . . are not at all implicated.” *Id.* Therefore, at this early stage, the Court felt a pressing need to limit this potentially expansive doctrine. *Id.*

128. See *id.* (expanding upon limitations set forth by Court’s language). The Court placed emphasis on the forum in which the action was tried. *Id.* at 458-59. Based on an historical inquiry into the jury as a fact-finding body, the Court determined that only in certain common-law suits were juries available as fact-finders. *Id.* “[A]s a general rule, the decision turned on whether courts of law supplied a cause of action and an adequate remedy to the litigant.” *Id.* The Court contrasted suits alleging breach of contract from suits involving demands for specific performance to distinguish between those instances when an adequate legal remedy was unavailable, thus vitiating a right to jury. *Id.* at 459.

129. See *Moses*, *supra* note 24, at 212-15 (detailing merger between public rights and Seventh Amendment). If the public rights doctrine impeded the availability of jury trials, then any attempt to define the scope of these “public rights” would adversely affect the constitutional guarantees in the Seventh Amendment. *Id.*; see also *Lunenburg*, *supra* note 40, at 955-58 (arguing *Atlas* decision provides broad authority for Congress to frame issues as “public rights”). Such authority would effectively remove these issues from Seventh Amendment scrutiny. *Lunenburg*, *supra* note 40, at 955-58.

130. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (detailing expansion of administrative state signified by attempts to modify Administrative Procedure Act in 1975).

131. 473 U.S. 568 (1985).

132. *Id.* at 585-87 (dismissing view that identity of parties alone determines public nature of right). The Court abandoned the view expressed in *Northern Pipeline Constr. Co., v. Marathon Pipe Line Co.*, and adopted the position that public rights may exist where the government is not a party to an action. *Id.*; see also *Northern Pipeline Constr. Co., v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (defining “public rights” as “matters arising between the Government and persons subject to its authority”). The *Thomas* Court noted the lack of majority support for the alleged “bright-line test” advocated by the plurality opinion in *Northern Pipeline*. See *Thomas*, 473 U.S. 585-86. Rather, the *Thomas* decision argued that a limit on the public rights definition threatened the government’s administrative ability. *Id.* at 587. The Court stated, “[t]o hold otherwise would be to defeat the obvious purpose of the legislations to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact.” *Id.* at 590 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

Schor,¹³³ the Court articulated a balancing test that afforded Congress the power to delegate a broader range of cases.¹³⁴ Previous attempts to provide bright-line definitions were held to “unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers.”¹³⁵ Even though the issue in *Schor* involved a private right, the Court deferred to Congress and held that the Constitution, under the newly articulated balancing test, did not prevent Congress from taking a private right out of the jurisdiction of an Article III court where necessary to effectuate a regulatory scheme.¹³⁶

The ever-expanding public rights exception finally yielded to limitations when the Court ruled definitively on the scope of the Seventh Amendment in *Granfinanciera, S.A. v. Nordberg*.¹³⁷ Until then, it was assumed the reach of the Seventh Amendment coincided with evolving Article III case law.¹³⁸ *Granfinanciera* brought new life to the Seventh Amendment as an independent, additional requirement.¹³⁹

The *Granfinanciera* Court’s strong support of jury trials in private right cases effectively curtailed the *Schor* decision.¹⁴⁰ In overruling congressional delegation of fraudulent conveyance actions to non-Article III bankruptcy courts, the Court abided by its broad definition of public rights expressed in *Thomas*, but spoke strongly in favor of a right to jury in claims asserting private

133. 478 U.S. 833 (1986).

134. *See id.* at 851 (providing a flexible factors test to determine whether Congress acted constitutionally). The Court looked at:

the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. Like in *Thomas*, the Court disparaged the use of bright-line tests as being too constrictive. *Id.*

135. *Schor*, 478 U.S. at 851 (justifying reasons for dismissing brightline test).

136. *See Sun, supra* note 28, at 553 (discussing holding of *Schor* decision allowing legislative and executive branches to determine public rights).

137. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-55 (1989) (expressing rationale of decision).

138. *See supra* notes 118-128 and accompanying text (equating Seventh Amendment analysis with public rights doctrine); *see also* Warner, *supra* note 89, at 1000-09 (discussing merits of public rights/“Seventh Amendment equation” in wake of *Granfinanciera*).

139. *See Warner, supra* note 89, 1008-09 (extracting independent “vitality” in Seventh Amendment from ruling in *Granfinanciera*). Warner discusses the danger of linking the Seventh Amendment to the tumultuous Article III case law. *Id.* at 1008. Strength comes to the Seventh Amendment by virtue of the different analyses now mandated by the Court. *Id.* Had the Court wished the Seventh Amendment to parallel the Article III analysis, it would not have altered the Seventh Amendment analysis. *Id.* at 1003-07 (illustrating additional requirements implanted in Seventh Amendment analysis).

