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ARTICLES

Reconstruction and the Transformation of Jury Nullification

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More than a century ago, the Supreme Court, invoking antebellum judicial precedent, held that juries no longer have the right to “nullify”—that is, to refuse to apply the law as given by the court. Today, however, in assessing the constitutionally protected right to criminal jury trial, the Supreme Court has emphasized originalism, delineating the right’s current boundaries by the Founding-era understanding of it. Relying on this Supreme Court jurisprudence, scholars and several federal judges have recently concluded that because Founding-era juries had the right to nullify, the right was beyond the authority of nineteenth-century judges to curtail and thus should be restored. But originalists who advocate restoration of the right to nullify are missing an important constitutional moment: Reconstruction. The Fourteenth Amendment fundamentally transformed constitutional criminal procedure, in the process altering the relationship between the federal government and localities and between federal judges and local juries.

This Article (1) responds to what is an emerging consensus among these commentators that the Supreme Court’s prohibition of jury nullification cannot be justified on originalist or historical grounds and (2) provides new evidence of how the Fourteenth Amendment’s Framers, ratifiers, original interpreters, and original enforcers thought about juries, evidence that differs from the traditional perspective that the Reconstruction Congresses intended to empower juries. It finds that the Reconstruction Congresses understood the Fourteenth Amendment not to incorporate against the states the jury’s historic right to nullify, even as it incorporated a general right to jury trial. On the contrary, Reconstruction Republicans understood jury nullification to be incompatible with new constitutional rights they were charged with protecting in the

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former Confederate states and in the Utah Territory. In what was then among the most significant revolutions in federal jury law, Reconstruction Republicans supported legislation that would purge en masse from criminal juries Southern and Mormon would-be nullifiers—even some prospective jurors who plausibly believed that a federal criminal statute was unconstitutional.

Thus, the Reconstruction Congresses, through the Fourteenth Amendment and its enforcement legislation, may have provided a constitutional basis for the nineteenth-century judicial precedent that had disallowed the jury’s right to nullify. Although no single account can definitively capture “original meaning,” this Reconstruction-era history provides a new original understanding of a contemporary dilemma in constitutional criminal procedure.

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INTRODUCTION

More than a century ago, in *Sparf v United States*,¹ the Supreme Court held that the constitutional right to jury trial² does not give a jury the right to decide questions of law or to reject the law as

¹ 156 US 51 (1895).

² See US Const Art III, § 2, cl 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); US Const Amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”). Although the right to criminal jury trial is guaranteed in both the body of the Constitution and the Bill of Rights—the only right so guaranteed—this Article, like the Supreme Court’s jurisprudence, often speaks in terms of the Sixth Amendment right. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 Ind L J 397, 398 (2009).

presented to it by the court³—an idea known as the right to nullify the law.⁴ But today, the constitutionality of prohibiting jury nullification is under attack.

Recently, the Court has emphasized originalism in constitutional criminal procedure.⁵ For stage after stage of trial,⁶ the Court has analyzed Founding-era history to determine the Sixth Amendment's original meaning and its continuing constitutional requirements.⁷ Relying on these decisions, scholars and several federal judges have concluded that, because Founding-era juries had the right to nullify, the right was implicit in the constitutional meaning of jury, was beyond the judiciary's authority to curtail, and should be restored. *Sparf*, they assert, should be overruled because it cannot be justified on originalist or historical grounds.

Yet those who advocate an originalist restoration of the right to nullify overlook an important constitutional moment: Reconstruction. Assuming an originalist or textualist perspective, the Fourteenth Amendment should shine significant light on criminal procedure because it is the textual prism through which the Court refracts most modern doctrine. Both the Court and its commentators, however, have largely ignored the Reconstruction-era history that illuminates the

³ *Sparf*, 156 US at 102.

⁴ See Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* 6 (Carolina 1998). Although nullification is conventionally defined as a “jury’s knowing and deliberate rejection of the evidence or refusal to apply the law,” *Black’s Law Dictionary* 875 (West 9th ed 2009), the concept has been expanded to include single holdout jurors who “choose not to follow the law as it is given to them by the judge.” Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw U L Rev 877, 881–83 (1999).

⁵ See Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 Georgetown L J 1493, 1516 (2006) (noting that originalism has “figured prominently” in recent constitutional criminal procedure cases); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 Georgetown L J 183, 185 (2005) (“Originalism, in short, is a powerful force in criminal procedure.”).

⁶ For examples of originalism as applied to testimony, see *Giles v California*, 554 US 353, 362–66, 377 (2008); *Crawford v Washington*, 541 US 36, 42–51 (2004) (drawing on Founding-era cases to exclude previous statements that defendant’s wife gave to police after she invoked the marital right to not testify at trial). For verdicts, see, for example, *Jones v United States*, 526 US 227, 244–48 (1999); *United States v Gaudin*, 515 US 506, 511–15 (1995). For sentencing, see, for example, *Oregon v Ice*, 555 US 160, 167–68 (2009); *Apprendi v New Jersey*, 530 US 466, 476–85 (2000).

⁷ See *Danforth v Minnesota*, 552 US 264, 271 (2008) (“[*Crawford*] ‘turn[ed] to the historical background of the [Confrontation] Clause to understand its meaning,’ and relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation.”) (citation omitted), quoting *Crawford*, 541 US at 42–51. See also *Blakely v Washington*, 542 US 296, 306 (2004) (noting that without the sentencing restrictions required by *Apprendi*, “the jury would not exercise the control that the Framers intended”).

Fourteenth Amendment's original understanding and thus how it may have transformed criminal procedure.

This Article tries to remedy these substantive and temporal omissions—that the Court's originalism neglects nullification and that *Sparf's* critics neglect Reconstruction—by assessing how the Reconstruction generation understood nullification. Its purpose is not to evaluate the merits or demerits of originalism as a methodology or of jury nullification as a practice. Rather, it offers a new way of understanding nullification through a different lens of history. Starting from the premise that the Court considers originalism highly relevant to jury law,⁸ it analyzes how incorporating the Fourteenth Amendment and Reconstruction-era history into that methodology might affect an originalist interpretation of the right to nullify.

First, this Article concludes that the Fourteenth Amendment's Framers understood their Amendment to guarantee criminal jury trial in state courts—but not to incorporate against the states the jury's historic right to nullify. In 1868, unlike in 1791, this right was not considered inherent in due process or jury trial. Second, this Article shows that, unlike the Sixth Amendment's Framers, the Fourteenth Amendment's Framers understood nullification to be inconsistent with new constitutional rights, and they understood the Constitution to authorize Congress and the federal courts to disallow nullification. Their Amendment's text and history provide an alternative justification of *Sparf*, one that comports with originalism—of the Reconstruction-era variety—and illustrates that original meaning may not be captured exclusively in a Founding-era conception of rights.

In addition to arguing that *Sparf's* holding may be justified on originalist grounds, this Article also challenges the recent historical scholarship on Reconstruction and juries, which has contended that the Reconstruction Congresses intended to empower juries by expanding the jury pool to blacks and did not intend to restrict Sixth Amendment jury trial rights.⁹ This Article provides new evidence that the Reconstruction Congresses sought to reduce jury power by restricting the jury pool, purging would-be nullifiers from the jury boxes. The Congresses tried to do so even when the purges would exclude local majorities from the juries and even when prospective

⁸ Recent criminal procedure opinions for the Court written by Justices Ruth Bader Ginsburg, Antonin Scalia, John Paul Stevens, and David Souter have relied upon originalist analysis. See *Ice*, 555 US at 168–69 (2009) (Ginsburg); *Giles*, 554 US at 2682–86 (Scalia); *Apprendi*, 530 US at 477–83 (Stevens); *Jones*, 526 US at 244–48 (Souter).

⁹ See, for example, James Forman Jr, *Juries and Race in the Nineteenth Century*, 113 Yale L J 895, 926–30 (2004); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L Rev 203, 238–41 (1995). See also notes 97–99, 261–63, and accompanying text.

jurors held what were then considered plausible views that federal criminal statutes were unconstitutional. Recent scholarship has missed this strand of Reconstruction history about curbing the jury's authority.

This Article proceeds in four parts. Part I establishes the analytical framework. It begins with the descriptive and normative attacks on *Sparf's* holding, and then it explains why the Reconstruction era may provide a better textual and historical basis for determining current criminal procedure rights than Founding-era originalism does. Parts II and III apply the Reconstruction-era historical analysis. Part II addresses whether that generation understood the Fourteenth Amendment to incorporate against the states the right to nullify by analyzing nullification through judicial practices, treatises, dictionaries, and the Reconstruction Congresses' debates. Part III asks whether the Reconstruction generation understood the Constitution to disallow, or to authorize Congress to disallow, the jury's right to nullify by providing case studies of proposed legislation intending to purge prospective nullifiers in the South and in Utah. This Article concludes that, under a Reconstruction-era interpretation, the Fourteenth Amendment did not incorporate the jury's right to nullify, and it may have transformed the Sixth Amendment to disallow that right, suggesting that Founding-era originalism should not monopolize originalist constitutional criminal procedure interpretation.

I. THE SUBSTANTIVE AND TEMPORAL OMISSIONS OF MODERN DOCTRINE

Ever since Justice John Marshall Harlan's opinion for the 5–4 Court in *Sparf* 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,”¹⁰ the law of the land has been that though juries may have the unauthorized power to nullify, they have no legal or moral right to do so,¹¹ and

¹⁰ *Sparf*, 156 US at 102–03.

¹¹ *Id.* at 74. The Supreme Court has not considered nullification at length since *Sparf*. See Douglas D. Koski and Hui-Yu Lee, *Jury Nullification in the United States of America: A Brief History and 21st Century Conception*, in Douglas D. Koski, ed., *The Jury Trial in Criminal Justice* 322, 326 (Carolina 2003). Many of the courts of appeals continue to rely on *Sparf's* holding. See, for example, *Merced v McGrath*, 426 F3d 1076, 1079 (9th Cir 2005) (“[W]hile jurors have the power to nullify a verdict, they have no right to do so. . . . [since] ‘it is the duty of juries in criminal cases to take the law from the court, and apply the law to the facts.’”), citing *Sparf*, 156 US at 102; *Dopp v Pritzker*, 38 F3d 1239, 1251 (1st Cir 1994). See also Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* 227 (Prometheus 2007).

courts have the authority to prevent it.¹² But Founding-era Americans embraced nullification and viewed jury interpretation of law as not merely a power but also an essential right. With the rise of originalism on the modern Supreme Court, scholars, lawyers, and judges have argued that *Sparf* should be revisited. This Part sets up the Article's analytical framework by explaining why *Sparf* is susceptible to Founding-era originalist challenges and how the Reconstruction era may illuminate the constitutionality of its holding.

A. Founding-Era Originalism and Jury Nullification

Although *Sparf* has been followed for more than a century, the current Supreme Court's criminal procedure jurisprudence has prioritized originalism over doctrinalism,¹³ suggesting to commentators that the Court may be receptive to modifying its nullification doctrine to accord with the Founding-era right. The Court has even hinted that it may be open specifically to reevaluating *Sparf*'s disallowance of nullification.¹⁴ When expounding on juries' historical ability to check the judiciary, for example, the Court has favorably cited eighteenth-century nullification,¹⁵ and Justice Antonin Scalia has indicated that the Constitution permits juries to prevent judges from "interpret[ing] criminal laws oppressively,"¹⁶ implying that the jury has a legitimate law-interpreting, and thus perhaps a legitimate nullifying, role.

Recognizing that Founding-era criminal juries had the right to determine the law, academics have made originalist arguments contending that the criminal jury's right to nullify is constitutionally guaranteed and should be restored.¹⁷ "Whether the 'jury lost the right' to disregard the judge's instructions," Professor Raoul Berger asserted

¹² Today, courts combat nullification through voir dire, see Federal Judicial Center, *Benchbook for U.S. District Court Judges* § 2.06(8)(d) at 93 (4th ed rev 2000); juror oaths, see *United States v Thomas*, 116 F3d 606, 614 (2d Cir 1997); jury instructions, see Eleventh Circuit Pattern Jury Instructions: Criminal § 2.1 (2010); and their power to remove nullifying jurors, see *United States v Abbell*, 271 F3d 1286, 1302–04 (11th Cir 2001) (per curiam).

¹³ See, for example, *Crawford v Washington*, 541 US 36, 67–68 (2004), overruling *Ohio v Roberts*, 448 US 56, 66 (1980).

¹⁴ For example, one could argue that the accepted history that the disallowance was judicially driven conflicts with the Court's finding that the Framers did not leave the "definition of the scope of jury power up to judges' intuitive sense" because "they were unwilling to trust government to mark out the role of the jury." See *Blakely v Washington*, 542 US 296, 308 (2004). See also *Crawford*, 541 US at 67–68.

¹⁵ See *Jones v United States*, 526 US 227, 246–48 (1999).

¹⁶ *Neder v United States*, 527 US 1, 30, 32 (1999).

¹⁷ See Nancy J. King, *Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom*, 65 U Chi L Rev 433, 434 (1998); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J Crim L & Criminol 111, 121 & n 44 (1998) (discussing the "powerful" originalist argumentation for nullification).

in laying out the originalist critique of modern nullification doctrine, “may be doubted. If . . . that right was an ‘attribute’ of trial by jury at the adoption of the Constitution, it was embodied therein, and therefore was beyond the power of courts to curtail.”¹⁸ Arguments against *Sparf* continue to be made in the pages of law journals today.¹⁹ Although they disagree whether Founding-era history should affect contemporary jurisprudence, scholars almost unanimously agree that when the Constitution and Sixth Amendment were ratified in the late eighteenth century, the jury was understood to have the right, not merely the power, to decide questions of law—and thus to nullify.²⁰

In supporting the conclusion that the right to nullify was inherent in the Founding-era meaning of “jury,” scholars point to four categories of evidence. First, they quote the statements of late eighteenth-century Americans regarding the jury’s right to decide questions of law.²¹ Second, they cite treatises and law books, which presented law as something juries could understand and should decide.²² Third, they discuss the then-existing practices in state and federal courts, in which jurors were the judges of law.²³ Fourth, they point to the principal purpose behind Article III’s and the Sixth

¹⁸ Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L Rev 873, 889–90.

¹⁹ See, for example, Chris Kemmitt, *Function over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U Mich J L Ref 93, 106–07 & n 83 (2006) (criticizing *Sparf*); Andrew J. Parmenter, Note, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 Washburn L J 379, 417–19 (2007) (arguing that nullification originally was “part of our constitutional system”).

²⁰ Compare Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 157–58 (Oxford 2004) (stating that Founding-era juries had the right to decide questions of law); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 98–103 (Yale 1998) (same); Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 30–31, 37, 63–64, 75–76 (Basic Books 1994) (same); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 40–41 (Kansas 1985) (same); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis L Rev 377, 396 (same); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv L Rev 582, 584–85 (1939) (same), with Krauss, 89 J Crim L & Criminol at 116–22 (cited in note 17) (arguing that it is not clear to what extent Founding-era juries had the right to determine questions of law).

²¹ See, for example, Akhil Reed Amar, *America’s Constitution: A Biography* 581 n 73 (Random House 2005) (listing leading Americans who accepted the right of nullification).

²² See, for example, Kramer, *The People Themselves* at 163 (cited in note 20). See also Conrad, *Jury Nullification* at 46–47 (cited in note 4); Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U Chi L Rev 867, 873–74 (1994).

²³ See, for example, Howe, 52 Harv L Rev at 590–605 (cited in note 20). Supreme Court justices regularly instructed jurors that they were the judges of law. See, for example, *Georgia v Brailsford*, 3 US (3 Dall) 1, 4 (1794) (Jay) (charging the jury that it had “a right to take upon yourselves to judge of both [law and fact], and to determine the law as well as the fact in controversy”); *Van Horne’s Lessee v Dorrance*, 2 US (2 Dall) 304, 307 (CC D Pa 1795) (Paterson) (charging the jury that to decide “the law as well as the facts”).

Amendment's rights to jury trial: to prevent judges from issuing corrupt verdicts biased toward the federal government.²⁴

Given this history, prominent officials and judges have taken the Court's recent originalism to have undermined *Sparf* and modern nullification doctrine. Although it is typically prodefendant advocates who criticize the disallowance,²⁵ half of the states' attorneys general recently questioned *Sparf's* legitimacy, noting that the "Court's recent Sixth Amendment caselaw . . . is a corrective to the single most striking long-term trend in constitutional criminal procedure: the systematic diminution of the jury's autonomy, a process that has proceeded apace since *Sparf v United States*."²⁶ More directly, several federal judges have called for *Sparf's* demise.

Then-District Judge Gerald Lynch, now on the Second Circuit, did so implicitly when he proposed to instruct the jury about a child pornography offense's mandatory minimum sentence so that, the Second Circuit found, "the jury could make an informed decision as whether to nullify the law."²⁷ Judge Lynch himself said that "historically jurors have sometimes [nullified], and the judgment of history is sometimes . . . that they've done the right thing."²⁸ Although the Second Circuit issued a writ prohibiting his instruction because it violated controlling authority that requires courts to forestall nullification,²⁹ Judge Lynch was not without judicial support. Defending Judge Lynch in a law journal, Judge Donald Middlebrooks issued a harsh originalist critique of *Sparf*.³⁰ Prohibiting nullification was not "the original intent of the founding fathers," he wrote, concluding that *Sparf* "took a wrong

²⁴ See, for example, Berger, 1990 BYU L Rev at 889 (cited in note 18) ("It borders on the inconceivable to attribute to the Founders an intention to leave their 'noble palladium' at the mercy of judges who, according to Justice James Wilson, they had regarded with 'aversion and distrust.'"), quoting James Wilson, *The Subject Continued—Of Juries*, in Robert McCloskey, ed., 2 *The Works of James Wilson* 503, 540 (Harvard 1967). Thomas Jefferson, for example, explained that "permanent judges acquire an Esprit de corps" and are liable to be misled "by a spirit of party" or "by a devotion to the Executive or Legislative It is left therefore to the juries . . . to take upon themselves to judge the law as well as the fact." See Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in Julian P. Boyd, ed., 15 *The Papers of Thomas Jefferson* 282, 283 (Princeton 1958).

²⁵ See, for example, Conrad, *Jury Nullification* at v (cited in note 4) (dedicating the book to defense attorneys); King, 65 U Chi L Rev at 434 (cited in note 17) (discussing the growth of the pronullification Fully Informed Jury Association).

²⁶ Brief of Amici Curiae States of New Mexico, et al, on Behalf of Petitioner, *Kansas v Ventris*, No 07-1356, *17 (US filed Nov 24, 2008) (available on Westlaw at 2008 WL 5026648) (accusing the Kansas Supreme Court of ignoring the United States Supreme Court's recent emphasis on preserving Sixth Amendment protections). Twenty-five states signed the brief.

²⁷ *United States v Pabon-Cruz*, 391 F3d 86, 90–91 (2d Cir 2004).

²⁸ Id (quoting Judge Lynch).

²⁹ See id at 91, 94–95, citing *Shannon v United States*, 512 US 573, 587–88 (1994).

³⁰ See Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 Am J Legal Hist 353, 353–55 (2004).

turn. Its holding is an assault on constitutional government that should be reconsidered.”³¹

In 2008, Judge Jack Weinstein took the ultimate step when he deemed *Sparf* no longer valid. In a 150-page opinion, Judge Weinstein, a long-time nullification sympathizer,³² held that he had committed reversible constitutional error when he declined to tell the jury about a mandatory minimum sentence because the jury had the right to consider the sentence and to nullify the law.³³ Judge Weinstein interpreted the Supreme Court’s recent Sixth Amendment decisions in the *Apprendi v New Jersey*³⁴ and *Crawford v Washington*³⁵ lines of cases to instruct judges to delineate the scope of constitutional criminal procedure provisions, including the right to jury trial, through practices that existed at the Founding rather than through longstanding precedent.³⁶ Based on the originalist historical analysis that showed that nullification was a legitimate jury practice at the Founding, Judge Weinstein declared that *Sparf* has been “largely abrogated”³⁷ by the Court’s recent Sixth Amendment decisions because Justice Horace Gray’s dissent defending nullification,³⁸ not Justice Harlan’s opinion for the majority, “had the history of the Sixth Amendment right.”³⁹

³¹ Id at 353–55, 421.

³² See Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 *Judicature* 168, 170 (1998) (calling nullification “the stuff . . . of our somewhat romantic democratic tradition”); Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 *Am Crim L Rev* 239, 240, 244 (1993) (arguing that “[w]hen juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors”).

³³ *United States v Polizzi*, 549 F Supp 2d 308, 404, 449–50 (EDNY 2008), revd *United States v Polouizzi*, 564 F3d 142 (2d Cir 2009).

³⁴ In *Apprendi* and its progeny—*Blakely v Washington*, 542 US 296 (2004), and *United States v Booker*, 543 US 220 (2005)—the Supreme Court distinguished between which facts are elements of an offense that must be found by the jury and which are sentencing factors that may be found by the judge. The Court clarified which facts are in each category by looking at the division of labor between juries and judges at the Founding; those facts that Founding-era juries would have found were within the scope of the Sixth Amendment were therefore elements of the offense for contemporary purposes. See also Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 *U Pa J Const L* 487, 512 (2009). Judge Weinstein reasoned that if nullification was within the jury’s province at the Founding, it too would be ingrained in the Sixth Amendment.

