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THE BEST OF BOTH WORLDS: RECONCILING TRADITION WITH EVOLUTION UNDER THE OHIO AND FEDERAL RIGHT TO A CIVIL JURY TRIAL

Jacob Hoback[*]

I. INTRODUCTION

The guarantees in the Bill of Rights do not only limit federal governmental power.[1] Although the Bill of Rights was originally applied only as a limit on the federal government, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates many of the individual rights provided in the Bill of Rights against the states.[2] Thus, the Bill of Rights today is also a limit on state governmental power.[3]

One exception, however, is the right to a civil jury trial under the Seventh Amendment.[4] Under the doctrine of selective incorporation, the Fourteenth Amendment only incorporates parts of the Bill of Rights against the states, and one such excluded provision is the right to a civil jury trial.[5] Nevertheless, most state governments established their own right to a civil jury trial under their respective constitutions.[6]

As a result, state courts often disagree with federal courts about how to implement the right to a civil jury trial.[7] There are two competing interests in analyzing whether the right to a civil jury trial exists under a cause of action: tradition and evolution. On one hand, the right to a civil jury trial requires a historical analysis, given the language of many state constitutions as well as the Federal Constitution.[8] For example, the

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1. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136 (1991).

2. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 331-32 (2011).

3. Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 444 (2012).

4. George E. Butler II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 765 (1985).

5. Amanda Szuch, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435, 436 (2011).

6. Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855 (2013).

7. For incorporated rights, states are bound by the Supreme Court's interpretation of the Bill of Rights, but because the Seventh Amendment is unincorporated, state courts interpreting their own constitutions may differ from U.S. Supreme Court precedent. Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 312 (2017).

8. *See*, *e.g.*, U.S. CONST. amend. VII. ("The right of trial by jury shall be *preserved*") (emphasis

Illinois Constitution states that "[t]he right of trial by jury *as heretofore enjoyed* shall *remain* inviolate."[9] In other words, the right was meant to exist as it did at the time of its ratification, and thus, a historical analysis is instructive to determine how to preserve the right as it originally existed.[10] On the other hand, the promulgation of new statutes and causes of action requires courts to reconcile new legislation with a prescribed traditional approach.[11]

In weighing the two interests, Ohio courts and federal courts are on opposite ends of the spectrum.[12] The Ohio Constitution states that the right of trial by jury "shall be inviolate."[13] Ohio courts require that a cause of action actually exist at the time of the ratification of the first Ohio constitution for there to be a right to a jury trial, whereas federal courts primarily consider the current nature of the cause of action as it exists today without any historical inquiry.[14] This is no minor disagreement, because in some cases, the difference is outcome-determinative.[15]

Ohio and federal courts can find a middle ground. Both approaches focus disproportionately on one interest and effectively disregard the other. This Note proposes a new approach under which the two interests could coexist. Under this proposal, a court would identify the current cause of action in a case and compare it to the most analogous cause of action at the time of the right's ratification.[16] Then, the court would ask whether a jury trial was guaranteed under the historical analog and rule accordingly. Consequently, courts could maintain the right as it existed at its adoption, while also making it relevant for current legislation.

Thus, this Note argues that Ohio courts and federal courts should adopt a hybrid approach to determining whether a jury trial is guaranteed for any given civil cause of action. First, Section II provides a background of the federal and state constitutional provisions and how courts have

added); ILL. CONST. art. I, § 13. ("The right of trial by jury *as heretofore enjoyed* shall *remain* inviolate") (emphasis added); WASH. CONST. art. I, § 21. ("The right of trial by jury shall *remain* inviolate") (emphasis added).

9. ILL. CONST. art. I, § 13 (emphasis added).

10. Suja A. Thomas, *The Civil Jury: The Disregarded Constitutional Actor*, U. CIN. PUB. L. & LEGAL THEORY RESEARCH PAPER SERIES NO. 07-30 at 3 (2007).

11. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974) (applying the right to a jury trial to the Title VIII of the Civil Rights Act).

12. 4 Ohio Civil Practice with Forms § 174.02 (2022).

13. OHIO CONST., art. I, § 5.

14. *Id.*

15. *See e.g.*, Hoops v. United Tel. Co., 553 N.E. 2d 252 (Ohio 1990) (holding that the right to a civil jury trial does not exist under a cause of action alleging age discrimination under Ohio law, even though the federal analysis results in a right to a jury trial under similar causes of action).

16. In fact, this is the first of two prongs of the current federal approach, but federal courts now hardly give it any consideration. *See e.g.*, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) (giving weight only to the second prong of the two-part test). Currently, however, no jurisdiction analyzes the first prong exclusively, which is what this Note proposes.

interpreted them. Then, Section III discusses the proposed approach and explains how it preserves tradition while also making the right applicable to modern causes of action. Finally, Section IV concludes by considering the consequences of the proposed hybrid approach.

II. BACKGROUND

Unlike the English legal system, the American legal system does not clearly prescribe whether a right to a jury trial exists. Under English law, if the plaintiff sought a legal remedy, the parties were generally entitled to a jury trial, and if the plaintiff sought an equitable remedy, the parties were generally not.[17] Federal and state constitutions, however, add a new level of complexity, because their texts call for a historic inquiry.[18] The U.S. Constitution states that "the right to a trial by jury shall be *preserved*."[19] Similarly, most state constitutions include language of historical reference such as "as heretofore enjoyed."[20] In other words, the right under the U.S. legal system depends on practices at the time when states ratified their constitutions.[21] The question is: how should courts analyze *new* causes of action under a *historic* test?

