CONSTITUTIONAL LAW—ADMINISTRATIVE ADJUDICATIONS RESULTING IN THE IMPOSITION OF A STATUTORY MONEY PENALTY CONSTITUTE A CLASS OF ACTIONS TO WHICH THE SEVENTH AMENDMENT DOES NOT APPLY—*Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974), *on rehearing*, 519 F.2d 1215 (3d Cir. 1975), *cert. granted*, 96 S. Ct. 1458 (1976).

On January 11, 1972, an employee of Frank Irey, Jr., Inc. (Irey) was killed when a trench where he was working caved in and buried him.[1] As a result of the accident, Irey was cited for violations of the Occupational Safety and Health Act of 1970 (OSHA).[2] At a subsequent hearing before an Occupational Safety and Health Review Commission (OSHRC) hearing examiner, Irey was found to have willfully violated the general duty section of the Act[3] and the standards promulgated by the Secretary of Labor dealing with the support of trenches.[4] Irey was assessed a civil penalty of $5,000.00 for these

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[1] Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1201 (3d Cir. 1974) (three-judge panel), *on rehearing*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *cert. granted*, 96 S. Ct. 1458 (1976) (No. 75–748). Approximately two months before the accident, West Virginia safety inspectors visited the Irey worksite and found safety violations in another trench. 519 F.2d at 1202. They required that the sides of the trench be sloped or shored before work could continue. *Id.* The trench in which the Irey worker was killed had been excavated the day before the accident and was seventy-five to one hundred feet from the trench investigated by the West Virginia inspectors. *Id.*

[2] Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1201 (3d Cir. 1974) (three-judge panel), *on rehearing*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *cert. granted*, 96 S. Ct. 1458 (1976) (No. 75–748). The primary violation found by the inspector was that Irey had failed to shore the sides of the trench. *Id.*

The Occupational Safety and Health Act of 1970 is codified at 29 U.S.C. § 651 *et seq.* (1970). For expositions of the significant sections of the Act in narrative form see Moran, *The Legal Process for Enforcement of the Occupational Safety and Health Act of 1970*, 9 GONZAGA L. REV. 349 (1974); Moran, *The Impact of the Job Safety Act*, 6 GA. L. REV. 489 (1972); Comment, *The Occupational Safety and Health Act of 1970*, 25 BAYLOR L. REV. 104 (1973).

[3] The general duty section of the Act requires in part that an employer provide a workplace "free from recognized hazards" which might cause death or serious injury. 29 U.S.C. § 654(a)(1) (1970). "Recognized hazards" are not limited merely to those detectable by the human senses. American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 510–12 (8th Cir. 1974). It has been suggested that the general duty section may violate the "void for vagueness" aspect of due process. Comment, *The Occupational Safety and Health Act of 1970: A New Concern for Employers*, 34 U. PITT. L. REV. 567, 576–78 (1973).

[4] Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1202 (3d Cir. 1974) (three-judge panel), *on rehearing*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *cert. granted*, 69 S. Ct. 1458 (1976) (No. 75–748). The hearing examiner's opinion is reported at CCH 1971–1973 Occ. Saf. & Health Dec. ¶ 15,310 (1972).

OSHA requires all employers to "comply with occupational safety and health stan-

violations.[5] The hearing examiner's findings were affirmed on review by the Commission.[6]

Pursuant to the statutory scheme, Irey then petitioned for judicial review in the United States Court of Appeals for the Third Circuit.[7] On initial hearing, the court in *Frank Irey, Jr., Inc. v. OSHRC*[8] rejected Irey's contentions that the OSHA statutory scheme was unconstitutional because it (1) permitted the imposition of a money penalty indistinguishable from a criminal punishment without providing "the constitutional protections afforded a criminal defendant,"[9] and (2) constituted an illegal delegation of judicial powers to the executive branch.[10] The court determined, however, that the Commission's findings had been based on a misinterpretation of the statutory term "willful" and, upon construing the term, remanded

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dards promulgated under this chapter." 29 U.S.C. § 654(a)(2) (1970). The Act empowers the Secretary of Labor to promulgate specific safety standards which are published in the Federal Register. *Id.* §§ 655(a), (b)(2). There has been some criticism that standards hurriedly adopted immediately after passage of the Act fail to provide adequate guidance because they lack specificity. Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777, 778–80 (1974). A "vagueness" challenge to particular standards promulgated by the Secretary of Labor was rejected in McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10–11 (4th Cir. 1974).

[5] Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1202 (3d Cir. 1974) (three-judge panel), *on rehearing*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *cert. granted*, 96 S. Ct. 1458 (1976) (No. 75–748).

[6] Frank Irey, Jr., Inc., CCH 1973–1974 Occ. Saf. & Health Dec. ¶ 16,391, at 21,283 (OSHRC 1973).

[7] For the procedural framework by which an appeal may be taken from the final order of the Commission to a federal circuit court of appeals see 29 U.S.C. § 660 (1970).

[8] 519 F.2d 1200 (3d Cir. 1974) (three-judge panel), *on rehearing*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *cert. granted*, 96 S. Ct. 1458 (1976) (No. 75–748).

[9] 519 F.2d at 1204. Irey pointed out that § 666(a) of the Act, a civil penalty section, and § 666(e), a criminal penalty section, both prohibit willful violations. The difference between the two is that § 666(e) only applies if the willful violation results in the death of an employee. Brief for Petitioner at 21, Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974) [hereinafter cited as Brief for Petitioner]. Irey argued that because the two sections prohibit the same behavior, both are criminal provisions. *Id.* at 21–22. Irey also argued that all the civil penalties contained in the Act are actually criminal, because their effect is "penal" rather than "regulatory." *Id.* at 26–27. Thus, Irey claimed that it should have been afforded those procedural guarantees accorded criminal defendants by article III, section 2 of the Constitution and the fifth and sixth amendments. *Id.* at 11–14.

[10] 519 F.2d at 1203, 1205. In accordance with Irey's conclusion that the OSHA civil penalties are in fact criminal, *see* note 9 *supra*, it argued that the delegation to the Secretary of Labor of the power to impose criminal sanctions was unconstitutional. Brief for Petitioner, *supra* note 9, at 37–39.

It is well settled that federal criminal adjudications may not be delegated to an administrative agency, because the fifth and sixth amendments to the Constitution require indictment and jury trial in these actions. *See, e.g.*, Lipke v. Lederer, 259 U.S. 557, 559 (1922); Wong Wing v. United States, 163 U.S. 228, 235, 237 (1896).

the case to the Commission "for further consideration."[11] Judge Gibbons dissented from the majority "on the single and narrow ground" that the OSHA scheme violated the seventh amendment by providing for the assessment and execution of "what is essentially an administrative in personam money judgment" without affording the defendant a civil jury trial.[12] When Irey then petitioned for a rehearing, the court vacated its earlier opinion, and sat en banc in order to address the seventh amendment issue.[13] Ultimately, a six-judge majority affirmed the court's prior judgment, holding that all administrative adjudications comprise a separate category of litigation which lies outside the reach of the seventh amendment, and, therefore, fact-finding in such actions need not be by jury.[14] Judge Gibbons, joined by three members of the panel,[15] again dissented, maintaining that actions to recover "an *in personam* money judgment" lie among those actions for which the seventh amendment guarantees a trial by jury, and that in such actions Congress was without power to do away with this guarantee by relegating fact-finding to an administrative agency.[16]

The issue of whether or not an administrative imposition of money penalties mandates a civil jury trial has remained a debatable question even though federal statutes providing for the imposition of such penalties are plentiful. As of 1972, seven executive departments and thirteen independent federal agencies had been empowered by Congress to impose civil money penalties.[17] What is significant, how-

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[11] 519 F.2d at 1206–07.

[12] *Id.* at 1207–08, 1214–15.

[13] Brief for Respondent on Rehearing at 3, Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1215 (3d Cir. 1975).

[14] 519 F.2d at 1215, 1217, 1218 (en banc).

[15] Judge Gibbons was joined by Judges Aldisert and Hunter. Judge Garth agreed with Judge Gibbons' legal reasoning and his conclusion but felt compelled to file a separate dissent because he did not agree with one aspect of Judge Gibbons' opinion. 519 F.2d at 1226. In the disputed portion, the case of NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act) was characterized by Judge Gibbons as a reaction to the Roosevelt court-packing plan. 519 F.2d at 1224–25. *See* note 136 *infra* and accompanying text. Judge Garth felt that political analysis had no place in a judicial opinion. 519 F.2d at 1226.

[16] 519 F.2d at 1225.

[17] Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 950–52 (1972). Professor Goldschmid's article was based on an extensive survey accomplished by questionnaires and interviews with personnel of the federal executive departments and independent agencies. The report was the first significant survey done in the area of administrative penalties. *Id.* at 896–97. At the time of his study, the executive departments empowered to assess money penalties were: Argriculture, Commerce, Interior, Justice, Labor, Transportation, and Treasury. *Id.* at 950–51. The independent

ever, is that presently, in the case of all but OSHA and five other instances, the enabling statutory schemes provide the defendant the opportunity of a jury trial in a federal district court before such a civil money penalty may be enforced.[18] This factor, and the fact that "well over 90% of cases" involving such money penalties are settled prior to litigation,[19] may well explain the paucity of judicial opinion on this question.

