FEDERALISM AND THE STATE CIVIL JURY RIGHTS

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Judicial federalism scholarship has concentrated on the interplay between the U.S. Supreme Court and state supreme courts for incorporated rights, where the former sets the floor for rights in the states. But little has been said about judicial federalism and the unincorporated rights, where states are unrestricted in their freedom to define the rights. The Seventh Amendment presents a one-of-a-kind experiment in judicial federalism, as the only federal constitutional right that is duplicated in the great majority of state constitutions and has generated an appreciable body of case law. In this Note, I analyze the evolution of state court treatment of the intertwined-issues problem, both before Beacon Theatres, Inc. v. Westover *announced the federal rule, and today. Surprisingly, I reveal first, a genuine split of authority in the states between the* Beacon Theatres *rule and a narrower rule, and second, that the states had nearly uniformly agreed to the narrower rule before* Beacon Theatres*—a fact not discussed by the* Beacon Theatres *Court or litigants. The* Beacon Theatres *decision has transformed the doctrinal landscape over more than fifty years; many state courts have uprooted their state rules and planted the federal rule in its place. This Note concludes that state supreme courts need a distinct approach for unincorporated rights, such as the Seventh Amendment, to serve judicial federalism norms.*

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INTRODUCTION

The Seventh Amendment, which guarantees a right to a jury trial in certain civil cases, is one of the few constitutional rights the Supreme Court has passed over for incorporation—that is, for application against the states through the Fourteenth Amendment.[1] Two characteristics distinguish the Seventh Amendment from all other unincorporated rights: the right to a jury trial is both provided for in the great majority of state constitutions and has generated an appreciable body of case law at both the federal and state levels.

Beacon Theatres, Inc. v. Westover is one of the first cases any student of the Seventh Amendment will read; it resolved a question of scope for the Seventh Amendment that was brought about by the merger of law and equity.[2] The Supreme Court used a broad rule for interpretation that has since become a fixture in Seventh Amendment jurisprudence. But at the time the Court decided *Beacon Theatres*, many states had already decided the issue and almost uniformly followed a more conservative rule. State law on the issue went unnoticed by the Court. It is absent from the *Beacon Theatres* opinions and the briefs filed with the Court.

1. According to Justice Alito's opinion for the Court in *McDonald v. City of Chicago*, the other unincorporated rights are the Third Amendment's protection against quartering of soldiers, the Fifth Amendment's grand jury indictment requirement, the Sixth Amendment's right to a unanimous jury verdict, and the Eighth Amendment's prohibition on excessive fines. 130 S. Ct. 3020, 3035 n.13 (2010).

2. 359 U.S. 500, 503, 508-10 (1959) (holding that the Seventh Amendment requires a jury trial of all legal issues, including those intertwined with equitable issues).

Today, *Beacon Theatres* is the starting point for analysis in many state cases—even though state courts are not compelled to accept the case. In some states, the analysis seizes on the Seventh Amendment's unincorporated status and reads like a rare step back into preincorporation days, when state courts alone set the metes and bounds for constitutional rights without direction from the U.S. Supreme Court. Many other state supreme courts elect to follow the Supreme Court's interpretation of the parallel right, some with and some without consideration of alternatives. Within a few years of *Beacon Theatres*, some state courts had uprooted established doctrine and planted the *Beacon Theatres* rule into state case reporters, either adopting *Beacon Theatres* as part of a broader judge-made policy of deferring to U.S. Supreme Court doctrine or embracing the rule out of a sense of obligation to the Court, with sometimes only cursory analysis of the Court's reasoning. In other states, state supreme courts determined that the state constitutional right differed from the Seventh Amendment right, leading to corresponding state rules that differed from the *Beacon Theatres* rule.

Justice William J. Brennan's pathbreaking article *State Constitutions and the Protection of Individual Rights*[3] set off new research and discussion about what came to be called the new judicial federalism. Justice Brennan argued that state constitutions should break from the federal interpretation and supply rights above and beyond those rights protected in the Bill of Rights.[4] However, judicial federalism scholars have given the unincorporated rights comparatively little consideration. *Beacon Theatres* presents a one-of-a-kind experiment in judicial federalism as an unincorporated right, where the U.S. Supreme Court does not set the "floor" for the right.

Though many scholars have written about Seventh Amendment jurisprudence, this Note is the first recent scholarship to take the pulse of the civil jury right in the states, where over ninety-five percent of American civil jury trials occur annually,[5] and where the right to a jury in civil trials was born. This Note reveals both a surprising amount of diversity in interpretations, even though the state constitutional rights are similar in text and history, and cryptic deference to *Beacon Theatres*, even though Seventh Amendment case law does not apply to the states. More than fifty years after *Beacon Theatres*, the case's presence continues to be felt, as state courts evaluate the issue in light of its holding. Just

3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

4. *Id.* at 491.

5. *See Civil Jury Trials in State and Federal Courts*, CIV. ACTION (Nat'l Ctr. for State Courts, Williamsburg, Va.), Summer 2007, at 1, 1.

last year, for instance, the Oregon Supreme Court adopted the *Beacon Theatres* rule.[6]

Part I of this Note describes the substance and history of the right to a jury trial in civil cases under state constitutions and introduces this Note's forum for analysis: the intertwined-issues problem. Part II reveals state courts' surprising agreement on treatment of the intertwined-issues problem before the U.S. Supreme Court's adverse decision in *Beacon Theatres*. In opposition to overstatements about the prevalence of *Beacon Theatres* in state courts, Part III presents a genuine split in state courts between those following the Supreme Court's interpretation in *Beacon Theatres* and states that follow a different construction, typically the traditional rule that dominated in the states before *Beacon Theatres*. Part IV discusses state courts' analytical treatment of the intertwined-issues problem in light of the judicial federalism paradigm and criticizes many state courts' lack of transparency through conclusory statements about uniformity between the Seventh Amendment and parallel state constitutional rights. None of the state supreme courts' interpretations of the intertwined-issues problem is indefensible, but some state courts' reliance on federal precedent leaves their opinions difficult to defend and neglects state constitutions.

I. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL IN CIVIL CASES

State constitutional rights to a jury trial in civil cases antedate the Seventh Amendment, and in their substance, bear greater resemblance to each other than they do to the Seventh Amendment. Generally speaking, the Seventh Amendment and the parallel state constitutional rights are designed to protect the right to a jury trial as it existed at common law.[7] When states merged their separate courts of law and equity, it became difficult to apply a rule for separate courts in one merged court: "[Trial by jury] is the sword in the bed that prevents the complete union of law and equity."[8] Significantly, the Seventh Amendment is one of few rights in the first eight amendments to the U.S. Constitution that have not been incorporated, leaving the states free to make an independent determination of the scope of the right under merged courts.

Subpart A describes the current status of the right to a jury trial in state constitutions and the history behind the scope of these rights. Subpart B explains the Seventh Amendment's historical link to the parallel state constitu-

6. *See* M.K.F. v. Miramontes, 287 P.3d 1045, 1057 (Or. 2012) (holding that the Oregon Constitution guarantees a right to jury trial for all claims, except for those which, standing alone, would not have been entitled to a jury trial at common law).

7. *See infra* notes 21-22 and accompanying text.

8. Fredal v. Forster, 156 N.W.2d 606, 612 (Mich. Ct. App. 1967) (quoting an unpublished lecture by Zechariah Chafee).

tional rights, and Subpart C presents the intertwined-issues problem, the issue decided by the U.S. Supreme Court in *Beacon Theatres*.

A. *Civil Jury Rights in State Constitutions*

Each of the original post-Revolution state constitutions guaranteed jury rights in civil and criminal trials. It was probably the only right universally secured by each of the state constitutions.[9] The Articles of Confederation never created federal courts, so the state constitutions were the sole source of the right to a jury trial in the United States. To this day, the constitutions in several of the former colonies are unique for their explicit reference to the civil jury right as being "sacred"[10] and "one of the best securities of the rights of the people."[11] For example, Virginia's Declaration of Rights of 1776 provided, "That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred."[12]

Today, forty-seven state constitutions provide for the right to a jury trial in civil cases, and most do so in the "Declaration of Rights" article, the state constitution counterpart to the U.S. Constitution's Bill of Rights. Variations are few. Over thirty states hold the right to be "inviolate." For example, Indiana requires that "[i]n all civil cases, the right of trial by jury shall remain inviolate."[13] Other states' jury rights are "as heretofore"[14] or "held sacred."[15] In the Seventh Amendment, the right is "preserved,"[16] and only the state constitutions of Alaska, Hawaii, and West Virginia echo the Seventh Amendment's "preserved" language.[17] With the exception of Utah, the clear intention in all forty-seven constitutions is to "freeze" the jury right at some point in time and constitutionally protect it to that extent.[18] The Utah Constitution's jury section does

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9. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960).

10. MASS. CONST. pt. I, art. XV; N.H. CONST. pt. I, art. XX; N.C. CONST. art. I, § 25; VT. CONST. ch. I, art. XII.

11. N.C. CONST. art. I, § 25.

12. VA. DECLARATION OF RIGHTS of 1776, art. 11.

13. IND. CONST. art. I, § 20.

14. *See, e.g.*, DEL. CONST. art. I, § 4 ("Trial by jury shall be as heretofore.").

15. *See, e.g.*, VT. CONST. ch. I, art. XII.

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

17. *See* ALASKA CONST. art. I, § 16; HAW. CONST. art. I, § 13; W. VA. CONST. art. III, § 13.

18. *See, e.g.*, Gilbreath v. Wallace, 292 So. 2d 651, 652 (Ala. 1974) ("Unlike the Federal Constitution which preserves the right to jury trial as of 1791, Alabama's Constitution effected a 'freezing' of the right to jury trial as of 1901." (footnote omitted)).

not expressly grant the right to a civil jury,[19] but the Utah Supreme Court enforces the right, saying constitutional convention records show a clear, virtually unanimous intent to "preserve" the right to a jury trial in civil cases.[20]

What is preserved? All forty-seven states hold that their constitutions protect the right to a jury either as it was at the time the state constitution was adopted[21] or that the state constitution adopts the right as it existed at English common law.[22] The practical effect of the distinction is negligible, as both interpretations generally preserve the right as it was at common law.

The common law system had two separate courts with separate jurisdictions—courts of law and courts of equity—and parties only had a right to a jury in courts of law. Whether the plaintiff sued in the court of law or the court of equity depended on what remedy the plaintiff sought. Courts of law declared legal relationships between parties, usually declaring the plaintiff to be entitled to a sum of money from the defendant. The decree in equity was directed at the defendant and ordered the defendant to perform or stop performing an act. Equitable relief could come in the form of an injunction, restitution, rescission, or the reformation of contracts.[23] Litigating issues in both courts would be expensive, time consuming, and problematic, so when the plaintiff desired both legal and equitable relief, the chancery court (the court of equity) could decide legal issues incidental to the equitable issues properly brought before the court under the equitable cleanup doctrine.[24] The chancellor would not empanel a jury, but rather would decide all issues in the dispute and decree complete relief.[25] Thus, parties could lose the right to a jury trial in some legal actions.

A minority of state courts in the early nineteenth century disagreed with the rigid law/equity construction and read their new state constitutions to protect certain idiosyncratic jury rights available at the time the constitution was

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19. UTAH CONST. art. I, § 10 ("In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.").

20. Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418, 419 (Utah 1981).

21. *See, e.g.*, Awada v. Shuffle Master, Inc., 173 P.3d 707, 711 (Nev. 2007) (en banc); Md. Cas. Co. v. Sasso, 204 A.2d 821, 825 (R.I. 1964).

22. *See, e.g.*, Kimball v. Connor, 3 Kan. 414, 432 (1866); Knee v. Balt. City Passenger Ry. Co., 40 A. 890, 891 (Md. 1898).

23. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 539, 1001 (10th ed. 2009).

24. A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 320-21 (1951).

25. 1 JOHN NORTON POMEROY, JR., EQUITY JURISPRUDENCE §§ 181, 231 (3d ed. 1905).

adopted. For example, when Georgia's constitution was adopted, a state statute guaranteed a jury right in some equity cases, which led the Georgia Supreme Court to hold that the "inviolate" right included that statutory equity jury right.[26] Dicta in decisions by the supreme courts of Massachusetts and New Hampshire suggested that state court litigants in those jurisdictions had a constitutional jury right in equity cases.[27]

North Carolina and Texas each boast two constitutional provisions guaranteeing the right to a jury trial in civil cases. Read together, the two states' constitutions create a broader class of cases to which the civil jury right attaches than was the case under the traditional law/equity distinction. North Carolina's Declaration of Rights includes a civil jury right that protects the right in some legal actions, but omits any mention of equitable actions.[28] When North Carolina merged law and equity, it did so by constitutional amendment, adding a separate section in the state's Judiciary Article that abolished all distinctions between law and equity and provided that all civil actions were entitled to have issues of fact tried before a jury.[29] Since then, the North Carolina Supreme Court has enforced the constitutional right to a jury trial in both legal and equitable cases.[30] The court once read the two provisions as separate rights to a jury trial,[31] but today reads the Judiciary Article as expanding the universe of cases entitled to a jury right under the Declaration of Rights:

> [The Judiciary Article] merely establishes the form and procedure for the trial of *all* civil actions, including the procedure of having issues of fact decided by a jury in what were formerly equity proceedings. In order to determine whether there exists a constitutional right to trial by jury of a particular cause of action, we look to [the Declaration of Rights], which ensures that there is a right

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26. Mounce v. Byars, 11 Ga. 180, 185-88 (1852); Hargraves v. Lewis, 7 Ga. 110, 126, 134 (1849). Today, Georgia relies on *Mahan v. Cavender*, 77 Ga. 118, 121 (1886) ("The interposition of juries in the trial of chancery cases is purely a matter of legislative regulation, and originated, so far as respects such trial in this state, in the judiciary act of 1799 . . . . Certain it is that no such right existed in England, either before or after the *Magna Charta* . . . .").

27. *See, e.g.*, Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 23 Mass. (6 Pick.) 376, 392, 399 (1828); Bell v. Woodward, 48 N.H. 437, 442 (1869); Hoitt v. Burleigh, 18 N.H. 389, 389-90 (1846); Marston v. Brackett, 9 N.H. 336, 349 (1838).

28. N.C. CONST. art. I, § 25.

29. N.C. CONST. of 1868, art. IV, § 1; *see id.* § 18. After North Carolina's constitutional convention in 1970, the pertinent section reads, "There shall be in this State but one form of action . . . which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury." N.C. CONST. art. IV, § 13, cl. 1.

30. Lee v. Pearce, 68 N.C. 76, 89 (1873) (per curiam) ("'In all issues of fact joined in any Court, the parties may waive the right to have the same determined by a jury,' &c., in the absence of such waiver 'all issues of fact' under the new system must be tried by a jury." (quoting N.C. CONST. of 1868, art. IV, § 18)).

31. *See* Faircloth v. Beard, 358 S.E.2d 512, 514 (N.C. 1987) ("There is not a conflict between these two sections but Article IV, Sec. 13 is more comprehensive."), *overruled by* Kiser v. Kiser, 385 S.E.2d 487 (N.C. 1989).

