FEDERAL COURTS— A DUE PROCESS LIMITATION ON THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN COMPLEX CIVIL LITIGATION—In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980)

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FEDERAL COURTS—A DUE PROCESS LIMITATION ON THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN COMPLEX CIVIL LITIGATION—In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).

I. INTRODUCTION

Whether juries should continue to be used to decide civil cases is an issue of vigorous controversy.\(^1\) Although the debate touches upon the entire range of civil litigation, it has begun to focus on the particularly problematic area of jury use in complex litigation. The advent of giant, multinational corporations and their increasing use of the courts to resolve business disputes has created the problem of the “big” case. The sheer volume, intricacy, and length of these cases has led even the most ardent supporters of the civil jury trial to question the wisdom of its continued use in complex litigation.\(^2\)

The concern that a lay jury may not possess the requisite background and knowledge to resolve complex legal and factual issues rationally has reached constitutional dimensions. The right to a civil jury trial, protected under the seventh amendment, has come into conflict with the rights protected under the due process clause of the fifth amendment. By balancing the interests and rights protected under both amendments, the court in In re Japanese Electronic Products Antitrust Litigation\(^3\) sought to determine the circumstances under which the due process clause limits the right to a civil jury in complex litigation.

After briefly tracing the history of seventh amendment adjudication, this note will explain the nature of the due process ap-


\(^2\) Two cases clearly demonstrate the nature of protracted complex litigation. In ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423 (N.D. Cal. 1978), the estimated length of trial was five months. The parties called 87 witnesses. The testimony filled more than 19,000 pages of transcript and more than 2,300 exhibits were admitted into evidence. In In re United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), the estimated length of trial was two years. The Judge estimated that 100,000 pages of evidence would be presented at trial, enough to form a stack over 40 feet high.

\(^3\) 631 F.2d 1069 (3d Cir. 1980).
proach and how it represents a marked departure from past interpretations of the seventh amendment jury trial right. The due process approach then will be evaluated, with emphasis on whether it represents a more effective method of dealing with the problem of jury use in complex litigation. Potential problems with the due process approach will be highlighted, including its possible effect upon the right to jury trial in the context of the broad range of contemporary civil litigation. Finally, this note will recommend various procedures that will permit the interests protected by the due process clause and the seventh amendment to coexist within a complex case. Aside from reconciling the conflict between the fifth and seventh amendments, these procedures assure that justice will be rendered in complex trials. No particular procedure will be proposed as the ultimate solution. Instead, this note will propose an approach to the problem that courts should follow when confronted with a complexity challenge to a jury trial demand.

II. FACTS

The nature and scope of complex litigation are typified by the facts of Japanese Electronic Products. This litigation began in 1976 when National Union Electric Corp. (NUE) filed suit against several Japanese competitors.\(^4\) NUE's complaint alleged that, beginning as early as 1960, defendants had violated the 1916 Antidumping Act\(^5\) by selling televisions in the United States at artificially low prices in an attempt to drive American producers out of the American television market. NUE further alleged that these dumping practices were the result of a conspiracy involving defendants and ninety other firms from around the world. NUE contended that defendants' activities violated the Sherman Antitrust Act\(^6\) and the Wilson Tariff Act.\(^7\) NUE sought treble damages and injunctive relief.\(^8\)

Four years later Zenith Radio Corp. filed the second complaint in this litigation. The complaint contained allegations of ille-

\(^4\) The defendants were Mitsubishi Corp., Matsushita Electrical Indus., Co., Toshiba Corp., Hitachi, Ltd., Sharp Corp., Mitsubishi Elec. Corp., Sanyo Elec. Co., and Sony Corp. Nine subsidiaries of these companies were also named as defendants in National Union Elec. Corp.'s [hereinafter referred to as NUE] action. 631 F.2d at 1072.
\(^6\) Id. 15 U.S.C. §§ 1, 2.
\(^7\) Id. 15 U.S.C. §§ 8, 73.
\(^8\) 631 F.2d at 1072.
galaxy similar to those asserted by NUE. The Zenith complaint named the same defendants as those named in the NUE action as well as Motorola, Inc. and Sears, Roebuck, and Co., two American companies. Zenith additionally asserted a Robinson-Patman Act violation based on defendants' alleged price discrimination in domestic sales. Zenith's final allegation was that two defendants violated section 7 of the Clayton Act by acquiring interests in domestic producers of electronic products. Zenith also sought treble damages and injunctive relief.

A group of Japanese defendants filed two counterclaims. The first charged Zenith with various violations of the Sherman Antitrust Act and the Robinson-Patman Act. The second charged Zenith and thirty coconspirators with maintaining a program of sham litigation against Zenith’s competitors. Defendant Sears, Roebuck, and Co. filed a separate counterclaim, alleging that Zenith’s advertisement claim that its televisions were manufactured exclusively with American components was false and thus was in violation of the Landam Act.

The Judicial Panel of Multidistrict Litigation ordered a consolidation of the Zenith and NUE suits. Zenith and NUE then made timely demands for a jury trial. Fourteen defendants moved to strike the demand on the ground that the suit's complexity rendered it inappropriate for jury determination. The United States District Court for the Eastern District of Pennsylvania denied defendants' motion, holding that the seventh amendment does not recognize a complexity exception to the right to jury trial. The United States Court of Appeals for the Third Circuit reversed, concluding that the due process clause of the fifth amendment precludes trial by jury when the complexity of a case prevents a jury from performing its decisionmaking function with a reasonable un-

9. Zenith sought damages over a longer period of time than NUE, and the alleged antidumping violations involved electronic products other than televisions. *Id.*
11. *Id.* § 18.
12. 631 F.2d at 1072.
13. *Id.* at 1072-73.
derstanding of the evidence and the relevant legal rules.\textsuperscript{17} The Third Circuit would deny a demand for a jury trial when examination of the factors contributing to complexity\textsuperscript{18} makes it apparent that a jury will not be able to decide the case rationally\textsuperscript{19}.

III. HISTORY OF SEVENTH AMENDMENT ADJUDICATION

A. The Historical Test

The seventh amendment provides that “in suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.”\textsuperscript{20} To determine when a jury trial is constitutionally mandated, the amendment requires an historical inquiry into whether the claim would have been considered legal or equitable in 1791, the year the seventh amendment was adopted\textsuperscript{21}. If the action in question would have been tried at law rather than in equity in 1791, the action must be tried before a jury\textsuperscript{22}.

Although this approach seems appealingly straightforward, it has been difficult to apply.\textsuperscript{23} It has been criticized as unrealistic and static, resulting in a “distribution of responsibility based on an historical division largely motivated by factors now irrelevant.”\textsuperscript{24} Similarly, one commentator has questioned the utility of the approach, saying that “contemporary civil litigation . . . [involves] subject matter and procedural patterns unused, and sometimes unknown, in 1791.”\textsuperscript{25}

\begin{itemize}
  \item 631 F.2d at 1084.
  \item The court of appeals identified three factors that a court should consider in assessing a suit's complexity: First, the overall size of the suit, determined by the length of trial, the amount of evidence, and the number of issues that require individual consideration; second, the conceptual difficulties of the facts and legal issues, to be determined by the amount of expert testimony and the length and detail of the jury instructions; and third, the difficulty of segregating distinct aspects of the case. \textit{Id.} at 1088-89.
  \item \textit{Id.} at 1089.
  \item U.S. Const. amend. VII.
  \item 9 C. Wright \& A. Miller, Federal Practice and Procedure § 2302, 14 (1971).
  \item 9 C. Wright \& A. Miller, supra note 19, § 2302, at 16.
  \item Note, \textit{The Right to a Nonjury Trial}, 74 Harv. L. Rev. 1176, 1190 (1961). One court has complained of being held in “historical bondage.” Gefen v. United States, 400 F.2d 476, 479 (5th Cir. 1968).
  \item McCoid, \textit{Procedural Reform and the Right to Jury Trial: A Study of Beacon
B. Toward a More Flexible Approach

The Federal Rules of Civil Procedure abolished the distinction between law and equity. Actions are no longer brought as either actions at law or suits in equity. Rather, the Federal Rules created a single form of action embracing all claims and offering all remedies. Federal courts thus are empowered to exercise both legal and equitable jurisdiction within a single action.

When legal and equitable claims are intertwined in the same action, the historical test provides little guidance in determining the litigants' jury trial rights. Beacon Theatres, Inc. v. Westover embodies many of the problems created by these new hybrid forms of action. In Beacon, Plaintiff Fox filed a complaint for declaratory relief, praying for an injunction to prevent Defendant Beacon from instituting an antitrust action against him. Beacon then filed a counterclaim against Fox, alleging violation of the antitrust laws. Beacon promptly demanded a jury trial on the antitrust counterclaim. The district court, however, considered the injunctive relief sought by Fox to be purely equitable. The mixture of legal and equitable claims within the same action prompted the district court to invoke the equitable clean-up doctrine. Once a court sitting in equity obtained jurisdiction over a suit primarily equitable in character, the equitable clean-up doctrine allowed the court to retain jurisdiction and to decide any incidental legal issues that arose in the course of the action. Additionally, the doctrine provided that

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26. FED. R. CIV. P. 2 provides that "There shall be one form of action to be known as a 'civil action.'"


