INTRODUCING TEXT-BOUND ORIGINALISM (AND WHY ORIGINALISM DOES NOT STRICTLY GOVERN SAME SEX MARRIAGE)

*Suja A. Thomas**

Originalism has played a part in many court decisions, including on the issue of whether states can ban same sex marriage. For the most part, the argument goes that the modern constitutional meaning trumpeted by supporters is not the original public meaning of the constitutional provision. Regarding same sex marriage, for example, originalists argue that the original public meaning of the Fourteenth Amendment's equal protection clause was the protection of African-Americans from discrimination by states, not the protection of gays and lesbians from discrimination by states. So, the equal protection clause did not and cannot protect gays and lesbians from such discrimination.[1] These arguments assume that originalism should play a significant role in the interpretation of all provisions in the Constitution. This brief essay introduces the idea that this assumption is misplaced. The interpretation of the Constitution must begin with the text. The text of the Seventh Amendment is the only part of the Constitution that explicitly incorporates originalism, doing so through the use of the words "common law" and "preserved" in the context of limiting the authority of the judiciary and the jury. The express inclusion of originalism in the Seventh Amendment necessarily limits the use of originalism for the interpretation of the rest of the Constitution. Originalism must play a lesser role or no role in the interpretation of the rest of the

* Professor of Law, University of Illinois College of Law. I am grateful for discussions with and comments from: Caitlin Borgmann, Ruth Colker, Benjamin Glassman, Robin Kar, Kurt Lash, Jason Mazzone, Darrell Miller, Robert Morse, Larry Solum, and Melissa Wasserman.

1. Steven Calabresi and Hannah Begley recently have argued that originalism protects a right to same sex marriage. Steven G. Calabresi & Hannah M. Begley, *Originalism and Same Sex Marriage* 25–27 (Northwestern Pub. Law Research Paper 14-51, 2014), *available at* http://ssrn.com/abstract=2509443; *see also* Grant R. Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J.L. & SOC. CHANGE 237 (2013) (arguing for originalist support for same sex marriage). Other discussions in favor or against such a right are found in recent blog discussions, including by Larry Solum, Ilya Somin, and Orin Kerr.

Constitution, including the Fourteenth Amendment. The essay also explores a role more generally for using originalism to interpret the authority of the jury, which is dependent upon the executive, the legislature, the judiciary, and the states, to exercise its own authority. Finally, while acknowledging that some role for originalism in the interpretation of the Constitution has been generally accepted, this essay contends that originalism strictly governs the interpretation of the Seventh Amendment, should have a significant role for construing the other jury provisions, and should play a less decisive role in explicating the meaning of most other constitutional provisions.

I. ORIGINALISM AND THE CONSTITUTION

In the interpretation of the Constitution, the Supreme Court has purported to apply some type and degree of originalism, a debated methodology by which interpretation of the Constitution occurs based on the original meaning of the Constitution. Some have written that the framers intended for the Constitution to be interpreted according to originalism.[2] Others have written that regardless of the intention of the framers regarding originalism, interpretation of the Constitution according to originalism is the only way that the meaning of the Constitution will not change according to the particular inclinations of the justices who interpret the Constitution.[3] And additional justifications are offered for originalism.[4]

Many, however, do not support the use of originalism. Under this view, originalism stifles the meaning of the Constitution when society continues to change.[5] Originalism may not adequately account for changing values and circumstances, and as a result the interpretation of the Constitution should occur through the use of living constitutionalism, which attempts to take into account these concerns.[6] Recently, the

2. RAOUL BERGER, GOVERNMENT BY JUDICIARY 4 (2d ed. 1997) (arguing that framers intended for their intentions to govern). *But see* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that framers did not expect their intentions would govern).

3. For extensive discussions of the normative justifications of originalism, see THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft & Bradley W. Miller eds. 2011).

4. *See id.*

5. *See, e.g.*, David A. Strauss, THE LIVING CONSTITUTION 1 (2010) ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended"); William J. Brennan, Jr., *The Constitution of the United States*: *Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986).