> to trial by jury where the underlying cause of action existed at the time of adoption of the 1868 constitution, regardless of whether the action was formerly a proceeding in equity.[32]

Remnants from Texas's vacillations between the civil law and common law traditions created Texas's modern civil jury right. Before statehood, the Republic of Texas's 1836 Constitution provided in its Declaration of Rights that "the right of trial by jury shall remain inviolate,"[33] as was common in American state constitutions. Between 1836 and 1840, the Republic of Texas shifted to the civil law inherited from Mexico, which makes no distinction between law and equity.[34] Texas repealed the civil law and moved to the English common law and its jury customs in 1840. The next year, the Texas Congress authorized equity judges to submit issues of fact to juries for advisory verdicts.[35]

Texas decided to merge law and equity when it joined the Union in 1845. The new constitution safeguarded the "inviolate" jury right in its Bill of Rights Article,[36] but also expanded the right to a jury trial to both legal and equitable claims.[37] This expansion was accomplished in the Judiciary Article, separate from the Bill of Rights Article.[38] Merger promoted simplicity, and the expanded jury right reflected confidence in the jury as trier of fact.[39] Unlike North Carolina, the two provisions continue as separate rights. Texas's Bill of Rights Article protects the jury right only as it existed at common law.[40] Parties may invoke the Judiciary Article provision for a jury right in "all causes," including equitable in addition to legal actions.[41]

Trial by jury is not a constitutional right in Colorado, Louisiana, or Wyoming. The constitutions of Colorado and Wyoming regulate the number of jurors in a civil trial but make no provision for the right to a jury trial in civil cases.[42] Statutes in these states grant the jury right for enumerated legal actions.[43]

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32. *Kiser*, 385 S.E.2d at 491; *see also* REBECCA B. KNIGHT, THE RIGHT TO A JURY TRIAL IN CIVIL ACTIONS IN NORTH CAROLINA (2007), *available at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/07%20Knight%20Right_to_Jury_Trial.pdf (summarizing the history and current status of the civil jury right in North Carolina).

33. REPUB. TEX. CONST. of 1836, Declaration of Rights, para. 9.

34. M.T. Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C. L. REV. 157, 162 (1953).

35. *Id.*

36. TEX. CONST. of 1845, art. I, § 12. Today, this right is found in article I, section 15, of the Texas Constitution.

37. TEX. CONST. of 1845, art. IV, § 16.

38. *See id.* Today, this right is found in article V, section 10, of the Texas Constitution.

39. Van Hecke, *supra* note 34, at 162.

40. *See* State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 291 (Tex. 1975).

41. *Id.* at 292 (quoting TEX. CONST. art. V, § 10) (internal quotation mark omitted).

42. *See* COLO. CONST. art. II, § 23; WYO. CONST. art. I, § 9; *see also* Kahm v. People, 264 P. 718, 719 (Colo. 1928) (en banc) ("But under our Constitution trial by jury in a civil

Louisiana follows the civil law tradition; thus, its statutory jury rights do not rely upon the law/equity distinction.[44]

B. *The Seventh Amendment and Its Roots in State Constitutions*

The Seventh Amendment tracked the state constitutional jury rights in place at the time of ratification and drew upon state rights for inspiration. In drafting the Amendment, James Madison rejected the proposed amendments from the states' constitutional ratifying conventions and instead studied the states' own bills of rights.[45] His proposal read, "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[46] The language "ought to remain inviolate" in Madison's proposal was consistent with the state civil jury rights, which declared that the civil jury right should "remain inviolate forever"[47] or "be held sacred."[48]

Madison's language did not survive Congress's deliberations. For reasons that remain unclear, a House committee replaced Madison's proposal with different language: "In suits at common law the right to trial by jury shall be preserved."[49] The House of Representatives accepted the committee version and

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action or proceeding is not a matter of right, but our General Assembly may provide for it."); *In re* GP, 679 P.2d 976, 988 (Wyo. 1984).

43. *See* COLO. R. CIV. P. 38(a); WYO. R. CIV. P. 38(a).

44. LA. CODE CIV. PROC. ANN. arts. 1731-32 (2012). In Louisiana, a jury trial is available in all civil actions except the following:

> (1) A suit where the amount of no individual petitioner's cause of action exceeds fifty thousand dollars exclusive of interest and costs.
>
> (2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want, or failure of consideration.
>
> (3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, workers' compensation, emancipation, tutorship, interdiction, curatorship, filiation, annulment of marriage, or divorce proceeding.
>
> (4) A proceeding to determine custody, visitation, alimony, or child support.
>
> (5) A proceeding to review an action by an administrative or municipal body.
>
> (6) All cases where a jury trial is specifically denied by law.

Id. art. 1732.

45. Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 220-21 (2001) (drawing upon historical sources to challenge the accepted understanding about the Seventh Amendment's connection to English common law).

46. 1 ANNALS OF CONG. 453 (1789) (Joseph Gales ed., 1834).

47. N.Y. CONST. of 1777, art. XLI; *see also* N.C. CONST. of 1776, art. XIV; S.C. CONST. of 1790, art. IX, § 6.

48. MASS. CONST. pt. I, art. XV; N.H. CONST. of 1784, pt. I, art. I, § 20; PA. CONST. of 1776, Declaration of Rights, art. XI; VT. CONST. of 1786, ch. I, § 14; VA. DECLARATION OF RIGHTS of 1776, art. 11.

49. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-MARCH 3, 1791, at 29-30 (Charlene Bangs Bickford & Helen E. Veit eds., 1986); Harrington, *supra* note 45, at 214.

forwarded it to the Senate.[50] The Senate added a jurisdictional requirement of a twenty-dollar amount in controversy and combined the House proposal with a separate proposal, the Reexamination Clause.[51] The House followed a Conference Committee recommendation to approve the Senate version.[52]

Early nineteenth-century decisions tied the Seventh Amendment to legal claims at English common law. *United States v. Wonson*, an 1812 opinion written by Justice Joseph Story while riding circuit, formally married the Seventh Amendment and the English common law: "Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."[53] A later Justice Story opinion interpreted suits at common law to be those "in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit."[54]

As originally ratified, the Seventh Amendment and the other constitutional amendments in the Bill of Rights did not apply to the states.[55] The Fourteenth Amendment, added after the Civil War, asserted a national power over state governments, preventing states from "depriv[ing] any person of life, liberty, or property, without due process of law."[56] Beginning in the late nineteenth century, the U.S. Supreme Court used the "selective incorporation" doctrine to incrementally incorporate most of the rights found in the first eight amendments to the Constitution against the states.[57] The Court most recently incorporated the Second Amendment in 2010.[58] Justice Hugo Black argued that Congress intended section 1 of the Fourteenth Amendment to incorporate all of the Bill of Rights,[59] but the Court has resisted the "total incorporation" view.[60] The right to a jury trial in civil cases is one of few rights contained in the Bill of

50. Harrington, *supra* note 45, at 215.

51. *Id.* at 216; *see also* U.S. CONST. amend. VII ("[A]nd no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

52. Harrington, *supra* note 45, at 215-17.

53. 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); *see also* Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry., 294 U.S. 648, 669 (1935).

54. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).

55. *See* Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247, 250-51 (1833); *see also* Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551-52 (1833).

56. U.S. CONST. amend. XIV, § 1.

57. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3034 n.12 (2010).

58. *See id.* at 3050.

59. Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

60. *See McDonald*, 130 S. Ct. at 3032-33.

Rights that have not been incorporated,[61] and the Court has not heard a Seventh Amendment incorporation case since the advent of the selective incorporation doctrine.[62] Notably, the Court has held that the Fourteenth Amendment incorporates the Sixth Amendment's guarantee of a jury in certain criminal cases.[63]

C. *The Intertwined-Issues Problem: Applying the "Inviolate" Right in Merged Courts*

The merger of law and equity courts brought about the intertwined-issues problem. Before merger, interpreting the right to a jury trial was uncomplicated. Legal actions were brought in courts of law, equitable actions were brought in chancery courts, and admiralty actions were brought in admiralty courts. Litigants in a court of law could demand a jury trial. Court reformers pushed for merger of courts as equity shifted from individualized justice to strict legal rules. Equity's new consistency rendered it "nothing more than a body of more enlightened principles of conduct which could be smoothly mortised into the common law."[64]

In the mid-nineteenth century, states began to merge their courts of law and equity, beginning with Texas in 1845.[65] After Arkansas merged law and equity by constitutional amendment in 2000,[66] only four states currently maintain separate courts of law and equity: Delaware, Mississippi, New Jersey, and Tennessee.[67] Federal trial courts merged law and equity in 1938.[68]

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61. *See* Walker v. Sauvinet, 92 U.S. 90, 92-93 (1875) ("A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury.")

62. *See McDonald*, 130 S. Ct. at 3035 n.13.

63. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

64. *See* Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945); *see also* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 25 (1905) ("The introduction of the common law theory of binding precedents and resulting case-law equity . . . that made equity a system must in the end prove fatal to it. In the very act of becoming a system it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall.").

65. Emmerglick, *supra* note 64, at 244. Consistent with its civil law tradition, Louisiana had only one form of action in 1812 when it joined the United States. FRIEDENTHAL ET AL., *supra* note 23, at 542 n.h.

66. John J. Watkins, *The Right to Trial by Jury in Arkansas After Merger of Law and Equity*, 24 U. ARK. LITTLE ROCK L. REV. 649, 649 (2002).

67. *See* Emmerglick, *supra* note 64, at 244 n.1.

68. *See* FED. R. CIV. P. 2 & advisory committee's note; STAFF OF H. COMM. ON THE JUDICIARY, 112TH CONG., FEDERAL RULES OF CIVIL PROCEDURE, at VII (Comm. Print 2011).

The merger of law and equity in state and federal courts erased the clear boundaries guiding application of jury rights, but the historical difference between law and equity endures in jury right jurisprudence.[69] Both federal and state merged courts had little trouble determining that the jury right existed when the plaintiff's case was legal and not equitable. Though the preference for bench trials on equitable issues has been criticized as anachronistic, states decline to extend the right to a jury to all equitable issues because just determination of equitable issues requires judicial skills and experience that cannot be passed to a lay jury through instructions.[70]

Problems arise in merged courts when one issue of fact is pertinent to both legal and equitable issues, as when the defendant's compulsory legal counterclaim turns on a fact common to the plaintiff's equitable claim[71] or when there are common issues of fact relevant to the plaintiff's legal and equitable claims.[72] The issue, which I will refer to as the intertwined-issues problem, can be broken down into two questions. First, do the litigants have a constitutional right to have a jury determine the common issue of fact? Second, if there is a jury right on the legal issue, does a constitutional guarantee of a civil jury right require one issue to be tried first, or is the order of issues committed to the trial judge's discretion? If the legal issue that triggers a jury right on the intertwined issue of fact is tried first, the equitable claim would acquire a right to a jury trial that it would not have had before merger. However, to deny the right would vest the plaintiff with the power to deprive the defendant of the jury right by pleading an equitable issue or forcing the defendant to make a legal counterclaim in an equitable proceeding.[73]

II. THE JURY RIGHT IN FEDERAL AND STATE COURTS AT THE TIME OF *BEACON THEATRES*

The U.S. Supreme Court was not painting on an entirely blank canvas when it settled the intertwined-issues problem for federal courts. In the decades before federal courts merged law and equity, state courts coalesced around an interpretation of the state right to a jury trial that did not require a jury trial on the facts common to legal and equitable issues. This group of states, which I call traditional-rule states, recognizes the equitable cleanup doctrine's destructive effect on the jury right in premerger practice. The rule preserves the jury right as it existed in the structure of separate courts of law and equity. The fed-

69. *See, e.g.*, Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 565 (1990); *Ex parte* Moore, 880 So. 2d 1131, 1134 (Ala. 2003).

70. *See* A-C Co. v. Sec. Pac. Nat'l Bank, 219 Cal. Rptr. 62, 69 (Ct. App. 1985).

71. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 502-03 (1959).

72. *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470, 475 (1962).

73. The *Beacon Theatres* plaintiff was accused of wielding the privileges of being a plaintiff in this way. *See* 359 U.S. at 504.

eral rule in *Beacon Theatres*, which I call the functional approach, read the Seventh Amendment as simply preserving the right to a jury trial on any fact determinative of any legal issue, regardless of other claims brought in the suit.

A. Beacon Theatres *and* Dairy Queen *Adopt the Functional Approach*

In two steps, the U.S. Supreme Court buried any trace of the traditional approach in federal courts and breathed life into a far-reaching, functional construction of the Seventh Amendment. The discussion in *Beacon Theatres, Inc. v. Westover*,[74] a landmark case for Seventh Amendment jurisprudence, contains the paradigmatic and often-quoted interpretation for the states adopting a functional approach. The Court held that the Seventh Amendment requires a jury trial on any legal issue—including intertwined issues—and "very narrowly limited" the trial court's discretion to try equitable issues before legal ones.[75] To Justice Stewart and two other dissenting Justices, this construction of the Seventh Amendment permitted defendants to "acquire[]" a jury right on a bench-trial issue by bringing a legal counterclaim.[76] It was a "marked departure from long-settled principles" because it "disregard[ed] the historic relationship between equity and law,"[77] but Justice Stewart did not cite the marked departure from settled state law on the issue.

Whether litigants have a right to a jury trial when the plaintiff voluntarily joins a legal claim with an equitable claim is a separate question from whether there is a right on a compulsory legal counterclaim. Three years after the *Beacon Theatres* decision, the Court in *Dairy Queen, Inc. v. Wood* read *Beacon Theatres* to protect the jury right for a voluntarily joined legal claim no differently than in a case involving a compulsory legal counterclaim.[78] The distinction between compulsory counterclaims and voluntarily joined issues is important, as four states today subscribe in part to the functional rule and in part to the traditional rule: they follow the traditional rule, but preserve the jury right when the counterclaimant pleads a compulsory legal counterclaim.[79]

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74. 359 U.S. 500.

75. *Id.* at 510. Though *Beacon Theatres* stated that it left judges with narrow discretion to try equitable issues first, the Court explained that it could not at that point anticipate circumstances under which the jury right for legal issues could be lost. *Id.* at 510-11; *see infra* note 181.

76. *Id.* at 516 (Stewart, J., dissenting).

77. *Id.* at 514, 517.

78. 369 U.S. 469, 472-73, 476-79 (1962).

79. *See infra* Part III.A.3.

B. *State Courts Adopt the Traditional Interpretation*

Merger began with the states, and state courts confronted and addressed the intertwined-issues problem well before the Supreme Court did. Surprisingly, little scholarly attention has been given to the question of how the states resolved the problem under their own constitutions despite the fact that many states merged courts, and confronted the intertwined-issues problem, before federal courts did. Yet, states generally took a path quite different from *Beacon Theatres* and offer a competing view of what "preserving" the right after merger means.

The great weight of authority in state courts pointed toward a narrower construction of the right at the time the U.S. Supreme Court decided *Beacon Theatres*. The most prominent rationale relied on the historical practice that when an equity court took jurisdiction, it had full authority to hear all issues, both legal and equitable, under the equitable cleanup doctrine.[80] A few states recognized a right to equitable proceedings—the right to try a case to the court—in their jury right clauses. In those states, the constitutional civil jury right could not infringe upon the constitutionally protected right to a nonjury trial.[81] In another variation, the "waiver-theory" jurisdictions held that a counterclaimant or plaintiff waived the jury right by not making the legal counterclaim in a separate action,[82] even where the counterclaim was compulsory and the counterclaimant could not bring the legal counterclaim independently.[83]

Some states interpreted their constitutions to require a jury right on the legal issues, but did not require legal issues to be tried before the equitable issues. The California Supreme Court faithfully applied this rule:

> Under our system, equitable and legal rights are determined in the same forum. It is within the discretion of the court to control the order of proof upon the issues joined. In the natural order, before defendant was entitled to a hearing upon the legal issues tendered she must defeat plaintiffs upon the equitable issues presented by them. . . . Had [the trial court ruled in the defendant's favor on the equitable claims], then defendant might with right have insisted that the remaining issues of law be tried before a jury. But that time never arrived,

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80. *See, e.g.*, Newbern v. Farris, 299 P. 192, 195 (Okla. 1931).

