

THE SEVENTH AMENDMENT— A RETURN TO FUNDAMENTALS

Some commentators have expressed concern¹ that the Supreme Court has permanently strayed from the historical test² for interpreting the seventh amendment.³ Two recent landlord-tenant decisions evidence the Court's return to this test for determining when a party may claim the constitutional right to a civil jury trial.

In *Curtis v. Loether*⁴ plaintiff brought an action under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act),⁵ claiming that defendants had refused to rent her an apartment because of her race.⁶ In *Pernell v. Southall Realty*⁷ plaintiff landlord asserted that defendant's rent was three months in arrears and sought restitution of possession under a District of Columbia statute.⁸ In each case the trial

1. F. JAMES, CIVIL PROCEDURE § 8.10, at 374 (1965); J. MOORE, FEDERAL PRACTICE RULES PAMPHLET 805-10 (1970). See also Note, ROSS v. Bernhardt: *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112 (1971).

2. Under the traditional test, the seventh amendment is interpreted to preserve the right to civil jury trial as it existed under the common law in 1791, when the Bill of Rights was finally ratified. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). The test entails a study of the division of jurisdiction among then existing courts of law, equity and admiralty; in 1791 the right to jury trial was limited to actions at law, although it did not apply to all such actions. McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967).

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

4. 415 U.S. 189 (1974).

5. 42 U.S.C. §§ 3601-19 (1970), prohibits discrimination in the sale or rental of housing. Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1970), authorizes private plaintiffs to bring civil actions to redress violations of the Act's fair housing provisions.

6. 415 U.S. at 190. Plaintiff, a black woman, sought injunctive relief and punitive and compensatory damages against the white defendants. An injunction was granted and then dissolved with plaintiff's consent, leaving the issues of actual and punitive damages for trial.

7. 416 U.S. 363 (1974).

8. D.C. CODE ANN. § 16-1501 (1973), provides in pertinent part: "When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia . . . may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession."

court denied defendants' request for a jury trial.⁹ The Supreme Court, in opinions by Mr. Justice Marshall, held that each action involved rights and remedies of the sort traditionally heard by a jury at common law, entitling the parties to a jury trial on demand.

The seventh amendment provides a right to jury trial "in suits at common law."¹⁰ Early in the nineteenth century this phrase was construed to dictate an historical test,¹¹ with courts to be guided by English common law practice of 1791.¹² This test was followed by most federal courts until 1959. In that year the Supreme Court seemingly abandoned the historical test in favor of a functional analysis in response to procedural reforms resulting from the merger of law and equity.¹³ Functional analysis applies only when a particular case would not have gone to a jury at common law. Instead of looking only to what a court would have done in 1791, as under the tradi-

9. *Rogers v. Loether*, 312 F. Supp. 1008 (E.D. Wis. 1970), *rev'd*, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974). For a discussion of the court of appeals decision see Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 Nw. U.L. REV. 503, 504-06 (1973). *Pernell v. Southall Realty* (Super. Ct. D.C., Aug. 9, 1971), *aff'd*, 294 A.2d 490 (D.C. App. 1972), *rev'd*, 416 U.S. 363 (1974). For a discussion of the appellate court decision see 1 FORDHAM URBAN L.J. 492 (1973).

10. See note 3 *supra*.

11. *United States v. Wonson*, 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812).

12. *Id.* Mr. Justice Story (on circuit) stated that the phrase "common law" referred to that of England rather than that of the individual states, as each state had its own practices. *Id.* at 750. A single definition was needed to produce a uniform jury trial right throughout the federal judiciary. Comment, *The Seventh Amendment and Civil Rights Statutes*, *supra* note 9, at 506.

13. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). See also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

In 1791 not every civil action was tried to a jury; issues in actions at law were generally so tried, while issues at equity were only so tried if the chancellor chose to send an issue to a jury for an advisory verdict. With the merger of law and equity in 1938, a single civil action was substituted for separate suits in law and equity. FED. R. CIV. P. 2. Provision was made for trial of both legal and equitable issues in the same action and differentiation of issues into jury and nonjury. See 5 J. MOORE, FEDERAL PRACTICE § 38.03, at 24.1-2 (2d ed. 1974).

