"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." 1

The wording of the seventh amendment suggests that determining whether the Constitution guarantees a right to jury trial in a particular case requires an historical inquiry. No new rights were conferred thereby; existing rights were "preserved" and given constitutional protection. Hence, it is inviting to infer that right to jury trial today depends solely upon whether jury trial was accorded a party, as a matter of right, in like cases in 1791. 2

Such an inquiry is no mean task. It involves a study of the distribution of jurisdiction among then existing courts of law, equity and admiralty, because, in 1791, jury trial as of right was confined to actions at law, 3 although it did not extend to all such actions. 4 Jurisdictional lines were primarily a matter of remedy, but to some extent turned on other factors such as subject matter and differences

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1 U.S. Const. amend. VII.

2 This is the date that ratification of the first ten amendments was completed and would be the relevant date for a purely historical test of the right in the federal courts.


4 E.g., Shillitani v. United States, 384 U.S. 364 (1966) (civil contempt); McElrath v. United States, 102 U.S. 426 (1880) (suit against the United States); 5 J. Moore, Federal Practice ¶ 38.32[1]. (2d ed. 1951) [hereinafter cited as Moore] (condemnation actions under the power of eminent domain).
in procedure.\textsuperscript{5} Further complications stem from historical shifts and overlapping jurisdiction.\textsuperscript{6} Moreover, the careful historian encounters difficulty in applying the fruits of his study to contemporary civil litigation involving subject matter and procedural patterns unused, and sometimes unknown, in 1791.\textsuperscript{7}

New procedural patterns in contemporary civil litigation do more than just complicate the application of 1791 results in right to jury trial disputes. In \emph{Beacon Theatres, Inc. v. Westover},\textsuperscript{8} the Supreme Court clearly suggested that the dimension of the constitutional right reflects changes engendered by procedural reform, \textit{i.e.}, that because of changes in rules regulating the conduct of adjudication, the results in right-to-jury-trial disputes may be different from those dictated by history, at least where the contemporary result broadens enjoyment of jury trial. If this is a sound reading of \emph{Beacon}, the case contains strong medicine. So measured, the right is far from static; the merits of further reform must be considered from a new aspect. In this article, I propose to examine critically the premises of the \emph{Beacon} decision and to explore briefly some of its ramifications. Preliminarily, however, some elaboration of \emph{Beacon} itself and of its principal successors is necessary.

\section{I. Beacon Theatres, Inc. v. Westover}

Plaintiff Fox, a theater owner, had made contracts with film distributors under which it was granted the exclusive right to show first-run pictures in a particular geographic area. These contracts also provided Fox with "clearances," periods during which no other theater in the same competitive area could show the same film. Defendant Beacon built a theater about eleven miles from plaintiff's and, according to the complaint, notified Fox that it regarded the contracts barring simultaneous showings of first-run films at the two theaters as a violation of the antitrust laws. Threats of treble damage suits against plaintiff and its distributors were also alleged in the complaint.

Fox sought a declaratory judgment that these contracts did not violate the antitrust laws. Plaintiff also requested an injunction to prohibit Beacon from instituting any antitrust actions against Fox or its distributors pending final disposition of the action. Beacon's

\begin{itemize}
  \item \textsuperscript{5} F. JAMES, CIVIL PROCEDURE § 8.2 (1965) [hereinafter cited as JAMES].
  \item \textsuperscript{6} Id.
  \item \textsuperscript{7} Commentators have attributed to the merger of law and equity most of the difficulties of determining right to jury trial today. \textit{See}, \textit{e.g.}, 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 872 (Wright ed. 1961); JAMES § 8.4.
  \item \textsuperscript{8} Id.
\end{itemize}
answer denied such threats. Alleging that there was no substantial competition between the theaters and that there was a conspiracy to manipulate contracts and "clearances" so as to restrain trade and monopolize first-run pictures, Beacon counterclaimed for treble damages and demanded a jury trial of disputed factual issues. The plaintiff moved to strike the demand for jury trial as to the complaint and the answer thereto.

The district court granted this motion as well as a further motion for separation of the issues raised by the complaint and answer from those of the counterclaim. The court also ordered that the plaintiff's claim be tried first without a jury. The Ninth Circuit denied mandamus. It held that the complaint presented equitable issues because, at the time of its filing, Fox was threatened with interference with its property or contract rights and was without an adequate legal remedy. Equitable jurisdiction thus having attached, it was immaterial that Fox might have acquired thereafter an adequate legal remedy by way of defense against Beacon's counterclaim. The court also ruled that, although the trial court was not required to try the nonjury claim first, its decision to do so was a matter within its discretion.

The Supreme Court, although conceding that the complaint validly sought equitable relief, reversed. It held that the controversy contained both legal and equitable elements with common factual issues and that, except under the most compelling circumstances, the lower court could not deprive a litigant of his right to jury trial on issues material to legal elements by ordering a sequence of trial which first disposed of equitable elements.

Mr. Justice Stewart, joined by Justices Harlan and Whittaker, dissented. The dissent relied on a purely historical view of the right to jury trial. With regard to the request for declaratory relief, it insisted that the statutory declaratory remedy is neither legal nor equitable and that the right to jury trial depends on "the basic context in which the issues are presented." If the issues are of a kind traditionally cognizable in equity, there is no right to jury trial; if of a kind traditionally cognizable at common law, there is such a right. Because an unsupported declaration of rights might not have protected

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9 Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).
10 The Court endorsed the Ninth Circuit's liberal construction of the complaint as requesting an injunction against the threat of suit as well as against the institution of such suits. 359 U.S. at 506.
11 The primary factual issue was whether there was substantial competition between the two theaters. The dissenting opinion raised some question as to whether that issue was in reality material to both the claim and the counterclaim. Id. at 513.
12 Id. at 515, citing E. Borchard, DECLARATORY JUDGMENTS 399-404 (2d ed., 1941) and 5 Moore § 38.29.
Fox adequately, the case was equitable. That the counterclaim for damages was legal was conceded, but traditionally it was within the trial court's discretion to fix the sequence of trials of contemporaneous actions in equity and at law.\textsuperscript{13}

Consistent with the latter point, Professor Fleming James, Jr., has suggested in his excellent treatise that the \textit{Beacon} decision could have been based simply on a finding that the trial court abused its discretion in fixing the sequence of adjudication.\textsuperscript{14} Support for this position may be found in the majority opinion of the Court which, in acknowledging the possibility that prior adjudication of equitable elements with nonjury determination of common issues of fact may be necessary, spoke in terms of discretion.\textsuperscript{15} So viewed, \textit{Beacon} would very nearly square with history, for equitable restraint of contemporaneous proceedings at law traditionally required the exercise of discretion. Yet the terms of that exercise were somewhat different. Historically, the determination was governed by such factors as the condition of the docket and whether the complainant in equity had been precipitate.\textsuperscript{16} In \textit{Beacon} the adequacy of the legal remedy is controlling.\textsuperscript{17} Indeed the Court in \textit{Beacon} seems more to be stating a rule with an exception than describing the terms of discretion.