81. *See, e.g.*, First Nat'l Bank v. Erling Bros., 249 N.W. 681, 682 (S.D. 1933) ("While the different forms of civil actions have been abolished by the reform procedure, the intrinsic distinction between legal and equitable actions has not been destroyed. . . . There is also the recognition of the right to have equitable issues tried according to the established equity practice.").

82. *See, e.g.*, Sav. Bank of New London v. Santaniello, 33 A.2d 126, 129 (Conn. 1943) ("[Counterclaimant] elected to come into equity and she should not now be heard to complain of her failure to secure a jury trial. Had this seemed so important to her, she could have brought an independent action."); Fogelstrom v. Murphy, 222 P.2d 1080, 1084 (Idaho 1950), *overruled by* David Steed & Assocs. v. Young, 766 P.2d 717 (Idaho 1988).

83. *See, e.g.*, Miller v. Dist. Court, 388 P.2d 763, 765-66 (Colo. 1964) (en banc) (interpreting Colorado's statutory provisions on the civil jury right).

> and I do not concede the right of a litigant to oust a court of equitable jurisdiction, in an action of purely equitable cognizance, merely by tendering additional issues which are triable at law before a jury. It is sufficient if a jury be had when those issues come to trial.[84]

Though *Beacon Theatres* precipitated a doctrinal shift, it was not the first case to adopt a functional interpretation. The Massachusetts Supreme Court foreshadowed the reasoning in *Beacon Theatres* in an 1884 decision adopting the functional rule.[85] Massachusetts's Declaration of Rights specifically protects the right to a jury trial, but not other procedural practices such as the trial of equitable issues to the court. Without a constitutional provision protecting equitable procedures, the court held that the right to a jury trial on legal issues prevailed.[86] One year before the Supreme Court decided *Beacon Theatres*, the Iowa Supreme Court held that a defendant's compulsory legal counterclaim triggered a jury right and that the issues triable to the jury must be tried before any issues are tried to the court.[87] Iowa's case is a notable exception to the trend to interpret the right narrowly, but the decision was not an act of creative and independent rulemaking. The Court reached for the proposition that federal court decisions are "highly persuasive" when an Iowa rule is based on a federal rule[88] and cited several federal district court and circuit court cases that portended the coming *Beacon Theatres* decision.[89] Even still, *Beacon Theatres* remains distinct because its rule is more sweeping than even the Iowa rule.[90]

C. *Statutory Extensions of the Jury Right After Merger*

In some states, the intertwined-issues problem never reached the courts because statutes foreclosed the problem. New York, with its groundbreaking Field Code, became the trailblazer for statutory broadening of the right to a jury. The 1848 Field Code included a statute protecting the right to a jury trial for some specific claims in all suits, such as claims of ejectment and for recovery of a chattel.[91] The 1878 Throop Code, which added to the Field Code, treated a

84. Thomson v. Thomson, 62 P.2d 358, 363 (Cal. 1936) (en banc) (quoting Angus v. Craven, 64 P. 1091, 1095 (Cal. 1901) (Henshaw, J., concurring)) (internal quotation marks omitted).

85. *See* Powers v. Raymond, 137 Mass. 483, 486 (1884).

86. *See id.*

87. *See* Folkner v. Collins, 91 N.W.2d 545, 547-48 (Iowa 1958).

88. *Id.* at 547 (citing *In re* Hoelscher's Estate, 87 N.W.2d 446, 450 (Iowa 1958)).

89. *Id.* at 547 (citing Morrison-Knudsen Co. v. Wiggins, 13 F.R.D. 304, 305 (D. Alaska 1952); Union Cent. Life Ins. Co. v. Burger, 27 F. Supp. 554, 555 (S.D.N.Y. 1939)).

90. *See* text accompanying notes 275-276 (describing Iowa's current rule, which does not go as far as *Beacon Theatres*, as interpreted in *Dairy Queen*).

91. N.Y. CODE PROC. § 208 (1848) ("Whenever, in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury, unless a jury trial be waived, as provided in section 221, or a reference be

counterclaim for jury right purposes as though the counterclaimant brought it in an independent action,[92] and the jury issues were tried before the issues triable to the court.[93] Montana's 1895 Code of Civil Procedure copied New York's counterclaim statute.[94] A postmerger Ohio statute created a jury trial right on issues of fact on any claim for the recovery of money or specific real or personal property.[95] Similarly, a now-repealed Wisconsin statute provided that an issue of fact in a suit for the recovery of money *must* be tried to a jury, subject to exceptions.[96]

Kentucky law made the jury right paramount even before merger. The Kentucky Civil Code provided that either party in an equitable action could demand the trial of any issue in the case entitled to a jury trial, but either party could require every equitable issue to be tried before the legal issues.[97] Where legal and equitable issues shared common facts, the Kentucky Supreme Court interpreted the statute as requiring the jury trial of the legal issues before the bench trial of equitable issues.[98]

Some courts fought statutory extensions of the right to a jury in civil trials on grounds of interference with the Judiciary Article in their respective state

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ordered, as provided in sections 225 and 226.") Today, this provision is codified in N.Y. C.P.L.R. 4101 (McKinney 2012).

92. N.Y. CODE CIV. PROC. § 974 (1876) (amended 1877) ("Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment."). Rule 4102(c) of the modern C.L.P.R. reconfirms the former § 974 by providing:

> A party shall not be deemed to have waived the right to trial by jury of the issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction; or of the issues of fact arising upon a counterclaim, cross-claim or third party claim, by asserting it in an action in which there is no right to trial by jury.

93. *See, e.g.*, Hoffman House v. Hoffman House Café, 55 N.Y.S. 763, 764 (App. Div. 1899). For excellent historical overviews of the New York statutory inventions for the jury trial, see generally Bernard E. Gegan, *Is There a Constitutional Right to Jury Trial of Equitable Defenses in New York?*, 74 ST. JOHN'S L. REV. 1 (2000); and Bernard E. Gegan, *Turning Back the Clock on the Trial of Equitable Defenses in New York*, 68 ST. JOHN'S L. REV. 823 (1994).

94. MONT. CODE ANN. § 25-7-104 (West 2011). This section replaced MONT. CODE CIV. P. § 1036 (1895).

95. *See* Romanowski v. Dziedzicki, 172 N.E. 446, 447 (Ohio Ct. App. 1930) (finding a jury trial right on defendant's counterclaim for money damages in an equitable action).

96. *Compare* Neas v. Siemens, 102 N.W.2d 259, 267 (Wis. 1960) (preserving the jury right on a qualifying counterclaim to an equitable action), *with* Mortg. Assocs. v. Monona Shores, Inc., 177 N.W.2d 340, 346 (Wis. 1970) (speaking disapprovingly of the *Neas* rule in dictum and suggesting that the statute pertains only to compulsory, qualifying counterclaims).

97. *See* Meek v. McCall, 80 Ky. 371, 373-74 (1882).

98. *See id*. at 375; *see also* Carder v. Weisengburg, 23 S.W. 964, 964 (Ky. 1893).

constitutions. For example, the Wisconsin Supreme Court held that a Wisconsin statutory right to a jury in mortgage foreclosures unconstitutionally divested the power of the courts to determine these actions and conferred the power upon juries.[99] The Michigan Supreme Court reached the same conclusion in a decision that spawned a colorful and exceptional jury right jurisprudence.[100] The court held:

> The functions of judges in equity cases in dealing with them is as well settled a part of the judicial power, and as necessary to its administration, as the functions of jurors in common-law cases. . . . The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. . . . The very wise provision of our constitution, which by section 5 of article 6 directs the legislature to abolish distinctions between law and equity proceedings, is carefully worded, and requires it to be done only as far as practicable. It does not blend legal and equitable interests, although no doubt it does favor the removal of such distinctions between those as are nominal, rather than real. . . . Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere."[101]

By comparison, Congress never statutorily expanded the jury right to solve the intertwined-issues problem after merging law and equity. Such a statute would be constitutional, as *Beacon Theatres* settled that there is no right to equitable proceedings in the U.S. Constitution.[102] Alexander Hamilton's *The Federalist No. 83* supplies originalist support for this interpretation. He argued at the time Article III of the U.S. Constitution was under consideration that the allocation of factfinding functions between judge and jury was subject to congressional determination.[103]

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99. Callanan v. Judd, 23 Wis. 343, 348 (1868); *see also, e.g.*, State v. Nieuwenhuis, 207 N.W. 77, 79 (S.D. 1926), *overruled by* Black v. Gardner, 320 N.W.2d 153, 157 (S.D. 1982); Van Hecke, *supra* note 34, at 164, 166-67 (discussing the experimentations with the civil jury right in equity cases by the legislatures of Michigan, South Dakota, and Wisconsin, all of which were ruled to be unconstitutional under the respective state constitutions); Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1178-79 (1961) (discussing states constitutionally protecting the "nonjury right").

100. *See infra* Part III.A.4 and text accompanying notes 286-288.

101. Brown v. Kalamazoo Circuit Judge, 42 N.W. 827, 830-31 (Mich. 1889). *Brown* has been cited by the U.S. Supreme Court as well as fifteen state supreme courts. It is the polestar for the right to equitable proceedings.

102. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) ("[T]he right to jury trial is a constitutional one, . . . while no similar requirement protects trials by the court . . . .").

103. *See* THE FEDERALIST NO. 83, at 496-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

III. THE RIGHT TO A JURY TRIAL IN CIVIL SUITS TODAY

State court treatment of the intertwined-issues problem changed significantly after the Supreme Court decided *Beacon Theatres*. Today, twenty-two states follow the functional rule created in *Beacon Theatres*, and eighteen states follow a variant of the traditional approach. The four states that have not merged law and equity could also be considered members of the traditional-approach group. Three state courts have no rule on the issue. The three states whose constitutional right to a jury trial departs from the law/equity distinction avoid the intertwined-issues problem altogether. Unlike the states, the District of Columbia is bound by the Seventh Amendment and its cases.[104] All of the state rules and the pertinent cases in each state are discussed in the Appendix. Figure 1, below, geographically describes the states' treatment of this issue.

At first blush, it might be surprising that more states do not track the *Beacon Theatres* interpretation. The substance of the right to a jury trial in most state constitutions is similar to the Seventh Amendment, and they share the same history.[105] State and federal courts even agree that their vague respective provisions generally refer to the right as it existed at English common law.[106] Many states have borrowed in whole or in part from the Federal Rules of Civil Procedure in designing their own civil procedure rules.[107]

Why the disharmony then? The states' right to a jury in a civil trial did not originate in the U.S. Constitution. In history, constitutional construction of the right to a civil jury emanates from the states. The state constitutional jury rights are not modeled after the Seventh Amendment; rather, the Seventh Amendment was based on the jury right as it existed in state constitutions.[108] Constitutional drafters for states joining the Union after the ratification of the Seventh Amendment also appear to take inspiration for their jury rights from earlier state constitutions, not the Seventh Amendment. Most choose the "inviolate" language unique to the state constitutional provisions over the Seventh Amendment's term, "preserve."[109]

The historical evolution of this doctrine reveals a case of the tail wagging the dog. *Beacon Theatres* is anomalous when viewed in light of the great majority of state courts embracing a traditional rule in 1959.[110] The states were the wellspring for wisdom on the civil jury right at the inception of the Seventh

104. Pernell v. Southall Realty, 416 U.S. 363, 370 (1974).

105. *See supra* Part I.A.

106. *See supra* text accompanying notes 21-22, 53-54.

107. *See* John B. Oakey & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

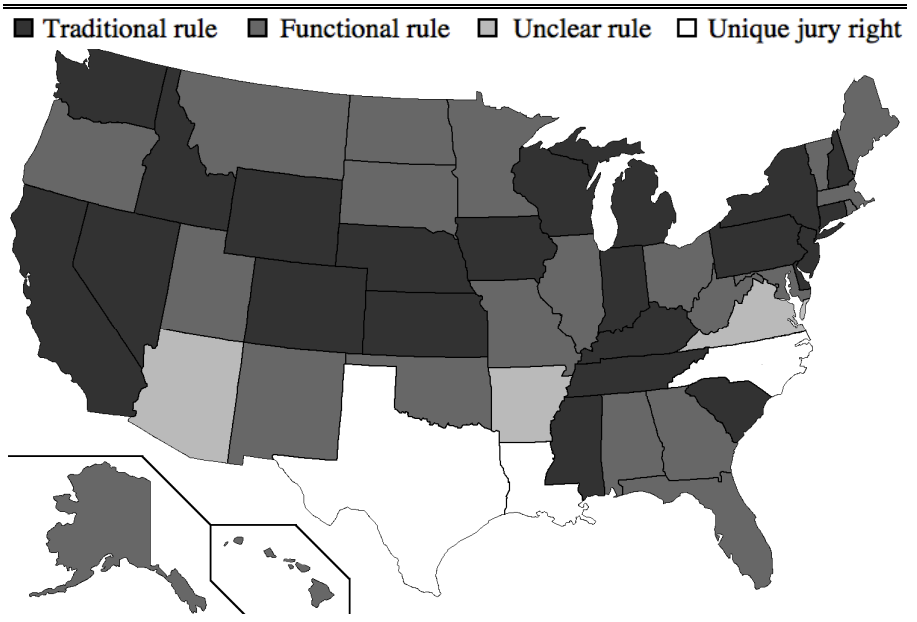
108. *See supra* Part I.B.

109. *See supra* text accompanying note 13.

110. *See supra* Part II.B.

Amendment, but after *Beacon Theatres*, federal court decisions have had a magnetic pull for some state supreme courts.

FIGURE 1



A. *Traditional-Rule States*

Twenty-two states use a variation of the traditional rule, all of which are narrower in their scope of protection than *Beacon Theatres* and the functional-rule states.

1. *Issue-orientation states*

Four issue-orientation jurisdictions[111] split up a case involving both legal and equitable issues in order to try the legal issues to a jury and the equitable issues to the court.[112] Significantly, these states either require the bench trial (equitable issues) to precede the jury trial (legal issues), or they commit the or-

111. I am using the very helpful "action orientation" and "issue orientation" terms from Note, *The Right to Jury Trial Under Merged Procedures*, 65 HARV. L. REV. 453, 456-57 (1952).

112. These states are California, Idaho, Nevada, and Wisconsin. *See infra* Appendix.

der of issues to the judge's discretion,[113] which is seldom overturned on appeal.[114] Issue preclusion will prevent the jury from making certain findings of fact. Depending on the outcome of the equitable issues, the legal issues may be disposed of entirely, sometimes negating the need for a jury at all. For example, in an issue-orientation jurisdiction, if a plaintiff sues a defendant for an injunction and money damages arising from the breach of a contract, the facts determinative of the injunction issue must be tried to the court before the remaining facts are tried to a jury for the money damages issue. *Beacon Theatres* and the states following the functional approach are essentially issue-orientation states that try issues in the opposite order; the legal issues with common facts are constitutionally required to be tried before the equitable issues.

Courts cite two justifications for the trial of equitable issues before legal issues. First, this was the order in which issues were tried in the eighteenth century before law and equity merged in England and the United States.[115] Even a defendant who merely raised an equitable *defense* to a legal claim could first go to the equity court and enjoin the legal suit until the chancellor heard the equitable defense. No jury was empaneled, and if the defense was successful, the injunction against the legal action was made permanent. If it was unsuccessful, the plaintiff could litigate the legal claim in a court of law.[116] Second, the trial of equitable issues first promotes judicial economy when the court can avoid empaneling the jury.[117]

California is a typical example of a state that follows an issue-oriented, traditional approach. The state follows the rule outlined above, but the judge may empanel an advisory jury to make preliminary factual findings for the equitable issues. The findings must be purely advisory. It is still the judge's duty to make independent findings on equitable issues. If the judge departed from the advisory jury's finding of fact on an equitable issue relevant to a later legal issue, the jury would still be bound by the judge's finding of fact.[118]

2. *Action-orientation states*

In sixteen action-orientation states,[119] the whole action is either legal or equitable. If the whole action is legal, the parties have a right to a jury trial on

113. *E.g.*, Awada v. Shuffle Master, Inc., 173 P.3d 707, 708 (Nev. 2007) (en banc); Du Pont v. Davis, 35 Wis. 631, 639 (1874).