This Section explains how Ohio and federal courts have approached this issue. First, Part A describes how the right to a civil jury trial became part of the American legal system. Next, Part B explains the difference between legal and equitable relief. Then, Part C summarizes how Ohio and federal courts analyze the issue by looking at *Teamsters v. Terry*[22] from the United States Supreme Court and *Hoops v. United Telephone Company*[23] from the Ohio Supreme Court.

A. Pre-Revolutionary Origins of the Right

If asked which right is most crucial for the preservation of a Nation, many would not think of the right to a jury trial but rather the rights to free speech or to keep and bear arms.[24] This, however, was untrue for

17. Fleming James Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 655 (1963).

18. *Id.* at 657.

19. U.S. CONST. amend. VII (emphasis added).

20. *See e.g.*, ILL. CONST. art. I, § 13 ("The right of trial by jury *as heretofore enjoyed* shall *remain* inviolate") (emphasis added); WASH. CONST. art. I, § 21 ("The right of trial by jury shall *remain* inviolate") (emphasis added).

21. Hamilton, *supra* note 6, at 885.

22. 494 U.S. 558 (1990).

23. Hoops v. United Telephone Co., 553 N.E. 2d 252 (Ohio 1990).

24. *See e.g.*, Peter Moore, *First Amendment is the most important, and well known, Amendment*, YOUGOV (Apr. 12, 2016, 3:15 PM), https://today.yougov.com/topics/politics/articles-reports/2016/04/12/bill-rights; *Why the Second Amendment Is Our Most Important Right*, TEEN INK

many of the great legal minds of the eighteenth and nineteenth centuries, for whom the right to a jury trial was one of the most cherished rights in the early Anglo-American legal system.[25] For example, renowned English jurist William Blackstone regarded the right to a civil jury trial as "the glory of the English law."[26] To Blackstone and many other legal thinkers, the right to a jury trial was sacred because in a jury trial, a person's fate was not in the hands of the government but rather "the unanimous consent of twelve of his neighbours [sic] and equals."[27]

1. The Federal Right to a Civil Jury Trial

The role of the jury is deeply rooted in pre-revolutionary history.[28] As early as 1624, juries were a component of all civil and criminal cases in Virginia and many other colonies.[29] Nevertheless, the privilege was later undermined by British rule.[30] In the 1760s, disputes were increasingly tried in admiralty and vice-admiralty courts, which did not require a jury.[31] This strongly contributed to the tensions between America and Great Britain.[32]

After the Revolutionary War, when the Framers discussed what should be included in the original Constitution, they were reluctant to establish a right to a civil jury trial.[33] Almost all the Framers supported a right to a federal *criminal* jury trial, but there was disagreement about whether to afford the right in civil cases.[34] One concern was the possibility that juries would be overly sympathetic with defendants who were sued under disfavored laws.[35]

(October 2, 2011), https://www.teenink.com/opinion/current_events_politics/article/369588/Why-the-Second-Amendment-is-our-Most-important-Right.

25. Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1202 (2014).

26. 3 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 379 (Univ. of Chi. Press 1979) (1768) (emphasis added).

27. *Id.*

28. *See generally* Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993).

29. *Id.* at 592.

30. *Id.* at 595.

31. *Id.*

32. *Id.*

33. Renee Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 824 (2014) (explaining the origins of the right to a jury trial under the U.S. Constitution).

34. *Id.*

35. Renee Lettow Lerner and Suja A. Thomas, *The Seventh Amendment*, CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125 (last visited April 17, 2021).

Nevertheless, advocates of a right to a civil jury trial—mostly antifederalists—were so adamant that they conditioned ratification of the Constitution on its inclusion.[36] For many, the importance of including the right stemmed from concerns regarding the separation of powers.[37] Although most of the guarantees in the Constitution act as a check on executive and legislative powers, the right to a jury trial serves as a check on judicial power.[38] Moreover, they regarded the jury trial as "the surest barrier against arbitrary power, and the palladium of liberty, with the loss of which the loss of our freedom may be dated."[39] Accordingly, many antifederalists feared that the lack of a right to a jury trial in civil cases would lead to corruption and political bias in the judicial system.[40]

Despite the efforts of the antifederalists, the original U.S. Constitution did not include a right to a civil jury trial; instead, the right was included later in the Seventh Amendment.[41] The federalists argued that a federal right to a civil jury trial was unworkable and that if states wanted to incorporate it into their own constitutions, they were free to do so.[42] After relentlessly protesting, however, more than half of the ratifying states called for Congress to enact an amendment establishing a right to a civil jury trial.[43] Consequently, Congress drafted an amendment establishing the right, and in 1791, Congress ratified the Bill of Rights, which included the right to a civil jury trial under the Seventh Amendment.[44] The Amendment provides that "[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 reexamined in any Court of the United States, than according to the rules of the common law."[45]

2. The Ohio Right to a Civil Jury Trial

The right to a jury trial existed in Ohio even before Ohio became a state.[46] Although the General Assembly did not draft the first Ohio Constitution until 1802, Ohio's constitutional history began in 1787 with

36. Lerner, *supra* note 33, at 825.

37. *Id.* at 830.

