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THE JURY'S CONSTITUTIONAL JUDGMENT

*Nathan S. Chapman**

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ABSTRACT

Despite the early American jury's near-mythical role as a check on overreaching government agents, the contemporary jury's role in constitutional adjudication remains opaque. Should the jury have the right to nullify criminal statutes on constitutional grounds? Should the jury apply constitutional doctrine in civil rights suits against government officers? Should courts of appeals defer to the jury's application of constitutional law, or review it de novo?

This Article offers the first holistic analysis of the jury's role in constitutional adjudication. It argues that the Constitution's text, history, and structure strongly support the jury's authority to apply constitutional law to the facts of a case and offer solid, though mixed, support for the longstanding doctrine against the jury's right to nullify statutes on the basis of its own constitutional view.

The Article furthermore makes a case for the jury's unique "constitutional competence." Composed of a diverse group of lay people, the jury brings popular values to bear on the application of constitutional law. By deferring to the jury's reasonable constitutional judgments, courts make room for popular constitutional norms on a case-by-case basis without forgoing the responsibility to "say what the law is." The resulting constitutional construction is a middle ground between judicial supremacy and judicial abnegation that promises a more symbolically and substantively democratic constitutional law.

I. INTRODUCTION

The Supreme Court's authority to invalidate government action that conflicts with the Constitution, though entrenched and never seriously contested, perennially attracts a great deal of scholarly interest.[1] By contrast, the proper scope of the *jury's* role in constitutional adjudication is unclear and underexplored[2]—this despite the early American jury's near-mythical status as "the grand Bulwark of LIBERTY,"[3] and recent empirical

1. For a recent example, see John F. Manning, *Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014). *See generally* Larry Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

2. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 251 (7th ed. 2009).

3. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 49 (1986) (quoting Maryland Resolves, 28 Sept. 1765, *in* Maryland Votes and Proceedings 10 (Sept. 1765)). *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 73–76, 87 (1998); LARRY D. KRAMER, THE PEOPLE THEMSELVES 38, 109, 134–35, 157–61, 233 (2004); SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW 40, 51 (1990); 1

studies that emphasize the importance of social and political identity for one's constitutional judgment.[4]

Consider the following scenarios:

(1) A defendant prosecuted under a state law that prohibits publications tending to incite religious violence asserts rights under the Free Speech and Free Exercise Clauses of the First Amendment.[5] The judge disagrees. Should the judge instruct the jury that it has the right to decide the constitutional question? Should the jury feel free to ignore the judge's instruction and acquit on constitutional grounds?[6]

(2) A police officer shoots a fleeing suspect in the back. The victim sues the officer for excessive force, in violation of the Fourth Amendment.[7] At trial, who should apply the constitutional standard to the facts, the judge or the jury?[8]

(3) The jury issues a verdict against the officer. Should the court of appeals defer to the jury's constitutional judgment, as it would to any other jury verdict, or should it review the underlying facts de novo?[9]

The only one of these questions to which the Supreme Court has provided a clear answer is the first: the jury has no right to nullify legislation.[10] But even that rule is "under assault at the hands of Founding-era originalism."[11] The Court's decisions that pertain to the other two

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ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed., George Lawrence trans., 1969) (1835); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 51–52 (2007).

4. *See, e.g.*, Dan M. Kahan et al., *"They Saw A Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) [hereinafter Kahan et al., *Protest*]; Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) [hereinafter Kahan et al., *Whose Eyes*].

5. *See, e.g.*, Alexander Stille, *Why French Law Treats Dieudonné and Charlie Hebdo Differently*, THE NEW YORKER, Jan. 15, 2015 (explaining that French law does not prohibit "blasphemy" but does prohibit the provocation of religious hatred or violence).

6. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY ch. 11 (2012).

7. *See* Tennessee v. Garner, 471 U.S. 1, 5 (1985).

8. *See* Scott v. Harris, 550 U.S. 372, 386 (2007) (upholding summary judgment against civil rights plaintiff on the basis of video evidence). *See generally* Michael L. Wells, Scott v. Harris *and the Role of the Jury in Constitutional Litigation*, 29 REV. LITIG. 65, 75–76 (2009) (suggesting that *Scott* is ambivalent about whether constitutional torts should be decided by a jury).

9. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) (articulating the "constitutional fact" doctrine); *see also* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688–89 (1989) (analyzing a jury's application of constitutional doctrine under a more deferential standard); *see generally* the discussion *infra* at Part IV.B.

10. Sparf v. United States, 156 U.S. 51 (1895).

11. Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1142 (2011); *see also* United States v. Pabon-Cruz, 391 F.3d 86, 90–91 (2d Cir. 2004) (recounting District Court Judge Lynch's jury instruction that "the judgment of history" is sometimes that nullifying juries have "done the right thing"); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 239–242 (2005) (making a "strong argument" for an original understanding of the Constitution that the jury has the right to nullify statutes on constitutional grounds); *see generally* Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury:* Sparf *and* Hansen v. United States *Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004).

questions are in tension. While the Court has assumed that the jury has authority to apply at least some constitutional standards in tort cases,[12] it has also said that courts of appeals should review a jury's application of constitutional law de novo,[13] which would minimize the importance of the jury's constitutional judgment. As a result of these tensions, lower courts lack guidance about the jury's role in constitutional adjudication. Courts are split, for instance, on whether the jury should apply the substantive due process "shocks the conscience" doctrine[14] and various elements of the First Amendment government employee speech doctrine.[15] The few scholars to consider the issue have been reluctant to endorse a robust role for the jury.[16] No wonder "the proper assignment of authority regarding facts, law, and constitution in a jury trial" "remains a troubling area of American law."[17]

This Article is the first to provide a holistic account of the jury's role in constitutional adjudication.[18] Based on constitutional text, history, practice, structure, and the jury's unique constitutional competence as a source of popular constitutional values, the Article argues that (1) the jury is obligated to follow the court's instruction on constitutional law, and therefore has no "right" to nullify criminal law on the basis of its own views of the Constitution; (2) trial judges should ordinarily allow the jury to apply constitutional doctrine to the facts of a case; and (3) courts of

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12. *See Scott*, 550 U.S. at 376.

13. *See Bose Corp.*, 466 U.S. at 501; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2439 n.51 (1998) (citing *Bose*, 466 U.S. at 508 & n.27) ("The *Bose* rule applies equally to jury trials and bench trials.").

14. *See* McConkie v. Nichols, 446 F.3d 258, 262 (1st Cir. 2006) (affirming district court's grant of summary judgment on ground that no reasonable juror could find defendant's conduct "shocks the conscience"); Boveri v. Town of Saugus, 113 F.3d 4, 7 (1st Cir. 1997) (describing issue as "whether a rational jury could say [defendant's conduct] was conscience-shocking"); Moore v. Nelson, 394 F. Supp. 2d 1365, 1368–69 (M.D. Ga. 2005) (same). *But see* Terrell v. Larson, 396 F.3d 975, 981 (8th Cir. 2005); Mason v. Stock, 955 F. Supp. 1293, 1308 (D. Kan. 1997) ("[T]he 'shock the conscience' determination is not a jury question."). *See generally* Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998); Collins v. City of Harker Heights, Tex., 503 U.S. 115, 126 (1992) (describing the allocation of decisionmaking responsibility vaguely).

15. *See, e.g.*, Lytle v. City of Haysville, Kan., 138 F.3d 857, 864 n.1 (10th Cir. 1998) (describing the split); Casey v. City of Cabool, Mo., 12 F.3d 799, 803 (8th Cir. 1993) (citing Shands v. City of Kennett, 993 F.2d 1337, 1342 (8th Cir. 1993)) ("[A]ny underlying factual disputes concerning whether the speech at issue was protected should have been submitted to the jury."); Holder v. City of Allentown, 987 F.2d 188 (3d Cir. 1993); Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) (holding the determination is for the court).

16. DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 123 (2008) ("Because the jury represents values associated with the political majority, it cannot fully be entrusted with protection of the values inherent in the Bill of Rights."); Wells, *supra* note 8, at 90 ("Judges deal with Fourth Amendment issues every day in both criminal and civil contexts. Simply on account of their expertise, they may be better suited to resolve them than juries.").

17. PRESSER & ZAINALDIN, *supra* note 2, at 251.

18. The Article sets the grand jury to one side. Its structural role, both historically and today, is too unique to fully consider alongside the criminal and civil petit juries.

appeals should review the jury's application of constitutional law for reasonableness.

The Constitution itself says little about the allocation of authority between judge and jury, and even less about how a court should decide constitutional questions. Given the paucity of constitutional text on the issue, it is unsurprising that early American practice was diverse and contested.

This Article argues that several relevant practices emerge from a review of the early American experience with constitutional adjudication. First, the colonial American jury had the power to control the substance of the colonial constitution by exercising the authority to indict, convict, or acquit against the law. When the colonial jury ignored law in order to limit the government's reach, it was exercising constitutional judgment.[19]

Second, the transition from the colonial unwritten constitution to written state and federal constitutions dramatically reduced the jury's role as a linchpin of popular sovereignty.

Third, from the first decade of the new republic, some Americans realized that it no longer made sense for the jury to control legislation. Federalist judges reasoned that for an individual jury to decline to enforce a statute on constitutional grounds would undermine the Constitution's allocation of lawmaking authority to the legislature, replacing the constitutional views of the legislature, the People's most representative institution, with the views of a handful of citizens who, unlike the Supreme Court, lacked authority to invalidate a law across the board.[20] Contrary to the claims of scholars (and some lower court judges),[21] the early practice supports both sides. On balance the Federalist structural argument, combined with entrenched doctrine, should be more persuasive today.

Fourth, what is equally clear from early criminal and civil cases is that virtually everyone took for granted the jury's authority to apply constitutional law to the facts of a case.[22]

However, just because the history supports the jury's application of constitutional law to the facts of a case does not mean that the Constitution *requires* judges to defer to the jury's constitutional judgment. Where the Constitution is silent, courts ordinarily allocate authority between judge

19. *See, e.g.*, JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 37–38 (1977).

20. *See infra* Part III.A.

21. *See* United States v. Pabon-Cruz, 391 F.3d 86, 90–91 (2d Cir. 2004) (recounting District Court Judge Lynch's jury instruction that "the judgment of history" is sometimes that nullifying juries have "done the right thing"); AMAR, *supra* note 11; AMAR, *supra* note 6; Middlebrooks, *supra* note 11.

22. *See infra* Part III.

and jury based on a host of considerations, especially the relative competence of judge and jury to decide the issue.[23]

This Article argues for the jury's unique "constitutional competence."[24] The jury is the only constitutionally mandated institution composed entirely of laypeople who serve at random and for a limited term. The jury's composition, therefore, gives it a uniquely popular voice. When the jury brings that voice to bear on constitutional questions, it serves as a popular structural check on government officers.

There are important limits, however, to the jury's role in constitutional adjudication. All of the reasons that weigh against the jury's right to nullify apply with equal force to the jury's right to apply constitutional law without judicial oversight. The jury is not entitled to construe the Constitution for itself. The jury must abide by the judge's instruction on constitutional law, and courts should review the jury's application of that law for reasonableness.

Put simply, courts should treat the jury's constitutional judgment as they would any other jury judgment, with one caveat: when the application of a constitutional standard may be characterized as either a question of law, for the court, or a question of fact, for the jury, the court should choose the latter.

The Article proceeds as follows. Part II explains why contemporary courts and scholars face such a confounding puzzle in the jury's constitutional judgment. Constitutional text, history, doctrine, and theory on point are inconclusive and underdeveloped. Part III argues that the history of the early American jury's role in constitutional adjudication strongly supports the jury's authority to apply constitutional law, as stated by the judge, to the facts of a case, but offers mixed support, at best, for the jury's authority to decide the constitutionality of a statute. Part IV explores the range of discretion courts may exercise in sending constitutional questions to a jury and in deferring to the jury's application of constitutional law. Consistent with contemporary doctrine, a judge could instruct a jury to apply virtually any of the First Amendment doctrines that limit criminal or civil liability on a case-by-case basis, and virtually any constitutional doctrine in a civil rights suit against a government or government officer. Likewise, judges are probably obligated by the Seventh Amendment to defer to the jury's reasonable constitutional judgment. Drawing on history, theory, and recent empirical studies of the

23. *See, e.g.*, Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907, 913 (2015) (holding that trademark tacking is a question for the jury); Markman v. Westview Instruments, Inc., 517 U.S. 370, 390–91 (1996) (holding that patent construction is a question for a judge).

24. *See infra* Part V.

role that cultural identity plays in constitutional judgment, Part V makes the case for the jury's unique constitutional competence. Part VI concludes.

II. THE QUANDARIES

The jury's role in constitutional adjudication is unclear. Scholars have shed little light on the issue, and courts have muddled through. Why? This Part explains that the question is complicated by constitutional text, history, doctrine, and theory. The text is silent; the historical practice was diverse; the doctrine is unprincipled, sparse, and internally inconsistent; and most contemporary constitutional theory has little to say about the jury.

A. Text

The first problem is textual silence. The Constitution provides for trial by jury in criminal and civil cases,[25] but it says little about the allocation of authority between judge and jury.

1. Reexamination Clause

The sole exception is the Reexamination Clause of the Seventh Amendment: "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[26]

The Reexamination Clause says nothing about the initial allocation of responsibility between judge and jury. Rather, it limits the authority of judges to reexamine facts a jury has already found. It does not tell a trial judge which kinds of questions to send to a jury in the first place. The first clause of the Seventh Amendment preserves "the right of trial by jury" in "Suits at common law."[27] But having a right to a jury trial, again, says nothing about the allocation of authority between judge and jury at that trial.