114. *See* Note, *supra* note 111, at 457 n.46.

115. *See, e.g.*, Hoopes v. Dolan, 85 Cal. Rptr. 3d 337, 345 (Ct. App. 2008).

116. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 243 (1922).

117. *Cf.* Nwosu v. Uba, 19 Cal. Rptr. 3d 416, 424 (Ct. App. 2004).

118. *See Hoopes*, 85 Cal. Rptr. 3d at 344.

119. These states are Colorado, Connecticut, Indiana, Iowa, Kansas, Kentucky, Nebraska, New Hampshire, Pennsylvania, South Carolina, Washington, and Wyoming.

the legal claims. Courts in these jurisdictions have created a variety of tests and factors to classify the action. Many search for the action's "essential basis,"[120] "main purpose,"[121] or "basic thrust."[122] Washington courts abide by a seven-factor test.[123] Some states make the "main purpose" determination based on only the plaintiff's complaint,[124] but most states consider other parties' pleadings and counterclaims.[125] Thus, even an equitable counterclaim can destroy the jury right.[126]

In the breach of contract hypothetical, the court will decide whether the "main purpose" of the whole action is the legal money damages issue or the equitable injunction issue. If the injunction is the main purpose, there is no right to a jury for any issue. If the money damages are the main purpose, the parties will have a right to a jury trial on the money damages issue (and any other legal issue in the action) but still no jury right on the remaining equitable issues. The rule is asymmetrical in that when the action is classified as legal, there is no jury right on the equitable issues in the "legal action," but when the action is equitable, there is no jury right on any issue. Entirely collateral issues—for example, permissive counterclaims arising on entirely separate facts—are not drawn into the action-orientation rule, because these actions were filed separately before merger.

The action-orientation rule has been justified as reducing the complexity of litigation and as a pragmatic construction of the jury right,[127] but has also been criticized as unworkable and arbitrary. Justice Potter Stewart questioned the practicality of the rule:

> The fact is, of course, that there are, for the most part, no such things as inherently "legal issues" or inherently "equitable issues." There are only factual issues, and, "like chameleons [they] take their color from surrounding circumstances." Thus the . . . "nature of the issue" approach is hardly meaningful.[128]

Delaware, Mississippi, New Jersey, and Tennessee apply the rule in their separate legal and equitable courts. *See infra* Appendix.

120. *E.g.*, U.S. Trust Co. v. Bohart, 495 A.2d 1034, 1041 (Conn. 1985).

121. *E.g.*, Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 247 S.E.2d 315, 318 (S.C. 1978).

122. *E.g.*, Miller v. Carnation Co., 516 P.2d 661, 663 (Colo. App. 1973).

123. *See infra* text accompanying note 339.

124. *E.g.*, Fogelstrom v. Murphy, 222 P.2d 1080, 1082-83 (Idaho 1950), *overruled by* David Steed & Assocs. v. Young, 766 P.2d 717 (Idaho 1988).

125. *See, e.g.*, State *ex rel.* Cherry v. Burns, 602 N.W.2d 477, 482 (Neb. 1999); Johnson v. S.C. Nat'l Bank, 354 S.E.2d 895, 897 (S.C. 1987).

126. *See* Fisbeck v. Scherbarth, Inc., 428 N.W.2d 141, 148 (Neb. 1988).

127. *E.g.*, Floyd v. Floyd, 412 S.E.2d 397, 399 (S.C. 1991).

128. Ross v. Bernhard, 396 U.S. 531, 550 (1970) (Stewart, J., dissenting) (alteration in original) (footnote omitted) (quoting Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 692 (1963)).

3. *Exceptions for the compulsory legal counterclaim*

Four states follow a traditional rule, but make important exceptions for the compulsory legal counterclaim, the fact pattern that spurred the *Beacon Theatres* holding.[129]

Sometimes this rule is more of a judicial mutation than a carefully considered interpretation of the state constitution. In *David Steed & Associates v. Young*,[130] Idaho's five-member Supreme Court considered the intertwined-issues problem and was unable to coalesce around a majority opinion. Justices Huntley and Bistline argued for an unqualified adoption of Seventh Amendment jurisprudence, citing several supportive pre-World War I Idaho jury cases in a footnote.[131] Then-Justice Bakes and Chief Justice Shepard cited numerous Idaho Supreme Court decisions supporting an action-oriented, traditional rule, and argued the plurality's rule was poles apart from Idaho case law.[132] Justice Johnson concurred only with the result of Justice Huntley's plurality opinion—that is, that the parties have a jury right on a compulsory legal counterclaim.[133] Three years later and after changes in court membership, Chief Justice Bakes wrote a four-to-one majority opinion in *Idaho First National Bank v. Bliss Valley Foods, Inc.* that required the trial court to decide the joint equitable issues first and then remaining legal issues.[134] Justice Johnson, author of the decisive special concurrence in *Steed*, dissented from *Bliss Valley* out of concern that the Supreme Court had impliedly overruled *Steed*.[135]

4. *The equal rights to a bench trial and a jury trial*

Michigan courts apply perhaps the most idiosyncratic test, but one which avoids the problem altogether. In a colorfully written opinion, the Michigan Supreme Court recognized constitutional rights to bench trials and jury trials that are of equal status.[136] Remarkably, when the same fact is common to both an equitable and legal claim, trial is held before the court and jury, and each may make independent findings of fact in deciding their respective issues. The

129. These states are Idaho, Iowa, New York, and South Carolina. *See infra* Appendix.

130. 766 P.2d 717 (Idaho 1988).

131. *Id.* at 720, 721 n.2 (Huntley, J.) (plurality opinion).

132. *Id.* at 723 (Bakes, J., dissenting).

133. *Id.* at 721 (Johnson, J., specially concurring).

134. *See* 824 P.2d 841, 865 (Bakes, C.J.) (Idaho 1991).

135. *Id.* at 885 (Johnson, J., concurring in part and dissenting in part).

136. Abner A. Wolf, Inc. v. Walch, 188 N.W.2d 544, 548 (Mich. 1971) (quoting Leser v. Smith, 180 N.W. 464, 465 (Mich. 1920)).

jury's finding is treated as advisory in equity practice.[137] The court explained, "While this implies the startling possibility of contradictory findings in the same case on the common issue of fact, this apparently is a consequence which must be accepted if each party has a constitutional right to a different mode of trial."[138] Other states have embraced the Michigan rule at times or struck down statutory jury rights as inconsistent with the right to try a case to the court, but only Michigan permits separate findings of fact today.[139]

B. *Functional-Rule States*

Twenty-one states follow the functional rule, as exemplified in *Beacon Theatres* and broadly interpreted by *Dairy Queen*.[140] A twenty-second state, North Dakota, follows the functional rule, except it denies the jury right for a legal defense.[141] Despite the legal defense exception from the other functional-rule states, North Dakota is included in the functional category because of the influence of Seventh Amendment cases on the North Dakota Supreme Court.[142]

The *Beacon Theatres* rule is first found in the anachronistic 1838 New Hampshire case of *Marston v. Brackett*, which held that a defendant to an equitable case had a constitutional right to demand a jury trial on disputed fact issues that are material to legal claims.[143] Unfortunately, the New Hampshire Supreme Court misread the history of the jury right in New Hampshire. John Pomeroy analyzed *Marston* as "purely exceptional," saying it "must depend upon an early practice in that State peculiar to itself."[144] The New Hampshire Supreme Court later overruled *Marston*, acknowledged the absence of any his-

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137. Smith v. Univ. of Detroit, 378 N.W.2d 511, 516 (Mich. Ct. App. 1985) (per curiam) (quoting 2 JASON L. HONIGMAN & CARL S. HAWKINS, MICHIGAN COURT RULES ANNOTATED 149 (2d ed. Supp. 1984)).

138. *Id.* (emphasis omitted) (quoting 2 HONIGMAN & HAWKINS, *supra* note 137, at 149). The rule was most recently discussed and treated favorably in 2007 in *Malik v. Salamy*, No. 264780, 2007 WL 1224033, at *2 (Mich. Ct. App. Apr. 26, 2007) (per curiam).

139. South Dakota followed the rule from 1926 to 1982. State v. Nieuwenhuis, 207 N.W. 77, 79 (S.D. 1926), *overruled by* Black v. Gardner, 320 N.W.2d 153, 157 (S.D. 1982); *see also* Note, *supra* note 99, at 1178-79 (describing state statutes struck down on these grounds).

140. These states are Alabama, Alaska, Florida, Georgia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, and West Virginia. *See infra* Appendix.

141. *See infra* text accompanying notes 307-310.

142. *See* Landers v. Goetz, 264 N.W.2d 459, 463 (N.D. 1978) (discussing *Beacon Theatres* in constructing the North Dakota rule).

143. Marston v. Brackett, 9 N.H. 336, 349 (1838), *overruled by* Copp v. Henniker, 55 N.H. 179 (1875).

144. THEODORE SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 489 (John Norton Pomeroy ed., 2d ed. 1874).

torical peculiarity, and suggested that the *Marston* court would have held differently had the court been properly informed.[145] New Hampshire fell back into the mainstream.

Much of the state courts' shift to the functional rule occurred more than a decade after *Beacon Theatres*, while the Supreme Court added to Seventh Amendment doctrine in *Ross v. Bernhard*,[146] *Curtis v. Loether*,[147] and *Tull v. United States*.[148] The trend continues, as at least four states have moved to the functional rule in the last decade.[149] In general, many of the state courts overstate the functional rule's hold in state courts and assume the weight of state court doctrine conforms to *Beacon Theatres*. Some of these states, such as Minnesota, mistakenly perceive the functional rule to be a majority rule in state courts.[150]

Many of the opinions adopting the functional rule thoughtfully discuss Seventh Amendment case law, but ignore or casually address the case law in other state courts following the traditional rule. Prior to *Beacon Theatres*, acknowledgements of the functional rule as a legitimate rule for courts were often absent or only cursory.[151]

Some courts express a preference for federal court precedent on the Seventh Amendment[152] or in general hold U.S. Supreme Court precedent to be persuasive authority.[153] Some courts will invoke *Beacon Theatres* because of the similarity between the federal and state rules of civil procedure.[154] For example, Florida became the first state to adopt the functional rule under the influence of *Beacon Theatres*.[155] The Florida Supreme Court relied on the simi-

145. *See Copp*, 55 N.H. at 211.

146. 396 U.S. 531 (1970).

147. 415 U.S. 189 (1974).

148. 481 U.S. 412 (1987).

149. *See, e.g.*, Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611, 616-17 (Minn. 2007); State *ex rel.* Leonardi v. Sherry, 137 S.W.3d 462, 472-74 (Mo. 2004); M.K.F. v. Miramontes, 287 P.3d 1045, 1057 (Or. 2012); Mundhenke v. Holm, 787 N.W.2d 302, 306-07 (S.D. 2010).

150. *See Onvoy*, 736 N.W.2d at 617.

151. *See, e.g.*, Mackenzie Oil Co. v. Omar Oil & Gas Co., 120 A. 852, 855 (Del. Ch. 1923) ("It will not be contended that, if a cause is properly in a court of equity, a right exists to insist that a fact necessary to be determined in the course of the proceedings, if it may be a subject for cognizance in a law court before a jury, may, for that reason, not also be determined in equity without the intervention of a jury.").

152. *See, e.g.*, *Onvoy*, 736 N.W.2d at 617.

153. *See, e.g.*, Higgins v. Barnes, 530 A.2d 724, 729 (Md. 1987).

154. *See id.* (noting that the Maryland rule writers, in the commentary to the Maryland Rules of Civil Procedure, explain that the state's rule is derived from Rule 2 of the Federal Rules of Civil Procedure); Evans Fin. Corp. v. Strasser, 664 P.2d 986, 988 (N.M. 1983) (noting that New Mexico's civil procedure rules for counterclaims is similar to Rule 13 of the Federal Rules of Civil Procedure).

155. *See* Hightower v. Bigoney, 156 So. 2d 501, 507-09 (Fla. 1963).

larities between the federal and Florida constitutions and rules of civil procedure for support in adopting *Beacon Theatres*. The Florida Supreme Court cited Florida state court cases and federal court treatment of the issue, but cited no other state court decisions or acknowledged their existence.[156]

Not all of the states that have adopted the functional rule after *Beacon Theatres* treat the intertwined-issues problem as an issue of first impression. For example, the Montana Supreme Court explicitly abrogated its traditional rule in 1984, finding the functional rule more consistent with the liberal principles of merged rules of civil procedure.[157] New Mexico and South Dakota also expressly overruled postmerger case law in adopting functional rules.[158]

IV. JUDICIAL FEDERALISM AND CIVIL JURY RIGHTS

For more than fifty years, *Beacon Theatres* has been the polestar for analysis on the intertwined-issues problem, and in many states, also the engine behind a significant doctrinal shift. Digging beneath the surface reveals a real diversity in analytical paths to a final rule with cryptic embraces of *Beacon Theatres* in many functional-rule states. State court analysis uncovers problems for state constitutionalism when viewed in light of principles of judicial federalism.

A. *The Judicial Federalism Paradigm*

Today, two views of state constitutional interpretation guide state supreme courts in interpretation of parallel state constitutional rights. Starting in the 1970s, a movement for revitalization of state constitutional law began with the "new judicial federalism" movement. Within the movement for the development of state constitutional law are two different views about the proper role of an independent state constitutional doctrine.[159] Justice William Brennan encouraged development of state constitutional law as a way to protect individual rights beyond the protection afforded by the U.S. Supreme Court's interpretation.[160] State courts could expand or maintain the Warren Court's liberal interpretation of rights while the Burger and Rehnquist Courts narrowed Warren Court rulings.[161] Less popular was the view of Oregon Supreme Court Justice Hans Linde, who saw the independent development of state constitutional law

156. *See id.* at 502-07.

157. Gray v. City of Billings, 689 P.2d 268, 272 (Mont. 1984).

158. *See* Blea v. Fields, 120 P.3d 430, 432-33 (N.M. 2005); Mundhenke v. Holm, 787 N.W.2d 302, 306 (S.D. 2010).

159. WAYNE R. LAFAVE ET AL., 1 CRIMINAL PROCEDURE § 2.12(a) (3d ed. 2012).

160. Brennan, *supra* note 3.

161. LAFAVE ET AL., *supra* note 159, § 2.12(a).

as beneficial by itself, not because state constitutional law might reinforce federal constitutional rights.[162] This view embraces state constitutional law development regardless of whether that doctrine supplied more or less rights than the U.S. Constitution. U.S. Supreme Court interpretations could provide persuasive authority, but no more so than any other state court's interpretation. The goal for Justice Linde was the development of independent constitutional law that drew upon its own traditions.[163]

The "lockstep" view of state constitutional law stands in opposition to the new judicial federalism movement. Unless the text of the state constitution clearly supports departing from the parallel federal right, courts subscribing to the lockstep theory interpret their respective state constitutional rights as following the U.S. Supreme Court's interpretations without reconsidering the merits of the Court's rule.[164] Supporters of this theory advance a number of justifications. First, it is argued that mirror interpretations reinforce the fundamental character of constitutional guarantees. If the history and purpose of the federal and state right are the same, different interpretations unsettle the public.[165] Second, the skewed impact of only "greater" state right interpretations over the federal interpretation having an impact should support restraint. Otherwise, judges could be systematically biased to rule in favor of more protective state rights out of an inclination to have their rulings "count."[166] Third, practical difficulties arise from administering different federal and state rights. State courts should not add needless complexity by departing from settled and well-known federal rules.[167]

B. *Analyzing the Intertwined-Issues Problem in State Court*

1. *Lockstep states*

As discussed in Part III, the doctrinal landscape has shifted since *Beacon Theatres*, and many more jurisdictions follow the federal rule. But more importantly, many of the cases carrying out the change are written in the "lockstep" style. For example, the Maryland Supreme Court followed this line of reasoning in a 1987 decision that came three years after Maryland courts merged law and equity.[168] The court summarized the practices in other states

162. *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

163. LAFAVE ET AL., *supra* note 159, § 2.12(a).

164. *See id.* § 2.12(b).