The rule of \textit{Beacon} is that, in cases involving both legal and equitable elements with a common factual issue, there is a constitutional right to jury trial on the factual issue; departure from the rule is

\begin{itemize}
\item \textsuperscript{13} 359 U.S. at 517, citing American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937) (suit in equity for cancellation and surrender of life policy on ground of fraud followed by action at law for the proceeds of the policy).
\item \textsuperscript{14} JAMES § 8.10.
\item \textsuperscript{15} 359 U.S. at 515.
\item \textsuperscript{16} The leading definition appears in American Life Ins. Co. v. Stewart, 300 U.S. 203, 215-16 (1937): A court has control over its own docket. . . . In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. . . . If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. . . . There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained.
\item \textsuperscript{17} If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.
\end{itemize}

359 U.S. at 510.
authorized only when irreparable harm would result from jury determination of the issue. This is the interpretation adopted by most of the lower courts.\(^\text{18}\) It represents a striking departure from history.\(^\text{19}\) Immediately, it rejects, for the purpose of determining right to jury trial, equity's traditional power\(^\text{20}\) to enjoin, pending adjudication in equity, proceedings at law instituted by plaintiff's adversary.\(^\text{21}\) The Court in \textit{Beacon} specifically referred to bills of peace, \textit{quia timet} and injunctions.\(^\text{22}\) Professor James has suggested that interpleader and rescission might be added to that list.\(^\text{23}\)

But the rule implies more. Taken literally, it requires that equity refuse to adjudicate an issue material to requested equitable relief, if that issue is also material to requested legal relief.\(^\text{24}\) For example, fact issues, material both to the grant of an injunction and to the award of damages in infringement cases, become triable to a jury as of right.\(^\text{25}\)

\(^{18}\) \textit{E.g.}, Florists Nationwide Telephone Delivery Network—America's Phone-order Florists, Inc. v. Florists Telegraph Delivery Ass'n, 371 F.2d 263 (7th Cir. 1967) (injunction and damages); AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965) (plaintiff sought injunction, accounting and treble damages; defendant counterclaimed for declaratory relief and damages); Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 (4th Cir. 1965) (restoration of union membership and damages); Swofford v. B. & W., Inc., 336 F.2d 406 (5th Cir. 1964) (plaintiff sought injunction, accounting and treble damages; defendant counterclaimed for declaratory relief); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961) (plaintiff sought declaratory and injunctive relief; defendant counterclaimed for damages; this the the leading lower court decision); Curry v. Pyramid Life Ins. Co., 271 F.2d 1 (8th Cir. 1959) (plaintiff sought damages; defendant counterclaimed for cancellation and injunction); General Inv. Co. v. Ackerman, 37 F.R.D. 38 (S.D.N.Y. 1964) (rescission and damages); Jennings v. McCall, 224 F. Supp. 919 (W.D. Mo. 1963) (accounting and damages); Harkobusic v. General Am. Transp. Corp., 209 F. Supp. 128 (W.D. Pa. 1962) (injunction and damages); Minnesota Mut. Life Ins. Corp. v. Brodish, 200 F. Supp. 777 (E.D. Pa. 1962) (plaintiff sought declaratory relief, cancellation and rescission; defendant counterclaimed for damages); Inland Steel Prod. Co. v. MPH Mfg. Corp., 25 F. R. D. 238 (N.D. Ill. 1959) (plaintiff sought declaratory relief and an injunction; defendant counterclaimed for declaratory relief and damages); Shubin v. United States District Court, 313 F.2d 250 (9th Cir. 1963) (dictum) (plaintiff sought declaratory relief; defendant counterclaimed where only an injunction was possible; jury trial was denied); United States v. Renz, 213 F. Supp. 521 (N.D. Iowa 1962) (dictum) (plaintiff sought foreclosure; one defendant counterclaimed against another for rescission and damages).

\(^{19}\) Writing in 1959, I utterly failed to see the significance of \textit{Beacon} and advocated an historical test which gave greater recognition to pre-merger party control over right to jury trial. McCoid, \textit{Right to Jury Trial in Federal Courts}, 45 Iowa L. Rev. 726 (1960). Viewing the request for declaratory relief as legal because it anticipated a treble damage claim, I saw the case as having no significant equitable elements. This may have been sound characterization under the \textit{Beacon} analysis. See text accompanying notes 111-18 \textit{infra}. But it ignored the historical jurisdiction of equity to act in such cases.

\(^{20}\) See \textit{3 J. Pomeroy, EQUITY JURISPRUDENCE} §§1360-61, 1363 (1883).


\(^{22}\) 359 U.S. at 569.

\(^{23}\) \textit{JAMES} § 8.10.

\(^{24}\) The Court referred specifically to the problem of multiplicity. 359 U.S. 506.

\(^{25}\) This rule is unquestionably established by Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), discussed at text accompanying notes 32-33 \textit{infra}, which has been followed by, \textit{e.g.}, Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 (4th Cir. 1965); Harkobusic v. General Am. Transp. Corp., 209 F. Supp. 128 (W.D. Pa. 1962). \textit{See also} Robine v. Ryan, 310 F.2d 797 (2d Cir. 1962), where the rule was partially applied.
Equity’s traditional power to dispose of incidental legal issues in order to avoid multiplicity of actions \(^{26}\) becomes a thing of the past.

The logic of the rule might also be extended to reject the result traditionally reached that, by application of the doctrine of collateral estoppel in situations requiring both legal and equitable adjudications, a prior equity decree controlled the determination of the same factual issues in a subsequent action at law.\(^{27}\)

Finally, a plaintiff, compelled by a merged procedure to seek both legal and equitable relief in a single action in order to avoid splitting his cause of action, \(^{28}\) will be subjected to jury trial on common factual issues. An illustration is the patent infringement action for an injunction and treble damages.\(^{29}\)

These departures from history are the consequences of a procedural reform, the merger of law and equity. Eliminating the ancient problem of multiplicity, this reform obviated the need or justification for binding nonjury determination in equity of issues common to legal and equitable relief, and permitted jury determination of such issues in a single, mixed action.

The language of the Court in *Beacon* and, indeed, the premises of the decision strongly presage a broader rejection of historical results. The Court seems to have concluded that, to the extent plaintiff Fox sought declaratory relief, its claim contained a legal element, *i.e.*, the controversy was both legal and equitable even without Beacon’s counterclaim.\(^{30}\) The possible premise was that the declaratory judgment remedy, by permitting an inverted and accelerated adjudication of Beacon’s right to legal relief, was legal, and that its availability eliminated the necessity for equitable intervention.\(^{31}\) This conclusion is consistent with the idea that procedural reform in the shape of merger of law and equity may make legal remedies adequate where hitherto they were inadequate. It thus alters the jury trial result

\(^{26}\) See 1 J. Pomeroy, *Equity Jurisprudence* **§§ 181, 243, 245** (1881).

\(^{27}\) *E.g.*, Brady v. Daly, 175 U.S. 148 (1899).

\(^{28}\) 1B Moore ¶ 0.410[1].

\(^{29}\) AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965).