Prior to 1938, cases such as *Beacon Theatres* and *Dairy Queen* would have been tried at equity because of the inadequacy of relief at law, but the Federal Rules obviated the difficulties with legal relief. While a purely historical test would have dictated a contrary result, the only reason why the cases would not have been heard by a jury at common law was no longer applicable, and the Court granted jury trial. This result was consistent with the Court's long-standing policy of avoiding unnecessary restrictions on jury trials. See *Simler v. Conner*, 372 U.S. 221, 222 (1963).

tional test, functional analysis focuses upon the reasons why that case would not have been tried by a jury. If procedural obstacles to legal relief have been corrected by merger and the Federal Rules, functional analysis dictates that a jury trial be granted.¹⁴ This kind of analysis is not as radical as it may appear: the inquiry is still jurisdictional, but the determination of jurisdiction is made by reference to existing rather than past procedure.¹⁵ Use of this analysis broadened the scope of the right to jury trial beyond that available at common law. Six years later the Court took its furthest step away from the historical test by adopting a three-pronged analysis.¹⁶ History was only one element to be considered.¹⁷

Now, however, the Court has reverted to a fundamental historical analysis for determining the scope of the seventh amendment. The reasoning in both *Curtis* and *Pernell* was based on Mr. Justice Story's famous dictum in a decision written over a century before the merger of law and equity:

The phrase "common law," found in this clause [of the seventh amendment], is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By *common law*, [the framers of the amendment] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.¹⁸

14. The facts of *Dairy Queen* illustrate the use of functional analysis. There, remedy at law was inadequate in 1791 because of the difficulty of determining some of the factual questions, and an equitable accounting would have been required. Now, however, FED. R. CIV. P. 53(b) provides for reference to a master in jury actions when the issues are especially complicated, eliminating the need for an equitable accounting.

15. McCoid, *supra* note 2, at 24.

16. See *Ross v. Bernhard*, 396 U.S. 531 (1970).

17. "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." *Id.* at 538 n.10. In subsequent decisions the Court has not referred to the *Ross* test, perhaps indicating its narrow applicability.

18. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), as quoted in *Pernell v. Southall Realty*, 416 U.S. 363, 374-75 (1974), and *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

In *Curtis*¹⁹ the Court found the Title VIII cause of action to be analogous to tort actions recognized at common law, and the relief sought—actual and punitive damages—to be the traditional form of

19. Prior to *Curtis*, lower courts were split on the applicability of the seventh amendment to suits brought under Title VIII. *E.g.*, *Marr v. Rife*, 363 F. Supp. 1362 (S.D. Ohio 1973) (no jury trial; an action based upon racial discrimination could not have been maintained at common law); *Kelly v. Armbrust*, 351 F. Supp. 869 (D.N.D. 1972) (jury trial; the action is one traditionally legal in character and plaintiffs requested actual and punitive damages); *Cauley v. Smith*, 347 F. Supp. 114 (E.D. Va. 1972) (no jury trial; the limitation on punitive damages and the discretionary language of the statute indicate relief is equitable); *Kastner v. Brackett*, 326 F. Supp. 1151 (D. Nev. 1971) (jury trial; the action is one traditionally legal in character, similar either to a suit for breach of an oral contract or a common law deceit action).

Curtis must have come as a surprise to commentators who had confidently predicted a contrary ruling. *E.g.*, Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1053 (1969); Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401, 403 (1973). Such predictions were based in part on congressional intent that actions under Title VIII not be tried to a jury, an important factor in *Katchen v. Landy*, 382 U.S. 323 (1966). *Katchen* held that actions under the Bankruptcy Act were not to be tried to a jury because to do so would interfere with the Act's goals of speed and inexpense of adjudication. Commentators felt this reasoning could be applied to Title VIII actions by using the third prong of the *Ross* analysis, *see* note 17 *supra*, to hold that trial by jury is inadequate in such actions because of the cost, delay and possible prejudice of juries. Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment, supra*.