140. *See Granfinanciera*, 492 U.S. at 66 (Scalia, J., concurring) (illustrating limiting language throughout Court’s decision in contrast with submissive holding in *Thomas* and *Schor*). “The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine.” *Id.* *But cf.* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

rights.¹⁴¹ The fraudulent conveyance actions were deemed private rights, “quintessentially suits at common law,” and therefore entitled to a jury trial.¹⁴² The Court’s decision seemed intent on closing a loophole born out of Article III case law.¹⁴³ “Congress cannot eliminate a party’s Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.”¹⁴⁴ The Court held fast to its determination that only public rights may be delegated, and sought to determine the nature of the rights in question by asking “whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution.”¹⁴⁵ The fraudulent conveyance actions were not considered part of such a statutory scheme because the bankruptcy Acts did not create new causes of action unknown to the common law.¹⁴⁶ The Court referred to the “purely taxonomic change” as an unsuccessful attempt by Congress to alter its Seventh Amendment analysis.¹⁴⁷ For a matter to be considered truly public, therefore, the right must be a novel creation by

141. See *Granfinanciera*, 492 U.S. at 55 n.10 (clarifying distinction between “public” and “private” rights). While the decision itself protected the right to a jury in private actions, the Court supported the theory that Congress dispense with juries in specific private right cases “involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity.” *Id.*

142. See *id.* at 56 (analogizing claim to state-law contract claim appearing as matter of private rather than public right).

143. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) (addressing problematic issue with public rights doctrine). The Court briefly addressed whether allowing the public rights doctrine to expand in this manner would likewise allow Congress to eliminate private actions simply by creating statutory schemes involving public rights. *Id.* The Court expressly limited Congress’s ability to swallow the Seventh Amendment, stating, “[l]egal claims are not magically converted into equitable issues by their presentation to a court of equity, nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal.” *Id.* at 52 (quoting *Ross v. Bernhard*, 396 U.S. 531, 528 (1970)).

144. *Granfinanciera*, 492 U.S. at 61 (1989).

145. *Id.* at 54 (quoting *Thomas*, 473 U.S. at 586). The Court recognized instances when Congress created causes of action that appeared “private” but were so integrated into a statutory scheme that they are considered “public.” *Granfinanciera*, 492 U.S. at 54. Therefore, if a cause of action arises out of a statutory scheme that “virtually occupies the field,” it may be considered public. *Id.* at 54 (quoting *Thomas*, 473 U.S. at 593-94) (Brennan, J., concurring). *But see Warner*, *supra* note 89, at 1020-21 (noting claim must be novel). Warner suggests the claim created by Congress must be “novel,” or unknown to the common law, for it to be considered public even though it was similar to an existing common-law claim. *Id.*

146. See *Granfinanciera*, 492 U.S. at 61 (analyzing rights created under legislation). The Court stated, “[t]he decisive point is that in neither the 1978 Act nor the 1984 Amendments did Congress ‘create a new cause of action, and remedies therefore, unknown to the common law.’” *Id.*; see also *Warner*, *supra* note 89, at 1010 (interpreting reasoning of *Granfinanciera* Court). The Court could not find fraudulent conveyancing actions to fit within the purposes behind the Bankruptcy Act, making any attempt to adjudicate such claims outside an Article III court unjustified. *Granfinanciera*, 492 U.S. at 61.

147. *Granfinanciera*, 492 U.S. at 60 (describing Congress’s failure to remove fraudulent conveyancing actions from Article III courts to public regulatory forums).

Congress in response to a manifest public problem.¹⁴⁸

The *Granfinanciera* ruling limited Congress's ability to circumscribe the Seventh Amendment and offered insight as to when such a constitutional infringement is permissible.¹⁴⁹ While the Court hinted that such congressional delegation was acceptable when traditional remedies were unable to solve a major public problem, it further stated that the mere expense of bankruptcy proceedings were insufficient to dispense with the Seventh Amendment.¹⁵⁰ In response to the functionalist argument that jury trials overburdened the bankruptcy system, the Court stated, "[t]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."¹⁵¹ The language in the decision, however, mandates consideration of the degree juries impair the operation of a legislative scheme when rights are properly removed from Article III courts under the public rights doctrine.¹⁵²

After *Granfinanciera*, the required Seventh Amendment analysis seems clear.¹⁵³ The Court first looks to whether the Seventh Amendment attaches under the modern historical test, then exempts its application only when Congress permissibly assigns resolution of a public right to a non-Article III adjudicative body where use of a jury impairs the functioning of the legislative scheme.¹⁵⁴

III. ANALYSIS

A. *The Prima Facie Case for the Seventh Amendment*

Under the modern historical test, the Constitution guarantees a jury in asbestos personal injury suits.¹⁵⁵ A comparison with English practice reveals

148. See Warner, *supra* note 89, at 1019-26 (illustrating requisite nature of action constitutionally adjudicated in non-Article III forum consistent with Seventh Amendment).

149. See *supra* text accompanying note 143 (illustrating *Granfinanciera* decision's impact).

150. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63 (1989) (rejecting functionalist argument for jury nullification). Respondent argued the jury should be limited based on functional considerations such as the ability to alter negotiating frameworks and delay proceeding by demanding a jury trial. *Id.* at 63 n.17.

