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Originalism and Summary Judgment

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I. INTRODUCTION

Over the last several years, the Supreme Court has revolutionized modern criminal procedure by invoking the Sixth Amendment right to a jury trial to strike down several sentencing innovations, including the federal sentencing guidelines themselves.¹ This revolution has been led by members of the Supreme Court who follow an “originalist” method of constitutional interpretation.² In this Article, I wish to discuss whether a similar “originalist” revolution may be on the horizon in civil cases governed by the Seventh Amendment’s “right of trial by jury.”³

In particular, I wish to discuss a series of provocative articles written by Professor Suja Thomas. In these articles, Professor Thomas has argued that one of the most important procedural innovations in civil litigation—the summary judgment device that has been available to judges since the Federal Rules of Civil Procedure were adopted all the way back in 1938—is

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¹ See *United States v. Booker*, 543 U.S. 220, 226–27 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 490–92 (2000).

² See generally Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005). There are, of course, many different permutations of originalism. See, e.g., Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. L. ISSUES 409, 412 (2009) (“[D]isagreement among originalists persist[s]” as to “*what* fixes original meaning . . .”).

³ U.S. CONST. amend. VII (“In 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.”).

inconsistent with the Seventh Amendment.⁴ Although Professor Thomas's arguments are based primarily on the requirements of Supreme Court precedent, her analysis is grounded almost entirely in history, and she has invoked an originalist methodology in her work.⁵ In this Article, I wish to take these invocations seriously and ask whether her analysis would satisfy an originalist that summary judgment is unconstitutional. Although her historical analysis is impressive, I think it may be a bit premature to draw any conclusions from it as a matter of originalism.

Professor Thomas's analysis largely begins and ends with a comparison of summary judgment to the procedural mechanisms that existed in 1791.⁶ In 1791, she notes, only juries and not judges were allowed to resolve cases where the sufficiency of a party's evidence was in dispute.⁷ Today, by contrast, summary judgment permits judges to resolve some cases in which the sufficiency of the evidence is in dispute.⁸ From these facts, Professor Thomas concludes that summary judgment is unconstitutional.⁹

I express no view on whether this analysis is sufficient as a matter of Supreme Court precedent. I question, however, whether it is sufficient as a matter of originalism. In order to conclude that summary judgment is unconstitutional, I think an originalist would need to know something more than simply the fact that summary judgment permits judges to resolve evidentiary disputes that they could not resolve in 1791.¹⁰ Not every little thing that juries did in 1791 was understood to be unchangeable in the absence of a constitutional amendment.¹¹ It is probably not the case, for example, that, if juries were given forty-five minutes for a lunch break in 1791, it would be unconstitutional to give them thirty minutes today. That is, an originalist would need to know whether there was something special about resolving evidentiary disputes in 1791 that made them rise to the level of

⁴ See generally Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) [hereinafter Thomas I]; Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (2008) [hereinafter Thomas II]; Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667 (2008) [hereinafter Thomas III].

⁵ See Thomas II, *supra* note 4, at 1616 ("The Seventh Amendment . . . requires . . . originalism."); Thomas III, *supra* note 4, at 1683.

⁶ See Thomas I, *supra* note 4, at 148–58.

⁷ See *id.*

⁸ See *id.* at 158–60.

⁹ See *id.*

¹⁰ See *infra* Part III.

¹¹ See *infra* Part III.

constitutional importance.¹² In particular, an originalist would need to do things like compare the text of the Seventh Amendment against a founding-era lexicon, look for statements from those in the founding generation on the question, or consult the original purposes of the Seventh Amendment in order to discern whether this particular feature of the jury system in 1791 was one that the Seventh Amendment was understood to preserve.¹³ In other words, in order to assess whether a practice that *existed* at the time of the Founding was something *required* by the Constitution, an originalist would need to invoke a frame of reference external to the practice itself, a frame of reference that informs *why* the practice might or might not have been understood to be constitutionally required.¹⁴ I take no position on what criteria an originalist should look to in assembling this frame of reference. For this Article, it is sufficient to note that Professor Thomas has yet to focus on assembling this frame of reference.

