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COMMENTS

THE FETISH OF JURY TRIAL IN CIVIL CASES: A COMMENT ON RACHAL v. HILL

David L. Shapiro * and Daniel R. Coquillette **

Rachal v. Hill, a 1970 decision by the Fifth Circuit, indicated that the seventh amendment right to jury trial may severely limit developments in the principles of res judicata. Professor Shapiro and Mr. Coquillette argue that such a limitation would be unsound, and that it finds no support in history or Supreme Court precedent.

UNDER the influence of Supreme Court decisions on the right to jury trial in civil cases in the federal courts,¹ most observers seem to develop a Pavlovian reaction to a seventh amendment, jury trial issue whenever it arises. Any close question — and sometimes one that is not so close — is resolved in favor of the jury trial right without serious analysis of history, precedent, or policy.

What may be of only passing interest in the classroom or in legal commentary becomes a cause for concern when it spreads to the lower federal courts. Yet the signs of contagion are appearing² — perhaps the most conspicuous recent example being the decision of the Fifth Circuit in *Rachal v. Hill*.³ At a time of growing concern over crowded dockets, the size of judgments, and the costs of litigation, the question whether we have more trial by jury than we want or need is well worth asking — and

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¹ E.g., *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

² See, e.g., *Crane Co. v. American Standard, Inc.*, 326 F. Supp. 766 (S.D.N.Y. 1971) (upholding defendant's right to a jury on an issue that had already been determined adversely to it in the same proceeding; the prior determination was rendered on appeal from a final judgment denying equitable relief); *Cannon v. Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971) (following result of *Rachal v. Hill*). An exception to this trend, however, can be seen in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1964), perhaps in part because of the fear that in some areas of the country juries would frustrate the statutory objective. See *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1264 & n.371 (1971).

³ 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971).

Rachal v. Hill is a case in point. The question seems particularly appropriate against the background of substantial limitations on the use of civil juries in England⁴—whose history is our common law heritage and at least a point of departure for the analysis of seventh amendment issues.

I

The first of the two actions involved in *Rachal v. Hill* began when the SEC filed a complaint in a federal district court against Mooney Aircraft, Inc., Mooney Corp., and Messrs. Rachal and Hunnicutt. The complaint alleged the use of a fraudulent scheme relating to the stock of the corporations, as well as other unlawful conduct, in violation of Sections 5 and 17(a) of the Securities Act of 1933,⁵ Section 10(b) of the Securities Exchange Act of 1934,⁶ and Rule 10b-5.⁷ Injunctive relief against continuance of the alleged practices was sought. The corporations consented to the entry of a permanent injunction, but Rachal and Hunnicutt demanded and received a trial. The district court, sitting without a jury, found that the two defendants had committed violations of the securities laws as alleged and entered an order granting the requested injunction on March 27, 1969.

The second action was brought against Rachal and Hunnicutt by Hill as representative of the stockholders in the two corporations, and derivatively in behalf of the corporations. The plaintiff sought the recovery of damages sustained as a result of the conduct complained of in the first proceeding. On the plaintiff's motion for summary judgment, the district court held that the fact issues relating to liability in the two proceedings were identical, that the defendants had had a full and fair trial, that no suggestion of any new evidence had been made, and that de-

⁴ Under the Administration of Justice Act of 1933, 23 & 24 Geo. 5, c. 36, § 6, and Rules of the Supreme Court, Order 33, Rule 5, it is a matter of discretion whether there shall be a jury in most civil actions in the Queen's Bench Division. See *Hope v. Great W. Ry.*, [1937] 2 K.B. 130. Moreover, the exercise of discretion is subject to appellate control. See *Ward v. James*, [1965] 1 All E.R. 563 (C.A.), (in order to achieve uniformity in awards of damages, a trial court should not order trial by jury in personal injury cases save in exceptional circumstances). There is no jury trial in Chancery; when a Chancery action involves one of the few issues on which a jury is guaranteed under the Administration of Justice Act, the issue may be transferred to Queen's Bench for determination. See ODGERS' PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS OF THE HIGH COURT OF JUSTICE 274 (20th ed. G. Harwood 1971).

⁵ 15 U.S.C. §§ 77e, 77(q)(a) (1970).

⁶ 15 U.S.C. § 78j(b) (1970).

