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Holmes v. Walton and its Enduring Lessons for Originalism

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HOLMES V. WALTON AND ITS ENDURING LESSONS FOR ORIGINALISM

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Originalism is nothing new. And the New Jersey Supreme Court's 1780 decision in Holmes v. Walton *shows it. In that case, the New Jersey Supreme Court disallowed a state law as repugnant to the state constitution because the law permitted a jury of only six to render a judgment. To reach that result, the court looked to the fixed, original meaning of the jury trial guarantee embedded in the state constitution, and it then constrained its interpretive latitude in conformity with that fixed meaning.* Holmes *thus cuts against the common misconception that originalism as an interpretive methodology is a modern development.*

Not only did the court in Holmes *rely on the animating principles of originalism to reach its decision, but by disallowing the state statute, it also granted relief to loyalists just months after Americans suffered their worst defeat of the Revolutionary War.* Holmes*, then, also shows that in times of crisis, originalism is a virtue rather than an encumbrance. By constraining judicial decision-making especially during periods of tumult, originalism safeguards the rule of law. Originalists today should look to past cases like* Holmes *for guidance and support, particularly in the face of growing calls from non-originalists and common good constitutionalists to cast originalism aside.*

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I. INTRODUCTION

Reading just about anything published on originalism this millennium leaves one with the impression that the interpretive methodology first came about in the 1980s. That impression is to some extent true. Paul Brest coined the term "originalism" at the start of that decade.[1] And self-described originalists engaged in rigorous debates over the methodology's wrinkles in the '80s as well.[2] Yet the two animating principles of originalism—that the communicative content of a textual provision becomes fixed at the time of the text's adoption (the "Fixation Thesis") and that the text's fixed meaning ought to constrain the interpretive latitude of decisionmakers today (the "Constraint Principle")—arose well before the Reagan Revolution.[3] Indeed, originalism was already in force during the American Revolution.

While some scholars have explored originalism during the Early Republic,[4] this Article is among the first to argue that state court judges employed originalism's animating principles to interpret state constitutional provisions well before the ratification of the federal Constitution. In particular, this Article explores the "understudied" and "overlooked" New Jersey Supreme Court case

1. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

2. Edwin Meese, III., *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464–66 (1986); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (influencing generations of originalists for years to come); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

3. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015); *see also* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 7 (2018) ("Although we maintain that originalism as a method of constitutional interpretation is as old as the Constitution itself, the roots of originalism as a distinctive theory of interpretation can be traced back to 1980.") (emphasis omitted); Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1218 (2013) ("The use of any version of originalism as a method of interpreting the Constitution has waxed and waned between 1787 and today . . . .").

4. *See* LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (exploring originalism at the time of the Constitution's ratification); Joel Alicea, *An Originalist Congress?*, 6 NAT'L AFF. 31, 38 (2011). *But see* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018) (arguing that the Constitution would take shape with time).

of *Holmes v. Walton*.[5] Though some originalists, John McGinnis and Michael Rappaport to name names, have noted *Holmes* as well as its originalist underpinnings in passing, no originalist has explored the case in any detail.[6]

Holmes v. Walton, decided in 1780, involved a challenge to a New Jersey statute that permitted a jury of only six to deliver a judgment.[7] The New Jersey Constitution guaranteed the right to a "jury trial," but it failed to elaborate on what that right entailed.[8] Nevertheless, the New Jersey Supreme Court deemed the state statute permitting a jury of just six repugnant to the state constitution's jury trial guarantee.[9] Many have celebrated *Holmes* as "the earliest precedent for judicial review."[10] And rightly so. But the decision stands out for so much more.

Though the court's actual opinion is lost to history, archival sources suggest that the New Jersey Supreme Court based its decision on the state constitution's text and the historical background principles animating the text's original meaning.[11] In doing so, this Article contends, the court engaged in pre-ratification originalism. The court, in other words, looked to the text enshrining the right to a "jury trial" and then to the original public meaning of jury trial at the time of the New Jersey Constitution's adoption when it disallowed the state law.[12] Viewed from this vantage point, *Holmes* emerges as an example of

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5. Mary Sarah Bilder, *Expounding the Law*, 78 GEO. WASH. L. REV. 1129, 1133–34 (2010).

6. 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, 795 (2009) (refuting another scholar's argument that the court in *Holmes v. Walton* moved beyond the text and background principles when interpreting New Jersey's constitution).

7. *See infra* Part III.

8. *See infra* Part III.

9. *See infra* Part III; *see also* Justin W. Aimonetti, Note, *Colonial Virginia: The Intellectual Incubator of Judicial Review*, 106 VA. L. REV. 765, 766 (2020) (exploring the repugnancy principle).

10. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 407–08 (2008); *see also* Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 CONST. COMMENT. 341, 341 (1990) ("*Holmes* is the earliest known example of judicial review in the American colonies."); Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 582 (2009); Joshua Seth Lichtenstein, *Abbott v. Burke: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429, 449 n.95 (1991); Robert L. Nightingale, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 YALE L. J. 1672, 1702 (2016).

11. *See infra* Part III.

12. Original public meaning originalism, as opposed to original intentions originalism, "posits that the object of interpretation is the text as reasonably understood by a well-informed reader at the time of the provision's enactment. In other words, it is the text, not the intentions of the enactors, that is key to interpretation." John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and*

judges engaging in originalism even before the ratification of the federal Constitution.

Not only did the New Jersey Supreme Court in *Holmes* rely on the animating principles of originalism, but the court, by disallowing the state statute, also granted relief to loyalists just months after Americans suffered their worst defeat of the Revolutionary War.[13] Despite the military crisis, the court did not pull a *Korematsu v. United States* and contort original public meaning to reach a result that would have advanced the American war effort.[14] The text of the state constitution and illuminating history—rather than subjective will and trying circumstances—drove the court's decision. In the face of growing calls from non-originalists and common good constitutionalists to discard originalism as an interpretive methodology,[15] this Article contends that originalists today should look to past cases like *Holmes* for guidance and support. Many critics attack originalism as either an anachronistic methodology privileging the views of those who came centuries ago or as an unsatisfactory methodology incapable of achieving the "common good."[16] But originalism's

Original Public Meaning, 113 NW. U. L. REV. 1371, 1373 (2019); *see* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251 (2019) ("Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s."); *see also* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1427 (2021) (critiquing original public meaning originalism because the theory is incapable of resolving "any historically contested or otherwise reasonably disputable issue").

13. *See generally* MARK EDWARD LENDER & GARRY WHEELER STONE, FATAL SUNDAY: GEORGE WASHINGTON, THE MONMOUTH CAMPAIGN, AND THE POLITICS OF BATTLE (2016).

14. *See generally* Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Neil M. Gorsuch, *Why Originalism is the Best Approach to the Constitution*, TIME (Sept. 6, 2019), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ [https://perma.cc/S7GV-CKYF].

