

The Jury's Constitutional Role, Originalism, and Judicial Usurpation
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I. Introduction	3
II. The Originalist Method	4
III. The Evidence of Support for Jury Power by the Founders	7
<u>A. The Political and Intellectual Atmosphere of the Founding Era</u>	7
1. <u>Liberty and Justice for All</u>	7
2. <u>Natural Law Concepts Underlie Jury Power</u>	8
<u>B. Defining The Jury</u>	15
<u>C. The History of the Jury as the Founders Knew It</u>	19
1. <u>John Lilburne – Father of Most Criminal Procedural Rights</u>	19
2. <u>William Penn, William Mead, and <i>Bushell's Case</i></u>	22
3. <u>The Restoration, the <i>Seven Bishops' Case</i>, and the Glorious Revolution</u>	27
4. <u><i>Zenger's Case</i> – Press Freedom Protected by a Law-Judging Jury</u>	31
5. <u>The Battle over Libel in Eighteenth Century England</u>	36
<u>D. Comments on the Jury by the Founders</u>	41
1. <u>Judging the Law as Well as the Facts</u>	41
2. <u>The Structural Argument – Juries Represent the People in the Judiciary</u>	45
3. <u>Juries – The Palladium of Liberty</u>	50
<u>E. State Constitutions and the Sedition Act</u>	52
1. <u>Georgia and Pennsylvania State Constitutions</u>	52
2. <u>The Sedition Act</u>	58
<u>F. Jury Practices of the Founders</u>	59

1. <u>The Impeachment of Samuel Chase</u>	59
2. <u>Trials and Instruction to the Jury</u>	63
3. <u>Prohibition Against Striking Jurors With Opinions of the Law</u>	68
4. <u>Counsel Argued Law to the Jury</u>	68
5. <u>Trials and Challenge to the Favor</u>	70
IV. Arguments that the Founders Opposed Jury Power and Subsequent History	71
<u>A. Arguments That the Founders Opposed Jury Power</u>	71
1. <u>More About the Originalist Method</u>	72
2. <u>Dueling Dicta in <i>Sparf v. United States</i></u>	73
3. <u>Academic Critics of Jury Law-Judging</u>	80
<u>B. American Courts Since the Founding and Judicial Usurpation</u>	83
V. Conclusion	85

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I. Introduction

The vast majority of today's judiciary, as evidenced by appellate court rulings, is hostile to the practice commonly known as jury nullification.¹ But there is persuasive evidence that the American Founders (including the judiciary) held diametrically opposing views from today's judiciary about the value of jury review of the merits of the law in criminal trials. Using originalist jurisprudence as articulated by Justice Antonin Scalia, this paper explores the evidence of the Founders' views and practices, and concludes that an originalist application of the Constitution to jury power would produce very different courtroom practices and attitudes from those which currently prevail. Although this paper is written primarily for those with an originalist perspective, marshalling evidence of the content of the concept of the jury held by the Founders and avoiding discussion of why we should accept the Founders' understanding, the Founders' own arguments for jury review should also be interesting to those who do not adhere to the originalist approach.

This paper will study the Founders' views on a criminal defendant's right to argue through counsel to the jury the constitutionality or propriety of the law under which the defendant is being prosecuted, the proper role of the judge and the jury in the republican system of ordered liberty detailed in the United States Constitution, the instructions that criminal trial judges should give juries about those roles, and the propriety of striking jurors for cause should they express opposition to the law under which the defendant is being prosecuted.

Part II briefly reviews the originalist method. Part III reviews the evidence that the Founders supported jury review of the merits of the law in criminal trials. Part III.A explores the

¹ *E.g.*, U.S. v. Sepulveda, 15 F.3d 1161, 1189-90 (1st Cir. 1993). Jury nullification is the "exercise of jury discretion in favor of a defendant whom the jury nonetheless believes to have committed the act with which he is charged." THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL JURY TRIAL, 1200-1800 xiii (1985).

intellectual atmosphere in the founding era, including the perspectives of the history and philosophers that the Founders studied and respected. Part III.B discusses contemporary definitions of "jury" and Part III.C details the history known to the Founders of how juries had acted to protect liberty. Part III.D presents the extensive commentary by the Founders on the role of the jury. Part III.E looks at the explicit state constitutional provisions protecting jury review of the law and similar language to that effect in the Sedition Act, and Part III.F covers courtroom practices in the founding era. Part IV addresses the significant arguments disputing that the Founders considered jury law-judging an integral part of the definition of the criminal trial jury.

Several of the sources normally used by originalists in interpreting the Constitution do not give us evidence of the Founders' views on the issue. There are no explicit textual references to jury review of law in the U.S. Constitution, and the issue was not discussed in the Constitutional Convention or the *Federalist* papers. We do, however, have a quote from the Massachusetts convention ratifying the U.S. Constitution and individual rights provisions in the Georgia Constitution of 1777 and the Pennsylvania Constitution of 1790. We also have multiple quotes from the most prestigious Founders on the topic, including three of the six original U.S. Supreme Court Justices. We have examples of practice in the early courts and two dictionary definitions from the founding era. But, the most powerful argument for what this analysis will contend was the Founders' perspective on jury power is their views on natural law and the logical application of natural law philosophy to the institution of the criminal trial jury.

II. The Originalist Method

Justice Scalia described the originalist method in a speech in 1988 that was recorded in a law review article entitled *Originalism: The Lesser Evil*² and in an essay entitled *Common-Law Courts in a Civil-Law System*.³ He applied the approach to the Sixth Amendment in *United States v. Gaudin*⁴ and *Crawford v. Washington*.⁵ The objective of originalism is “to establish the meaning of the Constitution, in 1789.”⁶ This is done by using the evidence of “the text of the Constitution and its overall structure,” contemporaneous understandings of the Constitutional doctrine in question (“particularly the understanding of the First Congress and of the leading participants in the Constitutional Convention”), the “background understanding” of the doctrine in question “under the English constitution,” and the nature of the doctrine in question “under the various state constitutions in existence when the federal Constitution was adopted.”⁷ Also to be considered are “the records of the ratifying debates in all the states.”⁸

Originalism also requires “immersing oneself in the political and intellectual atmosphere of the time – somehow placing out of mind [the] knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”⁹ When doing textual interpretation, “context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive

² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Justice Scalia models his methods of originalist interpretation on the method used by former Chief Justice Taft in *Myers v. United States*, 272 U.S. 52 (1926). *Id.* at 851.

³ Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Antonin Scalia, ed., 1997).

⁴ *United States v. Gaudin*, 515 U.S. 506, 515 (1995) (“it is precisely historical practice that we have relied on . . .”); 515 U.S. at 520 (“uniform poststratification practice can shed light upon the meaning of an ambiguous constitutional provision . . .”).

⁵ *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004). (“The Constitution’s text does not alone resolve this case. . . . We must therefore turn to the historical background of the Clause to understand its meaning.”).

⁶ *Id.* at 852.

⁷ *Id.*

⁸ *Id.* at 856.

⁹ *Id.* at 856-57.

rather than narrow interpretation—though not an interpretation that the language will not bear.”¹⁰

“[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.”¹¹

Justice Scalia’s opinion in *Crawford* best illustrates the step-by-step application of originalism to the Sixth Amendment’s Confrontation Clause.¹² First, he recognized that “the Constitution’s text does not alone resolve this case.”¹³ Resolution of the case instead required “turn[ing] to the historical background of the Clause to understand its meaning.”¹⁴ He reviewed the ancient origins of the Confrontation Clause and its implementation in the common-law, citing Blackstone.¹⁵ He also cited the notorious abuses of liberty in 16th and 17th century England that occurred when criminal defendants were denied confrontation rights and which led to reform in the latter part of the 17th century.¹⁶ He cited cases in the period immediately preceding the date of ratification of the Sixth Amendment in 1791 as well as early 19th century treatises.¹⁷ He also noted early colonial abuses of the right to confrontation and the writings of the colonists opposing the abuse, including writings of John Adams in 1768-69.¹⁸ Justice Scalia analyzed the declaration of rights adopted around the time of the Revolution as well as the Federal Constitution ratification debates and contemporary writings about ratification.¹⁹ He analyzed early state decisions that “shed light upon the original understanding of the common-law right.”²⁰

From this evidence, he put forth a proposition about the principal evil against which the

¹⁰ Scalia, *Common-Law Courts*, *supra* note 3, at 37.

¹¹ Scalia, *Originalism*, *supra* note 2, at 863.

¹² U.S. CONST. amend. VI (“to be confronted with the witnesses against him”); The Court held in *Crawford* that playing a tape-recorded statement of a defendant’s wife as evidence against the defendant when the wife did not testify under spousal privilege violated the Confrontation Clause. 541 U.S. at 38, 40, 68.

¹³ 541 U.S. at 42.

¹⁴ *Id.* at 43.

¹⁵ *Id.* (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1768-69)).

¹⁶ *Id.* at 44-45.

¹⁷ *Id.* at 46-47.

¹⁸ *Id.* at 47-48.

¹⁹ *Id.* at 48-49.

²⁰ *Id.* at 49.

Confrontation Clause was directed, which allowed him to test the fact situation at hand.²¹ Based on all that evidence, he declared the meaning of the Sixth Amendment.²²

Justice Scalia eloquently defends originalism in the *Originalism* and *Common-Law Courts*, so a further defense will not be attempted here. One alternative to originalism is a “Living Constitution” that changes the meaning of the Constitution over time to match the desires of those who interpret the Constitution.²³ However, to have any value, a Constitution must have fixed meaning. Words that can mean anything, mean nothing at all.

III. The Evidence of Support for Jury Power by the Founders

A. The Political and Intellectual Atmosphere of the Founding Era

To best put the Founder’s concept of the jury into context, we must follow Justice Scalia and “immers[e] [ourselves] in the political and intellectual atmosphere of the time”²⁴ One cannot read the Founders’ comments without being struck by two key points. First, liberty and justice were the Founders’ highest, commonly shared political goals. Second, the Founders’ conception of liberty was viewed through the Enlightenment proposition that natural law is superior to man’s law (also called civil law, positive law, temporal law, or statute law). Both of these views logically lead to the concept that the jury’s role is to protect liberty and to do justice by judging man’s law against the standard of natural law, and to refuse to convict defendants when the law is unjust.

1. Liberty and Justice for All

²¹ *Id.* at 50-51.

²² *Id.* at 53-54.

²³ See Scalia, *Common-Law Courts*, *supra* note 4, at 41-47.

²⁴ Scalia, *Originalism*, *supra* note 2, at 851.

The preamble to the Constitution lists the “establish[ment of] justice” and “secur[ing] the blessings of liberty” as the goals of the Constitution.²⁵ John Adams said in a letter to Elbridge Gerry on December 6, 1777, “Fiat Justitia ruat Coelum” which means “Let justice be done though the heavens should fall.”²⁶ In a 1765 work, Adams said that the “great struggle that peopled America” was “a love of universal liberty”²⁷ And he wrote, “Be it remembered, however, that liberty must at all hazards be supported.”²⁸

James Wilson, one of the first United States Supreme Court Justices and signer of both the Declaration and the Constitution, said in his 1790 inaugural lecture as the first professor of law at the college of Philadelphia (later merged with the University of Pennsylvania) to an audience which included President George Washington and Vice President John Adams: “Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness.”²⁹ And, “Were I called upon for my reasons why I deem so highly of the American character, I would assign them in a very few words — That character has been eminently distinguished by the love of liberty and the love of law.”³⁰

2. Natural Law Concepts Underlie Jury Power

The idea of a higher law trumping statute law is the essence of jury nullification and jury nullification’s most compelling virtue. The most persuasive argument that the Founders wholeheartedly embraced jury judging of the merits of the law is that the Founders believed in a higher law by which civil law is to be judged.

²⁵ U.S. CONST. pmb1.

²⁶ JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS v (C. Bradley Thompson, ed., 2000).

²⁷ JOHN ADAMS, *A Dissertation on the Canon and Feudal Law*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 23 (C. Bradley Thompson, ed., 2000).

²⁸ *Id.* at 28.

²⁹ JAMES WILSON, 1 THE WORKS OF JAMES WILSON 2, 37, 59, 72 (Robert Green McCloskey, ed., Belknap Press of Harvard University Press 1967).

³⁰ *Id.* at 70.

The Declaration of Independence appealed to “the Laws of Nature and of Nature’s God” and stated that “all Men . . . are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”³¹

To truly understand the outlook of the Founders, it is important to know the political philosophy and history upon which their opinions and decisions were based. The political philosophers to which the Founders frequently appealed were Locke, Grotius, Pufendorf, Burlamaqui, Montesquieu, Baccaria, and Vattel.³² The Founder’s favorite legal authorities were Edward Coke, Sir Matthew Hale, Sir John Holt, Sir John Vaughan (of *Bushell’s Case* fame — see Part III.C.2 below), and in later years, Blackstone and Lord Camden.³³ The ideas of many of these will be discussed below.

In America’s founding era, England had two competing ideological camps that also informed views of history – Tories and Whigs.³⁴ In the early 18th Century, a more radical set of English historians and political commentators — self-proclaimed “Real Whigs” — emerged from the more moderate pro-Parliament, pro-liberty Whigs.³⁵ These “Commonwealthmen,” who included John Trenchard, Thomas Gordon, Sir Robert Molesworth, and Walter Moyle, greatly influenced the Founders.³⁶ To the colonists, the most important of these commentators were Trenchard and Gordon, authors of the weekly *Independent Whig* which was later published in book form as *Cato’s Letters*. Their work was widely distributed at multiple times “in every

³¹ THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776).

³² BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27-29 (Enlarged Edition 1992) (1967).

³³ *Id.* at 30-31.

³⁴ TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 7 (Liberty Fund, Inc. 1998) (1965).

³⁵ *Id.* at 10 (citing CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMEN 3-21).

³⁶ *Id.* at 10-11.

colonial newspaper from Boston to Savannah.”³⁷ “[T]he writings of Trenchard and Gordon ranked with the treatises of Locke as the most authoritative statement of the nature of political liberty and above Locke as an exposition of the social sources of the threats it faced.”³⁸ Another commentator said, “No one can spend any time in the newspapers, literary inventories, and pamphlets of colonial America without realizing that *Cato’s Letters* rather than Locke’s *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period.”³⁹

Whigs in general believed that the Germanic Saxons who had settled England had a pure form of government that defined the rights of Englishmen through the common law, representative government, and juries of their peers.⁴⁰ They based much of their view of the Saxons on Thomas Gordon’s English translation of *GERMANIA* by Tacitus.⁴¹ Although he lived before the creation of the Whig party, Sir Edward Coke was solidly in the traditional Whig mold as a parliament man, using the common law derived from our ancestors as a bulwark against tyranny by the crown.⁴² But, the Commonwealthmen, so revered by the colonists, went further than that. David Mayer said:

Whiggism followed in part from the “common-law version” of history, but some of the more radical Whigs “went on to reject history altogether and aver that the criterion by which any government must be judged was not its antiquity, but its rationality.” These radical Whigs were the three generations of “Commonwealthmen” whom Caroline Robbins has described. They called themselves “Real Whigs” or “Independent Whigs,” to distinguish themselves from the mainstream of the eighteenth-century Whig political party and to avow a kinship with mid-seventeenth-century republicans such as James Harrington and

³⁷ BAILYN, *supra* note 32, at 36 (citing Elizabeth C. Cook, LITERARY INFLUENCES IN COLONIAL NEWSPAPERS, 1704-1750 81-83, 89, 125-26, 129, 137, 139, 159, 257, 265 (New York, 1912)).

³⁸ *Id.* at 36.

³⁹ CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC (1953), *quoted in* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 209 (1965).

⁴⁰ COLBOURN, *supra* note 34, at 30, 33, 37.

⁴¹ *Id.* at 31.

⁴² DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 9-10 (1994).

Algernon Sidney. They had a strong influence on Jefferson and his contemporaries, the Americans of the Revolutionary generation.⁴³

Algernon Sidney's DISCOURSES CONCERNING GOVERNMENT, a major influence on the Founders, was described by Caroline Robbins as "a textbook of revolution" in America.⁴⁴

As an example of the influences on individual founders, the works of philosophers Hugo Grotius and Samuel Pufendorf were taught at King's College (now Columbia University)⁴⁵ which was attended by John Jay, Alexander Hamilton, Robert R. Livingston (a drafter of the Declaration and pro-Constitution delegate to the New York Constitutional ratification convention),⁴⁶ and Gouverneur Morris (the penman of the Constitution).⁴⁷

Thomas Jefferson of course read Locke, but he usually mentioned Sidney when he mentioned Locke.⁴⁸ Jefferson also read Tacitus's GERMANIA, Trenchard and Gordon's CATO'S LETTERS, James Burgh's POLITICAL DISQUISITIONS, Granville Sharp's DECLARATION OF THE PEOPLE'S RIGHT TO A SHARE IN THE LEGISLATURE, Robert Molesworth's ACCOUNT OF DENMARK.⁴⁹ John Adams was one of the most widely read of the Founders. Among many others, he enjoyed the *Independent Whig* and Burgh, and considered his heroes to be Algernon Sidney, James Harrington, and John Milton, who he thought a "genius."⁵⁰

The theme of the political philosophers of the Founders is clear: The law of nature or nature's God trumps man's law. John Locke said:

First, [the legislature] is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people; for it being but the joint power of every member

⁴³ *Id.* at 19-21 (citing J.G.A. Pocock, *Ancient Constitution of the Feudal Law* 232 (1957)).

⁴⁴ Baily, *supra* note 32, at 34-35 (citing Caroline Robbins, *Algernon Sidney's Discourses . . .*, "W.M.Q.", 3d ser., 4 (1947), 267-296).

⁴⁵ *A Brief History of Columbia*, http://www.columbia.edu/about_columbia/history.html.

⁴⁶ U.S.History.org, *Robert Livingston*, at http://www.ushistory.org/declaration/related/livingston_r.htm.

⁴⁷ RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS—THE RAKE WHO WROTE THE CONSTITUTION* xiv, 12, 22, 31 (2003).

⁴⁸ MAYER, *supra* note 42, at 20-21.

⁴⁹ *Id.* at 19-21.

⁵⁰ COLBOURN, *supra* note 34, at 101-04.

of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of nature before they entered into society and gave up to the community; for nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself or over any other, to destroy his own life or take away the life or property of another. . . .

The obligations of the law of nature cease not in society but only in many cases are drawn closer and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions be conformable to the law of nature—i.e., to the will of God, of which that is a declaration—and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.⁵¹

Locke devoted a chapter in his *SECOND TREATISE OF GOVERNMENT* to usurpation.⁵² He said, “[A]ll commonwealths, with the form of government established, have rules also of appointing those who are to have any share in the public authority, and settled methods of conveying the right to them . . .”⁵³ Usurpation to Locke is “a kind of domestic conquest . . .”⁵⁴ So, a usurper is, “Whosoever gets into the exercise of any part of the power by other ways than what the laws of the community have prescribed . . .” A usurper has “no right to be obeyed though the form of the commonwealth be still preserved, since he is not the person the laws have appointed and consequently, not the person the people have consented to.”⁵⁵ In the next chapter on tyranny, Locke said, “As usurpation is the exercise of power which another has a right to, so tyranny is the exercise of power beyond right, which nobody can have a right to.”⁵⁶

⁵¹ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 76-77 (Thomas P. Peardon, ed., Bobbs-Merrill 1952) (1690).

⁵² *Id.* at 110-111.

⁵³ *Id.* at 111.

⁵⁴ *Id.* at 110.

⁵⁵ *Id.* at 111.

⁵⁶ *Id.* at 112.

