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Civil Procedure: Right to Jury Trial: Congress Intended to Grant Right to Jury Trial in Actions Under the Age Discrimination in Employment Act. (Lorillard v. Pons).

Ross F. Plaetzer

would take the interests of the public into consideration. "Anticompetitive" canons which serve to protect the public and not the professions would be more likely to be accepted.[66] The ethical rules that were the subject of Justice Blackmun's concern would probably fall into this category. Thus, competition within the professions would still be preserved, but not at the expense of sacrificing the integrity of the professions.

III. CONCLUSION

Strict Sherman Act scrutiny for the professions represents a marked shift from the presumed antitrust exemption of the *Federal Baseball* era. While it is clear after *Goldfarb* and *National Society* that no such blanket exemption exists, it is unclear whether the Court will always apply traditional Sherman Act analysis to the professions. The *Goldfarb* opinion indicated that restraints on professions might be treated differently in some cases. However, the Court did not appear to observe any distinction between the professions and other businesses in *National Society* where the restraint on the professional was illegal per se.

If there is to be any flexibility in the Court's application of the Sherman Act to the professions it will probably be in its treatment of professional restraints which are not illegal per se. Especially in analyzing professional ethical canons which are imposed to protect the public, the Court may be willing to consider factors other than the impact on competition in some cases. This approach would promote the high professional standards society deserves while preserving the competitive environment the Sherman Act requires.

JAMES H. GORMLEY, JR.

CIVIL PROCEDURE—Right to Jury Trial—Congress Intended to Grant Right to Jury Trial in Actions Under the Age Discrimination in Employment Act. *Lorillard v. Pons*, 434 U.S. 575 (1978). In *Lorillard v. Pons*[1] the United States

66. *Cf.* Friedman v. Rogers, 47 U.S.L.W. 4151 (1979) (where the Supreme Court upheld some state regulation of optometrists against a first amendment challenge on the grounds that it was needed for the protection of the public).

1. 434 U.S. 575 (1978).

Supreme Court held that Congress had by implication granted a right to a jury trial in private actions seeking lost wages for alleged violations of the Age Discrimination in Employment Act of 1967.[2] Since the Court based its holding on what it perceived to be the congressional intent to provide a jury trial under the ADEA, it avoided the need to determine whether the seventh amendment would have required such a right in the absence of such congressional intent. As importantly, the Court concluded by distinguishing between similar provisions of the ADEA and the Civil Rights Act of 1964.[3] While a right to a jury trial is now available in actions brought under the ADEA because of perceived congressional intent, the opposite congressional intent serves as the basis of denying a right to a jury trial in Title VII actions. Of course, only the denial of the right to a jury trial on the basis of perceived legislative intent raises constitutional issues.

I. BASIS OF DECISION: AVOIDING THE CONSTITUTIONAL QUESTION

Frances P. Pons, alleged that she had been discharged by

2. Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (1976)) [hereinafter referred to as ADEA]. Sections 626(b) and (c) of the ADEA read in pertinent part as follows:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.
>
> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

The ADEA was amended on April 6, 1978, see note 26 *infra*, but all references to the ADEA will be to the unamended Act unless otherwise noted.

3. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)).

Lorillard in violation of the Age Discrimination in Employment Act of 1967 and sought injunctive relief including: reinstatement, lost wages, liquidated and punitive damages, costs and attorney's fees.[4] Lorillard, her employer, moved the district court to strike Ms. Pons' demand for trial by jury on the issue of lost wages and the motion was granted.[5] The district court certified the issue for interlocutory appeal[6] to the Fourth Circuit which allowed the appeal and vacated the district court's order, ruling that the ADEA and the seventh amendment afforded respondent the right to a jury trial on the issue. The Supreme Court affirmed the Fourth Circuit's decision.[7]

A. Avoiding the Seventh Amendment Test

Under the Constitution, Congress clearly has the power to devise new remedies, both legal and equitable, and to create new rights.[8] The Congress also has the power to define the method of enforcing these new rights,[9] and in civil actions the power is limited only by the seventh amendment. The amendment provides that, "In Suits at common law . . . the right of trial by jury shall be preserved . . . ."[10] This limitation assures the right to a jury trial in common law or "legal" actions[11] and prevents Congress from creating a right of action without a concomitant right to a jury trial if the issue to be tried involves rights and remedies of the sort typically enforced in an action at law.[12] On the other hand, if the remedy made available by Congress is of an equitable nature, no such jury trial right exists.[13] Neither is the Congress precluded from "extending the

4. Pons v. Lorillard, 549 F.2d 950, 951 (4th Cir. 1977).

5. Pons v. Lorillard, 69 F.R.D. 576 (M.D.N.C. 1976).

6. *See* 28 U.S.C. § 1292(b) (1976).

7. 434 U.S. 575 (1978).

8. 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[7], at 128 (1978).

9. *Id.* at 116.

10. U.S. CONST. amend. VII.

11. The Court made it clear very early that the right under the seventh amendment extended beyond the common law forms of action recognized in 1791 when the amendment was adopted and applied to subsequent statutory enactments of Congress. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830). This extension was explicitly reaffirmed in Curtis v. Loether, 415 U.S. 189, 194 (1974).

12. *See* Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 460-61 (1977); Pernell v. Southall Realty, 416 U.S. 363, 375 (1974); Curtis v. Loether, 415 U.S. 189, 195 (1974); Ross v. Bernhard, 396 U.S. 531, 538 (1970).