\(^{30}\) Not only does the Court emphasize the significance of the Declaratory Judgment Act, 359 U.S. at 506-07, but it also explicitly speaks of jury trial of the plaintiff’s plea for declaratory relief. *Id.* at 508. The significance of this may not have been perceived entirely in James v. Pennsylvania Gen. Ins. Co., 349 F.2d 228 (D.C. Cir. 1965) (remanding for determination of the adequacy of the legal remedy).

\(^{31}\) The District Court’s finding that the Complaint for Declaratory Relief presented basically equitable issues draws no support from the Declaratory Judgment Act. . . . That statute, while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first.

359 U.S. at 504.
reached on the basis of a purely historical inquiry, even where merger is not a consideration. It cements the view that Beacon requires the right to jury trial to be measured in the light of procedural reform. And it opens to inquiry whether other procedural reform may not affect right to jury trial.

II. Beacon's Successors

The Court returned to the problem in 1962 in Dairy Queen, Inc. v. Wood. That decision may be viewed as opposed to my interpretation of Beacon; actually, however, the decision supports my thesis.

The plaintiff in Dairy Queen, alleging the breach of a written trademark licensing agreement and infringement of its trademark, sought an injunction against further use of the mark, an accounting to determine the amount owing and a judgment for that amount. The defendant denied any breach and alleged a modification of the agreement, laches and estoppel grounded on delay in assertion of the claim and antitrust violations; it also demanded a jury trial.

The district court granted a motion to strike the demand for jury trial on the ground that the action was purely equitable or, if mixed, equitable with incidental legal elements. The Third Circuit denied mandamus without opinion. Again, the Supreme Court reversed. In light of Rule 53(b), which provides for reference to a master in jury actions, the Court rejected the contention that an equitable accounting was necessary and ruled that defendant was entitled to a jury trial on the factual issues material thereto, since the plaintiff sought in part legal relief, i.e., a money judgment.

The argument that the decision is contrary to my reading of Beacon stems from the Court's attempt to square its decision with history. Citing Scott v. Neely and Cates v. Allen, Mr. Justice Black, the author of the majority opinion, argued that equity traditionally lacked jurisdiction where a claim "cognizable only at law is united in the same pleadings with a claim for equitable relief." Professor James has suggested that this is a misreading of history: that Scott and Cates, unlike Dairy Queen, represent a class of cases where "equity refused to give relief unless and until a preliminary issue

34 140 U.S. 106 (1891). The Court also cited the case in Beacon as forbidding denial of jury trial in the case of a claim for equitable relief in aid of a legal action or during its pendency. 359 U.S. at 510.
35 149 U.S. 451 (1893).
had been determined at law by a jury”; 37 and that “[i]n other situations (probably including that in both Beacon and Dairy Queen) equity would frequently have tried without a jury the very kinds of legal issues which were presented in those cases.” 38 To this it might be added that Scott and Cates dealt with changes in state law which, if applicable, would have contracted, rather than expanded or preserved, the right to jury trial in the federal courts. 39 Changes in state procedure, even in 1891 and 1893, did not govern the allocation of jurisdiction between law and equity in federal courts where right to jury trial was at stake. 40 Yet whatever the quality of the Court’s historical analysis, its reliance thereon may be asserted in opposition to any broad interpretation of Beacon.

The Court relied at least equally on the Beacon decision to support its conclusion that there is a right to jury trial on issues material to both legal and equitable relief. 41 This is a clear application of the “rule” of Beacon and one that goes beyond the situation of an equity proceeding designed merely to forestall legal action. 42 Moreover, its characterization of plaintiff’s claim for money as legal was based on the federal rules, which provide for reference to a master in jury cases, thus eliminating the need for an equitable accounting. 43 Although this procedure antedates the federal rules, 44 it is a procedural innovation which post-dates 1791. 45 Use of that rule to supplant equity jurisdiction, therefore, is a clear instance, following the Beacon lead, of definition of the right to jury trial in light of procedural reform.

37 James § 8.7, at 355.
38 Id. § 8.10, at 374 n.14.
39 Both cases dealt with Mississippi legislation which conferred jurisdiction of bills by creditors who had not reduced their claims to judgment in state chancery courts in order to set aside fraudulent conveyances of property. Both decisions held that, because of the seventh amendment, such state legislation could not enlarge equity jurisdiction in federal courts at the expense of jurisdiction at law.
40 “Whatever control the State may exercise over proceedings in its own courts, such a union of legal and equitable relief in the same action is not allowed in the practice of the Federal Courts.” Scott v. Neely, 140 U.S. 106, 114 (1891).
42 In Dairy Queen plaintiff sought affirmative, coercive relief: an injunction and a money judgment. Id. at 475.
44 An order appointing an auditor in an action at law was sustained against a seventh amendment argument in 1919. Ex parte Peterson, 253 U.S. 300 (1919). That case refers to earlier federal use of auditors in cases reaching the Supreme Court. Chicago, M. & St. P. Ry. v. Tompkins, 176 U.S. 167 (1900); North Carolina R.R. v. Swasey, 90 U.S. (23 Wall.) 405 (1875); Heirs of Dubourg de St. Colombe v. United States, 32 U.S. (7 Pet.) 625 (1833); Field v. Holland, 10 U.S. (6 Cranch) 8 (1810). All of these were equity proceedings, however. The power to appoint an auditor in an action at law was sustained in Fenno v. Primrose, 119 Fed. 801 (1st Cir. 1903).
45 Ex parte Peterson, supra note 44, at 307-08 (distinguishing the auditor in the common law action of account, who was appointed after an interlocutory judgment was rendered in cases where defendant’s obligation to plaintiff was as a guardian, bailiff or receiver of his property).
The reform involved in *Dairy Queen*, reference to a master, was of crucial significance to the very existence of a legal element.46

To these leading cases the Court has added four others: *Simler v. Conner*,47 *Meeker v. Ambassador Oil Corp.*,48 *Fitzgerald v. United States Lines Co.*49 and *Katchen v. Landy*.50

*Simler* made it clear that federal law governs the right to jury trial in federal courts,51 but otherwise added nothing. The suit was for declaratory relief and was regarded by the Court as legal, since it inverted and accelerated a legal claim for money damages.52 *Meeker* involved a request by the plaintiff for both legal and equitable relief.53 The Court reversed the denial of a demanded jury trial, citing *Beacon* and *Dairy Queen* in a per curiam opinion.

In *Fitzgerald*, a seaman brought an action, based on a single accident, for negligence, with liability claimed under the Jones Act, and for unseaworthiness and maintenance and cure. Plaintiff demanded a jury trial on all issues. The trial judge submitted the negligence and unseaworthiness issues to the jury, but retained for himself the claim for maintenance and cure. Following the Second Circuit's affirmance by a divided vote,54 the Supreme Court reversed and remanded for a jury trial on all three claims. The decision was not constitutionally grounded; rather it was based on the procedural desirability of submitting all three, related claims to a single trier of fact. This seems to mirror the *Beacon* idea that jury determination controls issues common to legal and equitable relief;55 it conceivably might be used to argue that issues peculiar to equitable relief must be submitted to a jury which is deciding related factual issues material to legal, or to legal and equitable relief. On the other hand, the Court's emphasis on the interrelationship of damages for negligence and maintenance and cure56 may make the case distinctive.