Hugo Grotius said, “For perfect freedom from fraud or compulsion, in all our dealings is a RIGHT which we derive from natural law and liberty.”⁵⁷ Like Locke, Grotius believed that citizens delegate some rights to society when leaving the state of nature, but stated, “the civil law can enjoin nothing which the law of nature prohibits, nor prohibit any thing which it enjoins”⁵⁸

Samuel Pufendorf believed that “Subjects ought to obey their lawful Sovereigns.”⁵⁹ “So far as the Civil Laws do not openly contradict the Law of GOD, the Subjects stand *obliged to obey them*”⁶⁰ But Pufendorf went on to clarify:

But . . . for a Subject, as in his *own* Name, to do a Thing which is repugnant to the Laws of God and Nature, can never be Lawful. And this is the Reason, why, if a Subject takes up Arms in an unjust War, at the Command of his Sovereign, he sins not: Yet if he condemns the Innocent, or accuses and witnesses against them falsely upon like Command, he sins. For as he serves in War, he serves in the Name of the Publick; but acting as a Judge, Witness, or Accuser, he does it in his Own.⁶¹

Algernon Sidney wrote a section of his DISCOURSES CONCERNING GOVERNMENT, entitled: “That which is not just, is not Law; and that which is not Law, ought not to be obeyed.”⁶² Arguing against the concept that “might makes right” and justifies law, he said, “The directive power of the law, which is certain, and grounded upon the inherent good and rectitude that is in it, is that alone which has a power over the conscience.”⁶³ He argued that under the incorrect principle of “might makes right” that the Christians should have followed Caligula,

⁵⁷ HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS 199 (A.C. Campbell, trans., M. Walter Dunne 1901) (1625) (emphasis in original), *available at* http://oll.libertyfund.org/EBooks/Grotius_0138.pdf.

⁵⁸ *Id.* at 91.

⁵⁹ SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE 224 (Andrew Tooke, trans. Ian Hunter and David Saunders, ed., Liberty Fund, Inc. 2003) (1691).

⁶⁰ *Id.* (emphasis in original).

⁶¹ *Id.* at 224-25. (emphasis in original).

⁶² ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 380-81 (Thomas G. West, ed., Liberty Fund 1990) (1698).

⁶³ *Id.* at 381.

Claudius, and Nero rather than St. Paul.⁶⁴ He summarized his argument by stating, “The sanction therefore that deserves the name of a law, *which derives not its excellency from antiquity, or from the dignity of the legislators, but from an intrinsick equity and justice.*”⁶⁵

John Adam’s hero, John Milton, said, “We are not bound by any statute of a preceding parliament but by the law of nature only, which is the only law of laws truly and properly to all mankind fundamental”⁶⁶ James Harrington believed that “higher law demanded that temporal laws must accord with ‘universal reason’ to be valid.”⁶⁷

Thomas Gordon discussed the relationship of natural law to “positive law” in an essay published in CATO’S LETTERS called *Considerations on the Nature of Laws*.⁶⁸ Gordon quoted Cicero: “The foundation of the law was uncovered from nature itself.”⁶⁹ Gordon also said:

[W]hen laws fail, we must have recourse to reason and nature, which are the only guides in the making of laws. . . . Law is therefore a sign of the corruption of man; and many laws are signs of the corruption of a state. . . . [I]t is as much against the law of nature to execute laws, when the first cause of them ceases, as it is to make laws, for which there is no cause, or a bad cause. . . . The violation therefore of law does not constitute a crime where the law is bad; . . . The essence of right and wrong does not depend upon words and clauses inserted in a code or a statute-book, much less upon the conclusions and explications of lawyers; but upon reason and the nature of things, antecedent to all laws.⁷⁰
[The law of nature] leads us to see, that the establishment of falsehood and tyranny (by which I mean the privilege of one or a few to mislead and oppress all) cannot be justly called law⁷¹

John Trenchard weighed in with his essay in CATO’S LETTERS called *Liberty proved to be the unalienable Right of all Mankind*.⁷² Trenchard said:

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis in original).

⁶⁶ CHESTER JAMES ANTIEAU, *THE HIGHER LAWS: ORIGINS OF MODERN CONSTITUTIONAL LAW* 67, 95 (1994) (quoting John Milton, *The Ready and Willing Vat to Establish a Free Commonwealth, reprinted in 3 WORKS* 403 (New York 1938 ed.)).

⁶⁷ *Id.* at 27, 33 (quoting *The Political Writings of James Harrington* 143 (Blitzer, ed., 1955)).

⁶⁸ Thomas Gordon, *Consideration on the Nature of Laws* (August 26, 1721), *reprinted in 1 CATO’S LETTERS*, 288-93 (Ronald Hamowy, ed., Liberty Fund 1995).

⁶⁹ *Id.* at 289.

⁷⁰ *Id.*

⁷¹ *Id.* at 291.

The right of the magistrate arises only from the right of private men to defend themselves, to repel injuries, and to punish those who commit them: That right being conveyed by the society to their publick representative, he can execute the same no further than the benefit and security of that society requires he should. When he exceeds his commission, his acts are as extrajudicial as are those of any private officer usurping an unlawful authority, that is, they are void; and every man is answerable for the wrong which he does. A power to do good can never become a warrant for doing evil.⁷³

That subjects were not to judge of their governors, or rather for themselves in the business of government, which of all human things concerns them the most, was an absurdity that never entered into the imagination of the wise and honest ancients.⁷⁴

In another essay entitled *All Government proved to be instituted by Men, and only to intend the general Good of Men*, Trenchard maintained that the people should judge the application of the law by the magistrate: “Here then is the natural limitation of the magistrate’s authority: He ought not to take that no man ought to give; nor exact what no man ought to perform: All he has given him, and those that gave it must judge of the application.”⁷⁵

Summarizing, the Founders’ goals were liberty and justice viewed in the light of natural law. Each person’s duty was to search his own conscience to compare man’s law to natural law, and when the individual was a decision maker, it was a moral wrong to participate in tyranny by applying positive law that violated natural law. This worldview is the essence of the practice of proper jury nullification. Natural law thinking and jury nullification are inextricably linked. Because the Founders took natural law seriously, it is only logical that they would see it as proper to encourage the application of conscience to positive law by the citizenry.

B. Defining The Jury

⁷² John Trenchard, *Liberty proved to be the unalienable Right of all Mankind* (December 30, 1721), reprinted in 1 CATO’S LETTERS, 405-413 (Ronald Hamorwy, ed., Liberty Fund 1995).

⁷³ *Id.* at 407.

⁷⁴ *Id.* at 409.

⁷⁵ John Trenchard, *All Government proved to be instituted by Men, and only to intend the general Good of Men* (January 6, 1721), reprinted in 1 CATO’S LETTERS, 413-420 (Ronald Hamorwy, ed., Liberty Fund 1995).

Scholars debate about the exact origins of trial by jury in the mists of time.⁷⁶ However, when looking to construe the meaning of the institution of the jury in the Constitution, the logical starting place is the dictionary most commonly used by the Framers. “The most common legal dictionary in Colonial Virginia was the British Jacob’s Law Dictionary”⁷⁷ The definition of jury in Jacob’s Law Dictionary is:

Jury (jurata, from the LAT. Jurare, to swear) Signifies a certain number of men sworn to inquire of and try the matter of fact, and declare the truth upon such evidence as shall be delivered them in a cause: and they are sworn judges upon evidence in matter of fact. . . .

it is apparent that juries were in use many years before the Conquest; and they are, as it were, incorporated with our constitution, being the most valuable part of it; for without them no man’s life can be impeached, (except by parliament) and no man’s liberty or property can be taken from him . . .

Juries are fineable, if they are unlawfully dealt with to give their verdict; but they are not fineable for giving their verdict contrary to the evidence, or against the direction of the court; for the law supposes the jury may have some other evidence than what is given in court, and they may not only find things of their own knowledge, but they go according to their consciences. Vaugh. 153, 3 Leon 147.

If a jury take upon them the knowledge of the law, and give a general verdict, it is good; but in cases of difficulty, it is best and safest to find the special matter, and to leave it to the judge to determine what is the law upon the fact. I Inst. 30.⁷⁸

This 1782 British definition recognizes the role of the juror’s conscience in going against the direction of the court and evidence. (See the discussion of *Bushell’s Case* infra III.C.2). It also makes it clear that the jury has the power to judge the law if it so chooses. While this is not an explicit recognition of the right of the jury to judge the merits of the law, it is implied because the use of conscience is not something to be disparaged, discouraged, or merely tolerated.

Acting on conscience is something to be encouraged.

⁷⁶ GREEN, *supra* note 1, at 331-32.

⁷⁷ WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA XVI (1970), *noted in* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 46 (1998).

⁷⁸ JACOB’S LAW DICTIONARY (1782), *cited in* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 46-47 (1998). A special verdict (or as Jacob phrases it, “the special matter”) is a “verdict that gives a written finding for each issue, leaving the application of law to the judge.” A general verdict is a “verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions.” BLACK’S LAW DICTIONARY 1555 (7th ed., 1999).

If any dictionary can claim to be authoritative on the meaning of the words at the time of the creation of the Constitution, it has to be Noah Webster's AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, despite being published some 39 years after the ratification of the Constitution.⁷⁹ Noah Webster was the one American most uniquely suited to create a dictionary that can elucidate Constitutional meaning. Webster was an attorney, having done part of his reading of the law under the tutelage of Oliver Ellsworth, who in the future would become the third Chief Justice of the United States.⁸⁰

Webster, a passionate believer in the American nation, wrote in 1785 in a four-part pamphlet called *Sketches of American Policy*, the first widely read call for a new Constitution to replace the Articles of Confederation.⁸¹ As part of a nationwide tour promoting his spelling and grammar books in which he lectured on his vision for a uniform American language and successfully lobbied every state in the union to pass copyright laws, he befriended almost every influential American of his day.⁸² His passion for the passage of a new Constitution led him to move to Philadelphia during the Constitutional Convention in 1787, where he dined almost every evening during the convention with the delegates including his law tutor, Oliver Ellsworth, Benjamin Franklin, James Madison, Roger Sherman, William Samuel Johnson, Abraham Baldwin, Rufus King, William Livingston, James Duane, Thomas Fitzsimmons, and Edmund

⁷⁹ NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

⁸⁰ HARLOW GILES UNGER, NOAH WEBSTER: THE LIFE AND TIMES OF AN AMERICAN PATRIOT ix, 35 (1998); Webster was a 16 year-old student at Yale when the American Revolution began. He was part of the student militia that drilled at Yale during the war. When British General Burgoyne was invading from the north, threatening to cut off Webster's native Connecticut with New England from the rest of the nation, Webster entered the field in response. His band of the militia arrived, however, too late to participate in the decisive victory over Burgoyne at Saratoga. *Id.* at ix, 19, 26-27; THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 252 (Kermit L. Hall, ed. 1992);

⁸¹ *Id.* at 81-83.

⁸² *Id.* at 107-08

Randolph.⁸³ George Washington visited him one evening, explicitly asking to review Webster's *Sketches*.⁸⁴

Webster spent 20 years creating the AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE accomplishing his lifetime goal of a unifying, American national language which he called "federal language."⁸⁵ His only substantial patron during that time was former first Chief Justice John Jay.⁸⁶ In appreciation, at age 70, Noah Webster rode fifty miles in a cold November to deliver the first bound two-volume set off the presses to former Chief Justice Jay.⁸⁷

Webster defined a jury as:

n. [Fr. *juré*, sworn, L. *juro*, to swear.] A number of freeholders, selected in the manner prescribed by law, empaneled and sworn to inquire into and try any matter of fact, and to declare the truth on the evidence given them in the case. *Grand juries* consist usually of twenty four freeholders at least, and are summoned to try matters alleged in indictments. *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. The decision of a petty jury is called a *verdict*.⁸⁸

This American definition of the founding era explicitly recognizes that the jury's role is to decide matters of law in criminal cases. This is powerful evidence that the Founders believed that jury

⁸³ *Id.* at 127, 129-31.

⁸⁴ *Id.* at 129; At the request of members of the Convention, Webster spent the three weeks after the Convention with Benjamin Franklin as Webster wrote the first essay arguing for the Constitution, entitled *Examination into the Leading Principles of the Federal Constitution*. A Webster biographer compared the impact of Webster's Examination with Alexander Hamilton, James Madison, and John Jay's *FEDERALIST PAPERS*:

Although the Federalist papers unquestionably won votes for ratification in cosmopolitan Northern cities, they had far less circulation elsewhere and almost none among ordinary Americans. In the end, Webster's short, easy-to-read pamphlet was at least as influential as the Federalist papers, if not more so, in less populated states, where isolated farmers eschewed all contact with governmental authority. It was to these men that Webster's arguments for ratification were directed, and he obviously knew how to address their concerns – far more than the citified Hamilton. *Id.* at 134-36, 137.

⁸⁵ *Id.* at 269, 303, 305.

⁸⁶ *Id.* at 277.

⁸⁷ *Id.* at 305.

⁸⁸ NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis in original).

law-judging was an integral part of the meaning of the term “jury” in the body of the Constitution and the Sixth Amendment.

C. The History of the Jury as the Founders Knew It

In *Crawford*, Justice Scalia said that “the Constitution’s text does not alone resolve” the questions of the case.⁸⁹ The Constitution’s text does not resolve the questions in this paper, either. “We therefore must turn to the historical background . . . to understand [the] meaning”⁹⁰ of the right of a defendant to a jury trial and of the proper role of the jury in the government created by the Constitution. The following sections describe the history of the jury as the Founders knew it.

1. John Lilburne – Father of Most Criminal Procedural Rights

Historian Thomas Andrew Green says that the person who brought the phrase, “as judges of law as well as fact” into the English consciousness was John Lilburne, a liberty activist before and during the Interregnum in the mid 17th century.⁹¹ Lilburne probably did more to move the English system to implement the protections for criminal defendants found in the American Constitution than any other person.⁹² Lilburne was the catalyst that inspired the abolition of the infamous Star Chamber in England. For standing up and questioning the legitimacy of the Star Chamber when he was brought before it in 1637 at age 22, he was whipped 200 times as he was transported via oxcart two miles through the streets of London, then pilloried for several hours in the hot sun while he proceeded to preach the evils of the Star Chamber to the gathered crowd.⁹³ This inspired Oliver Cromwell to introduce and pass legislation to repeal the Star Chamber that

⁸⁹ 541 U.S. at 42.

⁹⁰ *Id.* at 43.

⁹¹ GREEN, *supra* note 1, at 153.

⁹² JIM POWELL, THE TRIUMPH OF LIBERTY: A 2,000-YEAR HISTORY, TOLD THROUGH THE LIVES OF FREEDOM’S GREATEST CHAMPIONS 11 (2000).

⁹³ *Id.* at 13.

was reluctantly signed by Charles I in 1641.⁹⁴ Lilburne also challenged Parliament's prerogative as a law court to imprison adversaries. He argued against compelled, self-incriminatory testimony, and worked for the right of habeus corpus.⁹⁵

Lilburne served as a captain in Cromwell's army but resigned when Cromwell did not offer religious toleration to non-Puritans. Lilburne spent the rest of his life criticizing tyranny, losing one eye as punishment along the way.⁹⁶ For criticizing Cromwell, Lilburne was arrested and tried for high treason in 1649.⁹⁷ Lilburne and others had a large following called Levellers that identified themselves by wearing sea-green ribbons.⁹⁸ Historian G.P. Gooch called Lilburne "the most popular man in England."⁹⁹ Forty thousand signatures were collected petitioning for his release.¹⁰⁰ At the trial, Lilburne, representing himself because he was denied counsel, asked the judge if he could address matters of law as well as fact in the following colloquy:

Lilburne: [T]hat I may speak in my own behalf unto the jury, my countrymen, upon whose consciences, integrity and honesty, my life, and the lives and liberties of the honest men of this nation, now lies; who are in law judges of law as well as fact, and you [i.e., the court] only the pronouncers of their sentence, will and mind . . .

Lord Keble: Master Lilburne, quietly express yourself, and you do well: the jury are judges of matter of fact altogether, and Judge Coke says so: But I tell you the opinion of the Court, they are not judges of the law.

Lilburne: The jury by law are not only judges of fact, but of law also: and you that call yourselves judges of the law, are no more but Norman intruders; and in deed and in truth, if the jury please, are no more but ciphers, to pronounce their verdict.¹⁰¹

⁹⁴ *Id.*

⁹⁵ *Id.* at 11.

⁹⁶ *Id.* at 13-17.

⁹⁷ *Id.* at 16.

⁹⁸ *Id.*

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.* at 15.

¹⁰¹ GREEN, *supra* note 1, at 173 (citing State Trials 4:1379).

Lilburne was acquitted and the town of London celebrated all evening with ringing church bells and bonfires.¹⁰² Soon thereafter, a medal was struck with Lilburne's portrait, inscribed, "John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact."¹⁰³

Green, citing Lilburne's 1653 tract called *The Afflicted Mans Outcry*, said:

Lilburne did not as a general matter deny the authority of the bench; nor did he deny the right of the bench to instruct jurors on the law. Rather he invoked the jury as a shield, adjuring them to reject "void" law and to act on behalf of the people, whose powers of delegation of authority to true representatives had been wrongfully usurped.¹⁰⁴

Green had several insights about Lilburne and the Leveller approach to juries:

The "jury right" was more than just another Leveller reform item: the supposed right lay at the very heart of Leveller political and social theory . . . Finality of the verdict of the country had long implied the sanctity of the community's judgment concerning the accused. Now it also came to stand for the sanctity of the community's judgment regarding the substance of the "true law."¹⁰⁵

The Leveller argument was an argument not only for political leveling but for legal leveling as well. Law, according to the Leveller view, was a form of divine command comprehensible and accessible to the common man. Legal procedures and institutions could—and since Norman times did—vitiate the substance of true law. . . . Legal institutions were supposed to guarantee that equal justice prevailed, and no institution was more important in this regard than the criminal jury.¹⁰⁶

Green summarized the writings of a Leveller, John Jones who wrote approvingly about Lilburne's trial:

The very existence of jury trial, and the scope of the jurors' power, rested ultimately on the source of law. God had granted to the people—to the community—knowledge of his law. Though the people had, in turn, delegated ministerial functions to officials, judicial responsibility had been retained by the community; the jurors declared and applied the law in judging their fellows.

¹⁰² *Id.* at 175-76 (citing H. N. BRAILSFORD, *THE LEVELLERS AND THE ENGLISH REVOLUTION* 176 (1961)).

¹⁰³ *Id.* at 176.

¹⁰⁴ *Id.* at 197-98.

¹⁰⁵ *Id.* at 154.

¹⁰⁶ *Id.* at 165.

Judicial badgering usurped the people's right and duty not only to find fact but to decide the law.¹⁰⁷

Over a century later, Thomas Jefferson would recommend John Jones' essay called *Jurors Judges Both of Law and Fact* and another Leveller pamphlet by William Walwin called *Juries Justified* to a correspondent in 1789.¹⁰⁸

Continuing further on Leveller thought, Green said:

The Levellers insisted that law was not inherently complex; in criminal trials it was just a matter of right and wrong. Law came to the mind and conscience of the simplest man. The very nature of law presumed judgment by peers in accordance with standards comprehensible to the defendant. Jury trial was not to be formed in the image of enacted laws; rather, enacted laws were to conform to the logic and purpose of trial by jury. The more they did so, the more they would become simple and direct expressions of reason based on divine command.¹⁰⁹

The people did not *ab initio* find the law; rather, they retained the ultimate authority to overturn a judicial ruling, indictment, or statute on the grounds that it did not accord with the substance of fundamental law.¹¹⁰

Late in life, Lilburne became a Quaker.¹¹¹ His legacy of the fight for liberty and justice through the people's institution of the jury passed next to the Quakers in their struggle for religious liberty.¹¹²

2. William Penn, William Mead, and *Bushell's Case*

In 1664, the Restoration Parliament passed the Conventicles Act, which made non-Anglican religious meetings of five or more illegal.¹¹³ Many trials of Quakers resulted, and the Quakers responded with pamphlets using Leveller ideas urging that juries use their own

¹⁰⁷ *Id.* at 177, 183, citing John Jones, *Judges Judged Out of Their Own Mouthes* (London, May 6, 1650), [B.L.: E. 1414(1)]; *Jurors Judges of Law and Fact* (London, Aug. 2, 1650), [B.L.: E. 1414(2)].