Indeed, this external frame of reference is important not only because it can inform whether the resolution of evidentiary disputes was understood to be constitutionally important at the Founding, but also because it can inform whether other changes made to the federal courts since then might cast any constitutional concerns posed by summary judgment in a different light.¹⁵ Needless to say, the federal judicial system has changed a great deal since 1791. At the same time that summary judgment has arguably diminished the ability of juries to resolve cases, there have been a number of other innovations that have arguably enhanced the ability of juries to do so.¹⁶ Perhaps the modern civil system hath giveth to juries more than it hath taketh away. In order to assess whether any of these other changes is relevant to whether summary judgment infringes the Seventh Amendment, an originalist would, again, need to begin with a frame of reference external to the practices themselves. Although it is, again, beyond the scope of this paper to develop an external frame of reference against which these changes can be evaluated, I note that there are at least a few reasons to believe an originalist might find at least some of these other innovations relevant to an assessment of whether summary judgment is constitutional.¹⁷ Professor Thomas has yet to consider these other innovations.

¹² See *infra* Part III.

¹³ See *infra* notes 36–38 and accompanying text.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part III.

¹⁶ See *infra* notes 55–65 and accompanying text.

¹⁷ See *infra* Part III.

In Part II of this Article, I briefly explain the contours of the modern summary judgment device and why Professor Thomas thinks it is unconstitutional. In Part III, I explain why it would be difficult for an originalist to draw an inference about which jury practices were constitutional at the time of the Founding without invoking a frame of reference external to the practices themselves. I further explain that this external frame of reference may be important not only to drawing inferences about what was and was not important at the Founding, but also to assessing whether any other changes since the Founding might bear on the constitutionality of summary judgment. I close by describing some of the other procedural innovations that have come to the federal judicial system since 1791 and by asking whether an originalist might care about these other innovations when assessing whether summary judgment is constitutional.

II. THE MODERN SUMMARY JUDGMENT DEVICE AND PROFESSOR THOMAS'S CONSTITUTIONAL CHALLENGE

Under Federal Rule of Civil Procedure 56, judges are permitted to enter “summary judgment” before trial in favor of one of the parties “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”¹⁸ As this Rule has been interpreted by the United States Supreme Court, it not only permits judges to enter judgment for one of the parties whenever there are no factual disputes in a case and the only questions remaining to be decided are legal ones, but it also permits judges to make some assessment of the sufficiency of the evidence that has been uncovered in discovery (and can therefore be introduced at trial) to determine whether a “reasonable jury” could find for one of the parties.¹⁹ If the judge does not believe that a reasonable jury could find for one of the parties based on the evidence that has been uncovered, then the judge is permitted to enter judgment in the case for the opposing party.²⁰

Professor Thomas argues that the summary judgment device is unconstitutional because the Seventh Amendment guarantees the “right of trial by jury,”²¹ and the summary judgment device allows judges and not

¹⁸ FED. R. CIV. P. 56(c)(2).

¹⁹ *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (“[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”).

²⁰ *See id.*

²¹ U.S. CONST. amend. VII.

juries to resolve cases.²² She begins her analysis with the premise, found in the Supreme Court's precedents,²³ that the Seventh Amendment should be interpreted to protect the "substance" and "core principles" of the jury trial as it existed in England at the time the Amendment was ratified in 1791.²⁴ She then performs an analysis of the various procedural devices that existed in 1791 and shows that, although there were several procedural devices in 1791 that permitted judges to enter judgment for a party either before or after trial, juries, not judges, resolved all disputes as to the sufficiency of the evidence to support a party's case.²⁵ That is, all of these devices permitted judges to enter judgment for a party only in the absence of any factual disputes at all—either because one party had admitted all the factual allegations of the other party (as with the demurrers to the pleadings and evidence),²⁶ the factual disputes had already been resolved by agreement or by the jury (as with the special case),²⁷ or there was no evidence whatsoever on a required element of a party's claim (as with the compulsory nonsuit).²⁸ This, Professor Thomas argues, is in contrast to summary judgment, which, as I noted, allows judges to resolve some cases today where there is a dispute as to the sufficiency of the evidence.²⁹

²² See Thomas I, *supra* note 4, at 143 ("Cases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.").

