NOTES

Shore v. Parklane Hosiery Co.: the Seventh Amendment and Collateral Estoppel

In *Shore v. Parklane Hosiery Co.*,[1] the Court of Appeals for the Second Circuit held that issues litigated and decided in an injunctive action brought by the Securities and Exchange Commission (SEC) cannot be relitigated by the defendant in a subsequent civil damage action. The case involved a proxy statement sent to the stockholders of Parklane Hosiery Co. requesting their approval of a merger between Parklane and a dummy corporation pursuant to Parklane's plan to "go private."[2] After the merger was approved, Shore sued for damages in a class action on behalf of Parklane shareholders, alleging that the proxy statement was materially false and misleading, in violation of sections 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934.[3] The proxy statement allegedly failed to reveal that the actual purpose of the merger was to enable Parklane's president to repay personal debts totaling nearly $2 million.[4]

Eighteen months later, during pre-trial,[5] the SEC sued Parklane alleging the same violations of the securities laws.[6] The SEC injunctive action was tried first. The court, in a nonjury trial, found that defendants' proxy statement was materially misleading as alleged by the SEC.[7] Plaintiff in the private action then moved for summary

1. 565 F.2d 815 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1875 (1978) (No. 77-1305, 1977 Term).

2. SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). Shore's action was oue of five private actions growing out of the Parklane merger. *Id.* at 480.

3. 565 F.2d at 816.

4. *Id.* at 817; SEC v. Parklane Hosiery Co., 558 F.2d 1083, 1085 (2d Cir. 1977).

5. At the time the SEC filed its action, pre-trial discovery in *Shore* had not been completed. Petitioners' Brief for Certiorari at 6, Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1875 (1978) (No. 77-1305, 1977 Term) [hereinafter cited as Petitioners' Brief for Certiorari].

6. The SEC claimed violations of section 17(a) of the Securities Act of 1933 and sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934. Shore v. Parklane Hosiery Co., 565 F.2d 815, 817 (2d Cir. 1977). Plaintiff subsequently amended his complaint to conform to the SEC complaint. Petitioners' Brief for Certiorari, *supra* note 5, at 5.

7. SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 484-85 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). However, the trial court refused to grant the requested injunction because it found that there was not a reasonable likelihood that the harm would be repeated. 422 F. Supp. at 486-87.

judgment based on the court's findings in the SEC action. The district court denied the motion, relying on the Fifth Circuit case *Rachal v. Hill*,[8] which held that giving collateral estoppel[9] effect to findings in an SEC injunctive action would violate defendants' seventh amendment right to a jury trial.

The Second Circuit reversed, arguing that allowing defendants to relitigate issues already determined in the SEC action would ignore the basic purposes of collateral estoppel—"fairness, finality, certainty, economy in utilization of judicial resources, [and] avoidance of possibly inconsistent results."[10]

This Note argues that the result in *Shore* is inconsistent with the constitutional right to jury trial. Accepted seventh amendment analysis requires an historical examination of the right to jury trial as it existed in 1791. The *Shore* court incorrectly applied the historical test and overemphasized the degree to which that test has been undercut by recent Supreme Court decisions. The court's willingness to cut back

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8. 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). *Rachal* also involved an action for damages against corporate officers in which plaintiff shareholders argued that findings made in an SEC injunctive action estopped defendants to deny that their conduct violated the securities laws. *Id.* at 60-61.

Rachal had relied heavily on Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). In light of *Beacon Theatres'* "great respect" for a right to have legal claims tried first before a jury where legal and equitable claims are joined, the *Rachal* court said it would be "anomalous" to hold that a party has lost that right via a nonjury adjudication in which the present adversary was not a party. 435 F.2d at 64. *Rachal* emphasized the lack of mutuality and the "offensive" use of collateral estoppel. A later court said *Rachal* had read the seventh amendment as creating a "judicial policy exception" to the collateral estoppel doctrine. McCook v. Standard Oil Co. of California, 393 F. Supp. 256, 259 (D.C. Cal. 1975).

In addition to *McCook*, *Rachal* was followed in Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177 (3d Cir. 1972) (collateral estoppel not applied to arbitrators' findings); SEC v. Standard Life Corp., 413 F. Supp. 84 (W.D. Okla. 1976) (jury trial in SEC injunctive action denied because findings in injunctive action will not preclude relitigation in later private damage action); Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990 (S.D.N.Y. 1971) (no collateral estoppel effect given to district court findings in SEC injunctive action).