The OSHA penalty procedure may be summarized as follows: The Secretary of Labor is authorized to inspect work sites for potential violations of the Act or standards promulgated by him.[20] If, as a result of such inspection, he determines that a violation exists, he is required to issue a citation describing the violation and ordering its abatement.[21] Civil penalties up to $10,000 may be assessed depending on the willfulness and seriousness of the alleged violation.[22] "[W]ithin a reasonable time," the Secretary must notify the employer

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agencies authorized to assess money penalties were the Atomic Energy Commission, Civil Aeronautics Board, Environmental Protection Agency, Federal Home Loan Bank Board, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Federal Reserve System, Federal Trade Commission, Interstate Commerce Commission, Securities and Exchange Commission, Small Business Administration, and the United States Postal Service. *Id.* at 951–52. Professor Goldschmid also compiled a list of those statutes which enable the above executive departments and independent agencies to assess civil money penalties. *See id.* at 957–64.

[18] One executive department and two independent agencies, other than OSHRC, were identified by Professor Goldschmid as authorized to impose civil money penalties without affording the defendant a jury trial. They were the Immigration and Naturalization Service of the Department of Justice, the Federal Home Loan Bank Board, and the United States Postal Service. *Id.* at 950–52. The Goldschmid method of classification utilized a two-category system. The statutory data was fixed into either classification A, "[a]dministrative imposition subject to substantial evidence review," or classification B, "[c]ourt imposition, or administrative imposition subject to de novo review." *Id.* at 950. While the simplicity of this method of classification is appealing, the statutory material under scrutiny is widely differentiated in terms of the language employed, ranging from the very specific to the very ambiguous. Recognizing that the data might not work easily into the classification system used, Professor Goldschmid opted to place a statutory mechanism in category B "whenever doubt existed." *Id.* at 952 n.2.

After the Goldschmid survey was completed, two other monetary penalty provisions have been enacted which do not afford defendants the opportunity of a jury trial. The Secretary of the Interior may impose monetary sanctions for violations of the Endangered Species Act of 1973, subject only to "substantial evidence" review. 16 U.S.C. § 1540(a) (Supp. IV, 1975). Judge Gibbons noted that, at the time of the first *Irey* decision, this "provision ha[d] not been tested in the courts." 519 F.2d at 1214 n.10 (Gibbons, J., dissenting). In addition, an amendment to the Fair Labor Standards Act allows the Secretary of Labor to impose civil money penalties for violations of the child labor provisions of that act. 29 U.S.C. § 216(e) (Supp. IV, 1975).

[19] Goldschmid, *supra* note 17, at 899.

[20] 29 U.S.C. § 657(a) (1970).

[21] *Id.* § 658(a).

[22] *Id.* § 666.

of any penalty proposed to be assessed.[23] If the cited employer fails "within fifteen working days . . . to contest the citation or . . . penalty," such citation and penalty will be "deemed a final order of the Commission and not subject to review by any court or agency."[24] If contested, the case goes to an adjudicatory hearing before a hearing examiner of OSHRC,[25] whose decision the Commission has the discretion to review,[26] or upon whose decision the Commission will issue a final order "affirming, modifying, or vacating the Secretary's citation or proposed penalty."[27] Either the defendant or the Secretary may seek judicial review of the Commission's final order in a circuit court of appeals,[28] but factual findings "supported by substantial evidence on the record considered as a whole, shall be conclusive."[29] Recovery of any civil penalty thus imposed may be by a civil action in a federal district court;[30] however, "the role of the district court is to do nothing other than issue execution."[31] An OSHA defendant at no time has the opportunity to place before a jury the factual issues which have engendered the imposition of a penalty.[32] It is in this context, then, that the question of whether the OSHA procedure violates the seventh amendment arises.

The seventh amendment, adopted in 1791, states in part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .[33]

By its very wording, the seventh amendment created no new right to jury trials, but rather sought to retain the right to jury trials such as existed at English common law[34] when the amendment was adopted

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[23] *Id.* § 659(a).

[24] *Id.*

[25] *Id.* § 659(c).

[26] *Id.* § 661(i).

[27] *Id.* § 659(c).

[28] *Id.* §§ 660(a), (b).

[29] *Id.* § 660(a).

[30] *Id.* § 666(k).

[31] 519 F.2d at 1208 (Gibbons, J., dissenting); *see id.* at 1203 & n.7 (majority opinion).

[32] *Compare* 29 U.S.C. § 666(k) (1970) (OSHA enforcement provision) *with* 47 U.S.C. § 504(a) (1970) ("any suit for the recovery of a forfeiture imposed [by the FCC] shall be a trial de novo"). The Federal Coal Mine Health and Safety Act of 1969 provides a hybrid mechanism in which the district court may try de novo only certain factual issues. *See* 30 U.S.C. §§ 819(a)(4), 816 (1970); Goldschmid, *supra* note 17, at 952 n.2.

[33] U.S. CONST. amend. VII. Had the seventh amendment not been adopted, Congress would be free to abolish jury trial in all civil cases in the federal courts. *Cf.* THE FEDERALIST No. 83, at 518 (H. Lodge ed. 1888) (A. Hamilton).

[34] Capital Traction Co. v. Hof, 174 U.S. 1, 8 (1899); United States v. Wonson, 28 F. Cas. 745, 750 (No. 16,750) (C.C.D. Mass. 1812).

in 1791.[35] It is clear, however, that courts have construed the seventh amendment to guarantee jury trials in not only those common law actions recognized in 1791, but also in actions enforcing statutory rights subsequently established by Congress.[36] Mr. Justice Story explained in 1830:

> In a just sense, the amendment . . . embrace[s] all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.[37]

Since the seventh amendment has been regarded to be more concerned with substance than form,[38] the issue of whether or not a particular action mandates a right to trial by jury has come to rest on a determination of whether the action provides relief of a legal rather than equitable nature, or whether the action is of admiralty jurisdiction. Courts have customarily found it appropriate to resolve this question by analogizing the action in question to an equivalent form of action which existed at the time the seventh amendment was adopted. If the right to trial by jury existed in the historical analogue, that same right would attach to the present action.[39] It is not neces-

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[35] Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); *accord*, Damsky v. Zavatt, 289 F.2d 46, 48 (2d Cir. 1961).

[36] Cases to this effect are legion. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 375 (1974) (statutory action for possession of real property); Curtis v. Loether, 415 U.S. 189, 193 (1974) (Civil Rights Act of 1968); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962) (trademark statute); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 36 (1916) (by implication) (Safety Appliance Act of 1910); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 29 (1916) (by implication) (Sherman Act); Hepner v. United States, 213 U.S. 103, 115 (1909) (immigration laws); Simmons v. Avisco, Local 713, Textile Workers, 350 F.2d 1012, 1018 (4th Cir. 1965) (Labor-Management Reporting and Disclosure Act); Travelers Indem. Co. v. State Farm Mut. Auto. Ins. Co., 330 F.2d 250, 258 (9th Cir. 1964) (California insurance law).

[37] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830). "In cases of admiralty and maritime jurisdiction, it has been settled . . . that the trial is to be by the court." The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823). *See also* Crowell v. Benson, 285 U.S. 22, 45 (1932). It is also well settled that jury trials are not required in equitable actions. United States v. Louisiana, 339 U.S. 699, 706 (1950); Barton v. Barbour, 104 U.S. 126, 133 (1881); Shields v. Thomas, 59 U.S. (18 How.) 253, 261–62 (1856).

[38] Colgrove v. Battin, 413 U.S. 149, 156 (1973); Galloway v. United States, 319 U.S. 372, 392 (1943); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

[39] Cook v. Cox, 357 F. Supp. 120, 124–25 (E.D. Va. 1973) (action for damages for deprivation of inmates' constitutional rights analogized to action in tort); Martin v. Detroit Marine Terminals, Inc., 189 F. Supp. 579, 581–82 (E.D. Mich. 1960) (action for compensatory damages under Fair Labor Standards Act analogized to common law action for debt); *see* Curtis v. Loether, 415 U.S. 189, 195–96 & n.10 (1974) (action for damages for racial discrimination in housing analogized to action in tort); Damsky v. Zavatt, 289 F.2d 46, 51 (2d Cir. 1961) (action by the Government for taxes, penalties, and interest analogized to action for debt); Leimer v. Woods, 196 F.2d 828, 834 (8th Cir. 1952) (action for damages under Emergency Price Control Act analogized to action for debt);

sary that "a close equivalent" of the particular action have existed in 1791,

> for [the seventh] Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.[40]

The *Irey* majority, however, found it unnecessary to classify the OSHA proceeding as legal or equitable.[41] Rather, the court felt constrained to adhere to the proposition generated by the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*[42] that the seventh amendment is inapplicable to administrative adjudications, because such proceedings were " 'unknown to the common law.' "[43] While the *Irey* majority conceded that the law/equity "distinction is pertinent" where "a new remedy . . . is to be processed *in the courts*,"[44] in the case at bar, such analysis "obscure[d] the simple fact that this is an administrative adjudication"—a fact which in and of itself negated the necessity of a jury trial.[45] The primary significance of the *Irey* decision is the finding that no constitutional right to a jury trial exists in any adjudicatory proceeding other than suits at law brought in a federal court; adjudications before other tribunals, such as administrative agencies, because they were unknown at common law, are proceedings other than "suits at common law." Therefore, they are not governed by the seventh amendment. Once it has been thus determined that an adjudication is other than a suit at common law, it then becomes immaterial whether solely legal rights are to be en-

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United States v. Jepson, 90 F. Supp. 983, 984–85 (D.N.J. 1950) (action for treble damages under Emergency Price Control Act analogized to action for debt).

