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## The Right of Jury Nullification in Reconstruction-Era Originalism: The Fourteenth Amendment and the Constitutionalization of Judicial Precedent

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<b>Citation</b>	Jonathan Bressler, The Right of Jury Nullification in Reconstruction-Era Originalism: The Fourteenth Amendment and the Constitutionalization of Judicial Precedent (April 2009).
<b>Accessed</b>	February 18, 2015 1:39:11 AM EST
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THE RIGHT OF JURY NULLIFICATION  
IN RECONSTRUCTION-ERA ORIGINALISM:  
THE FOURTEENTH AMENDMENT AND THE  
CONSTITUTIONALIZATION OF JUDICIAL PREDECENT

*Jonathan Bressler*

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*Jonathan Bressler\**

*More than a century ago, the Supreme Court, invoking antebellum judicial precedent, held that juries no longer have the right to “nullify,” that is, to refuse to apply the law. Today, however, in determining the substance of the constitutional criminal procedure right of trial by jury, the Supreme Court emphasizes originalism, assessing the right’s current boundaries by the Founding-era understanding of it. Relying on the Supreme Court’s originalist jurisprudence, scholars and several federal judges have recently concluded that because Founding-era juries had the right to nullify, the right was beyond the authority of nineteenth-century judges to curtail, and that, under the current originalist regime, it should be restored. Yet originalists who advocate restoration of the right to nullify are missing an important constitutional moment: Reconstruction. The Fourteenth Amendment fundamentally transformed constitutional criminal procedure by incorporating rights against the states and by providing a federally guaranteed civil right to protection that altered the relationship between the federal government and localities and between federal judges and local juries. Reconstruction-era history thus illuminates a new original understanding of constitutional criminal procedure rights today.*

*This paper analyzes Reconstruction-era judicial practices, legal treatises, dictionaries, Congressional debates, and Congressional legislation to provide an account of how the Fourteenth Amendment’s framers, ratifiers, original interpreters, and original enforcers understood the “new” Constitution and their amendment to affect jury nullification. It finds that the Reconstruction Congresses understood the Fourteenth Amendment not to incorporate the jury’s right to nullify against the states, even as it incorporated a general right to jury trial and due process. On the contrary, the Reconstruction Republicans understood jury nullification to be incompatible with the constitutional rights to life, liberty, property, and security that they were charged with protecting in the former Confederate states and in the Utah Territory. In what was then among the most significant revolutions in federal jury law, the Reconstruction Republicans, understanding the Constitution to authorize them even to disallow jury nullification in at least some types of federal cases, supported legislation that would purge in mass from criminal juries Southern and Mormon would-be nullifiers, even some prospective jurors who plausibly believed that a federal criminal statute was unconstitutional.*

*Therefore, the Reconstruction Congresses, through the Fourteenth Amendment and its enforcement legislation, may have superdemocratically constitutionalized the nineteenth-century judicial precedent that had disallowed the jury’s right to nullify. There may be, in other words, an originalist basis, grounded in the Fourteenth Amendment’s text and history, for the shift away from the right to nullify. While no single account may definitively capture “original meaning,” Reconstruction-era history provides a new original understanding of a dilemma in contemporary constitutional criminal procedure.*

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\* Many thanks to my instructors Professors Akhil Reed Amar, Morton Horwitz, Michael McConnell, Jed Shugerman, and David Alan Sklansky for their guidance and advice in developing this paper, and to the participants in the Harvard Law School Legal History Workshop for helpful feedback and comments.

## I. INTRODUCTION

Only one right is guaranteed in both the body of the Constitution and the Bill of Rights,<sup>1</sup> and only one was guaranteed in all twelve state constitutions drafted before 1787:<sup>2</sup> the right of trial by jury in criminal cases. After all, as Alexander Hamilton asserted, “The friends and adversaries of the plan of the [Constitutional C]onvention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.”<sup>3</sup> Yet, in spite of its importance,<sup>4</sup> the constitutional text guarantees little more than trial by “jury.” While the term “jury” must have substance for the right to criminal trial to have meaning, there are no statements in Article III or the Sixth Amendment about what jury actually means or what jury trial actually requires.<sup>5</sup> Consequently, the Supreme Court has acknowledged that it must “give intelligible content to the right of jury trial.”<sup>6</sup> The Court, however, has had trouble determining whether to mandate, for example, twelve-person juries or unanimous verdicts,<sup>7</sup> and its decisions have often seemed arbitrary.<sup>8</sup>

Forty years ago, in deciding what the Constitution’s criminal jury provisions entail, the Court cared little about what the constitutional text was originally understood to protect. “We do not pretend,” the Court once remarked, “to be able to divine precisely what the word ‘jury’ imported to the framers, the First Congress, or the States in 1789.”<sup>9</sup> Recently, however, the

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<sup>1</sup> See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”).

<sup>2</sup> See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994); see also Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 421–26 (2009) (describing the state constitutions).

<sup>3</sup> THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>4</sup> See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 161 (1997) (“No idea was more central to our Bill of Rights—indeed, to America’s distinctive regime of government of the people, by the people, and for the people—than the idea of the jury.”).

<sup>5</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 241 (2005) (noting that jurors “could point to no strong statements in the constitutional text” that define their role).

<sup>6</sup> *Blakely v. Washington*, 542 U.S. 296, 305 (2004).

<sup>7</sup> Compare *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding state convictions on 10–2 verdicts did not violate the Sixth or Fourteenth Amendments), *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that state convictions on 9–3 verdicts did not violate the Fourteenth Amendment), and *Williams v. Florida*, 399 U.S. 78, 89–90 (1970) (calling the right to a jury of twelve “a historical accident” unprotected by the Sixth Amendment), with *Patton v. United States*, 281 U.S. 276, 288 (1930) (stating that a constitutional trial by jury “means a trial by jury as understood and applied at common law, and includes all the elements as they were recognized in this country and England when the Constitution was adopted,” including a jury of twelve and unanimous verdicts), and *Thompson v. Utah*, 170 U.S. 343, 349 (1898) (stating that “the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less”).

<sup>8</sup> Compare *Williams*, 399 U.S. 78 (upholding a criminal conviction by a unanimous jury of six), with *Burch v. Louisiana*, 441 U.S. 130 (1979) (holding that a criminal conviction on 5–1 vote violated the Sixth and Fourteenth Amendments), and *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a criminal conviction by a unanimous jury of five violated the Sixth and Fourteenth Amendments).

<sup>9</sup> *Williams*, 399 U.S. at 98.

Court has emphasized the significance of originalism in contemporary constitutional criminal procedure jurisprudence.<sup>10</sup> For stage after stage of criminal trial—from evidence<sup>11</sup> to verdict<sup>12</sup> to sentencing<sup>13</sup>—the Court has analyzed Founding-era history to determine the original meaning and thus the constitutional requirements of criminal jury trial.<sup>14</sup> In other words, the Court has found that “jury” has substantive content that was implicit in the original text and must be enforced today.<sup>15</sup> Statutes enhancing criminal punishment based on facts determined by a judge, rather than a jury, for example, have been held to violate the Constitution’s substantive right of trial by jury,<sup>16</sup> though the Constitution, of course, lacks explicit statements condemning these statutes as unconstitutional.

Notwithstanding its ubiquity in modern criminal jury law, the Court’s originalism has failed to penetrate two important realms. Substantively, the Court has missed one criminal jury trial right that the Founding-era framers considered among the most important. This was the jury’s right to decide questions of law, and thus to reject the law as given to it by the court, an idea most often identified today as the jury’s right to nullify the law.<sup>17</sup> While Founding-era jury nullification doctrine held that the jury’s right to nullify was essential to protect rights from an overbearing government, modern jury nullification doctrine, on the other hand, holds that jury nullifi-

<sup>10</sup> See Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 185 (2005) (“Originalism, in short, is a powerful force in criminal procedure . . .”); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1516 (2006) (noting that originalism has “figured prominently” in recent constitutional criminal procedure cases); Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL’Y 871, 871 (2008) (“Originalism is in the game, even if it does not always prevail. Sometimes . . . it does prevail, as in [recent constitutional criminal procedure cases].”).

<sup>11</sup> See *Giles v. California*, 128 S. Ct. 2678 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>12</sup> See *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Gaudin*, 515 U.S. 506 (1995).

<sup>13</sup> See *Oregon v. Ice*, 129 S. Ct. 711 (2009); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>14</sup> See *Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008) (“[*Crawford*] ‘turn[ed] to the historical background of the [Confrontation] Clause to understand its meaning,’ and relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation.” (second alteration in original) (citations omitted) (quoting *Crawford*, 541 U.S. at 43)); *Blakely*, 542 U.S. at 306 (noting that without the sentencing restrictions required by *Apprendi*, “the jury would not exercise the control that the Framers intended”).

<sup>15</sup> See, e.g., *United States v. Booker*, 543 U.S. 220, 237 (2005) (noting that the Supreme Court’s sentencing law decisions are motivated “by the need to preserve Sixth Amendment substance”); see also Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 725, 728 (2006) (noting that “the jury has a constitutionally protected substantive role to play in checking government power.”).

<sup>16</sup> See *Booker*, 543 U.S. at 226–27, 244; *Blakely*, 542 U.S. at 301, 305, 313; *Ring v. Arizona*, 536 U.S. 584, 592–93 (2002); *Apprendi*, 530 U.S. at 490.

<sup>17</sup> See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 6 (1998). Although nullification is conventionally defined as a “jury’s knowing and deliberate rejection of the evidence or refusal to apply the law,” BLACK’S LAW DICTIONARY 875 (8th ed. 2004), the concept has been expended to include single holdout jurors who “choose not to follow the law as it is given to them by the judge,” Nancy S. Marden, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 881 (1999).

cation is nothing more than an illegitimate power.<sup>18</sup> Because the modern doctrine is inconsistent with the Court's Sixth Amendment originalism, scholars, attorneys, and even federal judges have called for abrogating Supreme Court precedent and restoring the jury's right to nullify.<sup>19</sup>

Yet, this call for Founding-era originalism overlooks the other realm that the Court's originalism has ignored. Temporally, the Court and most of its originalist commentators have neglected a constitutional moment that, assuming an originalist or a textualist perspective, should shine significant light on contemporary criminal procedure rights, including the right to nullify.<sup>20</sup> This was the creation of the Fourteenth Amendment, the textual hook through which the Court refracts most modern criminal procedure doctrine, including all state issues. Fundamentally revolutionizing the nature of federalism and civil rights, the Fourteenth Amendment transformed them from a Founding-era constitutional paradigm of individual, locality, and state rights against liberty-endangering federal power to a Reconstruction-era constitutional paradigm of individual rights and liberty-enhancing federal power against locality and state rights. In establishing and prioritizing nationalist-oriented federalism and civil rights, therefore, the Fourteenth Amendment was understood to transform or to curtail certain older constitutional principles and rights that conflicted with the new ones.

In the criminal procedure context, against the implicit Sixth Amendment right of jury nullification, which had been another Founding-era bastion of individual defendants' and local juries' rights against the federal government, arose the Fourteenth Amendment civil right to protection by the state and federal governments of life, liberty, property, and security against defendants', nullifying juries', and states' deprivations of that right.<sup>21</sup> As a result, the Fourteenth Amendment altered the Sixth Amendment jury trial right's scope and meaning. Incorporation doctrine makes clear that some type of Reconstruction-era revision occurred with respect to state cases, but the constitutional revision may also apply to federal cases, where federally enforced Fourteenth Amendment civil rights may have superseded implicit or penumbral Sixth Amendment jury rights that existed at the Founding. In revising constitutional criminal procedure, the new Reconstruction-era civil right to federal and state protection of individual life, liberty, property, and security may have trumped certain Founding-era constitutional criminal procedure rights, like the jury's right to nullify.

Although the Court and its commentators have focused on the Sixth Amendment's Founding-era history, both have largely ignored the Reconstruction-era history that explains the original understanding of the Fourteenth Amendment's criminal procedure protections and thus how the Four-

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<sup>18</sup> See *infra* notes 28–43, 53–81 and accompanying text.

<sup>19</sup> See *infra* Section II.A.

<sup>20</sup> See *infra* Section II.C.

<sup>21</sup> See *infra* Section IV.A.

teenth Amendment may have transformed constitutional criminal procedure. Even Professor Akhil Reed Amar, the leading scholar who explains the Reconstruction-era process through which new constitutional amendments may have “reglossed” the original Bill of Rights<sup>22</sup> and who has discussed how Reconstruction may have affected the right to nullify,<sup>23</sup> agrees with originalist scholars that today there is or should be some Founding-era constitutional right to nullify.<sup>24</sup> Yet, the Founding-era perspective misses how Reconstruction committed the United States to a new vision of courts and juries, a new role of civil rights, a new robust reading of Congressional power, and a new priority of nationalism over localism. In attempting to understand the original meaning of our post-Fourteenth Amendment Constitution, Founding-era originalists omit the legal history of an important era, one that illuminates a “new,” Reconstruction-era original meaning.

This paper attempts to remedy these substantive and temporal omissions by assessing how the Reconstruction generation understood jury nullification. While others have written about doctrinal, prudential, and structural arguments for or against the jury’s right to nullify,<sup>25</sup> this paper focuses on the archetype of legal analysis that Philip Bobbitt calls “historical argument.”<sup>26</sup> Its purpose is not to evaluate the merits or demerits either of originalism as an interpretive methodology or of jury nullification as a practice. Rather, its purpose is to offer a new way of understanding the issue of jury nullification through a different lens of originalism, the methodology that the Supreme Court has adopted in its recent jury law jurisprudence. This paper starts from the premise that the Court considers originalism highly relevant to the issue—after all, recent constitutional criminal procedure opinions for the Court written by Justices Stevens, Scalia, Souter, and Ginsburg have relied upon substantial originalist analysis<sup>27</sup>—and then analyzes how incorporating Reconstruction-era history into that methodology may affect an originalist interpretation of the right to nullify.

First, this paper concludes that the Fourteenth Amendment’s framers understood their amendment to guarantee the right of criminal jury trial in state courts but not to incorporate the jury’s historic right to nullify against the states. In 1868, unlike in 1791, this right was not considered inherent in

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<sup>22</sup> E.g., Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 177 (2008) (discussing the Reconstruction-era process that “reglossed” the Second Amendment).

<sup>23</sup> See *infra* notes 166, 173 and accompanying text.

<sup>24</sup> See *infra* notes 161–170 and accompanying text.

<sup>25</sup> See, e.g., sources cited in SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 54–65 (8th ed. 2007).

<sup>26</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 7 (1982) (describing the five archetypes of constitutional arguments: historical, textual, structural, prudential, and doctrinal).

<sup>27</sup> For examples of the use of originalism in the majority opinions of recent constitutional criminal procedure cases, see *Oregon v. Ice*, 129 S. Ct. 711, 717–18 (2009) (Ginsburg, J.); *Giles v. California*, 128 S. Ct. 2678, 2682–86 (2008) (Scalia, J.); *Apprendi*, 530 U.S. at 477–83 (Stevens, J.); *Jones v. United States*, 526 U.S. 227, 244–48 (1999) (Souter, J.).

due process or jury trial. Second, it shows that, contrary to the Sixth Amendment's framers, the Fourteenth Amendment's framers understood jury nullification to be inconsistent with constitutional rights because it prevented the government from enforcing the right to protection contained in Section 1. While the Founding generation viewed jury nullification as an essential guarantor of constitutional rights, the Reconstruction generation believed that nullifying juries were violating victims' civil rights. Since the Reconstruction-era understanding of jury nullification was antithetical to the Founding-era understanding, the Fourteenth Amendment may have transformed this substantive criminal jury right that had been implicit in the Sixth Amendment. According to the Fourteenth Amendment's framers understanding, the Constitution and Fourteenth Amendment enforcement legislation did or could empower Congress and federal courts to disallow nullification, at least with respect to certain crimes, if not in all cases. Ultimately, the Fourteenth Amendment's text and history may provide an alternative justification of the Court's current doctrine prohibiting the jury's right to nullify, one that comports with originalism—*Reconstruction-era originalism*. More importantly, it illustrates that constitutional original meaning may not be captured exclusively in a Founding-era history of rights.

This paper proceeds in three principal parts. Part II discusses the conflicts in current nullification doctrine and explains this paper's methodology. It begins with a descriptive conflict: although current doctrine prohibits nullification, the Court has insisted upon originalism in constitutional criminal procedure and scholars have demonstrated that the Founding generation embraced the jury's substantive right to nullify; therefore, several federal judges have taken this substantive contradiction to mean that current nullification doctrine either should be or has been overruled. Part II also introduces the normative conflict: current doctrine is based upon nineteenth-century judicial precedent that defied the popular will of many antebellum state legislatures and may not be the type of authority that democratic constitutional theory should desire. It then explains why Reconstruction-era originalism may provide a better textual and historical basis for determining current criminal procedure rights than Founding-era originalism does. It concludes by examining prior scholarship in the field and how Reconstruction-era sources, particularly Congressional bills and debates, may illuminate an originalist understanding of the right of jury nullification.

Parts III and IV apply a Reconstruction-era originalist analysis of jury nullification. Part III addresses whether the Reconstruction generation understood the Fourteenth Amendment to incorporate the right of nullification against the states. It does so by assessing what the meaning of the right to jury trial in relation to nullification was in 1868 as understood through judicial practices, treatises, and dictionaries and, most importantly, by offering the Reconstruction Congresses' understanding of nullification as revealed in the floor debates from the Thirty-ninth through Forty-second Congresses. Part IV asks whether the Reconstruction generation understood the Constitution disallow, or to authorize Congress to disallow, the jury's right to nul-



lify. It analyzes whether the Reconstruction Congresses, acting in the name of a federal right to protection, consciously understood nullification to be antithetical to freedmen's rights in the Southern states and to women's rights in the Utah Territory, and it provides case studies of proposed legislation intending to purge jurors who were willing to nullify in federal criminal cases. Part V concludes that, under a Reconstruction-era originalist interpretation, the Fourteenth Amendment's new original meaning did not incorporate the jury's right to nullify, and it may have transformed the Sixth Amendment to disallow that right even in federal cases, suggesting that Founding-era originalism should not monopolize originalist constitutional interpretation.

## II. THE SUBSTANTIVE AND TEMPORAL OMISSIONS OF MODERN DOCTRINE

Ever since the first Justice Harlan's late-nineteenth-century opinion for the Supreme Court in *Sparf v. United States*<sup>28</sup> held that "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts,"<sup>29</sup> the law of the land has been that though juries may have the unauthorized *power* to nullify, they have no legal or moral *right* to do so, and courts have the authority to prevent it.<sup>30</sup> Today, *voir dire* seeks to ensure that jurors selected for service will not nullify,<sup>31</sup> jurors must take an oath to apply the law as instructed by the court,<sup>32</sup> jurors may be instructed that they

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<sup>28</sup> 156 U.S. 51 (1895).

<sup>29</sup> *Id.* at 102.

<sup>30</sup> The Supreme Court has not considered nullification at length since *Sparf* but has referred to it briefly. Compare Douglas D. Koski & Hui-Yu Lee, *Jury Nullification in the United States of America: A Brief History and 21st Century Conception*, in *THE JURY TRIAL IN CRIMINAL JUSTICE* 322, 326 (Douglas D. Koski ed., 2003) ("In *Sparf and Hansen v. United States*, the Supreme Court had its first and only say in the matter [of nullification]."), with *United States v. Powell*, 469 U.S. 57, 63 (1984) (characterizing jury nullification as "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons"), *Standefer v. United States*, 447 U.S. 10, 22 (1980) (describing nullification as jurors' "assumption of a power which they had no right to exercise" (internal citations and quotation marks omitted)), and *Dunn v. United States*, 284 U.S. 390, 393 (1932) (characterizing the practice of jury nullification as the "assumption of a power" which a jury has "no right to exercise"). For examples of recent appellate decisions relying on *Sparf*, see *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007) ("[W]e hold that the district courts may discharge a juror for . . . failure to follow the district court's instructions, or jury nullification . . ."); *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) ("[W]hile jurors have the power to nullify a verdict, they have no right to do so."); *Smith v. Winters*, 337 F.3d 935, 938 (7th Cir. 2003) (noting that there is "no right" of "jury nullification"); see also Kadish et al., *supra* note 25, at 54 ("The federal courts and nearly all the states . . . refuse to permit instructions informing the jury of its nullification power."); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES* 227 (2007) ("[S]ince the late nineteenth century, American courts have consistently held that although juries have the *power* to disregard the law . . . , they do not have the legal *right* to do so.").

<sup>31</sup> See FEDERAL JUDICIAL CENTER, *BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* § 2.06(8)(d), at 93 (4th ed., rev. 2000) (including among its list of standard *voir dire* questions to prospective jurors: "If you are selected to sit on this case, will you be able to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?").

<sup>32</sup> See *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) ("Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court . . .").

have a “duty” to convict if the evidence proves guilt,<sup>33</sup> and trial judges have a “duty”<sup>34</sup> to prevent nullification through instruction,<sup>35</sup> admonition, and the removal of nullifying jurors, even during jury deliberations.<sup>36</sup> In contrast to contemporary courts’ hostility toward nullification,<sup>37</sup> however, Founding-era Americans embraced nullification and viewed jury interpretation of law as not merely a power but also an essential *right*.

Whether jurors have the constitutional right or only the unauthorized power to nullify is an issue that affects the outcome of some criminal trials today. With only the power to nullify, jurors may still surreptitiously do so, but while prosecutors sometimes fear nullification, especially in cases involving euthanasia or drugs, guns, and other possession offenses, most commentators agree that such instances of jury disobedience are rare.<sup>38</sup> As an instance of televised jury deliberations showed, in a real criminal case where the judge permitted the defense attorney to argue for nullification but refused a nullification instruction, jurors are uncomfortable about disobeying judicial instructions.<sup>39</sup> If jurors had the right to nullify, however, then jurors could be informed of their power and right,<sup>40</sup> and increased nullification would ensue. Indeed, a study comparing nullification behavior by mock juries found that juries informed that they could nullify nullified more often than the uninformed control group.<sup>41</sup> Finally, with the jury’s right to nullify,

<sup>33</sup> See *United States v. Carr*, 424 F.3d 213, 218–21 (2d Cir. 2005) (upholding jury instruction that the jury had a “duty” to convict if the facts proved every element of the offense).

<sup>34</sup> See *Thomas*, 116 F.3d at 616.

<sup>35</sup> E.g., ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL), Pattern Instruction 2.1 (2003) (“You must also follow the law as I explain it to you whether you agree with that law or not . . .”).

<sup>36</sup> See *United States v. Abbell*, 271 F.3d 1286, 1302–04 (11th Cir. 2001) (per curiam) (approving the dismissal of a juror during jury deliberations who “was not applying the law as directed”); *United States v. Luisi*, 568 F. Supp. 2d 106, 108–10 (D. Mass. 2008) (dismissing a juror during jury deliberations for engaging in juror nullification).

<sup>37</sup> For Judge Posner’s particularly colorful analogy condemning nullification, see *Braun v. Baldwin*, 346 F.3d 761, 763 (7th Cir. 2003) (“Although advocacy of jury nullification could no more be flatly forbidden than advocacy of Marxism, nudism, or Satanism, we cannot think of a more reasonable regulation of the time, place, and manner of speech than to forbid its advocacy in a courthouse.”).

<sup>38</sup> See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 433 n.1 (1998); see also Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY* 56–57, 116 (1971) (providing data that indicates judges attribute to nullification only about 4 percent of jury acquittals in criminal cases in which the judge would have convicted).

<sup>39</sup> See Daryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1245, 1248 (1998) (noting that in the videotaped deliberations in *Wisconsin v. Reed*, jurors were reluctant to ignore the law and that their acquittal was not an act of nullification); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries To Determine the Law*, 89 J. CRIM. L. & CRIMINOLOGY 111, 114–15 (1998) (noting that the jurors in *Reed* were uncomfortable about breaking the rules).

<sup>40</sup> See *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) (“If jurors had a right to nullify, then a court would have a correlative duty to safeguard their ability to exercise this right.” (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913) (describing a legal taxonomy in which a duty is the correlative of a right))).

<sup>41</sup> See Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 Brook. L. Rev. 1207, 1236 (2001) (noting how an explicit nullification instruction altered the outcome of the

attorneys could argue the unconstitutionality of a criminal statute to a jury,<sup>42</sup> giving the defendant an additional opportunity to raise reasonable doubt, and courts could not strip juries of citizens unwilling to implement the judges' opinions on the law,<sup>43</sup> resulting in fewer convictions.

Nor has the right-power distinction been left undisturbed in its grave since the *Sparf* Court tried to bury it. With the rise of the Supreme Court's originalism, scholars, lawyers, and judges have argued that *Sparf* should be revisited. This Part explains why *Sparf* is susceptible to Founding-era originalist challenges and how Reconstruction-era originalism may illuminate the constitutionality of its holding.

### A. Founding-era Originalism and Jury Nullification

Although *Sparf* has been the law of the land for more than a century, the current Supreme Court's criminal procedure jurisprudence has prioritized originalism over doctrinalism, suggesting that the Court may be receptive to modifying its nullification jurisprudence to accord with the Founding-era right. When the Warren Court incorporated the Sixth Amendment's right to criminal jury trial against the states, it noted that "our decisions interpreting the Sixth Amendment are always subject to reconsideration."<sup>44</sup> The current Court has accepted that invitation. In overturning well-established precedents and statutes through originalist reasoning,<sup>45</sup> with some measure of disregard to the consequences of doing so, the Court has demonstrated its willingness to reject *stare decisis* and to repudiate criminal law doctrine that misunderstands the Constitution's original meaning.<sup>46</sup>

Some of the Court's language has hinted that it may be open specifically to reevaluating *Sparf*'s disallowance of nullification. The accepted history that the disallowance was judicially driven, for example, conflicts with the Court's finding that the framers did not leave the "definition of the scope of

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mock jury deliberations in Horowitz's study); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2588 (1997).

<sup>42</sup> See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1191 (1991); cf. *Gibbs v. VanNatta*, 329 F.3d 582, 584 (7th Cir. 2003) ("A jury does not have the authority to disregard the law, and as a result (a concrete consequence of the abstract distinction between power and authority) a defendant's lawyer is not permitted to argue to the jury that it should disregard the law; nor does the judge let on to the jury that it has the power to acquit in the teeth of the law."); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 336 (1st ed., Boston, Little, Brown, & Co., 1868) ("If the jury in a particular case, by the constitution or laws of the State, are judges of the law, it would seem that counsel should be at liberty to address them fully upon it . . .").

<sup>43</sup> See Krauss, *supra* note 39, at 114.

<sup>44</sup> *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968).

<sup>45</sup> E.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (overturning state sentencing statutes).

<sup>46</sup> See, e.g., *Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008) ("In *Crawford* we accepted the petitioner's argument that the interpretation of the Sixth Amendment right to confrontation that we had previously endorsed . . . needed reconsideration because it 'stray[ed] from the original meaning of the Confrontation Clause.'" (quoting *Crawford*, 541 U.S. at 42)).

jury power up to judges' intuitive sense" because "they were unwilling to trust government to mark out the role of the jury."<sup>47</sup> Moreover, when recognizing the need to expound on the historical ability of juries to check the judiciary, the Court's first resort was to cite favorably eighteenth-century jury nullification.<sup>48</sup> Indeed, Justice Scalia, after calling juries "the spinal column of American democracy," suggested that jurors should not permit judges "to interpret criminal laws oppressively,"<sup>49</sup> implying that the jury has a legitimate law-interpreting, and perhaps law-deciding, role, which means that they may be again permitted to nullify.

Recognizing that Founding-era criminal juries had the right to determine the law, academics have made powerful originalist arguments contending that the criminal jury's right to nullify is of constitutional dimension and should be restored.<sup>50</sup> "Whether the 'jury lost the right' to disregard the judge's instructions," Professor Raoul Berger asserted in laying out the originalist critique of modern jury nullification doctrine, "may be doubted. If . . . that right was an 'attribute' of trial by jury at the adoption of the Constitution, it was embodied therein, and therefore was beyond the power of courts to curtail."<sup>51</sup> In the pages of law journals today, scholars continue to make such arguments against *Sparf's* holding.<sup>52</sup> While some scholars disagree that Founding-era history should affect contemporary jurisprudence, scholars almost unanimously agree that when the Constitution and Sixth Amendment were ratified in the late eighteenth century, the jury was understood to have the right, not merely the power, to decide questions of law and thus to nullify.<sup>53</sup> In supporting the conclusion that the jury's right to nullify

<sup>47</sup> *Blakely v. Washington*, 542 U.S. 296, 308 (2004); *accord Crawford*, 541 U.S. at 67–68.

<sup>48</sup> See *Jones v. United States*, 526 U.S. 227, 246–48 (1999) (discussing the John Peter Zenger case).

<sup>49</sup> *Neder v. United States*, 527 U.S. 1, 30, 32 (1999) (Scalia, J., concurring in part and dissenting in part) (explaining that the Constitution allows juries to thwart "judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively" and that the Supreme Court may not cancel the jury's criminal guilt-finding function).

<sup>50</sup> See King, *supra* note 38, at 434 (noting a "renaissance of academic support for jury nullification," including originalist-based argumentation); Krauss, *supra* note 39, at 121 & n.44 (discussing "powerful" originalist argumentation for nullification written by scholars).