165. *See, e.g.*, State v. Hunt, 450 A.2d 952, 955 (N.J. 1982).

166. LAFAVE ET AL., *supra* note 159, § 2.12(c).

167. *Cf. id.*

168. *See* Higgins v. Barnes, 530 A.2d 724, 725, 728-29 (Md. 1987).

before explaining its decision to follow *Beacon Theatres*.[169] The Maryland Supreme Court opted to follow the federal practice because (1) the commentary to its state rules of civil procedure stated the rules were "derived" from the Federal Rules of Civil Procedure,[170] and (2) Maryland courts traditionally relied on federal court interpretations of analogous rules.[171]

The Florida Supreme Court went further. That court explained its decision to follow *Beacon Theatres* as an issue of trusting the U.S. Supreme Court's judgment with the right to a jury trial:

> We have quoted more liberally from [decisions of federal courts] than has been our custom, but when one calls to his aid a "cloud of witnesses" to establish a cause, we have found no more convincing way to do this than to let them talk. The witnesses so called were profoundly versed in the history and philosophy of trial by jury, they knew its place in our jurisprudence and they knew that those who wrote it into the constitutions, state and federal, meant to preserve it.[172]

Many of the state supreme courts that have adopted the functional rule describe the similarity between their state rules of civil procedure and the Federal Rules of Civil Procedure, either in general terms or because of similarity in the rules governing jury demand or the rules for claim joinder.[173]

The lockstep view loses its three justifications when applied to the rare unincorporated right, like the Seventh Amendment. As the Seventh Amendment is unincorporated, it has indisputably not achieved the "fundamental" status the incorporated rights have.[174] It may be unsettling for a state to claim that its constitution fails to protect state citizens' "fundamental" federal constitutional rights, but it is at least less unsettling for a state to lack protection for a federal right that is not fundamental and is not binding on the states. The skewed-impact justification most clearly withers as the Seventh Amendment does not set a floor for the states, and the state constitutional right will be enforced ex-

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169. *Id.* at 728 ("A review of the cases decided by courts of other states that have accomplished the merger of law and equity reveals a variety of approaches and philosophies, ranging from a jealous protection of the right of jury trial to a preference for the 'efficiency' of having a judge determine all issues in any case involving a legitimate equitable claim. A middle ground of cases makes the right to jury trial depend upon whether the issues in the case are predominantly legal or predominantly equitable in nature.").

170. *Id.* at 729 (citing MD. R. 2-301).

171. *Id.* (citing East v. Gilchrist, 445 A.2d 343, 345 (Md. 1982); Edmunds v. Lupton, 252 A.2d 71, 74 (Md. 1969)).

172. Hightower v. Bigoney, 156 So. 2d 501, 508 (Fla. 1963).

173. *See, e.g.*, Evans Fin. Corp. v. Strasser, 664 P.2d 986, 988-89 (N.M. 1983) (discussing similarity between the Federal Rules of Civil Procedure and the New Mexico Rules of Civil Procedure for counterclaims).

174. *See generally* Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (setting out the Supreme Court's modern test for selective incorporation, which applies to rights "fundamental to the American scheme of justice").

actly as the state courts choose to enforce it. Finally, if the jury right is unincorporated, the litigants in state courts still would only need to consult one authority, the state supreme court, on demanding the right to a jury trial in state civil cases.

Perhaps these courts do believe in the third justification, uniformity. Adopting *Beacon Theatres* for purposes of uniformity could be defended, but no state court yet has defended its functional rule on these grounds. It could be argued that the intertwined-issues problem is complicated, and though it critically addresses whether a right exists for a particular claim, the issue rarely confronts courts. When, as here, a constitutional issue is difficult and rarely arises, it might be difficult to ensure that state judges uniformly apply the rule; for this reason, it may be preferable for state courts to adopt the *Beacon Theatres* rule, which is accepted as a legitimate rule, has been written about, and can be easily researched by attorneys in federal treatises and case law. Furthermore, attorneys litigating in both state and federal court must master two different rules in states using their own rules. The convenience of uniformity, however, might be an unsatisfying explanation for the scope of a constitutional right.

Some Brennan-style new judicial federalists might follow the lockstep group. If their adherence to the new judicial federalism was based on the premise that an independent state constitutional law could only result in enforcing rights above and beyond the guarantee in the federal Bill of Rights, these jurists could follow the lockstep argument that the state rights must be at least as great the federal right. This was a critical premise in the Florida Supreme Court's adoption of the functional rule in *Hightower v. Bigoney*, which stated, "[The] Constitution of Florida, no less than the Seventh Amendment to the Federal Constitution, preserves the right to trial by jury and planted deep in American law the distinction between legal and equitable causes of action."[175]

2. *Independent state constitutional analysis*

Most of the traditional-rule decisions start with the state constitution and the premerger practice. In general, before merger, these state courts permitted equity courts to decide intertwined legal issues when equitable issues were properly brought into the equitable court. In the opinion of these courts, the traditional rule is most consistent with the constitutional right to a jury trial in civil cases before merger. Many rely on state-specific grounds, including that the litigants would not have had a right to a jury trial on the legal issue before merger,[176] that extending the right to a jury trial would infringe a right to a bench

175. 156 So. 2d at 509.

176. *See, e.g.*, Newbern v. Farris, 299 P. 192, 195 (Okla. 1931).

trial on the equitable issue,[177] or that the introduction of the legal issue in an equitable action constituted a waiver of the right to a jury trial.[178] Differences in the rules of civil procedure can be grounds to discount the value of *Beacon Theatres*. The Indiana Court of Appeals noted that the text of Rule 38 of the Indiana Rules of Trial Procedure restricted trial by jury to fact issues which were not of equitable jurisdiction before 1852, but that Rule 38 of the Federal Rules of Civil Procedure only preserved the right as declared by the Seventh Amendment.[179]

Other times, the analysis is more open-ended and conducted without comparison to *Beacon Theatres*. For example, a 1980 decision from the Washington Supreme Court acknowledged Washington's liberal procedure rules and concluded that the rules did not intend to, nor could they, alter the constitutional right to a jury trial, so the only effect of merger was to grant the trial court "wide discretion in cases involving both legal and equitable issues, to allow a jury on some, none, or all issues presented."[180] *Beacon Theatres* similarly noted the "flexibility" of the Federal Rules of Civil Procedure, but held that such flexibility counseled toward a functional interpretation.[181] The Washington Supreme Court cited state case law from as early as 1901 for its traditional rule and cited no federal case law on the jury right issue.[182]

At least two states point to different policies underlying the state right to a jury trial that distinguish the state right from the Seventh Amendment. Whereas Seventh Amendment case law has long described the right to a jury trial as an important right that cannot be undermined,[183] California has continued to use the traditional rule because that state's supreme court has found a policy of ju-

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177. *See, e.g.*, First Nat'l Bank v. Erling Bros., 249 N.W. 681, 682 (S.D. 1933) ("While the different forms of civil actions have been abolished by the reform procedure, the intrinsic distinction between legal and equitable actions has not been destroyed. . . . There is also the recognition of the right to have equitable issues tried according to the established equity practice.").

178. *See, e.g.*, Sav. Bank of New London v. Santaniello, 33 A.2d 126, 129 (Conn. 1943) ("[Counterclaimant] elected to come into equity and she should not now be heard to complain of her failure to secure a jury trial. Had this seemed so important to her, she could have brought an independent action.").

179. Hiatt v. Yergin, 284 N.E.2d 834, 848-49 (Ind. Ct. App. 1972), *overruled on other grounds by* Erdman v. White, 411 N.E.2d 653, 657 (Ind. Ct. App. 1980).

180. Brown v. Safeway Stores, Inc., 617 P.2d 704, 709 (Wash. 1980) (quoting Scavenius v. Manchester Port Dist., 467 P.2d 372, 374 (Wash. Ct. App. 1970)).

181. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) ("This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (footnote omitted)).

182. *See Safeway Stores*, 617 P.2d at 708-09.

183. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471-72 (1962); Scott v. Neely, 140 U.S. 106, 109-10 (1891); *cf. Beacon Theatres*, 359 U.S. at 510 n.18.

dicial economy in its state constitutional jury right.[184] Similarly, the South Carolina Supreme Court has interpreted its state constitution to require less strict enforcement of the right to a jury trial than would be required under the Seventh Amendment because of the reduction of complexity.[185]

Independent constitutional rulemaking does not necessarily mean that states will adopt the traditional rule. The Oregon Supreme Court's opinion last year in *M.K.F. v. Miramontes* is a model opinion for adopting the functional rule without relying on *Beacon Theatres*.[186] The court reasoned that the clean-up doctrine had been based on the risk of a second trial, but the risk was avoided with the merger of law and equity. As the Court explained:

> [T]he right to a jury trial must . . . not [depend] on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. To reach a different conclusion would be to import into current practice procedures that may have been necessary at one time but that our legislature has long since abandoned.[187]

The Oregon Supreme Court's opinion discussed *Beacon Theatres* and *Dairy Queen*, but also acknowledged the diversity of rules in other state courts.[188] The court turned back to Oregon-specific practices to reach a final rule.[189]

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184. *See* Nwosu v. Uba, 19 Cal. Rptr. 3d 416, 423 (Ct. App. 2004). The *Nwosu* court remarked that:

> Where plaintiff's claims consist of a "mixed bag" of equitable and legal claims, the equitable claims are properly tried first by the court. A principal rationale for this approach has been explained as follows: "When an action involves both legal and equitable issues, the equitable issues, ordinarily, are tried first, for this may obviate the necessity for a subsequent trial of the legal issues." Numerous cases having a mixture of legal and equitable claims have identified this same principle—that trial of equitable issues first may promote judicial economy.

Id. (citations omitted) (quoting Richard v. Degen & Brody, Inc., 5 Cal. Rptr. 263, 267 (Dist. Ct. App. 1960)).

185. *See* Floyd v. Floyd, 412 S.E.2d 397, 399 (S.C. 1991) ("As we interpret the 'main purpose' rule, its primary function is to administratively categorize an action in which parties seek both equitable relief and legal redress. When properly applied, the 'main purpose' rule reduces the complexity of litigation and does not deprive litigants of the right to a jury trial where appropriate.").

186. 287 P.3d 1045 (Or. 2012).

187. *Id.* at 1057.

188. *Id.* at 1054 ("State courts, of course, are not required to follow *Dairy Queen* to decide whether there is a state constitutional right to jury trial in cases in which a plaintiff seeks both legal and equitable remedies. State courts have adopted varying approaches . . . .").

189. *Id.* ("Our review of the development of the distinction between law and equity discloses that the positions of the parties in this case split according to their acceptance of the *Dairy Queen* approach. . . . To assess the parties' arguments, we again find it helpful to trace the distinction between law and equity, but now focus on how that distinction developed in Oregon.").

3. *Discussing* Beacon Theatres

Whether state supreme courts conclude that the traditional rule or the functional rule construction is more appropriate, their opinions should be clearly rooted in the state constitution. As the Seventh Amendment is unincorporated and state parallel rights are imperfect analogues, *Beacon Theatres* can be consulted, but not as an enlightened interpretation. The traditional rule interpretations must and do follow this analysis, and several state courts also reached the functional rule without *Beacon Theatres*.

Discussing *Beacon Theatres* can help identify the issue at hand and give courts the opportunity to state the proposition that they are not bound to follow Seventh Amendment case law.[190] If the state court does discuss federal law, it should be as persuasive authority. State courts vary widely in their treatment of *Beacon Theatres*, from the Michigan Supreme Court, which began its seminal jury right case with a long discussion on whether to talk about the case at all, to the Kansas Supreme Court, which suggested that the U.S. Supreme Court erred in *Beacon Theatres.*

The Michigan Supreme Court was the first court to discuss *Beacon Theatres* disapprovingly.[191] But whether to mention *Beacon Theatres* at all in the opinion was a contentious issue among the Michigan justices, which symbolized the larger question of the degree to which nonbinding U.S. Supreme Court treatment of similar constitutional issues deserved recognition. Justice Eugene Black's unorthodox opinion began by quoting in full his memorandum to his colleagues unsuccessfully arguing against citation of the federal cases.[192] Justice Black acknowledged that his memorandum was met with disagreement, and the final opinion criticized *Beacon Theatres* as irreconcilable with historical views of equity jurisdiction.[193]

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190. The Wisconsin Court of Appeals flatly stated in response to arguments about *Dairy Queen*, "*Dairy Queen* does not state the law of Wisconsin. The federal constitutional right to a jury trial in a civil case does not apply to states." Stivarius v. DiVall, 318 N.W.2d 25, 1982 WL 172138, at *7 (Wis. Ct. App. Jan 26, 1982) (unpublished table decision), *rev'd on other grounds*, 358 N.W.2d 530 (Wis. 1984).

191. *See* Abner A. Wolf, Inc. v. Walch, 188 N.W.2d 544, 550 (Mich. 1971).

192. *See id.* at 545-46. Justice Black's memorandum read in part:

> In preparing the opinion I decided purposely to omit reference to these cases [*Beacon* et al.], figuring that the profession already comprehends fully the difference between the congressionally controlled jurisdiction of the lower courts of the Federal system (under art. 3, U.S. Const.) and the jurisdiction which, by *our* Constitution, has from 1850 beginning been vested with what we know today as Michigan's 'one Court of Justice.' . . . .
>
> . . . .
>
> If three or four members of the Court deem it needful that these fundamentals require expatiation, I will be glad to add a pedantic paragraph, providing many interesting illustrations of professorial theory gone mad in the face of the people's grant of and duty to exercise the judicial power which . . . has been known pretty well.

Id. (first alteration in original) (internal quotation marks omitted).

193. *See id.* at 546, 550.

The Kansas Supreme Court asserted that *Beacon Theatres* was wrongly decided. *First National Bank v. Clark* reaffirmed prior case law stating that "the federal and state right to trial by jury might be viewed identically,"[194] but described *Beacon Theatres* as a "sharp departure" and declined to follow *Beacon Theatres* and *Dairy Queen*.[195] Similarly, a sharp 1972 decision from the Indiana Court of Appeals concluded that *Beacon Theatres* was "[h]ardly an inviting approach for Indiana to adopt."[196] The court also addressed the merits of *Beacon Theatres*, arguing that *Beacon Theatres* undermined the basic structure of historical equity jurisprudence. Before merger, issues of fact were not either legal or equitable and instead depended on the context in which they were brought.[197] The court further criticized *Beacon Theatres* for destroying judges' ability to promote "expedition and economy" by separating trials of claims and setting the order of issues to be tried.[198]

C. *Unpacking the Justification for Following* Beacon Theatres

Most of the courts adopting the functional rule do so under the following syllogism: Our state constitution is identical in all pertinent respects to the Seventh Amendment. Our state rules for civil procedure are identical in all pertinent respects to the Federal Rules of Civil Procedure. The Supreme Court adopted the functional rule under the same facts in *Beacon Theatres* and *Dairy Queen*. Therefore, we adopt the functional rule for our state constitution.[199] However, state courts devote little analysis to both critical premises: first, that the state constitution is like the Seventh Amendment, and second, that *Beacon Theatres* is an analogous case.

