

SOX, STATUTORY INTERPRETATION, AND THE SEVENTH AMENDMENT: SARBANES-OXLEY ACT WHISTLEBLOWER CLAIMS AND JURY TRIALS

Jarod S. Gonzalez*

“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*¹

I. INTRODUCTION

In the early part of the twenty-first century, corporate fraud and greed led to the downfall of two major multinational corporations, Enron and WorldCom.² Corporate scandals caught the attention of the general public, corporations, Wall Street, and Congress like few scandals ever have before.³ The primary victims of the scandals—company employees, investors, and pensioners—suffered greatly from the companies’ deceptive practices and ultimate collapses.⁴ Investigations into these debacles revealed that certain employees in these companies had identified the fraudulent practices that ultimately led to the destruction of their corporations,⁵ yet these employees were discouraged from reporting the practices because of a lack of legal protection for whistleblowers.⁶ The few

* Assistant Professor of Law, Texas Tech University School of Law; B.B.A., *summa cum laude*, University of Oklahoma, 1997; J.D., with highest honors, University of Oklahoma College of Law, 2000. Many thanks to Joseph Moody and Hannah Sussman for research assistance and Sandra Sperino from Saint Louis University School of Law for comments and suggestions concerning prior drafts of this article. I am solely responsible for any mistakes or errors that appear.

1. 293 U.S. 474, 486 (1935).

2. STEPHEN M. KOHN, MICHAEL D. KOHN, AND DAVID K. COLAPINTO, *WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES*, at xi (2004).

3. *See, e.g.*, *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 74 (Ind. Ct. App. 2002) (“With the sole exception of the war on terrorism, no issue dominates current thought more than the corporate and accountancy ethical scandals which have rocked our country.”).

4. KOHN, *supra* note 2, at xii.

5. *Id.*

6. *Id.* Although a variety of federal and state laws provide protection for certain types

corporate insiders who risked their careers in an attempt to correct the fraudulent practices, Cynthia Cooper and Sherron Watkins, were hailed as heroes by Time Magazine in 2002.⁷ Congress, responding to the outcry from the general public, acted swiftly to provide comprehensive federal protection for corporate employees who reported corporate fraud by enacting the Public Company Reform and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act.⁸ On July 30, 2002, President Bush signed the Sarbanes-Oxley Act into law.⁹ The Act aimed to destroy the “corporate code of silence” promoted by the lack of comprehensive legal protection for corporate whistleblowers.¹⁰

The Sarbanes-Oxley Act (“SOX”) contains four key provisions designed to protect whistleblowers. Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, contains a traditional civil anti-retaliation provision. Employers covered by SOX, including publicly traded corporations and their contractors, subcontractors, and agents, are prohibited from retaliating against employees who report suspected corporate fraud or Securities and Exchange Commission (SEC) violations.¹¹ The civil protections are limited to employees of publicly traded companies.¹² In addition to civil liability, SOX criminalizes retaliation against employee whistleblowers. Under the amended obstruction of justice statute, any person who

knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under

of whistleblowers, neither Texas state law nor federal law protected the whistleblowers of Enron and WorldCom.

7. Richard Lacayo and Amanda Ripley, *Persons of the Year*, TIME, Dec. 22, 2002, at 30.

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

9. Statement by President George W. Bush Upon Signing H.R. 3763, 38 WEEKLY COMP. PRES. DOC. 1286 (July 30, 2002).

10. KOHN, *supra* note 2, at xiii.

11. Sarbanes-Oxley Act of 2002 § 806 (codified at 18 U.S.C. § 1514A(a) (2002)). Section 806 of SOX was originally drafted by the Senate Judiciary Committee as Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002. KOHN, *supra* note 2, at 4. The corporate whistleblower provision, passed unanimously by the Senate Judiciary Committee, was incorporated into the final version of the Sarbanes-Oxley Act by way of the Leahy-McCain Amendment. KOHN, *supra* note 2, at 4. The Senate adopted the amendment on July 25, 2002. 148 CONG. REC. S7365-02 (daily ed. July 25, 2002). Senator Patrick Leahy was the principal sponsor of the corporate whistleblower law. KOHN, *supra* note 2, at 4.

12. 18 U.S.C. § 1514A(a) (2000)

this title or imprisoned not more than 10 years, or both.¹³

In addition, SOX prohibits retaliation against corporate whistleblowers who complain to auditing committees concerning questionable accounting practices.¹⁴ Finally, attorneys who practice before the Securities and Exchange Commission are now required to “report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof).”¹⁵

The heart of the whistleblower protection offered by SOX is the anti-retaliation provision contained in section 806. Section 806 adopts a two-track enforcement system that is unique in employment discrimination law. The first track is similar to the administrative procedures available under the whistleblower provisions of other federal statutes.¹⁶ The corporate whistleblower can file an administrative complaint with the Occupational Safety & Health Administration (OSHA)¹⁷ and an OSHA investigator will investigate the complaint and make findings.¹⁸ Objections to the findings of an OSHA investigator are filed with the Chief Administrative Law Judge in the United States Department of Labor.¹⁹ Administrative hearings are conducted by an Administrative Law Judge (ALJ) in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges.²⁰ The ALJ’s decision can be appealed to the Administrative Review Board (acting on behalf of the

13. 18 U.S.C. § 1513(e) (2000).

14. KOHN, *supra* note 2, at xiii.

15. 15 U.S.C. § 7245 (2000).

16. *E.g.*, 49 U.S.C. § 42121 (2002) (Aviation Investment and Reform Act for the 21st Century); 49 U.S.C. § 60129 (2002) (Pipeline Safety Act); 42 U.S.C. § 7622 (1977) (Clean Air Act); 42 U.S.C. § 5851 (1992) (Energy Reorganization Act); 42 U.S.C. § 6971 (1980) (Solid Waste Disposal Act); 5 U.S.C. § 1221 (1994) (Whistleblower Protection Act).

17. *See*, 18 U.S.C. § 1514A(b)(1)(A) (2000) (requiring complaints to be filed with Secretary of the Department of Labor). The Secretary delegated to the Assistant Secretary of OSHA the responsibility to receive and investigate SOX complaints. Order Delegating Responsibility for Administration of SOX Regulations, 67 Fed. Reg. 65008 (Oct. 22, 2002).

18. *See* 18 U.S.C. § 1514A(b)(2)(A) (requiring that the procedure used shall be the same as found in 49 U.S.C. 42121(b)(1)). The rules and regulations concerning the SOX administrative procedure generally follow the rules and procedures set forth in the employee protection provisions of the AIR 21 Act, which Congress enacted to protect airline employees engaged in protected whistleblowing activities from retaliation by air carriers; 49 U.S.C. § 42121(b). OSHA promulgated regulations that govern procedures and time frames for handling discrimination complaints under Title VIII of Sarbanes-Oxley. 69 Fed. Reg. 52,104 (Aug. 24, 2004). *See* 29 C.F.R. § 1980.103 (2005) (detailing regulations for filing of discrimination complaint); § 1980.104 (creating procedures for investigating complaints); § 1980.105 (detailing procedures for issuance of findings and preliminary orders).

19. *See* 29 C.F.R. § 1980.106(a) (detailing the procedure for objecting to a preliminary order).

20. *Id.* at § 1980.107 (requiring hearings to be conducted in accordance with the rules codified in 29 C.F.R. § 18(A)).

Secretary of Labor).²¹ Judicial review of the Administrative Review Board's decision is available in the appropriate federal court of appeals.²²

Unlike other federal whistleblower statutes, an option exists permitting a SOX complainant to take his or her case to federal court if the Secretary of Labor has not issued a final decision on the administrative complaint "within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant."²³ The whistleblower provision gives claimants in that situation the right to bring "an action at law or equity for de novo review" in the appropriate federal district court, regardless of the amount in controversy.²⁴ In short, the claimant may re-file the case in federal district court if the case is litigated for at least 180 days within the Department of Labor (DOL) without a final ruling, so long as the claimant does not engage in any "bad faith" conduct designed to delay DOL proceedings. One commentator claims that Congress provided the right to re-file because prior claims filed under other federal whistleblower laws and administered by the DOL tended to languish within the department for years.²⁵ The federal court escape clause allows claimants to bypass that particular problem.²⁶

Although SOX provides for a private right of action in federal court under the above-described conditions, the statute does not explicitly state whether such an action can be tried before a jury.²⁷ Senator Leahy, the principal sponsor and author of the SOX whistleblower provision, introduced legislative history supporting the congressional intent to provide the right to a jury trial.²⁸ However, the lack of an explicit guarantee in the

21. *Id.* at § 1980.110 (stating that requests for review must be filed with the Administrative Review Board).

22. *See* 18 U.S.C. § 1514A(b)(2)(A) (2000) (delineating procedure governed by 49 U.S.C. § 42121(b)); 49 U.S.C. § 42121(b)(4)(A) (2002) ("Any person adversely affected or aggrieved by a [final order issued by the Secretary of the Department of Labor] may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation.").

23. 18 U.S.C. § 1514A(b)(1)(A)-(B)

24. *Id.*

25. KOHN, *supra* note 2, at 8.

26. *Id.* at 9.

27. *Compare* 18 U.S.C. § 1514A(b)(1)(B) (granting the right to bring a SOX whistleblower action at law or equity for de novo review in the appropriate district court) with 42 U.S.C. § 1981a(c) (2000) ("If a complaining party [Title VII plaintiff] seeks compensatory or punitive damages under this section- any party may demand a trial by jury.").

28. 148 CONG. REC. S7420, 7420 (daily ed. July 26, 2002) ("Only if there is not final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she [] bring a de novo case in federal court with a jury trial available (See United States Constitution, Amendment VII; Title 42 United States Code, Section 1983).").

statute casts doubt on whether federal courts will uniformly interpret the statute or the Seventh Amendment to the U.S. Constitution to guarantee the right to a jury trial. A federal district court in Texas has interpreted the statute as failing to provide the right to a jury trial.²⁹ The Texas court concluded that the Seventh Amendment does not guarantee the right to a jury trial because the statutory remedies are limited to equitable relief.³⁰ Other federal district courts have noted the issue as one of first impression, but postponed ruling on the question.³¹ If the first few instances of judicial interpretation of the private right of action are any indication of what is to come, the federal courts will undoubtedly struggle with the jury trial issue in SOX, just as they have with other federal employment discrimination statutes that do not explicitly provide the right to a jury trial.³²

Congress provided SOX whistleblowers with a private right of action allowing them to bring an action at law to seek legal relief in the form of back pay and special damages, such as for mental anguish, as well as an

29. *Murray v. TXU Corp.*, 2005 WL 135433, at *5 (N.D. Tex. June 7, 2005).

30. *Id.* at *3 (holding that SOX does not provide for special or punitive damages).

31. *See Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310, 325 (S.D.N.Y. 2006) (dismissing motion for jury trial without prejudice, pending consideration of the issue by other courts); *Hanna v. WCI Comtys., Inc.*, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) (denying motion for jury trial until all other motions have been ruled upon prior to trial).

32. *See Lorillard v. Pons*, 434 U.S. 575, 585 (1978) (finding statutory right to jury trial in a private civil action for lost wages under the Age Discrimination in Employment Act (ADEA) even though the ADEA contains no provision expressly granting a right to jury trial); *Lebow v. Am. Trans Air, Inc.*, 86 F.3d 661, 672 (7th Cir. 1996) (stating that the Seventh Amendment guarantees a right to jury trial for employees suing their employers under the Railway Labor Act for discharge resulting from union-related activities); *Waldrop v. S. Co. Servs., Inc.*, 24 F.3d 152, 157 (11th Cir. 1994) (holding that jury trials are constitutionally required for actions at law under Section 504 of the Rehabilitation Act); *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1523 (11th Cir. 1991) (finding the Jury Systems Improvement Act, a jury-duty discrimination statute, provides a right to jury trial under the Seventh Amendment); *Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993) (deeming jury trials not required for Employee Retirement Income Security Act Section (ERISA) 510 claims because ERISA rights are essentially equitable in nature); *Troy v. City of Hampton*, 756 F.2d 1000, 1003 (4th Cir. 1985) (denying the existence of a constitutional right to a jury trial in actions for reinstatement and lost wages under the Veterans Reemployment Rights Act); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (providing evidence that pre-1991 Civil Rights Act cases were held not to require jury trials in a Title VII action for reinstatement and backpay). *Cf. Curtis v. Loether*, 415 U.S. 189, 198 (1974) (stating a damages suit under Section 812 of the Civil Rights of 1968 is an action to enforce "legal rights" and thus Seventh Amendment preserved the litigant's right to a jury trial). *See also* Denise Drake Clemow & Lisa Hund Lattan, *ERISA Section 510 Claims: No Right to a Jury Trial Can Be Found*, 73 NEB. L. REV. 756, 778 (1994) (claiming that no constitutional right to jury trial exists for Employee Retirement Income Security Act Section 510 claims because remedies provided by Congress are only equitable); Robert L. Strayer, II, Note, *Asserting the Seventh Amendment: An Argument for the Right to a Jury Trial When Only Back Pay is Sought Under the Americans with Disabilities Act*, 52 VAND. L. REV. 795, 796 (1999) (arguing that the Seventh Amendment preserves the right to jury on Americans with Disabilities Act backpay claims).

action at equity to seek reinstatement, a clearly equitable remedy, if the 180-day DOL decision deadline is not met. As a matter of statutory interpretation, the statutory structure and language, and the legislative history indicate that the right to a jury trial applies in situations where the relief sought includes backpay or non-pecuniary damages. Judicial interpretation implying the right to a jury trial is sensible and avoids a direct confrontation with the Seventh Amendment. However, even if the Seventh Amendment is squarely confronted, the result is the same. SOX whistleblowers who seek backpay and other special damages have the constitutional right to a trial by jury because they seek to enforce legal rights to legal relief. Backpay under SOX is the quintessential legal remedy. As a practical matter, SOX whistleblower actions should routinely be tried to juries even when SOX plaintiffs seek reinstatement in conjunction with legal relief.³³

II. THE STATUTORY QUESTION: MEANING AND INTERPRETATION

A. *The Aftermath of Ambiguity*

Congress has demonstrated an ability and an inclination to explicitly provide the right to a jury trial for a federal cause of action when it so desires. The classic example of an explicit statutory guarantee to a jury trial in the employment discrimination context, is the 1991 Civil Rights Act (CRA), which amended Title VII of the Civil Rights Act of 1964.³⁴ Section 102 of the CRA amended Title VII to provide for the recovery of compensatory and punitive damages in intentional discrimination cases.³⁵ The CRA defined compensatory damages through inclusion and exclusion. Included in the CRA's definition of "compensatory damages" are "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses."³⁶ By contrast, the CRA excludes, "backpay, interest on backpay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964" from the realm of "compensatory damages."³⁷ The CRA states that "[i]f a complaining party seeks compensatory or punitive damages under this section- *any party may demand a trial by jury.*"³⁸

33. See, e.g., *Dairy Queen v. Wood*, 369 U.S. 469, 471-72 (1962) (holding that a trial concerning legal claims ensures the right to a trial by jury).

34. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2 U.S.C and 42 U.S.C.).

35. *Id.* at § 102 (codified in 42 U.S.C. § 1981a(a)(1) (2002)).

36. 42 U.S.C. § 1981a(b)(3).

37. *Id.* at § 1981a(b)(2).

38. *Id.* at § 1981a(c)(1) (emphasis added).

In contrast to the amended Title VII, SOX contains no explicit statutory right to a jury trial. SOX enables the corporate whistleblower to bring “an action at law or equity for de novo review” in federal district court, assuming that the administrative requirement is satisfied.³⁹ It also contains a remedial provision, providing that a prevailing employee is entitled to all make-whole relief.⁴⁰ Make-whole relief includes three categories of compensatory damages as characterized by Congress: reinstatement, back pay, and special damages.

In terms of the plain language of the statute, the remedial provision and the characterization of the action as being available “at law or equity for de novo review” is the sum of the evidence of Congressional intent. The absence of a specific guarantee in the plain language of the statute does not necessarily mean that jury trials are to be denied to SOX plaintiffs. Ambiguity in the statute does not preclude an interpretation that implies the right to a jury trial.

Legal academic literature is replete with articles addressing particular statutory construction methodologies.⁴¹ While some articles address whether one foundational theory of statutory interpretation is better than another,⁴² I do not stake any particular claim as to whether one methodology of statutory construction is preferable to another, or whether the various methodologies can be neatly separated. However, various interpretive techniques will be used in addressing whether the right to a jury trial should be implied. In difficult interpretive puzzles such as this, the advice from Chief Justice Marshall is particularly apt: “Where the mind labours to discover the design of the legislature, it seizes every thing [sic] from which aid can be derived”⁴³

39. 18 U.S.C. § 1514A(b)(1)(B) (2000).

40. 18 U.S.C. § 1514A(c)(1).

41. See William N. Eskridge, Jr. & Philip F. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (“[F]oundationalism is a flawed strategy for theorizing about statutory interpretation and ... a more modest approach, grounded upon ‘practical reason,’ is both more natural and more useful.”); Stanley Fish, *Editor’s Symposium: What is Legal Interpretation? There is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005) (arguing that there is no textualist position); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (advocating the textualist approach to statutory construction); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005) (describing the difference between textualism and intentionalism).

42. See *supra* text accompanying note 41.

43. *United States v. Fisher*, 6 U.S.(2 Cranch) 358, 386 (1805).

B. Statutory Construction

It is often stated that a statute should be construed so as to avoid raising serious constitutional questions.⁴⁴ The SOX language, structure, legislative history, and purpose plausibly indicate that Congress intended to grant the right to a jury trial on SOX claims that seek legal-as opposed to equitable-relief. Judicial adoption of such an interpretation is favored in order to avoid the thorny constitutional question.⁴⁵

1. Supreme Court Precedent

The United States Supreme Court has been reluctant to imply a right to a jury trial when the statute makes no mention of jury trials, or even juries for that matter. In *City of Monterey v. Del Monte Dunes at Monterey*, the Court refused to construe the Federal Rules of Civil Procedure Section 1983 to imply a right to a jury trial.⁴⁶ The right to a jury trial was denied merely because the statute authorizes a party who has been deprived of a federal right under the color of state law to seek relief through “an action at law, suit in equity, or other proper proceeding for redress.”⁴⁷ The phrase “action at law,” standing alone, does not necessarily implicate the right to a jury trial.⁴⁸

In *Feltner v. Columbia Pictures Television*, the Court held, consistent with federal courts of appeals decisions, that § 504(c) of the Copyright Act cannot be interpreted to imply the right to a jury trial.⁴⁹ Section 504(c) permits the recovery of “statutory damages,” which the court assesses in a

44. The statutory question should be considered before the constitutional question as it is a “cardinal principle” that courts must “first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.” *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 707 (1999) (alteration in original) (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998)); accord *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). However, the Supreme Court has been willing to forego extended consideration of the statutory question when two conditions are satisfied: first, the wording and construction of the statute permit plausible arguments on both sides of the jury trial issue; and second, the necessity for jury trial is so clearly settled by prior Seventh Amendment decisions that it would be futile to spend time on the statutory issue. *Curtis v. Loether*, 415 U.S. 189, 192, n.6 (1974).

45. See *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”), but see Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815-17 (1983) (criticizing statute of construction).

46. *Del Monte Dunes*, 526 U.S. at 707.

47. *Id.*

48. *Id.* at 707-08.