In Ross v. Bernhard, 396 U.S. 531 (1970), the Supreme Court established a three-step test for determining the legal or equitable nature of a claim. Under this test the inquiry is to be made

> by considering, first, the pre-merger [*i.e.*, of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.

*Id.* at 538 n.10.

*But see* Block v. Hirsh, 256 U.S. 135, 158 (1921), in which an administrative proceeding to resolve landlord-tenant disputes was held constitutional in the absence of a provision for jury trials on the basis of due process reasonableness without looking to a historical analogy. *See* notes 50–63 *infra* and accompanying text.

[40] Pernell v. Southall Realty, 416 U.S. 363, 375 (1974).

[41] 519 F.2d at 1216, 1218.

[42] 301 U.S. 1 (1937).

[43] 519 F.2d at 1216 (quoting from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937)).

[44] 519 F.2d at 1216 (emphasis added).

[45] *Id.* at 1218.

forced, or solely legal remedies are to be afforded, or whether a jury trial would be mandated had the statute provided that such an action be brought in a federal court.

One is indeed hard-pressed to find unqualified decisional precedent for permitting Congress to allocate an otherwise legal adjudication to a non-court tribunal and thereby abrogate the right to a civil jury trial. In an early case, *Guthrie National Bank v. Guthrie*,[46] the Supreme Court considered the constitutionality of an act passed by the territorial legislature of Oklahoma establishing a commission to referee claims of individuals against certain municipalities.[47] The claim at issue was equitable because it arose from transactions made before the defendant municipality had been incorporated, and thus it was unenforceable at law.[48] The Court summarily dismissed the defendant's claim that the act deprived him of a jury trial on the ground that the seventh amendment was inapplicable because the proceeding established by the act "is not in the nature of a suit at common law."[49]

The Court's precise rationale for this conclusion is uncertain. It is clear that the claim at issue was equitable rather than legal. This

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[46] 173 U.S. 528 (1899).

[47] The act permitted persons to whom certain municipalities were indebted to present evidence of the debt to a three-member commission which determined whether or not the claim should be allowed. The commission was required to submit a report showing all claims allowed and disallowed to the district court judge for approval or disapproval. Claims allowed by the commission and approved by the district judge were paid by the territorial legislature, which reserved the power to tax the municipality for the amount of the debt. *Id.* at 530–31 & n.1.

[48] *Id.* at 534. The claims were based on monies advanced to carry on the administration of the community. The advances were used, among other things, for the establishment of schools and the maintenance of roads. *Id.* at 529. The Supreme Court noted that these services were "absolutely necessary, for the well-being of the people living there," and found significant "moral consideration" for official recognition of the advances. *Id.* at 535.

[49] *Id.* at 537. The Supreme Court brushed aside the seventh amendment claim, denominating as the "important question" the issue of whether or not the act allowing payment of claims was beyond the power of the territorial legislature. *Id.* at 534. The Court found it "indisputable" that the Oklahoma legislature had the power to authorize payment. *Id.* at 535.

While the seventh amendment was found inapplicable in the *Guthrie* case, there is no doubt as to its applicability to the incorporated territories of the United States. Rassmussen v. United States, 197 U.S. 516, 526 (1905) ("where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments"); Black v. Jackson, 177 U.S. 349, 363 (1900) ("[the seventh] Amendment . . . applies to judicial proceedings in the Territories of the United States"); Thompson v. Utah, 170 U.S. 343, 346 (1898) (constitutional provisions "relating to the right of trial by jury in suits at common law apply to the Territories of the United States").

would support the holding of the Court in *Guthrie* that a claim before the statutory commission was not a suit at common law. It is therefore uncertain as to whether the court would have held otherwise had the action been one at law. The mere fact that the action was brought before a statutory commission rather than in a court cannot be deemed determinative of the seventh amendment issue.

In *Block v. Hirsh*,[50] a landlord challenged the constitutionality of an act of Congress which temporarily suspended the right of landlords in the District of Columbia to sue for the possession of rented premises at the end of the lessee's tenancy.[51] The statute established a procedure whereby any tenant retained the right to continue occupation of a premises at the same rent, "subject to regulation by [a] Commission appointed by the act."[52] The landlord objected to the statute on the grounds that it was confiscatory and "that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land."[53]

Mr. Justice Holmes, speaking for a five-to-four majority, recognized that the act had been "made necessary" by a housing emergency in the District arising from the first world war,[54] and held that the statutory limitation of property rights was justifiable in light of the existing "public exigency."[55] As to the jury trial issue, Justice Holmes, with little further analysis, stated:

> If the power of the Commission established by the statute to regulate the [landlord-tenant] relation is established, as we think it is, . . . [the jury trial] objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.[56]

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[50] 256 U.S. 135 (1921).

[51] *Id.* at 153–54.

[52] *Id.* The act "declared that all (a) rental property and (b) apartments and hotels [were] affected with a public interest" requiring that the rents charged be regulated. Act of Oct. 22, 1919, ch. 80, § 106, 41 Stat. 300. The commission created to enforce the statute was required to determine whether rents charged were reasonable, and whether leases and contracts for possession were fair. *Id.* All tenancies in existence at the time of the act were to continue despite their expiration, "at the option of the tenant." *Id.* § 109, 41 Stat. at 301.

Appeal of an order of the commission to the Court of Appeals for the District of Columbia was authorized, but the order of the commission could not be modified "except for error of law." *Id.* § 108.

The act specifically stated that these measures were of a temporary nature and were required by the "emergencies growing out of the war with the Imperial German Government." *Id.* § 122, 41 Stat. at 304. The legislation was only valid for a two-year period, unless repealed before that time. *Id.*

[53] 256 U.S. at 153, 158.

[54] *Id.* at 154, 158.

[55] *Id.* at 156.

[56] *Id.* at 158. *See also* note 60 *infra* and accompanying text.

The dissent was unconvinced that any emergency vested the Government with the power either to do away with a landowner's dominion and use of his property without compensation or to interfere with obligations established by private contract.[57] Moreover,

> [t]he interposition of a commission is but a detail in the power exerted—not extenuating it in any legal sense—indeed, [it] intensifies [the statute's] illegality [by] tak[ing] away the right to a jury trial from any dispute of fact.[58]

Unquestionably, the Court in *Block* specifically authorized Congress to assign the adjudication of disputes regarding possession of real property to an administrative commission without affording the contestants a trial by jury. It is clear as well that historically an action for the possession of real property would have been an action at law mandating a trial by jury.[59]

Yet *Block* is weak authority for the general proposition that Congress may, without violating the seventh amendment, assign legal actions to an administrative proceeding which fails to provide a jury trial. There is no indication that the Court analyzed the jury trial issue as a seventh amendment problem. Rather, the absence of a jury trial was seen as an inseparable element of a summary proceeding which the Court found reasonable in terms of the fifth amendment because of a temporary public emergency.[60] In *Block*, Justice Holmes expressly noted that a time limit, such as contained in the statute under consideration,[61] designed "to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[62] Moreover, Justice Holmes was to later characterize *Block* as having gone "to the verge of the law."[63]

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[57] 256 U.S. at 159–60 (McKenna, J., dissenting).

[58] *Id.* at 164.

[59] *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 370 (1974); Ross v. Bernhard, 396 U.S. 531, 533 (1970) (dictum); Wehrman v. Conklin, 155 U.S. 314, 325 (1894); Scott v. Neely, 140 U.S. 106, 110 (1891); Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

[60] 256 U.S. at 158. Justice Holmes noted:

> A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent.

*Id.*

[61] *See* note 52 *supra*.

[62] 256 U.S. at 157. Other courts have recognized that *Block* dealt with a statute of temporary duration which was required by an emergency situation. *See* Kress, Dunlap & Lane, Ltd. v. Downing, 193 F. Supp. 874, 878 (D.V.I. 1961); *In re* Bradford, 7 F. Supp. 665, 675 (D. Md. 1934), *rev'd on other grounds sub nom.* Bradford v. Fahey, 76 F.2d 628 (4th Cir.), *opinion vacated and district court decision aff'd per curiam*, 77 F.2d 992 (4th Cir. 1935).

