Nonmutual Collateral Estoppel and the Seventh Amendment Jury Trial Right

Neil Novikoff
NOTES

NONMUTUAL COLLATERAL ESTOPPEL AND THE SEVENTH AMENDMENT JURY TRIAL RIGHT

INTRODUCTION

The Second and Fifth Circuits are in irreconcilable conflict on the question of whether defendants who have had factual issues determined against them in a nonjury Securities and Exchange Commission (SEC) action for an injunction are collaterally estopped from relitigating those issues before a jury in an action for damages brought by a private plaintiff. In essence, the question is whether nonmutual collateral estoppel can operate to deprive a defendant of his seventh amendment jury trial right. Resolution of this controversy requires an analysis of two issues: the applicability of the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover* and the seventh amendment's preservation of the jury trial right as it existed in 1791, the year in which the seventh amendment was adopted.

The *Beacon Theatres* doctrine provides that when legal and equitable claims possessing common factual issues are joined in the same action, the legal claim must first be tried before a jury in order to protect a party's seventh amendment jury trial right. The Supreme Court recognized that if the equitable claim were tried first before the court, the doctrine of res judicata would preclude the defendant from relitigating the common issues before a jury. The *Beacon Theatres* doctrine seeks to protect the jury trial right against this anticipated res judicata effect. The controversy between the Second and Fifth Circuits centers around the applicability of the *Beacon Theatres* doctrine to situations in which legal and equitable claims are not joined in the same action, but are the subject of two separate and successive suits. The question then becomes whether an equitable determination in, for example, an SEC action, can be the basis for an estoppel in a damage action brought by a private plaintiff against the same defendant.

In *Shore v. Parklane Hosiery Co.*, the Second Circuit interpreted *Beacon Theatres* as evidencing an "inherent respect for the doctrine of collateral

3. For a general discussion of nonmutual collateral estoppel, see notes 18-25 infra and accompanying text.
4. The seventh amendment provides: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.
6. Id. Throughout this Note reference to the *Beacon Theatres* doctrine will include the holding of the Supreme Court in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). In *Dairy Queen*, the Court extended the *Beacon Theatres* principle in holding that when a plaintiff presents legal and equitable claims in the same suit, the defendant is entitled to a jury trial on the common issues, even when the legal issues are characterized as being incidental to the equitable issues. Id. at 473. The *Beacon Theatres* doctrine is discussed in detail in pt. II(A) infra.
7. 359 U.S. at 504; see pt. II(A) infra.
8. 565 F.2d 815 (2d Cir. 1977), cert. granted, 98 S. Ct. 1875 (1978) (No. 77-1305).
estoppel." Partly as a result of this interpretation the Second Circuit denied a defendant the opportunity to relitigate before a jury those issues previously determined in a nonjury proceeding. A premise of the Shore opinion is that when ordering for trial of the legal and equitable claims is not possible, a situation not presented in Beacon Theatres, collateral estoppel can operate to deny a defendant his jury trial right. Conversely, in Rachal v. Hill, the Fifth Circuit interpreted Beacon Theatres as evidencing such respect for the jury trial right that it "would be anomalous" to allow a prior equitable determination to have an estoppel effect.

This Note will argue that the Second and Fifth Circuits have overemphasized the relevance of the Beacon Theatres doctrine to the factual situation presented by Shore and Rachal. Beacon Theatres did not address the issue of whether a party can relitigate before a jury those issues previously determined by the court in an equitable proceeding. In overemphasizing Beacon Theatres, both courts have failed to focus on the second and more essential issue: whether the seventh amendment's preservation of the jury trial right as it existed in 1791 can be eroded by evolutions in the common-law doctrine of collateral estoppel.

In 1791 collateral estoppel could not be applied when the parties in the prior and subsequent actions were not identical. In a situation of nonmutual collateral estoppel, therefore, a party could not be deprived of his jury trial right in the subsequent proceeding. Since 1791 the mutuality requirement has been relaxed. This Note will conclude, however, that because the seventh amendment preserves the jury trial right as it existed in 1791, the defendants in Rachal and Shore cannot be deprived of this right by the later development of nonmutual collateral estoppel.

I. THE NATURE OF THE CONTROVERSY
A. Nonmutual Collateral Estoppel

The judicially constructed doctrine of collateral estoppel in its contemporary form provides, in essence, that once a final judgment is entered on a
factual issue, the party against whom the doctrine is asserted will be denied the opportunity to retry the issue in a subsequent proceeding, if that party had a full and fair opportunity to litigate the issue in the prior action and application of the doctrine will not result in an injustice. Indeed, the modern trend is to dispense with the mutuality of estoppel requirement, which provides that both parties (or their privies) in the prior proceeding must be bound by that judgment before either party (or his privy) can assert that judgment as the basis for an estoppel in the subsequent suit.

The California Supreme Court decision of Bernhard v. Bank of America National Trust & Savings Association was influential in the erosion of the mutuality requirement. In Bernhard, Justice Traynor established the broad outlines of nonmutual collateral estoppel:

In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

Eventually, in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, the Supreme Court dispensed with the mutuality requirement in a factual situation in which a plaintiff sought to establish the validity of a patent, previously proven invalid, against a defendant who was not a party to the prior action. In sanctioning the use of nonmutual collateral estoppel, the Supreme Court stated that the broad question was “whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.”

The analytical soundness of nonmutual collateral estoppel, apart from the


22. Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 324 (1971). In Blonder-Tongue, the Court noted that as a result of Bernhard, numerous state and federal courts dispensed with the mutuality requirement, particularly when the prior determination was asserted defensively in the subsequent action against a plaintiff who had unsuccessfully litigated the issue in the prior proceeding. Id. For a discussion of the distinction between the offensive and defensive use of collateral estoppel, see Note, The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty, 35 Geo. Wash. L. Rev. 1010 (1967).


25. Id. at 328.
jury trial issue, certainly was not questioned in the *Rachal* or *Shore* decisions. The question clearly posed to both courts, however, was whether nonmutual collateral estoppel could operate to deprive a defendant of his jury trial right.