6. *See* Strauss, *supra* note 5, at 7–31; *see also* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM (2011) (debating originalism and living constitutionalism); *cf.* Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Theory* in THE CHALLENGE OF ORIGINALISM, *supra* note 3, at 38–39 (discussing existence of different versions of both originalism and living constitutionalism).

compatibility of originalism and living constitutionalism has even been claimed.[7]

For those who support originalism, the prevailing view of originalism refers to the original public meaning of the Constitution, as opposed to, for example, the intentions of the framers or ratifiers. Original public meaning originalism recognizes that people involved at the time of the founding may have had different intentions, but ultimately, text was adopted and the original public meaning of that text best captures the meaning of the Constitution.[8]

While justices of the Supreme Court agree that originalism has some role in constitutional interpretation, they have disagreed about how much influence it should have.[9] Dependent upon the beliefs of different justices who have sat on the Court over time or the particular issues that have come to the Court, originalism has had more or less influence in decisions of the Court.[10]

II. SAME SEX MARRIAGE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The equal protection clause of the Fourteenth Amendment provides that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws."[11] The clause, which requires states to protect "any person within its jurisdiction" with "the equal protection of [its] laws," does not limit its meaning by reference to past law.

7. JACK M. BALKIN, LIVING ORIGINALISM (2011); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011)).

8. *See* Solum, *supra* note 6, at 22–24, 30–32. There are many versions of originalism. For example, for years, Larry Solum has explained originalism in a thoughtful and sophisticated manner. In one recent work, Solum begins by carefully describing the present arena. He starts with a description of the two core ideas of originalism—the fixation thesis and the constraint principle. He further explains that originalists can differ on how fixation occurs—for example through original intent or original public meaning—and can disagree on the form of constraint, including the degree to which text binds. Solum also states that originalists can disagree on the extent to which context affects the meaning of text. The focus of that article is "the construction zone." Originalists will disagree on the intensity of any such zone, which involves ambiguous text, vague text, contradictory text, and textual gaps in the Constitution. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); *see also* Solum, *supra* note 6, at 32–38 (explaining the fixation thesis, the contribution thesis, and the constraint principle to which all or most originalists agree); Lawrence B. Solum, *The Fixation Thesis*, 91 NOTRE DAME L. REV. 1 (forthcoming 2015) (exploring the fixation thesis under which "the meaning of the constitutional text is fixed when each provision is framed and ratified."). This brief essay does not enter into the scholarly debate about Professor Solum or others' descriptions of originalism.

9. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y (forthcoming 2015) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498838. Sachs stated "[m]ost everyone accepts that some kind of original meaning is legally relevant sometimes; the only live disputes are what kind of original meaning, how much it contributes, and whether and when other sources can validly supplement or supplant that meaning." *See id.* at 16.

10. For example, originalism as a theory of interpretation became significant in the 1980s when Judge Robert Bork and then-Judge Antonin Scalia promoted the theory. *See* Keith E. Whittington, *Originalism*: *A Critical Introduction*, 82 FORDHAM L. REV. 375, 375–76 (2013).

11. U.S. CONST. amend. XIV.

Several federal courts have weighed in on the question of whether states may prohibit same sex marriage without contravening the equal protection clause. The only federal court of appeals to find such a prohibition constitutional stated in part that the interpretation of the equal protection clause must begin "by looking at how the provision was understood by the people who ratified it."[12] As the court pointed out, "[n]obody in th[e] case . . . argue[d] that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage."[13] In a thoughtful decision that considered other arguments in addition to originalism, the appeals' court concluded, among other things, that state laws prohibiting same sex marriage were permissible under the equal protection clause.[14] The other federal courts of appeals that considered this issue did not invoke originalism and found the state laws violated the equal protection clause.[15]

III. A BRIEF HISTORY OF THE ORIGINS AND INTERPRETATION OF THE SEVENTH AMENDMENT

To decide whether originalism should be employed to interpret provisions in the Constitution, including the Fourteenth Amendment's equal protection clause, the Seventh Amendment is the place to start, because it is the only place in the Constitution to refer explicitly to originalism through its use of "common law" and "preserved," providing:

> [i]n Suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be *preserved*, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the *common law*.[16]

An understanding of the meaning of the Seventh Amendment can help inform how originalism, including the common law, should govern the equal protection clause.