⁷ 17 C.F.R. § 240.10b-5 (1971).

fendants were collaterally estopped to deny the alleged violations of the securities laws.⁸

On appeal, the judgment was vacated and the case remanded for trial before a jury. Noting the modern trend of case and commentary, the Fifth Circuit declined to base its decision on the principle of mutuality of estoppel. It declared that a person not a party to a prior proceeding could, in appropriate circumstances, rely on a determination made in that proceeding — could, in other words, make use of the collateral estoppel doctrine against an adversary who had litigated an issue and lost. What prevented use of the doctrine in the case at hand, however, was the equitable character of the first proceeding: Rachal and Hunnicutt could not have had a jury in that proceeding⁹ and to estop them now, in an action for damages, would interfere with their jury trial right. While conceding the absence of a “case directly in point,”¹⁰ the court placed heavy reliance on *Beacon Theatres, Inc. v. Westover*,¹¹ a 1959 Supreme Court decision holding it to be error for a federal district judge to rule that an issue of fact common to a legal and an equitable claim in the same proceeding should be tried first to the court without a jury. After quoting extensively from *Beacon* and citing several other recent federal decisions, Judge Morgan, speaking for the court in *Rachal*, concluded:

In light of the great respect afforded in *Beacon Theatres*, supra, and its progeny, for a litigant's right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their

⁸ The district court also granted summary judgment on the other issues, awarding \$1,285.30 to Hill, dismissing the class action for failure to present common questions of fact, and awarding the corporations \$454,000 from Rachal and \$5,960 from Hunnicutt.

⁹ See p. 449 & note 27 *infra*.

¹⁰ 435 F.2d at 63. In a footnote, the court acknowledged that one of its own decisions — *Painters Dist. Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969) — had applied collateral estoppel in an analogous situation. The case was distinguished, however, on the grounds that the issue of jury trial was not raised and that since the parties in the second action had also been adversaries in the prior proceeding, the case did not raise “the special considerations required to insure justice in cases where mutuality of parties is lacking . . .” 435 F.2d at 63 n.5. Cf. *Kelliher v. Stone & Webster, Inc.*, 75 F.2d 331 (5th Cir. 1935), also cited by the *Rachal* court in the same footnote.

¹¹ 359 U.S. 500 (1959).

present adversary was not a party and which arose in a different context from the present action.¹²

The Supreme Court, busy with more important matters and perhaps a bit fatigued with the subject of jury trials in civil cases, denied certiorari near the close of the 1970 Term.¹³

II

The decline of the doctrine of mutuality of estoppel, recognized in *Rachal*, has been the subject of much discussion by courts and commentators¹⁴ and will not be rehearsed here.¹⁵ Nor will we discuss in any detail questions of the appropriateness of collateral estoppel in the specific context of the statutory scheme for administration of the securities laws. Our concern in this comment is with the conclusion in *Rachal* that a party's inability to obtain a jury trial in an initial proceeding for injunctive relief is, in itself, a basis for denying the application of collateral estoppel in a subsequent action for damages against that party.

Looking first at the authority relied on in the *Rachal* decision itself, we find it wholly unpersuasive. As noted, almost all of the court's eggs are placed in the *Beacon Theatres* basket. Although *Beacon Theatres*, like other Supreme Court decisions, can be

¹² 435 F.2d at 64. Despite the passage quoted in text, it is not entirely clear that the decision rested squarely on the seventh amendment. In the same paragraph, the court said:

It hardly makes sense that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case

Thus the decision may be explained simply as a refusal to extend the collateral estoppel principle in a way that would raise serious seventh amendment questions.

¹³ 403 U.S. 904 (1971).

¹⁴ See, e.g., *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942); *B.R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1 (1969).

¹⁵ Suffice it to note our agreement with the Fifth Circuit that collateral estoppel effect should not be denied solely because the party asserting it was not a party to the prior proceeding, and to note our surprise at the court's failure to discuss the possible distinction between offensive and defensive use of the doctrine. See, e.g., the discussions of the distinction in Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-party*, 35 GEO. WASH. L. REV. 1010 (1967).

broadly read as expressing a general policy in favor of jury trial, and thus as supporting the *Rachal* decision, a closer look at the *Beacon Theatres* case convinces us that, if anything, it cuts the other way. The plaintiff in that proceeding had sought a declaratory judgment that certain contractual arrangements relating to "clearances" for the showing of films did not violate the antitrust laws and had also sought an injunction pendente lite restraining the defendant from bringing suit under those laws to challenge the arrangements. The defendant denied the allegations and counterclaimed for treble damages under the antitrust laws. In ruling that the trial judge erred in denying defendant's request that issues common to the equitable claim and the legal counterclaim be tried first to a jury, the Supreme Court said:

[T]he effect of the action of the District Court could be, as the Court of Appeals believed, "to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit," for determination of the issue of clearances by the judge might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim."¹⁶

Note the assumption of the Court in *Beacon Theatres* that if an issue were tried first before a judge, relitigation of the issue before a jury in the same proceeding "might" be barred by principles of "res judicata or collateral estoppel."¹⁷ Indeed, if such relitigation were not barred, it is difficult to see how a basis for mandamus to the district judge in *Beacon Theatres* could have been made out. Unnecessary expenditure of judicial time in trying an issue without a jury and then trying it again with a jury, instead of settling it once and for all with a jury at the outset, can hardly constitute such an excess of authority as to call for the issuance of mandamus.

Beacon Theatres thus indicated that whenever principles of former adjudication or law of the case might preclude jury trial on an issue previously litigated before a judge in the same proceeding, the trial judge must, in the absence of exceptional circumstances, order the trial of issues within that proceeding to assure that foreclosure does not occur. But *Beacon Theatres* did not imply that principles of former adjudication should themselves be

¹⁶ 359 U.S. at 504.