30. Id. at 502-03.

31. Id. at 503.

32. Id.

33. See H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 52, at 121 (2d ed. 1948).
it was within the court’s discretion to decide the order in which the equitable claims were to be tried to the court. The doctrine’s purpose was to promote judicial economy and efficiency under the bifurcated system.\(^\text{34}\) It allowed a judge to dispose of both equitable and incidental legal claims within the same action. Consequently, courts were freed from the need to order a separate jury trial for the legal claims. Consolidation of legal and equitable claims also relieved the parties of the expense of having to spend additional time in court.\(^\text{35}\)

Applying the clean-up doctrine, the district court in *Beacon Theatres* ordered that the injunction issue be tried to the court first, even though a determination of this equitable claim had the effect of disposing of Beacon’s legal claim without a jury trial through res judicata or collateral estoppel.\(^\text{36}\) The United States Supreme Court rejected the clean-up doctrine, stating that equity jurisdiction exists only when legal remedies are inadequate.\(^\text{37}\) The inadequacy of a legal remedy must be determined “not by precedents decided under discarded procedures . . . but in light of remedies now . . . available”\(^\text{38}\) under contemporary procedures. The Court reasoned that, since the Federal Rules allowed legal and equitable claims to be resolved in one action, the use of the clean-up doctrine to reduce costs and to prevent a multiplicity of suits was unjustified.\(^\text{39}\) The court could simply try the legal issues

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35. The clean-up doctrine was designed to avoid the hardship caused by the existence of separate courts of law and equity. If a court sitting in equity refused to grant incidental legal relief, the plaintiff would have had to bring an entirely new action.
36. 359 U.S. at 504-05.
37. Id. at 506-07.
38. Id. at 507. For the purposes of this note, it is important to remember that the principle enunciated in *Beacon Theatres*, that equity jurisdiction is available only when legal remedies are inadequate, was applicable only to cases where procedures were inadequate at common-law. See McCoid, supra note 25, at 12-13. Accordingly, the Court held that where the remedy at law is adequate in light of contemporary procedures, equity lacks jurisdiction, even though such jurisdiction might have been invoked under earlier procedures. Id. This interpretation is significant because the inadequacy of a legal remedy standard established in *Beacon Theatres* does not suggest an inquiry into the inadequacy, competence, or appropriateness of a jury trial in a particular type of suit. The principle “alters the historical result only as procedural obstacles to an adequate remedy at law, [such as delay and multiplicity], are removed by reform.” Id.
39. 359 U.S. at 508. Since the plaintiff could present both his legal and equitable claims in one action under the merged system, he was no longer forced to file a
to a jury and the equitable issues to a judge, all within the same action. In addition, the Court established that only under the most imperative circumstances can the right to jury trial be lost through a prior determination of equitable claims.\textsuperscript{40} The order of trial must be so arranged that issues common to both the legal and equitable claims are tried to a jury before the court passes on any purely equitable claims.\textsuperscript{41}

The movement toward a more flexible approach to the interpretation of the seventh amendment continued in \textit{Dairy Queen, Inc. v. Wood}.\textsuperscript{42} Although the \textit{Dairy Queen} plaintiffs sought relief in the form of an equitable accounting, the Court held that the remedy at law was adequate and thus that the action was triable to a jury.\textsuperscript{43} An equitable accounting, the Court declared, is only available upon a showing that the "accounts between the parties are of such a 'complicated nature' that only a court of equity could satisfactorily unravel them."\textsuperscript{44}

C. Complexity of the Action as Ground for Equitable Jurisdiction

The decisions in \textit{Dairy Queen} and \textit{Beacon Theatres} have clearly enlarged the right to a jury trial at the expense of traditional equity jurisdiction.\textsuperscript{45} The Court in \textit{Dairy Queen}, however, did recognize the possibility that the complexity of a suit may render it inappropriate for jury determination. The Court considered complexity as a ground for ordering a nonjury trial.\textsuperscript{46} The no-

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\textsuperscript{40} Id. at 51D-II.

\textsuperscript{41} The thrust of the opinion in \textit{Beacon Theatres}, as interpreted by the Court in \textit{Dairy Queen, Inc. v. Wood}, 369 U.S. 469 (1962), is that when legal and equitable claims are joined in one action and the claimant is entitled to a jury trial of the legal issues, such issues must be submitted to a jury upon timely demand regardless of whether they are incidental to the equitable issues. Id. at 472-73.


\textsuperscript{42} Id. at 469 U.S. 469 (1962).

\textsuperscript{43} Id. at 477-78. The Court held that the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. Id.

\textsuperscript{44} Id. at 478.

\textsuperscript{45} 9 C. WRIGHT & A. MILLER, supra note 21, § 2302, at 21-22. Moreover, the Court in \textit{Beacon Theatres} stated that a jury trial is a constitutional right; a nonjury trial is not. 359 U.S. at 510.

\textsuperscript{46} The Court's decision, however, should be read as applying only to suits seeking an equitable accounting. Furthermore, the Court stated that in view of the
tion that an issue may be beyond the abilities of a jury to decide rationally was acknowledged in *Ross v. Bernhard*. The Court in *Ross* stated in a footnote that whether an issue is legal or equitable and, thus, whether there is a right to a jury trial, is to be determined by considering "first, the pre-merger custom . . . ; second, the remedy sought; and third, the practical abilities and limitations of juries."  

The first two criteria can be interpreted as a restatement of the historical test. The source of the third criterion, the practical abilities and limitations of juries, is not as easy to identify. Nonetheless, the third criterion suggests that the courts must inquire into the kinds of cases that may prevent a jury from performing its decisionmaking function rationally. In such a case the court may refuse to grant a jury trial.

Efforts by the federal courts to determine the significance of the *Ross* footnote have caused uncertainty and confusion. It is doubtful that the Supreme Court would have pronounced a new constitutional standard in such a cursory fashion. This lack of clar-

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use of a master to assist the jury under FED. R. CIV. P. 53(b), it would indeed be a rare case in which complexity would require a nonjury trial. 369 U.S. at 478.


48. Id. at 538 n.10 (emphasis added).


50. See Wolfram, supra note 22, at 644. Traditionally, the relative abilities of judge and jury did not influence the classification of a suit as legal or equitable. “At no time in history was the line dividing equity from law ... the product of a rational choice between issues which were better suited to court or to a jury trial.” F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.2, at 356 (2d ed. 1977).

The one exception was an action for an accounting in which the judge would consider the abilities of a jury. See notes 42-46 supra and accompanying text.

51. Since the Court failed to apply the third prong of the test in deciding the case, it left the courts with little guidance as to the application and meaning of “practical abilities and limitations.”

52. One commentator stated that “the footnote is so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent.” Redish, Seventh Amendment Right to Jury Trial: A Study of the Irrationality of Rational Decision Making, 70 NW. U. L. REV. 486, 526 (1975).

Recent seventh amendment cases decided by the Supreme Court also cast doubt upon the viability of the *Ross* footnote as strong precedent in future seventh amendment adjudication. The Court, despite many opportunities to do so, has not cited the *Ross* footnote as authority in subsequent cases. For example, in Curtis v. Loether, 415 U.S. 189 (1974) and Pernell v. Southall Realty, 416 U.S. 363 (1974), the Court's decision to grant the right to jury trial was made without any reference to the *Ross* footnote. See also Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Lorillard v. Pons, 434 U.S. 575 (1978).
ity, however, has not prevented four district courts from using various interpretations of the Ross footnote to strike jury trial demands in complex cases where legal claims were asserted. In *In re Boise Cascade Securities Litigation*, the court concluded that the footnote rests upon the due process requirement of fairness in the resolution of all civil cases. In *Bernstein v. United Pictures, Inc.* the court held that, although the first two criteria favored a finding that a jury trial should be granted, the third criterion, standing alone, was sufficient to deny an otherwise valid claim to a jury trial. The court stated that it is the “practical abilities and limitations of the jurors... that cause the court to conclude that the issues in this case must be considered to be equitable.”

The use of the third criteria of the Ross footnote as the overriding factor in determining the right to jury trial in complex litigation has not been followed by all courts. In *In re United States Financial Securities Litigation*, the Ninth Circuit refused to raise the test’s third factor to “constitutional dimensions.” The court doubted that the Supreme Court would announce such a radical departure from the historical test in a footnote. The court concluded that the right to jury trial is determined by the nature of the issue to be tried and not by the complexity or character of the overall action. In the Ninth Circuit the right to jury trial depends


55. 420 F. Supp. at 104.