15. *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009); *see also* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 954 (2021).

16. *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022). One of Professor Vermeule's main (though far from only) critiques of originalism is the subjectivity inherent to the level of generality at which a judge analyzes the original public meaning of a textual provision. *See id.* at 61; *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 487 (2017) (exploring the level-of-generality problem in relation to contested questions of constitutional law); Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post*-Heller *Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413, 439 (2020) (noting that "[a]ssessments at the higher level of generality almost always lead to a finding that a challenged regulation impinges on the right;" whereas "[a]ssessments of the right at a lower degree of generality more often lead to laws being upheld"). Professor Solum's answer to Vermeule's critique is that "there is no levels-of-generality problem for original-meaning originalism

critics fail to recognize that the limited capacity of originalism to effectuate certain political aims is one of, if not *the*, critical points of originalism. In times of chaos and uncertainty, originalism serves as an internal and external constraint on judging and thus safeguards the rule of law.[17]

To make its case, this Article proceeds in four Parts. Part I offers a bird's-eye view of originalism as an interpretive methodology, focusing on the Fixation Thesis and the Constraint Principle. Part II provides a detailed account of *Holmes v. Walton*, which is a case that has been vastly underexplored by academics and the like. Part III argues that the New Jersey Supreme Court reached a quintessentially originalist outcome in *Holmes* and almost assuredly relied on the two animating principles of originalism to arrive at that outcome. Part IV highlights three key takeaways from *Holmes* for originalism and beyond: (1) that originalism as a methodology is not a product of the late-twentieth century; (2) that *Holmes* demonstrates the virtues of originalism as both an internal and external constraint on judging; (3) and that *Holmes* casts doubt on the original correctness of current Supreme Court doctrine governing the permissible number of jurors in both civil and criminal cases.[18] Much as a

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or for any form of originalism that focuses on the linguistic meaning of the constitutional text" because linguistic meaning encompasses the "meaning of the text at the level of generality provided by the relevant words and phrases in the text itself." *See* Lawrence Solum, *Smith on Originalism & Levels of Generality*, LEGAL THEORY BLOG (Apr. 3, 2017), https://lsolum.typepad.com/legaltheory/2017/04/peter-j-smith-george-washington-university-law-school-has-posted-originalism-and-level-of-generality-georgia-law-review.html [https://perma.cc/C7SP-PC83].

17. Originalism safeguards the rule in law because originalist decisions are for the most part "falsifiable." *See* Kian Hudson, *Originalism: Its Problems and Its Promise*, LIBERALCURRENTS (Aug. 15, 2019), https://www.liberalcurrents.com/originalism-its-problems-and-its-promise/ [https://perma.cc/6TQ4-WTNW]. Originalism "obliges judges to ground their decisions in objective evidence" about what the reasonable reader at the time would have understood a word or phrase to mean, rendering the theory to some extent falsifiable: Did the judge follow objective evidence about the original public meaning of a word or phrase? *See id.* If not, then the prior decision may be subject to overruling where it was demonstrably erroneous. *See* Justin W. Aimonetti, *Second Guessing Double Jeopardy: The Stare Decisis Factors as Proxy Tools for Original Correctness*, 61 WM. & MARY L. REV. ONLINE 35, 48–49 (2020).

18. On November 7, 2022, the Supreme Court released orders. Among the orders included the denial of a petition for a writ of certiorari in *Ramin Khorrami v. Arizona*, No. 21-1553 (U.S. Nov. 7, 2022). That petition presented the question whether the Sixth and Fourteenth Amendments guarantee the right to a trial by a 12-person jury when the defendant is charged with a felony. Though the Court denied the petition, Justice Gorsuch penned a forceful dissent from the denial of certiorari. *See* Khorrami v. Arizona, No. 21-1553, 2022 WL 16726030, at *1 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari). Relying on the original public meaning of the federal Constitution along with historical background, Justice Gorsuch noted in his dissent that "[f]or almost all of this Nation's history and centuries before that, the right to trial by jury for serious criminal offenses meant the right to a trial before 12 members of the community." *Id.* at *5.

nonunanimous verdict is no verdict at all, a jury of fewer than twelve may itself be no jury at all.[19]

II. ORIGINALISM'S BUMPERS: THE FIXATION THESIS AND THE CONSTRAINT PRINCIPLE

If originalism is anything, it is not a mathematical formula. A judge does not plug a legal question into an originalism calculator to get an answer. The interpretive methodology simply does not "promise a step-by-step guide to correct legal answers, any more than the scientific method promises a step-by-step guide to curing malaria."[20] What originalism does offer is a framework for how to go about interpreting text.[21]

Think of originalism as akin to bowling with bumpers. Having the bumpers up does not guarantee a strike; just like a judge relying on originalism as an interpretive methodology does not guarantee a particular (or even a correct) legal outcome. But the bumpers provide the bowler with some assurance that the bowling ball will end up in vicinity of the pins; just like originalism provides a judge with some assurance that a gutter ball is not in the offing. Though originalists disagree about much,[22] contemporary originalists unite around originalism's two bumpers: The Fixation Thesis and the Constraint Principle.[23]

A. The Fixation Thesis

The Fixation Thesis represents originalism's right bumper. The Thesis stands for the following proposition: The original public meaning (or the communicative content[24]) of text is fixed at the time when the text is framed and ratified.[25] A word's meaning, in other words, "is fixed at the time it's

19. Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).

20. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST REV. 809, 820 (2019).

21. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 828 (2022); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 822 (2015).

22. Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1305 (2019).

23. Solum, *supra* note 3, at 6; *see also* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L. J. 156, 157 (2017) ("Yet the core ideas serve better as a summary than a definition; using them to circumscribe the theory is a mistake.").

24. "The communicative content of a writing is the content the author intended to convey to the reader via the audience's recognition of the author's communicative intention." Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 277 (2017) (emphasis omitted); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 641 (2013) ("Interpretation tries to determine the Constitution's original communicative content.") (emphasis omitted).

25. Solum, *supra* note 3, at 1.

enacted, whatever that time may be."[26] That is true even if the meaning of a word drifts with time.[27] It is also true even though "new applications of that [fixed, original] meaning will arise with new developments and new technologies."[28] Using a modified version of Professor Gary Lawson's fried-chicken-recipe example might help elucidate the Fixation Thesis.[29]

Imagine you stumble upon a pie recipe in your great-great-grandmother's attic. The recipe dates back centuries. It lists twenty ingredients. Some look familiar. Some seem off: one *pound* of *salt* and one *pinch* of *sugar*. Assume, however, that a pound and a pinch meant the opposite of what they mean today. The meaning of the two has inverted with time: In 1805, a pound meant a pinch and a pinch meant a pound.[30] The Fixation Thesis calls on a modern reader of the old recipe to read the ingredients in accordance with their fixed meaning in 1805, leading the reader to add just a pinch of salt rather than a pound to the pie recipe.[31]

The process of uncovering the original public meaning of a word, especially a word from centuries ago, is often a laborious enterprise.[32] Understanding whether the meaning of a word like "pinch" or "pound" has drifted with time

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26. Dean Reuter, Thomas Hardiman, Amy Coney Barrett, Michael C. Dorf, Saikrishna B. Prakash & Richard H. Pildes, *Showcase Panel II: Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 716 (2020) (statement of Prof. Randy Barnett).

27. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013).

28. Gorsuch, *supra* note 14; *see also* Mike Rappaport, *Originalism, the Fourth Amendment, and New Technology*, LAW & LIBERTY (Dec. 6, 2019), https://lawliberty.org/originalism-the-fourth-amendment-and-new-technology/ [https://perma.cc/4X5M-F4QV] ("Since such technology did not exist at the time of the Constitution, the [Constitution's text] did not specifically address it. In some cases, though, the new technology would seem to be unambiguously covered by the right [enshrined in the text]. But in other cases, it might not.").

29. *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825–26 (1997).

30. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519 (2003) ("[T]he conventional usages of individual words change over time.").

31. The modern recipe reader should try to model how a hypothetical reasonable person from 1805 would have read the list of ingredients. *See* Fallon, supra note 12, at 1440; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48–49 n.11 (2006) (noting that "an all-star roster of originalist scholars" have "endorsed reliance upon the reasonable person in constitutional interpretation").

32. As Justice Scalia put it: Discerning "the original understanding of an ancient text" means wading through "an enormous mass of material," evaluating "the reliability of that material," and "immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989).

requires research, evidence, and time. The same goes for textual provisions embodied in the Constitution or a statute (consider the original public meaning of "domestic violence" in Article IV, Section 4 of the federal Constitution).[33] Still, it is well to recognize that "originalism involves a highly limited version of the historical inquiry—one that uses limited evidence in limited ways."[34] In essence, originalists seek to uncover the fixed meaning of words in specific contexts.[35]

To discover original meaning, originalists employ a number of conventional tools—none of which require a history degree (though a history degree cannot hurt). Originalists often consult "old dictionaries" to understand how a word was used at the time of its adoption.[36] Originalists also use "a variety of other linguistic conventions," such as the rules of grammar and the canons of construction to unearth original meaning.[37] Primary source material as well as secondary sources might elucidate the original meaning of the text being interpreted, too.[38] Indeed, consider Justice Thomas's use in *New York State Rifle & Pistol Association v. Bruen* of historical sources, common-law rights, custom, precedent, and analogical reasoning to deem a New York law repugnant to the Second Amendment.[39] While the process of uncovering

33. Luther v. Borden, 48 U.S. 1, 43 (1849).

34. Baude & Sachs, *supra* note 20, at 813.

35. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2154 (2022) (analyzing the fixed meaning of the Second Amendment and applying that fixed meaning to a specific state regulation). The Court thus interpreted the Second Amendment and then construed or determined the legal effect to give to the interpreted meaning. *See* Justin W. Aimonetti & Christian Talley, *Race,* Ramos*, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 221–22 (2021) ("[W]e can think of constitutional exegesis as having a pair of key stages: interpretation and then construction. When we interpret a text, we seek to discover its communicative content—what the words meant at the time of their ratification. When we then construe the text, we determine what legal effect we should give to that meaning. The clearer the text, the smaller the 'construction zone.' But sometimes constitutional provisions are 'general, abstract, [or] vague,' so we must resort to other heuristics of meaning when applying them 'to concrete constitutional cases.' ") (emphasis omitted).

36. Nelson, *supra* note 30 (noting that "the conventional usages of individual words change over time").

37. *Id.*

38. Whittington, *supra* note 27, at 377. One note on the use of legislative history. Many originalists criticize the use of legislative history to the point that some think that originalists may never under any circumstance rely on legislative history. *See* Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 697 (2019). That view holds when an interpreter relies on legislative history to decipher the intent behind the words being interpreted. But what legislators understand a particular word or phrase to mean may be relevant to discovering the original public meaning of the word or phrase at the time. *See* Justin W. Aimonetti, *Confining Custody*, 53 CREIGHTON L. REV. 509, 514 (2020) (exploring what members of the First Congress understood the word "custody" to mean to assist with discovering the original public meaning of the word).

39. 142 S. Ct. at 2154.

original public meaning sometimes leaves substantial indeterminacies,[40] originalists do not strive to tell the entire social history leading to the adoption of the text at issue. The Fixation Thesis, in short, calls on lawyers to utilize the lawyer's toolbox to uncover the original meaning of language people at some point in the past took the time to write down.

B. The Constraint Principle

The Constraint Principle represents originalism's left bumper. The Constraint Principle stands for the following proposition: The text's fixed meaning ought to constrain the interpretive latitude of decisionmakers today.[41] Professor Randy Barnett has put the Principle this way: "[C]onstitutional actors ought to follow or be constrained or be influenced in their decisions by [the text's] fixed meaning."[42] The Constraint Principle strives to limit the influence of personal preference and public pressure,[43] rendering the interpreter and the process of interpretation "more legitimate."[44] An example of the Constraint Principle might help.

Return to the pie recipe. Your mother requests that you use the ancient family recipe to make a pie for Thanksgiving. The pinch-pound discrepancy becomes apparent within minutes of you getting started, and you take another ten to uncover that the two words meant the inverse in 1805. Personally, though, you prefer savory over sweet. Plus, saltier pies are the fashion of the day. But your mom—whose authority, as it should, controls—told you to follow the recipe. So, what do you do? Constrain yourself to the recipe as originally understood, or depart from the recipe and follow personal preferences and modern trends? Originalism's left bumper, the Constraint Principle, would have you, the baker, use the fixed meanings of pound and pinch and thus bake a sweeter rather than saltier pie.

The same logic applies to a judge utilizing originalism. Rather than interpret a word in accordance with its contemporary meaning, the judge should interpret the word in accordance with its original public meaning and then constrain later

40. Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 149 (2015); Baude & Sachs, *supra* note 20, at 815.

41. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 460 (2013).

42. Rueter, Hardiman, Barrett, Dorf, Prakash & Pildes, *supra* note 26, at 717.

43. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2213 (2017).

44. Rueter, Hardiman, Barrett, Dorf, Prakash & Pildes, *supra* note 26, at 698.

adjudication in harmony with that meaning.[45] Departing from the original public meaning increases the possibility of subjective decision-making.