B. Rachal v. Hill

*Rachal* followed a suit brought by the SEC against directors of Mooney Corporation and Mooney Aircraft, Inc. for alleged violations of sections 5 and 17(a) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, and rule 10b-5 promulgated thereunder. After a nonjury trial in the SEC action, the district court found that the defendants had violated the securities laws and entered an order of permanent injunction. In *Rachal*, stockholders in Mooney Corporation and Mooney Aircraft, Inc. brought suit individually and derivatively against the same two defendants to recover damages for the violations of the securities laws alleged in the prior SEC action. Plaintiffs moved for summary judgment on the basis of the court's findings in the SEC action. The district court granted the motion, ruling as a matter of law that the defendants were collaterally estopped from denying that they had violated the securities laws of the United States. On appeal, the Fifth Circuit reversed, holding that the doctrine of nonmutual collateral estoppel could not be applied so as to deprive the defendants of their right to a jury trial on the issue of liability in the private damage action. Although the Fifth Circuit did question whether nonmutual collateral estoppel could be applied so as to deprive a defendant of his seventh amendment jury trial right, the court's refusal to apply the collateral estoppel doctrine was not based on the fact that the element of mutuality was lacking. Finding no case squarely holding that nonmutual collateral estoppel could operate to deprive a defendant of his seventh amendment jury trial right, the *Rachal* court skirted this issue by basing its result exclusively on

---

26. In *Rachal*, the court accepted nonmutual collateral estoppel as a matter of federal law in the Fifth Circuit. 435 F.2d at 62. In *Shore*, the court noted that in *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964), the Second Circuit had dispensed with the mutuality of estoppel requirement. 565 F.2d at 819-19.
27. 15 U.S.C. §§ 77(e), 77q(a) (1976).
31. 435 F.2d at 60. In *Rachal*, however, plaintiffs did not allege a violation of § 17(a) of the Securities Act of 1933. 435 F.2d at 60.
32. 435 F.2d at 61.
33. *Id.* at 64.
34. *Id.* at 63.
35. *Id.*
36. *Id.* The *Rachal* court distinguished *Painters Dist. Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969), as a case in which mutual estoppel had operated to deny a defendant its jury trial right. 435 F.2d at 63 n.5. Because mutuality of estoppel was present, the *Rachal* court noted that the situation was similar to those cases holding that a prior equitable decree can work an estoppel in a subsequent action at law between the same parties, irrespective of the jury trial loss in the action at law. *See*, e.g., *Brady v. Daly*, 175 U.S. 148 (1899).
the *Beacon Theatres* doctrine and the respect that doctrine affords a litigant's jury trial right.\(^{37}\)

C. Shore v. Parklane Hosiery Co.

*Shore* involved a class and derivative action brought by Parklane Hosiery Company, Inc. (Parklane) stockholders against Parklane and twelve of its officers, directors, and shareholders. Plaintiff alleged that a proxy statement issued by Parklane contained materially false and misleading statements in violation of the Securities Exchange Act of 1934 and rules and regulations promulgated thereunder.\(^{38}\) The complaint sought damages, a rescission of the consummated merger, costs, and such other relief as the court might grant.\(^{39}\)

One and a half years after the private action for damages was instituted, the SEC brought suit against Parklane and its president,\(^{40}\) alleging that the proxy statement was materially false and misleading in the same respects as had been alleged by plaintiff in the previously commenced private damage action.\(^{41}\) Instead of damages, however, the SEC sought equitable relief, including an injunction against future violations of the federal securities laws.\(^{42}\) After a nonjury trial in the SEC action, the court found that the proxy statement did contain materially false and misleading statements and, therefore, violated section 14(a) of the Securities Exchange Act of 1934.\(^{43}\)

In reliance upon the district court's decision in the SEC action, plaintiff in the private action for damages moved for summary judgment, asserting that the defendants were collaterally estopped from maintaining that any genuine issues of material fact remained to be determined.\(^{44}\) Plaintiff's motion for summary judgment was denied by Judge Wyatt in a cryptic opinion. Judge Wyatt's opinion, in its entirety, read as follows: "The within motion is denied. \(^{45}\)

On appeal, the Second Circuit reversed, holding that nonmutual collateral estoppel can operate to deprive a defendant of his seventh amendment jury trial right.\(^{46}\) The Second Circuit noted that the seventh amendment jury trial

\(^{37}\) 435 F.2d at 63. For a detailed discussion of the *Rachal* court's reliance on the *Beacon Theatres* doctrine, see part II(B) infra.

\(^{38}\) Specifically, the complaint alleged violations of §§ 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), 78n(a), 78(c) (1976), and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1977). 565 F.2d at 816-17.

\(^{39}\) 565 F.2d at 817.


\(^{41}\) The SEC alleged that the proxy statement violated § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976), §§ 10(b), 13(a), and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), 78n(a) (1976), and rules promulgated thereunder. 565 F.2d at 817.

\(^{42}\) 565 F.2d at 817.


\(^{44}\) 565 F.2d at 818.

\(^{45}\) Id.

\(^{46}\) There can be no question that prior to *Shore* the Second Circuit had been critical of the Fifth Circuit's decision in *Rachal*. In Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973), the Second Circuit allowed an equitable decree to work an estoppel in a subsequent legal action between the same two parties. Because mutuality of estoppel was present, denying defendant the opportunity to reargue the common factual issues before a jury did not deprive it
right obtains only when there exist disputed issues of fact. Absent such a
genuine issue of material fact, a court may grant summary judgment pursuant
to Federal Rule of Civil Procedure 56 without violating seventh amendment
rights. The court reasoned that because the seventh amendment jury trial
right exists only with respect to disputed factual issues, "once those issues
have been fully and fairly adjudicated in a prior proceeding, nothing remains
for trial, either with or without a jury." Relitigation of these issues is
precluded by the policy considerations of judicial economy, certainty, and
finality of judicial determinations.

... of its seventh amendment right to a jury trial. Cognizant of this fact, the court in Crane
distinguished Rachal as being a case of nonmutual collateral estoppel. In dictum, however, the
court expressed doubt that Rachal had been decided correctly. The court stated that the
relaxation of the mutuality requirement "arguably should apply to [equitable decrees] to the same
extent as to judgments at law." Id. at 343 n.15.