³⁵ In *Crawford*, the Supreme Court construed the Confrontation Clause to prevent the admission in court of those types of hearsay statements that would not have been admissible during the Founding era. The contemporary scope of the Sixth Amendment, in other words, was defined by its scope at the Founding.

³⁶ *Polizzi*, 549 F Supp 2d at 421.

³⁷ Id at 435.

³⁸ See *Sparf*, 156 US at 113 (Gray dissenting) (arguing that the judge’s instruction unconstitutionally “denied [the jury the] right to decide the law”).

³⁹ *Polizzi*, 549 F Supp 2d at 421.

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

It is worthwhile recalling that the author of the majority opinion in *Sparf* was the first Justice Harlan. His minority opinion in *Plessy v. Ferguson*, which approved over his strong dissent the doctrine of separate but equal, degrading African-Americans, was adopted more than a half century later in *Brown v. Board of Education*. By contrast, Justice Harlan's *Sparf* majority ruling limiting jury power is in effect overruled now, more than a century later, by the recent *Booker* line of cases, essentially adopting the minority conclusion in *Sparf*.⁴⁰

The Second Circuit reversed Judge Weinstein without challenging his historical analysis. If the "general principles" of the *Apprendi* and *Crawford* lines lead the Court to reauthorize nullification in the sentencing context, it stated, "that is a decision we must leave to the Supreme Court."⁴¹ Still, the fact that a prominent jurist has asserted that *Sparf* is invalid—and has compared it to *Plessy v. Ferguson*⁴²—and that other federal judges seem to agree is notable in itself. Indeed, Judge Weinstein implies that the case formally overturning *Sparf* might be a new *Brown v. Board of Education*.⁴³

Sparf, in brief, is under assault at the hands of Founding-era originalism. Even if the courts never overturn *Sparf*, these historical arguments still illustrate that the Court's criminal procedure originalism contradicts its nullification doctrine, and this contradiction may lead courts to desire a more rational way of reconciling the substantive inconsistency.

⁴⁰ Id at 421–22 (citations omitted).

⁴¹ *Polouizzi*, 564 F3d at 160.

⁴² 163 US 537 (1896).

⁴³ 347 US 483 (1954).

B. Nineteenth-Century Judicial Lawmaking and Constitutional Change

The right–power distinction matters not only for its implications on contemporary jurisprudence but also because the transformation of nullification from cherished right to illegitimate power has normative implications for constitutional change. If nullification had been enshrined in the original meaning of “jury,” then the people, in ratifying the Constitution and the Sixth Amendment, might have superdemocratically established that right, creating a federal legislative process that incorporated a veto by jurors who had a right to nullify laws—even those passed by an elected Congress. Nineteenth-century judges might have undemocratically altered the Constitution’s meaning by disallowing the right to nullify. Permitting nineteenth-century judges to override the Constitution’s original meaning by judicial fiat may provide a weaker normative foundation for the disallowance of nullification than a textual basis, grounded in a constitutional amendment, would offer.

Even scholars who do not call for an originalist restoration of the right to nullify have long found its disallowance troubling in terms of normatively justifiable methods of constitutional change. In his classic article on nullification, Professor Mark Howe observed that the judges defeated “the people’s aspiration for democratic government” by disallowing the right: “What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions.” His final sentence concluded that it was possible to feel that the disallowance was “wise without approving the . . . methods which courts have used in reaching that result.”⁴⁴ Nor has scholarly opinion changed over the past seventy years. “What is especially striking about the decline of the jury’s power over law is the way in which it was carried out,” Professor Matthew Harrington wrote. “The drive to limit the law-finding function was entirely a judge-led exercise, carried out without legislative warrant and sometimes in the face of legislative enactments to the contrary.”⁴⁵

When judges first attempted to take the law-deciding right away from the jury in the nineteenth century’s first decade, legislatures fought back and impeached them.⁴⁶ Yet as the century advanced,⁴⁷

⁴⁴ Howe, 52 *Harv L Rev* at 615–16 (cited in note 20).

⁴⁵ Harrington, 1999 *Wis L Rev* at 380 (cited in note 20).

⁴⁶ For example, in 1803, the Pennsylvania legislature removed Judge Alexander Addison from office because he attempted to enforce his view that the state did not “vest the

judges, elite lawyers, and commercial interests increasingly echoed the view that there was a sharp distinction between law and fact and a correspondingly clear separation of function between judge and jury.⁴⁸ Attempting to foreclose that view and to codify the jury's law-deciding function, several states responded with legislation guaranteeing the jury's right to determine law in criminal cases.⁴⁹

Starting with justices riding circuit in the 1830s, however, judges began to declare that, as a matter of law, criminal juries were mere fact finders.⁵⁰ Although Justice Henry Baldwin had previously issued instructions permitting nullification,⁵¹ in 1832, when an attorney defended his client on a counterfeiting charge by arguing that the United States Bank's charter was unconstitutional, Justice Baldwin instructed the jury that the law was constitutional.⁵² Three years later, Justice Joseph Story even more vigorously denied the right to nullify. "It is the duty of the court to instruct the jury as to the law," he declared, "and it is the duty of the jury to follow the law, as it is laid down by the court."⁵³ Justice Story's instruction was most influential in deflecting the current of judicial opinion away from permitting criminal juries to decide questions of law.⁵⁴

interpretation of declaring of laws, in bodies [juries] so constituted." *Id.* at 417 & n 187 (quoting Judge Addison). In 1805, the US House of Representatives impeached Justice Samuel Chase for, among other things, "endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law." Articles of Impeachment Art I, § 3, in *Report of the Trial of the Hon. Samuel Chase* App 9 (Butler and Keating 1805).

⁴⁷ Although scholars agree that the disallowance of nullification was a nineteenth-century judge-led process, they dispute when the jury's role was confined to fact finding, with some dating it to as early as 1810 and others to as late as the end of the century. See, for example, Kramer, *The People Themselves* at 164 (cited in note 20) (dating the disallowance to the 1820s and 1830s); McDonald, *Novus Ordo Seclorum* at 290 (cited in note 20) (dating it to "a generation after the adoption of the Constitution"); Alschuler and Deiss, 61 *U Chi L Rev* at 906-07 (cited in note 22) (dating it to "the second half of the century"); Harrington, 1999 *Wis L Rev* at 432 (cited in note 20) (dating it to "the end of the nineteenth century").

⁴⁸ See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 141-44 (Harvard 1977).

⁴⁹ See, for example, An Act Concerning Crimes and Punishment, 1821 Conn Pub Acts title 22, § 112 (providing that in criminal cases the court was merely "to state [its] opinion to the jury, upon all questions of law, arising in the trial . . . and to submit to their consideration both the law and the facts"), superseded by An Act Concerning the Trial of Criminal Cases and the Procedure Therein, 1921 Conn Pub Acts ch 267, codified at Conn Gen Stat § 54-89; An Act Relative to Criminal Jurisprudence § 176, 1827 Ill Laws 124, 162 (providing that "juries in all [criminal] cases shall be judges of the law and fact"), overruled as unconstitutional by *People v Bruner*, 175 NE 400, 406 (Ill 1931).

⁵⁰ See Howe, 52 *Harv L Rev* at 589 (cited in note 20).

⁵¹ See *United States v Wilson*, 28 F Cases 699, 708 (CC ED Pa 1830) ("[Y]ou will distinctly understand that you are the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the court.").

⁵² See *United States v Shive*, 27 F Cases 1065, 1066-67 (CC ED Pa 1832).

⁵³ *United States v Battiste*, 24 F Cases 1042, 1043 (CC D Mass 1835).

⁵⁴ See Howe, 52 *Harv L Rev* at 589-90 (cited in note 20).

In the 1850s, as their own courts began to follow the federal example, states tried again to forestall them with new constitutional amendments.⁵⁵ Yet these enactments often counted for little. After the Massachusetts Supreme Judicial Court disallowed the jury's right to nullify,⁵⁶ the state legislature passed a statute reasserting the jury's right to resolve questions of law.⁵⁷ The Supreme Judicial Court, in *Commonwealth v Anthes*,⁵⁸ immediately interpreted away the statute's meaning and thus defeated the jury's right to nullify.⁵⁹

Cases like *Anthes* formed the heart of the Supreme Court's opinion in *Sparf*. Justice Harlan devoted little attention to Founding-era history but extensively cited nineteenth-century precedent.⁶⁰ He found that *Anthes* offered the "fullest examination" of the nullification question and relied upon Massachusetts Chief Justice Lemuel Shaw's observation that "though the jury had the power they had not the right to decide, that is, to adjudicate, on both law and evidence."⁶¹

The judiciary, of course, had reasons for disallowing the right to nullify. The increasing professionalization of lawyers and availability of law books convinced judges that they were the proper body to determine questions of law.⁶² The need for certainty, stability, and uniformity in law also persuaded them that the more centralized judiciary should restrain the law finding right of local juries.⁶³ Because laws had become democratically enacted, the populist rationale weighing in favor of the jury's law finding and liberty-protecting role had diminished.⁶⁴ Most importantly, the profound changes in understandings of the sources of legal authority from the eighteenth to nineteenth century—the demise of customary law, the rise of positivism, and at another level, the erosion of "popular

⁵⁵ See Ind Const Art I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); Md Const of 1851 Art X, § 5 (superseded 1864). These provisions are technically still in effect. See Ind Const Art I, § 19; Md Const, Decl of Rights Art 23. See also Ga Const Art I, § 1, ¶ 11(a).

⁵⁶ See *Commonwealth v Porter*, 51 Mass (10 Metcalf) 263, 285–86 (1845).

⁵⁷ See An Act Concerning the Duties and Rights of Jurors, 1855 Mass Acts and Resolves ch 152 at 590. See also Mass Gen Laws ch 278, § 11 (Wright & Potter 1932).

⁵⁸ 71 Mass (5 Gray) 185 (1855).

⁵⁹ *Id* at 187–93.

⁶⁰ See *Sparf*, 156 US at 71–86.

⁶¹ *Id* at 80–81.

⁶² See Harrington, 1999 Wis L Rev at 380, 405 (cited in note 20).

⁶³ See Alschuler and Deiss, 61 U Chi L Rev at 916–17 (cited in note 22); Harrington, 1999 Wis L Rev at 380, 436 (cited in note 20).

⁶⁴ See Harrington, 1999 Wis L Rev at 423, 427, 438 (cited in note 20); Alschuler and Deiss, 61 U Chi L Rev at 917 (cited in note 22); McDonald, *Novus Ordo Seclorum* at 41 (cited in note 20).

constitutionalism”⁶⁵—contributed to the broad shift away from jury authority over law finding.

But these rationales are problematic. Professor Morton Horwitz, for example, describes the “subjugation of juries” as an elite-driven process that expanded the political power of the legal profession and the commercial interests at the lower classes’ expense.⁶⁶ Furthermore, if the disallowance of nullification really was democracy enhancing, it seems odd that states were passing legislation that attempted to protect from the judiciary the jury’s right to nullify. Finally, because the right to nullify was understood to be an attribute of jury trial when the Sixth Amendment was ratified—by which time all federal crimes were democratically enacted⁶⁷—an originalist Court might question whether the judiciary’s policy arguments and evolving jury law could trump what had been understood as a constitutional right. In contrast to the evolutionary, extratextual nature of the antebellum disallowance of nullification is the revolutionary, textual, and superdemocratic process of constitutional amendment. Instead of relying on nineteenth-century judicial disallowance, as Justice Harlan did in *Sparf*, an originalist Court might be more consistent if it looked to the Fourteenth Amendment’s text and history.

C. The Fourteenth Amendment and Constitutional Criminal Procedure

Thus far, the role of the Fourteenth Amendment’s history in constitutional criminal procedure has been minimized. In applying history to its Sixth Amendment jurisprudence, the Supreme Court has emphasized the eighteenth century but has largely “missed” the nineteenth century, including the Reconstruction era.⁶⁸ Most scholars, moreover, have also ignored or minimized Reconstruction’s influence on constitutional criminal procedure.⁶⁹

⁶⁵ See Kramer, *The People Themselves* at 8 (cited in note 20).

⁶⁶ See Horwitz, *Transformation of American Law* at 143 (cited in note 48).

⁶⁷ In contrast to colonial-era criminal statutes enacted by Parliament, federal criminal statutes were enacted by Congress, and the Supreme Court established early on that there is no federal criminal common law. See *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32, 34 (1812); Ben Rosenberg, *The Growth of the Federal Criminal Common Law*, 29 Am J Crim L 193, 195–96 (2002).

⁶⁸ See David Alan Sklansky, Lecture Notes, *The Missing Years: Nineteenth-Century History in Criminal Procedure* *15–19 (AALS Workshop on Criminal Law and Procedure, June 14–16, 2006), online at <http://www.aals.org/documents/2006criminal/criminalworkbook2006.pdf> (visited Nov 26, 2011).

⁶⁹ But see *id.* at *1. Even Professor Akhil Amar, the leading scholar who explains the Reconstruction-era process through which new amendments may have transformed the original Bill of Rights, has sometimes minimized Reconstruction’s influence on criminal procedure. See Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 145–47, 153, 161–66

The Court's canonical explanation of incorporation is that the Fourteenth Amendment's Due Process Clause simply took the rights "implicit in the concept of ordered liberty,"⁷⁰ including the criminal procedure rights set forth in the Bill of Rights that are "fundamental in the context of the criminal processes maintained by the American States,"⁷¹ and applied them against the states without altering their meaning. In following an "essentially mechanical process" that does not reinterpret Founding-era doctrines to fit the Reconstruction-era amendment,⁷² the Court simply assumes that the Fourteenth Amendment incorporated the 1791 meaning of concepts like trial by jury rather than the 1868 meaning.⁷³

But omitting Reconstruction-era history makes little doctrinal sense from an originalist or textualist viewpoint considering that the Fourteenth Amendment is a product of Reconstruction and remains the necessary hook for the constitutional regulation of state criminal trials, and that the Court has rejected the notion of "blind" incorporation in other contexts.⁷⁴ Incorporation suggests that, in state cases, the constitutional text the Court is technically interpreting is the Due Process Clause, and thus Reconstruction understandings of due process and its relation to the Bill of Rights should be important.

There are reasons to believe that the Reconstruction-era history should matter in federal cases, too. State cases make up the overwhelming majority of all criminal trials⁷⁵ and produce most of the modern Court's criminal procedure doctrine.⁷⁶ If, as reverse incorporation suggests, consistent constitutional rules between state and federal practices are desirable, then the Court may be justified in

(Yale 1997) (arguing that the "first principles" to which constitutional criminal procedure should return are the principles of the 1780s–90s, not the 1860s–70s).

⁷⁰ *Danforth v Minnesota*, 552 US 264, 269–70 (2008), quoting *Palko v Connecticut*, 302 US 319, 325 (1937).

⁷¹ *Duncan v Louisiana*, 391 US 145, 149–50 n 14 (1968).

⁷² Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L J 1193, 1268 (1992).

⁷³ Consider 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). See also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L J 408, 500–09 (2010) (arguing that the Due Process Clauses had a different meaning in 1868 than in 1791).

⁷⁴ See *Harmelin v Michigan*, 501 US 957, 975 (1991) ("Unless one accepts the notion of a blind incorporation . . . the ultimate question is not what 'cruell and unusuall punishments' meant in the [English] Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.").

⁷⁵ See Steven M. Shepard, Note, *The Case against Automatic Reversal of Structural Errors*, 117 Yale L J 1180, 1213 (2008) (noting that, in 2002, there were 35,664 felony jury trials in the 23 states that record trial data but only 2,843 felony or class A misdemeanor jury trials in federal courts).

⁷⁶ See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich L Rev 145, 162 (2001).

using the Reconstruction era–based constitutional rules for state courts to reverse incorporate⁷⁷ the federal criminal procedure rules. Alternatively, as Professor Akhil Amar argues, the Fourteenth Amendment may have transformed the criminal procedure provisions of the original Bill of Rights, rendering the Reconstruction-era meaning applicable even without reverse incorporation, or the original meaning of its corresponding provisions may have superseded the earlier meanings in the Bill of Rights.⁷⁸

This is especially true given the Fourteenth Amendment’s nature. Its Framers’ conception of the role of the courts and judges was fundamentally different from the Founders’ conception: while the Founders feared the federal judiciary and circumscribed its reach, the Reconstruction Congresses empowered it.⁷⁹ Furthermore, the Fourteenth Amendment Framers shared a new vision of constitutional rights. Although the Bill of Rights, including the Sixth Amendment, was established partly to prevent self-dealing and corruption by a distant, possibly unrepresentative federal government and judiciary,⁸⁰ the Fourteenth Amendment transformed the Constitution and the Bill of Rights into a more nationalistic, minority-rights-protecting regime.⁸¹

⁷⁷ See Richard A. Primus, *Bolling Alone*, 104 Colum L Rev 975, 976 (2004) (defining reverse incorporation as the doctrine by which “the Fifth Amendment’s Due Process Clause was construed to incorporate at least some—and later all—of the equal protection guarantee of the Fourteenth”).

⁷⁸ See Amar, *Bill of Rights* at 269–78 (cited in note 20) (discussing how the Reconstruction amendments transformed the Sixth Amendment in terms of locality requirements and the racial composition of juries). See also Akhil Reed Amar, *Intratextualism*, 112 Harv L Rev 747, 772–73 (1999) (discussing how the Fourteenth Amendment transformed the Fifth Amendment). Or, in Bruce Ackerman’s language, the jurisprudence of a text drafted and ratified during Time Two (Reconstruction) should be governed by a synthesis of the original meanings at Times One (the Founding) and Two. Bruce Ackerman, *We the People: Foundations* 94–99 (Harvard 1991).

⁷⁹ For example, the Reconstruction Congress granted federal question jurisdiction, while the First Congress had not. Compare Act of Mar 3, 1875 § 1, 18 Stat 470, codified as amended at 28 USC § 1331, with Judiciary Act of 1789 § 9, 1 Stat 73, 76–77. Moreover, in 1869 Congress created a new nine-member circuit court judiciary to carry federal judicial authority into the states. See An Act to Amend the Judicial System of the United States § 2, 16 Stat 44, 44–45 (1869). Federal criminal trial courts were strengthened as well; the monumental Ku Klux Klan trials of 1871 and 1872 amounted to an unprecedented use of federal legal power over criminal law to secure new constitutional protection for blacks. See 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).

⁸⁰ See, for example, Federalist 83 (Hamilton), in *The Federalist Papers* 558, 564 (Wesleyan 1961) (Jacob E. Cooke, ed) (expressing doubt that trial by jury guarantees the court’s integrity but concluding that “the trial by jury must still be a valuable check upon corruption”); Thomas Jefferson, *Notes on the State of Virginia* 140 (J.W. Randolph 1853); Letter from Thomas Jefferson to the Abbé Arnoux at 283 (cited in note 24) (“[I]t is better to leave a cause to the decision of cross and pile, than to that of a judge biased to one side; and that the opinion of 12 honest jurymen gives still a better hope of right, than cross and pile does.”).

⁸¹ See Amar, *America’s Constitution* at 386–92 (cited in note 20).

These changes implicate nullification doctrine because they suggest a different allocation of authority between judge and jury. When the jury loses its right to decide questions of law, the law-deciding right accrues in the judiciary. At the Founding, when—as the Alien and Sedition Acts⁸² illustrated⁸³—the paradigmatic example of citizens in need of constitutional protection were localist critics of the federal government accused of violating Congress’s laws, prosecuted by the President’s agents, and tried under the pro-administration judiciary, the Constitution demanded strong jury rights to protect these citizens. During Reconstruction, however, the paradigmatic citizens who required constitutional protection were freedmen, Unionists, or women being persecuted by local majorities in the South or the West. Carpetbag federal judges appointed by a rights-protecting government in Washington became protectors of rights, while juries, particularly those nullifying criminal statutes, were considered the corrupt bodies that needed to be curtailed.⁸⁴ Disallowing nullification would prevent a local body—the jury—from challenging federal authority, just as Reconstruction was designed to ensure that localism could not trump nationalism.

In short, the Reconstruction-era context matters because it tells us what “due process” in relation to the law of judges and juries, civil rights, and federalism originally meant when the nation ratified the Fourteenth Amendment in 1868.⁸⁵ Although some might object to Reconstruction’s relevance by saying that the Reconstruction generation understood a Fourteenth Amendment term such as “due process,” or even terms in the original Bill of Rights, to refer to “natural rights” descended from the law of nature and enshrined with

⁸² The Alien and Sedition Acts were four laws passed by Congress and signed into law in 1798. See Act of June 18, 1798 (“The Naturalization Act”), 1 Stat 566, repealed by Act of April 14, 1802 (Naturalization Law of 1802) § 5, 2 Stat 153; Act of June 25, 1798 (“The Alien Act”), 1 Stat 570 (expired 1800); Act of July 6, 1798 (“The Alien Enemies Act”), 1 Stat 577, codified as amended at 50 USC §§ 21–24; Act of July 14, 1798 (“The Sedition Act”), 1 Stat 596 (expired 1801).

