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Nullifying History: Modern-Day Misuse of the Right to Decide the Law

David A. Pepper

NULLIFYING HISTORY: MODERN-DAY MISUSE OF THE RIGHT TO DECIDE THE LAW

David A. Pepper[†]

INTRODUCTION

A battle over competing visions of American democracy, fought in decades and centuries past, has resurfaced in law reviews,[1] as well as inside[2] and outside[3] courtrooms, in recent decades. On one side stands our current system of law making and law interpreting, based on the notion that our nation's laws should emanate from a carefully structured process, anchored in formal elections by the people and a formal law-making regime to which the people's elected representatives must adhere. It is a democracy based ultimately on the popular will, but with a web of procedural controls aimed to ensure that laws are enacted properly, consistently, with deliberation, and in a manner which best represents the views of the majority (while not falling below certain constitutional limitations). A crucial aspect of this vision is that courts, and the juries that serve them, are obliged to follow in good faith the law as enacted.

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† Law Clerk, the Honorable Nathaniel Jones, U.S. Court of Appeals for the Sixth Circuit. J.D. Yale Law School, 1999; B.A. Yale College, 1993. I would like to thank Professor Abraham Goldstein for his active and helpful guidance throughout this project, as well as the participants in the Spring 1999 Criminal Jury Seminar at the Yale Law School for their feedback on an early draft of this paper. Thanks in particular to R. Craig Green and Laura Ahn for their always-insightful comments and criticisms.

[1] *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 667 (1995); *see also* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996); Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989).

[2] *See, e.g.*, United States v. Thomas, 116 F.3d 606 (2d Cir. 1997); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

[3] The Fully Informed Jury Association (FIJA), among its other proposed reforms, proposes abolishing jury "oaths" because "the law belongs to the people . . . and it is always theirs to apply or not apply as they see fit." *See Needed Jury System Reforms* (visited August 26, 1999) http://nowscape.com/fija/_maxi.html. FIJA often distributes its literature to juries as they enter courthouses. *See id.* FIJA has convinced numerous state legislators to introduce bills to inform jurors of their power to nullify, and undertaken other similar lobbying steps. *See* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 942, 944 nn. 285-89 (1999).

On the other side of the battle stands a starkly different vision of democracy. Voiced by scholars as well as grass roots groups, this vision challenges the relatively rigid law-making process described above. The people, it argues, should have more direct control over the making of the laws than the current system allows. More specifically, *juries* have a far more crucial role to play in our democracy. Rather than simply following the law as passed by the legislature in its representative capacity, juries provide a second institution through which the people can and should exercise law-making and law-rejecting powers. Indeed, when they deem it appropriate, jurors have a right to enact their communal or personal norms in direct contravention of formally enacted laws. Voters left disenfranchised by laws passed without their support can in effect strike down those same laws in their capacity as jurors. This argument is commonly termed nullification.

These visions of democracy directly clash on one plane in particular—the question of whether we should maintain our current system's acceptance of juries' *power* to nullify law, or accept the argument that juries possess the *right* to nullify laws. The former, the "power" to nullify, results naturally from the combination of (1) our system of formal lawmaking; (2) our belief in judicial and juror independence and autonomy; and (3) our principles against double jeopardy. These factors together allow a jury to acquit a defendant with impunity for whatever reason it desires (including disagreement with the underlying law), and of course, that defendant cannot be retried under the relevant law. Importantly, this *power* to nullify emanates not at all from a notion that jurors should play a role in law making. In that realm, the people's role remains confined to voting. In contrast, the *right* to nullify, although appearing quite similar to the power to do so, emerges from the radically different vision of democracy described above. Accepting nullification as a right would introduce not only a vastly different role for juries within the operation of our democratic system, but would bring a host of smaller changes at trials themselves, such as requiring judges to inform juries of their right to nullify,[4] not allowing judges to remove "nullifying" jurors from juries,[5] and eliminating many of the safeguards that maximize

[4] *See* United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (rejecting an argument that a judge should instruct a jury on the history of nullification).

[5] *See generally Thomas*, 116 F.3d 606 (removing a juror who revealed his intention to nullify).

jurors' ability to apply the law they are given to the facts in question without distraction.[6]

Even this narrower debate of whether juries have the *right* or only the *power* to nullify takes place on many fronts.[7] This Article will join the foray on only one, but a crucial one. In recent decades, scholars who assert that juries have the right to nullify have pointed to American centuries past as evidence that such a right historically existed. In particular, these scholars call on the early American legal doctrine that juries possessed the "right to decide the law" as key precedent buttressing their modern-day claim of a nullification right. This ancient jury right, they assert, was no different than the right to nullify they wish for jurors to possess today. Indeed, some scholars claim it was more sweeping. They thus call on us to reclaim that tradition through nullification.

This Article will argue that the pro-nullification appeal to history is misconceived because it fails to analyze precisely what our American ancestors intended when they attributed to juries the "right to decide the law." Close analysis reveals that proponents of the jury's right to decide the law, joined by decisions granting juries that right, envisioned something considerably more constrained than today's "right to nullify." Indeed, this Article will show that the former right clearly did *not* warrant jurors to find a law or prosecution void, or to refuse to apply a law, for running counter to their personal notions of justice—which are precisely the prerogatives that today's nullification scholars want jurors to possess. The former "right," in other words, did not emerge from a notion that juries occupy a quasi-legislative tier in our democratic system, as today's pro-nullification scholars believe. These scholars' equation of the right to nullify and the right to decide the law is therefore fatally flawed.

Part I of this Article will introduce and summarize the pro-nullification historical account. This tale begins with the dawning of jury autonomy in England and the increasing authority of the jury in American colonial cases, and culminates with the reign of the "right to decide the law" in the first century after the Founding. Today's

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[6] *See generally* Needed Jury-System Reforms, *supra* note 3 (proposing the abolishment of juror oaths and greatly limiting jury instructions).

[7] For example, a number of scholars have argued against a right to nullify because the jury is not a democratically legitimate body. *See, e.g.*, Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2565 (1997) ("As a matter of democratic legitimacy, as well as constitutional law, the jury's power to nullify becomes more, not less, problematic when it is elevated to the status of putative right."). For a related and thoughtful exploration of the jury's role in a democratic system, and the extent to which a jury itself is democratic, see Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (1997).

pro-nullification scholars ask that we "return" to the days when jurors had the right to nullify at will.

Part II critiques this modern interpretation. It looks closely at the origins of the "right to decide the law," as well as the many sources that elaborated on the right as it existed in its heyday, to explore the meaning behind that right. In particular, it will highlight the central limitations on the right, which were always in place and which render the modern nullification scholar's analogy to that right flawed. Ironically, the very cases on which the pro-nullification account relies in describing a past right to nullify highlight the argument's errors. Part III summarizes the ways in which the two rights differed.

Part IV concludes the Article, arguing that nullification scholars will have to look elsewhere to support their case for the jury's right to nullify. At the very least, history is not on their side.

I. THE PRO-NULLIFICATION HISTORICAL ACCOUNT: FROM THE GLORY OF *BUSHELL'S CASE* TO THE TRAGEDY OF *SPARF & HANSEN*

In recent decades, pro-nullification scholars have called upon the past to argue for the jury's right to nullify.[8] They allege that a jury right to nullify has historically existed, and that, beginning with the Supreme Court case *Sparf & Hansen v. United States*,[9] an "anomaly" emerged where courts have rescinded that "right" ever since. After presenting these scholars' definition of nullification, this Part will summarize their historical account in two steps. First, it will present the broader historical account of jury nullification, utilizing Paul Butler's recent effort to extol the virtues of nullification as representative of the story espoused by pro-nullification scholars.[10] The Part will then examine in more detail the latter phase of that account: when the American jury possessed the right to decide law as well as fact.

A. *Defining Nullification: Deciding Against the Law for Non-Legal Reasons*

Although the term "nullification" is often used imprecisely,[11] those who call for a right to nullify espouse the same central princi-

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[8] *See, e.g.*, ABRAMSON, *supra* note 1 (presenting an historical argument for the existence of a *right* to nullify); Butler, *supra* note 1 (same); Scheflin, *supra* note 1 (same).

[9] 156 U.S. 51 (1895).

[10] Butler, *supra* note 1 (suggesting that African-American jurors should engage in jury nullification in certain cases).

[11] *See Thomas*, 116 F.3d at 614 (stating that "the term 'nullification' can cover a number of distinct, though related, phenomena"); *see also* Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 167 (1991) (explaining that the "[j]ury nullification debate . . . has been hampered by semantics").

ple—that juries can reject the formal law as they understand it if applying that law would offend their own notions of justice or morality. As described above, nullification therefore grants the jury a quasi-legislative function, allowing it to augment and check the results of our formal law-making procedures. A brief look at several scholars' views highlights this essential principle of the nullification account.

Paul Butler defines nullification in the following way: when a jury acquits a defendant whom it believes to be guilty of the crime charged because the jury *objects* to the criminal statute that the defendant violated or to the law's application to that defendant.[12] Butler makes clear that when he calls on African-American jurors to nullify, he is calling on them to "be guided by their view of what is 'just.'"[13] Professors Scheflin and Van Dyke define nullification similarly: when jurors, on the basis of conscience and mercy, refuse to convict a defendant who is technically guilty under the enacted law.[14] Professors Horowitz and Willging describe nullification as the power to acquit those who are legally guilty but *morally upright.* In other words, nullification is the right to deliver a verdict counter to both the law and evidence.[15] Finally, Professor Green characterizes nullification as a three-tiered hierarchy, with all three tiers including an element of defying the law based on moral or legal reasons.[16] In short, from all these perspectives, two key facets anchor an act of nullification: (1) it involves a decision *counter* to the formally enacted law;[17] and (2) it is

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[12] *See* Butler, *supra* note 1, at 700.

[13] *Id.* at 715.

[14] *See* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW AND CONTEMP. PROBS., Autumn 1980, at 51, 56. The authors go on to say that a nullification instruction would involve telling jurors to consider if "it would be *fair* and *just* to apply . . . the criminal law [against] an accused person, and that they should refuse to convict if a guilty verdict would be inconsistent with community standards of justice and fair play." *Id.* at 52.

[15] *See* Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787-1988*, 15 LAW. & HUM. BEHAV. 165, 165-66 (1991).

[16] *Strong nullification* occurs when the jury recognizes that a defendant's act is proscribed by the law but acquits because it does not believe the act *should be* proscribed. *Intermediate nullification* occurs when, although the act proved is properly classified as criminal, it is within a class of acts that do not *deserve* the punishment prescribed for them. *Weak nullification* occurs when, although the act proved is criminal and falls in a class of acts that may well deserve punishment, such punishment is *inappropriate* in the case at hand. *See generally* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE (1985).

[17] Professors Scheflin and Van Dyke try to cast their mode of nullification as not counter to law, but as "an integral part of the law itself" because it serves the "unique and vital function of smoothing the friction between law and justice, and between the people and their laws." Scheflin & Van Dyke, *supra* note 11, at 168; *see also* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997) (arguing that nullification often occurs "within" the rule of law). This does not change the central point that the courts are granting juries a quasi-legislative role—acting as representatives "smoothing" and molding the law based on their own notions of justice. Without addressing that broader intra-legal theory of nullifica-

one based on an *extra-legal* justification (meaning a justification that arises from the jury's own sense of justice and morality, rather than one that adheres to the principles emerging from the formal law or traditional legal reasoning stemming from that law).[18] As described in the Introduction, these two factors are crucial to the pro-nullification scholar's broader view that juries have a right to impose their own communal or personal norms in place of law resulting from our formal law-making apparatus.

B. Butler: The Broader History of Nullification

In an historical account representative of the broader nullification literature, Professor Butler argues that the "prerogative of juries to nullify has been part of English and American law for centuries."[19] First in Butler's line of cases establishing this "prerogative" is *Bushell's Case*.[20] In that trial, a judge fined and jailed jurors for defying his instruction and finding William Penn and William Mead not guilty of unlawful assembly. When one juror, Bushell, refused to pay the fine, the case proceeded to the Court of Common Pleas. There, Chief Justice Vaughan held that juries could not be so punished.[21] According to Butler, the decision "'changed the course of jury history.'"[22] The *Bushell's Case* jurors "have come to be seen as representing the best ideals of democracy because they 'rebuffed the tyranny of the judiciary and vindicated their own true historical and moral purpose.'"[23] In sum, *Bushell's Case* "established the *right* of juries under English common law to *nullify* on the basis of an objection to the law the defendant had violated."[24]

The next step in the standard historical account of nullification is the adoption of the right by colonial America. The trial of John Peter

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tion, this Article's characterization that an act of nullification is a decision *against the law* simply means that it is a decision against the formal law in question in a particular case.