56. 79 F.R.D. 59 (S.D.N.Y. 1978). A similar approach was used by the Court in *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978).

57. 79 F.R.D. at 69.

58. *Id.* at 70.

59. Some courts have relied on the first two criteria and have ignored the practical limitations and abilities test. *See, e.g.*, Polstorff v. Fletcher, 430 F. Supp. 592 (N.D. Ala. 1977); Mission Bay Campland, Inc. v. Sumner Fin. Corp., 72 F.R.D. 464 (M.D. Fla. 1976); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794 (W.D. Wis. 1975). In *Radial Lip Mach., Inc. v. International Carbide Corp.*, 76 F.R.D. 224 (N.D. Ill. 1977), the court held that under the Ross test, jury competence was only a part of the threshold determination of whether an issue is legal or equitable. *Id.* at 227.

60. 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

61. *Id.* at 425.

62. *Id.*

63. *Id.* at 422.
solely on ancient distinctions between law and equity. If the issues presented would have been considered legal at common law, then the right to jury trial attaches, regardless of complexity.

Along with laying the necessary foundation for an assessment of the merits of the due process approach, the foregoing discussion has shown the pattern of change in seventh amendment adjudication. Nowhere is this change or refinement more evident than within the realm of the complex case. The special problem of jury competence in these cases has induced some courts to slight the historical test by relying upon the practical abilities and limitations standard. The evolution of seventh amendment interpretation continues with *Japanese Electronic Products*. By introducing due process concerns into this interpretation, the court created a new approach to use in determining the right to jury trial in complex litigation.

IV. *Japanese Electronic Products*  
**AND THE DUE PROCESS BASIS FOR DENYING A JURY**  
**TRIAL IN COMPLEX CASES**

The court of appeals in *Japanese Electronic Products* acknowledged that claims for treble damages under antitrust and antidumping laws clearly are legal in nature, and thus under the historical test the action would be submitted to a jury. Nonetheless, the court held that submitting a case with the requisite degree of complexity to a jury will deprive the litigants of due process. The United States Court of Appeals for the Third Circuit thus rejected the district court's interpretation, which preserved the seventh amendment right to a jury trial regardless of the litigation's complexity. The court believed that the values and principles inherent in procedural due process should restrict some kinds of cases from being submitted to a jury. The court's approach, therefore, pro-

64. Id.
65. Id. at 431.
66. 631 F.2d at 1079.
67. See note 18 *supra* for factors to consider in assessing a suit's complexity. It is important to remember that in the *Japanese Electronic Products* decision, the court did not make a complexity determination or deny a jury trial on complexity grounds. 631 F.2d at 1090. The court left the issue of the complexity of the litigation to the district court on remand. Id. Thus, the court only overturned the district court's conclusion that a jury trial is mandated by the seventh amendment regardless of a suit's complexity. Id. at 1086. The court believed that a litigant should be given the opportunity to show that a suit is too complex for a jury to decide rationally because of the important due process rights involved. Id.
68. Id. at 1084. No specific precedent exists for finding a due process violation
vides that the right to a jury trial in complex litigation ultimately must be determined by reference to the underlying values sought to be promoted by due process.

The court was aware of the conflict it was creating. If, after an inquiry into the factors contributing to complexity, it is determined that a jury cannot perform its decisionmaking function in accordance with the demands of due process, a conflict arises between the fifth and the seventh amendments. Resolution of the conflict, the court reasoned, entails a balancing of the two constitutionally protected interests within the particular context of the complex case. If the interests protected by due process are found to outweigh the interests served by the right to jury trial, the seventh amendment must yield.

The court of appeals identified two basic interests to be safeguarded by due process in factfinding procedures. The primary interest is to minimize the risk of erroneous decisions. If a particular suit is so complex that it seems certain that a jury will not be able to understand the evidence and legal standards, the court concluded that the use of a jury provides no assurance that a reliable decision will be reached. Thus, when complexity prevents a jury from making an informed and intelligent evaluation of a case, a deprivation of due process results.

in submitting a case to a jury. The "practical abilities and limitations of juries" element of the Ross test seems to be in harmony with the due process argument proposed by the court here. See the discussion of the Boise case in notes 53 & 54 supra and accompanying text.

69. See note 18 supra.

70. The fifth amendment provides that "no person shall . . . be denied life, liberty or property, without due process of law." U.S. CONST. amend. V.

Due process applies whenever the enforcement power of the government is employed to deprive a person of property, whether such property is taken to meet a need of the government or for the benefit of another private person. L. Tribe, American Constitutional Law, 509, § 10-8 (1978).

71. 631 F.2d at 1084.

72. Id.

73. Id. at 1086.

74. Id. at 1087. The Court relied upon Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Court announced something akin to a general formula to determine whether the use of a particular procedure violates due process of law. The Court held that due process requires consideration of three factors: First, the private interest affected; second, the risk of an erroneous deprivation of such interests through the procedures used and the value of additional or substitute procedures; and finally, the government's interest, including the financial burdens that the additional or substitute procedures would entail. Id. at 335.

75. 631 F.2d at 1084.

76. Id.
Due process also protects the guarantee that a jury will be able to arrive at its decision in an appropriate manner and by rational means. Due process "does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules." If a jury cannot do this, it seems reasonable to conclude that its decision will not be reached by rational means. Accordingly, the court reasoned that the seventh amendment does not mandate a jury trial when a suit's complexity prevents a jury from gaining a fair understanding of the evidence and from rationally applying the legal rules.

The court asserted that the due process requirement of a competent decisionmaking body "implicates values of fundamental importance." If the jury cannot understand the evidence and the legal rules, it will not be able to make factual and legal determinations with a dependable degree of accuracy. The court feared that jury confusion would tend to undermine the ability of a district court to render just decisions since legal remedies might not be applied in accordance with the purposes and policies of the law. Furthermore, jury verdicts would be erratic, inconsistent, and unpredictable, frustrating any attempt by the courts to provide evenhanded justice.

77. Id. at 1079.
78. Id. See Peters v. Kiff, 407 U.S. 493 (1972) (due process requires a competent tribunal and a jury capable of rendering a verdict based on the evidence and the law); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing"); Schultz v. Pennsylvania, 350 U.S. 523, 526 (1956) (jurors are supposed to reach their conclusions on the basis of evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn); and Gasoline Prod. Co., Inc. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931) (if the jury would be confused and uncertain in its deliberations of an issue, a denial of a fair trial would result).
79. 631 F.2d at 1086. Aside from the possibility that a jury will simply be confused and overwhelmed by a mass of information and evidence that is foreign to the average person, the court provides a second reason why a jury may not be able to decide the complex case rationally. The likelihood of a long trial will weed out many jurors whose backgrounds may qualify them for deciding a complex case. For a fuller discussion of this constraint on the jury, see notes 159-65 infra and accompanying text.

The court also presumed that a judge is capable of deciding a complex case. See note 122 infra and accompanying text.
80. 631 F.2d at 1084.
81. Id.
82. Id.
The court next assessed the interests protected by the seventh amendment and found that the right to a jury trial does not implicate the same fundamental concerns as the rights protected under procedural due process. The court of appeals was unpersuaded by the district court's assertion that the due process approach fails to take into account the special benefits that juries bring to the litigation process. The court of appeals contended that the benefits associated with the use of juries are not present to any substantial degree in a complex case. For example, the district court emphasized the jury's unique ability to render its decision without opinion or justification. This allows the jury to modify the law by interjecting community sentiment into its decision; thus, the jury prevents harsh results that may be mandated by a strict application of the law. The district court asserted that the jury's power to give results without reasons was especially advantageous in complex cases where verdicts often are reached by determinations of degree or by line drawing. Although this practice is considered arbitrary by some, the process is somehow legitimized when it is conducted by a body representing the community. Regardless, the court of appeals indicated that the jury's ability to modify the law in accordance with community sentiment is valueless when the jury is unable to understand the normal application of the law to the facts in the first instance. When a jury is unable to understand the facts or to apply the law to the facts, the jury will reach its decision on the basis of its own perception of community values.