⁸³ Amar, *Bill of Rights* at 23 (cited in note 20).

⁸⁴ See notes 270–76 and accompanying text.

⁸⁵ See Amar, *Bill of Rights* at 242–46 (cited in note 20) (discussing how, with respect to the First Amendment, the Fourteenth Amendment may have transformed the due process theory of the Bill of Rights). Moreover, because criminal procedure was not merely incidental to the Fourteenth Amendment but was at its core—ingrained in the meaning of “due process”—it is possible to gain some insight into the Fourteenth Amendment’s original meaning. Consider Nelson, *Fourteenth Amendment* at 6 (cited in note 47) (contending that whether the Due Process Clause was meant to preclude states from enacting antiabortion legislation “never occurred to the Reconstruction generation and hence cannot be answered by examining records of its actual thought”).

the same, unchanging meaning since the Magna Carta,⁸⁶ with respect to jury law, the Reconstruction generation understood that the substantive meaning of “jury” had evolved over time.⁸⁷ This Article shows that the Thirty-Ninth Congress had a different understanding of trial by jury with respect to the jury’s right to nullify than the First Congress did. This evidence casts doubt upon whether originalists should assume that the meaning of constitutional words remained constant over three-quarters of a century or that the Fourteenth Amendment’s Framers incorporated eighteenth-century meanings into their Reconstruction-era Amendment.

D. Reconstruction-Era Meaning and Jury Nullification

The intersection of jury nullification doctrine and the Fourteenth Amendment has been almost entirely absent in the scholarly literature.⁸⁸ No scholar has argued that the Fourteenth Amendment provides a robust textual and historical basis for *Sparf’s* holding, and at least one scholar has explicitly doubted that suggestion.⁸⁹ The lone notable treatment of the question is a brief snapshot provided by Professor Amar of how the original meaning of the Constitution’s criminal-jury clauses possibly could have been supplanted by the meaning imbued to them via the Fourteenth Amendment⁹⁰ and of how

⁸⁶ Consider *Murray’s Lessee v Hoboken Land and Improvement Co*, 59 US (18 How) 272, 276 (1855). See also Andrew T. Hyman, *The Little Word “Due,”* 38 Akron L Rev 1, 9–10 (2005) (arguing that the Due Process Clause had the same meaning in 1868 as it had in 1791).

⁸⁷ See, for example, Cong Globe, 42d Cong, 2d Sess 822 (Feb 5, 1872) (Sen Sumner); John Proffatt, *A Treatise on Trial by Jury, Including Questions of Law and Fact* § 376 at 440–41 (Sumner Whitney 1877):

[T]he doctrine that the jury could take the law into their own hands was a popular one before and at the time of the Revolution. . . . But the doctrine was in due time discarded, the courts one after another holding it was the duty of the jury to be guided as to the law by the court.

Francis Wharton, *A Treatise on the Criminal Law of the United States* § 3094 at 1115 (Kay & Brother 4th rev ed 1857).

⁸⁸ For example, historical studies on nineteenth-century nullification doctrine and the jury’s right to interpret the law do not address the Fourteenth Amendment or the Reconstruction Congresses at all. See, for example, Conrad, *Jury Nullification* at 98–99 (cited in note 4) (moving chronologically from the antebellum era directly to *Sparf*); Alschuler and Deiss, 61 U Chi L Rev at 868–69 (cited in note 22) (noting that “[a]mong the topics that we have not considered [is] . . . the ‘incorporation’ of the right to jury trial in the Fourteenth Amendment’s Due Process Clause”). See also generally Harrington, 1999 Wis L Rev 377 (cited in note 20); Howe, 52 Harv L Rev 582 (cited in note 20). Recent works on the Fourteenth Amendment’s original meaning do not spend significant time on jury law. See generally James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 252 (Praeger 1997); Nelson, *Fourteenth Amendment* at 182–84 (cited in note 47); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 204–05 (Duke 1986).

⁸⁹ See King, 65 U Chi L Rev at 457–58 n 102 (cited in note 17).

⁹⁰ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1195 (1991):

the Fourteenth Amendment might not have incorporated a Sixth Amendment right to nullify.⁹¹

Professor Amar, however, not only never endorses these tentative theses but actually rejects them as merely “stronger” defenses than the ones Justice Harlan offered of what he considers *Sparf*’s still incorrect holding.⁹² Since raising those suggestions about *Sparf*, Professor Amar has published several arguments in favor of the jury’s right to play a role in deciding questions of law and to nullify.⁹³ Most recently, he has suggested that juries have a Founding-era “right to acquit against the evidence,” which “even today arguably encompasses the authority to acquit for reasons of constitutional scruple.” He adds, “Though twenty-first-century judicial orthodoxy frowns on these claims of constitutional competence, the right of . . . trial juries to just say no in certain contexts draws strength from the letter and spirit of the Bill of Rights.”⁹⁴ Thus, Professor Amar is no advocate of the view that the Fourteenth Amendment constitutionalized the judicial disallowance of the right to nullify.⁹⁵

But this Article provides substantial evidence that the Fourteenth Amendment could have constitutionalized the nineteenth-century precedent that disallowed the Founding-era right to nullify. It thus

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

See also Amar, *Bill of Rights* at 103 (cited in note 20) (same).

⁹¹ King, 65 U Chi L Rev at 457 n 102 (cited in note 17). Professor Amar, in response to objections to his approach to *Sparf* (quoted in note 88), offered

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

King, 65 U Chi L Rev at 457 n 102 (cited in note 17).

⁹² I thank Professor Amar for clarifying his views to me on this point.

⁹³ See, for example, Akhil Reed Amar and Alan Hirsch, *For the People: What the Constitution Really Says about Your Rights* 94–114 (Free Press 1998) (arguing for the jury’s right “to play a role in deciding some questions of constitutional law”); id at 106–07 (arguing that when the jury is deliberately kept “in the dark” about “the existence of a constitutional right” to nullify, “both the defendant and the jurors are effectively denied their rights”); id at 113 (arguing for “the jury’s right to nullify in order to do justice in a particular case”); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Georgetown L J 641, 685 (1996).

⁹⁴ Amar, *America’s Constitution* at 241–42 (cited in note 21).

⁹⁵ Indeed, Professor Amar’s new book, *America’s Unwritten Constitution* (forthcoming, Basic Books 2012), explicitly advocates for nullification to have an open and legitimate role in modern criminal jury trials. See id at *531–32.

offers a textual and historical basis grounded in the Fourteenth Amendment for disallowing the Sixth Amendment's original right of nullification by transforming⁹⁶ the meaning of the Sixth Amendment's right to jury trial through the prism of the Fourteenth Amendment. The Fourteenth Amendment is read in light of its Framers' understanding of it, which was that (1) the judicial disallowance of jury nullification had been sufficiently established by 1868 so that the Amendment did not incorporate the right to nullify against the states, and (2) because jury nullification was incompatible with certain guarantees of the new Amendment, the Amendment and its enforcement legislation would or could empower federal courts to protect those rights by prohibiting nullification.

In addition to its theoretical component, this Article also challenges the scholarly consensus that the Reconstruction era was principally one of jury empowerment. The few scholars who have addressed how Reconstruction generally affected jury law have tended to look at how Reconstruction affected juries by adding blacks through prohibitions on racial discrimination⁹⁷ rather than at how Reconstruction affected juries by purging certain whites—which omits half the story. For example, Professor James Forman's recent *Yale Law Journal* article argues that in response to nullification by white Southerners, the Reconstruction Republicans tried to “perfect” the jury principally “by providing for full black participation.”⁹⁸ He finds “no proposals to restrict the Sixth Amendment jury trial rights” and that “ideology—specifically, the longstanding commitment to juries that had been enshrined during abolitionism—played a restraining influence and made it unthinkable to attempt to limit the power of even overtly hostile juries.”⁹⁹

This Article, in contrast, finds that an important response to widespread nullification was to *purge* nullifiers from the jury boxes, whether they were whites in the Southern states in cases with black victims or Mormons in the Utah Territory in cases with women victims. Leading Republicans thought that those who either indirectly counseled lawbreaking or even just believed that a federal criminal statute was unconstitutional were unfit to serve as jurors, and they advocated highly restrictive juror exclusion bills that would exclude

⁹⁶ See Amar, 101 *Yale L J* at 1266 (cited in note 72); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *Ariz St L J* 1085, 1087–88 (1995).

⁹⁷ See, for example, Amar, 80 *Cornell L Rev* at 203–04 (cited in note 9); Forman, 113 *Yale L J* at 910 (cited in note 9).

⁹⁸ Forman, 113 *Yale L J* at 934 (cited in note 9).

⁹⁹ *Id.* at 910 (suggesting that congressional Republicans could have also combatted all-white juries by amending the Constitution, but finding no evidence of effort to do so).

majorities of local populations in multiple regions from serving as jurors.¹⁰⁰ In turn, their opposition repeatedly charged them with jury packing.¹⁰¹ Some Republicans went so far as to repudiate the right to nullify even in the abolitionist context.¹⁰² Republicans were so hostile to nullification that they not only would alter federal statutory and constitutional law but would also reclassify their own abolitionist legacy to curtail it.

Although deciphering the Due Process Clause's effect on the Bill of Rights can be difficult, particularly when assessing the Clause's effect on jury law,¹⁰³ it is not impossible. Practices in the federal and state courts during the Reconstruction era as well as Reconstruction-era treatises and dictionaries would show whether Americans would have understood the right to jury trial still to include, as it did at the Founding, the right to nullify. Moreover, there are the Reconstruction-

¹⁰⁰ See, for example, Act of Apr 20, 1871 ("Ku Klux Klan Act of 1871") § 5, 17 Stat 13, 15 (excluding certain persons from jury service in Ku Klux Klan Act prosecutions); HR 3097 § 4, 43d Cong, 1st Sess (Apr 25, 1874), in 2 Cong Rec 4466 (June 2, 1874) (excluding jurors who held certain beliefs from polygamy prosecutions); HR 1089 § 10, 41st Cong, 2d Sess (Feb 3, 1870), in Cong Globe, 41st Cong, 2d Sess 1367 (Feb 17, 1870) (same); S 286 § 17, 41st Cong, 2d Sess (Dec 6, 1869), in 41st Cong Globe, 2d Sess 3 (Dec 6, 1869) (same).

¹⁰¹ See, for example, 2 Cong Rec H 4470 (June 2, 1874) (Rep Potter):

[T]he Federal official would be able of his own will to pack a jury . . . As three-fourths of the men who reside in the Territory now do believe in polygamy and practice it, the result will be they will all be absolutely excluded from the juries in such cases, and the jury in all prosecutions for bigamy or polygamy will therefore necessarily be made up of persons who are non-Mormons.

Cong Globe, 42d Cong, 1st Sess 766 (Apr 18, 1871) (Sen Casserly) ("I do not believe that ten percent of the white people of the South fit to serve upon a jury, grand or petit, could take that [Ku Klux Klan Act] oath. . . . [Y]ou pack your juries.").

¹⁰² See, for example, Cong Globe, 41st Cong, 2d Sess 2148 (Mar 22, 1870) (Rep Blair).

¹⁰³ Section 1's language is notoriously ambiguous, see Nelson, *Fourteenth Amendment* at 61 (cited in note 47) (discussing "the vagueness and ambiguity of section one's language and the failure of the framing generation to settle how it would apply to a variety of specific issues"), and it mentions nothing explicitly about juries. Moreover, its legislative history provides little assistance because most congressional debate on the Fourteenth Amendment addressed § 2 and § 3, and the debates generally focused on practical questions of politics rather than on theoretical questions about the juristic meaning of the amendment's provisions. See Bond, *No Easy Walk* at 8 (cited in note 88). No congressional debates on the Amendment, to my knowledge, specifically addressed the jury's law-deciding right or power. Furthermore, the state ratification debates are a dead end. "Most of the legislatures that considered the Fourteenth Amendment kept no record of their debates, or their discussion was so perfunctory that it does not shed light on their understanding of its meanings." Curtis, *No State Shall Abridge* at 145 (cited in note 88). The accounts that survive are typically from newspaper sources that are not known for accuracy. See Bond, *No Easy Walk* at 8 (cited in note 88). Consequently, "there are few studies of the state ratification debates . . . [N]one thoroughly explores the understandings of politicians and citizens who participated" in them, see *id* at 12 n 23, and none explores their understandings of jury law.

era congressional debates, which are the principal source for most Fourteenth Amendment scholarship.¹⁰⁴

I have reviewed, at least briefly, every use of the terms “juror” or “jurors” and “jury” or “juries” in these sources from the Thirty-Ninth through the Forty-Third Congresses, covering the period from December 1865 through March 1875.¹⁰⁵ In using the debates as evidence, this Article draws upon the model of Professor Michael McConnell’s scholarship, which has used Reconstruction-era congressional debates to interpret the Fourteenth Amendment’s original meaning.¹⁰⁶ McConnell justifies these debates as evidence because the Reconstruction-era congressional debates were conducted, often in constitutional terms, by officers sworn to uphold the Constitution and because the Fourteenth Amendment was, far more than other amendments, a congressional creation.¹⁰⁷ These debates, federal enactments, and other Reconstruction-era sources may illustrate the Fourteenth Amendment process through which the United States experienced a constitutional criminal procedure revolution—one grounded in protecting the rights of blacks and, to a lesser extent, women—that redefined the Bill of Rights.

II. NONINCORPORATION OF THE RIGHT TO NULLIFY

Whether the Fourteenth Amendment’s Framers, ratifiers, original interpreters, and original enforcers understood due process or the right of jury trial to encompass the right to nullify may affect whether the Constitution’s original meaning protects or incorporates jury nullification, at least in state cases. This Part shows that Reconstruction-era history provides an argument that the Fourteenth Amendment neither directly protects nor incorporates the jury’s right to nullify.

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

The Fourteenth Amendment is relevant to jury nullification, of course, only if it affects the right of criminal jury trial. Otherwise, it

¹⁰⁴ See Nelson, *Fourteenth Amendment* at 5 (cited in note 47) (emphasizing the centrality of legislative records to Fourteenth Amendment scholarship and deeming the congressional debates to be “[a]n unusually extensive and rich body of materials”).

¹⁰⁵ My searches turned up 1,006 entries on the HeinOnline US Congressional Documents Database. One entry usually refers to a single day of congressional debate, although it may also refer to other listings in the Congressional Globe or the Congressional Record such as an index listing. Each entry includes all of the uses of the terms on that particular date, so a single entry may contain one insubstantial use of “jury” used on the date, or a single entry may contain an extended debate on jury law that used the terms dozens of times.

¹⁰⁶ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va L Rev 947, 953 (1995).

¹⁰⁷ See *id.* at 984, 1105, 1109.

could not protect or incorporate the right to jury and thus the right to nullify—but it could not plausibly transform or supersede the Sixth Amendment’s original meaning. The term “jury” nowhere appears in the Fourteenth Amendment;¹⁰⁸ if the Fourteenth Amendment protects the right to criminal jury trial, it must do so implicitly, just as, at the Founding, the constitutional right to criminal jury trial implicitly protected the jury’s right to nullify.

For our purposes, *Sparf’s* critics and supporters concur that the Fourteenth Amendment should be understood either to protect directly or to incorporate the right of criminal jury trial in state cases.¹⁰⁹ From a nineteenth-century perspective, moreover, there are substantial reasons for understanding § 1 to require trial by jury. The incorporation question and other such debates have been covered extensively in the literature,¹¹⁰ so a short sketch here suffices.

First, the Fourteenth Amendment contains a direct textual basis for requiring states to comply with the right of jury trial. Section 1 unambiguously requires state judicial proceedings to observe “due process of law,”¹¹¹ and the historical evidence shows that the Reconstruction-era meaning of “due process” implicitly included a right to criminal jury trial.¹¹² Indeed, the right to criminal jury trial for serious crimes was already recognized, according to one count, in the

¹⁰⁸ Professor Amar does not limit his brief nullification theory to the Fourteenth Amendment but rather invokes all three Reconstruction amendments. See Amar, 100 Yale L J at 1195 (cited in note 90); Amar, 80 Cornell L Rev at 204 (cited in note 9). But it is difficult to see how the Thirteenth or Fifteenth Amendments would apply to nullification. Only the Fourteenth Amendment provides due process protection and incorporates other rights. It may guarantee a right of protection of the law at the heart of the Congresses’ jury-related legislation, and Reconstruction-era members of Congress spoke in terms of the Fourteenth Amendment affecting jury rights. See, for example, 2 Cong Rec S 974 (Jan 28, 1872) (Sen Edmunds) (“[T]he fourteenth amendment allows Congress to require that colored men shall sit upon juries.”).

¹⁰⁹ For example, when Professor Berger called for a restoration of the jury’s right to nullify, he did not distinguish between federal and state cases. See Berger, 1990 BYU L Rev at 887–91 (cited in note 18).

¹¹⁰ Compare, for example, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan L Rev 5, 78 (1949) (arguing that selective incorporation lacks historical support); Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 Yale L J 74, 76–77 (1963) (same), with Amar, *Bill of Rights* at 141–43 (cited in note 20) (arguing that the Framers of § 1 understood their Amendment to achieve a version of selective incorporation); Curtis, *No State Shall Abridge* at 4–9 (cited in note 88) (same).

¹¹¹ See US Const Amend XIV, § 1.

¹¹² For example, Thomas Cooley, the leading Reconstruction-era constitutional treatise writer, defined “due process” to include criminal “trial” and added that, generally, “an accused person will be entitled to the judgment of his peers.” Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 224–25 (Little, Brown 1880). In 1868, he wrote that “[t]he trial of the guilt or innocence of the accused must be by jury,” a principle that he noted dated back in America to the earliest extant Plymouth Colony legislation. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 319 & n 1 (Little, Brown 1868).

constitutions of at least twenty-five of the twenty-seven states ratifying the Amendment.¹¹³

Second, the Fourteenth Amendment mandates criminal jury trial through either incorporation or its fundamental-rights alternative. The latter theory is that § 1 was understood to protect only certain limited natural rights common to all free government rather than specific guarantees of the Bill of Rights.¹¹⁴ Among the natural rights understood to exist in 1868 was the right of criminal trial by jury.¹¹⁵ Even academic foes of incorporation argue that while the Fourteenth Amendment was not understood to mandate all of the criminal procedure rights enumerated in the Bill of Rights, it was understood to require states to provide a fair process for deciding criminal cases, including a “jury trial right.”¹¹⁶

The strongest originalist case for a Fourteenth Amendment right to criminal jury trial comes through incorporation of the Sixth Amendment’s explicit jury clause. Professors Amar and Michael Curtis have marshaled much evidence that the Reconstruction Congresses understood the Fourteenth Amendment to make the Sixth Amendment right to jury trial binding on the states.¹¹⁷ In addition to their many statements advocating general incorporation of the Bill of Rights, Republicans spearheading the Amendment specifically understood incorporation to include the right of criminal jury trial.¹¹⁸ Because the right of criminal jury trial was among those being violated in the South in 1866, Republicans especially wanted to give constitutional sanction to the states’ obligation to guarantee that right.¹¹⁹

The Fourteenth Amendment’s Framers thus understood their Amendment to provide a federal guarantee, whether directly through due process or natural rights theory or indirectly through incorporation, of the long-established right to criminal trial by jury.

¹¹³ Chester James Antieau, *The Intended Significance of the Fourteenth Amendment* 142 (Hein 1997).

¹¹⁴ See Bond, *No Easy Walk* at 256 (cited in note 88).

¹¹⁵ See, for example, Cong Globe, 41st Cong, 2d Sess 176 (Dec 16, 1869) (Sen Edmunds) (stating that, “under a civil government,” trial by jury “of course is the only method of punishing crime”). See also Bond, *No Easy Walk* at 256 (cited in note 88).

¹¹⁶ See, for example, Thomas, 100 Mich L Rev at 215 (cited in note 76).

¹¹⁷ See Amar, *Bill of Rights* at 185–86 (cited in note 20); Curtis, *No State Shall Abridge* at 112–13 & n 36 (cited in note 88).

¹¹⁸ See, for example, Cong Globe, 42d Cong, 2d Sess 844 (Feb 6, 1872) (Sen Sherman) (stating that the “right to be tried by an impartial jury is one of the privileges included in the fourteenth amendment; and no State can deprive any one by a State law of this impartial trial by jury”); Cong Globe, 39th Cong, 1st Sess 2765 (May 23, 1866) (Sen Howard) (stating that among the fundamental guarantees made binding upon the states was the “right of an accused person . . . to be tried by an impartial jury”).

¹¹⁹ See Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863–77* 258 (Harper & Row 1988).

But did they, like the Founders who ratified the Constitution and the Sixth Amendment, understand the right to criminal jury necessarily to encompass the jury's right to nullify? Or, despite the protection or incorporation of the right to jury trial, was the right to nullify not protected or incorporated along with it?