The meaning of the Seventh Amendment is unclear from the text of the Amendment and the records surrounding its adoption, and as a result, has been the subject of much research and debate.[17] There was little discussion of the civil jury trial in the federal convention. Although one delegate argued for the necessity of the jury to protect against "corrupt Judges," others recognized difficulty in expressing the cases in which a civil jury trial was warranted, and some argued that the legislature could be

12. DeBoer v. Snyder, 772 F.3d 388, 403 (6th Cir. 2014), *cert. granted by* 135 S. Ct. 1041 (2015)
13. *Id. But see supra* note 1.
14. *DeBoer*, 772 F.3d 388.
15. *See* Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).
16. U.S. CONST. amend. VII (emphasis added).
17. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 652 (1973) ("[T]he original understanding can be only imperfectly perceived today.").

"trusted" to determine the cases in which juries were required.[18] Thereafter, a proposal to add language to Article III that stated "a trial by jury shall be preserved as usual in civil cases" was not passed.[19] Delegates emphasized that differences among the states made what was "usual" impossible to determine and believed that "such a clause would be pregnant with embarrassments."[20]

Significant concern mounted after the Constitution was adopted with a grant of appellate jurisdiction over law and fact to the Supreme Court and no jury trial for civil cases.[21] Later, Congress proposed the Seventh Amendment to the states,[22] and it was subsequently adopted in 1791.

The Supreme Court has often interpreted the Seventh Amendment to determine whether there should be a jury trial or whether a procedure that affects the jury trial is constitutional.[23] In this evaluation, the focus has been on the common law language. "Common law" in the Seventh Amendment, which governs the types of cases in which the jury trial is "preserved" and also how the judiciary can re-examine facts tried by a jury, could refer to a variety of practices. It could refer to the practice of the English common law courts, to the practice of the state courts, or to the practice of the federal courts. Common law could refer to those practices in 1791 when the Amendment was adopted so common law could mean the English common law in 1791, state common law in 1791, or federal common law in 1791. Alternatively, it could refer to the English common law at any point in time, the individual practices of the state courts at any point in time, or the law of the federal courts at any point in time.

In the early nineteenth century, Justice Story stated that common law in the Seventh Amendment could not mean the law of the individual

18. James Madison, *Debates in the Federal Convention*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587–88 (Max Farrand ed., 1911) (Mr. Gerry, Mr. Gorham, and Col. Mason). Gorham stated "[i]t is not possible to discriminate equity cases from those in which juries are proper." *See id*. at 587.

19. *Id*. at 628.

20. *Id*.

21. *See* Ellen E. Sward, *A History of the Jury Trial in the United States*, 51 U. KAN. L. REV. 347, 372 (2003); Wolfram, *supra* note 17, at 667–73, 678–79, & 693–94.

22. The history of the language of the Amendment is not completely clear because of the lack of record keeping. Madison proposed the first version to the House of Representatives on June 8, 1789 as "[i]n suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate," along with "nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law." 1 ANNALS OF CONG. 435 (1789). On August 17, 1789, a committee of the House considered "nor shall any fact, triable by jury according to the course of the common law, be otherwise re-examinable than according to the rules of the common law." *Id.* at 755. On August 18, 1789, the proposal for "'[i]n suits at common law, the right of trial by jury shall be preserved,' was considered and adopted" by the House. *Id.* at 760. The House adopted this version on August 21, 1789. *Id.* at 767. On September 7, the Senate added an amount in controversy requirement. *Id.* at 767. On September 25, 1789, the Senate adopted the language "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1165 (1971).