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Taken together, the Fixation Thesis and the Constraint Principle dictate that textual meaning becomes fixed at the time of the text's adoption and that the discoverable historical meaning of the text has legal significance and is authoritative for purposes of judicial interpretation in the present.[46] This Article turns next to the noteworthy, yet understudied, case of *Holmes v. Walton*. In doing so, this Article shows that the judges who overturned the judgment in that case relied on the discoverable original public meaning of jury trial at the time of the state constitution's adoption and regarded that public meaning as authoritative for purposes of later interpretation.[47]

III. THE SAGA OF *HOLMES V. WALTON*

New Jersey, as a border state separating the American and British forces during the Revolutionary War, faced the daunting task of halting trade with enemy forces. Contraband smuggling jeopardized the American war effort.[48] And trade with the enemy undermined "the morale and loyalty of Americans" and gave "the British the means to reconnoiter American territory."[49] In response to the looming military crisis following the American defeat at the Battle of Monmouth, New Jersey sought ways to prohibit trade with the Redcoats.[50]

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45. The pie example provides a nice display of the interpretation-construction distinction. "[I]nterpretation refers to the process of determining a text's linguistic meaning, and construction refers to the process of giving the text legal effect." Amy Barrett, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law: Introduction*, 27 CONST. COMMENT 1, 1 (2010) (internal quotation marks omitted); *see* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96. (2010). Here, the baker interprets the words pound and pinch and then constructs those words by giving effect to them (i.e., baking a sweeter rather than saltier pie).

46. Whittington, *supra* note 27, at 377–78; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (defining the "basic theory" behind the variations of originalism). Originalism's bumpers taken together thus place two tasks on those relying on an originalist methodology: (1) using a set of tools and practices to discover the fixed communicative content of text at the time of its adoption and (2) confining further action so that it is consistent with that meaning. *See* Solum, *supra* note 24, at 270,

47. Whittington, *supra* note 27, at 377.

48. HAMBURGER, *supra* note 10, at 409; Austin Scott, Holmes vs. Walton: *The New Jersey Precedent*, 4 AM. HIST. REV. 456, 461 (1899).

49. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 152 (2014).

50. Scott, *supra* note 48, at 456.

In 1778, Governor William Livingston of New Jersey enjoined "civil and military Officers of the counties of Monmouth and Bergen to use their utmost vigilance in preventing all commercial intercourse with the enemy."[51] Governor Livingston also called on the New Jersey General Assembly to act, noting that contraband smuggling across the battlelines represented "one of the most important Objects that can engage the Attention of the Legislature."[52] Sounding the Governor's call, the General Assembly enacted the Enemy Seizure Act of 1778 without a dissenting vote.[53]

The Enemy Seizure Act authorized an individual to seize contraband crossing enemy lines and to secure title to the seized contraband pursuant to a jury's judgment.[54] Specifically, the Act made it "lawful for any person or persons whomsoever to seize and secure provisions, goods, wares and merchandize attempted to be carried or conveyed into or brought from within the lines or encampments or any place in the possession of the subjects or troops of the King of Great Britain."[55] The Act also permitted those who seized contraband to obtain title to the goods with a judgment from a jury of only six jurors rather than twelve.[56] The General Assembly thought summary proceedings essential to the war effort and therefore allowed for "hearings in front of justices of the peace and truncated juries."[57]

Pursuant to the Enemy Seizure Act, Elisha Walton, an American officer in the patriot militia, seized goods from two local New Jersey business partners, John Holmes and Solomon Ketchamere.[58] Two days after seizing the businessmen's goods, Walton "obtained a trial before a sympathetic justice of the peace, John Anderson, who rapidly called a six-man jury, heard the evidence, and gave judgment for Walton."[59] With a forfeiture judgment in hand, Walton obtained title to a hundred yards of silk, additional textile products, and other goods worth a considerable sum.[60] The result of the trial surprised few, as

51. HAMBURGER, *supra* note 10, at 409.

52. *Id.*

53. Scott, *supra* note 48, at 461.

54. HAMBURGER, *supra* note 10, at 409.

55. Scott, *supra* note 48, at 456.

56. *Id.* at 456–57.

57. *See* HAMBURGER, *supra* note 49, at 152.

58. HAMBURGER, *supra* note 10, at 412; William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 474 (2005); Scott, *supra* note 48, at 457.

59. HAMBURGER, *supra* note 10, at 412.

60. Treanor, *supra* note 58, at 474; Scott, *supra* note 48, at 457.

the situation on the ground and circumstances surrounding the war "were as necessitous as any in American history."[61]

Holmes and Ketchamere, through their attorney William Willcocks, challenged the forfeiture judgment rendered by the six-member jury.[62] Leading up to oral argument, Willcocks lodged with the court various reasons for reversal, "including the unconstitutionality of the trial with six jurors."[63] Willcocks referenced Section XXII of the New Jersey Constitution, which stated "*that the inestimable right of trial by jury* shall remain confirmed as a part of the law of this colony, without repeal forever."[64] Based on the constitution's guarantee of the inestimable right, Willcocks argued that the court should reverse the judgment because "the [j]ury . . . consisted of six men only" contrary to the constitution of New Jersey.[65]

While the court considered Willcocks's constitutional claim, Governor Livingston, who had once served as a Justice on New York's Supreme Court, heard a rumor that the court found Willcocks's constitutional challenge persuasive.[66] In response, Governor Livingston quipped that "I should be sorry that the supposed Event of the Controversy should give the Tories any Cause of Triumph; but the Judges you know are bound to determine according to Law in whose favour soever that may appear to be, let the Consequences be what they may."[67]

Rumors proved true. The court delivered its decision in September 1780, reversing the judgment rendered against Holmes and Ketchamere and directing "the Judgment of the Justice in the Court below be revers'd and said Plaintiffs be restored to all Things."[68] Unfortunately, the opinion of the court is lost to history.[69] Yet primary and archival sources confirm that the court "concluded that the legislature was prohibited by law . . . from abrogating the customary right to trial by a twelve-member jury."[70] The court, in other words, reversed

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61. HAMBURGER, *supra* note 49, at 152.

62. HAMBURGER, *supra* note 10, at 413.

63. *Id.* at 414.

64. Scott, *supra* note 48, at 458 (emphasis added).

65. HAMBURGER, *supra* note 10, at 414–15.

66. *Id.* at 416.

67. *Id.*

68. *Id.*

69. *See* Scott, *supra* note 48, at 459.

70. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1709 (2012). Then-contemporary evidence sheds light on the court's reasoning, demonstrating that the court "met the question of constitutionality squarely" and deemed the law repugnant because it conflicted with the guarantee of a jury trial. United States v. Jepson, 90 F. Supp.

the judgment "on the ground that the legislature's authorization of six person juries violated the state's constitutional guarantee of the 'inestimable right of trial by jury.' "[71]

IV. *HOLMES V. WALTON* AND ITS ORIGINALIST UNDERPINNINGS

Though acclaimed as one of the earliest examples of judicial review in North America, *Holmes v. Walton* should also be recognized for its originalist underpinnings. This Article argues that the New Jersey Supreme Court reached a quintessentially originalist outcome and almost assuredly relied on originalism's two bumpers to arrive at that outcome. The court, in other words, relied on the Fixation Thesis and the Constraint Principle to deem the statute permitting a six-member jury to render a judgment repugnant to the state constitution.