B. The Right to Nullify in Reconstruction-Era Courts

For scholars of the Founding era, one measure for determining whether the existing conception of juries entailed nullification is to look at state and federal court practices. In the late eighteenth century, the virtually universal practice was to allow criminal juries to determine law as well as fact. Founding-era judges, lawyers, and, importantly, jurors¹²⁰ experienced the constitutional right of jury trial as encompassing by definition the jury's right to decide questions of law. Because of the antebellum judicial disallowance of nullification, this practice of submitting legal questions to the jury was not universal during Reconstruction—but it had not been disallowed everywhere either, and the 5–4 *Sparf* decision suggests that it may have been a close question. Although jury practices in Reconstruction-era courts cannot definitely tell us the understanding of the Fourteenth Amendment's Framers, ratifiers, interpreters, and enforcers, they nonetheless offer us some clues as to what Fourteenth Amendment due process and its right to criminal jury trial originally meant.

In the federal courts, the Supreme Court did not disallow nullification until the *Sparf* decision in 1895, a full generation after Reconstruction. Since the 1830s, however, lower courts, often with Supreme Court justices sitting on circuit, had consistently instructed jurors that they had no right to nullify. By 1868, federal courts in Philadelphia, Boston, the District of Columbia, San Francisco, and New York had all denied that the Constitution's guarantee of the right to trial by jury bestowed on the jury a right to determine law as well as fact.¹²¹ Other federal judges considered these precedents persuasive, even if not binding.¹²² These opinions suggest that by 1868 the practice

¹²⁰ See Amar, 100 Yale L J at 1186–87 (cited in note 90) (discussing the Founding-era perception of “jurors as pupils,” in which “[c]itizens would learn self-government by doing self-government”).

¹²¹ See *United States v Shive*, 27 F Cases 1065, 1066 (CC ED Pa 1832); *United States v Battiste*, 24 F Cases 1042, 1043 (CC D Mass 1835) (Story); *United States v Stettinius*, 22 F Cases 1322, 1327 (CC DDC 1839); *United States v Greathouse*, 26 F Cases 18, 21 (CC ND Cal 1863); *United States v Riley*, 27 F Cases 810, 812 (CC SDNY 1864).

¹²² For example, in 1851, sitting in the same court in which Justice Story had decided *Battiste* sixteen years earlier, Justice Benjamin Robbins Curtis noted that “Justice Story pronounced an opinion on this question” of nullification. “He denied that this right existed, and gave reasons for the denial of exceeding weight and force.” *United States v Morris*, 26 F Cases 1323, 1335 (CC D

in the lower federal courts, and particularly in the most significant cities, was not to allow the jury to decide questions of law.¹²³

According to the treatise writers, state court practices were more mixed. In 1857, Francis Wharton counted eleven states that were “unite[d] in the doctrine that the jury must take the law from the court” and five states that held the opposite view;¹²⁴ he said nothing about the law in the remaining fifteen. In 1876, John Proffatt found that thirteen states prohibited nullification, six allowed it, and five had unclear or conflicting rules;¹²⁵ he did not address the other thirteen. A half-century later, Professor Howe, reviewing a dozen states, wrote that six had disallowed nullification by 1871 but that the other half allowed it for at least another decade.¹²⁶ In addition to the lack of uniformity among the states, there is an additional problem in that Wharton, Proffatt, and Howe occasionally assessed state practices differently.¹²⁷

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

First, a trend shows direction but not universal practice. During Reconstruction, some state courts still considered nullification a right, even as judges vented their disapproval. In a Connecticut case from 1873, for example, the state supreme court approved of a trial court that had submitted the constitutional question whether a state liquor statute was constitutional to the jury while informing the jury that the supreme court had previously held the statute valid, presumably hoping the jury would follow that precedent.¹²⁸ In a Tennessee case from 1874, moreover, the state supreme court acknowledged that criminal juries had the right to judge the law, over a three-judge dissenting opinion that called nullification “wrong, and unsupported

Mass 1851). Although Justice Curtis noted his agreement with Justice Story, he still proceeded to answer the question independently, conducting his own originalist analysis of Founding-era history and concluding that the jury had no right to nullify. See *id.* at 1334–35.

¹²³ See Wharton, *Criminal Law* §§ 3100–01 at 1120–21 (cited in note 87).

¹²⁴ *Id.* at § 3108 at 1124–25.

¹²⁵ Proffatt, *Trial by Jury* §§ 377–81 at 441–45 (cited in note 87).

¹²⁶ Howe, 52 Harv L Rev at 591–612 (cited in note 20).

¹²⁷ In Pennsylvania’s case, for example, Wharton deemed the state antinullification, Proffatt put it in the uncertain camp, but Howe considered it pronullification until 1891.

¹²⁸ See *State v Buckley*, 40 Conn 246, 249 (1873).

by the constitution, or sound principles of law and policy.”¹²⁹ According to Howe, in Pennsylvania, Vermont, Connecticut, and, of course, the Supreme Court, the judiciary did not disallow nullification until a generation after Reconstruction.

Second, a judicial trend shows only what the judiciary thought the jury right entailed, and, just as antebellum state legislatures clashed with the courts, so did Reconstruction-era state legislatures. After the Georgia Supreme Court held, in 1870, that the jury must accept the law from the court,¹³⁰ the state passed an amendment (subsequently ignored by the judiciary) providing that the jury “in all criminal cases, shall be judges of the law and the facts.”¹³¹ After the Louisiana Supreme Court began curtailing the jury’s right to nullify in 1871,¹³² and its chief justice even called nullification a “legal heresy” and “moral wrong,”¹³³ the state constitution was amended to provide that “the jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence.”¹³⁴

But the driving force behind the Fourteenth Amendment and its original meaning was Congress, not the states. The critical question therefore may be whether, in guaranteeing the right of trial by jury through the Fourteenth Amendment, Congress thought that “jury” meant a body of citizens permitted to decide both fact *and* law. The legal treatises from which Congress was likely to draw its understanding of the jury and that illustrate how intelligent and informed Americans ratifying the Fourteenth Amendment understood the jury, in addition to the words spoken in the Reconstruction Congresses, show that Congress did not understand the criminal jury right to include the jury’s right to nullify.

C. The Reconstruction-Era Meaning in Treatises and Dictionaries

The best examples of what informed Americans would have understood the jury’s role to be are Francis Wharton and Thomas Cooley, the two great nineteenth-century American treatise writers who wrote about the jury’s law finding right during the late antebellum and Reconstruction eras. Wharton, a Pennsylvania Democrat, published the fourth edition of *A Treatise on the Criminal*

¹²⁹ See *Withers v State*, 1 Shannon 276, 282 (Tenn 1874). See also Howe, 52 Harv L Rev at 599 (cited in note 20).

¹³⁰ See *Brown v State*, 40 Ga 689, 697–98 (1870).

¹³¹ Ga Const of 1877, Bill of Rights Art I, § 2, ¶ 1 (superseded 1945) (“[T]he jury in all criminal cases shall be the judges of the law and the facts.”).

¹³² See *State v Tally*, 23 La Ann 677, 678 (La 1871).

¹³³ *State v Johnson*, 30 La Ann 904, 905–06 (La 1878) (Manning concurring).

¹³⁴ La Const of 1879 Art 168.

Law of the United States in 1857, less than a decade before the Fourteenth Amendment was drafted. Cooley, a Michigan Republican, published the first edition of *A Treatise on the Constitutional Limitations* in 1868, the year the Amendment was ratified. In addition to these treatises, John Proffatt's classic *A Treatise on Trial by Jury*, published in 1877, also illuminates jury rights and duties during the Reconstruction era. Although Wharton was the most emphatic, he, Cooley, and Proffatt all agreed that, under the then-existing state of the law, juries no longer had the right to nullify and instead were required to take the law from the court.

Wharton, a Yale-educated lawyer who began his career as a state prosecutor, first published his *Treatise on the Criminal Law* in 1846, and revised it many times thereafter. As a young prosecutor in 1845, he had benefited from a state judge's instruction that it was the jury's duty "to receive the law for the purposes of this trial from the court,"¹³⁵ even though the Pennsylvania Supreme Court did not mandate this rule until a half-century later.¹³⁶ As a treatise writer, he paid special attention to the jury's right to decide the law; the fourth edition, for example, contained over ten pages on the subject.¹³⁷

Wharton's conclusion was that juries had no right to decide the law. "When a case is on trial," he wrote, "the great weight of authority now is that the jury are to receive as binding on their consciences the law laid down by the court."¹³⁸ He conceded that the jury had the power to nullify because an acquitted defendant could not be retried in spite of the evidence. Nevertheless, "this exception arises," he insisted, "not from the doctrine sometimes broached that the jury are the judges of the law in criminal cases, but from the fundamental policy of the common law which forbids a man when once acquitted to be put on a second trial for the same offence."¹³⁹ Aside from this lone exception, it could be "hardly doubted" that judges, as the only rightful law deciders, must set aside verdicts that contradicted the law.¹⁴⁰

Wharton understood that during the Founding era the jury had the right to nullify. "For some time after the adoption of the federal

¹³⁵ Francis Wharton, *A Treatise on the Law of Homicide in the United States: To Which Is Appended a Series of Leading Cases* 722–23 (Kay and Brother 1875) (discussing the court's charge to the jury in *Sherry's Case*).

¹³⁶ Compare *Hilands v Commonwealth*, 2 A 70, 72 (Pa 1886) (stating that jurors "are not only the judges of the facts . . . but also of the law"), with *Commonwealth v McManus*, 21 A 1018, 1019–20 (Pa 1891) (compelling the jury to take the law from the court, although not permitting the judge to "give[] them a binding instruction upon the law").

¹³⁷ Wharton, *Treatise on the Criminal Law* §§ 3093–3108 at 1115–25 (cited in note 87).

¹³⁸ *Id.* at § 3093 at 1115.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

constitution,” he acknowledged, “a contrary doctrine, it is true, was generally received.”¹⁴¹ But “it was not long before it was found necessary, if not entirely to abandon the rule, at least practically to ignore it.”¹⁴² The problem was that if “juries have any moral right to construe the law,” there could be no settled law because juries’ notions on fundamental questions varied and juries could not bind one another on interpretations of the law.¹⁴³

[I]n practice, however speciously the doctrine may be asserted, it is, except so far as it may sometimes lead a jury to acquit in a case where the facts demand a conviction, practically repudiated, and since its only operation now is mischievous, it is time it should be rejected in theory as well as real[i]ty. For independently of the reasons already mentioned, an attempt to carry it out in practice, would involve a trial in endless absurdity.¹⁴⁴

Wharton made it clear that he believed, at least a decade before Reconstruction, that nullification was antithetical to a legitimate system of jury trial.

Thomas Cooley agreed, though he was more cautious than Wharton was. Appointed the University of Michigan Law School’s first dean in 1859 and elected to the Michigan Supreme Court in 1864, Cooley established himself as perhaps the nation’s leading constitutional scholar with the publication of his *Treatise on the Constitutional Limitations*, the most important of his many works.¹⁴⁵ The treatise appeared while states were ratifying the Fourteenth Amendment, making it among the best sources for determining the original meaning of “jury” rights implicit within the Amendment and of the jury’s right to nullify.

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

whether the jury are bound to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty to follow it if it accords with their own convictions, or to disregard it if it does not.¹⁴⁶

He considered the issue complicated. When the jury acquits on the law against the evidence, the acquittal is final, which suggests that the jury

¹⁴¹ Wharton, *Treatise on the Criminal Law* § 3094 at 1115 (cited in note 87).

¹⁴² *Id.* at § 3096 at 1118.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at § 3098 at 1119.

¹⁴⁵ See Kermit L. Hall, *The Magic Mirror: Law in American History* 222 (Oxford 1989); Jerome C. Knowlton, *Thomas McIntyre Cooley*, 5 Mich L Rev 309, 312–14 (1907).

¹⁴⁶ Cooley, *Treatise on the Constitutional Limitations* at 322 (cited in note 112).

is the judge of the law; but when the jury convicts on the law against the evidence, the judge sets aside the verdict, which suggests that the jury may not judge the law.¹⁴⁷ Nonetheless, he continued:

[I]t is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases arises from the merciful maxim in the common law, which will not suffer an accused party to be put twice in jeopardy, however erroneous may have been the first acquittal.¹⁴⁸

This led Cooley to reason that “the rule of law would seem to be, that it is the duty of the jury to receive and follow the law as delivered to them by the court,” though, of course, “the jury have the complete power to disregard it.”¹⁴⁹ Thus, Cooley concluded that jury had the power but not the right to decide questions of law, and he added that although there were opposing decisions, “the current of authority” supported his conclusion.¹⁵⁰

Although John Proffatt’s *Treatise on Trial by Jury* was not published until 1877, it too illustrates the understanding of the right to jury during the Reconstruction era. Proffatt was a prominent San Francisco lawyer who authored or edited several legal works, including a multivolume series of the most important state court decisions since the Founding.¹⁵¹ His *Treatise on Trial by Jury* naturally devoted much attention to the practice surrounding the jury’s law finding power.

Proffatt opened his discussion by acknowledging “a wide divergence of opinion.”¹⁵² “In many places it has been claimed for the jury that they may rightfully disregard the instructions of the court in matters of law” so that “they are the ultimate, rightful and paramount judges of the law as well as the facts in criminal cases.”¹⁵³ Even “a multitude of authorities, of old and recent date, of very respectable weight and learning” supported this assertion of a jury’s right to nullify.¹⁵⁴ Proffatt, however, disagreed with those authorities, and he did not believe that they represented the state of American law during Reconstruction.¹⁵⁵

¹⁴⁷ Id at 321–22.

¹⁴⁸ Id at 323.

¹⁴⁹ Id at 323–24.

¹⁵⁰ Cooley, *Treatise on the Constitutional Limitations* at 323–24 (cited in note 112).

¹⁵¹ See *Law Decisions*, NY Times 3 (May 17, 1880); *Obituary Notes*, NY Times 2 (July 23, 1879).

¹⁵² Proffatt, *Treatise on Trial by Jury* § 359 at 426–27 (cited in note 87).

¹⁵³ Id at § 373 at 438.

¹⁵⁴ Id.

¹⁵⁵ Id at § 375 at 439–40.

Although he conceded that juries “in criminal cases have the *power*, which is often too freely exercised, to decide upon the law in criminal cases,” Proffatt added that “if the question be as to their *right* to decide the law, it is an entirely different matter. It may be safely asserted that in a large majority of our States this right is denied.”¹⁵⁶ Like Wharton, Proffatt acknowledged that nullification doctrine was popular at the Founding but had been discarded during the antebellum era. He also agreed that the disallowance of nullification was not just a descriptive fact but also a normatively justifiable policy.¹⁵⁷ Mirroring Wharton and Cooley, Proffatt ultimately concluded that the “preponderance of judicial authority in this country is in favor of the doctrine that the jury should take the law from the court and apply it to the evidence under its direction.”¹⁵⁸

Nor were Reconstruction-era scholars the only ones to understand the jury as a fact finding, but not law-deciding, body. Like legal treatises, dictionaries also illustrate that, by Reconstruction, the understanding of the right to criminal jury trial did not include the right to nullify. For example, one dictionary of the Constitution, intended for laymen, defined “jury” as a body of men selected “to try questions of fact in civil and criminal suits, and who are under oath or solemn affirmation to decide the facts truly and faithfully, according to the evidence laid before them.”¹⁵⁹ Criminal juries thus tried only questions of fact and only according to the evidence.

The leading nineteenth-century American dictionary provides even more conclusive evidence.¹⁶⁰ Noah Webster, a Yale-educated lawyer like Wharton, first published his *American Dictionary of the English Language* in 1828. In this first edition’s definition of “jury,” Webster noted, “*Petty juries*, consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions.”¹⁶¹ This definition of jury thus included the criminal jury’s right to decide the law. After Webster died in 1843, George and Charles Merriam acquired the rights to Webster’s *Dictionary* and hired Webster’s son-in-law Chauncey A. Goodrich, a Yale alumnus and professor of rhetoric, to oversee new editions.¹⁶² In

¹⁵⁶ Proffatt, *Treatise on Trial by Jury* § 375 at 439–40 (cited in note 87).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at § 376 at 440.

¹⁵⁹ Henry Flanders, *An Exposition of the Constitution of the United States* 217 (Butler 1860).

¹⁶⁰ Consider *Tennessee v Lane*, 541 US 509, 559 (2004) (Scalia dissenting) (relying on the 1860 edition of Webster’s *American Dictionary of the English Language* to define “enforce” in the Fourteenth Amendment).

¹⁶¹ Noah Webster, 2 *An American Dictionary of the English Language* at “jury” (Converse 1828).

¹⁶² Philip P. Gove, ed., *Webster’s Third New International Dictionary of the English Language Unabridged* 6a (Merriam 1967).

the 1865 revised and enlarged edition, current when the Fourteenth Amendment was adopted, no distinction was drawn between civil and criminal juries, and no mention was made of any jury's law-deciding right. A "jury" was defined as a body of men, selected according to law, impaneled and sworn to inquire into and try any matter of fact, and to declare the truth of it on the evidence given them in the case.¹⁶³

Between 1828 and 1865, therefore, the dictionary seems to have understood the meaning of jury to have changed from one in which criminal juries decided questions of fact *and law* to one in which law-deciding was not in the definition of any jury. Dictionary definitions do not change lightly, so the 1865 edition provides significant evidence that the meaning of "jury" had evolved. Goodrich was not law trained himself, but he understood the significance of precise legal definitions. In his preface, he wrote that the Judge J.C. Perkins, "who [] had long experience as editor of various law publications . . . revised the terms of Law and Jurisprudence."¹⁶⁴

Wharton, Cooley, Proffatt, and Webster's *Dictionary* concurred: the jury's right to nullify, inherent in the meaning of "jury" in the Founding era, was largely incompatible with the Reconstruction-era meaning of "jury." These sources suggest that informed Americans in 1868 would not have understood the Fourteenth Amendment to protect the right to nullify either through incorporation or through its § 1 language. Members of the Reconstruction Congresses were likely familiar with Wharton, Cooley, and Webster's *Dictionary*. To determine how they viewed jury nullification, we may also turn to their own words.

D. The Reconstruction-Era Meaning in Congress

The Reconstruction-era congressional debates suggest that most members of Congress, and particularly Republicans who designed the Fourteenth Amendment's agenda, understood the right to criminal jury trial not to include the jury's right to nullify. The jury-based analogies they invoked, the bills relating to jury service they proposed, and the state-court jury practices they discussed show almost no support for a constitutional right to nullify and much antagonism toward it. Among those who both played instrumental roles in framing the Reconstruction amendments and commented on jury practices are Senators Lyman Trumbull, Charles Sumner, Frederick Theodore Frelinghuysen, and William Morris Stewart.

¹⁶³ Noah Webster, *An American Dictionary of the English Language* 732 (G. & C. Merriam rev and enl ed 1865) (Chauncey A. Goodrich and Noah Porter, eds).

¹⁶⁴ See *id.* at iv.

Senator Trumbull, a moderate Republican from Illinois, chaired the influential Judiciary Committee, coauthored the Thirteenth Amendment,¹⁶⁵ and authored the Second Freedmen's Bureau Act¹⁶⁶ and Civil Rights Act of 1866,¹⁶⁷ which the Fourteenth Amendment sought to constitutionalize. In February 1866, Republicans united to support his two bills as necessary amendments to President Andrew Johnson's Reconstruction plan, viewing them as a prelude to readmitting the South to Congress.¹⁶⁸ President Johnson, however, vetoed the Freedmen's Bureau Bill partly because he did not think Reconstruction matters should be decided while the eleven Southern states remained unrepresented.¹⁶⁹ The House responded with a resolution that no former Confederate state shall be represented in Congress until Congress declared the state entitled to representation.¹⁷⁰

The Senate concurred after acrimonious debate.¹⁷¹ Among those who objected was James Dixon of Connecticut, who agreed with Johnson that each house could judge the particular qualifications of its members but could not outright disqualify an entire state.¹⁷² Trumbull countered that while each house could judge individual qualifications, the entire Congress could determine which states were qualified to send members to Congress.¹⁷³ When Dixon responded that the Senate could still admit even a member chosen by a treacherous state, Trumbull replied:

If the Senator means to ask me if the Senate has not the physical power to admit anybody, elected or not, I admit they have the same right to do it that twelve jurymen would have, against the sworn and uncontradicted testimony of a hundred witnesses, to bring in a verdict directly against the evidence, and perjure themselves. . . . We might admit a man here from Pennsylvania avenue, elected by nobody, as a member of this Senate; but we would commit perjury in doing it, and have no right to do it.¹⁷⁴

Trumbull thus understood the jury to have the power, but no right, to bring a verdict against the evidence. He recognized no exception for

¹⁶⁵ See Horace White, *The Life of Lyman Trumbull* 152, 223–24, 257–60 (Houghton Mifflin 1913).