<sup>51</sup> See Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 B.Y.U. L. REV. 873, 889–90.

<sup>52</sup> For recent articles advocating originalism in jury jurisprudence, see Appleman, *supra* note 2, at 397–98 (providing "the missing historical and constitutional justification for the Supreme Court's fidelity to the jury"); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 106–07 (2006) (criticizing *Sparf*); Andrew J. Parmenter, Note, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 417–19 (2007) (arguing that nullification originally was "part of our constitutional system").

<sup>53</sup> Compare JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 30–31, 37, 63–64, 75–76 (1994) (stating that Founding-era juries had the right to decide questions of law), AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 97–103 (1998) (same), LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 157–58 (2004) (same), FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 40–41, 289 (1985) (same), WILLIAM NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 21

was inherent in the Founding-era meaning of “jury,” scholars point to four categories of evidence.

First, they quote the statements of intelligent and informed late-eighteenth-century Americans regarding the jury’s right to decide questions of law.<sup>54</sup> John Adams, for example, wrote, “It is not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”<sup>55</sup> Zephaniah Swift, a future Chief Justice of the Connecticut Supreme Court, wrote that juries were “the proper judges, not only of the fact but of the law that was necessarily involved.”<sup>56</sup> For the Founding generation, the jury’s right to nullify was essential to deter overzealous officials, to check prosecutorial discretion, and to enable jurors to serve as the People’s voice.<sup>57</sup> Theophilus Parsons, a future Chief Justice the Massachusetts Supreme Court, explained that jury nullification was necessary to secure the proposition that “act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Innocent they [the jury] certainly will pronounce him, if the supposed law he resisted was an act of usurpation.”<sup>58</sup> The jury, in other words, would determine the legitimacy of the law by answering the legal question of whether a law was an act of usurpation. For the Founding generation, this jury right to judge such questions of law rendered jury trial as critical as legislative lawmaking and the right to vote.<sup>59</sup> Rivals Thomas Jefferson and Alexander Hamilton—indeed, framers from all political viewpoints—understood the right of criminal trial by jury necessarily to encompass the jury’s right to nullify.<sup>60</sup>

Second, scholars cite treatises and law books, which presented law as

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(1975) (same), Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, and Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (same), with Krauss, *supra* note 39, at 119–21 (arguing that it is not clear to what extent Founding-era juries had the right to determine questions of law).

<sup>54</sup> See, e.g., AMAR, *supra* note 5, at 238, 581 n.73 (listing leading Americans who accepted the right of nullification). For the reasons why originalists look at “intelligent and informed” Founding-era Americans and not only the Constitution’s Framers, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

<sup>55</sup> John Adams, Diary (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 3, 255 (AMS Press 1971) (Charles Francis Adams ed., 1850).

<sup>56</sup> ZEPHANIAH SWIFT, A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT 410 (1795).

<sup>57</sup> See generally AMAR, *supra* note 5, at 238–41; KRAMER, *supra* note 53, at 28–29, 157–58.

<sup>58</sup> 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94 (J. Elliot ed., 1888).

<sup>59</sup> See, e.g., Adams, *supra* note 55, at 253 (“The common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature” as they have through the legislature.); Essays by a Farmer (IV), reprinted in 5 THE COMPLETE ANTI-FEDERALIST 245, 249–50 (Herbert V. Storing ed., 1981) (“The trial by jury is . . . more necessary than representatives in the legislature . . .”); Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 283, 284 (Julian P. Boyd ed., 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”).

<sup>60</sup> See CONRAD, *supra* note 17, at 50 (discussing Hamilton); Jefferson, *supra* note 59, at 284.

something juries could understand and should decide.<sup>61</sup> In his 1794 treatise on New York practice, for example, William Wyche wrote that in criminal cases the juries may “take upon themselves the knowledge of the law.”<sup>62</sup> *Jacob’s Law Dictionary*, the most common legal dictionary in eighteenth-century Virginia, explained that the jury may give a “verdict contrary to the evidence, or against the direction of the court; for the law supposes the jury may have some other evidence than what is given in court, and they may not only find things of their own knowledge, but they go according to their consciences.”<sup>63</sup> Moreover, late-eighteenth-century Americans took their understanding of the jury’s meaning by studying recent examples of nullification. More than any formal law book, *A Brief Narrative of the Case and Trial of John Peter Zenger*, a pamphlet reprinted fourteenth times in the half-century between Zenger’s trial and the Sixth Amendment’s ratification, taught Americans about the role and duties of jurors.<sup>64</sup> During Zenger’s trial, his attorney Andrew Hamilton had declared that he knew juries “have the right beyond all dispute to determine both the law and the fact,”<sup>65</sup> and the jury, interpreting the law, had acquitted Zenger against the judge’s instruction.<sup>66</sup> Founding-era Americans who read the pamphlet would have understood a jury to have the right to nullify.

Third, scholars discuss the then-existing practices in state and federal courts, where jurors were the judges of law.<sup>67</sup> Edward Tilghman told Congress that in Pennsylvania judges inform the jurors “what, in the opinion of the court, was the law, but the jury were the judges of the law and the fact.”<sup>68</sup> When a Connecticut plaintiff moved to set aside a verdict because the jury had mistaken the law and evidence, the state supreme court denied the motion, noting, “It doth not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both.”<sup>69</sup> In one of the U.S. Supreme Court’s only three jury cases,<sup>70</sup> Chief Justice Jay charged the jurors that they had “a right to take upon yourselves to judge of both [law and fact], and to determine the law as well as the fact in controversy.”<sup>71</sup> Similarly, Justices riding circuit often charged the jury that they decided “the law as well as the facts.”<sup>72</sup> Justice Paterson, for example, charged the jury that “if legislatures assumed to themselves the

<sup>61</sup> See KRAMER, *supra* note 53, at 163.

<sup>62</sup> WILLIAM WYCHE, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK IN CIVIL ACTIONS 168 (1794).

<sup>63</sup> CONRAD, *supra* note 17, at 46–47 (quoting *Jacob’s Law Dictionary* (1782)).

<sup>64</sup> See Alschuler & Deiss, *supra* note 2, at 873–74.

<sup>65</sup> Krauss, *supra* note 39, at 184 (quoting Hamilton).

<sup>66</sup> See Alschuler & Deiss, *supra* note 2, at 873.

<sup>67</sup> See Howe, *supra* note 53, at 591–605

<sup>68</sup> *Id.* at 595.

<sup>69</sup> Wittner v. Brewster, 1 Kirby 422, 423 (Conn. 1788).

<sup>70</sup> Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).

<sup>71</sup> *Id.* at 4.

<sup>72</sup> E.g., Van Horne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 306 (C.C.D. Pa. 1795).

power to enact unconstitutional laws they ought not to be binding upon juries; and . . . courts and juries were the proper bodies to decide on the constitutionality of laws.”<sup>73</sup> In the Whiskey Rebellion cases, judges allowed lawyers for both sides to debate before the jury the question of whether armed resistance to enforcement of the Excise Act constituted treason. The judges then advised the jury what their opinions on the law were, and the jury was permitted to decide among the lawyers’ and the judges’ statements in reaching their verdict.<sup>74</sup> The jury’s right to decide questions of law was so integral to Founding-era juries that a few states explicitly included the right in their constitutions.<sup>75</sup> While there were several practical reasons for the jury’s law-deciding right, such as trial benches consisting of multiple judges,<sup>76</sup> the absence of reported precedents,<sup>77</sup> and the lack of widespread legal education,<sup>78</sup> another reason for the right was that the higher law of the Constitution was not supposed to be not a prolix legal code but rather a document accessible to the People.<sup>79</sup>

Fourth, scholars point to the principal purpose behind Article III’s and the Sixth Amendment’s rights to jury trial: to prevent judges from issuing corrupt verdicts biased toward the federal government. Jefferson explained that “permanent judges acquire an *Esprit de corps*” and are liable to be misled “by sprit of party” or “by a devotion to the Executive or Legislative. . . . It is therefore left to the juries . . . to take upon themselves to judge the law as well as the fact.”<sup>80</sup> His rival Hamilton agreed that the “strongest argument in [the jury’s] factor is that it is a security against corruption.”<sup>81</sup> Because nullification was essential to protect constitutional rights from an overbearing government or judiciary, Professor Berger concludes, “It borders on the inconceivable to attribute to the Founders an intention to leave their ‘noble palladium’ at the mercy of judges who, according to Justice James Wilson, they had regarded with ‘aversion and distrust.’”<sup>82</sup>

Given this Founding-era history, prominent officials and judges have taken the Court’s recent originalism to have already undermined *Sparf* and

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<sup>73</sup> KRAMER, *supra* note 53, at 135 (quoting Justice Patterson).

<sup>74</sup> See Harrington, *supra* note 53, at 402–03.

<sup>75</sup> E.g., PA. CONST. of 1790 art. IX, § 7; see also Howe, *supra* note 53, at 587.

<sup>76</sup> See KRAMER, *supra* note 53, at 158; Alschuler & Deiss, *supra* note 2, at 904–05 (explaining that Massachusetts trial benches had at least three judges); Harrington, *supra* note 74, at 390, 401 n.116 (explaining that the Judiciary Act of 1789 granted jurisdiction over serious federal criminal offenses to circuit courts that consisted of a district court judge and two Supreme Court Justices riding circuit).

<sup>77</sup> See Alschuler & Deiss, *supra* note 2, at 904–06.

<sup>78</sup> See KRAMER, *supra* note 53, at 158; Alschuler & Deiss, *supra* note 2, at 904–05.

<sup>79</sup> See Amar, *supra* note 42, at 1195.

<sup>80</sup> Jefferson, *supra* note 59, at 283; see also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J. Randolph ed., 1853) (“[I]f the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.”).

<sup>81</sup> THE FEDERALIST No. 83 (Alexander Hamilton), *supra* note 3, at 500 (discussing the civil jury).

<sup>82</sup> Berger, *supra* note 51, at 889.

modern jury nullification doctrine. While it is generally pro-defendant advocates who criticize the disallowance of nullification,<sup>83</sup> fully half of the states' attorneys general recently questioned *Sparf's* legitimacy, noting that the "Court's recent Sixth Amendment caselaw . . . is a corrective to the single most important striking long-term trend in constitutional criminal procedure: the systematic diminution of the jury's autonomy, a process that has proceeded apace since *Sparf v. United States*."<sup>84</sup> More directly, several federal judges have even called for *Sparf's* demise.

Judge Lynch of the Southern District of New York did so implicitly when he proposed to instruct the jury about a child pornography offense's mandatory minimum sentence so that, the Second Circuit found, "the jury could make an informed decision as whether to nullify the law."<sup>85</sup> Judge Lynch himself said that "historically jurors have sometimes done that [nullify], and the judgment of history is sometimes . . . that they've done the right thing."<sup>86</sup> Although the Second Circuit issued a writ of mandamus prohibiting Judge Lynch's instruction and explained that an instruction would violate controlling authority that requires courts to forestall nullification,<sup>87</sup> Judge Lynch's attempt to permit the jury to consider a sentencing question of law suggested judicial support for the restoration of nullification.<sup>88</sup> Defending Judge Lynch's attempt, Judge Middlebrooks of the Southern District of Florida soon thereafter issued a harsh originalist critique of *Sparf*.<sup>89</sup> Prohibiting jury nullification "was not the original intent of the founding fathers," he wrote. "*Sparf* was not only wrong on the facts and wrong on the law, it was and remains an assault on democracy. . . . The bludgeoning of the jury in *Sparf* and before has harmed the credibility and legitimacy of the judicial branch. It should not have happened and should not continue." He concluded that the Court in *Sparf* "took a wrong turn. Its holding is an assault on constitutional government that should be reconsidered."<sup>90</sup>

In 2008, accepting Judge Middlebrooks's invitation and revisiting Judge Lynch's issue, Judge Weinstein of the Eastern District of New York took the ultimate step when he deemed *Sparf* no longer good law in light of the Supreme Court's originalist jurisprudence. In a colossal 150-page opinion, Judge Weinstein, a long-time nullification sympathizer,<sup>91</sup> held that he had

<sup>83</sup> See, e.g., CONRAD, *supra* note 17, at v (dedicating book advocating "jury independence" to "[d]efenders"); King, *supra* note 38, at 434 (discussing the growth of the pro-defendant and pro-nullification Fully Informed Jury Association).

<sup>84</sup> Brief for New Mexico et al. as Amici Curiae Supporting Petitioner at 17, *Kansas v. Ventris*, No. 07-1356 (U.S. Nov. 24, 2008), 2008 WL 5026648. Twenty-five states signed the brief.

<sup>85</sup> *United States v. Pabon-Cruz*, 391 F.3d 86, 90 (2d Cir. 2004).

<sup>86</sup> *Id.* (quoting Judge Lynch).

<sup>87</sup> See *id.* at 91, 94–95 (citing *Shannon v. United States*, 512 U.S. 573 (1994)).

<sup>88</sup> See also *United States v. Datcher*, 830 F. Supp. 411, 418 (M.D. Tenn. 1993).

<sup>89</sup> See Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 419–21 (2004).

<sup>90</sup> *Id.* at 353–55, 421.

<sup>91</sup> See Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 JUDICATURE 168, 170



committed reversible constitutional error when he declined to tell the jury about the mandatory minimum sentence of a child pornography offense because the jury had the right to consider the sentence and to nullify the law.<sup>92</sup> Reasoning that Supreme Court decisions issued after Judge Lynch's case required judges to assess jury rights through originalism rather than precedent, Judge Weinstein turned to the Founding-era history of nullification. Based on historical analysis, he declared that *Sparf* has been "largely abrogated"<sup>93</sup> by the Court's recent Sixth Amendment decisions because Justice Gray's dissent defending nullification,<sup>94</sup> and not Justice Harlan's opinion for the majority, "had the history of the Sixth Amendment right."<sup>95</sup>

Whatever the judicial system's evaluation of modern juries and their proper role, the Supreme Court has recently instructed us that in matters of sentencing as well as hearsay, it is necessary to go back to the practice as it existed in 1791 to construe the meaning of constitutional provisions such as the Sixth Amendment. Justice Gray dissenting in *Sparf* seems to have hit both the modern and ancient marks exactly. Judges are forcefully reminded in *Crawford v. Washington* . . . that no matter how long and firm a precedential line of Supreme Court cases, if analysis shows it was ill-based historically it must be abandoned.

It is worthwhile recalling that the author of the majority opinion in *Sparf* was the first Justice Harlan. His minority opinion in *Plessy v. Ferguson*, which approved over his strong dissent the doctrine of separate but equal, degrading African-Americans, was adopted more than a half century later in *Brown v. Board of Education*. By contrast, Justice Harlan's *Sparf* majority ruling limiting jury power is in effect overruled now, more than a century later, by the recent *Booker* line of cases, essentially adopting the minority conclusion in *Sparf*. It is not particularly significant that the same 1890s Supreme Court appears to have been wrong—by our present standards—on two important cases, but it is notable that the Supreme Court feels called upon now to overrule major precedents going back to the late nineteenth century based upon a revised historical analysis.<sup>96</sup>

Judge Weinstein is so far alone among his colleagues on the bench in believing that *Sparf*, has, as a matter of law, been overruled.<sup>97</sup> Still, the fact

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(1998) (calling nullification "the stuff . . . of our somewhat romantic democratic tradition"); Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239, 240, 244 (1993) (arguing that "[w]hen juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors" and that "[n]ullification arising from idealism is good for the American soul").

<sup>92</sup> *United States v. Polizzi*, 549 F. Supp. 2d 308, 404, 449–50 (E.D.N.Y. 2008).

<sup>93</sup> *Id.* at 435.

<sup>94</sup> *Sparf v. United States*, 156 U.S. 51, 113 (1895) (Gray, J., dissenting) (arguing that the judge's instruction unconstitutionally "denied [the jury the] right to decide the law").

<sup>95</sup> *Polizzi*, 559 F. Supp. 2d at 421.

<sup>96</sup> *Id.* at 421–22 (internal citations omitted).

<sup>97</sup> For examples of post-*Booker* decisions upholding the disallowance of jury nullification, see *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007); *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006); *United States v. Luisi*, 568 F. Supp. 2d 106, 108–10 (D. Mass. 2008). For the Supreme Court's most recent discussion of *Sparf*, see *United States v. Gaudin*, 515 U.S. 506, 512–14 (1995).

that such a prominent jurist has asserted that *Sparf* is invalid—and compared it to *Plessy*, among the gravest of insults he could deliver to any judicial opinion—and that at least two other federal judges may agree with him shows that pro-nullification arguments may one day prevail in the lower courts and the originalist Supreme Court. Indeed, Judge Weinstein implies that the case formally overturning *Sparf* may be the next *Brown*. *Sparf*, in brief, is under assault, Founding-era originalism is trying to slay it. Even if the courts do not overturn *Sparf*, these historical arguments still illustrate that the Court's criminal procedure originalism contradicts its nullification doctrine, and this contradiction may lead the courts to desire a more rational way of reconciling the substantive inconsistency.<sup>98</sup>

### *B. Nineteenth-Century Judicial Lawmaking and Constitutional Change*

The right-power distinction matters not only for its implications on contemporary jurisprudence but also because the transformation of nullification from a cherished right to an illegitimate power has normative implications for constitutional change. If nullification was enshrined in the original constitutional meaning of “jury,” then the People, in ratifying the Constitution and the Sixth Amendment, may have *superdemocratically* established that right, creating a federal legislative process that incorporated a veto by jurors who had a right to nullify laws, even those passed by an elected Congress. Nineteenth-century judges, without pursuing the Article V or another “higher-lawmaking” process,<sup>99</sup> undemocratically altered the Constitution's meaning by disallowing the right to nullify. Regardless of the merits or demerits of jury nullification, permitting nineteenth-century judges to override the Constitution's original meaning by judicial fiat may provide a weaker normative foundation for the disallowance of nullification than a textual basis, grounded in a superdemocratic constitutional amendment, would offer.

Even scholars who do not call for a Founding-era originalist restoration of the right to nullify have long found nullification's disallowance troubling in terms of normatively justifiable methods of constitutional change. In his classic 1939 *Harvard Law Review* article on nullification, Professor Mark Howe observed that the judges defeated “the people's aspiration for democratic government” by disallowing the right. “What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions.” His final sentence concluded that it was possible to feel that the disallowance of nullification was “wise without approving the . . . methods which courts have used in reaching that result.”<sup>100</sup> Nor has scholarly opinion changed over the next seventy

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<sup>98</sup> For criticism of this inconsistency, see Recent Case, 122 HARV. L. REV. 990 (2009).

<sup>99</sup> Cf. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991) (advocating “dualist democracy” in which “higher-lawmaking” may amend the Constitution outside of the Article V process).

<sup>100</sup> Howe, *supra* note 53, at 615–16.

years. “What is especially striking about the decline of the jury’s power over law is the way in which it was carried out,” Professor Matthew Harrington wrote recently. “The drive to limit the law-finding function was entirely a judge-led exercise, carried out without legislative warrant and sometimes in the face of legislative enactments to the contrary.”<sup>101</sup> Indeed, scholars have viewed the disallowance as primarily an episode of judicial lawmaking.

When judges first attempted to take the law-deciding right away from the jury, legislatures fought back and impeached them. In 1803, the Pennsylvania legislature removed Judge Addison from office because he attempted to enforce his view that the state did not “vest the interpretation of declaring of laws, in bodies [juries] so constituted” because it would make laws fluctuate with “every changing passion and opinion of jurors.”<sup>102</sup> Two years later, the U.S. House of Representatives impeached Justice Chase on similar grounds. While riding circuit, Justice Chase had told the jury in John Fries’s trial for leading a mob protest against federal taxes that constitutional questions were the sole province of the judiciary, and he also refused to permit Thomas Callendar’s attorney to argue the unconstitutionality of the Sedition Act to the jury.<sup>103</sup> Consequently, he was impeached for, among other reasons, “endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of the law.”<sup>104</sup> Although the Senate failed to convict him of the charge, Justice Chase was forced to respond to the charge by admitting that the jurors “were to decide both the law and the facts.”<sup>105</sup>

Although legislative opposition continued, the judicial disallowance of nullification ultimately prevailed.<sup>106</sup> Beginning in the first decade of the nineteenth century, judges, elite lawyers, and commercial interests began echoing Justice Chase and Judge Addison’s view that there was a sharp distinction between law and fact and a correspondingly clear separation of function between judge and jury.<sup>107</sup> Attempting to foreclose that view and to codify the jury’s law-deciding function, several states responded with leg-

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<sup>101</sup> Harrington, *supra* note 5374, at 380.

<sup>102</sup> *Id.* at 417 (quoting Judge Addison).

<sup>103</sup> See KRAMER, *supra* note 53, at 135; Amar, *supra* note 42, at 1191–94; Harrington, *supra* note 5374, at 406–14.

<sup>104</sup> Articles of Impeachment, Art. I, § 3, in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE app. at 3 (1805).

<sup>105</sup> *Id.* at 35 (quoting Chase). Only sixteen of thirty-four senators voted to convict on this charge.

<sup>106</sup> Although scholars agree that the disallowance was a nineteenth-century judge-led process, they dispute when the jury’s role was confined to fact-finding, with some dating the disallowance of nullification to as early as 1810 and others to as late as the end of the century. See, e.g., KRAMER, *supra* note 53, at 164 (dating the disallowance to by the 1820s and 1830s); MACDONALD, *supra* note 53, at 290 (dating the disallowance to by “a generation after the adoption of the Constitution”); NELSON, *supra* note 53, at 169 (dating the disallowance to by 1810); Alschuler & Deiss, *supra* note 2, at 906–07 (dating the disallowance to “the second half of the century”); Harrington, *supra* note 5374, at 432 (dating the disallowance to by “the end of the nineteenth century”).

<sup>107</sup> See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 143 (1977).

isolation. Tennessee, for example, guaranteed that in all criminal cases “the jury shall have a right to determine the law and the facts,”<sup>108</sup> and as the embargo crisis embroiled Massachusetts in 1808, the legislature declared the right of juries to judge law and fact in criminal cases.<sup>109</sup> Likewise, in 1821, Connecticut provided that in criminal cases the court was merely “to state [its] opinion to the jury, upon all questions of law, arising in the trial . . . and to submit to their consideration both the law and the facts,”<sup>110</sup> while in 1827, an Illinois statute said that “juries in all [criminal] cases shall be judges of the law and fact.”<sup>111</sup>

Starting with federal courts in the 1830s, however, judges began to declare that as a matter of law criminal juries were mere fact-finders.<sup>112</sup> While in 1830, Justice Baldwin had issued instructions permitting nullification,<sup>113</sup> two years later, when an attorney defended his client on a charge of counterfeiting United States Bank notes by arguing to the jury that the bank’s charter was unconstitutional, he instructed the jury that the law was constitutional. “The power to judge of the law as well as the fact in a criminal case,” he said, was no more than the power “to ascertain the existence of a law; if you see it in the statute book, you cannot on your oaths say there is no law, or exercise a power denied to the people of a state by the most solemn constitutional provision, declare the supreme law to be void.”<sup>114</sup> Justice Story even more vigorously denied the jury’s right to nullify. “It is the duty of the court to instruct the jury as to the law,” he declared, “and it is the duty of the jury to follow the law, as it is laid down by the court.”<sup>115</sup> Although Justice Story’s instruction was issued in the context of preventing a slave trade capital conviction not covered by the statute as he construed it, his decision was applied to prohibit pro-defendant nullification too, and more effectively than any other decision, it deflected the current of judicial opinion away from permitting criminal juries to decide questions of law.<sup>116</sup>

In the 1840s, some state courts began to follow the federal example, and the legislatures once again tried to forestall them. In 1851, the Indiana and Maryland constitutions were amended to guarantee the jury’s right to nullify.<sup>117</sup> Yet legislative enactments often counted for little. After the Massa-

<sup>108</sup> Howe, *supra* note 53, at 598 (quoting the Tennessee state constitution).

<sup>109</sup> See An Act Regulating the Selections, Empanelling, and Services of Jurors, 4 Mass. Laws 382, 389–90, ch. 139, § 15 (1808).

<sup>110</sup> Rev. Laws of Conn., tit. 2, § 112 (1821).

<sup>111</sup> Ill. Rev. Laws, Crim. Code, § 188 (1827).

<sup>112</sup> See Howe, *supra* note 53, at 589.

<sup>113</sup> See *United States v. Wilson*, 28 F. Cas. 699, 708 No. 16,730 (C.C.E.D. Pa. 1830) (“[Y]ou will distinctly understand that you are the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the court.”).

<sup>114</sup> *United States v. Shive*, 27 F. Cas. 1065, 1066–67 (C.C.E.D. Pa. 1832) (No. 16,278).

<sup>115</sup> *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).

<sup>116</sup> See Howe, *supra* note 53, at 589–90.

<sup>117</sup> See IND. CONST. art I, § 19 (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”); MD. CONST. of 1851 art. X, § 5 (“In the trial of all criminal cases, the Jury

chusetts Supreme Judicial Court had disallowed the jury's right to nullify,<sup>118</sup> the state legislature, motivated partly by contempt for the recent Fugitive Slave Act,<sup>119</sup> passed a new statute reasserting the jury's right to resolve questions of law,<sup>120</sup> but the Supreme Judicial Court, in *Commonwealth v. Anthes*,<sup>121</sup> immediately nullified the law and thus the jury's right to nullify.<sup>122</sup> Cases like *Anthes* became the heart of Justice Harlan's opinion for the U.S. Supreme Court in *Sparf* as Justice Harlan devoted little attention to Founding-era history but extensively cited nineteenth-century precedent.<sup>123</sup> He found that *Anthes* offered the "fullest examination" of the nullification question and therefore relied upon Chief Justice Shaw's observation that "though the jury had the power they had not the right to decide, that is, to adjudicate, on both law and evidence."<sup>124</sup>

The judiciary, of course, had reasons for disallowing the right to nullify. The increasing professionalization of the bench and bar and availability of law books convinced judges that they were the proper body to determine questions of law.<sup>125</sup> The need for certainty, stability, and uniformity in commercial law, and its symmetrical application to criminal law, also persuaded them that the more centralized judiciary should restrain the law-finding right of local juries.<sup>126</sup> Since federal and state criminal statutes were now democratically enacted, the populist rationale weighing in favor of the jury's law-finding and liberty-protecting role had been diminished.<sup>127</sup>

Yet, these rationales are problematic. Professor Morton Horwitz, for example, describes the "subjugation of juries" as an elite-driven process that expanded the political power of the legal profession and the commercial interests at the lower classes' expense.<sup>128</sup> Furthermore, if the disallowance of nullification really was democracy-enhancing, it seems odd that states were passing legislation that attempted to protect from the judiciary the jury's right to nullify. Finally, since the right to nullify was understood to be an attribute of jury trial when the Sixth Amendment was ratified—a time when

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shall be the Judges of the Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."). These provisions are still in effect. See IND. CONST. art I, § 19; MD. CONST. Decl. of Rights art. XXIII; see also GA. CONST. art. I, § 1, ¶ 11(a).

<sup>118</sup> See *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263, 285–86 (1845).

<sup>119</sup> See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 177 n.47 (1964) (explaining why contempt for the Fugitive Slave Act, rather than for temperance laws as Professor Howe had alleged, was the strongest pro-nullification motivating factor).

<sup>120</sup> See Mass. Acts & Resolves 1855, ch. 152, at 590, now Mass. Gen. Laws ch. 278, § 11 (1932). The bill passed the Massachusetts State House by a vote of 202–106, illustrating its popularity.

<sup>121</sup> 71 Mass. (5 Gray) 185 (1855).

<sup>122</sup> *Id.* at 193.

<sup>123</sup> See *Sparf v. United States*, 156 U.S. 51, 71–86 (1895) (discussing nineteenth-century cases).

<sup>124</sup> *Id.* at 80 (quoting *Antes*, 71 Mass. at 206) (misquotations in original).

<sup>125</sup> See Harrington, *supra* note 5374, at 380, 405.

<sup>126</sup> See Alschuler & Deiss, *supra* note 2, at 917; Harrington, *supra* note 5374, at 380, 399, 405, 436.

<sup>127</sup> See MACDONALD, *supra* note 53, at 41; Alschuler & Deiss, *supra* note 2, at 917; Harrington, *supra* note 5374, at 423, 427, 438.

<sup>128</sup> See HORWITZ, *supra* note 107, at 143.

all federal crimes were democratically criminalized<sup>129</sup>—an originalist Court may question whether the judiciary’s policy arguments and evolving jury law may trump what had been understood as a constitutional right. In contradistinction to the evolutionary, extratextual, and class-based nature of the antebellum disallowance of nullification, which may not have been of constitutional dimension, stands the revolutionary, textual, and superdemocratic process of constitutional amendment ratification. Instead of relying on the nineteenth-century judicial disallowance of nullification, as Justice Harlan did in *Sparf*, an originalist Supreme Court may be more consistent and more grounded if it looked at the text and history of the Fourteenth Amendment.