49. *Feltner*, 523 U.S. at 345.

just amount.⁵⁰ In this context, “court” refers to the judge, not jury.⁵¹ The Court contrasted the remedies provisions of the Copyright Act, which uses the term “court” in contexts that confer authority on the judge, with § 504(b) of the Act.⁵² Section 504(b) does not use the word “court” in addressing awards of actual damages and profits.⁵³ The Court stated that actual damages and profits are generally thought to constitute legal relief and intimated that entitlement to a jury trial exists for copyright actions that seek actual damages.⁵⁴

In *Granfinanciera, S.A. v. Nordberg*, the Court considered a bankruptcy case where a Chapter 11 bankruptcy trustee sued various corporations in order to avoid allegedly fraudulent transfers and to recover damages.⁵⁵ The corporations based their claim to a jury trial entirely on the Seventh Amendment.⁵⁶ The Court agreed with the corporations’ position that the 1982 version of 28 U.S.C. § 1411—a provision for jury trials in bankruptcy proceedings—did not provide a statutory entitlement to a jury trial.⁵⁷ The Court characterized § 1411 as “notoriously ambiguous” and noted that the confused legislative history of § 1411 had “puzzled commentators.”⁵⁸

In *Lorillard v. Pons*, the Court implied a statutory right to a jury trial in a private Age Discrimination in Employment Act (ADEA) action for lost

50. In pertinent part, 17 U.S.C. § 504(c) provides:

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just . . .

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

17 U.S.C. § 504(c) (2004).

51. *Feltner*, 523 U.S. at 346.

52. *Id.*

53. *Id.*

54. *Id.*

55. 492 U.S. 33, 33 (1989).

56. *Id.* at 40.

57. *Id.* at 40, n.3.

58. *Id.*

wages.⁵⁹ The relevant statutory language authorized individuals to bring actions for “legal or equitable relief,” and “the court . . . to grant such legal or equitable relief as may be appropriate.”⁶⁰ The Court’s decision rested on two factors. The statute uses the term “legal relief,” which the court determined to be a “term of art.”⁶¹ The Seventh Amendment entitlement to a jury trial on claims for legal relief is historic and well-known, thus raising the inference that Congress used the term “legal” with the intent to provide for a jury trial.⁶² In addition, the ADEA’s remedial provisions were expressly to be enforced in accordance with the Fair Labor Standards Act of 1938 (FLSA), which had been uniformly interpreted to provide a right to a jury trial on unpaid wage claims by private actors.⁶³ As the Court stated, “where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”⁶⁴ The Court presumed that Congress intended the FLSA right to jury trial to apply in the ADEA context.⁶⁵

2. SOX Statutory Structure, Statutory Language, and Legislative History

The statutory language in the civil action and remedial provisions should be interpreted to imply the right to a jury trial. The civil action provision authorizes a SOX plaintiff to bring an “action at law . . . for de novo review.”⁶⁶ “[A]ction at law” is synonymous with a jury trial.⁶⁷ The term “de novo review” in this statute could be interpreted to mean a de novo jury trial. The remedial provision authorizes the recovery of monetary damages as compensation, which constitutes legal relief.⁶⁸ Legal relief has traditionally been associated with entitlement to a jury trial.⁶⁹

59. 434 U.S. 575, 577 (1978).

60. *Id.* at 579, n.5; 29 U.S.C. § 626(b)-(c) (2000).

61. *Lorillard*, 434 U.S. at 583.

62. *Id.*

63. *Id.* at 580-81.

64. *Id.* at 581.

65. *Id.*

66. 18 U.S.C. § 1514A(b)(1)(B) (2000).

67. *See infra* note 104.

68. *See infra* note 109.

69. *See infra* note 104.

a. *The SOX civil action provision*

The statute authorizes a SOX plaintiff to bring an “action at law or equity for de novo review” in federal district court.⁷⁰ *Del Monte Dunes* instructs that the use of the phrase “action at law” does not necessarily imply the right to a jury trial, however the use of the language in SOX should certainly be considered in determining whether to imply such a right, since actions at law are synonymous with jury trials. Equity suits are not tried to juries,⁷¹ and it would seem at first blush that “de novo review” entails a decision by a judge, and not one made by a jury.

It is possible that Congress contemplated that some SOX plaintiffs would bring a federal action only seeking reinstatement as their only remedy, however unlikely that would be. In such a scenario, the action would be in equity because reinstatement is an equitable remedy, and thus no right to a jury trial attaches.⁷² However, in the typical SOX action, the plaintiff will seek reinstatement, back pay, and perhaps damages for reputational and mental anguish. This typical SOX action would presumably be at law, because legal relief in the form of monetary damages is sought.⁷³ Because an action at law seeking monetary damages is the quintessential jury claim, it would appear as though Congress intended for these types of claims to be tried by juries.⁷⁴

The following subparts examine what Congress likely meant by “de novo review” and whether it can be conducted by a jury. The conclusion is that Congress intended for juries to hear a trial de novo if a plaintiff brings a SOX action at law.

i. De novo review means de novo trial

De novo review is a legal term the meaning of which varies with the circumstances. Literally, de novo means “[a]new; afresh; a second time.”⁷⁵ The use of the term “de novo review” that immediately comes to mind is in reference to appellate review of a trial court’s legal decisions, such as whether the trial court’s jury instructions misstated the law, or whether the trial court properly granted summary judgment.⁷⁶ De novo review, in this

70. 18 U.S.C. § 1514A(b)(1)(B) (2000).

71. See *infra* notes 101-02.

72. See *infra* notes 101, 102, & 116.

73. See *infra* note 110.

74. 18 U.S.C. § 1514A(b)(1)(B) (2000).

75. BLACK’S LAW DICTIONARY 435 (6th ed. 1990).

76. See *Wall Data v. Los Angeles County Sheriff’s Dep’t*, 447 F.3d 769, 784 (9th Cir. 2006) (reviewing jury instructions de novo to determine whether instructions misstated the law); accord *United States v. Darif*, 446 F.3d 701, 709 (7th Cir. 2006); *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 235 (2d Cir. 2006); see also *Scaife v. Cook County*, 446

context, does not involve the taking of additional evidence; as such, it is not a trial de novo.

Historically, the term “de novo review” has its origins in equity cases, where appellate courts tried claims anew.⁷⁷ In the ancient English chancery system, de novo review of the chancellor’s decision “took the form of a trial de novo complete with the taking of testimony and other evidence.”⁷⁸ In the United States, review in equity cases gradually moved from a complete trial de novo to simply an appellate review of the record.⁷⁹ Today, in states with chancery courts, the appeal of an equity case generally involves the appellate court conducting de novo review of the factual findings and legal conclusions made by the chancellor, all based on the record made in the chancery court.⁸⁰ Currently, some level of deference is given to the chancellor’s factual findings because oral testimony is allowed in equity trials.⁸¹ Historically, only written testimony was permitted in equity cases.⁸²

Notwithstanding the watered-down version of de novo review in modern-day equity cases, de novo review generally entails at the very least “an independent determination of the issues.”⁸³ In other words, deference is not paid to the previous entity that made a particular decision, whether the entity is a trial court or an administrative agency. It is more difficult to ascertain whether the “independent determination” is to be based strictly on the record developed by the prior entity, or whether the entity engaging in the de novo review can make a determination based on additional evidence that is generated in the new proceeding. The term de novo review is used both ways.⁸⁴

F.3d 735, 738-39 (7th Cir. 2006) (reviewing the district court’s grant of summary judgment de novo, viewing the facts and drawing all inferences in the light most favorable to the nonmoving party).

77. See *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 573 (Or. Ct. App. 2003) (stating that the origins of “de novo review” are found in equity cases).

78. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U.L.REV. 11, 16 (1994).

79. *Id.* at 16-18.

80. See *Ark. Presbytery v. Hudson*, 40 S.W.3d 301, 305 (Ark. 2001) (noting that in equity cases, the appellate court reviews both law and fact); *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) (stating the standard of review to include errors of law and fact).

81. Kunsch, *supra* note 78, at 17-18. See *Ark. Presbytery*, 40 S.W.3d at 305 (stating a finding of fact is not reversed unless the lower court has clearly erred).

82. See Kunsch, *supra* note 78, at 17-18 (discussing the historical changes in the allowance of testimony in equity cases).

83. *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991). See also *United States v. First City Nat’l Bank of Houston*, 386 U.S. 361, 368 (1967) (finding that de novo review means the court should make an independent determination of the issues).

84. See 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 15.02 (3d. ed. 1999) (stating that under the de novo review standard, the court is authorized to make a judgment based on the agency record or on its own or a new remand

Under some federal statutes and laws, *de novo* review does not involve the taking of additional evidence and is confined to the record developed below.⁸⁵ In other federal statutes, *de novo* review involves the reviewing entity considering new or additional evidence, or conducting a complete trial *de novo*.⁸⁶ For SOX purposes, the question is whether “de

record); *see also* 5 B. MEZINES, J. STEIN, & J. GRUFF, ADMINISTRATIVE LAW § 51.04 (rev. ed. 1985) (stating that court engaged in *de novo* review is not confined to the administrative record, but may pursue whatever further inquiry necessary or proper to exercise the court’s independent judgment).

85. *See Perry v. Simplicity Eng’g*, 900 F.2d 963, 966 (6th Cir. 1990) (confining reviewing court to administrative record in ERISA benefits denial case, despite standard of review described as *de novo*); *see also* 28 U.S.C. § 636(b)(1)(B)(2000) (providing that the Federal Magistrates Act, provides for *de novo* district court review of a magistrate’s recommendations on pretrial motions; however, *de novo* review is based on the evidentiary record before the magistrate); *accord* *United States v. Raddatz*, 447 U.S. 667, 673 (1980) (discussing the Federal Magistrates Act).

86. The Privacy Act provides a civil action in federal district court to any individual who desires to challenge an agency’s determination not to amend the individual’s record. Privacy Act, 5 U.S.C. § 552a(g) (2004). “In such a case the court shall determine the matter *de novo*.” *Id.* (emphasis added). The “*de novo*” review in the Privacy Act “is not limited to or constricted by the administrative record.” *Doe v. United States*, 821 F.2d 694, 698 (D.C. Cir. 1987). The Federal Administrative Procedures Act (APA), provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.” Federal Administrative Procedures Act, 5 U.S.C. § 706(2)(F) (1996) (emphasis added). The courts have universally interpreted this provision as establishing a *de novo* review standard. In *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court referred to § 706(2)(F) as providing for *de novo* review, but confined the *de novo* review of agency actions to two circumstances. 401 U.S. 402, 415 (1971). The Court stated:

De novo review of whether the Secretary’s decision was “unwarranted by the facts” is authorized by § 706(2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action.

Id. Subsequent cases have revealed that the *Overton Park* decision makes it difficult to convince a court that *de novo* review is authorized under § 706(2)(F). However, it is understood that *de novo* review under the APA permits the consideration of extrinsic evidence outside of the administrative record. This therefore allows the plaintiff to put on his own case through new testimony and documentary evidence. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (discussing the *de novo* standard set out in *Overton Park*); *FTC v. U.S. Roofing Corp.*, 853 F.2d 458, 461 n.5 (6th Cir. 1988) (stating that *de novo* review allows the reviewing court to make its own findings of fact); *Stewart v. Potts*, 126 F. Supp. 2d 428, 434 (S.D. Tex. 2000) (explaining that an “arbitrary and capricious” standard of review does not equate to *de novo* review); *La Plaza Def. League v. Kemp*, 742 F. Supp. 792, 799 (S.D.N.Y. 1990) (allowing the entry of extrinsic evidence); *Cronkhite v. Kemp*, 741 F. Supp. 828, 829-30 (E.D. Wash. 1990) (describing the spectrum of appellate review); Edward C. Fritz, *Broadening Judicial Review Under the National Forest Management Act*, 3 Wis. ENVTL. L.J. 27, 35 (1996) (explaining the use of trial *de novo*).

novo review” means independent fact-finding based solely on what is in the administrative record, or whether “de novo review” involves a complete trial de novo in which additional evidence that is generated in the civil action itself is considered.

“De novo review” in SOX means a full de novo trial, in which the fact finder makes an independent determination of liability and damages based on evidence generated and introduced in the federal court case. The SOX legislative history reveals that the use of the word “review” in the statute is not intended to signify that the federal court fact finder is limited by any administrative record. It states that the SOX claimant may bring a “de novo case in federal court with a jury trial available. The legal definition of “case” is: “[a] civil or criminal proceeding, action, suit, or controversy at law or in equity.”⁸⁷ Congress used the term “de novo review” to indicate that a claimant could bring an entirely new suit in federal court. Nothing in the statute or the legislative history indicates that this new case must be limited to the administrative record before the Department of Labor. Congress did not expressly indicate that de novo review was to be confined to the administrative record; nor did it use the term “substantial evidence,” a term of art which is universally understood to mean review limited to the administrative record.⁸⁸

Interpreting “de novo review” in SOX as being limited to the administrative record is illogical because in most SOX actions brought in federal district court there is little, if any, agency record to review. Generally, SOX complainants who choose to file suit in district court do so before the administrative law judge holds an administrative hearing.⁸⁹ In those situations, the only relevant administrative document that the fact-finder could possibly “review” is an OSHA preliminary order.⁹⁰ The

87. BLACK'S LAW DICTIONARY 228 (8th ed. 2004).

88. See *Chandler v. Roudebush*, 425 U.S. 840, 862 n.37 (1976) (“In most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like ‘substantial evidence,’ which has ‘become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court.’”) (internal citations omitted).

89. See Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 29 C.F.R. § 1980.114(a) (2005) (granting complainants the right to bring an action for de novo review of their claim in federal district court if the Administrative Review Board has not issued a final decision within 180 days of the filing of the complaint).

90. *Hanna v. WCI Cmty. Serv., Inc.*, 348 F. Supp. 2d 1322, 1326-1331 (S.D. Fla. 2004). The OSHA preliminary order cannot become a “final decision,” and hence not reviewable in a de novo case, unless the SOX complainant fails to object to the preliminary order within 30 days of receiving the OSHA findings. See 49 U.S.C. § 42121(b)(2)(A) (2000) (“If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B).”); 29 C.F.R. §

OSHA investigator's preliminary written findings are based on a brief initial investigation and only go so far as to state "whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act."⁹¹ The OSHA preliminary findings are not made after a trial court-like hearing in which both parties have a fair opportunity to present their case.⁹² A trial court-like hearing only occurs after the preliminary order is appealed to an administrative law judge.⁹³ SOX plaintiffs who sue in federal district court after the 180 day deadline passes have only received a preliminary finding from OSHA. It is unjustifiable to conclude that Congress intended for SOX plaintiffs to be limited to arguing, in their "de novo federal court case", whether the OSHA investigator correctly determined if a SOX violation occurred. This is particularly true since the OSHA investigator has only conducted a brief investigation, without a trial court-like hearing, and the preliminary "reasonable cause" finding is not even a finding as to whether or not a violation actually occurred.

Some SOX actions may be brought after a substantial agency record has been developed. The statute permits complainants to bring an action in district court for de novo review "[i]f the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant."⁹⁴ For example, under the literal language of the statute, if an administrative law judge decides 300 days after the administrative complaint is filed that the employer did not violate SOX, the complainant may then appeal the administrative finding to the Administrative Review Board (ARB). While the ARB appeal is being conducted, the complainant is permitted to bring suit in federal district court because there has not been a "final decision" within 180 days. Similarly, if the complainant fully litigates the case through the administrative scheme and receives a "final decision" from the ARB 500 days after the administrative complaint was filed, the complainant may then bring suit in federal district court because the "final decision" of the Secretary did not occur within 180 days of the

1980.106(a), (b)(2) (2005) (establishing the possible avenues for judicial review of a discrimination complaint that has not been subject to full administrative review). If a SOX plaintiff sues in federal district court within 30 days of receiving the OSHA findings, the preliminary order should not be a "final decision." If a SOX plaintiff sues in federal district court more than 30 days after receiving the OSHA findings, presumably he would have needed to have objected to the findings at the administrative level in order to proceed with the de novo suit.

91. 29 C.F.R. § 1980.105(a) (2005)

92. *Hanna*, 348 F. Supp. 2d at 1331.

93. 29 C.F.R. § 1980.107.

94. 29 C.F.R. § 1980.114(a).

filing of the administrative complaint.⁹⁵ In both of these scenarios, the federal court fact-finder would have a substantial agency record and findings to review.

It is uncertain whether courts will interpret the statute to allow SOX plaintiffs who have already had an administrative proceeding, in the form of an ALJ hearing, ARB appeal, or both, to bring a de novo case in federal district court. The Department of Labor's position is that federal courts should apply collateral estoppel and *res judicata* principles if a complainant brings a SOX action in federal district court following extensive administrative litigation that has resulted in a decision by an administrative law judge or the ARB.⁹⁶ The application of these principles would preclude those suits on the grounds that Congress did not intend for SOX plaintiffs to get a second bite at the apple.

The Department of Labor believes it would be "a waste of the resource of the parties, the Department, and the courts for complainants to pursue duplicative litigation."⁹⁷ This position is understandable on efficiency grounds. Moreover, allowing a suit in federal district court after a full and complete administrative adjudication appears at odds with the appellate judicial review procedures allowed under SOX after a full administrative adjudication.⁹⁸ However, SOX would not be the first federal employment discrimination statute to be interpreted to allow complainants to fully litigate an administrative complaint and subsequently pursue a case de novo in federal court. For example, federal employees are permitted to pursue full administrative adjudication of their Title VII discrimination claims.⁹⁹ A federal employee who is displeased with the final decision of the Equal Employment Opportunity Agency may bring a civil action de novo in federal district court.¹⁰⁰ De novo review for federal employees

95. District Court Jurisdiction of Discrimination Complaints, 69 Fed. Reg. 52,111 (Aug. 24, 2004) (codified at 29 C.F.R. pt. 1980) ("This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending review by the Board. The Act might even be interpreted to allow a complainant to bring an action in Federal court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint.").

96. *Id.*

97. *Id.*

98. See 18 U.S.C. § 1514A(b)(2)(A) (2004) (stating that actions brought after a full administrative adjudication will be governed by the rules of 49 U.S.C. § 42121(b)); 49 U.S.C. § 42121(b)(4)(A) (2000) (indicating that while review is available it must conform to chapter 7 of Title 5 of the United States Code); 29 C.F.R. § 1980.112(a) (2000) ("Within 60 days after the issuance of a final order by the Board (Secretary) under §1980.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals . . .").

99. 42 U.S.C. § 2000e-16(c) (2000).

100. *Id.*; See Chandler v. Roudebush, 425 U.S. 840, 863 (1976) (holding that federal employees have a right to a trial de novo under Title VII).

asserting Title VII claims in federal district court involves a trial, not limited to the evidence from the administrative record, in which there must be judicial findings concerning liability and remedy based on the evidence introduced in the federal court case.¹⁰¹ This is a new trial on both questions of fact and issues of law conducted as if there had been no administrative trial in the first instance.¹⁰² If a second bite at the apple is permitted by SOX, the plain language of the statute and its legislative history indicate that *de novo* review entails a *de novo* trial in which the fact-finder is not limited to either the administrative record or findings.

ii. *De novo* review allows for a *de novo* jury trial

De novo review in SOX means *de novo* trial-- a new trial of the entire case in which a fresh, independent determination concerning liability and remedy is made. This determination is not limited to or constricted by the administrative record; nor is any deference due the Department of Labor's conclusions. Therefore, the next question is who, a judge or a jury, must make this independent determination. While the statute does not explicitly state whether a jury or a federal judge conducts the *de novo* review, it is likely that Congress intended for *de novo* jury trials.