[63] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); *accord*, Tyson &

In *Crowell v. Benson*,[64] the Supreme Court held constitutional a congressional allocation of fact-finding to an administrative commissioner in actions by individuals for compensation under the Longshoremen's and Harbor Workers' Compensation Act of 1927,[65] and, in so doing, the Court addressed a seventh amendment challenge to the statute using a more traditional analysis. The Court held that the statutory scheme, by depriving the litigants of a right to jury trial, in no way violated the seventh amendment,[66] basing this conclusion on the ground that the statute dealt solely with matters falling

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Brother v. Banton, 273 U.S. 418, 437–38 (1927); *In re* Bradford, 7 F. Supp. 665, 675 (D. Md. 1934), *rev'd on other grounds sub nom.* Bradford v. Fahey, 76 F.2d 628 (4th Cir.), *opinion vacated and district court decision aff'd per curiam*, 77 F.2d 992 (4th Cir. 1935).

[64] 285 U.S. 22 (1932).

[65] *Id.* at 54, *construing* Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. § 901 *et seq.* (Supp. IV, 1975). In *Crowell*, the United States Employee's Compensation Commission made an award to an injured maritime worker, which his employer sought to have enjoined on the ground that the injured party was not an employee at the time of the incident—a fact which would deprive the Commission of jurisdiction over the action. 285 U.S. at 36–37.

Reaffirming the statement in Den *ex dem.* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856), that matters subject to suits at common law, equity, or admiralty cannot be withdrawn from the cognizance of the article III judiciary, the *Crowell* Court drew a distinction between factual and legal determinations, finding that only the latter need be made by a court. *Id.* at 49–50. Thus, fact-finding, which in cases at law was performed by a jury, might in other cases be delegated to an administrative agency. *Id.* at 50–51. But the Court excepted from this holding the administrative determination of a "jurisdictional" fact, *i.e.*, one which would be "a condition precedent to the operation of the statutory scheme." *Id.* at 54–55. A judicial determination of a "jurisdictional" fact was held to be required to be made by an article III court in order that constitutional rights might be enforced solely by the "constitutional courts." *Id.* at 56–62.

In regard to this point, however, *Crowell* was not to remain the definitive decision. The " 'jurisdictional' fact" aspect of the *Crowell* opinion has been seriously eroded by subsequent decisions. *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944) (determination of whether employer-employee relationship exists, a jurisdictional fact, found to be within the province of the NLRB); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49–50 (1938) (whether complaint concerns interstate commerce, a jurisdictional fact, to be determined by the agency subject to review under the substantial evidence standard); Gudmundson v. Cardillo, 126 F.2d 521, 524 (D.C. Cir. 1942) (interpreting *Crowell* as meaning merely that an agency determination on a fact of constitutional significance "is not conclusive"); Kreutz v. Durning, 69 F.2d 802, 804 (2d Cir. 1934) (*Crowell* doctrine confined to jurisdictional facts in actions between parties; "dealings of the government with its citizens were expressly excluded").

Professors Gellhorn and Byse note that *Crowell* has never been extended beyond the limited facts on which it was decided. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 424 (6th ed. 1974). When the " 'jurisdictional' fact" doctrine was raised in the criminal case of Estep v. United States, 327 U.S. 114 (1946), Justice Frankfurter concluded that it "had earned a deserved repose." *Id.* at 142 (concurring opinion).

[66] 285 U.S. at 45.

within the admiralty jurisdiction.[67] It is significant that in deciding the seventh amendment issue the court looked not to the nature of the proceeding, but rather to the essence of the action. It is thus not inappropriate to suggest that had the essence of the action been a suit at common law rather than a suit in admiralty, the statute would have been held violative of the seventh amendment notwithstanding the fact that it established a statutory proceeding unknown at common law.

In the subsequent case of *NLRB v. Jones & Laughlin Steel Corp.*,[68] the Supreme Court considered a seventh amendment challenge to the National Labor Relations Act,[69] which empowered the National Labor Relations Board to order employers guilty of unfair labor practices to reinstate employees victimized by such practices and to pay such employees back wages.[70] The seventh amendment challenge derives from the argument that an award of back pay is tantamount to a legal remedy of money damages distinct from the equitable remedy of reinstatement.[71] If this were so, a jury trial should be required at least with regard to the damage issue. The *Jones & Laughlin* Court, however, specifically renounced this argument, stating that the seventh amendment is inapplicable in "cases where recovery of money damages is an incident to equitable relief."[72] Since the primary thrust of the Board's action in *Jones & Laughlin* was to enjoin the unfair labor practices of the defendant and reinstate its victimized employees, the back pay award was properly characterized as incidental to the injunctive relief sought. This alone would have been sufficient to settle the seventh amendment matter.[73]

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[67] *Id.* at 39, 45.

[68] 301 U.S. 1 (1937).

[69] Act of July 5, 1935, ch. 372, 49 Stat. 449, *as amended*, 29 U.S.C. § 151 *et seq.* (1970).

[70] *See* 29 U.S.C. § 160(c).

[71] *See* 301 U.S. at 48; Agwilines, Inc. v. NLRB, 87 F.2d 146, 150 (5th Cir. 1936).

[72] 301 U.S. at 48.

[73] Prior to the case of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), federal courts sitting in equity would routinely decide legal claims for monetary damages when equity jurisdiction was properly invoked on related issues. *See, e.g.*, Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 504–07 (1928) (court of equity enjoining surface landowner from building on his property due to existence of a mineral lease may also decide issue of monetary damages due landowner from holder of mineral lease); John B. Kelly, Inc. v. Lehigh Navigation Coal Co., 151 F.2d 743, 746 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946) (court of equity enjoining discharge of refuse into river may also decide issue of money damages due plaintiff for trespass); Williamson v. Chicago Mill & Lumber Corp., 59 F.2d 918, 920–21 (8th Cir. 1932) (court of equity hearing action to quiet title and enjoin trespass may also decide issue of damages resulting from trespass); Maytag Co. v. Meadows Mfg. Co., 45 F.2d 299, 301 (7th Cir. 1930), *cert. denied*, 283 U.S. 843 (1931) (court of equity enjoining unfair business practices may also

But the Court continued on. It further held that the seventh amendment

> does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank* v. *Guthrie*, 173 U.S. 528, 537.
>
> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.[74]

This language, as was that found in *Guthrie*,[75] is susceptible to several interpretations. It states a conclusion: The seventh amendment is inapplicable to the proceeding at bar because such a proceeding was unknown at common law. But this conclusion may have been attributable to the fact that (1) no common law proceeding could provide the essentially equitable remedy sought to be enforced at bar; or (2) no common law proceeding existed which would enforce

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decide issue of money damages due plaintiff for libel and slander); Equity R. 23, 226 U.S. 654 (1912). *See also, e.g.*, Rice & Adams Corp. v. Lathrop, 278 U.S. 509, 515 (1929) (court of equity acquiring jurisdiction will ordinarily determine related legal rights which "otherwise would fall within the exclusive authority of a court of law"); Greene v. Louisville & Interurban R.R., 244 U.S. 499, 520 (1917) (court of equity properly acquiring jurisdiction "should dispose of the entire controversy . . . and not remit any part of it to a court of law"); McGowan v. Parish, 237 U.S. 285, 296 (1915) (court of equity should decide all issues presented in a controversy, even though this would require a determination of "legal rights that otherwise would not be within the range of its authority").

The *Beacon* case significantly narrowed the applicability of the "incident to equity" doctrine in the federal courts. The Court held that "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510–11. In the subsequent case of Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 (1962), the Court made it clear that *Beacon* was to apply even though "the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues."

However, a monetary award of back pay, made as an incident to the equitable remedy of reinstatement, has remained immune from the holdings of *Beacon* and *Dairy Queen* on the ground that reinstatement and back pay are so completely intertwined that the back pay issue does not present a separate legal claim. McFerren v. County Bd. of Educ., 455 F.2d 199, 202–04 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972); Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *see* Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966); Brady v. Trans World Airlines, Inc., 196 F. Supp. 504, 507 (D. Del. 1961) (on motions for summary judgment), *decision on the merits*, 223 F. Supp. 361 (D. Del. 1963), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). *See also* Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49, 52–53 (S.D. Ga. 1968) (jury trial denied on back pay award in conjunction with suit for declaratory and injunctive relief by existing employees alleging discrimination in promotion).

[74] 301 U.S. at 48.

[75] For a discussion of the *Guthrie* language see notes 46–49 *supra* and accompanying text.

> prohibitions against interference by employers with self-organization of employees [which] were not only unknown [but] obnoxious to the common law;[76]

or (3) administrative proceedings per se were altogether unknown to the common law. Various federal courts have read *Jones & Laughlin* as embodying one or more of these three postulates,[77] manifesting the confusion that had been engendered by the Court's ambiguous statement. It was not until *Curtis v. Loether*[78] that the Supreme Court somewhat clarified the position it had taken in *Jones & Laughlin*.