¹⁷ Since the question involved a determination of the issue in the same proceeding, the applicable doctrine would seem to be not res judicata but the more flexible "law of the case." See Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1, 15-20; Note, *Law of the Case*, 5 STAN. L. REV. 751 (1953).

For a recent holding contrary to the assumption in *Beacon Theatres*, see *Crane Co. v. American Standard, Inc.*, 326 F. Supp. 766 (S.D.N.Y. 1971).

changed under the influence of the seventh amendment. *Rachal* takes exactly the opposite tack from *Beacon Theatres*, concluding that seventh amendment considerations do influence the application of these principles when reordering is impossible, as it was in *Rachal* because of the separateness of the two proceedings.

Beacon Theatres' reasoning also emphasized the impact of procedural reforms on the jurisdiction of equity to grant the relief sought by the plaintiff:

Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules [especially Rule 13, relating to counterclaims] necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.¹⁸

In this respect as well, *Rachal* and *Beacon Theatres* are quite dissimilar. No procedural reforms — merger of law and equity, declaratory judgments, or anything else — can be said to have affected the equitable character of the relief sought by the SEC in the initial proceeding or to have given the defendants a right to a jury in that action. Instead, *Rachal* raises the wholly different question whether the seventh amendment requires relitigation of an issue already decided adversely to the party who now asserts a jury trial right. Is there really an anomaly, as the Fifth Circuit seemed to think, in concluding that a jury must be given on an issue not yet adjudicated, but that an issue need not be *relitigated* once it has been decided by the court sitting alone?

No greater support for the *Rachal* result can be garnered from the two other Supreme Court decisions cited in the Fifth Circuit opinion: *Dairy Queen, Inc. v. Wood*¹⁹ and *Scott v. Neely*.²⁰ In *Dairy Queen* the Supreme Court held that when a plaintiff combined a demand for an injunction with a demand for damages,²¹

¹⁸ 359 U.S. at 509 (footnotes omitted).

¹⁹ 369 U.S. 469 (1962).

²⁰ 140 U.S. 106 (1891). This case, while not cited directly in *Rachal*, did appear in a passage quoting from *Beacon Theatres*. 435 F.2d at 64.

Ross v. Bernhard, 396 U.S. 531 (1970), not cited in *Rachal*, in some respects goes beyond earlier decisions in applying the seventh amendment. See *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 172-76 (1970). Like its predecessors, however, it does not lend direct support to the *Rachal* result.

²¹ The demand was designated one for an "accounting," but the Court in-

the defendant had a right to a jury on any common issues.²² And in *Scott*, a leading nineteenth century decision on jury trial, the Court held that a federal court in a diversity case should not follow a state statute allowing a creditor to sue in equity to set aside a fraudulent conveyance before his claim against the debtor had been reduced to a judgment at law. To allow such a "blending" of claims in a federal equity proceeding would be to broaden the scope of equity jurisdiction and therefore to deny the debtor's right to a jury on the issue of the existence of the debt. Thus *Dairy Queen*, like *Beacon Theatres*, involved the delicate problem of adjusting seventh amendment rights to a merged system of law and equity, while *Scott* established that existing jury trial rights in the federal courts could not be eroded by state laws telescoping legal and equitable claims into a single equitable proceeding.

The holding in *Scott* seems beyond any serious argument, even after the merger of law and equity in the federal courts; and although there is room for debate about such decisions as *Beacon Theatres* and *Dairy Queen*, we need not grapple with those pronouncements here. Taking them for all they are reasonably worth, the question raised in *Rachal* was not concluded against the plaintiff. If we assume that they do not compel an answer in his favor, are there other sources, not considered by the court, that might have informed the result?

III

The seventh amendment provides that the right to trial by jury in suits "at common law . . . shall be preserved" The reference to preservation of a right suggests the relevance of the nature of that right in 1791, when the seventh amendment became effective, but no material bearing on that issue is alluded to by the *Rachal* court. The omission, a bit startling at first glance, may be explainable on several grounds. One might ask, for example, whether it can really aid in resolving a jury trial issue to examine the state of the law almost two centuries ago — at a time when law and equity were often administered by separate courts and when the statutory rights now asserted were not even dreamed of. And whose law should one look to if such

sisted that the plaintiff's "choice of words" was not controlling. 369 U.S. at 478. The action, in the Court's view, was one in which damages, a legal remedy, were being sought.