83. Id. 84. Id. at 1085. 85. In re Japanese Elec. Prod. Litigation, 478 F. Supp. 889, 938-39 (E.D. Pa. 1979). A general verdict allows a jury to render a decision without opinion or justification. All the jury need do to render a general verdict is to announce which party has won and, if it is the plaintiff, the amount of his recovery. 86. See 5 MOORE'S FEDERAL PRACTICE ¶ 49.05, at 2217 (2d ed. 1980) in which it is stated:

[T]he general verdict, at times, achieves a triumph of justice over law. The jury is not, nor should it become, a scientific fact finding body. Its chief value is that it applies the 'law,' oftentimes a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthy fashion that comports with 'justice' as conceived by the masses, for whom after all the law is mainly meant to serve.

not by a conscious and deliberate modification of legal rules.\textsuperscript{90} This, the court stated, is not more than "unprincipled decision-making."\textsuperscript{91}

The court of appeals was equally unpersuaded by the district
court's argument that the jury should be preserved in complex civil
litigation because it provides a needed check on judicial power.\textsuperscript{92} If
a jury cannot comprehend the evidence and the legal rules, the
court reasoned that the jury itself would be the equivalent of an arbi-
trary judicial power, the very evil it was intended to check.\textsuperscript{93}

The court of appeals provided further support for its argument
that denial of a jury trial in complex litigation does not implicate
fundamental concerns, such as those protected by procedural due
process. The court pointed out that the Supreme Court has refused
to include the civil jury trial as an essential element of ordered lib-
erty; thus, the right to jury trial in civil matters has not been incor-
porated into the due process clause of the fourteenth amend-
ment.\textsuperscript{94} Implicit in the Supreme Court's refusal to categorize the
civil jury trial as a fundamental right is the view that a judge can
render basic justice without the aid of a jury.\textsuperscript{95}

\begin{small}
\textsuperscript{90} Id. The federal rules provide a safeguard against the possibility that a jury
will render its decision wholly on its conception of community values without regard
to the evidence presented. \textit{Fed. R. Civ. P. 49(a)} allows the court to use a special ver-
dict, in which case the jury must submit a special written finding upon each issue of
fact. \textit{Fed. R. Civ. P. 49(b)} allows the court to issue forms for a general verdict to the
jury. The forms are accompanied by interrogatories which require the jury to answer
specific questions concerning issues of fact important to a verdict. Both these proce-
dures compel the jury to consider the factual basis of the litigation.

\textsuperscript{91} 631 F.2d at 1085.

\textsuperscript{92} Id. (citing \textit{In re Japanese Elec. Prod. Litigation, 478 F. Supp. at 942}). \textit{See}
Higginbotham, \textit{Continuing the Dialogue: Civil Juries and the Allocation of Judicial

\textsuperscript{93} 631 F.2d at 1085.

\textsuperscript{94} Id. In \textit{Palko v. Connecticut}, 302 U.S. 319 (1937), the Court stated that the
right to trial by jury may have value and importance. \textit{Id.} at 325. To abolish trials by
jury, however, is not to violate a principle of justice so rooted in tradition as to be
ranked as fundamental. "Few would be so narrow or provincial as to maintain that a
fair and enlightened system of justice would be impossible without them." \textit{Id.}

In \textit{Duncan v. Louisiana}, 391 U.S. 145 (1968), the Court held that trial by jury in
criminal cases is fundamental to the American scheme of justice and an essential ele-
ment of ordered liberty. \textit{Id.} at 149.

\textsuperscript{95} The court buttressed this argument by pointing out that the requirement of
bench trials in equitable and maritime actions proves that judges are capable of pro-
viding fair and just trials. 631 F.2d at 1086-87.
\end{small}
V. DEPARTURE CONTINUES: ASSESSING THE DUE PROCESS APPROACH

The due process approach to determine the right to a jury trial represents a dramatic departure from the historical test. After a careful inquiry into whether a case is so complex that it precludes rational decisionmaking by a jury, a court would balance the conflicting interests to decide whether the use of a jury would promote fairness and justice. By bringing into the forefront of seventh amendment interpretation these policy judgments as to the advisability, fairness, and appropriateness of submitting a particular kind of case to a jury for resolution, the court in *Japanese Electronic Products* departed completely from the historically recognized distinction between law and equity as the litmus test for determining the right to jury trial.\(^{96}\) The present inquiry thus focuses upon jury competence rather than upon fine distinctions between law and equity formulated by courts at the time the seventh amendment was adopted.

The court of appeals' rejection of the historical test is justifiable. The changing character of contemporary litigation could not have been anticipated by the framers of the seventh amendment or by the judges who sat on the English courts of chancery. Reliance upon policies that existed almost two hundred years ago to resolve the present problem of jury use in complex civil litigation, therefore, is inappropriate. Moreover, the courts should not rely upon historical distinctions between law and equity since that approach will impede the development of other methods to resolve the complex-case problem facing the federal courts. For example, the district court in *Japanese Electronic Products* held that the right to jury trial depends solely upon the distinction between law and equity: no complexity exception to the seventh amendment was recognized. If all courts applied this simplistic distinction between law and equity, they could ignore the problems that complex litigation creates in terms of a jury's ability to render rational and fair decisions. If the claims asserted in a complex case are legal in nature, a jury trial would be ordered regardless of the degree of a suit's com-

\(^{96}\) The due process approach makes any inquiry into historical distinctions between law and equity unnecessary. *Id.* at 1083. In this way, the approach is a sharper departure from the historical test than the inquiry suggested under the *Ross* footnote. Under a strict reading of the footnote, an inquiry into the pre-merger custom of common-law courts is required.
plexity and the potential danger of an irrational verdict. Conversely, the due process approach squarely addresses the problem. By recognizing due process concerns, the due process approach forces courts to focus upon the development of alternatives to remedy the problem of irrational decisionmaking by a jury. The court of appeals in *Japanese Electronic Products* looked for alternative solutions and suggested that courts try severance or other procedures to reduce the complexity of suits. By making lawsuits understandable, jury trials need not be denied.\(^{97}\)

Thus, to the extent that the due process approach allows the federal courts flexibility in determining the fairness of submitting a complex case to a jury, free from the shackles of the historical test, it represents a more realistic and effective approach to resolution of the problem.

VI. ANALYSIS

A. Implications of the Decision

1. Scope of the Due Process Approach

Critics of the due process approach might argue that case-by-case determination of complexity eventually will dilute the right to jury trial in all civil suits\(^{98}\) since irrational verdicts are possible in all cases,\(^{99}\) not just in complex ones. Strict application of the due process requirement that courts minimize the risks of erroneous decisions suggests that judges make a comparison between their ability to render rational decisions and the jury's ability to do so. If a judge considers himself to be a more capable decisionmaker, which his experience and expertise may lead him to believe, a literal reading of the standard suggests that a nonjury trial should be

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\(^{97}\) *Id.* at 1088. The court provided little guidance or meaningful discussion of the application of these procedures. For a fuller discussion of possible methods of reducing complexity and for a recommended approach to the application of various procedures, such as separate trials and masters, see text accompanying notes 127-58 infra.

\(^{98}\) The fear that the due process approach will lead to the long run dilution of the right to jury trial was expressed by the district court in *In re Japanese Elec. Prod. Litigation*, 478 F. Supp. 889, 932-33 (E.D. Pa. 1979) and by the court in *Radial Lip Mach., Inc. v. International Carbide Corp.*, 76 F.R.D. 224, 228 (N.D. Ill. 1977).

\(^{99}\) Procedures allowing for directed verdicts and judgments notwithstanding the verdict (J.N.O.V.) are safeguards against irrational jury decisions and are a recognition of the fact that irrational verdicts may occur. For a fuller discussion of devices for controlling a jury, see F. JAMES, CIVIL PROCEDURE 249-336 (1965).
ordered. This would minimize the risks of an erroneous decision. If the courts interpret the due process approach in this way in the future, the approach will invite a loosely defined and discretionary jury trial determination in all civil cases: a judge's decision that a jury lacks the sophistication to decide a case rationally, or that his ability outweighs that of the jury, will allow him to strike a jury trial demand. Such an interpretation would, indeed, be tantalizing to a judge who harbored unarticulated hostilities toward the jury system.

Undoubtedly there is room for exercising discretion in the application of the due process approach, but a reading of the court's approach suggesting that it will lead to the eventual dilution of the right to a jury trial sweeps much too broadly. Rather, the decision actually reinforces the position of the jury within the broad spectrum of contemporary civil litigation. The court of appeals simply has carved out a very limited exception to the right to jury trial. It can be employed only in exceptional cases when the court, after inquiry into the factors contributing to complexity, determines that a jury cannot decide the case rationally. A litigant may not be denied a jury trial merely because the judge prefers a nonjury trial to a jury trial. Instead, it must be evident that a suit's complexity will preclude rational decisionmaking in accordance with the requirements of procedural due process. The court of appeals in Japanese Electronic Products did not consider the civil jury to be a dispensable part of the litigation process in the vast majority of civil suits, nor did the court demean the valuable contributions made by juries in civil cases. It merely concluded that the benefits of a jury could not be realized in a suit considered to be too complex for a jury to decide rationally: allowing or requiring a party to try his case before a jury in a suit containing all the elements of complexity would not, in effect, preserve the right to jury trial as that right is commonly perceived or understood.

The due process approach presented in Japanese Electronic Products, therefore, will have no effect upon jury trial rights outside the sphere of complex litigation. By limiting the standard to suits where both complexity and jury competence problems clearly are evident, its scope is limited sufficiently.

