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ARTICLES

Nullification as Law

JENNY E. CARROLL*

The rule of law is central to our notion of governance and our legal system. The ideal of a knowable, regular, public law shimmers in the discourse of our democracy. It stands in sharp contrast to the arbitrary and often despotic law of men, in which those with absolute power rule absolutely. But the devil is always in the details. To move past the idealism is to enter a contested realm where competing theories seek to claim the mantle of the rule of law. Although this Article cannot claim to resolve the dispute over the precise meaning or construct of the rule of law, it does seek to consider the role that jury nullification plays in our republican democracy. In so doing, a more nuanced conception of the rule of law emerges—one grounded in the daily realities of the lives the law would govern. This new vision of the rule of law includes, if not at times encourages, the possibility of nullification.

Jury nullification erodes the formal paradigm surrounding law. The audacity of a juror defining law speaks of some small space where law is constructed and given meaning outside the halls of formal government. It suggests a law that is more than the written word of statutes, executive orders, or judicial opinions, but is an interplay between the written word and the citizen's interpretation of that word. In its very nature, nullification points to a citizen juror as a source of the law itself. It pushes against static constructs of law and seeks to inject community-based ideals of justice and equity into the larger body of law.

In placing nullification within the context of the rule of law, this Article recognizes the democratic function of the criminal jury and asserts that nullification promotes that function. In doing so, it considers how the citizen's relationship with the government has developed in light of changing notions about the criminal jury's role in the interpretation of law, concluding that nullification is consistent with notions of the rule of law; instead, nullification promotes an active role for the citizen in the construction and deconstruction of the law itself.

* Associate Professor of Law, Seton Hall University School of Law. © 2014, Jenny E. Carroll. Thanks to Adam Steinman, Larry Solum, Paul Butler, Daryl Brown, Charles A. Sullivan, L. Song Richardson, Brian Sheppard, Alice Ristroph, Rachel Godsil, D. Michael Risinger, John Copacino, Wally Mylenic, and Michael Cahill for their helpful suggestions. This Article has also benefited greatly from comments received during presentations at Seton Hall University School of Law, Georgetown University Law Center, Brooklyn Law School, University of Alabama School of Law, Southwestern Law School, Wayne State Law School and the University of Idaho School of Law. Finally, I would like to especially thank members of Larry Solum's Advanced Constitutional Law Seminar for their critiques as well as the careful editing of *The Georgetown Law Journal* staff.

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INTRODUCTION

The rule of law has long been central to notions of liberal governance.¹ As a theory, it has its appeal. It draws power from its ability to protect individual liberty while seeking to minimize the coercive power of the government.² Under the rule of law, the statutes and codes governing a community are relatively fixed points, providing a predictable framework for public and private behavior. Citizens know what “the law” expects of them, and they are free to make rational choices to obey or reject the law. No matter what they choose, the application of the law is equal, consistent, and without bias.³ At its most basic level, the rule of law draws a distinction between the concept of the law itself and the normative world. The law’s enforcement is not the product of the prevailing political party’s belief system or even shifting community values; it is made of stronger, more constant stuff.⁴ The government’s subjective role is

1. See JOHN RAWLS, *A THEORY OF JUSTICE* 235–40 (1971).

2. See Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 615, 615–16, 619–20 (1991).

3. See Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1–2 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (describing the rule of law as “those institutional restraints that prevent governmental agents from oppressing the rest of society” by restricting the arbitrary power of the government over the governed); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 318 (1990) (describing the benefits of the rule of law as including its nonarbitrary application of rules to all citizens equally); JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 15 (J. W. Gough ed., Basil Blackwell 1948) (1690).

4. See ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 90 (1990) (arguing that in order for the rule of law to properly function, there must be a sustainable line drawn between legal argument and political ideal).

minimal, and obedience to the law is achievable.⁵

But the rule of law is a contested concept as well. Though its primary ideals of a general, public, and regular law are largely accepted, efforts to explain how these ideals are and should be realized within the American democracy diverge.⁶ To further complicate discussion, adhering too closely to any particular ideal of the rule of law leaves large swaths of the actual experience of governance and lawmaking unaccounted for. Efforts to redefine the rule of law as a concept have circled back to a series of underlying values in an effort to explain the continued utility of the theory. In doing so, each reconceptualization has clung to the notion of a separation between those who make laws and those to whom the law is applied. To the extent that there is overlap in these realms, it is that those who occupy the formal spaces where law is created are also subject to those laws. Ordinary citizens are the recipients, not the creators, of law. Even as theorists have recognized that the rule of law must account for lawmaking that occurs through interpretation,⁷ the realm of that interpretation remains in those narrow spaces of formal governance. Thus, even among those who would move the rule of law away from its positivist and formalist roots, the power of lawmaking remains in particular and designated spaces, separated from the very people whom the law would govern.

Jury nullification is rarely discussed as anything but an anathema to the rule of law.⁸ Nullification, or the possibility that a citizen juror would interpret the

5. See William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *THE RULE OF LAW* 265, 265 (Ian Shapiro ed., 1994); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785 (1989) (noting that in a democracy, application of the rule of law is a two-part process beyond which the theory offers little specificity: "first, there must be rules; second, those rules must be capable of being followed").

6. See Lawrence B. Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW*, *supra* note 5, at 120, 121. This is not to say that the rule of law is without coercive effect. Like all systems of governance, the rule of law is not immune to the reality that the enforcement of law is achieved by the use or threatened use of force by the government against the citizen. That the citizen may accept the law's restriction and never test the government's willingness to use force against him may well serve to diminish the perspective that the law is coercive, but it does not obscure the underlying truth of the law's coercive possibility. As it cannot undo the coercive nature of the government's relationship with its citizens, the rule of law seeks to render the terms of the coercion known and equally applied. Despite these noble and alluring goals, within the United States, the effort to balance the coercive effect of governance and the promise of uniformity and equality under the law has rendered the notion of the rule of law within our democracy a contested concept.

7. See RONALD DWORKIN, *LAW'S EMPIRE* 166 (1986) (arguing that in order for a State or its laws to maintain integrity, they must engage in a process of interpretation premised on consistent and agreed upon principles); H.L.A. HART, *THE CONCEPT OF LAW* 125 (1961) (describing law as a process of creating and then interpreting in order to achieve acceptance); RICHARD A. POSNER, *LAW AND LITERATURE* 163 (3d ed. 2009) (describing the importance of incorporating interpretation into the rule of law rendering "law . . . the art of governance by rules, rather than an automated machinery of enforcement"); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 956–59 (1995) (arguing that law draws meaning not only from construction but also from interpretation).

8. See, e.g., THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 323–24 (Little, Brown, & Co. 1868) (noting that the rule of law requires juries "to receive and follow the law as delivered to them by the court" though acknowledging that juries "have the complete power to disregard it"); FRANCIS WHARTON, *A*

law as deficient either in whole or in its application to a particular defendant, seems counter to the primary ideals of the rule of law: that laws are knowable in advance of any particular case, that they are created and applied in a uniform manner, and that a separation exists between the governed and the government.⁹ The rule of law establishes a distant (and from the citizen's perspective, passive) relationship between the citizen and his government. Nullification challenges this relationship. It opens the possibility that a juror, with no greater qualification than the fact of his citizenry (and his ability to survive the voir dire process), is an appropriate source of law. The citizen's role shifts from the law's passive recipient to the law's active creator through his interpretation and application of the law as juror. With this shift, a new conception of law is born—one that encompasses both an articulation and the interpretation of a rule.

TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 3096, at 1118 (Kay & Brother 4th rev. & ed. 1857) (indicating that allowing juries to consider questions of law creates instability in the law and robs it of its uniform meaning); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 916–17 (1994); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 436.

Darryl Brown provides a notable exception to this generalized exclusion of nullification from the rule of law. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1200 (1997). Brown argues that as a matter of theory, nullification is in fact consistent with the rule of law, provided that it is limited to nullification based on principles of proper governance and lawmaking shared by the community. *Id.* Using Brown's template, nullification emerges as a method of law interpretation—that is, jurors define law in the context of the particular cases they judge.

9. Although I am using the term nullification to describe juror consideration of the law, I recognize that the term itself is charged, suggesting an illegitimate act of defiance. This Article rejects that characterization of nullification, contending that when jurors judge law, they simply shift the process of creation and interpretation of law away from the formal branches towards the citizens themselves. Jurors do not destroy the law through nullification; instead they participate in its creation, pushing it to reinvent itself as a body responsive to their lived experiences. This shift preserves the law's legitimacy and was contemplated by the Founders as appropriate and necessary. See Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 662 (2012).

Like any discussion of nullification, mine comes with the uneasy recognition that nullification can create an interpretation of law that is in fact discordant with the governed's own perspective, whether on a local, state, or national level. One need look no further than the post-Reconstruction history of juries to realize that nullification became a tool of oppression and a mechanism of enforcing a particular social and political order. See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 167–86 (1998); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 145–52; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705 (1995); Carroll, *supra*, at 676; Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 122–24 (1996); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 935–48 (1999); Frank I. Michelman, *Foreword: "Racialism" and Reason*, 95 MICH. L. REV. 723, 733–34 (1997) (highlighting the dangers of race-based jury nullification). This Article does not attempt to jettison or overlook this history of nullification, but rather to recognize the potential power of nullification—to do good and bad—and to suggest that there are times when nullification can create a more responsive law. All this is not meant to suggest that nullification does not at times force the law away from the expectations of the everyday citizens with catastrophic results for already disenfranchised portions of the population. As will be discussed further, the challenge in resurrecting the jury's role as judge of law is how to harness the beneficial power of nullification while minimizing its potentially oppressive power. Such a discussion is touched on in this paper, but further discussion is beyond the scope of what can be accomplished in this Article.

Law is redefined not only in terms of the written words that compose it, but by the citizen's interpretation of those words. Under this new conception, law flows from both formal and informal sources, which include jurors engaged in nullification. This conception of law, and the rule of law under it, is not only a more accurate presentation of lawmaking in the American democracy; it also saves the rule of law as a theory by recognizing that the value of the law is not only in its predictability but also in its ability to be responsive to the citizens' own lives and to conform with the citizens' expectations and understanding of the law. In this, the rule of law jettisons some of its allegiance to a formalist construct of the law and adopts a more nimble conception that preserves the stability of the system as a whole. This in turn elevates the value of nullification within the democracy as a mechanism through which the citizens can voice dissent and exercise discretion previously reserved for more formal actors.

In proposing this novel construction of law and the rule of law, I begin in Part I with an exploration of the relationship between the rule of law as a theory and nullification in the criminal system. This analysis considers the history of nullification in the United States, from the Founders' original conception of juries as judges of fact and law to the eventual efforts to eradicate the right of jury nullification from the federal system. In this examination, I consider the significance of the nullification debate in the context of the larger debate surrounding the relationship between the citizen and his government. I argue that as support for nullification waned, so too did support for the citizen's role as a direct and active participant in governance and law creation.¹⁰ With this historical context in place, I consider in Part II the conception of law and the rule of law within theories of democracy and governance. As competing theories emerged, support for the citizenry as a legitimate source of law fell into question, and nullification was abandoned as a component of the rule of law.

In Part III, I conclude that this rejection of nullification as a source of law not only betrays the underlying principles of the theory but undermines the modern conception of law and the rule of law within our democracy. I propose instead a conception of the rule of law that recognizes the vital role that mechanisms of direct citizen construction of law, including nullification, can play within the democracy in preserving notions of justice and law that is truly cognizable to the citizenry. Limiting law creation and interpretation to the formal realms of government runs the risk of moving the law increasingly farther away from the

10. As will be discussed, there are certainly moments of departure from this general trend of the citizen adopting a passive role vis-à-vis the government. See *infra* note 272 and accompanying text. Social movements have relied on direct citizen action to force change from formal government sources. Likewise referendum movements and recall elections have promoted an active role for the citizenry at times of great disconnect with larger formal policies. Nullification does not replace these moments of direct citizen involvement—in fact it may promote it—but it does provide another mechanism of ensuring direct citizen involvement in formal government and lawmaking. See 2 *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 869–70 (Paul Finkelman ed., 2006) (arguing that the Civil Rights Movement was fueled at least in part by nullified verdicts).

citizen's own sense of what the law is and what it ought to be. When juries are given the authority to interpret the law, they open a dialogue between the formerly static construct and the ordinary citizen, creating a space for the individual citizen to create and interpret law. In this sense, the jury plays a role that members of the formal branches may be unable or unwilling to do: they construct law that is both public and predictable to the masses from which they are drawn. I am not suggesting that juries should displace the authority of formal bodies to create and interpret law, but rather that they act as a check in cases where the ideal of a knowable law has been displaced by an overly formal construct. In this sense, the jury, with its communal sense of law and justice, behaves in a manner consistent with the rule of law.

I. THE HISTORICAL PERSPECTIVE

As the Supreme Court continues to define the Sixth Amendment right to jury trial in historical terms, the question of the right to nullify lingers on the outskirts of the conversation. In recent cases, the Supreme Court has sought to revitalize the original role of the jury in the criminal justice system.¹¹ Indeed, the Court has repeatedly cited with favor examples of early criminal juries that decided both questions of law and questions of fact.¹² Thus, as the Court promises a return to the original notion of the criminal jury as the "great bulwark of [our] civil and political liberties,"¹³ it resurrects something else as well: the original notion of the relationship between the citizen and the government and the jury's role in that relationship. This original relationship stands in stark contrast to the citizen's relationship with the government today, and it

11. For various applications of originalism to different doctrines in criminal procedure, compare *Giles v. California*, 554 U.S. 353, 362–66, 377 (2008) (applying an originalist analysis to testimony and the Confrontation Clause), *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008) (same), and *Crawford v. Washington*, 541 U.S. 36, 42–51 (2004) (same), with *Jones v. United States*, 526 U.S. 227, 244–48 (1999) (applying originalism to verdict requirements), and *United States v. Gaudin*, 515 U.S. 506, 511–15 (1995) (same), and with *Oregon v. Ice*, 555 U.S. 160, 166–68 (2009) (relying on originalism to support expanding the jury's consideration of evidence that forms the basis for sentencing). *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (same), and *Apprendi v. New Jersey*, 530 U.S. 466, 476–85 (2000) (same). See also Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005) (commenting on the resurgence of originalism in the Court's criminal procedure jurisprudence); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1516–17 (2006) (noting the Court's recent reliance on originalism to define criminal procedure). Though the Court does not distinguish between what types of originalism it is seeking to apply, competing definitions of originalism abound. See generally Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (describing competing scholarly constructions of originalism).

12. See *Blakely*, 542 U.S. at 308 (arguing that it is inappropriate for courts to limit the roles of the juries because the Founders "were unwilling to trust government to mark out the role of the jury"); *Neder v. United States*, 527 U.S. 1, 30, 32 (1999) (Stevens, J., concurring) (endorsing the jury's law-interpreting function by noting that the Constitution allows juries to prevent judges from "interpret[ing] criminal laws oppressively"); *Jones*, 526 U.S. at 245–48 (discussing the jury's historical role as a check on government power).

13. *Apprendi*, 530 U.S. at 477 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

pushes against the fears that inevitably surface when one discusses nullification, particularly in the context of the rule of law.

This is not to say that originalism must be the only way to approach such questions. It has long been recognized that the Supreme Court invokes numerous modalities in interpreting and constructing constitutional meaning.¹⁴ Indeed, on other jury-related issues—such as the composition of criminal juries—the Court has departed quite significantly from the Founders’ original understanding, broadening juror eligibility and trying to prevent groups from being systematically excluded for improper reasons.¹⁵ There are sensible reasons for doing so. The ability of previously excluded groups to participate in various dimensions of our constitutional democracy has been explicitly codified by post-Founding constitutional amendments.¹⁶ In terms of interpretive methodology, then, there is no fundamental inconsistency in approaching the composition of the jury (which has properly evolved as conceptions of citizenship evolved) differently from what the jury—however constituted—gets to decide. On that latter issue, the Supreme Court has been clear that it will follow the Founders’ original understanding.¹⁷

14. See JACK M. BALKIN, *LIVING ORIGINALISM* 3–4 (2011); PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 10–13 (1991) (suggesting different modalities of interpretation including historical and textual modalities that consider the intent of the founders); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 628–29 (1999); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 *TEX. L. REV.* 1753, 1753–55 (1994); LAWRENCE B. SOLUM, *Should We Be Originalists?*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* (2011).

15. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986) (holding that members of insular minority groups could not be systematically excluded from juries); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (expanding the right to jury participation beyond original conceptions to include women).

16. See U.S. CONST. amend. XIII (altering the definitions of citizenship); U.S. CONST. amend. XIV (same); U.S. CONST. amend. XIX (same).

17. In interpreting the provisions of the jury right in the Sixth Amendment, an alternative possibility is to view this jury right as a “rule,” akin to Balkin’s analysis of the rule that the President must be a native-born U.S. citizen at least thirty-five years of age who has lived in the United States for at least fourteen years. See BALKIN, *supra* note 14, at 45–46. It requires no interpretation; the text speaks for itself. At the time the text was written, the term “jury” referred to a body of selected individuals that would consider both questions of fact and questions of law, just as the terms of eligibility for the presidency referred to natural-born citizens who were at least thirty-five years of age and who had lived in the United States at least fourteen years. U.S. CONST. art. II, § 1, cl. 5. Whatever questions existed surrounding who could be a citizen (and so a juror or the President) or other nuances of the positions did not undo the basic understandings of the terms. Certainly both concepts have undergone an evolution as definitions of citizenship have shifted either by amendment or by social norm, but the basic premise of what these terms meant and continue to mean was self-defining at the moment those words were put to paper. To be elected President of the United States, a candidate must be a person who is a natural-born citizen at least thirty-five years old; similarly, in criminal matters, one is entitled to a jury trial.

As seductively persuasive as this analysis may be, it is problematic. Unlike the terms of presidential eligibility, the right to trial by jury has undergone years of reinterpretation and modification both by the courts and by the other branches of government. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543–44 (1989) (holding that there was no constitutional right to a jury for criminal matters punishable by imprisonment of six months or fewer); *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970) (same); *Frank v. United States*, 395 U.S. 147, 148 (1969) (same); see also John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trials*, 15 *HARV. J.L. & PUB. POL’Y* 119,

An exploration of this original relationship suggests that nullification is a vital component of democracy and its lawmaking function because it allows for an alternative definition of what the proper sources of law are and, even more fundamentally, what the law is. In this, the prospect of a jury deciding questions of law is consistent with the rule of law within the American democracy. The jury, with its original power to reject (or nullify) laws it finds discordant with the lived experiences of the citizenry, emerges not as a scourge of the rule of law within the democracy but rather as a bridge between the governed and the law, and as a source of the law itself. This proposition stands in direct contradiction to the Supreme Court's characterization of the nullifying jury in century-old cases such as *Sparf*¹⁸ and *Horning*.¹⁹ In short, the Court's recent holdings on the role of the jury resurrect a distant memory of the criminal jury that promoted the rule of law within the democracy by creating a mechanism to ensure individual liberty while checking the government when it overstepped its proper authority or when it created law that was inconsistent with the citizen's notion of what the law ought to be. In this historical role, the jury serves as a counterspace to the realm of formal government—one where the law is interpreted, applied, and recreated by the very citizens who live under its control. In the confines of the jury room, nullification reemerges as a mechanism of voice for jurors who seek to imagine a law consistent with their lived values and as a mechanism of exit for defendants who seek to challenge the state's demand for wholesale obedience in the face of all other value systems.