13. In Ross v. Bernhard, the Court provided a guide for determining the "legal" nature of an issue. The Court must consider: "[F]irst, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." 396 U.S. 531, 538 n.10 (1970).

right of jury trial to non-common law actions, such as suits in equity and in admiralty."[14]

If a statute expressly provides for the right to a jury trial, the classification of the action as legal or equitable is immaterial.[15] Problems arise, however, when a statute enacted by Congress is silent on the right to a jury trial. The court must then examine the nature of the action in order to determine whether a jury trial right is demanded either by the statute itself, or under the constitutional test as it has evolved in the Court's decisions from *Beacon Theatres, Inc. v. Westover*[16] to *Atlas Roofing Co. v. Occupational Health & Safety Review Commission.*[17]

Unfortunately, the lower courts have been unable to synthesize an accurate and easily applicable test from this long line of cases, with the result that decisions to grant or deny a jury trial under a statute not expressly authorizing one are not uniform. For example, prior to *Lorillard* the circuit courts were split on the ADEA jury question and the rationales for either allowing or denying this right were inconsistent.[18] Additionally, the jury question for a given statute has often been decided by a mechanical application of a chosen version of the constitutional test,[19] or the issue has been perfunctorily disposed of with scant analysis.[20] Thus in *Lorillard* although it may have recognized that a new and clearer synthesis of its holdings from *Beacon Theatres to Atlas Roofing* was required, the Court was not ready to formulate such a synthesis. Instead, it inferred a congressional intent to provide for a jury trial on the basis of the legislative history and structure of the ADEA.

B. The ADEA

Enacted to eliminate age discrimination from the work-

14. 5 MOORE'S FEDERAL PRACTICE ¶ 38.08[5], at 82 (1978) (footnotes omitted).

15. *Id.* ¶ 38.12[1], at 128.24.

16. 359 U.S. 500 (1959).

17. 430 U.S. 442 (1977). *See also* Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Ross v. Bernhard, 396 U.S. 531 (1970); Katchen v. Landy, 382 U.S. 323 (1966); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

18. *Compare* Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976), *vacated and remanded,* 435 U.S. 911 (1978) (no jury right) *with* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978) (jury right).

19. *See, e.g.,* Pons v. Lorillard, 549 F.2d 950, 953-54 (4th Cir. 1977), *aff'd,* 434 U.S. 575 (1978).

20. *See, e.g.,* Slack v. Havens, 522 F.2d 1091, 1094 (5th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

place, the ADEA is a type of "piggy-back" legislation which creates a new statutory right that is procedurally enforced trough a pre-existing statute, in this instance, the Fair Labor Standards Act of 1938.[21] The ADEA specifies that its provisions "shall be enforced in accordance with the powers, remedies, and procedures"[22] set out, in part, in sections 216(b) and 217 of the FLSA.[23]

In general, the FLSA compels employer compliance with set wage and hour limits by utilizing both legal and equitable remedies. Section 216(b) of the Act allows an aggrieved employee to bring a private action against his employer for unpaid minimum wages or overtime compensation and liquidated damages in any state or federal court of competent jurisdiction. Section 217 allows the Secretary of Labor of his own initiative to bring suit in the district courts to enjoin an employer's violation of the FLSA and to restrain "any withholding of payment of minimum wages or overtime compensation" found by the court to be owed to employees under the Act.[24]

Congress departed somewhat from the provisions of the FLSA enforcement mechanism when it passed the ADEA. For instance, whereas in a private action under section 216(b) of the FLSA an employee may recover lost wages, overtime compensation and liquidated damages; in a private action under section 626(c) of the ADEA, he may seek "such legal or equitable relief as will effectuate the purposes"[25] of the ADEA. Comparably under the ADEA the Secretary is granted the full range of remedies available to employees in private actions, and, further, may seek an injunction in the district or state courts.[26] Also, while liquidated damages generally flow as a matter of right to private plaintiffs for violations under the FLSA,[27] Congress specified in the ADEA that they may be awarded only for "willful violations" of the Act.[28] Finally, the ADEA includes

21. Ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1976) [hereinafter referred to as FLSA].

22. 29 U.S.C. § 626(b) (1976).

23. 29 U.S.C.A. § 216(b) (Supp. 1978); 29 U.S.C. § 217 (1976).

24. 29 U.S.C. § 217 (1976).

25. *Id.* § 626(c). *See also id.* § 626(b). This includes an injunction which under the FLSA is available only to the Secretary. *See, e.g.*, Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 930 (1959).

26. *See* 29 U.S.C. § 626(b) (1976).

27. *But see* 434 U.S. at 581 n.8.

28. 29 U.S.C. § 626(b) (1976).

provisions for informal, voluntary settlement procedures not found in the FLSA.[29]

Under the ADEA a person allegedly discriminated against on the basis of age in an employment situation may bring an action for appropriate legal or equitable relief in any state or federal court of competent jurisdiction.[30] Any amounts owing the plaintiff as a result of the discrimination are deemed to be "unpaid minimum wages or unpaid overtime compensation"[31] for the purposes of sections 216 and 217 of the FLSA. Thus, when an aggrieved employee brings a private action under section 626(c) of the ADEA for amounts owing as a result of the employer's unlawful conduct, the suit is litigated under the "powers, remedies, and procedures"[32] of section 216(c) of the FLSA, subject only to the additional provisions allowed by the ADEA for suits under that section of the FLSA.