Start with the Fixation Thesis. Recall that the Fixation Thesis stands for the proposition that the original meaning of text is fixed when the text is framed and ratified.[72] In 1776, the people of New Jersey passed and ratified Section XXII of the New Jersey constitution, which guaranteed "*the inestimable right of trial by jury*" in both civil and criminal cases.[73] The New Jersey Constitution

983, 990 (D.N.J. 1950); *see* HAMBURGER, *supra* note 10, at 416; Scott, *supra* note 48, at 460. Consider just three historical episodes that show the court deemed the Enemy Seizure Act unconstitutional as repugnant to the state constitution. First, in the months after the court rendered its decision, some residents from northern New Jersey complained to the General Assembly that the court had "set aside some of the Laws as unconstitutional." HAMBURGER, *supra* note 10, at 417; Scott, *supra* note 48, at 459 ("On the afternoon of the 8th of December, 1780, in the House of Assembly, 'a petition from sixty inhabitants of the county of Monmouth was presented and read, complaining that the justices of the Supreme Court have set aside some of the laws as unconstitutional, and made void the proceedings of the magistrates . . . .' "). Second, after Walton obtained a new trial against Holmes and Ketchamere, Willcocks argued to the court that "as a trial by six men is unconstitutional there is no law existing by which this cause could be tried." HAMBURGER, *supra* note 10, at 417. Third, Justice Kilpatrick in 1802 wrote in the case of *State vs. Parkhurst* that in *Holmes v. Walton* "it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional, and in that case inoperative." State v. Parkhurst, 9 N.J.L. 427, 444 (1802).

71. HAMBURGER, *supra* note 49 (quoting N.J. CONST. of 1776, art. XXII); HAMBURGER, *supra* note 10, at 415; Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 543 (2006) ("In New Jersey in 1780, state court judges found a legislatively authorized six-man jury contrary to the new state constitution."); Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 346 (2021).

72. Solum, *supra* note 3, at 1.

73. N.J. CONST. of 1776, art. XXII (emphasis added); *see* Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 796 (2020) ("David Brearly helped draft the New Jersey

did not specify what number of jurors constituted a legitimate jury.[74] Without a set number of jurors specified in the text, the court looked to the original meaning of jury trial.

In 1776, a reasonable ordinary person would have understood the right to a jury trial to have a particular meaning.[75] At that time, the trial by jury had a well-recognized history and represented "the essential mechanism for deciding factual questions at common law" and for adjudging the guilt of a criminal defendant.[76] Indeed, "the right to trial by jury had been in existence in England and linked to credible sources, such as the Magna Carta."[77] With time, Englishmen viewed juries as "the most representative institution available to the English people."[78]

Importantly, the reasonable person at the time would have understood a jury as requiring twelve jurors for it to constitute a legitimate jury.[79] The twelve-

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Constitution of 1776 and served as the Chief Justice of New Jersey; in this capacity, he decided the case of *Holmes v. Walton*—cited in *State v. Parkhurst*—which struck down a state law as unconstitutional."). *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2015) (exploring the importance of the states and their constitutions in the development of the federal republic and federal constitutional rights).

74. Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 849 (2006); Moore, *supra* note 10, at 353 ("New Jersey's constitutional text, like that of the later federal Constitution, was silent on the question of how many jurors would satisfy its most fundamental guarantee.").

75. John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 937–38 (2021) ("[U]ncertainties can be reduced by the rule that directs interpreters to look to the history of an institution to understand how it operated. Thus, a provision relating to a jury, which might have been vague in ordinary language, is assigned a specific meaning based on how that institution functioned over time.").

76. HAMBURGER, *supra* note 10, at 407.

77. Luzan Moore, *One Less Juror: A Defendant's Right to Juror Substitution*, 29 TOURO L. REV. 1513, 1515 (2013).

78. Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649–1670*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800 at 182, 182 (J.S. Cockburn & Thomas A. Green eds., 1988); *see also* Justin W. Aimonetti & Jackson A. Myers, *The Founders' Multi-Purpose Chief Justice: The English Origins of the American Chief Justiceship*, 124 W. VA. L. REV. 203, 207 (2021) (explaining that text adopted around the time of the Founding should be viewed from a transatlantic perspective because doing so may reveal a deeper understanding of the original public meaning of the text at issue).

79. *See* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 5 (1993) ("When the Founders drafted the Bill of Rights to include the Seventh Amendment, a jury of twelve was what they contemplated: the common law of England had fixed the number at twelve over four hundred years before the drafting of the Bill of Rights. Furthermore, it was a scholarly axiom at the time the Bill of Rights was drafted that a jury was comprised of twelve. This clearly was the understanding of the Founding Generation . . . ."); Alisa Smith & Michael J. Saks, *The Case for Overturning* Williams v. Florida *and the Six-Person Jury:*

member jury dates back to at least 1066, when William the Conqueror brought across the English channel the practice of trial by jury in civil and criminal cases.[80] Indeed, when the people of New Jersey adopted their constitution, "the twelve-person unanimous criminal jury was an institution with a nearly four-hundred-year-old tradition in England."[81] Blackstone's Commentaries identified a trial by twelve as fundamental: No person could be found guilty of a serious crime unless "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbours indifferently chosen, and superior to all suspicion."[82] Blackstone sounded a similar tune for civil matters: "For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men."[83] In light of that history, it should come as no surprise that colonial Virginia's Charter of Jamestown "established the twelve-person jury in 1607."[84] Nor should it come as a surprise that a "flurry of state-court decisions" reported soon after the Constitutional Convention understood a legitimate jury to require twelve jurors.[85]

Consider, too, that the historical record suggests that the court in *Holmes v. Walton* "relied on seventeenth-century sources in refusing to apply a state statute that required loyalists to challenge a seizure of their property before a six-person jury."[86] In particular, the 1699 Declaration of Rights and Privileges

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History, Law, and Empirical Evidence, 60 FLA. L. REV. 441, 448 (2008) ("Throughout 700 years of common-law jurisprudence, no historical evidence supports juries of numbers other than twelve.").

80. *See* Arnold, *supra* note 79, at 3 ("For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve persons.").

81. Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 643 (1998); Smith & Saks, *supra* note 79, at 447 ("The number of jurors at the time of adoption—and for centuries of common-law history preceding the Sixth Amendment—was set at twelve.").

82. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769).

83. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (1768).

84. *Developments in* the *Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1468 (1997).

85. Miller, *supra* note 81, at 643–44 n.133 (1998) (collecting cases); *see also* Work v. State, 2 Ohio St. 296, 304 (1853) ("[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, must be confirmed by the unanimous suffrage of twelve of his equals and neighbors, and superior to all suspicion,' before the accused can be subjected to any manner of punishment.") (emphasis and internal quotation mark omitted) (quoting Blackstone, *supra* note 82, at 343). *But see* H. Richmond Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 534 (1973) ("Juries of less than twelve are not new to America. They were used in early colonial times and even in the first days of our nation when our native common law was developing.").

86. *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 39 (2001).

emanating from the East Jersey House of Representatives and the West Jersey Concessions and Agreements of 1676, "provided that trials shall be by 'twelve honest men of the neighborhood' and 'by the verdict of twelve men,' respectively."[87] What's more, "the right of trial by twelve jurors had fundamental constitutional status in New Jersey independent of colonial charters, acts of assembly, or even the constitutional text."[88] To determine the original, fixed meaning of jury trial, then, it seems clear that the court looked to a combination of source material, including the " 'common law of England,' 'immemorial custom,' and prior colonial charters."[89]

Move next to the Constraint Principle. After unearthing the original public meaning of jury trial, the court "measured the statute against the state constitution, found that the former violated the latter, and refused to apply it to the case at hand."[90] The court, in other words, constrained its decision-making to the fixed meaning of jury trial. The court could have concluded that Holmes and Ketchamere had received a jury trial (six jurors notwithstanding).[91] The court could have also looked around, noticed the battle being waged against the globe's superpower, and upheld the judgment because a contrary result would have dampened the American cause. But the court chose neither option. Instead, and in the face of "profound military and economic emergencies," the court recognized its "duty to follow the law, and [it] therefore . . . held the summary administrative proceedings unconstitutional for violating jury rights."[92] Because a jury of six jurors was not a jury as originally understood, the court held that the "legislature's emergency establishment of administrative summary proceedings had to give way to the constitution."[93]

The New Jersey Supreme Court in *Holmes v. Walton* relied on originalism's bumpers, as the court confined itself to "the traditional meaning of jury in its decision."[94] It, in conformity with the Fixation Thesis, "consult[ed] background

87. Treanor, *supra* note 58, at 475; Scott, *supra* note 48, at 459.

88. Moore, *supra* note 10, at 356.

89. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 630 (2009) (quoting Scott, *supra* note 48, at 458–49).

90. Hulsebosch, *supra* note 74, at 849.

91. Moore, *supra* note 10, at 354 ("The court could have affirmed the verdict in Walton's favor, but could not have reversed it, based on a literal application of article XXII. There had been a 'trial by jury.' Because the constitutional text did not specify how many jurors were required, the court quite plausibly could have affirmed the verdict on textual grounds.").

92. HAMBURGER, *supra* note 49, at 154.

93. *Id.* at 152.

94. McGinnis & Rappaport, *supra* note 6, at 795.

principles" to understand the original meaning of jury trial.[95] The court next, in conformity with the Constraint Principle, "interpreted jury as a term that in light of its history required twelve individuals."[96] At bottom, then, *Holmes* not only "provides more evidence that judicial review" in the late eighteenth century "did not require courts to defer to any possible meaning of the text, but that they read the text in light of historical traditions" and often decided cases in accordance with originalism's bumpers.[97]

V. TAKEAWAYS FROM *HOLMES V. WALTON* FOR ORIGINALISM AND BEYOND

The Justices of the New Jersey Supreme Court had a choice when ruling in *Holmes v. Walton* on the constitutionality of the jury's judgment. They could have found a way to reason around the constitutional challenge and upheld the judgment to further American war effort. Or they could have thrown out the judgment as repugnant to the state's constitutional guarantee to a jury trial. History confirms that the court chose the latter over the former. And that result is significant for at least three reasons. First, *Holmes* undercuts a common criticism of originalism—that the methodology originated in the late twentieth century. Second, *Holmes* demonstrates the virtues of originalism as both an internal and external constraint on judging. In times of crisis, originalism constrains judicial decision-making and safeguards the rule of law. Third, *Holmes* casts doubt on the original correctness of current Supreme Court doctrine, which has read the jury trial guarantees enshrined in both the Sixth and Seventh Amendments as permitting a jury of only six rather than requiring twelve.

A. A Common Misconception

It is a common misconception that originalism as an interpretive methodology is a product of recent vintage.[98] As Professor Lee Strang has

95. *Id.* at 795 n.159; Buenger, *supra* note 10, at 582 ("[I]n New Jersey as early as 1779 in *Holmes v. Walton*, a case challenging a conviction by a jury of six, not twelve, as the Constitution of New Jersey required through an extension of English common law.").

96. John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 884 (2016).

97. *Id.*

98. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545 (2006) ("[O]riginalism became a central organizing principle for the Reagan Justice Department's assault on what it regarded as a liberal federal judiciary."); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 13 (2009) ("Originalism is the instrument and the beneficiary of a deliberate decision by former Attorney General Edwin Meese and others to structure the Reagan Justice Department's critique of the Warren and Burger Courts in jurisprudential terms."); NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S

documented, the goal of interpretation during the early Republic "was to ascertain the lawmaker's fixed communicated meaning" through conventional interpretive tools.[99] During that era, judges for the most part avoided relying on "contemporary meaning or normative considerations" when exercising their judicial duty.[100] In the words of Chief Justice Marshall:

> [T]he intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers.[101]

Lawyers and historians alike have shown that "originalism has been [in use] since the Republic's beginning" and that the methodological approach to interpretation dominated the judiciary up until the New Deal Era.[102] The outcome in *Holmes v. Walton* adds additional support to the contention that originalism served as a judicial mainstay for much of the nation's early history. Judges, even before the ratification of the federal Constitution, unearthed the fixed meaning of textual provisions and constrained the latitude of their judicial decision-making in accordance with that fixed meaning. In short, judges then, as many do now, interpreted text as meaning the same as "it meant when adopted."[103]

B. Originalism as a Constraining Force

On top of demonstrating that originalism as an interpretive methodology is not a product of the late twentieth century, *Holmes v. Walton* also highlights a key virtue of originalism—its ability to constrain judicial subjectivity and thus

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GREAT SUPREME COURT JUSTICES 145 (2010) (contending that Justice Black, who warmed a seat on the Supreme Court in the 1960s and 70s, is "the inventor of originalism"); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716 (2011) ("Originalism, as a distinct theory of constitutional interpretation, arose as a by-product of the conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts."); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 908 (2008) ("The idea of originalism as an exclusive theory, as the criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s.") (emphasis omitted).