23. *See, e.g.*, Beacon Theaters v. Westover, 359 U.S. 500 (1959).

states. "[B]eyond all question" common law meant the English common law. He explained that:

> the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.[24]

Soon thereafter, the Supreme Court, with Justice Story writing for the Court, adopted this reading of common law in the Amendment to refer to the English common law.[25] Although the Court did not refer specifically to England and 1791, the date when the Seventh Amendment was adopted, it referred to past practices, and the Court subsequently confirmed that the common law in the Seventh Amendment was the English common law in 1791.[26] In its decisions, the Court has recognized that the English common law in 1791 influences the analysis of the extent of the jury trial right under the first clause of the Amendment, and the constitutionality of procedures that affect the jury trial right, under the first and second clauses. While an analysis of the Court's decision to define common law as the English common law in 1791 cannot be addressed in this brief essay, among other things, support for the Court's decision is found in definitions of "common law" and "preserved."[27]

IV. ORIGINALISM'S ROLE OUTSIDE OF THE SEVENTH AMENDMENT

So, the question becomes what role originalism should play in the interpretation of the rest of the Constitution, when the Seventh

24. United States v. Wonson, 28 F. Cas. 745, 750 (No. 16, 750) (C.C.D. Mass. 1812).

25. *See* Parsons v. Bedford, 28 U.S. 433, 446–48 (1830).

26. *See* Dimick v. Schiedt, 293 U.S. 474, 476–85 (1935) (examining English common law case law and treatises before and after the adoption of Seventh Amendment); Wolfram, *supra* note 17, at 642 (citing Thompson v. Utah, 170 U.S. 343 (1898), the first case referring to the date of adoption).

27. For example, Johnson defined common law as "[c]ustoms which have by long prescription obtained the force of laws; distinguished from the statute law, which owes its authority to acts of parliament." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773). Timothy Cunningham stated that there were three important characteristics of the common law. "[F]irst, it is taken for the laws of this realm simply, without any other law joined to it; . . . Secondly, For [sic] the *King's court*, as the *King's Bench* or *Common Pleas*, only to shew [sic] a difference between them and the base courts. . . . Thirdly, and most usually, By [sic] the *Common law* is understood such laws as were generally taken and holden for law, before any statute was made to alter the same." 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771). Samuel Johnson defined "to preserve" as "[t]o save; to defend from destruction or any evil; to keep." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1775); *see also* Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 194–96 (2012) (addressing argument against the Court's interpretation in AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89–93 (1998)); SUJA A. THOMAS, THE OTHER BRANCH: RESTORING THE JURY IN THE AMERICAN CONSTITUTION (forthcoming Cambridge Univ. Press) (further exploring meaning of "common law" and "preserved" in Seventh Amendment).

Amendment is the only provision in the Constitution to be governed explicitly by originalism—there through its use of "common law" and "preserved" in the text. Interpretation of these other constitutional provisions must start with the actual text,[28] clauses that do not refer to originalism.[29] While the late eighteenth century English common law has been used to interpret many provisions of the Constitution in addition to the Seventh Amendment,[30] common law is not included in those provisions.

A. Defining the Common Law's Function for Originalism

Originalism could be defined as an interpretation of the Constitution according to the past "common law." If so, arguably only the Seventh Amendment should be interpreted according to originalism, because only it refers to "common law" and "preserved." Under this reading of the Constitution, the common law governs the meaning of the Seventh Amendment, and it does not govern the interpretation of other constitutional text.

Alternatively, the common law could be used to interpret other constitutional provisions that do not explicitly include the term common law. The use of the common law to govern the rest of the Constitution in the same manner as it governs the Seventh Amendment, however, would make the reference to "common law" in the Seventh Amendment superfluous. So, if common law is used to interpret other constitutional text, it appears that it should be used in a different manner. Discussing this idea in a dissent in a case regarding the interpretation of the Eleventh Amendment, Justice Souter stated:

> [t]he Seventh Amendment . . . was adopted to respond to Antifederalist concerns regarding the right to jury trial. . . . Indeed, that Amendment vividly illustrates the distinction between provisions intended to adopt the common law (the Amendment specifically mentions the "common law" and states that the common-law right "shall be preserved") and those provisions, like the Eleventh

28. Early on, the Supreme Court emphasized the importance of the text to the interpretation of the Constitution. It stated

> [t]he framers of the constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight.

McPherson v. Blacker, 146 U.S. 1, 27 (1892).

29. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008) (The use of words in parts of the Constitution can help inform the meaning of the same words in other parts.). For a discussion of arguments by Professors Amar, Lawson, and Paulsen that originalism is mandated by the constitutional text, *see* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 739 & n.44 (2010).