Still, the Reexamination Clause bears on the initial allocation of authority between judge and jury in two ways. First, it extends the common law distinction between law and fact. The clause quelled Anti-Federalist concerns that the Supreme Court, pursuant to its "appellate Jurisdiction, both as to Law and Fact,"[28] would exercise plenary authority over every

25. U.S. CONST. art. III, § 2, para. 3 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . . ."); *id.* at amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

26. U.S. CONST. amend. VII.

27. *Id.*

28. U.S. CONST. art. III, § 2, para. 2.

aspect of a trial judgment.[29] The conceptual distinction between law and fact is less than airtight,[30] and the modern Supreme Court has nibbled at the edges of the jury's authority to decide questions that courts traditionally regarded as questions of fact.[31] Nevertheless, the Reexamination Clause assumes a meaningful conceptual distinction between the two, and therefore, to some extent, entrenches that distinction in practice.[32]

Second, the Reexamination Clause suggests that judges should give particular solicitude to a jury's finding of fact, as opposed to the jury's conclusion of law. In early practice, federal courts ordinarily reviewed a trial decision on a writ of error, which authorized the reviewing court to pass judgment only on questions of law.[33] If the reviewing court disagreed with a fact found at trial, the proper recourse was to set the case for retrial, not to change the finding.[34] The Reexamination Clause and the early practice both suggest that a federal judge might allow a jury to decide questions of law or mixed questions of law and fact. They likewise suggest, however, that a judge has more leeway to reexamine a jury's legal conclusions than the jury's findings of fact.

As this Article discusses further, the Reexamination Clause may well bear on the authority of judges to review the jury's application of law, including its application of *constitutional* law. But the Clause is silent about the threshold question: what is the jury's authority to decide a legal question, including, perhaps, a constitutional question, in the first instance?

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29. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 340 (2011) (New York's "A Plebeian"); *see id.* at 287 (Edmund Pendleton); *id.* at 288 (George Mason); *id.* at 289 (Patrick Henry); THE ANTIFEDERALIST NO. 83 (Luther Martin); Luther Martin, Letter to the Citizens of Maryland (Mar. 21, 1788), *in* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 684 (E.H. Scott ed., 1898). *But see* THE FEDERALIST NO. 81 (Alexander Hamilton) (arguing that the Supreme Court should decline to review jury findings of fact in cases arising at common law, but review findings of fact de novo in cases arising at civil law).

30. *See* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("[W]e [do not] yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."); *see also* Ornelas v. United States, 517 U.S. 690, 700–01 (1996) (Scalia, J., dissenting); Thompson v. Keohane, 516 U.S. 99, 111 (1995) (distinction is "slippery"); Miller v. Fenton, 474 U.S. 104, 113 (1985) ("elusive"); *Pullman-Standard*, 456 U.S. at 288 ("vexing nature"); Baumgartner v. United States, 322 U.S. 665, 671 (1944) (Frankfurter, J.); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922); James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

31. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., 532 U.S. 424, 437 (2001) (characterizing punitive damages as a question of law); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435 (1996) (characterizing compensatory damages as a question of law).

32. Parsons v. Bedford, 28 U.S. 433, 447–48 (1830) (Story, J.).

33. United States v. Wonson, 28 F. Cas. 745, 745–46 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 16,750).

34. *Id.*

2. Supremacy Clause

The Constitution likewise says little about *constitutional law* that would bear on the allocation at trial of authority to decide constitutional questions. The Supremacy Clause, though, may be an exception. The Clause declares that federal law, including the Constitution, is the "supreme Law of the Land."[35] The principal purpose was to prevent states from nullifying federal law.[36] The Framers had good reason to be concerned. Under the Articles of Confederation, state legislatures had passed—and state judges had enforced—laws that favored local property rights over the prior interests of absentee Tories.[37] The practice was popular with local constituencies, but it violated the United States' treaty obligations.[38] Britain retaliated, and Congress sought a way to control state legislatures and judiciaries.

To that end, the Supremacy Clause not only declares federal law to be supreme, but puts a fine point on the responsibility of state judges: they are "bound [by federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[39] The Clause thus makes it clear that a state judge may not decline to apply federal law on the ground that it is repugnant to state law.[40]

What of the Clause's reference to state "judges," but not to juries? The history of the Clause suggests that the Framers saw state judges, and not necessarily state juries, as the crucial institutional actors in constitutional adjudication.

In some senses, the Continental Congress enacted a forerunner of the Supremacy Clause only months before the Philadelphia convention. In a series of resolutions, the Congress urged the state legislatures to avoid laws that would interfere with federal treaty obligations.[41] One of the resolutions would have had each state pass a law that generally "repealed" "the Acts or parts of Acts of the [state] Legislature . . . as are repugnant to the treaty of peace between the United States" and Britain.[42] John Jay argued that such a

35. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

36. *See* THE FEDERALIST NO. 33 (Alexander Hamilton); THE FEDERALIST NO. 44 (James Madison).

37. *See, e.g.*, FORREST MCDONALD, NOVUS ORDO SECLORUM 155 (1985); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 594 & n.20 (2001).

38. MCDONALD, *supra* note 37, at 156.

39. U.S. CONST. art. VI, cl. 2.

40. *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY ch. 5 (2008) (explaining the duty of judges to decline to apply lower law that is "repugnant" to contrary higher law).

41. *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 124–25 (Mar. 21, 1787) (Roscoe R. Hill ed., 1936).

42. *Id.* at 183 (Apr. 13, 1787) (John Jay).

general repeal would effectively "turn[] over" the validity of any "particular [state] Act or clause" to the "proper Department, viz, the Judicial."[43] He equated the "Judicial" department, or "Courts of Law," and "Judges." As "Men of Character and Learning, [who] feel as well as know the obligations of Office and the value of reputation," Jay argued that "there is no reason to doubt that their conduct and Judgments relative to these as well as other Judicial matters will be wise and upright."[44]

Alexander Hamilton likewise promoted the resolutions to the New York Assembly.[45] To the charge that a state law generally repealing laws repugnant to the treaty would give too much power to judges, he responded that the law would neither give nor take any power from judges.[46] Citing Cicero, Hamilton explained that judges follow the rule that "when two laws clash, that which relates to the most important matters ought to be preferred."[47] Thus, he argued, "as all treaties were known by the constitution as the laws of the land, so must the judges act on the same, any law to the contrary notwithstanding."[48] Both Jay and Hamilton thus assumed that state judges—and not necessarily state juries—would have a duty to enforce the superiority of federal law.

The foregoing episode sheds light on the negotiations at Philadelphia over how best to prevent state nullification of federal law. The first proposal to that end was a provision that would vest Congress or some other federal institution with the power to nullify state legislation.[49] The point was to prevent state laws harmful to the national interest and prompted by sectional passions from ever taking effect, thereby eliminating the need to rely on state (or federal) judges to invalidate unconstitutional state laws. Harkening to the Crown's imperial prerogative as to colonial laws, Pinkney declared such a provision to be "indispensably necessary" as "the corner stone of an efficient national Govt."[50] James Madison likewise urged it as "absolutely necessary" that "[t]he judges of the state . . . give the state laws their operation, although the law abridges the rights of the national government."[51] Only a federal negative on state laws would

43. *Id.*

44. *Id.*

45. *Remarks on an Act Repealing Law Inconsistent with the Treaty of Peace*, THE DAILY ADVERTISER, Apr. 23, 1787, *reprinted in* IV THE PAPERS OF ALEXANDER HAMILTON 150 (Harold C. Syrett ed., 1962).

46. *Id.* at 152.

47. *Id.*

48. *Id.*

49. James Madison, *In Committee of the Whole* (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., 1911).

50. *Id.* (recounting a statement made by Mr. Pinkney).

51. Robert Yates, Friday, June 8, 1787, *in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 49, at 169 (recounting a statement made by Mr. Madison).

generate enough "centrifugal force" to prevent "the planets [from flying] from their orbits."[52] For an array of reasons, a federal negative on state laws proved to be a nonstarter.

By contrast, the provision that became the Supremacy Clause was, from the beginning, a workable alternative. Bound up with the issue of state judges enforcing federal law was the question of the relationship between state and federal courts. The "New Jersey Plan" sought to clarify the answer to both of these questions.[53] "[T]he Common law Judiciarys" of state courts of "first instance" would try offences against national law, with appeal to a federal court.[54] Additionally, the Plan included a draft provision that would become the Supremacy Clause: "all Acts of the U. States in Congs.," and "all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States," "and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding."[55] Notably, the proposal said nothing about the relative status of federal and state constitutional law; it neither subordinated state law to federal constitutional law, nor subordinated state *constitutional* law to federal law of any kind. Thus, the New Jersey Plan would have relied on state trial courts to enforce federal criminal law, and would have bound those courts to consider federal legislation and treaties (but not federal constitutional law) as superior to state legislation and common law (but not state constitutional law).[56]

The New Jersey Plan's uses of "judiciary" rather than "judges" may have reflected the drafters' view that state juries had an important part to play in enforcing federal law. This would have been consistent with the views of Luther Martin, the Plan's principal draftsman and an ardent advocate of the jury's political role within the judiciary.[57]

The other Framers' chief concern with the proposal, however, was whether it would be enough to guarantee the enforcement of federal law. The Nationalists did not trust "the Courts of the States"[58] or the "firmness of Judges,"[59] but there was little debate on the New Jersey Plan formulation before it was sent to the Committee of Detail.[60]

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52. *Id.* (footnote omitted).

53. *See generally* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 171–77 (1997).

54. *Id.* at 172.

55. James Madison, Friday, June 15, 1787, *in* THE RECORD OF THE FEDERAL CONVENTION OF 1797, *supra* note 49, at 245.

56. *See* AMAR, *supra* note 11, at 300–01; RAKOVE, *supra* note 53, at 171–72.

57. MAIER, *supra* note 29, at 430–34.

58. RAKOVE, *supra* note 53, at 173. *See* 1 FARRAND, *supra* note 49, at 252, 317.

59. 2 FARRAND, *supra* note 49, at 391.

60. RAKOVE, *supra* note 53, at 175.

Without written record, the Committee of Detail revised the provision into its current state. The Clause specifically obligates state "judges," and omits any statement about state "judiciaries" or juries. The change may have been stylistic. We have already seen that John Jay, just months beforehand in the Continental Congress, referred to the "Judiciary," "Courts of Law," and "Judges" interchangeably. But given that "judges" is more specific than "judiciaries," it may have reflected the Committee of Detail's impulse to clearly put the onus on state judges to enforce federal law. The record gives no indication of why, and the members of the convention approved the revision "without debate or dissent—even from Martin."[61] In either case—whether the framers considered "judiciary" and "judge" to be synonymous, or whether they sought to emphasize the obligations of state *judges* to federal law—the Clause's explicit binding of state "judges" strongly implies that the Constitution relies on state judges (and by implication federal judges) to enforce federal law over contrary state law.

This does not mean that the *jury* is not bound by the Constitution. The Constitution binds the government acting through any agent, including a jury.[62] On this view, the Supremacy Clause emphasized, but did not create, the duty of state judges to the superiority of federal law. State juries are also government actors and also have a duty to uphold federal law and conflicts with state law. Moreover, juries routinely take oaths to uphold the law, and are legally and morally bound by those oaths no less than a federal or state officer would be bound by an oath administered pursuant to the Oath Clause of Article VI.[63]

Besides the Reexamination and Supremacy Clauses, the Constitution has nothing to say about the allocation of authority between judge and jury. Likewise, it says nothing explicit about the proper method of interpreting and applying constitutional law.[64]

B. History

The second problem with ascertaining the jury's proper role in constitutional adjudication is historical. The early jury's role as a structural check on executive and judicial agents in the late eighteenth century has

61. *Id.* at 174. Martin later asserted that the reason Article III gave appellate jurisdiction to the Supreme Court over issues of fact and law was because the Framers "would . . . not confide in state juries," as "they could not trust state judges." THE ANTIFEDERALIST NO. 83 (Luther Martin).

62. *See* U.S. CONST. art. III, § 2.

63. For an interesting discussion of the oath's role in constitutional enforcement, see Richard Re, *Promising the Constitution*, 110 NW. U. L. REV. (forthcoming 2016).

64. For a contrary view, see Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 858 (2009).

gained near-mythic quality among American lawyers and judges.[65] The political centrality of the early jury is well known. American Whigs relied on the jury as a popular buffer between the government and its political enemies du jour. By acquitting John Peter Zenger of libel because the accusations he published about Governor Crosby were accurate,[66] a colonial Massachusetts jury spearheaded a liberal view of speech regulation that ultimately spread around the world.[67] The Constitution's failure to guarantee trial by jury in federal civil cases was one of the Antifederalists' main objections to ratification.[68] The federal jury's authority to nullify the Sedition Act on constitutional grounds was one of a handful of questions that divided the first two American political parties.[69] One of the central features of the Republican reconstruction strategy was the enfranchisement of black jurors and the disenfranchisement of Mormon jurors.[70] Indeed, until the late nineteenth century, federal courts treated the nullification of statutory criminal law as a legitimate exercise of the jury's authority.[71]

Unfortunately, the details of early practice are foggy. There are few records of trial practice from the late eighteenth and early nineteenth centuries, and the records that do exist are underexplored.[72]

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65. *See* AMAR, *supra* note 3, at 73–76, 87; KRAMER, *supra* note 3, at 38, 109, 134–35, 157–61, 233; STIMSON, *supra* note 3, at 40, 51; DE TOCQUEVILLE, *supra* note 3, at 275; VIDMAR & HANS, *supra* note 3, at 51–52.