The primary reason that the statute should be interpreted to allow a jury to conduct the *de novo* review is because according to the legislative history the whistleblower may bring a "*de novo* case in federal court with a *jury trial* available."¹⁰³ This evidences the Congressional intent. Although an understandable reaction would be to associate *de novo* review with decision-making by a judge, it would be unwise to do so here given that the statute specifically allows for the SOX action to be brought at law. Actions at law were typically tried by juries.¹⁰⁴ By contrast, in equity courts, the

101. See *Chandler*, 425 U.S. at 843-62 (stating a lack of intent by Congress for review of Title VII claims to be limited to administrative records); *Morris v. Rumsfeld*, 420 F.3d 287, 292 (3d Cir. 2006) (holding that a *de novo* trial under § 2000e-16(c) requires the court to decide the issues essential to the plaintiff's claims, including liability, without deferring to any prior administrative adjudication); *Scott v. Johanns*, 409 F.3d 466, 471-72 (D.C. Cir. 2005) ("Under Title VII, federal employees who secure a final administrative disposition finding discrimination and ordering relief have a choice: they may either accept the disposition and its award, or file a civil action, trying *de novo* both liability and remedy. They may not, however, seek *de novo* review of just the remedial award . . ."); *Timmons v. White*, 314 F.3d 1229, 1232-38 (10th Cir. 2003) (barring a plaintiff who brings a *de novo* action under 2000e-16(c) from limiting review to the issue of remedy only; § 2000e-16(c) action requires independent judicial determination of liability and remedy through a trial *de novo* not confined to the administrative record or administrative findings).

102. See *Timmons*, 314 F.3d at 1233-34 (holding that *de novo* review involves a reexamination of all aspects of a claim).

103. 148 CONG. REC. S7420 (daily ed. July 26, 2002) (emphasis added).

104. DAN B. DOBBS, LAW OF REMEDIES § 2.6(1) (2d ed. 1993) ("Equity courts did not

chancellor acted as the trier of fact and decision-maker on all issues in an action in equity-- the equity courts did not grant jury trials.¹⁰⁵ Finally, there are numerous examples of statutes in which a legislature has provided for a de novo jury trial. It would not be ground-breaking for Congress to have intended for a de novo jury trial in SOX litigation. In the civil law context, Congress provided for a de novo jury trial on the amount of an administrative penalty issued by the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969.¹⁰⁶ It has also provided for a de novo jury trial in civil actions brought by federal employees under the 1972 amendments to Title VII, which were previously discussed.¹⁰⁷ The jury trial right applies to federal employees who sue in court under § 2000e-16(c) because of the 1991 Civil Rights Act.¹⁰⁸

b. The SOX remedial provision

Congress provided for make-whole relief in the SOX statute, which includes "compensatory damages" and "special damages." A nuanced look at the statute reveals that "compensatory" and "special" damages include monetary damages. Monetary damages that compensate a party for his or her loss are generally viewed as legal relief.¹⁰⁹ *Feltner* and *Lorillard*,

grant jury trials; law courts did.").

105. *Id.* at § 2.6(2) ("The old separate courts of equity did not afford jury trials as of right. The chancellor acted as trier of fact as well as decision-maker on issues of conscience or rules.").

106. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 757 (codified at 30 U.S.C. §§823-959 (2000)); *Nat'l Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 393 (1976).

107. *See* 42 U.S.C. § 2000e-16(c) (2000) (citing an employee's right to bring a civil action on appeal from an agency decision); 42 U.S.C. § 1981a(a)(1), (c)(1) (2000) (granting complainants the right to recover compensatory and punitive damages as well as request a jury trial); *West v. Gibson*, 527 U.S. 212, 221, 227 (1999) (holding jury trial provision in 1981a(c) applies to complaining party who sues under 2000e-16(c) and seeks compensatory damages).

108. 42 U.S.C. § 2000e-16(c) (2000).

109. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710-11 (1999) ("The Court has recognized that compensation is a purpose 'traditionally associated with legal relief.'" (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998)); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) ("Money damages are, of course, the classic form of *legal* relief."); *Woodell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991) ("Generally, an award of money damages was the *traditional* form of relief offered in the courts of law.") (emphasis added); 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 2.06[1][c] (3d ed. 1997) (if a claim seeks only monetary damages, the claim will usually be legal and the parties entitled to a jury trial because monetary damages were the traditional form of relief offered in the courts of law); 1 JOHN N. POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 237d (5th ed. 1941) ("The award of mere compensatory damages, which are almost always unliquidated, is a remedy peculiarly belonging to the province of the law courts, requiring the aid of a jury in their assessment,

which focus on the Congressional use of “terms of art” that connote legal relief, instruct the SOX interpretation.

The statute generally provides that the prevailing SOX employee “shall be entitled to all relief necessary to make the employee whole.” The reference in § 1514A(c)(1) to “make-whole” relief does not necessarily clarify whether the relief available is legal, equitable, or both.¹¹⁰ But the description in § 1514A(c)(2) of reinstatement, back pay, and special damages as “compensatory damages” gives pause.¹¹¹ Compensatory damages are traditionally a legal remedy, but the statute is confusing if it truly means what it says.¹¹² Back pay could be viewed as compensatory damages and thus legal relief, as explained in Part III.¹¹³ Special damages in the SOX context, if interpreted to include non-pecuniary damages such as emotional distress, mental anguish, and reputational damages, are also appropriately characterized as “compensatory damages.”¹¹⁴ Such damages would clearly be legal relief. But reinstatement cannot be characterized as compensatory damages. The remedy of reinstatement has uniformly been viewed as injunctive relief and therefore equitable in nature.¹¹⁵

The answer to this dilemma requires an understanding of the whistleblower provisions in two federal statutes: the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) and the False Claims Act (FCA).¹¹⁶ The AIR 21 whistleblower protection provision prohibits an air carrier from discharging or otherwise discriminating against any employee because the employee provided information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.¹¹⁷ The FCA

and inappropriate to the judicial functions and position of a chancellor.”).

110. *Compare* *Rogers v. Hartford Accident Life & Ins. Co.*, 167 F.3d 933, 944 (5th Cir. 1999) (holding “make whole relief” is actually compensatory, i.e., legal, relief not recoverable under ERISA § 502(a)(3)) *with* *Squires v. Bonser*, 54 F.3d 168, 172-73 (3d Cir. 1995) (holding reinstatement, an equitable remedy, advances the policy goals of make-whole relief and deterrence in a way in which money damages cannot).

111. 18 U.S.C. § 1514A(c)(2) (2000); *see supra* note 41 (citing articles addressing particular methods of statutory construction).

112. *See supra* note 110 (citing case law defining monetary damages as legal relief).

113. *See infra* Part III.A.2.b.

114. KOHN, *supra* note 2, at 108.

115. *See* *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002) (referencing a petitioners brief conceding injunction is an inherently equitable remedy); *Lorillard v. Pons*, 434 U.S. 575, 583 n.11 (1978) (“judgments compelling ‘employment, reinstatement or promotion’ are equitable”); DOBBS, *supra* note 104, at §§ 1.2, 6.10(5) (explaining how reinstatement is an equitable remedy as it is essentially injunctive relief and historically the injunction was an equitable remedy).

116. 49 U.S.C. § 42121 (2000); 31 U.S.C. § 3730(h) (2000).

117. 49 U.S.C. § 42121(a) provides:

Discrimination against airline employees.—No air carrier or contractor or

whistleblower protection provision protects employees who report their employers who have submitted fraudulent bills to the United States Government.¹¹⁸

The remedial elements of both the AIR 21 and the FCA whistleblower provisions are crucial to understanding the remedial portion of the SOX whistleblower provision.¹¹⁹ SOX provides that DOL administrative proceedings will be governed by the “rules and procedures” of AIR 21, 49 U.S.C. § 42121(b).¹²⁰ Section 42121(b)(3)(B) details the remedies

subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal Law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

118. 31 U.S.C. § 3730(h) (2000). See *Neal v. Honeywell*, 191 F.3d 827, 829 (7th Cir. 1999) (“The False Claim Act, 31 U.S.C. §§ 3729-31, penalizes contractors who submit fraudulent bills to the United States. Private citizens may pursue *qui tam* actions under the Act, taking a portion of the recovery as reward (and incentive) for their efforts.”). According to BLACK’S:

“*Qui tam*” is abbreviation of Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*” meaning “Who sues on behalf of the King as well as for himself.” It is an action brought by an informer, under a statute [here the False Claims Act] which establishes a penalty for the commission or omission of a certain act [here submitting fraudulent bills to the federal government], and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution. It is called a “*qui tam* action” because the plaintiff states that he sues *as well* for the state as for himself.

BLACK’S LAW DICTIONARY 1251 (6th ed. 1990). In addition to providing the right to file a *qui tam* action, the Act also contains a whistleblower-protection provision, which prohibits retaliation against employees who turn in their employers for violating the Act. 31 U.S.C. § 3730(h) (2000).

119. 49 U.S.C. § 42121(b)(3)(B) (2005); 31 U.S.C. § 3730(h) (2000).

120. See 18 U.S.C. § 1514A(b)(2)(A) (2004) (“IN GENERAL. — An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title

available to a prevailing AIR 21 complainant by stating that if a violation occurs, the Secretary of Labor shall order the air carrier to “(i) take affirmative action to abate the violation, (ii) reinstate the complainant to his or her position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; *and (iii) provide compensatory damages to the complainant.*”¹²¹ Although compensatory damages are often viewed as encompassing both pecuniary and non-pecuniary damages¹²², the AIR 21 whistleblower statute views “compensatory damages” as primarily non-pecuniary, separate and apart from pecuniary damages such as back pay.¹²³ This is not surprising given that the AIR 21 remedial provision was modeled, to some extent, after other federal whistleblower remedial provisions, such as the one in the Energy Reorganization Act (ERA).¹²⁴ It is established law that “compensatory damages” are available under the ERA whistleblower provision and other environmental whistleblower statutes and that “compensatory damages” under these statutes means non-pecuniary damages, which include recovery for mental anguish, emotional distress, pain and suffering, humiliation, and loss of professional reputation.¹²⁵ The law in this area was clear at the time Congress enacted

49, United States Code.”). A person who alleges retaliation in violation of SOX may seek relief by “filing a complaint with the Secretary of Labor.” 18 U.S.C. § 1514A(1)(a) (2000).

121. 49 U.S.C. § 42121(b)(3)(B) (2005) (emphasis added).

122. See RESTATEMENT (SECOND) OF TORTS § 903 (1979) (“Compensatory damages are the damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.”). Compensatory damages are divided into two categories: pecuniary and non-pecuniary. *Id.* §§ 905-906. Non-pecuniary compensatory damages include compensation for bodily harm and emotional distress, and are awarded without proof of pecuniary loss. *Id.* § 905.

123. See *Lawson v. United Airlines, Inc.*, 2002-AIR-6, at 50 (Dep’t of Labor, Dec. 20, 2002) (holding compensatory damages under AIR 21 statute may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation).

124. See, e.g., Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 67 Fed. Reg. 15,454 (Apr. 1, 2002) (interim final rule) (showing that in drafting regulations governing AIR 21, Assistant Secretary of OSHA gave consideration to the whistleblower regulations of the ERA, when appropriate).

125. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, electronic slip op. at 31-35 (ARB Feb. 9, 2001), *aff’d sub. nom.* *Georgia Power Co. v. U.S. Dep’t of Labor*, No. 01-10916 (11th Cir. 2002) (unpublished) (awarding \$250,000 in compensatory damages for emotional distress and damage to professional reputation); *Van der Meer v. W. Kentucky Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-38 (ARB Apr. 20, 1998) (awarding \$40,000 in compensatory damages for public humiliation); *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, No. 93-ERA-24 (Dep’t of Labor, Feb. 14, 1996) (awarding \$40,000 in compensatory damages for emotional pain and suffering); *Trueblood v. Von Roll America, Inc.*, 2002-WPC-3 to 6, 2003-WP-1 (Dep’t of Labor, Mar. 26, 2003) (awarding \$50,000 in compensatory damages for mental anguish, anxiety, and damage to career aspirations); *Michaud v. BSP Transp., Inc.* ARB No. 97-113, ALJ Case No. 95-STA-29 (ARB Oct. 9, 1997).

SOX in July 2002.¹²⁶ Although little administrative case law interpreting “compensatory damages” under AIR 21 existed at the time SOX was enacted, there is no reason to believe that “compensatory damages” in AIR 21 means anything different than what it means under the ERA and other whistleblower statutes administered by OSHA. Indeed, six months after SOX’s enactment, an Administrative Law Judge ruled perfunctorily in an AIR 21 case that the AIR 21 statute contemplated the possible award of compensatory damages, which included awards for emotional pain and suffering, mental anguish, embarrassment, and humiliation.¹²⁷ Therefore, it would not be a stretch to conclude that SOX remedies include compensatory damages, meaning recovery for non-pecuniary loss, in order to align with AIR 21 and ERA law.¹²⁸

The potential counter argument is that for federal court actions, the SOX whistleblower statute does not explicitly adopt the AIR 21 Rules and Procedures.¹²⁹ Indeed, adoption of the AIR 21 Rules and Procedures would have been illogical because they are designed to align SOX administrative proceedings with AIR 21 administrative proceedings on procedural issues.¹³⁰ In any event, the statutory reference to the AIR 21 Rules and Procedures should in no way be interpreted to incorporate AIR 21 remedies. The Rules and Procedures are not remedies, despite the incorporation of § 42121(b) in its entirety into the statute.¹³¹ Moreover, the statute specifically states that the remedies available in SOX administrative and federal court actions are provided in the remedial provision.¹³² If Congress intended to explicitly incorporate the AIR 21 remedies, it could have easily done so; there would have then been no need for an independent SOX remedial provision. In spite of these arguments, the legislative history supports the position that courts should imply the right to a jury trial.

Congress considered compensatory damages as a remedy, separate

126. *See supra*, note 125.

127. *See supra* note 125.

128. SOX adopts the AIR 21 requirement that a complaint will be dismissed if it fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel decision alleged in the complaint. The “contributing factor” language is identical to language in the employee protection provisions of ERA and AIR 21 and thus should be interpreted pursuant to established interpretations of the phrase under ERA case law. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52,104, 52,106-107 (Aug. 24, 2004) (final rule).

129. *See* 18 U.S.C.A. § 1514(b)(2) (2000) (stating adverse party in complaint has right to “present evidence and cross-examine witness”).

130. *Supra*, note 18.

131. AIR 21 remedies are provided in 49 U.S.C. § 42121(b)(3)(B) (2000).

132. *See* 18 U.S.C.A. § 1514(b)(1),(c) (2000) (stating statutory prohibitions on harassment of witness or victim).

and apart from reinstatement and back pay, even though the explicit statutory language says otherwise. The section-by-section analysis of section 806 states: “[§ 1514A(c)] governs remedies and provides for the reinstatement of the whistleblower, back pay, *and compensatory damages to make a victim whole*, including reasonable attorney fees and costs, as remedies if the claimant prevails.”¹³³ The compensatory damages referenced do not specifically include damages for mental anguish, emotional distress, reputational injury, and the like, but the use of the phrase “to make a victim whole” certainly supports such a statutory interpretation.¹³⁴ If Congress viewed compensatory damages, back pay, and reinstatement as separate remedies, it becomes apparent why Senator Leahy stated in the legislative history that jury trials are available in SOX actions.¹³⁵ Congress could rightfully have considered back pay and non-pecuniary damages, like reputational and mental anguish damages, to be legal relief in which the Seventh Amendment right to jury trial would attach.¹³⁶

An inquiry into the legislative history would be more determinative if it included more than merely Senator Leahy’s statements about jury trial guarantees and the remedial provision in the section-by-section analysis. Unfortunately, those two pieces of information appear to be the only clues in the legislative history; there is nothing else in the legislative history that would either support or undermine the idea that Congress intended to

133. 148 CONG. REC. S7418 (daily ed. July 26, 2002); CORPORATE FRAUD RESPONSIBILITY: A LEGISLATIVE HISTORY OF THE SARBANES-OXLEY ACT OF 2002, Vol. 3, Doc. No. 85, Corporate and Criminal Fraud Accountability Act of 2002, S. REP. NO. 107-146, at 13-14 (William Manz ed., William S. Hein & Co., Inc. 2003) [hereinafter CORPORATE FRAUD RESPONSIBILITY] (emphasis added).

134. CORPORATE FRAUD RESPONSIBILITY., *supra* note 133.

135. *See*, 148 CONG. REC. S7418, S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy) (noting that an employee may bring a “de novo case in federal court with a jury trial available,” once administrative proceedings have been exhausted).

136. Culling the legislative history of a statute for signs of intended Congressional meaning, especially when the legislative history is sparse, is a challenging task. The interpreter who takes such a route should remind himself of the possible unreliability of such history and the fact that the exercise is something of a construct because a collective entity cannot have an “intent.” Nelson, *supra* note 41, at 362. It is nonetheless a useful exercise in the present case. The SOX statute uses remedial terms of art that are intended to convey a particular legal meaning. The meaning can be derived from the way in which the law of remedies tends to define those particular words. However, the interpreter must be open to evidence that Congress attached a specific meaning to a particular term, especially when that evidence supports an interpretation that is consistent with remedies law. *See e.g.*, Eskridge & Frickey, *supra* note 41, at 356 (“[T]he original expectations of the Congress that enacted the statute . . . are important in a democracy where the legislature is the primary source of lawmaking The most authoritative historical evidence is the legislative history of the statute, because it is a contemporary record made by the enacting legislators. In some instances, the legislative history may provide an example or suggest an application that squarely fits within a subsequent interpretive problem.”).

guarantee the right to a jury trial.

If one accepts the argument that Congress adopted the AIR 21/ERA interpretation of compensatory damages to include reputational and mental anguish damages, which the legislative history seems to support, it would follow that Congress also intended to provide for legal relief.¹³⁷ For those unwilling to accept that reasoning, a more satisfying interpretation is available through comparing the SOX whistleblower provision to the FCA whistleblower provision.

It is a well-known principle of statutory construction that when a federal statute is almost identical to another previously-enacted federal statute, the judicial interpretation of the language from the initial federal act is persuasive evidence of the meaning of language in the later statute. This principle of statutory construction holds even if the later statute makes no reference to the original statute.¹³⁸ This concept is related to the doctrine that related statutes should be read in *pari materia*.¹³⁹

The SOX and FCA whistleblower statutes attack similar evils; both statutes protect employees from retaliation for reporting fraud by employers. SOX prohibits retaliation for reporting *corporate* fraud while the FCA prohibits retaliation for reporting *governmental* fraud. It is not surprising that remedial provisions of both statutes are similar. In fact, they are almost identical.¹⁴⁰ That Congress appears to have borrowed the

137. Eskridge & Frickey, *supra* note 41, at 355 (noting that textual analysis of a statute sometimes involves looking “to similar provisions in other statutes, especially those regulating similar things.”).

138. See 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 52.02 (6th ed. 1984) (“The fact that a federal statute is almost a literal copy of another federal statute is persuasive evidence of a reenactment of that statute; it is therefore proper to the decision construing the statutory language of the original statute. It is not necessary for the statutes to be identical in order for the rule to apply; as an example, cases construing the Railroad Revitalization & Regulatory Reform Act are relevant to analyze the Federal Motor Carrier Act.”).