¹⁰⁸ THOMAS JEFFERSON, 7 THE WRITINGS OF THOMAS JEFFERSON 422-24 (Albert Ellery Bergh, ed., 1904). For more on this letter, see *infra* Part III.D.1, nn.237, 238.

¹⁰⁹ GREEN, *supra* note 1, at 184-85.

¹¹⁰ *Id.* at 192.

¹¹¹ *Id.* at 198-99.

¹¹² *Id.*

¹¹³ *Id.* at 202.

interpretation of the law to refuse to convict under the act.¹¹⁴ Judges, however, began to fine juries for not bringing in the verdict that the judges thought lawful when they did acquit Quakers being prosecuted under the act.¹¹⁵

In 1670, William Penn, who would later found Pennsylvania, and William Mead were arrested for preaching to a Quaker assembly and charged with the capital offenses of unlawful and tumultuous assembly, disturbance of the peace, and riot.¹¹⁶ There were many injustices visited upon the defendants and jury during the trial. Court recorder John Howel refused to allow Penn to view the indictment before pleading.¹¹⁷ Setting the tone of the trial, Lord Mayor Starling, the presiding judicial officer, asked Penn and Mead in the presence of the jury why they were not wearing their hats, ordering the officers in the court to put their hats on their heads. No sooner than done, Recorder Howel berated them for their disrespect of the King's Court for wearing their hats and fined them forty marks each for doing so.¹¹⁸

Defending themselves, Penn and Mead had both asked for and received assurances that they would receive "Liberty in making [their] Defence".¹¹⁹ Despite this, when they repeatedly asked for a statement of the law upon which they were charged, both Penn and Mead were thrown in the bale-dock, a cage under floor level at one end of the courtroom from which the

¹¹⁴ *Id.* at 203-07.

¹¹⁵ *Id.* at 208-210.

¹¹⁶ CONRAD, *supra* note 77, at 24-25.

¹¹⁷ William Penn, *The People's Ancient and Just LIBERTIES Asserted, in the Trial of William Penn and William Mead, at the Sessions held at the Old-Baily in London, the First, Third, Fourth, and Fifth of September, 1670, against the most Arbitrary Procedure of that COURT* (1670), in *THE POLITICAL WRITINGS OF WILLIAM PENN* 6 (Andrew R. Murphy, ed., 2002).

¹¹⁸ *Id.* at 7-8

¹¹⁹ *Id.* at 6-7.

defendant could be heard if shouting, but could not be seen by the jury.¹²⁰ At one point, Howel threatened to have Mead's tongue cut out.¹²¹

The jury came back the first time after an hour and a half split eight to four, with Edward Bushell in the group of four dissenters.¹²² The panel of judges threatened Bushell with indictment and one threatened to put a mark upon him, before sending the jury back for more consideration.¹²³ The next time the jury came back, they had a unanimous decision and delivered it for William Penn as, "Guilty of Speaking in Gracious-Street."¹²⁴ The judges refused this verdict and, after more threats, sent the jury back for more deliberation.¹²⁵ A half hour later, the jury returned with a written, signed verdict, repeating Penn's verdict, and declaring Mead not guilty.¹²⁶

The judges refused to accept the verdict, despite Penn's protests. Howel declared that the jury should be locked up "without Meat, Drink, Fire, and Tobacco" until the jury returned a verdict that the court would accept.¹²⁷ As the jury left the room, Penn told them, "You are Englishmen, mind your Priviledge, give not away your Right." Bushell and others replied, "Nor will we ever do it."¹²⁸ The jury was kept all night as Howel had instructed, and was even denied a chamber-pot.¹²⁹

In the morning, the jury repeated their verdict once again. Penn asked if the Recorder accepted the verdict given for Mead, but Howel said, "It cannot be a Verdict, because you are

¹²⁰ *Id.* at 12-13. Julius Marke, *The Intriguing Doctrine of Jury Nullification*, at <http://www.chrononhotonthologos.com/lawnotes/jurynul2.htm>.

¹²¹ PENN, *supra* note 117, at 12.

¹²² *Id.* at 14. Note that the spelling of Bushell's name is not consistent in the literature. Penn's account lists the name as "Bushel" and Green follows that spelling. 6 HOWELL'S STATE TRIALS 999 uses "Bushell", as does Conrad and the U.S. Supreme Court in *Sparf v. United States*, 156 U.S. 51 (1895). This paper uses "Bushell."

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 15.

¹²⁶ *Id.*

¹²⁷ *Id.* at 16.

¹²⁸ *Id.*

¹²⁹ *Id.* at 17.

Indicted for a Conspiracy; and one being found not Guilty, and not the other, it could not be a Verdict.”¹³⁰ After the jury was sent out once again and returned again with the same verdict, Lord Mayor Starling threatened to cut Edward Bushell’s nose. Howel stated, “Till now I never understood the Reason of the Policy and Prudence of the Spaniards, in suffering the Inquisition among them: And certainly it will never be well with us, till something like the Spanish Inquisition be in England.”¹³¹ The jury was then locked up in Newgate prison for another night with “several sworn” to deny them food, drink, fire, tobacco, and toilet facilities.¹³²

In the morning, the jury repeated its earlier verdict. Then refused by the judges, they gave a not guilty verdict for Penn as well as Mead. The judges required each juror to independently state his name and verdict.¹³³ The jurors were fined 40 marks each, and each to be imprisoned until his fine paid. Eight paid their fines, but Edward Bushell, John Bailey, John Hammond, and Charles Milson refused to pay and were imprisoned.¹³⁴

Bushell filed a writ of *Habeus Corpus ad Subjiciendum* and his case was heard by the Court of Common Pleas.¹³⁵ Chief Justice Vaughan wrote the opinion for the Court, holding that juries are not fineable for bringing a verdict of their own understanding.¹³⁶ His logic was based on the theory that juries are the sole judges of the fact. As such, a judge cannot substitute his own judgment of the facts and conclude that the juries have not followed the law.¹³⁷ The logic of the case was summarized in the Jacob’s Law Dictionary definition of “jury” above: “for the law

¹³⁰ *Id.*

¹³¹ *Id.* at 18.

¹³² *Id.* at 19.

¹³³ *Id.* at 20.

¹³⁴ CONRAD, *supra* note 7777, at 27 (citing *Bushell’s Case*, HOWELL’S STATE TRIALS 6:1006, 1012).

¹³⁵ *Id.*

¹³⁶ *Id.* (citing *Bushell’s Case*, HOWELL’S STATE TRIALS 6:1012).

¹³⁷ *Id.* at 27-28.

supposes the jury may have some other evidence than what is given in court, and they may not only find things of their own knowledge, but they go according to their consciences.”¹³⁸

Conrad and Green argue that Justice Vaughan’s opinion in *Bushell’s Case* was conservative and as non-controversial as it could be, given that it overturned the practice of fining juries. Conrad noted how the opinion “studiously avoided addressing the issue of jury law-finding.”¹³⁹ Green said:

Vaughan used extreme care to avoid any argument that smacked of politics of the day. His legal precedents were similarly uncontroversial, drawn almost without exception from before the Interregnum and not tainted by any recent political maneuvering or misuses of power; . . . [W]ithout endorsing either side in the Quakers’ struggle with authorities, or even acknowledging the turmoil, Vaughan attempted to settle this controversial question simply on the basis of “reason” and his own (perhaps idealized) view of the old common law.¹⁴⁰

Note that Judge Vaughan did not adopt the notion of a jury judging the law as well as the facts used by Lilburne and by most of the Founders who discussed the issue. He said, “[H]ow the jury should, in any other manner, according to the course of trials used, find against the direction of the court in matter of law, is really not conceivable.”¹⁴¹ Vaughan was saying that a combined verdict of fact and law always had a factual aspect to it and could not be properly considered a judgment of the law.

But there were several practical effects of the Vaughan opinion and the Penn and Mead trial that went beyond the narrow confines of the opinion. First, Justice Vaughan’s holding that juries cannot be punished for their verdicts created a practical firewall (the power) for jury independence that has never been breached by American appellate courts. Second, the protection of the liberty of Penn allowed the “Keystone State” of the American union to develop

¹³⁸ JACOB’S LAW DICTIONARY, *supra* note 78.

¹³⁹ CONRAD, *supra* note 77, at 28.

¹⁴⁰ GREEN, *supra* note 1, at 248.

¹⁴¹ *Sparf v. United States*, 156 U.S. 51, 121 (1985) (Gray, J., dissenting, quoting Vaughan, 143-44).

and prosper. It is difficult to imagine American liberty or independence without Penn's founding of Philadelphia and Pennsylvania. The Declaration of Independence and Constitution were written in Penn's city. Pennsylvania provided a shining example of how liberty and religious tolerance could produce harmony and prosperity. Pennsylvanians were key to the development of the American conception and protection of jury independence, as well. Third, the story itself of how juries protected Penn's liberty became part of the canon of American liberty.¹⁴² Finally, as Conrad points out:

The decision in *Bushell's Case* became a primary authority for advocates of jury independence, who tended to miss many of the details in Vaughan's subtle arguments concerning the irreviewability of jury fact-finding, and rush headlong into the implicit protection given to the practice of jury law-finding.¹⁴³

The end of the seventeenth century saw Lilburne's Leveller ideas create the political party of the Founders and a famous jury nullification that was celebrated as a lynchpin of the British Glorious Revolution.

3. The Restoration, the *Seven Bishops' Case*, and the Glorious Revolution

The political battles of the Restoration under Charles II and James II that led to the Glorious Revolution in 1688 had several impacts on the Founders. First, out of a love of English liberty and the fear of the Catholicism of James II and the supposed tyranny and domination by France that his faith might bring, the political movement which the Founders embraced as their own was formed. The members of the movement, called themselves and their meeting place the Green Ribbon Club, "the name recall[ing] Leveller days."¹⁴⁴ The Club's enemies derisively called them Whigs, and the name stuck.¹⁴⁵ The leader of the Whig movement was Anthony

¹⁴² See, e.g., *Zenger's Case*, *infra* Part III.C.4.

¹⁴³ CONRAD, *supra* note 77, at 28.

¹⁴⁴ POWELL, *supra* note 92, at 18.

¹⁴⁵ WINSTON CHURCHILL, VI A HISTORY OF THE ENGLISH SPEAKING PEOPLES 367-68 (Barnes & Noble, Inc. 1993) (1956).

Ashley Cooper, earl of Shaftsbury.¹⁴⁶ John Locke, the philosopher who most influenced the Founders, was Shaftsbury's physician and aide.¹⁴⁷ Shaftsbury and his party worked unsuccessfully to pass an Exclusion Bill that would stop James, the Catholic brother of Charles, from succeeding Charles.¹⁴⁸ In 1681, Charles finally sought to imprison Shaftsbury for treason, but a jury – this time a grand jury – saved Shaftsbury by refusing to indict him.¹⁴⁹ Shaftsbury then fled to Holland, where he soon died in exile.¹⁵⁰

When a plot against the life of Charles II (the Rye House Plot) was uncovered, an associate of the Green Ribbon Club and a Whig, Algernon Sidney, was arrested in the roundup.¹⁵¹ His papers were searched, and his unpublished manuscript of DISCOURSES CONCERNING GOVERNMENT was seized and used as evidence of treason against him in a trial full of errors of law, judged by one of the most infamous judges in English history, Judge George Jeffreys.¹⁵² Judge Jeffreys charged Sidney's jury: "It is our duty upon our oaths to declare the law to you, and you are bound to receive our declaration of law, and upon this declaration to inquire whether there be a fact, sufficiently proved, to find the prisoner guilty of high treason of which he stands indicted."¹⁵³ Sidney was executed, becoming a martyr for future Whigs.¹⁵⁴

When James II ascended to the throne as feared by the Whigs, an attempt was made to forcibly replace James with the Duke of Monmouth, a son of questionable legitimacy of Charles

¹⁴⁶ POWELL, *supra* note 92, at 20.

¹⁴⁷ *Id.*

¹⁴⁸ CHURCHILL, *supra* note 145, at 364-75.

¹⁴⁹ *Id.* at 375.

¹⁵⁰ *Id.* at 376.

¹⁵¹ *Id.* at 18. CHURCHILL, *supra* note 145, at 378-80.

¹⁵² ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT xxxiv-xxxv (Thomas G. West, ed., Liberty Fund 1990) (1698).

¹⁵³ *Sparf v. United States*, 156 U.S. 51, 124 (1895) (Gray, J., dissenting, quoting 9 HOWELL'S STATE TRIALS 817, 889).

¹⁵⁴ SIDNEY, *supra* note 152, at xxxv; COLBOURN, *supra* note 34, at 56.

II.¹⁵⁵ The rebellion was quickly crushed and Lord Chief Justice Jeffreys was appointed under a commission of oyer and terminer¹⁵⁶ to Wales, where he conducted the infamous “Bloody Assizes” in which dire punishment was threatened against juries who did not follow the dictates of the court, leading to three hundred executions (including that of Monmouth) and the transportation as indentured servants of around 800 to Barbados and some others to Virginia.¹⁵⁷ One of Monmouth’s officers, a Whig and former Leveller, Richard “Hannibal” Rumbold, gave a gallows speech, saying, “I am sure that no man born marked of God above another, for none comes into the world with a saddle on his back, neither any booted and spurred to ride him.”¹⁵⁸ Thomas Jefferson paraphrased that sentiment in one of his last letters, written on June 24, 1826.¹⁵⁹

James II, in 1687 and 1688, in what he surely initially thought was a minor request, provoked a firestorm that was one of the causes of the Glorious Revolution which unseated James. The showdown came in a trial known as the *Seven Bishops’ Case*, in which a law-finding jury was haled as having saved the liberties of Englishmen.¹⁶⁰ James’s request seemed beneficent and innocuous enough. He wanted to issue a “Declaration of Indulgence for Liberty of Conscience.”¹⁶¹ In April, 1687, he asked the leading Anglican bishops to sign it, but all

¹⁵⁵ CHURCHILL, *supra* note 145, at 385-89.

¹⁵⁶ “Commission of Oyer and Terminer . . . [Law French *oyer et terminer* “to hear and determine”] *Hist.* A royal appointment authorizing a judge (often a serjeant-at-law) to go on the assize circuit and hear felony and treason cases.” Black’s Law Dictionary 265 (7th ed. 1999).

¹⁵⁷ *Id.* E.g., Rootsweb.com Genealogy Site, <http://archiver.rootsweb.com/th/read/DORSET/1998-10/0908212483> (discussing an entry in THE COMPLETE BOOK OF EMIGRANTS, 1607-1776 about a James Gallop, who was “convicted before Chief Justice Jefferies at the Court of Oyer and Terminer for Dorset, Somerset and Devon for waging war against the King and sentenced to be transported to [Virginia]” in 1685). One wonders what the Virginia grandchildren of James Gallop thought about the need for juries to protect against oppressive judges and government.

¹⁵⁸ CHURCHILL, *supra* note 145, at 385-89; Powell, *supra* note 92, at 18; Richard Rumbold, *Speech on the Scaffold* (1685), available at <http://www.bartleby.com/268/3/15.html>.

¹⁵⁹ POWELL, *supra* note 92, at 18.

¹⁶⁰ GODFREY D. LEHMAN, WE THE JURY: THE IMPACT ON OUR BASIC FREEDOMS 73-74 (1997); Green, *supra* note 1, at 263.

¹⁶¹ LEHMAN, *supra* note 160, at 74.

except two refused.¹⁶² In April, 1688, he tried again, this time demanding that every religious minister read his declaration to his congregation on specified Sundays.¹⁶³ The Archbishop of Canterbury, William Sancroft, then wrote a letter to the king explaining why in conscience he and his six fellow signers could not follow his decree because the king was not constitutionally permitted to interfere in such religious matters.¹⁶⁴

The seven bishops personally presented the letter to James. He reacted strongly, declaring the bishops to be seditious and demanding that he be obeyed.¹⁶⁵ A copy of the bishops' letter was printed and widely disseminated, lighting a fire throughout the nation, and leading to almost universal refusal to follow the king's decree.¹⁶⁶ James then filed an information against the seven bishops for seditious libel, dodging the necessity of an indictment from a grand jury.¹⁶⁷ Lord Chancellor George Jeffreys assured James that his four judges on the King's Bench could handle a jury. One of the four was Chief Judge Robert Wright, who had joined Jeffreys in the "Bloody Assizes" and whom Jeffreys himself had called a "beast."¹⁶⁸ The king's men made sure to stack the jury panel with men beholden financially or ideologically to the Crown.¹⁶⁹

The Crown proved that the bishops had written a seditious letter to the king, and that, they claimed was all it had to do. The jury therefore, was to find the bishops guilty.¹⁷⁰ The defense argued that the king did not have the constitutional power to suspend the laws of Parliament, to dispense with punishments, or to abrogate the right of the people to petition for

¹⁶² *Id.*

¹⁶³ *Id.* at 74-75.

¹⁶⁴ *Id.* at 77.

¹⁶⁵ *Id.* at 77-78.

¹⁶⁶ *Id.* at 78.

¹⁶⁷ *Id.* at 79.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 82-83.

¹⁷⁰ *Id.* at 84, 90.

redress of grievances.¹⁷¹ One of the four judges, Judge Powell, went against his peers and agreed with the defense on the legal point that only the Parliament – and not the king – had the constitutional power to legislate. He told the jury that the ultimate decision was left “to God and to your consciences.”¹⁷²

The jury brought back a verdict of “not guilty.”¹⁷³ The whole nation celebrated, and James soon fled England as William and Mary came to claim the throne in the Glorious Revolution.¹⁷⁴ The next notable jury action occurred in the Colonies, where the influence of William Penn and Pennsylvania was felt in New York.

4. Zenger’s Case – Press Freedom Protected by a Law-Judging Jury

A new colonial governor, William Cosby, arrived in New York from England in 1732.¹⁷⁵ His term of office immediately started with an oppressive action that was to be the first of many — he sought to claim by decree half of the salary earned by the local leader, Rip Van Dam, in Van Dam’s capacity as interim governor during the period after Cosby had been appointed but before Cosby arrived in New York.¹⁷⁶ Van Dam cagily agreed on splitting the fees for the period of overlap but suggested that the higher salary Cosby was earning in England during the same period be included in that to be split. By this calculation, Cosby owed Van Dam!¹⁷⁷ The governor decided to sue, but he did not want the matter before a jury as required by common law. Instead, he brought suit in the Supreme Court before a three judge panel over which he had the power of appointment and removal.¹⁷⁸

¹⁷¹ *Id.* at 91.

¹⁷² *Id.* at 92.

¹⁷³ *Id.* at 92-95.

¹⁷⁴ *Id.* at 95-99.

¹⁷⁵ VINCENT BURANELLI, THE TRIAL OF PETER ZENGER 10 (1957).

¹⁷⁶ *Id.* at 11-12.

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Id.*

The Chief Justice of the Supreme Court, Lewis Morris, one of the most powerful men in New York, agreed with Van Dam's counsel, James Alexander and William Smith – two of the most able attorneys in New York – that the Supreme Court had no jurisdiction in the matter, publishing his opinion via an independent publisher, Peter Zenger.¹⁷⁹ The governor removed Morris from the bench without taking the legally required step of consulting his Council on the matter.¹⁸⁰ Morris, Van Dam, Alexander, Smith, and others decided to take their grievances to the public by forming in November, 1733 the first independent newspaper in North America, the *New York Weekly Journal*, hiring Peter Zenger to publish it.¹⁸¹

Modeling the paper after Trenchard and Gordon's CATO'S LETTERS (and reprinting much of their work), and under the secret editorship of James Alexander, the *New York Weekly Journal* editorialized in favor of liberty, freedom of the press, and against the continued excesses of Governor Cosby.¹⁸² The governor struck back by trying to have Zenger indicted for seditious libel, but two separate grand juries refused to go along.¹⁸³ After other threats by the Governor's henchmen against Zenger, the Governor's Council issued a warrant for Zenger's arrest without the benefit of a grand jury indictment, and he was arrested on November 17, 1734.¹⁸⁴ Bail was set at an outrageously unaffordable sum of 400 pounds, and Zenger languished in jail until his trial in August, 1735.¹⁸⁵ Despite Zenger's imprisonment, the *Journal* only missed one week of publication due to the heroic efforts of Anna Catherine Zenger, Zenger's wife and mother of their six children.¹⁸⁶

¹⁷⁹ *Id.* at 12-13.