38. *Id.*

39. THE ANTI-FEDERALIST NO. 83 (Brutus).

40. Lerner, *supra* note 33, at 826.

41. Landsman, *supra* note 8, at 598.

42. *Id.*

43. *Id.* at 600.

44. *Id.*

45. U.S. CONST. amend. VII.

46. STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 7 (Praeger, 2004).

the Northwest Ordinance.[47] Along with providing a structure of government, the Northwest Ordinance included a bill of rights, which included "the right to religious freedom, habeas corpus, trial by jury, due process, and reasonable bail (except in capital cases)."[48]

Then, when Ohio became a state, the General Assembly included the right to a civil jury trial in its first constitution.[49] Although there has only been one U.S. Constitution, there have been three Ohio Constitutions, and all three constitutions included a right to a civil jury trial.[50] During the 1851 revision of the original Ohio constitution, the right to a civil jury trial never changed, textually or substantively.[51] The Bill of Rights of the first Ohio Constitution stated "that the right of trial by jury shall be inviolate."[52] Now, the phrase exists in the Ohio Constitution in Article I, Section 5.[53] Despite the fact that Ohio ratified its current constitution in 1851, the Ohio Supreme Court has held that the provision is only applicable to causes of action for which a right to a jury trial existed at the time of the ratification of Ohio's first constitution in 1802.[54]

B. The Distinction of Law and Equity

Early American jurists believed that the American right to a jury trial should be the same as it was under the English legal system.[55] When interpreting what the Framers of the Seventh Amendment meant by "common law," Circuit Justice Story explained that "[b]eyond all question, the common law. . . 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."[56]

Under English common law, the existence of a right to a jury trial depended on the type of relief sought: legal or equitable.[57] The distinction between legal and equitable relief is fairly straightforward. Legal relief is best thought of as monetary damages, and equitable relief is best thought

47. *Id.*

48. *Id.* at 8.

49. OHIO CONST. of 1802, art. VIII, § 8.

50. 4 Ohio Civil Practice with Forms § 174.02 (2020); OHIO CONST. of 1802, art. VIII, § 8; OHIO CONST., art I, § 5.

51. 4 Ohio Civil Practice with Forms § 174.02 (2020).

52. OHIO CONST. of 1802, art. VIII, § 8.

53. OHIO CONST., art. I, § 5.

54. 4 Ohio Civil Practice with Forms § 174.02 (2020) (citing Mason v. State, 58 Ohio St. 30 (Ohio 1898)).

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

56. *Id.*

57. Fleming, *supra* note 17, at 655.

of as a court order for a party to do something.[58] Consider something as simple as contract law. If John breaches a contract with Mary, Mary has two options: she could ask the court for monetary damages from John to compensate for the loss that she suffered as a result of the breach—a legal remedy—or she could ask the court to order John to fulfill his end of the contract—an equitable remedy.[59]

Thus, in accordance with English tradition, whether a right to a jury trial exists in the American legal system largely depends on the type of relief sought.[60] Justice Story explained that an inquiry about the type of remedy sought is necessary under the Seventh Amendment.[61] In *Parsons v. Bedford*, the Court concluded that "[b]y 'common law,' the framers of the constitution of the United States meant. . .suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered."[62] In other words, "common law" under the Seventh Amendment referred to causes of action in which the plaintiff sought a legal remedy—not an equitable one. Following Justice Story's tenure, the Court has consistently relied on *Parsons* and the legal-equitable distinction to determine whether the right to a jury trial exists.[63]

In sum, the right to a jury trial—both under Ohio and federal law—exists today only in causes of action that seek legal relief, as opposed to equitable relief.[64]

C. Where Ohio Courts and Federal Courts Disagree

The question of whether a right to a jury trial exists is more complex now than it was under the English common law, because while English courts only analyzed the type of relief sought, American courts add a historical analysis.[65] Because of the historic language in the Seventh

58. *Equity*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/equity (last visited Mar. 26, 2021).

59. Of course, a court will still determine whether the particular type of relief sought is appropriate. *See generally* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253 (1991). This example is merely to demonstrate the differences between the types of relief.

60. Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 468 (2022).

61. Parsons v. Bedford, 28 U.S. 433, 434 (1830).

62. *Id*.

63. *See e.g.*, Curtis v. Loether, 415 U.S. 189, 193 (1974) (citing *Parsons*, 28 U.S. at 446-47).

64. *Parsons*, 28 U.S. at 446 ("The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence"); Digital & Analog Design Corp. v. N. Supply Co., 590 N.E.2d 737, 742 (Ohio 1992) (citing Taylor v. Brown, 92 Ohio St. 287 (Ohio 1915) ("[W]e have long held that a right to a jury trial does not exist if the relief sought is equitable rather than legal.")).