There is little question that the Founders valued the jury not only as a safeguard of individual liberty but also as a political mechanism.²⁰ Among the

119–20 (1992) (describing limitations on the right to jury trial in criminal matters). Setting aside the formalistic alterations, which I discuss below, the original functional notion of the jury as a citizen body considering questions of both law and fact as a check on government power is foreign and even rogue to our modern vision of the institution. Indeed the Court's admonition in the *Crawford* and *Apprendi* case line to revive the historical jury role would hardly seem necessary if that role had achieved the constancy that presidential eligibility had achieved. *Crawford v. Washington*, 541 U.S. 36, 42–56 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Another possibility, therefore, is that the right to trial by jury requires some level of interpretation because the text itself carries a meaning more obscure than the calculation of a person's age or place of birth.

18. The Court addressed the question of the jury's right to consider questions of law in *Sparf v. United States*, 156 U.S. 51 (1895). In Justice Harlan's opinion, the 5–4 Court 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.” *Id.* at 102. The Court concluded—in federal court at least—that questions of law were the province of judges alone. *Id.* The decision, controversial at the time, warned that nullification threatened the rule of law because juries were “untrained in the law” and were not bound by fixed legal principles as the professional bar and judiciary were. *Id.* at 101–02. As a result, if jurors were permitted to determine questions of law and fact, they would return inconsistent verdicts that were motivated more by local passion than by adherence to the law itself. *Id.* at 74.

19. The Court revisited the question of nullification in *Horning v. District of Columbia*, 254 U.S. 135 (1920). In *Horning*, the Court upheld *Sparf*'s position that jurors should not consider questions of law and should be confined to consideration of the facts. *Id.* at 138.

20. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 233–42 (2005) (discussing the Founders' vision of the jury and their endorsement of the right to nullify as a means to check the power of the government).

grievances that the colonists lodged against the English Crown was the suspension or denial of their right to be tried by jury.²¹ To the Founders and the colonists, the criminal jury served a political, even lawmaking, function.²² It was more than an opportunity to sit in judgment of the facts of a particular case; it was the last protection of liberties in the face of an oppressive government.²³ The jury did more than signify the possibility that a citizen could check the power of government; it was that check.²⁴ The notion, heralded by the current Supreme Court, of the criminal jury as a “guard against a spirit of oppression and tyranny on the part of rulers”²⁵ was integral to the Founders’ and the colonists’ conception of the power of the criminal jury.²⁶

The American Revolution itself was steeped in a story of the jury as a moment of direct citizen check on the oppressive power of the government.²⁷ In the years preceding the revolution, colonial juries “functioned as resistance bodies,” refusing to convict or indict political and religious dissenters.²⁸ In this way, juries sent a message to the Crown regarding which laws and customs the

21. The Declaration of Independence listed as one of its grievances the King’s “depriving us . . . of the benefits of Trial by Jury.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). By the time the Sixth Amendment promised the right to a jury—fifteen years later—the notion of an active jury was firmly entrenched in the post-Revolutionary psyche.

22. See 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 5 (L. H. Butterfield ed., 1961) (describing the role of the jury as providing a space for the citizen’s conscience to influence and create law).

23. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342 (11th ed. 1791).

24. See THE FEDERALIST NO. 83, at 558, 564 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that whatever misgiving one might have about the criminal jury that “the trial by jury must still be a valuable check upon corruption”); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (Richmond, J.W. Randolph ed., 1853) (stating that the best hope for the citizenry lies with the citizen jury rather than the government that might seek to curtail citizens’ rights); Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 388 (2004) (“Revolutionary colonials refused to define law as an instrument of the state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves.”).

25. *Appendix v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, *supra* note 13, at 540–41).

26. See Carroll, *supra* note 9, at 673.

27. See *id.* 670–75.

28. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL DEMOCRACY 22–24, 68–75 (1994) (discussing the history of the development of the jury in colonial America as a political institution). One need look no further than the 1735 trial of publisher John Peter Zenger to realize the catalytic power of the jury as a voice of rebellion. See generally JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., 1963). Accused of seditious libel for criticizing the royal governor, Zenger’s counsel argued in part that the jury ought to acquit him not because of his factual innocence but because of the suffocating effect of a libel law that criminalized even truthful criticism of the government. *Id.* at 95–96. With this argument, Zenger’s trial was recast from the singular factual inquiry that the judge urged to a bulwark of individual liberty in the colonies. *Id.* at 96. That the verdict of not guilty became a rallying cry for the revolt against the Crown should have come as no surprise. In a system that sought to exclude all dissent, its very existence became a touchstone of freedom and resistance. See Alschuler & Deiss, *supra* note 8, at 874 (noting that colonial juries consistently refused to convict fellow colonists accused of libel as a mechanism of protesting the oppressive rule of the colonial government); see also LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 17 (1985) (noting the role of libel trials in shoring up support for the revolutionary ideal). This phenomenon among colonial jurors was not lost on the

colonies would tolerate and which were so inconsistent with their own sense of the roles of government and the law that juries refused to enforce them even in the face of overwhelming evidence of violation.²⁹ To these citizens, the law was constructed not only in the formal realms of government, but also in the citizen's interpretation and acceptance of the law. The meaning of the law did not reside in the text³⁰ alone but also in the lived experiences of the people whom the law affected and whose behavior the law purported to govern. As jurors, these chosen citizens engaged in acts of interpretation conferring or rejecting the authority in the law based on its ability to reflect their values and larger sense of community norms. Laws that confounded these ideals were reinterpreted or rejected by the people themselves as they rendered verdicts that affirmed or nullified the law. In doing so, juries conferred a meaning in the law previously absent by driving the law beyond its prescriptive limitations towards a descriptive construct. In these moments of interpretation, case by case, they sought to recreate the law to reflect their own values and their own sense of governance. No doubt this process may have been truncated by the apparent authority of the formally constructed law or by the failure of the community's ability to coalesce around a single set of values. There is, after all, a power even—or perhaps especially—among revolutionaries in formally constructed law. Likewise, notions of justice are hardly objective or universal, even—or perhaps especially—those forged by revolutionary ties. To engage in an act of nullification, as opposed to mere jury hanging, the jurors must find a common ground in their interpretative process that rejects the formal constructs of law and forges a new interpretation. This is no small task and, as will be discussed further later, was and is a relatively rare occurrence in the larger machine of the criminal justice system. But this singular moment of transformational process embodied in the citizen's interpretation of the law—the citizen simultaneously imagining what the world was and what it could or should be—created the possibility to make the law whole and granted it an authority and legitimacy among the constituency that may have been previously absent.

In enshrining the right to criminal jury trials in Article III³¹ and the Sixth Amendment,³² the Founders understood this right to include a citizen's right to interpret law and to nullify it.³³ The Founders' inclusion of the right to decide questions of law in turn sanctified a particular relationship between the citizenry

Crown; England, in response, extended the jurisdiction of admiralty courts, which sat without juries, to hear libel cases. See Alschuler & Deiss, *supra* note 8, at 875.

29. See Carroll, *supra* note 9, at 670.

30. Here, I mean text broadly—either written codified law or law created by some formal body (including the court in a common law system).

31. U.S. CONST. art. III, § 2.

32. U.S. CONST. amend. VI.

33. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 157–58 (2004); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 584–85 (1939) (describing all Founding Era juries as having the right to decide questions of law and of fact); see also ABRAMSON, *supra* note 28, at 30–31, 37, 63–64, 75–76; Harrington, *supra* note 8, at 396.

and the government, of which the jury was an integral part. The right of nullification recognized that the rule of law in the new democracy depended on the citizenry to check the power of government.³⁴ The role of the citizen was an active one.³⁵ The government created laws because the people granted the government the power to do so, and the people accepted the laws and policies that power produced.³⁶ The government was not only representative of the people but directly responsive to them. In moments when the government had exceeded its power, the jury offered a limited check and could signal the need for a larger movement towards reform.³⁷

This is not to say that the jury was the only mechanism to check the government or that juries, with their verdicts, somehow controlled the day-to-day functions of the formal branches of government. But it is to say that early notions of the democracy envisioned a citizenry that actively checked the government in its midst, and jury nullification was integral to that vision.³⁸ This conception of government checked directly by the people depended on a particular notion of the law itself—one in which the law sprang from the people themselves and was subject to not only their acceptance or recognition of it but also their interpretation and recreation of it.³⁹ Tucked among the formal branches of government, with their order and uniformity and knowable law, was this underlying notion: at moments when the law, either in application or interpretation, strayed so far from the citizen's own conception of it, there were mechanisms of response that allowed for direct and unfiltered citizen critique of the

34. See James Madison, Public Opinion (Dec. 19, 1791), in 14 THE PAPERS OF JAMES MADISON 170 (Robert A. Rutland et al. eds., 1977) (describing the role of the citizen in the newly formed government as a check on oppressive rule); James Madison, Charters (Jan. 18, 1792), in 14 THE PAPERS OF JAMES MADISON, *supra*, at 192 (noting that liberty is only safe when the public keeps a constant and watchful eye on the government).

35. See Colleen A. Sheehan, *Madison's Party Press Essays*, 17 INTERPRETATION 355, 357, 371 (1990); Colleen Sheehan, *The Politics of Public Opinion: James Madison's "Notes on Government,"* 49 WM. & MARY Q. 609, 618–19 (1992) (describing Jefferson's, Madison's, and other Republicans' admonitions that the citizens must remain active in the new democracy and that the power of government flowed from the people).

36. See Madison, Charters, *supra* note 34, at 192 (describing the people as the guardians of liberty and government as their designated agents); see also ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 102 (2012) (noting that in a democratic system, the formal decision makers are agents of the citizen's delegated power).

37. See Butler, *supra* note 9, at 705 (arguing that jury nullification is and can be a powerful tool for checking Executive Branch abuses and curbing improper or problematic prosecutorial discretion).

38. See Carroll, *supra* note 9, at 668–75 (describing the role that nullification played in the Founders' vision of governance). The right to a jury is the only right present in both the body of the Constitution and the Bill of Rights. See U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."). Despite other quarrels at the time of ratification, the Founders were unified in their belief that a robust jury system was required as a vital component of the democracy. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991).

39. See KRAMER, *supra* note 33, at 157–58 (chronicling the Founders' early visions for direct citizen involvement in law creation and interpretation).

law, even if only on a small scale. Under this system, the citizens did not have to “mob” to change the direction of governance.⁴⁰ A less radical critique was available in the form of jury review of the meaning of the law itself.⁴¹

In those moments of unfiltered contact between the citizen and the government, the accused could look to his fellow citizens to correct the failings or overzealousness of the formal branches.⁴² The jury, isolated in its construction and impact, was a last opportunity to check the oppressive power of government and to force an accountability that might otherwise be absent from the law and the government itself. Alexis de Tocqueville, in describing early juries in the postcolonial United States, argued that they were political—not just judicial—institutions and as such, were vital to the democracy.⁴³ He warned:

To look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large. The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.⁴⁴

De Tocqueville recognized that this vision of the jury placed the power of the democracy directly in the hands of the governed, “instead of leaving it under the authority of the Government.”⁴⁵

De Tocqueville’s characterization of the criminal jury in early America is akin to that given by Alexander Hamilton, who noted that although there were many contentious points during the Founding, the embrace of an active and political criminal jury was not one of them.⁴⁶ Describing the early debates on government, Hamilton wrote:

[I]f they agree in nothing else, [the Founders] concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.⁴⁷

40. See *id.* (describing direct democracy in the form of mass citizen protest which forced alteration of laws that the people found unjust or unresponsive to their own needs).

41. See DeWolfe Howe, *supra* note 33, at 615–16 (noting that when the judiciary curtailed the rights of juries to consider questions of law in criminal cases they defeated “the people’s aspiration for democratic government”).

42. See Butler, *supra* note 9, at 715 (calling for juries to resume the role of monitoring prosecutorial discretion); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 *YALE L.J.* 895, 899 (2004) (citing early examples of juries curtailing executive enforcement of law).

43. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 281 (Henry Reeve trans., Lawbook Exchange ed. 2003) (1883).

44. *Id.*

45. *Id.*

46. See THE FEDERALIST NO. 83, *supra* note 24, at 562.

47. *Id.* (referring to federalist and republican/antifederalist-leaning Founders).

If one adopts this perspective of the jury as a political actor and “the spinal column of American democracy,”⁴⁸ two notions emerge. The first is that the right to trial by jury should be viewed not only as an individual right of the accused but also as a collective right of the citizenry.⁴⁹ But there is also a second, more complex possibility. The identification of the jury as a political body hinges on the acceptance of a particular type of relationship between the citizen and the government and the law itself. This latter notion is complicated by what appears to be the Founders’ own competing visions for the democracy.⁵⁰

As the nation grew and the potential for national consensus seemed anything from problematic to impossible,⁵¹ notions of the democracy and the relationship between the citizen and government shifted, as did the conception of the proper role of the jury. As the current Court struggles to revitalize an originalist role of the criminal jury, questions about democracy and the conception of law inevitably follow. To determine what role jury nullification has in either the originalist vision of the jury or the oxymoronic, but perhaps ascendant, *modern* originalist vision of the jury, we will have to look back to the two eras of “originalism”: the post-Revolution Era and the Reconstruction Era. This examination will admittedly be limited in scope; it seeks to tell a small part of the larger story of the evolution of the relationship between the citizen and the government in the American democracy with an eye towards placing the jury at the center of the narrative.

A. THE FOUNDERS, THE DEMOCRACY, AND THE JURY

To try to construct a notion of original meaning today is no small task.⁵² Although there is some record of the Founders’ vision of the country they sought to create, this record hardly supports a single conception.⁵³ Instead, any

48. *Neder v. United States*, 527 U.S. 1, 30, 32 (1999) (Scalia, J., concurring in part and dissenting in part) (noting that the Founders viewed the jury as a vital mechanism because of their “healthy suspicion of the power of government”).

49. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *IND. L.J.* 397, 398 (2009).

50. Debates between the Federalists and the Republicans raged after the Revolution and challenged notions of the appropriate role of the government and the citizenry it controlled. See BENJAMIN RUSH, *On the Defects of the Confederation* (1787), in *THE SELECTED WRITINGS OF BENJAMIN RUSH* 26, 28 (Dagobert D. Runes ed., 1947) (describing the Federalist position in the 1790s that citizens were subject of the government, playing a role only as electors at a designated time); James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 *U. CHI. L. REV.* 117, 166–69 (1999) (same); see also James Madison, Speech in Congress on “Self-Created Societies” (Nov. 27, 1794), in *JAMES MADISON: WRITINGS* 552 (Jack N. Rakove ed., 1999) (articulating the Republican view that citizens should hold power over the government at all times and not be mere subjects).

51. See, e.g., *THE FEDERALIST* NO. 10, *supra* note 24, at 63 (James Madison) (discussing, in the context of creating congressional districts, the challenges of the growing democracy in terms of consensus building and the risks of ad hoc decision making at a local level).

52. See generally, e.g., Berman, *supra* note 11; Thomas B. Colby (discussing competing versions of originalism) & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009) (same).

53. See *supra* note 50.

discussion of originalism must consider competing notions of the democracy and the law that would flow from it.⁵⁴ As the early debates surrounding the nature of government and its locus raged, there were certainly some moments of consensus (such as over the role of the jury discussed above⁵⁵), but there was also a sense that the emergent republican democracy would vest primary power for governance and the source of the law's meaning directly in the people.⁵⁶ In this world, the "business" of governance might well be accomplished by the formal government, but that government drew its authority from the citizens, who at any moment could reject the government's interpretive claims and force a new meaning on and from the law. To talk about the democracy or the law as "originalist," then, requires a reimagining of the Constitution as a document whose meaning was meant to be controlled by the community at large, even as it was created by an elite that was skeptical of the masses' abilities to understand and protect their own rights.⁵⁷

The history of the democracy and its creation seems to encompass an internal struggle between wanting the people to reign supreme in the most literal sense and questioning the ability of the populace to engage in the business of governance.⁵⁸ Nowhere is this more evident than in the judicial branch. Whether

54. See AMAR, *supra* note 20; Larry D. Kramer, "The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697, 712–13 (2006) (discussing the Founders' struggles to define the proper role of citizens in the emergent democracy); see also *supra* note 50.

55. See *supra* notes 20–47 and accompanying text.

56. See KRAMER, *supra* note 33, at 157–58; THE FEDERALIST NO. 51, at 349 (James Madison) (noting that "[a] dependence on the people is no doubt the primary controul on the government" with formal government serving as "auxiliary precautions").

57. Even this characterization is tricky. As will be discussed in more detail, citizens eligible to fill the role of the "check" on government—whether as jurors or part of the larger electorate—were themselves an elite and exclusive bunch. See Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1536–51 (2004) (describing Madison's acceptance of the republican form of democracy in part because of concerns regarding the common citizenry's ability to engage in the hard project of governance). The Court itself has recognized the systematic exclusion of certain groups from jury selection or eligibility and the effect such exclusion can have on verdicts. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 413–14 (1991) (noting that when groups are excluded from jury selection, verdicts may fail to represent community values and may be viewed as less legitimate). More recent studies confirm that such exclusion continues, particularly in the highest stake criminal cases. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4–6 (2010), available at <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>. The Founders might have been comfortable with the notion of jurors deciding questions of law in no small part because those who would sit as jurors were not dissimilar to those who would serve in formal government. See Alschuler & Deiss, *supra* note 8, at 914–16 (noting that restrictions on juror eligibility in post-Revolutionary America would have ensured the construction of a limited body of juror-interpreted law that was likely consistent with existing common law); Carroll, *supra* note 9, at 701.

58. To the Federalist, reliance on the citizenry for governance was a risky proposition. They instead envisioned citizens as the subjects of an elite government that could dictate daily conduct and construct larger policies. See RUSH, *supra* note 50 at 26; Martin, *supra* note 50, at 166–69. But even the Republicans envisioned a government of the elite guiding the people. See Madison, *Notes for the National Gazette Essays* (ca. Dec. 19, 1791–Mar. 3, 1792), in THE PAPERS OF JAMES MADISON, *supra* note 34, at 157, 160 (describing those elected—or appointed, in the case of the courts—to government

judicial supremacy is inconsistent with the original or founding notions of the democracy is far from settled.⁵⁹ To be sure, the Founders spoke extensively of the final authority for the interpretation of the law as resting with the citizenry, but they also created a judicial branch that, at least on a federal level, stood apart both from the citizenry and from the other branches of government.⁶⁰ It was not subject to the whims of the populace in the same way that the executive or legislative branches were. It was not elected and, save the rarity of impeachment, judges enjoyed life tenure.

The support for this type of judicial branch even among ardent supporters of republicanism need not be that mysterious. It rests on the realization that there is a distinction between law and politics. So while under an originalist perspective the people may control the ultimate meaning and mechanisms of the law, the judiciary may serve as a buffer between the needs of the few and the demands of the many, ensuring that the law and the Constitution itself emerge as constants that persist above, and at times despite, popular sentiment.⁶¹ This idea of a buffer should not be confused with judicial supremacy, but it may well be realized through a claim of supremacy. That is, the people may ultimately reject the interpretation of the judiciary as contrary to their own values, and they

positions as a form of *literati* that would serve to educate the public and in the process shape public opinion). Even as Madison spoke of the government as being directly accountable to the people, he conceived of the government itself as an elite body that could help drive the public opinion to which it was accountable. *See id.* at 160; *see also* Madison, *Public Opinion*, *supra* note 34, at 170 (arguing that where public opinion is “not . . . fixed, it may be influenced by the government”).

59. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 8–10 (2001) (arguing that true originalism mandates that authoritative legal interpretation occur not only in the courts, but can be undertaken by the other political branches and the community at large).