²² When law and equity were separately administered, the plaintiff could presumably have insured a jury on the common issues by going to law first for damages and then to equity for an injunction. The effect of *Dairy Queen* was to give both parties a guarantee of a jury on common issues under a merged procedure.

an examination is to be made? Procedures in each of the colonies varied widely and developed, at least to some degree, independently.²³ Reports of American decisions during this period are rare,²⁴ and although the English reports are more complete, significant changes in the relationship between law and equity were in process.²⁵ Any snapshot of the English system as of 1791 is therefore likely to be misleading and, in any event, of little utility in coping with present-day problems.²⁶

Despite the admitted force of these arguments, we do not see how an historical inquiry can be avoided when a seventh amendment question is raised. Even the most ardent critic of any historical test would concede that matters that would have fallen entirely within the jurisdiction of a court of equity or admiralty in 1791 do not come within the definition of a suit at "common law" under the seventh amendment.²⁷ Nor, in our view, can it

²³ See THE FEDERALIST No. 83, at 565-66 (J. Cooke ed. 1961) (A. Hamilton); Wilson, *Courts of Chancery in America—Colonial Period*, 18 AM. L. REV. 226 (1884), in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 779 (1908); Fisher, *The Administration of Equity Through Common Law Forms in Pennsylvania*, in *id.* at 810; Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

²⁴ See Henderson, *supra* note 23, at 299-300.

²⁵ See 3 W. BLACKSTONE, COMMENTARIES *55; CUNNINGHAM'S LAW DICTIONARY, at "Chancery," sec. 2 (2d ed. 1771).

²⁶ For the conclusion that the Supreme Court has become impatient with historical inquiry and has, in significant part, rejected it, see *The Supreme Court, 1969 Term, supra* note 20, at 175-76. For a full and provocative discussion of the relevance of historical investigation to current problems, see F. JAMES, CIVIL PROCEDURE §§ 8.1-11 (1965) C. WRIGHT, FEDERAL COURTS § 92 (2d ed. 1970); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967).

With respect to the scope of the sixth amendment guarantee of jury trial in criminal cases the Supreme Court's rejection of history as affording a controlling test has been even more explicit. Thus in *Bloom v. Illinois*, 391 U.S. 194 (1968), the Court held that a right to trial by jury exists in certain criminal contempt proceedings. In a long footnote, the Court found the historical materials ambiguous and then concluded: "In any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution." *Id.* at 200 n.2.

The Court's reluctance to be bound by history in sixth amendment cases does not, however, require that the seventh amendment receive similar treatment. While the right to a jury in a criminal case has been held protected by the due process clause of the fourteenth amendment, *Bloom v. Illinois*, 391 U.S. 194 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968), no such conclusion has been or seems likely to be reached with respect to the jury trial right in civil cases. Thus analysis of the latter question seems less likely to be cut loose from its historical moorings by prevailing notions of fundamental fairness associated with the due process guarantee.

²⁷ See 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES

be concluded that a clear historical basis for a jury trial claim should be overridden if an analysis of the values and limitations of juries indicates that trial by jury is inappropriate.²⁸ Freed from any constitutional restraint, we might decide, as the English have, to eliminate jury trial in virtually all civil actions. But surely that avenue is closed so long as the seventh amendment continues in its present form.

Difficult as it may be, then, we believe some effort must be made to determine the state of the law in the late eighteenth and early nineteenth centuries — to determine, in other words, what it was that the seventh amendment was seeking to preserve. True, the frequently inconclusive character of the evidence, together with the changes in substance and procedure that have followed, compel us to regard the inquiry as a beginning rather than an end. But they cannot compel its abandonment.

In the context of *Rachal*, a key question to be posed at the outset is whether a determination of an issue made by a court of equity was given preclusive effect in a subsequent proceeding at law, even though the effect of such preclusion would be to deprive a litigant of a jury trial on the issue in the second action.²⁹

With the question thus sharply focused, the answer still does not emerge with absolute clarity. The relationship between the Chancery and the common law courts was sometimes far from cordial.³⁰ And the doctrine of *res judicata* lacked the precision

§ 1768 (5th ed. 1891). Thus it seems clear that neither the SEC nor the defendants in the suit for injunctive relief that preceded *Rachal* would have had a constitutional right to a jury on any issue. Nor is there anything in the securities laws to indicate the presence of a statutory right to a jury trial. In fact, a request for a jury was denied in an analogous proceeding, brought by the Secretary of Labor under the enforcement provisions of the Fair Labor Standards Act, § 16, ch. 676, 52 Stat. 1069 (1938), as amended, 29 U.S.C. §§ 216-17 (1970), despite the suggestion that collateral estoppel might subsequently bind the defendant in an action for damages. *Mitchell v. Michigan-U.S. Indus. Glove & Laundry Co.*, 189 F. Supp. 411 (E.D. Mich. 1960).

²⁸ For a forceful statement that a functional test has a place in an historical frame, see Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176 (1961).

²⁹ This question should be distinguished from the much-debated question of the nature of the obligation created by an equity decree, and particularly its extra-territorial effect. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971); Barbour, *The Extra-Territorial Effects of the Equitable Decree*, 17 MICH. L. REV. 527 (1919); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954). While the historical materials discussed do bear on both questions, the question raised in the text is one of collateral estoppel, rather than of "merger" or "bar." See Currie, *supra*, at 645-46.