### C. The Fourteenth Amendment and Constitutional Criminal Procedure

There is, of course, an overarching doctrinal problem with using the Fourteenth Amendment and Reconstruction-era history in constitutional criminal procedure—like nullification doctrine, it too contradicts the Supreme Court’s recent jurisprudence. In applying legal history analysis to its criminal procedure jurisprudence, the Court has emphasized the eighteenth century, particularly in the context of the Bill of Rights’s adoption, but, as Professor David Alan Sklansky observed, it has largely “missed” the nineteenth century and Reconstruction Era.<sup>130</sup> Most scholars, including even sometimes Professor Amar,<sup>131</sup> have also ignored or minimized Reconstruction’s influence on constitutional criminal procedure.<sup>132</sup>

The Court’s canonical explanation of incorporation is that the Fourteenth Amendment’s Due Process Clause simply took the fundamental rights “implicit in the concept of ordered liberty”<sup>133</sup> or “necessary to an Anglo-American regime of ordered liberty,”<sup>134</sup> including the criminal procedure rights set forth in the Bill of Rights that are “fundamental in the context of

<sup>129</sup> In contrast to colonial-era Parliament-enacted criminal statutes, all federal criminal statutes were enacted by a democratic Congress, and the Supreme Court established early on that there is no federal criminal common law. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (mem.); Ben Rosenberg, *The Growth of the Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 195–96 (2002).

<sup>130</sup> See Lecture Notes, David Alan Sklansky, *The Missing Years: Nineteenth-Century History in Criminal Procedure* (June 14, 2006).

<sup>131</sup> See AMAR, *supra* note 4 (arguing that the “first principles” to which constitutional criminal procedure should return are the principles of the 1780s–90s, not the 1860s–70s). Of course, Professor Amar is probably the leading scholar who explains how the original Bill of Rights was transformed by the Reconstruction amendments, and he has written extensively on how Reconstruction has influenced constitutional criminal procedure. See, e.g., sources cited *infra* note 165. Still, he has, for example, advocated a return to Founding-era search-and-seizure law, even though modern police date from the antebellum era. Compare Akhil Reed Amar, *Fourth Amendment: First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that strict warrant requirements conflict with the Fourth Amendment’s late-eighteenth-century history), with LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 149 (1993) (explaining that the police “were essentially an invention of the first half of the [nineteenth] century”).

<sup>132</sup> See Sklansky, *supra* note 130.

<sup>133</sup> *Danforth v. Minnesota*, 128 S. Ct. 1029, 1034–35 (2008) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>134</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

the criminal processes maintained by the American States,”<sup>135</sup> and applied them against the states without altering their meaning.<sup>136</sup> In other words, the Court assumes an “essentially mechanical process” of incorporation that does not reshape or reinterpret Founding-era doctrines to fit the Reconstruction-era amendment.<sup>137</sup> By doing so, the Court has taken the Due Process Clause to have incorporated, for example, the Sixth Amendment and also its eighteenth-century context—but not the Due Process Clause’s own Reconstruction-era context.<sup>138</sup> Consequently, when incorporating the Sixth Amendment in *Duncan v. Louisiana*,<sup>139</sup> the Court focused exclusively on the jury’s role in the colonial era.<sup>140</sup> While the Court correctly observed that the Founding-era right to jury trial was “granted to criminal defendants in order to prevent oppression by the Government,”<sup>141</sup> the Court neglected to assess, in light of the fact that Reconstruction-era juries themselves were sometimes used to facilitate oppression or as instruments of oppression, whether the Reconstruction-era right to jury trial preserved exactly the same jury rights that the Founding-era right did. The Court simply assumed that the Fourteenth Amendment’s text, ratified in 1868, incorporated the 1791 meaning of trial by jury, rather than the 1868 meaning.<sup>142</sup>

Yet, the omission of Reconstruction-era history makes little doctrinal sense from an originalist or textualist viewpoint considering that the Fourteenth Amendment is a product of Reconstruction, not the Founding, and that the amendment remains the necessary constitutional hook for the constitutional regulation of state criminal trials.<sup>143</sup> Despite appearances, the Supreme Court does not apply the Bill of Rights directly to state criminal procedure rights but rather incorporates it only by reference to due process in the Fourteenth Amendment. This suggests that the constitutional text that the Court is technically interpreting is the Due Process Clause, and therefore Reconstruction understandings of due process and its relation to the Bill of Rights, should be of special concern to a Court trying to bring originalism and textualism into constitutional criminal procedure.<sup>144</sup> Therefore, at least

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<sup>135</sup> *Id.*

<sup>136</sup> See George C. Thomas, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 162 (2001); Sklansky, *supra* note 130.

<sup>137</sup> Akhil Reed Amar, *The Bill of Rights and the Constitution*, 101 YALE L.J. 1193, 1268 (1992).

<sup>138</sup> See Sklansky, *supra* note 130.

<sup>139</sup> 391 U.S. 145 (1968).

<sup>140</sup> See *id.* at 151–54.

<sup>141</sup> *Id.* at 155.

<sup>142</sup> Cf. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 731 (2008) (“Although it is regularly, if not uniformly, assumed that the Fifth Amendment Takings Clause has the same original meaning as the incorporated Fourteenth Amendment Takings Clause, that may not be true. These enactments were passed at different times, under different circumstances, and with different purposes.”).

<sup>143</sup> See Thomas, *supra* note 136, at 163.

<sup>144</sup> See Sklansky, *supra* note 130.

in state criminal procedure cases, if original understanding or historical context matter in interpreting constitutional provisions, then the Fourteenth Amendment's backdrop should be even more important than the backdrop of the original Bill of Rights.

There are reasons to believe that the Reconstruction-era history should matter in federal criminal procedure cases too. State cases comprise the overwhelming majority of all criminal trials,<sup>145</sup> and they produce the large majority of the modern Court's criminal procedure doctrine.<sup>146</sup> If, as reverse incorporation suggests, consistent constitutional rules between state and federal practices are desirable, then the Court may be justified in using the Reconstruction-era-based constitutional rules for state courts to reverse incorporate the federal criminal procedure rules. Alternatively, in Amarian theory, the Fourteenth Amendment may have transformed the criminal procedure provisions of the original Bill of Rights, rendering the Reconstruction-era meaning applicable even without reverse incorporation, or the original meaning of its corresponding provisions may have superseded the earlier meanings in the Bill of Rights.<sup>147</sup> At a minimum, in Ackermanian language, the jurisprudence of a text drafted and ratified during time "two" (Reconstruction) should be governed by a synthesis of the original meanings at times "one" (the Founding) and "two,"<sup>148</sup> or perhaps even by only the new original meaning at time "two." Quite simply, the modern Court and its scholars should not monopolize the Founding Era when they are applying originalism.

This is especially true given the nature of the Fourteenth Amendment. For example, its framers' conception of the role of the courts and judges was fundamentally different from the Founders' conception. The Founders feared the federal judiciary and circumscribed its reach. The Reconstruction Congresses, on the other hand, embraced it. In the civil context, for example, while the First Congress elected not to give the lower federal courts federal question jurisdiction out of fear that it would make these courts too powerful,<sup>149</sup> the Reconstruction Congress in 1875 granted them federal question jurisdiction to bring federal law into the federal courts.<sup>150</sup> Similarly, the Founding Era's Eleventh Amendment overruled a recent Supreme

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<sup>145</sup> See Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1213 (2008) (noting that in 2002, there were 35,664 felony jury trials in the twenty-three states that record trial data but only 2843 felony or class A misdemeanor jury trials in federal courts).

<sup>146</sup> See Thomas, *supra* note 136, at 162; see also AMAR, *supra* note 5, at 385 (noting that the Fourteenth Amendment is the "constitutional provision deployed in court more often than any other—more often, perhaps, than all others combined" and that it "has come into play in most of the major constitutional cases decided by the modern Supreme Court").

<sup>147</sup> See AMAR, *supra* note 53, at 269–78 (discussing how the Reconstruction amendments transformed the Sixth Amendment in terms of locality requirements and the racial composition of juries).

<sup>148</sup> Cf. ACKERMAN, *supra* note 99, at 94–99 (discussing one–two judicial synthesis).

<sup>149</sup> See Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>150</sup> See Act of Mar. 3, 1875, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331).



Court decision and stripped the federal judicial power to hear certain diversity lawsuits involving the states;<sup>151</sup> conversely, in 1867 Congress expanded the federal courts' jurisdiction to give them for the first time the authority to issue writs of habeas corpus to state prisoners,<sup>152</sup> and in 1869 Congress created a new nine-member circuit court judiciary to carry federal judicial authority into the states.<sup>153</sup> Federal criminal trial courts were strengthened as well; the monumental Ku Klux Klan trials of 1871 and 1872 were an unprecedented use of federal legal power over criminal law to secure new constitutional protection for blacks.<sup>154</sup> The use of new federal courts and new jury laws, as in the Ku Klux Klan trials, illustrates that the Reconstruction Congresses had a new conception of judicial power—one understood and intended to protect victims' civil rights.

Along those lines, the Fourteenth Amendment framers' shared a new vision of constitutional rights. The original Bill of Rights, including the Sixth Amendment, was not premised upon preventing majority tyranny and protecting minority rights. Rather, it was established to prevent self-dealing and corruption by a distant, possibly unrepresentative federal government and judiciary. In expressing the need for strong jury rights at the federal level, after all, even political rivals like Alexander Hamilton and Thomas Jefferson agreed that inhibiting corrupted judges was a primary rationale.<sup>155</sup> Indeed, the structure of the original Bill of Rights was built upon allowing localities to reign in federal officials. The Fourteenth Amendment, however, repudiated this structure, transforming the Constitution and the Bill of Rights into a minority-rights protecting regime.<sup>156</sup> The Fourteenth Amendment, in other words, demanded that the Constitution take into account the civil rights of victims being tyrannized by local majorities.

Furthermore, the Fourteenth Amendment created a new reading of robust federal power that prioritized nationalism over localism. States and local bodies like juries no longer were the constitutional mechanism primarily responsible for protecting civil rights. On the contrary, the Fourteenth Amendment charged the federal government with the authority to protect and to enforce civil rights. Indeed, the entire apparatus of the Reconstruction Amendments was to expand federal power into and against localities—hence the amendments' Congressional enforcement language, which stands

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<sup>151</sup> See U.S. CONST. amend. XI (overruling *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

<sup>152</sup> See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241). *But see* Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 (repealing appellate jurisdiction), *superseded by* Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (returning appellate jurisdiction).

<sup>153</sup> See Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44.

<sup>154</sup> See Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872*, 33 EMORY L.J. 921, 924 (1984).

<sup>155</sup> See THE FEDERALIST No. 83 (Alexander Hamilton), *supra* note 3 at 500; JEFFERSON, *supra* note 80, at 140; Jefferson, *supra* note 59, at 283.

<sup>156</sup> See generally AMAR, *supra* note 53.

in stark contradiction to the first eleven amendments,<sup>157</sup> and corresponding enforcement legislation, which, like the Ku Klux Klan Act of 1871, ran through the federal courts.<sup>158</sup> The Fourteenth Amendment made such federal enforcement of the civil right to protection of life, liberty, property, and security an immediate constitutional priority, one that may have superseded older implicit constitutional rights that denied federal authority and defeated its federalism-revolutionizing and federal rights-protecting objectives.

These changes implicate criminal procedure and nullification doctrine because they suggest a different allocation of authority between judge and jury. When the jury loses its right to decide questions of law, the law-deciding right does not disappear but rather is transferred to a strengthened judiciary, which makes sense in the context of the Reconstruction Congresses' empowerment of the federal judiciary. At the Founding, when, as the Alien and Sedition Acts illustrated, the paradigmatic citizens in need of constitutional protection were localist critics of the federal government being accused of violating Congress's laws, being prosecuted by the Executive Branch's agents, and being tried under the pro-administration judiciary, the Constitution demanded strong jury rights to protect these citizens. During Reconstruction, however, the paradigmatic citizens who required protection were freedmen, Unionists, or women being persecuted by local majorities in the South or the West.<sup>159</sup> Carpetbag federal judges appointed by a rights-protecting government in Washington became better protectors of rights, while juries, particularly those taking the law into their own hands and nullifying criminal statutes, were now the corrupt bodies that needed to be curtailed. Disallowing nullification would do so while preventing a local body—the jury—from challenging governmental authority, just as Reconstruction was designed to ensure that localism could not trump nationalism.

In short, the Fourteenth Amendment context matters because it tells us what “due process” in relation to the law of judges and juries, civil rights, and federalism originally meant when the nation ratified the Due Process Clause in 1868. Nor are the objections to this Reconstruction-era “new original meaning” jurisprudence unanswerable. Some Fourteenth Amendment “due process” questions, of course, may be impossible to answer through historical inquiry. Professor William Nelson has contended that whether the Due Process Clause was meant to preclude states from enacting antiabortion legislation, for example, never occurred to the Reconstruction generation and “hence cannot be answered by examining records of its actual thought.”<sup>160</sup> Yet, criminal procedure jurisprudence is different because

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<sup>157</sup> See AMAR, *supra* note 5, at 361.

<sup>158</sup> See Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985).

<sup>159</sup> See AMAR, *supra* note 53, at 242–46 (discussing how, with respect to the First Amendment, the Fourteenth Amendment may have transformed the due process theory of the Bill of Rights).

<sup>160</sup> WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 6 (1988).

its issues arose during Reconstruction and received substantial Congressional attention. Since Reconstruction-era treatises discussed criminal procedure and the Reconstruction Congresses often debated criminal procedure matters, there are legitimate historical answers as to how these Congresses and their generation understood issues like jury nullification. Indeed, criminal procedure was not merely incidental to the Fourteenth Amendment but was at its very core—ingrained in the meaning of “due process.”

Others may object that the Reconstruction generation, like its Founding forbearers, understood a Fourteenth Amendment term such as “due process,” or even terms in the original Bill of Rights, to refer to “natural rights” descended from the law of nature and enshrined with the same, unchanging meaning since the Magna Charta.<sup>161</sup> In other words, the Reconstruction Congresses may not have understood that their conception of “due process” or, assuming incorporation, their conception of the Bill of Rights could have been and was indeed different from the Founding-era conception. This objection, however, is also unsound. Normatively, it may not matter whether the Reconstruction generation understood the due process right and the corresponding right to criminal jury trial as timeless, fixed natural rights because what counts, under an originalist theory, is the text’s meaning when it was written into the Constitution, in 1868. Descriptively, the objection is verifiably false; the Reconstruction generation, as both statements in Congress and treatises illustrate, understood that the substantive meaning of “jury,” a component of due process, had evolved over time.<sup>162</sup>

Of course, the discovery, or rediscovery, of Reconstruction-era history may not always make a difference because meanings may not always evolve. Just as the Supreme Court now says that the Fourteenth Amendment entirely swallows up, for example, the Fifth Amendment’s Double Jeopardy Clause<sup>163</sup> or Self-Incrimination Clause,<sup>164</sup> the Court may find that (1) the meaning of “due process” in 1868 included a double jeopardy or self-incrimination protection identical to the 1791 meaning or (2) the Fourteenth Amendment incorporated the Fifth Amendment against the states, and the Fifth Amendment had the same meaning in 1868 as it had in 1791, so the

<sup>161</sup> Cf. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*.”).

<sup>162</sup> See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 822 (1872) (statement of Sen. Sumner) (“[A]t the beginning the jurors were witnesses from the neighborhood, afterward becoming judges, not of the law, but of the fact.”); JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 376, at 440–41 (San Francisco, Sumner Whitney & Co. 1876) (“[T]he doctrine that the jury could take the law into their own hands was a popular one before and at the time of the Revolution. . . . But the doctrine was in due time discarded, the courts one after another holding it was the duty of the jury to be guided as to the law by the court.”); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 3094, at 1115 (4th ed., Philadelphia, Kay & Brother 1857) (“For some time after the adoption of the federal constitution, a contrary doctrine [on the jury’s right to decide questions of law], it is true, was generally received.”).

<sup>163</sup> See *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>164</sup> See *Malloy v. Hogan*, 378 U.S. 1 (1964).

Fifth Amendment's meaning was not transformed, reconstructed, or superseded through its application to the states. Nevertheless, this often will not be the case,<sup>165</sup> and unless it is, Founding-era originalism should not monopolize the post-Fourteenth Amendment Constitution's original meaning. The Reconstruction-era history matters; an originalist Court should not assume that the meaning of constitutional words remained constant over three-quarters of a century, particularly given the political turmoil of Reconstruction, or that the Fourteenth Amendment's framers understood that they were incorporated eighteenth-century meanings into their nineteenth-century amendment. Indeed, this paper shows that the Thirty-ninth Congress had a different understanding of trial by jury with respect to the jury's right to nullify than the First Congress had. This understanding illuminates a different, new constitutional original meaning.

#### *D. Reconstruction-era Originalism and Jury Nullification*

The leading scholar who discusses the ways in which Reconstruction transformed the original Bill of Rights, Professor Amar, upon whose shoulders this paper stands, once provided a snapshot of how the original meaning of Article III's and the Sixth Amendment's criminal jury clauses possibly could have been supplanted by the meaning imbued to them through the Fourteenth Amendment. In a classic *Yale Law Journal* article, he theorized:

The strongest defense of [the Supreme Court's] holding [in *Sparf*] comes from provisions never cited by the Court, namely the Civil War Amendments. . . . [J]ury review would have created in fundamentally local bodies a power that approached de facto nullification in a wide range of situations. Existence of such a power in local bodies to nullify Congress' Reconstruction statutes might have rendered the Civil War Amendments a virtual dead letter. Thus it is plausible to think that these Amendments implicitly qualified the (equally implicit) power of local juries to thwart national laws.<sup>166</sup>

In other words, the theory is that in ratifying the Fourteenth Amendment, the People superdemocratically constitutionalized the undemocratic nineteenth-century judicial precedent that had disallowed the jury's right to nullify, thus constitutionally legitimizing *Sparf's* holding and contemporary nullification jurisprudence, at least for state cases, if not federal ones too.

Amar himself, however, not only never endorses the thesis—labeling it merely “plausible”—but actually rejects it. Amar thinks that the thesis he expounded would be a “stronger” defense of a still incorrect holding in

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<sup>165</sup> See Akhil Reed Amar, *Reconstructing Double Jeopardy: Some Thoughts on the Rodney King Case*, 26 CUMB. L. REV. 1, 9–10 (1995) (suggesting that the Fourteenth Amendment's dual sovereignty principles transformed the Double Jeopardy Clause); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 913–15 (1995) (suggesting that the Reconstruction Congresses' understanding of the self-incrimination clause may have been different from the Founding-era understanding).

<sup>166</sup> Amar, *supra* note 42, at 1195; see also AMAR, *supra* note 53, at 103.

*Sparf*. Believing that jurors have some constitutional right to nullify, Amar has said that the *Sparf* Court went too far and that Judges Lynch and Weinstein were correct that juries have the right to take sentencing law into account and to nullify the criminal statutes in some cases.<sup>167</sup> Since first theorizing about *Sparf*, he has published a lengthy argument for the jury's right "to play a role in deciding some questions of constitutional law" and "the jury's right to nullify in order to do justice in a particular case."<sup>168</sup> Calling the "constitutional case for nullification . . . strong," he has stated that when the jury is deliberately kept "in the dark" about "the existence of a constitutional right" to nullify, "both the defendant and the jurors are effectively denied their rights."<sup>169</sup> Most recently, Amar has suggested that American juries have a Founding-era "right to acquit against the evidence," a *right* that supports a limited form of jury legal question review and that "even today arguably encompasses the authority to acquit for reasons of constitutional scruple." He concludes, "Though twenty-first-century judicial orthodoxy frowns on these claims of constitutional competence, the right of . . . trial juries to just say no in certain contexts draws strength from the letter and spirit of the Bill of Rights."<sup>170</sup> Amar, thus, is no advocate of the view that the Fourteenth Amendment constitutionalized the judicial disallowance of the right to nullify.

In addition to the fact that Amar himself rejects it, there are other issues with the argument he put forward. *Sparf* arose from a federal prosecution, not a state one, yet the Fourteenth Amendment commonly is assumed to apply only to state action. Professor Amar does not explain why the Fourteenth Amendment should be understood to apply to federal jury nullification too. Moreover, while the Founding-era right of local juries to thwart national laws may have been "implicit," it was once well-established and widely recognized. Amar, like most other scholars, believes that the Founding-era right was real.<sup>171</sup> On the other hand, a Reconstruction-era principle or counter-right against nullification based in law enforcement or victims' rights to protection has not been previously recognized by others because current scholarship has not answered whether the Fourteenth Amendments' framers, unlike their Founding-era forbearers, understood the right of trial by jury *not* to include the jury's right to nullify. Professor Nancy King also raised other criticisms of Amar's conjecture:

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<sup>167</sup> Interview with Akhil Reed Amar, Sterling Professor of Law and Political Science, Yale Univ., in Cambridge, Mass. (Apr. 14, 2009).

<sup>168</sup> AKHIL REED AMAR & ALAN HIRSH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 94, 113 (1998).

<sup>169</sup> *Id.* at 106–07; *see also* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 685 (1997) ("The role of the criminal jury . . . involves even more than reliable factfinding . . . . It also involves normative judgment.").

<sup>170</sup> AMAR, *supra* note 5, at 241.

<sup>171</sup> *See* AMAR, *supra* note 5, at 238–39; AMAR, *supra* note 53, at 97–103; AMAR, *supra* note 4, at 123; Amar, *supra* note 42, at 1187–95.

The suggestion that the Fourteenth Amendment implicitly repealed the power of the jury, assuming such power once existed, is problematic. The interest of the government or of the victim in a conviction free from nullification is difficult to characterize as part of the due process guaranteed by that amendment, and the Fourteenth Amendment is not inevitably incompatible with jury nullification power.<sup>172</sup>

Confronted with King's response, Amar raised:

an alternative argument pertaining to how the role of the criminal jury was modified by the Fourteenth Amendment: by the time the Fourteenth Amendment was adopted, the jury's power to determine the law had eroded so dramatically that whatever the scope of jury rights incorporated by that amendment to the states, it did not include jury nullification.<sup>173</sup>

Yet, Amar's second argument is problematic too, beyond the fact that Amar himself believes in some right of nullification. This argument may be sound only if it is historically accurately in asserting that the jury's right to determine the law had been eroded so dramatically by 1868, which is a far more complicated question than determining the jury's right in 1791. Since prior nullification scholarship has not addressed the Fourteenth Amendment, the Reconstruction Era has not previously been viewed as a demarcation line. On the one hand, the narrow five-to-four *Sparf* decision was not issued until 1895, suggesting that the disallowance of nullification was not yet clearly established law during the Reconstruction Era. On the other hand, many lower federal courts and some state high courts had disallowed nullification by 1868 (but many had not).

Moreover, even if nullification had been widely disallowed by 1868, were Congress and the Fourteenth Amendment's framers aware of the change and did they approve of it? Would it be normatively justifiable for the Fourteenth Amendment to have constitutionalized undemocratic judicial precedent of which its framers were unaware or disapproved? Finally, Amar's second argument posits a different substantive outcome than his first. In the first, he suggests that the Fourteenth Amendment "qualified" or transformed the Sixth Amendment, implying that the disallowance of nullification was constitutionalized in both state and federal courts. In the second, though, he suggests that the Fourteenth Amendment simply did not incorporate part of the Sixth Amendment, implying that the disallowance was constitutionalized with respect only to state courts. Absent an unstated reverse incorporation, this argument suggests that contra *Sparf*, an originalist Supreme Court should restore the right to nullify in the federal courts.

King's response is also beset by a lack of historical specificity. She makes two claims, both of which this paper disputes. First, she claims that the Due Process Clause did not include a rights-based interest of the victim in a jury free from nullification, but a cogent argument has been made that

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<sup>172</sup> King, *supra* note 38, at 457 n.102.

<sup>173</sup> *Id.*

the Fourteenth Amendment protects the victim's interest in criminal convictions and that its framers understood it to do so.<sup>174</sup> Second, she claims that the Reconstruction Amendments were not incompatible with the theory of the right to nullify. Her claim may not even be true in the abstract, since the Fourteenth Amendment's text prioritized the rule of law over local autonomy, but even if true in the abstract, the historical context suggests a deeper truth. An important task of legal theory, Professor Horwitz has written, "is to uncover the specific historical possibilities of legal conceptions—to 'decode' their true concrete meanings to historical situations."<sup>175</sup> In the context of Reconstruction, the right to nullify was not compatible with the Republicans' understanding of the Fourteenth Amendment and due process.

This paper provides evidence that the Fourteenth Amendment may have democratically constitutionalized the nineteenth-century precedent that disallowed the Founding-era right to jury nullification. There is, in other words, a Fourteenth Amendment textual and originalist basis for not incorporating against the states the Sixth Amendment's original right of nullification, despite a general due process requirement of trial by jury. There is also an originalist basis for constitutionally disallowing the right of nullification in the federal courts too. This federal disallowance occurs by transforming, as Amar would like,<sup>176</sup> the meaning of the Sixth Amendment's right to jury trial through the prism of the Fourteenth Amendment and thus eliminating its original right to nullify. The Fourteenth Amendment, and Congress's power to enforce it, are thus read in light of the framers' structural understanding of it, which was that the amendment and its enforcement legislation would or could empower federal courts to protect victims' civil rights and similarly to prohibit jury nullification, notwithstanding any right to nullify now superseded under a last-in-time rule that had been previously guaranteed in the Constitution.<sup>177</sup> Since evidence for this federal disallowance comes from cases involving black and women victims, whether the framers' understood the Fourteenth Amendment to provide a constitutional basis for prohibiting jury nullification in all cases, only in certain civil rights-type cases involving minority victims, or only in cases specified by Congress or under Congress's Section 5 enforcement power remains an open question.

Contra Judge Weinstein, who apparently now considers the originalist Supreme Court to have restored nullification as a constitutional right, and

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<sup>174</sup> See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

<sup>175</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF THE LEGAL ORTHODOXY* 106–07 (1992).

<sup>176</sup> See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266 (1992) ("[I]n the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill may be subtly but importantly transformed in much the same way the Bill of Rights transformed language it had absorbed from still earlier sources.").

<sup>177</sup> In other words, superseded under the canon of construction *leges posteriores priores contrarias abrogant*, or subsequent laws repeal those before enacted to the contrary.

Judge Middlebrooks, who believes that only restoring the right to nullify is consistent with originalism, this paper suggests that even originalist courts may use this Reconstruction-era originalism, grounded in the Fourteenth Amendment and Reconstruction-era history, as their rationale for preserving the disallowance of nullification. Founding-era history, in other words, may not exclusively dictate the Constitution's original meaning. While Professor Bruce Ackerman called for a general "one-two" (Founding–Reconstruction) constitutional synthesis,<sup>178</sup> and Professor Amar's "refined incorporation" suggests which general rights in the original Bill, like the right of criminal jury trial, have been transformed,<sup>179</sup> this analysis shows how the Fourteenth Amendment's framers' understanding may affect one significant, particularized facet of that criminal jury trial right—the right to nullify.

Other than Amar's few-sentence hypothesis, from which he has distanced himself, the intersection of jury nullification constitutional doctrine and the Fourteenth Amendment has not been addressed in the scholarly literature. Historical studies on nineteenth-century nullification doctrine and the jury's right to interpret the law do not address the Fourteenth Amendment or the Reconstruction Congresses at all.<sup>180</sup> Most recent works on the Fourteenth Amendment's original meaning spend little time on jury law,<sup>181</sup> and the articles that do address Reconstruction and jury law general focus on the racial composition of juries.<sup>182</sup> Looking at Reconstruction juries through purely race-colored lenses, however, may create a distorted picture of what the Fourteenth Amendment's framers thought about nullification.

For example, Professor James Forman's recent *Yale Law Journal* article on nineteenth-century juries and race attempts to provide what is missing from some of the Supreme Court's jury jurisprudence by discussing "how various parties during . . . Reconstruction . . . thought about juries."<sup>183</sup> Yet, this otherwise excellent article omits half of the story. Forman argues that in response to jury nullification by white Southerners, the Reconstruction Republicans tried to "perfect" the jury principally "by providing for full black participation."<sup>184</sup> He finds "no proposals to restrict the Sixth Amendment

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<sup>178</sup> See ACKERMAN, note 99, at 88–89 (discussing "the problem of multigenerational synthesis").

<sup>179</sup> See Amar, *supra* note 176, at 1262–72; see also AMAR, *supra* note 53, at 299 (1998) (discussing Amar's theory's relationship with Ackerman's analysis).

<sup>180</sup> E.g., CONRAD, *supra* note 17, at 98–99 (moving chronologically from the antebellum era directly to *Sparf*); Alschuler & Deiss, *supra* note 2, at 868–69 (noting "[a]mong the topics that we have not considered are . . . the 'incorporation of the right to jury trial in the Fourteenth Amendment's Due Process Clause'); see also Harrington, *supra* note 5374; Howe, *supra* note 53; Note, *supra* note 119.

<sup>181</sup> E.g., JAMES EDWARD BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); NELSON, *supra* note 160.

<sup>182</sup> E.g., Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004).

<sup>183</sup> Forman, *supra* note 182, at 897.