²³ See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (interpreting the Seventh Amendment to "preserve the substance of the common-law right as it existed in 1791"). It should be noted that the Court has started with the premise that the Seventh Amendment protects the right to trial by jury as it existed in *England* rather than the *United States* because the jury-trial practices in the states were so divergent. See *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C. Mass. 1812) (No. 16,750) ("Beyond all question, 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.").

²⁴ See Thomas I, *supra* note 4, at 147 (arguing that the Seventh Amendment should preserve "the substance of the English common law jury trial in 1791"); Thomas III, *supra* note 4, at 1683 ("[T]he Court should embrace originalism to interpret the Seventh Amendment" and apply "the English common law . . . in 1791 when the Seventh Amendment was adopted . . .").

²⁵ See Thomas I, *supra* note 4, at 143, 148–58.

²⁶ See *id.* at 148–54.

²⁷ See *id.* at 156–57.

²⁸ See *id.* at 155–56.

²⁹ See *id.* at 143 ("Under [the summary judgment] standard, in contrast to under the common law, the court [rather than a jury] decides whether factual inferences from the evidence are reasonable, [and] applies the law to any 'reasonable' factual inferences . . .").

Professor Thomas acknowledges that there was one procedural device in 1791 that permitted judges to make an assessment of the sufficiency of a party's evidence (the motion for a new trial), but she argues that this device did not permit a judge to enter judgment for one of the parties, as summary judgment does, but, rather, permitted a judge only to order a *new jury trial*.³⁰ Thus, Professor Thomas argues, even if a motion for a new trial was granted by a judge, the ultimate assessment of the sufficiency of the parties' evidence would be performed by a (new) jury.³¹ As a result, Professor Thomas concludes that the "substance" and "core principles" of the jury trial in 1791 included the exclusive right of juries to resolve cases.³² Insofar as summary judgment permits judges to decide some of these cases today, Professor Thomas concludes that summary judgment is unconstitutional.³³

Although there is at least one scholar who has disputed Professor Thomas's historical analysis,³⁴ I am willing to assume that Professor Thomas has her history correct and that it is indeed true that, through summary judgment, judges today are resolving cases that juries resolved in 1791. In the next Part, however, I question whether this historical fact alone would satisfy an originalist that summary judgment is unconstitutional.

III. ORIGINALISM AND THE PROBLEM OF THE FRAME OF REFERENCE

Professor Thomas's analysis more or less proceeds in the following form: (1) she looks at the world as it existed in 1791 when the Seventh Amendment was ratified; (2) she finds that only juries resolved cases where the sufficiency of the evidence was disputed; (3) she asserts that jury resolution of evidentiary questions therefore formed part of the "substance" or "core principles" of the 1791 jury trial; and (4) she uses this assertion to conclude that judges, rather than juries, cannot constitutionally resolve such disputes today.³⁵ This analysis may or may not be sufficient for the purposes of existing Supreme Court precedent. I am skeptical, however, whether it is sufficient for the purposes of originalism.

³⁰ See *id.* at 157–58.

³¹ See Thomas I, *supra* note 4, at 158.

³² See *id.* at 143 ("Cases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.").

³³ See *id.* at 158–60.

³⁴ See Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1630–41 (2008).

³⁵ See generally Thomas I, *supra* note 4.

It goes without saying that not every little thing that juries did in 1791 was understood to be unchangeable in the absence of a constitutional amendment. As I noted above, it is probably not the case that, if juries were given forty-five minutes for a lunch break in 1791, it would be unconstitutional to give them thirty minutes today. In order for an originalist to assess whether a practice that *existed* at the time of the Founding was one that was also constitutionally *required*, I would think an originalist would need to know something more than simply the fact that the practice existed. In particular, I would think an originalist would need some sort of frame of reference external to the practices at the Founding themselves in order to separate those practices that were constitutionally important from those that were not. An originalist might look at a number of different things in assembling this external frame of reference. For example, an originalist might look to the text of the constitutional provision and juxtapose it against a founding-era lexicon.³⁶ Or, when the text is too ambiguous, an originalist might examine statements made by those in the framing generation on the question at issue.³⁷ Or, if no such statements can be found, an originalist might consult the original purposes of the constitutional provision.³⁸ I take no position on the criteria an originalist should examine to assemble the external frame of reference. My only point is that an originalist would need to examine *something* besides the jury trial in 1791 itself to discern which features of the jury trial in 1791 were thought to be constitutionally required from those that were not.