30. *See*, *e.g.*, McDonald v. Chicago, 561 U.S. 742, 767–70 (2010); Sachs, *supra* note 9.

> Amendment, that may have been inspired by a common-law right but include no language of adoption or specific reference.[31]

Under another view, originalism could encompass more than an interpretation of the Constitution according to the common law. It could refer to the use of additional sources of original public meaning—as previously stated, the prevailing view of originalism. An example of the use of original public meaning to interpret a provision of the Constitution is found in *District of Columbia v. Heller*.[32] There, the Court described originalism based on original public meaning as:

> [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' . . . Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[33]

Among other sources used to determine the original public meaning of terms in the Second Amendment were the 1773 edition of Samuel Johnson's Dictionary of the English Language, the 1771 edition of Timothy Cunningham's A New and Complete Law Dictionary, state laws, Blackstone's treatise, other treatises, and other works of the founders.[34]

Although sources of original public meaning originalism include more than the common law, the English common law has been a main source on which the Supreme Court and many scholars have relied to define the original public meaning of provisions in the Constitution.[35] In other words, use of the common law has been significant to an originalist interpretation of a constitutional provision.

B. Examining Why Originalism Was Included in the Seventh Amendment

The reason why common law was included in the Seventh Amendment and not in other parts of the Constitution, including the other jury provisions, can help determine how, if at all, originalism should be used to interpret the equal protection clause. Not much is known about the particular wording used in the Seventh Amendment. The decision to include common law very well may be related to the ease or difficulty with

31. *See* Seminole Tribe v. Florida, 517 U.S. 44, 164 & n.59 (1996) (Souter, J., dissenting).
32. *See* 554 U.S. 570 (2008); Solum, *supra* note 6, at 30–31.
33. 554 U.S. at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).
34. *Id.* at 581–619
35. *But see, e.g.*, Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 156–59 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION) (disputing McGinnis's & Rappaport's claim that framers and ratifiers accepted English common law, including as represented by Blackstone).

which the founders could express authority in the Constitution. If authority could be easily expressed, then a reference to material outside the Constitution may not have been necessary. On the other hand, if authority was more difficult to express, an outside reference might help establish that authority.

The decision to include common law in the Seventh Amendment also may have been related to the ability of the executive, the legislature, the judiciary, and the states ("traditional constitutional actors") to go beyond their own authority and the inability of the jury to protect its authority. The traditional actors can act without the impetus of another constitutional actor. However, the jury, including the civil jury, cannot act without another body essentially approving its authority to act.[36] Moreover, if a jury is not constituted or authority is taken away from it, the jury cannot act to protect its power under the Constitution.

Common law could have been included in only the Seventh Amendment because no significant concern existed about expressing the authority of the actors, other than the civil jury, in the Constitution including no concern that the authority of these actors—the traditional constitutional actors, the criminal jury, and the grand jury—could be easily taken away. The wordings of the constitutional provisions that set forth the authority of these actors are consistent with this idea. The powers of the legislature, the executive, and the judiciary are carefully delineated in Articles I, II, and III. The authority of the states also is broadly set forth in the Tenth Amendment. Similarly the authority of the grand and criminal jury is set forth in the Fifth Amendment and Article III including through specific exceptions to their authority.[37] On the other hand, there is evidence of the difficulty in explicitly defining the authority of the civil jury, for example in the discussion of congressional members in the federal convention and the discussion by Hamilton in the Federalist Papers.[38] The ultimate result was tying the authority of the civil jury to an outside reference. The Seventh Amendment set forth that a jury trial was preserved in certain types of suits—"Suits at common law"—and courts could not reexamine facts other than in accordance with certain types of rules—"rules of the common law."[39]

Both of these references to common law restrained the judiciary; juries, not judges, could hear common law suits, and judges could not affect the factual determination of the jury except according to common law

36. *See, e.g.*, Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 791 (2005); Suja A. Thomas, *The Civil Jury: The Disregarded Constitutional Actor* (Univ. of Cincinnati College of Law, Pub. Law and Research Paper Series No. 07-30, 2007) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029376.