³⁰ The conflict over the jurisdiction of Chancery during the late sixteenth and early seventeenth centuries caused some uncertainty as to the nature of a Chancery decree. Sir Edward Coke argued that the Chancery was "no court of record." E. COKE, *THIRD INSTITUTE* fol. 123. Further, he contended that the ancient statute of Praemunire, 27 Edw. III, c. 1 (1353), prohibited the Chancery

reflected in our present understanding of such terms as "merger," "bar," and "collateral estoppel." But by the end of the eighteenth century, it appears to have been generally agreed that determinations made in equity were binding in courts of law. Strong support for this conclusion is furnished by several treatises of the times, including Francis Buller's *Trials at Nisi Prius*, first printed in England in 1772, and Thomas Peake's *A Compendium of the Law of Evidence*, first printed in England in 1801, both of which were also published in the United States.³¹ Thus Peake tells us that "[t]he decree [in equity] is evidence on the same principle as a judgment in a Court of Law, and subject to the like rules,"³² while Buller's discussion is even more explicit:

A decree in chancery may be given in evidence between the same parties or any claiming under them, for their judgments must be of authority in those cases, where the law gives them a jurisdiction; for it were very absurd that the law should give

from interfering with the judgments of the common law courts. E. COKE, *THIRD INSTITUTE* fol. 119, 120.

This conflict, fully discussed in Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 *ILL. L. REV.* 127 (1941), had little to do with jury trial issues. On the few occasions when a jury question was raised, it was done in an ancillary way. See, e.g., *Heath v. Rydley*, 79 *Eng. Rep.* 286 (K.B. 1614). Moreover, the accuracy of Coke's assertion that Chancery and other courts were not of record has been persuasively challenged. See Thorne, *Courts of Record and Sir Edward Coke*, 2 *U. TORONTO L.J.* 24 (1937).

Coke's campaign suffered a decisive defeat in the famous Judgment of James I in 1616, 21 *Eng. Rep.* 65, but the "court of record" argument had a strange afterlife, based primarily on the posthumous prestige of Coke's *Institutes*. Traces of it can be found throughout the eighteenth century and even in the writings of Langdell in the late nineteenth century. See C. LANGDELL, *A SUMMARY OF EQUITY PLEADING* 35 n.4 (at 37) (2d ed. 1883). But see, e.g., *Barbour*, *supra* note 29, at 539-47. The argument undoubtedly influenced some judges, as in *Marret v. Sly*, 82 *Eng. Rep.* 1265 (Ch. 1658) (equitable decree not evidence in court of common law), and *Post v. Neafie*, 3 *Cai. R.* 22, 34-37 (N.Y. Sup. Ct. 1805) (dissenting opinion).

³¹ Peake's treatise was printed in Philadelphia in 1802 and Buller's in New York in 1788. These books, together with those cited in note 34, *infra*, were among the earlier treatises to be published in the United States. See James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, in *HARVARD LEGAL ESSAYS WRITTEN IN HONOR OF AND PRESENTED TO J.H. BEALE AND S. WILLISTON* 159, 184, 199 (1934); Wallach, *The Publication of Legal Treatises in America from 1800 to 1830*, 45 *LAW LIBRARY J.* 136 (1952). All treatises dealing with evidence and procedure referred to in these two articles have been consulted, as well as a number of English treatises of the period not published in the United States. With one minor exception, G. JACOB, *EVERYMAN HIS OWN LAWYER* 94 (N.Y., 1768), nothing inconsistent with the excerpts quoted here has been found.

³² T. PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 44 (Philadelphia, 1802). See also *id.* at 55.

them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof.

. . . .

And note; Wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment, of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter; and in case the determination be final in the court of which it is a decree, sentence, or judgment, such decree, sentence, or judgment will be conclusive in any other court having concurrent jurisdiction.

In consequence of the first part of this rule, if in ejectment a question arose about the marriage of the father and mother of the plaintiff, a sentence in the ecclesiastical court in a cause of jactitation would be conclusive evidence.³³

Similar statements are to be found in other important treatises of the period.³⁴

Contemporaneous judicial writings on both sides of the Atlantic support the statements in these treatises. Thus in *Hart v. Lovelace*,³⁵ decided in King's Bench in 1795, the court had to determine whether it was precluded from holding certain written instruments invalid as a result of prior litigation concerning the instruments in the Court of Chancery. No question of the validity of the instruments had been raised in the prior proceeding, and the court concluded that the question was still open. Lord Kenyon stated:

In the course of this argument I have had some difficulty in my mind respecting the [prior] decree in the Court of Chancery. If this question had been brought before that Court, and received a judicial decision, I should have thought myself bound by it, as being the judgment of a Court having competent jurisdiction over the subject matter: but the proceedings there were diverso intuitu; that suit had a different object in view: and the question before us did not arise in that Court.³⁶

³³ F. BULLER, TRIALS AT NISI PRIUS 243-44 (N.Y., 1806).

³⁴ See LORD GILBERT, THE LAW OF EVIDENCE 67 (5th ed. 1788) ("A Decree in Chancery may be given in Evidence, and so may a Sentence in the Ecclesiastical Courts, for their Judgments must be of Authority in those Cases, where the Law gives them a Jurisdiction . . ."); 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 478 (1796) ("Action of debt will lie on the decree of a court of chancery, to recover the penalty, for not performing the decree.").