100. The court recognized the problem of discretion. 631 F.2d at 1088-89.
101. See note 18 supra.
102. 631 F.2d at 1089.
103. Id.
2. Problem of Judicial Discretion

The court of appeals' approach to seventh amendment adjudication in *Japanese Electronic Products* does not equip federal judges with enough discretion to enable them to dilute the right to jury trial in noncomplex civil cases. The discretion that they can exercise within the realm of complex litigation, however, does present some potential problems.

The court attempted to objectify and to clarify the factors to be used to determine whether a case is too complex for jury determination. The dissent recognized, however, that applying the factors permits the court to exercise a substantial amount of discretion, a situation that gives rise to three potential problems.

First, the judicial attitude concerning the abilities of juries undoubtedly will vary from circuit to circuit and from judge to judge. Moreover, each judge's viewpoint as to the competency of a jury in complex civil litigation will affect his decision as to whether a suit has sufficient elements of complexity to warrant a nonjury trial on due process grounds. The obvious problem with determining the right to a jury trial through a case-by-case inquiry into complexity, therefore, is its lack of predictability. Because the outcome under the complexity test will depend upon a subjective view of jury competence, an inherently discretionary decision, a total lack of uniformity among the circuits could result. For example, under a case-by-case inquiry into complexity a litigant might have a right to jury trial in one circuit but not in another. This result is not sound. Every effort should be made to assure, to the fullest extent practicable, that express provisions in the Bill of Rights be uniformly and evenhandedly applied from circuit to circuit.

A second problem with the discretion afforded under the case-by-case approach to complexity is demonstrated by what the dissent considered to be its most serious difficulty with the majority opinion. Judge Gibbons stated: "I fear that the exercise of that dis-

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104. See note 18 supra.
105. 631 F.2d at 1093 (Gibbons, J., dissenting).
107. For example, a judge who has a relatively low opinion of jury ability may be more inclined in borderline cases to conclude that a suit is too complex for a jury to decide rationally. Conversely, a judge with a high opinion of jury ability may be less inclined to conclude that a suit is sufficiently complex to warrant striking a jury trial demand.
cretion will sometimes be influenced by unarticulated sympathies for or hostilities toward the underlying policies sought to be advanced in the lawsuit." Judge Gibbons apparently was concerned about the danger that a judge might deny a jury trial demand when he has a strong desire to interpose his sentiments and judgments into the policy issues sought to be resolved. For example, a judge who harbors strong opinions on race relations may deny a jury trial in a complex civil rights case so that he, as the ultimate decisionmaker, may impose his values and opinions on the outcome of the litigation. 109

The danger that a judge might make a finding of complexity and deny a jury trial for ulterior motives is insignificant in a complex antitrust case or other commercial lawsuit when the parties are large, multinational corporations carrying on a form of economic warfare in the courts. In contrast, however, an antitrust suit brought by the United States Government against a corporation has fundamental political and economic overtones concerning the issue of governmental intervention into the private sector of the economy. Similarly, in other kinds of complex litigation, such as those involving environmental law and civil rights, strong and emotional public policy judgments are an integral part of the litigation and often are decisive of the outcome. 110 The discretion to order a nonjury trial in such cases may, at the very least, be enticing to a judge who has strong preferences either for or against the public policy advanced in the lawsuit. 111

A third but closely related difficulty associated with the discre-

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108. 631 F.2d at 1093 (Gibbons, J., dissenting).
109. A strong counterargument can be made that a judge need not dispense with the jury in order to bring his biases to bear on the outcome of the litigation. The judge's power to make rulings on evidence and to control the proceedings may be sufficient to allow him to steer the outcome of the litigation despite the presence of the jury as decision maker.
110. See, e.g., Hill v. Tennessee Valley Auth., 549 F.2d 1064 (6th Cir. 1977) (policy of Endangered Species Act of 1973 warranted the termination of $100 million dam project in which millions of tax dollars had already been expended); West Va. Div. of the Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975) (policy of the Organic Act to conserve federal woodlands outweighed the policy of exploiting national forests to meet the rising demand for lumber).
111. One commentator has pointed out that providing judges with the power to deny jury trials in cases in which juries may not be able to perform their fact finding duties seems to run counter to the jury function of limiting the power of judges. The power to deny a jury trial provides judges with discretionary authority to determine whether this check on their powers should be imposed. See Wolfram, supra note 132 at 644.
tion afforded a judge is that his decision may be unreviewable. The *Japanese Electronic Products* majority opinion concluded that any erroneous denial of a jury trial can be remedied prior to trial by a writ of mandamus from a court of appeals. Such a device, as the dissent pointed out, very rarely will lead to a reversal of an order to strike a jury demand. When the reviewing court applies the criteria used to determine complexity, it probably will conclude that the trial court acted within the bounds of its broad discretion. The dissent also accords little significance to a posttrial plea that a jury trial was denied erroneously. Taking into consideration the strain and burden that complex cases impose upon the time and resources of the federal courts, “the pressures on an appellate tribunal not to order a retrial of an otherwise error-free trial in a complex case will . . . inevitably be irresistible.”

B. *Eliminating the Jury: Has Rational Decisionmaking Been Assured?*

The court of appeals in *Japanese Electronic Products* indicated that its goal was to assure that complex suits are resolved fairly and rationally in accordance with the principles inherent in procedural due process. The merit of the due process approach lies in its concern with the quality of justice rendered rather than with adherence to archaic and rigid principles and distinctions. It seems reasonable to conclude that jurors in a complex and protracted suit may not be able to achieve the goals of fairness and justice. Some civil cases are so enormous that they will virtually overwhelm the jury. The language of the complex case is often foreign to the average juror. The concepts that a juror is required to grasp within a relatively short period of time probably have taken those adept in the particular field years to master. The juror in a complex case

112. 631 F.2d at 1093 (Gibbons, J., dissenting).
113. Id. at 1089.
114. Id.
115. Id. at 1093 (Gibbons, J., dissenting).
116. Id.
117. Id. at 1084.
118. In *Japanese Electronic Products*, for example, the jury may have to review the technical features of thousands of different models and understand how differences between the models relate to cost of manufacturing, product performance, and marketability. The jury also will have to decide whether the price of Japanese goods sold in the United States is substantially less than the actual market value in Japan. This will require the jury to factor currency fluctuations and different marketing techniques between the two countries. Id. In Memorex Corp. v. IBM, 555 F.2d 1379
can aptly be described as "a stranger in a strange land." In addition, the juror must digest and assimilate a tremendous volume of evidence.

The alternative to a lay jury, however, is a lay judge. Although a jury may be inexperienced and unaccustomed to the technical features of a case, there is no real assurance that a judge will be any more familiar with such matters. In short, a judge may labor under the same conceptual difficulties. The *Japanese Electronic Products* court recognized this. Nevertheless, the court concluded that a judge's ability to digest a large amount of evidence, to apply legal standards to the facts, and to understand the process of civil litigation makes it reasonable to presume that a judge is capable of deciding a complex case.

The court's argument has merit; but, by focusing exclusively upon the judge's ability to decide a complex case, it fails to take into consideration the difficulties confronting a judge in a nonjury trial. An important function of the litigants which helps to assure that a complex case will be decided rationally is the organization of the mass of information into a comprehensible form. The process of organizing and presenting a large volume of evidence in a form that is comprehensible to the uninitiated may suffer in a nonjury trial since it is the presence of a lay jury that forces a "fierce discipline" upon the litigants to distill the information and to clarify the issues. In addition, the evidentiary rules are relaxed in a nonjury trial on the assumption that a judge will consider only admissible evidence. Without exacting rules, however, the issues and the proof may not be presented as clearly as they must be if a rational disposition of a complex case is to be attained.

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119. Schaffer, supra note 107, at 16, col. 4.

120. See note 2 supra. The discovery process in *Japanese Electronic Products* produced over 100,000 pages of depositions and over 1,000,000 documents. 631 F.2d at 1073.

121. Id. at 1087.

122. Id. The court in *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104-05, stated that the judge's ability to review daily transcripts and reporter notes, to study exhibits in depth, and to carry on colloquies with witnesses, makes him more capable than a jury to comprehend complicated facts.

123. Higginbotham, supra note 92 at 54.

124. Id.
Whether a judge or a jury is more competent is an issue that has divided, and probably will continue to divide, the federal courts. The conclusion that enormous and complex suits impose a heavy burden upon the factfinding body, however, is undisputed. Perhaps it is unrealistic to expect that either a judge or a jury can rationally and competently decide such cases in light of their present form and magnitude. Perhaps procedures that focus on reducing the size and dimension of the suits should be used to deal with the problem of complex litigation. By reducing the size and complexity of a suit, these procedures will also provide the courts with a method of preserving both the right to jury trial and procedural due process.

VII. AVOIDING A FATAL CLASH: PRESERVING JURY TRIAL RIGHTS AND RATIONAL DECISIONMAKING

A cardinal principle of constitutional adjudication is that the courts should avoid deciding constitutional questions. Deciding a constitutional question is legitimate only as a last resort. In accordance with this principle, the courts should seek to promote the interests implicit in the fifth and seventh amendments by attempting to mitigate the conflict between the two provisions. Every effort should be made to employ devices and procedures that will allow the two provisions to coexist. If the two amendments can be reconciled in this way, preserving the interests protected under both, the drastic solution of abrogating the right to jury trial need not be employed.