151. *Id.* at 63 (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

152. See *id.* at 42 n.4, 61 (discussing Congress's ability to incorporate jury in non-Article III tribunal after action constitutionally delegated). The decision indicated even when Congress permissibly removed an action from an Article III forum, the Seventh Amendment still applied where it would not impair the operation of the legislative scheme. Warner, *supra* note 89, at 1004-07 (explaining "impairment prong" of *Granfinanciera* decision). Congress, however, showed that while the use of a jury impaired the function of the legislation, it could not use lack of efficiency or convenience to prove impairment. *Id.*; see also *Granfinanciera*, 492 U.S. at 63 (dismissing efficiency argument).

153. See Moses, *supra* note 24, at 214-15 (describing state of Seventh Amendment jurisprudence including public rights as exception under *Granfinanciera*).

154. See *Granfinanciera v. Nordberg*, 492 U.S. 33, 42 (1989) (outlining necessary analysis); see also Moses, *supra* note 24, at 214-15 (depicting analysis used in *Granfinanciera*).

155. See *supra* Part II.A and accompanying text (outlining state of Seventh Amendment law surrounding

the origin of negligence cases dates back as early as the fifteenth century.¹⁵⁶ In fact, much of modern contract and tort law arose from “trespasses on the case,” which English courts distinguished from “trespasses” by considering the indirect force against another individual.¹⁵⁷ When the Seventh Amendment was enacted in 1791, personal injury cases sounding in negligence were ubiquitous in the English court system.¹⁵⁸ Finding a cause of action analogous to one at English common law, as the first prong of the historical test requires, was therefore easy to achieve.¹⁵⁹

Asbestos plaintiffs seek to recover money damages for injuries sustained as a result of a defendant’s intentional or negligent misdeeds.¹⁶⁰ Money damages are by definition “legal” damages, therefore the determination of damages must fall to a jury according to the historical analysis espoused in *Wooddell*.¹⁶¹ Despite the decision in *Markman* attempting to limit the scope of Seventh Amendment protection, the Court in *Feltner* re-emphasized the jury’s role in assessing damages by labeling the task a subsidiary issue worthy of Seventh Amendment protection in legal causes of action.¹⁶² By seeking legal damages in asbestos cases, the Seventh Amendment jury incurs relatively little criticism as compared to causes of action, such as bankruptcy proceedings, where equitable considerations often overlap or overshadow any legal relief.¹⁶³

Scholars suggest the *Markman* decision was motivated by an underlying deference to a legislative patent scheme and therefore potentially limits the

historical analysis).

156. See SCHWARTZ ET AL., *supra* note 9, at 1-5 (detailing origins of negligence tort actions).

157. See SCHWARTZ ET AL., *supra* note 9, at 1-5 (providing brief history of negligence law).

158. See Barrett, *supra* note 39, at 134 (discussing access to jury in 18th century England). Barrett details the applicability of juries to cases heard in the ancient communal and feudal courts. Barrett, *supra* note 39, at 135-37; SCHWARTZ ET AL., *supra* note 9, at 1-5 (dating origin of negligence suits around 15th Century).

159. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (applying first prong of historical test); *supra* notes 63-65 and accompanying text (outlining modern historical test).

160. See SCHWARTZ ET AL., *supra* note 9, at 130 (outlining elements of a negligence cause of action). See generally 60 AM. JUR. TRIALS *Asbestos Injury Litigation* § 73 (2005) (detailing intricacies of asbestos lawsuit).

161. See notes 66-68 and accompanying text (addressing legal nature of monetary damages).

162. *Supra* notes 79-80 and accompanying text (expressing holding of Court); see also *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (determining copyright damages as legal relief afforded protections of Seventh Amendment). Even though the Court in *Markman* strained to complicate the historical test with a new prong, the *Feltner* decision eliminates any cause for concern by attaching the Seventh Amendment to monetary damages. *Feltner*, 523 U.S. at 353. *Feltner* therefore mandates that a jury determine damages in an Article III court. *Id.* The court states, “we must conclude that the Seventh Amendment provides a right to a jury trial where the copyright owner elects to recover statutory damages.” *Id.*; see also Wright, *supra* note 39, at 524 (demonstrating importance of jury’s ability to determine damages). Wright states that “[n]o other feature of the common law jury system is more substantial or essential than the ability of the jury to determine the value of what the plaintiff has lost . . . the Constitution must protect it from the reach of the legislature.” Wright, *supra* note 39, at 523-24.

163. See *Markman v. Westview Instruments Inc.*, 517 U.S. 370 (1996); *Granfinanciera v. Nordberg*, 492 U.S. 33, 37 (1989) (defining issue as whether cause of action was legal or equitable in character); *Northern Pipeline Constr. Co. v. Marathon Pipe line Co.*, 458 U.S. 50, 63-76 (1982) (debating whether bankruptcy cases are public or private rights); see also Wright, *supra* note 39, at 520 (stating “no ground to dispute the legal nature of a negligence suit at common law”).