³⁵ 101 Eng. Rep. 654 (K.B. 1795).

³⁶ *Id.* at 657. The two concurring judges, Grose and Lawrence, agreed that consideration was not precluded by the proceeding in Chancery "because this question was not agitated in that Court, though, if it had, they [the judges] thought it would have been conclusive here." *Id.*; cf. *Perry v. Phelps*, 32 Eng. Rep. 756, 757 (Ch. 1804); *Scott v. Shearman*, 96 Eng. Rep. 575, 576 (K.B. 1775) (condemnation proceeding in Exchequer—a type of proceeding in which we

In the United States, the New York Supreme Court, as early as 1805, allowed an action of debt at law to be maintained on a decree of a sister state's court of chancery for the payment of money.³⁷ And there is broad language in other New York decisions recognizing the obligations of courts of law and equity to honor each other's determinations. Witness the observation of Chancellor Kent in 1815, and its resemblance to the passage quoted from Buller:

Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than the courts of law, in a similar case, could re-examine a decree of the court of chancery.³⁸

The chancellor here was echoing a similar declaration by the New York Court of Errors in 1800:

The general principle, that the judgment or decree of a court possessing competent jurisdiction, shall be final as to the subject matter thereby determined, is conceded on both sides, and can admit of no doubt.³⁹

believe a jury was not used — was “conclusive evidence to the jury” in an action in trespass for seizing the goods condemned) (unanimous holding).

³⁷ *Post v. Neafie*, 3 Cai. R. 22 (N.Y. Sup. Ct. 1805). For a later Supreme Court decision to the same effect, see *Pennington v. Gibson*, 57 U.S. (16 How.) 65 (1853); *cf. Brady v. Daly*, 175 U.S. 148, 159 (1899) (determination in equity proceeding that a scene in a play was protected by copyright held binding in subsequent action for damages); *Smith v. Kernochen*, 48 U.S. (7 How.) 198 (1849) (assignee of mortgage sued in federal court in ejectment; action held barred by prior state court determination in equity foreclosure action that the mortgage was void); *Dobson v. Pearce*, 12 N.Y. 156 (1854) (Connecticut equity decree enjoining plaintiff from enforcing New York judgment, on ground that the judgment was obtained by fraud, held conclusive evidence of fraud in plaintiff's action on the judgment in New York).

³⁸ *Simpson v. Hart*, 1 Johns. Ch. 91, 97 (N.Y. 1814). The court in this case held itself bound by a prior determination at law refusing to allow a set-off. *Hart v. Lovelace* was cited in support of the result.

³⁹ *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 492 (N.Y. Ct. Err. 1800). See also *Gelston v. Hoyt*, 1 Johns. Ch. 543, 546 (N.Y. 1815); *Picket v. Morris*, 2 Va. (2 Wash.) 255, 270-71 (1796) (argument of John Marshall as counsel); *Blacklock v. Stewart*, 2 Bay 363 (S.C. 1802). In the *Blacklock* case the court decided, in an action at law on an insurance policy, that it was not bound by a foreign decree in admiralty because of the uncertainty of the ground of the admiralty court's decision. The South Carolina court concluded, however, that “If the ground on which the sentence proceeded, is valid by the law of nations, and it is set forth with sufficient certainty, we are bound by it . . .” *Id.* at 367.

Joseph Story wrote not many years after these decisions that an equity decree “is, for most purposes, if not for all, of as high a dignity and character, as a judgment in a Court of Law.” J. STORY, *EQUITY PLEADINGS* 798 (5th ed. 1852). Estoppel on the record could be asserted on the basis of any final determination “whether it be a judgment or decree, a Court of Law, or a Court of Equity.” *Id.* at 796.

Small wonder, then, that the matter is treated casually in the *Restatement of Judgments* as an illustration of the general rule of collateral estoppel:

Where in a proceeding in equity a question of fact is actually litigated and determined by a valid and final decree, the determination is conclusive between the parties in a subsequent proceeding at law or in equity on a different cause of action.⁴⁰

But, a defender of the *Rachal* result might argue, the historical inquiry cannot end here; the seventh amendment was designed to ensure that if a litigant had a right to a jury in 1791, for whatever reason, that right would continue to be recognized. Since limitations on the doctrine of collateral estoppel — in particular the doctrine of mutuality — would have made it impossible for Hill to deprive *Rachal* and Hunnicutt of a jury on the issue of liability in an analogous proceeding in 1791,⁴¹ they should not be deprived of their right to a jury today.

This argument is not without force. A complete rebuttal might require a showing that the framers of the seventh amendment did not intend to foreclose developments in principles of former adjudication despite the effect such developments might have on the jury trial right. The history of the amendment, however, does not permit so close an analysis of intent,⁴² and it therefore seems appropriate to consider more broadly whether the courts and commentators of the day perceived a link between the existing limitations on *res judicata* and the jury trial right.