Professor Thomas has yet to focus on this external frame of reference. Although she asserted that jury resolution of cases where sufficiency of the

³⁶ See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 556 (1994) (arguing that originalists should exhaust dictionaries and grammar books before deeming a constitutional provision ambiguous).

³⁷ See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774 (2009) (“When the interpretation of language was unclear, the interpreter would consider the relevant originalist evidence—evidence based on text, structure, history, and intent—and select the interpretation that was supported more strongly by the evidence.”).

³⁸ See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007) (advocating an originalist approach that looks to “what the people who drafted the text were trying to achieve [and] . . . what principles they sought to endorse”); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 580 (2008) (advocating an originalist approach that looks to “the original understanding of the principle that was embodied in the text”); McGinnis & Rappaport, *supra* note 37, at 774.

evidence was in dispute formed part of the “substance” and “core principles” of the jury trial, she did not say how she came to this conclusion.³⁹ She did not say what she consulted to define the substance and core of the Seventh Amendment.⁴⁰ She merely observed that juries always did these things in 1791, and then concluded that these things must therefore be part of the substance and core of the jury’s 1791 domain.⁴¹ I question whether this sort of analysis would satisfy an originalist. I would think a thorough examination of some of the aforementioned indicia of the original understanding of the Seventh Amendment would be necessary before an originalist would conclude that it was thought important that juries resolve cases where the sufficiency of the evidence was in dispute.⁴² Although Professor Thomas at some points in her later work discusses some of the original purposes of the Seventh Amendment, she does not focus her constitutional analysis on these purposes.⁴³ The focus of her constitutional analysis, again, is the practices themselves that existed in 1791.

It is true that originalists sometimes rest their analyses of whether modern practices are constitutional without focusing on an external frame of reference, but, rather, by focusing on whether practices like them existed at the time the relevant constitutional provision was ratified. Justice Scalia, for one, sometimes finds various practices constitutional because those practices existed at the time of ratification.⁴⁴ He has, for example, concluded that the death penalty and public prayer are constitutional because these practices existed during the periods in which the Bill of Rights was adopted and then incorporated against state governments through the Fourteenth

³⁹ See Thomas I, *supra* note 4, at 159–60 (asserting that the three-fold “substance” or “core” of the Seventh Amendment was (1) “the jury or the parties determined the facts” and “[t]he court itself would never decide a case without such a determination of the facts by the jury or the parties;” (2) “a court would determine whether the evidence was sufficient to support the jury verdict only after the parties presented evidence at trial, and only after a jury rendered a verdict;” and (3) “a jury, not a court, decided a case that had any evidence, however improbable”).

⁴⁰ See *id.*

⁴¹ See *id.* (“The court itself [at the time of the Founding] would never decide a case without such a determination of the facts by the jury or the parties.”).

⁴² See *supra* notes 36–39 and accompanying text.

⁴³ See Thomas II, *supra* note 4, at 1680–83.

⁴⁴ See Thomas Colby & Peter Smith, *Living Originalism*, 59 DUKE L.J. 239, 253 (2009) (“Justice Scalia has frequently decided cases on the basis of the proposition that if the first Congresses and presidents engaged in a practice, then the Framing generation must have expected and thus understood the practice to be constitutional . . .”).

Amendment.⁴⁵ This form of originalism is sometimes referred to as “expected application originalism.”⁴⁶ Originalism of this sort is not so much concerned with what particular constitutional provisions mean in the abstract,⁴⁷ but, rather, with “how people living at the time the text was adopted would have expected it would be applied” in particular circumstances.⁴⁸ That is, “[i]f the Framers would have expected the Constitution to permit something, then it is permitted today, and if they would have expected it to preclude something, then it is precluded today.”⁴⁹