[18] Those who lobby for jury nullification in legislatures have utilized the same basic conception as the scholars in drafting their proposed instructions. *See, e.g.*, S. 4157, 218th Leg, lst reg. Sess. (N.Y. 1995) (cited in Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE. L.J. 2563 (1997)). The article calls on judges to instruct juries that they have "the final authority to decide whether or not to apply the law to the facts . . . that it is appropriate to bring into its deliberations the feelings of the community and its own feelings based on conscience, and that nothing would bar the jury from acquitting the defendant if it feels that the law, as applied to the facts, would produce an inequitable or unjust result[.]" *Id.* at 2576 & n.81. Other proposals make more general appeals to juries to call upon their "conscience" in rendering their verdicts. *See id.* at 2574-76.

[19] Butler, *supra* note 1, at 701.

[20] 6 HOWELL'S STATE TRIALS 999 (London 1810).

[21] *See id.*

[22] Butler, *supra* note 1, at 702 (quoting ABRAMSON, *supra* note 1, at 73-75).

[23] *Id.* (quoting GREEN, *supra* note 16, at 225-26).

[24] *Id.* at 701 (emphasis added).

Zenger,[25] who was accused of seditious libel for criticizing New York's governor, emerges as the seminal case importing the nullification right into early American law. Acceding to a lawyer's urging to ignore the judge's instructions and instead to follow their own "consciences and understandings," the *Zenger* jury acquitted the defendant.[26] Hence, "another case entered the canon as a shining example of the benefits of the jury system [and] the notion that juries should decide 'justice,' as opposed to simply applying the law to the facts, became relatively settled in American jurisprudence."[27] After *Zenger* and through the mid-nineteenth century, Butler portrays a landscape where nullification is an accepted doctrine in American law. He points in particular to early political trials, to "nullification" acquittals for white defendants who had illegally helped free black slaves,[28] and to cases where juries were told they had a "right to judge the law."[29]

According to Butler, beginning in the mid-1800s, "courts began to criticize the idea of jurors deciding justice."[30] A host of court decisions rejecting the right of "nullification" culminated in *Sparf & Hansen v. United States*,[31] where the Supreme Court held that jurors have the "power" but not the "right" to nullify. This diminished conception of the jury's role created an "anomaly" which "has been a feature of American criminal law ever since."[32]

Butler's basic outline is not new. Indeed, it repeats the general historical account numerous scholars have put forth in recent decades to show a right to nullify.[33] The framework, in its simplest shape, is as follows: *Bushell's Case* established the "right" to nullify,[34] colonial and American cases imported that "nullification" right by granting the

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[25] The Trial of Mr. John Peter Zenger, 17 HOWELL'S STATE TRIALS 675 (London 1735).

[26] *See* Butler, *supra* note 1, at 702.

[27] *Id.* at 702-03.

[28] *See id.* at 703 (recounting white juror's nullification of the Fugitive Slave Act).

[29] *Id.* (quoting United States v. Morris, 26 F. 1323 (C.C.D. Mass. 1851)).

[30] *Id.* at 703.

[31] 156 U.S. 51, 162 (1895).

[32] Butler, *supra* note 1, at 704.

[33] *See, e.g.*, Scheflin, *supra* note 1, at 169-81 (recounting the history of jury nullification).

[34] *See* David C. Brody, Sparf *and* Dougherty *revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 94 (1995) (stating that *Bushell's Case* established the jury's "right to give a verdict according to its convictions"); Scheflin, *supra* note 1, at 168 (stating that the *Bushell's Case* jurors' courage "has been institutionalized in our legal system under the doctrine of jury nullification"); John T. Reed, Comment, *Penn, Zenger and O.J.: Jury Nullification–Justice of the "Wacko-Fringe's" Attempt to Further its Anti-Government Agenda*, 34 DUQ. L. REV. 1125, 1130 (1996) (stating that "[m]any commentators use *Bushell* to advance the argument that jury nullification is a historic right"); Robert J. Stolt, Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV., Fall 1971, at 105, 107 (describing that *Bushell's Case* established the "right and the power of a jury to decide according to their collective conscience").

jury the "right" to "decide the law,"[35] and *Sparf* rescinded the right when it denied jurors the "right" to "decide the law."[36] Although other aspects of nullification history are also flawed,[37] this Article will focus more narrowly on the latter portion of this history, which mischaracterizes the American doctrine granting the jury the "right to decide the law." The next section will summarize the nullification scholars' analysis of this doctrine in more detail.

C. The Right To Decide the Law as The Right To Nullify

Nullification scholars uniformly point to the American jury's past "right to decide the law" to support their proposed right to nullify. Symbolized by *Zenger*, they argue, the right to decide the law emerged in early colonial times and continued through the first century of the founding of the United States. Their evidence includes colonial cases,[38] statements by the Founders,[39] Supreme Court cases[40]

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[35] *See* Brody, *supra* note 34, at 95 (describing that the Framers "clung to the concept of jury nullification"); Scheflin, *supra* note 1, at 173-75 (describing how jury nullification "had become an integral part of the American judicial system" because the jury's right to decide the law was widely accepted); Scheflin & Van Dyke, *supra* note 14, at 57 (describing how jury nullification principles spread to the American colonies and were symbolized by the *Zenger* trial); Stolt, *supra* note 34, at 107 (describing that the "English common law conviction of jury nullification came to America with the early colonists," as symbolized by *Zenger*).

[36] *See* Scheflin, *supra* note 1, at 179-81 (stating that *Sparf* culminated in favor of a limited role for the jury); Stolt, *supra* note 34, at 110 (describing *Sparf*'s rejection of "the right of jury nullification").

[37] For instance, the account misconstrues *Bushell's Case*. *Sparf* itself correctly dismissed the argument that *Bushell's Case* established the "right" to nullify. "[T]he fundamental proposition decided was that in view of the different functions of court and jury, and because a general verdict, of necessity, resolves 'both law and fact complicately,' . . . it could never be proved, where the case went to the jury upon both law and facts, that the jurors did not proceed upon their view of the evidence." *Sparf*, 156 U.S. at 90-91. Far from establishing the *right* to decide against the law, therefore, the *Bushell's* opinion established the jury's *power* to decide against the law in rendering general verdicts. For more detailed discussions of this analysis, see *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 211 (1855) (stating that Judge Vaughn's opinion was limited to the proposition that "the jury cannot be required implicitly to give a verdict by the dictates and authority of the judge"); *see also* GREEN, *supra* note 16, at 249 ("If Vaughn had any thought about law-finding or the jury's right to apply law mercifully, he kept them to himself."); Leipold, *supra* note 1, at 297 (stating that Vaughan's opinion "did not conclude that juries . . . had the right to determine what the law should be, [but] only decided that it was improper to punish the jurors"); Scott, *supra* note 1, at 394-408 (concluding that "[t]he opinion in *Bushel* not only fails to support the nullification position, it actually undercuts it"); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 494 (1976) (stating that *Bushell's Case* merely vindicated the jury's role "to finding the facts and applying the received law 'complicatedly' to those facts"). For a critique of the decision itself as "dishonest nonsense," see John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 298-99 & n.105 (1978).

[38] *See* Scheflin, *supra* note 1, at 173-74 (discussing the role of the jury in criminal trials during the colonial era).

[39] *See* JOHN ADAMS DIARY, *in* 2 THE LIFE AND WORKS OF JOHN ADAMS 253-55 (Charles Francis Adams ed. 1850) (describing the jury's right to exercise judgment).

[40] *See, e.g.*, Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (describing the right of the jury to determine the law) (cited in Scheflin, *supra* note 1, at 176).

and lower court holdings penned by Supreme Court Justices,[41] federal statutes,[42] and state constitutions and trials.[43] As stated above, the era in which this jury "right" reigned provides a crucial bridge in the nullification account, extending the interpretation of *Bushell's Case* geographically into the American domain and temporally to the dawn of the 20th century. If a reader accepts this historical backdrop, Butler's claim that today's rejection of the right to nullify is an "anomaly" rings true.

Crucially, this account assumes that the "right to decide the law" is functionally equivalent to the "right to nullify." This assumption would hold in either of two situations: (1) if the two phases are synonymous; or (2) if the right to decide the law comprised a broader power that necessarily would have encompassed the modern day right to nullify. Most scholars assume the former, conflating the two terms without articulation and discussing them interchangeably.[44] Others adopt the latter, claiming that the right to decide the law inherently included the narrower right to nullify. Professor Abramson has articulated this relationship between the two rights more directly than any other scholar:

> Jurors' right to decide questions of law gives them considerably *greater* authority than jury nullification itself requires. That right to nullify is *narrow*, permitting jurors only the right not to apply the law. The crucial significance of this restriction is that juries can nullify to acquit, never to convict. By contrast, the right to decide questions of law entitles jurors to apply their own interpretation of the law to either the detriment or the benefit of a defendant.[45]

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[41] *See, e.g.*, Case of Fries, 9 F. Cas. 924 (Pa. Cir. Ct. 1800) (charging juries that they were to judge both law and facts) (cited in Scheflin, *supra* note 1, at 176).

[42] *See* Act of July 14, 1798 (Alien and Sedition Act), ch. 74, § 3, 1 Stat. 596, 597 (granting the jury the right to determine the law) (cited in Scheflin, *supra* note 1, at 176).

[43] *See, e.g.*, GA. CONST. art. I, § 1, ¶ 11; MD. CONST. (Dec. of Rights) art. XXIII.

[44] *See* Brody, *supra* note 34, at 99-104; Butler, *supra* note 1, at 702-04; Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 9-11 (1997); Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW. & HUM. BEHAV. 439, 440 (1988); Horowitz & Willging, *supra* note 15, at 166; William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71, 73-76 (1969); Reed, *supra* note 34, at 1133-36; Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 136 (1995); Stolt, *supra* note 34, at 108-10.

[45] ABRAMSON, *supra* note 1, at 67-68 (emphasis added).

Thus, he claims, the emergence of the American jury's "law-finding right" necessarily incorporated the right to nullify,[46] and the demise of the right in the 19th century negated the right to nullify. Abramson explains that although "[l]ogically speaking, it [was] possible to defend jury nullification while rejecting the notion that juries have any general right to decide questions of law . . . historically, jury nullification was debated as one example of the broader claim that jurors decided questions of law."[47] Similarly, Professor Scheflin explains that "the right of the jury to decide questions of law of necessity contains the lesser integral right to nullify. . . . [I]t is quite possible to disapprove of the broader right without also disapproving of the nullification right."[48] He is thus comfortable treating the two rights as essentially the same, as he does when he writes: "[I]n the period immediately before the [American] Revolution, *jury nullification* in the broad sense had become an intregral part of the American judicial system. The principle that juries could *evaluate and decide questions of both fact and law* was accepted by leading jurists of the period."[49] Similarly, Scheflin confidently asserts that 19th century cases rescinding the jury's law-finding right simultaneously signaled the "demise of the nullification right."[50] With this argument firmly in place, the nullification historical account appears to lead seamlessly and logically into its current call to return to that past. By showing its central assumption to be faulty, the remainder of this Article will cut off the nullification historical account at its roots.

II. THE NARROW CONTOURS OF THE RIGHT TO DECIDE THE LAW

Undoubtedly, the early American experience included the jury's right to decide the law.[51] As nullification scholars point out, evidence

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[46] *See id.* at 75-77. As do other nullification scholars, Abramson therefore points to 17th and 18th century cases establishing juries' right to decide the law and concludes that they granted the right to nullify. *See id.* at 68-75.

[47] *Id.* at 68.

[48] Scheflin, *supra* note 1, at 169 n.2. Scheflin exerts considerable effort to show that his proposed right to nullify is a narrow one. *See* Scheflin & Van Dyke, *supra* note 11, at 167 (suggesting that nullification "complete[s]" the law by permitting the jury to exercise "that one last touch of mercy").

[49] Scheflin, *supra* note 1, at 174 (emphasis added); *see also id.* at 224 (describing Andrew Hamilton's plea to the *Zenger* jurors to determine the law for themselves as explaining that "they had the historic and time-honored duty to nullify").

[50] *Id.* at 177; *see also* Scheflin & Van Dyke, *supra* note 14, at 57 (describing the *Zenger* trial as "[t]he most famous colonial example of jury nullification"); *id.* at 57-58 (describing founders' and justices' description of the jury's right to decide the law as acceptance of the principle of nullification).

[51] *See, e.g.*, R.J. Farley, *Instructions to Juries–Their Role in the Judicial Process*, 42 YALE L.J. 194, 202 (1932) ("In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally ac-

abounds of that right: statements by the Founders, cases and judicial statements at all levels, tracts, state constitutions, statutes, and other sources.[52] Yet the nullification scholars, satisfied in merely highlighting evidence of that right, have largely failed to take the crucial step: determining what functions and duties that right entailed.[53] Indeed, accompanying almost every indication of the existence of the right to decide the law are clues about its definition and scope. In overlooking these clues, nullification scholars have fundamentally misconstrued the careful and precise connotation of the term "right to decide the law." From its intellectual birth in pre-*Bushell's* England through its use in the colonies and the United States' first century, the right always encompassed a limited prerogative. The best evidence of its limits lies within the very cases on which the pro-nullification scholars rely.