Seventh Amendment's application in the future.¹⁶⁴ The Court may hesitate to impose the Seventh Amendment because patent law is similar to other congressional schemes involving public rights.¹⁶⁵ While this is arguably a subtle influence, a plain reading of *Markman* reveals that patent infringement claims simply do not satisfy the historical test.¹⁶⁶ The Court held that there was no historical analogue in English common law and therefore turned to functional considerations in assessing whether infringement should be determined solely by a judge.¹⁶⁷ *Markman* released patent infringements from Seventh Amendment protection by analogizing the interpretation of patent claims to the analysis of documents, a task that "is the province of the court, and not the jury."¹⁶⁸ *Markman* has little effect, therefore, on an asbestos suit because of the clear application of the historical test to personal injury causes of actions.¹⁶⁹ Unlike patent suits, the clear nexus between a modern personal injury tort and torts at English common law precludes the further analysis required in the *Markman* decision.¹⁷⁰

Strict application of the historical test demands a Seventh Amendment jury in asbestos personal injury suits, as those suits exist today.¹⁷¹ Congress contends that the FAIR Act does not preserve asbestos causes of action in a

164. See *Moses*, *supra* note 24, at 232 (discussing similarities between patent law and other legislative schemes). *Moses* states, "patent law, having a number of unique, federally imposed features, more closely resembles federally regulated areas like bankruptcy or OSHA, than essentially private rights areas such as contracts, torts or property." *Moses*, *supra* note 24, at 232. *Moses* opines that the Court utilized a result-oriented approach to their interpretation of the law. *Moses*, *supra* note 24, at 237-44. Even though this analysis is qualified by calling attention to *Markman*'s limiting language, the case still remains an example of the Court's ability to overshadow major issues with functionalist influences. *Moses*, *supra* note 24, at 239-40, 245.

165. See *Moses*, *supra* note 24, at 232 (addressing similarities between patents and congressional legislation).

166. See *Markman*, 517 U.S. at 388 (turning to functional considerations after exhausting historical analysis). The Court resolved to grant judges fact-finding duties in patent infringement suits which resulted from an inability to find a clear historical example of juries handling such a task. *Id.*

167. See *id.* at 388-89 (explaining judges more adept at interpreting language than juries). The Court decided that a "judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury." *Id.* Before the Court arrived at this conclusion, it conducted an analysis of English common law to determine whether cases involving documentary interpretation were customarily heard by juries at the turn of the 18th century. *Id.* at 384.

168. *Markman v. Westview Instruments Inc.*, 517 U.S. 370, 385 (1996) (illustrating rationale of decision).

169. *Supra* note 68 and accompanying text (demonstrating paradigmatic case satisfying historical analysis); see also *Wright*, *supra* note 39, at 520 (identifying negligence claim as "sounding in tort for money damages"). Personal injury suits seeking monetary damages are legal claims, and the Supreme Court has consistently endorsed this position. *Wright*, *supra* note 39, at 520.

170. See *Henderson*, *supra* note 38, at 300 (stating juries common for factual when disputes). The author argues that reliance on a unified English system may be improper. *Id.* at 299-300. In cases where disputes as to fact existed, England used juries in the 18th Century. *Id.* at 299-300; see also *supra* notes 155-157 and accompanying text (depicting origins of personal injury suits); *supra* notes 83-86 and accompanying text (demonstrating damages must go to jury as uses of fact).

171. *Supra* Part II.A (outlining provisions of historical test and its applicability to legal causes of action). The Seventh Amendment protects asbestos suits as they are currently brought in Article III courts. *Id.*

separate venue, but rather creates a new cause of action within an administrative agency that is properly authorized to assert jurisdiction over such claims.¹⁷² Under the public rights exception, Congress could eliminate Seventh Amendment protections by eradicating the jury from the asbestos tort realm.¹⁷³

B. A New Cause of Action Under the FAIR Act: Has Congress Gone Far Enough to Eliminate the Jury?

The *Granfinanciera* decision, like its predecessor public rights cases, demonstrated how private right claims become public right cases under certain circumstances.¹⁷⁴ The Court wrestled with the concept of a fraudulent transfer action becoming a public right in the context of a congressional attempt to restructure debtor-creditor rights.¹⁷⁵ Without determining whether this congressional scheme was itself a public right, the Court provided a general calculus to shoehorn private actions into the public rights category.¹⁷⁶ Though scholars debate over portions of the Court's language, the *Granfinanciera* decision strongly supports the idea that Congress can constitutionally remove a private right when that right is a novel, congressionally-created action, enacted in response to a manifest public problem, and closely integrated into a public regulatory scheme.¹⁷⁷ Therefore, the question becomes whether the FAIR Act can fit within the confines of the *Granfinanciera* exception.¹⁷⁸

172. See S. REP. NO. 108-118, at Part V (2003) (illustrating preemption of existing asbestos tort claims). FAIR can only be constitutional if it conforms to the public rights exception carefully articulated in *Granfinanciera* because the Seventh Amendment bars legislative delegation of asbestos suits in their current form. *Granfinanciera v. Nordberg*, 492 U.S. 33, 60-61 (1989) (addressing need for separate cause of action unrelated yet closely analogous to original common-law claim).