66. James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (1736), *in* THE CASE AND TRIAL OF JOHN PETER ZENGER 78, 100–01 (Stanley N. Katz ed., 1989); Zenger Trial, 17 How. St. Tr. 675, 706, 716, 722 (argument of Andrew Hamilton) ("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.").

67. *See, e.g.*, LEONARD LEVY, EMERGENCE OF A FREE PRESS 37 (1985).

68. MAIER, *supra* note 29, at 340; WILLIAM RIKER, THE STRATEGY OF RHETORIC 26, 265 (1996) (observing that from September 1777 to March 1778, Anti-Federalist publications included 49 summary sentences and 50,429 words arguing that "[t]he [Constitution] endangers jury trial because appeals on fact override juries, because there is no jury trial in civil cases, and because federal courts and large territory threaten juries of the vicinage").

69. *See, e.g.*, Virginia Resolutions (Dec. 21, 1798), *reprinted in* 17 THE PAPERS OF JAMES MADISON 185, 188 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991); Kentucky Resolutions (Nov. 16, 1798), *reprinted in* H. JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 130 (1991). *See generally* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994).

70. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORN. L. REV. 203, 204–06 (1995); Bressler, *supra* note 11, at 1181–99; James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 935–38 (2004).

71. Sparf v. United States, 156 U.S. 51, 64–90 (1895).

72. Important examples include BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT ch. 3 (1987) (exploring the civil jury in two Connecticut counties from the mid-sixteenth to mid-seventeenth centuries); WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760–1830, at 69–174 (1975) (exploring the changing role of the jury in Massachusetts from 1780 to 1830); A. GREGG ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE 203–231 (1981).

Contemporaries complained that the practice of qualifying, selecting, and empaneling jurors differed widely among jurisdictions.[73] For this reason, perhaps, the Judiciary Act of 1789 provided that federal courts would follow state jury practices.[74] In some jurisdictions, the criminal and civil juries exercised very different powers.[75] Moreover, practices were not set in stone; they evolved over time, sometimes rapidly.[76]

There is little doubt that the criminal jury enjoyed almost universal authority to decide questions of law.[77] But allocations of authority to the civil jury varied widely across time and jurisdiction; no matter what early Americans said about the jury's role, judges increasingly deployed an array of procedural devices, such as directing a verdict or ordering a new trial, designed to curtail the jury's independence.[78]

Ascertaining early jury practice is further complicated because practices and debates about practice were based on underlying debates about the nature of law. Early American legal practice saw the rise of several interrelated notions: legal positivism, the judge as trained lawyer, the lawyer as specialist, and legislative supremacy.[79] There was a corresponding decline of the jury's ability to maintain its traditional epistemological and political advantage.[80] In any given American jurisdiction, at any given time, the professional legal movement and the jury's adjudicatory role were closely related.[81]

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73. *See* Letter from Edward Carrington to James Madison (Aug. 3, 1789), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800, at 493 (Maeva Marcus eds., 1992); Letter from James Madison to Edmund Pendleton (Apr. 19, 1789), *id.*, at 375.

74. *See* Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (1789) (adopting "mode of forming juries" practiced in the states, so far as practicable for the federal courts). *See generally* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73–74 (1924).

75. *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 171 (1964).

76. *See id.* at 178.

77. MCDONALD, *supra* note 37, at 40–41; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903–06 (1994); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 396; Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582, 584–85 (1939). *But see* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116–22 (1998).

78. Renee Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 453 (2013); Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 257–63 (2000); Renee Lettow Lerner, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 506, 521 (1996).

79. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876, at 32–58 (1976); *see also* KRAMER, *supra* note 3, at 159–62; JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE chs. 2 & 3 (2004).

80. For a thorough exploration of this phenomenon, see generally STIMSON, *supra* note 3.

81. *See, e.g.*, NELSON, *supra* note 72, at 169–74; REID, *supra* note 79, at 18–55.

Not only do courts face the challenge of understanding the history. They also face the equally daunting challenge of deciding whether and how that history ought to bear on contemporary legal questions. Contemporary jury practice is not entirely discontinuous with early American jury practice, just as contemporary courts are not entirely different from early courts. But there are radical differences. The biggest difference may simply be the relative dearth of jury trials due to mechanisms like summary judgment and plea bargains.[82] Given the challenges, perhaps it is unsurprising that no one has attempted to analyze the early American jury with an eye toward the contemporary jury's proper role in constitutional adjudication.

C. Doctrine

Besides textual silence and historical complexity, courts deciding whether to send a constitutional question to a jury face doctrinal confusion. Few Supreme Court cases directly address the issue, and the handful that do point in different directions.

1. The Rule Against Jury Nullification

There is one clear doctrine regarding the jury's authority to construe the Constitution: the criminal jury must follow the judge's legal instructions.[83] The jury may not "nullify" the statutory law on a case-by-case basis. For the purposes of this Article, the necessary implication is that the jury may not acquit because the jurors personally believe, contrary to the judge's legal instruction, that the Constitution prohibits the law, prosecution, or conviction.

Though clear and long-established, the doctrine has been controversial since it was announced,[84] and many,[85] including a handful of federal district court judges,[86] currently oppose it. The problem is that the doctrine against jury nullification is in tension with practice at the founding and well into the nineteenth century.[87] As a result, the doctrine's validity is "under

82. *See, e.g.*, NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 35 (2007).

83. Sparf v. United States, 156 U.S. 51, 101–02 (1895).

84. *See id.* at 114 (Gray, J., dissenting).

85. *See, e.g.*, Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009); Nancy J. King, *Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom*, 65 U. CHI. L. REV. 433, 434 (1998).

86. *See* United States v. Pabon-Cruz, 391 F.3d 86, 90–91 (2d Cir. 2004) (recounting District Court Judge Lynch's jury instruction that "the judgment of history" is sometimes that nullifying juries have "done the right thing"); Middlebrooks, *supra* note 11.

87. *See, e.g.*, Middlebrooks, *supra* note 11, at 354–55.

assault at the hands of Founding-era originalism."[88] Akhil Amar, for instance, has suggested that there is a "strong argument" that, under the original understanding of the Constitution, juries have a right to acquit against the evidence.[89]

Furthermore, jury nullification, on constitutional or other grounds, undoubtedly happens. The jury has the de facto power to nullify, whether or not the lawyers or judge tell the jury it has a right to do so. Criminal juries decide an up or down verdict through a deliberative process that is a black box to outsiders. The Fifth Amendment Double Jeopardy Clause prohibits re-prosecuting defendants who have been acquitted,[90] whether they were acquitted against the evidence or not, and longstanding common law principles prohibit prosecuting jurors for attaint (for failing to obey the judge).[91] The result is that juries have the de facto power, if not the lawful authority, to acquit for any reason—including a constitutional one.

So even though the doctrine against jury nullification is clear and well-established as a matter of black letter law, its weight has been diminished by the jury's *power* to nullify, and by persistent scholarly arguments for the jury's *right* to do so. Whatever the jury's historical authority to decide questions of criminal law, however, this Article explains in the next part that the jury's authority to acquit on the basis of the jury's *own view* of the Constitution has always been deeply contested.

2. *Other Doctrinal Questions*

The Court has never clearly addressed the jury's authority to apply constitutional law; rather, a handful of doctrines point in different directions.

a. *The "Constitutional Fact" Doctrine*

The doctrine that most looms over the question of the jury's role in constitutional adjudication is the "constitutional fact," or "independent review," doctrine: courts may review de novo any fact necessary to a

88. Bressler, *supra* note 11, at 1142.

89. AMAR, *supra* note 6; *see also* AMAR, *supra* note 11, at 302 (making a "strong argument" that, under the original understanding of the Constitution, the jury has the right to nullify statutes on constitutional grounds).

90. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

91. Bushell's Case, 124 Eng. Rep. 1006, 1010 (1670) (holding that a trial judge may not punish jurors for contempt for returning a verdict against the judge's instruction). *See* Mark De Wolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582, 582–83 (1939) (interpreting *Bushell's Case* to imply the jury's right to decide questions of law).

constitutional judgment.[92] The Court has never clearly *held* that the doctrine applies to facts found by a jury, but it has *said* that the doctrine applies equally to facts found by a judge or jury.[93]

The implication of the doctrine for the jury's role in constitutional adjudication is obvious: if a jury's findings of "constitutional facts" are subject to de novo review by the trial judge, or if the trial court's findings of constitutional facts are subject to de novo review by a court of appeals, why does it matter whether a judge or jury finds the facts in the first instance? Indeed, the whole fact-finding exercise at trial is nothing more than a dry run for the court of appeals (or the Supreme Court). The doctrine's potential evisceration of a jury's constitutional judgment therefore casts a pall on the decision whether to send a constitutional question to the jury in the first place.

b. Applying Specific Constitutional Doctrines

The Supreme Court has rarely determined whether a jury may or may not decide a constitutional question. A key exception is the obscenity doctrine. The First Amendment prohibits the government from convicting someone for sexual expression that is, though perhaps offensive, not "obscene."[94] The criminal jury applies local "contemporary community standards" to determine whether the material at issue is "patently offensive," "appeals to the prurient interest," or has social value.[95] Courts review de novo the jury's judgment on the last element,[96] but the standard of review on the other elements is unclear.

Outside of obscenity, the Court has been ambivalent. The Court has reviewed deferentially jury applications of the libel doctrine under the First Amendment.[97] The Court has never squarely addressed the jury's proper role in a constitutional tort case under Section 1983,[98] but its review of jury verdicts in such cases suggests that it has no beef with the practice, and it

92. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984). *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); Monitor Patriot Co. v. Roy, 401 U.S. 265, 276–77 (1971); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); *see also* Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

93. *Bose Corp.*, 466 U.S. at 501.

94. Miller v. California, 413 U.S. 15, 24–27 (1973).

95. *Id.* at 15 (citing Roth v. United States, 354 U.S. 476, 489 (1957)).

96. Jenkins v. Georgia, 418 U.S. 153, 160 (1974).

97. *See infra* at Part IV.B.3; Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666–68 (1989).

98. *See, e.g.*, Kingsley v. Hendrickson, 135 S. Ct. 2466, 2468 (2015) (holding that a pretrial detainee bringing an excessive force claim need only show that the force was objectively unreasonable).

has suggested that a trial court should review a motion for summary judgment under the usual "reasonable jury" standard.[99]

In sum, a trial court facing the decision whether to send a constitutional question to a criminal or civil jury, and an appellate court deciding how to review a jury's constitutional judgment, face an array of half-developed doctrines that often point in different directions.

D. Theory

The fourth difficulty is with the current state of constitutional theory. Most contemporary theory focuses on constitutional hermeneutics, political theory, or both.[100] Hermeneutics, though central to a construction of legal texts by professionals, has little to say to an institution, like the jury, composed of a rotating cast of lay people.

Though the jury's historical role as a popular component of constitutional structure illustrates many concepts and tensions central to much contemporary political theory, for the most part theorists have neglected the jury. Deliberative democracy advocates analogize jury practice to more deliberative and popular legislative practices,[101] and popular constitutionalists rely on early jury practice as evidence of robust popular control of constitutional meaning at the founding.[102] Even popular constitutionalists, however, have neglected the potential role of the contemporary jury in constitutional adjudication.[103] Why?

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99. *See* Scott v. Harris, 550 U.S. 372, 380 (2007); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986). *But see* Michael L. Wells, Scott v. Harris *and the Role of the Jury in Constitutional Litigation*, 29 REV. LIT. 65, 75–78 (2009) (suggesting that *Scott* is ambivalent about whether constitutional torts should be decided by a jury). *See generally Scott*, 550 U.S. at 389–95 (Stevens, J., dissenting). A challenge to a civil jury verdict arises under Rule 50, which allows the judge to enter judgment against a party when it "has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a). In reviewing such a judgment as a matter of law, "the appellate judges review the verdict using the same standard the district court used in first passing on the motion. Review, then, could be called de novo over the district court's decision, but the actual standard used to test the jury itself is far more deferential." STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.01 (2d ed. 1991) (footnote omitted).

100. For constitutional hermeneutics, see, for example, Larry Solum, *Semantic Originalism* (2008), *available at* http://ssrn.com/abstract=1120244. For constitutional political theory, see, for example, 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). The genres are obviously oversimplifications; much constitutional theory addresses both hermeneutic and political theory.

101. *See, e.g.*, JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 80–85 (2009).

102. KRAMER, *supra* note 3, at 28, 151.

103. *See generally* KRAMER, *supra* note 3 (arguing nowhere that the contemporary jury should have a role in constitutional adjudication).

Perhaps they deem the payoff too small. The jury simply does not have the same influence it had when De Tocqueville declared it "as extreme a consequence of the sovereignty of the people as universal suffrage."[104]

Or perhaps, conversely, the jury may be *too* strategically placed to entrust with the Constitution.[105] The "people themselves," an inspiring symbol in the abstract, may wreak havoc in practice. And indeed the American jury has been responsible for grave injustice.[106]

The most relevant contemporary legal theory explores the relationship between cultural identity and constitutional adjudication. In a series of articles, Professors Kahan, Koffman, Braman, and others have demonstrated that members of political minority groups may be more sympathetic to constitutional claims.[107] Professors Sisk and Heise have likewise observed a correlation between a judge's political party and her views of the Establishment Clause.[108] No one, however, has drawn on these studies to argue for a more prominent role for the jury's constitutional judgment.

III. DEMYTHOLOGYZING THE EARLY JURY

As the prior Part suggested, a number of factors make it difficult to generalize about early American jury practice. This Part considers together a variety of early trial practices that others have explored separately. Taken together the practices suggest the following.