Rachal was criticized in McWilliams, *Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action?*, 48 MISS. L.J. 1, 27 (1977); Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 422, 454-55, 457 (1971) [hereinafter cited as Shapiro & Coquillette]; Comment, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338, 369-73 (1976). *Rachal* was discussed approvingly in Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal v. Hill*, 71 COLUM. L. REV. 1329, 1335 (1971); Note, *Civil Procedure—Right to Jury Trial. . .*, 40 U. CIN. L. REV. 373 (1971). The Restatement (Second) of Judgments notes *Rachal*, but adheres to the position taken in the first Restatement that "[t]he determination of an issue by a judge in a proceeding conducted without a jury is conclusive in a subsequent action whether or not there would have been a right to jury in that subsequent action if collateral estoppel did not apply." RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment d, and Reporter's Note (Tent. Draft No. 4, 1977) [hereinafter cited as RESTATEMENT (SECOND)].

9. Collateral estoppel is a procedural doctrine whereby an issue determined in a prior legal proceeding is considered concluded in a subsequent action. *See generally* Comm'r v. Sunnen, 333 U.S. 586, 587 (1947); F. JAMES, CIVIL PROCEDURE (1965) § 11.9 [hereinafter cited as JAMES]; 1B MOORE'S FEDERAL PRACTICE ¶ 0.441 at 3771-74 (2d ed. 1974) [hereinafter cited as MOORE].

10. 565 F.2d at 821 (footnote omitted).

on seventh amendment protections also rested on an overestimation of the benefits that can be derived from a liberal application of collateral estoppel.

I

THE SEVENTH AMENDMENT

The seventh amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[11] The word "preserved" has led most courts to analyze jury trial claims in terms of the right as it existed in the common law courts[12] of England[13] in 1791,[14] the date of the amendment's ratification. Litigants are entitled to jury trial in modern legal actions that closely resemble those in which juries were required in 1791. Most courts interpreting the seventh amendment have used this "historical approach."[15]

The Supreme Court, however, has permitted a departure from 1791 practice to *deny* a jury trial when the departure does not affect the "substance"[16] of the jury trial right, but rather is a "procedural incident or detail"[17] of the common law practice. This exception to the strict historical approach to seventh amendment analysis is rarely encountered.[18]

On the other hand, two lines of Supreme Court cases *expand* the seventh amendment right to jury trial beyond the 1791 practice. First, the Court has expanded the right to jury trial to include cases where the Declaratory Judgment Act and the Federal Rules have expanded the scope of legal relief and, correspondingly, reduced the scope of equita-

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11. U.S. CONST. amend. VII.

12. *E.g.*, Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

13. *E.g.*, Slocum v. New York Life Ins. Co., 228 U.S. 364, 377-78 (1913); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

14. *E.g.*, Dimick v. Schiedt, 293 U.S. 474 (1935). In Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), the Court referred to the historical inquiry as "pre-merger custom," i.e., the practice before 1938, when the Federal Rules of Civil Procedure merged legal and equitable actions into one civil action. It is unclear whether the Court intended to make a substantive revision of the traditional historical approach or was merely referring to the historical test in a loose fashion. See Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 643 (1973) [hereinafter cited as Wolfram].

15. *See generally* JAMES, *supra* note 9, at § 8.1; 5 MOORE, *supra* note 9, ¶ 38.08, at 79-85 (2d ed. 1978). For a discussion of the advantages and disadvantages of the historical approach see JAMES, *supra* note 9, at § 8.3; Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 489, 513, 515-16 (1975) [hereinafter cited as Redish]; Wolfram, *supra* note 14, at 733-34.

16. Colgrove v. Battin, 413 U.S. 149 (1973) (six-member civil juries in federal court do not violate seventh amendment); Baltimore & Caroline Line, Inc. v. Redman, 295 U.S. 654 (1935) (judgment n.o.v. does not violate seventh amendment). In *Redman* the Court said the seventh amendment preserves "the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure." *Id.* at 657.