A. Reducing Conceptual Difficulties

A court confronted with a complexity challenge to a jury trial should use efficient procedures and sound judicial management to help to improve jury comprehension. Judges should resort to the Manual of Complex Litigation, which provides a collection of procedures that can be used to aid the jury in its understanding of the case. Two procedures suggested by the Manual may be partic-

125. For an indication of the difference between the circuits, see the cases cited in note 106 supra.
126. See note 156 infra.
128. Id.
129. FEDERAL JUDICIAL CENTER, MANUAL OF COMPLEX LITIGATION (1978).
ularly helpful in improving jury comprehension: Masters and the pretrial conference.

When a court foresees a problem with the jury's ability to decide a technical, factual dispute, it can refer the dispute to a special master under rule 53 of the Federal Rules of Civil Procedure. The master is empowered to call a meeting, to hear witnesses, and to file a report containing findings of fact and conclusions of law when requested to do so by the court. The report of the master, however, does not free the jury from making factual determinations upon technical issues. Instead, the report is merely admissible evidence that the jury can either accept or reject. Nevertheless, the master's report is useful for the purposes of clarifying the facts and issues and giving the jury a clearer understanding of technical evidence.

In a less direct way, pretrial conferences can play a vital role in making a complex case more understandable to a lay jury. Rule 16 of the Federal Rules of Civil Procedure authorizes the court to conduct a pretrial conference to consider, among other things, the simplification and identification of issues. Streamlining the complex case by defining and simplifying the issues will help the jury to understand the nature of the dispute and also limit the scope of discovery to pertinent information. In addition to these procedural functions, the pretrial conference also should be used to ac-

130. See United States v. IBM, 76 F.R.D. 97 (S.D.N.Y. 1977); Bercovici v. Chaplin, 3 F.R.D. 409 (S.D.N.Y. 1943) (difficulty of trying issues to a jury may be overcome by reference to a master).

131. The power and duties of a master are completely dependent upon the court's order of reference. FED. R. CIV. P. 53(b), (c). Consequently, the master has the power to find facts and reach conclusions of law only if specifically authorized by the order of reference. Moreover, reference may be granted in a jury trial only when issues are complicated. FED. R. CIV. P. 53(b).

132. See 9 C. WRIGHT & A. MILLER, supra note 21, § 2604, at 782-83.

133. See 9 C. WRIGHT & A. MILLER, supra note 21, § 2604, at 782-83.


135. Allowing discovery to commence without a clear conception of relevancy and materiality will lead only to the confusion of the judge, of counsel and, ultimately, of the jury. For a discussion of the way in which pretrial conferences can limit discovery, see 6 C. WRIGHT & A. MILLER, supra note 21, § 1530, at 624-29.
commodate the special needs of a jury in a complex case. Judge and counsel should make a special effort to assure that issues are presented to a jury in an understandable manner. Consideration should be given to methods and techniques of presenting information that will clarify the issues for the jury.\textsuperscript{136}

Procedural devices such as the pretrial conference and the employment of masters, although useful in preventing jury confusion, are not panaceas. If complex litigation is viewed on a continuum with the least complex cases at the beginning and the most complex cases at the end, the devices considered thus far may assist the jury in rendering a rational decision in those cases at the beginning of the continuum. These devices, however, may not be sufficient to assure rational decisionmaking in cases having greater degrees of complexity. In such cases, more fundamental adjustments may be necessary to preserve both jury trial rights and procedural due process guarantees.

B. Making the Case Manageable

\textit{Japanese Electronic Products} is a complex case.\textsuperscript{137} Each separate claim standing alone, however, was not sufficiently complex to preclude rational decisionmaking by a jury. Instead, the complexity in \textit{Japanese Electronic Products}\textsuperscript{138} was caused by the parties' utilization of the liberal joinder provisions of the Federal Rules of Civil Procedure.\textsuperscript{139} By joining multiple claims and parties, the suit fell out of the purview of the jury.

The modern joinder rules are extremely liberal, allowing joinder of practically "any claim or any party. . . ."\textsuperscript{140} The ultimate goal of the joinder rules is to promote court efficiency and judicial economy and to expedite resolution of all related claims. To the extent that the liberal joinder rules and the rule permitting consoli-

\textsuperscript{136} For a general discussion of pretrial management of complex cases, see Withrow & Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 CORNELL L. REV. 1 (1976); Staff Paper, The Early Narrowing and Resolution of Issues, 48 ANTITRUST L.J. 1041 (1980).

\textsuperscript{137} See note 118 supra.

\textsuperscript{138} Other civil cases in which a nonjury trial was ordered on complexity grounds are ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423 (N.D. Cal. 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); In re United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), rev'd 609 F.2d at 411; In re Boise Cascade Litigation, 420 F. Supp. at 99.

\textsuperscript{139} 631 F.2d at 1091, (Gibbons, J., dissenting). See FED. R. CIV. P. 18, 19, 20, 22, 23, & 42(a).

\textsuperscript{140} Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 MINN. L. REV. 580, 581 (1952).
dation have eliminated duplication of effort and have saved judicial time and resources, they have proven to be of unquestionable value. As one commentator points out, however, "procedures cannot be 'good' or 'bad' in isolation, without relation to their context." Accordingly, despite their utility in preventing piecemeal adjudication, the rules permitting joinder and consolidation should be applied with an awareness of the practical problems they can create. While the court may be concerned with efficiency, joinder and consolidation may result in the creation of an unwieldy trial beyond the comprehension of a jury or even a judge.

1. A Seventh Amendment Limitation

Since complexity is largely the product of the courts' resort to both the joinder rules and the rule permitting consolidation, the courts' utilization of these rules, in effect, may preclude a litigant from enjoying his seventh amendment right to jury trial. A serious question arises regarding the extent to which a court should be allowed to create the complexity that makes a jury trial impossible in light of the requirements of due process.

The seventh amendment can be read to impose a limitation upon the power of a court to order joinder of claims and parties and consolidation of actions if these procedural devices remove the case from the purview of the jury. The joinder rules and the rule permitting consolidation are statutory grants of discretionary power. They are not mandated by any provision of the Constitution. The right to jury trial, however, is established and protected by the seventh amendment. Thus, construing the seventh amendment as placing a limitation upon the court's use of joinder and consolidation seems inescapable. To hold otherwise would be to assert that a statutory, discretionary power can prevent the exercise of a constitutional privilege embodied in the Bill of Rights. Judge Gibbons, in his dissent, indicated that the seventh amendment does place limitations on joinder and consolidation: "[i]f by virtue of joinder and consolidation a case becomes too complex for a single jury to handle, the remedy mandated by the seventh amendment is separate juries, as at common law."
The constitutional question of whether a judge is required by the seventh amendment either to refrain from ordering joinder or consolidation or to separate into its component parts a suit containing multiple claims and parties, however, can be avoided. The federal rules provide a safeguard against the creation of a suit so complex that it may be beyond jury comprehension.

2. Rule 42(b) of the Federal Rules of Civil Procedure

Rule 42(b) of the Federal Rules of Civil Procedure provides that a court may order a separate trial of any claim or issue "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. . . ."144 The judge’s discretionary power to order separate trials under the rule is extremely broad.145 Thus, when a party moves to strike a demand for a jury trial on complexity grounds, the judge can order separate trials. The judge thereby reduces the complexity of a suit sufficiently to bring it within the realm of jury competence.146 Charles Alen Wright, a distinguished scholar of civil procedure, stated that “the only valid way to handle the problem is to say that it is desirable to include as many claims and parties as there are in one suit, except where this may make the suit too many-sided and complicated for the jury to unravel. . . .”147 By following this approach, a court, by reducing the size of the litigation, could preserve rational decisionmaking and the right to jury trial.