37. The exceptions apply respectively "in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger" and in "impeachment" cases. *See* U.S. CONST. amend. V; U.S. CONST. art. III.

38. *See supra* notes 17–22 and accompanying text; THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

39. U.S. CONST. amend. VII

rules. It appears then that because of several factors, instructions were left regarding the authority that the judiciary held in relationship to the civil jury. There was difficulty expressing the authority of the civil jury, the judiciary and the jury shared authority, and the judiciary and possibly other traditional actors could otherwise usurp the authority of the jury. Accordingly, the common law language in the Seventh Amendment appears to be used to rein in the authority of the judiciary and possibly other traditional actors.[40]

C. Originalism and the Jury

Because common law is not found in any other provision in the Constitution, arguably the past common law should not strictly govern these other provisions.[41] So, how, if at all, should the traditional actors use the past common law to interpret other constitutional provisions? Certainly, if text is ambiguous, some sources are necessary to interpret the text. Because the Court has used common law to interpret the Constitution since the time of the adoption of the Constitution, this provides some reason that the common law possibly should influence the interpretation of constitutional text.

The unique characteristics of the jury could influence the application of the common law beyond the interpretation of the Seventh Amendment. Because the founders decided that common law restrained the power of the judiciary in relationship to the authority of a competing actor—the jury in civil cases—the use of the common law in similar circumstances to influence the interpretation of the power of competing, dominant, traditional actors in relationship to the criminal and grand juries is arguably justifiable. As discussed previously, the unique position of the jury in the Constitution—as unable to act without the assistance of a traditional actor and unable to influence those actors because of its inability to affect their authority[42]—results in the vulnerability of the authority of the jury.

Another factor in the interpretation of the authority of the jury that might be considered concerns how issues that relate to the authority of the

40. After the House considered language for the criminal, grand, and civil jury amendments, there was a proposal to adopt the following language, which exhibited a concern that the other traditional actors may attempt to usurp the authority of the judiciary or the jury.

> The powers delegated by this Constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the power vested in the Legislative or Executive.

1 ANNALS OF CONGRESS 760 (1789). Sherman stated that this language was unnecessary because the branches were "separate." *Id.* Madison, however, believed the people would like this amendment to show "the powers ought to be separate and distinct," and "it might also tend to an explanation of some doubts that might arise respecting the construction of the Constitution." *Id.*

41. *Cf.* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (discussing how precise constitutional text should be interpreted).

42. Thomas, *supra* note 36.

jury come to the Supreme Court. Unlike many reviews of the authority of the traditional actors, the Court considers the authority of the jury not when the jury purportedly has taken power from another actor, but rather only when another actor purportedly has taken authority from the jury. Again, here, one actor—the traditional actor—competes and dominates another actor—the jury, the dependent actor. To the extent then that the common law should influence the interpretation of other parts of the Constitution, arguably it should be used to restrain the traditional actors in relationships with the grand jury and criminal jury when the constitutional text is ambiguous and the traditional actor competes with the jury for authority.

This application of originalism is premised on the idea that the Constitution should be interpreted according to the past common law based on the relationships among the actors with authority in the Constitution. If a constitutional actor has a relationship(s) with another constitutional actor(s) such that it solely depends upon the other actor(s) in order to act, the dominant constitutional actor should interpret the authority of the dependent actor using originalism, and defer to the competing authority of the dependent actor when the meaning of the text is not clear and either actor could arguably possess authority. The criminal and grand jury have these relationships with the traditional actors, making them vulnerable to power grabs, and while the respective governing amendments do not specifically require originalism, applying it to protect the authority of the jury is logical, given that the jury may have no authority if not so protected.