17. Colgrove v. Battin, 413 U.S. 149, 155-56 (1973); Galloway v. United States, 319 U.S. 372, 390 (1943).

18. *See id.*

ble relief.[19] The seventh amendment also has been extended to causes of action created by federal statutes after 1791.[20] Barring congressional assignment of statutory causes of action to a specialized court of equity or administrative process,[21] the Court will grant a jury trial right "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary court of law."[22] To determine if the statute creates "legal" rights and remedies, courts have looked primarily to the type of relief sought.[23] However, courts also have considered whether an analogous action existed at common law in 1791,[24] whether the action is brought in an ordinary law court,[25] and whether there is evidence that Congress intended to grant a jury trial right in the action.[26]

These departures from the traditional form of seventh amendment analysis—particularly the one focusing on the post-merger blurring of the law-equity distinction—spawned much speculation about the continued validity of seventh amendment historical analysis.[27] Some commentators predicted the Court would adopt a "functional approach" to the seventh amendment which would consider not only post-1791 developments like merger, but also civil juries' "abilities and limitations" to decide particular types of cases.[28]

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19. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). *See also* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). The Court's approach in *Beacon Theatres*, *Ross*, and *Dairy Queen* expanded the right to jury trial into areas thought to be beyond the reach of the seventh amendment. *See generally* Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 7-12 (1976) [hereinafter cited as Kane]; Redish, *supra* note 15, at 488; Note, *Congressional Provision for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401, 408-09 (1973).

20. Curtis v. Loether, 415 U.S. 189 (1974). The *Curtis* Court said the applicability of the seventh amendment to statutes enacted since 1791 was " 'a matter too obvious to be doubted,' " citing Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) and Hepner v. United States, 213 U.S. 103, 115 (1909). 415 U.S. at 193.

21. *See, e.g.*, Atlas Roofing Co. v. OSHA, 430 U.S. 442 (1977) (proceedings against employer for violations of Occupational Safety and Health Act of 1970); Katchen v. Landy, 382 U.S. 323 (1966) (proceedings under Bankruptcy Act § 2, 11 U.S.C. § 11(a) (1964)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936) (NLRB proceedings).

22. Curtis v. Loether, 415 U.S. 189, 194 (1974).

23. *See, e.g., id.* at 196. *See also* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469; Schine v. Schine [1969-70 Transfer Binder], FED. SEC. L. REP. (CCH) ¶ 92,552 (S.D.N.Y. 1970).

24. Curtis v. Loether, 415 U.S. 189, 195 (1974).

25. Katchen v. Landy, 382 U.S. 323 (1966).

26. *See* Lorillard v. Pons, 434 U.S. 575 (1978); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916).

27. *See, e.g.*, Kane, *supra* note 19; McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967); Redish, *supra* note 15; Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112 (1971).

28. The functional approach is derived from a footnote in *Ross v. Bernhard* in which the Court declared that the "legal" nature of an issue is determined by considering three factors: "first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitation of juries." 396 U.S. 538 n.10. The third factor has been viewed as requiring courts to determine whether an action is one suited to the abilities of a jury. See Redish, *supra* note 15, at 523-24; Wolfram, *supra* note 14, at 644. The functional approach was

Recent Supreme Court decisions, however, have reaffirmed the viability of the historical test.[29] The earlier cases creating exceptions to the historical analysis which expanded the seventh amendment appear to have been the product of a pro-jury Court which sought to *expand* the right to civil jury trial into areas where the historical approach would not permit expansion.[30] However, where the jury trial right is in danger of *contraction*, the historical analysis appears to prevail.[31]

II

THE *SHORE* COURT'S SEVENTH AMENDMENT ANALYSIS

In their appeal to the Second Circuit, the defendants in *Shore* contended that *Rachal* and subsequent cases established their right to relitigate their alleged securities law violations before a jury in a private damage action.[32] Defendants also contended that because the seventh amendment "preserves" the right to jury trial as it existed in 1791, and since the nonmutual estoppel sought to be asserted against them did not exist in 1791,[33] the subsequent development of nonmutual estoppel could not extinguish their seventh amendment right.[34] The court rejected both arguments.

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employed neither in *Ross*, nor in any Supreme Court seventh amendment case since. Some commentators have questioned the constitutional status of the functional approach. *See* Wolfram, *supra* note 14, at 644-45; Note, *Ross v. Bernhard: The Uncertain Future of The Seventh Amendment*, 81 YALE L.J. 112, 129-30. However, other commentators have called the *Ross* footnote "a potential bombshell" and "a guide to the future" which is not dead, but only slumbering. *See* Redish, *supra* note 15, at 524; Kane, *supra* note 19, at 27-35. For the impact of the *Ross* footnote on lower courts, *see* Redish, *supra* note 15, at 524-25.

29. Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Colgrove v. Battin, 413 U.S. 149 (1973). *See generally* Comment, *The Seventh Amendment—A Return To Fundamentals*, 10 URB. L. ANN. 313 (1975).