The technique of ordering separate trials on the ground that the issues are too complicated and numerous to be resolved in a single trial has been used successfully by many courts. In Reines Distributors, Inc. v. Admiral Corp.,148 the United States District Court for the Southern District of New York held that the inherent complexity of an antitrust case is a factor to be weighed in the judge’s decision whether to order a separate trial of an issue.149 If

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144. FED. R. CIV. P. 42(b).
145. See United States v. 1,071.08 Acres of Land, 564 F.2d 1350, 1352 (9th Cir. 1977) (district court has broad discretion to order separate trials; exercise of that discretion will be set aside only if clearly abused).
146. When a court decides to order a separate trial of an issue or action, a separate jury also will be provided.
147. See Wright, supra note 140, at 581.
149. Id. at 621.
the result of the separate trial would be to simplify the litigation, the court reasoned that separation should be ordered.\footnote{150} In Reading Industries, Inc. v. Kennecott Copper Corp., the same court ordered separate trials to avoid confusing the jury since the jury would have had to assimilate the economic conditions of an entire industry and understand the relevant markets of various products.\footnote{152} In Henan Oil Tools, Inc. v. Engineering Enterprises, Inc., the United States District Court for the Southern District of Texas stated that the burden placed on the trier of fact, whether judge or jury, in complex antitrust cases entailing vast amounts of evidence and a protracted trial, is a heavy one to bear. The court reasoned that the present litigation came precisely within the authorization of rule 42(b).\footnote{154}

Thus, a counterbalance to the liberal joinder and consolidation rules is built into the Federal Rules of Civil Procedure to prevent the creation of unmanageable litigation and jury confusion.\footnote{155} Rule 42(b) be a very flexible and useful procedure to preserve jury trial rights. In addition, breaking a complex case down to a manageable size also may be the best way to provide justice to the litigants.\footnote{156}

\footnote{150. Id. at 621-22.}
\footnote{151. 61 F.R.D. 662 (S.D.N.Y. 1974).}
\footnote{152. Id. at 665.}
\footnote{153. 262 F. Supp. 629 (S.D. Tex. 1966).}
\footnote{154. Id. at 631. See also United States v. 1,071.08 Acres of Land, 564 F.2d 1350, 1353 (9th Cir. 1977) (lower court did not abuse its discretion in ordering separate trials when issues were sufficiently divergent to confuse a single jury); Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561, 577 (1952) (claims will be separately tried in order to avoid the overwhelming burden imposed by a single trial of all the issues); Sporn v. Hudson Transit Lines, 265 App. Div. 360, 361-62, 38 N.Y.S.2d 512, 514 (1942) (avoidance of multiplicity of suits is much desired, but cause of action should be severed when such a rule might result in prejudice and tend to confuse the jury).


\footnote{155. C. Wright & A. Miller, supra note 21, § 2387, at 278. If, however, a judge refuses to order separate trials in a complex case, a litigant who wishes to preserve his right to jury trial could argue that the seventh amendment mandates that separate trials be ordered.}

\footnote{156. Consider the following comment: "These ‘disputes’ often approach the scale of internecine economic wars . . . . Advocates that believe that such behemoth cases are actually being tried to a court in any traditional sense are either naive . . . or . . . deluding themselves about the efficacy of a bench trial." Higginbotham, supra note 92, at 54. See also S. Rifkind, Are We Asking Too Much of Our Courts?, 70 F.R.D. 96, 108 (1976).}
When separate trials are ordered to simplify a case, however, a conflict develops between the policy of promoting judicial economy and the interest in preserving trial by jury. Strong policy arguments support both sides of the conflict. The federal courts already are overburdened by complex and protracted litigation, and separate trials with separate juries may increase the burden greatly. Those who consider efficiency to be of the utmost importance may contend that the jury should be bypassed to help maintain a more economical system.157 The dissent in *Japanese Electronic Products* cogently states the opposing argument: "the provisions of the Bill of Rights which limit the way in which the federal courts conduct their business are designed to promote values other than efficiency."158 Moreover, jury trials are mandated by the Constitution; efficiency is not.

Since the success of each procedure employed to reduce complexity depends upon the degree of a particular suit's complexity, no single procedure will work in all cases. Dividing a suit into separate claims and parties, each heard by its own jury, in the vast majority of complex cases will bring the case within the purview of each jury to decide. Rule 42(b), however, is not a perfect solution. It is merely another important step in the process of trying to afford the parties due process and to preserve jury trial rights. If one plaintiff brings a single claim against one defendant, or if a case is broken down into its separate components and the separate claim is still too complex for decision by a jury, a more fundamental adjustment of the litigation process would be necessary. In this exceptionally rare but not inconceivable case, the special jury might best accommodate the litigants' right to a jury trial and to procedural due process. Our present jury selection process, however, is incapable of empanelling a jury competent to handle those rare cases when the litigants' constitutional rights would not be protected by the procedural devices previously discussed.

157. In *In re Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977), rev'd 609 F.2d at 411, the court stated that if the 18 cases were tried separately, the cases would be staggered over a 12 to 18 year period because many critical parts of the proof were the same and would have to come from the same witnesses. The court concluded that it would be unfair to require the litigants to wait this long for the case to be decided. *Id.* at 714.
158. 631 F.2d at 1091 (Gibbons, J., dissenting).
C. Improving Jury Composition: Special Juries as the Final Step

1. The Nature of the Present Problem

The Japanese Electronic Products court's conclusion that a jury may be incompetent to decide a complex case was based on the premise that the jury selection procedures, when used in protracted litigation, operate to empanel a jury lacking requisite background, intelligence, and technical skill to reach a rational decision.\(^{159}\) The disproportionate exclusion of jurors who are best able to decide a complex case can be attributed in part to the wide discretion that the Jury Selection and Service Act of 1968\(^{160}\) gives a judge in determining whether to excuse a potential juror.\(^{161}\) The Act simply provides that a juror "may be... excused by the court, upon a showing of undue hardship or extreme inconvenience."\(^{162}\) No meaningful or stringent guidelines are established under the statute concerning what constitutes undue hardship or extreme inconvenience.\(^{163}\) Consequently, most courts in complex litigation have accommodated potentially competent jurors who allege undue hardships or extreme inconvenience by excusing them.\(^{164}\) One court stated that "It would be unconscionable to de-
mand of any gainfully employed person . . . that he abandon his career for two years. . . . [F]ew careers would not be materially and permanently retarded in terms of promotions, seniority, maintenance of professional proficiency, etc., by such a long absence.”

2. Effects of Jury System Improvements Act

Recent legislative efforts have been directed toward improving the composition of federal juries. The Jury System Improvements Act of 1978 indicates a clear legislative intent to assure litigants of a jury selected from a fair cross section of the community. The Act makes one significant modification of the selection process which may affect the composition of juries in complex cases. The Act protects employees from intimidation, discharge, or coercion by employers who may be hostile toward an employee’s long absence while he has been on jury duty. The Act further guarantees that a juror may resume employment after completion of jury duty without the loss of seniority. The juror is treated as though he had been on a leave of absence.

The purpose of this portion of the Act is clear: qualified jurors employed in technical or professional fields should not be deterred from jury service by fear that their absence for a long period will jeopardize their jobs or will affect their seniority or job benefits. Consequently, judges may be less receptive to pleas that jury duty

(N.D. Cal. 1978), excuses reduced a pool of 175 prospective jurors to only 29. In Memorex Corp. v. IBM, 555 F.2d 1379 (9th Cir. 1977), all 118 jurors who asked to be excused were excused. See Shaffer, supra note 118, at 16, col. 4. In SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D. Conn. 1978), a pool of 95 jurors was reduced to 36 after excuses. See Note, The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment, 10 CONN. L. REV. 775 (1978).

165. In re United States Financial Sec. Litigation, 75 F.R.D. 702, 713 (S.D. Cal. 1977), rev’d, 609 F.2d 411 (9th Cir. 1979). The exclusion of highly skilled and educated members of the community from juries in complex cases is discussed by the court in ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 448 (N.D. Cal. 1978). The court stated that of the eleven jurors, several were housewives, one was retired, and the remainder held jobs that could be filled by other people. Id. Only one juror had a limited technical education. This led the court to say that the eleven jurors “probably represented [those] people in the community who could afford to spend 10 months serving on a jury.” Id.


169. Id.
will cost a competent juror his employment status. This provision alone may not result in the empanelling of a jury competent to decide a case that, after separate trials are ordered, contains a single claim sufficiently complex to warrant a due process objection to a jury trial. Although loss of a job may no longer be a problem, many judges may continue to feel that a long absence from professional or technical employment nevertheless will have a detrimental effect upon career goals.170 Furthermore, a judge simply may believe that it is unjust and counterproductive to impose the ordeal of lengthy jury service onto persons who do not wish to assume the duty. Most judges recognize that forcing an unwilling juror to sit through a lengthy trial will have an adverse effect upon the quality of justice rendered.171 Resentment may put such a severe strain on the particular juror's commitment to the task of rendering a rational decision that forcing such a juror to serve, no matter how competent he may be, may do the judicial proceeding more harm than good.172

If after the excusal stage of the jury selection process the sophisticated but unwilling juror has not been excused, the peremptory challenge stage of the process may result in his elimination.173 A clever, potential juror could convey false feelings of bias or hostility, prompting an attorney to use a peremptory challenge to eliminate him.174 Moreover, many lawyers use their peremptory

171. See J. VAN DYKE, supra note 161, at 129.
172. George Hart, former Chief Justice of the United States District Court for the District of Columbia, stated that because he does not "think that a person who wants to be excused will make a good juror, and it would not be fair to the court, to the litigants, or to the public to make him serve," he will excuse virtually everyone who requests. Id. at 129.
173. The parties can exercise two types of challenges: Challenges for cause and peremptory challenges. The challenge for cause eliminates jurors who during voir dire demonstrate an inability to consider the case with impartiality: if some type of bias can be shown to the satisfaction of the judge, the juror will be dismissed. No limit is placed on the number of prospective jurors who may be challenged or dismissed for cause.