¹⁸⁰ *Id.* at 14-15.

¹⁸¹ *Id.* at 15, 24, 28.

¹⁸² *Id.* at 28-29, 30-32.

¹⁸³ *Id.* at 35.

¹⁸⁴ *Id.* at 38.

¹⁸⁵ LIVINGSTON RUTHERFORD, JOHN PETER ZENGER 47, 61 (Arno Press, Inc. 1970) (1904).

¹⁸⁶ BURANELLI, *supra* note 175, at 38-39; Rutherford, *supra* note 185, at 128.

James Alexander and William Smith, as defense counsel for Zenger, challenged the legitimacy of the court in which Zenger was to be tried because the Supreme Court was left with only the remaining, compliant judges after Lewis Morris' removal. For this, they were disbarred.¹⁸⁷ This cleared the way for Andrew Hamilton (no relation to Alexander Hamilton), a famous, talented, experienced Philadelphia attorney to become Zenger's trial attorney.¹⁸⁸ Hamilton had also been William Penn's attorney.¹⁸⁹

Hamilton started the defense by freely admitting the fact that Zenger had published the issues of the *New York Daily Journal* that were the subject of the information for seditious libel, but argued that this fact alone was insufficient for conviction.¹⁹⁰ Hamilton maintained that the legal definition of libel included requirement that the words be false.¹⁹¹ When the prosecution cited cases that stated differently, Hamilton attacked those cases as being discredited rulings of the illegitimate Star Chamber, and he cited more recent cases to support his position.¹⁹² He also attacked the cases presented by the prosecution as distinguishable from the instant case in that those cases concerned statements about the King. He criticized the prosecution for daring to equate the King with the Governor.¹⁹³

The prosecution claimed that a requirement to prove falsity would require it to prove a negative.¹⁹⁴ In reply, Hamilton gave examples of exceptions to the rule that one cannot prove a negative and then assured the prosecutor that his proof was not needed because the defense was

¹⁸⁷ RUTHERFORD, *supra* note 185175, at 48-56.

¹⁸⁸ *Id.* at 57-59.

¹⁸⁹ *Id.* at 58.

¹⁹⁰ *Id.* at 63, 69-70, quoting James Alexander, *A brief Narrative of the Case and Tryal of John Peter Zenger, Printer of the New-York Weekly Journal* (1736).

¹⁹¹ *Id.* at 70-71.

¹⁹² *Id.* at 75.

¹⁹³ *Id.* at 76-77.

¹⁹⁴ *Id.* at 80.

ready to prove the truth of Zenger's statements.¹⁹⁵ The Chief Justice denied Zenger the opportunity to prove the truth of that which he had published by relying on a Star Chamber case that stated, "Appearance there is of Truth in any malicious Invective, so much the more provoking it is."¹⁹⁶

Hamilton turned again to the definition of libel, pointing out that a vital part of the definition is whether the words printed were "understood" to be scandalous or spoken in an ironical manner, to which the Chief Justice agreed.¹⁹⁷ He then sprung his trap on the judge, saying: "I thank your Honour; I am glad to find the Court of this Opinion. Then it follows that those twelve Men must *understand* the Words in the Information to be *scandalous* . . ." The Chief Justice replied that it was common for the jury to bring in a special verdict, finding the fact of the printing and leaving the matter of the law to the court.¹⁹⁸ Hamilton replied:

I know, may it please your Honour, the Jury may do so; but I do likewise know, they may do otherwise. I know they have the Right beyond all Dispute, to determine both the Law and the Fact, and where they do not doubt of the Law, they ought to do so. This leaving it to the Judgment of the Court, whether the Words are libelous or not, in Effect renders Juries useless (to say no worse) in many Cases . . .¹⁹⁹

Hamilton moved on to discuss the necessity of being able to speak freely to a free people:

[W]hen a Ruler of the People brings his personal Failings, but much more his Vices, into his Administration, and the People find themselves affected by them, either in their Liberties or Properties, . . . all the high Things that are said in Favour of Rulers, and Dignities, and upon the side of Power, will not be able to stop People's Mouths when they feel themselves oppressed, I mean in a free Government. . . . *The Practice of informations for Libels is a Sword in the Hands of a wicked King, and an arrant Coward, to cut down and destroy the innocent; the one cannot, because of his high Station, and the other dares not, because of his want of Courage, revenge himself in another Manner.*²⁰⁰

¹⁹⁵ *Id.* at 81.

¹⁹⁶ *Id.* at 81, 87-88.

¹⁹⁷ *Id.* at 92.

¹⁹⁸ *Id.* at 93.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 94. (emphasis in original).

After being chastised by the prosecution for going too far, Hamilton said among other things:

Men in Authority . . . are not exempt from observing the Rules of Common Justice, even in their private or public Capacities; the Laws of our Mother Country know no Exemption. . . . [S]uch is the Sense that Men in General (I mean Freeman) have of common Justice, that when they come to know, that a chief Magistrate abuses the Power to which he is trusted . . . Mankind in general seldom fail to interpose, and as far as they can, prevent the Destruction of their fellow Subjects. . . . And has it not often been seen (and I hope it will always be seen) that when the Representatives of a free People are . . . made sensible of the Sufferings of their Fellow-Subjects, by the Abuse of the Power in the Hands of a Governour, they have declared (and loudly too) that they are not obliged by any Law to support a Governour who goes about to destroy a Province or Colony . . .

²⁰¹

Hamilton appealed to natural rights: “[T]he Right of complaining or remonstrating is natural; And the Restraint upon this natural Right is Law only, and those Restraints can only extend to what is *false*.”²⁰² He recalled the heroic acquittal of an information of seditious libel by the jury in the *Seven Bishops’ Case*²⁰³ when the “they took upon them, to their immortal Honour! To determine both *Law* and *Fact* . . .”²⁰⁴

Hamilton’s final appeal to the jury was:

But to conclude; the Question before the Court and you, Gentlemen of the Jury, is not of small nor private Concern, it is not the Cause of a poor Printer, nor of *New-York* alone, which you are now trying: No! It may in its Consequence, affect every Freeman that lives under a British Government on the main of America. It is the best Cause. It is the Cause of Liberty; and I make no Doubt but your upright Conduct, this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens; but every Man who prefers Freedom to a Life of Slavery will bless and honour You, as Men who have baffled the Attempt of Tyranny; and by an impartial and uncorrupt Verdict, have laid a noble Foundation for securing to ourselves, our Posterity, and our Neighbors, That, to which Nature and the Laws of our Country have given us a Right, — — The Liberty — — — —both of

²⁰¹ *Id.* at 95, 96.

²⁰² *Id.* at 101. (emphasis in original).

²⁰³ *See supra* Part III.C.3.

²⁰⁴ *Id.* at 102-03. (emphasis in original).

exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing Truth.²⁰⁵

The jury took very little time to come back with a verdict of not guilty.²⁰⁶ The news of the trial was broadly celebrated and reported throughout the colonies and in England, and several versions of Alexander's transcript of the trial were printed.²⁰⁷ Almost exactly two centuries later, in 1934, U.S. Senator William E. Borah summed up the impact of the Zenger trial on America in words that were read into the *Congressional Record*. Zenger's trial:

contributed to the foundation and the subsequent establishment in the American Colonies and the United States of America of the now cherished principles of constitutional liberty, freedom of the press, independence of the judiciary, independence of the bar, freedom of elections and independence of the jury.²⁰⁸

Gouverneur Morris, the grandson of the principled Chief Justice Lewis Morris, who had stood up to Governor Cosby, went on to become the man who literally penned the Constitution as a delegate to the Constitutional Convention.²⁰⁹ Gouverneur Morris is quoted as saying, "The trial of Zenger in 1735 was the morning star of liberty which subsequently revolutionized America."²¹⁰

5. The Battle over Libel in Eighteenth Century England

Zenger's account (ghost-written by James Alexander) of the Zenger trial was widely read throughout the American colonies and England, creating a flurry of pamphlets debating jury rights and free speech in England.²¹¹ In the colonies the practice of informing jurors of their right to judge the law and the facts became the norm, but the battle over the doctrine in England continued throughout the eighteenth century in the debate over the implementation of libel

²⁰⁵ *Id.* at 123.

²⁰⁶ *Id.* at 124.

²⁰⁷ *Id.* at 127-28.

²⁰⁸ BURANELLI, *supra* note 175, at 66.

²⁰⁹ BROOKHISER, *supra* note 47, at xiv, 3-6.

²¹⁰ BURANELLI, *supra* note 175, at 63.

²¹¹ BRANT, *supra* note 39, at 180.

laws.²¹² For the latter half of the century, the battle was embodied in two individuals — William Murray, the Earl of Mansfield, standing for vigorous application of libel laws and opposition to the right of juries to judge the law versus Charles Pratt, Lord Camden, the hero of the Founders who championed free speech and the right of juries to judge the law.²¹³

The Mansfield versus Camden battle started in 1752 in a libel case of a bookseller named William Owen, prosecuted for criticizing the House of Commons for ousting a member who had fought election corruption. The Solicitor General prosecuting Owen was the future Earl of Mansfield and Owen's defense attorney was the future Lord Camden. Mansfield/Murray argued against jury law-finding, while Camden/Pratt argued for it. The judge sided with Mansfield/Murray, but the jury's verdict was "Not Guilty" despite pressure from the judge to change it to a special verdict.²¹⁴

Lord Mansfield went on to become Justice on the King's Bench, and Lord Camden went on to become Chief Justice of the Court of Common Pleas.²¹⁵ In 1763, when John Wilkes, popular Whig member of Parliament, was arrested on a general warrant for libel for criticizing a minister of the King, Chief Justice Camden issued a writ of habeas corpus for Wilkes. But, Wilkes was then charged by information for seditious libel and tried in Justice Mansfield's court. Before Wilkes could be brought to trial, Parliament — dominated by the Tories — banished Wilkes for five years, and Justice Mansfield tried him *in absentia*, finding him guilty.²¹⁶ Wilkes returned to England in 1768, whereupon he entered a running battle with Lord Mansfield. Mansfield imprisoned him, but Wilkes was repeatedly re-elected, and became tremendously popular in America. Wilkes-Barre, Pennsylvania was named in 1769 after Wilkes and a

²¹² See *infra* Part III.E.2; BRANT, *supra* note 39, at 182-206.

²¹³ BRANT, *supra* note 39, at 187-89, 196-206; Bailyn, *supra* note 32, at 27-29.

²¹⁴ BRANT, *supra* note 39, at 188.

²¹⁵ *Id.* at 189-90.

²¹⁶ *Id.*

defender of Wilkes.²¹⁷ Of course, the American acclaim that met Wilkes, a Whig working for liberty, was matched by animus against Tory Lord Mansfield.²¹⁸

A powerful new voice burst onto the scene in England in 1769, defending American liberty as well as freedom of the press and jury rights — the anonymous penman who called himself “Junius.” Junius summed his goals by saying to the English people:

I cannot doubt that You will unanimously assert the freedom of election, and vindicate Your exclusive right to chuse Your representatives. but other questions have been started, on which Your determination should be equally clear and unanimous. Let it be impressed upon Your minds, let it be instilled into Your children, that the liberty of the press is the *palladium* of all the civil, political, and religious rights of an Englishman, and that the right of juries to return a general verdict, in all cases whatsoever, is an essential part of our constitution, not to be controuled or limited by the judges, nor in any shape questionable by the legislature.²¹⁹

Because the writings of Junius offended the British power structure, and since he could not be found, those who were involved in publishing his pamphlets were arrested and tried in well-publicized and closely-followed cases for seditious libel before Justice Mansfield. Lord Mansfield instructed the juries that they had no right to judge the law, but only to determine whether the defendants published the pamphlets.²²⁰ Lord Camden announced to the House of Lords that Mansfield’s doctrine “is not the law of England. I am ready to enter into the debate whenever the noble lord will fix a day for it. I desire, and insist, that it may be an early one.”²²¹ Lord Camden raised six questions to Lord Mansfield. Mansfield replied that ““he would not

²¹⁷ *Id.* at 191-92.

²¹⁸ BAILYN, *supra* note 32, at 123.

²¹⁹ JUNIUS, JUNIUS, INCLUDING LETTERS BY THE SAME WRITER, UNDER OTHER SIGNATURES 113 (George Routledge and Sons, 1889).

²²⁰ BRANT, *supra* note 39, at 196-200.

²²¹ THOMAS ERSKINE MAY, 2 CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 256-57 (1861), available at <http://home.freeuk.net/don-aitken/emayvols.html>.

answer interrogatories,’ but that the matter should be discussed. No time, however, was fixed for this discussion; and notwithstanding the warmth of the combatants, it was not resumed.”²²²

The Constitutional Society was created under the leadership of famous liberal attorney, Thomas Erskine, to combat Mansfield’s doctrines. The society issued a pamphlet written primarily by Dr. Joseph Towers contrasting the views of John Lilburne and Lord Chief Justice Jeffreys on jury rights, implicitly, but clearly equating Mansfield to the infamous Jeffreys.²²³ In the House of Commons, Serjeant Glynn and Edmund Burke worked unsuccessfully to pass legislation opposing Mansfield’s doctrine. Burke “stressed the Star Chamber’s connection with the original restrictions on printing.”²²⁴

In 1783, the Dean of St. Asaph, William Davies Shipley, was arrested for re-publishing a pamphlet urging that Parliamentary districts be reapportioned to achieve proportional representation. The jury brought back a verdict of “guilty of publishing only.” Thomas Erskine, defending Dean Shipley, argued for a new trial to the full King’s Bench led by Justice Mansfield, delivering what member of Parliament, Charles Fox, called “the finest argument in the English language.”²²⁵ Erskine emphasized the “special miracle wrought for the safety of the nation” of the *Case of the Seven Bishops*. Erskine also recalled a popular ballad sung earlier in the century in England that contained the lyrics:

For twelve honest men have determin’d the cause,
Who are judges alike of the facts, and the laws.²²⁶

But, Justice Mansfield and his colleagues denied the motion for a new trial, and Justice Mansfield introduced the idea of a rights/power dichotomy. When the prosecutor said that the

²²² *Id.*

²²³ BRANT, *supra* note 39, at 202-03. Note that the hanging judge’s last name has been spelled both Jeffries and Jeffreys. This paper consistently uses Jeffreys. See, e.g., http://en.wikipedia.org/wiki/Hanging_Judge_Jeffreys.

²²⁴ *Id.* at 202.

²²⁵ *Id.* at 203-04.

²²⁶ *Id.* at 206.

jury had the right “to take upon themselves the decision of every question of law necessary to the acquittal of the defendant;” Justice Mansfield said that “he should call it the power, not the right.”²²⁷ Justice Willes dissented from Justice Mansfield’s idea, saying:

I believe no man will venture to say they have not the power, but I mean expressly to say they have the right. Where a civil power of his sort has been exercised without control, it presumes, nay, by continual usage, it gives the right. It was the right which juries exercised in those times of violence when the Seven Bishops were tried, and which even the partial judges who then presided did not dispute, but authorized them to exercise upon the subject--matter of the libel; and the jury, by their solemn verdict upon that occasion, became one of the happy instruments, under Providence, of the salvation of this country. This privilege has been assumed by the jury in a variety of ancient and modern instances, and particularly in the case of *Rex v. Owen*, without any correction or even reprimand of the court. It is a right, for the most cogent reasons, lodged in the jury; as without this restraint the subject in bad times would have no security for his life, liberty, or property.²²⁸

Erskine then pointed out a fatal defect in the indictment, and Dean Shipley was released.²²⁹ Note that Justice Gray commented extensively on this case in his dissent in *Sparf v. United States*.²³⁰ That case is discussed in more detail in Part IV.A.2.

The battle then shifted to the legislative branch in England, eventually leading to victory by the Whigs (including Lord Camden in the House of Lords) in the passage in 1792 of Fox’s Libel Act, settling the question of the role of the jury in libel cases.²³¹ The act said:

on every such trial the jury sworn to try the issue may give a general verdict upon such indictment or information; and shall not be required or directed, by the court or judge before whom such an indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel . . .²³²

²²⁷ *Sparf v. United States*, 156 U.S. 51, 133 (1895) (Gray, J., dissenting) (citing 4 Doug 94, 108).

²²⁸ *Id.* at 133-34 (citing 4 Doug 171-75).

²²⁹ BRANT, *supra* note 39, at 204-06.

²³⁰ *Sparf v. United States*, 156 U.S. 51, 132-34 (1895) (Gray, J., dissenting).

²³¹ MAY, *supra* note 221, at 262-63.

²³² CONRAD, *supra* note 77, at 42 (quoting St. 32 Geo. III c. 60 (1792)).

By the time the Dean of St. Asaph's case in 1783, America was already free of British rule, but the drafters of Pennsylvania's constitution in 1790 inserted language in its free speech clause, weighing in on the Whig side, stating that "in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."²³³ The origin of this language is discussed in Part III.E.1.

Summarizing, the Founders were keenly interested in history as a guide for action, and they understood the jury through their knowledge of its history. One vital lesson they had learned was that jury judging of law in direct opposition to the court was at the top of the list of tools that protected natural rights. In their worldview, heroes of liberty advocated and benefited by jury law-judging while opponents of liberty constrained and disparaged jury rights. So, we know what the Founders believed about the moral underpinnings of jury power, we know how they defined the jury, and we know what they knew of jury history. What did they actually say about the rights of the jury?

D. Comments on the Jury by the Founders

1. Judging the Law as Well as the Facts

To explore the attitudes of the Founders toward the law-finding ability of juries, we turn to the actual comments of the Founders.

In 1771, John Adams wrote:

Wherever a general verdict is found it assuredly determines both fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction of the court in point of law, was a legal determination of the issue. Therefore the jury have the power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment and conscience. . . .

²³³ PA. CONST. of 1790 art. IX, § 7, *available at* <http://www.paconstitution.duq.edu/con90.html>.

Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specifically, and submit the law to the court? Every man, of any feeling or conscience, will answer, No. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the court.²³⁴

In 1782, Thomas Jefferson wrote:

These magistrates have jurisdiction both criminal and civil. If the question before them be a question of law only, they decide on it themselves: but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertakes to decide both law and fact. If they be mistaken, a decision against right, which is casual only, is less dangerous to the state, and less afflicting to the loser, than one which makes part of a regular and uniform system. In truth, it is better to toss up cross and pile²³⁵ in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.²³⁶

Seven years later, Jefferson advised a correspondent to read several late seventeenth-century Whig pamphlets supporting jury rights that had been republished in the early 1770's in America.²³⁷ He went on to say:

Permanent judges . . . are misled by favor, by relationship, by a spirit of party, by a devotion to the Executive or Legislative It is left therefore to the juries, if

²³⁴ *Sparf v. United States*, 156 U.S. 51, 143-44 (1895) (Gray, J., dissenting, quoting JOHN ADAMS, 2 JOHN ADAM'S WORKS 253-55).

²³⁵ "Cross and pile" is a game of chance. James Ostrowski, *The Rise and Fall of Jury Nullification*, 15, no. 2 J. LIBERTARIAN STUD. 97 (2001), available at http://www.mises.org/journals/jls/15_2/15_2_3.pdf.

²³⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 130 (William Peden ed. 1955) (1782), cited in James Ostrowski, *The Rise and Fall of Jury Nullification*, 15, no. 2 J. LIBERTARIAN STUD. 96-97 (2001), available at http://www.mises.org/journals/jls/15_2/15_2_3.pdf.