60. *See* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the judiciary must serve as a check on the elected branches not only to guard against potential local prejudices but to ensure that the elected representatives did not “substitute their will [for] that of their constituents”); 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA, app. at 355 (Philadelphia, William Young Birch & Abraham Small 1803) (describing the establishment of an elite and independent judiciary); Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 116 (2012) (describing the concept of judicial review as a mechanism to separate the judiciary from the common citizen); *see also* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (discussing the elite position of the courts and their authority to exercise judicial review with impunity and in the process to uphold or strike down laws); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 115 (1986) (describing the power of judicial review); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) (noting the need for independence in the judicial branch as a mechanism to check localism); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1253 (2002) (noting that the Founders recognized the importance of an independent judiciary, even if this judiciary undid legislative goals: “even the Founders understood that judicial interpretation often would require independent judgment rather than rote obedience to legislative instructions”); Norman R. Williams II, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 985 (1994) (arguing that a judiciary that was removed from the citizenry was less likely to succumb to local bias).

61. *See* Kramer, *supra* note 54, at 743–44; Michelman, *supra* note 60, at 67.

may still reinterpret and reinvent the law in contrast to judicial edict.⁶² But such moments of citizen challenge to the judiciary are unlikely to occur on a daily basis and are unlikely to present in the form of mass uprising. In the majority of circumstances, the people's mechanism for rejecting the judiciary's interpretation may well be through the formal government branches themselves. For example, the citizens may elect a new executive or legislature that modifies the law itself in order to overturn a judicial decision or appoints judges and justices more attuned to their views.

But on some level, this explanation seems dissatisfying. It makes sense that in relying on "the people" to control the meaning of the law, the Founders (or at least some of them) feared that the society would collapse in on its own divergent, and often ignorant, views.⁶³ Their attraction to republicanism lay in no small part in the hope that elected representatives would bring to the government elite virtues that the populace as a whole could not.⁶⁴ The people's decisions (and passions) could be tempered through a carefully constructed government that would represent their interests with dispassion and check their factionalism with compromise.⁶⁵

One possibility is that at the end of the day the Founders did not trust the people and so wanted the elite to rule—whether elected as executive or legislators or appointed as a member of the judiciary.⁶⁶ But another possibility is that the Founders feared that if left to their own devices, the populace might never get to the weighty business of running the government. In other words, it was not that the Founders sought to wrest control of the law and government away from the citizenry with the creation of the formal branches; rather, they set up mechanisms to preserve the citizens' right to contest the authority of the government and to demand change during times when the government and the law it created veered too far afield of citizens' lived experiences and expectations of the law.⁶⁷ Some of these mechanisms lay in the powers and election of the formal government itself, but there were also means to check the power of

62. See *infra* notes 226, 272 and accompanying text.

63. See *supra* note 58.

64. See THE FEDERALIST NO. 10, *supra* note 24, at 62, 64 (noting that by requiring the election of representatives chosen by the majority the most "virtuous" were likely to gain office and power in the democracy).

65. See THE FEDERALIST NO. 49, *supra* note 24, at 339 (James Madison).

66. See RUSH, *supra* note 50, at 28 (arguing that the people should only be permitted to elect government but that the business of governance should fall to the elite).

67. This second description of the relationship between the people and elected government is repeated throughout the *Federalist Papers*. See, e.g., THE FEDERALIST NO. 51, *supra* note 24, at 349 (noting the people provide "primary controul on the government"); THE FEDERALIST NO. 49, *supra* note 24, at 339, 343 (stating that "the people are the only legitimate fountain of power" and it is "the people themselves: who, as the grantors of the [Constitution], can alone declare its true meaning and enforce its observance," and "it is the reason of the public alone that ought to controul and regulate the government"). *Federalist No. 49* noted that despite this power of the people, a system of representation was the only way to ensure smooth daily functioning of government, reserving the need for direct popular rejection of government to "certain great and extraordinary occasions." THE FEDERALIST NO. 49, *supra* note 24, at 339.

the government that were not dependent on the government for their very existence. From mobbing to jury nullification, these mechanisms of critique were more nimble, less formal, and vital to the Founders' conception of the democracy. They were reminders that ultimately, the citizens control the meaning and construction of law in the democracy. In this active role, they need not seek government permission or even move within the formal corridors of power to realize their power. To speak of the Founders' "original" conception of law or government during this period immediately following the revolution, is to speak of a government actively, and at times directly, controlled by the citizen.

This conception of the citizen's power is worth lingering on a moment longer. First, it should not be surprising. The Founders' conception of democracy and governance was influenced by their all-too-recent experience of the power of a distant, unresponsive, and unsympathetic ruler. The very decision to "revolt" signaled a rejection of the ordinary channels of power in favor of a self-determinist bent that elevated individuality over blind obedience and conformity, even if that obedience and conformity was steeped in history and offered some stability even in its oppression.⁶⁸ What would the revolution have been if it only replaced one top-down system of government with another?⁶⁹

This raises a second key component of this conception of government: the government as a placeholder for the people. The government itself was not conceived of as the source of policy but the conduit of the people's will. Although the formal powers of lawmaking may have lain with the elected and appointed government actors, the meaning of the law—and indeed the validity of the law—came from the people themselves.⁷⁰ The people were not the passive recipients of the government's exercises of power or interpretation of the law; they were the source of that power and interpretation.⁷¹ Although they may not have written the law, citizens accepted or rejected it in the context of their own lives, thereby transforming it from a static set of writings to a living, responsive body.⁷²

This raises the third critical point in my concededly oversimplified version of the Founders' democracy: there might be functions or even policies that the people cede to the formal government on a regular basis.⁷³ Their day-to-day

68. See DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 265 (1962); Kramer, *supra* note 54, at 727 (describing the Revolution's embrace of a construct of government at odds with British constitutional tradition).

69. Admittedly, within the construction of the citizen-driven government, the Founders disagreed on the proper place of direct citizen rule, but all theories, even those espoused by Federalists, acknowledged the power of a citizen-elected government. See *supra* note 58.

70. See KRAMER, *supra* note 33, at 157–58.

71. See *id.*

72. See Carroll, *supra* note 9, at 694–96.

73. See GREENE, *supra* note 36, at 46 (arguing that society cannot function with literal self-government and therefore must adopt republican models that cede individual power to the collective); ALAN RYAN, *ON POLITICS: A HISTORY OF POLITICAL THOUGHT FROM HERACDOTUS TO THE PRESENT* 35 (2012)

interactions with the law might well be passive and accepting. But in moments when the law and the citizens' experience diverged, the Founders' expectation was that the citizenry could react and change the law or its meaning through their direct action.⁷⁴ Jury nullification was both a critical first responder and a backstop when law became discordant with lived experiences.

B. RECONSTRUCTION AND THE CITIZENRY: LAW, CITIZENSHIP, AND COMPROMISE

At some point after the Founding era, the notions of the government and of the citizen's relationship to the government shifted. The ideal of the citizenry lending meaning to or outright rejecting the law shifted toward a top-down conception of lawmaking, where the citizens received and obeyed the law as produced by the government they elected or witnessed appointed in their names. The space between the law and the citizen expanded while the space to protest or reject the law contracted. Certainly in the years following, some forms of protest persevered (mainly because some sentiment is impossible simply to legislate away or to order into submission). Citizens exercised First Amendment rights even in the face of antiseditious statutes or antilibel statutes⁷⁵ and juries nullified even in the face of *Sparf* and *Horning*,⁷⁶ but these decisions had a fundamentally changed meaning because the citizens' relationship with the government had changed. The citizen no longer made the law; the government did, and citizens could choose between obedience and punishment. Our very concept of citizenry was altered so that our role was no longer to check the power of government but to live obediently in the glow of its benevolence.

There has been some debate over the source or moment of this shift; one candidate is the ratification of the Fourteenth Amendment, which signaled the formalization of a fundamental change in the conception of government and citizenry and, therefore, our concept of originalism. Accepting the Fourteenth Amendment as the catalyst for the shift raises questions, however. First, is it possible (or realistic) to talk about originalism post-Reconstruction? Should we be instead talking about a modern conception of the constitutional democracy and its conception of law? Second, to the extent that we are seeking some return to pre-Reconstruction originalism, how should we cope with the challenges of the modern era?

(noting that democracies inevitably move towards delegating power to an elite and away from the general population because the operation of the government itself, whether on a local, state, or national level, simply consumes too much energy to allow the citizenry to accomplish anything else if they are expected to participate directly in all government decisions).

74. See *supra* notes 41–47 and accompanying text.

75. See ABRAMSON, *supra* note 28, at 75.

76. See CONRAD, *supra* note 9, at 11 (describing the changing role of jury nullification); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 115 (1966) (chronicling juror nullification); Butler, *supra* note 9, at 681–84, 721 n.225 (describing the potential political power of jury nullification, especially in modern times); W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1088–90 (1996) (discussing the democratic potential of jury nullification as a mechanism to bring about systematic change).

Much has been written about the significance of the periods leading up to and following the Civil War. I do not intend to re-analyze the history others have covered so eloquently. But some key points are worth revisiting. As the country shifted away from revolution to a more permanent reality, concepts of governance and the law also shifted. As we sought to define ourselves as a nation, our idea of law moved. Founded on an ideal of natural law where each man was able to know the law by his own sense of morality, we quickly evolved into a nation of positive law and compromise.⁷⁷ Formal government, with its endless balancing of competing local, state, and national interests, became the source of the law.⁷⁸ Likewise the practice of law and judging became professionalized and formal, further removing it from the realm of the common man.⁷⁹

Our concept of government itself changed as well quickly after the revolution. As the federal government asserted more power, the tide of federalism turned and there was a corresponding movement toward state-centered governance.⁸⁰ If the push toward states' rights was designed to ensure the preservation of local interest that might be lost in a larger federal compromise, these stakes are evident in the debate over whether or not criminal juries had the right to decide questions of law. By the 1830s, federal judges, particularly Supreme Court Justices riding circuit, began to instruct juries that they were not entitled to interpret law but that their role was limited to that of fact finders.⁸¹ State court practice was more mixed, though many state courts had begun to follow

77. See Alschuler & Deiss, *supra* note 8, at 906–07 (describing a shift away from natural law towards codified law); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *COLUM. L. REV.* 547, 566–67 (1993) (same).

78. See, e.g., *United States v. Polizzi*, 549 F. Supp. 2d 308, 421 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142 (2d Cir. 2009) (describing the shift away from natural law towards a codified law supplied increasingly by formal government bodies).

79. *Id.* (describing the rise of the professional bar and class of professional judges).

80. Perhaps this shift was constant (or for some, was no shift at all). The debates surrounding the Constitution are rife with arguments promoting and decrying federalism. The Ninth and Tenth Amendments to the Constitution are lasting tributes to the split between those who sought to promote a strong central government and those who sought to empower the state governments and the people themselves. See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *TEX. L. REV.* 331, 379 (2004).

81. See DeWolfe Howe, *supra* note 33, at 588–90. Justice Baldwin, who had previously allowed jurors to consider questions of law, refused to permit juror consideration of the constitutionality of the United States Bank's charter. *United States v. Shive*, 27 F. Cas. 1065, 1066–67 (C.C.E.D. Pa. 1832) (No. 16,278). Likewise, Justice Story, riding circuit in 1835, instructed juries sitting before him that “[i]t is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.” *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).

Although the Supreme Court did not weigh in on the matter until 1895, by 1868, federal courts were consistently holding that jurors were not allowed to decide questions of law. See, e.g., *United States v. Riley*, 27 F. Cas. 810, 812 (C.C.S.D.N.Y. 1864) (No. 16,164); *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863) (No. 15,254); *United States v. Morris*, 26 F. Cas. 1323, 1335 (C.C.D. Mass. 1851) (No. 15,815); *Stettinius v. United States*, 22 F. Cas. 1322, 1327 (C.C.D.D.C. 1839) (No. 13,387).

their federal counterparts.⁸² In the face of this curtailment of citizen rights, state legislatures pushed back, codifying the right of juries to consider questions of law by statute or within their state constitutions.⁸³

In the struggle between the courts and the legislature to define the jury's power, several themes emerge. First, the curtailment of the jury's right to consider questions of law was "entirely a judge-led exercise, carried out without legislative warrant and sometimes in the face of legislative enactments to the contrary."⁸⁴ Second, this judicially driven transfer of power away from the people toward a more elitist vision of government and the law was constructed by the judges themselves, with little consideration to the constitutionality of the decision or its effect on the citizen's relationship with the government.⁸⁵ Instead, the judiciary identified nullification as a growing and insidious threat to the democracy because it threatened to undermine the increasingly uniform and national construction of law.⁸⁶ Judges and lawyers cited the increasing professionalization of law as a justification for altering the original power of the jury.⁸⁷ They argued that the good of the nation demanded a stable and uniform construction of law that could only be realized by eliminating the law-interpreting power of the jury.⁸⁸ The power to interpret law, they argued, must rest with the judiciary in order to achieve the certainty in the law that the growing nation demanded.⁸⁹ Proponents justified this shift in democratic powers away from the citizens to the unelected judiciary because they reasoned that the laws had already been democratically enacted through the people's chosen representatives. Thus the need for the jury to serve as the guardian of liberty

82. See WHARTON, *supra* note 8, §§ 3100–01, at 1120–21 (counting, in 1857, eleven states that barred nullification, five that allowed it, and offering no insight to the practice of the remaining fifteen); see also JOHN PROHART, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT §§ 377–81, at 441–45 (Sumner Whitney & Co. 1877) (making a similar study for 1876 and finding thirteen states that barred nullification, six that allowed it, five that had unclear rules, and providing no information about the other thirteen). It should be noted that some state courts still strongly defended the jury right to nullify even during Reconstruction. See, e.g., *State v. Buckley*, 40 Conn. 246, 249 (1873); *Brown v. State*, 40 Ga. 689, 697–98 (1870); *Withers v. State*, 1 Shannon 276, 282 (Tenn. 1874).

83. See, e.g., IND. CONST. art. 1, § 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 (superseded 1864). Initially, as judges sought to curtail the right of juries to decide questions of law, legislatures fought back and impeached. Judge Alexander Addison was removed from office in Pennsylvania after he tried to prevent jurors from deciding questions of law. See Harrington, *supra* note 8, at 417 & n.187. Likewise, Justice Samuel Chase's refusal to allow juries to determine questions of law were among the grounds cited by the U.S. House of Representatives in impeachment proceedings. REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE App (1805). Despite this opposition, the nineteenth century saw a "clear and overwhelming trend, in both federal and state courts. . . to disallow nullification" and a growing trend among states to disallow it. Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1158 (2011).

84. Harrington, *supra* note 8, at 380.

85. See DeWolfe Howe, *supra* note 33, at 615–16.

86. See Alschuler & Deiss, *supra* note 8, at 916–17.

87. See Harrington, *supra* note 8, at 380, 405, 436.

88. *Id.*

89. *Id.*

within the democracy had diminished.⁹⁰ Voting for elected representatives now replaced the need for a political jury. Faith in the everyday citizen to directly interpret the law and “get it right” had waned among the most formal of government branches.⁹¹ Positivism ruled the day, and the people ceased to be the direct source of the law.⁹²

This manifestation of the federalism debate around the question of jury nullification makes sense. The nation that had been founded on the unifying goal of revolution eventually felt the tug of its ever-expanding component parts with their varying needs and interests. The notion of a national consensus around which government could be built seemed a distant memory (if in fact the consensus had ever existed at all). Whatever common interests remained seemed lost in the mundane realities of everyday governance and the divergence of opinion that urgent matters from slavery, to westward expansion, to modernization presented.⁹³ The business of governance became the business of holding the union together and maintaining the status quo as best as possible.⁹⁴ In this atmosphere, compromise was the coin of the realm and the voices of individual citizens were stifled as divisive.⁹⁵ The possibility of a nullifying jury was an

90. See *id.* at 423, 427, 438; Alschuler & Deiss, *supra* note 8, at 917; see also FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 41 (1985).

91. Cf. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 143–44 (1977) (arguing that the “subjugation of juries” was an elite-driven revolution that was achieved by an alliance between lawyers and merchants to promote stability and consistency in the law).

92. See KRAMER, *supra* note 33, at 8.

93. See GREENE, *supra* note 36, at 46 (noting that everyday governance often focuses on mundane administrative needs, as opposed to addressing larger, and often divisive, issues); RYAN, *supra* note 73, at 35 (same).

94. In the years leading up to the Civil War, the possibility of a permanent rift between the northern and southern states became more apparent. See generally DAVID M. POTTER, *THE IMPENDING CRISIS 1848–1861*, at 356–84 (Don E. Fehrenbacher ed., 1976). In response, the federal government produced a series of compromise legislation designed to create unity. These compromises, including the Fugitive Slave Act and Kansas–Nebraska Act, both of which sought to appease all perspectives in the slavery debate, only seemed to fuel tensions as populations on all sides found deficiencies in the compromises. See *id.* at 371 (noting that Kansas–Nebraska Act merely deferred to the courts the impending unrest surrounding the status of freed men and women and slaves in newly constructed territories rather than offering any real resolution to the debate); WILLIAM ADAMS, *CHRISTIANITY AND CIVIL GOVERNMENT* 5–6 (Baker & Scribner, 1851); JOHN C. LORD, “THE HIGHER LAW,” IN ITS APPLICATION TO THE FUGITIVE SLAVE BILL, 5–6 (Union Safety Comm., 1851); JOHN G. RICHARDSON, *OBEDIENCE TO HUMAN LAW CONSIDERED IN THE LIGHT OF DIVINE TRUTH* (H. A. Cooke 1852) (all arguing in sermons that the Fugitive Slave Act did require allegiance as they violate higher principles); Alfred L. Brophy, “*over and above there broods a portentous shadow . . . the shadow of law*”: Harriet Beecher Stowe’s Critique of Slave Law in Uncle Tom’s Cabin, 12 J.L. & RELIGION 457, 465–67 (1995–96) (describing the failure of the Fugitive Slave Act to create national calm in the face of impending southern succession); U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 ALA. L. REV. 959, 962 (2003) (arguing that the divisive nature of the Fugitive Slave Act and the Kansas–Nebraska Act radicalized citizen actors such as John Brown); Sandra L. Rierson, *The Thirteenth Amendment as a Model Revolution*, 35 VT. L. REV. 765, 832 (2011) (describing the failure of either compromise to unify the nation).

95. See Alschuler & Deiss, *supra* note 8, at 906–07; Reirson, *supra* note 94, at 832.

affront to stability, order, and a uniform system of laws.⁹⁶

In this world, what it meant to be a citizen of the democracy was turned on its head. Citizens became passive witnesses. The laws were made and executed, and the Constitution was interpreted—not by the people but by the government. The active space left for the citizen in the new democracy was the size of the voting booth where he cast his ballot for the government that would create, execute, and interpret the law in his name. His job was to live under the law and to obey. If he wanted to avoid punishment while pursuing a law consistent to his own experiences, he must vote the old regime out and vote a new one into office. That a citizen might feel disconnected from the government or the law itself should have come as no small surprise; the government had moved further and further from his own lived experience and at times was so distant as to be unrecognizable.

This history of the decline of active citizenship was not without protest. In the years (and days) leading up to the Civil War, outrage over the various compromises made for the sake of the preservation of the Union became apparent. From armed conflict,⁹⁷ to the election of more and more extreme representatives,⁹⁸ to jury nullification,⁹⁹ the citizen sought to use the remedies

96. Northern jurors often refused to enforce the Fugitive Slave Act, undermining whatever benefit the compromise of the Act might have created. See H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1131, 1170 (2012) (describing the refusal of Northern juries to enforce the Fugitive Slave Act and the effect it had on the eventual dissolution of the union); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 185–86 (2011) (same); Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 600–01 (2013) (same); Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L.J. 199, 214–15 & n.87 (2008) (same). For an example of one such case of apparent nullification, see generally *United States v. Morris*, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).