In neither the FLSA nor the ADEA did Congress make express provision for the right to a jury trial. The lower courts, however, have unanimously held that there is a right to a jury trial in private actions under section 216(b) of the FLSA for unpaid statutory compensation and liquidated damages.[33] Thus, the Supreme Court in *Lorillard* was able to hold that when Congress directed that the ADEA be enforced in accordance with the "powers, remedies, and procedures" of the FLSA, one of the procedures incorporated into the ADEA was the right to a jury trial on the issue of lost wages in private actions.[34] The Court reasoned that Congress was presumed to be aware of the judicial granting of the right to a jury trial under section 216(b) of the FLSA. Thus, when it directed that the ADEA be enforced in accordance with the "procedures" of the FLSA, it ratified[35] the lower courts' interpretation of the

29. *Id.* § 626(b) & (d).

30. *Id.*

31. *Id.* § 626(b).

32. *Id.*

33. *See, e.g.*, Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965); Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950); Olearchick v. American Steel Foundries, 73 F. Supp. 273, 279 (W.D. Pa. 1947).

34. 434 U.S. at 582-83.

35. The word "ratify" and the term "congressional ratification" and their grammatical variants are adopted from the Court's discussion in Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975). There the Court stated that a consistent interpretation by the courts of appeals of a particular provision of the Civil Rights Act of 1964 had been "plainly ratified" by Congress when it enacted the Equal Employment Opportunity Act of 1972 after rejecting amendments to change the particular section

jury trial right under section 216(b), and incorporated that right into subsections 626(b) and (c) of the ADEA.[36]

II. Rules of Statutory Construction

The Court took the established rule of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change,"[37] and expanded it to include situations where "Congress adopts a new law incorporating sections of a prior law, [in which case] 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."[38] This section of this note will explore two questions raised by this language in *Lorillard*. First, are the two rules above full and complete statements of the current law on congressional incorporation of judicial holdings or are there additional elements not discussed by the Court which need to be considered in such situations? Second, if prior law required consideration of other elements, did the Court intend to abolish these elements, or, is the *Lorillard* rule merely a succinct restatement of previous law?

A. *Re-enacted Statutes: The Ratification Doctrine*

While there are some cases to the contrary,[39] administrative and judicial interpretations of a statute are usually deemed to have received congressional approval if the statute is substantially re-enacted. Thus, these decisions are given the effect of law,[40] or at least a presumption of legislative approval of the rulings is created.[41]

However, this rule on re-enactment had been a limited one. An administrative agency or court could interpret a statute

construed by the courts of appeals. *Cf.* Thompson v. Clifford, 408 F.2d 154, 164 (D.C. Cir. 1968) ("legislative ratification"). The term is used herein to signify congressional approval of the construction of a statute by lower courts and administrative agencies as evidenced by Congress' re-enactment of the particular section unchanged in subsequent legislation.

36. 434 U.S. at 580-81.

37. *Id.* at 580.

38. *Id.* at 581.

39. *See, e.g.*, Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (re-enactment is an "unreliable indicium at best" of congressional satisfaction with a statutory interpretation).

40. Commissioner v. Estate of Noel, 380 U.S. 678, 682 (1965).

41. Shapiro v. United States, 335 U.S. 1, 20 (1948).

only when the language of the statute was not plain, and admitted of more than one reasonable meaning,[42] or when the sense of the law was "doubtful and ambiguous."[43] Thus subsequent re-enactment of a statute without change would not constitute a ratification where the law was plain.

Additionally, where there was room for an administrative or judicial interpretation, a court could not presume that Congress adopted the interpretation unless such construction was consistent with the legislative purpose behind the statute[44] and unless the construction had a " 'reasonable basis in law.' "[45] Where there were compelling indications that an interpretation was wrong or unreasonable, or that it ran counter to the purpose of the statute, there was held to be no congressional adoption of that construction unless Congress gave "express consideration or reference" to it.[46]

Moreover, for a reasonable interpretation of a doubtful and ambiguous statute to have been accorded any respect or weight, the construction must have been "definitely settled."[47] It was usually stated that ratification required that the line of construction be "consistent,"[48] "long-standing,"[49] "generally unchallenged,"[50] or "uniform."[51]

Also, Congress would not be "presumed to be aware of an administrative or judicial interpretation of a statute,"[52] in every instance. As stated by Judge Learned Hand, the rationale for the incorporation doctrine is that "those in charge of the amendment are familiar with existing rulings, or that they

42. Caminetti v. United States, 242 U.S. 470, 485 (1917). *But see* Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943).

43. Edwards v. Darby, 25 U.S. 126, 129, 12 Wheat. 206, 210 (1827). *See also* United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953); Louisville & Nashville R.R. v. United States, 282 U.S. 740, 757 (1931); Iselin v. United States, 270 U.S. 245, 251 (1926).

44. Morton v. Ruiz, 415 U.S. 199, 237 (1974).

45. Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968) (quoting NLRB v. Hearst Publications, 322 U.S. 111, 131 (1944)).