²³⁷ Simon Stern, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 YALE L. J. 1815, 1854 (2002), citing Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), in 5 THE FOUNDERS' CONSTITUTION 363, 363-64 (Philip B. Kurland & Ralph Lernder eds., 1987). Simon Stern teaches at Harvard Law School. <http://www.harvard.edu/faculty/directory/facdir.php?id=613>. The late 17th century pamphlets Jefferson recommended were: John Hawles, *The English-Mans Right* (London, Richard Janeway 1680) (reprinted in Boston in 1772); John Somers, *The Security of English-Mens Lives* (London, T. Mitchel 1682) (reprinted in New York in 1773); "A Person of Quality", *Guide to English Juries* (London, Thomas Cockerill 1682). *Id.* at 1829, 1851-54, nn.62, 147, 152.

they think the permanent judges are under any bias whatsoever in any cause, to take upon themselves to judge the law as well as the fact.²³⁸

In 1790, Justice James Wilson dedicated one of his college of Philadelphia lectures to the law of nature, and another to juries.²³⁹ In his lecture on juries, he said:

Let us suppose, that matters are brought to the sad alternative — that a juror must ruin his constitution, or perhaps, literally starve himself; or, to avoid immediate death or a languishing life, he must, contrary to his conscience, doom a fellow man and a fellow citizen to die — what must he do? In this crisis of distress, he prays direction from the laws of his country: the laws of his country, as often understood, tell him — you must starve: for it cannot be insinuated, that the laws will advise him to belie his conscience.²⁴⁰

After discussing the trials of Lilburne, Penn, and Mead, and Judge Vaughan's decision in *Bushell's Case*, Wilson said:

But, in many cases, the question of law is intimately and inseparably blended with the question of fact: and when this is the case, the decision of one necessarily involves the decision of the other. When this is the case, it is incumbent on the jury to pay much regard to the information, which they receive from the judges. But now the difficulty, in this interesting subject, begins to press upon us. Suppose that, after all the precautions taken to avoid it, a difference of sentiment takes place between the judges and the jury, with regard to a point of law: suppose the law and the fact to be so closely interwoven, that a determination of one must, at the same time, embrace the determination of the other: suppose a matter of this description to come in trial before a jury — what must the jury do? — The jury must do their duty, and their whole duty, they must decide the law as well as the fact.²⁴¹

The most direct comment on jury law-finding during the founding era was made by Theophilus Parsons at the Massachusetts ratifying convention of 1788:

The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the

²³⁸ Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), in 5 THE FOUNDERS' CONSTITUTION 363, 364 (Philip B. Kurland & Ralph Lernder eds., 1987) (cited in Stern, *supra* note 237, at 1854).

²³⁹ WILSON, *supra* note 29, at 55-56.

²⁴⁰ JAMES WILSON, 2 THE WORKS OF JAMES WILSON 530 (Robert Green McCloskey, ed., 1967).

²⁴¹ *Id.* at 540.

powers of Congress can hurt him, and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.²⁴²

Parsons later became Chief Justice of the Massachusetts Supreme Court.²⁴³

John Jay, the first Chief Justice of the United States Supreme Court, serving as a trial judge in the case of *Georgia v. Brailsford*, instructed the jury as follows:

It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of law it is province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are the best judges of the facts; it is, on the other hand, presumable that the court are the best judges of the law. But still both objects are lawfully within your power of decision.²⁴⁴

Justice Jay was speaking for the entire court, consisting that day of Supreme Court Justices William Cushing, James Wilson, John Blair, and William Paterson. (Justice James Iredell was absent.)²⁴⁵ Note that this was a civil case brought by a state against an individual. Some have questioned why Chief Justice Jay issued his law-finding instruction in a civil trial.²⁴⁶ Justice Gray explained that “it was a suit by a State to assert a title acquired by an act of its legislature in the exercise of its sovereign powers in time of war against private individuals.”²⁴⁷ Justice Gray and Professor William Nelson also point out that juries were told they could judge the law and facts in many civil cases in Colonial times.²⁴⁸

²⁴² *Sparf v. United States*, 156 U.S. 51, 144 (1895) (Gray, J., dissenting, quoting 2 ELLIOT’S DEBATES 94).

²⁴³ CONRAD, *supra* note 77, at 48.

²⁴⁴ *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794), cited in *Sparf v. United States*, 156 U.S. 51, 155 (1895) (Gray, J., dissenting).

²⁴⁵ *Sparf*, 156 U.S. at 157 (Gray, J., dissenting).

²⁴⁶ *E.g.*, *United States v Morris*, 26 F. Cas. 1323, 1334 (C.C.D.Mass. 1851) (No. 15,815).

²⁴⁷ *Sparf*, 156 U.S. at 157 (Gray, J., dissenting).

²⁴⁸ *Id.* William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence* 76 MICH. L. REV. 893, 904-17 (1978). In 1978, William E. Nelson was an Associate Professor of Law at Yale Law School. *Id.* at 893. Currently, he is the Edward Weinfeld Professor of Law at New York University School of Law. <http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=listings.fulltime#N>.

Zephaniah Swift, U.S. Congressman representing Connecticut from 1793-1797 and Supreme Court Justice of Connecticut from 1806-1819, said about a 1789 civil case, “The jury were the proper judges, not only of the fact but of the law that was necessarily involved.”²⁴⁹ Discussing criminal juries, he wrote that “they have full power to determine the law, as well as the facts, and to find a general verdict.”²⁵⁰

So, the leading Founders thought it proper for the jury to judge the merits of the law, even in direct opposition to the instructions of the court if the jurors are following their consciences.

2. The Structural Argument – Juries Represent the People in the Judiciary

It is important to note the phraseology of those advocating jury law-finding — the words, “right of the jury” to find the law and the facts. Why is the question not phrased in terms of the rights of the criminal defendant? The answer is that the question of jury law-finding was conceived by those who proposed it as a structural, constitutional issue. The question about jury law-finding goes to the heart of who holds the power in society — the people or the elite? Green said that the Leveller concept on this issue was that “Coercion of jurors also meant the loss by Englishmen of control over the law.” “The people did not *ab initio* find the law; rather, they retained the ultimate authority to overturn a judicial ruling, indictment, or statute”²⁵¹ What did the Founders have to say about this structural interpretation of the role of the jury as the voice of the sovereignty of the people?

William Penn said that the “*Birth-Right of Englishman*” could “be reduced to these Three:”

²⁴⁹ ZEPHANIAH SWIFT, 1 A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT 410, 1795-96 (cited in William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence* 76 MICH. L. REV. 893, 916 (1978)); Virtual American Biographies, <http://www.famousamericans.net/zephaniahswift/>.

²⁵⁰ *Id.* at 2:403.

²⁵¹ GREEN, *supra* note 1, at 154, 192.

1. *An Ownership, and Undisturbed Possession: That what they have, is Rightly theirs, and no Body's else.*
2. *A Voting of every Law that is made, whereby that Ownership or Propriety may be maintained.*
3. *An Influence upon, and a Real Share in that Judicatory Power that must apply every such Law, which is the Ancient Necessary and Laudable Use of Juries: If not found among the Britains, to be sure Practised by the Saxons, and continued through the Normans to this very Day.*²⁵²

The preeminent British legal commentator of the founding era, William Blackstone, produced this glowing tribute to trial by jury in 1769, just 20 years before the ratification of the Constitution and 22 years before the addition of the Sixth Amendment:

Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary for preserving the admirable balance of our constitution, to vest the executive power of laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that of the truth of the accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.²⁵³

Blackstone's view of the structure of the English constitution is one of a struggle for power between the people and the government. As much as Americans now discuss how a balance of power between the three branches of the government protects liberty, Blackstone reminds us that the older and more fundamental notion — embodied in the jury — is the balance of power between individuals and the awesome power of the state.

John Adams wrote in 1766 about juries in the British constitution:

²⁵² William Penn, *England's Present Interest Considered, with Honour to the Prince, and the Safety to the People* (1675), in *THE POLITICAL WRITINGS OF WILLIAM PENN* 26-27 (Andrew R. Murphy, ed., 2002) (emphasis in original).

²⁵³ WILLIAM BLACKSTONE, *4 COMMENTARIES ON THE LAWS OF ENGLAND* 343 (1769) (emphasis in original).

Thus it seems to appear, that two branches of popular power, voting for members of the house of commons, and trials by juries, the one in the legislative and the other in the executive part of the constitution, are essential and fundamental to the great end of it, the preservation of the subject's liberty, to preserve the balance and mixture of the government, and to prevent its running into an oligarchy or aristocracy, as the lords and commons are to prevent its becoming an absolute monarchy. These two popular powers, therefore, are the heart and lungs, the mainspring and the centre wheel, and without them the body must die, the watch must run down, the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution. In these two powers consist wholly the liberty and security of the people.²⁵⁴

In 1771, Adams wrote:

As the constitution requires, that, the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature. No wonder, then, that the same restless ambition of aspiring minds, which is endeavoring to lessen or destroy the people in legislation, should attempt to lessen or destroy it in the execution of laws. The rights of juries and of elections were never attacked singly in all the English history. The same passions which have disliked one, have detested the other, and both have always been exploded, mutilated, or undermined together.²⁵⁵

James Wilson said in his inaugural lecture at the college of Philadelphia in 1790:

Permit me to mention one great principle, the *vital* principle I may well call it, which diffuses animation and vigour through all others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large . . .²⁵⁶

A system in which juries judge the law as well as the facts is one that recognizes the people as sovereign. A system that instructs juries that they must follow the law as the judge instructs places the judge in a position of power over the people, denying their sovereignty.

Professor Akhil Amar describes the bicameral conception of the jury by the Founders:

The people themselves had a right to serve on the jury—to govern through the jury. In effect, each of the three branches of the federal government featured a

²⁵⁴ John Adams, *The Earl of Clarendon to William Pym*, in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 55 (C. Bradley Thompson, ed., 2000).

²⁵⁵ CHARLES FRANCIS ADAMS, 2 *JOHN ADAM'S WORKS* 253 (Books for Libraries Press 1969) (1850-56).

²⁵⁶ WILSON, *supra* note 29, at 77 (emphasis in original).

bicameral balance. In the legislature, members of Congress's lower house . . . would counterbalance the member or the upper house. . . . So, too, within the judiciary, trial jurors would counterbalance trial judges.²⁵⁷

One piece of evidence presented by Professor Amar for this conclusion is the writing under the pen name of "A Farmer," presumably by John Mercer, a Maryland anti-federalist who attended the Constitutional Convention but did not sign. Farmer Mercer wrote:

*The trial by jury is—the democratic branch of the judiciary power—more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks*²⁵⁸

Amar also quoted the anti-federalist author, "The Federal Farmer".²⁵⁹

It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. . . .

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government, of the society; and to come forward, in turn, as the centinels and guardians of each other.²⁶⁰

²⁵⁷ AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 237 (2005). Akhil Amar is Southmayd Professor of Law at Yale Law School. <http://www.law.yale.edu/outside/html/faculty/ara4/profile.htm>.

²⁵⁸ A Farmer, MARYLAND GAZETTE, Mar. 18, 1788, reprinted in HERBERT J. STORING, 5 THE COMPLETE ANTI-FEDERALIST 5, 38 (1981) (emphasis in original); AKHIL REED AMAR, THE BILL OF RIGHTS 95 (1998). Mercer studied law under Thomas Jefferson, served in the Revolutionary War, represented Virginia and later Maryland in Congress, and was Governor of Maryland. Storing, 5:5.

²⁵⁹ Leading federalists, including Oliver Ellsworth, asserted The Federal Farmer to be Richard Henry Lee, the Virginian who introduced the resolution for American independence in 1776, but several scholars dispute that. One biographer claims that The Federal Farmer was Melancton Smith. HERBERT J. STORING, 2 THE COMPLETE ANTI-FEDERALIST 215 (1981); J. KENT MCGAUGHY, RICHARD HENRY LEE: A VIRGINIAN 117, 196-97 (2004). Melancton Smith was a delegate to the New York Constitutional ratifying convention where he helped lead the call for amendments. He had served as a member of the Continental Congress from 1785-87. McGaughy, at 193; <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000592>.

²⁶⁰ The Federal Farmer, *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican IV* (October 12, 1787), reprinted in Herbert J. Storing, 2 THE COMPLETE ANTI-FEDERALIST 250-51 (1981), quoted in AKHIL REED AMAR, THE BILL OF RIGHTS 94-95 (1998).

The Federal Farmer also said, “[B]y holding the jury’s right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department.”²⁶¹

John Taylor of Caroline (Virginia), a founding era ally of Jefferson and Madison and political theorist, "described the jury as the 'lower judicial branch' in a bicameral judiciary."²⁶² In 1773, two North Carolinians sent instructions to their legislature, discussing the Crown’s actions disallowing courts that the North Carolina legislature had established and establishing prerogative courts of oyer and terminer, wrote:

Where [English] usage is not Just, or of no use to us (which may depend on our Circumstances) we think our Judges and Juries have a right to refuse them, but they have no right to refuse Acts of Assembly; yet we think there is a Power in the Crown of applying remedies to very pressing Evils for which no Law as provided, and the necessity and manner of exercising this Power must afterwards be Judged of by the People, either as Juries in Courts or as an Assembly, and if they find there was Necessity, that an expedient remedy was applied, that the manner of applying it was not oppressive, and in a Word that the power was not abused, we think the persons employed in it ought to be excused, but severely punished if the Contrary appears.²⁶³

This passage is another evidence of the notion that the jury is one of the institutions through which the people rule. It is also evidence that the practices in English courts were not necessarily those of the Colonists.

²⁶¹ The Federal Farmer, *An Additional Number of Letters From the Federal Farmer to the Republican Leading to a Fair Examination of the System of Government Proposed by the Late Convention; To Several Essential and Necessary Alterations in It; And Calculated to Illustrate and Support the Principles and Positions Laid Down in the Preceding Letters* XV (January 18, 1788), reprinted in Herbert J. Storing, 2 *THE COMPETE ANTI-FEDERALIST* 320 (1981).

²⁶² Judge Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004), quoting J. TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (1950). Colonel John Taylor was a Revolutionary veteran, the member of the Virginia House of Delegates that introduced Madison's Virginia Resolution of 1798 opposing the Sedition Act, and United States Senator. Middlebrooks at 393 n.180, citing C. WILLIAM HULL, JR., *THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE* 285-86 (1977). "Jefferson wrote that 'Colonel Taylor and myself, if ever, differed in any political principle of importance.'" *Id.*

²⁶³ 9 COLONIAL RECORDS OF NORTH CAROLINA 699-706 (William L. Saunders, ed. 1886-1890) (cited in Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. Crim. L. & Criminology 111, 136-37, 214 nn.112, 114-15 (1998)).

As late as 1831, Alexis de Tocqueville saw what the jury meant to Americans. He wrote:

The institution of the jury . . . places the real direction of society in the hands of the governed . . . and not in that of the government. . . . [I]t invests the people, or that class of citizens, with the direction of society The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as is universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.²⁶⁴

To the Founders, then, the people rightfully control their government and participate in the execution of the laws via the judiciary as jurors, much as they participate in the legislative process as voters. Their view was that it is no more proper for judges to control the actions of jurors who protect liberty than it is for legislators to control the actions of voters. The next section shows the importance the Founders placed on the institution of the jury.

3. Juries – The Palladium of Liberty

The Founders waxed eloquent on the importance of the jury to the protection of liberty.

Alexander Hamilton said that the views of the Founders on juries were in harmony:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury. Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.²⁶⁵

James Madison said about the jury in his speech to Congress proposing the amendments that would become the Bill of Rights:

Trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.²⁶⁶

How can the liberty of the people be secured by juries that do not judge laws trampling liberty?

²⁶⁴ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 293-94 ((Vintage ed. 1945) (1831), *quoted in* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1185 (1991).

²⁶⁵ THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961).

²⁶⁶ JAMES MADISON, WRITINGS 445-46 (Jack N. Rakove, ed. 1999).

Blackstone effused:

So that the liberties of England cannot be subsist, so long as this *palladium* remains sacred and inviolate, not only from open attacks (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.²⁶⁷

Blackstone's warning about the importance of preserving all of the forms of the jury against gradual erosion is important in decisions concerning the practices associated with the jury today.

James Wilson took issue with Blackstone on the issue of sovereignty of the people in a proper government because Wilson supported the Lockean view and Blackstone rejected it.²⁶⁸

Thomas Jefferson and St. George Tucker, a Supreme Court Justice in Virginia and professor of law at William and Mary, agreed with that assessment. Jefferson complained of Blackstone's "Tory hue."²⁶⁹ But Wilson had this to say about Blackstone's view of the jury:

But, with all his prejudices concerning government, I have the pleasure of beholding him, in one conspicuous aspect, as a friend to the rights of men. To those rights, the author of the beautiful and animated dissertations concerning juries could not be cold or insensible.²⁷⁰

In a letter to Thomas Paine in 1789, Jefferson wrote, "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its

²⁶⁷ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 343-44 (1769).

²⁶⁸ WILSON, *supra* note 29, at 77-79.

²⁶⁹ MAYER, *supra* note 42, at 48-51. *See generally* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS (Clyde N. Wilson, ed. 1999) (1803).

²⁷⁰ *Id.* at 79-80.

constitution.”²⁷¹ It is not possible for a jury to hold a government to its constitution unless that jury can determine that a law is unconstitutional and refuse to convict the defendant accused under the unconstitutional law. In a letter to L’Abbe Armond on July 19, 1789, Jefferson said, “Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of laws is more important than the making them.”²⁷² The way the people are involved in the judiciary is through the jury, and the only effective control juries have is through law-judging.

James Wilson said:

[W]hoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature — and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge²⁷³

The direct statements of Adams, Parsons, Jay, Jefferson, and Wilson showing that judging the law is done sometimes in opposition to the court cannot be explained away. Penn, Wilson, Adams, Blackstone, and others tell us that the jury has the structural role in the judiciary of representing the people by reviewing the work of the people’s agents in government by judging the merits of the law applied to defendants. The jury system cannot protect the Constitution and liberty as stated by Jefferson, Madison, and Hamilton without jury judging of the merits of the law.

E. State Constitutions and the Sedition Act

1. Georgia and Pennsylvania State Constitutions

²⁷¹ THOMAS JEFFERSON, 7 THE WRITINGS OF THOMAS JEFFERSON 408 (Lipscomb and Bergh, ed., Memorial ed., 1903).

²⁷² THOMAS JEFFERSON, 3 WORKS OF THOMAS JEFFERSON 81-82 (Washington ed. 1854), *cited in* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 582 (1938).

²⁷³ WILSON, *supra* note 29, at 186 (quoted in AKHIL REED AMAR, THE BILL OF RIGHTS 99 (1998)).

Two founding era state constitutions expressly addressed jury judging of law. The Georgia Constitution of 1777 had these provisions:

Article XLI. The jury shall be judges of law, as well as of fact, and shall not be allowed to bring a special verdict; but if all or any of the jury have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion.

Article XLII. The jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to the rules and regulations contained in this constitution.²⁷⁴

The Pennsylvania State Constitution of 1790 Bill of Rights (Article IX.) had these provisions:

Trial by jury.

Sect. VI. That trial by jury shall be as heretofore, and the right thereof remain inviolate.

Of the liberty of the press.

Sect. VII. That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government: And no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: *And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.*²⁷⁵

Given that language with explicit references to juries judging the law and the facts still exist in constitutional libel provisions in 19 states²⁷⁶ and that 3 states²⁷⁷ have general language to that effect, an analysis of the origin of that language in the debate at the Pennsylvania convention would seem vital. This language was written at exactly the right time to determine original

²⁷⁴ GA. CONST. of 1777 art. XLI, XLII, *available at* <http://www.cviog.uga.edu/Projects/gainfo/con1777.html>.

²⁷⁵ PA. CONST. of 1790 art. IX, §§ 6, 7 (emphasis added), *available at* <http://www.paconstitution.duq.edu/con90.html>.

²⁷⁶ ALA. CONST. art. I, § 12; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 6; DEL. CONST. art. 1, § 5; ME. CONST. art. I, § 4; MISS. CONST. art. 3, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; N.J. CONST. art. I, § 6; N.Y. CONST. art. I, § 8; N.D. CONST. art. I, § 4; PA. CONST. art. 1, § 7; S.C. CONST. art. I, § 16; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. 1, § 8; UTAH CONST. art. I, § 15; WIS. CONST. art. I, § 3; WYO. CONST. art. 97, § 97-1-020.