By carefully retracing this historical evidence, the remainder of this Article will expose that the crucial assumption delineated above is flawed. Specifically, it will show that the right to decide the law was neither equivalent to today's proposed right to nullify, nor did it encompass the right to nullify. To the contrary, the right to decide the law swept narrowly, placing a clear duty on juries to *follow* the law as they saw it, rather than *reject* the law as pro-nullification scholars would have them do.[54] Other strict limitations also applied, limitations over which the nullification right of today would run roughshod. The only similarities between the two are ultimately superficial ones. Thus, blindly to equate the two "rights" simply misreads American law of the past. Likewise, to assume that the extinct "right to decide the law" shows that America once accepted the radically different notion of a nullification-based democracy also misreads the past. As the Article will make clear, the right to decide the law can at most be seen as a challenge to judges' roles as interpreters of the law, and not to legislators' roles as the makers of law.

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corded the jury . . . ."); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (reviewing the historical role of juries in criminal proceedings).

[52] *See supra* notes 38-41 and accompanying text (discussing the basis for scholarly assertions of the existence of the right to nullify).

[53] This failure is particularly egregious because they have failed even to address the arguments of judges and scholars who have uncovered some key pieces of evidence that undercut their historical claims.

[54] In presenting this argument, this Article fills out in detail an argument begun by Simson, which nullification scholars appear to have overlooked since. *See* Simson, *supra* note 37, at 505-07. It also builds upon observations made by Professor Amar. *See* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 98, 342 n.64 (1998) (critiquing Scheflin's work for "unhelpfully conflat[ing]" nullification and the right to decide the law).

A. *The Right to Decide the Law*

1. *English Origins: The Leveller and Quaker Movements*

In his *Verdict According to Conscience*,[55] Professor Green describes the English birth of the "ideology of jury law-finding." The law-finding theory emerged as the traditionally broad powers of the self-informing jury[56] of the middle ages waned under a combination of pressures: The emergence of more nuanced substantive law, the rise of government prosecutors (superseding what had largely been the jury's inquisitorial role), the growing power of the bench, the greater legitimacy of a public rather than private criminal law system (decreasing the need for the jury's legitimizing role), and others.[57] These new limitations on the jury's powers and the greater transparency provided by growing substantive law and a more powerful bench compelled a question that had never arisen previously: could a jury return a verdict in the face of substantive law and, specifically, in the teeth of a judge's instruction on how to interpret that law? In response to this question, "[t]he right of the jury to [itself decide the law] had now to be invented and given a place in political and constitutional theory."[58] Green describes two groups that "invented" this right in the 17th century. Their articulation of the law-finding right gives the first indication of the duties and obligations that the right instilled on the jury. Although never adopted in English law, these first notions of jury law-finding would re-emerge across the Atlantic.

The first direct assertion of juries' right to decide the law came from John Lilburne and the Levellers, a radical group that clashed with Cromwell's regime in the mid-17th century. The full details of the Levellers' struggle are beyond the scope of this Article,[59] however, a crucial part of the Levellers' program for radical reform was the jury's right to decide the law. The discussion first emerged with Lilburne's publishing of the tract *Just Man's Justification* in 1646 and carried on at a high pitch until 1653, when Lilburne was tried and acquitted for a second time for his acts against the Crown.[60] After a

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[55] GREEN, *supra* note 16.

[56] Green explains that the jury's broad medieval power had not included the right to decide the law. *See id.* at 150. "[T]he medieval jury's de facto power to find law had always been founded on the realities of the process," which included little substantive law and a weak bench. *Id.*

[57] *See id.* at 1-152.

[58] *Id.* at 150.

[59] For a detailed account of the Levellers' struggle for the jury's right to decide the law, see GREEN, *supra* note 16, at 153-99.

[60] *See id.*

modest start,[61] Lilburne first voiced his belief that juries were "judges of law" at his trial in 1649.[62] Although his argument was rejected by the trial judge, Lilburne's theory gained momentum when the jury acquitted him.[63] Tracts following that trial bolstered the argument further, taking Lilburne's discussion in a more radical direction.[64] Finally, Lilburne's trial in 1653 and the literature he prepared for that trial fine-tuned the Leveller theory of jury law-finding.[65]

What did Lilburne mean by jury law-finding? Although the Levellers' own conceptions evolved in those seven years, several important themes emerged which would ultimately resurface in American legal thought. Most important, when Lilburne stated that juries had the right to "judge" the law at his 1649 trial, he indeed used the word *judge* purposefully—juries were to sit as judges in assessing the law and were to declare the statute "null and void under the true law of England."[66] He elaborated on his meaning in his writing and statements to the jury in his 1653 trial. There, Lilburne asked the jury to undertake several acts of legal interpretation: to assess the legal status of the 1651 statute which he allegedly violated,[67] to contrast that statute with substantive English common law, which had never provided a criminal sanction for the acts banned by the statute,[68] and to consider the "due process" implications of implying a criminal sanction that was "never before known."[69] In short, the jury was to acquit him because he was "not charged with anything that in the true law of England is a felonious crime."[70] He thus asked the jury to make a purely legal evaluation, insisting that they "examine the charges against the defendant and to reject them if it found that the facts cited did not amount to a crime under English law."[71]

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[61] Initially, the Levellers concluded that the law "was for the . . . judges to pronounce," with the only check being their possible removal for finding the law "ineptly or wrongfully." *Id.* at 165-66. *See also id.* at 169 (describing that Lilburne, during his imprisonment, "never abandoned the conventional law-fact distinction").

[62] *Id.* at 173.

[63] *See id.* at 174-76.

[64] *See id.* at 177-82 (representing the Leveller movement at its most radical and calling for the jury's right to decide the law as part of a plea to create a decentralized legal system based on scriptures and local community mores).

[65] *See id.* at 192-99.

[66] *Id.* at 195.

[67] Among other faults, the statute had been passed by a rump parliament. *See id.* at 192. Lilburne asked the jury to consider whether the enacting body was a "true parliament." *Id.* at 195.

[68] *See id.* at 193.

[69] *See id.* at 196.

[70] *Id.* at 197.

[71] *Id.* at 198. Leveller confidence that the jury was capable of undertaking this task of legal reasoning and assessment came from their view of the law as "not inherently complex," and primarily as a "matter of right and wrong" that "presumed judgment by peers in accordance

Although the Leveller movement declined rapidly in the 1650s, its notions of the jury's right to decide the law continued on through a new radical movement, the Quakers. While *Bushell's Case* marked the pinnacle of the Quaker trials, the Quaker law-finding ideology developed over numerous prosecutions in the 1660s brought under the 1662 Quaker Act as well as the 1664 Conventicles Act.[72] During that time, arguments in courts and tracts echoed the Levellers' theory that jurors should acquit defendants by *judging the law*. Importantly, however, the nature of their plea showed another important, if narrower, conception of what "finding the law" meant.

Rather than calling for jurors to negate the law as invalidly enacted, as the Levellers had, the Quakers argued that jurors' duty to interpret statutes allowed them to acquit defendants in contravention of judicial instructions on the law. First, they insisted that the state's policy of prosecuting Quakers under the acts violated the statutes' original purpose, which had been to "punish those who only pretended to take part in religious exercise [in order] to further their seditious ends"[73] and not to punish other groups engaged in legitimate religious exercise. The Quaker argument also faulted the bench's interpretation of the law, focusing specifically on the allocation of the burden of proof in determining the nature of the allegedly illegal meetings.[74] In short, the Quakers called on juries to reject judges' "view of the statute–[and] to find law insofar as that involved finding the true meaning of the statute."[75] Only the most radical Quaker position echoed the Leveller argument, asking juries to go beyond a consideration of the intent behind the statute to assess if the prosecution sought was consistent with the common law.[76]

A further articulation of the law-finding role emerged in *Bushell's Case* itself. In the trial of William Penn and William Mead which precipitated *Bushell's Case*, the defendants were charged with unlawful assembly and disturbing the peace, not for violating the Conventicles Act. For this reason, Penn and Mead's law-finding the-

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with standards comprehensive to the defendant." *Id.* at 184-85. This notion that law was within the comprehension of the average juror would also provide an important theme in the later development of the law-finding right in colonial America. *See infra* notes 107 and 245 and accompanying text.

[72] *See* GREEN, *supra* note 16, at 200-02. The Quaker Act made non-conformist religious meetings unlawful, while the Conventicles Act elaborated on that law, making it illegal for groups of five or more people to meet together under pretense of religion, when such a gathering did not accord with the forms of the Anglican church. *See id.*

[73] *Id.* at 204.

[74] *See id.* at 205.

[75] *Id.* at 206.

[76] *See id.* at 207.

ory resembled the Leveller argument—that the jury must consider whether the defendant "was being tried in accordance with the fundamental laws,"[77] meaning the common law. Thus, they repeatedly requested that the Court present the law to the jury "by which they should measure the truth of the indictment, and the guilt."[78] In a tract written after his acquittal, Penn further articulated that the "crucial point of reference for his jury was . . . the common law regarding the requisites for unlawful assembly and disturbance of the peace."[79] The prosecutor and judge in his trial had misstated the elements needed to prove such common law crimes, in effect creating a "self-proving" indictment.[80] Ideally, the jury should have itself decided whether the indictment and judicial charge conformed to the law of unlawful assembly, making its decisions based on its own understanding of the law and after considering defendants' arguments about the appropriate common law interpretation.[81]

Chief Justice Vaughan's silence regarding these law-finding arguments in his *Bushell's Case* opinion[82] perhaps foretold the future of those theories in English law—they never gained a foothold. In fact, as Professor Langbein has described, "*Bushel's Case* made no practical difference to the conduct of criminal procedure," as judges "had so many other channels of influence and control over the work of the criminal jury."[83] The powerful bench there was certainly not going to cede its right to interpret the law. However, for a number of reasons, the Leveller-Quaker notion of the jury's law-finding right would soon gain prominence in the American colonies, although with constraints.[84] Moreover, the notion that in finding law, juries were bound to act as judges, would also carry on there.

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[77] *Id.* at 224.

[78] *Id.* at 223.

[79] *Id.* at 227.

[80] *Id.*

[81] *See id.* at 228.

[82] The opinion rested solely on the jury's right to determine the facts, and was "remarkable for how little it addressed the most volatile issues of the day." GREEN, *supra* note 16, at 239; *see also supra* note 37 and accompanying text (discussing the flaws in the historical argument for the *right* to nullify).

[83] Langbein, *supra* note 37, at 298; *see also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903 (1994) ("In England, although juries may have often disregarded the instructions of judges, they never acquired de jure authority to do so.").

[84] *See infra* notes 85-195 and accompanying text (discussing the evolution of jury nullification in America, beginning with the *Zenger* trial).

2. *Law-Finding in America: Importing the Right to Decide the Law*

a. Colonial Origins: Zenger

The *Zenger* trial is famous for its impact on both freedom of speech and jury rights in colonial America. The trial introduced political insights and theories "into the popular aspect of American political life" that would be crucial in the United States' founding later in the century, and in years following.[85] Thus, as did the statements of the Quakers and the Levellers, the *Zenger* invocation of the jury's right to decide the law provides important clues about what was meant, at the time and later, by jury law-finding. Importantly, the notions Zenger's defense espoused were consistent with its English origin. They also illustrated that even in this foundational case, the right had clear limitations.

The *Zenger* trial marked the boiling point of a longstanding feud between an opposition faction in New York and that colony's governor.[86] John Zenger himself was but a pawn in a broader debate—he was a public printer who had agreed to publish the *Weekly Journal*, a newspaper whose primary aim was to carp at Governor Cosby. Nevertheless, after two months of publication, the state brought a seditious libel suit against Zenger himself.

At trial, Zenger's lawyer, Andrew Hamilton, perhaps the most prominent advocate of his day, took on the law of seditious libel and the trial judge's reading of it. At the time, seditious libel prosecutions left little room for jury participation. Whether a publication was in fact libelous was deemed a question of "law" to be determined by the judge. Moreover, libel law held that truth was not a defense in a libel suit.[87] The jury's only role was to assess whether in fact there was a publication and whether that publication had in fact referred to the particular people as charged.[88] Rather than argue those two factual questions before the jury, Hamilton conceded them.[89] He focused instead on two other points: that the jury generally should have a role in interpreting the law in question and, in doing so in the libel context, it

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[85] JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 34 (Stanley Katz ed., 1963).

[86] *See id.* at 2-7 (detailing the conflict leading to Zenger's trial for libel).

[87] *See id.* at 22, 68-70, 74. As the judge informed Hamilton: "[T]he jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous." *Id.* at 78.

[88] *See id.* at 22.