46. Kristensen v. McGrath, 179 F.2d 796, 804 (D.C. Cir. 1949), *aff'd*, 340 U.S. 162 (1950). *See also* American Mail Line, Ltd. v. United States, 213 F. Supp. 152, 164 (W.D. Wash. 1962); Hanson v. Landy, 24 F. Supp. 535, 540 (D. Minn. 1938). *Cf.* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95-96 (1973) (no need for judicial deference when "compelling indication" that administrative construction is wrong).

47. United States v. Missouri Pac. R.R., 278 U.S. 269, 280 (1929).

48. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972).

49. NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

50. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

51. United States v. Missouri Pac. R.R., 278 U.S. 269, 280 (1929).

52. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

mean to incorporate them, whatever they may be."[53] In most cases a certain quantum of actual knowledge by those active in securing passage of the legislation was required before the doctrine would be invoked. To have called upon the ratification doctrine, a line of rulings of an agency or of the courts must have actually been called to the attention of Congress during the consideration of the legislation,[54] and congressional awareness must have been something more than "a few isolated statements in the thousands of pages of legislative documents."[55] The doctrine was most likely to be utilized when Congress had considered the provisions of earlier legislation "in great detail" and where it would have been fair to assume that it thus accepted the construction placed on the statute by the administrative agency or the courts.[56] But congressional knowledge and approval of rulings which it had never seen or considered were rarely imputed.

In view of the many cases in which the Court had employed these rules of statutory construction, it seems best to consider the Court's statement of the rule in *Lorillard* as merely a concise shorthand version and not one which dismisses these qualifications. The same holds true whether the re-enactment doctrine or the *Lorillard* incorporation doctrine is applied. The unqualified posture of the statement that Congress is presumed to have knowledge of the construction given an existing statute when it incorporates it into a new law is belied by the facts of the case, which argue for a reading in line with the qualifications established in the rule for re-enacted legislation.

In the first instance, the section of the FLSA incorporated into the ADEA and interpreted by the courts did not expressly provide for a jury trial right and was therefore ambiguous on this question.[57] Thus, a judicial construction of the statute was proper.

Secondly, the line of decisions construing the jury trial right under section 216(b) of the FLSA was "well established" since

53. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 790 (2d Cir. 1946), *aff'd*, 328 U.S. 275 (1946). *See* Cleveland v. United States, 329 U.S. 14, 21 (1946) (Rutledge, J., concurring).

54. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 192 (1978); United States v. Calamaro, 354 U.S. 351, 358-59 (1957); Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955); Helvering v. New York Trust Co., 292 U.S. 455, 468 (1934).

55. SEC v. Sloan, 436 U.S. 103, 121 (1978).

56. NLRB v. Gullett Gin Co., 340 U.S. 361, 365-66 (1951).

57. 29 U.S.C.A. § 216(b) (Supp. 1978). *See* cases cited note 22 *supra*.

"every" court to pass on the matter had found an implied right to a jury trial.[58] This comports with the general requirement that the construction of the statute be "definitely settled."[59]

Thirdly, the Court stressed the "detailed knowledge"[60] which the Congress exhibited of the FLSA provisions and their judicial interpretations. The Court noted that congressional "selectivity . . . in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."[61] As discussed above, the appication of the rule for re-enacted legislation generally requires a certain degree of actual knowledge on the part of Congress. Here, the Court found considerable congressional awareness of the previous judicial construction of the FLSA. It seems, then, that just as the Court's recital of the established rule of statutory construction for legislation subsequently re-enacted should be read against the background of the Court's prior decisions, so should the modification of the rule in *Lorillard* be read to encompass similar qualifications.

B. Unanswered Questions

The Court's rationale in deciding *Lorillard*, however, does raise some interesting questions. (1) What would happen to the right to a jury trial under the ADEA if the FLSA were amended to deny such a right under section 216(b)?[62] (2) Does congressional ratification of the lower courts' decisions granting a jury right under section 216(b) foreclose a contrary Supreme Court determination? If not, what does "congressional ratification"

58. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

59. United States v. Missouri Pac. R.R., 278 U.S. 269, 280 (1929).

60. 434 U.S. at 581.

61. *Id.* at 582.

62. On April 6, 1978, after *Lorillard* was decided, the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, were signed into law. Section 4(a) of the Amendments renumbered § 626(c) of the ADEA to § 626(c)(1), and created § 626(c)(2) of the ADEA to read:

> In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C.A. § 626(c)(2) (Supp. 1 June 1978). *See* 123 CONG. REC. S17,296 (daily ed. Oct. 19, 1977) (remarks and amendment of Sen. Kennedy); H.R. CONF. REP. No. 95-950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 976, 1007. Thus, although this question was made moot insofar as it concerns the ADEA, it, nonetheless, is interesting for its precedential ramifications.

mean? (3) Should the Supreme Court accept as binding lower court decisions which Congress has ratified in enacting a new law even though the Court has never decided on the merits of the lower court rulings?[63] (4) Must congressional "knowledge" of the provisions of an existing statute and its judicial interpretation always reach the degree of detail which Congress exhibited when it enacted the ADEA?

Although the answers to these questions are important, the Court's decision should not, in all probability, be pushed to such rigorous limits. *Lorillard* should perhaps be viewed as a pragmatic attempt by the Court to decide an important question on the right to a jury trial under an increasingly important statute while at the same time avoiding, to the greatest extent possible, embarking on any discussion of the state of the law as it relates to the right to a jury trial under the seventh amendment. A more important question posed by *Lorillard* is: When should the courts invoke the seventh amendment test, as opposed to the statutory test, in determining the jury trial right.