²⁷⁷ GA. CONST. art. 1, § 1, ¶ XI; IND. CONST. art. 1, § 19; MD. CONST. DECLARATION OF RIGHTS art. 23.

intent, and was determined in Philadelphia, the then capitol of the United States and in the cradle of jury power in America. Yet, this author has found no analysis of the debate. Alexander Graydon, a delegate to the Pennsylvania convention that produced the 1790 Constitution, said, “Next to the construction of the senate, the regulation of the press was the ground of most acrimony in the Convention. Whether or not the truth should be received as a justification, on prosecutions for libels, divided its law characters. I was among the simple voters who thought that it ought”²⁷⁸

A record of the progression of proposed language and amendments in the convention that lasted from November 24, 1789 through August 30, 1790, does exist, but there is no record of the arguments made.²⁷⁹ What emerges from an analysis of the record of the votes on the amendments to the section on free-speech is a battle between those who wanted a liberal libel law and those who did not. The core of the libel provision never changed from what was proposed. The last sentence is of most interest to those seeking to glean information about the Founders’ conception of jury law-judging, and was where the battles were fought in the convention.

The free-speech advocates were a coalition of moderates led by James Wilson and constitutionalists and westerners led by William Findley.²⁸⁰ The leaders of the strict libel law advocates were Thomas McKean and William Lewis. Thomas McKean had one of the most full of all founding era resumes. He was a signer of the Declaration, President of the Continental

²⁷⁸ ALEXANDER GRAYDON, MEMOIRS OF HIS OWN TIME, WITH REMINISCENCES OF THE MEN AND EVENTS OF THE REVOLUTION 349 (Arno Press 1969, reprint of John Stockton Littell, ed., Lindsay & Blakiston 1846) (1811).

²⁷⁹ *Minutes of the Convention of the Commonwealth of Pennsylvania, which Commenced at Philadelphia, on Tuesday the twenty-fourth Day of November, in the Year of our Lord One Thousand Seven Hundred and Eighty-Nine, for the Purpose of Reviewing, and if They See Occasion, Altering and Amending the Constitution of the State, microformed on Early American imprints, First series, nos. 22764-65 (Readex Microprint, New York 1985) [hereinafter Minutes].*

²⁸⁰ RAYMOND WALTERS, ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT 36 (1957).

Congress, Chief Justice of Pennsylvania, and Governor of Pennsylvania.²⁸¹ Despite the resume, he was less liberty-loving than most in his era. For example, he was an admirer of and correspondent with Lord Mansfield.²⁸² William Lewis was a prominent Philadelphia attorney.²⁸³ Findley was a leader of the constitutionalists who initially supported the old constitution and opposed creating a new one.²⁸⁴

Chief Justice McKean, Lewis, and Findley had recently sparred in 1789 over libel law in a freedom of speech case in which McKean presided, Lewis prosecuted, and Findley defended.²⁸⁵ The anti-federalist publisher of the *Independent Gazetteer*, Eleazer Oswald, was sued for libel in a private suit by a former editor of a federalist newspaper, Andrew Brown. Brown's attorney was William Lewis.²⁸⁶ Eleazer alleged in print that the lawsuit was a "Federalist conspiracy" against him. Chief Justice McKean, who had tried to have Oswald prosecuted for his writings in 1782, only to be thwarted by a grand jury, decided that his court was being impugned and charged Oswald with criminal contempt, denying him a jury trial. William Lewis prosecuted the contempt charge. Findley claimed several constitutional violations, including violation of freedom of the press. Chief Justice McKean took the opportunity to explain his views on libel law, saying that criminal libel was justified for those with "bad motives." McKean fined Oswald and jailed him for a month. Oswald worked unsuccessfully to have McKean impeached, resulting in a three-day debate in the Pennsylvania legislature about libel law.²⁸⁷

²⁸¹ Thomas McKean Home Page, <http://users.clover.net/mckean>.

²⁸² G.S. ROWE, THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 262 (1978).

²⁸³ ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790 225 (1942).

²⁸⁴ *Id.*

²⁸⁵ NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 62 (1986).

²⁸⁶ G.S. ROWE, THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 253 (1978).

²⁸⁷ ROSENBERG, *supra* note 285, at 60-63 (citing *Republica v. Oswald*, 1 Dall. 319, 319-26, 329-32, 335-37).

At the Pennsylvania constitutional convention, the free-speech advocates started by proposing an additional sentence that read:

But upon all indictments for the publication of papers investigating the conduct of individuals in their public capacity, or of those applying or canvassing for office, the truth of the facts may be given in evidence in justification upon the general issue.²⁸⁸

The words “general issue” imply that the jury should judge on the mixture of fact and law. The first (unsuccessful) attempt of Thomas McKean and the strict libel law advocates was to limit the scope of when the provision applied by eliminating the words, “or of those applying or canvassing for office.”²⁸⁹ The debate over this provision stretched through three sessions. Albert Gallatin delivered a speech on behalf of jury trials as protection of freedom of the press.²⁹⁰

Free-speech advocate Alexander Addison successfully (by a 31 to 27 vote) moved to replace the last sentence with this: “In prosecutions for libels their truth or design may be given in evidence on the general issue, and their nature and tendency, whether proper for public information or only for private ridicule or malice, be determined by the jury.”²⁹¹ McKean then successfully (with a 56 to 3 vote) proposed adding the words, “under the direction of the court as in other cases.”²⁹² While this provision meant something to Chief Justice McKean, the fact that Justice Wilson and all but three of the free-speech advocates joined in the vote shows that this language was not considered a threat to their objectives.

A member of the strict libel law advocates, James Ross, introduced an unsuccessful motion that contained most of the language the free-speech advocates wanted and added the

²⁸⁸ Minutes at 66 (February 5, 1790).

²⁸⁹ *Id.* at 117 (February 19, 1790).

²⁹⁰ WALTERS, *supra* note 280.

²⁹¹ Minutes at 117-18 (February 22, 1790).

²⁹² *Id.* at 117-19 (February 22, 1790).

phrase, “and the jury shall have the same right to determine thereon as in other cases.”²⁹³

Overnight, the committee of James Wilson, William Findley, and William Lewis (two free-speech advocates and one libel law advocate) replaced the last sentence with the following:

In prosecutions for libels, their truth or design may be given in evidence on the general issue, and their nature and tendency, whether proper for public information, or only for private ridicule and malice, be determined by the jury, under the direction of the court, as in other cases.²⁹⁴

This is the language that was released to the public in February until the convention re-convened in August.²⁹⁵

When the convention reconvened, a large number of motions to modify the last sentence were considered, most of which battled over the definition of when the provision applied. It was William Lewis with a second by Thomas McKean that proposed the language, “the jury shall have the same right to determine the law and the fact, under the direction of the court, as in other cases.”²⁹⁶ But the free speech-advocates quickly incorporated this language into their proposals.²⁹⁷ In the end, it was westerner Alexander Addison, seconded by James Wilson, who proposed the words that were adopted by the convention.²⁹⁸ (“And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.”) All members of the convention save two die-hard strict libel law advocates voted for the final wording of the section.²⁹⁹

The fact that opponents of liberal free-speech interpretations of libel law proposed the jury law-judging language in the Pennsylvania 1790 free-speech clause gives pause when thinking about its meaning. But, James Wilson, whose pro-jury views we know well from his

²⁹³ *Id.* at 141 (February 25, 1790).

²⁹⁴ *Id.* at 113 (February 18, 1790), 142 (February 26, 1790).

²⁹⁵ *Id.* at 146 (February 26, 1790).

²⁹⁶ *Id.* at 178 (August 24, 1790).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 181 (August 25, 1790).

²⁹⁹ *Id.* at 183 (August 25, 1790).

lectures in the same year, accepted the language without problem. And, of course, this wording rejected the right/power dichotomy idea of Lord Mansfield, instead embracing the common American concept that jury judging of law is a right. We must conclude that this language was indeed the repudiation of the Mansfield view of the role of juries in relation to libel law. The fact that even American proponents of harsh libel law disagreed with Mansfield on jury law-judging in libel cases shows how different the political climate in the United States was from Britain.

2. The Sedition Act

In a dark day for liberty in 1798, the Federalist dominated Congress passed the Sedition Act punishing seditious libels. The act did, however, contain the following language: “the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.”³⁰⁰ The debate in the House sheds some light on the meaning of those words. Republican William Claiborne of Tennessee, an opponent of the bill, proposed to amend the act by inserting the words: “And in all cases arising under this act, the jury who shall try the cause, shall be judges of the law as well as the fact.” Claiborne’s stated reason for the amendment was to avoid the danger of applying Lord Mansfield’s application of the law of libel that took the power from the jury.³⁰¹ (See Part III.C.5 above.) Federalist Robert Goodloe Harper of South Carolina, a proponent of the bill, said that “there could be no need of such an amendment. It was well known that, in this country, the jury were always judges of the law as well as the fact, in libels, as well as in every other case.”³⁰² Federalist Nathaniel Smith of Connecticut, a proponent of the bill expressed a fear that the amendment implied that juries

³⁰⁰ *Sparf v. United States*, 156 U.S. 51, 161 (1895) (Gray, J., dissenting) (quoting 1 Stat. 597 § 3).

³⁰¹ 8 ANNALS OF CONGRESS 2135 *et. seq.* (1798), *quoted in* Howe, *supra* note 272, at 586-87.

³⁰² *Id.*

could rule on the “legality of testimony.”³⁰³ Federalist James A. Bayard of Delaware, also a proponent of the bill, opposed the amendment because “the effect of this amendment would be, to put it into the power of the jury to declare that this is an unconstitutional law, instead of leaving this to be determined, where it ought to be determined, by the Judiciary.”³⁰⁴

Republican Albert Gallatin of Pennsylvania, an opponent of the bill, proposed the amendment to the amendment that eventually became law, suggesting the use of the words in the libel provision of the Constitution of Pennsylvania, “showing clearly that its intention was only to declare that juries should have the same power to decide on the criminality of the act, which they had in other cases.”³⁰⁵

In his *Sparf v. United States* dissent, Justice Gray said that the language was:

a clear and express recognition of the right of the jury in all criminal cases to determine the law and the fact. The words “direction of the court,” as here used, like the words “opinion and directions” in the English libel act, do not oblige the jury to adopt the opinion of the court, but are merely equivalent to instruction, guide or aid, and not to order, command, or control. The provision is an affirmance of the general rule, and not by way of creating an exception; and the reason for inserting it probably was that the right of the jury had been more often denied by the English courts in prosecutions for seditious libels than in any other class of cases.³⁰⁶

So, we know the thinking that influenced the Founders, the history that they knew, the definitions of jury they used, their comments on juries, and the constitutional and statutory implementations of their ideas. How did they put these ideas into practice?

F. Jury Practices of the Founders

1. The Impeachment of Samuel Chase

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Sparf*, 156 U.S. at 161 (Gray, J., dissenting).

The 1805 impeachment trial in the U.S. Senate of Supreme Court Justice Samuel Chase offers insight into the practices and thoughts of the Founders on criminal trial jury issues. The first of the eight articles of impeachment in the Chase case contained charges relating to jury practice in the trial of John Fries.³⁰⁷ In Bethlehem, Pennsylvania in 1798, Fries led a group of armed men who released prisoners jailed for threatening federal property tax assessors.³⁰⁸ Fries was tried and convicted for the capital offense of treason, but he was given a new trial because of a possibly biased juror.³⁰⁹ The impeachment article concerned the second trial before Justice Chase and a district judge, Judge Peters in Philadelphia.³¹⁰

The legal issue in the case was the definition of treason. Fries' attorneys argued that violent opposition to one statute did not constitute levying war and therefore was not treason.³¹¹ Before the jury was called, Justice Chase told Fries' Philadelphia attorneys, William Lewis and Alexander Dallas, that "he had been informed that in the previous trial of the case there had been a great waste of time in making speeches on topics that had nothing to do with the business at hand, and in reading common-law cases."³¹² To prevent this, he handed the attorneys a written opinion on the definition of treason, which he planned to read to the jury. Without reading the opinion, the attorneys said they could better render service to their client by withdrawing from the case. In his testimony before the Senate, Lewis (one of the members most resistant to the libel clause in the 1790 Pennsylvania convention) averred that Justice Chase had "said that the judges were the final authority on the law, and if counsel thought they were wrong, counsel must address themselves to the court for that purpose, and not to the jury." Even though Justice Chase

³⁰⁷ WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 48, 59 (1992).

³⁰⁸ *Id.* at 48.

³⁰⁹ *Id.* at 61.

³¹⁰ *Id.*

³¹¹ *Id.* at 61-62.

³¹² *Id.* at 63.

promised the next day to allow the defense to present its case without interference, Lewis told Chase that he thought that Fries stood a better chance of a pardon from President Adams if he was convicted without counsel.³¹³ Indeed, Fries did proceed without counsel, was convicted and sentenced to death, and then pardoned by President Adams.³¹⁴

The second and third parts of the article of impeachment relating to the Fries trial are applicable to this paper:

2. In restricting the counsel for the said Fries from recurring to such English authority as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client:
3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as wells as on the facts, which was to determine his guilt, or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give³¹⁵

These two complaints show considerable support by the Founders for 1) including the right of counsel to argue the law to the jury as part of the right to assistance of counsel; and 2) the right of the jurors to determine questions of law, including the right the right to hear argument on the law from counsel.

Chase's defense was *not* that juries have no right to determine matters of law. Rather, he offered the written document which he originally intended to be read to the jury as proof that he agreed with the concept and planned to so instruct. His planned address to the jury included the following:

It is the duty of the court in this, and in all criminal cases, to state to the jury, their opinion of the law arising on the facts; but the jury are to decide on the present,

³¹³ *Id.*

³¹⁴ *Id.* at 49.

³¹⁵ ASHER C. HINDS, ED., 3 HINDS' PRECEDENTS 722 (1907) *available at* <http://www.gpo.gov/congress/house/precedents/hinds/hinds.html>.

and in all criminal cases, both the law and the facts, on their consideration of the whole case.³¹⁶

Probably because of this exculpatory evidence, the vote on the article was 16 in favor of conviction and 18 for acquittal. This charge and the defense are powerful evidence that the Framers thought the jury had a right to judge the law as well as the facts, that the assistance of counsel included the right to argue the law to the jury, and that the practice of jury instruction in criminal cases was to inform the jury of their right to determine the law.

But that argument becomes murkier when we learn of Justice Chase' thoughts on what was meant by the jury deciding the law and facts in the sedition trial of James Callender in Virginia in 1800.³¹⁷ In that trial, Callender's counsel, Mr. Wirt, said, "Since the jury have a right to consider the law, and since the Constitution is law, the conclusion is certainly syllogistic that jury have a right to consider the Constitution."³¹⁸ Justice Chase strongly disagreed, saying, "It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law."³¹⁹

Justice Chase went on at length, expressing perfectly the primary fear of many members of the judiciary which hate jury judging of law, "If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control."³²⁰ By 1800, Justice Wilson had passed away.³²¹ But Justice Wilson's view "that the supreme or sovereign

³¹⁶ REHNQUIST, *supra* note 307, at 67.

³¹⁷ *Trial of James Thompson Callender, for a Seditious Libel* (1800), reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 688 (Burt Franklin 1970) (1849) (cited in *Sparf v. Hanson*, 156 U.S. 51, 70 (1895)).

³¹⁸ *Id.* at 710.

³¹⁹ *Id.* at 713.

³²⁰ *Id.* at 714.

³²¹ Infoplease, <http://www.infoplease.com/ipa/A0101281.html>.

power of the society resides in the citizens at large³²² is in direct opposition to Justice Chase's fear that the people will control. Justice Chase continued:

For if, as is contended, the jury in criminal cases are not bound to take the law from the court, it is impossible to deny their absolute right in a case depending entirely upon an act of Congress, or a statute of a State, to determine, upon their own responsibility whether that act or statute is or is not law, that is, whether it is or is not in violation of the Constitution.³²³

The fear of Justice Chase, of course, was the goal of the other Founders as evidenced by their quotes in the other parts of this paper and their ideology as Real Whigs.

The Chase impeachment trial added two other interesting pieces of evidence to this discussion regarding arguments to the jury and jury instructions. Professor Stanton Krauss wrote:

William Lewis and Edward Tilghman, two of Pennsylvania's best lawyers, . . . spoke as witnesses against Chase They told the Senate that, in their vast experience in Pennsylvania's courts, lawyers argued the law to juries in criminal cases. . . . Tilghman went on to remark that (possibly after expressing an opinion on the law) the judges instructed these juries that the juries were the judges of law and the facts.³²⁴

2. Trials and Instruction to the Jury

The first major criminal trial reported in the courts of the United States resulted in a jury nullification.³²⁵ In 1793, not long after the initial American euphoria over the French Revolution, Gidron Henfield commissioned his schooner to France as a private ship-of-war and attacked British vessels. The English minister demanded Henfield's arrest and President Washington and

³²² WILSON, *supra* note 256. (Text at Part III.D.3.)

³²³ *Trial of James Thompson Callender, for a Seditious Libel* 688 (1800), reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 718 (Burt Franklin 1970) (1849).

³²⁴ Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 174 (1998). Stanton Krauss is Professor of Law, Quinnipiac College. *Id.* at 111.

³²⁵ *Trial of Gidron Henfield, for Illegally Enlisting in a French Privateer* (1793), reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49, 88 (Burt Franklin 1970) (1849)

his cabinet, seeking to avoid war with Great Britain, pressed charges against Henfield.³²⁶ His defense told the jury that there was no common or positive law justifying the charge.³²⁷ The prosecutor made the case that Henfield violated the law of nations which is the law of the United States.³²⁸ Supreme Court Justices James Wilson and James Iredell served with Judge Peters on the judicial panel.³²⁹ Justice Wilson started his charge to the jury:

This is, gentlemen of the jury, a case of first importance. Upon your verdict the interests of four millions of your fellow-citizens may be said to depend. But whatever be the consequence, it is your duty, it is our duty, to do only what is right. . . .

The reporter described Justice Wilson's final charge:

Remarking, that the jury, in a general verdict, must decide both law and fact, but that this did not authorize them to decide it as they pleased; they were as much bound to decide by law as the judges: the responsibility was equal upon both.³³⁰

In 1794 in *Georgia v. Brailsford*, Chief Justice Jay leading a panel consisting of Justices Wilson, Cushing, Blair, and Paterson, gave the jury instruction quoted above in Part III.2.1. In 1795 in *Bingham v. Cabot*, Supreme Court Justice James Iredell said:

It will not be sufficient to remark, that the court might charge the jury to find for the Defendant; because, though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.³³¹

In 1799, Justice Iredell made a charge to a grand jury in which he took a large amount of time addressing the arguments for and against the constitutionality of "the Alien and Sedition acts."³³² This strongly implies that Justice Iredell thought it the province of the grand jury to no bill

³²⁶ *Id.* at 1.

³²⁷ *Id.* at 59-60.

³²⁸ *Id.* at 80.

³²⁹ *Id.* at 83.

³³⁰ *Id.* at 83-88.

³³¹ *Bingham v. Cabot*, 3 U.S. 19, 33 (1795) (quoted in Con rad, *supra* note 77, at 53).

³³² *Trial of the Northhampton Insurgents*, in FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES* 458, 467-79 (1970 ed.) (1849).

because they thought a law unconstitutional. Otherwise, he would have instructed them that such analysis was not in their purview.