First, early state constitutions differed from the colonial constitution in ways that challenged the jury's traditional role. Under the colonial constitution, Americans relied on local juries to protect them from laws passed by an institution in which they were not represented; under their new constitutions, the people had a say through their representatives not only in the adoption of the written constitutions themselves, but also in the enactment of all legislation and the appointment of all executive and judicial officers. The terms of the colonial constitution were highly contestable because there was no one agreed-upon written text that set them

104. DE TOCQUEVILLE, *supra* note 3, at 273.

105. FAIGMAN, *supra* note 16, at 122–25.

106. *See, e.g.*, DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1979).

107. *See, e.g.*, Kahan et al., *Protest*, *supra* note 4, at 882–83; Kahan et al., *Whose Eyes*, *supra* note 4, at 879–80.

108. *See, e.g.*, Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185, 200–01 (2012) (finding that the ideological gap is particularly stark in cases about religion in schools); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1216–17 (2012) (finding that Democratic-appointed judges were twice as likely as Republican-appointed judges to invalidate government action under the Establishment Clause).

out;[109] in the American constitutions, the people themselves set forth the principles and limits of government in an extraordinary act of popular sovereignty. All told, it was going to be harder to imagine the jury as the principal voice of the people.

Second, as we have seen in Part I, one of the chief purposes of the federal constitution was to vest Congress with the power to legislate for the good of the entire nation without interference from the states. The point was that certain policy problems facing the nation—treaty obligations, debt, import taxation, etc.—required a uniform solution across the states. Jury nullification of federal law would pose a more acute form of the same problem the Constitution sought to avoid.

Third, as an implication of these changes, the federal jury's right to "nullify" legislation was hotly contested. The biggest dispute occurred over the jury's authority to acquit Sedition Act defendants, a debate that contributed to the rise of the first political parties. The Federalists' structural case against the federal jury's authority to nullify federal legislation was surely motivated in part by partisan aims, but it was a powerful constitutional argument in its own right.

Finally, in contrast to the jury's authority to nullify on constitutional grounds, the jury's authority to apply the judge's interpretation of constitutional law to the facts of a case was routine and essentially uncontested.

A. The Colonial Jury

The colonial American jury was powerful. Through the grand jury, criminal jury, and civil jury, Americans routinely controlled the application of imperial law in the colonies.[110] Colonists rightly obsessed over jury selection and the right to jury trial.[111] A jury packed with American Whigs guaranteed that the imperial constitution on the ground in the colonies expressed Whig political theory.[112]

Constitutional theorists rightly emphasize the colonial jury's political role for understanding the United States Constitution.[113] They neglect, however, how radically the written constitutionalism of the early republic

109. *See* HENRY ST. JOHN BOLINGBROKE, *Dissertation on Parties*, *in* 2 WORKS OF LORD BOLINGBROKE 130 (1754) (defining a constitution as "that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed").

110. *See* REID, *supra* note 19, at 27–28.

111. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1699–1703 (2012); 12 MADISON, *supra* note 69, at 202.

112. *See* REID, *supra* note 19, at 66–72.

113. *See, e.g.*, AMAR, *supra* note 11, at 233–38; KRAMER, *supra* note 3, at 26, 28–29.

departed from the imperial constitution faced by colonial juries. The discontinuities, as well as the continuities, between the two constitutional systems are important for grasping the jury's structural role in the adjudication of issues arising from the United States Constitution.

1. The Criminal Jury

Several episodes illustrate the jury's centrality in colonial constitutional practice. Perhaps the most influential was the American jury's refusal to convict a defendant of criminal libel if the defendant's accusations were true. It started in the mid-1730s, when New York prosecuted publisher John Peter Zenger for seditious libel of Governor Cosby.[114] Cosby was the Crown's agent, and Chief Justice DeLancey, the trial judge, was Cosby's.[115] At trial, Andrew Hamilton insisted, over DeLancey's objection, that truth was a defense.[116] As a matter of Whig ideology, Hamilton was on sure footing. As a matter of black-letter law, he was wrong.[117]

The jury acquitted.[118] From then, truth was effectively a defense to libel in the colonies.[119] The revolution would have been unthinkable without a press free to criticize the Crown's agents and Parliament's unpopular laws. A Whig jury had effectively imposed a constitutional limit on substantive criminal law and forever reordered the ability of the people to debate and criticize government officials.

2. The Civil Jury

The civil jury, too, exercised authority to punish and dissuade overreaching government officials.[120] The key case was *Erving v.*

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114. *See* PETER HOFFER, THE FREE PRESS CRISIS OF 1800: THOMAS COOPER'S TRIAL FOR SEDITIOUS LIBEL 10 (2011). The classic retelling is LEVY, *supra* note 67, at ch. 5.

115. *See* HOFFER, *supra* note 114, at 10–11.

116. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 23 (Stanley Nider Katz ed., 1963); HOFFER, *supra* note 114, at 12–14.

117. HOFFER, *supra* note 114, at 14.

118. James C. Humes, *Andrew Hamilton: The "Philadelphia Lawyer"*, 55 A.B.A.J. 227, 231 (1969).

119. LEVY, *supra* note 67, at 44.

120. *See* REID, *supra* note 19, at 29 ("John Adams spoke for most members of the bar, including some [T]ories, when he insisted that it was the duty as well as the right of a juror 'to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.'" (footnote omitted)). The jury may have exercised this power only in Royal colonies where the threat of overreaching agents was most acute. *See* MANN, *supra* note 72, at 80 n.32 (speculating on why the civil jury in Connecticut, a corporate colony, was far less active than its Massachusetts counterpart).

Cradock.[121] George Cradock was a Collector of the Customs of the port of Boston. Cradock seized one of John Erving's ships and prosecuted him in the admiralty court for carrying contraband in violation of the Staple Act of 1663. Erving negotiated a settlement in which Cradock, Governor Bernard, and the Crown would split 500 pounds evenly.[122]

With the admiralty case behind him, Erving promptly sued Cradock for trespass in the Suffolk County inferior court of common pleas. The suit was typical; colonial plaintiffs routinely sued officials for violating their rights under the imperial or customary constitution,[123] sometimes going so far as to argue that the statute purporting to authorize the government official was itself unconstitutional.[124] Indeed, Erving's attorney and perhaps "some of the Judges too" urged the jury to recognize

> the expediency of discouraging a Court [i.e., the vice-admiralty court] immediately subject to the King and independent of the Province and which determined property without a jury; and on a necessity of putting a stop to the practices of the Custom house officers, for that the people would no longer bear having their trade kept under restrictions.[125]

Nevertheless, the judges as a whole directed the jury to find for Cradock.[126] At stake was whether the British parliamentarian or the American Whig view of the British constitution would govern the colonies.[127] The jury returned a verdict for Erving of 600 pounds sterling.[128] Another jury trial in the superior court, presided over by Chief Justice Thomas Hutchinson, Tory *par excellence*, had a similar result.[129] Cradock had no legal recourse in the colony.[130] Cradock appealed to the King in

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121. JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 1761–1772, at 553, 556 (1761).

122. For a full account, see M.H. SMITH, THE WRITS OF ASSISTANCE CASE 178–82 (1978).

123. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 163 (1768) ("If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of mis-feasance . . . the party aggrieved shall have an action on the case, for damages to be assessed by a jury." (emphasis omitted)); NELSON, *supra* note 72, at 17–18.

124. REID, *supra* note 19, at 38 ("A Suffolk county jury could express popular dislike for the Stamp Act by returning a verdict of 'guilty' and, in theory at least, would be holding that, as a matter of law, the Stamp Act was unconstitutional.").

125. Letter from Governor Bernard to the Lords of Trade (Aug. 2, 1761), *in* QUINCY, *supra* note 121, at 555 n.2.

126. Letter from Governor Bernard to the former Governor Thomas Pownall, (Aug. 28, 1761), *in* QUINCY, *supra* note 121, at 555 n.2.

127. REID, *supra* note 19, at 31.

128. *Id.*

129. *Id.*

130. *Id.* There was a statutory defense for government officers who were enforcing the law, but because of the rules of special pleading in the common law courts, defendants had no opportunity to raise it. As a result the "statutory immunity was worthless." *See id.* at 182–83 n.44.

Council and Erving let the matter go, telling the superior court that the second jury's judgment had been satisfied.[131] *Erving* became an important political precedent for the civil jury's authority to determine and enforce the terms of the customary constitution.[132]

3. *Constitutional Structure in the New Republic*

The jury's role was bound to change when the states, asserting their independence, adopted written constitutions that provided for republican self-government and separated powers. Unsurprisingly, given the colonial jury's prominence, all of the early state constitutions provided for criminal trial by jury.[133] But the new constitutions dramatically changed the relationship between the law and the People. Three interrelated changes were in tension with the colonial jury's political role.

The first was the fact of a written constitution, enacted by the people through their authorized representatives, designed to constrain the government.[134] By the time the states ratified the United States Constitution, those constitutions bound not only the executive and judicial departments, but the legislative departments as well.[135] Gone were the days of disputing the terms of the customary constitution and whether they applied in the colonies. Gone too were the days of Locke's mythical moment of consent.[136] The people (or at any rate, those people allowed to exercise political authority) had clearly delegated and limited authority through written instruments that advanced time-worn principles of the English customary constitution, filtered through the lens of American Whig political theory. It would no longer be necessary for a jury to enforce a local view of which terms of the constitution applied, as it had been in the

131. Erving v. Cradock, *in* QUINCY, *supra* note 121, at 553, 556.

132. *See* THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, 1749–1774, at 161 (1828) (discussing John Hancock's case); Letter from Governor Bernard to the Lords of Trade (Aug. 6, 1761), *in* QUINCY, *supra* note 121, at 556–57 n.4 ("A Custom house officer has no chance with a jury, let his cause be what it will."). *See generally* REID, *supra* note 19, at 27–40.

133. *See* DAVID LIEBERMAN, PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 56–60 (1989); RAKOVE, *supra* note 53, at 293, 300. Georgia's constitution even provided that the jury had the authority to decide questions of law as well as fact. *See* GA. CONST. OF 1777, art. XLI ("The jury shall be judges of law, as well as of fact . . . 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." (emphasis added)).

134. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 86–93 (Rita Kimber & Robert Kimber trans., 1980). Connecticut was an exception. It had a customary constitution until 1818. *See* HAMBURGER, *supra* note 40, at 496–503.

135. 1 JULIUS GOEBEL, JR., 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 125–42 (1971).

136. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381, 387 (Peter Laslett ed., Cambridge University Press 1960) (1698).

empire. The only constitutional questions for a court to resolve would arise from a text; judges, not juries, had long exercised responsibility to interpret written legal instruments.[137]

The second American innovation that would have unsettled the colonial jury's place in the constitutional structure was like the first: all law, not only constitutions, would be subject to the will of the people through their representatives in the legislature, whether state or federal. Thus, it would be difficult to maintain that the jury's nullification of a statute enacted by the people's representatives was an essential ingredient in popular self-rule. More and more the colonial jury's political role would not only be obsolete; it would be counter-productive.

A third innovation was unique to federal law. Part I above explained that the federal framers were motivated, in part, to ensure that Congress would have the power "necessary and proper"[138] to implement national policies on a wide range of economic and political problems facing the fledgling nation. To this end, the original Constitution enumerates an array of congressional powers,[139] stipulates that federal law is superior to contrary state law,[140] and expressly obligates state judges to enforce this principle.[141] Vesting authority in a jury to ignore federal statutes (on whatever ground) would undermine this purpose.

There is no question that the Framers understood that Congress could go beyond its authority; they frequently referred to such acts of a legislature as "usurpations."[142] And there is no question that the Framers counted on "the People" to correct such usurpations. Some early Americans likely would have counted the jury among the institutions with the authority to counteract legislative usurpations. Others, however, would have relied on the franchise and the complex array of representative governmental institutions to enforce the people's understanding of the constitutional limits on the legislative branch. Still others may have counted on the Supreme Court. The question was unsettled. But, as we shall see, in several early Treason Clause cases, several judges and lawyers quickly ascertained that relying on the jury to enforce constitutional limits on the legislature would undermine the republicanism and popular sovereignty that such an act of nullification was meant to vindicate.

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137. See James Bradley Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 160–61 (1890) ("But, whatever their character and however used, the construction of writings, when once the facts necessary for fixing it were known, was a matter for the courts. This has always been so[.]").

138. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 18.

139. U.S. CONST. art. I, § 8.

140. U.S. CONST. art. VI, para. 2.

141. *Id.*

142. THE FEDERALIST NO. 42 (James Madison).

Going forward, constitutional disputes, including disputes in court, would be resolved by reference to written higher law.[143] Constitutionalism had taken a step in the direction of positivism.[144] That step raised new questions about the jury's role in constitutional adjudication.

B. Applying Constitutional Law

Within a decade of the ratification of the new federal constitution, the political enemies of the Adams administration were calling on the criminal jury to reprise its colonial role and nullify the Sedition Act on constitutional grounds. By then, however, federal courts had already begun to wrestle with the jury's proper role in constitutional cases. While everyone agreed that the jury could apply constitutional law, as stated by the judge, to the facts of a case, several judges had concluded that the jury lacked the authority to engage in constitutional construction—especially in the teeth of contrary legislation.

1. Treason

The first federal trials that raised constitutional questions were for treason. In 1795 and then again in 1799, the federal government put down Pennsylvania insurgencies designed to thwart the enforcement of specific excise taxes. The cases illustrate two points. First, the judges did not hesitate to allow the jury to apply the constitutional law of treason to the facts of a case. The fact that the law was constitutional made no difference. Second, from the very beginning, judges *did* hesitate to allow the jury the same discretion in constitutional trials that the criminal jury ordinarily enjoyed. Put simply, the judges emphasized the court's role in defining the scope of the constitutional law of treason, even when they paid lip service to the criminal jury's traditional right to determine both law and fact.