Subsequent to Crane, in Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974),
different plaintiffs brought numerous damage actions against Goldman, Sachs. The cases raised
identical claims of alleged violations of the federal securities laws. After the cases were
consolidated for pretrial discovery purposes, the judge announced that a case in which a jury trial
had been waived would be tried before a case the parties had expected to be tried before a
jury. Fearing that the nonjury determination would work an estoppel in the subsequent jury
trial, Goldman, Sachs sought a writ of mandamus from the Second Circuit directing the district
court judge to stay his order for the nonjury trial until the jury trial had been completed.

In Goldman, Sachs the Second Circuit noted that the dictum in Crane had created doubt as to
whether, in a situation of nonmutual collateral estoppel, a nonjury determination in one suit
could preclude relitigating the same issues before a jury in a subsequent action. The Second
Circuit, therefore, issued the writ "in order to foreclose the potential destruction of the
defendant's right to a jury trial." Id. at 78. The potential estoppel effect anticipated by the
Second Circuit in Goldman, Sachs was allowed to eventuate in Shore.

... at 819; see Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-20 (1902).

50. Id. The doctrine of collateral estoppel achieves three basic socially desirable ends: (1) the
protection of litigants against harassment from repeated trials of the same issue; (2) preserving
the prestige of the courts by avoiding inconsistent judgments; and (3) the conservation of judicial
resources by precluding repeated litigation of the same issue. Vestal, Res Judicata/Preclusion by

The decisions in Rachal and Shore also raise the policy considerations involved when collateral
estoppel is applied in the context of the federal securities laws. A discussion of these consider-
ations is beyond the scope of this Note. For a discussion of how the decision in Rachal fails to
recognize the role of private actions in the effective enforcement of the federal securities laws, see
Comment, The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal v.
Hill, 71 Colum. L. Rev. 1329, 1356-37 (1971).
The court in *Shore* did not share the *Rachal* court's concern about allowing nonmutual collateral estoppel to deny a party his jury trial right.\(^{51}\) The issues decided in the SEC injunctive action\(^{52}\) were identical to those presented in the class action for damages.\(^{53}\) The defendants received a full and fair opportunity to litigate these issues in the prior SEC proceeding.\(^{54}\) Moreover, law courts traditionally granted estoppel effect to prior equitable decrees.\(^{55}\) With the Supreme Court-sanctioned relaxation of the mutuality requirement,\(^{56}\) the *Shore* court seemingly perceived no reason why nonmutual collateral estoppel could not operate to deny a party his jury trial right.\(^{57}\) Almost as an afterthought the court analyzed *Beacon Theatres* to determine if a contrary result would be mandated.

\(^{51}\) See notes 34-37 *infra* and accompanying text.


\(^{53}\) 565 F.2d at 818.

\(^{54}\) *Id.*


\(^{56}\) See notes 24-25 *infra* and accompanying text.

\(^{57}\) In applying nonmutual collateral estoppel in derogation of defendants' jury trial right, the court noted that while defendants were aware of the pendency of the private action throughout the nonjury SEC proceeding, they made no effort to protect their jury trial right in the private suit. The court stated that defendants could have protected this right by expediting trial of the private action or by requesting the district court to try the SEC action before a jury or an advisory jury. 565 F.2d at 821-22. The court reasoned that it would not be unjust to raise an estoppel in the private action because such an occurrence was foreseeable. *Id.* at 822 (citing *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir.), cert. denied, 323 U.S. 720 (1944)). One commentator has argued that *Shore* should be limited to its facts because defendants failed to protect their right to a jury trial. Brodsky, *Collateral Estoppel in SEC Injunctive Actions*, N.Y.L.J., Feb. 1, 1978, at 24, col. 1. An attempt to limit *Shore* to its facts on the basis of a foreseeable estoppel, however, does not resolve the fundamental constitutional issue of whether nonmutual collateral estoppel can operate to deprive a defendant of his seventh amendment jury trial right. Moreover, a recent case demonstrates the difficulty of protecting the jury trial right from a foreseeable estoppel effect. In SEC v. Wills, [Current] Fed. Sec. L. Rep. (CCH) \(^{96,321}\) (D.D.C. Feb. 11, 1978), the court denied defendants' motion to stay the nonjury trial of an SEC injunctive action. The motion was made because, in light of *Shore*, defendants anticipated being deprived of their seventh amendment jury trial right in a private damage action, involving identical issues, then pending in the Second Circuit. In denying defendants' motion, the court stated that the SEC's efforts to enjoin future violations of the federal securities laws should not be obstructed by private litigation.

The suggestion of the *Shore* court that defendants should have requested that the issues in the SEC action be tried before a jury or an advisory jury is also worthy of comment. Fed. R. Civ. P. 39(b) provides: "[N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." The Second Circuit has itself recognized that a jury trial is not available as of right in an SEC suit for injunctive relief. SEC v Commonwealth Chem. Sec. Inc., 574 F.2d 90 (2d Cir. 1978). The district court, therefore, could not have ordered that the issues in the SEC injunctive action be tried before a jury.

Fed. R. Civ. P. 39(c) provides: "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or . . . with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had
II. THE APPLICABILITY OF THE Beacon Theatres DOCTRINE

A. Beacon Theatres, Inc. v. Westover

The split between the Second and Fifth Circuits revolves around their respective interpretations of the Supreme Court's decision in Beacon Theatres, Inc. v. Westover. Manifestly, any comparison of Shore and Rachal must commence with a discussion of the Beacon Theatres doctrine.

The merger of law and equity under the Federal Rules of Civil Procedure created a fundamental jury trial problem. At common law a jury trial was available in actions at law, while suits in equity were tried before the court. In preserving the jury trial right in actions at law, the seventh amendment maintained the distinction between legal and equitable actions. The Federal Rules of Civil Procedure retained the seventh amendment's test for the right to jury trial. The pleading, counterclaim, and joinder provisions of the Federal Rules of Civil Procedure, however, frequently resulted in the presence of legal and equitable claims in the same suit. The problem presented was whether the legal or equitable claim should be tried first. It was a problem of importance as the determination of the first claim would work an estoppel against relitigation of common factual issues. In Beacon Theatres the Supreme Court addressed itself to this issue.