There is considerable rhetorical force to expected-application originalism; it would be strange indeed for those who ratified a constitutional provision to continue to engage in practices that they themselves understood to violate that provision. Nonetheless, this simplified version of originalism is not foolproof.⁵⁰ But even if it were, I do not think it would be available to Professor Thomas. This is the case because expected-application originalism can be invoked only to establish that practices that *existed* at ratification are *constitutional*, not to establish that practices that did *not* exist at ratification are *unconstitutional*. When a practice existed at ratification, an originalist can plausibly conclude without further analysis that the practice must be constitutional because, as I noted, it would be strange for those who ratified a constitutional provision to continue to do things that they themselves understood to violate the provision. But when a practice did *not* exist at ratification, an originalist cannot draw the converse inference so easily. This is the case because the expected-application inquiry for a practice that did not exist at ratification would seem to be a *hypothetical* inquiry; it would seem to ask whether those who ratified the constitutional provision *would have* thought the practice was constitutional *had* it existed. There is no way to answer such a question without invoking an external frame of reference. It is not enough to analogize from the practices that did exist because, as any lawyer knows, any two things are both similar to one another and different

⁴⁵ See Colby, *supra* note 38, at 574 n.252 (2008).

⁴⁶ Balkin, *supra* note 38, at 296.

⁴⁷ For this reason, expected-application originalism is sometimes derisively called “I Have No Idea Originalism.” See Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 737 (2009) (“The argument is essentially, ‘I have no idea what this provision means. But whatever it means, it can’t prohibit this, because the Framers approved of it.’”).

⁴⁸ Balkin, *supra* note 38, at 296.

⁴⁹ Colby, *supra* note 38, at 573.

⁵⁰ See, e.g., *id.* at 580 (“It is possible that the framing generation misunderstood the way in which the principle that they enacted would apply to particular facts, or that their understanding of the facts was mistaken . . .”).

from one another in a countless number of ways. The question is whether the similarities or differences are relevant ones, and this requires a frame of reference external to the practices themselves. Professor Thomas, of course, is making just this form of argument: that something that did *not* exist when the Seventh Amendment was ratified in 1791—judicial resolution of cases with the sufficiency of evidence in dispute—is unconstitutional.⁵¹ As such, she may need to assemble an external frame of reference before an originalist would be satisfied with her analysis.

It should be noted that assembling this external frame of reference is important not only to discern which features of the 1791 jury trial were constitutionally important and which features were not. As I explain in more detail below, it might also be important to identify whether there have been any other changes to the federal civil system since then that affect the constitutionality of summary judgment. Needless to say, the federal judicial system has changed a great deal since 1791.⁵² Although it is true that the advent of summary judgment may have diminished the role of the jury, it is possible that other changes may have simultaneously enhanced it.⁵³ That is, when the forest rather than the trees of the modern federal civil system is compared to the system that existed in 1791, it might look better from the perspective of the Seventh Amendment.⁵⁴ Whether it does will depend on what the Seventh Amendment means; it will depend, again, on a frame of reference.

For example, perhaps the most significant procedural innovation in the federal system since 1791 has been the dramatic change in pleading rules. The English and American common law pleading practices “were designed not simply to control the level and types of cases heard, but as a mechanism to keep litigants out of the courtroom.”⁵⁵ “[P]leading was the central focus of

⁵¹ See Thomas I, *supra* note 4, at 158–60.

⁵² Indeed, it should be noted that there is a very good reason why judges in 1791 may not have resolved cases by assessing the sufficiency of the parties’ evidence before trial as they do today with summary judgment: the parties did not *have* much evidence before trial in 1791 because there was little-to-no pre-trial discovery available to litigants in English common law courts. See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 10 (2006) (“There was no pretrial discovery . . .”); Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694–97 (1998).

⁵³ See *infra* notes 55–65 and accompanying text.

⁵⁴ See *infra* notes 67–72 and accompanying text.

⁵⁵ Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1111 (2010).

law suits, and cases were often won or lost on the pleading skills of the attorneys.⁵⁶ Things are much different today under the Federal Rules of Civil Procedure. The very motivation behind the adoption of the Federal Rules in 1938 was to eradicate the technicalities of common-law pleading.⁵⁷ Now, plaintiffs need only set forth a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁵⁸ Moreover, judges now are explicitly instructed to bend over backwards *not* to resolve cases on the pleadings, but to construe the pleadings liberally “so as to do justice.”⁵⁹ It is true that the Supreme Court has recently tightened pleading rules a bit, but things today are still nothing like they were at the time the Seventh Amendment was ratified.⁶⁰ The changes in pleading rules have undoubtedly affected the role of the jury: cases that were lost or issues that were abandoned in light of the pleading rules in 1791 now have at least the chance to be resolved by juries.