In *Curtis v. Loether*,[64] the Court considered the jury question as it relates to the Fair Housing Act of 1968.[65] In contrast to *Lorillard*, the Court, while noting that the statute provided plausible arguments both for and against a jury right, summarily dismissed a statutory approach and stated that "the necessity for jury trial is so clearly settled by our prior Seventh Amendment decisions that it would be *futile* to spend time on the statutory issue . . . ."[66] In *Lorillard*, however, the Court followed the " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' "[67] The Court found that it "need not address the constitutional issue," since the statutory one was dispositive.[68] These statements may be viewed as marking a trend away from the seventh amendment test, unless the statutory examination is not

63. *See* Girouard v. United States, 328 U.S. 61, 69-70 (1946) (Court overruling its own construction of a statute which had been considered by Congress on several previous occasions where the part construed had been re-enacted).

64. 415 U.S. 189 (1974).

65. Pub. L. No. 90-284, §§ 801-901, 82 Stat. 73, 81-90 (codified at 42 U.S.C. §§ 3601-3631 (1970)).

66. 415 U.S. at 192 n.6 (emphasis added).

67. United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

68. 434 U.S. at 577.

fruitful. But this trend is less than clear, and until the Court squarely addresses the issue, *Lorillard* can serve only to perpetuate the confusion prevalent among the lower courts.

III. Court Continues to Distinguish Title VII Jury Right

Of more far reaching importance than its holding on the primary question was the Court's continued attempt to distinguish Title VII of the Civil Rights Act of 1964[69] from the ADEA and other similar statutes.[70] The lower courts, in almost uniformly holding that Title VII denies the right to a jury trial on the issue of back pay,[71] have responded to an apparent congressional characterization of the back pay remedy as an "integral part of the *statutory equitable* remedy"[72] and therefore exempt from the seventh amendment's requirements. One of the bases the Court in *Lorillard* used in distinguishing Title VII was that of congressional intent.[73] The Court also noted that "even if petitioner is correct that Congress did not intend there to be jury trials under Title VII, that fact sheds no light on congressional intent under the ADEA."[74] Thus, the Court, although expressly disclaiming any decision on the jury trial issue under Title VII,[75] seems, nonetheless, to have strengthened by recognition the congressional characterization argument employed by the lower courts in Title VII controversies.[76] This section

69. *See* note 3 *supra*.

70. *E.g.*, the Fair Housing Act of 1968, see note 65 *supra*, which the Court held in Curtis v. Loether, 415 U.S. 189 (1974), provided for a jury trial by right, if requested, under the seventh amendment. In *Lorillard*, the Court stated that while the "aims" and "substantive prohibitions" of the ADEA and the Civil Rights Act of 1964 were very similar, the "remedial and procedural provisions of the two laws . . . [were] crucial" and it found "significant differences" between them. 434 U.S. at 584.

71. *See, e.g.*, Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978) (per curiam); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951 (1977); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

72. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (emphasis added). *Cf.* Curtis v. Loether, 415 U.S. 189, 196-97 (1974) (apparently approving the lower court view).

73. 434 U.S. at 585 n.14..

74. *Id.* at 585.

75. *Id.* at 583-84.

76. Even before *Lorillard*, courts and commentators responded to the Court's Title VII remarks. *See, e.g.*, Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); Comment, *The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts*, 44 U. Chi. L. Rev. 365, 372 (1977) [hereinafter cited as *Right to Jury Trial Under ADEA and FLSA*].

will: (1) examine the validity of judicial reliance on congressional characterization of a remedy as equitable and (2) suggest an alternative analysis for use in Title VII cases.

A. *Congressional Characterization*

Since Congress may not deny the right to a jury where such right is guaranteed by the seventh amendment, congressional attempts to characterize a remedy as equitable are similarly restricted. This is necessarily so, since an unabridged power to characterize a remedy would allow Congress to limit use of jury trials and thus to unilaterally amend the Constitution by means of statutory enactments.[77]

In 1891, in two cases dealing with state legislative characterizations of statutory remedies, the Court suggested that the seventh amendment question be determined by looking not to the legislative characterization, but to the underlying *nature* of the action.[78] Since that date, the Court has carved out only a rather narrow area in which congressional characterization of a remedy as equitable will be permitted to supersede the seventh amendment jury guarantee.

In 1966, in *Katchen v. Landy*,[79] the Court analyzed a statute[80] which did not characterize an action as either legal or equitable and found an implied congressional intent to provide quick, summary and binding determination in *equity* of a bankrupt's creditors.[81] The Court held that a jury trial would "dismember"[82] the statutory scheme of the Bankruptcy Act. Eleven years later,[83] explaining its holding in *Katchen*, the Court stated that the grounds for allowing a court to exercise its summary jurisdiction without a jury in such a situation were that a bankruptcy court "was a *specialized* court of equity[84]

77. United States v. Jepson, 90 F. Supp. 983, 986 (D.N.J. 1950). *Cf.* Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

78. Scott v. Neely, 140 U.S. 106 (1891) (contract debt); Whitehead v. Shattuck, 138 U.S. 146 (1891) (action to recover realty).

79. 382 U.S. 323 (1966).