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46 Without reference to a master, plaintiff's request for an equitable accounting would have been justified. On that basis, it might have been questioned whether the case contained any legal element.
50 382 U.S. 23 (1965).
52 A client, admitting his obligation to pay a reasonable fee, sought a declaration that the contingent fee contract between the parties was the product of the lawyer's fraud and overreaching and requested an adjudication of the amount owing. *Simler v. Conner*, 282 F.2d 382 (10th Cir. 1960).
53 308 F.2d 875 (10th Cir. 1962).
54 306 F.2d 461 (2d Cir. 1962).
55 Indeed, *Beacon* itself pointed out the undesirability of splitting between different fact-finders determination of considerations relevant to the reasonableness of a restraint on trade. 359 U.S. at 508 n.10.
56 The same items of damage are to some extent recoverable under the different counts. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 19 (1963).
Katchen v. Landy, a bankruptcy case, presented a more difficult problem. A creditor who had filed claims objected, partly on the ground of denial of jury trial, to the referee’s summary adjudication ordering payment of allegedly voidable preferences and allowing the claims only on satisfaction of that judgment. The court of appeals affirmed, as did the Supreme Court, Justices Black and Douglas dissenting. The Court left open the applicability of Beacon and Dairy Queen, and justified the denial of jury trial on the ground that the imperative circumstances, which Beacon had recognized as justifying nonjury adjudication, were to be found in the congressional intent underlying summary jurisdiction: “a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.”

The Court in Katchen did not elaborate on why Beacon and Dairy Queen might not apply at all. But such a conclusion would have to be based on the view that a court exercising bankruptcy jurisdiction is acting entirely in equity. In effect, bankruptcy perpetuates the division of judicial jurisdiction which otherwise disappeared with the merger of law and equity. The Court held that bankruptcy jurisdiction included the power to affirmatively avoid preferences in order to prevent multiplicity of actions, a longstanding justification of equity power. Given a court with equity powers only, the essential ingredient of Beacon and Dairy Queen, i.e., legal jurisdiction, is missing.

The conclusion that bankruptcy courts are exclusively equitable was unnecessary so long as the Court regarded plenary trial of the trustee’s preference claim as seriously disruptive of a principal aim of bankruptcy. Theoretically, at least, that disruption might well constitute the kind of overriding imperative, frustration of the equitable remedy, with which the court had qualified the Beacon mandate. That mandate continues un tarnished by these cases. What remain for consideration are inquiries into its soundness and its scope.

III. The Premises of Beacon

If Beacon is to be read as holding that the grant of a jury trial is constitutionally compelled, as distinguished from merely permitted constitutionally, at its core must be the view that the command of

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58 Ex parte Christy, 44 U.S. (3 How.) 292, 311 (1845).
60 Whether in practice the exercise of summary jurisdiction is so much better designed to effectuate the congressional intent may be debatable. See W. Collier, Bankruptcy ¶ 23.12 (14th ed. 1966); J. MacLachlan, Bankruptcy § 194 (1956).
the seventh amendment is one of adherence to a principle rather than to a particular set of results. On no other basis can the Court claim that its decision is faithful to the peculiar "preservation" wording of that amendment. If right to jury trial is defined in terms of a constant principle, then Beacon only preserves the right.

The abstract view that the right is a matter of principle fits well with the conception of the Constitution as a durable document providing continually useful standards for an evolving society. The "right of trial by jury" must be redefined to reflect evolving procedure in the same way that our conceptions of "due process" or "unreasonable searches and seizures" have been flexibly defined to meet new problems. Indeed, this may be especially appropriate in the jury trial area where, in many instances, particular results had no long-settled usage in 1791.

However, the thesis that the seventh amendment compels adherence to a principle is sound only if that principle can be articulated meaningfully. Without such clear articulation either the command of the seventh amendment is empty, making right to jury trial a question of selective inquiry, or the command is necessarily tied entirely to results reached in 1791, making right to jury trial static. The Beacon opinion does provide the necessary formulation. It focuses on the distinction between law and equity jurisdiction. If the issue is legal, there is a right to jury trial; if equitable, there is no such right. It must be conceded, of course, that the problem of the constitutional right to jury trial is broader than this. The Court's focus appropriately could be only as broad as the problem before it, and that problem was a product of the law-equity distinction.

The law-equity distinction is a useful basis for a principle distinct from the historical result test, only insofar as it provides an effective means of continuing characterization. The Court meets this problem by suggesting that whether an issue is legal or equitable is determined

61 A recent study of the history of the seventh amendment suggests that in 1791 there was no precise meaning and that, in another context—judicial control over the jury—rational procedural changes have an impact on the nature of jury trial. Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966).

62 For example, jurisdiction over the person has expanded from the rigid physical presence and consent theories of Pennoyer v. Neff, 95 U.S. 714 (1878), to the more flexible minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Where constitutional limitations on choice of law once seemed to point to particular contacts as fixing the choice, Mutual Life Ins. Co. v. Liebling, 259 U.S. 209 (1922), freer rein is given today. See, e.g., Carroll v. Lanza, 349 U.S. 408 (1955).

63 See, e.g., Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) (rejecting the "mere evidence" limitation on searches and seizures).

64 See James § 8.2.

65 Admiralty must be considered; historically there was no right to jury trial in some actions at law.
by the nature of the relief to which it is material. Damages are legal; injunctions are equitable. This formulation does not acknowledge explicitly that the remedy sought was not historically the sole basis of the division between law and equity jurisdiction. Substantive factors other than remedy were sometimes controlling. The trust, for example, was a creature of equity. Hence, an action by the beneficiary against the trustee, even for money, normally was consigned to equity jurisdiction. Beacon, however, does not present a case where the substantive features control, beyond the fact that treble damages are recoverable only at law. Nor does Beacon touch upon substantive bases for the allocation of jurisdiction other than remedy.

In addition to the relief requested, procedural factors played a part in the allocation of jurisdiction. Equity sometimes assumed jurisdiction where the legal remedy was deemed inadequate because its availability required assertion of a claim by one's adversary. Beacon was just such a case. Fox could assert all its defenses in a treble damage action for antitrust violations brought by Beacon; but any delay in vindication of its rights threatened irreparable harm. That threat justified the intervention of equity. More often, perhaps, equity assumed jurisdiction over matters otherwise legal to avoid multiple suits. Dairy Queen was such a case, if plaintiff's claim for money is accepted as legal. Two suits would be necessary in a dual system, if both legal and equitable remedies are to be obtained and equity had not developed the practice of giving legal relief as an incident to equitable relief.

The Beacon Court's principle is directed exactly to those cases where equity jurisdiction was founded on procedural inadequacies at law: where the remedy at law is adequate in light of contemporary procedure, equity lacks jurisdiction, though such jurisdiction might

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66 Arguably, this suggestion is made explicit only by the dissenting opinion. 359 U.S. 500, 514. However, the majority's early emphasis on the prayer of Fox, id. at 503-04, and the concession at the outset that a claim for injunctive relief is stated, id. at 506, make clear the significance to the Court of the relief requested.