There have been other changes that have given litigants a greater chance to come before juries today than they had in 1791. For example, at the time of the Founding there was little opportunity to aggregate a large number of similar claims into one action; this meant that individuals with small claims not worth litigating on their own did not have much access to courts at all, let alone an opportunity to put their claims before juries.⁶¹ This changed with the advent of the modern class action device, which, after the amendments to the Federal Rules in 1966, permits similar claims to be aggregated in a vast array of cases in federal court.⁶² Moreover, even when claims were worth litigating, it was more difficult to bring them to court at the Founding than it is today because contingency fees were banned in early America (as they are

⁵⁶ RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 117 (5th ed. 2009).

⁵⁷ See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 648 (1994); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573–74 (2007) (Stevens, J., dissenting) (discussing the intent of the drafters of the Rules to depart from English common law pleading tradition).

⁵⁸ FED. R. CIV. P. 8(a)(2).

⁵⁹ FED. R. CIV. P. 8(e).

⁶⁰ See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (applying the plausibility standard established in *Twombly* to all civil claims); *Twombly*, 550 U.S. at 562, 570 (requiring plaintiffs to plead facts that make their claims “plausible”).

⁶¹ See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 166, 218, 268–69 (1987) (discussing the very limited group litigation procedures available in English courts during the founding era).

⁶² See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811, 818 (2010).

in England) and did not become accepted here until the middle of the nineteenth century.⁶³ In addition, at the time the Seventh Amendment was ratified, federal courts followed the English “loser pays” rule on attorneys’ fees; it was not until 1796 that the Supreme Court adopted the “American Rule” where each party pays its own fees.⁶⁴ Most commentators believe that all these changes have made it easier for litigants to bring suit today than in the past.⁶⁵

Might any of these other changes matter to an originalist assessing the constitutionality of summary judgment? Professor Thomas has yet to confront this question, and it is beyond the scope of this Article to answer it in any detail. But I will offer a few observations. First, there are some reasons to believe that the text of the Seventh Amendment buttresses Professor Thomas’s worry that summary judgment poses constitutional concerns insofar as it permits judges to resolve factual disputes. Although the Seventh Amendment does not say what aspects of “trial by jury” it seeks to “preserve[,]” a hint on this point might be found in the Amendment’s later prohibition on “any Court” reexamining “fact[s] tried by a jury.”⁶⁶ This later focus on the resolution of factual disputes suggests that such disputes may have been at the core of the Seventh Amendment’s jury trial right. On the other hand, even if these disputes were at the core, insofar as the Amendment explicitly prohibits only reexamination of such disputes, and not examination of such disputes in the first instance, one might argue that the Amendment protects only *second guessing* juries, not *preempting* juries, which, of course, is what summary judgment does. Consequently, I am unsure if an originalist would rely on the text of the Seventh Amendment alone to assess whether summary judgment poses constitutional concerns and whether those concerns

⁶³ See Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 239 (1998) (chronicling the adoption of contingency fees by state courts). The United States Supreme Court approved contingency fees in 1853. See *Wylie v. Coxe*, 56 U.S. 415, 419–20 (1853).

⁶⁴ See *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796).

⁶⁵ See, e.g., Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 691 (1997) (characterizing the American Rule as a “powerful mechanism, facilitating access for both plaintiffs and defendants”); Karsten, *supra* note 63, at 231, 240–41, 256–60 (discussing the incentives to litigate with contingency fees). See generally Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863 (1998) (discussing the incentives to litigate under the American versus English Rules).

⁶⁶ U.S. CONST. amend. VII.

might be overcome by the other aforementioned procedural changes that have arguably enhanced the role of juries since the Founding.