The Framers' goal with the Treason Clause was to blunt the usefulness of the law of treason as a weapon against passing political enemies.[145] They modeled the constitutional definition of treason on an Edward III statute, with two important differences.[146] First, the government could not expand

143. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 3 THE PAPERS OF JAMES IREDELL 309 (Donna Kelly & Lang Baradell eds., 2003); THE FEDERALIST NO. 78 (Alexander Hamilton). *See generally* HAMBURGER, *supra* note 40, at 293–308.

144. *See generally* RAKOVE, *supra* note 53.

145. THE FEDERALIST NO. 43 (James Madison); THE FEDERALIST NO. 84 (Alexander Hamilton). *See also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 667–69 (2d ed. 1851).

146. *See generally* JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS ch. 4, pt. a (1971).

the definition.[147] (In England, Parliament could adapt treason to meet political exigencies.[148]) Second, under the Constitution, "treason" included the terms of art "levying War against" the United States and "adhering to their enemies,"[149] but omitted "compassing the death of the king" or an analogous provision.[150] English courts had interpreted the latter to include conspiracy to commit treason, without overt acts.[151] The Framers thus intended to carefully circumscribe the definition of treason.

The Framers also wanted to emphasize the courts' role in enforcing those constitutional limits. They therefore placed the treason clause in Article III and specified that treason must be proven by "the testimony of two witnesses to the same overt act, or on confession in open court."[152]

In the first Judiciary Act, Congress prescribed a punishment for treason, copying Article III's definition. Everyone—defendants, prosecutors, and judges alike—agreed that the scope of treason was defined by the Constitution.[153]

At the time, the criminal jury enjoyed the authority to decide questions of law as well as fact. As a practical matter, there is no way to keep a criminal jury from acquitting against the law, and when it does, double jeopardy protects the defendant from the court's revision. This is still the case. But there is a great deal of evidence that judges and politicians well into the early national era agreed that the criminal jury had the right, as well as the power, to decide questions of law.[154] The treason trials raised the question whether the jury would have the right to decide questions of criminal law when that law was of *constitutional* dimension.

147. *See* U.S. CONST. art. III, § 3.

148. *See generally* G.R. Elton, *The Law of Treason in the Early Reformation*, 11 HIST. J. 211 (1968) (discussing political developments surrounding Parliament's significant expansion of the definition of treason in its 1534 treason act).

149. U.S. CONST. art. III, § 3, cl. 1.

150. *See* Letter from Thomas Jefferson to George Whyte (Nov. 1, 1778), *in* 2 THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1950) (explaining that he drafted the Virginia treason statute to simply omit reference to constructive treason, rather than to expressly disavow it, and that courts should construe it strictly). *See generally* JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS ch. 4, pt. a (1971).

151. *See* HURST, *supra* note 150, at ch. 4.

152. U.S. CONST. art. III, § 3, cl. 1.

153. *See* James Iredell, *Jury Charge of Justice Iredell in Fries' Case I*, *in* THE TWO TRIALS OF JOHN FRIES 165 (1800).

154. MCDONALD, *supra* note 37, at 40–41; Alschuler & Deiss, *supra* note 77, at 903–07; Harrington, *supra* note 77, at 396; Howe, *supra* note 77, at 584–85.

a. The Whiskey Rebellion Cases

The first federal treason trials arose from the Whiskey Rebellion.[155] Pennsylvania whiskey makers sought to repress the enforcement of federal excise taxes by forcing General Neville, the local excise agent, to surrender his commission. A band of them met in Couche's Fort, marched with arms to Neville's house, and burned it to the ground.

Justice Paterson presided over the two reported trials of note. In his charges to both juries, he stated clearly his view of the law and strongly urged a conviction. In neither did he mention the jury's authority to decide questions of law, which was a boilerplate component of early American jury charges.[156]

In *United States v. Vigol*,[157] "no question of law arose upon the trial," so the government and defendant agreed "to submit to the decision of the Jury, under the charge of the Court."[158] Paterson's charge left little room for discretion: "With respect to the evidence [of the acts], the current runs one way," and "[w]ith respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt."[159] Paterson reminded the jury that the defendant had attempted to show duress, and then explained to the jury that duress required "immediate and actual danger . . . [to the] life of the party," and that "in this [the defendant's counsel] have failed."[160]

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155. *See* United States v. Hamilton, 3 U.S. 17 (1795) (Wilson, J.) (granting bail until the next circuit court and rejecting a request to hold a special court); United States v. Vigol, 2 U.S. 346, 28 F. Cas. 376 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,621); United States v. Mitchell, 2 U.S. 348, 26 F. Cas. 1277 (C.C.D. Pa. 1795) (No. 15,788); United States v. Porter, 2 U.S. 345, 27 Fed. Cas. 597 (C.C.D. Pa. 1795) (No. 16,073) (directing verdict of not guilty when the court learned that the defendant was not the suspect the government sought); United States v. Insurgents, 2 U.S. 335, 26 Fed. Cas. 499 (C.C.D. Pa. 1795) (No. 15, 443) (considering several interesting arguments about the scope of the first judiciary act's jury selection provisions); Richard A. Ifft, *Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism During the Whiskey Insurrection*, *in* THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES 165 (1985). For background on the Whiskey Rebellion in general, see THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986).

156. *See, e.g.*, Georgia v. Brailsford, 3 U.S. (3 Dallas) 1, 4 (1794) (Jay, C.J.) (the jury have "a right to take upon [them]selves to judge of both, and to determine the law as well as the fact in controversy"); *see* LANGBEIN ET AL., HISTORY OF THE COMMON LAW 484 (2009) ("Jay's view was already somewhat anomalous in 1794. The balance of power between judge and jury was undergoing a rapid shift. Within a decade or two, both state and federal courts were freely granting new trial for verdict against law."); *see generally* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 84 n.70 (Maeva Marcus ed., 1998).

157. 2 U.S. (2 Dall.) 346, 28 F. Cas. 376 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,621).

158. *Id.* at 346, 28 F. Cas. at 376 (emphasis omitted).

159. *Id.* (emphasis omitted).

160. *Id.* at 347, 28 F. Cas. at 376. Paterson allowed that the jury could find a special verdict if it found that the prosecution had failed to show that the events did not occur on the day and with the number of persons specified in the indictment. *Id.* at 347, 28 F. Cas. at 377. Beyond this, he gave the jury no indication that it had a right to decide the law. *See id.*

The *Vigol* jury did something curious. At about 10:30 p.m., Paterson adjourned the jury until the following day. At that point, the jury requested a copy of Foster's Crown Law and the Acts of Congress. Paterson obliged.[161] Was the jury considering rejecting Paterson's view of the law of treason (which was apparently the same as the defendant's)? Did the jurors just want to be able to refer to the law as they deliberated? We do not know. According to the report, they concluded their deliberation at about 4:00 a.m. The next morning they delivered a guilty verdict.[162]

In *United States v. Mitchell*,[163] four witnesses testified seeing the defendant convening, armed, and with the other conspirators at Couche's Fort; the evidence placing the defendant at Neville's house, though, was weak.[164] Accordingly, Mitchell argued that "levying war" under the Constitution required the testimony of two witnesses to the effect that the defendant was present at the final act consummating the conspiracy to commit treason.

Paterson disagreed. He started by asserting that what happened at Neville's was treason. He then carefully walked through the evidence. He referred to Foster's Crown Law to demonstrate that marching, armed, toward levying war was an overt act of levying war and that what happened at Couche's Fort was sufficient.[165] Whether the levying war was complete at Couche's Fort, or at Neville's house, he said, "the prisoner must be pronounced guilty."[166] The jury complied.

In *Vigol* and *Mitchell*, Paterson strongly asserted his own view of law and fact. By contrast to the ordinary practice in a criminal trial, he gave no indication that the jury was free to go its own way on the law—even when the defendant had advocated a different legal rule.

b. The Fries Rebellion Cases

About five years later, the federal courts tried John Fries—twice—for spearheading a plot to subvert the enforcement of another excise tax.[167] The

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161. *See id.*

162. *Id.*

163. 2 U.S. (2 Dall.) 348, 26 F. Cas. 1277 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 15,788).

164. One witness affirmatively asserted seeing Mitchell at Neville's; another's memory of the event was hazy. *Id.* at 355–56, 26 F. Cas. at 1281.

165. *Id.* at 356, 26 F. Cas. at 1282.

166. *Id.*

167. THOMAS CARPENTER, THE TWO TRIALS OF JOHN FRIES ON AN INDICTMENT FOR TREASON (Philadelphia, William Woodard 1800) [hereinafter THE TWO TRIALS OF JOHN FRIES]; *see* United States v. Fries, 3 U.S. (3 Dall.) 515, 9 F. Cas. 826 (C.C.D. Pa. 1800) (No. 5,126); *see also* PAUL DOUGLAS NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION 165–66 (2004); Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 83–88 (1978).

parties accepted *Vigol* and *Mitchell* as binding precedent on the scope of "levying war." Justices Iredell and Chase, each in their own way, emphasized the judge's authority over the meaning of treason.

Iredell and District Court Judge Peters presided over the first trial. The judges allowed Fries's counsel to present arguments about the scope of "levying war." Chiefly, counsel argued that Congress had limited the scope of levying war under the Constitution by separately prohibiting and punishing certain actions that may have constituted levying war at common law, namely "rescue" of prisoners and sedition.[168] Judge Peters later privately expressed his view that the court had allowed the defense counsel "unfounded" and "unjustifiable" latitude in arguing "both Law & Fact."[169]

Iredell's lengthy charge to the jury expressed his "ideas on the points of law" that "absolutely coincid[ed] with" Peters'.[170] First, he emphasized that the crime of treason is "defined [by] the constitution . . . the supreme law . . . and not by any act of the legislature . . . ."[171] Congress may set the punishment, but may not alter the scope of treason. Second, he explained that the rescue and sedition statutes punish acts that would amount to treason when coupled with the intent to "destr[oy] . . . the government."[172] Intent was the key factual question in *Fries*.[173]

During Iredell's charge, defense counsel asked him to instruct the jury that the Constitution requires the testimony of two witnesses to the prisoner's treasonous intent with respect to the overt act. Iredell declined, stating that "if [the defendant] went with a treasonable design, then the act of treason is conclusive."[174] Rather than allowing that the jury could decide the question for itself, Iredell emphasized that on this score "no doubt could be entertained."[175] In a brief supplementary statement, Peters agreed: "The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere."[176] Iredell emphasized the jury's role of applying the law, as stated by the judges, in his ultimate charge:

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168. *See* THE TWO TRIALS OF JOHN FRIES, *supra* note 167, at 165–66 (charge of Circuit Justice Iredell).

169. Presser, *supra* note 167, at 85 (footnote omitted) (quoting Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804), 10 HISTORICAL SOCIETY OF PENNSYLVANIA, PETERS PAPERS 91).

170. THE TWO TRIALS OF JOHN FRIES, *supra* note 167, at 164–65 (charge of Circuit Justice Iredell).

171. *Id.* at 165 (emphasis omitted).

172. *Id.* at 166.

173. *See id.* at 166, 171. Iredell likewise emphasized the reliability of, and the importance of relying upon, the decisions in "western insurrection" cases. *See id.* at 168.

174. *Id.* at 171.

175. *Id.* at 171.

176. *Id.* at 175.

> [I]f it should appear to you that the prisoner formed a scheme, either on the way or at Bethlehem, by any kind of force to obtain this [treasonous] object, then, in my opinion, you ought to declare him guilty of the charge laid in the indictment. On the contrary, if you think he had no public and evil motive in view, he is not guilty of the crime.[177]

After about fifteen days of trial, the jury convicted. But Fries's fate was not yet sealed. He successfully challenged the conviction on the ground that one of the jurors had publicly expressed his bias before the trial.[178] On retrial, the defendant faced a judge who was eager to wrap things up and far less indulgent of legal arguments from the defense than Iredell had been.

Justice Chase's conduct in the second Fries trial was quizzical. On one hand, he absolutely forbade the defense from arguing law, sending a letter to that effect to the defense counsel before trial. As an act of protest, defense counsel quit. Rather than further delay the second trial, Chase served as both judge *and* counsel to Fries.[179] Chase clearly asserted Paterson's view of the law from *Vigol* and *Mitchell*.[180] On the other hand, Chase's charge to the jury was far more solicitous of the jury's authority to decide questions of law than Paterson or Iredell's had been.[181] In most respects, it reads as an ordinary criminal jury charge for the era.[182]

The best reading of Chase's jury charge in *Fries II* is that he believed the jury had a duty to decide "the law and the facts, on their consideration of the whole case," but that the judge had a corresponding duty to steer the jury toward what he took to be the correct view of law.[183] To that end, Chase eliminated the only possible source of law contrary to his own view by prohibiting the defense from arguing law. Controlling the evidence of law was the most powerful tool at a judge's disposal for controlling the jury's legal judgment.[184]

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177. *Id.* at 174.

178. United States v. Fries, 3. U.S. (3 Dall.) 515, 518, 9 F. Cas. 826, 916–23 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5,126).

179. *See* Presser, *supra* note 167, at 91.

180. THE TWO TRIALS OF JOHN FRIES, *supra* note 167, at 197 (charge of Circuit Justice Chase).

181. *See id.* at 199 ("If, upon consideration of the whole matter (law as well as fact) you are not fully satisfied, without any doubt, that the prisoner is guilty of the treason charged in the indictment, you will find him not guilty; but if, upon consideration of the whole matter, (law as well as fact) you are convinced that the prisoner is guilty of the treason charged in the indictment, you will find him guilty." (emphasis omitted)).