<sup>184</sup> *Id.* at 934.



jury trial rights” and that “ideology—specifically, the longstanding commitment to juries that had been enshrined during abolitionism—played a restraining influence and made it unthinkable to attempt to limit the power of even overtly hostile juries.”<sup>185</sup>

This paper, on the other hand, finds that while part of the Republicans’ response was to include blacks on juries, the larger response to widespread nullification was to *purge* nullifiers from the jury boxes, whether they were whites in the Southern states in cases with black victims or Mormons in the Utah Territory in cases with women victims. Leading Republicans thought that those who indirectly counseled lawbreaking or even just believed that a federal criminal statute was unconstitutional were unfit to serve as jurors, and they advocated highly restrictive juror exclusion bills that would exclude the majority of local populations in multiple regions from serving as jurors.<sup>186</sup> In turn, their opposition repeatedly charged them with jury-packing.<sup>187</sup> Significantly, some Republicans went so far as to repudiate the right to nullify even in the abolitionist context.<sup>188</sup> While Forman’s conclusions may suggest that Republicans accepted the jury’s right to nullify as long as juries were racially representative of the population, this paper suggests that the Republicans were so hostile to nullification that they would alter federal and constitutional law as well as reclassify their own abolitionist legacy to curtail it.

Of course, deciphering the effect of the Due Process Clause on a provision of the Bill of Rights is a difficult task, particularly when assessing the Clause’s effect specifically on jury law. Section 1’s language is notoriously vague and ambiguous,<sup>189</sup> and it mentions nothing explicitly about juries. Its legislative history provides little more assistance because most Congressional debate on the Fourteenth Amendment addressed Sections 2 and 3, and the debates generally focused on practical questions of politics rather

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<sup>185</sup> *Id.* at 910 & n.81.

<sup>186</sup> *E.g.*, Act of Apr. 20, 1871, ch. 22, § 5, 17 Stat. 13 (1871) (excluding certain persons from jury service in Ku Klux Klan Act prosecutions); H.R. 3097, 43d Cong. § 4 (1874) (excluding jurors who held certain beliefs from certain types of prosecutions); H.R. 1089, 41st Cong. § 10 (1870) (same); S. 286, 41st Cong. § 17 (1869) (same).

<sup>187</sup> *See, e.g.*, 2 CONG. REC. 4470 (1874) (statement of Rep. Potter) (“[T]he Federal official would be able of his own will to pack a jury . . . As three-fourths of the men who reside in the Territory now do believe in polygamy and practice it, the result will be they will all be absolutely excluded from the juries in such cases, and the jury in all prosecutions for bigamy or polygamy will therefore necessarily be made up of persons who are non-Mormons.”); CONG. GLOBE, 42d Cong., 1st Sess. 766 (1871) (statement of Sen. Casserly) (“I do not believe that ten per cent of the white people of the South fit to serve upon a jury, grand or petit, could take that [Ku Klux Klan Act] oath. . . . [Y]ou pack your juries.”).

<sup>188</sup> *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 2148 (1870) (statement of Rep. Blair) (“We hated the [Fugitive Slave L]aw itself. . . . But such was the law; and I believe I may now safely say that under that law no jury ever found a verdict which the facts did not justify, assuming that the law was one that should have been executed.”).

<sup>189</sup> *See* NELSON, *supra* note 160, at 61 (1988) (discussing “the vagueness and ambiguity of section one’s language and the failure of the framing generation to settle how it would apply to a variety of specific issues”).

than on theoretical questions about the juristic meaning of the amendment's provisions.<sup>190</sup> No Congressional debates on the amendment, to my knowledge, specifically addressed the jury's law-deciding right or power.

The state ratification debates are also a dead end. "Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment," the second Justice Harlan once noted, "are not generally available."<sup>191</sup> Indeed, most of the state legislatures that considered the Fourteenth Amendment kept no record of their debates, or their discussion was so perfunctory that it does not shed light on their understanding of its meanings.<sup>192</sup> The accounts that do survive are typically from newspaper sources that are not known for accuracy.<sup>193</sup> Consequently, there are very few studies of the state ratification debates; none thoroughly explores the understandings of those politicians and citizens who participated in them,<sup>194</sup> and none explores their understandings of jury law at all.

Yet, determining how the Fourteenth Amendment affected the right to nullify is not an impossible task. The nullification practices in the federal and state courts during the Reconstruction Era suggest whether the jury's right to nullify had eroded so dramatically that the Fourteenth Amendment would not have been understood to preserve that right. Reconstruction-era legal treatises and dictionaries suggest whether intelligent and informed Americans would have understood the right to jury trial still to include, as it did at the Founding, the right to nullify. Finally, there are Reconstruction-era Congressional debates, recorded in the *Congressional Globe* and *Congressional Record*, which are the principal source for almost all Fourteenth Amendment scholarship.<sup>195</sup>

I have reviewed, at least briefly, every use of the terms "juror/jurors" and "jury/juries" in these sources from the Thirty-ninth through the Forty-third Congresses, which covers a period from December 1865 through March 1875. These terms were used on thousands of occasions,<sup>196</sup> but most of these uses did not pertain to the nullification question. Some uses did not address the issue of nullification's legitimacy directly but illustrated how the Reconstruction Congresses understood the right of trial by jury in relation to nullification. Other debates, however, especially those on federal responses

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<sup>190</sup> See BOND, *supra* note 181, at 8.

<sup>191</sup> *Reynolds v. Sims*, 377 U.S. 533, 602 (1964) (Harlan, J., dissenting).

<sup>192</sup> See CURTIS, *supra* note 181, at 145.

<sup>193</sup> See BOND, *supra* note 181, at 8.

<sup>194</sup> See *id.* at 12 n.23. Bond's work addresses only the eleven former Confederate states.

<sup>195</sup> See NELSON, *supra* note 160, at 5.

<sup>196</sup> My searches turned up 1006 entries on the Hein Online U.S. Congressional Documents Database. One entry usually refers to a single day of Congressional debate, although it may also refer to other listings in the *Congressional Globe* or the *Congressional Record* such as an index listing. Each entry includes all of the uses of the terms on that particular date, so a single entry may contain one insubstantial use of "jury" used on the date, or a single entry may contain an extended debate on jury law that used the terms dozens of times. Since there were 1006 single entries, the terms appear thousands of times.

to nullification by white Southerners and by Mormon Utahns, showed what leading Republicans thought should be done with nullifiers—and thus what they understood the Fourteenth Amendment to authorize or even to require—they wanted these prospective jurors purged.

In using the Congressional debates as evidence, this paper draws upon the model of Judge McConnell's scholarship, which has used Reconstruction-era Congressional debates to interpret the Fourteenth Amendment's original meaning.<sup>197</sup> Judge McConnell offers two justifications for why these Congressional debates are particularly appropriate evidence for Fourteenth Amendment interpretation. First, Reconstruction-era Congressional debates were conducted, often in constitutional terms, by officers sworn to uphold the Constitution.<sup>198</sup> Second,

far more than other amendments, the Fourteenth Amendment was a Congressional creation. The states and the people exercised little control. The state ratification debates did not dwell on the details of the proposed Amendment, and—an important point—the margin of victory for the Amendment was attained by coercion of the Southern states rather than by winning the support of the electorate in three-fourths of the States. When an Amendment obtains its supermajority through Congressional exercise of its power to condition readmission of states to the Union, it is a fiction to treat the opinions of the people of the various states as controlling; it is Congress that effectively exercised the amendatory power.<sup>199</sup>

Judge McConnell also explains why it is appropriate to look at the debates not only of the Thirty-ninth Congress but also of the next four Congresses, which takes my research to March 1875. While the Thirty-ninth Congress drafted the Fourteenth Amendment, the Reconstruction Congresses were forced to determine what it meant, so their actions provide evidence of the original understandings of its requirements and limitations.<sup>200</sup> Furthermore, Judge McConnell finds much to support a claim of continuity between 1868 and 1875. The Reconstruction Era is understood by historians as “a distinct political era in which a particular political faction, with a particular political and constitutional agenda, dominated the federal government and pursued a consistent and coherent program.”<sup>201</sup> Many of the Fourteenth Amendment's framers in Congress remained in power through 1875; the Republicans held a strong majority in both Houses of Congress until March 1875, when, on the heels of the Election of 1874, their 199–88 advantage in the House of Representatives declined into a

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<sup>197</sup> See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

<sup>198</sup> See *id.* at 953, 1109; see also U.S. CONST. art. VI (“The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution . . .”).

<sup>199</sup> McConnell, *supra* note 197, at 1109.

<sup>200</sup> See *id.* at 984.

<sup>201</sup> *Id.* at 1105.

182–103 deficit.<sup>202</sup> Finally, many of the issues and arguments in Congress were similar throughout the period. The Congressional debates, federal enactments, and other Reconstruction-era sources may illustrate the Fourteenth Amendment process through which the United States experienced a constitutional criminal procedure revolution—one grounded in protecting the rights of blacks and women—that refined the Bill of Rights.

### III. NON-INCORPORATION OF THE RIGHT TO NULLIFY

Originalists, like Professor Berger, and those who consider themselves obligated to follow the Supreme Court's originalism, like Judge Weinstein, use Founding-era history to contend that the jury's right to nullify is of constitutional dimension, inherent in Article III and the Sixth Amendment, and must be restored.<sup>203</sup> They argue that the nineteenth-century judiciary's disallowance of that right was unconstitutional—just as unconstitutional as the recently overturned sentencing statutes that the Court determined violated the jury's constitutional prerogative to pass judgment upon every element of an offense. This paper does not dispute that, under an originalist regime, those nineteenth-century anti-nullification decisions may be unconstitutional and thus overturned—*unless* there was a subsequent constitutional amendment relating to due process and jury rights that constitutionalized the once-unconstitutional decisions. The Fourteenth may be that amendment.

But in relation to juries and nullification, what is that amendment's original meaning? Does the Fourteenth Amendment's original meaning—either in itself or through incorporation of the Sixth Amendment—protect the right to nullify, like Article III and the Sixth Amendment originally did? To answer these questions, we must use Reconstruction-era originalism to determine what the meaning of criminal trial by jury was in 1868.

If the Fourteenth Amendments' framers, ratifiers, original interpreters, and original enforcers did not understand due process or the right of jury by definition to encompass the right to nullify, then an originalist should be hard-pressed to contend that the Fourteenth Amendment's original meaning protects or incorporates nullification. On the contrary, if their understanding was that nullification was antithetical to the meaning of trial by jury, then an originalist reading of the Fourteenth Amendment should not protect or incorporate the right to nullify. This Part answers these conjectures affirmatively. Contra Professor Burger and originalists who seek to apply the right to nullify to the states, Reconstruction-era originalism provides an originalist argument that the Fourteenth Amendment neither protects nor incorpo-

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<sup>202</sup> See U.S. House of Representatives Office of the Clerk Website, Party Divisions of the House of Representatives (1789 to Present), [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html); see also United States Senate Website, Party Division in the Senate 1789–Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm).

<sup>203</sup> See *United States v. Polizzi*, 549 F. Supp. 2d 308, 421–22 (E.D.N.Y. 2008); Berger, *supra* note 51, at 887–90.

rates the jury's right to nullify.

*A. The Fourteenth Amendment and the Right to Criminal Jury Trial*

Of course, the Fourteenth Amendment is relevant to jury nullification only if it relates to the rights of criminal jury trials. Absent such a relationship, the Fourteenth Amendment could neither protect nor incorporate the right to jury and thus the right to nullify—but it could not plausibly transform or supersede the Sixth Amendment's original meaning either.<sup>204</sup> The term “jury” nowhere appears in the Fourteenth Amendment; therefore, if the Fourteenth Amendment protects the right to criminal jury trial, it must do so implicitly, just as the Article III and Sixth Amendment right to criminal jury trial implicitly protected the jury's right to nullify at the Founding.

For our purposes, both originalist scholars and those who oppose restoring the right to nullify concur that the Fourteenth Amendment should be understood to protect directly or to incorporate the right of criminal jury trial. When Professor Burger called for a restoration of the jury's right to nullify based on the original Constitution, for example, he did not distinguish between federal and state cases. The Supreme Court, ever since *Duncan v. Louisiana*, has also agreed that the Fourteenth Amendment incorporates the right to criminal trial by jury. Importantly, the contemporary Supreme Court's originalist criminal procedure jurisprudence has emphasized the fundamentality of the jury to due process.<sup>205</sup>

It is worth noting, though, that the Court did not find the right implicit in the Fourteenth Amendment until a full century after 1868. “Trial by jury” the Court held in 1900, “has never been affirmed to be a necessary requisite of due process of law.”<sup>206</sup> Indeed, the dissenters in *Duncan* pointed to many cases where the Court had previously stated that the Fourteenth Amendment did not require trial by jury.<sup>207</sup> From a nineteenth-century originalist perspective, though, there are substantial reasons for understanding Section 1 of the Fourteenth Amendment to require trial by jury. The incorporation and other debates have been played out in the literature,<sup>208</sup> so a short sketch

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<sup>204</sup> *But cf.* Amar, *supra* note 42, at 1195 (finding it plausible that the original right to nullify could have been transformed by the “Civil War Amendments”). Professor Amar does not limit his theory to the Fourteenth Amendment but rather invokes all three Reconstruction Amendments, perhaps because, as his brother has shown, the Fifteenth Amendment may more directly implicate jury service rights. *See* Amar, *supra* note 182. I, however, find only the Fourteenth applicable to nullification. Only the Fourteenth Amendment incorporates other rights; it guarantees the right of protection at the heart of the Congresses' jury-related legislation; and Reconstruction-era members of Congress spoke in terms of the Fourteenth Amendment affecting jury rights. *See, e.g.*, 2 CONG. REC. 974 (1872) (statement of Sen. Edmunds) (“[T]he fourteenth amendment allows Congress to require that colored men shall sit upon juries.”).

<sup>205</sup> *See, e.g.*, cases cited *supra* note 16.

<sup>206</sup> *Maxwell v. Dow*, 176 U.S. 581, 603 (1900).

<sup>207</sup> *See Duncan v. Louisiana*, 391 U.S. 145, 185 n.25 (1968) (Harlan, J., dissenting). *But see id.* at 154–55 (majority opinion) (stating that the cases upon which the dissent relied did not dispense “entirely with a jury trial in serious criminal cases”).

<sup>208</sup> Compare Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The*

here should suffice.

To begin, Section 1 unambiguously requires state judicial proceedings to observe “due process of law,”<sup>209</sup> and the preponderance of the evidence suggests that the Reconstruction-era meaning of “due process” implicitly included a right to criminal jury trial. Addressing the specific requirements of “due process” a few years after Reconstruction, the leading nineteenth-century constitutional treatise writer, Thomas Cooley, wrote that it mandated “prosecution according to the forms of law, resulting in conviction after public trial, and opportunity to be heard, and followed by judgment applying the law which the convicted party violated.”<sup>210</sup> In explaining what a criminal “trial” entailed, he said that although some states did not allow jury trials for minor offenses, “in general . . . an accused person will be entitled to the judgment of his peers.”<sup>211</sup> He was more explicit when writing in 1868, shortly before the Fourteenth Amendment was ratified. “The trial of the guilt or innocence of the accused,” he declared, “must be by jury,” an American principle that he noted dated back to the earliest extant Plymouth Colony legislation.<sup>212</sup> Cooley also described due process by referring to William Blackstone’s discussion of the Magna Charta as authoritative.<sup>213</sup> In another passage, Blackstone had written that the “trial by jury, . . . as the grand bulwark of [every Englishman’s] liberties, is secured to him by the great charter” in its textual precursor to due process.<sup>214</sup>

Antebellum authors agreed that due process required criminal trial by jury. Justice Story, in his *Commentaries*, wrote that the Fifth Amendment Due Process Clause “in effect affirms the right of trial according to the process and proceedings of the common law,”<sup>215</sup> which included criminal jury trial. “[N]o lawyer in this country or England, who is worthy of the appellation,” Alvan Stewart, a leading source of Reconstruction-era Republican ideology, similarly chimed, “will deny that the true and only meaning of the phrase, ‘due process of law,’” includes “a trial by a petit jury of twelve

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*Original Understanding*, 2 STAN. L. REV. 5 (1949) (arguing that selective incorporation lacks historical support), Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965) (same), and Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) (same), with AMAR, *supra* note 53 (arguing that the framers of Section 1 understood their amendment to achieve a version of selective incorporation), and CURTIS, *supra* note 181 (same).

<sup>209</sup> See U.S. Const. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>210</sup> THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298 (Boston, Little, Brown, and Co. 1880).

<sup>211</sup> *Id.* at 225.

<sup>212</sup> COOLEY, *supra* note 42, at 319 & n.1 (“All that extant of the legislation of the Plymouth Colony for the first five years consists of the single regulation, ‘that all criminal facts . . . shall be tried by the verdict of twelve honest men, to be impanelled by authority in form of a jury, upon their oath.’”).

<sup>213</sup> *Id.* at 351 (citing Magna Charta, ch. 29 (1215)).

<sup>214</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*349–50 (1765).

<sup>215</sup> 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1783, at 661 (Boston, Hilliard, Gray & Co. 1833).

men, and a judgment pronounced on the finding of the jury, by a court.”<sup>216</sup> The Fourteenth Amendment Due Process Clause thus serves as a direct textual basis for requiring states to comply with the right to trial by jury.

In addition to direct application of due process, the Fourteenth Amendment also mandates criminal trial by jury through incorporation or its alternative. The alternative, anti-incorporation theory of the Fourteenth Amendment is that Section 1 was understood to protect only certain limited natural rights common to all free government, rather than specific guarantees of the Bill of Rights.<sup>217</sup> Among the natural rights understood to exist in 1868 was the right of criminal trial by jury. For example, Senator George Edmunds said that “under a civil government” trial by jury “of course is the only method of punishing crime.”<sup>218</sup> Moreover, General Winfield Hancock, upon assuming command of the military district that included Texas and Louisiana, issued the following order to protect rights in his district: “[T]he great principles of American liberty are still the lawful inheritance of this people, and ever should be. The right of trial by jury, the habeas corpus, the liberty of the press, the freedom of speech, the natural rights of persons, and the rights of property must be preserved.”<sup>219</sup> The right of trial by jury was the first of those rights he listed. Even academic foes of incorporation, unlike the dissenters in *Duncan*, argue that while the Fourteenth Amendment was not understood to mandate all of the criminal procedure rights enumerated in the Bill of Rights, it was understood to require states to provide a fair process for deciding criminal cases, which included a “jury trial right.”<sup>220</sup>

The strongest originalist case for a Fourteenth Amendment right to criminal jury trial, though, comes through incorporation of the Sixth Amendment’s explicit jury clause. Professors Amar and Michael Curtis have marshaled much evidence that the Reconstruction Congresses understood the Fourteenth Amendment to make the Sixth Amendment right to jury trial binding on the states.<sup>221</sup> In addition to their discussion of more than thirty statements advocating general incorporation of the Bill of Rights, Republicans spearheading the amendment specifically understood incorporation to include the right of criminal jury trial. Since the right of criminal jury trials was among those being violated in the South in 1866, Republicans especially wanted to give constitutional sanction to states’ obligation to guarantee the right of criminal jury trial.<sup>222</sup> Introducing the amendment to his colleagues, Senator Jacob Howard reported that among the fundamental guarantees made binding upon the states would be the “right of an accused

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<sup>216</sup> AMAR, *supra* note 53, at 201 (quoting Stewart).

<sup>217</sup> See BOND, *supra* note 181, at 256.

<sup>218</sup> CONG. GLOBE, 41st Cong., 2d Sess. 176 (1869) (statement of Sen. Edmunds).

<sup>219</sup> BOND, *supra* note 181, at 256 (quoting Gen. Hancock).

<sup>220</sup> See, e.g., Thomas, *supra* note 136, at 215.

<sup>221</sup> See AMAR, *supra* note 53, at 186; CURTIS, *supra* note 181, at 112.

<sup>222</sup> See ERIC FONER, RECONSTRUCTION, 1863–77, at 258 (1988).

person . . . to be tried by an impartial jury.”<sup>223</sup> After ratification, Senator John Sherman reported that the “right to be tried by an impartial jury is one of the privileges included in the fourteenth amendment; and no State can deprive any one by a State law of this impartial trial by jury.”<sup>224</sup>

This guarantee, moreover, was not among the more controversial requirements of the Fourteenth Amendment. As George Paschal’s 1868 treatise noted, most of the states already had adopted similar jury rights provisions in their own constitutions.<sup>225</sup> Indeed, the right to criminal jury trial for serious crimes was recognized, according to one count, in the constitutions of at least twenty-five of the twenty-seven states ratifying the amendment.<sup>226</sup> Therefore, the Fourteenth Amendment’s framers understood their amendment to provide a federal guarantee, whether directly through due process or natural rights theory or indirectly through incorporation, of the long-established right to criminal trial by jury.

But how did they define the term? Did they, like the Founders who ratified the Constitution and the Sixth Amendment, understand the right to criminal jury to encompass, as a necessary component, the jury’s right to nullify? Or, despite the protection or incorporation of the right to jury trial, was the right to nullify not protected or incorporated along with it?

#### *B. The Right to Nullify in Reconstruction-era Courts*

For the Founding Era, one measure for determining whether the existing conception of jury entailed nullification was to look at the practices of federal and state courts. In the late eighteenth century, the universal, or virtually universal, practice in courts was to allow criminal juries to determine law as well as fact. Founding-era judges, lawyers, and, importantly, jurors—jury service being the means by which many of the intelligent and informed Americans who participated in the constitutional ratification process learned about rights and the legal system<sup>227</sup>—thus experienced the constitutional right of jury trial as encompassing by definition the jury’s right to decide questions of law and to nullify. Because of the antebellum judicial disallowance of nullification, however, this practice of submitting legal questions to the jury was not universal during Reconstruction. On the other hand, the practice had not been disallowed everywhere either. While jury practices in the Reconstruction-era courts cannot definitely tell us the understanding of the Fourteenth Amendment’s framers, ratifiers, interpreters, and enforcers, these practices nonetheless offer us some clues as to what Fourteenth Amendment due process and its right to criminal jury trial originally meant.

<sup>223</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

<sup>224</sup> CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman).

<sup>225</sup> See AMAR, *supra* note 53, at 210.

<sup>226</sup> See CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 141 (1997).

<sup>227</sup> See, e.g., Amar, *supra* note 42, at 1186–87 (discussing Founding-era “jurors as pupils”).



In the federal courts, the Supreme Court did not disallow nullification until the *Sparf* decision in 1895, a full generation after Reconstruction. Since the 1830s, however, lower courts, often with Supreme Court Justices sitting on circuit, had consistently instructed jurors that they had no right to nullify. By 1868, the federal courts in Philadelphia, Boston, the District of Columbia, San Francisco, and New York had denied that the Constitution's guarantee of the right to trial by jury bestowed on the jury a right to determine law as well as fact.<sup>228</sup> Other federal judges considered these precedents persuasive, though perhaps not binding. For example, in 1851, sitting in the same court in which Justice Story had decided *Battiste* sixteen years earlier, Justice Curtis noted that "Justice Story pronounced an opinion on this question" of nullification. "He denied that this right existed, and gave reasons for the denial of exceeding weight and force." Although Justice Curtis noted his agreement with Justice Story, he still proceeded to answer the question independently, conducting his own originalist analysis of Founding-era history. "I conclude, then," he wrote:

that when the constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the constitution when it adopts trial by jury.<sup>229</sup>

Although Justice Curtis's originalist history was, as we saw above, incorrect and thus his opinion may have little persuasive authority today, his opinion and those of his colleagues on the federal bench suggest that by 1868 the practice in the lower federal courts, and particularly those in the most significant cities, was not to allow the jury to decide questions of law.<sup>230</sup>

State court practices, however, were more mixed. In 1857, Francis Wharton counted eleven states that "unite in the doctrine that the jury must take the law from the court" and five states that held the opposite view;<sup>231</sup> he said nothing about the law in the remaining fifteen. In 1876, John Prof-fatt attempted a similar state-by-state assessment. He found that thirteen states prohibited nullification, six allowed it, and five had unclear or conflicting rules;<sup>232</sup> he did not address the other thirteen states. A half-century later, Professor Howe, reviewing a dozen states, wrote that six had disallowed nullification by 1871 but that the other half allowed it for at least another decade or even quarter-century.<sup>233</sup> In addition to the lack of uniform-

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<sup>228</sup> See *United States v. Riley*, 27 F. Cas. 810 (C.C.S.D.N.Y. 1864) (No. 16,164); *United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (No. 15,254); *United States v. Stettinius*, 22 F. Cas. 1322 (C.C.D.D.C. 1839) (No. 13,387); *United States v. Battiste*, 24 Fed. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545); *United States v. Shive*, 27 F. Cas. 1065 (C.C.D.E.D. Pa. 1832) (No. 16,278).

<sup>229</sup> *United States v. Morris*, 26 F. Cas. 1323, 1334–35 (C.C.D. Mass. 1851) (No. 15,815).

<sup>230</sup> See WHARTON, *supra* note 162, §§ 3100–3101, at 1120–21.

<sup>231</sup> *Id.* at § 3108, at 1124–25.

<sup>232</sup> PROFFATT, *supra* note 162, §§ 377–381, at 441–44.

<sup>233</sup> Howe, *supra* note 53, at 591–612.

ity among the states, there is the additional problem that Wharton, Proffatt, and Howe occasionally assessed state practices differently despite reading the same or similar precedents. In Pennsylvania's case, Wharton deemed the state anti-nullification by 1857; Proffatt put it in the uncertain camp in 1876; and Howe considered Pennsylvania pro-nullification until 1891.

This example, of course, contradicts the one certainty upon which Wharton, Proffatt, Howe, and modern scholars universally concur: during the nineteenth century, the clear and overwhelming judicial trend, in both federal and state courts, was to disallow nullification. They agree that on the eve of Reconstruction, at least with respect to the judiciary, the growing weight of authority was that the meaning of the right to jury no longer encompassed the jury's right to nullify. Yet, a mere judicial trend does not establish whether the Fourteenth Amendment's framers' conception of jury trial included the right to nullify.

First, a *trend* shows direction but not universal practice, as Wharton, Proffatt and Howe demonstrated. During Reconstruction, many state courts still considered nullification a right, even as judges implicitly or expressly vented their disapproval. In a Connecticut case from 1873, for example, the state supreme court approved of a trial court that had submitted the constitutional question of whether a state liquor statute was constitutional to the jury while simultaneously informing the jury that the supreme court, in a previous case, had held the statute valid, presumably desiring the jury to follow that precedent.<sup>234</sup> In a Tennessee case from 1874, the state supreme court, notwithstanding a long three-judge dissenting opinion asserting that nullification was "wrong, and unsupported by the constitution, or sound principles of law and policy,"<sup>235</sup> acknowledged that criminal juries had the right to judge the law. According to Howe, in Pennsylvania, Vermont, Connecticut, and, of course, the U.S. Supreme Court, the judiciary did not disallow nullification until a full generation after Reconstruction.

Second, a *judicial* trend shows only what the judiciary thought the jury right entailed, and, just as antebellum state legislatures clashed with the courts, so too did Reconstruction-era state legislatures. After the Georgia Supreme Court held, in 1870, that the jury must accept the law from the court,<sup>236</sup> the state passed a constitutional amendment (subsequently ignored by the judiciary) providing that the jury "in all criminal cases, shall be judges of the law and the facts."<sup>237</sup> Likewise, after the Louisiana Supreme Court began curtailing the jury's right to nullify in 1871,<sup>238</sup> and its chief justice even called nullification a "legal heresy" and "moral wrong,"<sup>239</sup> the

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<sup>234</sup> State v. Buckley, 40 Conn. 246 (1873).

<sup>235</sup> Howe, *supra* note 53, at 599 (quoting *Withers v. State*).

<sup>236</sup> See *Brown v. State*, 40 Ga. 689 (1870).

<sup>237</sup> GA. CONST. Bill of Rights ¶ 1, § 2 (1877).

<sup>238</sup> See *State v. Tally*, 23 La. 677 (1871).

<sup>239</sup> *State v. Johnson*, 30 La. 904, 905, 906 (1878).

state constitution was amended to provide that “the jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence . . . .”<sup>240</sup> Although these were former Confederate states, during the 1850s, the Maryland, Indiana, and Massachusetts state legislatures or constitutional conventions also tried to preserve the nullification right from what they considered undemocratic judicial usurpation.

Congress, not the states, however, was the driving force behind the Fourteenth Amendment and its original meaning,<sup>241</sup> so what matters most is how Congress understood the jury’s right to decide questions of law. If Congress conclusively believed that due process and the right to jury trial *did not* include the right to nullify, then, under an originalist jurisprudence, the Fourteenth Amendment, unlike the original Sixth Amendment, should not be read to protect the jury’s right to nullify, either through incorporation or otherwise. Thus, the critical question is whether, in guaranteeing the right of trial by jury through the Fourteenth Amendment, Congress thought that “jury” meant a body of citizens permitted to decide both fact *and* law. The legal treatises from which Congress was likely to draw its understanding of the jury and which illustrate how intelligent and informed Americans ratifying the Fourteenth Amendment understood the jury, in addition to the words spoken in the Reconstruction Congresses, show that Congress did not understand the criminal jury right to include the jury’s right to nullify.

### C. *The New Original Meaning in Treatises and Dictionaries*

Discussion of what intelligent and informed Americans understood the jury’s role to be during the Reconstruction Era must begin with Francis Wharton and Thomas Cooley, the two great nineteenth-century American treatise writers. Both defined today by the word “influential,”<sup>242</sup> Wharton and Cooley wrote about the jury’s law-finding right during the late antebellum and Reconstruction eras. Wharton, a Pennsylvania Democrat, published the fourth edition of *A Treatise on the Criminal Law of the United States* in 1857, less than a decade before the Fourteenth Amendment was drafted. Cooley, a Michigan Republican, published the first edition of *A Treatise on Constitutional Limitations* in 1868, the very year that the amendment was ratified. In addition to these treatises, another classic, John Proffatt’s *A Treatise on Trial by Jury*, published in 1876, illuminates jury rights and duties during the Reconstruction Era. Although Wharton was the most emphatic in his assertion, he, Cooley, and Proffatt all agreed that, according to the then-existing state of the law, juries no longer had the right to nullify and instead had to take the law from the court.