139. See *id.*, at § 51.03 (asserting that in determining whether a statute should be read in *pari materia*, the guiding principle is that if it is natural and reasonable to think that the understanding of members of the legislature be influenced by another statute, then a court called on to construe the act in question should allow itself to be similarly influenced).

140. The FCA remedial provision, 31 U.S.C. § 3730(h) (2000), states: “Any employee who is discharged . . . shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.” The primary difference between SOX and the FCA is that the FCA provides for double back pay. The SOX legislative history demonstrates that § 2010, Corporate and Criminal Fraud Accountability Act of 2002, as introduced to the Senate on March 12, 2002, contained the double back pay remedy. See CORPORATE FRAUD RESPONSIBILITY, *supra* note 133 (indicating section 806 of SOX tracked almost exactly the provisions of § 2010); accord 148 CONG. REC. § 7418 (daily ed. July 26, 2002). Section 806, as enacted, does not contain a double back pay remedy. See 18

remedial language appearing in the FCA statute and inserted it within SOX leads to the conclusion that Congress intended FCA whistleblower case law to govern the remedial terms in the SOX statute, along with the right to a jury trial.¹⁴¹ If that is the case, Congressional intent to provide the opportunity for SOX plaintiffs to seek legal relief in the form of non-pecuniary damages and obtain a jury trial is evident.

Both SOX and the FCA allow for the recovery of “compensation for any special damages sustained as a result of the discrimination.”¹⁴² Prior to the passage of SOX, the federal courts of appeals had uniformly interpreted “special damages” in the FCA with respect to retaliation to include damages for emotional distress. Emotional distress as special damages was premised on the grounds that back pay and reinstatement are the usual consequences under the FCA for retaliation violations, while emotional distress damages are the unusual consequence of such a violation. Thus, emotional distress damages are special damages according to the established common-law meaning of “special damages.”¹⁴³ Appellate courts permit the recovery of emotional distress damages on the basis that emotional distress damages are “special damages” under the FCA despite the fact that they are not listed in the statute as an example of special damages.¹⁴⁴ The limited case law indicates that FCA retaliation cases have been tried by juries.¹⁴⁵ Because FCA whistleblower plaintiffs are entitled to a jury trial, SOX whistleblower plaintiffs should have the same right. Implying the right to jury trial in SOX actions would also be consistent with court decisions that have implied the right to a jury trial in other federal anti-discrimination statutes that provide for lost wages and other

U.S.C.A. § 1514(c)(2)(B). SOX also specifically allows for the recovery of expert witness fees. *Id.*, at § 1514 (c)(2)(C). The FCA does not specifically list expert witness fees as a form of special damages. 31 U.S.C. § 3730(h) (2000). Neither SOX nor the FCA contain a punitive damages remedy, although punitive damages were a part of the SOX remedial structure in S.2010, as introduced. CORPORATE FRAUD RESPONSIBILITY, *supra* note 133, at 10-11.

141. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“Words of art bring their art with them. They bear the meaning of their habitat And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”) (emphasis added).

142. 18 U.S.C.A. § 1514A (c)(2)(C) (2000); 31 U.S.C. § 3730(h).

143. See *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 (8th Cir. 2000) (asserting allegations sufficient to create a material issue of fact regarding entitlement to damages for emotional distress); *Neal v. Honeywell*, 191 F.3d 827, 832 (7th Cir. 1999) (establishing connection between award for emotional damages and evidence).

144. See, e.g., *Hammond*, 218 F.3d 886; *Neal*, 191 F.3d 827.

145. See *Neal*, 191 F.3d at 829 (“A jury agreed with her accusations. . .”); *Wilkins v. St. Louis Housing Auth.*, 198 F.Supp. 2d 1080, 1082-85 (E.D.Mo. 2001) (“This matter is before the court, following a jury trial. . .”).

damages.¹⁴⁶

Judge Posner advocates the utilization of the “imaginative reconstruction” perspective.¹⁴⁷ Imaginative reconstruction is an interpretive technique that requires a judge to “think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to case at bar.”¹⁴⁸ It is typically associated with intentionalists; however, not all commentators believe that textualists repudiate the concept.¹⁴⁹ Professor Nelson argues that textualists use imaginative reconstruction when deciding severability of a statute, how to conform a statute to a dubious precedent which the court is not prepared to overrule, in criticizing the use of imaginative reconstruction in particular cases, and interpreting certain ambiguous statutes.¹⁵⁰ While commentators may disagree as to the propriety of the technique, I believe it aids in deducing this interpretive puzzle.¹⁵¹

In addition to the typical items that have already been surveyed, the imaginative reconstructionist looks at the values and attitudes of the period in which the legislation was enacted, along with considerations drawn from a broadly based conception of the public interest.¹⁵² The SOX whistleblower statute was enacted in the wake of corporate scandals such as Enron and WorldCom that ultimately left investors and pensioners penniless. Congress chose to provide a judicial, and not merely administrative, remedy to future discharged corporate whistleblowers. The public has a stake in holding corporations accountable when whistleblowers are penalized for reporting corporate fraud because the public wants to preempt a replay of scandals like Enron. Against that background, it is likely that Congress would have intended the public to have a role in making findings concerning corporations who punish whistleblowers.¹⁵³ As a cross-section of the community representing the

146. See *Frizzell v. Sw. Motor Freight*, 154 F.3d 641, 642-44 (6th Cir. 1998) (holding that jury right implied in FMLA).

147. Posner, *supra* note 45, at 817.

148. *Id.*

149. Nelson, *supra* note 41, at 403-04.

150. *Id.* at 403-13.

151. The seminal example of imaginative reconstruction is Judge Learned Hand's opinion in *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785 (2d Cir. 1946). Judge Hand used imaginative reconstruction to decide whether a veteran's reemployment right provided in a federal statute should be construed narrowly or broadly based in part on the public circumstances at the time of the enactment. *Id.* at 788-89. Judge Hand used imaginative reconstruction because the statutory language was ambiguous. I advocate imaginative reconstruction because the statutory language in SOX is similarly befuddling.

152. Posner, *supra* note 45, at 818-20.

153. See, e.g., *Fishgold*, 154 F.2d at 788-89 (“Against that background [situation in September 1940 as to whether the United States would send troops overseas to war] it is not likely that a proposal would then have been accepted which gave industrial priority,

general public, the jury is the logical choice to serve as the conduit of the public interest in this area of public concern.

III. THE CONSTITUTIONAL QUESTION: SOX AND THE SEVENTH AMENDMENT

If the federal courts decline to imply the right to a jury trial from the SOX whistleblower statute, they must grapple with the constitutional question of whether the Seventh Amendment guarantees the right to a jury trial for SOX cases brought in federal court. According to Supreme Court precedent, the answer turns on whether the nature of the SOX action is best viewed as an action at law or in equity, and whether the nature of the relief provided by the statute is legal or equitable. The vast majority of practitioners, scholars, and judges lack a detailed knowledge of the historical divide between law and equity. Delaware is an example of a jurisdiction that maintains the historical distinction between law and equity, but it is the exception to the rule.¹⁵⁴ Most attorneys operate in civil procedure systems that have merged law and equity entirely. The federal civil procedure system, of course, is the prime example. The adoption of the Rules Enabling Act in 1934 and Federal Rule of Civil Procedure 2 in 1938, completed the merger of law and equity in the federal system.¹⁵⁵ Although “memories of the divided bench” have faded,¹⁵⁶ the distinction between law and equity is of considerable practical importance in determining whether the right to a jury trial exists on a statutory cause of action that does not expressly or impliedly grant a right to jury trial.¹⁵⁷

The jury trial clause of the Seventh Amendment states: “In Suits at common law, where the value in controversy shall exceed twenty dollars,

regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties, or fifties, who had wives and children dependent upon them.”).

154. See *Weston Invs. v. Domtar Indus., Inc.*, No. 99C-06-041-FSS, 2002 WL 31011141, at *1 (Del. Super. Ct. Sept. 4, 2002) (“Delaware proudly guards the historic and important distinction between legal and equitable jurisdiction.”).

155. See 28 U.S.C. § 2072 (“The Supreme Court shall have the power to prescribe general rules of practice and procedure. . . .”); FED.R.CIV.P. 2 (“There shall be one form of action to be known as ‘civil action.’”). The creation of one form of action—the “civil action”—merged the systems of law and equity and eliminated the practice of having a “law side” and an “equity side,” with each “side” having its own particular rules and procedures. See 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 2.02[2][a] (3d ed. 1997) (noting the “merger of the systems of law and equity.”).

156. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1998) (recognizing that “memories of the divided bench, and familiarity with its technical refinements, recede further into the past.”)

157. See MOORE, *supra* note 155, at § 2.06[1][a] (explaining that the jury trial right exists for legal issues but not equitable or admiralty issues).

the right of trial by jury shall be preserved.”¹⁵⁸ The Supreme Court has stated that the Seventh Amendment right to a jury trial covers more than traditional common law actions that existed in 1791.¹⁵⁹ The right also applies to newly-enacted federal statutes that create legal rights and remedies.¹⁶⁰ An early Supreme Court case, *Parsons v. Bedford*, interpreted the Framers’ use of the term “common law” to include all suits in which “legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.”¹⁶¹ The *Parsons* court presumed the Amendment to embrace all suits “which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.”¹⁶² More recently, the Court stated that the applicability of the constitutional right to jury trial in actions enforcing statutory rights is “a matter too obvious to be doubted” if the statute creates legal rights and remedies which are enforceable in an action for damages in the ordinary courts of law.¹⁶³

Nonetheless, Congress maintains the power “to take some causes of action outside the scope of the Seventh Amendment by providing for their enforcement through a statutory proceeding or in a specialized court.”¹⁶⁴ For example, in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, the Board ordered the steel company to reinstate employees and pay back wages for engaging in unfair labor practices.¹⁶⁵ The company argued that it was constitutionally entitled to a jury trial, instead of a Board determination, because the lost wages award was equivalent to a monetary judgment.¹⁶⁶ The Court labeled the suit a “statutory proceeding” and, as such, not subject to the Seventh Amendment requirements.¹⁶⁷ Subsequent cases, refining *Jones & Laughlin* revealed that the Seventh Amendment is not applicable to administrative proceedings, at least when so-called “public rights” are concerned, due to the incompatibility between administrative adjudication and jury trials.¹⁶⁸ Similarly, the Seventh Amendment is not

158. U.S. CONST. amend. VII.

159. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.2 (2d ed. 1994).

160. See MOORE, *supra* note 155, at § 2.06[1][b] (asserting right to jury can be extended to claims derived from statutes).

161. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (emphasis in original).

162. *Id.*

163. *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (quoting *Rogers v. Loether*, 467 F.2d 1110, 1114 (7th Cir. 1972)).

164. 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2302.2.

165. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

166. *Id.* at 48.

167. *Id.*

168. See *Tull v. United States*, 481 U.S. 412, 418, n.4 (1987) (“[T]he Seventh Amendment is not applicable to administrative proceedings.”); *Atlas Roofing Co. v.*

implicated when Congress limits enforcement of statutory rights to specialized non-Article III courts, such as bankruptcy courts.¹⁶⁹

Under current Supreme Court case law, the SOX whistleblowers that remain in the SOX administrative scheme and do not opt out to federal court are not protected by the Seventh Amendment. An Administrative Law Judge will hear those cases; no jury will be involved at the administrative level. However, the Seventh Amendment right is implicated for the SOX whistleblowers that leave the administrative process for potentially better options in federal court. For those whistleblowers, the existence of the right to a jury trial depends on whether the SOX action resolves legal rights.¹⁷⁰ This entails a two-part analysis known as the “historical test.” One must first compare the SOX action to eighteenth century actions brought in the courts of law and equity in England to determine whether it is more analogous to legal forms of action existing at that time, or to equitable forms. Next, one must examine the nature of the relief sought, and the remedies, to determine whether the relief is more appropriately viewed as legal or equitable.¹⁷¹ Due to the inherent difficulties in divining a precise historical analogue, the second part of the test is generally viewed as the most important.¹⁷² If the SOX action is an action at law, one must also consider which particular issues in the case must be tried by a jury in order to preserve the substance of the common-law right as it existed in 1791.¹⁷³

A. *The Historical Approach*

The historical test traces its roots back to Justice Story’s 1812 circuit opinion in *United States v. Wonson*.¹⁷⁴ In *Wonson*, Justice Story held that in order to determine which civil cases the Seventh Amendment jury right applies to, courts must look to the English common law.¹⁷⁵ Justice Story

Occupational Safety & Health Review Comm’n, 430 U.S. 442, 460-61 (1977) (“[T]he Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding. . . .”); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) (“[T]he Seventh Amendment is generally inapplicable in administrative proceedings. . . .”).

169. See *Katchen v. Landy*, 382 U.S. 323, 337 (1966) (regarding bankruptcy, “there is no Seventh Amendment right to a jury trial for determination of objections to claims”); *but see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 (1989) (asserting that fraudulent conveyance action in bankruptcy court is subject to Seventh Amendment right to jury trial).

170. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

171. *Id.*; MOORE, *supra* note 155, at § 2.06[1][c].

172. *Tull*, 481 U.S. at 421 (1987); MOORE, *supra* note 155, at § 2.06[1][c] n. 12 (collecting cases).

173. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999).

174. 128 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

175. *Id.* at 750 (“Beyond all question, the common law here alluded to . . . is the

later expounded in *Parsons v. Bedford* that “suits at common law” referred to “suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized. . . .”¹⁷⁶ These two cases served as the foundation for the traditional Seventh Amendment analysis employed by the Supreme Court.¹⁷⁷

Various commentators have criticized the traditional Seventh Amendment approach. Charles Wolfram, a leading Seventh Amendment scholar, argues that the historical materials do not support the historical test’s allegiance to the English common law and concludes that the historical test is inconsistent with the “traditions of principled constitutionalism that have guided the Supreme Court in the interpretation of other commands of the Bill of Rights.”¹⁷⁸ Kenneth Klein labels the historical test a “two hundred year old myth” and analogized the historical test to the parable of the emperor’s new clothes.¹⁷⁹ Klein claims that no historical materials support the view that the Seventh Amendment’s reference to common law referred to English common law.¹⁸⁰ Akhil Reed Amar opines that the Supreme Court’s historical test is not the best reading of the amendment.¹⁸¹ Stanton Krauss bluntly states that the Supreme Court’s understanding of the Seventh Amendment is based on nineteenth century revisionist history.¹⁸² He concludes that Justice Story’s interpretation of the jury trial clause in *Wonson* and *Parsons* was not based on the clause’s text and history, but on the result that Story preferred.¹⁸³ Each of these commentators—Wolfram, Klein, Amar, and Krauss—

common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.”).

176. 28 U.S. 433, 446-47 (1830) (emphasis in original).

177. See, e.g., Rachael E. Schwartz, “Everything Depends on How You Draw the Lines”: An Alternative Interpretation of the Seventh Amendment, 6 SETON HALL CONST. L.J. 599, 600-02 (1996) (discussing the origin of the Seventh Amendment analysis).

178. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 731 (1973).

179. Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1005 (1992).

180. *Id.* at 1022 (“There is no recorded legislative history suggesting that the phrase ‘common law’ referred to the common law of England. Nor is support found in the records of the state debates, the Federalist Papers, or the writings of commentators of the time.”) (emphasis in original).

181. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, 89-90 (1998).

182. Stanton D. Krauss, *Commentary on Akhil Reed Amar’s the Bill of Rights: Creation and Reconstruction The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 475 (1999) (“Whatever its precise scope, the interpretation of the Jury Trial Clause that Justice Story propounded in *Parsons*, which he claimed to reflect the original understanding of its Creators, was pure *ipse dixit*. Worse yet, it seems clearly to have been wrong.”).

183. *Id.* at 478.

suggest various alternative approaches to the Seventh Amendment.¹⁸⁴

In spite of the criticism, the historical test's vitality has remained relatively constant over the last one hundred plus years and it appears unlikely that the test will be abandoned altogether by the Court.¹⁸⁵ Therefore, the remainder of the article focuses primarily on whether the Seventh Amendment guarantees the jury trial right on SOX actions under the historical test. My application of the SOX remedial scheme to the historical test shows that the Seventh Amendment does guarantee a jury trial in certain SOX actions. Furthermore, when the jury right attaches, the jury's primary role is making the factual determination as to whether the plaintiff has proven the elements of a SOX action and assessing damages. However, in light of the academic commentary criticizing the historical test, this part also applies the SOX action to various alternative approaches of the Seventh Amendment. The article ends by elaborating on the importance of the jury right in SOX actions.

184. See *infra* Part III.B.2.

185. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court reaffirmed the historical test in a regulatory takings claim brought under Section 1983. 526 U.S. 687 (1999). In deciding the Seventh Amendment question, the Court looked at whether the claims brought under Section 1983 were analogous to common law claims that provided legal relief. *Id.* at 708-11. The majority held that the § 1983 suit in question sought legal relief and therefore constituted an action at law within the meaning of the Seventh Amendment. *Id.* at 709-11. The majority then considered whether particular issues in the § 1983 suit were proper for determination by the jury under the Seventh Amendment. Justice Kennedy, writing for the majority, stated that history dictated whether particular issues in actions at law had to be tried by a jury, but noted that “[w]here history does not provide a clear answer, we look to precedent and functional considerations.” *Id.* at 718. The “functional consideration” in *Del Monte Dunes* was whether the issues in question were predominantly factual. Because the issue in the § 1983 action at law was predominantly a factual one, and factual issues are usually allocated to juries, the Court determined that the issue in question should go to the jury. *Id.* at 719-721. Although somewhat hazy, *Del Monte Dunes* indicates that “functional considerations” might in some circumstances be a part of the Seventh Amendment analysis. *Markman v. Westview Instruments, Inc.*, a patent case, could also be interpreted to stand for the proposition that function and process considerations play some part in a Seventh Amendment analysis, although *Markman* seems to view “functional considerations” differently than *Del Monte Dunes*. 517 U.S. 370 (1996). Regardless, at least one commentator opines that neither *Markman* nor *Del Monte Dunes* suggest any “radical change” to the traditional Seventh Amendment historical test. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 256 (2000). To the extent that the Supreme Court is open to expanding its Seventh Amendment analysis to include functional considerations, however the Court defines that term, it is unforeseeable that the Court intends to do away with the traditional approach altogether.

1. Nature of the Right

The first step in the historical test is to compare the SOX claim to historical legal forms of action and complaints in equity available in England circa 1791 in order to determine whether it is more analogous to legal forms of action existing at that time or to complaints appropriate at equity.¹⁸⁶ The answer to the first part of the test is not self-evident, in large measure because a SOX action could encompass both legal and equitable issues.¹⁸⁷ Indeed, Congress specifically provided for a complainant to bring the action at law or equity.¹⁸⁸ But in broad terms a SOX action is best characterized as an action at law.

A SOX whistleblower claim provides a remedy to an employee of a publicly-traded company who reports corporate fraud, either externally or internally, and suffers an adverse employment action because of the report.¹⁸⁹ Such an action has no exact counterpart in eighteenth century England. Indeed, there were relatively few publicly-traded companies in eighteenth century England.¹⁹⁰ The few such companies that existed were strongly tied to the English government and were substantially different from modern publicly-traded companies.¹⁹¹ Although no exact counterpart exists, English common law courts heard breach of contract, tort, and *qui tam* claims. A SOX whistleblower claim is essentially a specialized wrongful termination suit analogous to a breach of contract, tort, or *qui tam* claim that would likely have been brought in an English common law court and tried to a jury in the late 1700's.