80. 11 U.S.C. § 11-1103 (1964). Title 11 was extensively revised by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. As to the current jurisdiction of bankruptcy courts and the availability of a jury trial, see *id.* § 241, 92 Stat. at 2668 (codified at 28 U.S.C.A. §§ 1471-1482 (Supp. 1978)).

81. 382 U.S. at 328-30, 336-38.

82. *Id.* at 339.

83. Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442 (1977).

84. In Curtis v. Loether, 415 U.S. 189, 195 (1974), the Court implied that a "specialized court of equity" was one traditionally viewed as exercising equitable jurisdiction and in which a jury trial would disrupt the complex nature of the proceedings.

and constituted a forum before which a jury would be *out of place* and would go *far to dismantle* the statutory scheme" provided by Congress.[85] In discussing *Katchen* the Court has also stated that where there is a "functional justification for denying the jury trial right,"[86] congressional characterization, even though implied, can hold a cause of action free from the requirements of the seventh amendment.[87]

In applying the reasoning of *Katchen* to a Title VII action for back pay, it is difficult to see how a jury would "go far to dismantle" or "dismember" the relief provided by the Act, except perhaps that jury prejudice could foreseeably undermine its purpose.[88] Additionally, the court sitting for a Title VII action is not a "specialized" court of equity as is a bankruptcy court, but instead is an Article III court[89] of general jurisdiction in which a jury trial is consistent with adjudication of legal issues.[90]

In 1977, in *Atlas Roofing Co. v. Occupational Safety Commission*[91] the Court upheld the power of Congress to entrust the enforcement of "new statutory 'public rights'[92] . . . to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction"[93] on preserving jury trials. The Court, without listing criteria, distinguished new statutory public rights from "[w]holly private tort, contract, and property cases, as well as a vast range of other cases."[94] Thus, it appears that in certain specific instances Congress can provide for the initial resolution of rights in statutory administrative forums which are free from the strictures of the seventh amendment. However, the Court re-emphasized that the seventh amendment "prevents Congress from depriving a litigant of a jury trial in a *'legal'* action before a tribnal *customarily utilizing a jury* as its fact-

85. Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 454 n.11 (1977) (emphasis added) (footnote added).

86. Curtis v. Loether, 415 U.S. 189, 195 (1974).

87. *Id.*

88. However, the Court rejected this argument in *Curtis. Id.* at 198.

89. U.S. CONST. art. III, §§ 1-2.

90. *See* Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 458-59 (1977).

91. *Id.*

92. *"[E.]g.,* where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights." *Id.* at 458.

93. *Id.* at 455 (footnote added).

94. *Id.* at 458.

finding arm . . . and this Court has the *final* decision on the question whether a jury is required."[95]

As juries are customary before Article III district courts[96] when they are resolving disputes of a "legal" nature and the right to recover lost wages for illegal job discrimination is not a "new statutory public right,"[97] *Atlas* offers little if any support for a finding that the issue of back pay under Title VII is free from the strictures of the seventh amendment. Since it seems that the issue of back pay under Title VII does not fall within the exceptions established by the Court in *Katchen* and *Atlas*, the question cannot be answered by resorting to a congressional characterization of the remedy but must be answered by a seventh amendment test of the nature of the issue itself.[98]

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95. *Id.* at 461 n.16 (emphasis added).

96. U.S. CONST. art. III, §§ 1-2.

97. *See, e.g.*, Emmens v. Elderton, 10 Eng. Rep. 606 (H.L. 1853).

98. It has been suggested that if labeling of the Title VII back pay remedy as equitable cannot successfully be based on legislative characterization of it as a restitutionary equitable remedy, it can be based on the fact that the court in Title VII back pay actions is allowed some discretion. *Right to Jury Trial Under ADEA and FLSA, supra* note 76, at 373. The Court has found that a limited degree of discretion to award back pay is available to district courts in Title VII actions. Lorillard v. Pons, 434 U.S. 575, 584 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 421 (1975); *Right to Jury Trial Under ADEA and FLSA, supra* note 76, at 371. Justice Rehnquist, concurring in *Albemarle*, stated that the discretion criteria followed from Curtis v. Loether, 415 U.S. 189 (1974), and commented that to the degree that the district courts retain

> substantial discretion as to whether or not to award backpay . . . the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.

Albemarle, 422 U.S. at 443. (Rehnquist, J., concurring).

However, while discretion and flexibility are certainly the hallmarks of equity, 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 109 (5th ed. 1941), they are not the guiding criteria for determining if a particular remedy is equitable in *nature*.

> The question whether a particular case was to be tried in a court of equity — without a jury — or a court of law — with a jury — did not depend on whether the suit involved factfinding or on the nature of the facts to be found. . . . Rather, as a general rule, the decision turned on whether courts of law supplied a cause of action and an adequate remedy to the litigant.

Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 458-59 (1977) (footnote omitted). *See also* Ross v. Bernhard, 396 U.S. 531, 539 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-10 (1959); 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 176, 180 (5th ed. 1941).