182. *See id.* at 196 ("It is the duty of the court in this case, 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, and in all criminal cases, both the law and the facts, on their consideration of the whole case." (emphasis omitted)).

183. *See id.* (emphasis omitted).

184. *See* LANGBEIN ET AL., *supra* note 156, at 448–50.

Chase's opponents certainly interpreted his exclusion of evidence of the law as an attempt to limit the jury's discretion. The Republican-run House of Representatives listed Chase's ruling on the precedents as one justification for his impeachment.[185] Chase defended himself by saying that he believed the law of treason was settled against those precedents, and that the judge and the jury both have a duty to the law.[186] The implication from Chase's conduct is that he believed that the judge also has the duty to ensure that the jury applies the law, which in turn implies that the judge's understanding of the law controls. Both of those beliefs would be inconsistent with the jury's authority to decide the law, which Chase professed during the trial, and which was the order of the day. James Wilson, one of Chase's colleagues on the Supreme Court, echoed that tension, arguing that the jury, "in deciding legal questions, is bound by . . . legal reasoning," but admitting that jurors are the "ultimate interpreters of the law."[187] Regardless his jury instructions, Chase's actions, and his argument before the House of Representatives foreshadowed the logic eventually relied upon by the Supreme Court nearly a century later to establish that the jury has a duty to obey the judge's instruction on the law.[188]

The debate over the jury's authority to decide constitutional law, even criminal constitutional law, obscures an important point of agreement between the Federalist judges and their Republican adversaries. No one disputed that the jury had the authority to apply constitutional law to the facts of the case. The issues were (1) whether the judge was obligated to tell the jury that it had a right to decide questions of law and (2) whether

185. SAMUEL H. SMITH & THOMAS LLOYD, 1 TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS BEFORE THE SENATE OF THE UNITED STATES 5–8 (1805) (Washington, S.H. Smith 1805) [hereinafter TRIAL OF SAMUEL CHASE] (according to the impeachment trials, Chase's ruling "tend[ed] to prejudice the minds of the jury against the case of [Fries], before counsel had been heard in his defen[s]e, ... debarr[ed] the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law," and "wrest[ed] 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 give."). *See generally* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 76–82 (1971).

186. TRIAL OF SAMUEL CHASE, *supra* note 185, at 33–35 ("In this case, therefore, where the question of law arising on the indictment, had been finally settled by authoritative decisions, it was the duty of the court . . . early to apprise the counsel and the jury of these decisions, . . . so as to save the former from the danger of making an improper attempt, to mislead the jury in a matter of law, and the jury from having their minds preoccupied by erroneous impressions.").

187. AMAR, *supra* note 3, at 342 n.64 (citing 2 THE WORKS OF JAMES WILSON 541–42 (Robert G. McCloskey ed., 1967)); *see also* Henfield's Case, 11 F. Cas. 1099, 1121 (Wilson, Circuit Justice, C.C.D. Pa. 1793) (No. 6,630) ("[T]hat the jury, in a general verdict, must decide both law and fact, but . . . 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 . . . []on both").

188. *See* Sparf v. United States, 156 U.S. 51, 71–72, 78–79 (1895).

the judge could exclude evidence of the law. Everyone agreed that the jury could apply *some* construction of the Treason Clause.

c. *Later Treason Cases*

The next incident that gave rise to a treason prosecution was Aaron Burr's alleged conspiracy to lead a western insurrection and conquer Mexico.[189] In the first set of prosecutions, the Supreme Court did not wait for a trial judge and jury to decide a question about the scope of the Treason Clause. On writ of habeas corpus, the Court, endorsing Chase's opinion in *Fries*, concluded that "levying war" does not include "conspiring to subvert by force the government of our country."[190] Levying war requires acts beyond conspiracy. The Court thus held that the Treason Clause does not incorporate the English common law of constructive treason.[191] Without probable cause to hold them, the Court ordered the prisoners released.

Then came "the trial of the century"[192]—Chief Justice John Marshall, riding circuit, presided over the trial of former Vice President Aaron Burr.[193] Among the counsel for the government and defense (including Burr himself) were some of America's finest lawyers.[194] The government's case was hamstrung. None of the witnesses could place Burr at the scene of the "assemblage" of armed men that allegedly constituted the levying of war. Emphasizing the Supreme Court's prior ruling, Marshall excluded evidence of Burr's activities after the assemblage that the prosecutor offered to show Burr's participation in the conspiracy. After stating the law as received from the Supreme Court, Marshall instructed the jury as follows: "The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct."[195] The jury acquitted, a result that clearly accorded with Marshall's own view.

Like Paterson, Iredell, and Peters before him, Marshall stated his opinion of law and instructed the jury to apply that law. Like Chase, he excluded evidence that would only have been relevant under a view of the law he did not share. In sum, the early federal court judges uniformly treated the scope of the Treason Clause as a question for the judge even

189. *See generally* R. KENT NEWMEYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER OF WARS OF THE NEW NATION 25–26, 46–67 (2012).

190. Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807) (Marshall, C.J.).

191. *See id.* at 127.

192. PETER CHARLES HOFFER, THE TREASON TRIALS OF AARON BURR 146 (2008).

193. United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

194. *See generally* CHARLES F. HOBSON, THE AARON BURR TREASON TRIAL 20–33 (Fed. Judicial Ctr. 2006), *available at* http://www.fjc.gov/history/docs/burrtrial.pdf.

195. HOFFER, *supra* note 192, at 169.

when they were paying lip service to the criminal jury's right to determine a question of law. And, just as importantly, they uniformly allowed the jury to apply the law to the facts of the case, though the law was constitutional.[196]

The treason cases are especially instructive because of their subject matter. The colonial jury had been a safety net for political dissidents. Colonial merchants violated imperial excise laws, royal governors attempted to punish them, and local juries acquitted. There were few trials for treason per se, but every trial was about the right to dissent from a distant government's regulation of local affairs.

The early treason trials were an important test for the new federal government. Would Whig sentiment, channeled through the jury, continue to control constitutional litigation? The doctrinal path for such an approach was clear: the criminal jury had a right to determine law as well as fact. Remarkably, virtually everyone involved in the early treason trials, including defense counsel, agreed that the Constitution itself was the measure of treason, the Constitution incorporated English precedent through terms of art, and the judge was the ultimate arbiter of the provision's scope. The jury still had a role to play, however: no one so much as mentioned the possibility that the application of the law of treason, though constitutional, was beyond the jury's ken.

2. *Other Constitutional Standards*

In addition to the law of treason, early juries applied the Fourth Amendment's prohibition on "unreasonable searches and seizures" when they decided suits in trespass against a government officer.[197] At common

196. The only exception to this pattern in early treason cases proves the rule. In *United States v. Hodges*, 26 F. Cas. 332 (C.C.D. Md. 1815) (No. 15, 374), Justice Duvall and District Judge Houston presided over the treason trial of Hodges, a Maryland man who had "rescued" British soldiers held prisoner by a handful of Americans during the War of 1812. A British General had held Hodges' family hostage and threatened to destroy his town until he returned the prisoners. Hodges's defense was that he lacked treasonous intent. Justice Duvall and Judge Houston disagreed about the law. Duvall thought that the jury could infer treasonous intent from treasonous acts. *Id.* at 334. Houston disagreed. *Id.* The judges instructed the jury that they "are not bound to conform to [Duvall's] opinion, because they have a right in all criminal cases to decide on the law and the facts." *Id.* The jury immediately acquitted. *Id.* at 336. The instruction, contrary to the instruction in virtually every previous treason case, almost certainly grew out of the judges' disagreement about the law. Duvall was wrong, and he may have (rightly) mistrusted his own judgment. Judge Houston, Hodges's attorney, and the jury were fortunately able to render even such a momentous error of law "insignificant." *See* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 466–72 (1983) (awarding the honor to Duvall). *But see* Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 490–96 (1983) (making a case for Justice Thomas Todd).

197. U.S. CONST. amend. IV; *see, e.g.*, THE TWO TRIALS OF JOHN FRIES, *supra* note 167, at 173 ("[A]n officer [detaining men without a warrant] must be at his peril, and could only be justified on the exigency of the circumstance: if he did it unnecessarily, a jury would teach him to take care how he sported with the liberties of his fellow citizens . . . ."); *Essays of Hampden*, *in* 4 COMPLETE ANTI-

law, an individual's remedy for overreaching executive agents was a routine action in tort. Officers could defend by showing they had legal authority to execute the search or seizure.[198] "When new constitutional rights became relevant in the United States, the system readily absorbed them as pertinent to the issue of 'justification.'"[199] Early courts interpreted the Fourth Amendment to preclude the legal authority defense when the search or seizure was otherwise unreasonable.[200] Juries decided such cases without controversy.

State juries also routinely determined "just compensation" when the government exercised the power of eminent domain.[201] Procedures varied, but courts and executive agencies routinely relied on common law or special juries to estimate the value of condemned land as a check on government overreaching.

C. Reviewing Legislation

In treason, officer trespass, and eminent domain cases, early judges allowed juries to apply constitutional law to the facts of a case. In the treason cases, however, judges strongly resisted the criminal jury's ordinary authority to decide the scope of the law. Federal courts applied the same reasoning in the Sedition Acts cases, the first to challenge the constitutionality of a federal statute. Federalist judges were reluctant to allow a jury to interfere with an act of Congress on the basis of the jury's own constitutional views. The judges thus contributed to the first national debate about which institutions have a right to participate in constitutional construction.

On the heels of two domestic insurrections and the French Reign of Terror, and in the midst of the Adams administration's unpopular neutrality

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FEDERALIST 198, 200 ("Without [a jury] in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens."); *Essays by a Farmer* (I), *reprinted in* 5 COMPLETE ANTI-FEDERALIST 5, 14.

198. *See* AMAR, *supra* note 3, at 76. *See generally* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); Eric Schnapper, *Unreasonable Searches and Seizures of Paper*, 71 VA. L. REV. 869 (1985); Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991).

199. Afred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1129 (1969).

200. *See* AMAR, *supra* note 3, at 76; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1486–87, 1506–07 (1987); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1943 n.296, 1948 n.320 (1983) (state law causes of action against federal officers "commonplace" during nineteenth century); *see also* Hill, *supra* note 199, at 1124, 1128–29 (citing cases); Walter E. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 HARV. L. REV. 1532, 1538–40 (1972) (arguing that the Fourth Amendment should be interpreted to create a substantive right, not merely a procedural one).

201. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 135–40 (1999); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1783, 1762–68 (2013).

in the war between England and France, Congress passed the Sedition Act in 1798 to combat the possibility of a Jacobean-style insurrection. The Act prohibited libeling the United States government and its officers.[202] Republicans immediately criticized the act as an unconstitutional attempt by the Federalists to silence their political foes.[203] The claim was not unfounded; Vice President Jefferson had been bankrolling vitriolic publications against President Adams and the Federalists.[204]

One of the Republican strategies to avoid the effects of the Sedition Act was to persuade juries to refuse to convict on the ground that Congress lacked constitutional authority to prohibit libel. Federalist judges opposed this strategy and instructed juries in sedition trials that they had no authority to decide the constitutionality of an act of Congress.[205]

The issue came to a head in the trial of Thomas Callender.[206] William Wirt, future United States Attorney General, proposed the "Virginia Syllogism" on behalf of Callender: the jury has the authority to decide questions of law; the Constitution is the "supreme Law of the Land";[207] and the jury therefore has the authority to decide constitutional questions, including whether Congress has violated the Constitution. Under this logic, the jury has the duty to acquit a defendant charged with violating an unconstitutional law.[208]

Chase disagreed. His logic may have been less airtight than Wirt's, but his judgment was nevertheless based on sound constitutional reasoning,

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202. Act of July 14, 1798, ch. 74, 1 Stat. 596 (titled: "An act for the punishment of certain crimes against the United States.").

203. *See, e.g.*, Virginia Resolutions (Dec. 21, 1798), *reprinted in* 17 THE PAPERS OF JAMES MADISON 185, 188 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991); Kentucky Resolutions (Nov. 16, 1798), *reprinted in* H. JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 130 (1991); *see generally* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994).

204. *See, e.g.*, JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 270–74 (1956).

205. *See, e.g.*, United States v. Lyon, 15 F. Cas. 1183, 1185 (Paterson, Circuit Judge, C.C.D. Vt. 1798) (No. 8,646) (Paterson, J.) (instructing the jury: "[Y]ou have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law. Congress has said that the author and publisher of seditious libels is to be punished; and until this law is declared null and void by a tribunal competent for the purpose, its validity cannot be disputed. Great would be the abuses were the constitutionality of every statute to be submitted to a jury, in each case where the statute is to be applied.").

206. United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

207. U.S. CONST. art. VI.

208. *Callender*, 25 F. Cas. at 253 ("The federal constitution is the supreme law of the land; and a right to consider the law, is a right to consider the constitution: if the law of congress under which we are indicted, be an infraction of the constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oaths."); *id.* ("Since, then, the jury have a right to consider the law, and since the constitution [sic] is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution [sic].").

focusing on the Framer's intent and the Constitution's structure and purpose.