67 I do not believe that it is necessary in this context to characterize remedy generally as a matter of substance or procedure. I would prefer a process under which characterization depends on purpose and reflects the fact that the subject of remedies is material to both in-court and out-of-court conduct. Cf. Restatement (Second) of Conflict of Laws §122 (Proposed Official Draft, Part I, 1967).

68 The right to jury trial in treble damage cases proceeds from the fact that such an award is a penalty. Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594 (1928).

69 See note 66, supra.

70 James §8.2.

71 Id. §8.9; 3 J. Pomeroy, Equity Jurisprudence §1363 (1883).

72 James §§8.2, 8.7, 8.9; 1 J. Pomeroy, supra note 71, at §243 (1881).

73 Id. §181.
have existed under earlier and different procedure.\textsuperscript{74} This principle, which the Court views as commanded by the Seventh Amendment, as previously noted, is limited in scope. It focuses on right to jury trial only to the extent that right is affected by allocation of jurisdiction to equity because of procedural obstacles, such as delay or multiplicity, which make relief on the law side inadequate. It alters the historical result only as procedural obstacles to an adequate remedy at law are removed by reform.

It must be granted that acceptance of the premise that the seventh amendment preserves a principle of allocation of jurisdiction in light of procedural adequacy, rather than a result determined by procedure no longer in use, enlarges the scope of jury trial as of right. Objection to that enlargement proceeds from two quarters: those who believe that jury trial is inefficient and frequently inadequate for the increasingly complex factual inquiries of contemporary litigation; those who urge a purely historical test of right to jury trial. The first objection suggests, as Professor James has noted, an eclectic approach to the question which more properly belongs to the political than the judicial arena.\textsuperscript{75} While adherents to that policy can be expected to resist vigorously any enlargement of jury trial, their underlying premise is irrelevant to determination of the right under existing law.

For courts and lawyers, the second objection, forcefully presented by the \textit{Beacon} dissenters, is more serious. This objection to enlargement emphasizes the preservative language of the seventh amendment and of the major legislation producing procedural reform. In serious measure, however, this begs the question. Granted that the stated aim of the seventh amendment, the Enabling Act\textsuperscript{76} and the Rules,\textsuperscript{77} as well as the underlying intent\textsuperscript{78} of the Declaratory Judgment Act\textsuperscript{79} was to \textit{preserve} the right to jury trial, the question remains as to the dimension of the right preserved. The \textit{Beacon} decision does no violence to the preservation concept if the right is defined in terms of a principle of jurisdiction based on the adequacy of legal procedures.

Advocates of the historical test, however, insist that the right be defined in terms of the results of 1791, which necessarily include the

\textsuperscript{74} The principle is clearly perceived, but rejected because of the neutralist approach to procedural reform, in Note, \textit{47 Calif. L. Rev.} 760 (1959).


\textsuperscript{77} Fed. R. Civ. P. 38(a).

\textsuperscript{78} See E. Borchard, \textit{Declaratory Judgments} 399 (2d ed. 1941) (speaking particularly, however, of the Uniform Act).

procedure of that date. The Beacon dissenters fear that any other definition will “undermine the basic structure of equity jurisprudence, developed over the centuries and explicitly recognized in the United States Constitution.” That argument is in part rebutted by Professor James, who notes overlaps and shifts of jurisdiction, some of them after ratification of the seventh amendment. The “basic structure” was not as fixed and immutable as the dissenters imply. Moreover, I hope to show that the threat to equity jurisdiction posed by the Beacon decision is not so great as may at first appear. Not all reform of procedure is material to the allocation of jurisdiction. The Beacon dissenters and James argue that subsequent procedural innovations have been designed to improve procedure without disturbing the existing balance between jury and nonjury trial. That balance is disturbed by the Beacon principle; yet if the principle is part of the seventh amendment, the disturbance must be viewed simply as an inevitable consequence of reform.

Professor James recognizes that a purely historical test is not well suited to contemporary united procedure and, at least tentatively, voices approval of “an elastic construction of the historical test by the courts in order to accommodate further shifts of the kind and along the lines of those which were continually taking place in the very period of history to which the constitutions refer.” He registers concern, however, that a precedent of flexibility may be used by some future court to curtail jury trial. That concern, I believe, is misplaced. The Court’s principle operates only to expand jury trial; it reflects a strong pro-jury bias. The court’s adoption of a principle defining the right preserved by the seventh amendment in terms of a jurisdictional allocation not frozen by procedures now discarded, is a reflection of a bias which is of constitutional origin. The immediate premise of the Court is that right to jury trial must reflect contem-

80 359 U.S. at 519.
81 JAMES § 8.2.
82 See text accompanying notes 90-134 infra.
83 359 U.S. at 514-15 (directing their attention to the Declaratory Judgment Act).
84 JAMES § 8.10 (speaking more generally).
86 JAMES § 8.3.
87 Id. § 8.10. The flexibility of the Beacon variety does not appear to conform to the patterns of change, historically evidenced, which he believes should govern. The seventh amendment protects the right to jury trial; but nowhere in the Constitution is there a guarantee of a right to nonjury trial.
88 359 U.S. at 510; Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 291-99 (1966); Note, The Right to Nonjury Trial, 74 HARV. L. REV. 1176 (1961) (advocating a more selective approach where the Constitution does not require jury trial). The power of Congress to require a jury trial in cases historically triable to the court seems established. 5 Moore ¶¶ 38.12[1]-[13].
89 Cf. D. LOUISELL AND G. HAZARD, PLEADING AND PROCEDURE 925 (1962) (asking whether the priority of jury trial assumed by Beacon is based on the Constitution, policy or personal preference).
porary procedural reforms permitting greater enjoyment of jury trial. Underlying that premise, however, is the more fundamental assumption that jury trial is a desirable form of fact-finding in a democratic society. Arrived at politically, this assumption is reflected in the constitutional insistence on protection of jury trial.

IV. THE CONSEQUENCES OF THE Beacon Principle

Questions concerning the operative reach of the Beacon principle are best answered by an examination of whether specific contemporary procedures effect the requisite procedural reform—i.e., whether the procedure constitutes a change and whether the change eliminates the obstacles which had made the legal remedy inadequate. This is the pattern of analysis suggested by the Court's opinion. It permits us to identify areas not yet recognized, where the principle probably will be applied, as well as areas where application is debatable. It also reveals areas where the principle will be inoperative. Such an examination may serve to allay somewhat the fears of Beacon's critics. I do not intend this examination to be comprehensive; it is designed rather to elaborate the approach to the problem which I think is proper. At the same time, it should clarify further the meaning of the Beacon decision.

A. The Merger of Law and Equity

Much of the complexity of the contemporary problem of right to jury trial has been ascribed to the merger of law and equity.90 It was thus fitting that the Beacon court most clearly pointed to merger as a reform enlarging the enjoyment of that right.91 Lower courts have grasped most fully the significance of Beacon in this area.92 Merger was thought to create the problem; in reality, it provides a partial solution.