B. *Title VII Jury Right Under the Seventh Amendment*

The issue of back pay recoverable under Title VII, although labeled an equitable restitutionary remedy by numerous lower courts,[99] appears, however, to be a statutory codification of the common law action of general assumpsit for breach of contract by wrongful discharge,[100] for which a jury was historically available.[101] Attempts to label back pay under Title VII as a restitutionary remedy miss the mark. Restitution at equity was to restore the plaintiff "to the possession of his specific debt, his chattels, or real property."[102] "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge

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If viewed as an action in contract or, alternatively, in tort, as argued, the back pay remedy is at law and subject to the jury trial provisions of the seventh amendment. The sufficiency and adequacy of the back pay provision of Title VII have not been questioned, and the discretion which the Court has stated is allowed a court in such a situation is not foreign to courts of law — as is evidenced by patent litigation, where the court has discretion to treble damage awards returned by the jury. 35 U.S.C. § 284 (1976). *See* Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 Nw. U.L. REV. 503, 523-24 (1973). Claims that the complexity of some Title VII back pay actions requires equitable jurisdiction are weak in light of the Court's holding in *Dairy Queen*, where it pointed to the powers given district courts to appoint masters to assist the jury in cases of "exceptional" complexity. 369 U.S. at 478.

99. *See, e.g.*, Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970). *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

100. 42 U.S.C. § 2000e-5(g) (1976) provides in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and 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. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

The last sentence quoted from this section virtually codifies the common law courts' method for determining damages for wrongful discharge whereby the net amounts of the employee's earnings at a subsequent job were deducted, or the amount he could reasonably have earned in similar employment sought after the discharge in order to mitigate his losses. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1358, at 302 (3rd ed. W. Jaeger 1968). *Cf.* U.S. v. Jepson, 90 F. Supp. 983, 986 (D.N.J. 1950) ("[W]hen a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute . . . . To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments.").

101. *See, e.g.*, Fuchs v. Koerner, 107 N.Y. 529, 14 N.E. 445 (1887); Sutherland v. Wyer, 67 Me. 64 (1877); Baldwin v. Bennett, 4 Cal. 392 (1854). *See also* Ochoa v. American Oil Co., 338 F. Supp. 914, 918-19 (S.D. Tex. 1972).

102. 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[2], at 190.5 (1978).

ill-gotten gains or to restore the status quo, or to accomplish both objectives."[103] Liability under the restitution is based on unjust enrichment.[104] When a plaintiff seeks back pay for being wrongfully discharged under Title VII he does not seek to have anything wrongfully obtained by the employer "restored" to him.[105] Instead he seeks to protect an expectancy interest on which common law contract damages are based.[106]

Additionally, in the case of a violation of the Civil Rights Act of 1964 based on racial discrimination,[107] the Court has suggested that such a violation may also create a cause of action which sounds basically in tort. In *Curtis v. Loether*,[108] the Court held that a violation of the Fair Housing Act of 1968[109] based on race could "also be likened to an action for defamation or intentional infliction of mental distress. . . . [I]t has been suggested that 'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.' "[110] These types of tort actons were enforced at common law and a jury right was available.[111]

The Court has emphatically stated that "legal claims are not magically converted into equitable issues by their presentation to a court of equity,"[112] a pronouncement all but neglected by the lower courts in Title VII actions. Furthermore, there appears to be no justification for judicial obedience to any congressional characterization of the back pay issue as an equitable remedy since it does not fall within the *Katchen* or *Atlas* boundaries within which an action may be free of the strictures of the seventh amendment. The Supreme Court's continued

103. *Id.* (footnote omitted).

104. 1 G. PALMER, THE LAW OF RESTITUTION § 1.1, at 2 (1978).

105. 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[2], at 190.5 (1978).

106. Comment, *Jury Trial in Employment Discrimination Cases — Constitutionally Mandated?*, 53 TEX. L. REV. 483, 499 (1975).

107. *See* Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a) (1976)).

108. 415 U.S. 189, 195 (1974).

109. Pub. L. No. 90-284, § 812, 82 Stat. 73, 88 (codified at 42 U.S.C. § 3612 (1976)).

110. 415 U.S. at 195-96 n.10 (quoting C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 961 (2d ed. 1969)). *See also* Pons v. Lorillard, 549 F.2d 950, 954 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978); Cleverly v. Western Elec. Co., 69 F.R.D. 348, 350-51 (W.D. Mo. 1975); Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491 (1968); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 467-68 (1965).

111. 5 MOORE'S FEDERAL PRACTICE § 38.11[5], at 118-19 (1978).

112. Ross v. Bernhard, 396 U.S. 531, 538 (1970).

distinguishing of Title VII from other similar statutes serves little purpose except to encourage a rote recital by the lower courts of district and circuit court precedents.[113]

While the early cases in this area were, perhaps mistakenly, based on an understandable and well-intentioned desire to effect good public policy,[114] later courts considering the issue have not keenly analyzed the seventh amendment decisions of the Supreme Court. Thorough and insightful discussion of the issue in Title VII back pay cases has waned to the point where one circuit court recently was able to proclaim:

> We join the Fourth, Fifth, Sixth and Ninth Circuits in holing that jury trials needs not be provided defendants in Title VII suits. . . . An award of back pay under Title VII . . . is an integral part of the equitable remedy of reinstatement and is not comparable to damages in a common-law action for breach of employment contract.[115]

But precedent can embalm even a faulty principle, and until the Court passes squarely on the jury question, it appears there will be little to move the lower courts to a renewed and probing examination in this area.[116]

IV. CONCLUSION

The Supreme Court in *Lorillard* avoided any modification or redefinition of its previous seventh amendment holdings on the right to a jury trial under a statute silent on the question.

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113. *E.g.*, Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978) (per curiam).