In Beacon Theatres, plaintiff sought a declaratory judgment that it was not liable to defendant for treble damages under the antitrust laws, and an injunction to prevent defendant Beacon Theatres from instituting an antitrust action, based on the same controversy, against plaintiff during the pendency of plaintiff's suit. Beacon Theatres filed a compulsory counterclaim for treble damages, raising issues identical to those presented by plaintiff's complaint, and demanded a jury trial. Viewing the issues raised by plaintiff's complaint as being essentially equitable in nature, the district court granted defendant's motion for an advisory jury and denied plaintiff's motion to have the court impanel a jury. In doing so the court noted that an advisory jury does not protect the seventh amendment jury trial right. An advisory jury, therefore, does not resolve the tension between the seventh amendment jury trial right and the doctrine of nonmutual collateral estoppel. Pursuant to Fed. R. Civ. P. 39(c), however, the conflict between the seventh amendment jury trial right and the common-law doctrine of nonmutual collateral estoppel would be avoided were the SEC to consent to a jury trial of its injunctive action.

59. Fed. R. Civ. P. 2 provides: "There shall be one form of action to be known as 'civil action.'"
60. 5 Moore's Federal Practice ¶ 38.11[5]-[6] (2d ed. 1948).
61. Fed. R. Civ. P. 38(a) provides: "The right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate."
63. This problem is discussed in Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961).
64. 359 U.S. at 502-03.
65. Id. at 503.
66. Id. Fed. R. Civ. P. 38(b) provides: "Any party may demand a trial by jury of any issue triable of right by a jury . . . ."
court ordered that these issues be tried before the court. Thereafter, the treble damage claim presented by defendant's compulsory counterclaim would be tried before a jury.

Because the complaint and counterclaim involved a common factual issue, the Ninth Circuit reasoned that the action of the district court could limit the defendant's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit [because determination of the common issue by the judge might] operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent [jury] trial of the treble damage claim.

The Ninth Circuit, however, held that the district court judge did not abuse his discretion in trying the equitable claim first, irrespective of the fact that the doctrine of res judicata could prevent relitigation before a jury of the common factual issues raised by defendant's compulsory counterclaim.

The Supreme Court reversed, holding that the district court judge had abused his discretion in trying the equitable claim before the legal claim. Speaking for the Court, Justice Black noted that even though legal and equitable claims would be joined in one action, the Federal Rules of Civil Procedure provided that the seventh amendment right to jury trial be preserved. As a result, he concluded that, when legal and equitable claims are joined in one suit, the trial court has only limited discretion in deciding whether to try the legal or equitable claim first. Wherever possible, this discretion has to be exercised to preserve the right to jury trial. Only under the most compelling circumstances could the jury trial right be lost as the result of a prior determination of the equitable claim. Thus, Beacon

68. Id. In directing that the issues raised by plaintiff's complaint be tried to the court, the district court was acting pursuant to Fed. R. Civ. P. 42(b) which provides: "The court, in furtherance of convenience or to avoid prejudice, . . . may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues . . . ."

69. 359 U.S. at 503.

70. Plaintiff Fox was the operator of a movie theatre, and exhibited movies under contracts with movie distributors. These contracts granted Fox the exclusive right to show certain movies in a specified competitive area and provided for a "clearance," a period of time during which no other theatre could exhibit these same movies. Id. at 502. The complaint and counterclaim presented the common factual issue of the reasonableness of these clearances, which depended in turn on whether Fox and Beacon Theatres were in competition. Id. at 503-04.

71. Beacon Theatres, Inc. v. Westover, 252 F.2d 864, 874 (9th Cir. 1958).

72. 359 U.S. at 505. The Ninth Circuit held that plaintiff's complaint should be read as a whole in order to determine whether there existed a jury trial right. So reading the complaint, the court stated that plaintiff's plea for an injunction stated an equitable claim. The court noted that a court of equity could retain jurisdiction even though a legal remedy later became available by virtue of the counterclaim. When equity retained jurisdiction it could enjoin the later trial of the legal claim. The court reasoned that the estoppel effect of the equitable determination was analogous to an equitable injunction. Id.

73. Id. at 508.

74. Id. at 509-10.

75. Id. at 510.

76. Id.

77. Id. at 510-11.
Theatres' fundamental holding is that when legal and equitable claims possessing common factual issues are joined in the same proceeding, the legal claim must be tried first in order to preserve the claimant's jury trial right against the operation of res judicata.

B. Rachal's Interpretation of the Beacon Theatres Doctrine

In Rachal, the court began its analysis by establishing that, absent the prior determination of liability in the SEC action for an injunction, defendants would have been entitled to a jury trial in the subsequent private class action for damages. After recounting the basic facts and holding of Beacon Theatres, the Rachal court concluded that Beacon Theatres' "great respect" for a party's jury trial right in situations when legal and equitable claims are joined in a single action militated against the loss of that right by the application of nonmutual collateral estoppel in a two-proceeding situation.

In analogizing the Rachal and Beacon Theatres situations, the Rachal court reasoned that, had the plaintiff in Rachal been a plaintiff in the prior SEC injunctive action and there filed a claim for damages, defendant Rachal would have been entitled to a trial by jury on the issue of liability. Thus, in Rachal, the Fifth Circuit sought to deny plaintiff a position superior to the one he would have occupied had he been a plaintiff in the prior SEC action.

In order to deny plaintiff this superior position the Rachal court concluded that the doctrine of nonmutual collateral estoppel could not operate to deprive defendant of his seventh amendment jury trial right. It has been aptly noted by one commentator, however, that in relying on the Beacon Theatres doctrine the Rachal court demonstrated a "disregard for the diverse procedural context in which Beacon and Rachal arose."

C. Shore's Interpretation of the Beacon Theatres Doctrine

In Shore, the Second Circuit confronted the identical issue encountered by the Fifth Circuit in Rachal, and, based upon the same precedent, reached a contrary result. The Second Circuit distinguished Beacon Theatres from the situation in Shore. While Shore was concerned with the issue of whether the seventh amendment mandates the relitigating of factual issues previously determined in a nonjury action for an injunction, Beacon Theatres was confined to the ordering for trial of legal and equitable issues joined in the same proceeding. Beacon Theatres, therefore, did not confront the issue of whether a party can relitigate before a jury those issues determined by the court in a prior equitable proceeding.

78. 435 F.2d at 63. In Rachal, the plaintiffs demanded a jury trial on all issues pursuant to Fed. R. Civ. P. 38. While defendants did not request a jury trial, the court held that they were entitled to rely, pursuant to Fed. R. Civ. P. 38(d), on the demand made by plaintiffs. 435 F.2d at 63 n.4. Fed. R. Civ. P. 38(d) provides: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

79. 435 F.2d at 64.