[89] *See id.* at 62.

should find that statements must be false before they can be deemed libelous.[90]

Throughout his argument before the judge and jury, Hamilton returned to the central point: the jury had a right to "decide" or "determine" the law. The structure of a libel prosecution provided by the judge, he argued, deprived the jury of that right:

> I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court *whether the words are libelous or not* in effect renders juries useless (to say no worse) in many cases.[91]

He repeated this point some minutes later, stating that "where matter of law is complicated with matter of fact, the jury have a right to determine both"[92] —and did so again shortly thereafter, arguing that "it is very plain *that the jury are by law at liberty . . . to find both the law and the fact in our case.*"[93] In support of these claims, Hamilton pointed to *Bushell's Case*,[94] and alluded to the widespread fear that judges' already wide powers made them ill-suited to enjoy a monopoly in interpreting laws.[95]

What did Hamilton mean for the jury to do when he stated that they, not the judge, were to "decide the law"? Although his lofty rhetoric at times introduces ambiguity,[96] Hamilton's argument was a rather straightforward call for the jury to perform two legal tasks. First, echoing Penn in the *Bushell's Case* trial, Hamilton made clear that in determining the law, the jury was to assess for itself whether the elements of libel were met.[97] It was for the "twelve men" to "*understand* the words in the information to be *scandalous*."[98] Again echoing Penn, Hamilton complained to the judge that the court had not laid out clear standards for the jury to assess if those elements were met: "how shall we know whether the words were spoke in a

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[90] *See id.*

[91] *Id.* at 78.

[92] *Id.* at 91.

[93] *Id.* at 92.

[94] *See id.* at 91 ("The right of the jury to find such a verdict as they in their conscience do think is agreeable to their evidence is supported by the authority of *Bushell's Case*.").

[95] *See id.* at 87 ("[H]ow cautious ought we to be in determining by their judgments, especially . . . in the case of libels?").

[96] Looking at Hamilton's rhetoric, Abramson claims that "Hamilton blended two arguments about how the jury might exercise its right to decide questions of law." ABRAMSON, *supra* note 1, at 74. One was an appeal for the jury to "nullify" law; the second is an appeal to interpret the law. *See id.*

[97] *See* ALEXANDER, *supra* note 85, at 68.

[98] *Id.* at 78.

scoffing and ironical manner, or seriously? Or how can you know whether the man did not think as he wrote?"[99]

Second, Hamilton argued that the judge and prosecution's understanding of the elements of libel misread the common law. As part of its right to assess what comprised the elements of libel, the jury also was obliged to correct any errors by the court in divining those elements from the common law. Hamilton thus urged the jury to consider an additional element of libel that the trial judge rejected: whether statements alleged to be libelous were true or false. True statements, he maintained, could not be libelous. In making this argument, Hamilton did not appeal simply to jurors' common sense or conscience. Rather, he appealed to the law itself and the jury's own legal reasoning to convince them not only that falsity was a required element, but was one which fell within their domain to assess. First, he pointed to cases showing that falsity had in the past been a required element of libel,[100] and focused in particular on the case of the Seven Bishops, where a jury had taken upon itself "to determine both law and fact, and to understand the petition of the bishops to be no libel, that is, to contain no falsehood nor sedition, and therefore found them not guilty."[101] He pointed to legislation passed by Parliament eradicating the Star Chamber, asserting that "by the judgment of a Parliament, . . . the jury are the proper judges of what is false at least, if not of what is scandalous and seditious."[102] He called upon jurors' reason, introducing a parade of horribles which would unfold if the judge's broad definition of libel were accepted.[103] He reiterated skepticism about judges' good faith interpretation of laws, and precedents to that effect,[104] and he closed with a rhetorical flourish about the broad legal rights inherent in a democracy: "[t]he nature and the laws of our country have given us a right -- the liberty -- both of exposing and opposing arbitrary power . . . by speaking and writing truth."[105]

In short, Hamilton confronted the *Zenger* jury with legal arguments to convince them of his interpretation of the law. As he reiterated, he was calling on them to serve as judges and provided them with legal arguments to adjudicate. Just as Penn had argued, the jury should assess on its own the elements of the asserted crime and

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[99] *Id.* at 77.

[100] *See id.* at 71-74.

[101] *Id.* at 85 (emphasis omitted).

[102] *Id.* at 91 (emphasis omitted).

[103] *See id.* at 95-96 (arguing that should Zenger be found guilty of libel no one would be safe from the reach of the government).

[104] *See id.* at 90-93.

[105] *Id.* at 99.

whether those elements were met. Thus, the jury could reject erroneous interpretations of the law given to them by the judge or state's attorney. Even his broadest rhetoric to the jury is cabined within the broader legal nature of his argument.[106] Rather than a call to reject the law, this was a call to apply it in good faith.

b. Founders and the Right to Decide the Law

Hamilton's notion of juries' law-finding right would carry forth through the remainder of the colonial era and the founding era of the United States.[107] Several of the nation's founders thought and spoke at length about the right to decide law. Once again, their discussions continued the trend seen in the English cases and *Zenger*: that the right to decide the law placed on juries the duty to act as judges, determining the meaning and validity of a law based on legal standards. It did not grant jurors broad discretion to decide issues based on more general notions of justice that were counter to the law in place. Also, continuing a theme voiced by Hamilton and one which remained through the 18th and 19th centuries, their discussion of the law finding right generally conditioned that right to general verdicts, where questions of law and fact were mixed. Only in those cases, and not all cases, did the juries possess the right to decide the law.

James Wilson, who was "second (if that) only to Madison in his contributions to the Constitution,"[108] elaborated at length on the respective roles of the judge and jury when questions of law and fact are "inseparably blended" in a general verdict.[109] "When this is the case," Wilson made clear, "[t]he jury must do their duty, and their whole duty; they must decide the law as well as the fact."[110] Wilson was quick to outline narrow parameters of this "duty." In deciding the law, jurors could not simply do as they pleased in rendering a verdict, based on personal, moral or other reasons. Rather, "*they must determine [legal] questions, as judges must determine them, according to law.*"[111] And, he clarified that "law, particularly the common law, is governed by precedents, and customs, and authorities, and maxims:

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[106] *See id.* at 93 ("[J]urymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects.").

[107] *See* Scott, *supra* note 1, at 416 ("*Zenger* became a cornerstone in an American tradition of the jury's right to decide the law. Unlike mother England, in every jurisdiction which addressed the question, state and federal, American juries had the right to decide the law."). *See generally* Howe, *supra* note 51.

[108] AMAR, *supra* note 54, at 99.

[109] *See* JAMES WILSON, 2 THE WORKS OF JAMES WILSON 540 (Robert Green McCloskey ed., Harvard University Press 1967).

[110] *Id.*

[111] *Id.* at 542 (emphasis added).

those precedents, and customs, and authorities, and maxims are alike obligatory upon jurors as upon judges, in deciding questions of law."[112] Wilson provided additional reasons to assure that this duty was narrow and that jurors could carry it out responsibly. First, he stated, jurors would know and understand the law. According to Wilson, "when he is called to judge, . . . every citizen, in a government such as ours, should endeavor to acquire a reasonable knowledge of [the criminal law's] principles and rules."[113] Second, voicing a theme that would carry through the American law-finding cases of the 18th and 19th centuries, Wilson believed that judges would still play the central role in interpreting the law. Once a judge "inform[s] the jury concerning the law, it is incumbent on the jury to pay much regard to the information which they receive from judges."[114] In fact, instances where a jury resists the "advice of a judge" were and should be rare; such moments were limited to "[gross] misconduct" by the judge, or on suspicion of his integrity.[115]

John Adams was also a vocal proponent of the law-finding right, and elaborated on this right in 1771 writings. It is the juror's "right" and "duty" to "find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."[116] Lest the use of "conscience" be interpreted too broadly,[117] Adams' elaboration of this notion suggests that he was referring generally to jurors' need to consult their *legal* understandings, judgments, and knowledge. Echoing Wilson, he made this point clear when he described in detail the sources jurors should consult in "finding" the law:

> The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the constitution are intimately known . . . it is scarcely extravagant to say they are drawn in and imbibed with the nurse's milk and first air. Now, should the melancholy case arise that the judges should give their opinions to the jury

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[112] *Id.*

[113] *Id.* at 549. The trial itself was viewed as a mechanism to educate jurors, with the judge's instructions playing the crucial role. *See* AMAR, *supra* note 54, at 93-94.

[114] Wilson, *supra* note 109, at 539.

[115] *See id.* at 542.

[116] JOHN ADAMS, 2 THE WORKS OF JOHN ADAMS 255 (Charles F. Adams ed., Boston, Charles C. Little and James Brown 1850).

[117] Pro-nullification scholars often quote Adams in support of their historical argument. *See, e.g.*, Kunstler, *supra* note 44, at 75; Scheflin, *supra* note 1, at 174-75.

> against one of these fundamental principles, [j]uries have a right and a duty to ignore those opinions.[118]

Both Wilson and Adams therefore conceived of the right to decide the law as a duty to apply well-known legal rules to cases at hand. Like Hamilton in *Zenger*, they also saw it as inevitably emerging from the right to render general verdicts.

c. Federal Cases after the Founding

Although not expressly stated in the Constitution, this founding understanding of juries' law-finding right would soon emerge in federal trials, both in the Supreme Court and in lower federal courts.[119] The right to decide the law would reach its pinnacle around the Revolution and the first decades of the 19th century; it diminished in stature over the course of the 19th century;[120] and in 1895, the Supreme Court flatly rejected the right in *Sparf*. Once again, pro-nullification scholars exuberantly point to the pre-*Sparf* period to show the existence of a right analogous to that which they propose for today.[121] However, a careful examination of these cases shows yet again that jury law-finding was a narrow task, and, consistent with the notions developed by Hamilton, Adams, and Wilson, one which obliged jurors to *follow* the law. Moreover, the clear limits of the right to decide the law emerged in another way: jurors did not enjoy the right to determine the constitutionality of statutes, as that type of judgment was deemed beyond jurors' capacity. Finally, consistent with Hamilton, Adams, and Wilson's statements, courts consistently found that the jury's "right" to decide the law was not absolute. Instead, it was limited to those occasions where a general verdict inevitably required a consideration of law and fact together. Otherwise, judges were the sole interpreters of the law. This framework suggests that the driving force behind the "right" was the right to issue a general verdict itself, and ultimately the inviolability of the jury's fact-finding role. In other words, it was based on jurors' capacity as legal decisionmakers (akin to judges), rather than as alternative law-makers (or law nullifiers). In mere decades, this weak pedestal for the law-

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[118] ADAMS, *supra* note 116, at 254-55.

[119] *See* U.S. CONST. art. III, § 2 & amend. VI & amend. VII. Leipold notes the surprising lack of discussion of the jury's law-finding right at the time of the Founding—either in the founding debates, the debates over the Bill of Rights, or the Federalist Papers. *See* Leipold, *supra* note 1, at 289-90.

[120] Several powerful lower court opinions denied the jury's law-finding right. *See* United States v. Battiste, 24 F.Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545); United States v. Morris, 26 F. Cas. 1323, 131-36 (C.C.D. Mass. 1851) (No. 15,815).

[121] *See, e.g.*, Scheflin, *supra* note 1, at 175-77.

finding right would collapse toward the dichotomy we now have today: that the jury has a *right* to issue general verdicts, and concomitant with that right is the *power* (but not the *right*) to decide the law.

i. Deciding the Law: Interpreting the Law as Would a Judge

Justice Jay's opinion in *Georgia v. Brailsford*,[122] a case decided only six years after the Constitution's enactment, clearly established the jury's law-finding right within the new nation's legal framework. At the same time, the opinion's words and the conduct of the trial itself illustrated the narrow contours of that right. *Brailsford* involved a dispute over the rightful possession of an outstanding debt. Georgia claimed title to the bond under which the debt was owed, pointing to its 1782 act of confiscation from alien enemies, of which Brailsford (the original creditor) was one.[123] After informing the jury of the Court's conclusion that legally, Brailsford should prevail because his "right to recover [his debts] revived" after peace was struck between Britain and its former colony, John Jay delivered his famous instructions to the jury: "you have nevertheless a right to take upon yourselves to judge of both [fact and law], and to determine the law as well as the fact in controversy."[124] While nullification scholars have pounced on this language,[125] Jay's further elaboration of the jury's role under the right evinces its modest nature and the duty of the jury to engage in legal analysis in performing its role:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. . . . [W]e have no doubt [that] you will pay that respect, which is due to the opinion of the court: For . . . it is presumed . . . that the court are the best judges of law.[126]

Heeding Jay's words,[127] the jury returned from deliberations to ask the Court two purely legal questions: whether the Georgia Act completely vested the title from Brailsford, and, if so, whether the peace treaty with Britain revived defendants' right in the debt.[128] On hearing

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[122] 3 U.S. 1 (1794).

[123] *See id.* at 1 (stating that the case was tried under the Court's original jurisdiction, so it took place before the Supreme Court).

[124] *Id.* at 4.