Although the evidence is essentially negative in character, we do not believe that such a link existed. The doctrine of mutuality was plainly regarded as applicable whether or not the prior adjudication was one before a jury; the rationale underlying mutuality was found in the unfairness of binding a litigant by a prior determination when his adversary could not be bound by that same determination.⁴³ Since determinations at law and in equity were entitled to the same respect, there is nothing in the jurisprudence of the times to suggest that any modification of the mutuality principle would have been confined to instances in which the first determination had been at law or before a jury.

There are, in addition, affirmative reasons for rejecting a defense of *Rachal* based on the law of mutuality as it stood in 1791. First, it would reduce the historical inquiry to an absurdity. Since

⁴⁰ RESTATEMENT OF JUDGMENTS § 68, Comment j (1942).

⁴¹ Thus Peake, for example, at another point in his treatise, spells out the then-accepted view of mutuality as a requirement for application of *res judicata*. PEAKE, *supra* note 32, at 27.

⁴² See Henderson, *supra* note 23, at 291-99.

⁴³ See, e.g., PEAKE, *supra* note 32, at 27.

mutuality is only one aspect of the broader doctrine of *res judicata*, would it not follow from acceptance of the defense that the precise boundaries of the entire doctrine as of 1791 would have to be marked? That, for example, developments in the doctrine with respect to "privity,"⁴⁴ finality,⁴⁵ the meaning of a judgment "on the merits,"⁴⁶ the distinction between ultimate and mediate facts,⁴⁷ etc., would all have to be given fixed dates of birth before it could be decided whether a judgment in equity precludes re-litigation at law? Even the hardiest antiquarian would, and should, blanch at the prospect of such an undertaking.

Second, we believe it impossible to discern any rational basis for the line that would have to be drawn. The *Rachal* court did say that "special considerations" were "required to insure justice in cases where mutuality of parties is lacking."⁴⁸ But surely the statement was a makeweight designed to help brush off a disturbing precedent.⁴⁹ Should *Rachal* have been a different case if, say, the plaintiff in the damage action were a person or agency in "privity" with the SEC? Not surprisingly, a favorable comment on the *Rachal* decision has urged that its rationale be extended to the two-party situation.⁵⁰ We agree in part: the law must move one way or the other because such an arbitrary line is inherently unstable. As long as the line exists, the "ghost" of mutuality "still walks abroad, somewhat shrunken in size, yet capable of much mischief."⁵¹

IV

This historical inquiry, though cursory, indicates that in the late eighteenth and early nineteenth centuries, determinations in equity were thought to have as much force as determinations at law, and that the possible impact on jury trial rights was not

⁴⁴ See, e.g., Note, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098 (1968).

⁴⁵ See, e.g., *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89-90 (2d Cir. 1961), *cert. denied sub nom. Dawson v. Lummus Co.*, 368 U.S. 986 (1962).

⁴⁶ See, e.g., *FED. R. CIV. P. 41*; *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970), *noted in* 31 U. MD. L. REV. 85 (1971).

⁴⁷ See, e.g., *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), *cert. denied sub. nom. The Evergreens v. Commissioner*, 323 U.S. 720 (1944); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 842-43 (1952).

⁴⁸ 435 F.2d at 63 n.5.

⁴⁹ See note 10 *supra*.

⁵⁰ 40 U. CIN. L. REV. 373, 381 (1971): "[T]he logic of *Rachal* suggests a broader rule—that regardless of the blending or sequence of legal and equitable determinations, the right to a jury trial on legal issues can never be lost through prior equitable determination."

⁵¹ *Sampson v. Channell*, 110 F.2d 754, 761 (1st Cir.) (Magruder, J., *referring to Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)), *cert. denied*, 310 U.S. 650 (1940).

viewed with concern.⁵² But as already suggested, there are other matters to be considered. Changes in procedure or other factors may militate in favor of jury trial and may indeed require it as a matter of constitutional right.⁵³ No such considerations were brought forward by the *Rachal* court, however, and our own study persuades us that the discernible policy factors cut against any such conclusion. If collateral estoppel is otherwise warranted, the jury trial question should not stand in the way.

As noted earlier, several key developments in the interpretation of the seventh amendment have sprung from the impact of procedural reform on historical distinctions. For example, what is the point of talking about the former practice of going to law for damages after (or before) obtaining an injunction if the two forms of relief not only *may* be combined in a single proceeding but probably *must* be under emerging notions of the dimensions of a claim?⁵⁴ Does it make sense, in a merged procedure, to give the plaintiff but not the defendant a choice of a jury, even if a close historical analysis might indicate such a result?⁵⁵ And how can one meaningfully talk about an injunction against an action at law when the "law" action in question is filed as a counterclaim in the same proceeding, and a compulsory one at that?⁵⁶

No such puzzlements are presented in *Rachal*. The problem of the collateral estoppel effect to be given to the prior proceeding is unaffected by merger, or indeed by any other reform in judicial procedure since the adoption of the Constitution.⁵⁷