Wharton, a Yale-educated lawyer, began his career as a state prosecutor,

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<sup>240</sup> LA. CONST. § 168 (1879).

<sup>241</sup> See McConnell, *supra* note 197, at 1109.

<sup>242</sup> See AMAR, *supra* note 53, at 249 (Cooley); BLACK’S LAW DICTIONARY, *supra* note 17, at 1626 (Wharton).

which led him to write on criminal law and to compose practical legal treatises. The first edition of his *Treatise on Criminal Law* was published in 1846, and he revised it many times throughout the century. As a young prosecutor in 1845, Wharton had benefited from a state judge's instruction that it was the jury's duty "to receive the law for the purposes of this trial from the court,"<sup>243</sup> notwithstanding that the Pennsylvania Supreme Court did not mandate this rule until a half-century later.<sup>244</sup> As a treatise writer, Wharton paid special attention to the jury's right to decide the law; the fourth edition, for example, contained over ten pages on the subject.<sup>245</sup>

His firm conclusion was that juries had no right to decide the law. "When a case is on trial," he wrote, "the great weight of authority now is that the jury are to receive as binding on their consciences the law laid down by the court." He conceded that the jury had the power to nullify because an acquitted defendant could not be retried in spite of the evidence. Nevertheless, "this exception arises," he insisted, "not from the doctrine sometimes broached that the jury are the judges of the law in criminal cases, but from the fundamental policy of the common law which forbids a man when once acquitted to be put on a second trial for the same offence." Aside from this lone exception, though, it could be "hardly doubted in any quarter" that judges, as the only rightful law-deciders, must set aside verdicts that contradicted the law.<sup>246</sup>

Wharton understood that during the Founding Era the jury had the right to nullify. "For some time after the adoption of the federal constitution," he acknowledged, "a contrary doctrine, it is true, was generally received." Yet, he continued, "[I]t was not long before it was found necessary, if not entirely to abandon the rule, at least practically to ignore it." The problem was that if "juries have any moral right to construe the law," there could be no settled law because juries' notions on fundamental questions varied and juries could not bind one another on interpretations of the law.

[I]n practice, however speciously the doctrine may be asserted, it is, except so far as it may sometimes lead a jury to acquit in a case where the facts demand a conviction, practically repudiated, and since its only operation now is mischievous, it is time it should be rejected in theory as well as reality. For independently of the reasons already mentioned an attempt to carry it out in practice, would involve a trial in endless absurdity.<sup>247</sup>

Wharton approved of Supreme Court Justices riding circuit who had held that it was a good cause of preemptory challenge that a juror differed

<sup>243</sup> FRANCIS WHARTON, *A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES* 722–23 (Philadelphia, Kay and Brother, 2d ed. 1875) (discussing Judge Rogers's instructions in *Sherry's Case*).

<sup>244</sup> Compare *Hilands v. Commonwealth*, 111 Pa. 1 (1885) (stating that jurors "are not only judges of the facts . . . but also of the law"), with *Commonwealth v. McManus*, 143 Pa. 64 (1891) (effectively requiring the jury to take the law from the court).

<sup>245</sup> WHARTON, *supra* note 162, §§ 3093–3108, at 1115–25.

<sup>246</sup> *Id.* § 3093, at 1115.

<sup>247</sup> *Id.* §§ 3093–3094, 3096–3098, at 1115, 1118–19.

from the court in his view of the constitutionality of the statute on which the prosecution resisted. Not only were such challenges normatively acceptable to Wharton and the Justices, but also they illustrated that jurors no longer had any law-finding right. “On the assumption that the jury as the judges of the law as well as the court,” he remarked, “there is no more reason *a priori* that the court should set aside a juror, than that the jury should set aside the judge,”<sup>248</sup> an obvious absurdity. Wharton made it clear that in his influential treatise, the meaning of “jury” did not entail the jury’s right to nullify. On the contrary, he believed at least a decade before Reconstruction that nullification was antithetical to a legitimate system of jury trial.

Thomas Cooley did not disagree, though he was more cautious than Wharton had been. Appointed the University of Michigan Law School’s first dean in 1859 and elected to the Michigan Supreme Court in 1864, Cooley established himself as perhaps the nation’s leading constitutional scholar with the publication of his “landmark”<sup>249</sup> and “brilliantly crafted”<sup>250</sup> *Treatise on Constitutional Limitations*, the most important of his many works.<sup>251</sup> The treatise appeared while states were ratifying the Fourteenth Amendment, making it among the best sources for determining the original meaning of “jury” rights implicit within the Fourteenth Amendment and thus of the jury’s right to nullify.

“[I]t is still an important question,” Cooley began his four-page discussion of nullification,

whether the jury are bound to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty to follow it if it accords with their own convictions, or to disregard it if it does not.<sup>252</sup>

He considered the issue complicated because when the jury acquits on the law and against the evidence, the acquittal is final, so it appears that the jury is the judge of the law, but when the jury convicts on the law against the evidence, the judge sets aside the verdict, which suggests that the jury may not judge the law. Nonetheless, he continued:

it is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases arises from the merciful maxim in the common law, which will not suffer an accused party to be put twice in jeopardy, however erroneous may have been the first acquittal.<sup>253</sup>

This led Cooley to reason that “the rule of law would seem to be, that it is the duty of the jury to receive and follow the law as delivered to them by

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<sup>248</sup> *Id.* § 3101, at 1121.

<sup>249</sup> AMAR, *supra* note 53, at 282.

<sup>250</sup> SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 138 (2002).

<sup>251</sup> KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 222 (1989).

<sup>252</sup> COOLEY, *supra* note 42, at 322.

<sup>253</sup> *Id.* at 323.

the court,” though, of course, “the jury have the complete power to disregard it.” Thus, Cooley concluded that jury had the power but not the right to decide questions of law, and he added that although there were opposing decisions, “the current of authority” supported his conclusion.<sup>254</sup>

Both Wharton and Cooley informed their readers that the jury had the power yet not the right to nullify. They insisted that the jury’s ability to acquit against the evidence and the court’s corresponding inability to overturn acquittals against the law was grounded only in the double jeopardy protection—not in any law-finding right of the jury. That right, according to their understanding, no longer existed by the Reconstruction Era. In 1868, intelligent and informed Americans, like the Fourteenth Amendment’s framers, would not have understood the right to criminal jury trial to encompass the jury’s right to nullify.

Although John Proffatt’s *Treatise on Trial by Jury* was not published until 1876, after the Fourteenth Amendment had been ratified, it too illustrates the understanding of the right to jury during the Reconstruction Era. Proffatt was a prominent San Franciscan lawyer who authored or edited several legal works, including a many-volume series of the most important state court decisions since the Founding.<sup>255</sup> He called his *Treatise on Trial by Jury* “the first attempt” in American legal scholarship “to give the law applicable to all proceedings connected with the jury,”<sup>256</sup> and it naturally devoted much attention to the state of the law surrounding the jury’s law-finding power.

Proffatt opened his discussion by acknowledging that “there is a wide divergence of opinion.”<sup>257</sup> “In many places,” he continued, “it has been claimed for the jury that they may rightfully disregard the instructions of the court in matters of law” so that “they are the ultimate, rightful and paramount judges of the law as well as the facts in criminal cases.” Even “a multitude of authorities, of old and recent date, of very respectable weight and learning” supported this assertion of a jury’s right to nullify.<sup>258</sup> Proffatt, however, disagreed with those authorities and did not believe that they represented the state of American law during Reconstruction.

While he conceded that “the jury in criminal cases have the *power*, which is often too freely exercised to decide upon the law in criminal cases,” Proffatt added that “if the question be as to their *right* to decide the law, it is an entirely different matter. It may be safely asserted that in a large majority of our States this right is denied.” Like Wharton, Proffatt acknowledged that nullification doctrine was popular during at the Founding but had been discarded during the antebellum era. He also agreed that the disallowance of nullification was not just a descriptive *fait accompli* by Reconstruc-

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<sup>254</sup> *Id.* at 323–34.

<sup>255</sup> *Law Decisions*, N.Y. TIMES, May 17, 1880, at 3; *Obituary Notes*, N.Y. TIMES, July 23, 1879, at 2.

<sup>256</sup> PROFFATT, *supra* note 162, at v.

<sup>257</sup> *Id.* § 359, at 426–27.

<sup>258</sup> *Id.* § 373, at 438.

tion but also a normatively justifiable policy. “It is well this view was established,” he wrote, “for under the former doctrine there could be no stability or uniformity in the law.” Mirroring Wharton and Cooley, his ultimate conclusion was that the “preponderance of judicial authority in this country is in favor of the doctrine that the jury should take the law from the court and apply it to the evidence under its direction.”<sup>259</sup>

Nor were Reconstruction-era scholars the only ones to understand the jury as a fact-finding, but not law-deciding, body. Like the legal treatises, dictionaries also illustrate that, by Reconstruction, the understanding of the right to criminal jury trial did not include the jury’s right to nullify. For example, one dictionary of the Constitution, intended for laymen, defined “jury” as a body of men selected “to try questions of fact in civil and criminal suits, and who are under oath or solemn affirmation to decide the facts truly and faithfully, according to the evidence laid before them.”<sup>260</sup> It drew no distinction between civil and criminal cases; even criminal juries tried only questions of fact.

The leading nineteenth-century American dictionary provides even more conclusive evidence.<sup>261</sup> Noah Webster, a Yale-educated lawyer like Wharton, first published his *American Dictionary of the English Language* in 1828. In this first edition’s definition of “jury,” Webster noted, “*Petty juries*, consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions.”<sup>262</sup> This definition of jury thus included the criminal jury’s right to decide the law, affirming the jury’s right to nullify. After Webster died in 1843, George and Charles Merriam acquired the rights to Webster’s *Dictionary* and hired Webster’s son-in-law Chauncey A. Goodrich, a Yale alumnus and professor of rhetoric, to oversee new editions. In the 1857 revised and enlarged edition, current when the Fourteenth Amendment was adopted, no distinction was drawn between civil and criminal juries, and no mention was made of any jury’s law-deciding right. A “jury” was defined as:

A number of freeholders, selected in the manner prescribed by law, impaneled and sworn to inquire into and try any matter of fact, and to declare the truth on the evidence given them in the case.—*Juries* are of two kinds, *grand* and *petty* or *petit*. The office of . . . the latter is to try causes, both civil and criminal.<sup>263</sup>

Between 1828 and 1857, therefore, the *Dictionary* understood the meaning of jury to have changed from one in which criminal juries—by defini-

<sup>259</sup> *Id.* §§ 375–376, at 440–41.

<sup>260</sup> HENRY FLANDERS, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 217 (Philadelphia, E. H. Butler & Co. 1860).

<sup>261</sup> *Cf.* *Tennessee v. Lane*, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting) (relying on Webster’s *American Dictionary of the English Language* to define terms in the Fourteenth Amendment).

<sup>262</sup> NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

<sup>263</sup> NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1108 (Chauncey A. Goodrich ed., rev. and enl. ed., Philadelphia, J. B. Lippincott & Co. 1857).

tion—decided questions of fact *and law* to one in which law-deciding was not inherent in the meaning of any jury. Indeed, juries were to “try any matter of fact” and “to declare the truth on the evidence,” not the law. Dictionary definitions do not change lightly, so the 1857 edition provides evidence that the meaning of “jury” had evolved. Goodrich was not law-trained himself, but he understood the significance of precise legal definitions. In his preface, he wrote that his father Elizur Goodrich, a Yale trained-lawyer and former Yale law professor, reviewed and corrected the definitions on law.<sup>264</sup>

Wharton, Cooley, Proffatt, and Webster’s *Dictionary* concurred: the jury’s right to nullify, inherent in the meaning of “jury” in the Founding Era, was largely incompatible with the meaning of “jury” by Reconstruction. These sources suggest that informed Americans in 1868 would not have understood the Fourteenth Amendment to protect the jury right’s to nullify either through incorporation or through its own Section 1 language. Members of the Reconstruction Congresses were likely familiar with Wharton, Cooley, and Webster’s *Dictionary*, but we cannot rely on these sources alone. Although they may have shaped the members’ governing view, the Reconstruction Congresses were more concerned with other issues—like civil rights—than what elite lawyers like the treatise writers thought. To determine how they viewed jury nullification, we must turn to their own words.

#### *D. The New Original Meaning in the Reconstruction Congresses*

The words of the members of Congress who spoke about jury nullification agreed with the treatises and dictionaries of their time. Given the totality of the Reconstruction-era Congressional debates, the evidence shows that most members of Congress, and particularly the Republican leaders who designed the Fourteenth Amendment’s agenda, understood the right to criminal jury trial not to include the jury’s right to nullify, and therefore they would not have understood the Fourteenth Amendment to protect directly or to incorporate a protection of nullification. The jury-based analogies they invoked in their debates, the bills relating to jury service they proposed, and the state-court jury practices they discussed show almost no support for a constitutional right to nullify and much antagonism against it. Although the principal Republicans who framed the Fourteenth Amendment, Representative John Bingham, a Moderate Republican from Ohio, Representative Thaddeus Stevens, a Radical Republican from Pennsylvania, and Senator Jacob Howard, a Radical from Michigan,<sup>265</sup> did not make any statements during the Reconstruction Congresses relating specifically to the jury’s right to nullify, we have statements from other leading Republicans who played instrumental roles in framing the Reconstruction amendments and their enforcement legislation, including Senators Lyman Trumbull, Charles Sumner,

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<sup>264</sup> See *id.* at iv.

<sup>265</sup> See AMAR, *supra* note 53, at 186–87.



Frederick Theodore Frelinghuysen, and William Morris Stewart.

Senator Trumbull, a Moderate Republican from Illinois, is naturally important to our determination of the Reconstruction Congresses' understanding of nullification. He chaired the influential Judiciary Committee, co-authored the Thirteenth Amendment, and authored the Freedmen's Bureau Act and Civil Rights Act of 1866, which the Fourteenth Amendment was intended to constitutionalize. By February 1866, Republicans in the Thirty-ninth Congress had united in supporting his two bills as necessary amendments to the Johnson Administration's Presidential Reconstruction, viewing them as a prelude to readmitting the South to Congressional representation.<sup>266</sup> Much to the surprise of Congress, though, President Johnson vetoed the Freedmen's Bureau Bill because, among other reasons, he did not think Reconstruction matters should be decided while eleven states remained unrepresented in Congress.<sup>267</sup> In his veto message, he asserted that Congress did not have the constitutional "right to shut out, in time of peace, any State from the representation to which it is entitled by the Constitution."<sup>268</sup> Unshaken by Johnson, the House of Representatives responded with a resolution, for which it asked the Senate's concurrence, that "no Senator or Representative shall be admitted into either branch of Congress from any of the [former Confederate] States until Congress shall have declared such States entitled to such representation."<sup>269</sup>

The Senate concurred but not before acrimonious debate.<sup>270</sup> Among those who objected was James Dixon of Connecticut, an outspoken supporter of Johnson who had been elected to the Senate as a Republican but would run unsuccessfully for reelection as a Democrat in 1868.<sup>271</sup> Dixon agreed with Johnson that each House of Congress could judge the particular qualifications of its own individual members yet could not outright disqualify an entire state.<sup>272</sup> Trumbull, who supported the House's resolution, countered that while each House could judge individual qualifications, the entire Congress could determine which states were qualified to send members to Congress. Congress could disqualify a state if, for example, its legislature swore allegiance to the new emperor of Mexico.<sup>273</sup> When Dixon responded that, in spite of Congress, the Senate could still admit a member chosen by a treacherous state, Trumbull replied:

If the Senator means to ask me if the Senate has not the physical power to admit anybody, elected or not, I admit they have the same right to do it that twelve ju-

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<sup>266</sup> See FONER, *supra* note 222, at 246.

<sup>267</sup> *Id.* at 248.

<sup>268</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1042 (1866) (statement of Sen. Fessenden, quoting Pres. Johnson's veto message).

<sup>269</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1039 (1866).

<sup>270</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 1147 (1866) (the Senate vote was 29–18).

<sup>271</sup> See FONER, *supra* note 222, at 247.

<sup>272</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1042 (1866) (statement of Sen. Dixon).

<sup>273</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1042 (1866) (statement of Sen. Trumbull).

rymen would have, against the sworn and uncontradicted testimony of a hundred witnesses, to bring in a verdict directly against the evidence, and perjure themselves. I suppose we have the physical power to commit perjury here when we have sworn to support the Constitution. We might admit a man here from Pennsylvania avenue, elected by nobody, as a member of this Senate; but we would commit perjury in doing it, and have no right to do it.<sup>274</sup>

Trumbull, in other words, understood the jury to have the power to bring a verdict directly against the evidence but to have no right to do so. He recognized no exception or right for jury nullification. Jurors deciding cases were analogous to senators who had sworn to uphold the Constitution; acting contrary to the law was perjury.

On the nullification question, even those on opposite side of the political spectrum appeared to have agreed with Trumbull. Years later, Senator Augustus Summerfield Merrimon of North Carolina, known as one of the most partisan Democrats in Congress, favored the 1874 amendments to the Bankruptcy Act of 1867,<sup>275</sup> which offered concessions to debtors. He desired, for example, to increase the necessary debt for federal courts to have jurisdiction over bankruptcy cases. When Senator George Edmunds of Vermont objected that state juries were more prejudiced against creditors and more likely to find verdicts against the law, Merrimon countered:

[E]very juror in the State courts, every juror sitting in a State court as much as if he were sitting in a Federal court, is bound by the Constitution and laws of the Union. They are bound by their oaths to support and execute these laws; and the same obligation that rests upon them in the Federal courts rests upon them in the State courts. . . . [T]he judge charges them as to the law and their duties . . .<sup>276</sup>

Although bankruptcy cases were civil cases, Merrimon's statement suggests that he believed all juries, including criminal ones, were required to reach verdicts based on only the facts and not the law. Like Trumbull's senators, juries, Merrimon reasoned, were bound by oath to support the Constitution and the laws of the United States, which meant that they must follow the law as charged by the judge. Like Trumbull, Merrimon recognized no right of nullification.

In addition to Trumbull, Senator Sumner of Massachusetts is an appropriate figure by which to measure the Fourteenth Amendment's meaning to the Reconstruction Congresses' Republicans. True, Sumner was a Radical to the left of more mainstream Republicans like Trumbull, and, though voting for it, he also criticized the Fourteenth Amendment because he considered Section 2's acknowledgement that states could limit suffrage on racial grounds, a "compromise with wrong."<sup>277</sup> Nevertheless, he was also among

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<sup>274</sup> *Id.*

<sup>275</sup> Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, amended by Act of June 22, 1874, ch. 390, 18 Stat. 178, repealed by Act of June 7, 1878, ch. 170, 20 Stat. 99.

<sup>276</sup> 2 CONG. REC. 1326 (1874) (statement of Sen. Merrimon).

<sup>277</sup> FONER, *supra* note 222, at 253.

the leaders of Congressional Reconstruction, his proposed alternative to the Thirteenth Amendment was a precursor to Section 1 of the Fourteenth Amendment, and his Civil Rights Bill to enforce the Fourteenth Amendment finally won his Senate colleagues' approval in 1874 and passed the House, in amended form, the following year.<sup>278</sup> Sumner, in short, was among those senators who represented the Fourteenth Amendment's rights-protecting agenda and thus shines light on whether the Due Process Clause's meaning included the jury's right to nullify.

Like Trumbull and Merrimon, Sumner disputed the validity of nullification. His first statement to that effect came in July 1867. In January, the Thirty-ninth Congress, approaching its final adjournment still dismayed by the Johnson Administration's Reconstruction policies, had passed an act to establish an "extra" First Session of the Fortieth Congress to meet in July (instead of December). Radicals, like Sumner, hoped to remain in session throughout the summer so that Congress could continue overseeing Johnson's actions. Moderates, though, wanted the extra session only to pass new legislation preventing Johnson from defeating what they had already accomplished.<sup>279</sup> Therefore, Moderates proposed to confine the First Session's business to "removing the obstructions" in the way of Congress's Reconstruction acts and to forbid any further legislation in the session.<sup>280</sup> When Sumner objected to this resolution, claiming that the Senate had the constitutional duty to attend to all public business whenever it was in session, which would lead to a longer session, William Pitt Fessenden, a Moderate from Maine, insisted that the Senate had the constitutional authority to confine its business whenever the majority so desired. Sumner responded:

[Senator Fessenden] will pardon me for saying that he confounds right and power. Unquestionably the Senate has the power which the Senator from Maine attributes to it; but it has not the right. A jury, as we know according to familiar illustration, in giving the general verdict has the power to say "guilty" or "not guilty," and disregard the instructions of the court, but I need not say that it is a grave question among lawyers whether it has the right. Now, I submit that assuming that the Senate has the power which the Senator from Maine claims for it, it has not the right. It has not the right to disregard the spirit of the Constitution; and the proposition now before you is of that character.<sup>281</sup>

In this instance, with forty percent of the senators absent, Moderates prevailed, the Senate debated only the limited Reconstruction measures, and Congress adjourned within three weeks.<sup>282</sup> What is important for our purposes, however, is the analogy in Sumner's argument. Although he called the jury's right to decide questions of law "a grave question among law-

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<sup>278</sup> See *id.* at 533, 555–56.

<sup>279</sup> See *id.* at 308.

<sup>280</sup> See CONG. GLOBE, 40th Cong., 1st Sess. 481 (1867) (resolution of Sen. Anthony).

<sup>281</sup> CONG. GLOBE, 40th Cong., 1st Sess. 481 (1867) (statement of Sen. Sumner).

<sup>282</sup> See CONG. GLOBE, 40th Cong., 1st Sess. 498 (1867) (the Senate vote was 23–9 with 21 absent).

yers,” rather than a settled one, Sumner indicated that he did not believe in the right, and he implied that other senators would find persuasive his right-power analogy to nullification. He would have had no reason to illustrate his right-power constitutional objection to the Moderates’ resolution with the nullification example unless he thought that nullification, like the resolution, was only an illegitimate power and not a constitutional right. According to Sumner, then, the jury had the power but not the right to nullify.

Sumner made a similar point five years later in relation to his Civil Rights Bill, which included a provision requiring the racial integration of juries even in state courts. One argument against this provision was that it was a step on the slippery slope to blacks serving as judges, which some senators, including Matthew Carpenter, a Moderate from Wisconsin, were not prepared to support. Sumner replied that jurors were more like witnesses determining facts than judges determining law. Since the Civil Rights Act of 1866 established that blacks had the right to testify as witnesses, Sumner argued that they should have the right to serve as jurors too, even if they did not receive the right to serve as judges. Sumner charged that Carpenter

knows well the history of trial by jury; he knows that at the beginning the jurors were witnesses from the neighborhood, afterward becoming judges, not of the law, but of the fact. . . . [N]ow I insist that they should come under the same rule as witnesses. . . . I say nothing about judges, for the distinction is obvious between the two cases.<sup>283</sup>

Nor was Sumner alone in his conviction that jurors were fact-finders but not law-deciders. Senator Frelinghuysen of New Jersey, another leading Radical, made the same argument in relation to a subsequent iteration of Sumner’s bill. “The jury,” Frelinghuysen defined, “is an institution for the trial of issues of fact by the people . . . .” He too emphasized that, like witnesses, it is “acquainted with the mode of life, habits, and customs of the locality,”<sup>284</sup> rather than acquainted with the law like officers or judges. After a series of narrow defeats, Sumner’s provision requiring racially integrated juries finally became law in March 1875, a year after Sumner’s death, through the Civil Rights Act of 1875.<sup>285</sup> Its passage does not, of course, prove that the Senate accepted Frelinghuysen’s definition of the jury. Nonetheless, Sumner’s and Frelinghuysen’s statements illustrate that at least these Congressional leaders believed that the jury’s role was to judge only the facts, not the law, and Congress’s passage of the provision may provide circumstantial evidence that others in Congress held this view too.

Senators not only discussed how jurors were supposed to decide cases but occasionally acted like jurors themselves. When Democrat Philip Francis Thomas presented credentials as Maryland’s senator-elect, several Republicans objected, citing Section 3 of the Fourteenth Amendment and the

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<sup>283</sup> CONG. GLOBE, 42d Cong., 2d Sess. 822 (1872) (statement of Sen. Sumner).

<sup>284</sup> 2 CONG. REC. 3455 (1874) (statement of Sen. Frelinghuysen).

<sup>285</sup> See Forman, *supra* note 182, at 930 n.182.

Test-Oath Act of 1862, which prohibited from serving in Congress those who had engaged in insurrection or had given aid or comfort to the enemy. In 1863, when Thomas's eighteen-year-old son had told him that he was enlisting in the Confederate army, Thomas furnished him with \$100 for his trip to the South.<sup>286</sup> Thomas wanted to take the Senate's test-oath because he did not believe that a personal gift to his son constituted giving aid to the enemy, and the Judiciary Committee reported favorably upon his credentials. Nevertheless, the full Senate proceeded to debate his eligibility.

Senator Trumbull, an attorney admitted to the bar in two states, explained why he and his committee approved Thomas's credentials.<sup>287</sup> His colleague from Illinois, however, found him unpersuasive. "The question is did Mr. Thomas render assistance, did he give aid and comfort to the rebellion?" Senator Richard Yates said.

This is a question of fact. I will always yield to my colleague upon a question of law. His opinions upon law are convincing with me; they are conclusive with me; but in this case I act as a juror; the Senate is a jury; and it is a question of fact which we are called upon to decide.<sup>288</sup>

Yates, therefore, believed that the juror's role was to answer only questions of fact. While he would yield to the lawyer from Illinois on a question of law, he would not yield on a question of fact, just as jurors yield to the law-trained judge on questions of law but not fact.

Senator William Morris Stewart, a leading Radical and principal author of the Fifteenth Amendment, backed Yates's position. "Apply these facts," he said:

to any offense, to any common crime, even that of petty larceny, and there can be no doubt that a person who, knowing that a crime was to be committed, knowing the purpose of the party to be to commit a crime, aided him by giving him \$100, would be held guilty; that fact alone would be deemed conclusive in any case as a matter of law, and the court would so instruct. The jury might acquit, but that does not affect the question. The court would so instruct the jury as a matter of law.<sup>289</sup>

Stewart was a Yale-trained attorney who had served as a district attorney and as California's fifth Attorney General before representing Nevada in the Senate, so presumably he had thought about what substantive rights the right to jury trial protected. Like Yates, he thought that courts could instruct juries as a matter of law. While juries retained the power to defy judges' instructions, Stewart does not indicate that such defiance was a protected right. In the end, Yates and Stewart were persuasive, and the full Senate narrowly rejected Thomas.<sup>290</sup>

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<sup>286</sup> See CONG. GLOBE, 40th Cong., 2d Sess. 1145 (1868) (statement of Sen. Sumner).

<sup>287</sup> See CONG. GLOBE, 40th Cong., 2d Sess. 1146 (1868) (statement of Sen. Trumbull).

<sup>288</sup> CONG. GLOBE, 40th Cong., 2d Sess. 1153 (1868) (statement of Sen. Yates).

<sup>289</sup> CONG. GLOBE, 40th Cong., 2d Sess. 1174 (1868) (statement of Sen. Stewart).

<sup>290</sup> CONG. GLOBE, 40th Cong., 2d Sess. 1271 (1868) (the Senate's vote was 27–20 with six absent).

This was the understanding not only of senators from states where courts had disallowed nullification, like Sumner of Massachusetts, but also of senators from states where nullification was still a right, including Trumbull and Yates of Illinois as well as Indiana's Thomas Hendricks. Adopted in 1851 and still on the books during Reconstruction—and even today—Article I, Section 19 of Indiana's Constitution declares, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."<sup>291</sup> During the Reconstruction Era, moreover, Indiana's courts had not yet disallowed this right.<sup>292</sup> Senator Hendricks, nevertheless, like nineteenth-century courts interpreting similar language not to protect the jury's law-deciding right, appeared not to recognize a right to nullify in his state.

Passed over President Johnson's veto, the Military Reconstruction Act of 1867 allowed trials of civilians by military courts in the South even though the civil courts were open. William McCardle, a Mississippi newspaper publisher arrested for publishing incendiary articles by a military commander, invoked *habeas corpus* and appealed to the Supreme Court, challenging the act's constitutionality.<sup>293</sup> Attorney General Henry Stanbery, a staunch Johnson supporter who thought that the Military Reconstruction Act was unconstitutional, refused to defend the statute before the Court.<sup>294</sup> Although Congress, with Senators Trumbull and Carpenter arguing the case, prevailed on a jurisdictional issue,<sup>295</sup> Senator Howard, desiring Executive Branch support of Reconstruction legislation before the courts, proposed authorizing the Secretary of War to appoint lawyers to defend the constitutionality of military action in Reconstruction cases.<sup>296</sup> Defending his resolution, Howard said that the only appropriate course of action for an Attorney General was to defend the government's position or to resign.<sup>297</sup>

Hendricks, a Democrat admitted to the bar in two states, objected to Howard's attack on Stanbery, asserting that Stanbery ethically could not defend a statute that he considered unconstitutional. According to Hendricks's understanding of the law, an attorney, "whether he represents the Government or a private citizen," may not "represent the law to the court or the facts to the jury otherwise than in his judgment he believes them to be." Hendricks acknowledged that he wished that he had Indiana's state statutes with him, which defined the province of an attorney, but he said that above all, "that code declares that the attorney shall be true to the court in an argument of a question of law and true to the jury in an argument of a ques-

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<sup>291</sup> IND. CONST. art. I, § 19.