A related basis for these predictions is the similarity of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (1970), and Title VII of the 1964 Act, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. III, 1973), which prohibits discrimination in employment. The right to jury trial has regularly been denied in actions brought under Title VII. *E.g.*, *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Lowry v. Whitaker Cable Corp.*, 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972). *But cf.* *King v. Local 818, Laborers*, 443 F.2d 273, 275 (6th Cir. 1971). Some commentators believed, and petitioners vigorously argued in *Curtis*, Brief for Petitioner at 9-14, *Curtis v. Loether*, 415 U.S. 189 (1974), that Congress' use of the phrase "the court" in both Titles VII and VIII indicated the actions were to be heard by the judge alone. This interpretation of Title VII could have been used in *Curtis*. There are, however, distinctions between the two statutes, such as Congress' 1972 amendment of Title VII to authorize "any other equitable relief." 42 U.S.C. § 2000e-5(g) (Supp. III, 1973), amending 42 U.S.C. § 2000e-5(g) (1970) (emphasis added). Because there was no right to jury trial at equity, *see* note 13 *supra*, this amendment indicates that Congress intended Title VII actions to be tried to the judge alone. As there were arguments both ways, the result in *Curtis* can be justified on the basis of the Court's policy that all doubts are to be resolved in favor of jury trials. *See* *Scott v. Neely*, 140 U.S. 106, 109-10 (1891).

The Court has never directly considered the issue of jury trials in actions brought under Title VII, and Mr. Justice Marshall was explicit in *Curtis* that

relief at law.²⁰ The analysis in *Pernell* involved a detailed study of the forms of action for recovery of property at common law. The Court concluded that the statutory action²¹ encompassed rights and remedies enforced by the action of ejectment at common law, which included the right to jury trial.²² In neither case was reference made to the three-pronged functional analysis test, upon which lower courts have placed great emphasis²³ and on which the litigants' briefs in *Pernell* and *Curtis* heavily relied.²⁴ The Court's strict adherence to the traditional historical test in these cases suggests it never rejected the test, but was forced to bend it to accommodate changes occasioned by procedural reforms. This is not to say the Court will always use the historical test, but rather that the test is preferred and will be applied absent exigent circumstances.²⁵

the Court would "express no view on the jury trial issue in that context." 415 U.S. at 197. He distinguished the two Acts on the basis of statutory language, however. Although his statements may have been dicta, they do suggest that the Court would uphold the denial of a jury trial under Title VII. *Id.* One may wonder whether Congress intended for these two Acts, so alike in purpose, to receive such different interpretations.

20. 415 U.S. at 195-96.

21. See note 8 *supra*.

22. 416 U.S. at 371-81.

23. *E.g.*, *Marr v. Rife*, 363 F. Supp. 1362, 1363 (S.D. Ohio 1973); *Richards v. Smoltich*, 359 F. Supp. 9, 11 (N.D. Ill. 1973).

24. See Brief for Petitioner at 21, 31-35, *Pernell v. Southall Realty*, 416 U.S. 363 (1974); Brief for Respondent at 16-24, *Curtis v. Loether*, 415 U.S. 189 (1974).

25. Functional analysis may still be appropriate when the sole reason why a suit would have been tried at equity in 1791 was the inadequacy of legal relief, and that inadequacy has been eliminated by merger and the Federal Rules. The analysis applied in *Beacon Theatres*, see note 13 *supra*, and its progeny may be viewed as constitutionally compelled and constitutionally sound if the seventh amendment embodies a principle of determination of jurisdiction by reference to procedural adequacy, rather than solely by reference to past procedure. This permits a redefinition of the right to jury trial to comport with procedural developments in a manner that is similar to the flexible definitions given "due process" and "unreasonable searches and seizures." See *McCoid*, *supra* note 2, at 10-11.