[125] *See, e.g.*, Horowitz & Willging, *supra* note 15, at 167; Kunstler, *supra* note 44, at 75; Scheflin, *supra* note 1, at 175-76; Scheflin & Van Dyke, *supra* note 14, at 58.

[126] *Brailsford*, 3 U.S. at 4.

[127] He also warned them not to consider the comparative situations of Georgia and the defendants. *See id.* at 4-5.

[128] *See id.* at 5.

the Court's answers to those questions of law—that the Act did not vest the debt from Brailsford, but only sequestered it, and such sequestration ended with the later peace agreement—the jury returned a verdict for Brailsford without deliberation.[129] The *Brailsford* jury thus exercised its right to decide the law by considering the two crucial legal questions in the case, but did so by deferring to the court's judgment on both questions. In practice, then, the jury's actions were consistent not only with Jay's instruction, but with the modest, legalistic conception of deciding the law that Wilson and Adams had described in theory.

Although no other Supreme Court cases at the time elaborated further upon the right to decide law,[130] lower court cases, including decisions by Justices riding circuit, were consistent in their explanations of the right. In a 1793 federal trial in Pennsylvania, Justices Wilson and Iredell sat for the trial of Gideon Henfield, who was accused of violating domestic and international laws by committing illegal privateering against foreign ships.[131] In instructing the jury, Justice Wilson explained that "the jury, in a general verdict, must decide both law and fact."[132] But, he added, "this did not authorize them *to decide it as they pleased; they were as much bound by to decide law as the judges: the responsibility was equal upon both.*"[133] To ensure that they made their decision based on law, the Justices took great pains to explain their view of the law to the jury, for "it is the duty of the court to explain the law to the jury, and give it to them in direction."[134] The Justices proceeded to elaborate on international law, U.S. treaty law, the incorporation of those treaties into domestic law through the Supremacy Clause, and the legal duties of citizens to follow these laws.[135] Finally, the Justices made other observations regarding "legal principles which had been agitated in the course of the trial."[136]

A third early case outlining the responsibilities that inhered with the right to decide the law is *United States v. Smith & Ogden.*[137] There, defendants were indicted for initiating a military expedition

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[129] *See id.*

[130] *Brailsford* comprised the last jury trial held by the Supreme Court. In *Bingham v. Cabbot*, Justice Iredell suggested briefly that although juries should respect a court's views on the law, "they are not bound to deliver a verdict conformably to them." *See* Bingham v. Cabbot, 3 Dall. 19, 33 (1795).

[131] *See* Henfield's Case, 11 F. Cas. 1099, 1105-06 (C.C.D. Pa. 1793) (No. 6360).

[132] *Id.* at 1121.

[133] *Id.* (emphasis added).

[134] *Id.* at 1120.

[135] *See id.*

[136] *Id.* at 1121.

[137] 27 F. Cas. 1186 (C.C.D.N.Y. 1806) (No. 16,341A).

against "dominions" of a foreign power with which the United States was at peace.[138] The judge instructed the jury that the "law is now settled that [the right to judge the law] appertains to a jury in all criminal cases."[139] Like Iredell, however, he emphasized: "[b]ut the jury is therefore not above the law. In exercising this right, they attach to themselves the character of judges, and as such are as much *bound by the rules of legal decision as those who preside upon the bench.*"[140] To endeavor to decide the law as well as fact, the judge instructed, comprised an assumption of "responsibility" and introduced the "hazard of judging incorrectly upon questions of mere law."[141]

In the 1830 case of *United States v. Wilson*,[142] where Wilson was charged with robbing the United States mails, a judge reminded a jury of the responsibilities and duties they shouldered if they ignored the judge's instructions in favor of their own interpretation of the law. First, he implored them, "it is a very old, sound and valuable maxim in law that the court answers to questions of law and the jury to facts;"[143] with the law in this case clearly settled, he asked, "[i]f this jury should differ from [that law], can any man say what is the law of mail robbery as practically applied in this district?"[144] Nevertheless, if they did choose to go beyond the law as instructed, he implored them:

> [A]ct on the same rule under which you would be guided as a magistrate or judge on the oath and responsibility of office. Then you will not err. . . . [R]eflect, deliberate, forget all appeals to your feelings, or any modes of operating on your judgment but such as are pointed out by the law or evidence.[145]

A valuable source of evidence regarding the operation of the law-finding right also emerged from Congress' enactment of the Alien and Sedition Act in 1798.[146] Under that law, "the jury who shall try the cause [had the] right to determine the law and the fact, *under the direction of the court, as in other cases.*"[147] For the legal historian's purposes, the Act's language affirmed both the existence of, and

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[138] *See id.*

[139] Sparf & Hansen v. United States, 156 U.S. 51, 162 (1895) (citation omitted).

[140] *Id.* (emphasis added).

[141] *Id.*

[142] United States v. Wilson, 28 F. Cas. 699 (C.C.E.D. Pa. 1830) (No. 16,730).

[143] *Id.* at 712.

[144] *Id.*

[145] *Id.* at 712-13. The judge specifically called on the jury to consider the intent of Congress in passing the law. *See id.* at 712.

[146] 1 Stat. 596 (1798).

[147] *Id.* at 597 (emphasis added).

Congress' approval of, the law-finding right.[148] As Professor Howe has explained, this language voiced the "propriety of allowing the jury to determine the ultimate legal question of the substantive meaning of the statute."[149] Importantly, however, the inclusion of the words *"under the direction of the court"* also reflected the limiting notions voiced by Wilson and others—that the jury's role was confined to one of interpreting the law through legal principles, and for that reason, deference to the judge was generally due. As an Ohio Court stated in interpreting the phrase "under the direction of the court" in that state's bill of rights: "[The jury's] right to judge of the law, is a right to be exercised only under the direction of the Court; and, if they go aside from that direction, and determine the law *incorrectly*, they depart from their duty, and commit a public wrong."[150]

In perhaps the most famous and controversial case under the seditious libel statute, Justice Chase articulated how a jury was to proceed in assessing the facts and the law under the statute—namely, as a judge would.[151] First, he maintained, the jury must inquire whether the defendant "committed all or any of the facts alleged in the indictment to have been done by him."[152] If the jury concludes that a defendant did commit such acts, its next task is to inquire "whether the doing such facts have been made criminal and punishable by the statute of the United States, on which the traverser is indicted."[153] To do this, Chase counseled:

> [The jury] must peruse the statute, and carefully examine whether the facts charged and proved are within the provisions of it. If the words that create the offence are plain and intelligible, they must then determine whether the offence proved is of the species of criminality charged in the indictment; but if the words are ambiguous or doubtful, all construction should be rejected.[154]

Once again, law-finding involved careful legal interpretation, including close textual reads and considerations of vagueness.

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[148] Once again, nullification scholars believe they have found evidence to support a historical right to nullify. *See* Scheflin, *supra* note 1, at 176; Scheflin & Van Dyke, *supra* note 14, at 58.

[149] Howe, *supra* note 51, at 587.

[150] Montgomery v. Ohio, 11 Ohio 424, 427 (1842).

[151] The case, *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709), is famous because it led to the impeachment trial of Justice Chase. The aspect of the case where Chase outlined a jury's role in interpreting a statute was not a source of debate, however.

[152] *Id.* at 255.

[153] *Id.*

[154] *Id.*

Although a number of other early federal cases mentioned the right to decide the law in cursory fashion, few did so in significant detail. Nevertheless, the structure of those trials, and the brief discussion of the right in those proceedings, further support the narrow scope of jury law-finding. Essentially, these trials were structured to allow for a full consideration of legal arguments by the jury, making clear that the jury's law-finding role comprised precisely what the term suggested—a focus on the interpretation of the law at hand, or on other legal matters central to a case. Consistent with past cases and Congress' understanding that law-finding was to proceed "under the direction of the court," these cases generally required that the judge "state to the jury [his] opinion of the law arising on the facts."[155] The judge then allowed the lawyers to present their interpretive take of the law in question, for if the jury "were to decide the law, it seemed to follow that they had a right to hear the arguments of counsel upon the law."[156] And although these lawyers often used soaring rhetoric as part of those arguments, at their root, these arguments focused on the application and interpretation of the law in question.

United States v. Hodges[157] provides a colorful example of such a trial. Hodges was accused of treason for returning several deserters to the British Army. He claimed that his acts were compelled by the British Army's threats to destroy his town and take wives and children hostage. One of the two trial judges instructed the jury that the law of treason did not allow them to consider intent in their assessment of Hodges' acts because "[w]hen the act itself amounts to treason it involves the intention" required.[158] Relatedly, he stated that the British threats could not be considered a justification for Hodges' treachery.[159] Nevertheless, he reminded the jury that they "are not bound to conform to this opinion, because they have a right in all criminal cases to decide on the law and the facts."[160] Hodges' lawyer then rose to speak, attempting to persuade the jury that the judge's interpretation of the law was flawed. Despite occasional high rhetoric,[161] he returned again and again to straightforward legal arguments

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[155] Case of Fries, 9 F.Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127); *see also* United States v. Hodges, 26 F. Cas. 332, 332 (C.C.D. Md. 1815) (No. 15,374) ("The Court said they were bound to declare the law whenever they were called upon in civil or criminal cases; in the latter, however, it was their duty to inform the jury that they were not obliged to take their direction as the law.").

[156] Virginia v. Zimmerman, 28 F. Cas. 1227, 1227 (C.C.D.C. 1802) (No. 16,968).

[157] 26 F. Cas. 332 (C.C.D. Md. 1815) (No. 15,374).

[158] *Id.* at 334.

[159] *See id.* The other judge disagreed with both of these conclusions. *See id.*

[160] *Id.*

[161] *See id.* at 332 (telling jurors that they were responsible "only to God, to the prisoner, and to their own consciences").

for the jury to weigh. First, he pointed to precedent, showing that in a previous treason case, a court had held that treacherous intent was required.[162] He alluded more broadly to his "deliberate examination of all the authorities, of a thorough investigation of the law of treason in all its forms,"[163] which, he asserted, all required a showing of intent to prove treason. Next, he pointed to the logical flaws of the judge's "constructive treason"[164] analysis, arguing that judging such alleged acts without regard to intent would lead to rampant criminal liability; "[n]ay, half Prince George's county would come within [the prosecution's] baleful influence."[165] Finally, he pointed to the fact that the second judge overseeing the trial did not agree with his brother's opinion on the law as further evidence of the weakness of that legal position.[166] Overall, the lawyer made clear that his was a legal argument, and not a more general plea for lenience:

> Is it possible that in this favoured land, this last asylum of liberty, blest with all that can render a nation happy at home and respected abroad, [this constructive treason analysis] should be law? No. . . . I say there is no colour for this slander upon our jurisprudence. *Had I thought otherwise I should have asked for mercy, not for law.*[167]

Ultimately, the jury acquitted the defendant. Other trials followed this same pattern of a battle of legal presentations before the jury,[168] although over the course of the 19th century, judges became somewhat more aggressive in instructing the jury on the law.[169]

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[162] *See id.* at 335.

[163] *Id.* at 336.

[164] *Id.*

[165] *Id.*

[166] *See id.* This dissonance between two judges' instructions was not rare. *See infra* note 241.

[167] *Hughes*, 26 F. Cas. at 336 (emphasis added).

[168] *See, e.g.*, United States v. Lynch, 26 F. Cas. 1033 (C.C.S.D.N.Y. 1843) (No. 15, 648); Stettinius v. United States, 22 F. Cas. 1322, 1333 (C.C.D. D.C. 1839) (No. 13,387); United States v. Fenwick, 25 F. Cas. 1062, 1063-64 (C.C.D. D.C. 1836) (No. 15,086) (disallowing a reargument in opposition to a judicial instruction to the jury).

[169] *See, e.g.*, *Lynch*, 26 F. Cas. at 1035 (stating that the court "fully express[ed] their opinion to the jury what the law was, and felt bound in the present case to charge the jury distinctly and positively upon the points raised by the prisoners' councel"); *Stettinius*, 22 F. Cas. at 1333 (instructing that "the jury ought to respect [the judge's] instruction, and not lightly substitute their own often crude expositions, or the sometimes wild or interested suggestions of counsel, for the deliberate, calm, and impartial opinion of judges, who ought to be, and generally are, selected for their knowledge of the law and their judicial integrity"); Mattingly v. United States, 16 F. Cas. 1144, 1145 (C.C.D. D.C. 1844) (No. 9,295) (instructing the jury that they had the right "to determine both the law and the fact, but that in matters of law you ought to follow the opinion of the court").