114. One commentator suggests that federal judges handling the early Title VII discrimination cases were influenced by practical considerations to rule that there was no jury right under the statute. Of the early cases in which a jury was requested, the comment suggests three facts are common:

> (1) [T]he request was made by the defendant; (2) the suit was brought in the South; (3) the plaintiff alleged that the discrimination was racially motivated.
>
> These facts suggest that some southern defendants hope[d] to utilize sympathetic juries to avoid the imposition of the sanctions provided in Title VII for racial discrimination — the underlying assumption being that white jurors, who may themselves be competing with blacks for jobs, will be less sympathetic than a federal judge to the discrimination claims of the black workers.

Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167, 167 (1969-1970) (footnotes omitted).

115. Harmon v. May Broadcasting Co., 583 F.2d 410, 410-11 (8th Cir. 1978) (per curiam).

116. *See, e.g.*, Baker v. City of Detroit, 458 F. Supp. 379, 382 (E.D. Mich. 1978) (court stated it was "unwilling to disregard . . .[the] clear and well-reasoned mandate" against Title VII jury trials because the circuit courts had "spoken with one voice" on the question).

Instead, it adopted a pragmatic, narrow, statutory approach and decided the question of a jury trial right under the ADEA on what it perceived to be an implied congressional grant of such a right as evidenced by the structure of the Act. But whether the decision marks a trend away from the seventh amendment test is not at all certain. Perhaps the only general statement that can be made about *Lorillard* is that it teaches the jury questions be determined on a case by case basis.

The Court continued in *Lorillard* to distinguish Title VII of the Civil Rights Act of 1964 from other similar statutes which the Court has decided provide for a jury right. Such a distinction serves only to perpetuate what appears to be the use of faulty logic by the lower court on the Title VII jury question.

What is needed from the Court, and what *Lorillard* failed to provide, is a broad, yet clear synthesis of its holdings from *Beacon* to *Atlas*, which will guide the lower courts in deciding whether a jury trial right exists under a statute which is silent on the matter. Such a synthesis would go a long way toward ensuring a uniform grant or denial of the right to a jury by the lower courts in various statutory causes of action. It would also establish a criterion for the courts to apply in deciding whether a right to a jury trial exists when a court has implied a remedy[117] or a cause of action[118] where none has been expressly authorized either under the Constitution or a statute.

While a new synthesis by the Court is needed, it should in no instance be found on the ability of Congress to denominate a statutory cause of action as equitable when in fact that cause of action is of a legal nature under a seventh amendment test. If the seventh amendment is to *preserve* anything, such a

117. In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Court recognized a tort remedy for persons whose rights were violated in searches and seizures carried out in violation of the fourth amendment.

118. In Cort v. Ash, 422 U.S. 66, 78 (1975), the Court delineated the factors to consider to determine whether a private remedy is implicit in a statute not expressly providing one. Last term, the Court agreed to decide whether a private right of action exists under 20 U.S.C. 1682 (1976), which prohibits sex discrimination in most federally assisted educational institutions, for a female plaintiff allegedly discriminated against on the basis of her sex when she unsuccessfully sought admission to federally assisted private medical schools. *See* Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), *cert. granted*, 98 S. Ct. 3142 (1978). Should the Court imply a private action right under the statute, it would then be necessary to decide whether the right to a jury trial also exists.

power cannot constitutionally be delegated to the Congress beyond the mark established in *Katchen* and *Atlas*.[119]

ROSS F. PLAETZER

CRIMINAL PROCEDURE—Double Jeopardy—Double Jeopardy Clause Not Offended by Appeal of Dismissal on Defendant's Motion if Dismissal Requires No Determination of Guilt. *United States v. Scott*, 437 U.S. 82 (1978). Until 1970 the government's right to appeal a criminal case was limited by a number of jurisdictional provisions which greatly reduced the need to decide issues regarding the government's right to appeal on constitutional grounds.[1] However, the Omnibus Crime Control Act of 1970[2] eliminated these jurisdictional restrictions and allowed government appeals of decisions, judgments and orders except "where the double jeopardy clause of the United States Constitution[3] prohibits further prosecution."[4] Since 1971 there has been a resurgence of interest in the double jeopardy protection as a result of this change, and a number of Supreme Court cases have focused specifically upon its scope.[5]

These and earlier cases interpreting the clause have generally held that acquittals are not appealable by the government while, absent prosecutorial misconduct or judicial overreaching, mistrials generally are appealable.[6] Problems in interpreting the scope of the clause arise, however, in instances of dismissals which can be characterized neither as mistrials nor as acquittals. The general rule which had been followed in such

119. *See* Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 655 (1979) (Rehnquist, J., dissenting) (forcefully stating the "preservation" aspect of the seventh amendment).

1. *See* United States v. Wilson, 420 U.S. 332, 339 (1975).

2. Pub. L. No. 91-644, 84 Stat. 1880 (codified at 18 U.S.C. § 3731 (1976)).

3. U.S. CONST. amend. V reads in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

4. 18 U.S.C. § 3731 (1976) (footnote added).

5. *See, e.g.*, Swisher v. Brady, 98 S. Ct. 2699 (1978); United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Arizona v. Washington, 434 U.S. 497 (1978); United States v. Sanford, 429 U.S. 14 (1976); Serfass v. United States, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).

6. *See* text accompanying notes 27-55 *infra*.