97. As violence grew—particularly in border states such as Ohio and Missouri and territories such as Kansas—even formal government officials joined in the escalating animosity surrounding the debate on slavery. On May 22, 1856, as the United States Senate debated the status of Kansas joining the Union as a free or slave state, Senator Charles Sumner of Massachusetts took the floor and delivered an impassioned abolitionist speech entitled “The Crime Against Kansas.” As he exited the floor, Representative Preston Brooks of South Carolina rose and clubbed him senseless with a gold-topped cane. See DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST: THE MAN WHO KILLED SLAVERY, SPARKED THE CIVIL WAR, AND SEEDED CIVIL RIGHTS 158–59 (2005).

98. In the elections of 1856, 1858, and 1860, Republican candidates won increasing percentages in the House of Representatives, creating a strong antislavery contingency in federal government. See KENNETH C. MARTIS ET AL., THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS, 1789–1989, at 31–35, 111–15 (1989). The party’s rise to power was undoubtedly fueled in part by the refusal of some southern representatives to take their seats and later by the secession of southern states, but also in part by the increasing polarization between the positions of the Democratic and newly empowered Republican party. *Id.* at 34; see also JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 227 (1988) (describing the increasing radicalization of the Republican party in response to the 1850 Compromise and the *Dred Scott* decision).

99. See *Morris*, 26 F. Cas. at 1331. After a public rescue of a man named Frederick Jenkins from efforts to return him to Virginia and to slavery, eight abolitionists in Boston were charged with violating the Fugitive Slave Act, which prohibited aiding, abetting, and assisting the escape of a fugitive slave. See ABRAMSON, *supra* note 28, at 80. The defendants did not dispute the facts of the case but called on the jury to acquit them nonetheless because the Fugitive Slave Act was unconstitutional. See *Morris*,

promised in his original role as the check on government power. That these remedies were insufficient, that the nation went to war, is likely more a commentary on the extent of the divide among the citizenry and the government's systematic exclusion (and attempted dehumanization) of huge swaths of the population¹⁰⁰ than on the adequacy of the Constitution. But it is significant in an examination of the role of nullification because it signaled a change both in the relationship between the citizen and the government and in the concept of law itself within the democracy.

Emerging from the Civil War, the country remained divided. With the passage of the Fourteenth Amendment, the role of the federal government, and specifically the judiciary, was solidified as a source and protector of individual rights.¹⁰¹ Proponents of the Fourteenth Amendment sought to use a powerful judiciary to empower the same government the Founders had sought to check with the citizen jury.¹⁰² Looking backwards at the Fourteenth Amendment, it is hard to say precisely what those who promoted the Amendment thought they were incorporating to the states as the process due to the citizenry or what those rights would look like in practice.¹⁰³ Certainly the period following ratification

26 F. Cas. at 1331. The defendants called on the jury to consider a higher law—here, the Constitution—and to disregard the judge's instructions. *Id.* The judge ruled that jurors "have not the right to decide any question of law" and that "their duty and their oath [was] to apply to the facts, as they may find them, the law given to them by the court." *Id.* at 1336. In justifying his decision to give this instruction, the judge echoed the concerns of some of the Founders that without mandatory judicial instruction on the law, inconsistent verdicts would result. *Id.* at 1332. Despite the judge's warning, the jury acquitted, and the case was hailed as a triumph of justice over a morally corrupt law. See ABRAMSON, *supra* note 28, at 82. For discussion of similar cases, see generally Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249 (2003).

100. As I continue my own uneasy alliance with the Founders' view of the jury and its nullifying power, I am haunted by my own exclusion from this vision. As a woman, like my non-property-owning, nonwhite male brothers and sisters, a strictly originalist perspective of the jury would leave me with no power to weigh in on the laws of my community. It would not have empowered my ability to participate in the government; it would have only furthered my own and others' exclusion from power. Indeed it would exclude me from the very definition of personhood and render me a nonparticipant in the government that could still restrict and punish me. In this reflection, I cannot help but wonder whether some unease with nullification was informed by this reality. In this, I join the company of a long line of others who have wrestled with similar mixed emotions regarding nullification. See, e.g., Brown, *supra* note 8, at 1193 n.175; Butler, *supra* note 9, at 679; Forman, *supra* note 42, at 897–98.

101. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 22–23 (1998).

102. The Reconstruction Congress expanded the role of the federal judiciary and attempted to force construction of state judicial systems around a federal model in an effort to enforce and ensure the underlying goals of the newly minted Thirteenth Amendment. See Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (expanding federal question jurisdiction); An Act to Amend the Judicial System of the United States, ch. 22, § 2, 16 Stat. 44, 44–45 (1869) (appointing a circuit judge to each circuit to carry federal judicial authority to the states); Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872*, 33 EMORY L.J. 921, 924–33 (1984) (documenting the unprecedented expansion of the federal criminal law in order to protect the constitutional rights of African Americans).

103. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 145–47, 153 (1997) (arguing that the concept of the Bill of Rights had a meaning in 1868 that was distinct from that in 1791 and that the 1868 notion of the rights were incorporated to the states by the Fourteenth

to the present is replete with the lingering debate surrounding the extent to which rights were pressed upon the states and in what form.¹⁰⁴

With regard to the Sixth Amendment's promise of a jury in criminal trials, the Court and scholars are of many minds. On one hand, the Supreme Court has indicated that the Sixth Amendment right to jury was incorporated without alteration.¹⁰⁵ In later cases, the Court has relied on the Founders' rhetorical description of the jury as a democratic body, a description that, to the Founders, encompassed both fact- and law-interpreting rights.¹⁰⁶

But these cases are relatively recent, and they are separated from the Fourteenth Amendment's concept of the rights of criminal process both temporally and by a line of authority that would seem to contradict their spirit, if not their holdings. The Court's earlier decisions in *Sparf* and *Horning*, which sought to eliminate the jury's right to nullify verdicts,¹⁰⁷ suggest a different conception of the right to a jury. And the Court's decisions on the Eighth Amendment's cruel and unusual punishment standard¹⁰⁸ suggest a different conception of the

Amendment, not the original conception of the rights); 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) (same); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 500 (2010) (same).

104. In the context of criminal procedure, Akhil Amar has argued that the Fourteenth Amendment modified, and in the process superseded, the criminal provisions of the original Bill of Rights, transforming the requirements of a local jury in criminal cases and altering the racial composition of juries in the post-Reconstruction Era. See AMAR, *supra* note 101, at 269–78. As for the Court, incorporation of due process was slow and at times fraught with controversy. The Sixth Amendment right to counsel is a prime example of this slow and uneven trajectory of judicial acknowledgement of incorporation. See *Powell v. Alabama*, 287 U.S. 45, 66 (1932) (recognizing the importance of the Sixth Amendment right to counsel but remaining silent on the issue of incorporation to the states); *Betts v. Brady*, 316 U.S. 455, 464–66 (1942) (curtailing *Powell's* vision of the importance of counsel but again remaining silent on the issue of incorporation); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (acknowledging that the Sixth Amendment right to counsel is in fact incorporated to the states).

105. See *Danforth v. Minnesota*, 552 U.S. 264, 269–70 (2008) (holding that the Fourteenth Amendment's Due Process Clause took protections "implicit in the concept of ordered liberty" (including the rights of criminal process) and applied them to the states without altering their meaning); *Duncan v. Louisiana*, 391 U.S. 145, 149–50 n.14 (1968) (holding that the Fourteenth Amendment incorporated to the states without altering the rights of criminal process enshrined in the Bill of Rights).

106. See *supra* notes 12–13 and accompanying text.

107. Of course, the elimination of the jury's right to nullify as a legal matter did not eradicate the jury's power to nullify as a practical matter. Constitutional criminal procedure (including the Double Jeopardy Clause) makes acquittals unreviewable, even if they are based on nullification. See Carroll, *supra* note 9, at 682–84 (discussing the persistence of nullification through procedural protections including double jeopardy, standards of proof, and the mechanics of jury deliberation and verdict).

108. The Court has held that the Eighth Amendment was incorporated to the states through the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962). But in this incorporation, the Court has declined to adopt a static meaning for the "cruel and unusual standard" contained in the Eighth Amendment, instead repeatedly describing it as an evolving standard. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (noting that the Eighth Amendment's proportionality requirement should not be viewed through a historical lens but through as an "evolving standard[] of decency"); *Graham v. Sullivan*, 560 U.S. 48, 58 (2010) (finding that punishment standards are not fixed under the Eighth Amendment but subject to evolving social norms); *Kennedy v. Louisiana*, 554 U.S. 407, 434–35 (2008) (concluding that notions of proportional punishment were grounded in evolving standards); *Atkins v. Virginia*, 536 U.S. 304, 311–312 (2002) (holding that the Eighth Amendment's

substantive rights incorporated by the Fourteenth Amendment at least with regard to punishment.¹⁰⁹ These rulings seem in tension with the Court's recent decisions and contrary to an originalist notion of the jury, though consistent with an originalist framework analysis.

If one tries to reconcile the holdings over time, different possibilities emerge. One possibility is that the Reconstruction Congresses, fearing that local nullifying juries would undermine the power of newly passed civil rights legislation, sought to exclude the right to nullify from the right to jury trial incorporated to the states by the Fourteenth Amendment.¹¹⁰ Another possibility is that by the time the Fourteenth Amendment was ratified, jury nullification was no longer part of the American community's conception of the jury.¹¹¹ By that time the judiciary had all but barred it in all federal and most state courts.¹¹² Accordingly, the right to a jury that those who ratified the Fourteenth Amendment envisioned incorporating to the states likely did not entail the right to nullify.¹¹³ Certainly, proponents of the Amendment and of Reconstruction Era civil rights legislation sought to purge potential nullifiers from juries in the period immediately following the Fourteenth Amendment's ratification.¹¹⁴

prohibition on cruel and unusual punishment was to be judged using an evolving standard); *Harris v. Alabama*, 513 U.S. 504, 526 (1995) (holding that notions of proportionality were based in an evolving standard); *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (Kennedy, J., concurring) (rejecting a notion of blind incorporation of the Eighth Amendment's standard on cruel and unusual punishment and adopting instead an evolving standard); *Coker v. Georgia*, 433 U.S. 584, 603–04 (1977) (Powell, J., concurring in part, dissenting in part) (arguing that the Eighth Amendment is not premised on a fixed standard); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (indicating that assessment of cruel and unusual punishment under the Eighth Amendment involves "evolving standards of decency"). See generally John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297 (2013) (describing the evolution of the Eighth Amendment's standard on cruel and unusual punishment).

109. Though in recent cases, members of the Court who have supported the originalist notion of the jury have also argued that the abandonment of the original meaning of the Eighth Amendment in favor of an evolving standard was imprudent and inappropriate. See *Kennedy v. Louisiana*, 554 U.S. 407, 447, 469 (2008) (Alito, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 337, 340, 348 (2002) (Scalia, J., dissenting); *Helling v. McKinney*, 509 U.S. 25, 37, 40 (1993) (Thomas, J., dissenting) (arguing that the Court has abandoned the original meaning of the Eighth Amendment and improperly adopted "evolving standards of decency" to define cruel and unusual punishment).

110. Indeed, proponents of the Fourteenth Amendment and Reconstruction Era civil rights legislation spoke of juror nullification as undermining equality and creating hardships for freed slaves. See CONG. GLOBE, 39th Cong., 2d Sess. 1465 (1867) (statement of Sen. Van Winkle) (describing juror nullification in Virginia); see also Amar, *supra* note 38, at 1195.

111. See *supra* notes 81–82; see also CONG. GLOBE, 41st Cong., 2d Sess. 2148 (1870) (statement of Rep. Blair) (indicating that nullification was no longer a right of juries).

112. See *supra* notes 81–82.

113. See Bressler, *supra* note 83, at 1151–54.

114. See, e.g., Act of Apr. 20, 1871 (Ku Klux Klan Act of 1871), ch. 22, § 5, 17 Stat. 13, 15 (excluded certain persons from jury service in prosecutions); H.R. 3097, § 4, 43d Cong., 1st Sess.; 2 CONG. REC. 4466 (1874) (excluding jurors with certain beliefs from polygamy prosecutions); CONG. GLOBE, 41st Cong., 2d Sess. 1367 (1870) (same); 41st CONG. GLOBE, 2d Sess. 3 (1869) (same). In response to these restrictions on jury service, opponents of the bills charged the Republicans with jury packing. See 2 CONG. REC. 4470 (1874) (statement of Rep. Potter).

If this is true, then the expansion of the right to sit on a jury to former slaves and freedmen served a dual purpose. It was consistent with the espoused goals of the Republicans to ensure the full rights of citizenship to former slaves.¹¹⁵ But it also served to combat fears that white nullification would undo any equality achieved by the Thirteenth and Fourteenth Amendments.¹¹⁶ The failure of the integration of the jury to undo the significant harm of white nullification, particularly in the Southern states, offers some explanation of why the Court, in describing the post-Reconstruction jury, might have attempted to have it both ways—supporting the original role of the jury as a sword against government oppression while limiting the jury’s power to nullify.¹¹⁷

This discussion is incomplete, however, without recognizing that in the process of curtailing the jury’s right to decide questions of law, the original narrative surrounding the relationship between the citizen and the government itself was lost.¹¹⁸ As the federal government sought to expand the flow of

115. See 2 CONG. REC. 948 (1874) (statement of Sen. Sumner) (arguing that in order to ensure full rights of citizenship, juries must be racially integrated).

116. See AMAR, *supra* note 101, at 272; RANDALL KENNEDY, RACE, CRIME, AND THE LAW 302 (1997); Forman, *supra* note 42, at 897. See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 238 (1995).

117. See generally Forman, *supra* note 42, at 910.

118. There are likely many possible reasons for this shift in the conception of the citizen’s role in government, but I want to focus on three that surely played a prominent role. First, interpretation of the Privileges and Immunities Clause at this time promoted an understanding of citizenship articulated in the holding of *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230). Under this vision, protection became a substantive right of citizenship that was secured by the federal government’s prosecution of those who violated minority groups’ civil rights. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 555–57 (1991) (explaining that the Fourteenth Amendment seemed to incorporate *Corfield’s* concept of the federal government as the protector of citizens’ individual rights, even at the cost of state control over local matters).

Second, the passage of the Equal Protection Clause as a part of the Fourteenth Amendment imposed a duty on government to protect the citizen against infringement of property or rights. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 3, 15 (2008) (arguing that the Equal Protection Clause created a substantive right of protection and instilled the enforcement of that right in the federal government); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 821 (2006) (“The [Fourteenth] Amendment’s authors wrote [the] provisions [of the Equal Protection Clause] to correct a democracy deficit: the tendency of Southern officials to deny newly freed slaves the ‘protection of the laws.’”).

Finally, the Due Process Clause itself would seem to encompass a protective component, at least with regard to the state’s efforts to divest the citizenry of their rights through laws that affirmatively undid those rights or through a failure to protect when other citizens infringed on those rights. See CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (stating that the Fourteenth Amendment constitutionalized the “protection [of the citizen] by his Government”); CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull) (“American citizenship would be [of] little worth if it did not carry protection [of the government] with it.”). This latter notion was consistent with the vision of the federal government protecting citizens from the state and fellow-citizen oppression that was articulated in the Freedmen’s Bureau Act, a companion statute to the Fourteenth Amendment. See Freedmen’s Bureau Act, § 14, 14 Stat. 176 (1866) (stating that “the right . . . to have full and equal benefit of all laws and proceedings concerning . . . personal security . . . shall be secured to and enjoyed by all the citizens”).

individual liberties to citizens, particularly newly freed slaves and women,¹¹⁹ it imposed constitutional standards on the states in the name of equality and civil rights. The federal government became the guardian of individual liberties against the oppressive power of state government and local majorities, prosecuting and convicting those who violated Reconstruction Era civil rights reforms.¹²⁰ The rhetoric that had surrounded the Sixth Amendment's jury as a guardian against a distant and unresponsive government disappeared. It was replaced by the fear that nullifying juries would undo the Fourteenth Amendment's promise of a protective federal government in the face of oppressive local regimes.¹²¹ The specter of a citizen jury that could nullify the federal government's efforts to protect minority rights threatened to undo the government's newly realized obligation to protect civil rights.

And so, the citizen jury that had sheltered local critics of the federal government from conviction under the Alien and Sedition Acts—thereby bearing the continuing doctrine of revolution—lost its right to reject laws that seemed counter to its own expectations of the government.¹²² Ironically the promise of secure civil rights and citizen liberty brought with it further shifts in power away from the people. The citizen jury was recast as a body that needed to be restricted, lest it undermine the advances of the Thirteenth and Fourteenth Amendments with nullifying verdicts.¹²³

Arguably, without this restriction on the power of juries (in the post-Civil War South in particular), the promise of the newly ratified Amendments and the corresponding civil rights statutes might never have been realized. Before efforts to restrict juror nullification and to promote the integration of juries, justice for freedmen was virtually nonexistent when courts were left to their own devices.¹²⁴ The rights of African-American defendants were virtually

119. Even before the Civil War, the Republican Party platform sought protection for women and African Americans, focusing on "twin relics of barbarism"—slavery and polygamy, which was referred to as female slavery. 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). By 1866, the party had addressed both. The Thirteenth Amendment barred slavery and the Morrill Anti-Bigamy Act prohibited polygamy in all federal territories (it was already illegal in the states). U.S. CONST. amend. XIII, § 1; Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862), *repealed* by Act of Nov. 2, 1978, Pub. L. No. 95-584, § 2, 92 Stat. 2483, 2483.

120. One such example of increased federal prosecuting power came with the passage of the Ku Klux Klan Act of 1871, which created conspiracy liability based on efforts to deprive citizens of their federal rights or equal protection of the laws. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Proponents of this Act claimed it was constitutional under the Fourteenth Amendment both as a component of the federal government's power to protect life and liberty and also under the Equal Protection Clause. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 454–55 (1988).

121. See AMAR, *supra* note 20, at 386–92 (arguing that jury verdicts driven by local biases ran the risk of undoing the benefits of newly passed civil right legislation); *supra* note 118.

122. See AMAR, *supra* note 101, at 23–24.

123. See *supra* note 118.

124. See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 282 (1979) (recounting the atrocious record of postwar criminal judicial practice towards freedmen and women).

abolished.¹²⁵ Republicans, freedmen, and women who found themselves victims of crime fared no better.¹²⁶ There was reluctance by local and state executive authorities to investigate and prosecute crimes by whites against these groups—and when prosecutions occurred, juries often declined to convict, opting instead to return nullification verdicts.¹²⁷ As violence spread, the need for federal intervention was imperative on a practical level.¹²⁸ Without some action to curtail the ability of juries to nullify the law, the Thirteenth and Fourteenth Amendments and the legislation that accompanied them lingered as unfulfilled and empty promises. Equality was worth little more than the paper it had been printed on if juries were free to promote and protect oppression through their power to review questions of law. For civil rights to survive, nullification had to die.