The modern American employment at-will rule did not carry the day in eighteenth century England.¹⁹² The English rule presumed annual, fixed-

186. *Chauffeurs, Teamsters & Helpers Local 391 v. Terry*, 494 U.S. 558, 565 (1990).

187. *Id.* at 570 (“[Employees’] action against the Union [for breach of duty of fair representation] thus encompasses both equitable and legal issues. The first part of our Seventh Amendment inquiry, then, leaves us in equipoise as to whether [employees] are entitled to a jury trial.”)

188. 18 U.S.C. § 1514A(b)(1)(B) (2000).

189. 18 U.S.C. § 1514A(a)-(b).

190. Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from 18th Century England* 6 (Univ. of S. Cal. Law Sch. Law and Econ. Working Papers Series, Paper No. 24, 2005), available at <http://law.bepress.com/usclwps/art24>.

191. *Id.* at 27-28.

192. *See Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (“For well over a century, the general rule . . . in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”). The at-will rule did not appear as a staple of American employment law until the late nineteenth or early twentieth century and appears to have been spurred by Horace Wood’s 1877 treatise on master servant relations, which provided:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden

term employment.¹⁹³ The English rule, as expounded by William Blackstone¹⁹⁴, had its origins in feudal-era laws, such as the Statute of Labourers, which were designed to deal with labor shortages and deadly epidemics such as the plague.¹⁹⁵ The Statute of Labourers prohibited a servant from leaving employment before the end of a term, but also prohibited the master from discharging the servant before the end of a term absent reasonable cause.¹⁹⁶ Although the Statute of Labourers was later repealed, the presumption in favor of annual term employment with job protection for servants remained a part of English law throughout the eighteenth century.¹⁹⁷ Wrongful discharge claims brought by English servants circa 1791 were viewed as common-law breach of contract actions and tried by juries in common-law courts such as the King's Bench and Common Pleas.¹⁹⁸ Because an improper employment discharge in

is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H. G. WOOD, MASTER AND SERVANT § 134 (1877).

193. Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 859 (1983) ("In the eighteenth and nineteenth centuries, the English rule provided that unless expressed to the contrary, a term of employment was presumed to be for one year."). See *The King v. Inhabitants of Hampreston*, (1793) 5 T.R. 205, 207, 101 Eng. Rep. 116, 117 (K.B.) (unless otherwise specified, "hiring must be understood to be a hiring for a year.").

194. WILLIAM BLACKSTONE, 1 COMMENTARIES *413.

If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term

195. RICHARD CARLSON, EMPLOYMENT LAW 651 (2005).

196. See Statute of Labourers, 1349, 23 Edw. 3, c.1 (Eng.) (requiring that employment be for terms of years); Statute of Labourers, 1562 5 Eliz. 1, c.4 (Eng.) (repealing and recodifying English employment laws); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976); Heinsz, *supra* note 193, at 859.

197. See Heinsz *supra* note 193, at 859 ("In the eighteenth and nineteenth centuries, the English rule provided that unless expressed to the contrary, a term of employment was presumed to be for one year."); 25 EARL OF HALSBURY, HALSBURY'S LAWS OF ENGLAND 480-81 (3d ed. 1958) ("If a contract of hiring and service is . . . without limitation of time, there is a presumption that the hiring is for a year . . .").

198. See *Lebow v. Am. Trans Air, Inc.*, 86 F.3d 661, 668 (7th Cir. 1996) ("Employment by contract was the rule in eighteenth-century England, so an improper discharge would have been viewed as a [common-law] breach of contract."); accord *Stonehill Coll. v. Mass. Comm'n Against Discrimination*, 808 N.E.2d 205, 214 n.15 (Mass. 2004); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 783 (Conn. 1984). See also E. ALLEN FARNSWORTH, CONTRACTS, §§ 1.5, 11.2 (2d ed. 1990) (breach of contract actions were typically tried at common law in eighteenth-century England). Examples of wrongful discharge cases heard

eighteenth century England would have been viewed as a breach of contract claim remediable by the English common law, a SOX whistleblower action, which at its core is a wrongful discharge claim for implied breach of contract, is analogous to a common-law breach of employment contract claim and thus an action at law in which the right to jury trial is preserved by the Seventh Amendment.¹⁹⁹

Another apt analogy is to tort law. *Curtis v. Loether* and *Del Monte Dunes* affirm the general principle that a federal statutory claim that allows for monetary damages upon the violation of an imposed legal duty—just like SOX—sounds in tort, and thus a plaintiff asserting such a claim is entitled to a jury trial.²⁰⁰ *Curtis* concerned a suit for violations of the fair housing provisions of Title VIII of the Civil Rights Act of 1968, a race discrimination statute.²⁰¹ *Del Monte Dunes* involved a § 1983 action for deprivation of property.²⁰² In both cases, the Court explained why the statutory causes of action were best characterized as tort claims and clarified that a tort action seeking monetary damages, although provided for by statute and not by the common law, is generally a “suit at common law” for which the Seventh Amendment guarantees a jury trial.²⁰³

The *Curtis* Court stated that a Title VIII damages action sounds in tort because “the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach.”²⁰⁴ In *Del Monte Dunes*, the Court concluded that a § 1983 action fit within both the historical and modern definition of a tort claim in that “torts are remedies for invasions of certain rights, such as the rights to personal security, personal liberty, and property” and are “designed to provide compensation for injuries arising from the violation of

by English juries in common-law courts include *Fawcett v. Cash*, (1834) 110 Eng. Rep. 1026 (K.B.) and *Beeston v. Collyer*, (1827) 4 Bing. 309, 130 Eng. Rep. 786 (C.P.).

199. See, e.g., *Lebow*, 86 F.3d at 669 (wrongful discharge claim for engaging in union activities under Railway Labor Act analogous to common-law breach of contract action); *Waldrop v. S. Co. Servs., Inc.*, 24 F.3d 152, 156 (11th Cir. 1994) (unlawful discharge claim under Rehabilitation Act analogous to common-law breach of contract action); *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1524 (11th Cir. 1991) (constructive discharge claim under Jury System Improvements Act analogous to common-law breach of contract action); *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991) (unlawful discharge claim under Rehabilitation Act is closely analogous to breach of express or implied employment contract claim); *Rogers v. Exxon Research & Eng’g Corp.*, 550 F.2d 834, 838 (3d Cir. 1977) (ADEA suit for back wages is essentially a “routine contract action” in which the Seventh Amendment guarantees a jury trial).

200. *Curtis v. Loether*, 415 U.S. 189 (1974); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

201. *Curtis*, 415 U.S. at 189-90.

202. *Del Monte Dunes*, 526 U.S. at 693-94.

203. *Curtis*, 415 U.S. at 195-98; *Del Monte Dunes*, 526 U.S. at 707-33.

204. *Curtis*, 415 U.S. at 195.

legal duties.”²⁰⁵ Both Courts indicated that a statutory tort action for monetary damages is an action for which the jury right attaches because tort claims for monetary damages were triable to juries at common law.²⁰⁶ Other Supreme Court and federal appellate court cases also reflect this interpretation of the Seventh Amendment.²⁰⁷ Because SOX essentially defines a new legal duty, that publicly-traded companies cannot legally fire employees who report covered corporate fraud—and provides monetary compensation for injury caused by such a violation. As a result, a SOX plaintiff is entitled to back pay and special damages upon proof of a violation, a SOX action sounds in tort and the jury-trial entitlement applies.

The final analogy to *qui tam* actions available in eighteenth century-England, has instinctive appeal. During that time, the King’s Bench, an English common law court, had jurisdiction over common law writs of debt.²⁰⁸ Some of these writs of debt concerned *qui tam* actions—statutory causes of action by informers to recover statutorily imposed penalties.²⁰⁹ English law had a statute similar to the False Claims Act, that allowed an informer to recover penalties on behalf of himself and the King for spotting and reporting an illegal activity.²¹⁰ Such claims were tried at common law, presumably to juries.²¹¹ Analogizing SOX actions to these *qui tam* actions, which were brought as writs of debt at common law, is well-founded. English *qui tam* actions compensated informers for reporting illegal activity.²¹² The SOX action protects the jobs of employees who report illegal activity and ultimately provides make-whole relief to those who suffer an adverse employment action resulting from their report.²¹³

The *qui tam* action tried in the King’s Bench courts is the clearest

205. *Del Monte Dunes*, 526 U.S. at 727 (Scalia, J., concurring).

206. *Curtis*, 415 U.S. at 195-96 n.10; *Del Montes Dunes*, 526 U.S. at 715-19 (plurality opinion), 727-731 (Scalia, J., concurring).

207. See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) (“This Court has long assumed that . . . actions for damages to a person or property, are actions at law triable to a jury”); *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) (“The Seventh Amendment . . . entitled the parties to a jury trial in actions for damages to a person or property . . .”); *Lebow v. Am. Trans Air, Inc.*, 86 F.3d 661, 669 (7th Cir. 1996) (unlawful discharge suit under Railway Labor Act is comparable to common-law tort action); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 829 (4th Cir. 1994) (Rehabilitation Act is essentially a form of statutory tort).

208. Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 598-99 (1984).

209. *Id.* at 599.

210. *Id.*

211. Examples of *qui tam* cases heard by the King’s Bench include *Shipman v. Henbest*, (1790) 4 T.R. 109, 100 Eng. Rep. 921 (K.B.) (illicit sale of leather) and *Brooke v. Milliken*, (1789) 3 T.R. 509, 100 Eng. Rep. 705 (K.B.) (illicit sale of imported reprints of books originally written and published in the United Kingdom). KING, *supra* note 208, at n.100.

212. KING, *supra* note 208, at 599.

213. 18 U.S.C. § 1514A (2000).

eighteenth-century analogue to the modern-day SOX action. However, there is also historical evidence supporting the view that the modern-day SOX action is closely comparable to common-law breach of contract and tort actions, which were primarily tried to juries. In any event, each one of these close analogies supports the contention that the Seventh Amendment preserves the right to jury trial on SOX whistleblower claims.

2. The Nature of the Remedy

The second piece of the historical test focuses on the nature of the relief sought.²¹⁴ One must determine whether the SOX relief sought is legal or equitable in nature. In addition, one must consider whether at the time of the divided bench, the SOX remedies would have generally been sought in the courts of law or in the courts of equity.²¹⁵ To make such a determination, it is necessary to list the possible available remedies in a SOX action. The SOX remedial scheme is designed to “make whole” the prevailing corporate whistleblower.²¹⁶ “Make whole” relief includes reinstatement, back pay, special damages.²¹⁷

Historical and conceptual evidence demonstrate that, while reinstatement is an equitable remedy, back pay and special damages are legal remedies. Thus, in a SOX case in federal court where the plaintiff sues for reinstatement, back pay and special damages, the Seventh Amendment guarantees a jury trial because the plaintiff has asserted claims to legal remedies, back pay and special damages, even though an equitable remedy—reinstatement—is also asserted. That the right to equitable relief in the form of reinstatement is claimed does not vitiate the application of the jury right. In *Dairy Queen v. Wood*, the Court ruled that when two remedies are requested, one legal and one equitable, a jury trial is required so long as the right to the remedies turns on common issues of fact.²¹⁸ The Court embraced the concept of a constitutionally-required jury trial on all factual issues presented by claims for legal relief, even if those issues also concerned claims for equitable relief, and the equitable relief dominates the legal relief.²¹⁹ The analysis below elaborates and clarifies why SOX

214. See *supra* note 171.

215. *Tull v. United States*, 481 U.S. 412, 417-418 (1987) (citations omitted).

216. 18 U.S.C. § 1514A(c)(1) (“An employee prevailing in [a SOX action] shall be entitled to all relief necessary to make the employee whole.”); KOHN, *supra* note 2, at 102 (“The heart of a SOX damage award is a ‘make whole’ remedy. . . . Under the SOX, the ‘make whole’ remedy authorizes a court to award all relief necessary to make an employee ‘whole.’”).

217. 18 U.S.C. § 1514A(c)(2); KOHN, *supra* note 2, at 102.

218. *Dairy Queen v. Wood*, 369 U.S. 469 (1962); 2 DAN B. DOBBS, LAW OF REMEDIES § 6.10(5) at 225 (2d ed. 1993).

219. “[O]nly under the most imperative circumstances, circumstances which in view of

reinstatement is an equitable remedy, why SOX back pay and special damages are legal remedies, and why the Seventh Amendment guarantees a jury trial in SOX whistleblower actions that seek back pay and special damages.

a. SOX reinstatement

Little time need be spent on the question of the reinstatement remedy as it has already been alluded to in Part II.B. Professor Dobbs perfunctorily noted that reinstatement is “essentially injunctive relief.”²²⁰ Indeed, SOX suits in federal court to enforce preliminary reinstatement orders by the Department of Labor have been brought as suits for injunctive relief.²²¹ It is indisputable that the injunction is the quintessential equitable remedy from an historical standpoint.²²² Moreover, according to the Supreme Court it is “clear that judgments compelling employment, reinstatement, or promotion are equitable.”²²³ Accordingly, the nature of the SOX reinstatement remedy is best characterized as an equitable one that historically was available in courts of equity.

b. SOX back pay

The characterization of monetary remedies for Seventh Amendment purposes and for determining statutory authorization of relief has confounded the Supreme Court, federal courts, and commentators for many years.²²⁴ In particular, the characterization of the back pay remedy has proven to confuse too many courts in too many contexts.²²⁵ In the SOX context, the back pay remedy is simply a part of monetary compensation, *i.e.*, a damages award, and thus fits the nature of legal relief.²²⁶

SOX back pay is a substantial part of the SOX “make whole” remedial

the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.’ That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as ‘incidental’ to equitable issues or not.” *Wood*, 369 U.S. 469, 472-73 (1962) (internal citations omitted).

220. 2 DOBBS, *LAW OF REMEDIES* § 6.10(5) at 226 (2d. ed. 1993).

221. *Bechtel v. Competitive Techs., Inc.*, 2006 U.S. App. LEXIS 10926, 24 I.E.R. Cas. (BNA) 641 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 407 F. Supp. 2d 773 (W.D. Va. 2006).

222. KOHN, *supra* note 2.

223. *Id.*

224. Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1607-28 (2002).

225. *Id.* at 1628-35.

226. *See supra* note 109.

scheme.²²⁷ Its purpose is to restore the whistleblower to the same position he would have been in but for the illegal discharge or other illegal adverse employment action.²²⁸ It is measured by the difference between the actual earnings the whistleblower made from the time he first lost wages due to the illegal discharge, to the date of judgment and those he would have earned absent the illegal discharge.²²⁹ Stated differently, a SOX back pay award should include all of the compensation the whistleblower would have received but for the illegal firing—lost wages, raises, overtime compensation, bonuses, vacation pay, and retirement benefits.²³⁰ SOX back pay truly is compensation in the form of damages and is ultimately reflected in a monetary judgment.

Back pay did not exist as a common-law remedy.²³¹ Yet it has become a standard remedy in many employment discrimination and whistleblower statutes.²³² Indeed, it is remedially similar to a contract claim for past wages due that would have been brought in a law court.²³³ Most significantly, SOX back pay is a form of compensatory damages because the award is measured by *the whistleblower's loss as opposed to the employer's gain*.²³⁴ Any remedy, like back pay, that enables a person to

227. See KOHN, *supra* note 2 at 106 (noting that “reinstatement and back pay are usually the two most significant elements of a [SOX] ‘make whole’ remedy”).

228. *Id.* at 105, (quoting the basic black letter law concerning the calculation of whistleblower back pay from *Hobby v. Georgia Power Co.*, ALJ No. 1990-ERA-30, Recommended Decision and Order of ALJ, at 57 (internal citations omitted)).

229. *Id.* at 106. See, e.g., ABIGAIL MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 12.09 at 28 (3d ed. 1993) (stating that “The backpay period normally covers the entire period during which plaintiff was precluded from performing his or her job by the employer’s wrongful employment action, excluding periods during which plaintiff would not have been earning wages.”)

230. *Gutzwiler v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1562 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); RICHARD CARLSON, EMPLOYMENT LAW 992 (2005).

231. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1252 (10th Cir. 2004).

232. See 42 U.S.C. § 2000e-5(g)(1) (2000) (noting that upon a Title VII violation, the court may “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . , or any other equitable relief as the court deems appropriate.”); 5 U.S.C. § 1221(g)(1)(A) (2000) (stating that under the Whistleblower Protection Act, a federal employee who is entitled to corrective action under the WPA is to be “placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred.” The individual is also entitled to “back pay and related benefits.”).

233. *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 964 (10th Cir. 2002); 2 DOBBS, LAW OF REMEDIES § 6.10(5) at 226 (2d ed. 1993) (stating that “Back pay claims do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due”); 2 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE, § 9.46 at 363-65 (4th ed. 1998).

234. See *Millsap*, 368 F.3d at 1253 (stating that “[b]ackpay is compensatory because the award is measured by an employee’s loss rather than an employer’s gain.”); 2 DOBBS, LAW

receive compensatory damages is a legal remedy.²³⁵

A SOX back pay claim cannot fairly be categorized as restitutionary and thus equitable because it neither aims to prevent an employer's unjust enrichment nor does it restore "in kind" a specific thing to the whistleblower.²³⁶ Undoubtedly some courts in employment discrimination suits have mistakenly labeled back pay as restitutionary, simply because the purpose of back pay is to restore the plaintiff to their original position but for the wrongful employment decision.²³⁷ However, as many restitution scholars and courts have noted, that sort of an understanding of restitution is wrong because it destroys any conceptual distinction between compensatory damages and restitution.²³⁸ Moreover, even if a restitution

OF REMEDIES § 6.10(5) at 227 n.15 (2d ed. 1993) (asserting that "[b]ack pay might be considered restitutionary if it were measured by the defendant's gain rather than the plaintiff's loss, that is, if it were aimed at preventing unjust enrichment. But that is not the case; it is aimed at compensation and measured by the plaintiff's loss."); Strayer *supra* note 32, at 825 (noting that "[w]ith back pay, employees receive compensation for wages they would have earned if they had been employed and also fringe benefits. . . . Back pay is not wrongfully withheld wages; rather, it is damages for an employer's breach of a duty it owed to an employee.").

235. See *supra* note 109; Waldrop v. Southern Co. Services, 24 F.3d 152, 158 (11th Cir. 2004) (positing that "it has long been the general rule that back wages are legal relief in the nature of compensatory damages."); 2 DOBBS, LAW OF REMEDIES, § 6.10(5) at 226 (2d ed. 1993) (noting that back pay is an ordinary damages claim, close to an exemplar of a claim at law); 1 DOBBS, LAW OF REMEDIES § 1.1-1.2 at 3, 11 (2d ed. 1993) (asserting that "[t]he damages remedy is a money remedy aimed at making good the plaintiff's losses. . . . The damages remedy was historically a legal remedy."); 1 ARTHUR G. SEDGWICK & JOSEPH H. BEALE, A TREATISE ON THE MEASURE OF DAMAGES, § 3 at 3 (1920) (stating that "equity . . . gives specific relief by decreeing the very thing to be done which was agreed to be done . . . But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained."); Murphy *supra* note 224, at 1633 (noting that "[t]he backpay remedy is more appropriately characterized as damages for the plaintiff's losses and thus legal relief.").