D. Originalism and Same Sex Marriage

So, outside the interpretation of the jury provisions, what role should originalism play, including for interpreting the equal protection clause of the Fourteenth Amendment? The text gives us information about this interpretation. A constitutional provision could be explicitly governed by originalism. It was done so possibly because there was difficulty expressing the civil jury's authority and concern existed about the ability of the jury to garner authority in relationship to the judiciary and possibly other actors. On the other hand, arguably a choice was made that originalism does not strictly govern the Fourteenth Amendment or any other part of the Constitution, by not including common law or other language incorporating originalism in the text of the Constitution.[43] Those who enacted the Constitution were well aware that the traditional actors had authority to act under the Constitution and had the ability to push and pull against one another. These abilities and the people's authority to change the

43. *Cf.* Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1633 (2009) (discussing that while constitutional rights may "entrench deep values against future backsliding," they "are typically established as the culmination of a struggle to change the status quo, rather than to enshrine well-accepted fundamental values").

Constitution, if not interpreted as they wished, appear to have influenced the decision not to tie the Constitution to the past. While there may be other justifications for this interpretive method discussed here, it can be justified by the rule of law; the rule of law includes having internally consistent constitutional methodologies, and for originalism to be internally consistent it should strictly govern only where specified and constitutional text should not be strictly construed otherwise.[44]

The role that originalism should play in the interpretation of other constitutional provisions, outside of the jury provisions, is not otherwise addressed here—other than to argue that it should not strictly govern.[45] There may be a more limited role for past common law and also a role for an evolving common law. This idea comports with Supreme Court jurisprudence from the early twentieth century where the Court distinguished the use of the common law in the Seventh Amendment to delineate the authority of the civil jury. It stated:

> here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations (8th Ed.) 124.[46]

On the other hand, it recognized that the common law had changed and was expected to change.

> [T]he common law is susceptible of growth and adaptation to new circumstances and situations, and . . . the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule. . . . The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions.[47]

Change to the common law occurred and was important, including innovation initiated by justices in late eighteenth century England.[48]

Moreover, a basic difference between an evolving common law in the context of equal protection and other non-jury areas, and a fixed common law in the context of the jury, is the ability of the traditional actors to fight

44. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law--A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

45. *See supra* note 9.

46. Dimick v. Schiedt, 293 U.S. 474, 487 (1935).

47. *Id.*

48. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 888 (1996).

for authority. If the Supreme Court were to decide that states cannot prohibit same sex marriage, states can react and undoubtedly will with subsequent attempts to regulate marriage in part similar to states' actions after *Roe v. Wade*.[49] And the Court in turn can continue to review these state efforts. At the same time, there are self-limitations to common law adjudication,[50] and there are internal mechanisms to control the judiciary,[51] both of which will limit the judiciary.

E. A Few Possible Responses

This brief essay outlines the argument for text-bound originalism. Some of the possible responses against this argument include: (1) originalism consists of more than the common law, so the inclusion of some aspect of originalism in the Seventh Amendment does not preclude the application of originalism elsewhere; and (2) originalism may be expressed in the Seventh Amendment to ensure the use of the common law to interpret that provision without the founders intending to preclude its application elsewhere. These and other responses will be explored in a more in-depth piece in the future, but suffice it to say now that if originalism was to govern the whole Constitution, there was no necessity to include a reference to originalism in the Seventh Amendment.[52] The use of the common law and treatises, along with other founding materials, would have been an obvious way to interpret the Seventh Amendment, and thus, there was no need to include a reference to common law if originalism governed all the provisions of the Constitution equally.

V. CONCLUSION

Is there a role for originalism in the interpretation of the other parts of the Constitution that do not include an explicit reference to originalism, including to determine whether states can prohibit same sex marriage under the equal protection clause? In order for the constitutional text as a whole to be given its true meaning, originalism cannot strictly govern what equal protection and other parts of the Constitution outside of the Seventh Amendment mean.

49. 410 U.S. 113 (1973). Possible state reaction has already been discussed. Erik Eckholm, *Opponents of Gay Marriage Ponder Strategy as Issue Reaches Supreme Court*, N.Y. TIMES, Apr. 22, 2015, http://www.nytimes.com/2015/04/23/us/opponents-of-gay-marriage-ponder-strategy-as-issue-reaches-supreme-court.html?_r=0.

50. Strauss, *supra* note 48.

51. U.S. CONST. art. III, § 1 (serve "during good behaviour").

52. Future work will also engage the work of other leading originalism scholars. *See, e.g.*, Solum, *supra* note 8.

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