But the promise of the Fourteenth Amendment gave way to less idyllic realities, much like the original ideal of popular self-governance. If the North won the Civil War, the South won the Reconstruction. The initial advances that followed the ratification of the Thirteenth and Fourteenth Amendments and passage of post-war Civil Rights legislation proved unsustainable in the face of the economic, educational, and social inequities embedded in the national conscience.¹²⁹ In the process, the story of equality and governance gave way to a complex, though not wholly unexpected, narrative of freedom defined in terms of property rights. There are competing theories for the shift.¹³⁰ But it is hardly a surprise that the men who moved in the formal spaces of government would find more in common with those espousing a doctrine of freedom manifested in

125. See Forman, *supra* note 42, at 915–16.

126. See LITWACK, *supra* note 124, at 285.

127. See Forman, *supra* note 42, at 916, 921–22 (noting that, in Texas for example, all-white juries acquitted every white defendant accused of murdering African Americans between 1865 and 1866). Senator George F. Edmunds, in lamenting the state of justice in the South for freedmen and women, commented that “a jury trial is a mockery; it is a shield for cruelty and crime instead of being an instrument of punishment for it.” CONG. GLOBE, 41st Cong., 2d Sess. 176–77 (1869). Senator Henry Pease, reflecting on the state of affairs in Mississippi, commented that “[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.” 3 CONG. REC. 735 (1875).

128. See LITWACK, *supra* note 124, at 285.

129. See *id.*: John A. Powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment*, 32 CARDOZO L. REV. 885, 886–87 (2011).

130. See AUSTIN ALLEN, ORIGINS OF THE *DRED SCOTT* CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857, at 131, 161 (2006) (arguing that Reconstruction quickly abandoned the rhetoric of equality in favor of the construction of racial categorized classifications of citizenship and personhood in an effort to maintain cohesion in the country and secure economic stability); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 3–5 (2010) (describing the complex construction of American law around the country’s identity as settler); Austin Allen, *An Exaggerated Legacy: Dred Scott and Substantive Due Process*, in THE *DRED SCOTT* CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW 83, 91–92 (David Thomas Konig et al. eds., 2010) (arguing that Reconstruction quickly abandoned the rhetoric of equality in favor of the construction of racial categorized classifications of citizenship and personhood in an effort to maintain cohesion in the country and secure economic stability); Powell & Watt, *supra* note 129 (attributing the collapse of principles of equality following the Civil War to efforts to shore up corporate interests and prerogatives).

property interests than with the interests of freed slaves and women. Likewise, that equality should bear the burden of an economic component is hardly inconsistent with the nation's previous values. Even the Founding—steeped in the fraternity of revolution—constructed citizenship and, by extension, the right to participate in governance and lawmaking around property rights.¹³¹ A generation later, confronted with uncooperative or unsympathetic citizen juries, the elite—sitting as judges and members professional bar—led a charge to repress nullification and to remove the citizens' right to redefine the law. Likewise, in the years that followed the Civil War, the euphoria of the promise of liberty and equality pushed against a line of judicial interpretation surrounding the Thirteenth and Fourteenth Amendments that redefined the rights contained in those Amendments in terms of property and corporate interests. Beginning with Justice Field's dissent in the *Slaughter-House Cases*, the Court pushed against the rhetoric of the Amendments, reimagining their aims in terms of protection against regulation or other interference with economic freedoms.¹³² The role of the federal government shifted. Its duty was no longer to protect the individual rights of citizens against their fellow citizens but to stand aside to allow the nation's economic ascension.

The federal government that emerged failed to encourage the nimble citizen response that the Founders had considered so vital, and it also failed to provide the protection to the citizenry that it had promised in the Thirteenth and Fourteenth Amendments. As civil rights for freedmen and women slid by the wayside, the Supreme Court—the ultimate appointed federal protector—handed down decisions that defied principles of equality, due process, and justice in favor of systematic discrimination and equality defined in terms of a passive federal government and stratified notions of citizenship.¹³³

131. Early suffrage requirements swung on a fulcrum of property rights and, in the context of some debates, the very definition of personhood turned on possession of or classification as property. See generally JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) (discussing the history of defining citizenship and by extension personhood in terms of property rights).

132. Initially, the Court declined to extend the Thirteenth Amendment's prohibition on involuntary servitude, made applicable to the states through the Fourteenth Amendment, in terms of corporate prerogative, instead promoting a race-based conception of slavery as the basis for the amendments. See *Slaughter-House Cases*, 83 U.S. 36, 71–72 (1873). But dissents by Justice Field in *Slaughter-House* and in *Munn v. Illinois* hinted at things to come. The substantive due process rights in the Fourteenth Amendment became a mechanism to curtail government regulation of corporations and property interests. *Slaughter-House*, 83 U.S. at 109–10 (Field, J., dissenting); *Munn v. Illinois*, 94 U.S. 113, 138 (1876) (Field, J., dissenting). In his lengthy dissent in *Slaughter-House*, Field went so far as to suggest the notion that corporations were like people with human-like interests in the protection of substantive due process, which precluded regulations that might interfere with property rights. *Slaughter-House*, 83 U.S. at 110 (Field, J., dissenting). By the time the Court reached its decision in *Plessy v. Ferguson*, the Court had returned to the rhetoric of *Dred Scott*, upholding both the right of the States to define the status of African Americans and adopting the logic-defying doctrine of “separate but equal” spheres of citizenship. See *Plessy v. Ferguson*, 163 U.S. 537, 547–48 (1896) (holding that “separate but equal” is inherently equal).

133. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (noting that the Equal Protection Clause “was relegated to decades of relative desuetude” in the era following *Plessy*);

This is not to say there were not periods of revival—periods in which the Court appeared to resume its promised role as the protector of civil rights contemplated by the Fourteenth Amendment. As national sentiment shifted and reconvened around a call for the protection of substantive rights in face of the oppressive power of either the government or fellow citizens, the Court amiably handed down decisions that shored up the sentiment of the people. *Brown*, *Roe*, *Roper*, and *Lawrence*, to name just a few, have surely pushed the government's function toward something reminiscent of that described by the Reconstruction Era Congresses—defending the civil liberties of the citizenry.¹³⁴ But the underlying relationship between the citizen and government has remained relatively constant, even in these moments of change. It has remained a relationship informed by the Fourteenth Amendment's emergent and contradictory charge: that the federal government should both protect the rights of the citizenry, particularly those who were members of insular, minority groups, all the while maintaining a distant and limited role in the lives of the actual citizens. As the country is tossed on our current political and judicial tide, a return to the original ideal of the active, engaged citizen looms ahead as a beacon to both the left and the right, raising the questions of whether the original role of the citizen can be revised, in what forms, and at what costs.

This, then, is the extraordinary rise and fall of jury nullification. It began as one of the Founders' mechanisms of preserving the citizens' rights against the overreaching power of the government. But eventually the nullifiers turned on the people themselves, or at least some of them—disproportionately empowering the majority class against minority groups to horrific ends.¹³⁵ In response, the federal government itself assumed the role of protecting the vulnerable citizen in ways that the Founders' democratic checks, including the nullifying jury, failed to do. The federal government enacted progressive legislation and applied that legislation in communities that had previously failed to protect and had often actively prosecuted: freedmen, women, and Unionists. The federal legislature that passed and the federal judges who enforced early civil rights legislation expanded the democracy to protect and to include those previously relegated to the margins of power and beyond. But this role proved unsustainable and was abandoned, with only periodic revival largely at the insistence of the citizenry and in the face of shifting norms. This left the citizenry with neither their original role as the source of law nor the Fourteenth Amendment's

see also Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949) (lamenting that the Equal Protection Clause was “[v]irtually strangled in infancy by post-civil-war judicial reactionism”).

134. See BALKIN, *supra* note 14, at 11 (discussing shifts in popular sentiment that produced landmark civil rights decisions as a critical component of framework originalism, allowing a sea of change in the Court's interpretation of the Constitution).

135. See MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER* 20, 25, 32, 54–55, 120–24, 189 (1987) (describing the use of nullification as a means of indemnifying those who committed acts of racial violence); Abramson, *supra* note 9, at 145–52; Hodes, *supra* note 76, at 1089–90; Leipold, *supra* note 9, at 122–24; Marder, *supra* note 9, at 935–48; Michelman, *supra* note 9, at 734–35.

promised protective government.

In the end, our modern conception of law and power is tied only loosely to the Founders' original sense of the citizen directly empowered to create and interpret law. More concretely, it is grounded in our Reconstruction Era's memory of originalism, which depends on the government to dictate law to the citizenry in the name of preserving individual civil rights. Checking the power of the nullifying jury was one more way to prevent localism from overpowering the newfound power of the federal government.

In the muddled and self-contradictory story that is our democracy, the idea that civil liberties should be realized by removing them from the citizenry and placing them into the hands of government to distribute seems like a lost irony. With the government failing to seize that role, however, the need for a nimble and responsive citizenry reemerges and raises the fundamental question: where does a mechanism like nullification fit in our concept of the law?

II. CONCEPTIONS OF THE RULE OF LAW AND LAW ITSELF IN THE DEMOCRACY

With this historical perspective sketched, if only in the roughest terms, the more difficult question looms of defining the rule of law, and indeed the conception of the law itself, within the democracy. In this task there are known quantities. Governance emerges as a story about spaces—the places, real or theoretical, in which law is made and obedience acquired (or demanded). The rule of law as a theory seeks to define the boundaries of those spaces and, in the process, to define the concept of law. All the while, it remains itself a contested theory, defying precise borders. It is defined first in terms of what it is not: it is not the rule of men;¹³⁶ it is not anarchy;¹³⁷ it is not arbitrary.¹³⁸ It is then defined in terms of the values on which its modern construct is grounded. These values circle around general premises: The law is knowable, relatively stable, and constant.¹³⁹ Under the rule of law, the law is composed of rules that people can understand and comply with.¹⁴⁰ These rules exist prior to the cases to which

136. See Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1499–1500 (1988) (describing the centrality of the distinction between the rule of law and the rule of men in American political and legal thought).

137. See RAWLS, *supra* note 1, at 235, 240 (noting that the rule of law protects against Hobbes' war of all against all or anarchy).

138. See FRIEDRICH A. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW* 41 (1955) (describing the single most defining characteristic of the rule of law as a check against arbitrariness); Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, in *THE RULE OF LAW* 148, 148–49 (Ian Shapiro ed., 1994); Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 219–20 (2d ed. 2009) (defining the rule of law as a guard against official arbitrariness, even if imperfect).

139. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202–03 (10th ed. 1960) (defining the rule of law as encompassing three core ideas: (1) the absence of arbitrary exercise of power and allegiance to law, (2) equality in the law's application to all people, and (3) incorporation of constitutional law as binding); see also Richard H. Fallon, Jr., "The Rule of Law" as a Concept in *Constitutional Discourse*, 97 *COLUM. L. REV.* 1, 8 (1997).

140. RAWLS, *supra* note 1, at 236–37; Fallon, *supra* note 139, at 8; Raz, *supra* note 138, at 214.

they could be applied.¹⁴¹ These rules, or laws, actually guide people. Not only do people know what the law is, they obey it.¹⁴² This stable construct of law allows rational people to make rational choices about the legal consequences of their actions.¹⁴³ Under the rule of law, there is some supreme legal authority that creates the law and is governed by it.¹⁴⁴ That authority is distinct from the ordinary citizen, and even itself, in moments when the law governs it.¹⁴⁵ Finally, the law is instrumental.¹⁴⁶ It applies rules to achieve its end of impartial justice.¹⁴⁷ At its core, the rule of law requires publicity and predictability—the law must be accessible to those it would govern in ways that give them notice of what the law requires—even if only in theory.

Despite all that has been written, and despite some ability to concur on the rule of law principles catalogued above, disagreement persists over what these principles mean. There is no consensus on what the rule of law is or how exactly it will achieve the goals it espouses. Whatever coherence around core values it may muster, the rule of law, in practice, is elusive and relative.

A. FOUR IDEALS OF THE RULE OF LAW

There are competing ideals of the rule of law, each of which claims to achieve the proper balance of the theory's underlying values. Each faces challenges in the real world. Richard Fallon breaks the ideals into four conceptions: historicist, formalist, legal process, and legal substance.¹⁴⁸ The historicist ideal conceives of the rule of law as “rule by norms laid down by legitimating lawmaking authorities prior to their application to particular cases.”¹⁴⁹ The law under this theory is the product of past, publicly accountable acts.¹⁵⁰ Judges don't make new law; they simply apply what has been established before by historically recognized, legitimate, lawmaking authorities.¹⁵¹ For adherents to the historicist ideal, the law is a fixed point, its meaning or intent deter-

141. Radin, *supra* note 5, at 792.

142. Raz, *supra* note 138, at 213.

143. See HAYEK, *supra* note 138, at 54, 72–75; Radin, *supra* note 5, at 785, 787 (noting that the rule of law allows for prospectivity, but also assumes that people are rational actors who will make choices based on what they know of the rules governing their actions).

144. Radin, *supra* note 5, at 792 (noting that there is a separation between the government and the citizens under the rule of law with the government making the rules and the citizen receiving the rules).

145. Raz, *supra* note 138, at 212.

146. See HAYEK, *supra* note 138, at 45 (noting that central to the notion of the rule of law is the concept that the judges can enforce law and apply fair procedures); RAWLS, *supra* note 1, at 238–39 (same); GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 37, 40 (1988) (same); Fallon, *supra* note 139, at 9 (same); Raz, *supra* note 138, at 216–17 (same).

147. Radin, *supra* note 5, at 792.

148. Fallon, *supra* note 139, at 10.

149. *Id.* at 11.

150. Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989); Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 *RATIO JURIS* 127, 129 (1993) (claiming that the rule of law is simply “authorized governance . . . through published formal rules”).

151. See BORK, *supra* note 3, at 318; Scalia, *supra* note 150, at 1177–80.

mined long before its application.¹⁵² Even in the face of what they perceive as the inescapably political nature of lawmaking, historicists promise a law that avoids arbitrariness through its adherence to shared historical ideals and intents.¹⁵³

Despite its promise of stability that springs from an adherence to historical ideals, the historicist ideal fails to account for the realities of governance on many levels. First, the historicist ideal is premised on a historical intent that is not only readily discernible but uniform.¹⁵⁴ When confronted with the reality that history itself is a complex narrative of competing ideals, visions, and even memory, historicists offer little guidance on which narrative ought to prevail, or which perspectives ought to be excluded from this process.¹⁵⁵ To compound matters, historical intent is inevitably the product of its time. It is driven by the values and goals of those who conceive it—values and goals that, even if once consistent with those of the larger population, may well have shifted with time.¹⁵⁶ Second, the historicist ideal attempts to separate the interpreter from the original meaning he seeks to recover. In reality, both are situated in a shared cultural experience and cannot exist independently of the world both occupy.¹⁵⁷ In short, the historicist ideal of the rule of law is internal to the community, so the meaning of the law cannot be realized outside of the cultural context in which it resides. Although it may be possible that historicists seek only to structure a method of legal guidance based on historical norms—norms that may well recognize evolving experiences—this rescue of the historicist ideal sacrifices the stability that the ideal offered in the first place.

Fallon's second construction of the rule of law, the formalist ideal type, creates stability by anchoring the law in clearly constructed rules.¹⁵⁸ Like the

152. See Fallon, *supra* note 139, at 12.

153. Strict originalism is an example of this faith in historical conception to guide future application of the law. This brand of originalism conceives of a rule of law grounded in the identification and application of the Founders' intent in the resolution of modern legal issues. See, e.g., BORK, *supra* note 3, at 318.

154. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 38, 57 (1985); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–17 (1980).

155. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 726 (1988) (arguing that conceptions of norms require an understanding of the context in which those norms were created, including the values and expectations of those who made them). An additional dilemma may arise when no historical consensus exists either because the Founders were unable to agree or never contemplated the question at hand. See Fallon, *supra* note 139, at 26–27. If the “source” of legitimate lawmaking is silent, what is the appropriate alternative text, or is there none? *Id.* at 29–30.

156. See Monaghan, *supra* note 155, at 726–27 (noting that it may be impossible for the interpreter to account for these shifts under a historicist ideal, assuming it is even possible to split the interpreter's modern perspective from his or her conception of the original intent).

157. See Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 291 (1993).

158. Fallon, *supra* note 139, at 14. Justice Scalia, in his adherence to formalism, argues that rules are constants that can direct statutes and constitutional analysis in a way that is uniquely consistent with the rule of law. Scalia, *supra* note 150, at 1183.

historicist ideal, the formalist ideal draws strength from its adherence to a positivist, fixed, or static notion of the law. The formalist ideal defines the rule of law as dependent on rules that precede acts, setting up clear prohibitions and defining the outcomes of disobedience.¹⁵⁹ Under this conception of the rule of law, there are sharp distinctions between legislative and judicial functions.¹⁶⁰ The legislature creates the rules, and the judiciary applies those rules to cases. The substantive meaning of the law is achieved by adherence to a positivist canon in which rules are constructed by the legislature and are clearly knowable by the citizenry.¹⁶¹ Legal form, not some vague underlying moral ideal, lends meaning.¹⁶²

Like its historicist cousin, this conception of the rule of law faces challenges when applied to the real world.¹⁶³ Just as historical meaning cannot be separated from the lives of those who would seek to define it, neither can formally constructed rules.¹⁶⁴ Rules, like history, draw their meaning from the context of the lives they regulate. Answering the question of whether a rule applies to any given set of factual circumstances inevitably requires some external examination.¹⁶⁵ In the end, the rule does not define itself; it must be defined by those who would apply it and those to whom it would be applied.¹⁶⁶ In response to those who would argue that rules require context and interpretation, formalists could embrace the notion that the ideal requires only general legal directives.¹⁶⁷ But this in turn creates a new dilemma. If the rule is to survive because it is

159. *E.g.*, Scalia, *supra* note 150, at 1178–80; Summers, *supra* note 150, at 129.

160. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 726–27 (1988) (Scalia, J., dissenting) (arguing that the rule of law in the United States defines distinct functions for the branches of government).

161. Radin, *supra* note 5, at 793 (“Traditionally, legal ‘formalism’ is the position that a unique answer in a particular case can be ‘deduced’ from a rule, or that application of a rule to a particular is ‘analytical.’”).

162. Summers, *supra* note 150, at 139–41 (denying that underlying moral value is necessary or even productive in all legal systems). In modern constitutional discourse, formalism prefers rules that can be applied with little need for a moral analysis, unlike standards, which require or invite value assessment by those who would apply them. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). Even this distinction between rules and standards is not a sharp one, but one of degrees with the law residing somewhere in both. Sullivan, *supra*.

163. *See* Sunstein, *supra* note 7, at 978–96 (asserting that formal rules present an impossible ideal to accomplish in the real world in which law must inevitably interact with those whose lives it contacts).

164. Radin, *supra* note 5, at 797–801 (arguing, like other legal realists, that the formalist ideal is flawed because rules cannot be abstracted from the human lives they affect); Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1737 (1991).

165. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821–24 (1983).

166. *See generally* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19–24 (1984) (noting that laws and rules are culturally contingent because they are the products of those who construct them as well as those who interpret them).

167. Fallon, *supra* note 139, at 16; Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544 (1988). These general directives would still provide guidance as to accepted conduct but would avoid excessive specificity that might quickly render the rules obsolete. In this careful balance of articulated directives and vagueness, formalism might be saved.

general or vague, then formalism's promise of clear rules may not be possible. The rule's aim may be uncertain. Even specific rules are fraught with ambiguity because language itself is, by its nature, open to shifting interpretations that can render even the best-defined rules unclear.¹⁶⁸ In the end, the dilemma of the formalist ideal would seem to be that law cannot be capable of both shifting and being static. In moments when the law must evolve to survive or to promote substantive values, adherence to formalism may create an impossible quandary for the citizen who ironically finds instability in the law's inability to change with shifting social values.