1. *Are the Seventh Amendment and parallel state constitutional rights identical?*

There are good, practical reasons to link the Seventh Amendment with state constitutional jury rights. Symmetry serves interests of economy, and the state and federal rights bear similarity in substance. As discussed in Part I.A, the Seventh Amendment and the parallel state rights both "freeze" the right in

194. 602 P.2d 1299, 1302 (Kan. 1979).

195. *Id.* at 1302-03.

196. Hiatt v. Yergin, 284 N.E.2d 834, 849 (Ind. Ct. App. 1972), *overruled on other grounds by* Erdman v. White, 411 N.E.2d 653, 657 (Ind. Ct. App. 1980).

197. *Id.*

198. *Id.* (internal quotation marks omitted).

199. *See, e.g.*, Harada v. Burns, 445 P.2d 376, 379-82 (Haw. 1968); Higgins v. Barnes, 530 A.2d 724, 728-33 (Md. 1987); Camden-Clark Mem'l Hosp. Corp. v. Turner, 575 S.E.2d 362, 370-71 (W. Va. 2002); *cf.* Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611, 615-17 (Minn. 2007); State *ex rel.* Leonardi v. Sherry, 137 S.W.3d 462, 472-74 (Mo. 2004).

time and follow the law/equity distinction. Courts interpret the text of both the Seventh Amendment and state constitutions to require a right to a jury trial for substantially the same types of claims—claims that would have been brought in a court of law before merger. In the U.S. Supreme Court, these questions are answered by deciding what it means to "preserve[]" the right.[200] State courts also follow the historical test used by the Supreme Court, even though almost all state constitutions use a different word than "preserved."

However, there are grounds for state courts to distinguish the Seventh Amendment in constructing their state constitutional right—enough to merit substantive engagement by courts. Though today the state constitutional rights to a jury trial in civil cases share many similarities, there is precedent in history for diversity in jury rights. In the eighteenth century, the differences in state constitutional language and state court structure gave rise to a variety of constitutional rights in the states. In response to criticisms that the U.S. Constitution contained no federal right to a jury trial in civil cases, Alexander Hamilton wrote in *The Federalist No. 83* that the "material diversity" of state rights meant that the Federal Constitutional Convention could not decide on one satisfactory rule and that deferring to Congress's judgment for statutory provision of the jury right was preferable to choosing one state's rule for the U.S. Constitution.[201]

The Seventh Amendment's legislative history shows that Congress might have intended for the text of the Seventh Amendment to differ from all state constitutions at that time. In 1791, state constitutional treatment of the right to a trial in civil cases varied significantly in the eleven state constitutions in effect at the time,[202] but Madison wanted the Seventh Amendment to bear some resemblance to the state constitutional rights, which declared that the right to a jury trial in civil cases "ought to be held sacred" or should "remain inviolate forever."[203] However, Congress, for no clear reason, changed the text to "preserved," a word that no state constitution at the time used for its right to a jury trial. It is generally accepted Congress intended to "freeze" the right in time,[204] but the ambiguity has led a small minority of scholars to speculate that the Seventh Amendment was not supposed to be a parallel right to the state constitutions at all.[205]

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200. U.S. CONST. amend. VII. ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

201. THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 103, at 503.

202. *See id.* at 501-03.

203. Harrington, *supra* note 45, at 221-22.

204. *See, e.g.*, Fleming, *supra* note 128, at 655.

205. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89 (1998) ("[I]f a state court entertaining a given common-law case would use a civil jury, a federal court hearing the same case . . . must follow—must preserve—that state-law jury right."); Harrington, *supra* note 45 (arguing the Seventh Amendment is better understood in

More importantly for state supreme courts, the great majority of state constitution drafters have taken textual inspiration from other *state* constitutions instead of from the Seventh Amendment in crafting their civil jury rights. Even if a state supreme court is convinced that "inviolate" and "preserved" have the same meaning, it might decide that other state courts—not the U.S. Supreme Court—should be the primary comparison points. Of the thirty-six states to enact state constitutions with rights to a civil jury trial after the ratification of the Seventh Amendment, thirty-three chose to hold the jury right "inviolate," "as heretofore," or "sacred," as had been done in other state constitutions, instead of "preserved," as the right is phrased in the Seventh Amendment. The three to "preserve[]" are Alaska and Hawaii, both enacting constitutions in 1959, and West Virginia.[206] None of the eleven states that enacted constitutions before the Seventh Amendment used "preserved." Of the eleven, nine have held constitutional conventions and rewritten their constitutions since the Seventh Amendment. All have avoided the word "preserved."[207]

The Nevada Supreme Court in *Awada v. Shuffle Master, Inc.* used this textual premise as the foundation for its analysis.[208] The *Awada* court never mentioned the Seventh Amendment or the term "preserved" and instead attempted to define the meaning of "inviolate" in its constitution by consulting the practices in four other states with "inviolate" jury rights: California, Iowa, Ohio, and Wisconsin.[209] When the Nevada Constitution took effect in 1864, courts in each of these states held that the "inviolate" right was not abridged by granting the trial court discretion to determine the order of issues to be tried.[210] The *Awada* court concluded, "As these states' description of their 'inviolate' jury

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the context of the Judiciary Act's broader grant of a jury right); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407 (1999) (arguing the Seventh Amendment commits to Congress's discretion which cases are entitled to a jury trial); Rachael E. Schwartz, *"Everything Depends on How You Draw the Lines": An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599 (1996) (arguing the Seventh Amendment merely permitted Congress to provide the civil jury right in its discretion).

206. *See* ALASKA CONST. art. I, § 16; HAW. CONST. art. I, § 13; W. VA. CONST. art. III, § 13. West Virginia enacted its constitution in 1872. Maryland and South Carolina appear to have it both ways: the right to a jury trial in civil cases is "inviolably preserved" in Maryland, MD. CONST., Declaration of Rights, art. 23, and "preserved inviolate" in South Carolina, S.C. CONST. art. I, § 14. Over a dozen states rewrote their constitutions in constitutional conventions during the twentieth century, but continued to avoid "preserve." *See, e.g.*, PA. CONST. art. I, § 6 (constitution last revised in 1968).

207. Massachusetts's constitution took effect in 1780, and New Hampshire's constitution took effect in 1784. Only eleven of the original thirteen states had constitutions when the Seventh Amendment was ratified, because Connecticut and Rhode Island continued to rely on the government established in their royal charters.

208. 173 P.3d 707 (Nev. 2007) (en banc).

209. *Id.* at 711.

210. *Id.* at 711-12.

trial right when the framers adopted Nevada's Constitution informs our understanding of Nevada's jury trial right, we conclude that Nevada's jury trial right similarly does not require the district court always to proceed first with any legal issues."[211]

Still, most courts brush aside the idea that state constitutional rights—"inviolate," "as heretofore," or "held sacred"—might mean something different than "preserved." The Iowa Supreme Court dismissed the argument as "obviously" incorrect:

> [Appellant] argues however that the United States [C]onstitution, amend. 7, says "the right of trial by jury shall be preserved," whereas our Iowa constitution, art. 1, § 9, says it "shall remain inviolate" and that the difference in language compels a different construction.
>
> We are not inclined to agree with this refinement of interpretation. The intention of the two constitutional provisions is obviously the same. No case is cited that holds there is any difference between "preserving" a right and holding or keeping it "inviolate."[212]

As a matter of semantics, whereas "preserved" describes a right that is dependent on history and "freezes" the practice as it was, to hold a right "inviolate" or "sacred" could mean something different and more expansive than the meaning of "preserved" in the Seventh Amendment. Some courts have given "inviolate" a meaning arguably stronger than "preserved." The Illinois Supreme Court interpreted "inviolate" to mean "unhurt, uninjured, unpolluted, unbroken."[213] In Kentucky, "inviolate" means "unassailable. . . . [L]egislation and civil rules of practice shall be construed strictly and observed vigilantly in favor of the right and is not to be abrogated arbitrarily by the courts."[214]

In some states, another part of the state constitution may require a particular outcome. The state constitutions of North Carolina and Texas contain additional rights that foreclose the intertwined-issues problem. When North Carolina merged law and equity, it did so by constitutional amendment, adding a separate section in the Judiciary Article that abolished all distinctions between law and equity and provided that all parties to civil actions were entitled to have issues of fact tried before a jury.[215] Since then, the North Carolina Supreme Court has enforced the constitutional right to a jury trial in both legal

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211. *Id*. at 712 (footnote omitted).

212. Schloemer v. Uhlenhopp, 21 N.W.2d 457, 458 (Iowa 1946).

213. People *ex rel.* Denny v. Traeger, 22 N.E.2d 679, 682 (Ill. 1939).

214. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 908 S.W.2d 104, 108 (Ky. 1995); *accord* Seymour v. Swart, 695 P.2d 509, 511 (Okla. 1985).

215. N.C. CONST. of 1868, art. IV, §§ 1, 18. After North Carolina's most recent constitutional convention in 1970, the pertinent section reads, "There shall be in this State but one form of action . . . which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury." N.C. CONST. art. IV, § 13, cl. 1.

and equitable cases.[216] When Texas merged its courts, the state added a second constitutional right to a jury trial in "all causes," including legal but also equitable issues.[217] State courts in both North Carolina and Texas rely upon these differences instead of applying the *Beacon Theatres* rule to their state courts.[218] The Louisiana Constitution contains no right to a jury trial in civil cases, and state courts follow unique statutory requirements for the right to a jury trial.[219]

In other states, constitutional judiciary articles require a particular result. The Michigan Supreme Court reads its Judiciary Article as protecting a right to a nonjury trial in equitable cases. This right has the same force as the right to a jury trial in legal cases under the state constitution's Declaration of Rights. In a landmark case, the Michigan Supreme Court held that neither one of these rights could be compromised under the merged procedure. Issues must be separated and tried in different proceedings, even if it was possible that inconsistent findings of fact would result.[220] The four states without merged courts, Delaware, Mississippi, New Jersey, and Tennessee, continue to follow the traditional-rule interpretations that were typical before state courts began the trend towards a unified court system.[221] In New Jersey, this was constitutionally significant, as the New Jersey Supreme Court held that the separation of law and equity was part of its Judiciary Article, and that provision required respecting the chancery court's jurisdiction.[222]

2. *Is* Beacon Theatres *a good analogy for state courts?*

State courts' syllogism supporting the decision to follow *Beacon Theatres* is weaker to the extent that the *Beacon Theatres* and *Dairy Queen* decisions depended on uniquely federal issues. The reliance by *Beacon Theatres* on *Scott v. Neely* renders *Beacon Theatres* at least an imperfect analogue for state con-

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216. *See* Lee v. Pearce, 68 N.C. 76, 89 (1873) (per curiam) ("'In all issues of fact joined in any Court, the parties may waive the right to have the same determined by a jury,' &c., in the absence of such waiver 'all issues of fact' under the new system must be tried by a jury.").

217. TEX. CONST. art. V, § 10.

218. *See* Kiser v. Kiser, 385 S.E.2d 487, 491 (N.C. 1989); State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292 (Tex. 1975).

219. *See* Brewton v. Underwriters Ins. Co., 848 So. 2d 586, 588-89 (La. 2003).

220. *See* Abner A. Wolf, Inc. v. Walch, 188 N.W.2d 544, 548 (Mich. 1971).

221. *See* New Castle Cnty. Volunteer Firemen's Ass'n v. Belvedere Volunteer Fire Co., 202 A.2d 800, 803 (Del. 1964); Re/Max Real Estate Partners, Inc. v. Lindsley, 840 So. 2d 709, 711-14 (Miss. 2003) (en banc); Weinisch v. Sawyer, 587 A.2d 615, 620 (N.J. 1991), *superseded by statute on other grounds*, N.J. STAT. ANN. § 17:28-1.9a; Smith Cnty. Educ. Ass'n v. Anderson, 676 S.W.2d 328, 336-37 (Tenn. 1984).

222. *See* Lyn-Anna Props., Ltd. v. Harborview Dev. Corp., 678 A.2d 683, 693 (N.J. 1996). Unlike many other cases involving intertwined-issues problems, *Lyn-Anna Properties* includes a substantial discussion about the intent of the drafters of New Jersey's 1947 constitution. *See id.* at 690-91.

stitutional rights. *Scott v. Neely* was quoted for the crucial proposition that logically led to the *Beacon Theatres* rule that judges had almost no discretion in deciding the order of the issues in trial:

> "In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency."[223]

Dairy Queen, which applied the *Beacon Theatres* rule to a plaintiff's claims for a money judgment and injunction, relied much more on *Scott v. Neely* than *Beacon Theatres* did.[224] The *Scott* Court took a position on the Seventh Amendment that enforced the right beyond the right at the state level and gave the right high priority.

Before the establishment of the Federal Rules of Civil Procedure, procedure in federal courts was deferential to state courts and dissimilar across the federal court system. The Process Act of 1792 permitted the Supreme Court to make rules for procedure in admiralty courts and on the equitable side of federal courts, but the Process Act of 1789 governed actions brought on the law side of federal courts. On the law side, federal trial courts were to follow the rules for procedure in the state courts for their district. When state courts started to merge their courts of law and equity, federal courts remained divided under the Conformity Acts, with parties bringing their actions on either the equitable or the legal side even if the claims would have been brought jointly in state court.[225]

For purposes of the Seventh Amendment, *Scott* challenged equity's traditional jurisdiction over common legal claims. The *Scott* plaintiff had legal and equitable claims for the recovery of property, which would have both been heard in equity had the action been heard in Mississippi state court. The Supreme Court held that conformity did not control for the Seventh Amendment, and that the states could not extend or restrict the right to a jury trial in federal court.[226] Despite the federal procedure policy of intrastate uniformity, the right to a jury was uniformly applied in all federal district courts. When a jury right was properly demanded, the legal issues and equitable issues were separated and litigated on separate sides of the court, even (unlike in many state courts) if there were common issues. "The line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation."[227] The Seventh Amendment right to a jury trial cannot be impaired by blending a

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223. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) (alteration in original) (quoting Scott v. Neely, 140 U.S. 106, 109-10 (1891)).

224. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962).

225. *See* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1002 (3d ed. 2012).

226. *Scott*, 140 U.S. at 109-10.

227. Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 379 (1893).

legal claim with an equitable claim.[228] "Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."[229] Thus, the U.S. Supreme Court's interpretation of the Seventh Amendment was stronger than the state court's view of its own right to a jury trial.

Many state courts had already considered the intertwined-issues problem and settled on a traditional rule with less protection for the right. Before *Beacon Theatres*, federal circuit courts followed either a traditional rule, as the state courts did,[230] or ruled that judges' discretion to try the equitable issues first was limited.[231] Neither of these approaches protected the right to a jury trial in civil cases to the extent that *Beacon Theatres* would.[232] However, under *Scott v. Neely*, federal courts had some of the most robust rights to a jury trial in civil cases because the right to a jury trial on legal claims could not be lost through the equitable cleanup doctrine. In light of *Scott v. Neely*, which *Dairy Queen* characterized as a choice of robust enforcement of an important right over judicial economy,[233] it is not surprising that the U.S. Supreme Court would find an important constitutional right in the Seventh Amendment and side with a functional rule that fully provided for the right to a jury trial on legal claims. The failure of the Supreme Court to discuss practices in other jurisdictions and litigants' failure to cite state cases might suggest that the application of the Seventh Amendment to the intertwined-issues problem could be sui generis or distinguishable from state courts because of the uniquely federal provisions relied upon.[234]

Additionally, a concern by the Supreme Court for federal-state uniformity on constitutional jury issues would have militated against a long history of uniquely federal jury rules. Since the creation of the Seventh Amendment, when Congress chose "preserved" over any other word in the eleven state constitutions, uniformity has been a secondary concern. Even under the Conformity Acts, which were motivated by intrastate uniformity, the Seventh Amendment's constitutional status excepted it from intrastate conformity.