In *Curtis*, the issue was whether the seventh amendment is applicable in damage suits under Title VIII of the Civil Rights Act of 1968[79] arising from fair housing violations.[80] The Court held that the

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[76] Agwilines, Inc. v. NLRB, 87 F.2d 146, 150 (5th Cir. 1936).

[77] Postulate (1): The Sixth Circuit in McCraw v. Plumbers Union, 341 F.2d 705, 709 (6th Cir. 1965), appropriated the entire passage in question from *Jones & Laughlin* and used it in support of its holding that a union member, suing in a district court under the Landrum-Griffin Act for reinstatement to membership in the defendant union, plus damages, was not guaranteed a jury trial by the seventh amendment, because the proceeding was "essentially" equitable. *Accord*, McFerren v. County Bd. of Educ., 455 F.2d 199, 203–04 (6th Cir. 1972). In Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971), an action in which black school teachers wrongfully discharged sued for reinstatement and back pay under the Civil Rights Act, 42 U.S.C. § 1983 (1970), the Fifth Circuit relied on *Jones & Laughlin* for the proposition that "back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement." 427 F.2d at 320, 324.

Postulate (2): In Brady v. Trans World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961) (on motions for summary judgment), *decision on the merits*, 223 F. Supp. 361 (D. Del. 1963), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969), the court held that the plaintiff suing for reinstatement and assorted damages under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970), was not entitled to a jury trial. The court cited *Jones & Laughlin* for the proposition that the seventh amendment was inapplicable to the instant action because the relevant portions of the Act, aimed at "protecting the employment relation from discrimination . . . establish[ed] rights and duties 'unknown to the common law.' " 196 F. Supp. at 507–08 (alternative holding) (quoting from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937)).

Postulate (3): In Cook v. Cox, 357 F. Supp. 120, 124 (E.D. Va. 1973), the court, in dictum, cited *Jones & Laughlin* for the proposition that "with respect to statutory proceedings under federal law" (as opposed to "new causes of action"), no search for a historical analogue was required to hold the seventh amendment inapplicable.

[78] 415 U.S. 189 (1974), *aff'g* Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *rev'g* 312 F. Supp. 1008 (E.D. Wis. 1970).

[79] 42 U.S.C. § 3601 *et seq.* (1970).

[80] The plaintiff in *Curtis*, a black woman, was refused an apartment by white landlords on racial grounds. She instituted an action in federal district court under Title VIII of the Act, asking for injunctive relief and punitive damages, and later adding a claim for compensatory damages. A preliminary injunction was granted, but later dissolved when the plaintiff obtained alternate housing. Thus, the case went to trial on the damage claims only. Defendants' demand for a jury trial was denied by the trial court,

seventh amendment was applicable to the suit in question[81] and to all other suits "enforcing statutory rights . . . if the statute creates legal rights and remedies, enforceable . . . *in the ordinary courts of law*."[82] In so holding, the Court in dictum distinguished *Jones & Laughlin*, stating:

> *Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme. . . . [The case upholds] congressional power to entrust enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment.[83]

Again, here, the Court's meaning was less than evident. If the seventh amendment is only "generally inapplicable" to administrative proceedings, under what circumstances might it be said to apply? Was the "jury trials . . . incompatible" clause meant by way of limitation on the Court's general proposition? Or, was it meant by way of explanation, indicating that *all* administrative proceedings stand outside the seventh amendment? Inasmuch as the jury trial issue in *Curtis* arose in regard to an action tried in a federal district court, and not before an agency, the Court's resolution of the issue in that case affords no aid in answering these questions.

When, in *Pernell v. Southall Realty*,[84] the Court reasserted—again in dictum—its position taken in *Curtis*, the picture became no clearer. In *Pernell*, the Court addressed the question of whether the seventh amendment attached to an action for possession of leased premises brought in the Superior Court of the District of Columbia for nonpayment of rent.[85] The tenant, seeking to prove various affirmative defenses, asked for a jury trial. The trial court denied the request and ultimately rendered judgment against the tenant.[86] In reversing an affirming opinion of the District of Columbia Court of Appeals,[87] the Supreme Court held that since historically a right to a

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which proceeded to award punitive damages. 312 F. Supp. at 1008–11. The Seventh Circuit reversed, holding that a trial by jury was required. 467 F.2d at 1124.

[81] 415 U.S. at 192.

[82] *Id.* at 194 (emphasis added).

[83] *Id.* at 194–95 (footnote omitted).

[84] 416 U.S. 363 (1974), *rev'g* 294 A.2d 490 (D.C. Ct. App. 1972).

[85] 416 U.S. at 363–64.

[86] *Id.* at 364.

[87] Pernell v. Southall Realty, 294 A.2d 490 (D.C. Ct. App. 1972). The District of Columbia court of appeals noted that a former statute mandating the right to a jury trial

jury trial attached to actions for the recovery of real property,[88] the seventh amendment mandated that a similar right exist in the action at bar.[89] In so holding, the Court rejected the position taken by the court of appeals that *Block v. Hirsh* established that in summary eviction actions, there exists no right to jury trial unless such right is statutorily created.[90] Rather, the Court stated:

> *Block* v. *Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication.[91]

This principle, however, was never articulated in *Block*. It is merely a repetition of the *Curtis* dictum.[92] *Block* nowhere discussed the seventh amendment but, instead, justified its holding chiefly on the basis of "public exigency."[93]

Beyond this, the *Pernell* Court "assume[d]" without qualification that the seventh amendment would not prevent Congress from assigning landlord-tenant actions, which it had just held to be suits at common law, to an administrative agency.[94]

In its brief analysis, the *Irey* majority concluded that a "fair reading" of *Jones & Laughlin*, *Curtis*, and *Pernell* determined (a) that there exist three general classes of litigation: (1) "[l]egal proceedings in the courts," (2) "[e]quitable and admiralty cases in the courts," and (3) "[a]dministrative adjudications," and (b) that the seventh amendment guarantees a right to jury trial only in the first class.[95] The *Irey* majority found a "curious" inconsistency between the Supreme Court's " 'apparently overpowering bias in favor of jury trials in civil

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in actions for possession in the District had been replaced by the statute under which the present action was brought. The new statute provided no such right. *See id.* at 491. In determining whether the Constitution would otherwise require a jury trial in D.C. possession actions, the court looked to Block v. Hirsh, 256 U.S. 135 (1921) (discussed at notes 50–63 *supra* and accompanying text), which upheld the resolution of landlord-tenant disputes by an administrative proceeding. The court of appeals reasoned that such a proceeding would not have been upheld if the seventh amendment required that resolution of such disputes be by jury trial. 294 A.2d at 496.

[88] 416 U.S. at 370, 376; *see* note 59 *supra* and accompanying text.

[89] 416 U.S. at 375–76.

[90] *Id.* at 383; *see* note 87 *supra*.

[91] 416 U.S. at 383.

[92] *Compare* text accompanying note 91 *supra with* text accompanying note 83 *supra*.

[93] 256 U.S. at 156. *See* notes 60–63 *supra* and accompanying text.

[94] 416 U.S. at 383 (dictum). No direct citation was provided for this assumption; however, it appears the Court found support for its conclusion in *Jones & Laughlin* and *Curtis*. *See id.*

[95] 519 F.2d at 1217 (en banc) (footnote omitted).

actions' " tried in federal courts[96] and the Court's holding administrative adjudications exempt from the seventh amendment requirement.[97] Nonetheless, the majority concluded that its holding was compelled by *Curtis* and *Pernell*.[98] In a final comment, the majority acknowledged that a line existed beyond which Congress could not delegate "traditional remedies" to administrative bodies so as to abrogate the seventh amendment. Without defining that line, the majority concluded that it had "not been crossed in this case."[99]

Read together, the dissenting opinions of Judge Gibbons seek to establish two propositions: (1) a proceeding, the sole aim of which is to obtain an in personam money judgment, constitutes a suit at common law within the meaning of the seventh amendment,[100] and (2) Congress may not, without violating that amendment, assign fact-finding in such a proceeding "to any tribunal other than a jury."[101]

In asserting the first proposition, Judge Gibbons focused primarily on the in personam nature of the penalty sought to be imposed through the administrative proceeding.[102] "A suit for the recovery of an in personam money judgment," Judge Gibbons asserted, "is certainly an action at law."[103] Yet he did not suggest that "every legal proceeding whereby the government might recover money" would be such an action.[104] The dissent noted that although courts had upheld

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[96] *Id.* at 1218 (quoting from Ross v. Bernhard, 396 U.S. 531, 551 (1970) (Stewart, J., dissenting)).

[97] 519 F.2d at 1218.

[98] *Id.* at 1219 n.9.

[99] *Id.* at 1219. The majority cited for the existence of such a line two leading commentators on administrative law: L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87–94 (abr. student ed. 1965) and 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.12, at 131–33 (1958). 519 F.2d at 1219 n.10. Davis observes that the Supreme Court "has never held that judicial power has been improperly vested in an agency." 1 K. DAVIS, *supra* at 131. The section cited does not address the seventh amendment.