236. "Restitution" is generally viewed as recovery based on and measured by a defendant's unjust enrichment. RESTATEMENT OF RESTITUTION § 1 comments a, d (1937); 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 2.10 at 140 (1978); 1 DOBBS LAW OF REMEDIES, § 4.1(1) at 551 (2d ed. 1993); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278-82 (1979). The Supreme Court is open to characterizing monetary damages as equitable in cases where the damages are viewed as restitutionary—i.e., damages are being used to prevent unjust enrichment. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1990); *Tull v. United States*, 481 U.S. 412, 424 (1987); *Curtis v. Loether*, 415 U.S. 189, 1937 (1974). In *Terry*, the Court ruled that back pay in a breach of contract action against a union for violating a duty of fair representation did not qualify as restitutionary because it did not seek to prevent unjust enrichment on the part of the union. 494 U.S. at 570-71.

237. See, e.g., *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995) (holding that back pay is restitutionary in that it "operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation.").

238. Murphy *supra* note 224, at 1632; Laycock *supra* note 236, at 1282-83. See also *In re Acushnet River & New Bedford Harbor*, 712 F. Sup. 994, 1002 (D. Mass. 1989) ("Were the Court to accept the argument that a monetary award is restitutionary simply because it

characterization was appropriate, which it is not, that still would not render SOX back pay equitable.²³⁹ Historically, monetary restitution claims were asserted primarily in courts of law, not the courts of equity, through the writ of *assumpsit*. They were standardized under the law of quasi-contract, a distinct species of common-law obligation.²⁴⁰ Back pay, at most, is a restitution claim that is best characterized as legal restitution, not equitable restitution.²⁴¹

Federal court decisions concerning the characterization of Title VII back pay for Seventh Amendment purposes should not be heeded in the SOX back pay context for various reasons. Although the Supreme Court has never specifically ruled on whether back pay under Title VII is legal or equitable for jury trial purposes,²⁴² lower federal courts have routinely held that a jury trial is not guaranteed to plaintiffs seeking back pay under Title VII.²⁴³ Many rationalize that the specific language in Title VII's remedial provision²⁴⁴ demonstrates that Congress considered back pay as equitable under Title VII in that back pay was just an "integral part of the statutory equitable remedy" or "only incidental" to equitable relief provided by the statute.²⁴⁵ The notion that Title VII back pay is equitable was arguably supported by the historical "equitable clean-up" doctrine—in certain cases

returns a party to the pre-injury status, little would be left in the realm of compensatory damages.").

239. See 2 DOBBS, LAW OF REMEDIES, § 6.10(5) at 227 (2d. ed. 1993) ("[I]t is said that back pay is not legal after all, but is equitable because it is restitutionary. This point appears to be doubly wrong, since a claim does not become equitable by being restitutionary.").

240. *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760); FREDERIC WOODWARD, THE LAW OF QUASI-CONTRACTS, § 2, 2-4 (1913). See 1 DOBBS, LAW OF REMEDIES, § 1.2, 11, § 4.1(1), 556, § 4.2, 570-586 (2d ed. 1993) ("Restitution claims for money are usually 'claims at law'"); 2 DOBBS, LAW OF REMEDIES, § 6.10(5), 227 n.15 (2d ed. 1993) ("Restitution claims at law include *all* the quasi-contract claims based on *assumpsit*, such as those based on common counts like *money had and received* and *quantum meruit*."); *Murphy supra* note 224, at 1632 ("[M]ost restitutionary claims for money were asserted in the law courts."); .

241. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S.C. 1869 (2006); see also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (distinguishing between restitutionary relief available at law and restitutionary relief available in equity).

242. See *Murphy supra* note 224, at 1629 ("[T]he Supreme Court has expressly stated that it has not yet decided whether back pay under Title VII is legal or equitable for jury trial purposes.").

243. See 2 DOBBS, LAW OF REMEDIES § 6(10)5, 226 n.10 (2d. ed. 1993) (listing courts of appeals cases rejecting jury trials on Title VII claims).

244. See *supra* note 232.

245. Stephen F. Lazor, Comment, *Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEX. L. REV. 483, 485, 500 (1974); see also *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.").

when the Chancellor issued an equitable remedy, such as an injunction, he could award money if it was incidental to the equitable remedy.²⁴⁶ Some courts also intimated that Title VII back pay was an equitable remedy because the Title VII remedial language arguably provided discretion to the courts as to the availability of back pay.²⁴⁷

The Title VII back pay rationalization should not guide future courts concerning the characterization of SOX back pay for several reasons. The Seventh Amendment historical analysis would be useless if courts give a blank check to Congress to characterize remedies so as to negate the protections of the Seventh Amendment.²⁴⁸ If the line of Title VII cases are followed, Congress could label any remedy an equitable one, even if it is undisputed that the remedy was historically a legal remedy, thus bypassing the Seventh Amendment. In any event, the SOX remedial provision is vastly different from that in Title VII. The language does not reflect a Congressional determination that back pay is equitable.²⁴⁹ To the contrary, back pay is labeled as part of compensatory damages.²⁵⁰ The idea that the equitable clean-up doctrine can be used to prevent a truly legal claim from

246. See 1 POMEROY, *supra* note 109, §§ 231-242 (describing when equitable-clean up doctrine applied); *Harkless v. Sweeney Indep. Sch. Dist.*, 427 F.2d 319, 324 (5th Cir. 1970) (holding that back pay is an integral part of the remedy of injunctive reinstatement and therefore no jury right attaches); 1 DOBBS, *LAW OF REMEDIES*, § 2.6(4), 169, § 2.7, 180 (2d. ed. 1993) (discussing equitable clean-up doctrine); accord A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, U. PA. L. REV. 320, 320-31 (1951).

247. 2 DOBBS, *LAW OF REMEDIES*, § 6.10(5), 228 (2d. ed. 1993). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring) (revisiting prior findings that backpay decisions in the Title VII context are at the discretion of the trial judge).

248. Concerning his suggestion that the historical test is not the best reading of the Seventh Amendment, Professor Akhil Reed Amar argues that the core of the Seventh Amendment was directed at the states, not Congress, in part because "a Congress bent on evading civil juries could draft statutes sounding in equity, not law." AMAR, *supra* note 181, at 92. Amar's insight, that the jury right could be malleable based on Congressional labeling, is certainly a concern. However, if the historical test is to have any impact, courts must be sensitive to an historical Congressional labeling intended to defeat the jury right, even if the rationale underlying the Congressional action could be viewed as beneficent. For example, fear of jury prejudice after the passage of Title VII has been viewed as a pragmatic reason why the courts refused to grant jury trials in Title VII cases. But see Lazor *supra* note 245, at 506 (addressing this concern, but ultimately concluding it to be "insufficient to override the seventh amendment's mandate.").

249. The SOX statute lists reinstatement, back pay, and special damages under compensatory damages, but the legislative history indicates that reinstatement, back pay, and compensatory damages, i.e., non-economic damages, are separate remedies. Although the statute lists reinstatement under compensatory damages, reinstatement is clearly an equitable remedy. The statute does not specifically state whether back pay is legal or equitable.

250. 18 U.S.C. § 1514A(c)(2)(b). Once again, although the statute lists back pay under compensatory damages, the legislative history indicates that back pay and compensatory damages are separate remedies.

being tried to a jury has been soundly rejected, for good reason, by the Supreme Court due to the merger of law and equity in the federal courts.²⁵¹ Stretched to its outermost limits, the equitable clean-up doctrine would devour all cases in which legal and equitable remedies are asserted in the same action, even when the legal and equitable remedies are independent and equally important to the plaintiff, which severely encroaches on the jury trial guarantee.²⁵² Finally, the suggestion that the discretionary nature of a remedy due to Congressional action makes it “equitable” in the sense that the remedy could only have been brought in the courts of equity is unpersuasive.²⁵³ While it is true that the hallmark of equity is the discretion given to the Chancellor, this general principle hardly means that Congress should have the power to take a legal remedy and make it equitable by imbuing the remedy with discretion.²⁵⁴ Regardless, Congress did not imbue the SOX back pay remedy with such discretion. If a plaintiff proves unlawful retaliation and lost wages, he is entitled to back pay.²⁵⁵

c. SOX special damages

SOX provides “compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.”²⁵⁶ The “special damages” relief falls under

251. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471 (1962) (holding that the trial court was incorrect in “striking the demand for trial by jury . . . based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as ‘incidental’ to equitable issues— . . . no such rule may be applied in federal court.”); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508 (1959) (stating that regardless of the presence of both equitable and legal defenses, the case was best resolved through one full jury trial on all of the issues).

252. SOX reinstatement and back pay are listed as separate kinds of the more general “Compensatory Damages” and are therefore not intertwined for Seventh Amendment purposes. According to the statute a prevailing plaintiff “shall” be entitled to reinstatement, back pay, and special damages upon a violation. It appears conceivable that in any one SOX action not all remedies will be available. However, reinstatement, or at least front pay, and back pay appear to be “automatic” remedies in almost all SOX actions in which the complainant or plaintiff prevails. KOHN, *supra* note 2, at 104-05. It appears as though many SOX cases will arise where the potential back pay award is extremely large and as such will be hard to view as “incidental” to the reinstatement remedy. See Bureau of National Affairs (BNA), *Split Second Circuit Rejects Enforcement By Court of Preliminary SOX Reinstatement*, DAILY LABOR REPORT, No. 86, at AA-1 (May 4, 2006) (noting that OSHA investigators issued a preliminary reinstatement order as well as approximately \$350,000 to complainant for losses and costs resulting from the wrongful termination).

253. See 2 DOBBS, LAW OF REMEDIES, § 6.10(5), 228 (2d ed. 1993).

254. See Doug Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769, 775-76 (1977) (stating that conditioning the right to a jury trial on whether a monetary remedy is discretionary is a “novel and aberrant” view and should be discarded).

255. See *supra* Part II.A.

256. 18 U.S.C. §1514A(c)(2)(C) (2000)

the heading of “Compensatory Damages.”²⁵⁷ Part II.B. argues that the terms “compensatory damages” and “special damages” in the SOX remedial provision should be interpreted to include damages to reputation, emotional distress damages, and other non-pecuniary damages. The argument arose from an analysis of other federal whistleblower laws, such as AIR 21, ERA, and the FCA, each of which allow for recovery of the pecuniary and non-pecuniary damages listed above under the umbrella of either “compensatory” or “special” damages.²⁵⁸ This argument is consistent with the common law meaning of “special damages,”²⁵⁹ which Congress is presumed to have intended,²⁶⁰ and SOX’s stated policy to provide “make whole” relief to prevailing whistleblowers.²⁶¹ Thus, special and compensatory damages in the form of emotional distress damages and reputational damages are available under SOX. These damages qualify as legal relief, not equitable relief, because they traditionally have been associated with the law courts and determined by juries.²⁶²

The nature of the SOX action and remedial provision demonstrate that the Seventh Amendment preserves the right to jury trial on certain SOX claims. The SOX action is most analogous to historical forms of action that were brought in the law courts.²⁶³ The SOX remedies are split between

257. *Id.*

258. *See supra* Part II.B.

259. Special damages are those that, although flowing from the wrong, are unusual for the type of claim in question. 2 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 9.08[1][a] (1997); CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 8, 33 (1935). Fed. R. Civ. P. 9(g) requires a plaintiff to specifically plead “special damages.” *Avita v. Metro. Club of Chicago*, 49 F.3d 1219, 1226 (7th Cir. 1995). In the SOX context, lost wages in the form of back pay are general damages because they are normal in wrongful discharge cases; emotional distress damages and reputational damages are special damages because they are not the standard or common damages in wrongful discharge cases.

260. It is a longstanding principle of statutory construction that Congress intends to adopt the common-law definition of a statutory term unless otherwise stated. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not a departure from them.”).

261. KOHN, *supra* note 2, at 108. In wrongful discharge/whistleblower cases, compensatory damages have included compensation for “emotional distress, pain and suffering, mental anguish, lost future earnings capacity . . . harassment, humiliation, loss of professional reputation, ostracism.” *Id.* *See also* *Hanna v. WCI Cmty., Inc.*, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) (citing damages for reputational injury available under SOX); HENRY H. PERITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE, § 5.33, 319 (2nd ed. 1987) (“[C]ourts have awarded compensatory damages for the tort of wrongful dismissal which include lost earnings, lost future earnings, expenses of finding a new job, and mental anguish.”).

262. *See supra* note 109.

263. *See supra* Part III.A.1.

legal and equitable remedies. SOX reinstatement is an equitable remedy.²⁶⁴ SOX back pay, emotional distress damages, reputational damages, and other compensatory/special damages are legal remedies.²⁶⁵ Thus, when a SOX plaintiff asserts in his original complaint in federal court that he seeks reinstatement, back pay, and special damages for emotional distress, or merely reinstatement and back pay, the action asserts legal remedies such that the right to a jury trial attaches as to all issues concerning the legal remedies, even though an equitable issue is also present in the form of a request for injunctive relief.²⁶⁶

3. Allocating the Functions of Judge and Jury

The fact that the jury right attaches to a SOX action in federal district court does not mean that the jury will hear every issue that may arise in the case.²⁶⁷ *Del Monte Dunes* and *Markman* elaborate on how to determine which issues must go to the jury in order to preserve the substance of the jury right.²⁶⁸ It is preferable to again engage in a historical analysis, comparing the modern issue to an analogous issue that existed in 1791 when history is clear as to whom decided the older issue—the judge or the jury.²⁶⁹ If history does not supply an answer, existing precedent and functional considerations guide the determination.²⁷⁰ In the absence of an exact historical analogue, in order to determine which SOX issues go to the judge and which to the jury one must look to the distinction between questions of fact and questions of law.²⁷¹ Generally, the Seventh Amendment seeks to ensure that juries decide questions of fact and judges

264. See *supra* Part III.A.2.a.

265. See *supra* Part III.A.2.b.-c.

266. WRIGHT & MILLER *supra* note 164, § 2308, 82. The Supreme Court now has made it wholly clear that a claim that otherwise would be triable to a jury must be so tried even though it may be thought “incidental” to a claim for an injunction. The order of trial must be arranged so that any issues common to the legal claim and the claim for an injunction are tried to a jury at the outset, with the court thereafter resolving any purely equitable issues in the case. *Id.*

267. *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 731 (1999) (Scalia, J., concurring) (“To say that respondents had the right to a jury trial on their § 1983 claim is not to say that they were entitled to have the jury decide every issue. The precise scope of the jury’s function is the second Seventh Amendment issue before us here . . .”).

268. *Id.* at 718-23, 731-32; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377-91 (1996).

269. *Del Monte Dunes*, 526 U.S. at 718; *Markman*, 517 U.S. at 378.

270. *Del Monte Dunes*, 526 U.S. at 718; *Markman*, 517 U.S. at 384.

271. See *Del Monte Dunes*, 526 U.S. at 720 (“In actions at law predominantly factual issues are in most cases allocated to the jury”); *Id.* at 731 (Scalia, J., concurring) (favoring a methodology, which, if history does not supply an answer, recognizes the historical preference for juries to make factual determinations and for judges to decide legal questions).

decide questions of law.²⁷²

An historical analysis sheds some light on which SOX issues must be decided by the jury in order to preserve the substance of the Seventh Amendment right. English juries in the late eighteenth century assessed economic and at times, non-economic damages because damages assessments were primarily fact-based determinations.²⁷³ Accordingly, the amount of back pay, reputational damages, and mental anguish damages in a SOX action ought to be determined by a jury. The SOX liability questions, however, have no exact counterparts, thus complicating an historical analysis.

Generally, the SOX action is analogous to breach of implied contract, tort, and *qui tam* claims²⁷⁴ which were brought in the English common law courts. The elements of a SOX claim—protected conduct, employer knowledge of protected conduct, adverse personnel action, and causation²⁷⁵—are not easily identifiable with elements of the old common law forms of action that were precursors to modern-day contract and tort claims. Moreover, even when a question exists as to a possible historical tort or contract counterpart to a SOX liability, it is difficult to discern whether the historical issue was one for the jury or the judge at English common law. For example, while causation in modern-day negligence law and causation in SOX might be viewed as similar concepts, the concept of causation in the common law actions of trespass and case was decidedly different from a present-day understanding of causation.²⁷⁶ At English

272. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (reiterating that the Seventh Amendment aims “to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury . . .”). See also *Dimick v. Schiedt*, 293 U.S. 474, 476, 485-86 (1935) (explaining that questions of fact shall be decided by the jury and the court shall not deprive the jury of this practice); *accord Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-99 (1931); *Walker v. New Mexico & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897).

273. See *Scott v. Sheperd*, 95 Eng. Rep. 1124 (K.B. 1773) (affirming judgment where jury awarded plaintiff damages); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 64 (1983) (discussing the necessity of a jury assessment in forms of actions that allowed a damages remedy); Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 360 (1995) (noting that before the adoption of the Seventh Amendment, English juries assessed compensatory damages in accordance with their fact-finding role); George T. Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345, 354-56, 364-66 (1931) (explaining that juries received more deference in determining damages in actions in tort than in actions in contract).

274. See *supra* Part III.A.1.

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

276. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 392-400 (2d ed. 1981) (describing the narrow understanding of causation that defined both actions of

common law, causation was essentially a question of directness—whether “the defendant had directly done the harm.”²⁷⁷ Likely, as a practical matter, English juries considered questions of “directness” in trespass cases²⁷⁸, especially given the practice of confining jury questions to a single question of fact²⁷⁹ and the oftentimes lack of a clear separation between fact and law.²⁸⁰ However, historical evidence suggests that the test of directness had become a rule of law by the last quarter of the eighteenth century.²⁸¹ Perhaps the closest historical analogue to a SOX issue is whether an English *qui tam* plaintiff reported illegal activity.²⁸² This is similar to the protected conduct inquiry under SOX. It is likely that an English jury decided whether the *qui tam* plaintiff reported illegal activity in a *qui tam* action brought as a writ of debt, which would tend to indicate that the SOX protected activity issue is a jury question.²⁸³

The historical inquiry, while useful, does not provide a clear answer as to which SOX issues must be tried to the jury. Therefore, we look to the characterization of various issues as either legal or factual under current whistleblower and employment discrimination laws and the policy reasons why a jury, as opposed to a judge, should decide a particular SOX issue.²⁸⁴ This pragmatic search indicates that SOX issues can in most cases be properly delineated as either legal questions for the judge or factual questions for the jury.

The SOX employee protection provision prohibits a covered employer from discriminating against a covered employee for providing information or assisting in investigations concerning fraud against shareholders.²⁸⁵ SOX actions are governed by the legal burdens of proof established in the AIR 21 Act.²⁸⁶ As previously alluded to, a SOX plaintiff must prove by a preponderance of the evidence that: (1) he engaged in protected conduct;

trespass and case).

277. *Id.* at 395.

278. *Id.* at 396-97.

279. Francis, *supra* note 273, at 68-73.

280. Washington, *supra* note 273, at 346.

281. MILSOM, *supra* note 276, at 397.

282. See *supra* Part III.A.1.

283. See *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 709 (1999) (1999) (affirming the general principle that a federal statutory claim that allows for monetary damages upon the violation of an imposed legal duty sounds in tort, and thus a plaintiff asserting such a claim is entitled to a jury trial); *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974) (same).

284. *Del Monte Dunes*, 526 U.S. at 718-21 (when the historical analysis yields no discernible conclusion, consider precedent, the relative interpretive skills of judges and juries, and the statutory policies that should be furthered by the allocation in determining whether to allocate an issue to the judge or jury for Seventh Amendment purposes).

285. See *supra* note 11 and accompanying text.

286. 49 U.S.C. § 42121 (2002); 18 U.S.C. § 1514A(b)(2)(C) (2000).