Even as the right to decide the law faded from the scene in the late 1800s, its defenders continued to cast it in the narrow terms described above. In his long dissent in *Sparf*, Justice Gray provided a spirited defense of the right to decide the law. Nevertheless, his discussion of the duties involved in determining law showed once again that the right was conceived in narrow terms:

> The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by willfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be.[170]

Echoing previous judges, Gray's confidence in the jury to perform this legal assessment stemmed from his belief that "[t]he rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of people."[171]

From its birth until its death, therefore, the right to decide the law meant for the jury to conduct a legal inquiry into the prosecution in question, adhering to the law and legal principles already in place. The basis for jury decisionmaking was to be jurors' legal reasoning, and their good-faith interpretation of the formal laws on the books. Case after case demonstrates that to go beyond that narrow inquiry in favor of their own notions of justice and morality would have clearly overstepped the right.

ii. The Denial of Jury Review[172]

Jurors were granted discretion to perform other legal duties beyond simply interpreting particular provisions of statutory or common law. In *Hill v. Scott*, a federal judge left it to the jury to determine whether a given statute applied in a case of usury.[173] In another case, a jury found that a court had no jurisdiction over a given defendant.[174]

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[170] Sparf & Hansen v. United States, 156 U.S. 51, 172 (1895) (Gray, J., dissenting).

[171] *Id.* at 173.

[172] This author takes the term "jury review" from Professor Amar, who uses it to connote the equivalent of judicial review for the jury—namely, assessing the constitutionality of laws. *See generally* AMAR, *supra* note 54, at 98.

[173] *See* Hill v. Scott, 12 F. Cas. 175, 176 (C.Ct. D.C. 1838) (No. 6,498).

[174] *See* United States v. Robins, 27 F. Cas. 825, 830 (D.C.D. S.C. 1799) (No. 16,175) (discussing a New Jersey case where a jury had concluded such).

But the scope of the jury-finding right was not unlimited; in addition to the limits on how the jury was to go about determining the law, there were also limits on which functions it could exercise under that right. In particular, a clear ceiling was erected regarding the question of "jury review": whether jurors had the right to interpret the Constitution, and specifically, whether they could acquit defendants when they considered a law in violation of the Constitution. Although persons argued both sides of this debate in theory, the evidence suggests that juries could *not* perform "jury review" under the federal Constitution. This denial of jury review establishes a second important limit on the jury's right to decide the law, confining its role to certain aspects of trial decisionmaking rather than allowing it to be a player (as even judges could be after *Marbury*) in the broader democratic process, as jury review would have allowed.

A number of early constitutional thinkers believed that jurors ought to have played a key structural role within democratic government.[175] Following naturally from these beliefs was the notion that as part of the right to "decide the law," jurors possessed the right to assess the constitutionality of laws and to acquit defendants when they determined a law to be in violation of the Constitution.[176] When Adams proclaimed that "[t]he great principles of the constitution are intimately known [by ordinary jurors,]"[177] he seemed to be confirming this view.

Despite the logic of this position, federal courts assessing this question, led by justices and judges who acknowledged the right to "decide the law" in other contexts, refused to recognize jury review from the outset.[178] In a 1798 case, Justice Patterson, who had been in

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[175] *See generally* Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175 (1998) (arguing for the jury's role within constitutional politics). Jefferson thought of the jury as part of the necessity of "introduc[ing] the people into every department of government." AMAR, *supra* note 54, at 95 (citing letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed., 1958). Tocqueville described the jury as a "political institution . . . to which the execution of the laws is entrusted . . . ." *Id.* (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Phillips Bradley ed. 1945)). John Taylor of Caroline characterized the jury as the "lower judicial bench" in a bicameral jury, while anti-federalist tracts dubbed juries as the democratic wing of the judicial branch. *Id.* (citing JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950)).

[176] *See generally id.* at 98-100 (discussing the jury's ability to go outside the law when constitutionally required).

[177] *Id.* at 103.

[178] Although Professor Amar discusses the "strong arguments" for the "plausibility" of jury review, he does not argue that it in fact existed in history. Rather, "the mere fact of [the arguments'] strong plausibility shows how strikingly powerful the jury might have become had post-1800 history unfolded differently." *See* AMAR, *supra* note 54, at 103. Magliocca, on the other hand, asserts that jury review was widely accepted in colonial America and the early

the majority in *Brailsford*, explicitly denied the contention that juries were to assess the constitutionality of the Alien and Sedition Act: "[Y]ou have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law. . . . [U]ntil this law is declared null and void by a tribunal competent for the purpose, its validity cannot be disputed."[179] Two years later, Justice Chase in *Callender*, after expounding upon jurors' right to "decide the law" in *Callender* itself[180] and in previous cases,[181] agreed with Patterson, rejecting the defense's position that it was entitled to convince the jury that the Sedition Act was unconstitutional. Specifically, Callender's attorney argued that, given the jury's right to decide the law, and the Constitution's status as the supreme law of the country, the jury possessed a "right to consider the constitution;"[182] hence "if the law of congress under which we are indicted, be an infraction of the constitution, it has not the force of law, and if you were to find the traverser guilty under such an act, you would violate your oaths."[183] While Justice Chase did not question the jury's right to decide law,[184] he did deny that the jury could assess the constitutionality of the Act, citing the text and structure of the Constitution,[185] framers' intent,[186] Congressional intent in passing the Alien and Sedition Act,[187] the illogic of the asserted right,[188] the negative practical consequences rendered by such jury review,[189] the "usurpation" of judicial power that jury re-

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United States. *See generally* Magliocca, *supra* note 175. However, Magliocca can only point to a single case where a federal judge allowed a lawyer to argue the unconstitutionality of an Act. *See id.* at 195-96 (citing United States v. The William, 28 F. Cas. 614 (C.C.D. Mass. 1808) (No. 16,700)). In fact, Magliocca's overall theme that the right of jury law-finding was considered more appropriate in the constitutional realm is belied by the cases described in this Section. Courts seemed most troubled by the law-finding right precisely when it was argued that it implied the right to jury review. This is perhaps why some of today's nullification scholars shy away from the suggestion that jurors can assess the constitutionality of statutes. *See, e.g.*, Scheflin & Van Dyke, *supra* note 11, at 166.

[179] Lyon's Case, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646).

[180] *See* United States v. Callender, 25 F. Cas. 239, 253 (C.C.D. Va. 1800) (No. 14,709) ("[W]e all know that juries have the right to decide the law . . . .").

[181] *See generally* Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127).

[182] *Callender*, 25 F.Cas. at 253.

[183] *Id.*

[184] *See supra* note 180.

[185] *See Callender*, 25 F. Cas. at 256 (citing Article I, the Supremacy Clause, and the "oath and affirmation" clause).

[186] *See id.* at 255 (stating that it was never "intended by framers of the constitution . . . that [the constitutionality of a statute] should ever be submitted to the examination of a jury").

[187] *See id.* ("I cannot possibly believe that congress intended, by the statute, to grant a right to a petit jury to declare a statute void.").

[188] *See id.* ("If the statute should be held void by a jury, it would seem that they could not claim a right to such decision under an act that they themselves consider as mere waste paper."); *see also id.* at 253 (calling Callender's argument a "non-sequitur").

[189] *See id.* ("[T]he evident consequences of this right in juries will be, that a law of congress will be in operation in one state and not in another.").

view would entail,[190] and the jury's incompetence to perform such a role.[191] Justice Chase drew a clear distinction between the right to decide the law, which he accepted, and jury review, which he did not: "It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law."[192] He thus announced that "the court will not allow the counsel for [Callender] to argue before the petit jury, that they have a right to decide on the constitutionality of the statute . . . ."[193] Two hours later, the jury pronounced Callender guilty.[194] Even as the jury's law-finding right remained in place over the course of the 19th century, judges continuously rejected the jury's purported right to decide the constitutionality of a law.[195]

In addition to these cases, other clues also evince that jury review was not considered part of the jury right to decide law. First, scholars occasionally suggest that Justice Chase's subsequent impeachment by the House of Representatives shows that his denial of jury review was counter to core American values at the time.[196] To the contrary, the impeachment trial elicited a remarkable dearth of concern for this particular aspect of Chase's behavior on the bench. In fact, the striking lack of discussion over jury review during the Senate impeachment hearings suggests that this facet of Chase's actions was not at all troubling to the House that impeached him, the lawyers who were prosecuting him, or the Senators who were considering his removal.

Although the impetus of Chase's impeachment was a complex array of legal, political, philosophical, and personal factors,[197] the de-

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[190] *See id.* ("[T]he judicial power of the United States is the only proper and competent authority to decide whether any statute made by congress . . . is contrary to . . . the federal constitution."); *see also id.* at 257 ("[I]f the jury should exercise that power, they would thereby usurp the authority entrusted by the constitution of the United States to this court.").

[191] *See id.* at 253 ("[I]t is not competent to the jury to decide on this point . . . .").

[192] *Id.* at 255.

[193] *Id.* at 257.

[194] *See id.* at 258.

[195] *See* United States v. Morris, 26 F. Cas. 1323, 1332-33 (C.C.D. Mass. 1851) (No. 15,815) ("[T]he constitution did not design to create or recognize any such power . . . ."); Stettinius v. United States, 22 F. Cas. 1322, 1334 (C.C.D. D.C. 1839) (No. 13,387) (affirming a judge's instruction that "the jury ought not to take upon themselves, in opposition to the opinion of the court, to decide an act of congress to be unauthorized by the constitution, and therefore not law"); United States v. Shive, 27 F. Cas. 1065, 1066-67 (C.C.E.D. Pa. 1832) (No. 16,278) (refusing to allow the jury to consider the constitutionality of an act of Congress).

[196] *See* Magliocca, *supra* note 175, at 207 ("Although Chase escaped conviction by a few votes, a clear message was sent . . . validating past attempts to invoke [jury review].").

[197] *See generally* WILLIAM H. REHNQUIST, GRAND INQUESTS 15-134 (1992). The bitter divide between Federalists and Jeffersonian Republicans over the Sedition Act's constitutionality was perhaps the key backdrop to the *Callender-Fries* decisions. *See id.* at 48-49. However, the dispute also reflected the more general ideological rivalry between the Federalists and Jeffersonian Republicans. *See generally* Stephen B. Presser, *The Original Misunderstanding: The*

bate directly addressed his behavior in three cases: *Fries, Callender*, and an 1803 Baltimore trial in which Chase read a charge to a grand jury castigating recent Jeffersonian decisions.[198] Notably, although they relayed in painstaking detail his misdeeds at these trials, the eight articles of impeachment levied against Chase failed to mention his emphatic denial of jury review at *Callender*'s trial.[199] Apparently, Chase's allowing a potentially tainted juror onto the Callender jury (the second article of impeachment), his not allowing a defense witness to testify (the third), and his berating and interrupting of lawyers in a disrespectful way (the fourth) each sparked greater concern than his denial of jury review. Moreover, the managers of the case against Chase did not once mention in their opening or closing statements Chase's denial of jury review in the trial as a separate wrong; their witnesses during direct and cross-examination were equally silent on the topic.[200] Their case focused on the specific misdeeds alleged in the impeachment articles. When they discussed Chase's denial of jury review at all, they only did so in the context of the *manner* in which he denied it.[201]

Ironically, only Chase's defense team dwelled on his denial of jury review, doing so to justify Justice Chase's ire toward Callender's counsel. They characterized the attempt to argue constitutionality to the jury as a last ditch lawyer's trick to circumvent a clear losing argument:

> Could Mr. Chase, who for nearly fifty years has been at the bar and on the bench, of great acknowledged talents, be ignorant of the aim and object of counsel? And with his mind

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English, The Americans, and the Dialectic of Federalist Constitutional Jurisprudence, 84 NW. U.L. REV. 106 (1989).

[198] Chase warned in the latter case that Jeffersonian changes to the laws would "take away all security for property and personal liberty . . . and our Republican constitution will sink into a mobocracy . . . ." REHNQUIST, *supra* note 197, at 52.

[199] The first article addressed Chase's behavior at the *Fries* trial, alleging that he prejudiced the trial, unfairly denied certain arguments to Fries' counsel, and would not allow counsel to argue certain points of law to the jury. *See* REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE 9-10 (1805). The second through fifth articles addressed his behavior at the *Callender* trial, alleging that he improperly allowed a prejudiced juror to remain (Art. II), would not allow a defense witness to testify (Art. III), displayed "injustice," "partiality" and "intemperance" throughout the trial through his refusal to postpone the trial, constant interruptions, and "unusual, rude and contemptuous" expressions (Art. IV), and violated Virginia law by allowing *Callender* to be placed in custody prematurely (Art. V). The remaining articles involved his grand jury charge in the Baltimore case. *See id.*

[200] *See generally id,* at 1-140.

[201] One prosecutor argued that Chase "treated the counsel for Callender as mushrooms," and "turn[ed] the counsel into ridicule." *See id.* at 114. A witness testified that he had been "interrupted oftener by Judge Chase [in *Callender*] than I ever was during sixteen years practice[.]" *Id.* at 35. The witness also complained that Chase did not consult his fellow trial judge in making key decisions. *See id.* at 35.