Jaffe concludes that Congress may delegate virtually any actions—whether involving public or private rights—to an agency, so long as in private right cases a court shall have the opportunity to determine the law on appeal, *"and provided that the matter is not one at 'common law' entitling the parties to a jury trial."* L. JAFFE, *supra* at 91 (emphasis added).

[100] 519 F.2d at 1208 (three-judge panel dissent).

[101] *Id.* at 1225 (en banc dissent).

[102] The term "in personam" is used in contradistinction to the term "in rem." *See id.* at 1208–09 (three-judge panel dissent). These two terms have come to have different meanings in different contexts. In the context of *Irey*, the term "in personam" is used to characterize an action (or a judgment arising therefrom) which "seeks to subject [a defendant's] general assets to the payment of [a] judgment or to obtain a personal order against him." F. JAMES, CIVIL PROCEDURE § 1.8, at 22 n.6 (1965). "[A]n action in rem is one that seeks to adjudicate [a] defendant's interest in specific property." *Id.*

[103] 519 F.2d at 1208.

[104] *Id.*

the administrative imposition of forfeitures and assessments in cases involving customs and duties,[105] immigration,[106] and internal revenue,[107] in each instance an in rem proceeding had been involved.[108] On that basis, each of those cases was distinguishable from *Irey*. While Judge Gibbons seemed prepared to concede that in rem adjudications might not fall within the reach of the seventh amendment, he maintained that the Supreme Court had never authorized the imposition of an in personam civil penalty in any proceeding in which a seventh amendment jury trial had been sought and denied.[109]

Judge Gibbons' attempt to resolve the applicability of the seventh amendment on a determination of whether a proceeding is in personam or in rem obfuscates the proper distinction. By its own terms, the seventh amendment applies to all suits at common law —and such suits may be either in personam or in rem pro-

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[105] *Id.* at 1208–09. Customs and duties cases cited by Judge Gibbons included Origet v. Hedden, 155 U.S. 228 (1894) (suit for refund of excess duty and penalty exacted under statutory threat of in rem enforcement of lien on vessel); Passavant v. United States, 148 U.S. 214 (1893) (appeal from denial of judicial review of administrative assessment of excess duty and penalty under same statutes); *In re* Fassett, 142 U.S. 479 (1892) (in rem action filed against customs collector to obtain release of pleasure yacht seized to enforce duty assessed against vessel); and United States v. The Queen, 27 F. Cas. 669 (No. 16,107) (S.D.N.Y. 1870), *aff'd*, 27 F. Cas. 672 (No. 16,108) (C.C.S.D.N.Y. 1873) (information of forfeiture filed against vessel to enforce collection of assessed duty and penalty on goods imported therein).

[106] 519 F.2d at 1209–11. Immigration cases cited by the dissent included Osaka Shosen Kaisha Line v. United States, 300 U.S. 98 (1937) (libel filed against passenger ship to enforce administratively imposed penalty arising from alleged immigration violation); Lloyd Sabaudo S.A. v. Elting, 287 U.S. 329 (1932) (suit by ship company to recover fines for immigration law violations collected by administrator under statutory threat of denial of clearance papers to vessel); Elting v. North German Lloyd, 287 U.S. 324 (1932) (suit by ship owner to recover fines assessed under same statute); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909) (suit to recover fines paid under protest under similar law). Judge Gibbons noted that this basic sanction—the detention of the vessel involved until any assessment were paid—was "clearly in rem." 519 F.2d at 1210.

[107] 519 F.2d at 1211–13. Judge Gibbons discussed the tax cases of Helvering v. Mitchell, 303 U.S. 391 (1938) (administrative assessment of 50% tax-fraud penalty subsequent to acquittal in criminal tax-fraud action held not barred by double jeopardy), and Den *ex dem.* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (action in ejectment against purchasers of real property under federal distress warrant issued against revenue agent who failed to account for over one million dollars in tax collections). While *Murray's Lessee* stemmed from an in rem enforcement, by writ of distraint, against the defaulting fiduciary's real property, there is no indication that the *Mitchell* case was anything other than in personam. Judge Gibbons pointed out, however, that much of the Court's analysis in *Mitchell* relied upon in rem precedents and "show[ed] a complete awareness of the essentially in rem nature of the tax collection machinery." 519 F.2d at 1213.

[108] 519 F.2d at 1209, 1211, 1213. *See* notes 105–07 *supra*.

[109] 519 F.2d at 1213.

ceedings.[110] The cases which the dissent distinguished from *Irey* for the purpose of its seventh amendment analysis are more properly distinguishable on grounds other than the fact that they were simply in rem proceedings.

The revenue cases—those involving the imposition and collection of taxes and custom duties—may be set apart from *Irey* on the ground that summary revenue collection procedures significantly predate the seventh amendment. These procedures were not suits at common law historically, and therefore do not fall within the ambit of the seventh amendment.[111] Civil penalties arising from revenue violations, if sought by a summary administrative proceeding, may likewise be enforced without providing for a jury trial.[112] If, however, such penalties are sought by a civil action in a federal trial court, and if the action does not fall within the jurisdiction of admiralty or equity, the defendant is entitled to a jury trial.[113]

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[110] Ejectment, an in rem action, is a suit at common law triable to a jury. *See, e.g.*, Whitehead v. Shattuck, 138 U.S. 146, 151 (1891), *aff'g* Whitehead v. Entwhistle, 27 F. 778, 779 (C.C.N.D. Iowa 1886); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884); National Life Ins. Co. v. Silverman, 454 F.2d 899, 906 (D.C. Cir. 1971).

Forfeitures on land, also in rem actions, are likewise legal actions triable to a jury. C. J. Hendry Co. v. Moore, 318 U.S. 133, 153 (1943); 443 Cans of Frozen Egg Product v. United States, 226 U.S. 172, 183 (1912); United States v. Winchester, 99 U.S. 372, 374 (1879); The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823); United States v. J. B. Williams Co., 498 F.2d 414, 423 (2d Cir. 1974); Vandevander v. United States, 172 F.2d 100, 101 (5th Cir. 1949).

[111] Summary proceedings to collect tax revenues date back to 'the establishment of the English monarchy." Den *ex dem.* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856). Such summary proceedings have been held justifiable in light of the perceived necessity for the Government to collect its revenue promptly. *See, e.g.*, Phillips v. Commissioner, 283 U.S. 589, 596 (1931). Indeed, this "[i]mperative necessity has forced a distinction between [tax] claims *and all others*," in that summary proceedings to enforce such claims have been invariably accepted. Den *ex dem.* Murray's Lessee v. Hoboken Land & Improvement Co., *supra* at 282 (emphasis added). *See generally id.* at 277–78; The Sarah, 21 U.S. (8 Wheat.) 391, 397 note (1823); Damsky v. Zavatt, 289 F.2d 46, 49–52 (2d Cir. 1961). Thus, at the time the seventh amendment was adopted, summary tax collection procedures were well established, and, since that amendment was in no way intended to extend the right of jury trial to actions in which historically it was unknown, *see* notes 34–35 *supra* and accompanying text, summary revenue proceedings may be seen as not violative of the seventh amendment.

[112] Helvering v. Mitchell, 303 U.S. 391, 402 (1938); Olshausen v. Commissioner, 273 F.2d 23, 27–28 (9th Cir. 1959), *cert. denied*, 363 U.S. 820 (1960).

[113] Damsky v. Zavatt, 289 F.2d 46, 48–52 (2d Cir. 1961); United States v. The Queen, 27 F. Cas. 669, 671–72 (No. 16,107) (S.D.N.Y. 1870), *aff'd*, 27 F. Cas. 672 (No. 16,108) (C.C.S.D.N.Y. 1873).

In *Damsky*, an action was brought by the United States in a federal district court to obtain in personam money judgments against a taxpayer and his wife and to enforce tax liens against property purportedly owned by the wife. 289 F.2d at 47–48. The court pursued an extended historical analysis of the procedures by which revenues were collected by the English Crown and the American colonies, *id.* at 49–51, and concluded

Furthermore, the immigration cases concerned the administrative imposition of penalties arising from immigration violations. These penalties were enforceable either by civil actions brought by the United States in which the defendant had a right to a jury trial,[114] or by maritime libels[115] or other enforcement procedures within the admiralty jurisdiction.[116]

Thus, it seems that the in personam/in rem distinction on which Judge Gibbons sought to resolve the applicability of the seventh amendment is unnecessary. A better approach would have been to determine whether in general an action by the Government to impose a civil penalty is equivalent to a historical action at law. Upon this issue, a federal district court in *United States v. Jepson*[117] observed that

> [l]ong prior to our independence there had grown up under original writs certain well-defined actions at common law, among

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that where the Government sought merely to obtain a personal money judgment in a federal court against a taxpayer for taxes, penalties, and interest, the action was one of debt, to which the right of jury trial attached, *id.* at 51–52. The court further determined that an action to foreclose a tax lien is equivalent to the equitable action of foreclosure of a mortgagor's equity of redemption. Therefore, in a foreclosure action, no jury trial was required. *Id.* at 53. Thus, in the case at bar, since the husband had no colorable interest in his wife's property, *id.* at 48, the obtaining of an in personam judgment against him would require a jury, while enforcement of the tax lien would not, *id.* at 52, 53. Should the proceeds from the foreclosure be insufficient to satisfy the wife's tax assessment, further action to obtain an in personam deficiency judgment against her would not require a jury trial because such action would be merely incidental to the equitable remedy sought. *Id.* at 54–56. For a discussion of the "incident to equity" doctrine see note 73 *supra*.