65. Lerner, *supra* note 33, at 813.

Amendment,[66] legal scholars have concluded that "the scope of the federal constitutional right to a jury trial is largely, or even entirely, determined by historical considerations, not functional ones."[67] Accordingly, to determine whether a right to a civil jury trial exists, federal courts apply what they call a historical test, although the Court admits that the test is not really historically-based anymore.[68] Similarly, although the right to a civil jury trial in the Ohio Constitution does not contain a historical reference point,[69] Ohio courts have held that a historical analysis is instructive[70] and have applied one since 1836.[71]

Although Ohio and federal courts agree that the key question is whether the relief sought is legal or equitable, the courts disagree about the role that history should play in answering that question. Ohio courts apply a very formalistic historic inquiry.[72] In contrast, federal courts effectively do not perform a historical inquiry at all.[73] Instead, federal courts look primarily to the nature of the remedy sought.[74] For example, if a cause of action seeks injunctive relief, federal courts usually hold that a right to a civil jury trial does not exist because injunctive relief is usually an equitable remedy, even though that particular cause of action might have been tried in a court of law at the time of the Constitution's ratification.[75] In contrast, Ohio courts require that the cause of action actually existed at common law.[76] In other words, the Ohio constitution only guarantees the right of trial by jury in those cases where it existed previous to its adoption."[77]

66. The Seventh Amendment provides that "[i]n Suits at common law. . .the right of trial by jury shall be *preserved*." U.S. CONST. amend. VII (emphasis added).

67. Bray, *supra* note 60, at 474.

68. Although the Supreme Court claims to follow the "historic test," the Court candidly admits that it focuses primarily on the nature of relief sought, not historic analogs of the cause of action. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) ("The form of our analysis is familiar. 'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.' *The second stage of this analysis is more important than the first*.") (internal citations omitted) (emphasis added)).

69. The Ohio Constitution provides "that the right to a trial by jury shall be inviolate." Ohio Const., art. I, § 5. *Cf.* The Seventh Amendment provides that "[i]n Suits at common law. . .the right of trial by jury shall be *preserved*." U.S. CONST. amend. VII (emphasis added).

70. Hoops v. United Telephone Co., 553 N.E. 2d 252, 255 (Ohio 1990). (citing Willyard v. Hamilton, 7 Ohio 398, 402 (Ohio 1836)).

71. *See, e.g.*, Schafer v. RMS Realty, 138 Ohio App. 3d 244 (Ohio Ct. App. 2000).

72. *See, e.g.*, *Hoops*, 553 N.E. 2d 252 (holding that a jury trial does not exist for causes of action established after 1802).

73. See *supra*, note 68.

74. Tull v. United States, 481 U.S. 412, 417-18 (1987).

75. *See, e.g.*, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry 494 U.S. 558, 573 (1990).

76. McIntyre v. Northern Properties, 412 N.E.2d 434, 438 (Ohio 1979).

77. Belding v. State, 121 Ohio St. 393, 393 (1929).

To illustrate this disagreement, this Part summarizes *Teamsters v. Terry*[78] from the U.S. Supreme Court and *Hoops v. United Tel. Co.*[79] from the Ohio Supreme Court. Both cases involved a plaintiff asserting a cause of action that did not exist at the time of the respective constitutions' adoption. The U.S. Supreme Court ruled that although the suit would have been equitable in 1791, its nature was legal, and thus, a jury right existed.[80] In contrast, the Ohio Supreme Court ruled that because the cause of action did not exist in 1802, no jury right existed.[81]

1. Teamsters v. Terry

Federal courts apply a two-part analysis to determine whether a right to a civil jury trial exists.[82] They weigh (1) whether the historical common-law analog was legal or equitable and (2) the nature of the relief sought in the current cause of action.[83] For example, in *Curtis v. Loether*, the Supreme Court held that a jury trial is guaranteed under a Title VIII housing discrimination action because Title VIII is analogous to the common law duty of innkeepers to provide housing to a nomad—a cause of action that provides a legal remedy.[84] Additionally, the Court reasoned that the relief was legal in nature because it asked for actual and punitive damages, which were "the traditional form of relief offered in the courts of law."[85] Therefore, the Court held that a jury trial was guaranteed under Title VIII of the Civil Rights Act.[86]

As time went on, however, the Court gave significantly less consideration to the first prong of the test and effectively only considered the second prong.[87] This happened in *Teamsters v. Terry*, where the question presented was whether the Seventh Amendment entitled the parties to a jury trial where an employee sought relief in the form of backpay under breach of a union's fair duty of representation—a cause of action that did not exist in 1791.[88] In *Teamsters*, employees of a trucking company were laid off sporadically, and their union allegedly breached its duty of fair representation by not referring the employees' complaints

78. *Teamsters*, 494 U.S. 558.

79. *Hoops*, 553 N.E. 2d 252.

80. *Teamsters*, 494 U.S. at 573.

81. *Hoops*, 553 N.E. 2d at 255.

82. *See, e.g.*, *Curtis*, 415 U.S. 195, 196 (1974).

83. *Id.*

84. *Id.* at 195 n. 10.

85. *Id.* at 196.

86. *Id.* at 196, 198.

87. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry 494 U.S. 558, 574 (1990). (Brennan, J., concurring in judgment).