¹⁶⁶ S 60, 39th Cong, 1st Sess (Jan 5, 1866), in *Cong Globe*, 39th Cong, 1st Sess 129 (Jan 5, 1866).

¹⁶⁷ 14 Stat 27, codified as amended in various sections of Title 42.

¹⁶⁸ See Foner, *Unfinished Revolution* at 246 (cited in note 119).

¹⁶⁹ *Id.* at 247.

¹⁷⁰ See *Cong Globe*, 39th Cong, 1st Sess 1039 (Feb 27, 1866).

¹⁷¹ See *Cong Globe*, 39th Cong, 1st Sess 1132–47 (Mar 2, 1866).

¹⁷² *Cong Globe*, 39th Cong, 1st Sess 1042 (Feb 27, 1866) (Sen Dixon).

¹⁷³ *Id.* (Sen Trumbull).

¹⁷⁴ *Id.*

nullification. Jurors deciding cases were analogous to senators who had sworn to uphold the Constitution; acting contrary to the law was perjury.

Like Trumbull, Senator Sumner of Massachusetts is an appropriate figure by which to measure the Fourteenth Amendment's meaning to Republicans. Although a radical, he still was among the leaders of congressional Reconstruction.¹⁷⁵ His proposed alternative to the Thirteenth Amendment was a precursor to § 1 of the Fourteenth Amendment,¹⁷⁶ and his civil rights bill to enforce the Fourteenth Amendment finally won his Senate colleagues' approval in 1874 and passed the House, in amended form, the following year.¹⁷⁷ In short, he represented the Fourteenth Amendment's rights-protecting agenda and thus shines light on whether its meaning included the jury's right to nullify.

Sumner disputed the validity of nullification. His first statement to that effect came in July 1867. In January, the Thirty-Ninth Congress, approaching adjournment still dismayed by Johnson's Reconstruction policies, had passed an act to establish an "extra" first session of the Fortieth Congress to meet in July (instead of December). Radicals, like Sumner, hoped to remain in session throughout the summer so that Congress could continue overseeing Johnson's actions, but moderates wanted the extra session only to pass legislation preventing Johnson from ignoring what they had already accomplished. When Senator Henry B. Anthony proposed that the Senate confine the extra session's business to Reconstruction, thus shortening the session,¹⁷⁸ Sumner objected, claiming that the Senate had the constitutional duty to attend to all public business whenever it was in session.¹⁷⁹ William Pitt Fessenden, a moderate from Maine, insisted that the Senate had the constitutional authority to confine its business whenever the majority so desired.¹⁸⁰ Sumner responded:

[Senator Fessenden] will pardon me for saying that he confounds right and power. Unquestionably the Senate has the power which the Senator from Maine attributes to it; but it has not the right. A jury, as we know according to familiar illustration, in giving the general verdict has the power to say "guilty" or "not guilty," and

¹⁷⁵ See Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W Polit Sci Q 763, 763 (1965).

¹⁷⁶ See Cong Globe, 38th Cong, 1st Sess 521 (Feb 8, 1864).

¹⁷⁷ See Civil Rights Act of 1875, 18 Stat 335, invalidated as unconstitutional by *Civil Rights Cases*, 109 US 3, 24–26 (1883). See also Ronald B. Jager, *Charles Sumner, The Constitution, and the Civil Rights Act of 1875*, 42 New Eng Q 350, 361–63 (1969).

¹⁷⁸ See Cong Globe, 40th Cong, 1st Sess 481 (July 5, 1867) (Sen Anthony).

¹⁷⁹ Id (Sen Sumner).

¹⁸⁰ Id at 492–93 (Sen Fessenden).

disregard the instructions of the court, but I need not say that it is a grave question among lawyers whether it has the right. Now, I submit that assuming that the Senate has the power which the Senator from Maine claims for it, it has not the right. It has not the right to disregard the spirit of the Constitution; and the proposition now before you is of that character.¹⁸¹

Moderates prevailed, and Congress adjourned within three weeks.¹⁸²

But what is important for our purposes is Sumner's analogy. Although he called the jury's right to decide questions of law "a grave question," not a settled one, Sumner indicated that he did not believe in the right, and he implied that other senators would find his right-power analogy to nullification convincing. He would have had no reason to illustrate his right-power objection to the moderates' resolution with the nullification example unless he thought that nullification was an illegitimate power.

Sumner made a similar point five years later relating to his civil rights bill, which included a provision preventing racial discrimination in jury selection even in state courts. One argument against this provision was that it was a step to blacks serving as judges, which some senators would not support. Sumner replied that jurors were more like witnesses interpreting facts than judges interpreting law. Because the Civil Rights Act of 1866 established that blacks had the right to testify as witnesses,¹⁸³ Sumner argued that they should have the right to serve as jurors, too, even if they did not receive the right to serve as judges. Sumner charged that his opponent

knows well the history of trial by jury; he knows that at the beginning the jurors were witnesses from the neighborhood, afterward becoming judges, not of the law, but of the fact. . . . [N]ow I insist that they should come under the same rule as witnesses I say nothing about judges, for the distinction is obvious between the two cases.¹⁸⁴

Nor was Sumner alone in his conviction that jurors were fact finders but not law deciders. Senator Frelinghuysen of New Jersey, another leading radical, made the same argument in relation to a subsequent iteration of Sumner's bill. "The jury," Frelinghuysen defined, "is an institution for the trial of issues of fact by the people."¹⁸⁵

¹⁸¹ *Id.* at 493 (Sen Sumner).

¹⁸² See *Cong Globe*, 40th Cong, 1st Sess at 498 (cited in note 178) (recording that the Senate vote was 23-9 with 21 absent and Sumner voting against).

¹⁸³ Civil Rights Act of 1866 § 1, 42 USC § 1982.

¹⁸⁴ *Cong Globe*, 42d Cong, 2d Sess 822 (cited in note 178) (Sen Sumner).

¹⁸⁵ 2 *Cong Rec* 3455 (Apr 29, 1874) (Sen Frelinghuysen).

He too emphasized that, like witnesses, jurors are “acquainted with the mode of life, habits, and customs of the locality”¹⁸⁶ rather than acquainted with the law like judges are. After a series of narrow defeats, Sumner’s provision preventing racially discriminatory juries became law in March 1875 through the Civil Rights Act of 1875.¹⁸⁷ Its passage does not, of course, prove that the Senate accepted Frelinghuysen’s definition of the jury. Nonetheless, Sumner’s and Frelinghuysen’s statements illustrate that at least these congressional leaders believed that the jury’s role was to judge only the facts, not the law. Other senators, from time to time, suggested a similar view.¹⁸⁸

Senators not only discussed how jurors were supposed to decide cases but occasionally acted like jurors themselves. When Philip Francis Thomas presented credentials as Maryland’s senator-elect, several Republicans objected, citing § 3 of the Fourteenth Amendment and the Test-Oath Act of 1862,¹⁸⁹ which prohibited those who had engaged in insurrection or had given aid or comfort to the enemy from serving in Congress.¹⁹⁰ In 1863, when Thomas’s teenage son had told him that he was enlisting in the Confederate army, Thomas furnished him with \$100 for his trip to the South.¹⁹¹ Thomas wanted to take the Senate’s test-oath because he did not believe that a gift to his son constituted aid to the enemy, and the Judiciary Committee agreed. Nevertheless, the full Senate proceeded to debate his eligibility.

Senator Trumbull, an attorney admitted to the bar in two states,¹⁹² explained why his committee approved Thomas’s credentials.¹⁹³ His colleague from Illinois, however, found him unpersuasive. “The question is did Mr. Thomas render assistance, did he give aid and comfort to the rebellion?” Senator Richard Yates said.

This is a question of fact. I will always yield to my colleague upon a question of law. His opinions upon law are convincing with me; they are conclusive with me; but in this case I act as a juror; the

¹⁸⁶ *Id.* at 3454.

¹⁸⁷ See Civil Rights Act of 1875 § 4, 18 Stat at 336; Forman, 113 Yale L J at 930 & n 182 (cited in note 9).

¹⁸⁸ See, for example, 2 Cong Rec 1326 (Feb 9, 1874) (Sen Merrimon) (noting, in reference to the 1874 amendments to the Bankruptcy Act of 1867, that in both federal and state courts “the judge charges [jurors] as to the law and their duties”).

¹⁸⁹ 12 Stat 502.

¹⁹⁰ Test-Oath Act of 1862, 12 Stat at 502, repealed by Act of May 13, 1884 § 2, 23 Stat 21, 22.

¹⁹¹ See Cong Globe, 40th Cong, 2d Sess 1145 (Feb 13, 1868) (Sen Sumner).

¹⁹² See “Trumbull, Lyman,” in United States Congress, *Biographical Dictionary of the United States Congress, 1774–1989*, 1957, 1957 (GPO bicentennial ed 1989).

¹⁹³ See Cong Globe, 40th, 2d Sess at 1146 (cited in note 191) (Sen Trumbull).

Senate is a jury; and it is a question of fact which we are called upon to decide.¹⁹⁴

Senator William Morris Stewart, a leading radical and principal author of the Fifteenth Amendment,¹⁹⁵ backed Yates. “Apply these facts,” he said,

to any offense, to any common crime, even that of petty larceny, and there can be no doubt that a person who, knowing that a crime was to be committed, knowing the purpose of the party to be to commit a crime, aided him by giving him \$100, would be held guilty; that fact alone would be deemed conclusive in any case as a matter of law, and the court would so instruct. The jury might acquit, but that does not affect the question. The court would so instruct the jury as a matter of law.¹⁹⁶

Stewart was a Yale-trained attorney who had served as a district attorney and as California’s fifth attorney general before representing Nevada in the Senate.¹⁹⁷ Like Yates, he thought that courts could instruct juries as a matter of law, and that jurors yielded to judges on questions of law but not fact. In the end, the full Senate rejected Thomas.¹⁹⁸

Stewart’s view was the understanding not only of senators from states where courts had already disallowed nullification, like Sumner of Massachusetts, but also of senators from states where nullification was still a right, including Trumbull and Yates of Illinois as well as Indiana’s Thomas Hendricks. Adopted in 1851 and still on the books during Reconstruction—and even today—Article I, § 19 of Indiana’s Constitution declares, “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”¹⁹⁹ During the Reconstruction era, moreover, Indiana’s courts had not yet disallowed this right.²⁰⁰ But Senator Hendricks appeared not to recognize a right to nullify in his state.

¹⁹⁴ Id at 1153 (Sen Yates).

¹⁹⁵ See Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 *Chi Kent L Rev* 1013, 1023 n 36 (1995).

¹⁹⁶ *Cong Globe*, 40th Cong, 2d Sess 1174 (Feb 14, 1868) (Sen Stewart).

¹⁹⁷ See “Stewart, William Morris,” in United States Congress, *Biographical Dictionary* at 1877 (cited in note 192).

¹⁹⁸ See *Cong Globe*, 40th Cong, 2d Sess 1271 (Feb 19, 1868) (recording that the Senate’s vote was 27–20 in favor of rejecting Thomas, with 6 absent).

¹⁹⁹ *Ind Const Art I*, § 19.

²⁰⁰ See Proffatt, *Treatise on Trial by Jury* § 380 at 443 (cited in note 87). See also *Beavers v State*, 141 NE2d 118, 121–23 (Ind 1957).

After Attorney General Henry Stanbery, a Johnson supporter, refused to defend the Military Reconstruction Act²⁰¹ in the Supreme Court because he thought it unconstitutional,²⁰² Senator Jacob Howard proposed authorizing the secretary of war to appoint lawyers to defend the constitutionality of military action in Reconstruction cases.²⁰³ Defending his resolution, Howard said that the only appropriate course of action for an attorney general was to defend the government's position or to resign.²⁰⁴

Hendricks, a Democrat and lawyer,²⁰⁵ objected to Howard's attack on Stanbery, asserting that Stanbery ethically could not defend a statute that he considered unconstitutional. An attorney, "whether he represents the Government or a private citizen," may not "represent the law to the court or the facts to the jury otherwise than in his judgment he believes them to be." Hendricks wished that he had a copy of Indiana's statutes with him, which defined an attorney's role, but he said that above all, "that code declares that the attorney shall be true to the court in an argument of a question of law and true to the jury in an argument of a question of fact."²⁰⁶ Neither Hendricks nor his interpretation of Indiana law considered that an attorney might argue law to a jury.

Yet senators did recognize that some states still preserved the jury's right to nullify. During the Thirty-Ninth Congress, Senator Peter Van Winkle, a law-trained moderate from West Virginia, delivered the clearest statement of a senator's understanding of the jury's law-deciding right. To him, that right was "peculiar"—and an abomination. Speaking on a Reconstruction bill to provide for increased federal oversight of Virginia, a state that did not disallow nullification until after Reconstruction,²⁰⁷ he said:

I know that the law is not administrated in that State as it ought to be. I know this particularly in reference to the freedmen. I know that they are taken, tried for petty and trivial offenses, and the utmost penalty of the law is inflicted upon them. I am happy to say in regard to my former fellow-citizens that I am told this is

²⁰¹ 14 Stat 428 (1867).

²⁰² See Normal W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 Stan L Rev 1931, 1961 & n 170 (2008).

²⁰³ See Cong Globe, 40th Cong, 2d Sess 981 (Feb 5, 1868) (Sen Howard).

²⁰⁴ Id at 982.

²⁰⁵ See "Hendricks, Thomas Andrews," in United States Congress, *Biographical Dictionary* at 1172 (cited in note 192).

²⁰⁶ Cong Globe, 40th Cong, 2d Sess at 982–83 (cited in note 203) (Sen Hendricks).

²⁰⁷ See Howe, 52 Harv L Rev at 596–97 n 57 (cited in note 20) (noting that in 1881, the Virginia Supreme Court began explicitly requiring juries to follow the judge's legal instructions in criminal cases).

not the fault of the judges nor the fault of the lawyers at the bar, who frequently try to mitigate these penalties; but it is the fault of the juries, uninstructed men probably. The administration of the criminal law in Virginia is peculiar. In the first place, the juries are judges of both law and fact; and in the second place, in every case the jury fix the term of imprisonment, so that the judge has no control whatever over it.²⁰⁸

Virginia's criminal law was "peculiar" partly because "juries are judges of both law and fact," showing that Van Winkle believed that allowing the jury's right to nullify was the exception rather than the rule. Furthermore, he considered the jury's authority over law-deciding to be a significant cause of black oppression in the South.

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

E. The Paradox of Reconstruction-Era Meaning

Despite the picture of original understanding that treatises and debates reveal, there are a couple of problems with relying on this understanding alone to determine the original meaning of Fourteenth Amendment jury law. Initially, there is the descriptive problem of weighing potential contrarian voices. Although an overwhelming minority, some in the Reconstruction Congresses voiced support for the jury's law-deciding right. These voices are not a substantial concern, though, because there were so few in the Reconstruction Congresses who indicated that they understood the right to jury by definition to include the right to nullify.

I found only one example of a member of Congress who clearly suggested that he understood nullification to be a constitutional right. In early 1868, Representative Thomas Williams, a law-trained radical from Pennsylvania, wanted to curtail the Supreme Court's power to overturn congressional legislation, so he introduced a bill providing that only the Court's unanimous agreement could strike down a law of Congress.²⁰⁹ His rationale was that his legislation would make the

²⁰⁸ Cong Globe, 39th Cong, 2d Sess 1465 (Feb 16, 1867) (Sen Van Winkle) (noting the particular hardship for Virginia's nullification laws on freed blacks in that state).

²⁰⁹ See Cong Globe App, 40th Cong, 2d Sess 85 (Jan 13, 1868) (Rep Williams).

Court analogous to a jury, which required unanimity, because the “life and liberty and property of the citizen were not to be trusted to the keeping of the majority, or taken away except by the unanimous accord of all his judges, passing in criminal cases upon the law as upon the facts.” The Court, contrarily, “claims to pass, by a divided vote, upon the fundamental law of a great nation, and in effect to nullify that law Who, then, shall say that there is in this amendment anything unreasonable or unprecedented?”²¹⁰ Although his bill died quickly, Williams’s argument illustrates that he believed that the criminal jury’s right to pass upon questions of law was inherent in the meaning of jury and that juries, like the Court, could “nullify” a law by refusing to convict.

But other than Williams, no senator or representative appeared to understand nullification as either desirable or a right. The closest any came was to criticize any intrusions on the jury right. These statements, which did not mention jury law-deciding, are too vague to draw conclusions about original meaning. Senator Justin Smith Morrill of Vermont, for example, eulogized a judge under whose authority juries “suffered no depreciation, but their functions and capacity appeared to be vindicated upon every trial.”²¹¹ Yet he is an unlikely candidate for understanding the right to nullify as legitimate, because he spearheaded the Republicans’ initial antipolygamy legislation and later supported legislation to purge would-be nullifiers.²¹²

Moreover, when opposing a treason-trial jury bill, Senator Garrett Davis, a law-trained Democrat from Kentucky, said, “When you once commence innovations upon the right of trial by jury no man can set limits to the extent to which those innovations may go. The only way to preserve the right of trial by jury sacred and inviolate is to permit no innovations upon it.”²¹³ Was disallowing nullification an impermissible innovation? Davis did not think so. Only a year earlier he had insisted that Southern juries were not finding verdicts “in conflict with and in opposition to the law.” If juries did so, they would be “censurable.”²¹⁴ Davis thus is no candidate for a pronullification reading.

Although we may dismiss the descriptive problem in light of the overwhelming weight of the evidence, which shows that the Reconstruction Congresses understood the right to criminal jury not to include the right to nullify, there remains a normative dilemma. This

²¹⁰ *Id.*

²¹¹ *Cong Globe*, 39th Cong, 1st Sess 62 (Dec 14, 1865) (Sen Morrill).

²¹² See Act of July 1, 1862 § 1, 12 Stat 501, 501; Part IV.C.

²¹³ *Cong Globe*, 40th Cong, 2d Sess 2277 (Apr 8, 1868) (Sen Davis).

²¹⁴ *Cong Globe*, 39th Cong, 2d Sess 1465 (Feb 16, 1867) (Sen Davis).

may be called the paradox of Reconstruction-era original meaning, and it suggests that conscious structural design or original *intent*, as opposed to only original meaning, might matter in cases of Fourteenth Amendment incorporation. Unless the original intent agreed with the original meaning, then the Fourteenth Amendment may have, paradoxically, done little more than constitutionally incorporate what had been undemocratic (and perhaps unconstitutional) judicial precedent that had defied the superdemocratically adopted old original meaning.

On the one hand, incorporating wholesale the Bill of Rights' original meaning into the Fourteenth Amendment makes little descriptive sense from an originalist perspective because the Fourteenth Amendment Framers had a different conception of what due process and "jury" meant, and there is no evidence that they wanted to incorporate a 1791 definition, as opposed to the 1868 version.²¹⁵ On the other hand, it might be problematic if the Fourteenth Amendment unintentionally constitutionalized undemocratic judicial precedent that its Framers did not intentionally support.²¹⁶ If that precedent did not accord with the Founding-era meaning, then should these judges' decisions be rendered instantaneously constitutional in 1868 *only* because the plain language of due process—including its new, judicially constructed meaning of jury—was adopted in a new amendment? That is the paradox: it is conceivable that the Thirty-Ninth Congress constitutionalized a host of undemocratic criminal procedure practices merely because the understanding of due process included them in 1868, even if Congress did not intend to make a distinction between the 1791 and 1868 meanings.

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

²¹⁵ Consider Rappaport, 45 San Diego L Rev at 731 (cited in note 73) (discussing the Takings Clause and arguing that the meaning at the time of the Fourteenth Amendment's passage may have been different); Williams, 120 Yale L J at 414 (cited in note 73) (discussing the Due Process Clauses in a similar manner).

²¹⁶ Consider Hyman, 38 Akron L Rev at 10 (cited in note 86) (arguing that the Fourteenth Amendment's Framers would not have been inclined "to alter the meaning of the venerated Bill of Rights").

In the Civil War's aftermath, the Thirty-Ninth Congress's Republicans expected the Johnson administration to try the Confederacy's high officers for treason, but they faced a problem: treason was a civil offense, and therefore it required a civilian trial, with an impartial jury.²¹⁷ But how could a court find impartial jurors? How many citizens had not formed some opinion about whether the Civil War was treason or, as Jefferson Davis planned to argue,²¹⁸ self-defense?

In December 1865, Senator James Rood Doolittle, a moderate Republican, proposed a solution. He introduced a bill providing that in trials for federal offenses, a juror would not be disqualified even if he had

formed or expressed an opinion upon the guilt or innocence of the accused, founded upon public rumor, statements in public journals, or the common history of the times, provided he be otherwise competent, and upon his oath declare, and it appear to the satisfaction of the court that, notwithstanding such opinion, he can and will impartially try the accused upon the crime charged in the indictment, and a true verdict give *upon the evidence* to be produced upon the trial.²¹⁹

At first glance, it appears that Doolittle thought that jurors must give their verdicts "upon the evidence" only, which suggests that he did not understand jury to include the right to decide questions of law or to nullify. This is particularly important in the treason context, because in the Founding-era treason trials arising from the Whiskey Rebellion, lawyers for both sides had been allowed to debate before the jury the legal question whether armed resistance to the Whiskey Act²²⁰ enforcement could constitute treason, and the jury had been permitted to decide among the various legal explanations of the lawyers and the judges in reaching their verdict.²²¹ Through the evidence-only provision, therefore, Doolittle might have been rejecting the Founding-era practice in favor of a different Reconstruction-era one. At least, that is what his bill's language might suggest.