The Framers, Chase argued, never contemplated that a jury could decide the constitutionality of an act of Congress. This appears to be true. Though the Framers gave little attention to judicial review as a general matter, those who did address it almost universally assumed that judicial review of legislation would be performed by *judges*.[209]

Perhaps more importantly, Chase believed that the Constitution granted the authority to review the constitutionality of legislation to "[t]he judicial Power," which it assigned to "the supreme Court" and inferior courts as Congress might create.[210] The Constitution did *not* grant this power to the jury.[211] At this point, Chase could have pointed out that the Constitution likewise bound state judges, but not juries, to recognize the superiority of federal over state law, suggesting that the power of that form of judicial review was lodged specifically with judges, not juries.[212]

Furthermore, Chase argued, the result of allowing the jury to invalidate legislation would be absurd: a popular institution composed of a tiny minority would thereby have authority to undermine the considered judgment of the representatives of the people at large. Chase admitted that the jury had the authority to decide questions of law as a general matter. But that authority, for the foregoing reasons, could not extend to determining the constitutionality of legislation.[213]

The Republicans won the battle but, in the end, lost the war. The House impeached Chase, in part for *Callender*, but the Senate acquitted him.[214] Some believed through Reconstruction that the jury had the authority to decide the constitutionality of legislation, but the practice was probably never widespread.[215] And the Supreme Court effectively closed the door in *Sparf v. United States*,[216] holding that a criminal jury lacks authority to nullify a statute.[217]

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209. JAMES WILSON, LECTURES ON LAW PART 1 NO. XI: COMPARISON OF THE CONSTITUTION OF THE UNITED STATES, WITH THAT OF GREAT BRITAIN, in 1 THE WORKS OF JAMES WILSON 309, 329–30 (Robert Green McCloskey ed., Belknap Press 1967) (1790–91); THE FEDERALIST NO. 78 (Alexander Hamilton) ("A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceedings from the legislative body.").

210. U.S. CONST. art. III; *see Callender*, 25 F. Cas. at 254–55.

211. *See Callender*, 25 F. Cas. at 254.

212. *See supra* Part II.A.

213. *Callender*, 25 F. Cas. at 256–57.

214. *See generally* ELLIS, *supra* note 185.

215. *See* Bressler, *supra* note 11, at 1157–58.

216. 156 U.S. 51, 106 (1895).

217. *See id.* For a good historical account of *Sparf*, see generally Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury:* Sparf *and* Hansen v. United States *Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004).

In sum, judges, lawyers, and juries in the early republic struggled to discern the jury's proper role in constitutional adjudication. The colonial jury had been essentially unfettered, the most effective colonial institution at nullifying imperial law. A *written* constitution *promulgated by the people*, I have suggested above, made a significant difference. Unlike a colonial jury's enforcement of Whig political principles against the laws and agents of a distant, unrepresentative empire, an American jury's construction of the United States Constitution could have the effect of nullifying the law enacted by their representatives in Congress.

Although early practice strongly supports the jury's authority to apply constitutional law to the facts of the case, from the beginning the jury's authority to invalidate statutory law on constitutional grounds was highly contested. Federalists and Republicans, motivated perhaps in part by partisan ambition, made powerful legal arguments that continue to resonate. A century later, after diverse practices across jurisdictions, the Court definitively put an end to the jury's authority to determine the law, whether constitutional or not.[218] The early history on the issue is somewhat mixed, but it is fair to conclude that many of the judges and lawyers responsible for drafting, championing, and enforcing the Constitution in its first few years believed that constitutional interpretation was for the judge, not for the jury.

IV. DOCTRINAL POSSIBILITIES

History univocally supports the jury's authority to apply constitutional law to the facts of a case. This Part suggests two possible doctrinal results: trial courts could ordinarily allow a criminal or civil jury to apply constitutional doctrine to the facts of a case; and judges could review the jury's application of constitutional doctrine for reasonableness.[219] Courts of appeals would still have the authority to review a jury judgment for failure to apply the proper constitutional standard. This would be consistent with history; I argue that it would also be consistent with current Supreme Court doctrine, notwithstanding dicta to the contrary. The next Part considers whether courts *should* defer to the jury's reasonable constitutional judgment.

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218. *See generally* Bressler, *supra* note 11.

219. *See* FED. R. CIV. P. 50(a) (stating that the ordinary standard for reviewing a jury's judgment is reasonableness).

A. Allowing the Jury's Constitutional Judgment

The first step would be for trial courts to allow criminal and civil juries to apply constitutional doctrine. This would not entail a new right to a jury trial. Instead, whenever a judge empanels a jury and the verdict depends upon the jury's application of a constitutional doctrine, the judge would simply allow the jury to apply the doctrine to the facts it finds. The jury, rather than the trial judge, would give meaning to the doctrinal standard as it applies that standard to the facts of a case.

The jury's application of constitutional doctrine is most likely to arise in First Amendment limits on criminal liability and constitutional tort suits against governments and government officers. The criminal jury already applies some elements of the obscenity doctrine, and the civil jury applies (at least in some cases) constitutional tort standards and First Amendment libel and defamation standards.[220]

Allowing the jury to apply constitutional law means that courts would not characterize the application of constitutional doctrines to facts as "pure questions of law" to avoid the jury's constitutional judgment. Take, for instance, the public figure standard in First Amendment libel doctrine. Whether a state undersecretary of labor is a public figure is a mixed question of constitutional law and fact.[221] Unless an appellate court has determined that a state undersecretary of (whatever department) is categorically a public figure, the trial judge should give the doctrine to the jury, with examples from precedent, and tell the jury to decide.[222] In other words, the jury should apply "the law" as it stands at the beginning of the case. The trial judge should not innovate to avoid the jury's constitutional judgment. If an appellate court wants to hold categorically that undersecretaries of a certain department are public figures, it may do so. That ruling would then become part of the law applied by the next jury, and so on.

There may be special cases—certain doctrines or certain elements of a doctrine—that should not go to the jury, based on proven injustices or wild disparities across jurisdictions. The best way to curb the jury's discretion, however, would be to clarify the constitutional doctrine, refining it over time, rather than simply declining to allow the jury to apply constitutional law.

220. *See generally supra* Part II.C.2.

221. *See generally* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504–05 (1984).

222. *See generally id.*

B. Reviewing the Jury's Constitutional Judgment

The constitutional fact and independent review doctrines, which direct appellate courts to review findings of fact that support a constitutional judgment de novo, threaten to eliminate the jury's role in constitutional adjudication. But they do not have to. This section argues that the best reading of the relevant cases is that those doctrines do not apply to a jury verdict. In one sense, this is an argument for jury exceptionalism: the jury's constitutional judgment should be more respected than a trial judge's. In another, however, it underscores the oddness of a doctrine—the constitutional fact doctrine—that depends on the Supreme Court's view that higher courts enjoy special responsibility and power over constitutional questions.

1. The "Constitutional Fact" Puzzle

The law is currently unclear about whether, and how much, a reviewing court should defer to a jury's application of constitutional law to facts. Ordinarily a court reviews a question of law "de novo" and a finding of fact for "clear error."[223] Courts are somewhat less clear about the proper standard of review for "mixed questions" of law and fact, where a legal conclusion is inescapably bound up with determinations of fact. The federal courts of appeals have developed varying rules for specific mixed questions, ordinarily based on whether the question is dominated by a legal or factual determination.[224] For instance, the Ninth Circuit Court of Appeals reviews a district judge's determination that a suspect is "in custody" de novo[225] but reviews whether a civil plaintiff has proved negligence or proximate cause for clear error.[226] A jury verdict, by contrast, is ordinarily reviewed for "substantial evidence," whether issued by a civil or a criminal jury.[227] Substantial evidence means sufficient evidence for a reasonable person to reach the same conclusion as the verdict, even if the trial judge, appellate court, or another jury could have reasonably reached a

223. *See* Pullman-Standard v. Swift, 456 U.S. 273 (1982); *see also* FED. R. CIV. P. 52(b).

224. *See, e.g.*, Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 518–19 (9th Cir. 2011) ("[M]ixed question of fact and law are reviewed de novo, unless the mixed question is primar[il]y factual." (citing N.B. v. Hellgate Elem. Sch. Dist., *ex rel.* Bd. of Dirs., Missoula Cnty., Mont., 541 F.3d 1202, 1207 (9th Cir. 2008))); Estate of Jelke v. Comm'r, 507 F.3d 1317, 1321 (11th Cir. 2007) (citing Estate of Dunn v. Comm'r of Internal Revenue, 301 F.3d 339, 348 (5th Cir. 2002) ("[M]ixed questions of fact and law: the factual premises are subject to a clearly erroneous standard while the legal conclusions are subject to *de novo* review.").

225. United States v. Wendy G., 255 F.3d 761, 765 (9th Cir. 2011).

226. Harper v. City of Los Angeles, 533 F.3d 1010, 1027 n.13 (9th Cir. 2008) (proximate cause); Sacks v. Comm'r of Internal Revenue, 82 F.3d 918, 920 (9th Cir. 1996) (negligence).

227. Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998, 1008 (civil); United States v. Hanna, 293 F.3d 1080, 1088 (9th Cir. 2002) (criminal).

different one.[228] The standard secures a meaningful role for the jury's verdict, so long as it is reasonable.

One might assume that the law just as clearly secures a jury's constitutional judgment. Unfortunately that is not so clear, for the Supreme Court has held that (some) determinations of facts that support conclusions of constitutional law must be reviewed de novo.[229] Courts have variously referred to the doctrine as the constitutional fact doctrine or the independent review doctrine.[230] Perhaps because the Court has applied the doctrine intermittently, and rarely in a hot-button case, the scope and precise demands of the doctrine are somewhat hazy. The Court has held that the doctrine applies in libel claims,[231] and it has purported to apply the doctrine in a variety of other free speech claims.[232] Moreover, the Court has held that a court of appeal should review a trial judge's exclusion of evidence for a Fourth Amendment violation de novo.[233]

On its face, the constitutional fact/independent review doctrine appears to directly conflict with the "substantial evidence" standard by which

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228. *See* Howard *ex rel.* Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003); *see also* McCollough v. Johnson, Rodenberg & Lauinger, LLC, 637 F.3d 939, 955 (9th Cir. 2011); United States v. Nordbrock, 38 F.3d 440, 445 (9th Cir. 1994).

229. S*ee generally* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504–05 (1984).

230. *See, e.g., id.* at 517.

231. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685–94 (1989); *Bose Corp.*, 466 U.S. at 504–05; Time, Inc. v. Pape, 401 U.S. 279, 294 (1971) (Harlan, J., dissenting) ("While it is true, of course, that this Court is free to re-examine for itself the evidentiary bases upon which rest decisions that allegedly impair or punish the exercise of Fourteenth Amendment freedoms, this does not mean that we are of necessity always, or even usually, compelled to do so."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–86 (1964).

232. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2822 (2011) (citing *Bose Corp.*, 466 U.S. at 499) ("The record in this case, which we must review in its entirety, does not support those assertions."); Snyder v. Phelps, 562 U.S. 443, 452, 461 (2011); Randall v. Sorrell, 548 U.S. 230, 249 (2006) (Breyer, J.) ("[W]here there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." (citing *Bose Corp.*, 466 U.S. at 499)); Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 621 (2003) ("As an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court's findings."); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos., 515 U.S. 557, 567 (1995); Connick v. Meyers, 461 U.S. 138, 148 n.7 (1983) (public employee speech doctrine); New York v. Ferber 458 U.S. 474, 774 n.28 (1982) (child pornography); Miller v. California, 413 U.S. 15, 25 (1973) (obscenity); *New York Times*, 376 U.S. at 259, 283–86 (public figure libel); Edwards v. South Carolina, 372 U.S. 229, 234–38 (1963) (speech, assembly, petition); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (threat of clear and present danger). *See generally* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998).

233. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 697–700 (1996) (holding that the appellate court should have reviewed the criminal trial judge's finding of probable cause de novo); Haynes v. Washington, 373 U.S. 503, 515 (1963) (coerced confession); Niemotko v. Maryland, 340 U.S. 268, 271 (1951) ("In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." (citing Feiner v. New York, 340 U.S. 315 (1951))).

courts of appeals ordinarily review a jury verdict. The constitutional fact doctrine would have courts review any constitutional judgment de novo, whereas the substantial evidence standard would have courts defer to a jury's reasonable application of law (whether constitutional or not) to the facts of the case. The former would effectively eliminate the jury's independent role in constitutional adjudication—any jury verdict applying a constitutional standard would be upheld only so long as the reviewing court agreed with the jury's judgment.

Although the constitutional fact doctrine has a long and somewhat cloudy history,[234] the modern doctrine depends largely on *Bose Corp. v. Consumers Union*, a libel case in which the Court says, in dicta, that the doctrine applies equally to a judge or jury verdict.[235] The best understanding, I argue, of the Court's next case to consider the issue, *Harte-Hanks Commc'ns v. Connaughton*, undermines the dicta in *Bose* that would require the application of the doctrine to a jury verdict.[236] Since the case law does not clearly extend the rule to a jury verdict, and doing so would effectively eliminate the jury's influence on constitutional adjudication, which itself may raise difficult Seventh Amendment questions, the better course is to review a jury's constitutional verdict for substantial evidence, not de novo. To understand this, however, we need to carefully consider the Court's decisions in *Bose* and *Harte-Hanks*.