88. *Id.* at 561.

to a grievance committee.[89] Consequently, the employees filed a lawsuit against their former union.[90] The union moved to strike the employees' request for a jury trial, but the District Court and Fourth Circuit held that the Seventh Amendment entitled the employees to a jury trial.[91]

Although the claim would have been considered equitable in 1791, the Court held a right to a jury trial existed because the claim was legal in nature.[92] To reach this result, the Court first considered whether the case would have been legal or equitable in 1791.[93] In doing so, the Court reasoned that the claim against the union was most analogous to an action against a trustee for breach of fiduciary duty, which was an equitable cause of action.[94] Despite that historic analogue, the Court determined that a breach of duty of fair representation was a legal claim in nature because the claim did not seek restitution or injunctive relief.[95] Therefore, the Court held that the employees were entitled to a civil jury trial under their backpay claim.[96]

Justice Brennan, concurring in the judgment, argued that the Court should only consider the second prong.[97] He agreed that since the cause of action was legal in nature, the employees were entitled to a jury trial.[98] But contrary to the majority's reasoning, he believed that the only inquiry the Court should make was the nature of the relief sought because he believed that a deep historic inquiry was too onerous for jurists who are generally not qualified to make such historical speculations.[99] Although the majority based its decision almost exclusively on the nature of the relief sought, Justice Brennan believed that the Court should "dispense with [the historical inquiry] altogether."[100]

Justice Kennedy was on the other side of the spectrum from his colleague Justice Brennan. In a dissenting opinion, he argued that once the Court concluded that the duty of fair representation was analogous to an equitable trust action, the Court's analysis should have stopped.[101] He explained that the Court should have conducted a historical analysis

89. *Id.* at 562.
90. *Id.*
91. *Id.* at 563.
92. *Id.* at 570.
93. *Id.* at 565.
94. *Id.* at 569.
95. *Id.* at 572.
96. *Id.* at 573.
97. *Id.* at 574. (Brennan, J., concurring in part and concurring in the judgment).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 584 (Kennedy, J., dissenting).

"because the language of the Constitution requires it."[102] Additionally, he expressed concern that "if we abandon the plain language of the Constitution to expand the jury right, we may expect Courts with opposing views to curtail it in the future."[103] In other words, allowing courts to stray away from the original meaning of the Seventh Amendment might ultimately result in courts reaching a conclusion that restricts the right to a civil jury trial, even though a jury trial might have been guaranteed under a similar cause of action in 1791.

B. Hoops v. United Telephone Company

The Supreme Court of Ohio reached a different conclusion in *Hoops v. United Telephone Company*.[104] The issue in *Hoops* was whether a right to a jury trial existed under an Ohio anti-discrimination statute—a cause of action that did not exist in 1802.[105] In *Hoops*, a construction foreman claimed that he was terminated from his job because of his age.[106] He requested a jury trial, but the trial court denied the motion, and the court of appeals affirmed.[107]

The court held that a jury trial was not constitutionally required because the right "applies *only* where trial by jury existed previous to its adoption."[108] Further, the court explained that "[a]ctions for employment discrimination, including age discrimination, did not exist at common law and, therefore, no right to trial of these actions by a jury existed at common law."[109] The plaintiff argued that Ohio courts should follow the lead of federal courts, where the right to a civil jury trial existed in employment discrimination suits.[110] But the court rejected that argument, explaining that "[t]he legislature has clearly expressed its intention by the words used in the statute."[111]

III. DISCUSSION

Ohio and federal courts should both revisit their analyses in deciding when the right to a civil jury trial exists. Both approaches fail to appreciate the sacred tradition of the right and accommodate new causes of action.

102. *Id.* at 592-93 (Kennedy, J., dissenting).
103. *Id.* at 593.
104. *Hoops*, 553 N.E. 2d 252.
105. *Id.* at 252.
106. *Id*.
107. *Id.*
108. *Id.*
109. *Id.* at 255.
110. *Id.* at 257 (citing Curtis v. Loether, 415 U.S. 189, 190 (1974)).
111. *Id.*

This Section proposes a new approach. First, Part A explains the problems with the Ohio interpretation. Then, Part B explains the problems with the federal interpretation. Finally, Part C proposes a hybrid approach under which courts would identify the common law analog of a modern cause of action and consider whether it was legal or equitable at the time of the right's ratification.

A. Problems with Ohio's Interpretation

Ohio's interpretation of the right to a civil jury trial is problematic for three reasons. First, Ohio courts have no textual basis for their rigid historical requirement that the cause of action existed in 1802. Second, even the strictest form of originalism is less restrictive than Ohio's approach. Finally, Ohio's interpretation creates a capricious distinction between causes of action in 1802 and causes of action established thereafter.