²¹⁷ See William C. Davis, *Jefferson Davis: The Man and His Hour* 652–53 (HarperCollins 1991) (describing how efforts to try Davis in a military commission were rendered impossible when he was cleared of involvement in President Abraham Lincoln's assassination).

²¹⁸ *Id.* at 654 (noting that Davis was eager to have his case tried in order to prove that he had not committed treason, but rather seceded in self-defense).

²¹⁹ S 34 § 2, 39th Cong, 1st Sess (Dec 18, 1865) (emphasis added).

²²⁰ 1 Stat 199 (1791).

²²¹ See Harrington, 1999 Wis L Rev at 402–03 (cited in note 20).

But the House and Senate debates suggest that the “upon the evidence” language was inconsequential. When the Senate Judiciary Committee amended Doolittle’s bill and removed the reference to “upon the evidence” for an unreported reason, Doolittle said that the committee put his bill “in a better form than it was originally as drawn by myself.”²²² But after Doolittle’s bill died, Senator Trumbull pushed a later iteration of it in the Fortieth Congress that again referred to “a true verdict upon the evidence to be produced at trial.”²²³ This evidence-only bill passed the Senate,²²⁴ but no senators discussed the evidence-only provision. The House debates are also unclear. The original House bill required jurors to swear to give a true verdict “*upon the evidence* to be produced upon the trial,”²²⁵ but a substitute bill required jurors “to render an impartial verdict *upon the law* and evidence.”²²⁶ The House never debated the difference between the evidence-only and the law-and-evidence bills. None of the treason trial bills became law.

Hence, both senators and representatives included language in proposed bills instructing jurors to decide criminal cases “upon the evidence” only or “upon the law and evidence” without distinguishing between the two versions, at least in floor debates. Did they think that one version accorded with the Reconstruction-era treatises and the other with the Founding-era right? If they were unaware of the difference in meanings, then should the Fourteenth Amendment constitutionalize the then-existing meaning of due process, constructed by the undemocratic judges? Is original meaning, as opposed to conscious decision making, enough?

Fortunately, there are some answers to this paradox. First, although a few proposed bills used jury language casually, the overwhelming preponderance of the Reconstruction Congresses’ words shows that they understood the difference between *right* and *power* in the jury context. They understood the argument that nullification was a right and, unlike many state legislatures, rejected it.

Second, we may rely on more than original meaning. There is strong evidence that the Reconstruction Congresses structured the Fourteenth Amendment in a way that would permit or even require Congress to curtail jury nullification in places where it predominated. They did not merely understand nullification to be outside the meaning of jury; they intended, at least in some cases, to eliminate it.

²²² Cong Globe, 39th Cong, 1st Sess 338 (Jan 22, 1866) (Sen Doolittle).

²²³ S 464 § 2, 40th Cong, 2d Sess (Mar 26, 1868).

²²⁴ See Cong Globe, 40th Cong, 2d Sess 2277 (Apr 8, 1868).

²²⁵ HR 418, 39th Cong, 2d Sess (Mar 22, 1866) (emphasis added).

²²⁶ Cong Globe, 39th Cong, 2d Sess 24 (Dec 5, 1866) (Rep Lawrence) (emphasis added).

They were not merely constitutionalizing judicial precedents; they were consciously transforming or superseding the late eighteenth-century Constitution and its jury provisions. Their understanding of the Fourteenth Amendment was that it permitted or required the disallowance of nullification in state and federal courts.

III. CONSTITUTIONAL DISALLOWANCE OF THE RIGHT TO NULLIFY

Although Reconstruction-era history shows that the Fourteenth Amendment's Framers would not have understood their Amendment to incorporate against the states the jury's right to nullify, the history provides only part of the textual basis for disallowing the Founding-era right to nullify. First, the paradox of Reconstruction-era original meaning begs an answer to whether the Framers and ratifiers consciously preferred the Reconstruction-era meaning and hence consciously constitutionalized the undemocratic nineteenth-century judicial precedent. Second, the original meaning does not explain whether the disallowance should extend to federal courts.

The Fourteenth Amendment, after all, appears directed at only the states and thus should not necessarily affect jury rights in federal criminal cases. One solution, of course, is reverse incorporation and the desire to have uniform constitutional rights in state and federal court. A more satisfying rationale is that the Fourteenth Amendment's original meaning transformed or superseded the Sixth Amendment's Founding-era original meaning, constitutionalizing the judicial disallowance through its explicit due process and implicit jury rights provisions.

This rationale is grounded in the way that the Fourteenth Amendment revolutionized federalism and civil rights. Against the Sixth Amendment's original guarantee of defendant and jury rights, based in local resistance to what could become tyrannical federal law, the Fourteenth Amendment may have guaranteed a right of protection of individual life, liberty, property, and security that was enforceable by the federal government against individuals, localities, and states depriving rights. The Fourteenth Amendment's rights and governmental obligations may thus have trumped certain older, penumbral rights, such as curtailing the right to nullify, even in federal cases.²²⁷

²²⁷ See, for example, William Blackstone, 1 *Commentaries on the Laws of England* 59 (Chicago 1979) (“[W]here words are clearly *repugnant* in two laws, the latter takes place of the elder.”). Consider Williams, 120 *Yale L J* at 504–05 (cited in note 73) (“If the language of the two Due Process Clauses reflected some sort of actual conflict such that the competing understandings of the two generations of ratifiers could not be honored simultaneously, there would be a fairly strong argument that the meaning of the later-enacted provision should control.”).

This theory draws support from nullification's antebellum history, which was largely based on resistance to federal law. Take Massachusetts, which has been the subject of two studies.²²⁸ In 1808, as federal indictments were handed down during the embargo crisis, leaders of the state bar insisted on arguing to the jury that the Embargo Act²²⁹ was unconstitutional,²³⁰ and the legislature passed a statute declaring the right of juries to judge law and fact in criminal cases.²³¹ Moreover, in 1855, motivated partly by contempt for the recent Fugitive Slave Act of 1850,²³² the legislature passed a new statute declaring the jury's right to resolve questions of law.²³³ Nor was Massachusetts unique. During the tariff nullification crisis of 1832, South Carolina required jurors to take a test-oath to uphold its nullification ordinance, suggesting that jurors should nullify federal law.²³⁴

The Reconstruction Congresses knew that similar jury nullification threatened to defeat the Republican Party's ideology, upon which Reconstruction was built, along with the Fourteenth Amendment and its enforcement legislation. The only way that § 1's civil rights guarantee could be "self-executing" and that § 5 legislation could "enforce" the § 1 guarantee was for courts to disallow nullification. The Congresses' enforcement and related legislation specifically prohibited nullification in federal courts, illustrating that they understood the Constitution and the amendment's grant of power to authorize or to require the disallowance of nullification even in federal cases.

A. The Fourteenth Amendment and the Right to Protection

Proposed by Congressman and future Attorney General Ebenezer Hoar and demanded by other Reconstruction leaders like Charles Sumner and Salmon Chase, a principal plank of the antebellum Republican Platform called for the federal government to abolish the "twin relics of barbarism"—black slavery and polygamy,

²²⁸ See Deirdre A. Harris, Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 Suffolk U L Rev 968, 976–1003 (1978); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L J 170, 192 (1964).

²²⁹ Act of Dec 22, 1807, 2 Stat 451, repealed by Non-Intercourse Act, 2 Stat 528 (Mar 1, 1809).

²³⁰ See Note, 74 Yale L J at 175 n 31 (cited in note 228).

²³¹ See Act of Mar 12, 1808, 1808 Mass Acts ch 139, § 15.

²³² 9 Stat 462. See Note, 74 Yale L J at 177 n 47 (cited in note 228).

²³³ See An Act Concerning the Duties and Rights of Jurors, 1855 Mass Acts ch 152, codified as amended at Mass Ann Laws ch 278, § 11.

²³⁴ See Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* 50, 75–76 (Oxford 1987); William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1616–1836* 210–11, 271–73 (Harper & Row 1966).

which they considered akin to female slavery.²³⁵ By 1866, when the Fourteenth Amendment was drafted, the Republican Party had done so in name: the Thirteenth Amendment outlawed slavery everywhere,²³⁶ and the Morrill Anti-Bigamy Act²³⁷ outlawed polygamy in all federal territory, including Utah,²³⁸ the only jurisdiction where polygamy was widely practiced. Yet abolishing the “twin relics of barbarism” in name only was just the beginning. Reconstruction-era Republicans intended more than declarations of rights—hence the Thirteenth Amendment’s unprecedented § 2 enforcement provision, along with its sister sections in the other Reconstruction amendments.²³⁹ Republicans intended to guarantee the proclaimed right to liberty with a corresponding right implicit in liberty, the right to protection.

Dozens of scholars have argued that the Fourteenth Amendment was both intended and originally understood to establish a constitutional civil right to protection,²⁴⁰ which has relevance to crime victims²⁴¹ and a federal guarantee that deterrent criminal laws would be

²³⁵ See Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* 129–30 (Oxford 1995) (quoting the Republican Party Platform of 1856).

²³⁶ See US Const Amend XIII.

²³⁷ Act of July 1, 1862 (“Morrill Anti-Bigamy Act”), 12 Stat 501, repealed by Act of Nov 2, 1978 § 2, Pub L No 95-584, 92 Stat 2483, 2483.

²³⁸ Morrill Anti-Bigamy Act § 1, 12 Stat at 501.

²³⁹ See Amar, *America’s Constitution* at 361–63 (cited in note 21).

²⁴⁰ See, for example, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv L Rev 780, 821 (2006) (“The [Fourteenth] Amendment’s authors wrote those provisions to correct a democracy deficit: the tendency of Southern officials to deny newly freed slaves the ‘protection of the laws.’”); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L Rev 1379, 1403 (2006):

[C]onsider the way the Clause reads if the adjective ‘equal’ is omitted: ‘No State shall . . . deny to any person . . . the . . . protection of the laws.’ . . . This reading of the Equal Protection Clause, although unfamiliar to contemporary Americans, was the standard understanding of the Framers of the Fourteenth Amendment, who were concerned with the lack of protection accorded to Unionists and newly-freed slaves in the Reconstruction South.

Lawrence Rosenthal, *Policing and Equal Protection*, 21 Yale L & Pol Rev 53, 71 (2003) (“[W]hile we have become used to thinking of the concept of equal protection as a right of the individual against the state, its original meaning had much more to do with guaranteeing that law enforcement would be equally *effective* against all threats to public peace and safety.”); Evan Tsen Lee and Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination against Black Victims in Capital Sentencing*, 1998 S Ct Rev 145, 150 (“[O]ne of the core, historical objectives of the Equal Protection Clause . . . was to require southern states to protect newly freed slaves from private violence by southern whites.”); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 349 (1985) (“Against this background [of violence against freedmen] equal protection seems to mean that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury.”).

²⁴¹ See, for example, Akhil Reed Amar, Book Review, *Three Cheers (and Two Quibbles) for Professor Kennedy*, 111 Harv L Rev 1256, 1261–62 (1998) (“A core purpose of the 1866 Equal Protection Clause was to affirm the rights of black victims of crime.”); Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*,

enacted and enforced—through convictions.²⁴² The right to protection meant not only protection against the state but also protection by the state against private violence, and the Fourteenth Amendment empowered the federal government to enforce the right.²⁴³ Because these arguments have been made elsewhere, a brief summary suffices.

This right to protection was essential to Reconstruction from the start. The Freedmen’s Bureau Act,²⁴⁴ a landmark companion statute to the Fourteenth Amendment, provided that “the right . . . to have full and equal benefit of all laws and proceedings concerning . . . personal security . . . shall be secured to and enjoyed by all the citizens” of the South.²⁴⁵ Republicans then constitutionalized the right to personal security or protection through the Fourteenth Amendment. Throughout the Thirty-Ninth Congress, they repeated their understanding that among the rights the Amendment would guarantee was that of protection. Representative Samuel Shellabarger called it “self-evident” that “protection by the Government is the right of every citizen.”²⁴⁶ “Allegiance and protection are reciprocal rights,” Senator Trumbull elaborated. “American citizenship would be [of] little worth if it did not carry protection with it.”²⁴⁷

In addition to the Republicans’ general understanding, the Fourteenth Amendment’s specific text guaranteed the right to protection. Some scholars have argued that the Privileges and Immunities Clause made protection a substantive right of citizenship,²⁴⁸ citing the understanding of *Corfield v Coryell*,²⁴⁹ which was still then “the leading case” defining “privileges and immunities,”²⁵⁰ and which had described the right to “[p]rotection by the government” as distinct from and equal to the great inalienable rights to life, liberty, and property.²⁵¹ Others have relied upon the Equal Protection Clause, arguing that it “imposes a duty on each state to protect all persons and

11 Pepperdine L Rev 63, 77 (1984) (“While equal treatment was certainly an important concern of those who framed the fourteenth amendment, the clause also speaks of ‘the equal protection of the laws.’ It is this aspect of the equal protection clause which has particular relevance to the victims of crime.”).

²⁴² See Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 Duke L J 507, 546 (1991).

²⁴³ See *id.* at 510.

²⁴⁴ 14 Stat 173 (1866).

²⁴⁵ Freedmen’s Bureau Act § 14, 14 Stat at 176 (1866).

²⁴⁶ Cong Globe, 39th Cong, 1st Sess 1293 (Mar 9, 1866) (Rep Shellabarger).

²⁴⁷ Cong Globe, 39th Cong, 1st Sess 1757 (Apr 4, 1866) (Sen Trumbull).

²⁴⁸ See, for example, Heyman, 41 Duke L J at 555–57 (cited in note 242).

²⁴⁹ 6 F Cases 546 (CC ED Pa 1823).

²⁵⁰ *Slaughter-House Cases*, 83 US (16 Wall) 36, 75–76 (1873).

²⁵¹ *Corfield*, 6 F Cases at 551–52.

property within its jurisdiction from violence and to enforce their rights through the court system.”²⁵²

Others argue that the Due Process Clause meant that states could not divest the right to protection by depriving security against the invasion of rights by others.²⁵³ Representative William Lawrence of Ohio explained that “there are two ways in which a State may undertake to deprive citizens of [their] absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.”²⁵⁴ Representative James Wilson of Iowa, who chaired the House Judiciary Committee, explained that the clause encompassed not only the rights of life, liberty, and property, but also “those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named.”²⁵⁵

This understanding leads us to juries. The right to protection at the Fourteenth Amendment’s core illustrates that the interest of the government and the victim in civil rights necessitated their interest in the enforcement of those rights through criminal laws—and convictions.²⁵⁶ Because the Fourteenth Amendment was enacted largely to guarantee and to enforce the protection of civil rights, if an old, penumbral right—such as the Sixth Amendment right to jury nullification—interfered with the new, prioritized right, then the new right might take precedence.

The principal example involves federalism. The great objection to the Fourteenth Amendment and its enforcement legislation was that they infringed upon states’ rights guaranteed in the Founding-era Constitution and Bill of Rights. The federal government, opponents cried, was invading the states’ exclusive provinces, such as their responsibility for protecting citizens against criminal offenses.²⁵⁷ Defending one enforcement bill, Senator Oliver Hazard Perry Morton of Indiana responded:

The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are

²⁵² Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-enactment History*, 19 *Geo Mason U Civ Rts L J* 1, 3 (2008). See also sources cited in note 240.

²⁵³ See, for example, Heyman, 41 *Duke L J* at 557–63 (cited in note 242).

²⁵⁴ *Cong Globe*, 39th Cong, 1st Sess 1833 (Apr 7, 1866) (Rep Lawrence).

²⁵⁵ *Cong Globe*, 39th Cong, 1st Sess 1294 (Mar 29, 1866) (Rep Wilson).

²⁵⁶ But consider King, 65 *U Chi L Rev* at 457 n 102 (cited in note 17):

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

²⁵⁷ See Heyman, 41 *Duke L J* at 568 (cited in note 242).

powerless to redress these wrongs. . . . Shall it be said with any reason that it is proper to leave the punishment of these crimes to the States when it is a notorious fact that the States do not punish them?²⁵⁸

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

[S]o far as the right to sit upon a jury goes . . . that right must not only be defended by a penalty imposed on people who deny it, but it must be defended affirmatively for the protection of the community who are to be benefited by it. . . . [Therefore,] the fourteenth amendment allows Congress to require that colored men shall sit upon juries.²⁵⁹

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

B. Race, Southern States, and Juries

The typical story about white jury nullification in the Reconstruction South is that Congress responded by integrating juries through the Civil Rights Act of 1875, which forbade disqualification from jury service on the basis of race and criminalized racial discrimination in juror selection.²⁶⁰ Professor Forman, for example, focuses on the ways that Reconstruction Republicans worked "to eliminate barriers to black participation in the legal system, with a view toward ultimately securing the right of blacks to serve as jurors."²⁶¹ Likewise, Professor Randall Kennedy writes that the

²⁵⁸ Cong Globe App, 42d Cong, 1st Sess 252 (Apr 4, 1871) (Sen Morton).

²⁵⁹ 2 Cong Rec 948 (Jan 27, 1874) (Sen Edmunds).

²⁶⁰ See Civil Rights Act of 1875 § 4, 18 Stat at 336–37.

²⁶¹ Forman, 113 Yale L J at 897 (cited in note 9).

Republican Party responded to white nullification with “the elevation of blacks to formal equality with whites.”²⁶² Professor Amar similarly emphasizes how “Reconstruction Republicans facing southern jury nullification . . . reconstruct[ed] juries by repopulating them with blacks alongside whites.”²⁶³

Yet there was another response to Southern nullification—one not about making juries more democratic, more representative, or more powerful. It was about crippling local resistance to federal authority, disqualifying large proportions of local populations that had been eligible for jury service, and empowering federal judges at local jurors’ expense. This response was about obtaining convictions even with juries that Professor Kermit Hall stated were “*less representative of the defendants*” than any other politicized trials in American history.²⁶⁴ It was about ending jury nullification.

The Republican Party was founded on a platform of abolishing slavery, and the Thirteenth Amendment formally achieved that goal. Yet what immediately followed was not what the Republican Party had intended. Postwar justice for freedmen was atrocious, and some even compared it unfavorably with the justice that slaves had received.²⁶⁵ Although one problem was unequal treatment for black defendants, the larger problem was the need to protect freedmen from becoming crime victims.²⁶⁶ The infrequency with which whites were convicted of crimes against freedmen, not to mention crimes against Republicans or Unionists, encouraged even more violence.²⁶⁷ Sheriffs, justices of the peace, and other local civil officials were reluctant to prosecute whites,²⁶⁸ but the most important factor was the juries.²⁶⁹

White juries were viewed as the principal cause of Reconstruction injustice. In Texas, for example, the state prosecuted five hundred whites for murdering blacks in 1865 and 1866, but in each trial, the all-white juries acquitted every defendant.²⁷⁰ In Georgia, a Freedmen’s Bureau officer conceded that the “best men in the State admit that no jury would convict a white man for killing a freedman.”²⁷¹ Likewise, a Florida sheriff lamented, “If a white man kills

²⁶² Randall Kennedy, *Race, Crime, and the Law* 302 (Vintage 1997).

²⁶³ Amar, *Bill of Rights* at 272 (cited in note 20).

²⁶⁴ Hall, 33 Emory L J at 938 (cited in note 79) (emphasis added).

²⁶⁵ See Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 282 (Vintage 1979).

²⁶⁶ See Forman, 113 Yale L J at 916 (cited in note 9).

²⁶⁷ See Litwack, *Been in the Storm So Long* at 285 (cited in note 265).

²⁶⁸ See Foner, *Unfinished Revolution* at 204 (cited in note 119).

²⁶⁹ Forman, 113 Yale L J at 921 (cited in note 9).

²⁷⁰ *Id.* at 916.

²⁷¹ Litwack, *Aftermath of Slavery* at 286 (cited in note 265).

a colored man in any of the counties of this state, you cannot convict him.”²⁷² Judge Thomas Settle of North Carolina told Congress that the “defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury; or, if you do, the petit jury acquits the parties.”²⁷³ No matter how vigilant the civil authorities were, they could not punish white offenders because

[i]n nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction upon a trial at the bar. I have heard of no instance in North Carolina where a conviction of that sort has taken place.