173. *Supra* Part II.B (referring to implications of public rights doctrine).

174. See *Granfinanciera*, 492 U.S. at 52-53, 60-61 (distinguishing between private rights and newly created public rights closely resembling private actions); see also *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 850-56 (1986) (according with *Thomas* decision's factors test); *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 589 (1985) (outlining lenient test to govern public rights doctrine). While *Schor* certainly contributed to the evolution of the public rights doctrine, it has been rendered ineffectual by *Granfinanciera*. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-76 (1982) (holding Article III bars Congress from delegating bankruptcy cases to legislative courts in certain situations); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n.*, 430 U.S. 442, 460 (1977) (holding Seventh Amendment allows Congress to create and assign statutory rights to administrative agency); see also Warner, *supra* note 89, at 1018 (assessing *Granfinanciera* decision's effect on precedent).

175. See Warner, *supra* note 89, at 1022-23 (framing issue in *Granfinanciera*).

176. Warner, *supra* note 89, at 1019 (extrapolating test from *Granfinanciera*). Warner interprets *Granfinanciera* to elucidate a test that borrows language from the *Thomas* decision but is much narrower in scope. Warner, *supra* note 89, at 1019.

177. Warner, *supra* note 89, at 1019-25 (considering factors making interpretation of private right as public right possible).

178. *Supra* notes 151-152 and accompanying text (showing *Granfinanciera* decision is prism through which courts must view public rights).

1. The FAIR Act as a Response to a Manifest Public Problem

Asbestos litigation is at a boiling point.¹⁷⁹ Accordingly, it is unnecessary to argue that Congress should be forced to remain idle in the face of a pressing social issue.¹⁸⁰ The *Granfinanciera* Court willingly conceded private rights to non-Article III tribunals when Congress demonstrates that the statute passed was in response to a serious issue which “traditional rights and remedies” fail to adequately address.¹⁸¹

It is debated whether traditional remedies available in the court system suffer from “grave deficiencies.”¹⁸² The impact of asbestos litigation wreaked havoc on defendants, forcing many into bankruptcy and limiting money generally available to plaintiffs.¹⁸³ The FAIR Act, however, seriously disadvantages large classes of plaintiffs, particularly smoking victims.¹⁸⁴ While the need for action is undisputed, there are more reasonable measures available.¹⁸⁵ For

179. See Hanlon, *Asbestos Legislation*, *supra* note 1, at 552-54. The court system is largely abused by litigants who file without any demonstrable injury. *Id.* Over ninety percent of asbestos claims are filed by plaintiffs that show no physical impairment; over one million claims will be filed before the litigation runs its course. See RAND REPORT, *supra* note 1, at 46 (providing asbestos litigation statistics); Hanlon, *Asbestos Legislation*, *supra* note 1, at 552-54 (describing the nature of asbestos litigation in contemporary jurisprudence); Schwartz, *supra* note 6, at 882 (revealing “asbestos litigation has reached a crisis”); *supra* note 9 and accompanying text (demonstrating Supreme Court’s desire for reform).

180. See *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 593-94 (1985) (illustrating utilization of Article I powers to enact legislative scheme). The Court recognized the need to act upon serious matters, and stated that Congress may create new rights when “acting for a valid legislative purpose pursuant to its constitutional powers.” *Id.* Congress was still limited to those rights that were truly public in nature. *Id.* There was no indication, following this decision, that Congress has the ability to usurp the role of a jury whenever it may please without regard to constitutional limitations. *Id.*

181. See 9/11 Bill, *supra* note 10, at 230 (demonstrating passage of Bill carefully drafted to comply with Constitution). Like the FAIR Act, the 9/11 Bill imposed a no-fault administrative fund to compensate persons killed in the September 11th attacks, though participation in the system was voluntary. *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33, 60-61 (1989) (analyzing effectiveness of current remedies under law). The argument that current legal remedies are incapable of handling the asbestos epidemic is persuasive, though the pressing need for legislation will not excuse a constitutional violation without satisfying other factors extrapolated from *Granfinanciera*. S. REP. NO. 108-118, at Part IV (2003) (highlighting need for legislation); Warner, *supra* note 89, at 1018-19 (requiring specific characteristics in order for private rights to become public rights within statutory scheme). Congress’s ability to draft legislation in conformity with the constitution evinces this fact. Warner, *supra* note 89, at 1018-19.

182. See *Granfinanciera*, 492 U.S. at 60-61 (holding current system capable of handling fraudulent conveyancing actions). In *Granfinanciera*, the Court saw no flaw in the current legal system that required Congress to pass the 1978 and 1984 bankruptcy amendments. *Id.* at 60-61.