Through the peremptory challenge prospective jurors are eliminated without explanation and without the judge's consent. See Swain v. Alabama, 380 U.S. 202, 220 (1965). Normally the advocates are limited to three peremptory challenges. In the case of multiparty litigation, however, a judge may allow each party to the action a designated number of peremptory challenges not to exceed three each. See Standard Indus., Inc. v. Mobil Oil Corp., 475 F.2d 220 (10th Cir. 1973). The attorney may use the peremptory challenge to remove a venireman who is likely to be hostile but whose prejudice cannot be proved.
174. J. VAN DYKE, supra note 161, at 152-60.
challenges to eliminate competent jurors who may use their education or expertise to influence less sophisticated jurors toward an unfavorable verdict.\textsuperscript{175}

The modifications made by the Jury System Improvements Act, therefore, will not significantly improve the composition of a jury empanelled to decide a complex case. During the excusal stage, judges undoubtedly will continue to use their discretion to accommodate the unwilling juror, perhaps because forcing such a person to serve against his will is both unfair to him and potentially harmful to the interests of the litigants. Furthermore, the peremptory challenge can be exploited by a competent juror, enabling him to shun his jury duty by a false display of bias or hostility.

Thus, a more fundamental change is in order. Although the right to jury trial has been said to deserve the utmost protection,\textsuperscript{176} the right is not inflexible. In \textit{Ex Parte Peterson},\textsuperscript{177} Justice Brandeis stated that the seventh amendment’s command to preserve the right to jury trial does not require that old forms of practice and procedure be retained.\textsuperscript{178} “New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.”\textsuperscript{179}

3. Special Juries

A jury composed of individuals who possess expertise in the subject matter of the dispute may be better able to decide fairly and rationally those rare complex cases involving facts and legal issues that lie beyond the competence of a lay jury even after the case is broken down into its component parts.\textsuperscript{180} One possible method of selecting special juries would be to restore the “keyman” system. Under this system, a jury commissioner for a particular district would consult prominent members of the community, known as key-men, for names of individuals from the community whose experience and background might qualify them to decide a complex dispute.\textsuperscript{181} The key-men consulted by the jury commis-

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\item 175. Note, \textit{supra} note 164, at 780-81.
\item 177. 253 U.S. 300 (1920).
\item 178. \textit{Id.} at 309.
\item 179. \textit{Id.} at 309-10.
\item 180. Special juries were used in England at common law in complex cases which “were of too great nicety for the discussion of ordinary freeholders.” Thayer, \textit{The Jury and its Development}, 5 \textit{Harv. L. Rev.} 295, 300 (1892) (citing 4 W. BLACKSTONE, BLACKSTONE’S COMMENTARIES 357 (G. Tucker ed. 1803)).
\item 181. Until the passage of the Jury Selection and Service Act of 1968, 28 U.S.C.
sioner would be individuals with years of experience and demonstrated prominence in the particular field that is the subject of the dispute.

Under this special jury system at least some of the benefits associated with lay juries would be preserved. For example, the special jury would maintain the traditional check on judicial power. It would continue to allow citizens to participate in the judicial process. It would preserve the role of the jury in legitimizing the imposition of sanctions by the courts. Nevertheless, before the use of special juries can be considered to be a viable option, some threshold constitutional and practical problems may prevent or frustrate any attempt to employ them.

The Supreme Court held in *Taylor v. Louisiana* that the American concept of a jury contemplates a jury drawn from a fair cross section of the community. "[T]he jury [must] be a body truly representative of the community . . . and not the organ of any special group or class." The proportionate representation of all economic groups and social classes on a particular jury panel, however, is not necessary.

Selecting jurors on the basis of competence probably will result in the empanelling of a jury that is not representative of a fair cross section of the community even though people are not intentionally excluded on the basis of race, sex, or social class. Such a jury may contain a disproportionate number of white, middle-class males since they presently dominate the technical and business professions from which special jurors will be drawn. Consequently, the courts may consider such a scheme unconstitutional. Moreover, the empanelling of such a jury runs afoul of the jury function of interjecting into its verdict the sentiments and values of the community.

Although the constitutionality of the special jury makes its via-

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§ 1861 (1976), the “key man” system was used to pick federal jurors. Less than one-third of the states continue to use the system. J. *Van Dyke, supra* note 161, at 86.

182. *See* 631 F.2d at 1093 (Gibbons, J., dissenting) for a discussion of this particular jury function.


184. *Id.* at 527. This principle has been codified into federal law. *See* 28 U.S.C. § 1861 (1976).

185. 419 U.S. at 527. *See* U.S.C. § 1862 (1976) which provides: “No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.”

bility uncertain, Congress could amend the Jury Selection and Service Act of 1968\(^{187}\) to allow the use of special juries in complex cases in which separate trials would not reduce the complexity of a claim sufficiently.\(^{188}\) Congress may feel compelled to do so in the future for two reasons. First, *Japanese Electronic Products* raised important and fundamental due process concerns that cannot be ignored. Second, the present jury selection system fails to empanel a jury representing a fair cross section of the community.\(^{189}\)

Were a special jury amendment enacted, an additional practical problem still would exist: few jurors are willing to sit on a jury for a prolonged period. The people who will be asked to serve on special juries are precisely the people who are reluctant to serve for long periods and who have successfully sought excuses under the present jury selection process. In light of this practical problem and the constitutional objection, the feasibility of the special jury is clouded with uncertainties. Nevertheless, the special jury is the best option available to preserve many of the features of a jury trial and to guarantee procedural due process when separation of issues has failed to do so. Moreover, since such cases rarely will develop, a departure from the cross-section standard may be justified because the quality of justice is enhanced when a special jury is used.\(^{190}\)

**VIII. CONCLUSION**

*Japanese Electronic Products* involved a highly technical, voluminous, and protracted antitrust dispute. The United States Court of Appeals for the Third Circuit's decision brings into the forefront of seventh amendment adjudication the issue of whether the due


\(^{188}\) An argument could be made that such an amendment is unlikely since the intent of Congress in enacting the Jury System Improvement Act of 1978, Pub. L. No. 95-572, 95 Stat. 2453 (amending 28 U.S.C. § 1861 (1976)), was to assure that juries be representative of a fair cross-section of the community. See notes 183-86 supra and accompanying text.

\(^{189}\) *See In re* Boise Cascade Sec. Litigation, 420 F. Supp. at 104 (it must be apparent that any jury chosen to sit on a case for six months will not be a fair cross-section of the community at large). *See also* ILC Peripherals Leasing Corp. v. IBM, 455 F. Supp. 423, 448 (N.D. Cal. 1978) *aff'd sub nom.* Memorex Corp. v. IBM, 555 F.2d 1379 (9th Cir. 1977); Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 70; and *supra* note 150.

process demands of fairness and rationality are upheld by jury trials of complex civil litigation. The approach taken by the Third Circuit recognizes for the first time a due process limitation on the right to jury trial. If a judge determines that a suit's complexity surpasses the capacity of a jury to decide rationally, the judge must deny a pretrial demand for a jury trial. The flexibility that such an approach allows is preferable to a strict adherence to the archaic distinctions between law and equity to determine jury trial rights in complex litigation. The due process approach adopted by the Third Circuit is sufficiently limited in scope. It will not lead to the eventual dilution of the right to jury trial in the vast majority of civil suits.

The due process approach, however, is not devoid of problems. The approach lends itself to an excessive exercise of judicial discretion since the judge decides whether a case is too complex for jury determination. The potential danger is that the judge's exercise of that discretion may be influenced by his desire to eliminate the jury so that he may use his decisionmaking power to interpose his sentiments and biases into the policy issues sought to be advanced in the lawsuit.

This note proposes the following approach to the problem of jury trials in complex litigation. Once a judge determines that submitting a particular complex case to a jury may violate due process rights, the alternative of wholesale elimination of the jury need not, and should not, be employed. In the court's effort to preserve due process rights, the right to jury trial should be afforded the utmost protection. The conflict between the right to jury trial and due process can be reconciled by resorting to innovative procedures such as the pretrial conference and reference to a master or by ordering separate trials of individual claims. If a judge refuses to exercise his discretion to order separate trials, he may be mandated by the seventh amendment to do so. If these devices cannot bring the case within the purview of jury competence, then the use of special juries, if declared constitutional, may be appropriate.

The proposed approach also may be the best method of assuring rational decisionmaking. Complex cases in their present configuration may be so intricate and voluminous that neither the judge nor the jury can render a rational decision. In the final analysis, then, if the quality of justice suffers in overly complex lawsuits, the best solution may be to place outer limits on the size of the litigation submitted to a factfinding body for resolution.

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