80. Id.

81. Id.

82. 40 U. Cin. L. Rev. 373, 381 (1971); accord, Shapiro & Coquillette, supra note 55, at 447.

83. 565 F.2d at 820.
Despite this restrictive interpretation, the *Shore* court nevertheless relied on *Beacon Theatres* to deny a party the opportunity to relitigate equitable issues determined in a prior nonjury proceeding. In *Shore*, the court analyzed *Beacon Theatres* as being based on the assumption that unless the legal issue were tried first, the equitable determination would estop the defendant in the subsequent legal action from retrying before a jury those issues common to the equitable claim.84

As evidence of this assumption, the *Shore* court noted the fact that the Court in *Beacon Theatres* anticipated situations in which a jury trial could be lost in the single action situation by virtue of the court having first determined the equitable issue.85 The *Shore* court reasoned that absent this fundamental assumption the Supreme Court in *Beacon Theatres* would not have been concerned with the ordering for trial of the legal and equitable claims. If the equitable determination did not have an estoppel effect, the defendant in *Beacon Theatres* would, in any event, remain entitled to a jury trial on his legal compulsory counterclaim.86 In essence, while the *Shore* court interpreted *Beacon Theatres* restrictively, it found in that decision an "inherent respect"87 for the collateral estoppel doctrine.

Although the assumption alluded to by the court in *Shore* was clearly present in *Beacon Theatres*,88 and has since been confirmed by the Supreme Court in *Katchen v. Landy*,89 it does not provide an insight into whether the operation of nonmutual collateral estoppel can deprive a party of his seventh amendment jury trial right. The language of the Court in *Beacon Theatres*90 is limited to situations in which legal and equitable claims are joined in the same proceeding.91 *Shore* and *Rachal*, however, involve two separate and successive suits. When properly limited, therefore, *Beacon Theatres* compels neither the *Shore* nor the *Rachal* result.92 It is submitted that in order to resolve the

84. Id. at 820-21. Some commentators have asserted that the presence of this assumption in *Beacon Theatres* was the basis for the issuance of mandamus to the district court. *See* Shapiro & Coquillette, *supra* note 55, at 446; notes 70-77 *supra* and accompanying text.
85. 565 F.2d at 820; *see* note 77 *supra*.
86. 565 F.2d at 820-21.
87. Id. at 821.
88. This anticipated estoppel effect was also present in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), *rev'd* *per curiam* 308 F.2d 875 (10th Cir. 1962).
89. 382 U.S. 323 (1966). In *Katchen*, the Court upheld a bankruptcy trustee's right to recover a preference in a summary proceeding, in which there is no jury trial right, over petitioner's objection that this would deprive him of his seventh amendment jury trial right in a plenary proceeding under § 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1976). In holding that bankruptcy courts could try equitable claims before legal claims, the Court stated: "Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. at 339-40.
90. *See* note 71 *supra* and accompanying text.
91. Even those commentators who are critical of the *Rachal* decision are cognizant of the fact that *Beacon Theatres* is confined to situations where legal and equitable claims are tried in one action. *See* Shapiro & Coquillette, *supra* note 55, at 446 & n.17.
92. Some commentators would argue, however, that a proper interpretation of *Beacon Theatres* does compel the result in *Shore*. While recognizing that *Beacon Theatres* was only concerned with trial sequence when legal and equitable claims are joined in the same action, they...
question of whether nonmutual collateral estoppel can operate to deprive a party of his jury trial right, one must analyze whether the seventh amendment right to a jury trial must be preserved, in its 1791 form, against expansion of the collateral estoppel doctrine to situations in which mutuality is not present.

III. Preserving the Seventh Amendment Jury Trial Right as It Existed in 1791

A. The Historical Inquiry

The seventh amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." By virtue of this constitutional language a party's jury trial right is preserved as it existed in 1791, the year in which the seventh amendment was adopted. Today, when an issue arises as to whether a party is entitled to a trial by jury, it is necessary to engage in an historical inquiry to determine whether such a right existed in 1791. If a jury trial right did exist in a suit at common law in 1791, a party will not be deprived of this right in a similar contemporary suit.

Rachal and Shore are analogous to those 1791 situations in which legal and equitable claims possessing common factual issues were asserted in two separate and successive suits. As a general proposition, a jury trial would have been available on the legal claim, while the equitable claim would have been tried by the court. By definition, because the parties in both suits would have been identical, mutuality of estoppel would have been present. If the equitable claim was determined before the legal claim, the equitable claim nevertheless conclude that "Beacon Theatres did not imply that principles of former adjudication should themselves be changed under the influence of the seventh amendment." Shapiro & Coquillette, supra note 55, at 446-47. The result in Rachal is therefore criticized for concluding that the seventh amendment does "influence the application of these principles when reordering is impossible, as it was in Rachal because of the separateness of the two proceedings," Id. at 447. For a discussion of how the seventh amendment does restrict the application of nonmutual collateral estoppel, see pt. III infra.

93. U.S. Const. amend. VII.
96. At common law a jury trial was normally available in actions at law, while actions in equity were tried by the court. 5 Moore's Federal Practice ¶ 38.11[5]-[6] (2d ed. 1948). The distinction between law and equity was basically a function of the relief requested. Id. Legal and equitable jurisdiction, however, was at times affected by the inability of the legal remedy adequately to protect the plaintiff's interests. In such situations it was necessary to bring separate actions at law and in equity. McCoid, Right to Jury Trial in the Federal Courts, 45 Iowa L. Rev. 726, 728-30 (1960) [hereinafter cited as McCoid—Right to Jury Trial]; 40 U. Cin. L. Rev. 373, 375 (1971).
97. 5 Moore's, supra note 96, ¶ 38.11[5].
98. Id. ¶ 38.11[6].
would have worked an estoppel against relitigation of the factually related issues in the subsequent action at law.\footnote{99} This collateral estoppel effect would have resulted regardless of the fact that in the action at law the defendant would have been deprived of his jury trial right on the issues common to the equitable claim.\footnote{100} Absent this element of mutuality, courts in 1791 did not allow the prior action to work an estoppel on the factually related issues raised in the subsequent action.\footnote{101} In a situation of nonmutual collateral estoppel there was no possibility of a defendant being deprived of his jury trial right as the result of a prior equitable determination.

