# Foreword: Originalism and the Jury

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Originalism is a term fraught with controversy; it is usually associated with "conservative" results in constitutional interpretation, including most recently the right to bear arms under the Second Amendment. The application of originalism to the interpretation of the Sixth and the Seventh Amendments, however, seems to defy this view. Using an originalist approach, the Supreme Court has broadly interpreted the jury trial right, as a general matter, holding, for example, that a jury must find facts that influence sentencing and that a jury trial right exists for some congressionally created causes of action.

Despite the Court's endorsement of an originalist approach to the constitutional right to a jury trial, the Court's decisions have sometimes fallen short of the original meaning of the Sixth and Seventh Amendments. A few years ago I wrote an article entitled "Why Summary Judgment Is Unconstitutional" in which I challenged the accepted constitutionality of the common procedure of summary judgment. While writing this article and others challenging procedure under the Seventh Amendment, I became interested in the scholarship and decisions of Justice Antonin Scalia on originalism and the jury. Justice Scalia's scholarship, including *A Matter of Interpretation: Federal Courts and the Law*, and *Originalism: The Lesser Evil*, have caused people to think about the applicability of originalism to the Constitution. Moreover, Justice Scalia's decisions on sentencing, the confrontation clause and other jury trial right questions have confounded traditional views on the conservative and liberal lines in judicial interpretation, including the application of originalism.

The idea for this Symposium on Originalism and the Jury, co-sponsored by The Ohio State University and the University of Illinois, was born at a breakfast with Judge Jeffrey Sutton. Judge Sutton, an OSU law graduate and former clerk of Justice Scalia, was also interested in these jury issues and was interested in bringing Justice Scalia to Ohio State. Judge Sutton quickly enlisted then Ohio State Law Dean Nancy Rogers and Douglas Berman to help plan for an event at Ohio State. And both Judge Sutton and another former clerk to Justice Scalia, Brian Fitzpatrick, were able to secure the participation of Justice Scalia.

We had a wonderful program including a Keynote Address by Justice Scalia, and panels on The Framers and the Jury, the Seventh Amendment Civil Jury Trial, the Sixth Amendment Criminal Jury Trial, and Originalism in Advocacy, respectively moderated by Illinois Dean Bruce Smith, Deborah Merritt, Ohio State Dean Alan Michaels and Judge Sutton. In addition to the

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moderators and the authors mentioned below, several others participated on the panels, including Stephanos Bibas, Michael Dreeben, Jeffrey Fisher, Orin Kerr, and Carter Phillips. We feel fortunate to have had such a distinguished group of people participate in the Symposium and write for this Symposium issue.

There are many people to thank for this Symposium in addition to the people already mentioned. Thanks to Dean Michaels and Associate Dean Garry Jenkins for their work on the event. Louis Billionis, my former Dean at the University of Cincinnati, and Ralph Brubaker, an Interim Dean at Illinois, should also be thanked for preliminary discussions about this Symposium. Finally, the Symposium Editor, Nathan Colvin, did a wonderful job organizing and putting on the event. Of course, the new *Ohio State Law Journal* board with Editor-in-Chief Jessica Kim at the helm performed the hard work of cite-checking and editing these—sometimes heavy on the English common law—articles.

This Symposium issue includes provocative articles that use originalism and challenge accepted notions of the role of the jury. Doug Berman makes the case for jury involvement with federal habeas corpus actions. He argues that a jury role reviewing the constitutionality and lawfulness of criminal convictions would have been welcomed by the Constitution's Framers and would help reform the current problems in habeas review. Judge Nancy Gertner also writes about a broader criminal jury trial right. She contends that informing juries of mandatory sentencing and mandatory enhancements would give more "intelligible content" to the criminal jury trial right. Joan Larsen also writing about the criminal jury describes the relationship between the criminal jury of the founding era and the modern jury. She concludes that some aspects of the original jury should be restored including unanimity and twelve-person juries.

Brian Fitzpatrick explores the civil jury trial right and takes on my argument against summary judgment. He argues that to decide whether summary judgment is unconstitutional the importance of English juries deciding the sufficiency of the evidence as well as changes made to the jury trial since the late eighteenth century must be considered. James Oldham also addresses limitations to the civil jury trial right by arguing for a complexity exception to the Seventh Amendment. His contentions are based on two characteristics of business litigation in England in the late eighteenth century—the frequent referral of cases to arbitration and the strong likelihood that a case that went to trial would be tried by a special jury of merchants. Like Oldham, in another article, Gene Schaerr and Jed Brinton discuss the civil jury trial right in the context of modern business litigation. They contend that the Framers did not envision modern business when they established the civil jury trial right, and as a result, certain rules in the legal

system become very important, including regarding juror qualifications, financing of litigation, and punitive damages.

Somewhat differently than the others who write on the civil jury trial right in this issue, I argue that the right has been inappropriately limited. Using the English common law, I show that the right should be understood as a limitation on Congress, in addition to a limitation on the courts, and that any actions with damages, including ones currently before administrative agencies and bankruptcy courts, should be tried to juries. Finally, William Nelson explores the extent of lawfinding power of colonial American juries, including through the questions of whether law was under the control of local communities, or did law represent the enforceable will of central political authorities. His conclusion from his research thus far is juries possessed such power in some states, and they did not in others. He also finds, however, that, for the most part, localities had the power to resist centrally imposed law.

We hope these articles shed new light on this interesting issue of Originalism and the Jury.