Throughout Reconstruction, Congress was well aware of the Southern juries’ defects. Senator Edmunds said that in the South “a jury trial is a mockery; it is a shield for cruelty and crime instead of being an instrument of punishment for it.”²⁷⁴ Henry Pease, a carpetbag senator from Mississippi, reported that in the South a “white man may slay a negro, and it may be proven as clear as the noon-day sun that it was a case of murder with malice aforethought; and yet you cannot get a jury to convict.”²⁷⁵ He continued:

[I]n the State of Mississippi, where our laws are executed with as much impartiality as in any other southern State, I do not know among the several hundred homicides committed in that State a single instance, since reconstruction, where a white man has been convicted of killing a negro; and I venture the assertion that there have been over five hundred murders of negroes in that State by white men, and not one of them punished.²⁷⁶

Some identified Southern juries’ acquittals as based on the juries’ prejudiced conception of the law rather than on outright racial animus. Alluding to *Dred Scott v Sandford*,²⁷⁷ Senator Morton contended that most Southern whites “have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect.”²⁷⁸ Conceivably, some might have understood the law to permit or to require acquittals despite white violence. Indeed, one judge reported that some whites “feel and believe, morally, socially, politically,

²⁷² Foner, *Unfinished Revolution* at 435 (cited in note 119).

²⁷³ Cong Globe, 42d Cong, 1st Sess 158 (Mar 18, 1871) (Sen Sherman).

²⁷⁴ Cong Globe, 41st Cong, 2d Sess 176–77 (Dec 16, 1869) (Sen Edmunds).

²⁷⁵ 3 Cong Rec 735 (Jan 26, 1875) (Sen Pease).

²⁷⁶ *Id* at 738.

²⁷⁷ 60 US (19 How) 393 (1857).

²⁷⁸ 3 Cong Rec 1795 (Feb 26, 1875) (Sen Morton).

or religiously, that it is not murder for a white man to take the life of a negro with malice aforethought.”²⁷⁹ If it were serious about enforcing the Fourteenth Amendment, Congress could not allow jurors who understood the law to permit white violence to decide cases.

In early 1871, as white violence and jury nullification continued, Congress held hearings on one major source of problems: the Ku Klux Klan. Congress heard dozens of witnesses testify and collected hundreds of pages of testimony about the organization, including its members’ manipulative behavior on juries.²⁸⁰ “The evidence shows that this Ku Klux organization,” Senator Morton concluded, required its members “to commit perjury as jurors, and to acquit at all hazards one of their number who may be upon trial.”²⁸¹ Among a litany of wrongs he discovered, Representative Clinton Cobb of North Carolina condemned KKK members because as jurors “they have nullified trials by perjury.”²⁸² Such nullification, the legislators realized, escalated violence. Where KKK members “sit upon juries,” Senator Thomas Osborn of Florida recognized, “outrages of the worst order, the most inhuman violence and cold-blooded murders are committed with impunity.”²⁸³ “What is the civil law to” a KKK member, asked Senator Charles Drake of Missouri, when “[h]e knows that . . . the jurors who go there will acquit him in spite of all the evidence[?]”²⁸⁴

A House Committee on Reconstruction report demanded legislation. The Fourteenth Amendment, it noted, vested in Congress “the power, by proper legislation, to prevent any State from depriving any citizen of the United States the enjoyment of life, liberty, and property.” Given each Southern state’s inability to punish crime, the report concluded that each had “by its neglect or want of power, deprived the citizens of the United States of protection in the enjoyment of life, liberty, and property as fully and completely as if it had passed a legislative act to the same effect.”²⁸⁵ Taking up the invitation, Representative Benjamin Butler, a radical from Massachusetts, drafted an initial bill and Samuel Shellabarger, a

²⁷⁹ King, 65 U Chi L Rev at 466 (cited in note 17).

²⁸⁰ See Cong Globe App, 42d Cong, 1st Sess 196 (Apr 6, 1871) (Rep Snyder).

²⁸¹ Cong Globe App, 42d Cong, 1st Sess 252 (Apr 4, 1871) (Sen Morton). See also Cong Globe, 42d Cong, 1st Sess 158 (Mar 18, 1871) (Sen Sherman).

²⁸² Cong Globe, 42d Cong, 1st Sess 437 (cited in note 281) (Rep Cobb).

²⁸³ Cong Globe, 42d Cong, 1st Sess 654 (Apr 13, 1871) (Sen Osborn).

²⁸⁴ Cong Globe, 41st Cong, 2d Sess 2745 (Apr 18, 1870) (Sen Drake).

²⁸⁵ Frank J. Scaturro, *The Supreme Court’s Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* 99 (Greenwood 2000), quoting To Protect Loyal and Peaceable Citizens of the United States, HR Rep No 41-37, 41st Cong, 3d Sess 4 (1871).

radical from Ohio, submitted a subsequent one to enforce the Fourteenth Amendment.²⁸⁶

The bill, enacted as the Ku Klux Klan Act of 1871,²⁸⁷ designated certain conspiracies to deprive citizens of federal rights or equal protection as offenses punishable under federal law and provided a federal cause of action for those whose federal rights were violated under color of state law.²⁸⁸ Republicans expressed two Fourteenth Amendment justifications for the legislation, one based on the federal government's affirmative power to protect life, liberty, and property directly when states fail to do so and the other based on equal protection. All but four members of Congress who had voted for the Fourteenth Amendment and were still serving in Congress voted for the Ku Klux Klan Act, which they considered a continuation of the amendment.²⁸⁹

They also saw the act as a remedy for the KKK-infiltrated juries throughout the South. "Now, if there be any combination of men who shall combine and conspire together," Representative Burton Cook of Illinois said,

to compel a jury in a United States court to give a false verdict . . . that combination is an offense against the United States, for the simple reason, easily understood, that it seeks to deprive a citizen of the United States of a right guaranteed to him by the Constitution of the United States.²⁹⁰

Furthermore, Shellabarger's original bill was amended to include a new section directly targeting juries. Section 5 provided:

[N]o person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy.²⁹¹

²⁸⁶ Scaturro, *Retreat from Reconstruction* at 100–01 (cited in note 285).

²⁸⁷ 17 Stat 13.

²⁸⁸ See Ku Klux Klan Act of 1871 § 3, 17 Stat at 14; Foner, *Unfinished Revolution* at 454–55 (cited in note 119).

²⁸⁹ See Scaturro, *Retreat from Reconstruction* at 101–02, 110–13 (cited in note 285).

²⁹⁰ Cong Globe, 42d Cong, 1st Sess 486 (Apr 5, 1871) (Rep Cook).

²⁹¹ Ku Klux Klan Act of 1871 § 5, 17 Stat at 15.

Based on a Civil War statute that had required federal jurors to swear past and future loyalty to the United States,²⁹² § 5 barred from civil rights cases any juror who could not swear that he had never even indirectly aided, counseled, or advised a conspiracy to deny freedmen civil rights. Moreover, prospective jurors who lied in an attempt to qualify would be subject to perjury charges, and the ultimate decision about a juror's qualification was left to judgment of federal judges. Congress had replaced the historic localism of juries with federal orders to be executed by federal judges.

The Ku Klux Klan Act aroused much opposition from Democrats because it made violence infringing civil and political rights a federal crime and thus acted upon individuals rather than the states.²⁹³ Its jury provision was also the subject of many attacks. "Gentlemen on the other side have denounced the law which applies the oath to jurors as an infamous law," Representative Butler reported. He argued that Congress should not allow men effectively engaging in a continuing rebellion against the federal government

to sit on juries and enforce our laws to put down a new rebellion when a judge of the United States thinks it is not safe for them to sit there[.] . . . [I]n my judgment, it would be infamous, if that is the word always to be used to characterize laws, for us to permit the men who started the old rebellion, and who are fostering this, who stand by it day by day and are murdering our friends, black and white, to sit upon the juries and deal with questions of fact in cases where in the last resort we must go to the courts for redress under our Constitution and laws.²⁹⁴

Speaking for the Republicans, Butler argued that juries were authorized to do no more than "deal with questions of fact" and had to do so honestly. Federal judges should be charged with suppressing widespread nullification.

In response to this rationale, Eugene Casserly, who led the Democratic opposition in the Senate, charged that the Ku Klux Klan Act packed the courts and violated the right to jury trial. Cases would be fixed, and juries would not be representative of the dominant local political community. He argued:

I do not believe that ten per cent of the white people of the South fit to serve upon a jury, grand or petit, could take that oath. It would have been a great deal more honest and manly to have

²⁹² Act of June 17, 1862 § 1, 12 Stat 430, 430.

²⁹³ See Foner, *Unfinished Revolution* at 455 (cited in note 119).

²⁹⁴ Cong Globe, 42d Cong, 1st Sess 793 (Apr 19, 1871) (Rep Butler).

just excluded all such men from juries and to have provided that nobody should sit upon a jury, either grand or petit, except a man who had always been loyal and a man who was black; and that is the effect of it. It confines your juries entirely to the so-called loyalists of the southern States and the black people there. You are to have no other jurors; in other words, you pack your juries.²⁹⁵

Of course, the Ku Klux Klan Act's purpose was to restrict Southern juries to Unionists, freedmen, and others who would execute federal law and thus guarantee the freedmen's right of protection. It was meant to secure convictions, the only way to enforce civil rights in the South.

Given the circumstances, the jury provision worked. In South Carolina, federal troops arrested more than four hundred Klansmen, and to oversee their trials President Ulysses S. Grant appointed a judge determined to implement the Ku Klux Klan Act's jury provision. Many white jurors summoned to serve defaulted; the twenty-one member grand jury included fifteen blacks and had a white Republican as its foreman. Of the petit jurors, more than two-thirds were black, and no defendant had a jury composed of a majority of whites. Unable to guarantee acquittals, more than one hundred Klansmen pled guilty, and the government won guilty verdicts or courtroom confessions in all cases that went to trial.²⁹⁶ In North Carolina, hundreds were indicted and sent to prison, while over six hundred Klansmen were indicted in Mississippi.²⁹⁷ Federal prosecutors achieved over five hundred jury convictions in 1872, more than a tenfold increase from two years earlier.²⁹⁸ Although only hundreds were imprisoned in a region where thousands had committed violent felonies, even these convictions produced a dramatic decline in violence and largely ended the KKK's Reconstruction-era career.²⁹⁹

This achievement was possible only because, in addition to integrating Southern federal juries with freedmen, the federal government purged white nullifiers from those juries. The Reconstruction Congresses felt constitutionally authorized, or even compelled, to transform federal jury law. In doing so, they did not insist that juries were supposed to be demographically representative—owing to the jury provision disqualification, blacks were disproportionately represented in the KKK trial juries—and did not shy away from

²⁹⁵ Cong Globe, 42d Cong, 1st Sess 766 (Apr 18, 1871) (Sen Casserly).

²⁹⁶ See Hall, 33 Emory L J at 934–41 (cited in note 79).

²⁹⁷ See Foner, *Unfinished Revolution* at 457 (cited in note 119).

²⁹⁸ See Forman, 113 Yale L J at 925–26 (cited in note 9).

²⁹⁹ See Foner, *Unfinished Revolution* at 458–59 (cited in note 119).

empowering federal judges to determine the composition of juries, a far different power dynamic between judge and jury than existed at the Founding. Moreover, unlike their Founding forebears, they did not see juries as representing the “conscience” of the community or as entitled to decide questions of law in addition to fact. Reconstruction shifted authority not only from the peripheral states to the national center but also from local juries to the government itself.

But there are two reasons why Southern juries are not a perfect example of how the Fourteenth Amendment’s Framers understood their authority to transform jury law. First, these juries may not have been engaging in “core” nullification when they were acquitting whites against the evidence and in spite of the law because they may not have been resting their verdicts on honest legal interpretations. Although Chief Justice Roger Taney wrote in 1857 that blacks “had no rights which the white man was bound to respect,”³⁰⁰ such an assertion was not constitutionally plausible after the Civil War and Fourteenth Amendment. Second, the Reconstruction Congresses’ response to the white nullifiers was to exclude only those who had committed at least indirect counseling or actions—not those who merely had different interpretation of the law. The true test of Reconstruction Congresses’ understanding of nullification would come when they considered prospective jurors who had done nothing illegal but simply had a different, plausible understanding of constitutional law.

C. Polygamy, the Utah Territory, and Juries

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

Established in 1850, the Utah Territory found itself in national controversy two years later when Brigham Young, its territorial governor and the Mormon Church’s president, proclaimed that

³⁰⁰ *Dred Scott*, 60 US (19 How) at 407.

Mormons believed in and practiced polygamy,³⁰¹ which was not then prohibited at the federal level by Congress or in Utah by the territorial legislature.³⁰² At its first national convention in 1856, the Republican Party placed polygamy, which they deemed female slavery, alongside black slavery as one of the “twin relics of barbarism” that the party was committed to abolishing in federal jurisdictions.³⁰³ Over the next four years, Republicans advocated legislation to prohibit polygamy but were stymied by Southern Democrats who feared that antipolygamy legislation was a step on the path toward the federal abolition of slavery.³⁰⁴ But in 1862, after Southern secession, the Morrill Anti-Bigamy Act overwhelmingly passed the Republican-dominated Congress,³⁰⁵ outlawing bigamy in the territories and providing for a prison sentence of up to five years.³⁰⁶

Despite the Morrill Act’s support in Washington, it did not dismantle polygamy in Utah. As a federal criminal statute, it required jury trials, and no Mormon jury would indict, let alone convict, the Mormon men who violated the statute.³⁰⁷ Even government officials flaunted the statute. In 1862, federally appointed Governor Stephen Harding complained that “it is recommended by those in high authority that no regard whatever should be paid” to the Act,³⁰⁸ and as late as 1865, two-thirds of all territorial officials were polygamists.³⁰⁹ In 1867, Mormon leaders even petitioned Congress for the statute’s repeal, claiming that the absence of a single conviction demonstrated its inefficacy.³¹⁰ A congressional report conceded that the Morrill Act was a “dead letter,”³¹¹ but rather than abandon a federal law that had been stalled by local resistance, Congress, as it did with Southern

³⁰¹ See Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* 1, 9, 59 (Carolina 2002).

³⁰² See Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-Day Saints, 1830–1900* 137 (Illinois 2001) (noting that an existing territorial statute banned adultery, but that only the offended spouse could initiate proceedings, and that the first prosecution under this statute did not occur until 1871).

³⁰³ See Foner, *Free Soil* at 130 (cited in note 235).

³⁰⁴ See Gordon, *Mormon Question* at 57, 62–63 (cited in note 301).

³⁰⁵ See *id.* at 81.

³⁰⁶ Morrill Anti-Bigamy Act § 1, 12 Stat at 501.

³⁰⁷ See Gordon, *Mormon Question* at 83 (cited in note 301).

³⁰⁸ Firmage and Mangrum, *Zion in the Courts* at 139 (cited in note 302), quoting Robert Joseph Dwyer, *The Gentile Comes to Utah: A Study in Religious and Social Conflict (1862–1890)* 9 (Catholic U 1941).

³⁰⁹ See Gordon, *Mormon Question* at 111 (cited in note 301).

³¹⁰ See *id.* at 83.

³¹¹ As a judiciary committee report lamented five years after polygamy was outlawed, the Morrill Act was a “dead letter.” Report from the Committee on the Judiciary, HR Rep No 27, 39th Cong, 2d Sess 3 (Feb 28, 1867).

resistance, decided to redouble its efforts, beginning what Professor Sarah Gordon has called “a second reconstruction in the West.”³¹²

The federal government wanted to fight the battle in humanitarian terms. Although formally claiming the power to regulate polygamy through the Territorial Clause, which authorizes Congress to make “all needful Rules and Regulations” in the territories,³¹³ the government rested the heart of its case on a similar right-to-protection ground that justified much of its legislation concerning freedmen. When the Morrill Act’s constitutionality was argued in the Supreme Court in 1878, Attorney General Charles Devens, in his brief and at oral argument, evaded explicit constitutional analysis of the federal power to outlaw polygamy, but he relentlessly emphasized the human cost of polygamy.³¹⁴ The Act was about the federal government’s right to protect women from the bondage of polygamy. Only convictions of polygamist men, it contended, would safeguard the Utah women.

Mormons considered the humanitarian claim absurd. To them, polygamy was not only ordained by God but also endorsed by women. In 1870, only one year after Wyoming became the first state to grant women unrestricted suffrage, the Mormon-dominated Utah legislature enfranchised women in an attempt to prove female liberty in Utah and female support for polygamy.³¹⁵ Indeed, women were such strong supporters of the practice that Congress disenfranchised them in 1887.³¹⁶ Instead of humanitarianism, Mormons thought the central issues were constitutional questions, chiefly concerning federalism but also concerning freedom of religion. They insisted that they had the constitutional right to structure their domestic relations like marriage however the Utah majority saw fit.³¹⁷

The constitutional debate occurred in uncharted waters because the federal government had never before claimed authority to pass laws regulating marriage. Rooted in federalism, the Mormons’ main argument was that the Constitution protected local autonomy and customs against which Congress could not legislate. Although they conceded that the federal government had authority in initially organizing the territories, they contended that the authority was limited to basic questions of governmental structure. Once the territorial governments were in place, they thought that domestic issues were matters for local debate and disposition. Marriage laws

³¹² Gordon, *Mormon Question* at 14 (cited in note 301).

³¹³ US Const Art IV, § 3, cl 2.

³¹⁴ See Gordon, *Mormon Question* at 4, 126 (cited in note 301).

³¹⁵ *Id.* at 97, 167–71.

³¹⁶ Act of March 3, 1887 § 20, 24 Stat 635, 639.

³¹⁷ See Gordon, *Mormon Question* at 86 (cited in note 301).

had always been the states' province, and it was difficult for Mormons to see how local marriage practices affected the national interest. Thus, they thought that the Morrill Act exceeded Congress's constitutional authority.³¹⁸

Many Americans, particularly Northern Democrats and Southerners, agreed that local governments, even territorial ones, had the right to resist federal intervention in domestic matters traditionally left to the states.³¹⁹ Indeed, the Supreme Court recognized precisely that principle only a few years before in *Dred Scott*, when it held that the Constitution did not confer upon Congress general "powers over person and property" in the territories but rather limited federal reach there as it did in the states.³²⁰ If the Territorial Clause did not grant Congress the power to regulate slavery, then certainly Congress could not regulate local marriages, an issue much less tied to the national interest. Nor had the recent amendments changed the equation. Although the Thirteenth and Fourteenth Amendments reversed *Dred Scott's* holding on black slavery, rights, and citizenship, they said nothing about marriage law. Because *Dred Scott*—according to those Mormons, Northern Democrats, and Southerners—was still good law on the question of federal power in the territories, the Morrill Act was unconstitutional.

Arguing the Mormons' cause before the Supreme Court, George Washington Biddle, a prominent Philadelphia Democrat, relied chiefly upon this federalism question, even citing *Dred Scott* authoritatively.³²¹ He claimed that a structural principle of the Constitution was limiting federal power to override decisions of local majorities in areas traditionally reserved for local authority. The Morrill Act was facially unconstitutional because the Territorial Clause conferred upon Congress the power to make only needful rules to protect the national interest, which did not include marriage regulations. "[T]here is always an excess of power," he told the justices,

when any attempt is made by the Federal Legislature to provide for more than the assertion and preservation of the rights of the General Government over a Territory, leaving necessarily the enactment of all laws relating to the social and domestic life of its

³¹⁸ See *id.* at 224–25.

³¹⁹ See *id.* at 123.

³²⁰ *Dred Scott*, 60 US (19 How) at 450.

³²¹ See Brief of Plaintiff in Error, *Reynolds v United States*, No 180, *53 (US filed Oct 2, 1876) ("Reynolds Brief").

inhabitants, as well as its internal police, to the people dwelling in the Territory.³²²

Territorial inhabitants were not “mere colonists, dependent upon the will” of the center. Like state residents, they were “most competent to determine what was best for their interests,” protected in such self-determination by the “genius of the Constitution.”³²³ This was what the American Revolution had been fought for and the Constitution was designed to protect. Criminalizing polygamy constituted an exercise of tyranny over the Utahns.

Biddle also raised a religious belief defense,³²⁴ which the Supreme Court viewed as an argument that the Morrill Act violated the First Amendment’s Free Exercise Clause³²⁵ because it prevented the Mormons from practicing a basic tenet of their religion.³²⁶ Although Biddle did not emphasize this argument, it became the core of the Supreme Court’s opinion in *Reynolds v United States*.³²⁷ Finding that Congress had the power to regulate polygamy because it was a social evil subject to government regulation, the Court held that the statute was constitutional because it regulated only action, not belief, and thus did not violate the First Amendment.³²⁸ Although the Court’s decision was unanimous, modern scholars have noted that the post–New Deal Court has significantly qualified the ruling.³²⁹

Thus, the Mormons had a plausible, if ultimately unsuccessful, First Amendment argument as to why the Morrill Act was unconstitutional, and according to Reconstruction-era jurisprudence, a plausible Territorial Clause argument. Eventually, the Mormons agreed with the Court that the federal government could prohibit polygamy,³³⁰ but the Morrill Act’s constitutionality was an open question at least until 1879.

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

³²² Id at *55.

³²³ Id at *53–54.

³²⁴ Id at *54–57.

³²⁵ US Const Amend I.

³²⁶ *Reynolds v United States*, 98 US 145, 161–62 (1879).

³²⁷ 98 US 145 (1879).