183. See *supra* note 8 and accompanying text (describing consequences of extensive asbestos litigation).

184. See Hanlon, *supra* note 14, at 489 tbl.1 (illustrating FAIR Act compensation scheme). Smoking claimants receive mere fractions of what non-smoking claimants receive for cancer afflictions, the most heavily compensated illness. *Id.* By stating that the FAIR Act is not designed to compensate smokers, Congress ignores the synergistic effect smoking combined with asbestos exposure can have on the lungs. See S. REP. NO. 108-118, at Part VI (2003) (rationalizing reduced awards for smoking claimants); 60 AM. JUR. TRIALS *Asbestos Injury Litigation* §§ 73, 41 (illustrating synergistic effect of smoking and asbestos exposure). Under the FAIR Act, smoking claimants are forced to accept reduced compensation while being denied an opportunity to prove causation before a jury of their peers. See 60 AM. JUR. TRIALS *Asbestos Injury Litigation* §§ 73, 41 (discussing issues of causation).

185. See RAND REPORT, *supra* note 1, at 26-45 (discussing alternatives within court system). Certain

example, recently passed legislation involving dispute resolution was designed to encourage participation through an incentive-based system.¹⁸⁶ No Seventh Amendment concerns exist where participants waive their constitutional rights in order to reap the benefits of a compensation scheme.¹⁸⁷

2. *The Integration of Asbestos Suits Into a Congressionally Regulated Scheme*

The fraudulent transfer actions at issue in *Granfinanciera* were ancillary to Congress's attempt at restructuring debtor-creditor relationships, therefore the private rights at issue were separated from the congressional scheme, making them peripheral.¹⁸⁸ By contrast, asbestos suits are private actions that are essential to the operation of the FAIR Act as proposed.¹⁸⁹ Even though the structuring of the Act prevents the use of asbestos in industry and provides certainty to defendants' liability, without the complete preemption of asbestos lawsuits it would assuredly fail.¹⁹⁰ The possibility of contributing to a trust for victim compensation while being exposed to the tort system as well is unacceptable to defendant corporations.¹⁹¹

Asbestos tort actions are patently integral to the congressional scheme under

jurisdictions resort to "inactive" and "expedited" dockets that allow courts to postpone suits until plaintiffs demonstrate physical impairment. *Id.* at 26-28. This is an attempt to compensate only those plaintiffs suffering from asbestos related physical afflictions and avoid the major problem caused by unimpaired plaintiffs flooding the court system. *Id.* This approach produces mixed results and it is difficult to truly assess the effectiveness of the system because it is not applied uniformly throughout varying jurisdictions, allowing unimpaired plaintiffs to shop for more favorable jurisdictions. *Id.*; see also Behrens, *supra* note 8, at 263 (explaining policy rationale behind unimpaired dockets); Hanlon, *Asbestos Legislation*, *supra* note 1, at 582 (explaining use of inactive dockets or pleural registries); McGovern, *supra* note 9, at 156 (suggesting potential legislation). McGovern proposes a system that preserves litigants' ability to pursue recovery in a court of law as an example of legislation that does not violate the command of the Seventh Amendment. McGovern, *supra* note 9, at 156.

186. See 9/11 Bill, *supra* note 10, at 240 (illustrating legislation enacted post 9/11 World Trade Center bombing). This Act allows for the expedited, no-fault recovery provided in the FAIR Act, but still allows injured parties to preserve their jury rights by entering a civil suit in lieu of the claims process. *Id.* at 240; see also SCHWARTZ ET AL., *supra* note 9, at 1259-60 (discussing potential for elective no-fault schemes as alternative to tort system).

187. See 9/11 Bill, *supra* note 10, at 240 (allowing waiver of claimants' constitutional rights). In order to take advantage of the guaranteed compensation under the 9/11 Bill, claimants must waive their right to jury trial in the civil court system. 9/11 Bill, *supra* note 10, at 240. That decision remains the plaintiff's to make. 9/11 Bill, *supra* note 10, at 240; *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989) (discussing election as waiver). In *Granfinanciera*, the Court agreed with the principle that a plaintiff can waive his constitutional rights by electing to pursue his claim in a legislative court that provides an expedited recovery. *Granfinanciera*, 492 U.S. at 59 n.14. "The investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress has created . . . the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court." *Id.*

188. See *Granfinanciera*, 492 U.S. at 55-56 (explaining reasoning of court).

189. See S. REP. NO. 108-118, at Part VI.E (2003) (explaining need for preemption of prior claims).

190. See *id.* (discussing preemption of claims). The preemption of all asbestos tort suits is a major concept underlying the composition of the FAIR Act. *Id.*

191. See Hofmann, *supra* note 11, at 3 (demonstrating defendants' perspective on FAIR Act). The insurance industry is particularly opposed to any legislation that leaves defendants exposed to the court system. *Id.*

the FAIR Act, as the foundation of the act is tort reform.¹⁹² Delegating private rights to non-Article III tribunals when such actions are integral to a scheme is an immaterial test, however, if the actual scheme itself is in conflict with the Constitution.¹⁹³ The Court made clear that mere taxonomic changes will not transform an action from private to public.¹⁹⁴ The FAIR Act's constitutionality must therefore rest upon the distinguishing characteristics of plaintiffs' claims within the non-Article III tribunal itself.¹⁹⁵

3. Has Congress Created a Novel Cause of Action Closely Analogous or Identical to Existing Asbestos Actions?

As the public rights doctrine rapidly developed over the two decades beginning in the late 1970s, the Court never touched upon an administrative scheme like the FAIR Act.¹⁹⁶ None of the cases influencing the Court involved a complete preemption of common-law actions.¹⁹⁷ Under the proposed legislation, a claimant before the administrative tribunal asserts an identical claim as a plaintiff in a common-law asbestos tort action, but with a slightly altered the procedure.¹⁹⁸ A claimant still alleges she was injured through an

192. See S. REP. NO. 108-118, at Part I (stating purpose of proposed legislation); *supra* Part I (illustrating purpose behind FAIR Act).