1. The Text

There is no textual support for Ohio's strict historical analysis. The Ohio Constitution is unique because it does not have a reference point: a word or phrase such as "preserve," "remain," or "as heretofore enjoyed,"[112] which would signal some sort of connection to a particular point in time.[113] These reference points indicate that the right "is dependent on history and 'freezes' the practice as it was."[114] But Ohio's text does not contain any reference point at all. Thus, Ohio lacks a textual basis for any historical inquiry.[115]

Comparing the Ohio Constitution with other constitutions further demonstrates this point. First, compare Ohio's constitution with the federal Constitution. Ironically, the federal analysis is less historically-focused than the Ohio test, yet the text of the federal Constitution places greater emphasis on history than the Ohio Constitution.[116] Specifically, the Federal Constitution provides that the right to a civil jury trial "shall be *preserved*."[117] The Ohio Constitution, however, only provides that "the

112. *See, e.g.*, U.S. CONST. amend. VII ("The right of trial by jury shall be *preserved*") (emphasis added); ILL. CONST. art. I, § 13 ("The right of trial by jury *as heretofore enjoyed* shall *remain* inviolate") (emphasis added); WASH. CONST. art. I, § 21 ("The right of trial by jury shall *remain* inviolate") (emphasis added).

113. Hamilton, supra note 6, at 885.

114. *Id.*

115. *Id.* Hamilton argues in his article that merely holding a right inviolate could indicate a more expansive view of the right.

116. *See, e.g.*, *Curtis*, 415 U.S. 189 (1974).

117. U.S. CONST. amend. VII (emphasis added).

right of trial by jury shall be inviolate."[118] In other words, federal courts would be more justified in adopting Ohio's approach, but even the federal analysis leaves room for modern causes of action.

Next, consider the Illinois Constitution. The Supreme Court of Illinois has the same requirement as Ohio—that the statute existed at common law.[119] Illinois's strict requirement is justified, though, by the language of its constitution. It provides that "the right of trial by jury *as heretofore enjoyed* shall *remain* inviolate."[120] Given the temporal words such as "remain" and "as heretofore enjoyed," the Supreme Court of Illinois must have reasoned that the Framers of the Illinois Constitution intended that the jury trial would be limited to only what existed at the time of its ratification. Although the Ohio Supreme Court provides the same analysis, its right to a civil jury trial is not rooted in the same historically-focused language and is thus unjustified in applying such a rigid approach.

Moreover, some other state constitutions contain reference points but do not apply a test as strict as Ohio's. For example, the New Jersey Constitution provides that "[t]he right of trial by jury shall *remain* inviolate."[121] Despite the reference point to the framing of the New Jersey Constitution, the New Jersey Supreme Court rejected a strict historical test like the one Ohio applies.[122] Instead, like federal courts, it focuses mostly on the nature of remedy sought.[123]

Finally, no reasonable mind would interpret "inviolate" the way that Ohio does with respect to a jury trial when additional rights are at stake. For example, Alabama law provides that "[e]very voter shall have the right to vote a secret ballot, and that ballot shall be kept secret and *inviolate*."[124] Suppose that the Alabama legislature established a new office that did not exist at the date of the statute's adoption. No person could reasonably argue that ballots for that office could be destroyed since the office did not exist at the time of the enactment of the statute. For the same reason, Ohio's analysis of the word "inviolate" is erroneous.

Therefore, because the text of Ohio's right to a civil jury trial does not contain a historical reference point, Ohio courts should not adopt a strict historical analysis.

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118. OHIO CONST., art. I, § 5.

119. Martin v. Heintold Commodities, Inc., 643 N.E.2d 734, 755 (Ill. 1994) ("We thus find that the Consumer Fraud Act is a statutory proceeding unknown to the common law. Because of this, our constitution does not confer the right to a jury trial. . .").

120. ILL. CONST. art. 1, § 13 (emphasis added).

121. N.J. CONST. art. I, para. 9.

122. Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 142-43 (N.J. 2015).

123. *Id.*

124. Ala. Code § 17-6-34 (2018) (emphasis added).

2. Originalism

Even if Ohio's constitution calls for the application of originalism,[125] such a method of interpretation would not support Ohio's analysis. Originalism does require a historical analysis, but even the strictest methods of interpretation consider modern realities. For example, Justice Scalia, one whose interpretive methodology is often criticized as formalistic, did not simply discount the constitutionality of any new innovations because they did not exist at ratification but instead asked what the Framers would have expected if the innovation existed then.[126] His type of interpretation is referred to as "expected application originalism."[127] Although it is commonly identified as restrictive, even this type of originalism accommodates "new phenomena and new technologies—like television or radio—by analogical extension with phenomena and technologies that existed at the time of adoption."[128]

Take, for instance, *Kyllo v. United States*.[129] There, to determine whether Danny Kyllo was using a high-intensity lamp to grow marijuana, the United States Department of the Interior used a thermal imager to gauge the radiation levels inside of Kyllo's house.[130] The scan unequivocally revealed that Kyllo was growing marijuana, and the government then successfully convicted Kyllo for illegally growing marijuana.[131] The U.S. Supreme Court held that the search was a violation of the Fourth Amendment.[132] Writing for the majority, Justice Scalia used expected-application originalism.[133] He started from the basic principle of the Fourth Amendment at the time of the ratification: that "the Fourth Amendment draws 'a firm line at the entrance of a house.'"[134] Next, he explained that the Court "must take the long view, from the original meaning of the Fourth Amendment forward."[135] Applying the old principles of the Fourth Amendment under the modern facts, Justice Scalia concluded that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would

125. Prof. Suja Thomas argues that the text of the right to a civil jury trial requires originalism due to the historic language. Thomas, *supra* note 10, at 3.

126. Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919, 927 (2010). There are many forms of originalism, but the purpose of comparing Ohio's analysis to this form of originalism is to illustrate that even the strictest form of originalism does not support Ohio's analysis.

127. *Id.*

128. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296-97 (2007).

129. Kyllo v. United States, 533 U.S. 25 (2001).

130. *Id.* at 29-30.

131. *Id.* at 30.

132. *Id.* at 40.

133. *Id.*

134. *Id.* (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

135. *Id.*

previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[136]

Thus, Ohio's inquiry is not just formal originalism; it is historical rigidity. In *Kyllo*, the majority did not discount the right to privacy just because thermal imaging did not exist in 1791. Instead, it applied the understanding of the law to new phenomena. Ohio courts should ask the same question: how was the right to a civil jury trial understood, and how can that understanding be applied today? Asking this question allows Ohio courts to both preserve the desires of the drafters of the Ohio constitution and also make the right applicable to modern situations. At common law, the test only considered whether the cause of action sought a legal or equitable remedy, and there were no qualifications or extra requirements relating to how long the cause of action existed. Ohio courts should not restrict the right to a jury trial merely because of the point in time when the General Assembly established a cause of action. That does not mean that no historical inquiry is needed. But courts should not just ignore new phenomena. Instead, they should consider how the new phenomena would have been considered by the drafters of the constitutions.

3. A Capricious Distinction

Finally, Ohio's distinction between causes of action that existed in 1802 and causes of action that were established thereafter is entirely capricious. Ohio essentially uses two elements to determine whether a right to a jury trial is guaranteed: (1) that the cause of action existed in 1802 and (2) that the cause of action was legal. Ohio courts, however, should only focus on the type of remedy sought. Although there is sound reason for limiting a jury trial to legal causes of action,[137] there is no reason to exclude causes of action established after 1802 from receiving a jury trial. Laws evolve because societal values evolve; that is part of the political process. Thus, closing the door to the right to a jury trial merely because the General Assembly in 1802 did not establish a particular cause of action both shackles citizens to a completely different time and undermines the legitimate legislative change that happens day-to-day in every society.

Advocates of Ohio's approach might argue that guaranteeing a jury trial in new causes of action changes the right, but that is unpersuasive. Incorporating new causes of action into the right would not alter the right

136. *Id.*

137. For instance, one could argue that laypeople are not sufficiently educated in the legal field to decide whether a plaintiff is entitled to equitable relief.

as it existed at common law. When the Supreme Court holds that the First Amendment applies to Facebook[138] or that the Fourth Amendment applies to thermal imaging,[139] the Supreme Court is not changing a particular right. Instead, it is merely taking new facts and applying them to old constitutional analyses. Take grammar, for example. English syntax has been largely unchanged since the 1800s, but the development of new words such as "bae,"[140] "hangry,"[141] or "gobbledygook"[142] has not changed basic English syntactic structure. In other words, one could still say that "this Note is gobbledygook," even though the word did not exist at the time of the creation of the English language, yet the structure remains unchanged.

B. Problems with the Federal Interpretation

The federal interpretation of the right to a civil jury trial is problematic for two reasons. First, the federal interpretation completely disregards any historical inquiry whatsoever, despite the strict, historic language of the text. Second, the lack of historic inquiry materially alters the right.

1. The Text

First, the federal analysis is problematic because it does not give any weight to the word "preserve." The Seventh Amendment provides that "the right of trial by jury shall be *preserved*."[143] The Court should strongly weigh the word "preserved" because it is the only place in the Bill of Rights where the Framers used that particular word. Reasonable minds can disagree about how to interpret the Constitution, but the uniqueness of the text leaves little room for debate.[144] Thus, the Court should give it at least some weight.

In considering the word "preserved," the Court should conclude that it must adopt a historical analysis. "Preserve" comes from the Latin *praeservare*: *prae* meaning "beforehand," and *servare* meaning "to keep."[145] Taking the words together, "preserve" means to keep it as it was beforehand. To fulfill this command, courts should not dismiss the historic practices of the eighteenth century like the federal courts do.

138. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
139. *Kyllo*, 533 U.S. 25.
140. *Bae*, MERRIAM-WEBSTER (11th ed. 2021).
141. *Hangry*, MERRIAM-WEBSTER (11th ed. 2021).
142. *Gobbledygook*, MERRIAM-WEBSTER (11th ed. 2021).
143. U.S. CONST. amend. VII (emphasis added).
144. Thomas, *supra* note 10, at 3.
145. *Preserve*, MERRIAM-WEBSTER (11th ed. 2021).

Rather, they should look to the common law traditions to determine how the right to a civil jury trial was kept. Therefore, courts should take the modern cause of action and render a decision based on how it would have been understood at the time of the right's ratification. In doing otherwise, courts ignore the plain language of the text.

2. (Lack of) Originalism

Second, despite the apparent instruction to "preserve" the right, the federal analysis alters it. The Constitution requires the jury trial to be preserved in suits at common law.[146] By "common law," the Court has explained that the Framers referred to "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized."[147] But the Court has slowly strayed away from what the Founders considered legal and equitable, thus changing the right from how it existed in 1791. For example, in *Teamsters*, the Court held that a duty of fair representation was mostly analogous to a breach of fiduciary duty—an equitable issue.[148] The Court, however, ruled that the action was legal based on modern distinctions between legal and equitable causes of action.[149] In other words, the case would have been decided differently in 1791. Consequently, the right today is different from the right as it existed at common law—the antithesis of preservation.