30. The dissent in Ross v. Bernhard, 396 U.S. 531 (1970), for example, attributed the majority's decision to "an unarticulated but apparently overpowering bias in favor of jury trials in civil actions." 396 U.S. at 551. *See also* McCoid, *Procedural Reform and the Right to A Jury Trial: A Study of Beacon Theatres v. Westover*, 116 U. PA. L. REV. 1, 14-15, 24 (1967).

31. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974).

32. Brief for Appellees at 8-11, Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977).

33. Until recently, estoppel had to be mutually binding. This meant that one who sought to invoke a prior judgment as binding must have been either a party, or in privity with a party, to the action in which the judgment was rendered. Nonmutual estoppel, on the other hand, allows anyone to use a judgment adverse to a party to the earlier action. *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 302 (1961). *See generally* JAMES, *supra* note 9, at § 11.26; Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459 (1968); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 862 (1952).

34. Brief for Appellees at 15, Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977). For a discussion of the decline of the mutuality requirement see JAMES, *supra* note 9, at § 11.34; Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1471 (1968).

A. Rachal *and Other Precedent*

The Second Circuit held that *Beacon Theatres, Inc. v. Westover*,[35] relied on by the Fifth Circuit in *Rachal*,[36] was inapposite because the action there did not involve an independent equity proceeding.[37] Moreover, the court argued, *Beacon Theatres* cut against defendants. The court said *Beacon Theatres'* holding—that a legal counterclaim should be tried to a jury before an equitable claim—would be unimportant unless an equity decree could preclude relitigation in a subsequent action at law.[38] The court therefore reasoned that *Beacon Theatres* actually supported the application of collateral estoppel to the *Shore* defendants.

B. *Abrogation of the Mutuality Rule*

The court also rejected defendants' argument that the post-1791 abrogation of the mutuality requirement should not be permitted to curtail a jury trial right extant in 1791. The court reasoned that in 1791 there was no "common law analogue" to a stockholder's suit based on an implied right of action created by antifraud provisions of federal securities law, and, therefore, that it was impossible to determine whether a jury trial would have been granted in such a case in 1791. Even assuming that a jury trial would have been granted in 1791, the court said it could not be assumed that courts then would not have eased the mutuality requirement and given collateral estoppel effect to the findings in the SEC action. Therefore, the court argued that granting a jury trial by refusing to apply nonmutual estoppel in this case would not simply preserve the jury trial right, but might expand it.

C. *A "Functional Approach"*

Finally, the court characterized the strict historical approach urged by the defendants as "somewhat weakened" by recent Supreme Court decisions. This allowed the court in effect to adopt the "functional approach" to the seventh amendment, which weighs the equities of the case before it and also considers the administrative benefits of a broad application of collateral estoppel.

D. *Improper Application of the Historical Test*

The court's analysis reflects a misunderstanding of the historical test. The assertion that there is no common law analogue to a securities fraud action is questionable,[39] and in any event irrelevant to de-

35. 359 U.S. 500 (1959).

36. Rachal v. Hill, 435 F.2d at 63-64 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

37. In *Beacon Theatres* one party's equitable claim was met by the other party's legal counterclaim. The Court held that since both claims shared a common factual basis, the trial court must structure the proceedings so that the right to jury trial on the common factual issue was preserved. 359 U.S. at 510-11.

38. 565 F.2d at 820-21.

39. *Id.* at 823. The court's narrow characterization of the cause of action seems to compel

fendants' argument. To apply the historical test, courts examine the common law antecedents of a statutory cause of action created after 1791 to determine if a jury trial would have been granted at common law; if so, a jury trial also is required under the statute. This inquiry is irrelevant in *Shore* because a jury trial right already exists in a private civil action for damages under the securities laws. A jury trial right has been recognized in such cases for decades, particularly where money damages are sought.[40] Thus, the *Shore* court's search for a common law antecedent to a securities fraud action was unnecessary. The court instead should have inquired whether the jury trial right as it existed in 1791 could have been curtailed by applying nonmutual collateral estoppel.