As specifically authorized by the original Enabling Act,93 merger requires the federal courts, which already had jurisdiction at law and in equity, to exercise both powers in a single action when both legal and equitable issues are raised.94 This step was not entirely new to

90 See note 7 supra.
92 See note 18 supra.
94 2 Moore § 2.06. The authorization is implemented by the simple language: "There shall be one form of action to be known as 'civil action,'" Fed. R. Civ. P. 2, coupled with Fed. R. Civ. P. 1 which provides that the Rules govern in all suits whether cognizable as cases in law, equity or admiralty.
the federal courts. It had been partially anticipated by Equity Rules 22 and 23, adopted by the Supreme Court in 1912.\textsuperscript{95}

The situations in which merger significantly affects the scope of jury trial as of right already have been outlined in part.\textsuperscript{96} Under the \textit{Beacon} principle, merger generally requires jury trial in cases "[w]here A seeks equitable relief principally to defeat an action at law by B against him on grounds cognizable as a defense at law, and where B interposes the law action by way of counterclaim. . . ." \textsuperscript{97} This, of course, is the fact situation in \textit{Beacon} itself. Merger also requires a jury trial where the plaintiff seeks cumulative legal and equitable relief.\textsuperscript{98} This was, at least in part, the problem of \textit{Dairy Queen},\textsuperscript{99} and probably of \textit{Beacon} itself.\textsuperscript{100} While the principle was occasionally applied in such cases prior to \textit{Beacon},\textsuperscript{101} recognition thereafter is uniform.\textsuperscript{102}

Both situations involve mixed requests for legal and equitable relief. Right to jury trial on factual issues material to requested legal relief stems from the fact that merger permits unitary and simultaneous adjudication at law and in equity. No longer is it necessary to delay plaintiff's right to adjudication by relegating him to a defense at law with its possible concomitant, irreparable harm. No longer is it necessary to adjudicate in equity the right to what would otherwise be legal relief to avoid the burdens of multiple suits, or to bind a litigant by prior equitable adjudication of factual issues material to legal relief where formerly two suits were required. In a single proceeding, factual issues material to legal relief can be decided by a jury, in most cases, without in any way threatening harm from delay to any litigant.

This same fact about merger is relevant in other cases in which requests for legal and equitable relief are mixed. One such instance occurs where equitable relief is a prerequisite to legal relief. Prior to merger, equity, in order to avoid multiplicity in such cases, fre-

\textsuperscript{95} Rule 22 provided for transfer of actions to the law side if improperly commenced in equity. Rule 23 provided for trial, according to legal principles, of legal issues arising in an equity proceeding. Rules of Practice in Equity, 226 U.S. 654 (1912). Provision also was made for transfer of actions to equity from the law side if improperly commenced there. Act of March 3, 1915, ch. 90, 38 Stat. 956 (now 28 U.S.C. §§ 379-99 (1964)). These beginnings of merger are described in 2 \textsc{Moore} \textsuperscript{111}2.05[1]-[4].

\textsuperscript{96} See text accompanying notes 9-31 supra.

\textsuperscript{97} \textsc{James} §§ 8.9-8.10.

\textsuperscript{98} See cases cited note 25 supra.

\textsuperscript{99} If plaintiff's claim for money damages was characterized as legal. See text accompanying notes 42-43 supra.

\textsuperscript{100} Because plaintiff's claim for declaratory relief was characterized as legal. See text accompanying note 31 supra.

\textsuperscript{101} \textit{E.g.}, Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952) (cited in \textit{Beacon}).

\textsuperscript{102} See cases cited note 25 supra.
quently went on to consider plaintiff's right to legal relief after his right to equitable relief had been established. In such cases, there was no right to jury trial. Merger permits jury trial on remaining issues material to the claim for legal relief following an award of equitable relief, since multiplicity is no longer a problem. Merger probably does not justify granting a jury trial on issues essential to equitable relief, even if those issues are also material to the legal relief claimed. Merger permits disposition of the claim for legal relief at law without a second action; it does not alter the fact that the right to equitable relief is a substantive prerequisite to legal relief. In other words, merger does not mean that issues common to combined claims for equitable and legal relief in every instance must be tried to a jury. Merger materially affects the right-to-jury-trial question only in those cases in which equity jurisdiction originally was based on procedural grounds.

B. Interpleader

The meaning of Beacon can be clarified by looking at still another situation where the principle does not apply. The primary development of interpleader was in the equity courts of the eighteenth and nineteenth centuries. From this fact stems the prevailing view that interpleader is equitable in nature and carries no right to jury trial. Interpleader may be viewed merely as a procedure by which competing claimants, whose claims may be legal, can be brought before a court to protect the interpleading party from the risk of double

108 Professor James takes the same position. James § 8.7.

109 5 Moore ¶ 38.38[1]. Historical purists may be troubled by the suggestion that equity borrowed the device from the common law. However, the conclusion reached by Professor Hazard and Mr. Moskovitz in their careful study of interpleader, that the modern rules of interpleader are derived from equity practice, is satisfactory for our purpose. Hazard & Moskovitz, An Historical and Critical Analysis of Interpleader, 52 Cal. L. Rev. 706, 709 (1964); accord, Rogers, Historical Origins of Interpleader, 51 Yale L.J. 924, 947-50 (1942).
liability. Supporting this view is the fact that the process adds nothing of substance to the adjudication. The interpleading party is liable to one, or another, or both or neither claimant, on the same principles that would have governed had those claimants instituted separate legal actions against him. Interpleader protects him from double liability, which might ensue from inconsistent determinations in separate proceedings.

If interpleader is merely a procedure, may not the Beacon principle require jury trial when the claims of the competing claimants are legal? The defect of this argument is that, while interpleader is a procedural device, it is not procedural reform. At least, it is not procedural reform in a relevant sense. Both statutory and Rule 22 interpleader in the federal courts are three steps away from qualification in that respect. They free interpleader from some of the limiting conditions that had grown up around that procedure, but it seems likely that this is simply a return to the original broader conception of interpleader in equity. Assuming that the elimination of those conditions rises to the level of reform, it does not change the proper characterization of interpleader from equitable to legal, even though the 1948 Revision of the Judicial Code has eliminated the explicit characterization of earlier acts and the Rule speaks in neutral terms. The reform is merely of equity's own procedure, i.e., of the conditions on which the device may be used.

Finally, procedural reform, in the seventh amendment sense, must involve something more than the mere verbal transfer of jurisdiction.

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107 Pomeroy noted that the claims might be legal, or legal and equitable or equitable; the legal character of one or more of the claims, however, did not detract from exclusive jurisdiction in equity. 3 POMEROY, EQUITY JURISPRUDENCE § 1321 (1883).