(2) the employer knew he engaged in protected conduct; (2) he suffered an unfavorable personnel action; and (4) the protected conduct was a contributing factor in the unfavorable action.²⁸⁷ An employer can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected conduct.²⁸⁸ These four elements and the employer's affirmative defense are the heart of a SOX action. They are primarily factual issues to be decided by a jury. In contrast, there are numerous issues in a SOX action that are essentially legal questions that must be resolved by a judge. The jury has no role to play in deciding such questions.

a. SOX questions of law

Due in part to the unique two-tiered enforcement system established by the statute, administrative law, administrative appeals, and federal judges confront challenging legal questions under the SOX statute. These include, but are not limited to, jurisdictional questions, coverage questions, procedural questions, evidentiary questions, and constitutional questions.²⁸⁹ Judges have ruled on whether the statute operates retroactively,²⁹⁰ the effect of filing a SOX complaint in federal district court on the jurisdiction of the administrative law judge in the administrative proceeding,²⁹¹ whether the statute applies extraterritorially,²⁹² whether a non-publicly traded subsidiary of a publicly traded parent company is a covered employer,²⁹³ the applicability of the attorney-client privilege in a particular case,²⁹⁴ the propriety of economic reinstatement or front pay in lieu of reinstatement,²⁹⁵ and whether the right to jury trial is guaranteed by the statute or Constitution.²⁹⁶ These are just a sample of the legal questions that have

287. 49 U.S.C. § 42121(a)-(b)(2)(B)(iii)-(iv); *Collins v. Beazer Homes*, 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004); *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 7 (ARB September 30, 2005); *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 8 (ARB July 29, 2005).

288. 49 U.S.C. § 42121(a)-(b)(2)(B)(iv); *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 8 (ARB July 29, 2005).

289. Sarbanes-Oxley Act (SOX) Whistleblower Digest, U.S. Department of Labor, Office of Administrative Law Judges, *available at* <http://www.oalj.gov>.

290. *McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX-23, slip op. at 12 (ALJ Jan. 16, 2004).

291. *Stone v. Duke Energy Corp.*, 432 F.3d 320, 323 (4th Cir. 2005).

292. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7-18 (1st Cir. 2005).

293. *Bothwell v. Am. Income Life*, 2005-SOX-57, slip op. at 5 (ALJ Sept. 19, 2005).

294. *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15, slip op. at 2-3 (ALJ Aug. 15, 2003).

295. *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-15, slip op. at 5-6 (ARB June 9, 2006).

296. *Murray v. TXU Corp.*, No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444, at *1-2, 86 Empl. Prac. Dec. (CCH), P41, 981 (N.D. Tex. June 7, 2005).

already been addressed by judges. Judges will have to rule on many more legal questions in the future. As a general principle, the interpretive questions posed by the statute concerning jurisdiction, coverage, procedure, and evidence are legal questions to be resolved by judges.²⁹⁷ The Seventh Amendment does not have any impact on these questions.

b. SOX questions of fact and mixed questions of fact and law

Whether the elements of a SOX action have been proven by a preponderance of the evidence and damages determinations are generally factual questions for the jury.²⁹⁸ Regarding the SOX elements, it is

297. Professor Kirgis, has recently examined the aspect of Seventh Amendment jurisprudence considered in Part III.A.3 of this article: how to allocate particular questions to the judge or jury in a case where the right to jury trial exists. Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125 (2003). Professor Kirgis argues that the fact-law distinction should guide courts in determining the questions that must go to the jury and proposes an inferential analysis for distinguishing “fact” questions that must go to the jury from other questions that should be decided by the judge. *Id.* at 1130. Under this test, “[a] question of fact is one that requires for its answer inductive inferences about the transactions or occurrences in dispute.” *Id.* at 1158. By contrast, a question of law calls “for either deductive inferences or inductive inferences leading to conclusions beyond the transactions or occurrences in dispute.” *Id.* at 1130. I will examine Kirgis’ inferential test, which I find illuminating, later in this article. Kirgis’ inferential account of the fact-law distinction correctly presupposes that most decisions made during the litigation process are simply outside the realm of the jury even though those decisions require the decision-maker, i.e., the judge, to make certain “factual” findings. *Id.* at 1145-46. Kirgis describes this as the judicial screening function and defines a screening decision as any decision that entails “regulating the actions of the parties to ensure that the adjudicative process unfolds in a way that comports with systemic norms.” *Id.* at 1146. He notes that “judicial screening” questions are often referred to by courts as questions of “law,” but that such description is a “matter of convention rather than as a counterpoint to decisions of ‘fact.’” *Id.* There are three basic types of judicial screening questions which are outside the province of the jury: (1) questions addressing the propriety of the chosen forum (e.g., jurisdictional questions); (2) questions about what data/information can be considered by the decision-maker (e.g., evidentiary questions); and (3) questions about whether a particular question can be posed to the decision-maker (e.g., the propriety of submitting a proposed jury question). *Id.* at 1147-1153.

The SOX questions concerning jurisdiction, coverage, procedure, and evidence, which are set forth above, fit within the judicial screening function described by Professor Kirgis and may not be decided by a jury.

298. The Seventh Amendment does not prevent the use of procedural devices to dismiss SOX actions which do not have sufficient evidentiary proof on each SOX element. *See e.g.*, *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656-60 (1935) (recognizing that sufficiency of the evidence is a question of law for the court). As in other federal employment retaliation/discrimination cases, whether a SOX case gets to the jury depends on the quality and amount of evidence introduced during the summary judgment stage and/or during trial, even if, as a general proposition, the determination as to whether a SOX plaintiff proved an element of his cause of action is a factual determination. A determination by a judge that a case can only be decided one way does not violate the

instructive to examine the way in which statutory elements in other areas of employment law have been characterized by the courts. Federal employment retaliation law, whistleblower statutes, and First Amendment retaliation law correctly treat causation and the employer's knowledge of protected conduct as factual issues for the jury provided sufficient evidence is presented on these elements.²⁹⁹

Retaliation cases conflict on whether the protected conduct inquiry is a question of fact or law. Most courts interpret the "opposition" clause of the Title VII retaliation provision to require the employee to demonstrate that he had a "reasonable belief" that the employer engaged in unlawful employment practices in order to prove protected conduct.³⁰⁰ The employee's "reasonable belief" is viewed objectively, but the plaintiff does not have to prove that the opposed conduct in fact violated Title VII.³⁰¹ The "reasonable belief" standard provides considerable room for a fact-finder to make a determination as to whether an employee engaged in protected conduct under Title VII, but many courts view the issue of whether actions constitute protected conduct under Title VII as questions of

Seventh Amendment. See, e.g., *Hill v. City of Scranton*, 411 F.3d 118, 127 (3d Cir. 2005) (rejecting contention that courts may never grant summary judgment on either the second or third prongs of the retaliation test); *Kirgis*, *supra* note 297, at 1151-52 (explaining that courts consistently hold that judges do not violate the Seventh Amendment when deciding that a question can be answered only one way); Ellen E. Seward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 592-632 (2003) (discussing transformation of fact into law).

299. See *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2002) ("A jury, however, can find [Title VII] retaliation even if the [corporate] agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the order of a superior who has the requisite knowledge."); *King v. Preferred Tech. Group*, 166 F.3d 887, 894 (7th Cir. 1999) (explaining that a question of fact existed for the jury as to whether employer terminated plaintiff's employment for legitimate, non-retaliatory reason or because of plaintiff's use of FMLA leave); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933 (11th Cir. 1995) (holding that the Secretary of Labor's determination as to whether an ERA-whistleblower was fired for engaging in protected activity or for legitimate, non-discriminatory reason is an adjudicative, factual finding that must be supported by substantial evidence); *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir. 2004) (explaining that whether constitutionally protected speech was a motivating factor in the discharge is a question of fact); *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 334-35 (9th Cir. 1995) (discussing conflicting evidence that raised fact issue sufficient to deny summary judgment as to whether decision-maker knew of employee's First Amendment protected whistle-blowing activity).

300. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

301. See *Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (explaining that plaintiff need not prove that employer's conduct is unlawful but holding that plaintiff's belief regarding such conduct is objectively unreasonable).

law.³⁰² Similarly, in First Amendment retaliation claims, whether speech is constitutionally protected is uniformly regarded as a question of law for the court.³⁰³

Recent Supreme Court authority suggests that the adverse employment action element under Title VII is best viewed as a question of fact. The scope of the adverse employment action element of Title VII retaliation law has varied widely among the circuits until recently.³⁰⁴ In *Burlington Northern and Santa Fe Railway Company v. White*, the Court held that the Title VII retaliation provision covers only those employer actions that would have been “materially adverse” to a reasonable employee or job applicant.³⁰⁵ The Court upheld a jury’s verdict that a reassignment to more onerous job duties and a thirty-seven day suspension without pay constituted retaliation under this standard.³⁰⁶ *White* contemplates the fact-finder, *i.e.*, the jury, determining whether an employer’s actions constitute retaliation when sufficient evidence exists for

302. See *Bechtel Constr. Co.*, 50 F.3d 926 at 931 (stating that the determination as to whether general inquiries regarding safety constitute protected activity under whistleblower protection provisions of the Energy Reorganization Act is a question of law to be reviewed on a de novo basis); *Heckmann v. Detroit Chief of Police*, 705 N.W.2d 689, 698 (Mich. Ct. App. 2005) (stating that whether plaintiff engaged in protected activity under Michigan Whistleblower Protection Act presents a question of law). Compare *George v. Sw. Bell Tel. Co.*, 2005 U.S. Dist. LEXIS 31195, *11 (N.D. Tex. December 5, 2005) (concluding that plaintiff’s summary-judgment evidence was sufficient for a jury to find that the plaintiff reasonably believed the complained of conduct was unlawful and thus a fact issue existed as to whether opposition constituted protected activity) with *Barnes v. Small*, 840 F.3d 972, 976 (D.C. Cir. 1988) (deciding that the protected activity determination is a question of law because it is largely based on an interpretation of Title VII), and *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 41 (D.D.C. 2004) (noting that “the determination as to whether the memorandum is protected activity is a question of law because it relies on an interpretation of Title VII”), and *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 790 (D.C. 2001) (“Whether actions by an employee constitute protected activity [under Title VII] is a question of law. . .”).

303. See *Curinga* 357 F.3d at 310 (weighing employee’s interest in speech against government employer’s interest is a matter of law); accord *Horstkoetter v. Dep’t of Pub. Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998); *Orange v. District of Columbia*, 59 F.3d 1267, 1272 (D.C. Cir. 1995); *Hatcher v. Bd. of Pub. Educ.*, 809 F.2d 1546, 1556 (11th Cir. 1987).

304. See *Burlington N. and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (U.S. June 22, 2006) (resolving the circuit split); Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 134-139 (1998) (providing detailed overview of each circuit’s construction of the adverse action element of Title VII retaliation claims); Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an “Adverse Action” in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 321-55 (2001-2002) (conducting a circuit-by-circuit analysis in an attempt to define “adverse action” in the context of §704(A) retaliation claims).

305. *White*, 126 S.Ct. at 2415.

306. *White*, 126 S.Ct. at 2416.

a reasonable jury to conclude that the employer's action would be materially adverse to a reasonable employee.

The SOX elements should generally be viewed as factual determinations to be made by a SOX jury. Like Title VII law, the causation and employer's knowledge of protected conduct elements in SOX actions are pure factual determinations to be made by a jury when conflicting evidence is presented by employee and employer.³⁰⁷ The characterization of the SOX protected conduct element is trickier. It is similar to the Title VII protected conduct element in that a SOX plaintiff need only prove he had a "reasonable belie[f]" that he engaged in protected activity.³⁰⁸ However, it is more appropriate for a juror to determine whether someone "reasonably believed" the employer committed a Title VII violation than whether someone "reasonably believed" the employer violated securities laws or other laws that protected fraud against shareholders. Both determinations require an understanding of what actions may in fact violate the law (or at least what actions could

307. Under Professor Kirgis' inferential test for determining a question of fact as distinguished from a question of law, when a question involves inductive inferences it is a question of fact that must be resolved by the jury under the Seventh Amendment. My characterization of the causation and employer's knowledge of protected conduct elements as questions of fact to be resolved by the jury is consistent with Kirgis' description of the basic types of factual conclusions jurors in circumstances that require inductive reasoning. Kirgis states:

At least for purposes of adjudication, inductive reasoning may be used to reach conclusions of three basic types: that an event or condition in the past or present probably has occurred or is occurring; that an event or condition in the future probably will occur; or that a hypothetical event or condition probably would occur given some postulated set of circumstances, a type of reasoning known as the counterfactual conditional. The phrase "events or conditions" in these formulations is intended to encompass virtually all phenomena in the world, including the identity of things or persons, the occurrence of physical events or human acts, mental states, and *relations of cause and effect*.

Kirgis, *supra* note 297, at 1155 (emphasis added).

Whether (and when) an employer knew that an employee engaged in activity alleged to be SOX-protected falls within Kirgis' first type of inductive-reasoning conclusions because it concerns a determination regarding an actual historical event or condition derived from inferences and the judgment of witnesses' credibility. *Id.* at 1155. Whether an employee's SOX-protected activity was a contributing factor in the adverse employment action suffered by the employee, and/or whether the employer would have taken the same employment action regardless of the protected activity is a causation question of the third type described by Kirgis because it requires a probabilistic inference based on the circumstances surrounding the employee's employment situation and the actual personnel decision. *Id.* at 1157 ("In their focus on the likely course of events, both questions of but-for cause and questions of proximate cause require probabilistic inferences about hypothetical conditions in the world—the events that were most likely to happen given the state of the world prior to the injury.").

308. Reddy v. Medquist, Inc., ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 8 (ARB Sept. 30, 2005).

conceivably fall within the scope of those laws) and to some degree involve considerations of credibility.³⁰⁹ The credibility judgments, however, are dependent on one's knowledge of what could possibly violate or impact the underlying substantive law, be it Title VII or the various federal laws prohibiting fraud against shareholders. It could be argued that the protected conduct determination is better suited to the common sense of the jury if it is believed that the jury intuitively understands or can be quickly educated on the fundamental tenets of Title VII anti-discrimination law.³¹⁰ However, given the complexities of the various federal laws relating to fraud against shareholders, it would seem that in most cases a trained specialist, the judge, would be best suited to determine whether particular employee actions constitute protected activity under SOX.³¹¹ The policy-oriented and complex aspects of whether a SOX plaintiff engaged in protected conduct indicates the protected conduct determination is best viewed as a mixed question of fact and law to be resolved by a jury or judge depending on the individual circumstances of the particular case at

309. See e.g., *Tuttle v. Johnson Controls Battery Div.*, 2004-SOX-76, slip op. at 3-4 (ALJ Jan. 3, 2005) (explaining that employee's claim that he reasonably believed the employer violated one of the laws or regulations enumerated in SOX whistleblower statute must be examined under both subjective and objective standards).

310. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389-90 (1996) (conceding that in theory there could be a case where a jury is responsible for making simple credibility judgments despite the fact that sophisticated terms of art are at issue).

311. Professor Kirgis' article elaborates on the difficulties courts and commentators have encountered in determining whether questions of reasonableness are questions of fact for the jury or questions of law for the judge. He explains that such determination varies with the type of reasonableness question at issue. For example, the question of negligence in a civil case has historically been viewed as one for the jury. In contrast, in malicious prosecution cases, the question whether a person had a "reasonable belief" that another committed a crime is reserved for the judge. Kirgis, *supra* note 297, at 1162-70. Kirgis reconciles this apparent discrepancy through the lens of his inferential account of the fact-law distinction by noting that determining reasonableness in a negligence case involves making inductive inferences about the nature of the defendant's conduct, whereas determining whether a person had a reasonable belief in the guilt of another does not require such inferences. *Id.* at 1169-70 ("A decision maker tasked with making that decision [whether a person had a reasonable belief that another committed a crime] needs nothing but his own sense of how to characterize events in the world. The decision maker simply compares the apparent conduct of the accused with the decision maker's storehouse of knowledge about what constitutes apparent criminal conduct.").

The question of whether an employee had a "reasonable belief" that his employer violated any federal law concerning fraud against shareholders is similar to the malicious prosecution question in that it does not involve any inductive inferences. Once it is determined what the alleged SOX-protected plaintiff complained about, it is simply up to the decision maker to compare the alleged fraudulent conduct with the decision maker's "storehouse of knowledge" about what could conceivably constitute fraud against shareholders under the various federal laws. Due to the complexities of these federal fraud laws, a federal judge is likely better equipped than a juror to make such a decision.

hand, but typically by the judge.³¹²

The characterization of the SOX adverse employment action is nuanced as well. The adverse employment action determination lies somewhere between a pure factual determination of the causation element and a mixed question of fact and law determination of the protected conduct element. It is an open question how “unfavorable” the employment action must be to fall within the scope of the SOX anti-retaliation provision. It is unanswered whether the “materially adverse” standard from *White* governs, or if a broader or stricter standard controls.³¹³

312. Compare *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 9 (ARB July 29, 2005) (stating that whether equity research analyst’s “refusal” to raise her stock rating during a review committee meeting constituted protected activity is a legal question) and *Harvey v. Home Depot USA, Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 04-SOX-20 and 04-SOX-36, USDOL/OALJ REPORTER at 14 (ARB June 2, 2006) (dismissing SOX action for failure to state a claim on which relief can be granted because complainant’s letters sent to the company’s Board of Directors and Executives, which informed management about questionable personnel practices, corporate expenditures with which the employee disagreed, and possible FMLA and FLSA violations, did not constitute SOX-protected activity), with *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 7-8 (ARB Sept. 30, 2005) (confirming that finding by ALJ that complainant did not engage in protected activity is conclusive if supported by substantial evidence) and *Collins v. Beazer Homes*, 334 F. Supp. 2d 1365, 1377-80 (N.D. Ga. 2004) (holding that, upon employer’s motion for summary judgment, a genuine issue of material fact existed as to whether SOX plaintiff engaged in protected activity and that reasonable jurors could find by a preponderance of the evidence that SOX plaintiff engaged in protected activity).

313. See 18 U.S.C. § 1514A(a) (2002) (stating that an employer may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee.”) (emphasis added); 29 C.F.R. § 1980.102(a). Like the Title VII anti-retaliation provision in 42 U.S.C. § 2000e-3(a) (2000), the scope of the adverse employment action part of the SOX statute depends on the interpretation of the term “discriminate.” The Office of Administrative Law Judges (OALJ) Sarbanes-Oxley Act Whistleblower Digest already contains several contradictory opinions from administrative law judges concerning the scope of the SOX adverse employment action element. Compare *Halloum v. Intel Corp.*, No. 2003-SOX-7, slip op. at 10 (ALJ Mar. 4, 2004) (adopting a “reasonably likely to deter employees from making protected disclosures” standard, advocating a test for unfavorable employment action that encompasses more than simply economic actions) and *Hendrix v. Am. Airlines*, 2004-SOX-23 (ALJ Dec. 9, 2004) (applying an expansive definition of adverse action based on whistleblower law, concluding that placement on a lay-off list amounts to an adverse employment action even though the person’s name was removed from the list before the lay-offs came to fruition and thus the person suffered no tangible job consequence), with *Dolan v. EMC Corporation*, 2004-SOX-1, slip op. at 3 (ALJ Mar. 24, 2004) (holding that a SOX adverse employment action must have some tangible job consequence and unfavorable performance evaluations, absent tangible job consequences, do not rise to the level of an adverse employment action). The ALJ ruled in *Dolan* that the complainant’s negative performance evaluation was not an adverse employment action because it did not result in a lower salary, jeopardize job security, or cause any tangible job detriment. The *Halloum*, *Hendrix*, and *Dolan* decisions were decided prior to the Supreme Court’s decision in *Burlington Northern and Santa Fe Railroad v. White*.