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228. *Scott*, 140 U.S. at 109-10.

229. *Id*. at 110.

230. *See, e.g.*, Tanimura v. United States, 195 F.2d 329, 329 (9th Cir. 1952); Orenstein v. United States, 191 F.2d 184, 190 (1st Cir. 1951).

231. *See, e.g.*, Leimer v. Woods, 196 F.2d 828, 833-34 (8th Cir. 1952); Bruckman v. Hollzer, 152 F.2d 730, 732 (9th Cir. 1946).

232. *See* 9 WRIGHT ET AL., *supra* note 225, § 2338.

233. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471 (1962).

234. *See* Brief for the Petitioner at 32-36, Beacon Theatres v. Westover, 359 U.S. 500 (1959) (No. 45), 1958 WL 91627; Brief for the Respondent at 39-44, *Beacon Theatres*, 359 U.S. 500 (No. 45), 1958 WL 91628; Reply Brief of Petitioner at 4-5, *Beacon Theatres*, 359 U.S. 500 (No. 45), 1958 WL 91629.

The Supreme Court was again forced to choose between intrastate uniformity and a federal policy in the Seventh Amendment favoring jury decisions one year before *Beacon Theatres* in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[235] In deciding whether the *Erie* doctrine required the state right to a jury to be applied to a diversity case, the Supreme Court acknowledged the value in intrastate uniformity because the nature of the tribunal—trial by bench or jury—can substantially affect the outcome of litigation.[236] "[W]ere 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice."[237] The Court ultimately concluded that federal courts were an independent system for administering justice, federal policy favored the jury right, and that these considerations overrode the policy benefits of intrastate uniformity[238]:

> The policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. . . .
>
> . . . It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.[239]

CONCLUSION

Even more than fifty years after *Beacon Theatres*, the intertwined-issues problem continues to be a developing area of the law. This Note sheds light on the surprisingly continued vigor of the traditional rule in some states and suggests an analytical framework suitable for working with the rare unincorporated constitutional right. The real significance in *Beacon Theatres*'s path through state courts lies not in the changes to state court litigants' substantive rights to a jury trial in civil cases. Rather, the process of using "lockstep" principles for an unincorporated right leaves state courts on shaky ground analytically and neglects state constitutions' exclusive role in protecting the right.

235. 356 U.S. 525 (1958).
236. *See id.* at 536-37.
237. *Id.* at 537.
238. *Id.* at 537-39.
239. *Id.* at 537-38 (footnote and citation omitted).

APPENDIX

Alabama: The Alabama Supreme Court follows the functional rule.[240]

Alaska: The Alaska Supreme Court adopted the functional rule in 1983.[241]

Arizona: Arizona has not confronted this issue, thanks to a "curious" history of handling equitable issues.[242] An Arizona statute granted the civil jury right in both legal and equitable proceedings in 1910 when Arizona joined the Union, and this right was preserved "inviolate" by the state constitution.[243] The statute was amended in 1921 so that the equity verdict was merely advisory, and the equity jury was discarded by statute in 1956.[244] However, the Arizona Supreme Court has "preserved" the advisory equity jury.[245] Recently, Arizona has at times described the right to the jury in equity cases without clarifying its advisory nature.[246]

Arkansas: The intertwined-issues problem remains unsettled in Arkansas, which merged law and equity in 2001.[247] The Arkansas Supreme Court has wrestled with jury trial issues generally in the wake of merger[248] and spoken approvingly of the equitable cleanup doctrine after merger,[249] but the court has not specifically dealt with the intertwined-issues problem.[250]

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240. *See Ex parte* Thorn, 788 So. 2d 140, 144-45 (Ala. 2000); Poston v. Gaddis, 335 So. 2d 165, 168 (Ala. Civ. App. 1976).

241. Shope v. Sims, 658 P.2d 1336, 1340 (Alaska 1983); *see also* Municipality of Anchorage v. Baugh Constr. & Eng'g Co., 722 P.2d 919, 928 n.7 (Alaska 1986).

242. *See* Hammontree v. Kenworthy, 404 P.2d 816, 821 (Ariz. Ct. App. 1965).

243. ARIZ. CONST. art. 2, § 23.

244. Weaver v. Weaver, 643 P.2d 499, 501 (Ariz. 1982) (en banc) (Gordon, V.C.J., specially concurring).

245. City of Tucson v. Superior Court, 798 P.2d 374, 380 n.5 (Ariz. 1990) (en banc).

246. Chartone, Inc. v. Bernini, 83 P.3d 1103, 1110 (Ariz. Ct. App. 2004); *see also* Shaffer v. Ins. Co. of N. Am., 545 P.2d 945, 946 (Ariz. 1976).

247. *See* ARK. CONST. amend. 80, §§ 6, 21; First Nat'l Bank of DeWitt v. Cruthis, 203 S.W.3d 88, 91 (Ark. 2005).

248. *See* Nat'l Bank of Ark. v. River Crossing Partners, LLC, 385 S.W. 3d 754, 756 (Ark. 2011); Ludwig v. Bella Casa, LLC, 372 S.W.3d 792, 799-800 (Ark. 2010) (Brown, J., concurring in part and dissenting in part); *Cruthis*, 203 S.W.3d at 90.

249. *River Crossing Partners*, 385 S.W.3d at 758.

250. *See* Charles D. McDaniel, Jr., Note, First National Bank of Dewitt v. Cruthis*: An Analysis of the Right to a Jury Trial in Arkansas After the Merger of Law and Equity*, 60 ARK. L. REV. 563, 589 (2007) ("While *Cruthis II* does stand for the principle that equity jurisdiction survived the merger generally intact, the complete ramifications of the merger—most importantly, the status of the clean-up doctrine—remain to be seen.").

California: California follows an issue-oriented, traditional rule. The legal issues in a mixed suit are entitled to a jury,[251] but "[t]he court may decide the equitable issues first, [which] may result in factual and legal findings that effectively dispose of the legal claims."[252]

Colorado: Colorado follows an action-oriented, traditional rule. The civil jury right is not constitutionally protected, but Colorado statutory law protects certain enumerated legal claims.[253] Originally, the jury right in Colorado turned on the "primary object of the suit."[254] Most recently, the rule was stated as "[w]here legal and equitable claims are joined in the complaint, the court must determine whether the basic thrust of the action is equitable or legal in nature."[255]

Connecticut: Connecticut is an action-oriented, traditional-rule state and uses a primary purpose test:

> "[W]hen legal and equitable issues are combined in a single action, whether the right to a jury trial attaches depends upon the relative importance of the two types of claims. Where incidental issues of fact are presented in an action essentially equitable, the court may determine them without a jury in the exercise of its equitable powers." To determine whether the action is essentially legal or essentially equitable, we must examine the pleadings in their entirety.[256]

Delaware: Delaware has not merged law and equity and has rejected attempts to abandon the equitable cleanup doctrine.[257] Delaware's Court of Chancery is permitted to determine a legal issue, even where the injunctive issues that gave the suit chancery jurisdiction became moot.[258]

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251. Robinson v. Puls, 171 P.2d 430, 431 (Cal. 1946) (en banc).

252. Nwosu v. Uba, 19 Cal. Rptr. 3d 416, 428 (Ct. App. 2004) (emphasis omitted). See *Hoopes v. Dolan*, 85 Cal. Rptr. 3d 337, 343-46 (Ct. App. 2008), for a thorough explanation of the current status and history of California's treatment of the *Beacon Theatres* issue.

253. *See* COLO. CONST. art. II, § 23; COLO. R. CIV. P. 38(a).

254. *See* Esselstyn v. U.S. Gold Corp., 149 P. 93, 94 (Colo. 1915).

255. Carder, Inc. v. Cash, 97 P.3d 174, 187 (Colo. App. 2003).

256. Texaco, Inc. v. Golart, 538 A.2d 1017, 1019-20 (Conn. 1988) (citations and some internal quotation marks omitted) (quoting U.S. Trust Co. v. Bohard, 495 A.2d 1034, 1041 (Conn. 1985)).

257. *See* Acierno v. Goldstein, No. 20056, 2004 WL 1488673, at *5 (Del. Ch. June 25, 2004).

258. New Castle Cnty. Volunteer Firemen's Ass'n v. Belvedere Volunteer Fire Co., 202 A.2d 800, 803 (Del. 1964).

District of Columbia: Unlike state courts, District of Columbia courts are bound by the Seventh Amendment and federal cases interpreting the civil jury right.[259]

Florida: The Florida Supreme Court adopted the functional rule as stated in *Beacon Theatres* and *Dairy Queen* without qualification.[260] Florida was an early adopter of the *Beacon Theatres* rule.[261]

Georgia: Georgia follows the functional rule.[262] Georgia established a statutory right to a binding jury verdict in all equity cases in 1792, which was repealed by 1982.[263]

Hawaii: Hawaii follows the functional rule and was an early adopter of the *Beacon Theatres* and *Dairy Queen* rules.[264]

Idaho: Idaho follows an issue-oriented, traditional rule with a sui generis exception for the compulsory legal counterclaim. In *David Steed & Associates v. Young*, two Idaho Supreme Court justices adopted the *Beacon Theatres* rule and cited *Dairy Queen* in a legal counterclaim case.[265] A third justice concurred, but only held that there was a jury right for a compulsory legal counterclaim.[266] Two justices dissented.[267] Three years later, Chief Justice Bakes, author of the *Steed* dissent, wrote the majority opinion in *Idaho National Bank v. Bliss Valley Foods, Inc.*,[268] which held (as summarized by one commentator) that "when legal and equitable issues are joined in a lawsuit, the trial court should first decide the equitable issues, and then, if the conclusions as applied to the legal issues leave any questions to be decided, there should be a jury trial as to those remaining legal issues."[269]

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259. Pernell v. Southall Realty, 416 U.S. 363, 370 (1974).

260. *See* Cerrito v. Kovitch, 457 So. 2d 1021, 1022 (Fla. 1984).

261. *See* Hightower v. Bigoney, 156 So. 2d 501, 507 (Fla. 1963).

262. *See* Life for God's Stray Animals, Inc. v. New N. Rockdale Cnty. Homeowners Ass'n, 322 S.E.2d 239, 241 (Ga. 1984).

263. *See* Cawthon v. Douglas Cnty., 286 S.E.2d 30, 34 (Ga. 1982) (per curiam); Van Hecke, *supra* note 34, at 160-61.

264. *See* Lee v. Aiu, 936 P.2d 655, 665 (Haw. 1997); Harada v. Burns, 445 P.2d 376, 381-82 (Haw. 1968).

265. *See Young*, 766 P.2d 717, 720-21 (Idaho 1988) (plurality opinion).

266. *See id.* at 721 (Johnson, J., specially concurring).

267. *See id.* at 723 (Bakes, J., dissenting).

268. 824 P.2d 841 (Idaho 1991).

269. Jennifer S. Reid, Note, *Erosion of the Right to Trial by Jury in the State of Idaho:* Idaho First National Bank v. Bliss Valley Foods, 31 IDAHO L. REV. 371, 378 (1994) (citing Idaho First Nat'l Bank v. Bliss Valley Foods, Inc., 824 P.2d 841, 865 (Idaho 1991)).

Illinois: Illinois follows the functional rule.[270]

Indiana: Indiana follows an action-oriented, traditional rule. There is no jury right where "the essential features of a suit as a whole are equitable and the individual causes of action are not distinct or severable."[271] Unlike the cleanup doctrine, "the simple inclusion of an equitable claim, standing alone, does not warrant drawing an entire case into equity."[272] Since 2011, Indiana has used a multipronged test to determine whether a case is essentially equitable:

> If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[273]

Iowa: Iowa mostly follows an action-oriented, traditional rule, but also follows *Beacon Theatres* for the compulsory legal counterclaim.[274] Legal defenses will not trigger a civil jury right.[275] A compulsory legal counterclaim or severable legal counterclaim would give rise to the jury right, but not a legal counterclaim with common facts.[276]

Kansas: Kansas follows an action-oriented, traditional rule. The Kansas Supreme Court has criticized *Beacon Theatres* and *Dairy Queen* as "sharp departure[s]" in that holding there is no civil jury right in an "essentially equitable" proceeding.[277] "[T]he test is whether the essential nature of the action is grounded on equitable rights and is one in which equitable relief is sought."[278]

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270. *See* Cooper v. Williams, 376 N.E.2d 1104, 1104-05 (Ill. App. Ct. 1978); Rozema v. Quinn, 201 N.E.2d 649, 653 (Ill. App. Ct. 1964) ("[W]here a law and equity action are joined but a proper demand for a jury in the law action is made, the latter cannot be tried with the chancery action.").

271. Songer v. Civitas Bank, 771 N.E.2d 61, 68 (Ind. 2002).

272. *Id.*

273. Lucas v. U.S. Bank, N.A., 953 N.E.2d 457, 465-66 (Ind. 2011).

274. *See* Conrad v. Dorweiler, 189 N.W.2d 537, 539 (Iowa 1971).

275. *Id.*

276. *See* Weltzin v. Nail, 618 N.W.2d 293, 297-98 (Iowa 2000) (en banc).

277. First Nat'l Bank v. Clark, 602 P.2d 1299, 1302-03 (Kan. 1979).

278. Koerner v. Custom Components, Inc., 603 P.2d 628, 636 (Kan. Ct. App. 1979) (quoting Karnes Enters. v. Quan, 561 P.2d 825, 830 (Kan. 1977)).

Kentucky: Kentucky follows an action-oriented, traditional rule. "If the nature of the issues presented is essentially equitable, no jury trial is available. If the issues are predominantly legal in scope, however, a right to a jury trial exists." [279]

Louisiana: Louisiana has no constitutional civil jury provision, and its statutory jury right does not relate to the common law distinction between law and equity.[280]

Maine: Maine follows the functional rule, and the Maine Supreme Judicial Court has discussed the *Beacon Theatres* rule favorably.[281] Maine preserves the jury right so long as the legal claims are not merely "incidental" to equitable claims.[282]

Maryland: Maryland follows the functional rule.[283]

Massachusetts: Massachusetts follows the functional rule.[284] The Massachusetts Supreme Judicial Court first adopted the rule in 1884.[285]

Michigan: Michigan courts apply perhaps the most idiosyncratic test to avoid the problem altogether. In a colorful opinion, Michigan recognized a constitutional right to have an equitable claim heard by a judge that is of equal status as the constitutional civil jury right.[286] Remarkably, when the same fact is common to both an equitable and legal claim, trial is held before the court and jury, and each may make independent findings of fact in deciding their respective issues. The jury's finding is treated as advisory in equity practice.[287] The court explained, "[w]hile this implies the startling possibility of contradictory findings in the same case on the common issue of fact, this apparently is a

279. Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 210 (Ky. Ct. App. 2009).

280. *See supra* note 44 and accompanying text.

281. *See* Avery v. Whatley, 670 A.2d 922, 925-26 (Me. 1996).

282. *See* Kennebec Fed. Sav. & Loan Ass'n v. Kueter, 695 A.2d 1201, 1203 (Me. 1997); Cyr v. Cote, 396 A.2d 1013, 1019 (Me. 1979).

283. *See* Higgins v. Barnes, 530 A.2d 724, 729-30 (Md. 1987).

284. *See* MacCormack v. Bos. Edison Co., 672 N.E.2d 1, 4 n.4 (Mass. 1996); *cf.* Dalis v. Buyer Adver., Inc., 636 N.E.2d 212, 214 (Mass. 1994).

285. *See* Powers v. Raymond, 137 Mass. 483, 486 (1884).