In 1798, however, the instruction given by Supreme Court Justice William Paterson was different. In October of that year, United States Congressman Matthew Lyon of Vermont, a Republican, was charged with violating the recently passed federal Sedition Act for criticizing President Adams.³³³ Congressman Lyon was not represented by counsel and was unsuccessful in striking all jurors who he knew to be hostile to him. He freely admitted to printing and saying the things he had about President Adams. After the prosecution had made its case, the judicial panel, led by Justice Paterson, began charging the jury. Lyon politely asked the court for an opportunity to present his own defense. He spoke for two hours, arguing primarily that the Sedition Act was unconstitutional, without interruption by the court. But, Justice Paterson told the jury that they should ignore Lyon's constitutional challenge, stating, "[U]ntil this law is declared null and void by a tribunal competent for the purpose, its validity cannot be disputed." Congressman Lyon served a four month prison sentence, but was overwhelmingly re-elected while in prison.³³⁴

In 1799 in the trial of Isaac Williams for accepting a commission on a French vessel and serving against Great Britain, Federal District Judge Law "expressed doubts as to the legal operation of the evidence; and gave it as his opinion, that the evidence, and the operation of the law thereon, be left to the consideration of the jury." Chief Justice Oliver Ellsworth, sitting with Judge Law, told the jury that he thought the facts offered by the defense were "totally irrelevant"

³³³ WILLIAM J. WATKINS, JR., RECLAIMING THE AMERICAN REVOLUTION 45 (2004).

³³⁴ *Id.* at 45-47.

having “no operation of law” and that “the jury ought not to be embarrassed or troubled with them; but by the constitution of the court the evidence must go to the jury.”³³⁵

In an 1804 New York state case in which Harry Crosswell was charged with libeling President Jefferson, the trial court restricted the jury to delivering a special verdict, and Alexander Hamilton argued for a new trial to a panel that included four justices.³³⁶ Hamilton argued:

The Chief Justice misdirected the jury, in saying they had no right to judge of the intent and of the law. In criminal cases, the defendant does not spread upon the record the merits of the defence, but consolidates the whole in the plea of not guilty. This plea embraces the whole matter of law and fact involved in the charge, and the jury have an undoubted right to give a general verdict, which decide both law and fact . . .

It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions. It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both the law and of the criminal intent.³³⁷

In his dissent in *Sparf v. United States*, Justice Gray quoted these parts of Hamilton’s arguments:

That in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, is entrusted with the power of deciding both law and fact. . . .

That in criminal cases, nevertheless, the court are the constitutional advisers of the jury in matter of law; who may compromit their conscience by lightly or rashly disregarding that advice, but may still more compromit their consciences by following it, if exercising their judgments with discretion and honesty they have a clear conviction that the charge of the court is wrong.³³⁸

³³⁵ Trial of the Isaac Williams, in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 652, 653-54 (1970 ed.) (1849).

³³⁶ CONRAD, *supra* note 77, at 48-49.

³³⁷ *People v. Crosswell*, 3 Johns. Cas. 336, 346 (1804) (quoted in CONRAD, *supra* note 77, at 49).

³³⁸ *Sparf v. United States*, 156 U.S. 51, 147-48 (1895) (Gray, J., dissenting).

Two of the four judge panel, Justices Kent and Smith Thompson (later a U.S. Supreme Court Justice), agreed with Hamilton. Justice Lewis, who had presided over the original trial, and Justice Brockholst Livingston (later a U.S. Supreme Court Justice) disagreed.³³⁹

In 1806, Judge Talmadge said to the jury in the Circuit Court of the United States for the District of New York:

You have heard much said upon the right of a jury to judge of the law as well as the fact. . . . The law is now settled that this right appertains to a jury in all criminal cases. They unquestionably may determine upon all the circumstances, if they will take the responsibility and hazard of judging incorrectly upon questions of mere law. But the jury is not therefore above the law. In exercising this right, they attach to themselves the character of judges, and as such are as much bound by the rules of legal decision as those who preside upon the bench.³⁴⁰

In 1808, Federal District Judge Davis wrote:

A comparison of the law with the constitution is the right of the citizen. Those who deny this right, and the duty of the court resulting from it, must regard with strange indifference, a precious security to the individual, and have studied, to little profit, the peculiar genius and structure of our limited government.³⁴¹

Despite this language, Judge Davis attempted to keep defense attorney Samuel Dexter from arguing that the act in question (the Embargo Act) was unconstitutional to the jury. Dexter persisted in the face of the threat of contempt to so argue, and the jury acquitted. Dexter expressed “that the attorney had a moral obligation to his client to argue the law to the jury.”³⁴²

In his *Sparf v. United States* dissent, Justice Gray listed three other federal district cases in the early 1800’s where judges instructed the jury on their power to judge the law.³⁴³ Professor Nelson, who studied both criminal and civil American cases during the founding era, said, “[I]n the cases in which they sat, eighteenth-century juries, unlike juries today, usually possessed the

³³⁹ *Id.* *Sparf v. United States*, 156 U.S. 51, 72 (1895).

³⁴⁰ *Sparf*, 156 U.S. at 162 (Gray, J. dissenting) (quoting TRIALS OF SMITH AND OGDEN, 236-37).

³⁴¹ *United States v. The William*, 28 F.Cas. 614, 615 (D. Mass. 1808) (No. 16,700).

³⁴² Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 175 n.31 (1964-65) (citing WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 342 (1926)).

³⁴³ *Sparf*, 156 U.S. at 163-64 (Gray, J., dissenting).

power to determine both law and fact.”³⁴⁴ Professor Krauss, whose article questions the historical evidence of jury law-finding (and is discussed *infra* in Part IV.A.), admitted the slightly exaggerated accuracy of the comment by Daniel Chipman: “[F]rom the ‘infancy’ of [Rhode Island], its judges sat ‘not for the purpose of deciding causes, for the Jury decided all questions of law and fact; but merely to preserve order, and to see that the parties had a fair chance with the Jury.’”³⁴⁵

So, even though there were exceptions, the majority of the evidence we have shows founding era judges instructing juries of their right to law-judge.

3. Prohibition Against Striking Jurors With Opinions of the Law

One practice of the Founders deserves to be followed today, and provides more proof of founding era support of jury judging of law — the refusal to strike jurors for cause because they expressed an opinion about the law. In 1788, the Supreme Court of Connecticut affirmed a trial court’s refusal to strike a juror in a slave’s suit for freedom.³⁴⁶ The reason stated by the defense for striking the juror was for having the opinion “that ‘no negro, by the laws of this state could be holden a slave.’”³⁴⁷ The Supreme Court held that “[a]n opinion formed and declared upon a general principle of law, does not disqualify a juror to sit in a cause in which that principle applies.”³⁴⁸ Nelson wrote, “Jurors, the Connecticut court believed, were ‘supposed to have opinions of what the law is,’ since they sat as ‘judges of law as well as fact.’”³⁴⁹

4. Counsel Argued Law to the Jury

³⁴⁴ Nelson, *supra* note 248, at 905.

³⁴⁵ Krauss, *supra* note 324, at 191 (quoting DANIEL CHIPMAN, 1 D. Chipman 18 (1824)).

³⁴⁶ Nelson, *supra* note 248, at 917.

³⁴⁷ *Id.* (citing *Pettis v. Warren*, Kirby 426, 427 (Conn. 1788)).

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 917-18.

Nelson, discussing American eighteenth-century legal practice, said “counsel . . . on summation could argue the law as well as the facts, at least in Georgia, Massachusetts, New York, Pennsylvania, South Carolina and Virginia, and probably in other colonies for which no direct evidence is available.”³⁵⁰ Note that the attorneys in *Henfield’s Case* argued the law to the jury. And even though Justice Paterson told the jury that they should defer on issues of constitutionality to the judiciary, he allowed Matthew Lyon to argue the constitutionality of the Sedition Act to the jury.³⁵¹

In an 1802 federal criminal case (*Virginia v. Zimmerman*), Abigail and John Adams’ nephew and Adams appointee, D.C. Circuit Judge William Cranch, disagreed with a trial court because it refused to allow counsel to argue a point of law to the jury because “the court having decided the point of law, he [counsel] must not argue it before the jury.”³⁵² The reporter summarized the dissent as follows:

CRANCH, Circuit Judge, contra, observed that he held it to be an important point in favor of the liberties of the people that the jury, in criminal cases, had a right to decide the law as well as the facts. And if they were to decide the law, it seemed to follow that they had a right to hear the arguments of counsel upon the law; especially as the opinion of the court was not given in this, but in another case, before a different jury.³⁵³

The judges in the majority were Jefferson-appointee Circuit Chief Judge William Kilty, a Revolutionary War veteran whose only notable legal experience before serving was to compile the laws of Maryland, and Adams-appointee Judge James Marshall, the brother of John Marshall.³⁵⁴

³⁵⁰ Nelson, *supra* note 248, at 911. Nelson’s article includes substantiation for each state.

³⁵¹ See Part III.F.2 *supra*.

³⁵² *Virginia v. Zimmerman*, 28 F. Cas. 1227 (C.C.D.C. 1802) (No. 16,968) (discussed in Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. Crim. L. & Criminology 111, 136-37, 214 nn.112, 114-15 (1998));

³⁵³ *Virginia v. Zimmerman*, 28 F. Cas. 1227 (C.C.D.C. 1802) (No. 16,968).

³⁵⁴ JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 7-8* (2001). Judge Cranch served 54 years on the D.C. Circuit. *Id.* at 4.

Statements by two Founders imply long support for counsel arguing law to the jury as a right. In discussing the rights of a criminal defendant under the Sixth Amendment, St. George Tucker stated that the defendant “shall have the assistance of counsel for his defense; . . . not as a matter of grace, but of right; . . . not for his partial defense, upon a point of law, but for his full defense, both on the law, and the evidence”³⁵⁵ Zephaniah Swift, discussing England and English law, said:

Our ancestors, when they first enacted their laws respecting crimes, influenced by the illiberal principles which they had imbibed in their native country, denied counsel to prisoners to plead for them to anything but points of law. It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered.³⁵⁶

These quotes do not state to whom points of law should be argued, but given Justice Swift’s comment in the same work about juries judging law, it would follow that he meant that counsel should argue points of law to the jury. Justice Tucker and Justice Swift were correspondents, so it is likely that Justice Tucker meant the same.³⁵⁷

5. Triors and Challenge to the Favor

Professor Nancy King wrote part of a paper on jury nullification on a jury practice of the Founders which she says “fits well with the separation of powers theory of nullification.”³⁵⁸ The practice was the use of triors³⁵⁹ in the selection of jury members. Professor King wrote:

³⁵⁵ Tucker, *supra* note 269, at 243. St. George Tucker was a Revolutionary War veteran (serving at Guilford Courthouse and Yorktown), a professor of law at William and Mary, a Supreme Court Justice in Virginia, and a federal District Judge appointed by President Madison. He took his professorial position at William and Mary from George Wythe, Thomas Jefferson’s law professor. Tucker’s primary contribution to the law was his adaptation of Blackstone to American law called a VIEW OF THE CONSTITUTION OF THE UNITED STATES. Published in 1803, it was “the first extended, systematic commentary on the Constitution.” *Id.* at vii-x.

³⁵⁶ ZEPHANIAH SWIFT, 2 A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 398-99 (1796); available at http://press-pubs.uchicago.edu/founders/documents/amendV-VI_criminal_processes29.html.

³⁵⁷ TUCKER, *supra* note 269, at 404 n.3.

³⁵⁸ Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 467-73 (1998). Professor King is the Lee S. and Charles A. Speir Professor of Law at Vanderbilt University Law School. <http://law.vanderbilt.edu/faculty/king.html>.

At common law, a party could challenge a potential juror by alleging that the venireman possessed an undeclared belief that might affect his verdict. The challenge was termed a “challenge to the favor.” When contested, this allegation of bias was tried in open court, not before the judge, but before “triors” . . . –two or three laymen who listened to the testimony and determined whether the challenged venireman actually possessed the belief alleged by the challenger.³⁶⁰

The decision of the triors was not reviewable by the court. Professor King wrote, “[T]his system offers some support for the idea that the triors, as jurors, served to check the ability of the judge and prosecutor to manipulate jury outcomes through juror challenges.”³⁶¹ The practice was abandoned over the course of the nineteenth century, along “with a general shift of power away from jurors to judges.”³⁶² Professor King knows of no one ever claiming that the denial of this practice alone violated the right to a jury trial.³⁶³

So, it appears from the evidence that vast majority of known cases of the founding era (save the exceptions for which Samuel Chase was impeached, the 1802 *Virginia v. Zimmerman* case in which Judge Cranch dissented, and the Emargo Act case of *The William* in 1808) allowed defense counsel to argue law to the jury. And a majority of founding era courts instructed the jury that they had a right to determine law as well as the facts. We know of at least one state that did not allow strikes for cause because of expressed opinions of the merits of the law during voir dire and we know of no states that contradicted that practice. The philosophy, statements, and actions of the vast majority of those Founders about whom we have information are consistent in their respect for jury law-judging.

IV. Arguments that the Founders Opposed Jury Power and Subsequent History

A. Arguments That the Founders Opposed Jury Power

³⁵⁹ TRIOR, TRIER, *n.* [from *try*.] In law, a person appointed by the court to examine whether a challenge to a panel of jurors, or to any juror, is just. The *triors* are two indifferent persons. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis in original).

³⁶⁰ King, *supra* note 358 at 467-68.

³⁶¹ *Id.* at 468-69.

³⁶² *Id.* at 471-72.

³⁶³ *Id.* at 472.

1. More About the Originalist Method

Justice Scalia's exposition of the originalist method leaves out other questions that would be extremely helpful in resolving the issues addressed in this paper. First, what is the evidentiary standard when arguing that a procedure deserves Constitutional protection? Second, when determining the Constitutionality of legal procedures, whose opinions count — only the judiciary of the founding era, or the popular sentiments of the people in whose name the Constitution was written? Third, how pervasive does adherence to and practice of a doctrine in the founding era have to be, to be deemed a doctrine that was accepted by the Founders? Does there have to be unanimity of thought of those who spoke, wrote, or acted on the doctrine? Or, will a majority or a super majority do?

As discussed above, the undisputed goals of the Founders were liberty and justice. To be true to the goals of the Founders, an evidentiary standard that works toward those goals is required. Professor Randy Barnett proposes that originalist jurisprudence should use a standard in judging law that puts the burden on government before allowing liberty to be denied. He calls this a presumption of liberty.³⁶⁴ But in this case we are not judging a statute. Rather, the burden is on those making the case for a changed Constitutional interpretation. The right evidentiary standard for originalists should be that a doctrine purported to produce liberty and justice should be proven by a preponderance of evidence.

Since the Constitution is a document of “We the People,” originalist jurisprudence should not limit itself just to the opinions of the founding era judiciary. This is especially true when considering the allocation of power between the judiciary and the people. A document of the

³⁶⁴ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253-69 (2004); Randy Barnett is currently the Austin B. Fletcher Professor at the Boston University School of Law. <http://www.bu.edu/law/faculty/profiles/barnett/index.html>.

people should be evaluated by what the people (or those people who we have record of speaking on the topic) thought in the founding era.

Finally, no doctrine in any era is unanimously supported by the people of that era. Therefore, the test of adherence to a doctrine for an era has to be some sort of majority of the commentary available. Extra weight should be given to prominent leaders at seminal moments in the founding era. Those due extra weight are Madison, Hamilton, and Jay because of their prominence in advocating the Constitution; John Adams and Jefferson because of their leadership roles in the Declaration of Independence and their Presidencies; signers of the Declaration and the Constitution; the first Supreme Court Justices; and Nathaniel Webster because of his unique relationship to the Constitutional Convention.

These rules of interpretation – preponderance of the evidence, inclusion of more than just comments by the judiciary, and simple majority of the commentary and action with extra deference to prominent leaders – will be used as we examine arguments against jury law-judging.

2. Dueling Dicta in *Sparf v. United States*

Most of the arguments against jury judging of the merits of the law are based not in originalist jurisprudence, but rather on philosophical opposition to the doctrine. This paper will focus primarily on the arguments that claim that the Founders did not support jury power.

The most famous American debate over jury nullification was between Justice John Marshall Harlan and Justice Horace Gray in *Sparf v. United States*, 156 U.S. 51 (1895). *Sparf's* holding has since been abrogated by *Beck v. Alabama*, 447 U.S. 625 (1980). (*Sparf* held that it is not error for a judge to fail to instruct the jury about the option of finding a lesser included charge from a set of facts.)³⁶⁵ But the dicta of Justice Harlan's majority opinion opposing jury

³⁶⁵ *Sparf v. United States*, 156 U.S. 51, 63-64 (1895).

power continues to influence lower courts. Both Justice Gray in the dissent and Justice Harlan wrote long, scholarly opinions focusing on the history of jury power.

Justice Harlan employed a number of arguments against the concept of jury law-judging as a right. A good part of the argument is a discussion of the string of precedents of post-founding era trending toward hostility to jury law-judging, which of course is irrelevant when using the originalist method. Justice Harlan's first argument was to attack the jury instruction of Justice Jay in *Georgia v. Brailsford* quoted above in Part III.D.1.³⁶⁶ He quoted Supreme Court Justice Benjamin R. Curtis in *United States v. Morris*,³⁶⁷ calling the case "an anomaly" because it was a civil case.³⁶⁸ Harlan quoted Justice Curtis with approval when Curtis questioned the accuracy of the reporting of the case. The question about the case being civil was answered in Part III.D.1. Questioning the accuracy of the report of a case cannot be considered persuasive or proper jurisprudence. Nonetheless, Justice Gray gave several reasons why the report was accurate in his dissent, including the fact that the reporter was the plaintiff's counsel in the case, that the presiding judge reviewed each report, and that a newspaper contemporaneously reported the same language.³⁶⁹

Justice Harlan discussed the jury instruction given by Justice Wilson in *Henfield's Case*.³⁷⁰ (See Part III.F.2). Justice Harlan argued that even though Justice Wilson told the jury that they could "decide both law and fact" that his qualifying statement that "it is the duty of the court to explain the law to the jury, and to give it to them in direction" meant that it was the "duty of the jury to apply the facts of the case the law as given to them by the court 'in

³⁶⁶ *Id.* at 64-65.

³⁶⁷ *United States v. Morris*, 26 F. Cas. 1323 (C.C.D.Mass. 1851) (No. 15,815).

³⁶⁸ *Sparf*, 156 U.S. at 65.

³⁶⁹ *Id.* at 156-57 (Gray, J., dissenting).

³⁷⁰ *Id.* at 68-69 (quoting *Trial of Gidron Henfield, for Illegally Enlisting in a French Privateer* (1793), reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49, 84, 86-88 (Burt Franklin 1970) (1849)).

direction.”³⁷¹ Justice Harlan cited Justice Wilson’s lectures (without specificity) to say that Justice Wilson only meant the words of determination of both law and fact to support a general verdict jointly considering law and fact, “not that the jury could ignore the directions of the court, and take the law into their own hands.”³⁷² Justice Harlan must have missed Justice Wilson’s lecture quoted above (Part III.D.1.) stating that, “the laws of [our] country . . . cannot be insinuated . . . [to] advise [a juror] to belie his conscience.”³⁷³ And Wilson saying, “Suppose that . . . a difference of sentiment takes place between the judges and the jury, with regard to a point of law: . . . what must the jury do? — The jury must do their duty, and their whole duty, they must decide the law as well as the fact.”³⁷⁴ Justice Harlan also missed the quote by Justice Iredell above in Part III.F.2 in *Bingham v. Cabot*. Justice Gray pointed out these discrepancies, and furnished the entire quote of Justice Wilson’s charge to the jury.³⁷⁵ (See Part III.F.2 above.) Justice Gray said, “This statement . . . is quite inconsistent with the idea that the jury were bound to accept the explanation and direction of the court in the matter of law as controlling their judgment.”³⁷⁶

Justice Harlan quoted Justice Samuel Chase in the *Callender* sedition case (a sampling of which is in Part III.F.1 above) opposing the notion that judging the law meant judging the constitutionality of the law.³⁷⁷ Justice Harlan also quoted another judge who claimed to have heard Justice Thompson express that he had come to question later in life his concurrence with Justice Kent’s protection of jury law-judging in his opinion in *People v. Crosswell*. He also

³⁷¹ *Sparf*, 156 U.S. at 68-69.

³⁷² *Id.* at 69.

³⁷³ WILSON, *supra* note 240.

³⁷⁴ *Id.* at 540.

³⁷⁵ *Sparf*, 156 U.S. at 158-59 (Gray, J., dissenting) (quoting *Trial of Gidron Henfield, for Illegally Enlisting in a French Privateer* (1793), reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49, 84, 87-88 (Burt Franklin 1970) (1849)).