The third construction of the rule of law in Fallon's world is the legal process ideal type.¹⁶⁹ The legal process ideal rejects the notion that the law consists only of rules that preexist their application and are static in their construction, and instead defines the law in terms of procedure that seeks to sustain substantive goals.¹⁷⁰ In this, adherents to the legal process ideal root law in "current, normative" consensus and acknowledge that legal doctrine—no matter which formal body creates it—must strive to reflect evolving standards and expectations.¹⁷¹ This is not to say that adherents to the legal process ideal abandon stability; rather, they claim that stability is best located in the creation of processes that promote fairness through the development of legal norms as opposed to rigid rules.¹⁷² The ideal seeks to create an internal connection between the law itself and the citizen's expectations of reasonableness, which guides not only law creation but also subsequent legal interpretation.¹⁷³ Precedent serves as a basis for the determination of particular cases.¹⁷⁴ But in the end, the ideal places stock in judicial review to serve as the basis for procedural fairness and as the guarantor that other lawmaking bodies, including the legislative and executive branches and administrative decision makers, do not exceed their authority or create laws inconsistent with the normative consensus.¹⁷⁵

The legal process ideal wrestles with the dilemma created by the historicist and formalist ideals' allegiance to a rigid construction of law by acknowledging

168. HART, *supra* note 7, at 125.

169. Fallon, *supra* note 139, at 18.

170. Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in JUSTIFICATION 71, 82–83 (J. Roland Pennock & John W. Chapman eds., 1986); Radin, *supra* note 5, at 783; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–85 (1996); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 792–801 (1989).

171. Fallon, *supra* note 139, at 19.

172. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, 4–5, 152–53, 157–58 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

173. *Id.* at 1378.

174. STEVEN J. BURTON, *JULGING IN GOOD FAITH* 36–37 (1992); HART & SACKS, *supra* note 172, at 145–52. Adherents to the legal process ideal, though allowing for consideration of precedent, historical agreement, and legal principles, are nonetheless unopposed to the creation of legal norms based on current values. See, e.g., Fallon, *supra* note 139, at 31–32.

175. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372, 1401 (1953).

that law must include some process of interpretation. The law itself, unable to contemplate every possible application in advance, must undergo some process of synthesis in the lives of those it governs.¹⁷⁶ The ideal therefore defines the conception of law not only in terms of its literal creation (in legislative or administrative bodies), but also in its subsequent interpretation by those who apply it; the ideal defines law in terms of a consensus that shifts with the communal values. It finds stability in its ability to control the realm of the appropriate decision makers in the system of governance, ceding substantive and procedural control to formal decision makers,¹⁷⁷ and it finds stability by defining the substantive goal of reasonableness to which the decision makers must constantly adhere in order to legitimate their interpretations.¹⁷⁸ In this, the legal process ideal departs from formalism by abandoning the notion of a static law, while simultaneously maintaining the concept by regulating proper sources of interpretation.¹⁷⁹

This ideal, too, faces challenges in its real world application. In its promise of a flexible law, it fails to create any real standard.¹⁸⁰ Even the promises of a "reasonable" law, identifiable by those it would govern, is by its very nature so vague that it loses all meaning in its application.¹⁸¹ Instead of creating a stable law, the ideal grounded in an agreed-upon norm offers no real guidance and renders the law uncertain. In the real world where the law is created and applied, a normative consensus seems all but impossible to identify in any real terms. Consensuses that emerge tend to lose clarity as they gather momentum, eventually coming to rest as vague ideals that offer little guidance in everyday decision making, much less a binding notion of the law.¹⁸²

The fourth and final ideal that Fallon identifies is the substantive ideal type. Like the legal process ideal, this ideal seeks to uphold the underlying value of stability by imagining a conception of law as a moral authority that guides behavior rather than a set of predetermined rules.¹⁸³ Rules that do emerge from this construction must align with the community's underlying moral values from which the rule draws its authority.¹⁸⁴ Legal concepts draw substantive meaning from political morality, which in turn guides interpretation and applica-

176. Michelman, *supra* note 170, at 82; Radin, *supra* note 5, at 783; Strauss, *supra* note 170, at 884-85.

177. HART & SACKS, *supra* note 172, at 3-6.

178. Michelman, *supra* note 170, at 83.

179. MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 253-55 (1992); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE*, 78-80, 83-84 (1973).

180. See Tushnet, *supra* note 165, at 804-05, 824.

181. See Fallon, *supra* note 139, at 20.

182. See Michelman, *supra* note 136, at 1510-15.

183. This is the newest incarnation of the rule of law, seeking to identify the law as a moral guide, which in turn must align itself with existing moral values. See DWORKIN, *supra* note 7, at 93; DWORKIN, *supra* note 154, at 11-12.

184. Michelman, *supra* note 136, at 1501-03.

tion of the law.¹⁸⁵ Without the ability to maintain substantive conformity with moral expectations, the law ceases to exist. This conception of the rule of law, like its predecessors, is also challenging to implement. It identifies what the law ought to be, but leaves open the question of what the law actually is.¹⁸⁶ Although this ideal allows for some interconnection between the other ideals, it opens up the greatest possibility for arbitrary enforcement of the law by failing to identify a realistic core upon which the law is premised.¹⁸⁷

B. RETHINKING THE RULE OF LAW AND LAW ITSELF

Each of the ideals described by Fallon is rife with admirable values and fraught with criticism. In each, the rule of law as a theory, and the conception of law that accompanies it, struggles to reconcile its promise of a predictable, knowable, stable law with the reality that rules, laws, and even the government itself exist in context—the spaces of people’s real lives—and are subject to interpretation and reimagination. The rule of law is bound on all sides by the need for a normative consensus that allows the law to demand obedience through the acceptance of the law by the citizens. The law may govern the community, but the community must have some space to shape the law. At the end of the day, the rules or norms are only as effective as their ability to resonate with the community’s own notion of law and governance.

In moments of disconnect, when the law is discordant with the community’s values or expectations, the law loses its power, and the underlying aim of the rule of law is defeated. The law becomes a foreign body. To retain its link to the community norms, the rule of law must reconceive of the relationship it seeks to create between the citizen and his government and, in the process, the law itself. Each of the ideals that Fallon describes constructs a rule of law that imagines the relationship between the citizen and the government as a distant one, with formal bodies creating law that the citizen must learn to accept and recognize, or reject. This law might well attempt to reflect the underlying values of the community or its historical past, but it is created outside of the community itself. This construction of law inevitably fails because it belies the reality that the law and the citizen must occupy the same space; the very meaning of the law is drawn from the lives of the citizens it governs and their expectations of the law within their lives. To accelerate the space between the people and the law is to construct a law that circles ever further away from those from whom it would demand obedience.

But to reduce the space between citizens and the law, and to reinvigorate the relationship between citizens and their government, is to construct a law that

185. DWORKIN, *supra* note 7, at 17, 81, 223–39; Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–19 (1983) (describing the process of seeking to conform the law to existing norms as “jurisgenerative”); Michelman, *supra* note 136, at 1500–03, 1515–24; Michelman, *supra* note 170, at 72.

186. See Raz, *supra* note 138, at 211, 223–28.

187. Summers, *supra* note 150, at 136.

jettisons some of the formalistic premises in favor of the normative experiences of those to whom the law applies.¹⁸⁸ Although abandoning rigid application may inject a degree of uncertainty into the law, even the most ardent proponents of formalism would not argue that the law's redeeming principle is consistency for consistency's sake.¹⁸⁹ The law serves many masters—empowering some, controlling others, and protecting still others—but in the criminal system, its ultimate goal is always some larger concept of justice.¹⁹⁰ When consistent application of the law alone will undermine that larger aim, there must be a mechanism within the system to construct new meaning¹⁹¹ and to bend the law around the lives it encounters to achieve its ultimate ends.¹⁹²

In short, a construction of law that is drawn from many sources, including those it seeks to govern, may actually enrich the rule of law.¹⁹³ The creation of a rule, or even a general principle to guide that rule, does not alone create law. The writing that would codify and memorialize some collective value or morality as law is only the beginning (or maybe the middle) of the story. The writing is simultaneously a fixed and ambiguous point. It is fixed in that it is unchanging (though not unchangeable). It remains long after the wars, elections, and debates have ended. Absent some extraordinary moment of repeal, it lingers, even if unenforced, as law capable at any moment of demanding allegiance against the threat of punishment. But the text alone is incapable of imagining the lives of those to whom it might apply. It is composed of generalities. It is both overinclusive and underinclusive from the moment it is set to paper. It cannot contemplate the future scenario when the words, applied formally, would confound their own purpose and produce an unjust result.

Like all textual creatures, the written law is also, in its stasis, ambiguous. Its language obscures and eludes meaning at the moment of contact with the

188. Sunstein, *supra* note 7, at 959–68 (arguing that the rule of law must be animated by many sources and cannot rely on mechanical application in the hopes of achieving a just result).

189. As Dworkin aptly noted, at the end of the day, the rule of law must be a functional ideal. DWORKIN, *supra* note 7, at 189.

190. Eskridge & Ferejohn, *supra* note 5, at 265, 267 (arguing that rule of law ultimately must be driven by both “coherence and justice” for the courts and for the citizens).

191. *Id.*

192. As will be discussed further in Part III, *infra*, it is important that this mechanism be incorporated into the system itself, lest the rule of law be undermined. Without such a mechanism, the system risks the allegiance of its citizenry. If the citizens cease to recognize the law, it loses meaning in their lives, even if that meaning that was previously accepted. Laws that were once obeyed, and perhaps still consistent with the citizens' expectation at the time they were enacted, emerge as part of a foreign system aligned with discordant law.

193. See DWORKIN, *supra* note 7, at 187–90 (recognizing that the rule of law requires consideration of many sources of law, including normative experience). There are additional possible sources. Randy Barnett argues that the unenumerated constitutional rights suggest an alternative source of law. See Barnett, *supra* note 2, at 620. Though these rights are by their nature unenumerated, he argues that they are consistent with the rule of law as they promote “a particular set of values.” *Id.* at 624. In this, he shares a modern perspective of the rule of law as more than rules but based on broad principles. *Id.* Margaret Jane Radin offers a still broader articulation of the rule of law, describing it as an inevitably open texture. Radin, *supra* note 5, at 819.

normative world. Someone must give meaning to the words. Someone must interpret the law. Interpretation imperils predictability, knowability, and stability. As the executive and judiciary define the parameters of the law through application and interpretation, even the plainest of text may take on meanings increasingly distant from the understanding of ordinary folks who live in the shadow of the law. Words abandon their common or understood meanings and become terms of art, complex to the point of incomprehension with their interpretive glosses. Statutes with vague or open-textured language are particularly vulnerable. Appellate courts, with their allegiance to elaborate legal tests and the inevitable carving out of exceptions over time, only compound the problem. In time, the citizens' ability to know the law morphs into a near-impossible ideal.

Each layer of interpretation carries a power all its own, writing meaning over and onto the words of the statute, seeking to lend the citizen a context and history through which expectations of the law can be shaped. But at some point, in a quiet space removed from the formal rooms of this previous construction, the citizen lays the written word and the history it carries next to the story of his own life and seeks a common meaning. When that commonality is elusive—when the formal construction of the law's meaning is too rigid or otherwise confounds the citizen's notions of morality or the purpose of the law itself—the citizen may seek reconciliation, an integration of the law's formalism with the normative experience that law and citizen occupy together. Failing that, the citizen will write a new meaning through resistance.

The later ideals of legal process and substance theories push to accommodate the reality that rigid application of the law undermines its purpose. These ideals describe law as a body constructed by and drawing meaning from many sources.¹⁹⁴ But these ideals are limited in the sources of interpretation they will consider.¹⁹⁵ In particular, these ideals fail to contemplate the citizen's own moment of interpretation as a possible source of law, believing that such an informal source of law might undermine predictability and stability. But in this, they overlook the possibility that the citizen may possess a power of interpretation that formal branches lack. Jurors, by virtue of the fact that they are ordinary citizens drawn from the community where an offense allegedly occurred, are in the unique position to consider the law in the context of a common and community-based understanding. Where courts and prosecutors may speak of the formal meaning of statutory terms, the citizen interprets the language of the statute in lived terms, lending the possibility of a new and more nuanced meaning that is more consistent with the citizens' expectation of the law.¹⁹⁶ In

194. See HART, *supra* note 7, at 7–8 (explaining that using competing sources of the law can help give it meaning and context that are otherwise absent).

195. See *id.* at 12.

196. See, e.g., Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868 (1991). Smith's work concludes that jurors are not influenced by the formality of substantive criminal law doctrines, and instead rely on prototypical

this sense, the juror may create stability and predictability in the law in ways that have eluded formal construct alone.¹⁹⁷ Granting juries the authority to interpret law will not displace executive discretion in application or judicial discretion in interpretation, but granting juries the power to nullify can allow the citizen to serve a unique function: to check oppressive applications of the law in cases in which formal construction of the law has destroyed its predictability and distanced it from the very people it would govern.

A wider conception of law that draws meaning both from formal sources and from the lives of the people who live under it may ultimately prove more useful in achieving the underlying aims of the rule of law than reliance on formal sources alone. What the law loses in terms of consistency, it may gain back, at least in part, by acquiring a meaning that resonates with the citizen's expectations of government and larger principles of justice.¹⁹⁸ The moment of law-making never truly ceases. It is no longer confined to the rules, statutes, or their formal application or interpretation; rather, the law evolves and is shaped each day by the lives it governs and peoples' attempts to reconcile their own principles and expectations with the law's written word.

This is not to say that the law lacks a point of reference. The shared history of the law—its writing, prior application, and prior interpretation as precedent—all simultaneously offer a starting point for those who would ground the law in their own lives. But in moments when this history's application is inconsistent with the citizen's notion of the purpose of the law itself, the citizen is not bound to apply the law rigidly and unthinkingly. Instead, a new construction of meaning is possible.

The law, thus reconstructed, ceases to be a distant body and becomes a living part of our *nomos*—our widely shared and deeply held social norms of our community.¹⁹⁹ These norms construct our expectations about what behavior is permissible and what is forbidden. They form the basis of our belief systems and sense of justice.²⁰⁰ The written law is integrated so that it fits in the spaces of the citizens' lives. The law takes on a meaning that encompasses not only the words written, applied and interpreted by the formal government, but also the

representations drawn from their own lives and cultural identifications in reaching verdicts. *Id.* at 870. People, even when instructed otherwise, carry an intuitive perception that, in the context of juries, drives them towards a verdict which conforms with their normative sense of the world and the law's role in it. See HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 37–39 (1987) (theorizing that people perceive realities and arrive at conclusions about what they are perceiving based on their ability to recognize patterns of behavior and morality in any given scenario).

197. See Lawrence Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2040–43 (2005) (offering prototypical reasoning as a methodology of interpretation).

198. See HART, *supra* note 7, at 8 (explaining that the use of competing sources of the law helps to give it meaning and context otherwise absent). As will be discussed in Part III, *infra*, even methodologies of ad hoc judging (like those that may be present in nullification) do not necessarily produce inconsistent results.

199. See Lawrence Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 89 (2006).

200. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 5–7 (1995).

cultural norms and expectations of the community it commands.²⁰¹ When one conceives of the rule of law as *nomos*, the line around the formal and positive construction of law blurs and opens to a broader possibility of meaning. The rules, statutes, and formalized interpretation still exist, but they form only a part of an ongoing process of recognition.

In this normative world, the line between formal law—what is lawful and what is unlawful—is constantly made, challenged, and maintained. This line is defined by the narratives and cultural norms that locate it. In one community, it may exist in one form; in another, its meaning shifts to be something previously unrecognizable.²⁰² The governed ground the law in their lives, and in the process their relationship with the government is altered. In doing so, we, as citizens, accept an active role. We must discern our principles and compel the law to act upon these principles.²⁰³ We recognize that a true rule of law requires more than mere mechanical application of the law without reference to the larger world in which it exists.²⁰⁴ We gather the meaning passed to us by the formal government, and we hold this meaning side by side with our own understanding and expectation. There may be little divergence between the two. We may accept the law as delivered, thankful that some other force did the heavy lifting of law creation. But other times, this comparison may confound our sense of social norms. In these moments when our *nomos* rings discordant with positive law, our social norms likely provide a better guide to the “law in action” than the “law on the books.”²⁰⁵ In these times of disconnect, the legitimacy of the law may be undermined by the resulting uncertainties.

When law and communal values do not align, some discretion in the application of the law seems inevitable; only its locus is variable. One possibility is that the police will not arrest; and even if they do, the prosecutors will not bring charges; and even if they do, the juries will not convict. In this scenario the authority of the law is undermined by wholesale refusal to accept the law as present. Another possibility produces equally uncertain results: police will choose among cases for enforcement; and when they do, prosecutors will pick and choose among cases to bring charges; and when they do, juries will sometimes convict and sometimes acquit. In this system, which relies heavily on executive discretion, the law, though statically constructed, becomes difficult

201. See Radin, *supra* note 5, at 808–09.

202. See *id.* at 807 (arguing that a rule will control in practice only when there is strong public agreement surrounding it, though that strong public agreement regarding the meaning of the rule may well vary from community to community).

203. DWORKIN, *supra* note 7, at 96, 189–90 (requiring that in order for the rule of law to achieve full integration of the citizens’ perspective, “each citizen must accept demands on him, and may make demands on others . . . Integrity therefore fuses citizens’ moral and political lives: it asks the good citizen . . . to interpret the common scheme of justice.”).

204. See *id.* at 187–90.

205. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 32–34 (1910).

to predict in application.²⁰⁶ In either case, the goal of a reliable, certain, and predictable law that girds the rule of law is undermined by strict reliance on positive law.

In these moments of disconnect between the *nomos* and the positive law, granting and recognizing the jury's the power to nullify may actually increase the predictability of the law by allowing the citizen himself to attempt to realign the law with prevailing community values and expectations of the law—the very values and expectations he carries himself. If he chooses, along with his fellow jurors, to return a nullified verdict, he communicates to the formal branches of government that the citizenry will not sanction the enforcement and application of laws that are not aligned with the social norms and morals of the community. He demands and creates a law consistent with his own values and imagination. In the process, a new possibility of interpretation emerges, drawn not from those who constructed the law in the formal branches, but from those who live each day under a formal law not of their own creation.²⁰⁷

Contextualized in the history of our democracy, there is no small irony in understanding the rule of law and the law itself as requiring a fidelity to shared communal values. Just as the conception of government narrowed following Reconstruction and consigned the citizen to a more passive role, the conception of the rule of law must now widen, urging the citizen to step forward and resume a long forgotten role as the direct source of the law itself.²⁰⁸ These narrow and wide conceptions at times butt up against one another and at other times entwine with each other. As Justice Scalia advocates for his formalistic and textual construction—a narrow reading of the rule of law—he simultaneously calls for a return to the original role of the citizenry as jurors, a role rooted in a modern conception of the citizenry as a valid source of law. The only thing missing is a mechanism for their interpretive power—a means by which ordinary citizens can either recognize the formally constructed law, accept it, and obey it; or refuse to recognize the law, reject it, and resist it. Nullification is one such mechanism of resistance, or even reconstruction, of law around an aspirational communal identity or *nomos*.

206. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (“Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.”).

207. See JÜRGEN HABERMAS, *1 THE THEORY OF COMMUNICATIVE ACTION* 104–11 (Thomas McCarthy trans., 1984) (suggesting that the proper source of interpretation is not the people who wrote the text, but the people who live under it).

208. See MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 5–8 (1973) (describing the necessity (and willingness) of citizens to engage in unlawful actions when presented with laws or circumstances they consider contrary to their internal senses of conscience as a last effort to force the law to align with their individual senses of order).