Second, an examination of what may be the most prominent purpose behind the Seventh Amendment both bolsters Professor Thomas's concerns about summary judgment as well as the possibility that those concerns might be overcome by the aforementioned jury-enhancing changes to the federal system. Many scholars believe that the most prominent purpose behind the Seventh Amendment was to empower ordinary citizens with some say in the outcome of federal cases so that they could hinder the work of unjust federal judges—or even unjust Congresses.⁶⁷ As commentators have put it, “the Seventh Amendment was added to the Bill of Rights in order to serve as a check on unrepresentative, unaccountable federal judges”⁶⁸ and to “ensure[] that central authorities in a state, provincial, or national capital could not impose their will on local communities.”⁶⁹ Indeed, in some of her later work, Professor Thomas appears to agree that this was one of the original purposes of the Seventh Amendment.⁷⁰

If this was indeed one of the original purposes, then Professor Thomas is correct to worry that summary judgment presents constitutional questions, not so much because the device permits judges to resolve factual disputes in particular, but because the device prevents juries from hearing cases that they would have heard in 1791, and, as such, insulates judges from some interference juries might have wielded in 1791. But it is also true that at least one of the aforementioned jury-enhancing procedural changes may offset this jury-diminishing one. As I noted above, there are cases and issues that have the opportunity to come before juries today that could not have done so in

⁶⁷ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 82–83 (1998) (“The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury,” and that the jury-trial Amendments “were centrally concerned with the . . . danger that government officials might attempt to rule in their own self-interest at the expense of their constituents’ sentiments”); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670–71 (1973) (noting the desire to “achieve results from jury-tried cases that would not be forthcoming from trials conducted by judges alone”; in particular, “the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges”).

⁶⁸ MARCUS ET AL., *supra* note 56, at 531.

⁶⁹ William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1656 (2008).

⁷⁰ See Thomas II, *supra* note 4, at 1680–83.

1791 because they were lost or abandoned on the pleadings.⁷¹ Juries could not hinder the work of judges in these cases in 1791 because judges resolved the cases on the pleadings well before trial.⁷² Today, in light of the notice-pleading regime of the Federal Rules, juries have at least the chance to have their say in all these cases. If the original purpose of the Seventh Amendment was to cast a particular balance between the power of juries and judges, then the changes in pleading rules may be just as relevant to the constitutional analysis as the advent of summary judgment; when a constitutional provision seeks to preserve a balance of power, it is difficult to assess whether it has done so when the weights are removed from one side of the scale.

By contrast, the other procedural changes since 1791 mentioned above—the advent of class actions, contingency fees, and the American Rule on fees—might not be relevant to the Seventh Amendment analysis. This is the case because these changes do not affect the balance of power between judges and juries; these changes simply increase the number of cases that come to court in the first place, where they will be subjected to whatever balance of power between judges and juries otherwise exists. But this is exactly my point: in order to assess what is relevant and what is not, one needs to assemble some sort of external frame of reference. Professor Thomas has yet to focus her energies here.

V. CONCLUSION

Although the summary judgment device has been with us for many decades, Professor Thomas thinks it is unconstitutional because it permits judges to resolve a set of cases—those where the sufficiency of a party's evidence is in dispute—that could only be resolved by juries at the time the Seventh Amendment was ratified. Although her analysis is based primarily on the requirements of Supreme Court precedent, it is also grounded almost entirely in history, and she has invoked an originalist methodology in her work. As such, it is worth asking whether originalists would be satisfied with Professor Thomas's analysis. I think they might find her analysis thus far premature. In order to conclude that the Seventh Amendment requires juries to resolve cases where the sufficiency of a party's evidence is in dispute, an originalist would want to know more about the jury trial in 1791 than the fact that juries had the exclusive power to resolve such disputes. Not every little thing that juries did in 1791 was understood to be unchangeable absent a constitutional amendment. In order to separate the things that juries did that were important to the Seventh Amendment and the things that they did that

⁷¹ See *supra* notes 55–60 and accompanying text.

⁷² See MARCUS ET AL., *supra* note 56, at 116–17.

were not, one must assemble a frame of reference external to the jury practices themselves. This external frame of reference might be assembled from many places—a comparison of founding-era lexicons to the constitutional text, an examination of founding-era statements on the question, an assessment of the original purposes of the Seventh Amendment, etc.—but it has to be assembled from somewhere. Professor Thomas has not yet focused her energies here. There is more work to be done before an originalist might conclude summary judgment is unconstitutional.