The historical test has received sharp criticism in recent years. One writer complains that the test retains too much deadwood from the past and is unsuited to today's merger procedures, thus preventing continuous inquiry into the suitability of various types of issues for jury trial. F. JAMES, *supra* note 1, § 8.3, at 347. Another commentator criticizes the test as "[in]consistent with the traditions of principled constitutionalism that have guided the Supreme Court in the interpretation of other commands of the Bill of Rights." Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 731 (1973). See also Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167, 172-74 (1969).

Curtis and *Pernell* are notable for their exemplification of the type of analysis to be used in determining if the right to jury trial attaches to a cause of action embodied in a statute. When faced with seventh amendment questions, some courts have tried to determine if the jury right exists by asking whether the specific statutory claim is one that historically could be brought at law.²⁶ Both cases, however, stated that the amendment's applicability goes *beyond* the common law forms of action recognized in 1791.²⁷ The relevant inquiry is whether the statutory action involves rights and remedies of the sort recognized at common law, even if the particular action was then unknown.²⁸ Thus, courts are not to be straight-jacketed merely because the action itself could not have been maintained at common law. Rather, they are to search out the nearest historical analogue to the cause of action the suit embraces and determine whether it would have involved the right to jury trial in 1791.²⁹

The Court also addressed the related problem of the distinction between statutory rights and statutory proceedings. Mr. Justice Holmes once innocently stated that the seventh amendment "does not apply where the proceeding is not in the nature of a suit at

26. The court in *Marr v. Rife*, 363 F. Supp. 1362, 1364 (S.D. Ohio 1973), reasoned that since slavery was legal in 1791, actions alleging racial discrimination could not have then been maintained. It denied the right to jury trial in an action brought under the Fair Housing Act, for such an action was not available at common law. In *Pernell v. Southall Realty*, 294 A.2d 490, 492-93 (D.C. App. 1972), *rev'd*, 416 U.S. 363 (1974), jury trial was denied because D.C. CODE ANN. § 16-1501 (1973), provides for an expedited proceeding in which title is not tried; it thus bears only superficial resemblance to common law ejectment actions.

27. *Pernell v. Southall Realty*, 416 U.S. at 375-76; *Curtis v. Loether*, 415 U.S. at 193.

28. The damage action in *Curtis* was analogized to common law tort actions, such as that available against an innkeeper who refused lodging or an action for defamation or intentional infliction of mental distress. 415 U.S. at 195-96. In *Pernell*, although the proceeding established by the District of Columbia statute was a "far cry in detail from the common-law action of ejectment," both served the same essential function, permitting eviction of one who is wrongfully detaining possession. 416 U.S. at 375. The Court also found that every action recognized in 1791 for recovery of the possession of property carried with it the right to jury trial. *Id.* at 376.

29. This principle was recognized as early as *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830), and finds wide support among commentators. *E.g.*, F. JAMES, *supra* note 1, § 8.1, at 339; 5 J. MOORE, *supra* note 13, ¶ 38.11[7]; 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2316, at 79 (1971). For a case applying this analysis but holding against the right to jury trial see *Luria v. United States*, 231 U.S. 9, 27-28 (1913).

common law."³⁰ His remark has occasionally been interpreted as distinguishing between substantive rights derived from common law and those derived from statute. This interpretation has been used to hold that no jury trial is required in a cause of action created by statute, since any such action would have been unknown at common law.³¹ The court of appeals in *Curtis* expressly rejected this approach and emphasized that the proper distinction is between a proceeding "in the nature of a suit at common law" (*i.e.* a judicial action) and a "statutory proceeding" (such as an administrative hearing).³² The Supreme Court approved this distinction.³³ The question is *where* legal rights and remedies created by statute are enforceable—if in an action in ordinary courts of law, the jury right attaches; if in a special administrative proceeding, unknown to the common law, then strictures of the seventh amendment do not apply.³⁴

30. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

31. "The law is well established that the various special statutory actions which have been created from time to time . . . do not come within the meaning of common law." *Lawton v. Nightingale*, 345 F. Supp. 683, 684 (N.D. Ohio 1972). This was also the unsuccessful contention of the federal government in *United States v. Friedland*, 94 F. Supp. 721, 723 (D. Conn. 1950).