Regardless of the standard adopted, the determination as to whether this SOX element is proven by a preponderance of the evidence should be one for the jury. Jurors should obviously be charged on the proper standard, and judges must contain juries whose collective imaginations go beyond the pale.³¹⁴ But jurors, many of whom are either employees or employers, typically possess the requisite common sense and experience to differentiate the trivial employer action from the employer action that would dissuade a reasonable employee from complaining about corporate fraud. In most cases, that sort of a determination should be a factual one for the jury, not a legal one for the judge.

B. Alternative Approaches

The historical test remains ensconced in Seventh Amendment jurisprudence, but over the years, courts and commentators have advocated for various exceptions and alternative approaches to this traditional analysis.³¹⁵ The complexity exception—the notion that a purely functional approach to Seventh Amendment analysis should replace the historical test, and the view that the extent of the right to jury trial in civil cases in federal cases is left entirely to the discretion of Congress—warrants explanation.³¹⁶ Treatment of the question of a SOX right to jury trial under these approaches is considered, but the question of whether the stated exception or alternative approaches should replace the traditional historical test is beyond the scope of this article and will not be dealt with in any comprehensive fashion. However, a vision of the jury as the constitutional actor that can best vindicate the community's sense of justice should influence how we view whether the Seventh Amendment guarantees the

314. See e.g., *Erickson v. EPA*, ALJ No. 1999-CAA-2 at 25 (ARB May 31, 2006) (stating that co-worker “shunning” that has no tangible job consequences is not an adverse employment action as a matter of law); BNA, *Justices Wrestle With Appropriate Standard in Argument Regarding Title VII Retaliation*, DAILY LAB. REP., Apr. 18, 2006, at AA-1 (relating when Justice Scalia questioned Sheila White’s attorney, Donald A. Donati, during an oral argument in the *Burlington Northern and Santa Fe R.R. v. White* case about whether a broad standard for adverse employment actions would lead to trivial claims ending up before a jury and stated that “juries can have amazing imaginations.”).

315. See *supra* Part III.A.

316. The state-law incorporation approach is advocated by Akhil Reed Amar in *The Bill of Rights: Creation and Reconstruction*. Amar, *supra* note 181, at 89-90. Charles W. Wolman also examined the approach in *The Constitutional History of the Seventh Amendment*. 57 MINN. L. REV. 639, 712-18, 732-34 (1973) (stating that state law incorporation is an alternative approach that appears to have some historical support, but would also raise numerous practical problems if ever adopted by the Court). As applied to the SOX action, the right to jury trial in a SOX case under this approach would depend on the law with respect to jury trials of the forum state in which the federal-court SOX action is brought. No attempt is made to analyze the SOX jury right in each of the 50 states under this approach.

right to a jury trial on SOX claims.

1. The Complexity Exception and Functional Approach

Some commentators argue that the Seventh Amendment right to a jury trial in civil cases is severely proscribed in complex cases.³¹⁷ Although considerable debate exists as to what constitutes a complex case,³¹⁸ commentators in favor of a complexity exception to the Seventh Amendment have summarized various characteristics of a trial that should play a part in considering whether a case is too complex to be heard by a jury. They include the operative details and nature of the trial (number of parties, probable length of trial, the amount of evidence and corresponding exhibits to be introduced into the record), the nature of the evidence to be proposed at trial (the degree to which the average juror can realistically understand any sophisticated evidence presented in the case), and the difficulty in understanding any complex substantive law relevant to the case.³¹⁹ Of those proponents of a complexity exception, some favor the exception on the ground that the English common law and American colonial law took complex cases out of the hands of jurors,³²⁰ others on due process grounds,³²¹ and a few make arguments based purely on pragmatic

317. See *infra* notes 318-325.

318. See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1754-1803 (1992) (stating that complex litigation involves the inability to guarantee reasoned judgment and procedures created by the assertion of increased judicial power clash with at least one of the four pillars of transsubstantivism—inter-transactional neutrality, intra-substantive neutrality, transactional neutrality, or inter-personal neutrality).

319. See Jeffrey Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243, 290-293 (1980) (giving examples of complex litigation cases); Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865, 883-84 (1998) (describing the characteristics that assist the court in the determination of whether a case is too complex for a jury trial).

320. See James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965, 966 (1980) (recalling that it was the practice in English common law to try complex cases as proceedings in equity, without a jury); Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1637-38 (1983) (arguing that the exception is favorable based on practices of American colonial law); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 44, 107 (1980) (stating that American colonial law preferred jury trials because they were speedier); see also Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 613 (1984) (positing that complex cases were not possible in English common law).

321. See Oakes, *supra* note 319, at 298 (asserting that if a jury is functionally unable to reach an intelligent decision in a particular complex case, then any decision reached by that jury will violate the due process clause); Joseph C. Wilkinson, Jr., Frank D. Zielinski, &

reasons.³²² Many of these proponents interpret Supreme Court cases over the past forty years as opening the door to a complexity exception.³²³ Alternatively, opponents of a complexity exception vigorously disagree that history supports a complexity exception,³²⁴ argue that empirical data does not support the view that jurors are incompetent to understand complex legal issues,³²⁵ claim that procedural and judicial management improvements should allay any due process concerns,³²⁶ and posit that jealous preservation of the jury right must be maintained because the jury

George M. Curtiss, III, *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 90-95, 104 (1988) (discussing the issue of adopting the due process clause of the fifth amendment as a means of excluding complex cases from the seventh amendment right to jury trial).

322. See Patrick Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation*, 1 REV. LITIG. 3, 3 (1980) ("The jury is as inappropriate to some antitrust cases today as the wild west gunfighter is to modern Abilene. Judges who insist that the jury is right for all times and all cases make the same mistake we see portrayed [in television stories involving the magnificent, aging performer who refuses to acknowledge his or her limitations].").

323. See Miron, *supra* note 319, at 886 ("[T]he Supreme Court has opened the door to a complexity exception to the Seventh Amendment with its reasoning in *Ross v. Bernard* and, more recently, *Markman v. Westview Instruments, Inc.*").

324. See Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 830 (1980) (stating that there is no historical support to avoid a jury trial in cases involving complicated facts).

325. See Maxwell M. Blecher & Howard F. Daniels, *In Defense of Juries in Complex Antitrust Litigation*, 1 REV. LITIG. 47, 74-78 (1980) (stating that empirical studies and scholarly interpretations of those studies are mixed as to how well jurors fare in complex cases); see also Joe S. Cecil, Valerie P. Hans, & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 764 (1991) ("Thus, the overall picture of the jury that emerges from the available data indicates that juries are capable of deciding even very complex cases, especially if procedures to enhance jury competence are used."); Margaret Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 593 (2001) ("With respect to a jury's handling of technical or complex issues, a number of studies have concluded that juries handle complex issues well, and that there is no reason to believe that judges fare better in the face of complexity than jurors."); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 55 (1997) ("Several studies buttress the contention of lay jury incompetence in complex cases.").

326. See Blecher and Daniels, *supra* note 325, at 88-91 (outlining suggestions of procedural measures that would serve to address or minimize concerns about the practical limitations of juries); James L. Flannery, Comment, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, U. PITT. L. REV. 693, 694 (1981) (suggesting that separation of issues and use of a special master to hear and simplify complex evidence should resolve the due process concern); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 220 (1990) (contesting that clear and orderly procedures would decrease jury passivity); Lisa S. Meyer, Comment, *Taking the "Complexity" Out of Complex Litigation: Preserving the Constitutional Right to Civil Jury Trial*, 28 VAL. U. L. REV. 337, 360-71 (1993) (asserting that active involvement by the judiciary is critical in managing complex litigation).

implements important public policies, complexity notwithstanding.³²⁷

Even if the complexity exception is constitutional, SOX actions do not fit within this exception. Generally, the number of parties involved in a SOX action is small (typically one plaintiff and one defendant), the length of trial time should be relatively short, and the evidence should be understandable to jurors if presented in a straightforward manner. Moreover, it would be unwise to say that SOX actions are categorically complex merely because they often involve complaints about sophisticated securities regulation and accounting practices. The question is not whether SOX actions are complex in the abstract; it is whether the particular issue the jury must decide is over its collective head.³²⁸

Considerable complexity could arise in determining whether a plaintiff engaged in SOX-protected activity. But, the protected-activity issue, as previously mentioned, should be resolved by the judge because it is a question of law. A SOX jury's main role as the fact finder is to resolve the issue of causation, which it is qualified to do, because a SOX causation determination entails making probabilistic assessments grounded in real-world experience. The causation determination in a SOX case boils down to a determination of whether the SOX-protected activity was a "motivating factor" or "contributing factor" in the adverse employment action.³²⁹ The resolution of the causation question in a particular SOX case may be difficult because the evidence conflicts, but it is not "complex" in the sense that the issue is so technical in nature that it is beyond the comprehension of twelve ordinary citizens. This type of causation determination is frequently made by juries in other employment discrimination and whistleblower cases.³³⁰

327. See Maxwell M. Blecher & Candace E. Carlo, *Toward More Effective Handling of Complex Antitrust Cases*, 1980 UTAH L. REV. 727, 744 (1980) (stating that the jury is integral to a democratic government); Blecher and Daniels, *supra* note 325, at 78-87 (stating that the jury is integral to a democratic government).

328. See Wilkinson, *supra* note 321, at 84 ("The inquiry [under the complexity exception] is not whether a case as a whole is too complex for a jury because it fits a particular category . . . but whether particular issues in the case are so technical in nature that they are beyond the reasoned and comprehending decision-making power of the jury.").

329. See *Collins v. Beazer Homes*, 334 F. Supp. 2d 1365, 13758-80 (N.D. Ga. 2004) (discussing the necessary factors to prove causation); *Halloum v. Intel Corp.*, No. 2003-SOX-7, at 7-8 (ARB Jan. 31, 2006) (same).

330. See *Carter v. Diamondback Golf Club, Inc.*, 2006 U.S. Dist. LEXIS 3739, *23, 97 Fair Empl. Prac. Cas. (BNA) 1086 (M.D. Fla. 2006) (holding that in mixed-motive religious discrimination case under Title VII, circumstantial evidence raised a genuine issue of material fact on causation such that the jury must determine whether illegitimate reasons motivated the employer to terminate the plaintiff's employment); *EEOC v. Int'l House of Pancakes*, 411 F. Supp. 2d 709, 716 (E.D. Mich. 2006) (declaring that in an age discrimination case under the ADEA, sufficient evidence existed for a reasonable jury to conclude that restaurant's stated reason for ending waitress's employment relationship was a pretext for age discrimination); *Robinson v. Hilton Hospitality, Inc.*, 2006 U.S. Dist. LEXIS

Closely related to the complexity exception is the notion that jury trial actions should be separated from non-jury trial actions under the Seventh Amendment based on the relative abilities of judges and juries. For example, in *Ross v. Bernhard*, the Court spoke for the first time of the “practical abilities and limitations of juries” as a conceivable criterion for constitutionally distinguishing a case that must go to the jury under the Seventh Amendment from a case that need not go to the jury.³³¹ Subsequent cases revealed that the Court was not prepared to replace the traditional historical test with a purely functional approach.³³² Scholars have pointed out several problems with a purely functional approach.³³³ First, a functional approach has no direct historical support.³³⁴ Also, disagreement exists concerning the particular functions a jury is best able to perform and the types of cases a jury is best suited to hear.³³⁵ Finally, a functional approach would provide federal judges with extraordinary discretion to determine whether a jury hears a particular case, which is inconsistent with the Framers’ conception of the jury trial right as a strong civilian check on the power of the judge.³³⁶

Despite the fact that an explicitly functional approach has not been adopted by the Court, the *Markman* and *Del Monte Dunes* decisions indicate that in the absence of historical information, the Court is willing to

11469, *33-36, 11 Wage & Hour Cas. 2d (BNA) 447 (S.D. Ohio 2006) (deciding that in a FMLA-retaliation case, genuine issue of material fact raised on whether employer terminated employee for requesting FMLA leave; causation to be determined by jury); BNA, *Former County Employee Wins \$4.75 Million in Potential First Verdict under Arizona Law*, DAILY LAB. REPORT, Oct. 17, 2005, at A-1 (reporting that a jury returned a multi-million dollar verdict in a retaliation claim under Arizona whistleblower law).

331. *Ross v. Bernhard*, 396 U.S. 531, 537 n.10 (1970) (discussing the limitations of juries as a distinguishing factor to prevent a case from going to a jury).

332. See *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 567 n.4 (1990) (declaring that the court is hesitant to rely on whether the issues are “typical grist” for the jury’s judgment as an independent basis for extending the right to a jury trial under the Seventh amendment); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40 n.4 (1989) (stating that the court does not declare that the Seventh Amendment provides a right to a jury trial on all legal rather than equitable claims).

333. See *Moses*, *supra* note 185, at 239 (“Giving the court the power to determine on a functional basis if an issue should go to a jury would essentially abrogate the constitutional guarantee of the right to a jury trial”); Wolfram, *supra* note 178, at 644 (listing several reasons why a functional approach is problematic).

334. Wolfram, *supra* note 178, at 719 (recalling that there was some debate about whether there should be a constitutional guarantee of jury trial but “none of these seem to have contemplated that these issues of utility could be evolved into a standard for determining the extent of the right to jury trial”).

335. *Id.* at 644.

336. *Moses*, *supra* note 185, at 239 (“Giving the court the power to determine on a functional basis if an issue should go to the jury would essentially abrogate the constitutional guarantee of the right to a jury trial”); Wolfram, *supra* note 178, at 644 (stating several reasons why a functional approach is problematic).

consider the relative abilities and limitations of the judge and jury in determining whether, in an action in which the right to jury trial attaches, a particular issue within the action should go to the jury.³³⁷ In making such a determination, the Court has indicated that it will be guided by the jury's primary role as a fact finder.³³⁸

For the aforementioned reasons, it is unlikely that the Court will discard the historical test in favor of a purely functional approach. If the Court does adopt a purely functional approach, which attempts to separate types of cases that *must* be tried to the jury from types of cases that *need not* be tried to the jury, the SOX whistleblower action should be the type of case that is tried to a jury because juries have the requisite skills to determine whether an employee was fired for whistleblowing. Similarly, if the status quo remains in force, the Seventh Amendment requires a jury to make factual findings on most of the elements of a SOX action.³³⁹

2. Congressional Control of Jury Trials on Statutory Claims

Various scholars, including Stanton Krauss, Rachael Schwartz, and Kenneth Klein, reject the historical test of the Seventh Amendment and conclude that, with respect to statutorily created federal laws, no jury right exists under the Seventh Amendment unless Congress specifically provides for a jury right in the statute itself.³⁴⁰ They contend that the Seventh Amendment merely states that the Constitution does not prohibit jury trials, note that jury trials make sense in some civil cases, and specify that Congress has plenary power to decide in which situations a right to jury trial should be preserved.³⁴¹ In an era in which Congress has federalized much of what was previously a part of the common law and has created new legal rights that would have formerly been developed through the

337. See *supra* note 185.

338. *Id.*

339. See *supra* Part III.A.3.

340. See Klein, *supra* note 179, at 1036 ("The Seventh Amendment can be read as the simple instruction that it is: If a legislature creates, by statute, a legal right which heretofore did not exist, the legislature can determine whether trial of that right should be to a jury, but in all other instances a litigant has an absolute right to a jury trial in a civil case in federal court."); Krauss, *supra* note 182, at 483 ("In sum, the theory that the Jury Trial Clause gave Congress plenary authority to determine the extent of the right to civil jury trial in the federal courts comports with all of the early historical evidence. . . . [T]hat theory should be considered the original understanding of the Seventh Amendment right to jury trial."); Schwartz, *supra* note 177, at 629-30 ("The alternative interpretation places the judgment as to when specific types of civil cases are best tried by juries in the hands of Congress. This interpretation not only accords with the expressed intentions of the Framers (demonstrated by contemporary writings), but also provides a far more workable standard for the courts to apply.").

341. See *supra* note 340.

common law, the Seventh Amendment's role as a protector of the fundamental importance of the jury in civil cases in federal court will be abrogated, if their view is correct. Such an approach which would represent a paradigm shift in Seventh Amendment jurisprudence, and should be scrutinized with the utmost care. If, however, these scholars are correct, there is no right to a jury trial in a SOX federal court action because Congress did not specifically provide for a jury right. The interpretation of SOX that implies a right to jury trial is unpersuasive if this alternative view of the Seventh Amendment ever carries the day. In that brave new world, Congress must specifically provide for a jury trial right in the statute for such a right to exist. It did not do so in the SOX statute.

3. A Historical Vision of the Jury and its applicability to SOX

Scholars have suggested an array of approaches to interpret and apply the Seventh Amendment to civil claims in federal court.³⁴² Each has various arguments that can be made both for and against.³⁴³ Yet, in evaluating whether the right to jury trial on a SOX whistleblower action in federal court is constitutionally protected, I cannot help but intuitively gravitate to the historical vision of the jury that is outlined in current Sixth Amendment jurisprudence. This vision "focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people" and acts as "a means by which ordinary people can exercise governmental power to vindicate the community's sense of right."³⁴⁴ Like Vikram David Amar, I question whether the Sixth Amendment view of the jury should also guide our understanding of the Seventh Amendment.³⁴⁵ It is questionable whether the Framers who meant to ensure that a twelve-member jury, not a lone judge, stand as a bulwark against governmental tyranny, would have also wanted that same institution to judge the whistleblower claims of those who stand up to corporate wrongdoing. If so, as twenty-first century Americans, we might also consider whether any parallels exist between the community interest in having a criminal jury determine the guilt or innocence of those Enron executives accused of criminal law violations and the community interest

342. *Id.*

343. *Id.*

344. Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 293-94 (2005) ("The basic constitutional vision underlying the *Booker/Blakely/Apprendi* line of cases focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people.").

345. *Id.* at 297 ("In other words, although the *Apprendi* line relies on jury rights under the Sixth Amendment, ought not the vision of the jury it reflects inform our understanding of the Seventh Amendment, which covers *civil* juries in federal courts as well?").

in having a civil jury determine whether a whistleblower was fired for engaging in SOX-protected activity. I find that in this era of the “vanishing civil jury trial,” the fundamental importance of the civil jury as a constitutional actor has never been more critical.³⁴⁶ Whether SOX whistleblower claims in federal courts are to be tried by juries is something in which all of us, as citizens, have a stake. I would rather see this historical vision of the jury, as opposed to a strict convenience and efficiency consideration, influence the constitutional decision.

IV. CONCLUSION

The structure, language, and purpose of the Sarbanes-Oxley Act whistleblower provision indicate that courts should imply the right to a jury trial as a matter of statutory interpretation. In addition, the Seventh Amendment guarantees the right to a jury trial under the static historical test applied by the Supreme Court because a SOX action is analogous to an English common-law action and SOX damages remedies are legal in nature. In general, the jury in a SOX case in federal court should make factual findings on the elements of a SOX action, the causation element in particular, and damages. The judge in a SOX case will resolve the other issues in the case, which constitute questions of law.

346. Justice Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 163 (2005) (documenting the “steady, steep, decades-long decline” in the number of jury trials in Texas courts).