In 1791, therefore, a defendant could be deprived of his jury trial right only by the operation of mutual collateral estoppel. \textit{Rachal} and \textit{Shore} thus presented the issue of whether the seventh amendment preserved the jury trial right against the extension of the collateral estoppel doctrine to the nonmutual situation. This central issue, however, was addressed only by the court in \textit{Shore}, as the \textit{Rachal} court based its decision entirely on the \textit{Beacon Theatres} doctrine.\footnote{102}

\section*{B. The Historical Inquiry in \textit{Shore}}

In \textit{Shore}, the court rejected the defendants' contention that their seventh amendment jury trial right must be preserved on historical grounds against enlargement of the collateral estoppel doctrine.\footnote{103} Defendants' argument was based on the fundamental proposition, noted above, that the seventh amendment preserves the jury trial right as it existed under the common law when the amendment was adopted in 1791, that is, when mutuality was required before collateral estoppel could operate to defeat the jury trial right. Defendants, therefore, conceded that collateral estoppel could deprive them of their jury trial right if there existed a mutuality of parties.\footnote{104} In 1791, however, collateral estoppel could not apply where mutuality did not exist and, consequently, nonmutual collateral estoppel could not operate to deprive a defendant of his jury trial right. Because the plaintiff in \textit{Shore} was not a party to the prior SEC action, defendants argued that their jury trial right in the subsequent private damage action could not be lost by an invocation of the collateral estoppel doctrine.\footnote{105}

\footnote{99} Brady v. Daly, 175 U.S. 148, 159 (1899). In \textit{Brady}, plaintiff first filed a bill in equity for injunctive relief and later brought an action at law for damages.

\footnote{100} Id. Prior to the merger of law and equity a plaintiff could exercise considerable control over a jury trial right in those situations in which both a legal and equitable action were necessary to protect his interests. Suing first in equity and then at law was but one option. Plaintiff could seek injunctive relief in equity with an additional claim for incidental damages. Under the "cleanup doctrine" equity could award these damages. \textit{See}, e.g., Goldschmidt Thermit Co. v. Primos Chem. Co., 225 F. 769 (E.D. Pa. 1915), \textit{cert. denied}, 263 U.S. 719 (1924). In such a case neither party was entitled to a jury trial. Plaintiff could sue first at law for damages and then in equity for an injunction. In this case there would be a jury trial right on all issues except the right to an injunction. \textit{See generally} McCoid—Right to Jury Trial, \textit{supra} note 96, at 129-30.

\footnote{101} \textit{See}, e.g., Triplett v. Lowell, 297 U.S. 638 (1936); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

\footnote{102} \textit{See} pt. II(B) \textit{supra}.

\footnote{103} 565 F.2d at 823.

\footnote{104} Brief for Appellees at 15.

\footnote{105} Id. at 16.
In making this argument, the defendants in Shore placed principal reliance upon Dimick v. Schiedt. In Dimick, the Supreme Court examined the scope of the 1791 jury trial right to determine whether a plaintiff in an action for personal injuries, upon an inadequate jury verdict, was compelled to accept a judge's increased award, or was entitled under the seventh amendment to a new jury determination on the question of damages. In holding that the plaintiff could not be denied a new trial even if the defendant agreed to a court-determined increase, the Supreme Court stated:

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution.

In Shore, the Second Circuit minimized the force of this language, which insulates the seventh amendment jury trial right from the encroachments of common-law doctrines.

The Second Circuit minimized the import of Dimick by questioning the functional utility of using an historical approach to define the scope of the seventh amendment jury trial right. Invoking Supreme Court language from Ross v. Bernhard, the Shore court stated that such an historical inquiry is "extensive and possibly abstruse" in nature. The court noted that the complexity of such an historical inquiry is compounded by both the scarcity of eighteenth century precedent and the merger of law and equity effectuated by the Federal Rules of Civil Procedure. Because the seventh amendment only preserves the jury trial right "[i]n Suits at common law," in determining whether a jury trial right exists with respect to statutes enacted after 1791 it is necessary to locate the closest 1791 analogue to such legislative enactments. In Shore, the court concluded that a search for this analogue "is often a tenuous procedure at best." While it is readily apparent that the court was

106. 293 U.S. 474 (1935).
107. Id. at 487 (citation omitted).
109. 565 F.2d at 822 (quoting 396 U.S. at 538 n.10).
110. 565 F.2d at 822; see McCoid—Right to Jury Trial, supra note 96, at 728-29; McCoid—Procedural Reform, supra note 95, at 1-2; Shapiro & Coquillette, supra note 55, at 448-49.
111. 565 F.2d at 822.
112. Id. In order to highlight its dissatisfaction with such historical inquiries, the court in Shore pointed to the Supreme Court's rejection of the historical test in determining whether a sixth amendment jury trial right existed in criminal contempt proceedings. Id. at 822-23. In Bloom v. Illinois, 391 U.S. 194 (1968), the Supreme Court found the historical precedent ambiguous and concluded that "[i]n any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempt are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution." Id. at 200 n.2.

Some commentators have noted, however, that a rejection of the historical test in sixth
not enamored of the historical search for such analogues, it nevertheless concluded that such an inquiry, even if conducted, would not compel granting defendants an opportunity to relitigate before a jury those issues resolved in the prior injunctive action brought by the SEC.113

In addition, the Shore court distinguished Dimick on several grounds. First, the personal injury action for damages brought in Dimick had existed prior to 1791, and had always been triable before a jury.114 Second, prior to 1791 the court clearly was not, in cases such as Dimick, allowed to increase the amount of damages awarded by the jury.115 Conversely, in Shore the court could not locate a 1791 analogue to an SEC proceeding for an injunction or a stockholder's derivative suit based upon alleged violations of the federal securities laws. Absent such analogues, the court could not envision what interplay there would have been between the seventh amendment right to a jury trial and the doctrine of collateral estoppel as it existed in 1791.116

Shore's treatment of the historical inquiry is open to criticism. The Supreme Court's decision in Ross v. Bernhard117 provides a contrast to the Second Circuit's denial of defendant's jury trial right on the ground that analogues to an SEC action for injunctive relief or a stockholder's suit based upon an implied private right of action under the federal securities laws could not be found.