99. STRANG, *supra* note 4, at 11.

100. *Id.*

101. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

102. STRANG, *supra* note 4, at 2; State v. Walker, 267 P.3d 210, 216 n.1 (Utah 2011) (collecting cases from the early Republic that relied on originalism).

103. South Carolina v. United States, 199 U.S. 437, 448 (1905).

honor the legitimate authority of the people who ratified the governing text.[104] Recall that New Jersey stood at the forefront of the American war effort for independence. A judicial decision from the state's supreme court in favor of the contraband smugglers posed a real danger of spiraling into a "serious military setback."[105] And the judges of the court acknowledged the potential ramifications of holding "an essential wartime measure unconstitutional."[106] But hold the law unconstitutional is what they did. In doing so, the court adhered to the original meaning of the Constitution's text and thus privileged the will of the people who had adopted the law over the crisis of the moment.[107]

The court's decision in *Holmes v. Walton* demonstrates the virtues of originalism as an internal and external constraint on judging. Originalism walls off, or at least reduces, "certain considerations that might . . . tempt[]" a judge.[108] That is not to say originalism eliminates all judicial discretion in judicial adjudication. But it is to say that originalism cabins free-wheeling judicial decision-making and thereby honors the will of the people who adopted the law.[109] Originalism also provides a framework that permits outsiders looking in to judge for themselves whether the judicial reasoning has departed from or aligns with the original public meaning of the text that has been interpreted.[110]

Contrast *Korematsu v. United States* with *Holmes v. Walton*. In *Korematsu*, a majority of the Supreme Court, "unmoored from originalist principles, upheld the executive internment without trial of American citizens of Japanese descent despite [the federal] Constitution's express guarantees of due process and equal

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104. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 271 (2005) (noting that judges naturally drift toward originalism when dealing with issues of first impression because it constrains their decision-making latitude); *see also* Lawrence B. Solum, *Construction and Constraint: Discussion of Living Originalism*, 7 JERUSALEM REV. LEGAL STUD. 17, 18 (2013) ("Constrained by original meaning, the Justices would no longer be free to impose their own views about controversial issues in the guise of constitutional interpretation.").

105. HAMBURGER, *supra* note 10, at 420.

106. *Id.* at 418.

107. The judges stuck to original meaning of their Constitution rather than reducing it "to an empty shell" into which the judges could pour their own preferences or other normative considerations. BERGER, *supra* note 2, at 314–15 (arguing that non-originalist constitutional interpretation "reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences").

108. Baude, *supra* note 43, at 2224.

109. Sachs, *supra* note 21, at 819 ("Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. Our law happens to consist of their law, the Founders' law, including lawful changes made along the way.") (emphasis omitted).

110. *See supra* text accompanying note 17.

protection of the laws."[111] The decision in *Korematsu* cannot "be defended as correct in light of the Constitution's original meaning," as it "depended on serious judicial invention by judges who misguidedly thought they were providing a 'good' answer to a pressing social problem of the day."[112] Simply put, the Court pursued "political ends through judicial means."[113] It upheld the constitutionality of the executive order not because the Constitution demanded that result, but rather to advance the American war effort.

By contrast, the New Jersey Supreme Court in *Holmes v. Walton* elevated the rule of law above the realities on the ground when it disallowed the state statute permitting a jury of only six. The decision in *Holmes*, unlike the decision in *Korematsu*, can and should be defended as correct in light of the New Jersey Constitution's original meaning. The court's decision in *Holmes* to grant loyalists relief stemmed from judges putting personal preference to the side and sticking to the original meaning of the state constitution's text. The stark contrast between *Korematsu v. United States* and *Holmes v. Walton* shows that by serving as an internal and external constraint on judging, originalism "preserv[es] the people's legitimate political authority" and safeguards the rule of law.[114]

C. Current Supreme Court Doctrine Stands on Unsteady Footing

In addition to undercutting a common criticism of originalism and showing that originalism operates as an internal and external constrain on judging, *Holmes v. Walton* adds another reason to doubt the original correctness of the United States Supreme Court's 1970 decision in *Williams v. Florida* and its 1973 decision in *Colgrove v. Battin*.[115] Additional background shows why.[116]

Start first with jury trials in criminal cases. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[117] For much of the nation's history, the

111. Gorsuch, *supra* note 14.

112. *Id.*

113. *Id.*

114. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 52 (2022).

115. Williams v. Florida, 399 U.S. 78, 89–92 (1970); Colgrove v. Battin, 413 U.S 149, 157 (1973).

116. As noted *supra* note 18, Justice Gorsuch penned a forceful dissent from the denial of certiorari involving a request for the Court to reconsider its precedent permitting a jury of less than twelve to convict. *See Khorrami v. Arizona*, No. 21-1553, 2022 WL 16726030, at *1 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari). This Article strengthens Justice Gorsuch's well-reasoned dissent and provides further historical fodder in support of the view that the original public meaning of the Constitution requires a criminal trial before 12 members of the community.

117. U.S. CONST. amend. VI.

Supreme Court had suggested that the Sixth Amendment right to a jury trial guaranteed a defendant in all criminal proceedings a twelve-member jury.[118] In *Thompson v. Utah*, for instance, the Court addressed the question "whether the jury referred to in the original [C]onstitution and in the [S]ixth [A]mendment is a jury constituted, as it was at common law, of twelve persons."[119] The Court concluded in the affirmative, writing that "the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of *twelve jurors*."[120] The Court later reiterated the Constitutional guarantee of a twelve-member jury in *Patton v. United States*. There, the Court, looking again to common law and English history, stated that a "constitutional jury means *twelve men* as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person."[121] The Court added for good measure that "the jury should consist of *twelve men*, neither more nor less."[122]

Decades later, in the 1970 case of *Williams v. Florida*, the Court departed from the history and common law when it upheld a Florida statute that provided for a six-member jury in all noncapital cases. Justice White, writing for the majority, conceded that previous opinions had suggested that a legitimate criminal jury must consist of twelve jurors, yet he deemed such prior statements unpersuasive and nonbinding.[123] Justice White instead stated nothing "suggests . . . that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution."[124] Rather, in his view, the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial."[125] Basing the decision on functional considerations, the Court labelled the deeply

118. Rochin v. California, 342 U.S. 165, 170 (1952) ("No changes or chances can alter the content of the verbal symbol of 'jury'—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant.").

119. 170 U.S. 343, 349 (1898), *overruled by* Collins v. Youngblood, 497 U.S. 37, 51–52 (1990), *and abrogated by* Williams v. Florida, 399 U.S. 78, 101 (1970).

120. *Thomson*, 170 U.S. at 353 (emphasis added).

121. Patton v. United States, 281 U.S. 276, 292 (1930), *abrogated by* Williams v. Florida, 399 U.S. 78, 101 (1970) (emphasis added).