108 Hazard & Moskovitz, supra note 106, at 706.

109 Pomeroy listed four essential elements: (1) the same thing, debt or duty must be claimed by both or all claimants; (2) adverse titles or claims must be dependent or derived from a common source; (3) the plaintiff must not claim any interest in the subject matter; and (4) the plaintiff must not have incurred independent liability to any of the claimants. 3 POMEROY, EQUITY JURISPRUDENCE §§ 1322-26 (1883). These conditions all are expressed in substantive terms, but they circumscribe the availability of the procedural device rather than the plaintiff's non-liability.

110 Hazard & Moskovitz, supra note 106, at 707-08. Their work was to some extent anticipated by Rogers, who found that "privity" and "independent liability," requirements attributed to common law interpleader, had no historical foundation. Rogers, supra note 106, at 925.

111 It simply broadens the utility of the process in equity.

112 "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader . . . ." 28 U.S.C. § 1335(a) (1964). (Emphasis added.) Moore states that the change was made for purposes of conforming to the language of the Federal Rules. 3 MOORE ¶ 22.06[2], at 3039.

from equity to law; more is required than a bare statement that what could be done in equity can now be done at law. In a system of divided courts, Congress could confer on law courts the power to use procedures that had previously been available only in equity, thereby enlarging the right to jury trial under the seventh amendment, since real change would be involved. In a unitary system, however, neither Congress nor the Court can alter the dimension of the constitutional right by such verbalization. Interpleader remains, in my view, an equity procedure involving no constitutional right to jury trial.

C. Declaratory Judgment

As procedural reform, the declaratory judgment remedy seems to fall somewhere between merger and interpleader. There is clearly reform, because the Act permits a declaration of rights in many cases where previously that had not been possible. Yet it must be conceded that equity, by use of bills of peace, quia timet, injunctions and rescission and cancellation, effectively granted relief amounting to a declaration of rights. In light of previously existing equity jurisdiction, it may be fairly argued that, in cases where that jurisdiction operated effectively, there is no right to jury trial in declaratory judgment actions today because there was no reform. The change is merely one of verbalization; it confers a different label on the relief requested.

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114 Pomeroy states that in England and some American jurisdictions, a summary form of interpleader was made available by statute in actions at law. 3 Pomeroy, Equitable Jurisprudence § 1329 (1883). Had this taken place in the federal system prior to merger, it might be argued with some force that procedural reform of real dimension had taken place with a resulting relevance to jury trial as of right under the Beacon decision. The language of the federal interpleader legislation, note 112 supra, is to the contrary, however; I have found no evidence of interpleader actions on the law side of the federal courts prior to 1938. This is not to dispute the power of Congress to require a jury trial in a proceeding otherwise equitable; but the right conferred thereby would be statutory rather than constitutional.

115 Borchard suggested that a principal function of the remedy is that it "has enabled the courts to pass on new types of cases which heretofore predicated adjudication on prior violence or destruction of the status quo." E. Borchard, Declaratory Judgments 280 (2d ed. 1941); cf. Pittman v. West Am. Ins. Co., 299 F.2d 405 (8th Cir. 1962).

116 E. Borchard, Declaratory Judgments, pt. 1, ch. IV (2d ed. 1941); James §§ 8.8, 8.10. This has led, on occasion to the suggestion that "the declaratory judgment and injunctive remedies are equitable in nature." Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967). See also 47 Calif. L. Rev. 760, 765 (1959). Such suggestions may also stem from the fact that early English development was in Chancery. See E. Borchard, Declaratory Judgments 128-29 (2d ed. 1941); Developments in the Law—Declaratory Judgments, 62 Harv. L. Rev. 787, 790 (1949). There is wide agreement that the roots of the remedy are much deeper, are traceable to the Civil Law, E. Borchard, Declaratory Judgments 87-101 (2d ed. 1941), and came to us from Scotland. Id. at 125-28; Pugh, The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems, 6 Vand. L. Rev. 79 (1952) (emphasizing that equity had no concept of the general declaratory action).

117 The same argument might be made with regard to merger as a reform eliminating multiplicity, to the extent that equity, by giving incidental legal relief, had already eliminated that problem. In essence the argument is that reform means change and that to some extent neither merger nor the declaratory judgment effect real change.
This argument of "no change" must be distinguished from that of the dissenters in *Beacon* and of Professor James. Their argument is simply that the seventh amendment requires adherence to the results of 1791. As such, it represents a rejection of the procedural reform principle, although Professor James acknowledges existence of a "flexible rather than static rendering of the constitutional test" as a consequence of *Beacon*. The no-change argument would concede the validity of the principle, but deny its application.

The no-change argument clearly has been rejected by the *Beacon* majority. Although that rejection was unnecessary, in light of Beacon's counterclaim which independently justified characterization of the case as a mixture of claims for legal and equitable relief and brought it within the reach of merger reform, the rejection was not explained. It is susceptible of explanation, however.

It has already been noted that, prior to the Declaratory Judgment Act, immediate adjudication of many legal controversies was impossible. Equitable remedies were unavailable because an adjudication, when coercive legal relief was later sought, was believed an adequate remedy. While declaratory relief remains discretionary, many of those controversies now are subject to immediate adjudication pursuant to the Act. This acceleration of the time of adjudication clearly is a significant procedural reform, a relevant change. So long as what is accelerated is adjudication of the right to legal relief, it is a procedural reform of adjudication at law which requires a right to jury trial. As merger of law and equity eliminated the problem of multiplicity which had justified the intervention of equity in matters otherwise legal, so the declaratory judgment remedy eliminates the problem of delay which had justified equity intervention in otherwise legal matters. Unlike interpleader, something has been added to procedure at law which makes the legal remedy adequate.

The real question is how much has been added. Professor James has expressed the fear that, under a liberal interpretation of *Beacon*, the declaratory judgment remedy may be used as a substitute for nearly all forms of equitable relief. However, he promptly suggests that "probably it was meant to be confined to cases where declaratory relief is sought to forestall a law action." With this qualification I quite agree. With respect to acceleration of adjudication, the declara-

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118 JAMES § 8.10, at 377.
119 Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967); 6A MOORE ¶ 57.08.[2].
120 Id. ¶ 57.05; Developments in the Law—Declaratory Judgments, 62 HARV. L. REV. 787, 789 (1949).
121 JAMES § 8.11.
122 Id.
tory judgment is a reform, a change of procedure as distinguished from a verbalization altering only the label. If the declaratory judgment remedy had been made available only in those cases where equity already accelerated adjudication, there would be no change, no relevant reform; the declaratory judgment would be as equitable as interpleader. Because the acceleration permitted by the remedy is so much broader, it is a reform which must be regarded as supplanting the more limited equity jurisdiction. Its aim at procedural reform is much more analogous to merger which, by providing on a broad scale for the unitary exercise of legal and equitable power in a single action, comprehended a prior exercise of equitable power in matters otherwise legal.

D. Derivative Actions by Shareholders

The shareholder's derivative suit provides a difficult context in which to test the application of the *Beacon* principle. A 1963 decision in the Ninth Circuit held that there was a constitutional right to jury trial in such actions where "claims asserted against the corporation are of a kind which, if asserted by the corporation, would be cognizable in a suit at common law." The decision seems to be based on the view that such an action is a composite of equitable and legal claims, i.e., the shareholder's claim against the corporation which is equitable because based on breach of trust, and the corporation's claim against a third party which is legal. On this basis it can be argued that merger eliminates the necessity of equity adjudication of the latter claim.