III. NULLIFICATION AND THE RULE OF LAW

Compared to other moments of lawmaking—the legislature’s creation and codification, the executive’s enforcement, or the judiciary’s interpretation—nullification occupies a small space. By itself, it cannot make law. It does not summon a new meaning across the legal universe. It has no power to demand uniform deference to its will. It creates no precedent. In the larger world of the *nomos*, it is a near-private moment that serves the unique function of pressing the community’s shared values onto the face of the law. Beyond this, nullification is a warning that whatever the formal construct of the law, it exists apart from the citizen’s own understanding of the law. It demands correction of constructs of the law that do not account for the citizen’s lived experience and resulting expectations of the law. It is a call to interpretive commitment—a seizing of the active role of citizenship that the Founders envisioned and the Reconstructionists abandoned. Despite nullification’s limitations, and contrary to popular notions, nullification is also consistent with the rule of law because it creates a mechanism to lend predictability and knowability to the law when formal constructs have failed to align themselves with the citizen’s own expectations.

Nullification is a challenge to the notion that law—constructed, enforced, and interpreted by the formal bodies of government—requires wholesale deference. It is a rejection of the premise that the citizen owes a duty of unquestioning obedience to the State and its construction of law above other competing allegiances.²⁰⁹ It pushes against an external construct of the law, in which the State defines the terms of the community it governs and then demands obedience to those terms as the cost of continued membership in the community.²¹⁰ It recognizes instead that there are times when rejection of the law is a good thing—when the lives of the citizens are diminished by wholesale deference and improved by disobedience.²¹¹

Although obedience to the law may create stability within a community, such obedience can also produce harm.²¹² Laws, left static, may fail to acknowledge the world as it actually exists, and may instead imagine circumstances as they

209. See PHILLIP SOPER, *THE ETHICS OF DEFERENCE: LEARNING FROM LAW’S MORALS* 183 (2002).

210. See GREENE, *supra* note 36, at 83 (citing the argument that law must spring from shared values to merit obedience); see also Joseph Raz, *The Obligation to Obey: Revision and Tradition*, in *THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS* 159, 174 (William A. Edmundson ed., 1999) (rejecting required obedience to laws that, although promoting stability within a community, fail to embody communal values).

211. See MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* 279–80 (2006) (noting that disobedience to the law is often feared as contagious and a catalyst for systematic instability, when in reality disobedience may promote a more stable law by creating one that is more immediately responsive to the populace); ABRAHAM LINCOLN, *ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865* (Library of America, 1989) (same).

212. See GREENE, *supra* note 36, at 98 (noting that the law may become outdated and thus fail to represent the needs of the citizens).

might—but do not—exist.²¹³ Likewise, laws, even from the moment of their creation, may never have adequately accounted for or accommodated the lives of the citizens they govern.²¹⁴ In these moments, it may be that the citizen, and not the government, is better able to access the value of the law and suggest counter-meanings or interpretations.²¹⁵ Indeed, citizens' continued allegiance to the law as constructed by formal bodies may alienate citizens from their own values, their government, and their personal autonomy.²¹⁶

In part, this is a recognition that in the process of compromise, settlement, and interpretation that informs the formal construction of the law the citizen's sovereignty may be lost. In these moments, whatever virtue is gained from this stable and unifying conception of law may simply come at too high a price for those left to live in the shadow of the formal law. But it is also a recognition that if the government seeks to force an unquestioning deference to the law based on its status as "law" alone, without any effort to ground the legitimacy or justification of the law in the citizen's own value system, the relationship between the citizen and government shifts. The government claims power for itself as the source of the law and the source of the value system that is bestowed on the citizenry through the creation, application, and interpretation of the law.

Nullification promotes the opposite reality: that the power of governance—law creation, application, and interpretation—must flow from the citizen to the government. Members of the formal bodies that have created, codified, enforced, and interpreted the law have done so as an act of delegation—by virtue of the citizens' willingness to cede the power of governance to representatives. The fact of this delegation alone cannot displace the power of the citizens' own normative judgments about the value of the law, measured by its ability to account for their own lives and values. Indeed, juries have nullified and continue to nullify, even without formal permission.²¹⁷

Nullification, even in the small space it occupies, is thus a safety valve in a world that might otherwise reduce self governance to a series of deferred loyalties and wholesale obedience. It is a constant reminder that the value of the law flows from the people, and that the formal decision makers are agents—repositories of our delegated power—and not the source of power itself.²¹⁸ The law is not an external body but an internal one that is as fluid as our own shifting values, norms, and expectations.²¹⁹

213. *See id.*

214. *See id.*

215. *See id.* at 99.

216. *See* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 14–17 (1998) (arguing that there will be times when personal autonomy and political authority are fundamentally incompatible).

217. *See supra* notes 75–76 and accompanying text.

218. *See* GREENE, *supra* note 36, at 102.

219. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 56 (2001) (arguing that interpretation of law must be responsive and not a fixed point).

In this it may appear that nullification renders the law less knowable, less constant, and even ad hoc. The fear of both inconsistent verdicts and their effect on the rule of law is indeed powerful. The horrific history of nullifying verdicts serves as a reminder of the power of this near private moment when compounded across a community.²²⁰ But this first impression ignores equally valid realities. Nullification is an act of integration—it seeks to map the formally constructed law onto the lives of the governed and, in the process, preserve the underlying value of law itself. It is a moment of direct citizen interpretation that pushes the law to account for a previously excluded perspective. This is not to say that jurors always accurately reflect the desires of their larger community. Though they may be difficult to detect, surely there are instances in which jurors, even as they sought to imprint their own values on the law, returned verdicts that seemed to fly in the face social expectations. But the very possibility of their interpretive acts opens up the possibility of participation by groups previously excluded from other formal realms of power (provided that those groups are permitted to become jurors). In short, nullification renders the law a body in motion, unmooring the law from its static origins. It is a moment of voice—expressing dissatisfaction within the confines of the walls of the system—and a moment of exit—rejecting law that would exclude the citizen's own experience. Within a democratic rule of law, nullification is consistent with an expanded vision of the law, and there is inherent value to it. The ability of jurors to challenge the law as formally constructed promotes the underlying values of the democracy, sheltering an outlying narrative that channels the power of interpretation and enforcement away from the government and toward the people. It drives the law to bend toward the citizens' conceived notion of justice, whether that notion is drawn from their understanding of the law or a competing narrative in their own lives.²²¹

That the citizen juror's sense of justice may be inconsistent with or in direct conflict with a larger national sense does not undermine its value or displace it as a possible source of law. Discordant and divergent perspectives play a valuable role in the creation and interpretation of law in our democracy.²²² Acknowledging the difference between the State's formal construction of the law and the citizen's own sense of the law pushes against a complacency that would suggest that the nation has but one perspective. Divergence rebels against a notion that we, as individual citizens, are truly singular in our identities. Instead it embraces the reality that we are the complex and multifaceted sons and daughters of those early revolutionaries who risked their lives rather than

220. The history of nullification surrounding the Fugitive Slave Act in the North offers a positive counterpoint to this negative memory. See Forman, *supra* note 42, at 899–902.

221. See Solun, *supra* note 6; see also Brown, *supra* note 8, at 1153 (“To achieve one of law’s ends—justice—we must sometimes abandon law’s means, such as rule application.”).

222. See Heather Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010) (noting that discordant and divergent perspectives would be present in a well-functioning democracy).

offer blind obedience to a government so distant that they could no longer recognize themselves in the laws that sought to govern them. Nullification empowers a forum for our dissent within the larger construct of government—even if it is only in a small space such as in a jury room or on a verdict form. Even that small moment can serve as a catalyst for change when it resonates with a broader community.²²³ Nullification is a reminder that local forums may be better suited to serve as proving grounds for the dynamic beliefs of the citizenry.

In today's contentious political atmosphere, the Founders' ideal of governance based on a national consensus may be difficult to imagine. Indeed, to hope that the populace could reach consensus, whether on a national, state or even local level, seems like a quaint anachronism.²²⁴ Yet recent political movements suggest that some issues enjoy a resonance that motivates, even if these issues are vague. The Occupy Wall Street (OWS) movement and the Tea Party movement, for example, are testaments to the principles of popular democracy that were espoused by the Founders, principles that some now claim as originalism.²²⁵ Like the New Deal and the Civil Rights movements before them, these movements represent moments of great disconnect between the government and the people.²²⁶ Democracy responds most effectively when it opens a space outside of formalized government to allow for expression of the people's discontent with the law or with their government representatives.²²⁷

The appeal of such movements notwithstanding, such movements raise questions of utility. Although they have undoubtedly altered the current state of politics, their most readily realized effects thus far seem to be partisan gridlock, increasing polarization among the citizenry²²⁸ and, in the case of OWS, an impressive number of arrests for misdemeanor trespass charges on a single

223. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (noting that part of the power of nullification is to serve as a locus of attention when the application of the law is inconsistent with either stated government policy or the sentiment of larger state or national communities).

224. Even early discussions of "national consensus" suggest that it was a mechanism to foil radicalism and factionalism, ensuring a system of national governance that promoted common, as opposed to local, goals. See *THE FEDERALIST NO. 10*, *supra* note 124, at 64; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

225. See BALKIN, *supra* note 14, at 11.

226. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 *HARV. L. REV.* 1731, 1758–64 (1991) (arguing that social movements can produce changes in formally constructed law that might be defined as "judge-found law" as opposed to "judge-made law"). See generally BALKIN, *supra* note 14.

227. See KRAMER, *supra* note 33, at 9–34; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 *U. PA. L. REV.* 297, 318 (2001).

228. See Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 *N.W. U. L. REV. COLLOQUY* 281, 282–83 (2011) (attempting to answer the question of what the Tea Party stands for); Andrew Tangel, *Occupy Movement Turns 1 Year Old, Its Effect Still Hard to Define*, *L.A. TIMES* (Sept. 15, 2012), <http://articles.latimes.com/2012/sep/15/business/la-fi-occupy-anniversary-20120915> (describing the political effects of the Occupy Wall Street movement).

day.²²⁹ Though I do not doubt the political power of these products (or their accompanying movements), I question what actual effect they have had on the state of the law or on the citizen's sense that he can control the creation, application, and interpretation of law or reject laws that might seem discordant with his own view of the government or social order.

This sense of disenfranchisement has many sources. The formal branches of government have sought to maintain the supremacy of their own exercise of power.²³⁰ Presidents have expanded executive authority, most recently over matters ranging from immigration policy to redefining the law of war.²³¹ Similarly, the legislative branch has sought to push back on executive authority, wielding the sword of budgeting power in an effort to alter the executive's agenda.²³² This atmosphere has contributed to the notion that we, as citizens, merely serve the role of electing our officials and then passively bearing witness to the awful spectacle of governance and law making.²³³ Once the law is created and applied, we also take a back seat to its interpretation, waiting for the Supreme Court to tell us the law's meaning and its place in the constitutional continuum. Where the other branches have claimed control over the creation and application of the law, the Supreme Court has claimed the power of interpretation of the law.²³⁴

To say that these exercises of power by the three branches—to the exclusion of the citizenry—were not contemplated by the Founders assumes that there was some continuity in how the Founders imagined the government functioning.²³⁵ Even without a homogeneous sense of the democracy they were founding, the Founders created a constitutional structure that made power grabs possible and offered a check-and-balance system in an effort to combat overreach-

229. See Colin Moynihan, *185 Arrested on Occupy Wall St Anniversary*, N.Y. TIMES, (Sept. 17, 2012), <http://cityroom.blogs.nytimes.com/2012/09/17/protests-near-stock-exchange-on-occupy-wall-st-anniversary/>. For a complete listing of the total number of arrests connected to the Occupy Wall Street movement by location and date, see OccupyArrests.Com, <http://occupyarrests.moonfruit.com/>.

230. This struggle for power among the branches is consistent with the Founders' concept of the value of competing government branches as a check on the power of any single actor or body of actors in the government. See THE FEDERALIST NO. 51, *supra* note 24, at 319, 351; see also Madison, *Charters*, *supra* note 34, at 191–92 (describing departmentalism as a mechanism to ensure checks among branches of government).

231. See generally *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057 (2012) (describing expansions of executive power in the Bush and Obama presidential administrations).

232. See John Boehner, *The President is Raging Against a Budget Crisis He Created*, WALL ST. J. (Feb. 20, 2013), <http://online.wsj.com/article/SB10001424127887323495104578314240032274944.html>.

233. Thomas Jefferson rejected this notion as contrary to the principles of the revolution. See Letter from Thomas Jefferson to James Madison (Apr. 2, 1798), in 17 THE PAPERS OF JAMES MADISON 104–05 (Robert A. Rutland et al. eds., 1977); see also *supra* note 50.

234. See GREENE, *supra* note 36, at 238 (using an opinion by Justice Anthony Kennedy to note that not only has the Supreme Court claimed the power of interpreting the Constitution for itself, but that once it has spoken regarding a particular issue, there may be little opportunity left to engage the Court in a dialogue regarding that interpretation).

235. *But see supra* note 50 and accompanying text.

ing by any one branch.²³⁶ In addition, their own lived history would have taught them that some people would push for the supremacy of one branch, and others would push back toward balance among the branches. But they also imagined a mechanism to check these competing branches, and they placed the power of that check directly in the hands of the citizens. In this, nullification offers a means to accomplish what may be lost in the larger process of governance—the opportunity to inject local voice into the larger process of compromise.

Nullification also opens other possibilities. Just as it provides a space for competing voices in the larger body politic, it opens up the possibility of a law constructed in spaces that acknowledge the horizontal and vertical components of citizens' lives. People exist both horizontally and vertically. Their identities are a combination of traits, beliefs, and associations that group people along these competing axes. These identities are vertical in relation to formal hierarchy. In the terms of governance, people are citizens, or elected or appointed officials. Their formal role in the creation of law is defined by the vertical spaces they occupy. A citizen, for example, votes.²³⁷ The citizen hopes to elect representatives who will implement policies consistent with the citizen's own values and expectations. If the representative fails in that assigned role, or the citizen changes his mind on what he expects from the representative, the citizen is still confined to the remedies of the vertical space he occupies. For most citizens, this space is a bottom rung in the vertical hierarchy of governance. The citizen is common. He is one part of a mass that elects the few who govern from a higher vertical space than his own. Those few members of higher echelons of this vertical construct write laws, execute laws, and interpret laws; they are the formal lawmakers. They simultaneously represent and govern. Their words become law, and the citizen waits for their pronouncements to tell him what is or is not permitted.

But people also occupy horizontal spaces. Spread out across the plane that is personhood, individuals simultaneously answer to different names and different identities. Some may be disjunctive: a citizen may be, for example, a man or woman, son or daughter, husband or wife, or partner or single. He is Jewish, or Protestant, or Catholic, or Muslim, or Buddhist, or Zoroastrian, or adherent of some other religion, or an atheist. Others are conjunctive: a citizen may be a sports enthusiast and a knitter and a florist and a clarinetist and the author of an award-winning series of ladies' romance novels set in nineteenth century England. He may support equal rights, but not gay marriage. He may be pro-life and pro-death penalty. He may own a gun, but support gun restrictions.

The list goes on and on in any of a multitude of combinations. The details do

236. The Founders also constructed the Constitution as a document that was sufficiently imprecise to foster ever-shifting presentations of law and government. See GREENE, *supra* note 36, at 64 (describing the Constitution as aspirational, unlike statutes that set out specific rights and duties); see also *supra* note 230.

237. See GREENE, *supra* note 36, at 46–47 (noting that formal government offers little opportunity for direct citizen voice outside of casting a ballot).

not matter as much as the recognition that people draw their identities from many sources. These sources may crash against one another in a struggle for value dominance. Should this citizen vote for municipal bonds that fund a new hockey arena or a concert hall? Should the citizen push for state-run health insurance to cover independent contractors such as authors if that health insurance might also fund abortions for women? In each of these decisions, the citizen weighs the competing values of his horizontal identity in order to exercise the political will of his vertical identity. In the process of reconciling the pluralism of the citizen's life, questions of obedience and deference inevitably loom. On one hand, theories of liberal governance would support the notion that the citizen owes deference to the law—even laws that conflict with the citizen's underlying moral values.²³⁸ On the other hand, the citizen may ask whether he owes deference to formally constructed law and the government above all other constructs of social value and competing pluralism?²³⁹ Nullification offers the possibility of integrating the competing pluralisms that constitute the lives of the governed and imagines a law that seeks to account for shifting allegiances and identities even as it seeks to establish law.

As an informal source of law, nullification offers a mechanism to allow citizens to explore pluralism in the context of real applied law. In a jury room, a citizen may well be engaged in the same process of compromise that informs vertical participation in the context of formal lawmaking. But the jury room also opens the possibility that, when given the chance to explore the horizontal self in the context of the application of the law, the citizen may reach a different conclusion. Even the man who supports gun-control legislation in general may weigh his competing allegiances differently when asked to apply that gun control to a fellow knitter who defended herself with an illegally possessed firearm. In this process of compromise, the nullifying juror opens a new realm of law—one that seeks to integrate the competing internal identities of the citizen. Nullification challenges the notion that obedience to the law and faith in the rule of law enjoy only one construct. It suggests instead that, just as liberal governance implores the citizen to be faithful to the law, so too must those who make and interpret law be faithful to competing sources of meaning that in different contexts may push competing identities to the surface when the law is placed in our normative world.

In this, nullification serves many masters. It elevates a previously excluded

238. See, e.g., RAWLS, *supra* note 1, at 115, 344, 351, 354–55 (contending that if a state meets the minimum requirements of legitimacy, then the citizen has a moral duty of obedience to the institution, even if the citizen finds the institution's laws unjust); JOHN RAWLS, *POLITICAL LIBERALISM* xviii–xix, 54–58 (1993) (arguing that mutual concepts of justice mandate obedience to laws, even if the moral basis for the law diverges from the citizen's own sense of morality). Ronald Dworkin would reach a similar conclusion, but for different reasons. See DWORKIN, *supra* note 7, at 166, 180 (stating that citizens owe a duty of obedience out of an associative obligation).

239. See GREENE, *supra* note 36, at 1 (asking why obedience to law requires competing norms, including religious, familial or social values, to be rendered subservient to those promoted by the state).

voice within the confines of formal government and pushes back against an unresponsive construction of law, while opening up a new forum for expression of the citizen's competing values and ideals.²⁴⁰ But it also offers a moment of reconciliation between formal construction and the citizen's conception of law that saves the whole by forcing alteration or exception rather than wholesale rebellion. It creates a space in the government for those who might otherwise be forced to exit.²⁴¹ The nullified verdict is a warning of a perceived distance between the citizen's sense of justice in a single case and the general law itself. Like all warnings, it can fall on deaf ears, or if heard, it can fail to resonate with a larger audience that might effectuate some change. But in those moments when it does resonate, it is a call to produce a more responsive law—one that is truly created by the people and not handed to them whole by the government that, once receiving their votes, can easily form a ruling class with no true connection to the citizens it serves.

In a world where many citizens do not vote, even in local elections, because they sense that their vote will not matter, a vote in a room of eleven fellow citizens lifts this hopelessness. A jury vote—every jury vote—matters. One vote could be the difference between a conviction and a hung jury. What the jury lacks by way of an “empire,” with its limited power and jurisdiction, it makes up for as a site of meaningful “minority” rule in the face of a nationalistic push toward consensus that the community may not accept.²⁴² In this sense, nullification does not undermine or merely correct the imperfections of the law—it offers a moment of meaningful democracy and relief from the rigors of a formalist construction.²⁴³ This construct of the jury as a source of law is consistent with the Founders' own distrust of concentrations of power within the democracy. Just as the three branches serve as a system of multiple checking mechanisms on the power of formal government, recognizing the democratic function of the jury forces an accounting with the possibility of an alternative interpretation of (or even rejection of) the law.²⁴⁴

240. Divergent perspectives presented as nullified verdicts can serve as catalysts for change, energizing a national response to local rule. See *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES*, *supra* note 10, at 869–70 (arguing that “consistent acquittals (by all white juries) in state criminal courts in the American South in the early 1960s” helped fuel the Civil Rights movement). Though the nullified verdict may be devastating for those who counted on a particular application of the law, it carries far more force as a motivator towards change than as a source of power in its own right. In this, even nullified verdicts grounded in the prejudice of a community may serve as valuable witnesses to the oppressive power of that community.