122. *Patton*, 281 U.S. at 288 (emphasis added).

123. Williams v. Florida, 399 U.S. 78, 90–93 (1970).

124. *Id.* at 99.

125. *Id.* at 99–100.

rooted right to a jury of twelve "a historical accident, unnecessary to effect the purposes of the jury system."[126] As a result, "state provisions allowing for fewer than twelve jurors in a criminal trial have withstood federal constitutional challenges" ever since the 1970 decision of *Williams v. Florida*.[127]

Though *Williams* involved criminal juries in state courts, the decision's rationale soon spread to the Seventh Amendment's guarantee of civil juries in federal court.[128] The Seventh 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."[129] Three years after *Williams*, the Supreme Court in *Colgrove v. Battin* held that the Seventh Amendment permitted six-member juries in federal civil cases.[130] The *Colgrove* Court embraced the same functional rationale it developed in *Williams*, drawing on the results of scientific studies rather original meaning.[131] In doing so, the Court concluded that a departure from the twelve-member standard in federal civil cases would do no violence to any "substantive aspect of the right of trial by jury."[132] And the Court did not care that "twelve jurors was a well-established limitation on [a civil] jury size in 1791" because reducing a civil jury from twelve to six members did not impair the fundamental role of the jury.[133] Justice Thurgood Marshall penned a fiery dissent, noting that when "a historical approach is applied to the issue at hand, it cannot be doubted that the Framers envisioned a jury of 12 when they referred to trial by jury."[134]

Originalists should not only question the methodological underpinnings of both *Williams v. Florida* and *Colgrove v. Battin* for straying from the original meaning of jury trial, but good reason exists to doubt the continued legitimacy of at least *Williams v. Florida* in the wake of intervening Supreme Court

126. *Id.* at 102; *see also* United States v. Gaudin, 515 U.S. 506, 511 n.2 (1995) ("We held in *Williams v. Florida*, that the 12–person requirement to which Story referred is not an indispensable component of the right to trial by jury.") (citation omitted).

127. People v. Taylor, 503 P.3d 912, 916 (Colo. App. 2021). *But see* Ballew v. Georgia, 435 U.S. 223, 245 (1978) (holding that defendant's "trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments").

128. *Developments in the Law—The Civil Jury*, *supra* note 84, at 1475.

129. U.S. CONST. amend. VII.

130. Colgrove v. Battin, 413 U.S. 149, 160 (1973).

131. *Id.* at 157.

132. *Id.*; *see* Miller, *supra* note 81, at 628–29.

133. Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 923 (2013).

134. *Colgrove*, 413 U.S. at 176 (Marshall, J., dissenting).

precedent.[135] In the 2020 case of *Ramos v. Louisiana*, the Court held that the Sixth Amendment requires unanimity among the votes of jurors in criminal cases.[136] In reaching that result, the Court noted that history supports the view that no person could be found guilty of a serious crime unless convicted "by the unanimous suffrage of twelve of his equals and neighbors."[137] The Court's mention of the history of twelve-member jurors followed close on the heels of some justices identifying *Williams v. Florida* as a dubious precedent.[138] Casting doubt on *Williams v. Florida* makes sense because laws permitting a jury of fewer than twelve members are "hard to reconcile with an idea that our Constitution can be legitimately altered only by amendment."[139] Plus, *Holmes v. Walton* adds just another reason why the Court should reconsider and "abandon *Williams* [*v. Florida*] and return to the originalist position of twelve-member juries."[140] The same should hold true for *Colgrove v. Battin*.[141]

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135. *See* Wofford v. Woods, 969 F.3d 685, 707 n.27 (6th Cir. 2020) ("Juries of less than twelve were upheld in *Williams v. Florida*. [But] *Williams* may no longer be completely sound after *Ramos* [*v. Louisiana*].") (citations omitted); State v. Khorrami, No. 1 CA-CR 20-0088, 2021 WL 3197499, at *9 (Ariz. Ct. App. July 29, 2021), *review denied*, (Feb. 8, 2022) ("In *Ramos*, however, the Supreme Court did not address any issue of constitutionally permissible jury size, much less overrule *Williams*. Rather, the Supreme Court said due process requires unanimous verdicts in criminal trials.") (emphasis omitted).

136. 140 S. Ct. 1390, 1395 (2020).

137. *Id.*; *see also* Blakely v. Washington, 542 U.S. 296, 301 (2004) (making the same point).

138. McDonald v. City of Chicago, 561 U.S. 742, 867–68 (2010) (Stevens, J. dissenting).

139. Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 34–35 (2004); *see also* William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 108 (2016) ("We likewise doubt the pedigree of modern cases on . . . jury numbers."); Jordan Gross, *Incorporation by Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with the Supreme Court's Regulation of State Courts*, 109 KY. L.J. 299, 343 (2021) ("Following *Ramos*, although a state may use a six-person jury, it must be unanimous.").

140. Lessard v. State, 232 So. 3d 13, 18 (Fla. Dist. Ct. App. 2017) (Makar, J., concurring) (emphasis added). Whether a decision overruling *Williams v. Florida* would apply retroactively is a question beyond the scope of this Article. The answer, however, seems almost certainly no in light of *Edwards v. Vannoy.* Edwards v. Vannoy 141 S. Ct. 1547, 1562 (2021) ("[N]ew procedural rules do not apply retroactively on federal collateral review."); *Khorrami v. Arizona*, No. 21-1553, 2022 WL 16726030, at *1 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari) ("*Williams* was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts.").

141. The Seventh Amendment has not been incorporated to the states. As a result, state juries with less than twelve members would remain permissible even if the Court overruled *Colgrove v. Battin*.

V. CONCLUDING REMARKS

The New Jersey Supreme Court's decision in *Holmes v. Walton* bears the hallmarks of an originalist decision. The court ruled in conformity with the Fixation Thesis and the Constraint Principle. It looked to the fixed meaning of jury trial as understood in 1776 and then constrained itself to that fixed meaning when deciding the legal question presented. By relying on the two animating principles of originalism to reach an originalist outcome, the court's decision in *Holmes v. Walton* pushes back against the common misconception that originalism is a product of the late twentieth century; it highlights the virtues of originalism as an internal and external constraint on judging; and it casts doubt on the original correctness of *Williams v. Florida* and *Colgrove v. Battin*. In the face of growing calls from non-originalists and common good constitutionalists to throw originalism overboard, this Article contends that originalists today should look to past cases like *Holmes v. Walton* for guidance and support. Though some doubt the workability of originalism, old cases like *Holmes v. Walton* should inspire confidence in the continued benefits of the interpretive methodology. As demonstrated by *Holmes v. Walton*, originalism honors the will of the people who adopted the written law, serves as an internal and external constraint on judging, and preserves the rule of law.