It should be noted that any taxpayer may elect to pay his tax assessment in full and thereafter sue in a federal district court, before a jury, for a refund. *See* 28 U.S.C. §§ 1346(a)(1), 2402 (1970). This right to a jury trial is merely statutory—not a constitutional requirement. *See, e.g.*, Wickwire v. Reinecke, 275 U.S. 101, 105 (1927).

In *The Queen*, the United States filed an information of forfeiture against a vessel and her master for failure to pay certain duties. 27 F. Cas. at 670. The action was tried without a jury in a federal district court which held that it could enforce the in rem penalty against the vessel without a jury, within its admiralty jurisdiction. *Id.* at 670–71. The in personam penalty sought to be imposed on the master, however, was held not cognizable in admiralty, since admiralty jurisdiction did not by statute extend to him. Therefore, since this penalty could be assessed against the master only by a suit at common law where the defendant was entitled to a jury trial, the suit against the master was dismissed. *Id.* at 671–72.

[114] Hepner v. United States, 213 U.S. 103, 115 (1909) (dictum), *construing* Act of March 3, 1903, ch. 1012, § 5, 32 Stat. 1214–15 (corresponds to 8 U.S.C. § 1330 (1970)).

[115] *See* Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 99 (1937).

[116] Lloyd Sabaudo S.A. v. Elting, 287 U.S. 329, 333 (1932); Elting v. North German Lloyd, 287 U.S. 324, 326 (1932); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 329 (1909). All of these cases involved the sanction of detention of the vessel involved, effected by a denial of clearance papers. *See* note 106 *supra*.

[117] 90 F. Supp. 983 (D.N.J. 1950).

> them, the action of debt covering, among other causes, suits for statutory penalties . . . .[118]

On this basis, the court held that where the United States sought to recover a statutory penalty under the Emergency Price Control Act of 1942, the defendant was entitled to a jury trial.[119] Subsequently, other courts have concluded that as a general proposition, the seventh amendment is applicable whenever the Government sues to collect a statutory penalty.[120]

The validity of Judge Gibbons' second proposition rests on the resolution of this fundamental question: If the seventh amendment mandates that the litigants in a particular action be entitled to a jury trial, is it violative of that amendment for Congress to delegate such an action to a non-article III tribunal sitting without a jury? The *Pernell* dictum—which assumes that Congress has the unrestricted power to delegate actions for the possession of real property, which are ac-

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[118] *Id.* at 984. *Cf.* United States v. Mundell, 27 F. Cas. 23, 28 (No. 15,834) (C.C.D. Va. 1795) ("Whatever, therefore, the laws order any one to pay, that instantly becomes a debt which he hath beforehand contracted to discharge"). *See also* 1 J. CHITTY, A TREATISE ON PLEADING 112 (11th Am. ed. 1851) (action at debt would lie to recover a statutory penalty).

[119] 90 F. Supp. at 984, 986, *construing* Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

[120] In United States v. J. B. Williams Co., 498 F.2d 414 (2d Cir. 1974), the Second Circuit held that jury trial must be available on disputed factual issues in a proceeding for the collection of penalties for a violation of a Federal Trade Commission order. The court found

> that in general "there is a right of jury trial when the United States sues . . . to collect a penalty, even though the statute is silent on the right of jury trial."

*Id.* at 422–23 (quoting from 5 J. MOORE, FEDERAL PRACTICE ¶ 38.31[1], at 232–33 (1974 ed.)).

The Ninth Circuit in Connolly v. United States, 149 F.2d 666 (9th Cir. 1945), reversed an award of a statutory penalty by a court sitting without a jury. The Government had brought suit against two defendants for trespass under a statute allowing for injunctive relief, damages, and a penalty; however, its complaint sought only an injunction and incidental compensatory damages and not the statutory penalty. The defendant failed to demand a jury trial. The trial judge subsequently granted the injunction and nominal damages and assessed the statutory penalty. *Id.* at 667–68. The court of appeals reversed as to the imposition of the penalty, noting:

> The question of damages is distinct from that of statutory penalty. The [defendants] might very well have waived their right to jury trial on the issue of damages, and yet, if the statutory penalty had been sought, demanded a jury trial.

*Id.* at 669. In making this observation, the court unquestionably demonstrated its belief that an action by the Government to collect a statutory penalty is one to which the right to a jury trial, as guaranteed by the seventh amendment, attaches.

*See also* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 405–06 n.19 (D.C. Cir. 1975) ("action by the United States to recover a statutory penalty is of a common law nature for purposes of the Sixth Amendment" [*quaere*: seventh amendment?]).

tions at law, to administrative tribunals[121]—suggests that it would not be violative.

Judge Gibbons would disagree. He assumed the seventh amendment to be applicable to "the entire federal government, [and] not merely the Article III courts," where suits at common law are involved.[122] This assumption seems well-founded. With the exception of the Supreme Court, the entire federal adjudicatory apparatus is established by Congress,[123] by authority vested and defined not only by article III, but also article I and other constitutional provisions. In addition to establishing adjudicatory tribunals. Congress may determine matters of procedure, as it sees fit,[124] restricted only by such limitations as may be imposed by the Constitution. The seventh amendment is one such limitation in that it prohibits Congress from permitting a federal tribunal to hear a suit at common law without affording the parties a jury.

In the exercise of its powers, Congress has created, from time to time, a variety of adjudicatory forums, including so called "constitutional courts,"[125] "legislative courts,"[126] and administrative agencies.

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[121] *See* note 94 *supra* and accompanying text.

[122] 519 F.2d at 1220 (en banc dissent).

[123] 1 J. MOORE, FEDERAL PRACTICE ¶ 0.1 (2d ed. 1975). The Supreme Court is the only federal court expressly created by the Constitution. *See* U.S. CONST. art. III, § 1; Palmore v. United States, 411 U.S. 389, 400–01 (1973).

[124] Stevenson v. Fain, 195 U.S. 165, 167 (1904); The Steamer St. Lawrence, 66 U.S. (1 Black) 522, 527 (1862).

[125] In *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929), the Supreme Court defined "constitutional courts" as "[t]hose established under the specific power given in section 2 of Article III." These courts may exercise no other jurisdiction than that conferred in article III, and must "have judges who hold office during good behavior, with no power in Congress to provide otherwise." *Id.*

Present article III courts include the Supreme Court of the United States, *see* U.S. CONST. art. III, § 1; the United States circuit courts of appeals, Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 724 (1929); the United States district courts, Mookini v. United States, 303 U.S. 201, 205 (1938); the Court of Claims, Glidden Co. v. Zdanok, 370 U.S. 530, 584 (1962); and the Court of Customs and Patent Appeals, *id.*

[126] Legislative courts are established pursuant to constitutional provisions other than article III. Their judges are tenured and salaried as Congress may deem appropriate. Williams v. United States, 289 U.S. 553, 581 (1933); *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929). Legislative courts—unlike constitutional courts—may render advisory opinions, Williams v. United States, *supra* at 569, and, along with their judicial business, may take "jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters," O'Donoghue v. United States, 289 U.S. 516, 545 (1933).

Among such courts are those of the territories of the United States, established pursuant to article IV, section 3, clause 2 of the Constitution, *see* American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828); the District of Columbia Court of Appeals and Superior Court, established pursuant to article I, section 8, clause 17 of the Constitution, *see* Palmore v. United States, 411 U.S. 389, 398–99 (1973); and the United States Tax Court, established under article I, section 8, clauses 1 and 18 of the Constitu-

Conceptually, these forums, when operating in their adjudicative capacities, are to a large measure indistinguishable. Unquestionably, these bodies are all statutory tribunals, and actions before them grounded upon a congressional act are invariably "statutory proceeding[s]."[127] Each of them finds facts, applies the law, and ultimately determines legal or equitable rights. Suits at common law, or proceedings tantamount to such actions, have been delegated to any of these tribunals.[128]

Neither the text of the seventh amendment nor any other provision of the Constitution suggests that this amendment is limited by anything other than its own terms. Nor is there any provision of the Constitution which suggests that a proceeding, whose character is essentially a suit at common law for seventh amendment purposes, takes on a new character depending on the nature of the tribunal before which it is heard. Indeed, the Supreme Court has held that the seventh amendment shall, as a matter of constitutional law, apply to legislative courts when adjudicating suits at common law.[129] On

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tion, *see* Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392, 394–95 (1971); 26 U.S.C. § 7441 (1970).