32. 467 F.2d at 1115.

33. 415 U.S. at 194-95. The idea that a cause for relief based upon a statute is not per se free from the constitutional right to jury trial is not unique to *Curtis*. Mr. Justice Story, in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445-46 (1830), expressly rejected the dissent's contention that the seventh amendment was inapplicable because the claim arose not under common law but under the statutes of Louisiana. In an unbroken line of cases involving enforcement of statutory rights, the Court has treated the right to jury trial as well settled. *E.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (trademark infringement); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (Sherman & Clayton Acts); *Fleitmann v. Welsbach St. Lighting Co.*, 240 U.S. 27, 29 (1916) (Sherman Act); *Hepner v. United States*, 213 U.S. 103, 115 (1909) (Alien Immigration Act of 1903).

34. *Pernell v. Southall Realty*, 416 U.S. at 383; *Curtis v. Loether*, 415 U.S. at 195.

One commentator has expressed concern at Mr. Justice Marshall's statement, 416 U.S. at 383, that "[w]e may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency." 4 L. PROJECT BULL., Issue 5, at 5-6 (1974). Such an agency may rely for its constitutionality on *Block v. Hirsh*, 256 U.S. 135 (1921), upholding a statute transferring actions for the recovery of real property from the courts to a rent control commission. In *Pernell* Mr. Justice Marshall said that *Block* "merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." 416 U.S. at 383. *Block*, however, involved an exceptional situation—a severe housing shortage following World War I—and

The practical effects of *Curtis* and *Pernell* are far-reaching, for now parties in actions of these types will be able to submit their claims to juries as of right.³⁵ The consequences of this right will vary widely, depending upon the type of suit involved. In actions brought under the Fair Housing Act, the damages recovered may diminish because jurors are not likely to be sympathetic to the plaintiffs' claims.³⁰

the regulation was to be in effect for only two years. 256 U.S. at 154. Such a temporary authority is clearly distinguishable from a permanent landlord-tenant agency, which Congress could not create by relying solely on its police power.

Several commentators have considered Congress' power to entrust determination of actions traditionally heard at law to administrative agencies and have suggested persuasive constitutional arguments that such agencies would not violate the seventh amendment. See, e.g., Micon, *Constitutional and Other Limitations on Illinois Administrative Agencies*, 24 CHI-KENT L. REV. 137, 155 (1946); Note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282, 293-94 (1942); Comment, *The Seventh Amendment and Civil Rights Statutes*, supra note 9, at 527-30. See also Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261 (1935). These constitutional arguments are important in light of specific proposals for the creation of landlord-tenant agencies. E.g., McNamara, *The District of Columbia Landlord and Tenant Court: An Obsolete Structure in Need of Reform*, 23 CATH. U.L. REV. 275 (1973).

35. The seventh amendment applies only to courts of the United States, *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211, 217 (1916), including those of the District of Columbia. *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). *Pernell*, therefore, will not be directly applicable to the typical eviction case, which is generally brought in state court. Analysis similar to that used in *Pernell* may be applied in state court actions, however, when antecedent state common law and state constitutional provisions are involved: "Where the state common law granted a right to jury trial in eviction proceedings immediately prior to the adoption of the state constitution and that constitution contains a guarantee of the right to jury trial in civil proceedings, then the state court may be compelled by its own state constitution to recognize the right to trial by jury in eviction proceedings notwithstanding state statutes or rules of court to the contrary." 4 L. PROJECT BULL., Issue 9, at 4 (1974). In addition, state courts have often found federal construction of the seventh amendment either persuasive or controlling in construing their own constitutional provisions for civil jury trial. 1 FORDHAM URBAN L.J. 492, 493 n.5 (1973). The state court issue did not arise in *Curtis*. Mr. Justice Marshall stated that since the decision was based on the seventh amendment rather than on construction of Title VIII, the issue of jury trial in actions brought in state courts was not being decided. 415 U.S. at 192 n.6.