193. See Wright, *supra* note 39, at 459 (stating Constitution takes precedent over legislation). Wright argues that the Constitution takes precedent over any legislative attempt to abolish a civil jury in cases that are analogous to suits at common law. Wright, *supra* note 39, at 459; *supra* Part II.A (discussing purpose of public rights doctrine).

194. *Supra* notes 140-141 and accompanying text (explaining Court's rationale in *Granfinanciera*).

195. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 60 (1989) (requiring novel legislative creation). The Court stated, "in neither the 1978 Act nor the 1984 Amendments did Congress creat[e] a new cause of action, and remedies therefore, unknown to the common law." *Id.*; see also *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 461 (1977) (holding OSHA regulations new causes of action unknown to common law).

196. See *Atlas Roofing*, 430 U.S. at 445-46 (outlining Occupational Safety and Health Act of 1970). Claims filed under OSHA arose out of the Secretary of Labor's new power to assess fines for workplace safety and health violations. *Id.* OSHA did not alter existing civil actions. *Id.*; see also *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 572-73 (1985) (outlining history of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of 1984). Litigation under FIFRA occurred as a result of the mandatory licensing effect of previous pesticide legislation and the parties' inability to agree on compensation values. *Thomas*, 473 U.S. at 572-73. Such litigation occurred as a result of congressional action, unlike asbestos cases which arise from the negligence of private individuals. *Id.*; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835-36 (1986) (interpreting Commodity Exchange Act). The CEA allowed investors an alternative forum to recover against professional commodity brokers' violations under the Act. *Schor*, 478 U.S. at 836. The CEA was merely offered as an expeditious *alternative* as opposed to a mandatory diversion from the court system. *Id.*

197. See *supra* notes 140-141 (illustrating legislation before Court in prior decisions). Congressional action served as the catalyst for public rights cases. See *supra* notes 140-141. The causes of action being delegated to non-Article III tribunals would not exist but for congressionally enacted statutory schemes. See *supra* notes 140-141. Asbestos cases, by contrast, exist by virtue of an individual's private rights against another. See *supra* Part III.A (explaining origins of asbestos torts).

198. See S. REP. NO. 108-118, at V (2003) (illustrating claims procedure under FAIR Act); 60 AM. JUR. TRIALS *Asbestos Injury Litigation* § 73, I (2005) (describing paradigmatic asbestos tort claim).

exposure to an asbestos product by a defendant, and therefore she is entitled to monetary compensation.¹⁹⁹ An arbiter of fact still determines what damages to award a claimant, only under the FAIR Act, that task is for a medical board with limited discretion rather than a jury.²⁰⁰

The FAIR Act procedure hardly resembles the sort of “closely analogous” claim suggested in *Granfinanciera*.²⁰¹ While the Court defers to certain congressional regulatory schemes, it also calls for a “creative” element to a cause of action before such suit is considered public.²⁰² The Court adamantly denies Congress the ability simply to reclassify a preexisting common-law cause of action.²⁰³ Through the FAIR Act, Congress does exactly that.²⁰⁴ Congress has not altered the nature of the remedy or the fundamental characteristics of the personal injury suit itself.²⁰⁵ Even the litigants remain the same, although the FAIR Act affords the defendants much needed insulation from liability.²⁰⁶

C. Rendering the Seventh Amendment of the United States Constitution a Nullity

The Seventh Amendment prevents the government from limiting or restricting the right to jury trial as it existed at common law.²⁰⁷ The Court may defer to the legislature in particular situations, but such deference is not possible when faced with a constitutional command.²⁰⁸ As articulated in *Granfinanciera*, upholding the FAIR Act sets a precedent allowing Congress to eradicate the jury from almost any case involving private rights.²⁰⁹ Congress is

199. See S. REP. NO. 108-118, at V (2003) (detailing FAIR Act claim process).

200. See *id.* (explaining medical criteria and claimants’ burden to establish illness).

201. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (looking for difference between common law and new statutory claims).

202. See *supra* notes 140-145 (refusing public right status to private actions altered only in name); see also Warner, *supra* note 89, at 1019-20 (interpreting Court’s language to require novel cause of action).

203. See Warner, *supra* note 89, at 1020 (discussing difference between closely analogous and reclassified cause of action).

204. See *supra* notes 197-198 (comparing existing cause of action to claim under FAIR Act).

205. See S. REP. NO. 108-118, at V (2003) (explaining operation of FAIR Act). The structure of the Act reveals no significant changes other than delegating the task of assessing damages to an agency. *Id.* Proponents analogize the Act to Workmen’s Compensation schemes, but fail to consider the difference in the relationships among parties involved. *Id.* Employees stand in a much different position than many asbestos victims, who were not exposed to the toxin while on the job. See 60 AM. JUR. TRIALS *Asbestos Injury Litigation* §§ 73, I (explaining ubiquitous nature of asbestos pollutants in society).