286. *See* Abner A. Wolf, Inc. v. Walch, 188 N.W.2d 544, 548 (Mich. 1971) (quoting Leser v. Smith, 180 N.W. 464, 465 (Mich. 1920)).

287. *See* Smith v. Univ. of Detroit, 378 N.W.2d 511, 516 (Mich. Ct. App. 1985) (per curiam) (quoting 2 HONIGMAN & HAWKINS, *supra* note 137, at 149).

consequence which must be accepted if each party has a constitutional right to a different mode of trial."[288]

Minnesota: Minnesota follows the functional rule.[289]

Mississippi: Mississippi has not merged law and equity and retains the equitable cleanup doctrine.[290]

Missouri: Missouri follows the functional rule, but provides that the practical and efficient trial of a case may require limited incidental legal claims to be tried to a judge along with equitable matters.[291]

Montana: Montana follows the functional rule. The Montana Supreme Court overruled precedent endorsing the cleanup doctrine in 1984 and adopted *Beacon Theatres* and *Dairy Queen*.[292]

Nebraska: Nebraska follows an action-oriented, traditional rule and recognizes a constitutional right to trial by the court. The "essential character" of the action and the remedy or relief determines whether the action is equitable or legal.[293] An equitable counterclaim made in a legal action may void any jury right the plaintiff would have had.[294]

Nevada: Nevada follows the issue-oriented, traditional rule. On first impression, the Nevada Supreme Court determined in 2007 that it is within the trial judge's discretion to try the equitable claims first and use those findings as a basis for the remainder of the case.[295]

New Hampshire: New Hampshire follows the action-oriented, traditional rule. The civil jury right is determined by the nature of the case and the relief

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288. *Id.* (emphasis omitted) (quoting 2 HONIGMAN & HAWKINS, *supra* note 137, at 149). The rule was most recently discussed and treated favorably in *Malik v. Salamy*, No. 264780, 2007 WL 1224033, at *2 (Mich. Ct. App. Apr. 26, 2007) (per curiam).

289. *See* Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611, 615-17 (Minn. 2007).

290. *See* Re/Max Real Estate Partners, Inc. v. Lindsley, 840 So. 2d 709, 711-12 (Miss. 2003).

291. *See* State *ex rel.* Leonardi v. Sherry, 137 S.W.3d 462, 472-74 (Mo. 2004).

292. *See* Gray v. City of Billings, 689 P.2d 268, 271-72 (Mont. 1984).

293. State *ex rel.* Cherry v. Burns, 602 N.W.2d 477, 482 (Neb. 1999).

294. *See* Fisbeck v. Scherbarth, Inc., 428 N.W.2d 141, 148 (Neb. 1988).

295. Awada v. Shuffle Master, Inc., 173 P.3d 707, 708 (Nev. 2007) (en banc).

sought; parties have the right to a civil jury if the common practice at 1784 included a jury right.[296]

New Jersey: New Jersey, which retains separate courts of law and equity, has continued to follow the equitable cleanup doctrine.[297] New Jersey courts consider the historical basis for the cause of action and focus on the requested relief in determining whether the action is primarily legal or equitable.[298]

New Mexico: New Mexico follows the functional rule upon the view that compulsory counterclaimants may not have their rights "automatically abrogated upon the actions of others."[299] Four months after the U.S. Supreme Court decided *Dairy Queen*, the New Mexico Supreme Court held that equitable issues should be decided before legal issues, while preserving the *Beacon Theatres* exception.[300] The New Mexico Supreme Court subsequently overruled that case in 2005 and adopted the *Dairy Queen* approach.[301]

New York: New York's traditional rule is not easily described as issue oriented or action oriented because it is based generally on the view that a party's voluntary interposition of an equitable issue should waive the jury right. When the plaintiff joins legal and equitable issues, the plaintiff waives the jury right unless the "primary character" of the case is legal when the case is viewed in its entirety.[302] However, the defendant would always have a jury right on any legal issue in the plaintiff's complaint.[303] Equitable counterclaims are always tried by the court, even when interposed on a primarily legal action.[304] Consistent with *Beacon Theatres*, a legal counterclaim to an equitable action presents a jury right for the defendant and the plaintiff, even where the latter waived a jury right by joining equitable and legal claims.[305] When legal and equitable causes of action are joined in one complaint, the court may sever the

296. *See* Franklin Lodge of Elks v. Marcoux, 825 A.2d 480, 489 (N.H. 2003).

297. *See* Lyn-Anna Props., Ltd. v. Harborview Dev. Corp., 678 A.2d 683, 687 (N.J. 1996).

298. *See* Weinisch v. Sawyer, 587 A.2d 615, 620 (N.J. 1991), *superseded by statute on other grounds*, N.J. STAT. ANN. § 17:28-1.9a.

299. Evans Fin. Corp. v. Strasser, 664 P.2d 986, 989 (N.M. 1983).

300. *See* State *ex rel.* McAdams v. Dist. Court, 728 P.2d 1364, 1366 (N.M. 1986).

301. *See* Blea v. Fields, 120 P.3d 430, 435 (N.M. 2005).

302. *See* Cadwalader Wickersham & Taft v. Spinale, 576 N.Y.S.2d 24, 25 (App. Div. 1991). *But see* Zimmer-Masiello, Inc. v. Zimmer, Inc., 559 N.Y.S.2d 888, 889-90 (App. Div. 1990) (stating a strict waiver rule without the "primary character" exception).

303. *See* Azoulay v. Cassin, 478 N.Y.S.2d 366, 367 (App. Div. 1984).

304. *See* Menado Corp. v. Indem. Ins. Co. of N. Am., 279 N.Y.S.2d 84, 86 (Civ. Ct. 1967).

305. *See* Forrest v. Fuchs, 481 N.Y.S.2d 250, 253 (Sup. Ct. 1984); *see also* N.Y. C.P.L.R. 4101 (McKinney 2013) (interpreting New York's constitutional civil jury right).

legal causes and direct a separate jury trial, leaving the equitable causes for the court.[306]

North Carolina: As discussed in Part I.A, North Carolina's two constitutional amendments on the right to a jury trial in civil actions forecloses the intertwined-issues problem.

North Dakota: North Dakota follows a functional rule. The rule almost conforms to the *Beacon Theatres* and *Dairy Queen* doctrine, except that actions where only a legal defense is raised are still "equitable action[s]."[307] A party raising a legal counterclaim to an equitable action is entitled to the jury right, and "[w]henever the issues are so interrelated that a decision in the nonjury portion might affect the decision of the jury portion, the jury portion is to be tried first."[308] A party raising a legal defense denominated as a legal counterclaim will be denied the jury right.[309] The right is generally preserved when the plaintiff pleads a legal claim, unless the legal claim "is incidental to and dependent upon the equitable claim."[310]

Ohio: Ohio follows the functional rule.[311] There is no right to a civil jury where the plaintiff's legal claim is incidental to the equitable claim.[312] If the counterclaimant's legal counterclaim would extinguish the original equitable claim if true, the issue is triable to a jury. However, if the legal counterclaim is "incidental or ancillary to the equitable nature of the original claim," there is no right to a jury.[313]

Oklahoma: Oklahoma follows the functional rule.[314] Oklahoma once followed a rigid version of the equitable cleanup doctrine.[315]

Oregon: The Oregon Supreme Court adopted a functional rule on first impression just last year.[316] Before 2012, the Oregon Supreme Court admitted

306. Vinlis Constr. Co. v. Roreck, 260 N.Y.S.2d 245, 247-48 (App. Div. 1965).

307. *See* C.I.T. Corp. v. Hetland, 143 N.W.2d 94, 101 (N.D. 1966).

308. Ask, Inc. v. Wegerle, 286 N.W.2d 290, 296 (N.D. 1979) (citing Landers v. Goetz, 264 N.W.2d 459 (N.D. 1978)).

309. *See* Great Plains Supply Co. v. Erickson, 398 N.W.2d 732, 735 (N.D. 1986).

310. Kopperud v. Reilly, 453 N.W.2d 598, 601 (N.D. 1990); *see also* Schumacher v. Schumacher, 469 N.W.2d 793, 800 (N.D. 1991) (distinguishing *Kopperud*).

311. *See* Pyromatics, Inc. v. Petruziello, 454 N.E.2d 588, 592 (Ohio Ct. App. 1983).

312. *Id.*

313. Huntington Nat'l Bank v. Heritage Inv. Grp., 467 N.E.2d 564, 566 (Ohio Ct. App. 1983).

314. *See* I.C. Gas Amcana, Inc. v. Hood, 855 P.2d 597, 599 (Okla. 1992).

315. *See* Newbern v. Farris, 299 P. 192, 194-95 (Okla. 1931).

that its cases had not provided a rule for the intertwined-issues problem,[317] but Oregon appeared to be leaning towards a functional rule. The Oregon Supreme Court signaled that it is sometimes preferable for the trial judge to try the legal issues before the equitable issues if a decision on the legal issues will resolve an equitable issue.[318]

Pennsylvania: Pennsylvania follows the action-oriented, traditional rule. Once a court of equity obtains jurisdiction, it may decide incidental legal issues. Legal counterclaims trigger no jury right because the plaintiff waived the jury right by bringing an equitable action, and the counterclaimant waived the jury right by choosing to bring a legal counterclaim in an equitable action.[319] Pennsylvania does not provide for compulsory counterclaims.[320]

Rhode Island: Rhode Island follows the functional rule. The Rhode Island Supreme Court examined its historical practices and discovered that chancery courts frequently submitted legal issues to juries before making equitable determinations.[321] It has preserved this practice, which conforms substantially with *Beacon Theatres* and *Dairy Queen*.[322]

South Carolina: South Carolina follows the action-oriented, traditional rule. Both parties have a civil jury right when a compulsory legal counterclaim is made to an equitable action, and the legal issues are tried first, but the defendant waives the jury right when a permissive, legal counterclaim is interposed in an equitable suit.[323] South Carolina courts consider the "main purpose" of a plaintiff's action, which is found in the body of the complaint, to determine whether the action is legal or equitable.[324] The South Carolina Supreme Court justifies the rule as reducing the complexity of litigation and appropriately preserving the constitutional right.[325]

316. *See* M.K.F. v. Miramontes, 287 P.3d 1045, 1057 (Or. 2012).

317. *See* McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co., 193 P.3d 9, 18 n.9 (Or. 2008).

318. *See* Rexnord, Inc. v. Ferris, 657 P.2d 673, 679 n.4 (Or. 1983).

319. *See* Rosenberg v. Rosenberg, 419 A.2d 167, 169 (Pa. Super. Ct. 1980).

320. *See* PA. R. CIV. P. 1031.

321. *See* Md. Cas. Co. v. Sasso, 204 A.2d 821, 824 (R.I. 1964).

322. *See* Bendick v. Cambio, 558 A.2d 941, 944 (R.I. 1989).

323. *See* Johnson v. S.C. Nat'l Bank, 354 S.E.2d 895, 897 (S.C. 1987) (per curiam); *see also* First-Citizens Bank & Trust Co. of S.C. v. Hucks, 408 S.E.2d 222, 223 (S.C. 1991).

324. Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 247 S.E.2d 315, 318 (S.C. 1978).

325. *See* Floyd v. Floyd, 412 S.E.2d 397, 399 (S.C. 1991).

South Dakota: The South Dakota Supreme Court adopted the functional rule in 2010, clarifying contradictory cases and abrogating all cases inconsistent with *Beacon Theatres* and *Dairy Queen*.[326]

Tennessee: Tennessee has not merged law and equity.[327] Actions are judged to be either inherently legal or inherently equitable, with the former giving rise to a constitutional civil jury right.[328] For all but two years since 1846, the Tennessee Legislature has statutorily provided a broad civil jury right for either party in a chancery suit to the trial of any material fact, except in cases involving complicated accounting.[329] The Tennessee Supreme Court has created exceptions for both intricate cases too complicated for solution by a jury and issues that by their nature are inappropriate for the jury, such as contempt proceedings, unless provided otherwise in statute.[330]

Texas: The intertwined-issues problem is not found in Texas, because Texas courts read two constitutional provisions jointly as extending the right to a jury to all cases of law or equity.[331]

Utah: Utah follows the functional rule.[332]

Vermont: Vermont follows the functional rule.[333]

Virginia: Virginia has always had merged courts, but only recently merged the separate forms of legal and equitable pleading in 2006.[334] Virginia courts have not addressed the intertwined-issues problem completely.[335] Virginia litigants have a statutory right to a binding jury verdict in the narrow instance of a plea in equity,[336] which is a unique form of defensive pleading that does not argue the merits of the complaint and instead raises a single issue of fact that is

326. *See* Mundhenke v. Holm, 787 N.W.2d 302, 306 (S.D. 2010).

327. *See* TENN. CODE ANN. § 16-11-101 (2012).

328. *See* Smith Cnty. Educ. Ass'n v. Anderson, 676 S.W.2d 328, 336 (Tenn. 1984).

329. *See* TENN. CODE. ANN. § 21-1-103 (2012).

330. *See* Moore v. Mitchell, 329 S.W.2d 821, 823-24 (Tenn. 1959).

331. *See* State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292 (Tex. 1975).

332. *See* Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418, 421 (Utah 1981).

333. *See* Ward v. Ward, 583 A.2d 577, 581 (Vt. 1990); *see also* State v. Irving Oil Corp., 955 A.2d 1098, 1105 (Vt. 2008) (holding that a monetary award incidental to equitable issues will not trigger the civil jury right).

334. *See* W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006).

335. *See id.* at 81-82.

336. VA. CODE ANN. § 8.01-336(D) (2013).

an absolute defense to the suit if proved.[337] With a statute authored by Thomas Jefferson, Virginia was the first state to ever make a statutory provision for this type of binding jury verdict in an equity case.[338]

Washington: Washington follows the action-oriented, traditional rule. When there are mixed issues of law and equity, the trial court has wide discretion to determine whether the action is primarily legal or equitable. In making the determination, the trial court should consider seven factors:

> (1) [W]ho seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.[339]

West Virginia: West Virginia follows the functional rule.[340] Like Virginia, West Virginia has a statutory right to a jury in a plea of equity.[341]

Wisconsin: Wisconsin follows the issue-oriented, traditional rule.[342] Wisconsin case law prefers for the trial judge to try the equitable claims first, but the court has discretion to try the legal claims first.[343]

Wyoming: Wyoming follows the action-oriented, traditional rule. In determining whether the action is primarily legal or equitable in nature, the court examines the substance of the issues in the underlying action as presented in the pleadings. Primarily legal actions trigger a jury right.[344]

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337. Angstadt v. Atl. Mut. Ins. Co., 492 S.E.2d 118, 121 (Va. 1997).

338. *See* Van Hecke, *supra* note 34, at 158.

339. Brown v. Safeway Stores, Inc., 617 P.2d 704, 709 (Wash. 1980).

340. *See* Camden-Clark Mem'l Hosp. Corp. v. Turner, 575 S.E.2d 362, 371 (W. Va. 2002).

341. W. VA. CODE § 56-4-55 (2012); *see supra* note 337 (describing Virginia's analogous plea in equity); *see also supra* note 338 (describing Virginia's analogous historical use of the right).

342. *See* Harrison v. Juneau Bank, 17 Wis. 340, 350-51 (1863); Stivarius v. DiVall, 318 N.W.2d 25, 1982 WL 172138, at *7 (Wis. Ct. App. Jan. 26, 1982) (unpublished table decision), *rev'd on other grounds*, 358 N.W.2d 530 (Wis. 1984).

343. *Harrison*, 17 Wis. at 351; Stivarius, 1982 WL 172138, at *7.

344. *See* Hyatt Bros. *ex rel.* Hyatt v. Hyatt, 769 P.2d 329, 335 (Wyo. 1989).