³²⁸ Id at 168.

³²⁹ See Kathleen M. Sullivan and Gerald Gunther, *First Amendment Law* 536 (Foundation 4th ed 2007); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St L J 409, 419–25 (1986).

³³⁰ See Gordon, *Mormon Question* at 221 (cited in note 301).

absolute control over Utah's legal apparatus. The territorial legislature had not only severely limited the federal territorial courts' dockets by granting extensive criminal jurisdiction to the local probate courts, but it also empowered local Mormon marshals, rather than federal officials, to summon jurors even for the federal courts.³³¹ With Mormon-only juries, federal officials knew that they could not obtain any Morrill Act convictions.

Republicans in Congress proposed a solution. In December 1869, Senator Aaron Cragin of New Hampshire introduced a bill "[t]o provide for the execution of the law against the crime of polygamy" in Utah, which would have made federal officials responsible for jury selection and denied probate courts' jurisdiction in criminal cases.³³² More unusually, it provided:

[N]o citizen of the United States, who is living in the practice of polygamy, or who believes in its rightfulness, shall be competent to serve as a grand or petit juror in criminal cases arising under the act of eighteen hundred and sixty-two . . . or in criminal cases arising under this act.³³³

Cragin wanted to purge from juries all citizens who *believed* in polygamy's legality, even if they did not practice it—and even though the Morrill Act's constitutionality would not be determined for another decade. Jurors had no right even to believe that an act of Congress was unconstitutional, and Congress was empowered to disallow nullification.

Two months later, Shelby Cullom of Illinois introduced a corresponding House bill to take jury selection out of Mormons' hands and to increase the federal courts' jurisdiction.³³⁴ Section 10 provided that "in all prosecutions for bigamy, and the crimes specified in this act, no person shall be competent to serve, either as grand or petit jurors, who *believes in*, advocates, or practices bigamy, concubinage or polygamy."³³⁵ This provision raised the ire of Utah's nonvoting delegate, William Henry Hooper, who said that even he, a nonlawyer, understood that § 10 was a legal monstrosity "fraught with evil."³³⁶ After recounting the history of criminal jury trial, he asked:

³³¹ See Firmage and Mangrum, *Zion in the Courts* at 140–42, 144 (cited in note 302).

³³² Cong Glob, 41st Cong, 2d Sess 3 (Dec 6, 1869) (Sen Cragin).

³³³ S 286 § 17 (emphasis added) (limiting sharply the ability of polygamists or those who believed in polygamy to serve on juries, and granting federal prosecutors "unrestricted right of challenge" for this cause).

³³⁴ HR 1089 §§ 7, 25, 41st Cong, 2d Sess (Feb 3, 1870), in Cong Globe, 41st Cong, 2d Sess 3571 (May 18, 1870).

³³⁵ HR 1089 § 10.

³³⁶ Cong Globe App, 41st Cong, 2d Sess 178 (Mar 22–23, 1870) (Delegate Hooper).

Now, sir, is there any member of this House who will claim or pretend that the provisions of this bill are not in violation of this most sacred feature in our Bill of Rights? The trial by jury by this bill is worse than abolished, for its form—a sickening farce—remains while its spirit is utterly gone. . . . The merest tyro in the law knows that the essence of a trial by jury consists in the fact that the accused is tried by . . . a tribunal as will agree to no verdict except such as, substantially, the whole community would agree to if present and taking part in the trial. Any other system of trial by jury is a mockery and a farce.³³⁷

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

The House rejected Hooper's interpretation of the criminal jury right. Indeed, one leading Republican went so far as to repudiate antebellum nullification in fugitive slave cases. After Representative Austin Blair of Michigan, who had been a prominent abolitionist and one of the most pro-Union Civil War governors, spoke in favor of Cullom's bill, Henry Dawes, a moderate Republican from Massachusetts who supported the bill but opposed § 10, questioned how Blair could support § 10.³³⁸ Had they not joined an organization that opposed the Fugitive Slave Act of 1850? Were jurors in fugitive slave cases not justified in nullifying? Blair responded:

I must say to the gentleman from Massachusetts that when I was engaged with him in an association which complained of the hardships of the fugitive slave law and of its execution we complained because we wanted to defeat the law. We hated the law itself. I confess I would have trampled it into the dust if I could have done it, I thought it was so inhuman. And for that purpose I was disposed to resort to every legal expedient that possibly could be availed of. *But such was the law; and I believe I may now safely say that under that law no jury ever found a verdict which the facts did not justify, assuming that the law was one that should have been executed.*³³⁹

The great abolitionist and humanitarian Blair repudiated the abolitionists' nullification legacy. Although citizens were free "to resort

³³⁷ Id at 179.

³³⁸ Cong Globe, 41st Cong, 2d Sess 2148 (Mar 22, 1870) (Rep Blair); id (Rep Dawes).

³³⁹ Id (Rep Blair) (emphasis added).

to every legal expedient” to repeal unjust laws, nullification was not among their options.

In March, the House passed Cullom’s bill, including § 10, by a 94–32 vote.³⁴⁰ The House had been aware of Hooper’s Sixth Amendment objection, debated whether nullification was legitimate, and overwhelmingly interpreted the Constitution to permit it to disallow nullification. The House believed that it was constitutionally empowered to execute federal law at local juries’ expense. But like Cragin’s bill, Cullom’s bill died without a vote in the Senate at the hands of the powerful railroad lobby.³⁴¹ Pro-railroad senators, like California’s Aaron Augustus Sargent, wanted to minimize antagonism with the Mormon community and successfully advocated delay, insisting that the newly completed railroad would bring “civilizing elements” to Utah that would make such legislation unnecessary.³⁴²

Meanwhile, the Grant administration increased its efforts to suppress polygamy. In 1870, President Grant appointed new officials who were determined to enforce the Morrill Act, including US Attorney Charles Hempstead and Chief Justice James McKean of the Utah Territory Superior Court. Chief Justice McKean decided to recognize only the US attorney and federal marshals as competent to try cases and to select juries. Through non-Mormon juries, Hempstead was able to indict Brigham Young and other church leaders for polygamy-related offenses.³⁴³ But their plan failed. In an unrelated civil case, the US Supreme Court found that Chief Justice McKean had “wholly and purposely disregarded” the territorial statute directing the territorial marshal, not the federal marshal, to summon juries.³⁴⁴ If the federal government did not like Utah’s jury system, only Congress, not federal judges, could change it. The federal indictments of Young and the other church leaders were quashed.³⁴⁵

Besieged by pleas from Utah’s federal officials, President Grant called upon Congress to override the territorial legislature, explaining that without such an amendment “it will be futile to make any effort . . . for the punishment of polygamy, or any of its affiliated vices or crimes.”³⁴⁶ In May 1874, Representative Luke Poland of Vermont proposed a bill to restrict the probate courts’ jurisdiction and to

³⁴⁰ Cong Globe, 41st Cong, 2d Sess 2181 (Mar 23, 1870).

³⁴¹ See Gordon, *Mormon Question* at 111–12 (cited in note 301).

³⁴² Firmage and Mangrum, *Zion in the Courts* at 147 (cited in note 302).

³⁴³ *Id* at 141, 144–47.

³⁴⁴ *Clinton v Englebrecht*, 80 US (13 Wall) 434, 440 (1871).

³⁴⁵ See Firmage and Mangrum, *Zion in the Courts* at 145 (cited in note 302).

³⁴⁶ President Ulysses S. Grant, Message to Congress (Feb 14, 1873), in Cong Globe, 42d Cong, 3d Sess 1357.

reform the jury selection system. A former Vermont Supreme Court justice, Poland had dealt with questions of jury nullification before. In an 1860 case, a trial judge had instructed the jury that the rule permitting juries to decide questions of law appeared to him to be “a most nonsensical and absurd theory” but that “such is the law of this State.”³⁴⁷ The defendant objected, but Poland’s supreme court unanimously held that the instruction was not reversible error. The chief justice’s opinion stated that the rule that the jury is to determine the law may “be characterized as an absurdity,” but it “will nevertheless be sure, in the long run, to constantly gain ground, and become more and more firmly fixed in the hearts and sympathies of those with whom liberty and law are almost synonymous.”³⁴⁸

In 1874, Poland had less concern for jury rights. Although his bill was more moderate than Cullom’s had been in that it allowed a Mormon probate judge to draw half of the names for the jury lists, its § 4 provided for the removal in any prosecution for adultery, bigamy, or polygamy of any juror who “practices polygamy, or . . . *believes in the rightfulness* of the same.”³⁴⁹ Again, the provision received much attention.³⁵⁰ Clarkson Potter, a Democrat from New York and future American Bar Association president, was one objector. He wondered whether “it would be better to drive this Mormon people out of the Territory without color of law at the point of the bayonet than to establish a precedent of this character.” Because he estimated that three-quarters of Utah men were Mormons who believed in polygamy, he thought that “the Federal official would be able of his own will to pack a jury,” essentially destroying the jury trial right. His “main objection” to the bill was that “in all prosecutions for polygamy no man shall be a juror who believes in or practices polygamy.”³⁵¹

The Republican majority agreed that jury nullification was the central issue. John Cessna of Pennsylvania reported that Mormons had told the House Judiciary Committee that it had not been “decided by the Supreme Court of the United States that the law against bigamy and polygamy in Utah was constitutional or otherwise, and that until it should be decided by the Supreme Court of the United States that the law was constitutional they would not obey it.”³⁵² Instead of allowing local juries to decide whether the Morrill Act was

³⁴⁷ *State v McDonnell*, 32 Vt 491, 523 (1860).

³⁴⁸ *Id* at 531–32.

³⁴⁹ HR 3097 § 4, 43d Cong, 1st Sess (Apr 25, 1874) (emphasis added), in 2 Cong Rec H 4466 (June 2, 1874).

³⁵⁰ See, for example, 2 Cong Rec 4468 (June 2, 1874) (Rep Crouse).

³⁵¹ *Id* at 4470 (Rep Potter).

³⁵² *Id* at 4473 (Rep Cessna).

constitutional, Cessna supported Poland's bill. Jasper Ward of Illinois, another Judiciary Committee member, voiced the strongest support for the bill. "Do you allow a man to sit as a juror in a case of murder who believes in or practices murder?" he asked. "Do you allow a man to sit as a juror in a trial for any crime who believes in or commits that crime?" Ward insisted that "such a thing has not been heard of" before.³⁵³ Ward, of course, did not mention the celebrated jury nullification in the Alien and Sedition Act or fugitive slave cases.³⁵⁴ The House majority overwhelmingly thought that § 4 was constitutional and passed Poland's bill by a 159–55 vote.³⁵⁵

Once again, the railroad lobby stalled the measure in the Senate.³⁵⁶ On the last day of the session, the Republican majority decided to compromise. Senator Frelinghuysen offered to "prune the bill of anything that could be objectionable to any one who wants law there."³⁵⁷ Senator Sargent, after repeating that "the progress of time, the influx of gentiles . . . is gradually solving this question," moved to eliminate the controversial portion of § 4.³⁵⁸ Frelinghuysen had hoped to keep that provision, but he conceded that he would remove it rather than see the entire bill fail.³⁵⁹ Once amended, the bill passed.³⁶⁰ The Senate sent it back to the House, where Poland admitted that a "great deal that was good in the bill has been struck out by the Senate."³⁶¹ The House passed the amended bill, and upon President Grant's signature, the Poland Act, with no provision for striking jurors based on belief alone, became law.³⁶²

As soon as the Poland Act took effect, federal prosecutors began arresting Mormon leaders, including even George Cannon, Utah's nonvoting delegate in Congress. Convictions, however, remained rare because proving polygamy without marriage records or cooperating witnesses was difficult and because the juries remained half-Mormon.³⁶³ George Reynolds, whose case was decided by the Supreme Court in 1879, was convicted only after the federal government reneged on a deal and his second wife appeared visibly pregnant on

³⁵³ *Id.* at 4474 (Rep Ward).

³⁵⁴ See note 83 and accompanying text.

³⁵⁵ 2 Cong Rec at 4475 (cited in note 350).

³⁵⁶ See Gordon, *Mormon Question* at 111–12 (cited in note 301).

³⁵⁷ 2 Cong Rec 5415 (June 23, 1874) (Sen Frelinghuysen).

³⁵⁸ *Id.* at 5415, 5417 (Sen Sargent).

³⁵⁹ *Id.* at 5417 (Sen Frelinghuysen).

³⁶⁰ *Id.* at 5418.

³⁶¹ 2 Cong Rec at 5444 (cited in note 357) (Rep Poland).

³⁶² See Act of June 23, 1874, 18 Stat 253.

³⁶³ See Gordon, *Mormon Question* at 113–15, 147 (cited in note 301).

the stand.³⁶⁴ Faced with a lack of convictions but with Supreme Court precedent on its side,³⁶⁵ Congress in 1882 passed the antipolygamy Edmunds Act,³⁶⁶ which included a provision excluding jurors who believed in polygamy from polygamy trials, like the one that had been removed from Poland's bill.³⁶⁷ By the time Utah achieved statehood in 1896, there had been well over a thousand polygamy-related prosecutions.³⁶⁸

The crusade against polygamy shows that the Fourteenth Amendment's Framers not only saw jury nullification as outside the scope of Sixth Amendment protection but also viewed it as a practice that the federal government needed to eliminate to preserve Utah women's right to protection from the "relic of barbarism." According to the congressional majority, a prospective juror's belief that a law was unconstitutional disqualified him from jury service, even given plausible arguments in his favor. Of course, Cragin's and Cullom's bills did not pass the Forty-First Congress, and although the Forty-Third Congress enacted the Poland Act, it was stripped of the juror-belief provision, which became law only in 1882. Nevertheless, the evidence suggests that the Fourteenth Amendment's Framers overwhelmingly supported the antinullification legislation and understood it to be compatible with or required by the Constitution.

First, the antipolygamy crusade's leaders—Cragin, Cullom, Frelinghuysen, Morrill, and Poland—all served in the Thirty-Ninth Congress and were representative of the Republican ideology that existed throughout Reconstruction. Second, the antinullification legislation, including the juror-belief provisions, was supported by substantial majorities of the total Congresses. The House passed both Cullom's bill and Poland's original bill, including § 4, with 74 percent of the vote. It appears that the Senate let Cullom's bill die and amended Poland's bill only because the railroad lobby had enough influence to stall the bills, not because the Mormon pronullification legal position commanded a Senate majority. After all, neither bill was defeated in a vote, and Senator Sargent, who spearheaded the opposition, principally relied upon pragmatic arguments that polygamy would disappear of its own accord with the coming of the

³⁶⁴ See Firmage and Mangrum, *Zion in the Courts* at 151–53 (cited in note 302); Gordon, *Mormon Question* at 114–15 (cited in note 301).

³⁶⁵ See *Miles v United States*, 103 US 304, 310–11 (1880) (upholding the dismissal of jurors characterized as biased after they said that they believed polygamy was ordained by God).

³⁶⁶ 22 Stat 30 (1882), repealed by Act of Dec 8, 1983, Pub L No 95-213, 97 Stat 1459.

³⁶⁷ Act of Mar 22, 1882 § 5, 22 Stat 30, 31.

³⁶⁸ See Gordon, *Mormon Question* at 155–57 (cited in note 301) (finding that from 1871 to 1896, over 2,500 criminal cases were brought in Utah, of which more than half were polygamy related).

railroad, not upon Delegate Hooper's constitutional arguments that the House bills violated the Constitution. As a constitutional matter, then, the Reconstruction Congresses understood themselves to have the authority to prohibit even "core" jury nullification.

CONCLUSION

This Article has provided a descriptive and interpretive account of Reconstruction-era jury nullification law. Two conclusions follow from the descriptive account. First, the Reconstruction-era public and congressional understandings were antithetical to the Founders' understanding. What had been considered a cherished right was reduced to an unauthorized power, at least a generation before *Sparf*. The Fourteenth Amendment's Framers and ratifiers understood juries to have the right to decide only questions of fact.

Second, in reconstructing juries to thwart nullification, Congress not only pursued racial integration, as others have emphasized, but also took unprecedented steps to disqualify from jury service local majorities in the South and the West who would not enforce federal statutes through guilty verdicts. Particularly in Utah, many of those whom the House voted overwhelmingly to disqualify (and whom Congress in 1882 would disqualify) were nullifying consistent with the "core" Constitution-based nullification lauded during the Founding era. Congress was more interested in obtaining convictions to protect blacks' and women's rights than in making juries more reflective of local communities. Indeed, some estimated that legislation to remove prospective nullifiers would disqualify 75 to 90 percent of previously eligible jurors. Congress found the mass disqualifications justifiable because juries were not the "conscience" of the community. Rather, they were fact finding instruments implemented not only to protect defendants' rights but also to enforce victims' rights. Only jurors willing to enforce federal law were qualified to serve.

In addition to these descriptive conclusions, two interpretive conclusions follow. The first is that there is an originalist argument for *Sparf's* holding, grounded in Fourteenth Amendment text and history. With respect to state courts, the Reconstruction Congresses, in accordance with the public understanding, did not understand the Fourteenth Amendment to protect directly the right to nullify or to incorporate the right against the state courts. With respect to federal courts, the Reconstruction Congresses considered themselves constitutionally authorized to disallow, or to codify the antebellum judiciary's disallowance of, a Founding-era right to nullify.

Reconstruction Congresses pursued legislation that would purge from federal juries any prospective juror who believed that certain statutes were unconstitutional. This legislation was consistent with the

text, history, and purposes of the Fourteenth Amendment, which transformed the Constitution by elevating the federal judiciary over local juries as rights protectors, and nationalism over localism. The Fourteenth Amendment may thus have constitutionalized the nineteenth-century judicial precedent against nullification. This alternative account suggests that, at a minimum, Founding-era history should not monopolize the original meaning of the post-Fourteenth Amendment Constitution or the Supreme Court's criminal procedure jurisprudence.

But this Article's second interpretive conclusion is that, although the contemporary Court may turn to original text and history to give "intelligible content"³⁶⁹ to the criminal jury trial right, originalism goes only so far. It gives the Court only a menu of limited plausible interpretive possibilities from which it must choose.

On the macrolevel, we have seen this in terms of a Founding-era versus Reconstruction-era approach. Some Founding-era originalists posit that jury nullification is an inherent constitutional right. Reconstruction-era originalism, however, suggests that nullification is an illegitimate practice that interferes with other constitutional rights. In selecting which era to use and in determining to what extent new Fourteenth Amendment rights may revise and even abrogate earlier Sixth Amendment penumbral rights, originalists must choose. The current Supreme Court has preferred the Founding-era Sixth Amendment rights, but this Article has argued that prioritizing the Fourteenth Amendment rights is a plausible choice, too.

On the microlevel, even Reconstruction-era originalism presents only a menu of plausible choices. The right to nullify was not understood to be incorporated against the states, and the disallowance of nullification was to some extent constitutionalized for federal cases. But to what extent? Again, there are multiple choices: Did Congress understand itself to have the constitutional authority to disallow nullification in all cases, or only in cases in which the victims were akin to "discrete and insular minorities,"³⁷⁰ perhaps through its § 5 authority?

One plausible reading is that the Fourteenth Amendment disallowed the jury's right to nullify in all cases, so that the implicit Fourteenth Amendment meaning of "jury," under a last-in-time rule, essentially supersedes the earlier Sixth Amendment meaning of jury and transforms the prior penumbral Sixth Amendment rights.³⁷¹ This

³⁶⁹ See *Blakely v Washington*, 542 US 296, 305 (2004).

³⁷⁰ *United States v Carolene Products Co.*, 304 US 144, 153 n 4 (1938).

³⁷¹ Consider Amar, *Bill of Rights* at 243 (cited in note 20) (discussing the Reconstruction-era "feedback effect" on the original Bill of Rights).

reading draws strength from principles of jurisprudential consistency, from the Fourteenth Amendment's nationalizing theme, and from Reconstruction-era jury law, as expressed in federal courts, state judicial trends, and legal treatises, which generally held that jury nullification was not a right in any case.

But another plausible reading is that the Fourteenth Amendment disallowed the right to nullify only in cases in which victims are discrete and insular minorities. Confined to its historical context, the Fourteenth Amendment was largely about protecting discrete and insular minorities, particularly freedmen and perhaps also Unionists and Republicans in the South whose rights had been violated before, during, and after the Civil War. The Reconstruction Congresses' antinullification legislation was similarly targeted. Specific statutes explicitly protected victims that the Reconstruction Congresses considered discrete and insular minorities who were not being protected by local juries—freedmen and victims of polygamy. Although Utah women made up nearly half of the territory's population and held the right to vote, the Reconstruction Congresses considered them a politically dependent minority enslaved by the “relic of barbarism.”

Reconstruction-era originalism thus may raise more questions than it provides answers. It serves as an alternative both to the Founding-era originalism of *Sparf's* critics that neglects the Fourteenth Amendment's constitutional transformation and to nineteenth-century doctrine, like the judicial disallowance of nullification, that may lack democratic warrant. It complicates without resolving how we may understand the original meaning of constitutional rights.