⁵² Indeed, the materials suggest that jury trial questions as such were not viewed as important in marking the boundaries between law and equity during the eighteenth and early nineteenth centuries. That such questions were not entirely ignored, however, is indicated by two important decisions of the period. In *Denton v. Stewart*, 29 Eng. Rep. 1156 (Ch. 1786), the plaintiff brought an action for specific performance of a contract for the sale of a house, and when it was discovered that the property had been transferred by the defendant to another, the court retained jurisdiction for the determination of damages resulting from the breach. But some years later in *Todd v. Gee*, 34 Eng. Rep. 106, 107 (Ch. 1810), Lord Eldon confined *Denton* to its particular circumstances and insisted that ordinarily "this Court . . . would not give compensation for the damage, sustained by not being able to complete the subsequent contract; which might fairly be offered to the consideration of a jury."

⁵³ See McCoid, *supra* note 26.

⁵⁴ See, e.g., F. JAMES, CIVIL PROCEDURE §§ 11.10, 11.14 (1965); C. CLARK, CODE PLEADING 137-46 (2d ed. 1947); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 824-31 (1952); Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357, 361-65 (1967). But see, e.g., *Woodbury v. Porter*, 158 F.2d 194 (8th Cir. 1946).

⁵⁵ See the discussion of *Dairy Queen, Inc. v. Wood*, at pp. 447-48 *supra*.

⁵⁶ See the discussion of *Beacon Theatres, Inc. v. Westover*, at pp. 445-47 *supra*.

⁵⁷ Admittedly, the same argument could be made against the result in *Ross*

Are there factors favoring a jury trial even though history, viewed directly or through the prism of procedural change, does not require it?⁵⁸ The costs are clear enough. The time of the court must be taken up with relitigation of an issue already fully tried in a proceeding in a coordinate court whose procedures are comparable in every respect but the availability of a jury. Hill, a private plaintiff whose resources are presumably limited, is unable to derive any benefit from the earlier litigation conducted by the government, even though the government itself was acting to protect the interests of private investors like him. And if the rights of the defendants here are of constitutional dimension, they presumably cannot be impaired by Congress. What, then, is the status of the provision of the antitrust laws that a judgment or decree in a proceeding brought by the United States "shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said [antitrust] laws . . . as to all matters respecting which such judgment or decree would be an estoppel as between the parties thereto"?⁵⁹ Does it violate the defendant's seventh amendment rights if a prior determination estops him on an issue, but not if it shifts to him the burden of going forward?

We confess ourselves unable to find the benefits to be weighed in the balance against the problems that are raised. Jury trial in civil cases is not an unmixed blessing;⁶⁰ it is at least in some

v. Bernhard, 396 U.S. 531 (1970), upholding the right to a jury on certain issues in a stockholder's derivative action. See McCoid, *supra* note 26, at 21-23. But, rightly or wrongly, the Supreme Court in *Ross* saw the derivative suit as having two aspects, only the first of which—the question of the stockholder's standing to sue—is properly viewed as equitable in nature under a merged procedure. See *The Supreme Court, 1969 Term, supra* note 20, at 172-76.

⁵⁸ One such factor might arise if a defendant could show that the plaintiff in the first proceeding had deliberately framed his complaint to have the issues in the first proceeding tried without a jury, so that in a second proceeding he could rely on collateral estoppel and circumvent a jury. This showing, however, could presumably only be made when the litigants in both proceedings were the same—that is, the case explicitly recognized and distinguished in *Rachal*, see note 10 *supra*. Nor does this factor explain why a plaintiff in an initial equitable proceeding should be granted jury trial in a subsequent proceeding against a different adversary, a result which *Rachal's* rationale would support.

⁵⁹ 15 U.S.C. § 16(a) (1970).

⁶⁰ For critical appraisals of trial by jury in some or all civil actions, see, e.g., J. FRANK, *LAW AND THE MODERN MIND* 170-85 (1930); H. ZEISEL, H. KALVEN, & B. BUCHHOLZ, *DELAY IN THE COURT* 71-81 (1959); Lummus, *Civil Juries and the Law's Delay*, 12 B.U.L. REV. 487 (1932); Peck, *Do Juries Delay Justice?*, 18 F. R. D. 455 (1956). See also Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915); *Duncan v. Louisiana*, 391 U.S. 145, 171, 187-89 (1968) (dissenting opinion). While not prepared to argue that civil juries are

part responsible for delay in the courts, for escalation in the size of damage awards, and for the high cost of judicial administration. Admittedly, the institution serves important values that may justify its retention even in the absence of constitutional constraints. But whatever its worth when an issue has not yet been litigated, its use to retry a complex question already fully and fairly aired in an adversary proceeding seems to us to involve a net loss of substantial proportions. Nothing in the seventh amendment, in the Supreme Court's interpretation of it, or in considerations of fairness and justice requires such a loss to be borne.

an anachronism serving no valid present purpose, we do view with alarm the steady, uncritical extension of the seventh amendment into new domains.