<sup>292</sup> See PROFFATT, *supra* note 162, § 380, at 443.

<sup>293</sup> See *Ex parte McCardle*, 74 U.S. 506, 508 (1868).

<sup>294</sup> See Normal W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1961 & n. 170 (2008).

<sup>295</sup> *McCardle*, 74 U.S. at 511, 515.

<sup>296</sup> CONG. GLOBE, 40th Cong., 2d Sess. 981 (1868) (statement of Sen. Howard).

<sup>297</sup> *Id.* at 982.

tion of fact.”<sup>298</sup> Neither Hendricks nor his interpretation of Indiana state law even considered that an attorney might argue law to a jury. His statements reveal that during Reconstruction even a senator from a pro-nullification state considered law-deciding outside the scope of the jury’s right.

Yet, senators did recognize that, though the jury’s right to nullify had been largely disallowed, some states still preserved it. During the Thirty-ninth Congress, Senator Peter Van Winkle, a law-trained Moderate from West Virginia, delivered the clearest statement of a senator’s understanding of the jury’s law-deciding right. To him, that right was peculiar—and an abomination. Speaking on a Reconstruction bill to provide for increased federal oversight of Virginia, a state that did not disallow nullification until 1881,<sup>299</sup> he said:

I know that the law is not administrated in that State as it ought to be. I know this particularly in reference to the freedman. I know that they are taken, tried for petty and trivial offenses, and the utmost penalty of the law is inflicted upon them. I am happy to say in regard to my former fellow-citizens that I am told this is not the fault of the judges nor the fault of the lawyers at the bar, who frequently try to mitigate these penalties; but it is the fault of the juries, uninstructed men probably. The administration of the criminal law in Virginia is peculiar. In the first place, the juries are judges of both law and fact; and in the second place, in every case the jury fix the term of imprisonment, so that the judge has no control whatever over it.<sup>300</sup>

Van Winkle announced that Virginia’s criminal law was “peculiar” because “juries are judges of both fact and law,” demonstrating that he believed that allowing the jury’s right to nullify was the exception rather than the rule. Furthermore, he considered the jury’s authority over law-deciding, which included the right to convict against the evidence, or at least to convict on trumped-up charges, just as it included the right to acquit against the evidence, to be a significant cause of black oppression in the South.

The Reconstruction Congresses understood the jury’s right to nullify not to be included within the meaning of criminal jury, and thus they understood the Fourteenth Amendment not to protect or to incorporate the jury’s original right to nullify. Yet, they understood far more than that. They also understood that nullification was intertwined with oppression, particularly in the South, and that Congress may or even must enact legislation, pursuant to the Fourteenth Amendment, to prohibit it.

### *E. The Paradox of New Original Meaning*

Despite the picture of original understanding that the Reconstruction-era treatises and Congressional debates appear to give us, there is a descriptive and a normative problem with relying on original meaning alone to deter-

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<sup>298</sup> CONG. GLOBE, 40th Cong., 2d Sess. 982 (1868) (statement of Sen. Hendricks).

<sup>299</sup> See Howe, *supra* note 53, at 596 n.57.

<sup>300</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1465 (1867) (statement of Sen. Van Winkle).

mine the new original meaning of Fourteenth Amendment jury law. Descriptively, there is the dilemma, inherent in all originalist analysis, about how to weigh contrarian voices. Although they were a minority, there were some in the Reconstruction Congresses who voiced support for the jury's law-deciding right. This descriptive problem, however, is not a substantial concern because there were so few contrarian voices in the Reconstruction Congresses who understood the right to criminal jury by definition to include the jury's right to nullify. In contrast to the words of leading Republican senators like Trumbull, Sumner, Frelinghuysen, and Stewart, as well as senators across the aisle like Merrimon and Hendricks, I found only one example of a member of Congress who clearly indicated that, like the Founders, he understood nullification to be a constitutional right.

In early 1868, Congress continued asserting authority vis-à-vis the other branches of government. Congress not only had supplanted Presidential Reconstruction with Congressional Reconstruction and, through the House of Representatives' vote in February, impeached President Johnson, but also it had waged war against the Supreme Court. The Judicial Circuits Act of 1866 had reduced the Court's size from ten to eight, and, in March, while William McCardle's case was pending, Congress stripped the Court of jurisdiction to hear certain types of Reconstruction cases, preventing the Court from ruling on the Military Reconstruction Act's validity. Representative Thomas Williams, a law-trained Radical Republican from Pennsylvania, wanted to curtail further the Court's power to overturn Congressional legislation, so he introduced a bill providing that only the unanimous agreement of the Supreme Court could strike down a law of Congress.<sup>301</sup>

His rationale was that his legislation would make the Court analogous to the jury, a unanimity-based institution that Williams saw in the Founders' luminous light. The jury, he insisted, was a "time-honored institution . . . imbedded in our constitution as the palladium of all our rights—the one great preeminent defense of private and public liberty." It required unanimity, he declared, because the "life and liberty and property of the citizen were not to be trusted to the keeping of the majority, or taken away except by the unanimous accord of all his judges, passing in criminal cases upon the law as upon the facts." While the jury requires unanimity, the Court "claims to pass, by a divided vote, upon the fundamental law of a great nation, and in effect to nullify that law . . . Who, then, shall say that there is in this amendment anything unreasonable or unprecedented?"<sup>302</sup>

Although his bill died quickly, Williams's argument illustrates that he, like the Founders, believed that the criminal jury's right to pass upon questions of law was inherent in the meaning of jury. Williams also recognized that, like the Supreme Court declaring an Act of Congress void, juries too

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<sup>301</sup> See CONG. GLOBE, 40th Cong., 2d Sess. app. at 85 (1868) (statement of Rep. Williams).

<sup>302</sup> *Id.*



could “nullify” a law by refusing to convict. As long as the jury spoke unanimously, Williams appears to have approved of what he understood to be a time-honored right still legitimate in 1868.

Other than Williams, though, no senator or representative appeared to understand nullification as either desirable or a right. The closest any came to doing so was to criticize, in the Justice Scalia mode, any intrusions on the jury right.<sup>303</sup> These statements, which did not mention jury law-deciding, are too vague to draw conclusions about original meaning. Senator Justin Smith Morrill of Vermont, for example, eulogized a judge under whose authority juries “suffered no depreciation, but their functions and capacity appeared to be vindicated upon every trial.”<sup>304</sup> Yet, he is an unlikely candidate for understanding the right to nullify as legitimate because he was a leading proponent of the Republicans’ anti-polygamy legislation that sought to remove constitutional questions from the jury’s reach and to purge prospective nullifiers.

Furthermore, when opposing a treason trial jury bill, Senator Garrett Davis, a law-trained Democrat from Kentucky, said, “When you once commence upon innovations upon the right of trial by jury no man can set limits to the extent to which those innovations may go. The only way to preserve the right of trial by jury sacred and inviolate is to permit no innovations upon it.”<sup>305</sup> Was disallowing nullification an impermissible innovation? Davis did not think so. Only a year earlier he had insisted that Southern juries were not finding verdicts “in conflict with and in opposition to the law.” If juries did so, they would be “censurable”; however, he maintained that they were not because “juries find verdicts in conformity to the law.”<sup>306</sup> Davis therefore is not a candidate for a pro-nullification reading of the jury’s meaning in 1868 either.

Although the descriptive problem may be overcome because the overwhelming preponderance of the evidence shows that the Reconstruction Congresses understood the right to criminal jury not to include the right to nullify, there still remains the normative dilemma that I call the paradox of new original meaning. The paradox suggests that conscious structural design or original *intent*, as opposed to only original meaning, matters in cases of Fourteenth Amendment incorporation. Unless the Fourteenth Amendment’s original intent agreed with its original textual meaning, then the nation, through the superdemocratic adoption of the Fourteenth Amendment, may have, at least with respect to due process, paradoxically done little more than constitutionalize what was then undemocratic judicial precedent that transgressed the superdemocratically adopted old original meaning.

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<sup>303</sup> Cf. *Neder v. United States*, 527 U.S. 1, 39–40 (1999) (Scalia, J., concurring in part and dissenting in part).

<sup>304</sup> CONG. GLOBE, 39th Cong., 1st Sess. 62 (1865) (statement of Sen. Morrill).

<sup>305</sup> CONG. GLOBE, 40th Cong., 2d Sess. 2277 (1868) (statement of Sen. Davis).

<sup>306</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1465 (1867) (statement of Sen. Davis).

On the one hand, the Supreme Court's current jurisprudence of incorporating wholesale the original Bill of Rights into the Fourteenth Amendment Due Process Clause makes little descriptive sense from an originalist perspective because, as the original understanding of nullification shows, the Fourteenth Amendment framers had a different conception of what "jury" and thus due process meant. There is no originalist evidence that they wanted to incorporate the 1791 definition of jury, as opposed to the 1868 version, into the Due Process Clause,<sup>307</sup> just as the Founders incorporated the contemporaneous late-eighteenth-century meanings of earlier English doctrines like the prohibition on cruel and unusual punishment, rather than the seventeenth-century understandings.

On the other hand, though, it may be a shame if Congress unintentionally constitutionalized through the Due Process Clause undemocratic nineteenth-century judicial precedent that it did not support. In other words, if, as Professor Berger, Judge Weinstein, and others have reasoned, what the nineteenth-century judges had done in disallowing nullification was unconstitutional before 1868 because it was did not accord with Founding-era originalism, then should these judges' initially unconstitutional decisions be rendered instantaneously constitutional in 1868 *only* because the plain language of due process—including its new, judicially constructed meaning of jury—was adopted in a new amendment? Is this back-door constitutionalism, where the changing meaning of "jury" slides in through the Due Process Clause, a type of jurisprudence we desire? That is the paradox: it is conceivable that the Thirty-ninth Congress constitutionalize a whole host of undemocratic criminal procedure practices merely because the original understanding of due process included them in 1868, even if Congress did not intend to make a distinction between the 1791 and 1868 meanings.

There is something to be said for this concern. While we know that the Founders thought deeply about the jury's right to interpret the law and to find against the evidence, the Reconstruction Congresses at times appear to have greatly minimized the issue. A series of proposed bills relating to treason trials provides some circumstantial evidence that the Congresses expected juries to reach verdicts based only on the evidence, but it provides even more evidence that the Congresses simply were not thinking carefully about the issue. These bills appeared to use jury language carelessly.

In the immediate aftermath of the Civil War, the Thirty-ninth Congresses' Republicans expected the Johnson Administration to punish traitors, particularly the Confederacy's high officers, but in addition to the Administration's leniency, they faced a problem. Even in the case of Jefferson Davis, then housed in as a military prison at Fort Monroe, treason was a civil offense, not a military one, and therefore it required a civilian trial,

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<sup>307</sup> Cf. Rappaport, *supra* note 142, at 731 (discussing the Takings Clause).

with an impartial jury.<sup>308</sup> But how could a court find impartial jurors? How many reasonably intelligent and informed citizens would not have read or heard about the Civil War and formed at least some opinion about whether the Civil War was treason or, as Davis planned to argue, self-defense?<sup>309</sup>

In December 1865, Senator James Rood Doolittle, a Moderate Republican from Wisconsin, proposed a solution. He introduced a bill providing that in trials for offenses against the United States, a juror would not be disqualified even if he had

formed or expressed an opinion upon the guilt or innocence of the accused, founded upon public rumor, statements in public journals, or the common history of the times, provided he be otherwise competent, and upon his oath declare, and it appear to the satisfaction of the court that, notwithstanding such opinion, he can and will impartially try the accused upon the crime charged in the indictment, and a true verdict give *upon the evidence* to be produced upon the trial.<sup>310</sup>

Upon first glance, it appears that Doolittle thought that jurors must give their verdicts “upon the evidence” only, not also upon the law, which suggests that he did not understand jury to include the right to nullify. This is particularly important in the context of treason because in the late-eighteenth-century treason trials arising from the Whiskey Rebellion, lawyers for both sides had been allowed to debate before the jury the question of whether armed resistance to enforcement of the Excise Act constituted treason, and the jury had been permitted to decide among the various statements by the lawyers and the judges in reaching their verdict.<sup>311</sup> Through the evidence-only provision, therefore, Doolittle would have been rejecting the Founding-era practice in treason trials in favor of a different Reconstruction-era one. At least, that is what his bill’s plain language suggests.

The following month, however, the Senate Judiciary Committee amended his bill and removed the reference to “upon the evidence,” for an unreported reason. Doolittle not only did not object but even said that the committee put his bill “in a better form than it was originally as drawn by myself,”<sup>312</sup> suggesting that the law-evidence distinction was utterly unimportant to both Doolittle and the Judiciary Committee. Yet maybe it was important. Doolittle’s amended bill died in the Thirty-ninth Congress, but in the Fortieth Congress, Senator Trumbull pushed a later iteration of it that once again referred to “a true verdict upon the evidence to be produced at trial.”<sup>313</sup> This evidence-only bill easily passed the Senate,<sup>314</sup> and, though Senator Davis, among others, criticized the earlier iteration for intruding

<sup>308</sup> See WILLIAM C. DAVIS, *JEFFERSON DAVIS: THE MAN AND HIS HOUR* 644, 652–53 (1996).

<sup>309</sup> *Id.* at 654.

<sup>310</sup> S. 34, 39th Cong. (1865) (emphasis added).

<sup>311</sup> See Harrington, *supra* note 5374, at 402–03.

<sup>312</sup> CONG. GLOBE, 39th Cong., 1st Sess. 338 (1866) (statement of Sen. Doolittle).

<sup>313</sup> S. 464, § 2, 40th Cong. (1868).

<sup>314</sup> See CONG. GLOBE, 40th Cong., 2d Sess. 2277 (1868).

upon the right of criminal jury trial,<sup>315</sup> neither he nor the other senators discussed the evidence-only provision. Thus, the evidence-only provision may have consciously rejected the Founding-era understanding of the jury's right to decide law in treason trials, or the law-evidence distinction may not have been considered at all.

The House debates are also unclear. The original, virtually identical House bill regarding "trials for treason against the United States" required jurors to swear to give a true verdict "*upon the evidence* to be produced upon trial."<sup>316</sup> In December 1866, however, William Lawrence of Ohio, a leading Radical Republican on the Judiciary Committee, substituted the evidence-only bill with a new one that he said was modeled on Ohio's jury statute, which, among other changes, now required jurors "to render an impartial verdict *upon the law* and evidence."<sup>317</sup> Was Lawrence aware that his state's statute had a pro-nullification understanding of the jury? Did he want this to be his colleagues' understanding too? The House never debated the difference between the evidence-only and the law-and-evidence bills, Lawrence's bill did not pass the House in the Thirty-ninth Congress, and it failed again in the Fortieth Congress after he reintroduced the "law and evidence" version. None of the treason trial bills became law.

Hence, both senators and representatives included language in proposed bills instructing jurors to decide criminal cases "upon the evidence" only or "upon the law and evidence" without distinguishing between the two versions, at least in the floor debates. Did they not see the difference between one version that accorded with the Reconstruction-era treatises and the other that agreed with the Founding-era right? Did they not realize that their understanding of due process and its jury rights would affect constitutional law? If they did not, then should the Fourteenth Amendment constitutionalize the then-existing meaning of due process, constructed by the undemocratic judges rather than by the Reconstruction Congresses that framed and interpreted the amendment? Is only original meaning, as opposed to conscious decisionmaking, enough?

Fortunately, though, there are answers to this paradox. First, although a few proposed jury bills appeared to use jury language carelessly, the Reconstruction Congresses, as their overwhelming preponderance of their words showed, understood the difference between *right* and *power* in the jury context. They consciously chose to understand jury nullification as a power but not a right, and they consciously preferred that reading. They understood the argument that nullification was a right, and, unlike many state legislatures, they rejected it. It was outside their conception of the meaning of jurors—*their* conception of due process, not just the judges' conception.

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<sup>315</sup> See CONG. GLOBE, 39th Cong., 2d Sess. 1465 (1867) (statement of Sen. Davis).

<sup>316</sup> H.R. 418, § 1, 39th Cong. (1866) (emphasis added).

<sup>317</sup> CONG. GLOBE, 39th Cong., 2d Sess. 24 (1866) (statement of Sen. Lawrence) (emphasis added).

Second, we are not compelled to rely *only* on original meaning. There is strong evidence that the Reconstruction Congresses structured the Fourteenth Amendment in such a way that would permit or even require them to curtail jury nullification in places where it predominated. They did not merely understand nullification to be outside the meaning of jury; they, like the nineteenth-century judges, intended, at least in some cases, to eliminate it. They were not merely constitutionalizing an undemocratic judiciary's precedents; they were consciously and superdemocratically transforming or superseding the late-eighteenth-century Constitution and its jury provisions.

Their new original understanding of jury, which excluded nullification as a component, meant that the original understanding was that nullification would not be protected through Fourteenth Amendment due process or incorporation of the Sixth Amendment. On the contrary, their understanding of the Fourteenth Amendment was that it permitted or required the disallowance of nullification in state and federal courts.

#### IV. CONSTITUTIONAL DISALLOWANCE OF THE RIGHT TO NULLIFY

Discovering the Reconstruction-era original meaning of the Fourteenth Amendment's protection of criminal jury trial gets us halfway to offering an originalist, textual basis for disallowing the jury's right to nullify. This original meaning shows us that nullification in 1868 was not conceived of as a constituent right of criminal trial by jury like it had been in 1791, and thus the Fourteenth Amendment's framers and ratifiers would not have understood Fourteenth Amendment due process, natural rights, or incorporation to protect the right to nullify in the sense that the Sixth Amendment's framers understood their amendment to protect it. Yet the new original meaning gets us only halfway. The paradox begs us to answer whether the Fourteenth Amendment's framers and ratifiers *consciously* preferred the Reconstruction-era meaning, as opposed to the Founding-era one, and hence consciously constitutionalized the nineteenth-century judicial precedent. In addition, there is the issue of American federalism.

Although neither pro-nullification originalists nor those who prefer the Supreme Court's current doctrinally based anti-nullification doctrine draw a distinction between state and federal cases, Reconstruction-era original meaning jurisprudence suggests that there is an argument that we must do so to remain faithful to the text and original meaning. On its surface, after all, the Fourteenth Amendment appears directed only at the states and thus should not necessarily affect rights in federal criminal cases. Even if the disallowance of nullify were incorporated against the states, originalists like Professor Berger still could argue to the originalist Supreme Court that nullification was of constitutional dimension when the Sixth Amendment was ratified and must be restored in federal courts. One solution to this dilemma, of course, is reverse incorporation and the desire to have uniform constitutional rights in state and federal court. While the current Court demands such unity from the Founding-era perspective, applying 1791 meaning to

state cases, may be at least as logical to apply the 1868 meaning to federal cases because criminal procedure doctrine is overwhelmingly state-based.

A more satisfying rationale, however, is that the Fourteenth Amendment's Reconstruction-era original meaning either transformed or superseded the Sixth Amendment's Founding-era original meaning. The Fourteenth Amendment, in other words, through its explicit due process and implicit jury rights provisions, may have constitutionalized the judicial disallowance of nullification. This rationale is based in the way that the Fourteenth Amendment revolutionized the nature of federalism and civil rights. Against the backdrop of the Sixth Amendment's original guarantee of defendants' and juries' rights, which was based in local resistance to tyrannical federal law, the Fourteenth Amendment guaranteed a civil right of protection of individual life, liberty, property, and security that was enforceable by the federal government against tyrannical individuals, localities, and states that deprived that right. Although the right to nullify may have been implicit at the Founding, in redefining due process and the American judicial system, the Fourteenth Amendment's new vision of courts and juries, new commitment to civil rights, and new prioritization of governmental authorize may have redefined the original Constitution's implicit meanings. New rights created by the Fourteenth Amendment may have trumped certain older, merely penumbral rights. In this way, victims' civil right to protection in life, liberty, property, and security and the government's right to enforce that right through convictions without law-based resistance from local juries may have curtailed the jury's right to nullify even in some federal cases.

This abstract theory is backed by the Reconstruction Congresses themselves, which expressed hostility to jury nullification and understood that nullification threatened to defeat both the ideology of the Republican Party, upon which much of Reconstruction was built, and the Fourteenth Amendment, along with its enforcement legislation. The only way that the Section 1 civil rights guarantee could be "self-executing" and that Section 5 legislation could "enforce" the Section 1 guarantee was for courts to disallow nullification. Congress's enforcement and related legislation specifically prohibited nullification in federal courts, illustrating that the Reconstruction Congresses understood the Constitution and the amendment's grant of power either to authorize or to require the disallowance of nullification, at least in pursuit of civil rights. Their legislation, as post-enactment evidence of their vision of the Fourteenth Amendment and its effect on juries, ultimately may point to the conclusion that the Fourteenth Amendment's new original meaning transformed or superseded the old original meaning of the "jury," and thus of nullification, in Article III and the Sixth Amendment.

#### *A. The Fourteenth Amendment and the Right to Protection*

Proposed by the future Grant Administration Attorney General Congressman Ebenezer Hoar and insisted upon by other Reconstruction leaders like Charles Sumner and Salmon Chase, a principal plank of the antebellum Republican Party Platform called for the federal government to abolish

within its jurisdiction the “twin relics of barbarism”—black slavery and polygamy, which they considered akin to female slavery.<sup>318</sup> By 1866, when the Fourteenth Amendment was drafted, the Republican Party had done so, at least in name: the Thirteenth Amendment outlawed slavery everywhere,<sup>319</sup> and the Morrill Anti-Polygamy Act outlawed polygamy in all federal territory,<sup>320</sup> the only jurisdiction where polygamy was widely practiced. Yet abolishing the “twin relics of barbarism” in name only was just the beginning of the Republican agenda. The Reconstruction-era Republicans intended more than mere declarations of rights—hence the unprecedented Section 2 enforcement provision of the Thirteenth Amendment, along with its sister sections in the other Reconstruction Amendments.<sup>321</sup> The Republicans intended not just to proclaim the right to liberty but also to guarantee it with a corresponding right implicit in liberty, the right to protection.

The civil right to protection was essential to the Republicans’ Reconstruction program from the start. The Freedmen’s Bureau Act of 1866, a landmark companion statute to the Fourteenth Amendment, provided that “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security . . . shall be secured to and enjoyed by all the citizens” of the South.<sup>322</sup> The Republicans then constitutionalized the right to the full benefit of laws concerning personal security or protection through the Fourteenth Amendment. Professor Steven Heyman has marshaled substantial evidence that Section 1 was both intended and understood to establish a constitutional civil right to protection, which included a federal guarantee that deterrent criminal laws would be enacted and enforced—through convictions.<sup>323</sup> The right to protection meant protection not only protection against the state but also protection by the state against private wrongs. Since the widespread violence against blacks in the Thirteenth Amendment’s wake convinced Republicans that the states could not be relied upon for protection, the Fourteenth Amendment empowered the federal government to enforce the right to protection.<sup>324</sup>

Throughout the Thirty-ninth Congress, Republicans repeated their understanding that among the civil rights that the Fourteenth Amendment would guarantee was the right to protection. Representative Samuel Shellabarger called it “self-evident” that “protection by the Government is the right of every citizen.”<sup>325</sup> Senator Stewart added, “It is the duty of the Gov-

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<sup>318</sup> See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 129–30* (1995) (quoting the Republican Party Platform of 1856).

<sup>319</sup> See U.S. CONST. amend. XIII.

<sup>320</sup> See Act of July 1, 1862, ch. 126, 12 Stat. 501.

<sup>321</sup> See AMAR, *supra* note 6, at 361.

<sup>322</sup> Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176.

<sup>323</sup> See Heyman, *supra* note 174, at 546.

<sup>324</sup> See *id.* at 510.

<sup>325</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger).

ernment to protect; of the subject to obey.”<sup>326</sup> “These are the essential elements of citizenship,” echoed Senator Morrill, “allegiance on one side and protection on the other.”<sup>327</sup> “Allegiance and protection are reciprocal rights,” Senator Trumbull elaborated:

[C]an it be that . . . the people of our day have struggled through a war, with all its sacrifices and all its desolation, to maintain it, and at last . . . we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection? . . . American citizenship would be little worth if it did not carry protection with it.<sup>328</sup>

Recounting and denouncing violence against freedmen and Unionists in the South and the inability or unwillingness of local authorities to suppress it, Republicans emphasized that the right to protection included criminal protection through the enforcement of criminal laws.<sup>329</sup> Even their opponents agreed. Freedom “does mean protection,” Senator James McDougall, a Democrat from California, concurred. “Under all Governments that are free, freedom is perfect protection in life, liberty, and the enjoyment and pursuit of happiness.”<sup>330</sup> Senator Edgar Cowan, a conservative Republican from Pennsylvania who opposed the Fourteenth Amendment and was not returned to the Senate, opposed black citizenship, but he agreed that even an alien was entitled “to the protection of the laws. You cannot murder him with impunity. . . . He has a right to the protection of the laws.”<sup>331</sup> Absent conviction of white murderers, however, blacks would be slaughtered with impunity. The difference between the Fourteenth Amendment’s proponents and opponents was not whether protection was a right; it was whether it should be a *federal* right too. The proponents, of course, prevailed.

In addition to the Republicans’ general understanding, the Fourteenth Amendment’s specific text guaranteed the right to protection through two clauses. The Privileges and Immunities Clause made protection a substantive right of citizenship. Section 1 commanded that “[n]o State shall . . . abridge the privileges or immunities of citizens of the United States,”<sup>332</sup> but it left the term “privileges or immunities” undefined. In explaining the clause to their colleagues, Senators Trumbull and Howard cited *Corfield v. Coryell*,<sup>333</sup> which was the first and still then “the leading case” defining “privileges and immunities.”<sup>334</sup> In *Corfield*, Justice Washington declared:

[T]hese fundamental principles . . . may . . . be all comprehended under the fol-

<sup>326</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2799 (1866) (statement of Sen. Stewart).

<sup>327</sup> CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill).

<sup>328</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull).

<sup>329</sup> See Heyman, *supra* note 174, at 568.

<sup>330</sup> CONG. GLOBE, 39th Cong., 1st Sess. 393 (1866) (statement of Sen. McDougall).

<sup>331</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Cowan).

<sup>332</sup> U.S. CONST. amend. XIV.

<sup>333</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>334</sup> See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-6 (1873); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 29 (1980).



lowing general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.<sup>335</sup>

According to Justice Washington, then, the right to “[p]rotection by the government” was distinct from and equal to the great inalienable rights to life, liberty, and property. Since the Thirty-ninth Congress and Reconstruction-era generation relied upon *Corfield* to define “privileges and immunities,” this was their understanding of the right. Therefore, they understood the Privileges and Immunities Clause to guarantee the right of protection and Section 5 to authorize Congress to enforce that guarantee.

The Due Process Clause also guaranteed that right. In 1868, some of the civil rights listed within the clause were understood to have positive content.<sup>336</sup> In defining due process, Representative Bingham, the author of Section 1, said that it guaranteed the right “of all persons to be protected in life, liberty, and property.”<sup>337</sup> Like their contemporary Thomas Cooley, the Fourteenth Amendment’s framers also drew upon Blackstone to define due process. Blackstone treated the Magna Charta’s analogous provision as having a positive dimension, explaining that it “protected every individual of the nation in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.”<sup>338</sup> Due process, in other words, required the state to protect individuals and to secure their life, liberty, and property, unless they forfeited that protection.

Furthermore, Professor Heyman argues that the term “deprive” then meant not only to take away a possession but also to divest of a right.<sup>339</sup> In that sense, the state could not take life, liberty, or property directly without due process, but it also could not refuse to protect an individual in life, liberty, or property, thereby depriving him of security against the invasion of those rights by others. In that vein, Representative Lawrence explained that “there are two ways in which a State may undertake to deprive citizens of [their] absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.” Wherever the law guarantees a right, such as those of life, liberty, and property, it also necessarily gives a corresponding “means whereby [the right] may be possessed and enjoyed.”<sup>340</sup> Likewise, Representative James Wilson of Iowa, who chaired the House Judiciary Committee, explained that the Due Process Clause encompassed not only the rights of life, liberty, and property but also “those which are necessary for the protection and maintenance and perfect enjoyment of

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<sup>335</sup> *Corfield*, 6 F. Cas. at 551–52.

<sup>336</sup> See Heyman, *supra* note 174, at 557.

<sup>337</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (statement of Rep. Bingham).

<sup>338</sup> 4 BLACKSTONE, *supra* note 214, at \*424.

<sup>339</sup> See Heyman, *supra* note 174, at 562.

<sup>340</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence).

the rights thus specifically named.”<sup>341</sup> The right to protection, therefore, was ingrained in the Fourteenth Amendment’s original meaning.