Although recent cases have allowed for a more expansive interpretation of the right through the current federal analysis, the pendulum could easily swing the other way. It might be easy to suggest that the federal analysis is objectively better because it has led to favorable and more expansive results, at least for now. Justice Kennedy, however, cautioned against this line of thinking, explaining to the Court that "[i]f we abandon the plain language of the Constitution to expand the jury right, we may expect Courts with opposing views to curtail it in the future."[150] Justice Kennedy's criticism is warranted. Indeed, this has happened before. In the 1760s, criminal[151] matters, which were often heard in courts of law (where a jury existed), started getting brought in the admiralty and vice-admiralty courts, where no right to a jury existed.[152] Under the current

146. Parsons v. Bedford, 28 U.S. 433, 434 (1830).

147. *Id.*

148. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 569-70 (1990).

149. *Id.* at 570.

150. *Id.* at 593. (Kennedy, J., dissenting).

151. Although the issue of the right to a jury trial in criminal cases is a question of Sixth Amendment interpretation, this analogy is still applicable to this argument since the same could have been done to equitable claims.

152. Landsman, *supra* note 28, at 595.

federal reasoning, this could occur today. Suppose that a party requested a jury trial in a case that the Framers would have considered legal. Although the Framers might have concluded that the cause of action was legal, the Court could nevertheless hold that the cause of action is equitable based on how it thinks the right *should be* preserved rather than how it *was*, thereby depriving the right. Therefore, to ensure that courts do not restrict the right just as they have expanded it, courts should only focus on how the Framers applied the right rather than establishing new standards on their own.

C. One Solution for Two Problems

Courts should adopt the hybrid approach. Under this methodology, a court would identify the closest historical analog to the current cause of action and determine whether it was considered legal or equitable at common law. Recall the Court's decision in *Curtis*.[153] There, the Court compared housing discrimination under Title VIII of the Civil Rights Act to a similar cause of action that existed prior to the right's adoption.[154] Then, the Court considered whether a jury trial existed based on the classification of the remedy at the time.[155] Federal courts should return to this analysis and make it their only consideration, and Ohio courts should adopt it too. This is exactly what "keeping it as it was beforehand" means. In other words, based on the drafters' understanding of legal and equitable, the court would apply the right as it would have been understood in 1791.

Courts should adopt this approach because it stays faithful to the original understanding and text of the right while also valuing legislative change. First, the hybrid approach stays faithful to the original understanding of the right because it applies the legal-equitable framework as it existed at the time of the ratification. In other words, it does not consider what is now thought of as legal or equitable, but instead what was legal or equitable to the drafters of the constitutions. Second, the hybrid approach values legislative change by making the right applicable to new causes of action.

Additionally, the hybrid approach makes it more difficult for courts to undermine the right. One of Justice Kennedy's well-founded critiques of the current federal approach is that the courts could use this power to restrict the right to a civil jury trial.[156] The hybrid approach prevents any

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

154. *Id.* at 195 n. 10.

155. *Id.* at 196.

156. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 593 (1990) (Kennedy, J., dissenting).

possibility of that happening by establishing a firm floor that incorporates all causes of action at the time of the ratification and the analogs thereto into the right to a civil jury trial. Thus, courts cannot exclude those causes of action from the right to a jury trial. Moreover, each legislature, under analogous equitable causes of action, can establish a right to a civil jury trial under the specific statutes. Thus, the hybrid approach establishes the minimum of causes of action in which a jury trial is guaranteed without possibility of reduction but also allows the legislatures to extend the right as far as they desire.

Finally, this approach respects the will of the elected people who ratified the Bill of Rights and the Ohio Constitution. Deciding whether a right to a jury trial exists is a tough job, but somebody has to do it. The million-dollar question is: who decides? Under the federal analysis, courts decide. But under this proposal, the understanding of those who voted for the adoption of the Bill of Rights prevails. With a glimpse back to history, one can look at how this practice existed in the English and American legal systems at the time of the right's ratification. Indeed, the understanding of the right two-hundred years ago may be antiquated and inappropriate for today—or just flatly wrong. But at least under this approach, the courts are giving deference to the political process and the understanding of those who voted for ratification of the constitutions. That is what democracy is all about.

IV. CONCLUSION

To balance both interests of evolution and tradition, Ohio and federal courts should adopt the hybrid approach. Recall Justice Scalia's opinion in *Kyllo*. His reasoning is important to this issue because it conveys an important reality—that tradition and evolution can live in harmony. Because the world keeps spinning while the words on legislative texts remain stagnant, it can be tempting to think that preserving tradition and "staying with the times" cannot occur simultaneously. But that thought is shortsighted. The hybrid approach allows courts to extend the right to new causes of action but also preserves tradition by requiring a historical comparison to the right at its ratification. Under this approach, citizens can enjoy the same right that existed in 1791 and 1802 under new causes of action, while also knowing that courts will not have the liberty to add or subtract from their fundamental rights. Simply put, they can enjoy the best of both worlds.