> made up as to the constitutionality of the law, was he fit a cypher to see the jury misled . . . . The very object was disrespectful to the authority of the court, and with becoming dignity he stopped the counsel, in language suited to the occasion which gave it birth.[202]

Arguing the point even more bluntly, his defense counsel reiterated Justice Chase's arguments at trial: "[t]he maddest enthusiasts for the rights of jurors—their most zealous advocates have never contended for such a right before the cases of Fries and Callender. Whether a law exists . . . ? The decision of these questions have always been allowed the exclusive right of the court."[203] And repeating the more narrow meaning of "deciding the law" as it had been defined in other cases, they reiterated one final time:

> Nay the very right claimed on behalf of jurors, that they may determine what is the true construction of the law, and whether the case is within its provisions, of itself necessarily presupposes, and is predicated upon the *existence of a law*, the *true construction* or *meaning of* which they are to determine.[204]

Once again, they closed: "And will any man say that under such circumstances, it was not proper to interrupt the counsel?"[205] Thus, with Justice Chase's justiceship on the line, his defenders did not minimize his denial of jury review.[206] Instead, they characterized the mere argument for jury review as so outrageous that Justice Chase's resulting outburst was understandable. Chase's accusers said nothing to rebut this argument.

Perhaps the Chase team's confidence stemmed from the fact that not only had federal judges rejected Callender's argument,[207] but

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[202] *Id.* at 159.

[203] *Id.* at 209. "What has been allowed to the jurors as their incidental right on the general issue? Not to decide whether there is an existing law, or whether a law is in force, but to declare the true construction of an *existing* law, and whether the case at issue comes within the true construction of such law." *Id.*

[204] *Id.* at 209.

[205] *Id.* at 230.

[206] Chase's defenders took a notably different tack to rebut the article of impeachment that charged Chase with denying the jury the right to decide the law in the *Case of Fries*. Instead of justifying the purported denial, as they did with the denial of jury review, they argued that the trial record in fact showed that he had allowed the jury to exercise that right.

[207] *See* Presser, *supra* note 197, at 138 (noting that even the strongest Jeffersonian judges of the day had rejected "jury review" claims). This is not surprising, since the very notion that the judiciary itself could render statutes void was still in its early years. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review); *see also* Simson, *supra* note 37, at 498 (pointing out that juries in colonial times likely lacked the right to decide the validity

Congress, too, had clearly pronounced the same limitation on the jury's right to decide the law only several years before. In passing the Alien and Sedition Act, Congress chose its words carefully to avoid allowing the jury to nullify the Act itself as unconstitutional. During the floor debate, one House member worried that the Act's language granting the jury the "right to determine the law and fact" would be construed too broadly, and, in particular, "the effect of this amendment would be, to put it into the power of a jury to declare that this is an unconstitutional law, instead of leaving this to be determined, where it ought to be determined, by the Judiciary."[208] In response to this concern, another Congressman added to the statute the words "as in other cases," in order to show "clearly that [the act's] intention was only to declare that juries should have the same power to decide on the criminality of the act, which they had in other criminal cases."[209] Thus, the Act's final language, that "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, *as in other cases*,"[210] comprised an attempt to cabin the jury's right to decide the law to a good-faith interpretation of the statute's meaning. It also reflected the assumption among 1898 lawmakers that "in other cases," juries also lacked the power to render a statute void.

This consistent denial of "jury review" is particularly damaging to the nullification historical account because jury review would have been similar (though still less sweeping) to the right sought by today's nullification scholars: a jury's right to refuse to enforce a law because they deem it unjust or otherwise invalid.[211] Justice Chase and others mustered numerous arguments why jury review was not a sound doctrine,[212] but the core concern was that jury review would allow the jury to go far beyond the limited legalistic, trial-based duty envisioned for the law-finding right. As one scholar observed in discussing a mid-19th century debate regarding jury law-finding under the Massachusetts Constitution, there were two distinct notions of jury law-finding at play in those years. "First, there was the view that the jury could respond to a higher law; if the statute before it was iniquitous, the jury should reach its conclusion on the basis of natural laws

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of Crown statutes because "the colonies lacked jurisdiction to consider the conformity of legislative acts to fundamental, or constitutional, norms").

[208] 8 ANNALS OF CONG. 2136 (1798) (statement of Rep. James Bayard, Delaware).

[209] *Id.* at 2137; *see also* Simson, *supra* note 37, at 502.

[210] Act of July 14, 1798 (Alien and Sedition Act), ch. 74, § 3, 1 Stat. 596, 597 (emphasis added).

[211] *See supra* notes 5-6, 11-18, and accompanying text.

[212] *See supra* at 178-184.

that were more truly just."[213] On the other hand, the jury was thought only to be "qualified to determine the contents of the positive law, using the judge's instruction as evidence."[214] Although these two positions did not always clash openly, the question of jury review placed them in stark contrast, for "[t]he codification of natural rights was thought to be the United States Constitution" and "the reliance on a higher law was usually viewed as a constitutional judgment."[215] Therefore, in leaving "jury review" outside the parameters of the right to decide the law, the federal courts flatly rejected the notion that jurors could find against the law based on their notions of higher justice. Rather, their role was confined to accepting the law that was in place and interpreting its legal meaning as best they could—usually by deferring to the judge's instructions.[216]

iii. Tying the Right to the General Verdict

From the outset, a third limitation was placed on the jury's right to decide law: the right only existed when the jury was rendering a general verdict where the law and facts were inextricably intermingled. This condition carried several implications. First, it limited the occasions for jury law-finding. Second, it suggested that the right to decide the law was not an absolute right. Rather, it was a necessary consequence of the jury's right to issue a general verdict with impunity. In other words, it derived from a concern over the jury's role in the administration of trials—an important concern, but not nearly as grand as today's pro-nullification notion that juries must assume a more affirmative role within the democratic process. If accepted in earlier centuries, that broader notion would naturally have led to the application of the "right to decide the law" in all cases, not only gen-

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[213] Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 178 (1964).

[214] *Id.* at 179-80.

[215] *Id.* at 178.

[216] Scheflin tries to wriggle out of this problem by acknowledging that juries can not strike down laws based on unconstitutionality, nor could they in the past. *See* Scheflin, *supra* note 1, at 169 n.2. This does not solve his problem, however, at least in terms of his historical argument. Perhaps the predominant reason for the discomfort with jury review was that interpreting the constitution involved the consideration of more ephemeral factors of "higher law" and justice, along with the consideration of more legalistic questions, such as the text and structure of the constitution. While the jurors were deemed competent to perform the latter in other contexts, judges shied from allowing jury review precisely because constitutional interpretation involved more abstract considerations.

Nullification scholars today ask that jurors *only* consider personal notions of justice and morality in rendering verdicts, not grounded by *any* legal standards—constitutional or other. *See supra* notes 5-6, 12-18, and accompanying text. For the same reasons even 19th century advocates of the law-finding right shied from jury review, such jurists would have rejected the proposition that juries should render verdicts based solely on general norms of justice.

eral verdict cases. Finally, from the outset, this strict limitation to general verdicts greatly diluted the conceptual importance of the right to decide the law. Over time, in fact, this conditioning of the law-finding right would spell its own demise, for the original weak framework was only a small step removed from the holdings of *Battiste, Sparf & Hansen*, and modern cases that the right to render a general verdict necessarily implies a *power* to decide law, even if there is no jury *right* to decide law.

From *Zenger's* Hamilton, through Wilson and Adams, through the federal court decisions of the 19th century, the historical evidence demonstrates that the jury's right to decide the law was consistently cabined within its right to render general verdicts. Hamilton's conception was clear: the law-finding right applied "where matter of law is complicated with matter of fact."[217] Wilson also made clear that the right to decide law applied in those cases where "the question of law is intimately and inseparably blended with the question of fact"—in a general verdict.[218] When there was no such blending, "there is no doubt or difficulty in saying, by whom the separate decision shall be made": questions of law "belong exclusively to the judges" and those of fact "exclusively to the jury."[219] Adams, too, cast the right to decide the law not on its own terms, but as part of the right to grant *general verdicts*. "[T]he jury have a power of deciding an issue upon a general verdict," he stated, and a general verdict "assuredly determines both the fact and the law."[220] Thus, if the jury have the right to cast a general verdict, he asked, "is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court[?]"[221]

Cases from the dawn of the new nation echoed the limitation that juries enjoyed the right to decide law only when a general verdict called "questions of law [to come] into joint consideration with the facts."[222] Although judges often recited this statement merely in passing, usually in cases where general verdicts allowed for jury law-finding, some judges explored the implication of this condition for the jury's law-finding right. As they did so, they recognized the strict limits that this condition placed on the law-finding right: it diluted the strength of the right itself by showing that it was not absolute; it removed the opportunity for law-finding in numerous cases; it ce-

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[217] ALEXANDER, *supra* note 85, at 91.
[218] WILSON, *supra* note 109, at 540.
[219] *See id.*
[220] ADAMS, *supra* note 116, at 254.
[221] *Id.*
[222] Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6,360).

mented judges' position as the privileged interpreters of laws; and, perhaps most importantly, it provided the distinction between the *right* to decide the law and the *power* to decide against the law that would ultimately spell the demise of the law-finding right itself.

In *Stettinius v. United States*,[223] Judge Cranch explored these limitations in considerable detail. The general verdict requirement shows that the jury's right to decide the law is not absolute or exclusive, Cranch explained. "It is admitted by all who have advocated the right of the jury to decide the law in criminal cases, that that right extends only to the finding of a general verdict upon the general issue."[224] On the other hand:

> [w]henever . . . the law was separated from the fact, so that each could be seen and considered by itself, no pretense that the jury had a right to decide the pure unmixed question of law, has ever been set up by the wildest advocate of the rights of juries.[225]

Observing this dichotomy, Cranch concluded that while the "immediate and direct right" to decide the law is "intrusted to the judges," that right is only "incidental" to a jury.[226] From this conclusion, the judge made several additional observations limiting the jury's law-finding right. First, he noted that judges were to decide every question of law when "the law and the facts are separated," such as when parties litigating agree on the facts or when special verdicts are given, and that "[i]t has never been pretended that the jury are to decide a pure question of law unmingled with the facts."[227] Second, because the right is directly that of the judge, "the jury ought to show the most respectful deference to the advice and recommendation of judges, [and] the examples of their resisting the advice of a judge, in points of law, [should be] rare."[228] Third, for the same reason, the "judge [has] a right . . . to instruct the jury upon the whole law of the case."[229] And most importantly, Judge Cranch concluded that the general verdict requirement did not suggest that juries "ha[d] a right to render a verdict against law."[230] Rather, it was simply the fact that a court could not overturn a general verdict acquitting a defendant that granted juries the *power* to decide against the law in favor of a defendant. That

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[223] 22 F. Cas. 1322 (C.C.D. D.C. 1839).
[224] *Id.* at 1327.
[225] *Id.*
[226] *Id.* at 1329.
[227] *Id.* at 1330.
[228] *Id.* at 1329.
[229] *Id.* at 1335.
[230] *Id.* at 1331.

a court can set aside *convictions* against the law showed that a verdict against the law was only within the *power* that accompanied its right to issue general verdicts. The right to decide the law was thus not an independent right, but a necessary concomitant of the right to issue general verdicts.[231]

As Judge Cranch's opinion foretold, the implications of the conditioning of the right to decide law on the general verdict would quickly evolve into the dilution, and ultimate abandonment, of the right. The decline can be seen in a series of cases. In *United States. v. Fenwick*[232] the court instructed that "the jury has right to give a general verdict, and, in doing so, must, of necessity, decide upon the law as well as upon the facts of the case."[233] Similarly, in *United States v. Stockwell*, the court stated that "the right of the jury to decide the law, was only the right to find a general verdict which includes both the law and the facts of the case."[234] The famous cases of *United States. v. Battiste*[235] and *United States v. Morris*[236] would tighten the logical noose on this argument, leading the way to *Sparf* itself. In *Battiste,* a prosecution for illegal slave trading, Justice Story remarked in detail on the jury's law-finding capacity. In rendering a general verdict, Story explained, jurors must "necessarily compound[] [both] law and . . . fact . . . [and] must necessarily determine the law, as well as the fact."[237] In undertaking this task, he proclaimed, although "they have the physical power to disregard the law, as laid down to them by the court[,] . . . I deny, that, . . . they have the moral right to decide the law according to their own notions, or pleasure."[238] Juries should instead "follow the law; as it is laid down by the court."[239] Sixteen years later in *Morris*, Justice Curtis expanded on this argument in far bolder terms. In response to the defendant's argument about the jury's right to decide the law, he stated that "[t]he jury have the power to go contrary to the law as decided by the court; but that the power is not the right, is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do."[240] He proceeded to reject the jurors' right to decide law in both the present and past, concluding that in rendering a general verdict, jurors' "duty and oath require them to apply to the facts, as they may find them, the

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[231] *See id.*
[232] 25 F. Cas. 1062 (C.C.D. D.C. Cir. 1836) (No. 15,086).
[233] *Id.* at 1064.
[234] 27 F. Cas. 1347, 1348 (C.C.D. D.C. Cir. 1836) (No. 16,405).
[235] 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).
[236] 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).
[237] 24 F. Cas. at 1043.
[238] *Id.*
[239] *Id.*
[240] *Morris,* 26 F. Cas. at 1335.

law given to them by the court."[241] These latter opinions proved to be models for the Supreme Court's decision forty years later in *Sparf*, where the Court cited them extensively in concluding that although the jury "have the physical power to disregard the law," they do not have the "right to decide the law according to their own notions or pleasure."[242]

In sum, the unyielding insistence that the right to decide the law was contingent on a general verdict proved a fatal weakness to the right itself. Once again, it also conclusively demonstrates that the right emerged from concerns over the jury's trial-specific role, and not more dramatic notions of jurors as legislators. Perhaps most telling is that jurors, while allowed to render decisions in mixed fact/law questions, were not permitted to rule on questions of pure law—exactly the type of questions a nullification right would entrust them to address.