241. See Gerken, *supra* note 222, at 9 (noting that we should not ignore the role that divergent voices can play in a functioning democracy of forcing an integration of minority perspectives).

242. See *id.* at 27.

243. Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1380, 1383 (1994).

244. GREENE, *supra* note 36, at 103–04 (noting that the Founders not only created multiple branches of government, but forced those branches to compete for the citizen's allegiance, thereby installing a constant reminder that the citizen, not the government, is the ultimate source of power within the democracy).

Nullification creates a more knowable, more consistent law insofar as it conforms to the citizens' expectations of the law in their own communities. It is true to the *nomos*. Nullification requires that twelve citizens serving as jurors come to a consensus about the law that contradicts the one promoted by formal government. This suggests a depth of feeling regarding the state of the law that is both intransigent and consistent among and across those individuals chosen as jurors on a particular case.²⁴⁵ In agreeing to nullify, jurors seek to drive the law back towards themselves. They create a law that is knowable to them in a tangible way by refusing to apply it to their fellow citizen.

Though limited by both its effect (a single verdict) and its participants (jurors on a single criminal case), nullification nonetheless raises concerns about the risk of random, incorrect or biased verdicts. Given (1) the checkered history of nullification and (2) the dynamic that juror opinion tends to converge during deliberations regardless of the accuracy of the agreed-upon opinion,²⁴⁶ these concerns are not without basis. I will address the first concern momentarily, but the second concern raises an interesting dilemma in the context of a nullification discussion. The risk that jurors will arrive at incorrect or improper conclusions because of their tendency to move towards a unified group opinion is not unique to nullifying juries;²⁴⁷ it would be present regardless of whether or not nullification was permitted. Jurors could just as easily arrive at an improper consensus regarding factual matters as legal ones, and could be as easily dissuaded from their sense of factual accuracy as legal accuracy.²⁴⁸ As to the accuracy of the verdict, researchers found that, provided juries were of sufficient size, the consensus fostered during deliberation tended towards "correct" unanimous verdicts.²⁴⁹ In other words, so long as jurors were allowed to deliberate on their opinions, even in the face of divergent opinions, the jury as a group was capable of coming to consensus around what was identified as the correct opinion.

This conclusion makes sense. Consider the Condorcet Jury Theorem.²⁵⁰ The

245. In order to nullify a verdict, jurors must reach an affirmative consensus to nullify. Absent this consensus, one juror may certainly cause a hung jury but may not nullify a verdict.

246. See Barbara Luppi & Francesco Parisi, *Jury Size and the Hung Jury Paradox*, 42 J. LEGAL STUD. 399, 406–07, 412 (2013) (finding that "people tend to become less confident in their own prior belief and more confident in the emerging group consensus (independent of whether the nascent consensus is correct) as the deliberation progresses and the opinions of other jurors become known.").

247. See RUPERT BROWN, *GROUP PROCESSES* 176 (2d ed. 2000) ("The groups were also more confident about the correctness of their answers, and this was true even when they got the answers wrong!"); Luppi & Parisi, *supra* note 246 (examining theories of cascade behavior on juries); Cass R. Sunstein, *Group Judgment: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 981 (2005) (describing the effect of information cascade on decision making behavior, concluding that people move towards consensus regardless of the accuracy of the group opinion).

248. In fact, studies of the cascade behavior examined jurors' consideration of fact, not law. See Luppi & Parisi, *supra* note 246.

249. *Id.* at 412.

250. William P. Bottom et al., *Propagation of Individual Bias Through Group Judgment: Error in the Treatment of Asymmetrically Informative Signals*, 25 J. RISK & UNCERTAINTY 147, 152–54 (2002) (describing Condorcet Jury Theorem).

Jury Theorem postulates that, if people are answering a question with two possible answers, one true and one false, and that the average probability that each voter will answer correctly exceeds fifty percent, then the probability of a group arriving at a correct answer increases as the group size increases.²⁵¹ In other words, if each voter has a better than random chance at arriving at the correct answer, then as an aggregate their ability to arrive at a correct answer will increase as the group's population grows. Placed in the context of a group like a jury which requires a supermajority to arrive at a verdict, the Jury Theorem holds that the probability of a correct verdict increases toward certainty as the size of the group increases.²⁵²

The Jury Theorem is important, but it is also incomplete in that it considers each voter's decision individually, not in the context of the deliberative reality through which juries reach their verdicts.²⁵³ As a result, it fails to account for the myriad of possible errors that group thinking, particularly the thinking of groups charged with reaching consensus, can labor under.²⁵⁴

The Jury Theorem also assumes that people do in fact have an accurate sense of what is "right" and what is "wrong" (and are likely to vote accordingly),²⁵⁵ and that the types of decisions a jury makes can be reduced to diametrically opposed "right" or "wrong" choices that a juror could discern and differentiate.²⁵⁶ Under the Jury Theorem, if each individual in a group is more likely to be wrong than right, then the likelihood that the group will decide correctly falls to zero as the size of the group increases. In the context of jury deliberation, regardless of whether you are considering nullification or not, the risk is that jurors will fail to arrive at a "correct" consensus because of their own biases, ignorance, confusion, or some other unknown factor. The resulting verdict, even if believed "correct" by the jury, will ring discordant with the larger community.

This risk would appear to be present in any democratic process.²⁵⁷ But analysis of the jury decision-making process is tricky in ways that other

251. *Id.*

252. *Id.* at 153 (demonstrating mathematically the increasing probabilities as group size increases).

253. See David Austen-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POL. SCI. REV. 34, 34 (1996); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 714 (1996) (suggesting that groups facing "many real-world decision tasks" including "jury decision making" are more likely to suffer biases in no small part because such decisions tend to not present clear diametrical options as the Jury Theorem posits); Sunstein, *supra* note 247, at 997 (stating "[t]he most fundamental point is that in deliberation, individuals are not making judgments on their own; they are being influenced by the judgments of others. When interdependent judgments are being made, and when some people are wrong, the Condorcet Jury Theorem offers no clear predictions").

254. See Sunstein, *supra* note 247, at 984–1012 (providing a convincing analysis of the possible risks of group thinking generally and in the context of jury deliberation).

255. See Austin-Smith & Banks, *supra* note 253, at 43–44 (1996) (arguing that it is improper to assume that jurors will choose the correct choice).

256. See Kerr et al., *supra* note 253, at 714 (noting that real life decisions are rarely binary).

257. See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 994–95 (1989) (arguing that Condorcet theory should promote the "best" outcome in any democratic decision-making process).

democratic processes may not be. In addition to the risks identified for majorities in other contexts, jury verdicts suffer the additional complication that in order to reach a verdict, jurors must not only come to a supermajoritarian (if not unanimous) consensus;²⁵⁸ they must do so in the presence of each other, thereby subjecting their perspective to scrutiny. Given the deliberation process, jurors are likely to influence each other in ways that voters in secret-ballot contexts are not.²⁵⁹ Finally, jurors' verdicts are publicly accessible. Even in jurisdictions where jurors' names are not included in a public record, the result of their deliberations is. Finally, as members of the geographic community in which a trial occurs, jurors have an added incentive to be careful in their deliberations because they live—in a literal sense—with the consequences of their decisions. These realities undoubtedly alter the dynamic of the jury decision-making process and may well create risks of improper verdicts,²⁶⁰ but they do not suggest that these juries are unlikely to properly identify their particular community's sense of morality and to vote in a manner consistent with that sense of morality. Quite the contrary, one would expect that jurors would have some understanding of their communal morality and, moreover, that they would be hesitant to promote an alternative reality in light of the need to reach consensus, the nature of the deliberations themselves, and the publicly available verdict that will be the product of their vote. In other words, although jurors may not be able to identify morality for every member of the community at any given moment (and large swaths of the community may be excluded from ever having the opportunity to join the electorate that is the jury), those who do sit as jurors should be able to identify firmly held communal norms and have some incentive to enforce them through their verdict. To the extent that jurors do defy probability and reach a false conclusion, an event that surely happens occasionally, their failure to accurately apply the law seems no more or less probable than their failure to accurately assess the facts in a particular case—a role that is relatively uncontroversial.

Arguably, this analysis overlooks some significant risks of nullification.

258. *Compare* *Appodaca v. Oregon*, 406 U.S. 404 (1972) (upholding constitutional state procedural rules that allowed non-unanimous verdicts in criminal cases, but requiring a supermajority of votes), *and* *Johnson v. Louisiana*, 406 U.S. 356 (1972) (same), *with* *Williams v. Florida*, 399 U.S. 78 (1970) (upholding a state procedural rule that reduced jury size from twelve to six jurors in criminal cases, but noting that a six-person jury must reach a unanimous verdict).

259. See Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 *LAW & SOCIETY REV.* 667, 667 (2011) (noting that jurors persuade one another to adopt particular positions and that socioeconomic class, race, and sex can play a role in the level of influence jurors have over one another, with members of minority groups more often the subject of persuasion). For a recent, albeit limited, juror discussion of this phenomena, see Dana Ford, *Juror: 'No doubt' that George Zimmerman Feared for His Life*, AC 360° (July 16, 2013, 4:57 PM), <http://www.cnn.com/2013/07/15/justice/zimmerman-juror-book> (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/I.307/16/acd.01.html>) (describing jurors' efforts to convince others to change their votes). This certainly links to the dangers of the Information Cascade Behavior discussed above. See *supra* notes 246–49 and accompanying text.

260. See *supra* notes 253 & 255.

First, given that juries are not drawn from a national, or even a state pool, but a local one, jury nullification may well reflect local values, rather than larger communal ones. Studies of jury nullification in the South, particularly in the period following Reconstruction, reveal the power of nullification to enforce local values, even those that were distasteful to a larger state and national audience.²⁶¹ The effect of geography, and the social values linked to a particular location, is also evident in contemporary verdicts and venue shopping.²⁶² In their discussions of juror eligibility, the question of vicinage, or the requirement of local juries, was hotly debated among the Founders. Originally, the Constitution did not require local juries.²⁶³ Anti-Federalist opponents of the Constitution protested.²⁶⁴ They noted that, without a local jury requirement, verdicts would no longer reflect the values of the communities most affected by the alleged crime.²⁶⁵ They feared that the federal government would use the lack of a vicinage requirement to shop for venue and thereby procure its desired outcome even if that outcome was counter to the local community's own values.²⁶⁶ In the end, despite the risks posed by local juries and discordant verdicts, the Founders adopted the vicinage requirements in most cases, finding it consistent with their view that the law should reflect communal values, which at times varied by locale.²⁶⁷ To the Founders, localism as expressed through jury verdicts served to save, not wreck, the larger national community and to lend legitimacy to federal law that might otherwise be discordant with community values in a particular location. It is also useful to note that when verdicts from particular locations appear to consistently defy larger communal values, mechanisms of executive, legislative, and judicial redress exist and have been utilized to "correct" such decisions.²⁶⁸

Second, the aforementioned risk that dissenting jurors will lose their voice in the drive towards consensus—undermining one of the key potential benefits of jury nullification—is perhaps joined to the risk that supermajority and unanimity requirements, although encouraging accurate reflection of the community's values, may also create the opportunity for a holdout juror to hold a verdict hostage in an effort to achieve a particular result. Both concerns, though

261. See Forman, *supra* note 42, at 899–901.

262. See, e.g., Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509 (1994) (noting the effect of venue on verdict); see also Dan Higgins, *Not Guilty Pleas for Blood-Throwing Protestors*, ITHACA J., July 15, 2003, at 1B (describing the effect of a liberal Ithaca jury in the trial of war-protesting nuns); Diana L. Mattina, *Protestors Stand by Actions*, ITHACA J., Mar. 19, 2003, at 2A (same).

263. U.S. CONST. art. III, § 2, cl. 3.

264. See JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 22 (1994) (describing the Anti-Federalist reaction to the lack of a local jury requirement).

265. See *id.*

266. See *id.* at 22–23 (noting that the concept of venue shopping had been utilized by the British colonial government in an effort to quash early revolutionaries; it was, therefore, easy fodder for the Anti-Federalists).

267. See Middlebrooks, *supra* note 24, at 388.

268. See Carroll, *supra* note 9, at 695–97.

diametrically opposed in their end result, are answered by the same reality that jurors who feel sufficiently strongly about their beliefs are likely to cling to them even in the face of a competing majority opinion. In other words, the very existence of the rare phenomena of hung juries simultaneously suggests that jurors are both likely to arrive at consensus and that there is a mechanism jurors can exercise when they cannot reach consensus that allows them to preserve their divergent perspectives. A juror so moved by the strength of his convictions that he feels compelled to adhere to them in the face of opposition by his fellow jurors and the inevitable instructions of the judge-urging consensus suggests, at the most basic level, that the juror is committed to his position. But such a holdout may also signal that a particular position may be one shared by other members of the community that lack a mechanism to express their sentiments. In contrast to nullification that requires arrival at consensus, the holdout juror's failure to realize consensus offers a different, though valuable, commentary on law rather than on nullification.

This raises a third dilemma of jury nullification, which is much more difficult to explain away than the others. To the extent that jury deliberation is both veiled in secrecy vis-à-vis the outside world and is available only to a select few, the mechanism of jury selection becomes critical. Failure to include a variety of community perspectives on a jury risks a verdict that fails to reflect communal values; but if the verdict is a nullified one, it may undermine the stability of the law and reinforce oppressive regimes. Evidence of continued exclusion of particular classes of individuals and perspectives must be addressed if the promise of nullification as a means of infusing the law with communal values is to be realized.

As the Court struggles along with all of us to define the role of the citizen in our modern democracy, some salience emerges. We, as citizens, are a powerful source of meaning. Every day we construct a law that flows from the bottom upward, pushing against an increasingly distant and elite government.²⁶⁹ But we are also a dangerous force when our own concept of justice is grounded in prejudice or "cruel poverty and ignorance."²⁷⁰ Critics—who would call on us to choose between the protections promised by Reconstruction Era proponents of the Fourteenth Amendment and our roles as guardians promised by the Founders in the Sixth Amendment—ignore the vital role both conceptions of governance play as we slouch toward a modern rule of law. We need both. We need a government that can preserve the rights of the individual in the face of oppression by the majority, but we also need the power and the right to set the

269. The Court, in defining the role of the jury, has repeatedly stressed that one function of the jury is to guard against government oppression and to reject any law that is unjust in its construction or application. *See, e.g.*, *Oregon v. Ice*, 555 U.S. 160, 167–68 (2009); *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476–85 (2000); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Johnson v. Louisiana*, 406 U.S. 356, 373 (1972); *Williams v. Florida*, 399 U.S. 78, 87 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 156–57 (1968).

270. HARPER LEE, *TO KILL A MOCKINGBIRD* 216 (1960).

boundaries of law and to push back against that same government when it becomes the oppressor.

CONCLUSION

In defining a rule of law within the American democracy, there has been a near-constant struggle to reconcile the Founders' original notion of the jury as finder of both law and fact with the promise of the knowable and consistent law. In fact, the practice of jury nullification that the Founders looked to as a final check on the oppressive power of government rapidly fell out of favor as the nation grew and the divergent needs of citizens became apparent. By Reconstruction, the federal government, through the judiciary, had sought to abolish nullification, and proponents of the Fourteenth Amendment actually sought to purge nullifying jurors and exclude incorporation of nullification to the states. But in the process of seeking to eradicate nullification, the relationship of the citizen to the government shifted in important ways. Citizens ceased to be the active guardians of their rights in the face of government oppression and became the passive recipients of rights and liberties granted them by the government. As the Supreme Court reconsiders the original role of the jury in its Fifth and Sixth Amendment jurisprudence, a reexamination of jury nullification is necessary.

Admittedly, nullification is a blunt tool. The obscurity of the jury room may protect deliberations from government intrusion but may also promote outcomes oppressive and silencing in their allegiance to those already in power. Absent a more nuanced approach to jury verdicts themselves, the jury's decision may be subject to the convenient interpretative and rhetorical spins of those who would use the verdict for a larger political cause.²⁷¹ Beyond this, the nation's checkered history with nullification speaks of the controversy surrounding it. But even in its imperfect presentation, jury nullification offers a window to a critical and alternative approach to the rule of law in a democratic society. It imagines a law derived not from a formal construct alone, but by the people's interpretation and interaction with that construct. Nullification ceases to be a mere rogue moment of governance or source of instability but is remembered for its historical self—a means to draw the law ever closer to the lives of those it would govern. Even among those who would oppose direct citizen interpretation of the law unfiltered by representation, there is a recognition that the law in our democracy is a narrative told in many voices. Jury nullification offers a mechanism by which a countervailing and often unheard narrative emerges. It integrates the people's lives, expectations, and shared community values with the law and as such is integral to the concept of the rule of law within the democracy.

271. See Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. L. F. 91, 136–40 (2005) (noting that jury verdicts fail to offer any meaningful explanation for their basis, leaving them open to a variety of (and at times inaccurate) interpretations and suggesting mechanisms to render criminal jury verdicts more transparent in their meaning).

Whatever challenges nullification may present, to remove nullification is to separate the citizens from the law that would seek to govern them. Instead, we should recognize that nullification compresses the space between the formal construction of the law and the citizen's lived experience of the law. It recognizes that the power of the majority to create law in the representative democracy carries with it the power to level divergence and suppress dissent. Nullification allows the citizen to carve some new meaning out of and into the law's face and so to create a new source of law constructed from their own lives and their own principles. In this, nullification serves a democratic function that a majoritarian-constructed law cannot: it integrates the competing pluralities of the citizenry to create a nimble and responsive law. In the process, the role of the citizen shifts from passive acceptance or recognition of the power and authority of the government as the sole arbiter of legality to active participation in the interpretation, synthesis, and eventual rejection and reconstruction of the law on the citizen's own terms. This is the power—for better or for worse—of nullification. It is democracy unfiltered by formality. It is the oftentimes painful process of internalization and reconceptualization, free of all the formal filters of construction and representation. It is a return to the most primal of all conceptions of the rule of law—to the *nomos* in which the citizen knows and names the law himself because it falls within and is consistent with the narrative of the community where it resides.

Instead of rejecting nullification as counter to the rule of law, our democracy should embrace it as a mechanism that moves the formal and static body of the law toward *nomos*. Nullification capitalizes on a moment of disconnect between the citizen's sense of the world and the law that would govern it, opening an avenue for dissent and resistance. In the process, it creates space for minority views that, though unable to fully integrate in communities where the minority and majority views diverge, can nonetheless find purchase to resist centrally dictated policy by refusing to administer that policy in the name of the people.²⁷² It supports the notion that predictability and uniformity are not always the best conditions for a democracy, nor do they serve the overarching purposes of having criminal juries in the first place.²⁷³ The empowerment of the divergent view, even if only in the context of single verdict, may push the system toward a more nuanced and fully developed policy—one that flows from the bottom up to the government. In all this, dissent finds a place within the institution of government, rather than being confined to private spaces.²⁷⁴ In this public exposure, dissent gains a power previously absent, pushing new meaning on the law.

272. History is replete with examples where local citizens forced action long before the federal government was catalyzed to act. Decisions in *Brown*, *Roe*, *Simmons*, and *Lawrence* serve as reminders of the power of shifting communal sentiments on law. In this way, localities often stand on the vanguard of policy, reflecting popular will long before the federal government seizes upon it. See *supra* note 134 and accompanying text.

273. Gerken, *supra* note 222, at 61.

274. *Id.*