On this issue, the *Shore* court concluded that the lack of a common law analogue to securities actions made it impossible to predict what 1791 courts would have done with a procedural issue like collateral estoppel had they confronted the securities statutes.[41] Yet, even if there were no "securities actions" in 1791, there certainly were similar damage actions.[42] In any event, the requirement of mutuality of estoppel did not depend on the type of action brought. A 1791 court, faced with a new action based on new securities laws, certainly would have preserved the mutuality doctrine, which was so imbedded that it did not fall for 150 years.[43]

The court based its speculation regarding the rules of collateral estoppel as they might have existed for a 1791 securities fraud action on an article which had argued that equity decrees were given preclusive effect at law in 1791.[44] Even if so, this is irrelevant. The issue in

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the conclusion. If such a narrow definition were given to all statutes, it is unlikely that a common law analogue ever would be found. No seventh amendment case before *Shore* can be found in which the Court has failed to find a 1791 analogue to a statutory cause of action.

A close 1791 analogue to the *Shore* action was the common law action of deceit, "which was an action of tort for damages." WILSHERE, PRINCIPLES OF THE COMMON LAW 118-19 (1937). An action for deceit was the general common law remedy for fraudulent acts of any kind which resulted in actual damage. 2 W. BLACKSTONE, COMMENTARIES 1732 (W. Jones ed. 1916). *See also* Derry v. Peek, 14 A.C. 337 (1889); Pasley v. Freeman, 100 Eng. Rep. 450 (1789). It is true that if the action in *Shore* can be characterized as one pertaining to the internal relations of a corporation, then the closest analogy is to an equitable action for breach of trust. *See* C. COOKE, CORPORATION TRUST AND COMPANY; AN ESSAY IN LEGAL HISTORY 69, 75, 84 (1951). However, since equity would not grant money damages, any action in which the shareholders sought such relief would have to have been brought in common law courts.

40. The author of *Shore*, Judge Mansfield, in a case decided eleven years earlier clearly assumed such a right. Richland v. Crandall, 259 F. Supp. 274 (S.D.N.Y. 1966). *See also* cases cited in note 23 *supra*.

41. 565 F.2d at 823.

42. *See* note 39 *supra*.

43. Nonmutual estoppel was recognized in Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 321-26 (1971); JAMES, *supra* note 9, at § 11.34; RESTATEMENT (SECOND), *supra* note 8, at § 88, Comment b and Reporter's Note (Tent. Draft No. 2, 1975). *But see* Comment, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 521-22 (1976) (mutuality still required in most states today).

44. Shapiro & Coquillette, *supra* note 8, at 451-53. The evidence concerning the preclusive-

Shore is whether the mutuality requirement would have prevented applying collateral estoppel in 1791.

It has been argued that examining the mutuality requirement as it stood in 1791 would "reduce the historical inquiry to an absurdity" by forcing a court to mark out the precise boundaries of the entire doctrine of collateral estoppel in 1791 before it could be decided whether a judgment in equity precludes relitigation at law.[45] This argument seems to assume that adhering to a strict historical test in a situation such as that presented in *Rachal* or *Shore* would be hypertechnical. But mutuality was not a hypertechnical procedural rule. It remained one of the cornerstones of collateral estoppel for 150 years.[46]

For these reasons, the Second Circuit's seventh amendment analysis is unconvincing. Because the mutuality requirement was so important in 1791, proper application of the traditional historical test to the facts in *Shore* compels granting defendants' jury trial request. Instead, the court used a post-1791 development—relaxation of the mutuality requirement of collateral estoppel—to deprive defendants of a jury trial right that would have been granted by courts in 1791.[47] The development of nonmutual estoppel, unlike those developments involved in the few Supreme Court cases recognizing an exception to the historical analysis, was not related to merger of law and equity or to the underlying historical reasons for equity jurisdiction,[48] and was not a mere "procedural incident or detail."[49] The decision thus departs from accepted seventh amendment analysis.[50]

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ness of equity decrees may not be as clear cut as Shapiro and Coquillette suggest. For example, there is some evidence that litigants in 18th century equity courts received—either of right or common practice—jury determination of contested factual issues. *See* Chesnin & Hazard, *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1000 (1974). *But see* Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620 (1974).

45. Shapiro & Coquillette, *supra* note 8, at 454-55.

46. Shapiro and Coquillette's own sources confirm the importance of the mutuality rule in 18th century English law. *See* F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 232 (1806) (natural justice requires that one should not be injured by a determination that he, or those under whom he claims, could not originally controvert); T. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 38 (2d ed. 1804) (no verdict shall be admissible except between parties or people privy to suit).