This right leads us to juries. Professor King assumed that the “interest of the government or of the victim in a conviction free from nullification is difficult to characterize as part of the due process guaranteed by [the Fourteenth A]mendment.”<sup>342</sup> Consequently, she added that even if “sometime during the nineteenth century judges, not jurors, became the better protectors of individual rights (at the time that the Fourteenth Amendment was ratified, for example),” this would not change her constitutional analysis because “such concerns about competency are irrelevant” to the Constitution’s original meaning and structure.<sup>343</sup> The right to protection at the Fourteenth Amendment’s core, however, illustrates that the interest of the government and the victim in civil rights necessitated their interest in the enforcement of those rights through criminal laws and thus criminal convictions. Under originalist jurisprudence, competency concerns should be relevant if a new amendment, by definition altering the old constitutional text, includes them within its original meaning. The Fourteenth Amendment was enacted in large part to guarantee and to enforce the protection of civil rights. If an old, penumbral right—such as the Sixth Amendment right to jury nullification—would, under the Fourteenth Amendment’s original meaning, interfere with the new, prioritized right, the new right may take precedence.

The principal example, of course, involves federalism. The great objection to the Fourteenth Amendment and its enforcement legislation was that they infringed upon the rights of the states guaranteed in the original meaning of the Founding-era Constitution and Bill of Rights. The federal government, opponents cried, was invading the states’ exclusive provinces, such as their responsibility for protecting citizens against criminal offenses.<sup>344</sup> Defending one bill to enforce the Fourteenth Amendment, Senator Oliver Hazard Perry Morton of Indiana responded:

But it is said these crimes should be punished by the States; that . . . the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. . . . Shall it be said with any reason that it is proper to leave the punishment of these crimes to the States when it is a notorious fact that the States do not punish them?<sup>345</sup>

If states’ rights guaranteed in the old Constitution interfered with rights guaranteed in the new amended Constitution, then those rights must recede into history, and the federal government must intervene in state affairs.

Similarly, if old Article III and Sixth Amendment jury rights were inter-

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<sup>341</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson).

<sup>342</sup> King, *supra* note 38, at 457 n.102.

<sup>343</sup> *Id.* at 456.

<sup>344</sup> See Heyman, *supra* note 174, at 568.

<sup>345</sup> CONG. GLOBE, 42d Cong., 1st Sess. app. at 252 (1871) (statement of Sen. Morton).

fering with and contextually incompatible with Fourteenth Amendment rights, then the Fourteenth Amendment must transform or supersede those rights too. Like the states cited by Senator Morton, juries were tied to the Fourteenth Amendment's right to protection. In speaking on Senator Sumner's bill to integrate juries, the law-trained Senator Edmunds, who would take a lead in subsequent polygamy-related jury legislation explained:

[S]o far as the right to sit upon a jury goes . . . that right must not only be defended by a penalty imposed on people who deny it, but it must be defended affirmatively for the protection of the community who are to be benefited by it. . . . [Therefore,] the fourteenth amendment allows Congress to require that colored men shall sit upon juries.<sup>346</sup>

Senator Edmunds illustrates that the Reconstruction-era Congress understood that juries affected "the protection of the community" whose crimes they evaluated. The Fourteenth Amendment empowered Congress to pass legislation affecting juries to defend affirmatively the right to protection. One solution was, as Senators Sumner and Edmunds advocated, integrating juries by adding blacks to juries that had been all white as well as adding non-Mormons to juries that had been all Mormon. Another solution was to purge those interfering with the right to protection—the nullifiers.

#### *B. Race, the Southern States, and the Disallowance of Jury Nullification*

The typical story told about white jury nullification in the Reconstruction South is that Congress responded by integrating juries through the Civil Rights Act of 1875, which forbade disqualification from jury service on the basis of race and made it a crime for any state or federal official to discriminate on racial grounds in selecting jurors.<sup>347</sup> Professor Forman, for example, focuses on the ways that Reconstruction Republicans worked "to eliminate barriers to black participation in the legal system, with a view toward ultimately securing the right of blacks to serve as jurors."<sup>348</sup> Likewise, Professor Randall Kennedy writes that the Republican Party responded to white nullification with "the elevation of blacks to formal equality with whites."<sup>349</sup> Professor Amar similarly emphasizes how "Reconstruction Republicans facing southern jury nullification . . . reconstruct[ed] juries by repopulating them with blacks alongside whites."<sup>350</sup> Yet, there was another response to Southern nullification, one that was not about making juries more democratic, more demographically representative, or more powerful. Instead, it was about crippling local resistance to federal authority, disqualifying large proportions of local populations that previously had been eligible for jury service, and empowering federal judges at the expense of local

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<sup>346</sup> 2 CONG. REC. 948 (1874) (statement of Sen. Edmunds).

<sup>347</sup> See Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 335, 336–37.

<sup>348</sup> Forman, *supra* note 182, at 897.

<sup>349</sup> RANDALL KENNEDY, RACE, CRIME, AND THE LAW 302 (1997).

<sup>350</sup> AMAR, *supra* note 53, at 272.

prospective jurors. This response was about obtaining convictions even with juries that Professor Kermit Hall suggested were “*less representative* of the defendants” than any other political trial in American history.<sup>351</sup> In brief, it was about ending jury nullification in the South.

The Republican Party was founded on a platform of abolishing the “relic of barbarianism” that was slavery, and the Thirteenth Amendment formally achieved that goal. Yet what immediately followed may not have been less barbaric. Postwar justice for freedmen in the South was atrocious; it was not compatible with a right to liberty, and some even compared it unfavorably with the justice that slaves used to receive.<sup>352</sup> While one problem was unequal treatment for black defendants, the larger problem was the need to protect freedmen from becoming victims of crime,<sup>353</sup> a concern that we saw was at the heart of the Fourteenth Amendment. The infrequency with which whites were convicted of crimes against freedmen, not to mention crimes against Republicans or Unionists, not only was unjust but also encouraged more white violence.<sup>354</sup> Sheriffs, justices of the peace, and other local civil officials were reluctant to prosecute whites, but Republicans agreed that the most important factor contributing to injustice was the juries.<sup>355</sup>

Throughout the South, white juries were viewed as the principal cause of Reconstruction injustice. In Texas, for example, the state prosecuted over five hundred whites for murdering blacks in 1865 and 1866, but in every one of the trials, the all-white juries acquitted every one of the white defendants.<sup>356</sup> A Freedmen’s Bureau officer in Georgia conceded that the “best men in the State admit that no jury would convict a white man for killing a freedman.”<sup>357</sup> Likewise, a sheriff in Florida lamented, “If a white man kills a colored men in any of the counties of this state, you cannot convict him,”<sup>358</sup> while an observer in Richmond pointed out that “the verdicts are always for the white man and against the colored man.”<sup>359</sup> Testifying before Congress, Judge Settle of North Carolina reported that the “defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury; or, if you do, the petit jury acquits the parties.” He added that no matter how vigilant the civil authorities were, they could not punish white offenders because:

[i]n nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a

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<sup>351</sup> Hall, *supra* note 154, at 938 (emphasis added).

<sup>352</sup> See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 282 (1981).

<sup>353</sup> See Forman, *supra* note 182, at 916.

<sup>354</sup> See LITWACK, *supra* note 352, at 285.

<sup>355</sup> See FONER, *supra* note 222, at 204.

<sup>356</sup> See Forman, *supra* note 182, at 916.

<sup>357</sup> LITWACK, *supra* note 352, at 286.

<sup>358</sup> FONER, *supra* note 222, at 434.

<sup>359</sup> *Id.* at 204.

conviction upon a trial at the bar. I have heard of no instance in North Carolina where a conviction of that sort has taken place.<sup>360</sup>

Congress was well aware of the Southern juries' defects throughout Reconstruction. Senator Edmunds said that in the South "a jury trial is a mockery; it is a shield for cruelty and crime instead of being an instrument of punishment for it."<sup>361</sup> Henry Pease, a carpetbag senator from Mississippi, reported that in the South a "white man may slay a negro, and it may be proven as clear as the noon-day sun that it was a case of murder with malice aforethought; and yet you cannot get a jury to convict." He continued:

[I]n the State of Mississippi, where our laws are executed with as much impartiality as in any other southern State, I do not know among the several hundred homicides committed in that State a single instance, since reconstruction, where a white man has been convicted of killing a negro; and I venture the assertion that there have been over five hundred murders of negroes in that State by white men, and not one of them punished.<sup>362</sup>

Some even identified Southern juries' acquittals as based on the juries' prejudiced conception of the law, rather than on simple outright prejudice. Referring to *Dred Scott*,<sup>363</sup> Senator Morton contended that most Southern whites "have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect."<sup>364</sup> They, in other words, may have understood the law to permit or to require acquittals in instances of white violence. Indeed, one judge reported that some whites "feel and believe, morally, socially, politically, or religiously, that it is not murder for a white man to take the life of a negro with malice aforethought."<sup>365</sup> Certainly Congress, if it was serious about enforcing the Fourteenth Amendment's right to federal protection, could not allow jurors who understood the law to permit white violence to decide cases based on such an interpretation of law.

In early 1871, as white violence and jury nullification continued throughout the South, Congress held hearings on one major source of problems: the Ku Klux Klan. Congress heard dozens of witnesses testify and collected hundreds of pages of testimony about the organization, including its jury practices.<sup>366</sup> "The evidence shows that this Ku Klux organization," Senator Morton concluded, requires its members "to commit perjury as jurors, and to acquit at all hazards one of their number who may be on trial."<sup>367</sup> Among a litany of wrongs he discovered, Representative Clinton

<sup>360</sup> CONG. GLOBE, 42d Cong., 1st Sess. app. at 253 (1871) (statement of Sen. Morton, quoting Judge Settle).

<sup>361</sup> CONG. GLOBE, 41st Cong., 2d Sess. 176–77 (1869) (statement of Sen. Edmunds).

<sup>362</sup> 3 CONG. REC. 736, 738 (1875) (statement of Sen. Pease).

<sup>363</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

<sup>364</sup> 3 CONG. REC. 1795 (1875) (statement of Sen. Morton).

<sup>365</sup> King, *supra* note 38, at 466.

<sup>366</sup> See CONG. GLOBE, 42d Cong., 1st Sess. app. at 196 (1871) (statement of Rep. Snyder).

<sup>367</sup> CONG. GLOBE, 42d Cong., 1st Sess. app. at 252 (1871) (statement of Sen. Morton); see also CONG.

Cobb of North Carolina condemned KKK members because as jurors “they have nullified trials by perjury.”<sup>368</sup> Such nullification, the legislators realized, escalated violence. Where KKK members “sit upon juries,” Senator Thomas Osborn of Florida recognized, “outrages of the worst order, the most inhuman violence and cold-blooded murders are committed with impunity.”<sup>369</sup> “What is the civil law to” a KKK member, asked Senator Charles Drake of Missouri, “when he knows that . . . the jurors who go there will acquit him in spite of all the evidence.”<sup>370</sup>

In February, the House Committee on Reconstruction produced a report calling for legislation in response to the violence in the South. The Fourteenth Amendment, it noted, vested in Congress “the power, by proper legislation, to prevent any State from depriving any citizen of the United States the enjoyment of life, liberty, and property.” Given the inability of each Southern state to punish crime after it has been committed, the report concluded that each state had “by its neglect or want of power, deprived the citizens of the United States of protection in the enjoyment of life, liberty, and property as fully and completely as if it had passed a legislative act to the same effect.”<sup>371</sup> Taking up the invitation, Representative Benjamin Butler, a Radical from Massachusetts, drafted an initial bill and Samuel Shellabarger, a Radical from Ohio, submitted a subsequent one “to enforce the Fourteenth Amendment.”<sup>372</sup> The bill, which was enacted in April as the Ku Klux Klan Act of 1871,<sup>373</sup> designated certain conspiracies to deprive citizens of federal rights or equal protection as offenses punishable under federal law and provided a federal cause of action for those whose federal rights were violated under color of state law.<sup>374</sup>

Republicans expressed two Fourteenth Amendment justifications for the legislation, one based on the federal government’s affirmative power to protect life, liberty, and property directly when states fail to do so and the other based on an equal protection rationale. All but four members of Congress who had voted for the Fourteenth Amendment in 1866 and were still serving in Congress voted for the KKK Act, which they saw as a continuation of the Fourteenth Amendment.<sup>375</sup> They also saw the act as a remedy for the KKK-infiltrated juries throughout the South. “Now, if there be any combination of men who shall combine and conspire together,” Representative Burton Cook of Illinois said, “. . . to compel a jury in a United States court to give a false verdict . . . that combination is an offense against the United States, for

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GLOBE, 42d Cong., 1st Sess. 158 (1871) (statement of Sen. Sherman).

<sup>368</sup> CONG. GLOBE, 42d Cong., 1st Sess. 437 (1871) (statement of Rep. Cobb).

<sup>369</sup> CONG. GLOBE, 42d Cong., 1st Sess. 654 (1871) (statement of Sen. Osborn).

<sup>370</sup> CONG. GLOBE, 41st Cong., 2d Sess. 2742 (1870) (statement of Sen. Drake).

<sup>371</sup> FRANK J. SCATURRO, *THE SUPREME COURT’S RETREAT FROM RECONSTRUCTION* 99 (2000).

<sup>372</sup> *Id.* at 100–01.

<sup>373</sup> Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

<sup>374</sup> See FONER, *supra* note 222, at 454–55.

<sup>375</sup> See SCATURRO, *supra* note 371, at 102, 110–13.

the simple reason easily understood, that it seeks to deprive a citizen of the United States of a right guaranteed to him by the Constitution of the United States.”<sup>376</sup> Furthermore, Shellabarger’s original bill was amended to include a new section directly targeting juries. Section 5 provided:

[N]o person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy . . . .<sup>377</sup>

Based on a Civil War statute that had required federal jurors to swear past and future loyalty to the United States and had disqualified many men who had fought for the Confederacy from federal jury service,<sup>378</sup> Section 5 barred from civil rights cases any juror who could not swear that he had never even indirectly aided, counseled, or advised a conspiracy to deny freedmen their civil rights. Moreover, prospective jurors who lied in an attempt to qualify for jury service would be subject to federal perjury charges, and the ultimate decision about a juror’s qualification was left to judgment of federal judges. Congress had replaced the historic localism of juries with federal orders to be executed by federal judges.

The KKK Act aroused much opposition from Democrats because it made violence infringing civil and political rights a federal crime and thus acted upon individuals rather than the states.<sup>379</sup> Its jury provision was not immune from criticism either. “Gentlemen on the other side have denounced the law which applies the oath to jurors as an infamous law,” Representative Butler reported. He argued that Congress should not allow men effectively engaging in a continuing rebellion against the federal government:

to sit on juries and enforce our laws to put down a new rebellion when a judge of the United States thinks it is not safe for them to sit there . . . . Sir, in my judgment, it would be infamous, if that is the word always to be used to characterize laws, for us to permit the men who started the old rebellion, and who are fostering this, who stand by it day by day and are murdering our friends, black and white, to sit upon the juries and deal with questions of fact in cases where in the last resort we must go to the courts for redress under our Constitution and laws.<sup>380</sup>

Speaking on the Republicans’ behalf, Butler suggested that juries were authorized to do no more than “deal with questions of fact” and that they had to do so honestly. Federal judges should be charged with suppressing wide-

<sup>376</sup> CONG. GLOBE, 42d Cong., 1st Sess. 486 (1871) (statement of Rep. Cook).

<sup>377</sup> Act of Apr. 20, 1871, ch. 22, § 5, 17 Stat. 13, 15.

<sup>378</sup> Act of June 17, 1862, ch. 103, 12 Stat. 430 (1862).

<sup>379</sup> See FONER, *supra* note 222, at 455.

<sup>380</sup> CONG. GLOBE, 42d Cong., 1st Sess. 793 (1871) (statement of Rep. Butler).

spread nullification that was denying freedmen their civil rights, preventing them from seeking legal redress, and thus fomenting more violence.

In response to this rationale, Eugene Casserly, who led the Democratic opposition in the Senate, charged the KKK Act with court-packing and violating the right to jury trial. Cases would be fixed, and juries would no longer be representative of the dominant political community. He argued:

I do not believe that ten per cent of the white people of the South fit to serve upon a jury, grand or petit, could take that oath. It would have been a great deal more honest and manly to have just excluded all such men from juries and to have provided that nobody should sit upon a jury, either grand or petit, except a man who had always been loyal and a man who was black; and that is the effect of it. It confines your juries entirely to the so-called loyalists of the southern States and the black people there. You are to have no other jurors; in other words, you pack your juries.<sup>381</sup>

Of course, it was precisely the KKK Act's purpose to limit Southern juries to Unionists, freedmen, and others who would execute federal law and therefore guarantee the freedmen's right of protection. The KKK Act was meant to secure convictions, which were the only way to enforce civil rights, to limit violence and to bring justice to the South.

Given the circumstances of the Reconstruction South, the KKK Act's jury provision worked. In South Carolina, for example, federal troops arrested more than four hundred Klansmen, and to oversee their trials President Grant appointed a fearless federal judge who was determined to have a jury that was both racially integrated and free from prospective nullifiers. Because Judge Bond insisted on implementing the KKK Act's jury provision, many of the white jurors summoned to serve defaulted, and the twenty-one member grand jury ended up including fifteen blacks and a white Republican as its foreman. Of the petit jurors, more than two-thirds were black, and no defendant had a jury composed of a majority of whites. Unable to rely on their henchmen to acquit them, more than one hundred Klansmen pled guilty, and the government won either guilty verdicts or courtroom confessions in the five cases that went to trial.<sup>382</sup> In North Carolina hundreds more were indicted and many were sent to prison, while the U.S. attorney in Mississippi indicted over six hundred Klansmen.<sup>383</sup> In 1872, federal prosecutors achieved over five hundred jury convictions, more than a tenfold increase from just two years earlier.<sup>384</sup> Although only several hundred men were imprisoned in a region where thousands had committed violent felonies, even these convictions reinvigorated the morale of Southern Republicans, enabled blacks to exercise their rights as citizens, produced a dramatic decline in violence throughout the South, and largely

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<sup>381</sup> CONG. GLOBE, 42d Cong., 1st Sess. 766 (1871) (statement of Sen. Casserly).

<sup>382</sup> See Hall, *supra* note 154, at 934–41.

<sup>383</sup> See FONER, *supra* note 222, at 457.

<sup>384</sup> See Forman, *supra* note 182, at 925–26.



ended the Reconstruction-era career of the KKK.<sup>385</sup>

This achievement was possible only because the federal government purged white Southern nullifiers from federal juries, in addition to integrating those juries with freedmen. The Reconstruction Congresses felt authorized by the Constitution, or even compelled by the civil right to protection, to transform federal jury law. In doing so, however, the Reconstruction Congresses did not insist that juries were supposed to be demographically representative of the local community—owing to the jury provision disqualification, blacks were disproportionately represented in the KKK trial juries—and they did not shy away from empowering federal judges to determine the composition of juries, a far different power dynamic between judge and jury than existed at the Founding. Moreover, unlike their Founding forbearers, they did not see juries as representing the “conscience” of the community—a community that happened to be a sick Southern society—or as entitled to decide questions of law in addition to fact. Juries existed only to decide questions of fact. They were not to thwart the civil authorities’ execution of laws to protect civil rights with which they disagreed. Reconstruction shifted authority not only from the peripheral states to the national center but also from local juries to the government itself.

Yet, for all that this episode teaches us about the Reconstruction-era right to nullify, there are two significant reasons why the intersection of juries and the South is not a perfect example of how the Fourteenth Amendment’s framers understood their amendment to transform jury law. First, white Southern juries may not have been engaging in “core” jury nullification when they were acquitting whites against the evidence and in spite of the law because the juries may not have been resting their verdicts on their honest interpretation of the law. While the Chief Justice of the U.S. Supreme Court was able to write in 1857 that, based on the original meaning of the Constitution, blacks “had no rights which the white man was bound to respect,”<sup>386</sup> perhaps not even the right to protection, such an assertion was no longer constitutionally plausible after the Civil War and the Fourteenth Amendment guaranteed freedmen civil rights. Second, the Reconstruction Congresses’ response to the white nullifiers was to exclude only those who had committed *actions*—not those who merely had different, legitimate interpretation of the law. Even the most innocuous purged juror under the KKK Act had, according to the judge, at least “indirectly” counseled, advised, or aided an illegal conspiracy. The true test of the Reconstruction Congresses’ understanding of nullification would come when they considered prospective jurors who had done nothing illegal but simply had a different understanding of constitutional law.

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<sup>385</sup> See FONER, *supra* note 222, at 458–59.

<sup>386</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

*C. Polygamy, the Utah Territory, and the Disallowance of Jury Nullification*

If Southern jury nullification did not go to the core of nullification doctrine, the nullification in Utah did. Jurors there consciously believed that a federal criminal statute was unconstitutional. In support of their belief, they made plausible constitutional arguments, ones that were also voiced by members of the Reconstruction Congresses and by a distinguished attorney before the Supreme Court shortly after Reconstruction had ended. The Republican majority in the Reconstruction Congresses sought to purge these jurors based solely on their *belief* that the statute was unconstitutional, even if the jurors had never committed any illegal actions themselves. In other words, Republicans understood the Constitution to empower them to disallow even jury nullification in non-race-related cases by law-abiding citizens that was based on disputed understandings of the Constitution.

Established as part of the Compromise of 1850, the Utah Territory found itself at the center of national controversy two years later when Brigham Young, Utah's territorial governor and the Mormon Church's president, proclaimed that Mormons believed in and practiced polygamy,<sup>387</sup> which was not then prohibited at the federal level by Congress or in Utah by the territorial legislature.<sup>388</sup> At its first national nominating convention in 1856, the Republican Party equated polygamy, which they deemed female slavery, alongside black slavery as the "twin relics of barbarism" that the party was committed to abolishing, at least in federal jurisdictions.<sup>389</sup> Over the next four years, Republicans advocated legislation to prohibit polygamy in the territories but were stymied by Southern Democrats who feared that anti-polygamy legislation was a step on the path toward the federal abolition of slavery.<sup>390</sup> In 1862, after the Southerners had seceded, the Morrill Act for the Suppression of Polygamy,<sup>391</sup> which outlawed bigamy in the territories and provided for a prison sentence of up to five years, overwhelmingly passed the Republican-dominated Congress.<sup>392</sup>

Despite the Morrill Act's tremendous support in Washington, it did not effectively dismantle polygamy and end "female slavery" in Utah. As a federal criminal statute, it required jury trials, and no Mormon jury would indict, let alone convict, the Mormon men who violated the statute. Even government officials flaunted the statute. In 1862, the federally appointed Governor Stephen Harding complained that "it is recommended by those in

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<sup>387</sup> See GORDON, *supra* note 250, at 1, 9.

<sup>388</sup> See EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900*, at 137 (2001) (Firmage and Mangrum also note that an existing territorial statute banned adultery, but only the offended spouse could initiate proceedings, and the first prosecution under this statute did not occur until 1871).

<sup>389</sup> See FONER, *supra* note 222, at 130.

<sup>390</sup> See GORDON, *supra* note 250, at 57, 62–63.

<sup>391</sup> Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501, 510 (repealed 1910).

<sup>392</sup> See GORDON, *supra* note 250, at 81.

high authority that no regard whatever should be paid” to the act,<sup>393</sup> and as late as 1865, two-thirds of all territorial officials were polygamists. In 1867, Mormon leaders even petitioned Congress for the statute’s repeal, claiming that the absence of a single conviction demonstrated its inefficacy.<sup>394</sup> A Congressional report conceded that the Morrill Act was a “dead letter,” but rather than abandon a federal law that had been stalled by resistance at the local level, Congress, as it did with Southern resistance, decided to redouble its efforts, beginning what Professor Sarah Gordon has called “a second reconstruction in the West.”<sup>395</sup>

The federal government wanted to fight the battle over polygamy in humanitarian terms. While formally claiming the power to regulate polygamy through the Territorial Clause,<sup>396</sup> which authorized Congress to make “needful rules and regulations” in the territories, the government rested the heart of its case against the other “relic of barbarianism” on a similar right-to-protection ground that justified much of its legislation concerning freedmen in the South. When the Morrill Act’s constitutionality was argued in the Supreme Court in 1878, Attorney General Charles Devens, both in his brief and at oral argument, evaded explicit constitutional analysis of the federal power to outlaw polygamy, but he relentlessly emphasized the human cost of polygamy.<sup>397</sup> The Morrill Act was about the federal government’s right to protect women from the bondage of polygamy. Only the prosecutions and convictions of polygamist men, the government contended, would safeguard the Utah women from the abuse of the barbaric practice.

Mormons, on the other hand, thought that the humanitarian issue was absurd. To them, polygamy not only was ordained by God but also was acclaimed by women. In 1870, only one year after the Wyoming Territory became the first state or territory to grant women unrestricted suffrage, the Mormon-dominated Utah legislature enfranchised women in an attempt to illustrate both female support for polygamy and female liberty in Utah. Indeed, women voters were such strong supporters of polygamy that Congress later disenfranchised them in the Edmunds-Tucker Act of 1887,<sup>398</sup> one of many federal statutes passed in an attempt to end polygamy. Instead of humanitarianism, Mormons thought the central issues were constitutional questions, chiefly concerning federalism but also concerning freedom of religion. Between 1862 and 1869, when the Supreme Court declared that the anti-polygamy legislation was constitutional, Mormons insisted that they had the *constitutional* right to structure their domestic relations like mar-

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<sup>393</sup> FIRMAGE & MANGRUM, *supra* note 388, at 139.

<sup>394</sup> See GORDON, *supra* note 250, at 83, 111.

<sup>395</sup> See *id.* at 14.

<sup>396</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>397</sup> See GORDON, *supra* note 250, at 4, 126.

<sup>398</sup> Act of Mar. 3, 1887, ch. 396, § 20, 24 Stat. 635, 639.

riage however the Utahn majority saw fit.<sup>399</sup>

The constitutional debate occurred in uncharted waters because the federal government had never before claimed the authority to pass laws regulating marriage or religion. Rooted in federalism, the Mormons' principal argument was that the Constitution protected local autonomy and local differences against which the national Congress could not legislate. Although they conceded that the federal government had authority in the initial organization of the territories, they contended that such authority was limited to the basic questions of the structure of public government. Once the structures of territorial government were in place, they thought that domestic issues were matters for local debate and disposition. Marriage laws always had been the province of the states, and it was difficult for the Mormons to see how local marriage practices affected the national interest. Quite simply, they did not believe that the Constitution granted Congress the authority to pass the Morrill Act.<sup>400</sup>

Many Americans, particularly Southerners and Northern Democrats, agreed that local governments, even territorial governments, had the right to resist federal intervention in domestic matters that traditionally had been left to the states. Indeed, the Supreme Court recognized precisely that principle only a few years before in *Dred Scott*, when the Court held that the Constitution did not confer upon Congress general "powers over person and property" but limited the federal government's reach there as it did in the states.<sup>401</sup> If the Territorial Clause did not grant Congress the power to regulate slavery in the territories, as the Court had found, then certainly Congress could not regulate local marriages, an issue tied much less to the national interest. Nor had the recent amendments changed the equation. Although the Thirteenth and Fourteenth Amendments reversed *Dred Scott*'s holding on black freedom, rights, and citizenship, they said nothing about expanding the federal government's reach over marriages in the territories. Since *Dred Scott*, according to many Mormons, Southerners, and Northern Democrats, was still good law on the question of federal power in the territories, the Morrill Act was unconstitutional.

In arguing the Mormons' cause before the Supreme Court, George Washington Biddle, a prominent Philadelphia Democrat, relied chiefly upon this federalism question, going so far as to cite *Dred Scott* authoritatively. He claimed that a structural principle of the Constitution was the limitation of federal power to override the decisions of local majorities in areas traditionally reserved for local authority. The Morrill Act was facially unconstitutional because the Territorial Clause conferred upon Congress the power to make only *needful* rules to protect the national interest, which did not in-

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<sup>399</sup> See GORDON, *supra* note 250, at 86.

<sup>400</sup> See *id.* at 5, 224.

<sup>401</sup> See *id.* at 123.

clude marriage regulations. “There is always an excess of power,” he told the Justices,

when any attempt is made by the Federal Legislature to provide for more than the assertion and preservation of the right of the General Government over a Territory, leaving necessarily the enactment of all laws relating to the social and domestic life of its inhabitants, as well as its internal police, to the people dwelling in the Territory.

The power to create a territory and to make needful regulations did not confer upon the federal government the power to rule the inhabitants as “mere colonists, dependent upon the will” of the center. Like residents of the states, residents of the territories were “most competent to determine what was best for their interests.” They were protected in such self-determination by the “genius of the Constitution.”<sup>402</sup> This was precisely what the American Revolution had been fought for and what the Constitution was designed to protect. Criminalizing polygamy constituted an abuse of power by the center against the periphery—an exercise of tyranny over the Utahns.

Biddle also argued that the Morrill Act violated the First Amendment Free Exercise Clause<sup>403</sup> because it prevented the Mormons from practicing a basic tenet of their religion. Although Biddle did not emphasize this argument, it became the core of the Supreme Court’s opinion in *Reynolds v. United States*,<sup>404</sup> which was the Court’s first major decision on free exercise exemptions.<sup>405</sup> Finding that Congress had the power to regulate polygamy because it was a social evil subject to government regulation, the Court held that the statute was constitutional because it regulated only action, not belief, and thus did not violate the First Amendment.<sup>406</sup> Although the Court’s decision was unanimous, modern scholars have noted that the post–New Deal Court has significantly qualified the ruling.<sup>407</sup> The Mormons, in other words, had a plausible First Amendment argument as to why the Morrill Act was unconstitutional, and according to Reconstruction-era jurisprudence, their Territorial Clause argument was also plausible. Although even the Mormons ultimately agreed with the Court that their position was wrong,<sup>408</sup> the Morrill Act’s constitutionality was an open question at least until 1879.