The decision has been criticized on the ground that *Beacon* speaks only to civil actions which were historically separable into suits at law and in equity, while the shareholder's suit is historically unitary. The criticism emphasizes the trust relationship between management and shareholder and suggests that the dual analysis of the court is necessary only when the shareholder enforces corporate rights against an outsider. Even there, however, the critic apparently relies on equity's historically exclusive jurisdiction. While his reading of *Beacon* is too narrow, it does make the telling point that equity jurisdiction over derivative suits against corporate insiders is based

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124 323 F.2d at 836. The relevant third parties were directors of the corporation.
125 Note, 74 YALE L.J. 725 (1965).
126 Id. at 737.
127 Id. at 730-32.
on subject matter rather than procedure. It does not justify, however, denial of a jury trial on issues material to the corporate claim against outsiders, since, in that type of derivative suit, equity jurisdiction over the corporate claim might be grounded on the multiplicity problem which was eliminated by merger.

In his study of the history of the derivative suit, Professor Prunty notes the importance to equity jurisdiction, both in England and America, of the trust relationship. He also emphasizes the representative nature of the proceeding, though the representation is of the other shareholders rather than of the corporation. Nevertheless, that representative factor might serve as a basis for denial of jury trial, if it justified characterization of the whole of derivative proceedings as equitable. Certainly the representative action, regardless of the remedy sought, was historically equitable, not only because of the rigid joinder rules of common law, but also because of the need for judicial protection of the represented absentees.

To the argument that representation is merely a joinder device which might be adopted by the law courts like other joinder tools of equity, it might be answered that, in a unitary system, any so-called adoption, unless it permits previously unavailable procedure, is mere verbalization and not reform of procedure at all. No real change of procedure is involved in contemporary legislation governing derivative suits.

If there is a difficulty with this argument, it lies in the fact that representative actions were entertained on the law side of the federal courts prior to merger. Thus, there may have been pre-merger

128 The Ninth Circuit may have been seeking to avoid that difficulty when it suggested that, because the liability of the insiders rested on a finding of gross negligence which is actionable at common law, there was a right to jury trial. DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 837 (9th Cir. 1963). It was unnecessary, therefore, to determine whether the judgment could be rested on breach of fiduciary duty which might be cognizable only in equity. Id. at 837 n.24.


130 Id. at 984, 989.

131 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 561 (Wright ed. 1961); Z. CHAFFE, SOME PROBLEMS OF EQUITY 211-12 (1950); 3 MOORE ¶ 23.02.

132 Z. CHAFFE, SOME PROBLEMS OF EQUITY 211-12 (1950).

133 Stearns Coal & Lumber Co. v. Van Winkle, 221 F. 590 (6th Cir. 1915), cert. denied, 241 U.S. 670 (1916); Penny v. Central Coal and Coke Co., 138 F. 769 (8th Cir. 1905). Pursuant to the Conformity Act, both cases rely on state legislation authorizing class suits. The cited state legislation, however, appeared in codes that merged law and equity into a single system (Arkansas in 1868, Kentucky in 1851) as do the Federal Rules. While prior to the Rules, procedure in law actions in the federal courts corresponded to state procedure under the Conformity Act, there was authority rejecting use of state practice which blurred law and equity. See A. DOBIE, FEDERAL JURISDICTION AND PROCEDURE § 147 (1928). In neither suit, apparently, was the matter argued in terms of right to jury trial or that the proceeding should have been in equity.

Moore, relying on the original 1937 committee note to Rule 23, argues that it was intended to make this joinder device applicable to all actions, whether previously legal or equitable. 5 MOORE ¶ 38.38[2]. Robinson v. Brown, 320 F.2d 503 (6th Cir.
reform of procedure at law. Those actions, however, were class actions, rather than shareholder derivative suits. In spite of the relationship between the two, it may be argued that there is no evidence of adoption by law courts of the representation device in the derivative suit area. Moreover, use at law of the representation procedure in class suits had not been validated by the Supreme Court at the time of merger. After merger, any adoption by law courts of an equity procedure without more would be a mere change of label without any real reform of procedure. The only significance would be alteration of right to jury trial. This is not procedural reform within the meaning of the *Beacon* principle.

V. Conclusion

Examination of merger, interpleader, the declaratory judgment and the shareholder's derivative suit illustrates that determining whether a particular procedural device embodies reform going beyond the mere changing of labels requires an individualized, and sometimes complex, inquiry. Yet it is an inquiry required by the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover*. That decision requires a determination whether previous inadequacy of a legal remedy, which hitherto justified the exercise of equity jurisdiction, has been cured by changes of procedure. The scope of seventh amendment protection of right to jury trial has always been largely a question of the jurisdictional lines between law on the one hand, and equity and admiralty on the other. *Beacon* does not alter the view that the inquiry is jurisdictional. It does assert, however, that the seventh amendment's protection is based on a jurisdictional principle, rather than a conglom-

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1963), denied a jury trial in a class suit where the plaintiff sought only equitable relief and there were no facts in dispute. The question remains whether any real change was effected, although a statutory right to jury trial might be created, in any event, if that was intended.

134 See *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947). The derivative action was the subject of Equity Rule 94, Additional Rule of Practice in Equity, 104 U.S. ix (1882), repromulgated as Equity Rule 27, Rules of Practice in Equity, 226 U.S. 656 (1912). The class action was also made the subject of a rule. Equity Rule 38, id. at 659.

In *Richland v. Crandall*, 259 F. Supp. 274 (S.D.N.Y. 1966), jury trial was allowed in a derivative action because it was alternatively a class action for damages under the Securities Exchange Act; but the trial court took the firm position that the seventh amendment does not guarantee jury trial in a derivative action. *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964), was rejected on the ground that right to jury trial belongs to the corporation which sues the outsider at law, and not to the stockholder who sues derivatively. Rejection of *DePinto* seems based on the unitary view of the derivative suit. The unitary view may stem simply from the already developed concept that equity could assert jurisdiction over matters otherwise purely legal, to avoid multiplicity. If the representative feature has continuing significance, the corporation's claim against the outsider is not "otherwise legal" where asserted by the shareholder.
eration of jurisdictional results dictated by discarded procedures; jurisdiction is determined in light of existing, not past, procedure.

The consequences of such a "principle approach" are probably not as far-reaching as the critics of Beacon fear. Many current practices do not involve any change of jurisdiction. Other changes are less extensive in any real sense than might be thought, for change requires more than label alteration. One change, merger, while clearly contracting equity jurisdiction to some degree, itself makes unnecessary many further changes. The pattern of procedures once equitable gradually being taken over at law is a familiar one. Prior to merger those changes were substantial; in a unitary system such shifts are conceptual and, as such, are not within the Beacon principle.

The Beacon decision, however, clearly enlarges enjoyment of jury trial as of right and reflects a basic pro-jury bias. That it should do so is quite clear, in view of the pro-jury bias of the Constitution.