In Ross, plaintiffs brought a derivative suit for money damages and other relief against the directors of their closed-end investment company and the company's investment brokers. Plaintiffs requested a jury trial on the corporation's claims against the defendants for breaches of their fiduciary duty in the payment of excessive fees to the brokers. The district court denied defendants' motion to strike petitioner's jury trial demand.118 The Second Circuit reversed, holding that petitioner's derivative action was entirely equitable in nature and that the seventh amendment did not require a jury trial on any part of it.119 The Supreme Court reversed, holding "that the right to a jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."120

amendment cases cannot be used as precedent for a similar rejection of the test when the seventh amendment jury trial right is at issue. While the sixth amendment jury trial right in criminal cases is protected by the due process clause of the fourteenth amendment, Duncan v. Louisiana, 391 U.S. 145 (1968), the seventh amendment jury trial right is not so protected. As a result, analysis of the seventh amendment right "seems less likely to be cut loose from its historical moorings by prevailing notions of fundamental fairness associated with the due process guarantee." Shapiro & Coquillette, supra note 55, at 449 n.26.

113. 565 F.2d at 823.
114. Id.
115. Id.
116. Id. Shore further distinguished Dimick in a manner highlighting the fact that, were the issue of whether nonmutual collateral estoppel can operate to deprive a defendant of his seventh amendment jury trial right not present, Shore would clearly represent an appropriate case in which to raise an estoppel. Because the verdict rendered in Dimick was inadequate, the plaintiff was not accorded a fair trial. Conversely, in Shore the defendants were accorded a full and fair opportunity to litigate the issues raised in the prior SEC action. Id.; see pt. II(A) supra.
119. 403 F.2d 909 (2d Cir. 1968).
120. 396 U.S. at 532-33.
Justice White's majority opinion in *Ross* is based on *Beacon Theatres*, which held that the seventh amendment jury trial right depends on the nature of the issue to be tried and not on the character of the overall action. Justice White reasoned that a derivative suit had a dual nature. First, the stockholder's right to sue on the corporation's behalf is equitable. Second, the corporation's claim against directors or third parties may be either legal or equitable. If the corporation had sued on a claim presenting legal issues, the corporation could have demanded a jury trial. Justice White concluded that, as a result of *Beacon Theatres*, a corporation's jury trial right could not be forfeited merely because the stockholder's standing to sue presented an equitable issue triable to the court.

Prior to the merger of law and equity, a court of equity could try these legal claims of a corporation brought in the context of a derivative suit. Equity was permitted to do this because there was a threat of irreparable injury and no adequate remedy at law existed when the stockholder was without standing to sue and the corporation refused to assert its own claim. Under the Federal Rules of Civil Procedure there now exists only a "civil action," in which legal and equitable claims may be joined and in which legal and equitable relief is available. As a result, according to Justice White, "[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity [are] destroyed." After the merger of law and equity, therefore, a court could resolve the equitable issue of the stockholder's standing to sue on the corporation's behalf and then try before a jury the corporation's claim for damages.

The import of *Ross* to the *Shore* situation is that the historical inquiry into the reach of the seventh amendment jury trial right has been reformulated in

---

121. *Beacon Theatres*, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) (footnote omitted). ("[O]nly 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."); *Dairy Queen*, Inc. v. *Wood*, 369 U.S. 469, 473 (1962) ("[T]he sole question . . . is whether the action now pending . . . contains legal issues.").


123. 396 U.S. at 538.

124. Id.

125. Id. at 539.

126. Id.


128. 396 U.S. at 539-40. In a dissenting opinion, Justice Stewart took issue with the Court's characterization of derivative suits as possessing both a legal and equitable nature. Justice Stewart viewed the derivative suit as solely an equitable form of action, in which there is no seventh amendment jury trial right. In so viewing the derivative suit, Justice Stewart distinguished the *Beacon Theatres* doctrine as involving "historically separable suits, one in law and one in equity." *Id.* at 549 (Stewart, J., dissenting). Justice Stewart's fundamental objection was that under the Court's analysis the seventh amendment and the Federal Rules "magnetically interact" to enlarge the seventh amendment jury trial right. *Id.* at 543 (Stewart, J., dissenting). The Court's opinion, he felt, marks a departure from the historical test of the right to jury trial, a departure which he explained "as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions." *Id.* at 551 (Stewart, J., dissenting).
order to focus on "whether it is now possible to try the corporate claim to a jury rather than the question of whether, had the present procedures existed in 1791, a court of law then sitting would have heard it."\textsuperscript{129} The corporate claim will be triable to a jury when it is legal in nature.\textsuperscript{130} In determining whether an issue is legal in nature, the \textit{Ross} Court propounded a test which focuses on the nature of the remedy sought.\textsuperscript{131} In this regard, money damages is a classically legal remedy.\textsuperscript{132}

The Court's holding in \textit{Ross} broadens the seventh amendment jury trial right in derivative suits beyond its 1791 form. To this extent the decision is at variance with the seventh amendment and the Federal Rules of Civil Procedure, both of which seek to preserve the jury trial right as it existed in 1791. Of vital significance, however, is the fact that the Supreme Court relaxed the historical inquiry in order to expand the jury trial right. To be sure, the decision in \textit{Ross} represents a Supreme Court bias in favor of jury trials. In light of the ease with which the Supreme Court extended the seventh amendment jury trial right to stockholder's derivative suits for money damages, it is incongruous that the Second Circuit should be eager to restrict this jury trial right because it could not find an eighteenth century analogue to an SEC action for injunctive relief or a derivative suit based on alleged violations of the federal securities laws. Absent these analogues, the court in \textit{Shore} could merely speculate:

Had the 1791 courts been faced with the question [of whether nonmutual collateral estoppel could operate to deprive a defendant of his jury trial right], perhaps they, like their 20th century successors, would have decided that the statutory purposes [of the federal securities laws] would best be facilitated by permitting private plaintiffs to utilize the SEC-obtained findings and by easing the mutuality requirement accordingly, giving collateral estoppel effect to such findings against a party who had had a full and fair trial of the issues in the case brought by the SEC rather than allow him a second trial before a jury.\textsuperscript{133}

This line of thought loses track of the fundamental proposition that in 1791 a party could not be deprived of his jury trial right by the operation of nonmutual collateral estoppel.\textsuperscript{134}

\textsuperscript{129} \textit{The Supreme Court, 1969 Term}, 84 Harv. L. Rev. 1, 175 (1970) [hereinafter cited as \textit{1969 Term}].