A decade before 1879, however, Republicans in Congress and in Utah were determined to eradicate polygamy by gaining control over the Utah legal system, including the juries. With the completion of the transcontinental railroad at Promontory Summit, Utah, in 1869, increasing numbers of non-Mormon immigrants began settling in Utah. The Mormons, however,

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<sup>402</sup> *Id.* at 123–5.

<sup>403</sup> U.S. CONST. amend. I.

<sup>404</sup> 98 U.S. (8 Otto) 145 (1879).

<sup>405</sup> See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 524 (3d ed. 2007).

<sup>406</sup> *Reynolds*, 98 U.S. at 168.

<sup>407</sup> See SULLIVAN & GUNTHER, *supra* note 405, at 524.

<sup>408</sup> See GORDON, *supra* note 250, at 221.

still exercised absolute control over Utah's legal apparatus, including its juries. The territorial legislature not only had severely limited the federal territorial courts' dockets by granting extensive criminal jurisdiction to the local probate courts, but it also had empowered local Mormon marshals, rather than federal officials, to summon jurors even for the federal courts.<sup>409</sup> With Mormon-only juries, the federal government knew that it could not obtain any Morrill Act convictions.

Republicans in the Forty-first Congress proposed a solution. In December 1869, Senator Aaron Cragin of New Hampshire introduced a bill "to provide for the execution of the law against the crime of polygamy" in Utah, which, among other changes to Utah's legal system, would have made federal officials responsible for jury selection and denied the probate courts' jurisdiction in criminal cases.<sup>410</sup> More unusually, the bill provided:

[N]o citizen of the United States, who is living in the practice of polygamy, *or who believes in its rightfulness*, shall be competent to serve as a grand or petit juror in criminal cases arising under the act of eighteen hundred and sixty two . . . or in criminal cases arising under this act.<sup>411</sup>

Thus, Cragin wanted to purge from juries all citizens who just *believed* in polygamy's legality, even if they did not practice polygamy themselves and even though the Morrill Act's constitutionality would not be determined by the Supreme Court for another decade. He certainly thought that jurors had no right to decide questions of law—or even believe that an Act of Congress was unconstitutional—and thought that Congress was empowered to disallow nullification.

Two months later, Representative Shelby Cullom of Illinois introduced a corresponding House bill to take jury selection out of the Mormons' hands and to increase the federal courts' jurisdiction.<sup>412</sup> Section 10 provided that "in all prosecutions for bigamy, and the crimes specified in this act, no person shall be competent to serve, either as grand or petit jurors, who *believes in, advocates, or practices bigamy, concubinage or polygamy.*"<sup>413</sup> This provision raised the ire of Utah's non-voting delegate, William Henry Hooper, who said that even he, only a merchant by trade, understood that Section 10 was a legal monstrosity "fraught with evil." After recounting the significance and history of criminal trial by jury, he asked:

Now, sir, is there any member of this House who will claim or pretend that the provisions of this bill are not in violation of this most sacred feature in our Bill of Rights? The trial by jury by this bill is worse than abolished, for its form—a sickening farce—remains while its spirit is utterly gone. . . . The merest tyro in the law knows that the essence of a trial by jury consists in the fact that the ac-

<sup>409</sup> See FIRMAGE & MANGRUM, *supra* note 388, at 140–42.

<sup>410</sup> S. 286, 41st Cong. (1869).

<sup>411</sup> *Id.* § 17 (emphasis added).

<sup>412</sup> H.R. 1089, 41st Cong. (1870).

<sup>413</sup> *Id.* § 10 (emphasis added).

cused is tried by . . . a tribunal as will agree to no verdict except such as, substantially, the whole community would agree to if present and taking part in the trial. Any other system of trial by jury is a mockery and a farce. The standard of public morality varies greatly in a country so vast as ours, and the principle of a jury trial recognizes this fact, and wisely provides, in effect, that no person shall be punished who when brought to the bar of public opinion in the community where the alleged offense is committed is not adjudged to have been guilty of a crime.<sup>414</sup>

Hooper thus made the classic argument for the jury's right to decide questions of law. The jury was to act as the conscience of the community, and when the community agreed that a criminal statute was wrong, the jury was entitled to nullify and thus to acquit.

The House, however, rejected Hooper's interpretation of the criminal jury right. Indeed, at least one leading Republican went so far as to repudiate antebellum nullification in fugitive slave cases. After Representative Austin Blair of Michigan, who had been a prominent abolitionist, one of the most pro-Union Civil War governors, and was then a prominent proponent of women's civil rights and suffrage, spoke entirely in favor of Cullom's bill, Henry Dawes, a Moderate Republican from Massachusetts who supported the bill but opposed Section 10, questioned how Blair could support Section 10.<sup>415</sup> Had they not belonged to a political organization that opposed the Fugitive Slave Act of 1850? Were jurors in the prosecutions of the Fugitive Slave Act's offenders not justified in nullifying? Blair responded:

I must say to the gentleman from Massachusetts [Representative Dawes] that when I was engaged with him in an association which complained of the hardships of the fugitive slave law and of its execution we complained because we wanted to defeat the law. We hated the law itself. I confess I would have trampled it into the dust if I could have done it, I thought it was so inhuman. And for that purpose I was disposed to resort to every legal expedient that possibly could be availed of. *But such was the law; and I believe I may now safely say that under that law no jury ever found a verdict which the facts did not justify, assuming that the law was one that should have been executed.*<sup>416</sup>

The great abolitionist and humanitarian Blair, who sought to abolish the death penalty, thus repudiated the abolitionists' nullification legacy. Although citizens were free "to resort to every legal expedient" to repeal unjust laws, nullification was not a *legal* expedient. Jury verdicts were legitimate only when the jury's interpretation of the facts, not its interpretation of what the law should be, justified them.

In March, the House passed Cullom's bill, including Section 10, by a 94–32 vote.<sup>417</sup> The House had been aware of Hooper's Sixth Amendment objection that the Constitution protected nullification, debated whether nul-

<sup>414</sup> CONG. GLOBE, 41st Cong., 2d Sess. app. at 178–79 (1870) (statement of Del. Hooper).

<sup>415</sup> CONG. GLOBE, 41st Cong., 2d Sess. 2148 (1870) (statement of Rep. Dawes).

<sup>416</sup> CONG. GLOBE, 41st Cong., 2d Sess. 2148 (1870) (statement of Rep. Blair) (emphasis added).

<sup>417</sup> CONG. GLOBE, 41st Cong., 2d Sess. 2181 (1870).

lification was the legitimate, and overwhelmingly interpreted the Constitution to permit it to disallow nullification. The House believed that it was constitutionally empowered to execute federal law at the expense of local juries' rights. Indeed, if one takes the House's humanitarian arguments seriously, the congressmen may have believed that the women's constitutional right to protection even required the House to disallow nullification. Like Cragin's bill, however, Cullom's bill died in the Senate without a vote at the hands of the powerful railroad lobby.<sup>418</sup> Pro-railroad senators, like California's Aaron Augustus Sargent, presumably wanted to minimize antagonism with the Mormon community. At any rate, they successfully advocated delay, insisting that the newly completed railroad would bring "civilizing elements" to Utah that would make such legislation unnecessary.<sup>419</sup>

Meanwhile, the Grant Administration increased its efforts to suppress polygamy. In 1870, President Grant appointed new officials long associated with Republican opposition to polygamy who were determined to enforce the Morrill Act, including U.S. Attorney Charles Hempstead and Chief Justice James McKean. Chief Justice McKean wrote to President Grant that he had decided to recognize only the U.S. attorney and federal marshals as competent to try cases and to select juries. Through non-Mormon juries, Hempstead was able to indict Brigham Young and other church leaders for polygamy-related offenses.<sup>420</sup> Their plan, however, did not work. In an unrelated civil case, the U.S. Supreme Court found that Chief Justice McKean had "wholly and purposely disregarded" the territorial statute directing the territorial marshal, not the federal marshal, to summon juries.<sup>421</sup> The Court found that in the absence of a Congressional law to the contrary, the territorial legislation had the authority to set forth rules for jury selection that federally appointed judges could not ignore.<sup>422</sup> If the federal government did not like Utah's jury system, only Congress could change it. The federal indictments of Young and the other church leaders were quashed.

Besieged by pleas from Utah's federal officials to amend the jury system, President Grant called upon Congress to override the territorial legislature, explaining that without such an amendment "it will be futile to make any effort . . . for the punishment of polygamy, or any of its affiliated vices or crimes."<sup>423</sup> In May 1874, Representative Luke Poland of Vermont acted upon the request and proposed a bill to restrict the probate courts' jurisdiction and to reform the jury selection system. A former Vermont Supreme Court Justice, Poland had dealt with questions of jury nullification before. In an 1860 case, for example, a trial judge had instructed the jury that the

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<sup>418</sup> See GORDON, *supra* note 250, at 111–12.

<sup>419</sup> See FIRMAGE & MANGRUM, *supra* note 388, at 147.

<sup>420</sup> *Id.* at 141, 144–47.

<sup>421</sup> *Clinton v. Englebrecht*, 80 US (13 Wall.) 434, 440 (1871).

<sup>422</sup> *Id.* at 446.

<sup>423</sup> CONG. GLOBE, 42d Cong., 3d Sess. 1357 (1873) (message from President Grant).



rule that the jury could decide questions of law appeared to him to be “a most nonsensical and absurd theory” but “such is the law of this State.”<sup>424</sup> The defendant objected that the judge was trying “to fly-blow the established law of the state,” but Poland’s Supreme Court unanimously held that the instruction was not reversible error. The Chief Justice’s opinion stated that the rule that the jury is to determine the law may “be characterized as an absurdity,” but it “will nevertheless be sure in the long run to constantly gain ground, and become more and more firmly fixed in the hearts and sympathies of those with whom liberty and law are almost synonymous.”<sup>425</sup>

In 1874, however, Poland had less concern for jury rights. Although his bill was more moderate than Cullom’s had been in that it allowed a Mormon probate judge to draw half of the names for the jury lists, its Section 4 provided for the removal in any prosecution for adultery, bigamy, or polygamy of any juror who “practices polygamy or . . . believes in the rightfulness of the same.”<sup>426</sup> Again, this provision received substantial attention in Congress. Representative Lorenzo Crouse of Nebraska objected to Section 4 because Congress’s “action upon this bill will become a precedent for the future.”<sup>427</sup> Clarkson Potter, a Democrat from New York and future President of the American Bar Association, echoed similar concerns. He wondered whether “it would be better to drive this Mormon people out of the Territory without color of law at the point of the bayonet than to establish a precedent of this character.” Since he estimated that three-quarters of Utah men were Mormons who believed in polygamy, he thought that “the Federal official would be able of his own will to pack a jury,” essentially destroying the jury trial right. “[M]y main objection,” he concluded, “is to . . . provision in the bill as reported that in all prosecutions for polygamy no man shall be a juror who believes in or practices polygamy.”<sup>428</sup>

The Republican majority agreed that the central issue was jury nullification. John Cessna of Pennsylvania reported that Mormons had told the House Judiciary Committee that it had not been “decided by the Supreme Court of the United States that the law against bigamy and polygamy in Utah was constitutional or otherwise, and that until it should be decided by the Supreme Court of the United States that the law was constitutional they would not obey it.”<sup>429</sup> Instead of allowing local juries to decide whether the Morrill Act was constitutional, at least until the Supreme Court ruled on it, Cessna supported Poland’s bill. Jasper Ward of Illinois, another Judiciary Committee member, voiced the strongest support for the bill. “Do you allow a man to sit as a juror in a case of murder who believes in or practices mur-

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<sup>424</sup> *State v. McDonnell*, 32 Vt. 491, 523 (1860).

<sup>425</sup> *Id.* at 531–32 (Redfield, C.J.).

<sup>426</sup> H.R. 3097, 43d Cong. (1874) (emphasis added).

<sup>427</sup> 2 CONG. REC. 4468 (1874) (statement of Rep. Crouse).

<sup>428</sup> 2 CONG. REC. 4470 (1874) (statement of Rep. Potter).

<sup>429</sup> 2 CONG. REC. 4473 (1874) (statement of Rep. Cessna).

der?” he asked. “Do you allow a man to sit as a juror in a trial for any crime who believes in or commits that crime?” Ward insisted that “such a thing has not been heard” before.<sup>430</sup> Ward, apparently, was not aware of jury nullification in Alien and Sedition Act or Fugitive Slave Act cases. In any event, the House majority overwhelmingly thought Section 4 was constitutional and passed Poland’s bill by a 159–55 vote.<sup>431</sup>

Once again, the Senate proved troublesome, and the railroad lobby stalled the measure.<sup>432</sup> On the last day of the Congressional session, the Republican majority decided to compromise. Senator Frelinghuysen offered to “prune the bill of anything that could be objectionable to any one who wants law there.”<sup>433</sup> Senator Sargent, after repeating that “the progress of time, the influx of gentiles . . . is gradually solving this question,” moved to eliminate Section 4.<sup>434</sup> Frelinghuysen had hoped to keep that provision, but he conceded that if the opposition insisted on removing it, he would accept the amendment rather than see the bill fail; once amended, the bill passed.<sup>435</sup> The Senate sent the amended bill back to the House, where Poland admitted that a “great deal that was good in the bill has been struck out by the Senate.”<sup>436</sup> Shortly before Congress adjourned, the House passed the amended bill, and upon President Grant’s signature, the Poland Act, with no provision for striking jurors based on belief alone, became law.

As soon as the Poland Act took effect, federal prosecutors began arresting Mormon leaders, including even George Cannon, Utah’s non-voting delegate in Congress. Convictions, however, remained rare because proving polygamy without marriage records or cooperating witnesses was difficult and because the juries remained half-Mormon.<sup>437</sup> George Reynolds, whose case was decided by the Supreme Court in 1879, was convicted only after the federal government reneged on a deal and his second wife appeared visibly pregnant on the stand.<sup>438</sup> Faced by a lack of convictions and with Supreme Court precedent on its side,<sup>439</sup> Congress in 1882 passed the anti-polygamy Edmunds Act, which included a provision excluding jurors who believed in polygamy from polygamy trials, like the one that had been removed from Poland’s bill.<sup>440</sup> By the time Utah achieved statehood in 1896, there were well more than a thousand polygamy-related prosecutions.<sup>441</sup>

<sup>430</sup> 2 CONG. REC. 4474 (1874) (statement of Rep. Ward).

<sup>431</sup> 2 CONG. REC. 4475 (1874).

<sup>432</sup> See GORDON, *supra* note 250, at 111–12.

<sup>433</sup> 2 CONG. REC. 5415 (1874) (statement of Sen. Frelinghuysen).

<sup>434</sup> 2 CONG. REC. 5415, 5417 (1874) (statement of Sen. Sargent).

<sup>435</sup> 2 CONG. REC. 5417 (1874) (statement of Sen. Frelinghuysen).

<sup>436</sup> 2 CONG. REC. 5444 (1874) (statement of Rep. Poland).

<sup>437</sup> See GORDON, *supra* note 250, at 113–15, 147.

<sup>438</sup> See FIRMAGE & MANGRUM, *supra* note 388, at 151–53; GORDON, *supra* note 250, at 115.

<sup>439</sup> See *Miles v United States*, 103 US 304, 310–11 (1880) (upholding dismissal of jurors the Court characterized as biased after they explained that they believed polygamy was ordained by God).

<sup>440</sup> Act of Mar. 22, 1882, ch. 47, § 5, 22 Stat. 30, 31.

<sup>441</sup> See GORDON, *supra* note 250, at 155–57 (finding that from 1871 to 1896, over 2500 criminal cases

The Reconstruction Congresses' crusade against polygamy demonstrates that the Fourteenth Amendment's framers not only saw jury nullification as outside the scope of Sixth Amendment protection but also viewed it as a practice that the government needed to eliminate to preserve the Utah women's right to protection from the "relic of barbarism." According to many members of the Reconstruction Congresses, a prospective juror's belief that a law was unconstitutional, even if there were plausible constitutional arguments in his favor, disqualified him from jury service. These members believed in nullification's disallowance in spite of hearing objections that disqualifying jurors for mere belief violated the Constitution. Jurors had no right to decide questions of law; in fact, if they did so, they disqualified themselves.

Of course, Cragin's and Cullom's bills did not pass the Forty-first Congress, and while the Forty-third Congress enacted the Poland Act, it was stripped of the juror-belief provision that would not become law until 1882. Nevertheless, the evidence suggests that the Fourteenth Amendment's framers overwhelmingly supported the anti-nullification legislation and understood it as compatible with or required by the Constitution. First, the leaders of the anti-polygamy crusade—Cragin, Cullom, Frelinghuysen, Morrill, and Poland—all served in the Thirty-ninth Congress, and they were representative of the Republican ideology that existed from the antebellum era through Reconstruction. Second, the anti-nullification legislation, including the juror-belief provisions, was supported by strong majorities of the total Congress. The House passed both Cullom's bill and Poland's original bill, including Section 4, with 74% of the votes. Based on the evidence, it appears that the Senate let Cullom's bill die and amended Poland's bill only because the railroad lobby had enough influence to stall the bills, not because the Mormon pro-nullification legal position commanded a majority of the Senate votes. Neither bill, after all, was ever defeated in a vote, and Senator Sargent, who spearheaded the opposition, principally relied upon pragmatic arguments that polygamy would disappear of its own accord with the coming of the railroad, not upon Delegate Hooper's constitutional arguments that the House bills violated the Sixth Amendment. As a constitutional matter, the Reconstruction Congresses understood themselves to have the authority to prohibit even "core" jury nullification.

## V. CONCLUSION

This paper has provided a descriptive and an interpretive account of jury nullification law during the Reconstruction Era. From the descriptive account, two conclusions follow. First, addressing a gap in the history of nineteenth-century jury nullification,<sup>442</sup> this paper has showed that, on the

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were brought, of which more than half were polygamy-related).

<sup>442</sup> See *supra* note 180 and accompanying text.

whole, the Reconstruction-era public understanding of jury nullification and the understanding in Congress were antithetical to the Founders' understanding. What had been once considered a cherished right had been reduced to an unauthorized power at least a generation before *Sparf*. While Founding-era courts, treatises, and statesmen almost universally agreed that juries had the right to decide legal questions and thus to nullify the law, Reconstruction-era federal courts, treatises, and members of Congress, particularly the Republican majority that framed the Fourteenth Amendment, understood juries to have the right to decide only questions of fact.

The second descriptive conclusion is that in reconstructing juries to inhibit jury nullification, Congress not only pursued a strategy of racial integration, as others have emphasized,<sup>443</sup> but also took unprecedented steps to disqualify from jury service local majorities in the South and the West who would not enforce federal statutes through guilty verdicts. Particularly in Utah, many of those who the House in the early 1870s twice voted overwhelmingly to disqualify (and who Congress in 1882 would disqualify) were nullifying based on what was then considered a plausible interpretation of constitutional law, akin to the type of "core" nullification lauded during the Founding Era. The Reconstruction Congresses, in other words, were more interested in obtaining convictions to protect the civil rights of blacks and women than they were in making juries better reflect local communities. Indeed, some voices in Congress estimated that proposed Congressional legislation to remove prospective nullifiers would disqualify 75–90% of previously eligible jurors.<sup>444</sup> According to Congress, the mass disqualifications were constitutionally justifiable because juries were no longer the "conscience" of the community. Rather, juries were fact-finding instruments implemented not only to protect defendants' constitutional rights but also to enforce victims' civil rights. Only jurors who were willing to enforce federal law as instructed by the judge were qualified serve.

In addition to these descriptive conclusions, two interpretive conclusions also follow from the evidence. The first is that there is an originalist argument, grounded in the Fourteenth Amendment's text and history, for the current doctrinal prohibition on jury nullification. With respect to state courts, the Reconstruction Congresses did not understand the Fourteenth Amendment to protect directly the jury's right to nullify or to incorporate the right against the states. The members' statements and legislative proposals accorded with the Reconstruction-era public understanding of the practice of jury nullification as expressed in treatises and dictionaries that defined nullification as just an unauthorized power and no longer a constitutional right. Therefore, regardless of a Founding-era Sixth Amendment federal right to nullify, no constitutional right to nullify, under originalist theory, should be

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<sup>443</sup> See *supra* notes 182–185, 348–350 and accompanying text.

<sup>444</sup> See *supra* notes 381, 428 and accompanying text.

enforced in state courts. When courts apply the right to jury through the Fourteenth Amendment and give it “intelligible content,” they should, according to this argument, apply the meaning of “jury” when the Fourteenth Amendment was framed and ratified, which excludes the right to nullify.

Moreover, with respect to federal courts, the Reconstruction Congresses’ understood themselves to be constitutionally authorized to disallow, or to codify the antebellum judiciary’s disallowance of, a Founding-era right to nullify. They pursued legislation that would purge from federal juries any prospective juror who believed that certain criminal statutes were unconstitutional. This legislation was consistent with the text, history, and purposes of the Fourteenth Amendment. While the original Sixth Amendment had been designed to protect the citizenry through expansive jury rights from an overbearing government, the Fourteenth Amendment and its right to protection transformed the Constitution by elevating as rights protectors the federal judiciary over local juries and nationalism over localism. In transforming the Constitution through a federally enforced right to protection of civil rights, the Fourteenth Amendment may thus have constitutionalized the nineteenth-century judicial precedent against nullification.

This argument suggests that even if the Supreme Court remains committed to originalism over doctrinalism in its constitutional criminal procedure jurisprudence, it need not overturn the precedents that prohibit nullification. The Court, under originalist jurisprudence, may have contemporary jury nullification doctrine correct after all—even if has yet to study its Reconstruction-era history to understand why. An originalist Court may reaffirm its anti-nullification holdings while recasting them under a new rationale,<sup>445</sup> Reconstruction-era originalism, which better explains what the Fourteenth Amendment was understood to protect than the Court’s traditional Founding-era originalism does. At a minimum, this alternative originalist account suggests that Founding-era history should not monopolize the original meaning of the post-Fourteenth Amendment Constitution. Given the Reconstruction-era transformation of constitutional law, including constitutional criminal procedure, Reconstruction-era history matters in originalist interpretation; it too illuminates the Constitution’s original meaning.

From this follows this paper’s final interpretive conclusion. The contemporary Supreme Court may turn to originalism to give “intelligible content” to the criminal jury trial right, but originalism goes only so far. Ultimately, the Court must use other methodologies to fill in the details. Originalism simply cannot provide the final answers. Indeed, at best, it may give the Court a menu of limited plausible interpretive possibilities from

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<sup>445</sup> Cf. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 122–24 (2000) (discussing how in *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965), the Supreme Court reaffirmed its holdings in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), while recasting them from a substantive due process rationale to a First Amendment rationale).

which the Court must use another method to make a choice.

On the macro-level, we have seen that this is true in terms of Founding-era versus Reconstruction-era originalism. With respect to jury nullification, Founding-era originalism posits that jury nullification is a constitutional right of defendants and juries inherent in Article III's and the Sixth Amendment's right to jury trial. Reconstruction-era originalism, however, contends that nullification is an illegitimate practice that interferes with victims' and potential victims' constitutional right to protection. Originalism, in other words, may be deployed in multiple, contradictory ways, either, on the one hand, to protect defendants' criminal procedure rights and localities' rights or, on the other hand, to protect victims' civil rights and government enforcement of those rights. Rights counteract rights. In selecting which originalist era to use and in determining to what extent new Fourteenth Amendment rights may revise and even abrogate earlier Sixth Amendment penumbral rights, originalist courts must choose one over the other. The current Supreme Court has preferred the original Sixth Amendment rights, yet this paper has argued that prioritizing the Fourteenth Amendment rights is probably even more reasonable and originalist too. Originalism may provide these two plausible choices, but it cannot compel a particular choice.

On the micro-level, even Reconstruction-era originalism does no more than present a menu of plausible choices. It does overwhelmingly establish that the right to nullify was not understood to be incorporated against the states and that the disallowance of nullification was *to some extent* constitutionalized for federal cases, as the KKK Act to enforce the Fourteenth Amendment and Cragin's bill, Cullom's bill, and Poland's initial bill proposed to purge from federal courts prospective nullifiers who would interfere with victims' civil rights. But to what extent were Sixth Amendment defendant and jury rights revised through Fourteenth Amendment victim and government rights? What was the scope of the constitutionalization of disallowance? There are at least three plausible choices: the Fourteenth Amendment disallowed the right of nullification first, in all cases; second, in cases in which the victims were "discrete and insular minorities"<sup>446</sup>; or third, in cases specified by Congress through its Section 5 authority.

One plausible reading of the evidence is that the Fourteenth Amendment disallowed the jury's right to nullify in all cases. If nullification were disallowed in all cases, then the implicit Fourteenth Amendment meaning of "jury," under a last-in-time rule, would essentially supersede the earlier Sixth Amendment meaning of jury and transform or curtail the prior penumbral Sixth Amendment rights. Reverse incorporation from the state cases' non-incorporation principle or a similar "feedback effect"<sup>447</sup> would produce

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<sup>446</sup> Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>447</sup> See AMAR, *supra* note 53, at 243 (discussing the Reconstruction-era "feedback effect" on the original Bill of Rights).

this result. This reading draws strength not only from principles of jurisprudential consistency but also from the victims' rights-protecting theme of the Fourteenth Amendment and its enforcement legislation, which emphasized that all potential victims had the right to be protected by deterrent criminal laws that were enforced by juries. It is also consistent with the Fourteenth Amendment's federalism theme, which prioritized Congress and the federal judiciary over localities and juries. This all-encompassing reading is also bolstered by Reconstruction-era jury law, as expressed in federal courts, state judicial trends, and legal treatises, which generally held that jury nullification was never a right in any case. It would mean that *Sparf's* holding may be entirely consistent with originalism, if we use Reconstruction-era originalism, rather than Founding-era originalism, as the yardstick.

Another plausible reading of the evidence is that the Fourteenth Amendment, through the self-executing Section 1, disallowed the right to nullify only in cases where victims are discrete and insular minorities. Confined to its historical context, the Fourteenth Amendment was about protecting discrete and insular minorities, particularly freedmen and perhaps also Unionists and Republicans in the South whose rights had been violated before, during, and after the Civil War. The Reconstruction Congresses' anti-nullification legislation was similarly targeted. Although the proposed post-Civil War treason trial legislation instructing jurors to decide cases "upon the evidence to be produced at trial" involved as a victim an entire nation injured by disloyalty, the more specific anti-nullification statutes explicitly protected victims that the Reconstruction Congresses considered minorities who were not being protected by local juries. In the case of the KKK Act, of course, the victims whose rights were being infringed were freedmen who were not even constitutionally guaranteed the right of jury service until the Civil Rights Act of 1875. Women victims in the polygamy legislation were discrete and insular minorities too. Although Utah women comprised nearly half of the territory's population and even held the right to vote, they did not have the right of jury service, and, more importantly, the Reconstruction Congresses considered them a politically impotent minority enslaved by the "relic of barbarism." Hence, the minority rights-protecting theme of Section 1 and the enforcement legislation makes the constitutional right to protection particularly compelling in the case of discrete and insular minorities, the paradigmatic Section 1 rights claimants.

A third plausible reading is that Congress must specify in its criminal statutes through its Section 5 authority when it is protecting victims' Section 1 rights by disallowing nullification. Although statutes ordinarily cannot trump constitutional rights, when Congress acts pursuant to express constitutional authority to enforce other constitutional rights it may be engaging in a type of higher lawmaking. This reading Section 5 is also consistent with the legislation debated in the Reconstruction Congresses. Enacted through Congress's Section 5 power, the KKK Act purged Southern nullifiers, but Congress specified only in KKK Act cases. Furthermore, although they were not Section 5 bills, the Cragin, Cullom, and Poland bills did the same

for Mormon nullifiers in polygamy and polygamy-related cases only. In other words, the Reconstruction Congresses did not pass legislation purging nullifiers from all federal cases but instead noted precisely in which types of civil rights cases judges should dismiss prospective jurors who were inclined not to decide cases on facts alone. Just as Congress instituted anti-nullification provisions in the KKK Act to enforce the Fourteenth Amendment, it may be similarly able to implement anti-nullification principles in other criminal statutes designed to enforce the right of protection or other constitutional rights.

These plausible readings illustrate that even if courts turn to Reconstruction-era originalism, it cannot provide all of the answers as to what the substance of criminal procedure rights like trial by jury should be. Rather than providing conclusive solutions, Reconstruction-era originalism provides a framework through which the original meaning of constitutional rights may be understood. It serves as an alternative to the Founding-era originalism, like the arguments to restore nullification, that neglects the Fourteenth Amendment's civil rights and federalism constitutional transformation and to nineteenth-century doctrine, like the judicial disallowance of nullification, that lacks democratic warrant. Descending from among our greatest liberty-enhancing amendments, Reconstruction-era illuminates *an* understanding, but not *the* understanding, of our Constitution.