³⁷⁶ *Sparf*, 156 U.S. at 158 (Gray, J. dissenting).

³⁷⁷ *Sparf*, 156 U.S. at 70-72.

quoted a letter by Justice Thompson at the end of his life stating opposition to juries disregarding judicial instructions in criminal cases.³⁷⁸

The response to this is that while Justice Chase, as a signer of the Declaration, gets some extra weight in the debate, Justice Chase does not get as much “founding era weight” as Hamilton, or Adams, or Jefferson. Justice Chase is in the minority of those Founders from whom we have quotes. Justice James Wilson said in his lectures:

[W]hoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature [W]hen a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge³⁷⁹

Further, the weight of Chase’s opinion has to be greatly reduced by the fact of his impeachment, even if his comments on juries judging the Constitution were not part of his impeachment. As to the split in the opinion by the New York state justices in *Croswell*, the two (or three) justices in *Croswell* are still in the minority in the era, and Hamilton carries more weight as spokesman for the beliefs of the founding era than they.

Justice Harlan quoted Justice Curtis in *United States v. Morris* when he argued that the wording of the Sedition Law which declared that “the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases” did not mean that juries could judge law in other cases. “I draw from this the opposite inference;” Justice Curtis said, “for where was the necessity of this provision if, by force of the Constitution, juries, as such, have both the power and the right to determine all questions in criminal cases; and why are they to be directed by the court?”³⁸⁰ The House debate (see Part III.E. above) over the jury right language is the best explanation of why it was included. The words were included

³⁷⁸ *Id.* at 72. For more on *Croswell*, see *supra* Part III.F.2.

³⁷⁹ WILSON, *supra* note 29, at 1:186 (quoted in AKHIL REED AMAR, *THE BILL OF RIGHTS* 99 (1998)).

³⁸⁰ *Sparf*, 156 U.S. at 75-76.

for the same reason the Bill of Rights was added to the Constitution – to be doubly sure that past government oppressions would not be repeated in the future. The “direction of the court” phrase was included because it is proper that the jury hear the wisdom of the judge, even if they are not bound by it. (See Hamilton’s explanation of the role of the judge in *Croswell* in Part III.F.2. above.)

Justice Harlan argued that the act of Congress in 1802 which authorized circuit courts to raise questions of points of law to the Supreme Court for final resolution showed that juries should not judge the law. He asked rhetorically, “Now, can it be that, after a question arising in a criminal trial has been certified to the Supreme Court, and there finally decided . . . does the Constitution of the United States, which established a Supreme Court, intend that a jury may, as a matter of right, revise and reverse that decision?” He said that the act was “designed to effect one of the [Constitution’s] important and even necessary objects — a uniform exposition and interpretation of the law of the United States.”³⁸¹

Of course, if the people rule through the jury in the judiciary as they do through the vote in the legislature as John Adams says, the answer to Justice Harlan’s question is yes, at least on those issues that are mixed law and fact suitable for the jury. (Evidentiary rulings and other procedural issues, of course, are not normally within the power – or right – of the jury.) While uniform exposition and interpretation of the law is a worthy goal, that goal is not mentioned in the preamble to the Constitution as are the higher values of liberty and justice. Given their natural law worldview, the Founders would certainly have chosen an occasional chance at liberty and justice through jury nullification over a uniform application of a tyrannical law.

Justice Harlan cited Lord Mansfield’s decision in *Rex v. The Dean of St. Asaph* as proof that English common law was that juries do not have the right to judge the law, and that

³⁸¹ *Id.* at 76-77.

therefore the Founders did not believe in the right.³⁸² Of course, that 1783 case was decided after America split from Britain. And given the antipathy that the predominant Whigs in America had toward Lord Mansfield and his doctrine (discussed above in Part III.C.5.), originalists cannot rely upon Mansfield's statement of law as a basis for American constitutional interpretation.

Justice Harlan argued that “[t]he language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that ‘in many of the States the arbitrary temper of the colonial judges, holding office directly from the Crown, had made the independence of the jury in law as well as fact of much popular importance.’”³⁸³ The implication is that it is acceptable jurisprudence to modify the practices and views of the Founders when the current judiciary thinks that the assumed rationale of the Founders is no longer relevant. This, of course, is not an originalist position. Justice Gray's response to this was, “And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy.”³⁸⁴ James Ostrowski said that Justice Harlan “erroneously concludes that the founders' distrust of government extended only to colonial rule. The Constitution and the Bill of Rights argue to the contrary.”³⁸⁵

Justice Harlan posited that when the Founders discussed judging the law and the facts, they were simply talking about the nature of the general verdict that is compounded of law and fact determinations. “But,” he said, “this falls far short of the contention that the jury, in applying the law to the facts, may rightfully refuse to act upon the principles of law announced

³⁸² *Id.* at 77-78.

³⁸³ *Id.* at 89-90 (quoting FRANCIS WHARTON, CRIMINAL PLEADINGS AND PRACTICE § 806 (8th ed.)).

³⁸⁴ *Sparf*, 156 U.S. at 176 (Gray, J., dissenting).

³⁸⁵ Ostrowski, *supra* note 235, at 106-07.

by the court.”³⁸⁶ The statements of John Adams and Justice James Wilson in Part III.D.1 and Alexander Hamilton in Part III.F.2 discussing the jury’s duty to go against the direction of the court and the instruction by Justice John Jay in *Georgia v. Brailsford* show Justice Harlan to be wrong. The celebrated history of jury nullification that the Founders knew (documented above in Part III.C) was filled with cases where the juries went against the direction of the court on the law. And, finally, the Founders’ views on judging statute law by the standard of natural law and the numerous references to the conscience of the jury contradict Justice Harlan’s proposition.

Justice Harlan quoted several English cases ranging from the Sixteenth Century to well into the Nineteenth Century, including *Bushell’s Case* as supporting his position.³⁸⁷ The Zenger case, however, changed American practice, separating past and future English cases from the views of the Founders. English treatises commenting on English law which Justice Harlan also cites, especially those published after the founding era³⁸⁸ are also of no use to an originalist.

Justice Harlan concluded his opinion in *Sparf* with a long quote from the opinion of Justice Curtis about the importance of enforcing law that is unpopular in some localities:

To enforce popular laws is easy. But when an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced, there then becomes a strain upon the administration of justice, and few unprejudiced men would hesitate as to where that strain would be most firmly borne.³⁸⁹

These stirring words by Justice Curtis about a “just cause” were to enforce an act extremely unpopular in Massachusetts in 1851 – the Fugitive Slave Act of 1850.³⁹⁰ It is unjust law such as this for which the Founders would have thought jury nullification instruction and jury

³⁸⁶ *Sparf*, 156 U.S. at 90.

³⁸⁷ *Id.* at 90-99.

³⁸⁸ *Id.* at 94-96.

³⁸⁹ *Id.* at 106-07 (quoting *United States v. Morris*, 26 F.Cas. 1323, 1336 (C.C.D.Mass. 1851) (No. 15,815)).

³⁹⁰ *Morris*, 26 F.Cas. at 1329. The defendant being prosecuted, Robert Morris, was the first black attorney in Boston. Morris, a member of the Abolitionist Committee of Vigilance and Safety, was accused of assisting a runaway slave, Shadrach, in escaping from one of the first enforcements of the Fugitive Slave Act of 1850. Middlebrooks, *supra* note 262, at 400-405.

nullification the perfect remedy. John Adams, the lifelong enemy of slavery,³⁹¹ would have definitely approved of instructing the jury of their power to acquit using natural law principles and conscience in this case, despite the explicit constitutionality of the act. The conflicted slaveholder, Thomas Jefferson,³⁹² would no doubt have approved of jury law-judging in a Fugitive Slave Act case, as well.

Justice Harlan's opinion in *Sparf*, was not written from an originalist perspective. The tone of the opinion is one of a judge who has a viewpoint that he wants to see put in place, and not one attempting to determine the intent of the Founders so that he can apply it. Justice Gray (joined by Justice George Shiras, Jr.) in the dissent, on the other hand, wrote an originalist opinion.³⁹³ Next, we turn to comments from academic commentators.

3. Academic Critics of Jury Law-Judging

Professor Stanton Krauss did extensive, original research on the practices of the Founders in jury law-finding.³⁹⁴ Professor Krauss' mission was to test what he called the "conventional wisdom" that "juries acquired the right to determine the law as well as the facts in colonial

³⁹¹ THOMAS G. WEST, *VINDICATING THE FOUNDERS: RACE, SEX, AND JUSTICE IN THE ORIGINS OF AMERICA* 5 (1997).

³⁹² *Id.* at 3. Jefferson's first draft of the Declaration accused George III of violating the natural rights of slaves. In 1779, he proposed a law in Virginia that would have gradually ended slavery. In 1784, he proposed a law that would have banned slavery in the Western territories. *Id.*

³⁹³ *Sparf*, 156 U.S. at 108-83 (Gray, J., dissenting). Justice Gray said:

The question of the right of the jury under the Constitution of the United States cannot be usefully or satisfactorily discussed without examining and stating the authorities which bear upon the scope and effect of the provisions of the Constitution regarding this subject. In pursuing this inquiry, it will be convenient to consider, first, the English authorities; secondly, the authorities in several Colonies and States of America; and lastly, the authorities under the national government of the United States. *Id.* at 114.

But the question what are the rights, in this respect, of persons accused of crime, and of juries summoned and empaneled to try them, under the Constitution of the United States, is not a question to be decided according to what the court may think would be the wisest and best system to be established by the people or by the legislature; but what, in the light of previous law, and of contemporaneous or early construction of the Constitution, the people did affirm and establish by that instrument. *Id.* at 169.

³⁹⁴ Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. CRIMINOLOGY 111 (1998). Stanton Krauss is Professor of Law at Quinnipiac University School of Law. <http://law.quinnipiac.edu/x550.xml?School=&Dept=&Person=560>.

times . . . ” by reviewing records of colonial cases in detail.³⁹⁵ Krauss said, “if American criminal juries had this right from colonial times until the mid-nineteenth century, . . . a powerful originalist argument could be made that the criminal jury’s right to determine the law is of constitutional dimension.”³⁹⁶ His conclusion, however, was strongly worded:

[T]he public records I have studied do not support the conventional wisdom. . . . For the most part, however, we just don’t know enough to say what lawfinding authority colonial criminal juries had. . . . It is important to note that the evidence reviewed . . . quite strongly indicates that these juries had no right to nullify laws they deemed [in]valid. Indeed, there is no indication that any colonist even suggested that such authority existed.³⁹⁷

Professor Krauss made his conclusion, not because of evidence to the contrary of the “conventional evidence,”³⁹⁸ but because he believes the evidence is insufficient. He made a significant epistemological error throughout his paper in that he repeatedly rejected relevant evidence because it was not conclusive. Relevant evidence is defined in the Federal Rules of Evidence as that “having a tendency to make the existence of [a] fact that is consequential to the determination of the action more probable . . . than it would without the evidence.”³⁹⁹ He also refused to make a conclusion based upon available evidence because he did not have all of the evidence he wanted.

Professor Krauss provides plenty of relevant evidence, however. He agrees that founding era juries heard debates about the law.⁴⁰⁰ He shows us the influence of William Penn on surrounding areas. He tells us that Penn may have been involved in writing the New Jersey

³⁹⁵ *Id.* at 116.

³⁹⁶ *Id.* at 120.

³⁹⁷ *Id.* at 122.

³⁹⁸ Krauss credits four original sources of the “conventional wisdom”: Samuel M. Quincy, *Powers and Rights of Juries*, in Josiah Quincy, Jr., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 558-72 (Samuel M. Quincy, ed., 1865); Justice Gray’s dissent in *Sparf v. United States*, 156 U.S. 51 (1895); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1938-39); and William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1977-78). *Id.* at 116, 118, n.43.

³⁹⁹ FED. R. EVID. 401.

⁴⁰⁰ Krauss, *supra* note 394, at 124.

Concessions & Agreements that was adopted as law in 1681 that included the following language:

There shall be, in every court, three justices or commissioners, who shall sit with the twelve men of the neighborhood, with them to hear all cases, and to assist the said twelve men of the neighborhood in case of law; and that they the said justices shall pronounce each judgment as they shall receive from, and be directed by the said twelve men, in whom only the judgment resides, and not otherwise . . . ⁴⁰¹

Professor Krauss thinks that “it’s not clear whether” this language incorporates Penn’s notion of jury law-judging.⁴⁰²

Professor Krauss also tells us about another Penn influence. One of Penn’s attorneys, Roger Mompesson, served as Chief Justice of the New York Supreme Court. Chief Justice Mompesson informed a jury in the trial of “Francis Makemie for unlicensed preaching that it had the right to decide the difficult legal questions posed by the case.” Professor Krauss does not “know what to make” of this because, “No London judge would have said what he did to Makemie’s jury.”⁴⁰³ If Krauss is right about English practice, this of course is relevant evidence showing the difference between American and English practice. Finally, Professor Krauss does cite several cases where the judiciary was hostile to jury law-finding, but all were before the Zenger case in 1735 and its influence.⁴⁰⁴

Professor Nancy J. King has published a paper that does a thorough job of examining the arguments for and against jury nullification and the implications if jury law-finding were to be

⁴⁰¹ *Id.* at 162 (citing Mary Maples Dunn, *Did Penn Write the Concessions?*, in THE WEST JERSEY CONCESSIONS AND AGREEMENTS OF 1675/77: A ROUND TABLE OF HISTORIANS 24-28 (New Jersey Historical Commission Occasional Papers No. 1, 1979.) and THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 396, 428 (Aaron Learning & Jacob Spicer, eds., 2d ed. 1881)).

⁴⁰² Krauss, *supra* note 394, at 162-63.

⁴⁰³ *Id.* at 165-66 (citing Francis Makemie, *A Narrative of a New and Unuauual American Imprisonment, of Two Presbyterian Ministers, and Prosecution of Mr. Francis Makemie One of them, for Preaching One Sermon at the City of New York* (1707) (Evans # 1300), *reprinted in* 4 TRACTS AND OTHER PAPERS RELATING PRINCIPALLY TO THE ORIGIN . . . OF THE COLONIES IN NORTH AMERICA, no. 4 (Peter Force, ed., 1846)).

⁴⁰⁴ Krauss, *supra* note 394, at 142-60.

recognized as a constitutional right.⁴⁰⁵ Her paper discusses that there are advocates on both sides of the constitutional issue, concluding that “historical accounts of their intent regarding the extent of the criminal jury’s power are inconclusive.”⁴⁰⁶ Professor King predicts “that a constitutional privilege protecting potential nullifiers from exclusion . . . would be a nightmare to administer.” This is because:

[n]one of the theories granting nullification independent protection contains within it any clue about the content of such a privilege; which reasons to acquit would be privileged by the Constitution and which would not. So long as there is any constitutionally protected sphere for nullification, judges will be plagued by the task of distinguishing satisfactory extra-legal reasons to acquit from unsatisfactory extra-legal reasons to acquit.⁴⁰⁷

Of course, originalists do not allow administrative difficulties to deter protection of those doctrines the Founders thought part of the Constitution. The difficulties of determining proper thinking by jurors are overcome by simply accepting the Founders’ notion of sovereignty of the people via juries, and not attempting to control jury acquittals. In the Founders’ view, controlling the jury judgments of acquittal are as illegitimate as controlling the judgment of the voters.

So, how did we get from the celebration and protection by the Founders of jury law-judging to the current hostility of today’s orthodoxy?

B. American Courts Since the Founding and Judicial Usurpation

Professor Mark DeWolfe Howe wrote a paper in 1938 chronicling the change in practice and viewpoint on jury law-finding from the days of the Founders to the late nineteenth

⁴⁰⁵ King, *supra* note 358.

⁴⁰⁶ *Id.* at 444.

⁴⁰⁷ *Id.* at 479.

century.⁴⁰⁸ He concluded his story of the change of thought from the Founders' protection of jury law-judging to the judiciary's current hostility by saying:

Although one may thus justify the court's denial of the jury's right to determine constitutional questions it may still be doubted, of course, whether the faith of judges in their own purity and constitutional thought has always been warranted. 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. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching the result.⁴⁰⁹

Joseph Story, as a Federal Circuit Judge (later United State Supreme Court Justice), started the trend away from the Founders' doctrine with a strongly worded discussion of jury law-judging in *United States v. Battiste*.⁴¹⁰ In a world-turned-upside-down view, Judge Story said in that case:

Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.⁴¹¹

Judge Story showed a complete lack of understanding of the concerns of defendants Lilburne, Penn, Mead, Sidney, the seven bishops, Zenger, and Dean Shipley. A perspective that truly understands the legitimate wishes of the criminal defendant is one that would allow the defendant the choice of arguing law-judging and the merits of the law to the jury, or not. Of course, defendants are protected from juries that convict with insufficient evidence by the fact that judges can overturn such convictions.

Professor Howe chronicled what happened when in 1855 in Massachusetts the legislature passed a statute saying that "in all trials for criminal offenses, it shall be the duty of the jury . . .

⁴⁰⁸ Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 595 (1938-39). Howe later was Professor of Law at Harvard University. He was secretary to Justice Oliver Wendell Holmes, 1933-1934 and Holmes's authorized biographer. http://www.beardbooks.com/readings_in_american_legal_history.html.

⁴⁰⁹ *Id.* at 616.

⁴¹⁰ *Id.* at 589-90.

⁴¹¹ *United States v. Battiste*, 24 F.Cas. 1042, 1043 (C.C.D.Mass. 1835) (No. 14,545).

to decide at their discretion, by a general verdict, both the fact and the law involved in the issue"412 Chief Justice Lemuel Shaw in *Commonwealth v. Anthes*, held that the district court had erred in allowing a question of law to go to the jury in an alcohol prohibition case.⁴¹³ Chief Justice Shaw's reasoning was that the jury law-judging act was declaratory and made no change in the law, and that "a statute, which should in explicit terms provide that the jury should have a power [to judge the constitutionality of the law] . . . would be repugnant to the Constitution of the Commonwealth."⁴¹⁴ There is no clearer example of judicial usurpation. Not only did Chief Justice Shaw usurp power from the jury to judge the merits of the law, he usurped the law-making power of the legislature.

A number of recent Supreme Court rulings have begun to re-establish the implementation of the Sixth Amendment as the Founders envisioned.⁴¹⁵ It is hoped that this paper will help practitioners make arguments that will enable the Supreme Court to take the next logical step: apply the originalist method to jury review of the merits of the law.

V. Conclusion

Originalist analysis shows that jury review of the merits of the law in criminal cases was an integral and essential element of the definition of jury as used in the body of the Constitution and in the Sixth Amendment. The natural law philosophy of the Founders is inextricably linked to jury review of the merits of the law and jury use of conscience to judge statute law by natural law. There is clear and convincing evidence that the Founders considered the practice of allowing defendants and their counsel to argue the merits of the law to the jury to be an integral

⁴¹² Howe, *supra* note 408, at 609 (quoting from Mass. Laws of 1855, c. 152).

⁴¹³ Howe, *supra* note 408, at 610 (citing *Commonwealth v. Anthes*, 5 Gray 185, 187 (1855)).

⁴¹⁴ *Id.* (citing 5 Gray at 222).

⁴¹⁵ E.g., *United States v. Gaudin*, 515 U.S. 506 (1995), *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Crawford v. Washington*, 541 U.S. 36 (2004), *Blakely v. Washington* 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005).

part of what was meant by a criminal trial by jury and the right to assistance of counsel as used in the Constitution. By a preponderance of the evidence, we can conclude that the Founders had no intention that jury panelists should be struck for expressing qualms about the law at issue in the case before them. We may also conclude that the Founders believed that jurors should be apprised of their right to judge the law in nuanced terms similar to those used by Chief Justice Jay. To be true to original meaning and intent, criminal trial juries should be recognized as the mechanism by which the people as sovereigns review and control the work of their government. And the abridgement of the right of the jury to judge the application of the law should be viewed as usurpation. The Founders would agree that restoring their jury practices will help - indeed, may be the only way - to secure the blessings of liberty to our posterity.