[127] The *Jones & Laughlin* Court characterized the NLRB action then under review as "a statutory proceeding" in its attempt to distinguish it from a suit at common law. 301 U.S. at 48; *see* text accompanying note 74 *supra*. Judge Gibbons noted the irrelevancy of this distinction in a seventh amendment analysis since it is clear that statutory proceedings may in fact be actions in the nature of a suit at common law to which the seventh amendment is applicable. 519 F.2d at 1223 (en banc dissent). For a partial list of the numerous statutory proceedings which have been held to be subject to the seventh amendment see note 36 *supra*.

[128] *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974) (delegation of proceeding in nature of action at debt to legislative court); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (delegation of proceeding in nature of contract action to constitutional court); Block v. Hirsh, 256 U.S. 135 (1921) (delegation of proceeding in nature of action for possession of real property to administrative agency).

[129] The Supreme Court has held that the seventh amendment applies in the territorial courts of the United States, *see* cases cited note 49 *supra*, and these courts are legislative courts, American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828). Furthermore, "[i]t is beyond doubt" that in the lower courts of the District of Columbia, which are also legislative courts, "the provisions of the Constitution . . . securing the right of trial by jury, whether in civil or in criminal cases, are applicable." Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

In the Court of Claims, formerly a legislative court, now a constitutional court, the seventh amendment has never been found to apply. However, this has not been due to the one-time " 'legislative' character of the court," Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962), but rather due to the fact that suits in this court are against the Government, *id.*; *see* 28 U.S.C. § 1491 (1970). Suits against the sovereign were not suits at common law, and therefore jury trials have never been required in such actions unless by explicit statutory mandate. *See* Galloway v. United States, 319 U.S. 372, 388–89 (1943) (alternative holding); Wickwire v. Reinecke, 275 U.S. 101, 105 (1927); McElrath v. United States, 102 U.S. 426, 440 (1880).

what basis, then, may administrative tribunals be exempted from the seventh amendment? They are merely another category of adjudicatory forums established by congressional fiat. It follows then that a proceeding tantamount to a suit at common law is within the scope of the seventh amendment, regardless of the forum.

Further, Judge Gibbons urged that the position taken by the *Irey* majority engendered difficulties regarding separation of powers. He noted that although the court classified all litigation into three mutually exclusive categories—legal court actions, equitable and admiralty court actions, and administrative adjudications—this last category was never defined.[130] In the absence of judicially determined definitions, Congress could define an action to be an administrative adjudication merely by assigning it to an administrative agency. By denominating an action as an administrative adjudication, Congress would, at the same time, be determining that such action is not a suit at common law for seventh amendment purposes.[131] This would be impermissible, Judge Gibbons insisted, for "the constitutional scheme of things requires that the [Supreme] Court, not Congress, give meaning to the Constitutional terms."[132] Moreover, under the majority's view, Congress could be free to delegate any civil actions it deemed proper to an agency and thereby eliminate the right to civil jury trial altogether.[133] To permit Congress such freedom would directly contradict the careful vigilance the Supreme Court has maintained to insure the survival of the seventh amendment.[134]

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[130] *See* 519 F.2d at 1221 (en banc dissent).

[131] *Id.* at 1222.

[132] *Id.* In so stating, Judge Gibbons relied on Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which voiced the fundamental constitutional principle that " '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " 519 F.2d at 1222 n.6 (quoting from Marbury v. Madison, *supra* at 177). This conclusion has been frequently reiterated. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 703 (1974); Younger v. Harris, 401 U.S. 37, 52 (1971); United States v. Raines, 362 U.S. 17, 20 (1960).

[133] *See* 519 F.2d at 1222, 1225 (en banc dissent). This problem was similarly recognized in United States v. Jepson, 90 F. Supp. 983, 986 (D.N.J. 1950), where the court insisted that the seventh amendment applies whenever

> a federal statute embraces a common-law form of action . . . . To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.

[134] For example, the Court has diligently restrained the expansion of equity and admiralty in order to ensure that they do not absorb suits at common law in derogation of the right to jury trial. *See* Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 44 (1934) ("in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction");

Judge Gibbons concluded his analysis by criticizing the *Jones & Laughlin* opinion as well as the majority's interpretation of that opinion and its progeny. *Jones & Laughlin*, he felt, had been written "with less than usual precision."[135] He viewed the case to be an example of inordinate judicial deference to the Congress in a period when the Court was under severe pressure from both the executive and legislative branches to cease its interference with the implementation of various New Deal programs.[136] As such, Judge Gibbons nar-

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Crowell v. Benson, 285 U.S. 22, 55 (1932) ("[i]n amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction") (footnotes omitted); Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924) (the admiralty jurisdiction cannot be enlarged so as to "includ[e] a thing falling clearly without" that jurisdiction); Scott v. Neely, 140 U.S. 106, 109–10 (1891) (the seventh amendment cannot "be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief"); Whitehead v. Shattuck, 138 U.S. 146, 151 (1891) (the seventh amendment "would be defeated if an action at law could be tried by a court of equity"); Root v. Railway Co., 105 U.S. 189, 206 (1882) (the seventh amendment prohibits equity jurisdiction from infringing on the right to jury trial); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459–60 (1851) (congressional extension of admiralty jurisdiction to inland navigable waters upheld because trial by jury on all factual issues was explicitly preserved by the same statute). *See also* Swofford v. B & W, Inc., 336 F.2d 406, 411 (5th Cir. 1964) ("the distinction . . . between law and equity, is constitutional, to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury").

[135] 519 F.2d at 1223 (en banc dissent).

[136] *Id.* at 1224. During the early and middle 1930's, the Supreme Court struck down several economic recovery measures initiated by the Roosevelt Administration and passed by Congress. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935); United States v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act).

After his overwhelming reelection in 1936, President Roosevelt responded to these decisions by proposing his famous "court-packing" plan in 1937. G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 285–86 (8th ed. 1970) [hereinafter cited as GUNTHER & DOWLING]. Under the plan one additional Supreme Court Justice could be appointed for each Justice over the age of 70 on the Supreme Court who had been on any bench over ten years. *See id.* at 286. The plan provided for a maximum of fifteen Justices. *Id.* In 1937 there were six Justices over seventy years of age on the Supreme Court bench. *Id.*

Meanwhile, in the Congress, two joint resolutions proposing constitutional amendments were introduced, one of which would allow Congress to override by a two-thirds vote a ruling of the Supreme Court that a federal statute was unconstitutional. S.J. Res. 80, 75th Cong., 1st Sess. (1937). The second joint resolution would have removed from the lower federal courts the power to declare a federal or state statute unconstitutional. It also provided that the Supreme Court could strike down such a statute only if two-thirds of the members of the Court found beyond a reasonable doubt that the statute was unconstitutional. S.J. Res. 98, 75th Cong., 1st Sess. (1937).

*Jones & Laughlin* was decided at the height of this controversy, when the Supreme Court was "completely isolated from the other two branches of federal government and most severely under attack." 519 F.2d at 1224 (en banc dissent). While neither the "court-packing" plan nor the joint resolutions were successful, the Court's decision in

rowly read *Jones & Laughlin* as standing for "no more" than the proposition that the seventh amendment is inapplicable in "equitable enforcement proceeding[s]."[137] Furthermore, he read the *Pernell* and *Curtis* dicta as merely "approv[ing] . . . congressional delegation of Article I power to an administrative agency in cases in which that procedure is constitutionally permissible."[138] This view finds no constitutional bar to the delegation of cases falling within the jurisdiction of equity or admiralty to an agency. However, an action for the imposition of a statutory penalty, such action being equivalent to a suit at law, could not be so delegated, under this rationale, without violating the seventh amendment.

The constitutional arguments raised by the *Irey* dissent are substantial and persuasive. Fundamentally, the majority seems to have adopted an excessively narrow position as to the purview of the seventh amendment. That amendment was intended to ensure that in federal proceedings in which legal rights were to be established, fact-finding was to be by a jury, if the parties so wished, regardless of the form of the proceeding.[139] Yet the *Irey* majority would permit Congress the seemingly unqualified power to remove such fact-finding from a jury merely by classifying a proceeding as an administrative adjudication. Manifestly, the reach of the seventh amendment is a matter of law which is not within the province of the legislature to determine. To hold otherwise is to acknowledge, whether intended or not, a "most profound and enormous redistribution of power among the three branches of the federal government."[140] As Judge Gibbons aptly noted, social goals—such as those which prompted the enactment of OSHA—may not be sought at the expense of our constitutional form of government.[141]

*Frank Curtis*

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*Jones & Laughlin*, for example, would seem to support President Roosevelt's assertion "that he had lost the battle but won the war." GUNTHER & DOWLING, *supra* at 289.

Judge Gibbons noted that language in the decision indicating a deferential attitude toward Congress "was perfectly understandable," considering the circumstances under which *Jones & Laughlin* was decided; however, deference exhibited under those circumstances "cannot be regarded as permanent surrender of constitutional authority." 519 F.2d at 1224.

[137] 519 F.2d 1223 (en banc dissent).

[138] *Id.*

[139] *See* text accompanying note 37 *supra*.

[140] 519 F.2d at 1221 (en banc dissent).

[141] *Id.* at 1225.