206. See S. REP. NO. 108-118, at I (explaining purpose of FAIR Act). Though Congress touts the FAIR act as expeditious relief to victims, the benefits to industry defendants are overwhelming by comparison. *Id.* Defendants are guaranteed to pay less compensation to all claimants who smoke, their potential liability is reduced to a fraction of total revenue, and insurance companies benefit from fixed liability rates. *Id.*

207. See *supra* Part II.A (discussing applicability of Seventh Amendment).

208. See Sun, *supra* note 28, at 559 (stating “[d]eference to Congress, however, is not absolute and must yield when the Court faces a clear constitutional command”).

209. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989) (recognizing need for curbing congressional power). The Court observed, “to hold otherwise would be to permit Congress to eviscerate the

able to re-label any private cause of action to public and assign it to a non-Article III tribunal.²¹⁰ For example, Congress could delegate private battery suits to a tribunal attached to a legislative scheme, effectively eliminating the constitutionally guaranteed jury from another action historically heard before a jury.²¹¹ This is not what the Framers intended when they guaranteed each citizen a right to a jury trial in civil actions.²¹²

A personal injury tort is fundamentally grounded within the category of private rights so that allowing Congress to remove the Seventh Amendment guarantee strips the amendment of its meaning altogether.²¹³ If the public rights doctrine, along with the Seventh Amendment, is to serve as any bar to congressional delegation, these quintessentially private legal rights must be placed out of the legislature's reach.²¹⁴

Essentially, the FAIR Act is an attempt to shift private legal action into the confines of an administrative forum at the expense of the Seventh Amendment, the American jury system, and the rights of litigants to have the cause of their injury proven before their peers.²¹⁵ Concerns over efficiency and the practical effect of juries are "insufficient to overcome the clear command of the Seventh Amendment."²¹⁶ The Court should not allow the FAIR Act to serve as precedent, thereby relegating the Seventh Amendment to insignificant words on a page.²¹⁷

Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Id.* at 52; *see also* Klein, *supra* note 22, at 1038 (observing potential for public rights doctrine to "swallow" Seventh Amendment).

210. *See* Klein, *supra* note 22, at 1038 (commenting on loophole born from public rights doctrine).

211. *See supra* Part II.A (discussing private rights that are guaranteed juries by Seventh Amendment). Under the same logic that justifies the FAIR Act, Congress could reclassify any action at common law into a cause of action arising under a regulatory scheme. *See supra* Part II.A. If the legislature does this at will, then the Seventh Amendment becomes meaningless. *See supra* Part II.A.

212. *See supra* Part II.A (articulating historical importance of jury right).

213. *See Granfinanciera*, 492 U.S. at 51-53 (restraining Congress's ultimate power to dodge Seventh Amendment). The Court specifically avoided the scenario that FAIR presents. *Id.*

214. *See* Sun, *supra* note 28, at 559 (articulating Framers' concerns). The Framers were particularly distressed when the jurisdiction of the non-jury admiralty court expanded under English rule. Sun, *supra* note 29, at 559. Congress should not be allowed to quietly nullify a constitutional guarantee that was so important to the founders of our nation. *See* ATLA Brief, *supra* note 22, at *6-14 (arguing strength of Seventh Amendment overcomes legislative attempts to diminish rights).

215. *See supra* Part III.B (comparing claim under FAIR Act to private asbestos personal injury suit).

216. *Curtis v. Loether*, 415 U.S. 189, 198 (1974). The late Chief Justice William H. Rehnquist remarked that "no amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . ." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 346 (1979) (Rehnquist, C.J., dissenting).

217. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989) (articulating restraints on legislature).

IV. CONCLUSION

Much has been published in recent years regarding the decline of the jury and its vanishing importance in American jurisprudence. A growing mistrust of the once sacred system now permeates judicial decisions. Whether this trend continues depends on many variables, although the Court's position on the FAIR Act is a clear indication of the jury's perceived role in modern litigation. The FAIR Act requires the Court to draw a definitive line in the sand. If the Act is upheld, then the Seventh Amendment is unquestionably weakened.

Constitutional protections often come with caveats, and the rules often yield to exceptions. It would not be unrealistic to imagine the Court turning a blind eye to the Seventh Amendment by couching its decision under a banner of judicial economy. The FAIR Act, after all, presents a far more expeditious alternative than the present court system.

Regardless of the procedural logistics, courts must not forget that plaintiffs in asbestos suits are victims entitled to the full protection of the Constitution. Accordingly, Congress should abridge these victims' rights only after the most careful consideration of viable alternatives. The American jury has stood as a guarantor of fairness and equality under the law for over two-hundred years, and it will continue to do so long after asbestos cases leave our courtrooms. Congress should not be allowed to diminish the power of this institution without recognizing the grave implications attending the FAIR Act.

Peter A. Arhangelsky