III. THE RIGHTS COMPARED

This host of limitations on the law-finding right illustrates the errors in the modern-day nullification account. To briefly re-examine the nullification account's alternative assumptions about the relationship between the right to nullify and the right to decide the law, there first exists the standard assumption that the two rights are interchangeable.[243] Second, there is the Abramson-Scheflin view that "[j]urors' right to decide questions of law gives them considerably *greater* authority than jury nullification itself requires,"[244] and that "historically, jury nullification was debated as one example of the broader claim that jurors decided questions of law."[245] Figures A and B, summarizing the discussion above, show that neither of these positions is tenable, historically or logically.

First, the least broad expanse of jury's rights is displayed in the second concentric circle of Figure 1 in Appendix A: the jury's right to decide the facts with impunity, established in *Bushell's Case*. This right necessarily granted the jury the power to nullify laws, an action countless juries have exercised since.[246]

Second, the right to decide the law, enjoyed by juries from *Zenger* until *Sparf*, comprised a broader right than the pure fact-finding

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[241] *Id.* at 1336.

[242] 156 U.S. 151, 174 (citing United States v. Battiste, 24 F. Cas 1042 (C.C.D. Mass. 1835) (No. 14,545)).

[243] *See supra* notes 12-14, 44-50, and accompanying text.

[244] ABRAMSON, *supra* note 1, at 67 (emphasis added).

[245] *Id.* at 68.

[246] *See infra*, Appendix A.

right. But given that the law-finding right could only be practiced in general verdict cases where law and fact intermingled, the two rights are closely related, and both are indeed ultimately anchored in the fact-determining right. Even more important for the purpose of this Article's argument is what lay beyond the scope of the law-finding right—that is, what rights and duties the early Americans were *not* comfortable granting to the jury even as they granted the right to decide the law. As described above, the right did not give juries license to undertake law-finding based on their own, extra-legal notions of justice, but called instead on their knowledge and understanding of the law, supplemented by arguments on the law by judges and litigants. Nor did it permit them to decide knowingly *against* the law, based on either their general notions of justice or their interpretation of constitutional principles. Although, like the fact-finding right, the law-finding right inherently granted to juries the *power* to nullify, this power should not obscure the more narrow confines of their right to decide law.

Finally, today's proposal that juries enjoy the right to decide *against the law* based on their *extra-legal* notions of justice falls beyond even the "jury review" right denied to juries under the law-finding right. Indeed, it combines the very elements that were found to be beyond the law-finding right: deciding *against* the law, and deciding based on *extra-legal* criteria. The nullification right is broader than even the right to jury review because jury review would have been based on mixed considerations of *legal* constitutional questions (with which jurors were believed to be familiar) and more abstract questions of justice (which they were not deemed competent to consider). Nullification as it is defined today, on the other hand, would eliminate even the legal considerations of constitutional analysis. As Professor Simson explains, while the law-finding right approximated the role of a judge (but with more limits) the proposed nullification right is akin to that of a legislature, creating a separate body that "defines blameworthy conduct according to its own notions of justice."[247]

This analysis is unaffected by nullification scholars' attempts to minimize the scope of their proposed right.[248] As Figure 2 in Appendix B shows,[249] however they are characterized, the central duties Scheflin, Abramson and others wish the jury to perform under a nullification right are precisely those that were beyond the scope of jury

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[247] Simson, *supra* note 37, at 507.

[248] *See* Scheflin & Van Dyke, *supra* note 14, at 111-15 (arguing that nullification may only be practiced to acquit rather than convict—a showing of "jury mercy"—and that it does not allow for the nullification of statutes or precedent).

[249] *See infra* Appendix B.

law-finding. The superficial similarity between the two rights is largely due to the fact that both allow the jury to decide a case against a judge's instruction, and that both provide the jury with the *power* to nullify.

IV. CONCLUSION

This Article's argument about the limited, trial-centered nature of the right to decide the law is complemented by other scholars' work detailing the reasons that the right emerged in colonial times and continued through a century of United States law. Primarily, the right's rise and fall reflected evolving confidence in the judicial branch of the government as it grappled with and applied laws after they were enacted. The distrust[250] and lack of skill[251] of colonial and early American judges were crucial factors, along with a distrust of lawyers in general.[252] A belief that law was sufficiently uncomplicated so that the average citizen, with the help of a judge, could make competent legal decisions was another factor.[253] The simplicity of the criminal law further enabled people to entrust its interpretation to jurors.[254] Simply stated, rather than pitting the jury as a *quasi-legislative* check against *Congress*, the rise of the right to decide the law is best seen as a past battle between jury and judge, with the jury having enjoyed some (but not even all) of the duties that judges enjoy today.

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[250] *See* Scott, *supra* note 1, at 416 ("The roots of [the law-finding] tradition undoubtedly rested in the pre-revolutionary manipulation of the legal system by the royal judiciary."); SIMSON, *supra* note 37, at 503 ("Appointed by the king and dependent upon his favor for their continuation in office, . . . colonial judges threatened to stretch the law at every opportunity in favor of prosecutors proceeding in the name of the crown.").

[251] *See* HOWE, *supra* note 51, at 591 ("[A] large percentage of the judges were laymen."); Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth Century America*, 71 NOTRE DAME L. REV. 505, 518 (1996) (stating that after the Revolution, "[t]he quality of the judiciary was low," and because of low salaries and the requirement of circuit-riding, "the bench tended to be recruited from the less able members of the profession, if indeed they were professionals at all"). Professor Nelson describes in detail the problems of insufficiently skilled judges struggling to instruct colonial juries on the law—they often shied from drawing legal conclusions, and in cases where more than one judge sat upon the bench (the vast majority of trials), judges often gave conflicting instructions. *See* William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 909-13 (1978).

[252] *See* Lettow, *supra* note 251, at 518 (explaining that in the beginning of the Republic, "[p]ublic hostility toward lawyers flourished" for both ideological and economic reasons); Note, *supra* note 213, at 172 ("Underlying the conception of the jury as a bulwark against the unjust use of government power [was] the distrust of 'legal experts.'"). There was also a more general distrust of "legal experts." *See id.*

[253] *See supra* notes 108-115, 116-118, and accompanying text (describing Wilson's and Adams' view of the accessibility of U.S. laws); Note, *supra* note 213, at 172 (describing the "faith in the ability of the common people").

[254] *See* ABRAMSON, *supra* note 1, at 915 (stating that the paucity and simplicity of positive law made the system less concerned with who was to interpret the law).

Not surprisingly, therefore, the decline in the right to decide the law over the course of the 19th century came in response to fundamental changes in the American assessment of the judicial branch. Judges and the bar in general became more skilled[255] and thus more confident in constraining the jury's role. The fear of "imperial judges" at the dawn of the law-finding right waned.[256] Substantive law grew in sophistication and complexity, further removed from the understanding of the lay juror.[257] Juries became less cozy and more heterogeneous, and they were less frequently populated with people who inspired communal confidence.[258] Overall, the demise of the right to decide law was one of numerous tremors in the American legal system generated by this growing confidence in the nation's judges.[259]

This Article has thus shown that today's pro-nullification scholars have misunderstood the practice of yesteryear. Law-finding was not the equivalent of today's proposed right to nullify, and it certainly was not more broad than that right. Even the radical English inventors of jury law-finding conceived a jury working hard to interpret, construe, and *follow* the law, whether it was the common law, or a given statute, or possibly higher law. Colonial America adopted this conception of juries as legal adjudicators, applying legal reasoning and engaging in good-faith interpretation of law as a judge would. When the new nation came into being, it too adopted this model; once again, the jury's was a legal task, construing and *following* the law. Moreover, the new nation erected additional limitations on the law-finding

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[255] *See* Lettow, *supra* note 251, at 518-20 (discussing the improved education and training of lawyers and judges over the course of the 19th century).

[256] *See* Farley, *supra* note 51, at 203 (stating that "[t]he fear of judges had passed" by the mid-19th century).

[257] *See* Alschuler & Deiss, *supra* note 83, at 915-16 (describing that "[a]s the volume of accessible positive law increased [in the 19th century,] it was evident that 'judge law' and 'jury law' were distinct," while previously they had been the same); Lettow, *supra* note 251, at 521 ("Newly confident and professionally-trained judges had a trial and appellate system that allowed them to define the law clearly and to know when juries were disregarding it.").

[258] *See* ABRAMSON, *supra* note 1, at 89; Alschuler & Deiss, *supra* note 83, at 916 ("Over the course of the nineteenth century, as American society grew more diverse and jury membership more inclusive—and as the legal issue presented to the courts grew more complicated—the belief that jurors' consciences would yield sound, shared, consistent answers to legal questions undoubtedly faded.").

[259] *See* Alschuler & Deiss, *supra* note 83, at 917-21 (interpreting the deeper symbolism in the jury's loss of power to decide the law); Farley, *supra* note 51 (describing the emergence of more formal jury instructions effected by the new judge-jury balance, and the consequent bolstering of appellate courts' power and scope of review of trials); Lettow, *supra* note 251 (tracing judges' growing use of "new trial" to control juries); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1034-35 (1997) ("Judicial review could only become possible after influential segments of the American political community moved away from the belief that juries were competent triers of law and fact alike, and instead accepted the benefits of allowing professionally expert judges to act as independent sources of legal authority.").

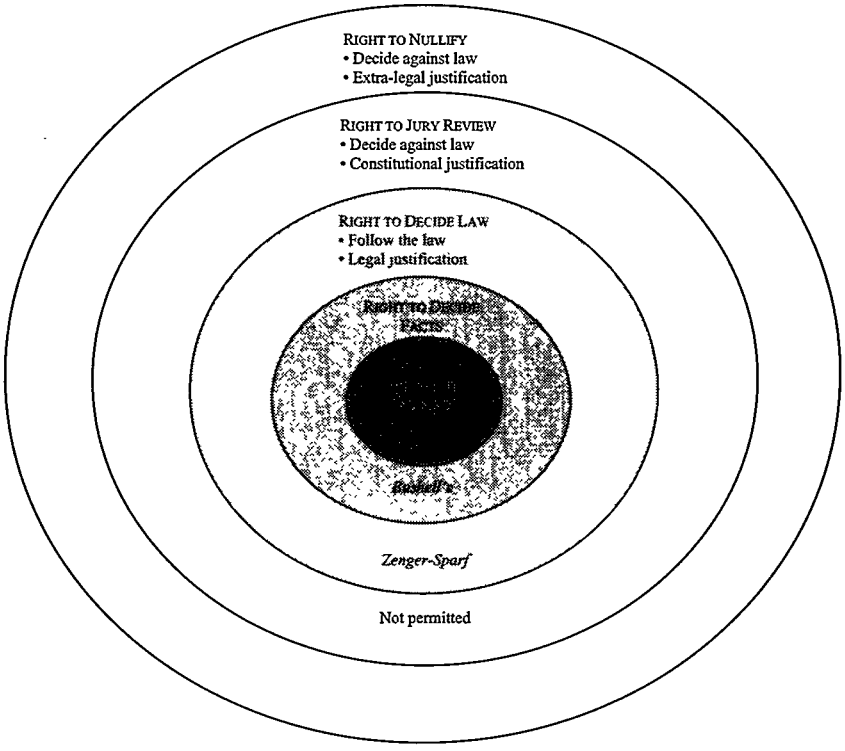
right which further cabined the jury's role. These limitations would ultimately lead to the internal collapse of the right itself into today's practical acceptance of juries' *power* to nullify.

If modern-day nullification proponents wish to claim for today's jury the more esteemed role in our democratic process that would come with the right to nullify, which would require our legal system to include instructions to jurors of that right as well as the right of self-proclaimed nullifiers to remain on juries,[260] they will have to create it from whole cloth. For although there is ample precedent demonstrating the jury's power to nullify, the annals of America's past simply do not provide precedent for the jury's right to do so.

[260] *See* United States v. Thomas, 116 F. 3d 606 (2d Cir. 1997) (holding that a juror intending to nullify the law, without examining the evidence, may be dismissed).

APPENDIX A

Figure 1.



APPENDIX B

Figure 2.