\textsuperscript{130} 396 U.S. at 539.

\textsuperscript{131} In \textit{Ross}, the Court indicated that the legal nature of an issue is determined by considering three factors: first, the premerger custom with reference to such issues; second, the remedy being sought; and third, the "practical abilities and limitations of juries." \textit{Id}. at 538 n.10.

It has been observed, however, that the test actually focuses on the remedy being sought. The importance of the premerger custom with reference to such issues is questionable in light of the Court's deviation from the historical text in reaching its decision in \textit{Ross}. The "practical abilities and limitations of juries" factor is of scant importance in light of the fact that nowhere in the \textit{Ross} opinion did the Court discuss the ability of juries to decide complex corporate issues. \textit{1969 Term, supra} note 129, at 176-77 n.26.


\textsuperscript{133} 565 F.2d at 823.

\textsuperscript{134} See notes 96-101 supra and accompanying text.
C. The Shapiro & Coquillette Comment

With the importance of the seventh amendment jury trial right in derivative suits having been defined by Ross, the remaining issue is how the doctrine of collateral estoppel would have interacted with this jury trial right. In this regard the Second Circuit exclusively relies upon a law review article,\(^{135}\) written by Professor Shapiro and Mr. Coquillette, for the fundamental proposition that in 1791 courts of law gave preclusive effect to prior equitable decrees.\(^{136}\) It is, therefore, necessary to examine the thesis of the Shapiro and Coquillette article.

The historical inquiry in the Shapiro and Coquillette article focuses on whether during the eighteenth century equitable decrees were given preclusive effect in subsequent legal actions, even though the result would be to deny a party a jury trial in the subsequent legal suit. The authors conclude that "by the end of the eighteenth century, it appears to have been generally agreed that determinations made in equity were binding in courts of law\(^{137}\) in actions between the same parties. Cognizant of the fact that in 1791 equitable decrees were given preclusive effect only in situations of mutual collateral estoppel, the authors attempt to rebut the very historical argument pro-

Admitting that the argument is a forceful one,\(^{138}\) the authors, based on negative evidence,\(^{139}\) conclude that 1791 courts did not acknowledge a relationship between the jury trial right and the doctrine of collateral estoppel as it then existed. The authors reason that because equitable and legal decrees were both entitled to preclusive effect, 1791 jurisprudence does not indicate that the development of nonmutual collateral estoppel would have been limited to instances in which the prior determination was rendered by a jury.\(^{140}\) As an affirmative reason for rejecting an historical defense of defendant's jury trial right, the authors state that the logical extension of such a defense "would reduce the historical inquiry to an absurdity.\(^{141}\) Indeed, the "precise boundaries\(^{142}\) of the 1791 doctrine of res judicata would have to be ascertained, and subsequent developments could not then operate to deprive defendants of their jury trial rights.

Although it is certainly disquieting to contemplate having to examine the precise boundaries of a common-law doctrine in order to define the reach of seventh amendment rights, the negative evidence upon which the authors base their assertion that nonmutual collateral estoppel can operate to deprive a defendant of his jury trial right is not convincing. The seventh amendment preserves the jury trial right as that right existed in 1791.\(^{143}\) As a function of this historical preservation the seventh amendment adopts common-law rules

---

\(^{135}\) Shapiro & Coquillette, supra note 55.

\(^{136}\) 565 F.2d at 823.

\(^{137}\) Shapiro & Coquillette, supra note 55, at 451.

\(^{138}\) Id. at 454.

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id.

\(^{142}\) Id. at 455.

\(^{143}\) See notes 93-95 supra and accompanying text.
relevant to the jury trial right, as those rules existed in 1791. The Supreme Court has enunciated clearly that to change these rules is to alter the Constitution. While the Supreme Court has deviated from a strict historical definition of the jury trial right, it has only done so when that deviation would operate to expand this constitutional guarantee. Such a selective departure from the historical test is reflective of a Supreme Court bias in favor of trial by jury. Underlying this bias is the "fundamental assumption that jury trial is a desirable form of fact-finding in a democratic society."

It is against this background that the failure of the Shapiro and Coquillette article to adduce affirmative evidence of nonmutual collateral estoppel operating to deprive a defendant of his jury trial right proves to be an analytically fatal defect. Indeed, it is made clear in *Dimick v. Schiedt* that the seventh amendment jury trial right cannot be restricted by the evolution of common-law doctrine. In light of *Dimick* it is difficult to avoid the conclusion, asserted by the defendants in *Shore*, that the expansion of the doctrine of collateral estoppel to include nonmutual situations cannot operate to restrict the seventh amendment right to jury trial.

**Conclusion**

The *Beacon Theatres* doctrine is concerned with the protection of a party's seventh amendment jury trial right in situations in which legal and equitable claims possessing common factual issues are joined in one suit under the Federal Rules of Civil Procedure. As a result, *Beacon Theatres* did not confront the issue of whether the seventh amendment requires that a party be permitted to retry before a jury issues previously litigated in a nonjury action brought by a different plaintiff. The dispute over the relevance of the *Beacon Theatres* doctrine to the situation of nonmutual collateral estoppel conceals the fundamental issue presented by *Shore* and *Rachal*.

The analytical focus in *Shore* and *Rachal* should have been on the issue of whether the seventh amendment protects a party's jury trial right against judicial relaxation of collateral estoppel's mutuality requirement. With the inquiry thus narrowed, and in light of the Supreme Court's rationale in *Dimick*, it is submitted that nonmutual collateral estoppel cannot be applied when its operation would deprive a party of his seventh amendment jury trial right.

Neil Novikoff

---

145. *Id.*
146. *See* pt. III(B) *supra*.
149. *1969 Term, supra* note 129, at 176 n.23.
150. 293 U.S. 474 (1935); *see* notes 106-07 *supra* and accompanying text.
151. Brief for Defendants-Appellees at 14-20; *see* notes 103-07 *supra* and accompanying text.