36. Note, *Jones v. Mayer*, supra note 19, at 1051. "If most white citizens had substantial objections to discriminatory refusals to sell property, there would be no need for the laws in the first place." *Id.* at 1051 n.229. See also Goldfarb & Kurzman, *Civil Rights v. Civil Liberties: The Jury Trial Issue*, 12 U.C.L.A.L. REV. 486, 487 (1965); Comment, *The Right to Jury Trial under Title VII*, supra note 25.

In cases brought under the Fair Housing Act, it is regularly the white defendant who requests the jury trial and the black plaintiff who objects. E.g., *Marr v.*

Legislative history reveals that the Act's proponents were concerned about this possibility.³⁷ *Curtis* recognized that jury prejudice could deprive a victim of discrimination of the verdict to which he is entitled, but this risk was not sufficient to overcome dictates of the seventh amendment.³⁸ On the other hand, the jury right will probably have the opposite effect in eviction cases. A jury is likely to include renters, who may be sympathetic to the evicted tenant and unwilling to enforce landlord-weighted laws.³⁹ Landlords may also be more inclined to settle out of court, rather than face a jury presumably sympathetic to the tenant's interests.⁴⁰ Although these arguments run counter to the traditional concept of the jury as an impartial fact-finder, common sense suggests that the allocation of questions of fact between judge and jury may have a great influence upon the result, especially in cases involving such volatile issues as open housing.⁴¹

The major significance of these two cases lies not in their specific holdings but in the type of analysis employed. They evince a return

Rife, 363 F. Supp. 1362 (S.D. Ohio 1973); *Kelly v. Armbrust*, 351 F. Supp. 869 (D.N.D. 1972); *Cauley v. Smith*, 347 F. Supp. 114 (E.D. Va. 1972); *Kastner v. Brackett*, 326 F. Supp. 1151 (D. Nev. 1971).

37. For thorough analysis of the legislative history of Title VIII and other civil rights statutes, revealing concern among supporters that jury trials might conflict with the purposes of these statutes, see Brief for Petitioner at 15-26, *Curtis v. Loether*, 415 U.S. 189 (1974).

38. 415 U.S. at 198. The Court also felt that the trial judge's power to direct a verdict, grant judgment notwithstanding the verdict, or grant a new trial provides substantial protection against this risk. *Id.*

Other courts have discussed the problem of jury bias. *Lawton v. Nightingale*, 345 F. Supp. 683 (N.D. Ohio 1972), was an action under 42 U.S.C. § 1983 (1970), which authorizes damage actions for violations of civil rights. That court stated, "If a jury could be resorted to in actions brought under this statute, the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views." *Id.* at 684. In *Cook v. Cox*, 357 F. Supp. 120 (E.D. Va. 1973), also an action under § 1983, the court said that "legislative history reveals that the Congress was motivated in part to pass the act by what it viewed as a failure of southern juries to justly consider the claims of Negro litigants in state courts." *Id.* at 125.

39. 1 *FORDHAM URBAN L.J.* 492, 493 n.3 (1973).

40. 60 *GEO. L.J.* 848, 855-56 (1972).

41. 1 *FORDHAM URBAN L.J.* 492, 493 n.3 (1973). For an argument that such an approach is based on elitist and undemocratic presumptions see Comment, *The Seventh Amendment and Civil Rights Statutes*, *supra* note 9, at 538.

to fundamentals in construing the seventh amendment and indicate that functional analysis was an exception to the rule, rather than a new trend. *Curtis* and *Pernell* should give new impetus to the historical test and serve as prototypes for courts faced with seventh amendment questions.

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