47. Had *Shore* been brought in 1791, defendants would not have been collaterally estopped from relitigating their alleged violations of the securities laws. Mutuality of estoppel was required in 18th English common law courts. *See, e.g.*, F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 232 (1806); T. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 38 (2d ed. 1804). *See also* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912). Indeed, abrogation of the mutuality rule did not occur until the 20th century. *See, e.g.*, Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942); JAMES, *supra* note 9, at § 11.34.

48. *See* note 19 and accompanying text *supra*.

49. *See* note 17 and accompanying text *supra*.

50. The Supreme Court has "never addressed the question of whether the right to jury trial could be coustitutionally restricted by a test including nonhistoric factors." Kane, *supra* note 19, at 11.

This Note's criticism of the court's analysis can be mitigated only if one accepts the court's conclusion that the historical test has been weakened by recent Supreme Court decisions.[51] However, the Court's decisions which eschewed the historical approach generally expanded the jury trial right.[52] Moreover, the last of the decisions which allegedly weakened the historical test occurred in 1970.[53] Since that time, the Supreme Court has on three occasions employed the historical test.[54]

The result in *Shore* cannot be justified given the continued vitality of the historical test. However enlightened from an overall policy perspective may be the relaxation of the mutuality rule, to use this development to eliminate a jury trial right clearly extant in 1791 would undercut the historical test and the seventh amendment itself. If *Shore* is to be followed, a court need not look back to 1791 at all. A court could simply consider recent developments, judicial or legislative, that militate against jury trial. To adopt this analysis does violence to 150 years of seventh amendment law.

In any event, the policy considerations which led the *Shore* court to depart from traditional seventh amendment analysis are not compelling. This Note now will assess the strength of policy considerations on which the *Shore* court relied.

III

SHOULD THERE BE A JURY TRIAL RIGHT IN *SHORE*?

A. Arguments Supporting Jury Trial

The case in favor of civil jury trial begins with the Constitution itself. Justice Story, writing for the Supreme Court in 1830, recognized that the seventh amendment was adopted because of the deep importance of civil jury trial to the American people. Justice Story noted that the absence of the right to civil jury trial in the body of the Constitution was "one of the strongest objections originally taken against the Constitution of the United States."[55]

The perceived value of the civil jury stems from the assumption that juries might be more reliable than a judge sitting alone.[56] The

51. 565 F.2d at 822.

52. *See* notes 19-26 and accompanying text *supra*.

53. Ross v. Bernhard, 396 U.S. 531 (1970).

54. *See* note 29 *supra*.

55. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445 (1830). "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of English law' and 'the most transcendent privilege which any subject can enjoy.' " Dimick v. Schiedt, 293 U.S. 474, 485 (1935). In 1933, however, England abolished the right to civil jury trial in all but a small number of actions. Interestingly, one of the excepted actions is the action for fraud. Admin. of Justice Act, 1933, 23 & 24 Geo. 5, c.36, § 6.

56. Unfortunately, there is little evidence on the frequency with which judges disagree with juries. The Chicago Jury Project found that judges agreed with juries 79% of the time in personal injury cases. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065, (1964).

jury has been viewed as a bulwark against corrupt or case-hardened judges and bad laws.[57] It is also seen as infusing community values and common sense into the legal system.[58]

B. Arguments Against Jury Trial

Two policy considerations favor denying a jury trial claim in *Shore*. First, broad application of collateral estoppel has several benefits: elimination of inconsistent verdicts,[59] protection of litigants from the vexation and expense of unnecessary litigation,[60] and conservation of judicial resources.[61] The *Shore* decision will prevent inconsistent verdicts on the question of whether defendants violated the security laws since there will be only one adjudication of that issue. Similarly, *Shore* also will tend to decrease the litigation expenses borne by a party to a subsequent damage suit. However, *Shore* will not necessarily conserve judicial resources significantly. It is true that the *Shore* principle might conserve judicial resources because the threat of collateral estoppel in a later private action arguably will cause defendants to enter into more consent decrees in SEC actions.[62] Because the findings on which the consent decree is based are not binding in the subsequent damage action, a defendant would thereby preserve the jury trial right in the subsequent action. However, the magnitude of this savings is open to question. Nonjury injunctive actions brought by the government typically take little time.[63] Moreover, the total number of actions

57. Evidence from the constitutional ratification debates suggests that the proponents of a constitutional right to civil jury trial desired that right because a jury could serve as "a check upon what the popular mind might regard as legislative as well as judicial excesses." Wolfram, *supra* note 14, at 671-72.

58. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 498 (1966) [hereinafter cited as KALVEN & ZEISEL], 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 11.14 (rev. ed. 1973); Wigmore, *A Program for the Trial of a Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929). The jury supposedly reaches a consensus on community standards of fairness and justice during its process of deliberation. *But see* KALVEN & ZEISEL, *supra*, at 496; Erlanger, *Jury Research in America: Its Past and Future*, 4 LAW & SOC'Y REV. 345, 347 (1970). The jury then applies these standards to the facts of the case. Janata, *Federal Civil Jury Trials Should Not Be Abolished*, 60 A.B.A.J. 934, 936 (1974); Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023, 1031, 1054 (1974). Two-thirds of judges' disagreements with juries are attributable to differences in senses of values. KALVEN & ZEISEL, *supra* at 494-95. On the other hand, it has been recognized that community "values" may reflect racial or economic prejudice rather than notions of fairness and justice, J. FRANK, COURTS ON TRIAL 129-30 (1950), although, of course, judges may be subject to the same prejudices. For a summary of the arguments for and against the civil jury see Redish, *supra* note 15.

59. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952).

60. *Id.* at 820; Reed v. Allen, 286 U.S. 191, 201 (1932); 1B MOORE, *supra* note 9, ¶ 0.441, at 3779.

61. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 379 (1974).

62. Wall Street Journal, Nov. 17, 1977, at 6, col. 1. The reduction in contested SEC actions also will further the second policy of collateral estoppel—protection against unnecessary litigation.

63. An analysis of workload data for federal district courts over the last six years shows that civil jury trials use more time than court trials. Forty percent of civil nonjury trials are completed in less than one day, but only nine percent of civil jury trials are completed in less than one day.

affected is likely to be very small because many defendants entered into consent decrees even before *Shore*,[64] and because SEC actions represent an extremely small percentage of securities actions filed.[65]

The most obvious conservation of judicial resources which might occur under *Shore* is the time saved in the private action because the private plaintiff is not obliged to offer proof on an issue determined in the government action.[66] For the reasons stated above, however, the apparent savings may be largely illusory. Moreover, while it is true that *Shore* will reduce litigation time in the civil damage action, a jury still must be impaneled to determine damages and to prove any elements of the civil violation that were not proven in the SEC injunctive action.[67] Since much of the delay inherent in the jury trial system is attributable to the jury selection process, that a second trial with a jury still will be necessary suggests that *Shore* may not save substantial court time.

Even if *Shore's* effect on securities actions will be minimal, arguably the *Shore* principle logically extends to other areas, such as antitrust,[68] labor board actions,[69] and other situations in which a private

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The average civil jury trial in federal court lasts 3.7 days, compared to 1.7 days for nonjury trials. Calculated from data contained in [1976] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 332-33 (Table C-8) [hereinafter cited as ANNUAL REPORT].

64. It is estimated that 80% of SEC enforcement actions are settled. Wall Street Journal, Nov. 17, 1977, at 6, col. 1.

65. In fiscal year 1976 the SEC filed 158 suits for injunctive relief and 17 miscellaneous actions in federal district courts. 42D ANNUAL REPORT OF THE SEC FOR THE FISCAL YEAR ENDED JUNE 30, 1976, H.R. DOC. NO. 95-21 95th Cong., 1st Sess. 206 (1977). In the same year nearly 2,050 private securities actions were filed. ANNUAL REPORT, *supra* note 63, at 294 (Table C-2).

66. If collateral estoppel is applied in *Shore*, plaintiff will not be forced to prove what the SEC already had demonstrated—the illegality of defendants' conduct. Collateral estoppel is intended to save legal resources in this manner. *See* Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 338, 346 (1971).

67. For example, in order for the *Shore* private plaintiff to prevail in a 10b-5 claim he must prove more than that defendants made untrue statements or omitted material facts in their proxy solicitation, which is all that the judge in the SEC action found. SEC v. Parklane Hosiery Co., Inc., 422 F. Supp. 477, 486-87 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). Plaintiff also must prove that defendants intended by their misstatements and omissions to deceive, manipulate, or defraud. *See* Note, *The Scienter Requirement In SEC Injunctive Enforcement Of Section 10(b) After Ernst & Ernst v. Hochfelder*, 77 COLUM. L. REV. 419 (1977). The plaintiff also must demonstrate that he has been harmed by defendants' conduct and has suffered damages. These facts must be litigated *de novo* in the private action. Thus, giving collateral estoppel effect to the findings made in the SEC action will save at most only the court time otherwise required to litigate defendants' violation of the securities laws. In this respect the case for applying collateral estoppel in *Shore* is much weaker than in Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313 (1971). There the Court's decision to apply collateral estoppel prevented an entire lawsuit. In *Shore*, there will be a second lawsuit by private plaintiff whether or not collateral estoppel effect is given to the findings in the SEC action.

68. Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), provides that a final judgment in an antitrust action brought by the government which results in a determination that defendant violated the antitrust laws is prima facie evidence against defendant in an action brought by any other party under the antitrust laws. This section can be read to show that congress intended only

plaintiff can sue for damages based on the same statutory violations for which the government already sued.[70] Yet, savings produced in these fields by an increase in the number of consent decrees probably would be marginal. Nevertheless, to the extent that the subsequent civil trial is shortened—which seems particularly likely in the antitrust field[71]—*Shore* could save additional court time.

A second reason to apply collateral estoppel arises from the policies behind the securities laws. The possibility of civil damages may be a useful weapon of the SEC in its enforcement of proxy requirements.[72] *Shore's* boost to private plaintiffs therefore seems consistent with the purposes of the securities laws. *Borak's* solicitousness to private plaintiffs, however, has been undercut by recent Supreme Court decisions limiting a plaintiff's remedies in the securities field.[73] This same trend can be seen, to a more limited extent, in antitrust.[74] The argument that *Shore* will lead to greater deterrence of securities, antitrust, labor, and other violations of federal laws is therefore less persuasive.

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that government antitrust actions have *prima facie*—not preclusive—effect on subsequent private actions. *See* United States v. Grinnell Corp., 307 F. Supp. 1097 (S.D.N.Y. 1964); Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 YALE L.J. 541, 552-54 (1976). If this view is correct, then *Shore* would not affect private antitrust actions. However, legislation repealing section 5(a) has been introduced in Congress "to aid the private enforcement of the antitrust laws, by extending the common law of collateral estoppel to litigated antitrust judgments." H.R. 7647, 95th Cong., 1st Sess. (1977). If the proposed legislation becomes law, the logic of *Shore* could then be applied to give preclusive effect to litigated antitrust judgments.

69. Most courts give preclusive effect to National Labor Relation Board (NLRB) findings of unfair labor practices under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187(b). K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 428 (1976). Given the willingness of courts already to give NLRB findings collateral estoppel effect, it is unlikely that *Shore* will have a significant impact.

70. The law regarding the preclusive effect generally of administrative proceedings was settled by United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 427-29 (1976). However, barring an expression of congressional intent to the contrary, *Shore's* logic may extend to cases where a government regulatory agency such as the Civil Aeronautics Board, Interstate Commerce Commission, or Environmental Protection Agency obtains a final judgment against a violator of a statute.

71. Private antitrust actions are extremely lengthy. In fiscal year 1976, the median time from filing to disposition of private antitrust actions was 14 months. Of the 50 antitrust jury trials in 1976, 22 took between four and nine days to try, six took between 10 and 19 days, and seven took more than 20 days. ANNUAL REPORT, *supra* note 63, at 186, 332-33 (Table C-8). To the extent that *Shore* reduces the need to relitigate issues in private antitrust actions, considerable savings to courts and litigants may result.

72. J.I. Case v. Borak, 377 U.S. 426 (1964).

73. *See, e.g.*, Santa Fe Indus. v. Green, 430 U.S. 462 (1977); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232 (1976).

74. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); United States v. Marine Bancorporation, 418 U.S. 602 (1974). *But see* City of Lafayette v. Louisiana Power & Light Serv., 98 S. Ct. 1123 (1978) (plurality opinion).

C. *Balancing Competing Policy Arguments*

Undetermined savings of judicial time and possible elimination of inconsistent results are therefore the major policy considerations favoring *Shore's* denial of jury trial. Balanced against these is the great importance our society places on jury trial. Courts should not be free to deny a jury trial on policy grounds when the constitutional stature of the civil jury trial right is coupled with Supreme Court's continued adherence to the historical analysis of the seventh amendment.

CONCLUSION

Shore no doubt will be applauded by critics of the civil jury and courts which view with understandable concern the mounting federal court civil backlog. However, the result cannot be justified when *Shore* is examined under the historical approach to the seventh amendment. To deny a jury trial in *Shore* because of the policies underlying collateral estoppel would seriously erode rights intended to be protected by the seventh amendment.

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