2. Bose Corporation v. Consumers Union

Bose sued a consumer reporting agency for libel because it published an article claiming that one of Bose's sound systems made music sound like it "wander[ed] 'about the room.'"[237] According to Bose, the report was inaccurate; the sound system made music sound like it wandered "along the wall," not "about the room."[238] At a bench trial, the author of the review testified that he failed to perceive the distinction between the two musical paths. Discrediting the author's testimony, the judge determined that he had written with reckless disregard for the statement's veracity, and had thus written with the actual malice sufficient to impose liability for libeling a public figure.[239]

The Supreme Court reversed, holding that the evidence was insufficient to establish actual malice.[240] To get there, the Court had to mount a

234. *See, e.g.*, Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).
235. 466 U.S. at 501.
236. *See* 491 U.S. at 659.
237. *Bose Corp.*, 466 U.S. at 494.
238. *Id.* at 511.
239. *Id.* at 489–91.
240. *Id.* at 513–14.

strenuous defense of its own authority to review facts relevant to a constitutional adjudication de novo, something it called "the rule of independent review."[241] The main hurdle was reconciling that standard of review with Federal Rule of Civil Procedure 52(a), which provides that appellate courts will review a trial judge's findings of fact for clear error.[242] The Court explained that Rule 52(a) does not forbid a full review of the record.[243] Although appellate courts reviewing a finding of actual malice should give "due regard" to the fact-finder's opportunity to judge the credibility of witnesses,[244] the Court maintained that "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, *whether the factfinding function be performed in the particular case by a jury or by a trial judge.*"[245]

By all appearances, therefore, *Bose* declared that (1) the doctrine of independent review entails a holistic review of the record; (2) the doctrine also requires de novo evaluation of the constitutional facts underlying a judgment of actual malice; and (3) the doctrine applies whether the fact-finder was a judge or jury.[246] Many commentators have given the case this reading.[247] From reading the cases and commentary, however, one would never know that *Bose* was not the Court's last word on the independent review doctrine.

3. Harte-Hanks Communications v. Connaughton

Five years later, while purporting to apply the *Bose* independent review doctrine, the Court deferred to a jury's actual malice judgment. In *Harte-Hanks Communications v. Connaughton*,[248] a newspaper reported that several people said Connaughton, a candidate for local political office, offered to compensate them for testifying against his political opponent

241. *Id.* at 499.

242. *Id.*

243. *Id.* at 499 (citing United States v. U.S. Gypsum Co., 438 U.S. 422 (1978)).

244. *Id.* at 499–500.

245. *Id.* at 501 (emphasis added). Chief Justice Rehnquist and Justice White dissented on the ground that such decisions as "the credibility of the testimony of the author of [a] defamatory statement . . . are best left to the trial judge." *Id.* at 518.

246. *See id.* at 509 n.27.

247. *See, e.g.*, FAIGMAN, *supra* note 16, at 128; Allen & Pardo, *supra* note 30, at 1786 ("Under the auspices of constitutional-fact review, appellate courts must review de novo the 'actual malice' element in defamation suits."); Volokh & McDonnell, *supra* note 13, at 2439 (equating "independent judgment" doctrine and "de novo review"); *id.* at 2439 n.51 ("The *Bose* rule applies equally to jury . . . and bench trials"); Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1271–72 (1996); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels*, 64 N.C. L. REV. 993 (1986).

248. 491 U.S. 657, 660.

before a grand jury. Connaughton denied the charges and sued the paper for public figure libel. At trial, there was conflicting testimony on the facts supporting actual malice. The jury determined that the publication was defamatory, false, and published with actual malice.[249] The court of appeals—purporting to apply the independent review doctrine—upheld the award because the trial record included ample evidence to support the jury's judgment.[250]

In its brief before the Supreme Court, the newspaper leaned on a straightforward reading of *Bose*, arguing that "[a]n appellate court must review the whole record and draw its own inferences from the evidence,"[251] and "[i]n each case, an appellate court must independently assess the significance, if any, of evidence of tenuous probative value" of actual malice.[252]

Connaughton responded that the independent review doctrine was "practically infeasible" because it required an appellate court to make a determination of *mens rea* on contested evidence, and "constitutionally troublesome" when applied to a jury judgment because the Seventh Amendment prohibits reexamination of any fact found by a jury.[253]

In its reply, Harte-Hanks did an about-face, acknowledging that the independent review doctrine requires

> appellate courts to resolve disputed issues of material fact in favor of a jury's finding of "actual malice," . . . [which] both respects the jury's salutary role in assessing witness credibility and preserves the distinct duty of appellate courts to determine "whether governing rules of federal law have been properly applied to the facts."[254]

Harte-Hanks provided no citation.

Justice Stevens, who authored the *Bose* opinion, likewise authored the majority opinion in *Harte-Hanks*. Contrary to the Court's seemingly clear dicta in *Bose*, the Court reviewed the trial record for whether there was sufficient evidence to support the jury award rather than making its own

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249. *Id.* at 661 n.2.

250. *Id.* at 662–63.

251. Brief for Petitioner, Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657 (1989) (No. 88-10), 1988 WL 1026348, at *33.

252. *Id.* at *36 (emphasis omitted).

253. *See* Brief for Respondent, Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657 (1989) (No. 88-10), 1988 WL 1026350, at *4–7; *see also* U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

254. Reply Brief of Petitioner, Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657 (1989) (No. 88-10), 1988 WL 1026351, at *9 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 n.26 (1964)).

independent judgment.[255] The Court reasserted that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law,"[256] and that, "[i]n determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full."[257] Nevertheless, the Court determined that "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses.'"[258] A reviewing court is therefore still obligated to "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect."[259] Applied to the case at hand, the Court concluded that "it is evident that the jury *must* have rejected [certain testimony]:"[260] "[w]hen [the jury's] findings are considered alongside the undisputed evidence, the conclusion that the newspaper acted with actual malice inexorably follows."[261]

It was somewhat unclear whether the Court was *doing* what it was *saying*. On one hand, the Court appeared to reassert that an actual malice determination is a question of law, subject to de novo review regardless of whether the finder of fact was the judge or jury. But on the other hand, it acknowledged that a jury's determination of a witness's credibility should be reviewed for clear error. The practical upshot of these somewhat diagonal rules was that the Court, in reviewing the jury verdict, was bound to begin with the verdict and work backwards through the testimony at trial, deferring to the verdict insofar as it was based upon inferences from testimony that the jury could reasonably have credited. Put simply, the Court deferred to an imaginary set of facts that must have supported the jury verdict, so long as those facts were in turn supported by *some* testimony.

Justice Scalia, concurring in the judgment, attempted to clarify this:

> This analysis . . . accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony. Of course the Court examines the evidence pertinent to the jury determination—

255. *See* Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685 (1989).

256. *Id.* (citing Bose Corp v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984)).

257. *Id.* at 688.

258. *Id.* (citing *Bose Corp.*, 466 U.S. at 499–500).

259. *Id.* at 688 (internal quotation marks omitted) (citing *N.Y. Times Co.*, 376 U.S. at 285).

260. *Id.* at 691.

261. *Id.* at 690–91.

> as a reviewing court always must—to determine that the jury *could reasonably* have reached that conclusion.[262]

The majority opinion offers no express contradiction or response to Justice Scalia's claims, nor does it address respondent's argument that declining to defer to the jury's reasonable application of constitutional law would violate the Seventh Amendment.

The Court's approach in *Harte-Hanks* suggests that, consistent with the independent review and constitutional fact doctrines, a court may defer to a jury's application of constitutional law based upon a reasonable determination of fact. So long as the jury applied the proper legal standard, the court should begin with the verdict and review the entire trial record to determine whether the evidence may reasonably support the verdict. This is no different than the substantial evidence rule.

It may be argued that *Harte-Hanks* does not actually modify the *Bose* doctrine; rather, it simply clarifies its scope when a jury verdict depends upon a determination of the credibility of witnesses who are offering inconsistent testimonies. The "credibility determination only" reading of *Harte-Hanks* gains support from the Court's insistence that whether the evidence amounts to actual malice is a question of law, and not of fact. But it would be impossible, as a practical matter, for a reviewing court to separate the underlying facts, to which the court must defer, from the jury's verdict on actual malice. So long as the trial judge assigns responsibility to the jury for determining whether there was actual malice, rather than asking the jury to return a special verdict determining the facts of the case, a reviewing court, applying the *Harte-Hanks* methodology (if not its dicta), would be bound by the jury's reasonable determination of actual malice. If the Supreme Court meant to hold that a trial court should never give the actual malice question to a jury because it is a question of law, it should have vacated the verdict. On retrial, the jury, if there was one, would return a special verdict, finding the facts on which a determination of actual malice might be based, and the judge would apply the actual malice standard to those facts. But that is not what the Supreme Court did. Instead, it took the jury's application of the actual malice standard at face value and worked backwards from there, as a court ordinarily would do when reviewing a jury verdict. Regardless of the Court's dicta in *Bose Corporation* and its declaration in *Harte-Hanks* that actual malice is a question of law, the Court's actions in *Harte-Hanks* clearly demonstrate

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262. *Id.* at 698; *see also id.* at 700 ("[T]he Court's opinion is correct insofar as the critical point of deference to jury findings is concerned . . . . I would have [made] our independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it reasonably could have made. That is what common-law courts have always done, and there is ultimately no alternative to it.").

deference to a jury's reasonable application of constitutional doctrine.[263] Thus, the best reading of the Court's constitutional fact and independent review line of cases strongly suggests that, insofar as those doctrines require de novo review of a trial court's application of constitutional law to the facts of a case, they do not extend to a jury verdict.

4. The Appellate Court's Law-Defining Function

Appellate court deference to a jury's reasonable application of constitutional law does not cede all authority to the jury to determine the scope and meaning of constitutional law. Courts always review a jury verdict for whether the judge properly instructed the jury on the law and whether the jury's verdict comports with the law. There is no reason why the same rules should not apply to an appellate court's review of a jury's constitutional judgment.

The Supreme Court's cases in the area support this view. In *New York Times Co. v. Sullivan*,[264] for instance, the Court reviewed a libel award rendered by an Alabama jury against the New York Times for an advertisement it published that was critical of a local official's civil rights record. Famously, the Court did not defer to the jury verdict, but that was in part because the Court concluded that the jury had applied the wrong legal standard. The Court used the case as an opportunity to develop more First Amendment protections for those who are critical of public figures. The Court's decision to apply the standard itself, rather than to send the case back down for retrial, was likely due to its skepticism that the Alabama judiciary (whether including a jury or not) would apply it impartially.

More recently, the Court used the jury instructions in a constitutional tort case to clarify the proper legal standard. In *Kingsley v. Hendrickson*, the Court considered whether a pretrial detainee suing an officer for "excessive force" in violation of the Fourth Amendment must show that the force used against him was objectively unreasonable given the facts surrounding the incident, or whether it was subjectively unreasonable to the officer at the time.[265] The Court held that the proper standard was "objective unreasonableness," and then evaluated the jury instructions to see whether it was likely that the jury had actually applied that standard or the subjective standard.[266] Thus, the Court both clarified the legal standard and emphasized the importance of the jury verdict's reliance on the proper

263. *See* Scott v. Harris, 550 U.S. 372, 380 (stating that the video evidence of the seizure left Harris's "version of events [] so utterly discredited by the record that no reasonable jury could have believed him").

264. 376 U.S. 254 (1964).

265. 135 S. Ct. 2466 (2015).

266. *Id.* at 2472–73.

legal standard—without undermining the jury's role in applying that standard.

As the foregoing cases illustrate, reviewing a jury verdict for lawfulness has three important benefits. First, it protects against improper bias. To some extent, the point of having a jury decide a constitutional question is to influence the constitutional adjudication with a measure of the jury's bias.[267] But when that bias manifests itself in a verdict that is inconsistent either with the law as it stands or with a court of appeals' view of the law, the court maintains authority to correct the error or elaborate the law in a way that will protect against impermissible bias.

Second, review of a jury verdict for lawfulness ensures that constitutional doctrine continues to develop as uniformly and clearly as possible. On one hand, diverse jury verdicts, or verdicts that inch away from an appellate court's view, may invite more frequent elaboration (and perhaps even clarification!) of constitutional doctrine. On the other hand, appellate courts, especially the Supreme Court, already tolerate a great deal of diversity among constitutional judgments at the trial level; continuing to tolerate such diversity when the decisions are rendered by juries would imbue constitutional law with a meaningful dose of popular sentiment.

Third, and finally, by reviewing jury judgments for lawfulness, courts of appeals maintain and exercise their longstanding duty to "say what the law is" in cases that raise a constitutional question.[268] Deferring to the jury's reasonable application of existing constitutional doctrine neither abandons nor diminishes judicial responsibility.[269] Rather, it merely makes space, according to the ordinary rules of procedural and judicial review, for the jury to have a modest say in the scope of constitutional law by applying it on a case-by-case basis.

V. THE JURY'S CONSTITUTIONAL COMPETENCE

So far this Article has endeavored to show why the jury's constitutional judgment is a vexed question, argued that the history supports allowing the jury to apply constitutional law, and explained how this might work in practice given existing doctrine. Nowhere, however, has the Article argued that the law, either as it currently stands or as it ought to be understood, *requires* the jury's constitutional judgment. The reason is that, as a matter of longstanding and widely accepted practice, a trial judge enjoys great discretion over whether to label a question one of law, fact, or "mixed,"

267. *See infra* Part V.D.

268. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

269. For a study of judicial duty, see generally PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

and thereby retain responsibility for the question or send it to the jury. Most constitutional questions, as a descriptive matter, are mixed. Absent an appellate case on point, therefore, a trial judge has great discretion over the jury's role in constitutional adjudication.

This Part argues that trial judges should ordinarily allocate responsibility for applying constitutional law to the facts of a case to the jury. All of the familiar arguments for and against the jury's role in the justice system—arguments about relative competence, litigation costs, and the like—apply with equal force to constitutional cases, so there is no reason to consider them in detail here. Instead, this Part argues that the jury, whatever its competence in other sorts of cases, has a unique "constitutional competence," based on its unique ability to bring a popular perspective to the application of constitutional law, an ability that accords with the history and purposes of its role in constitutional structure. In terms of relative institutional competence, the jury has a unique capacity as a popular and legal institution to increase constitutional law's democratic legitimacy; to incorporate the political morality of a wide variety of Americans, not just a professional class, into constitutional law; and to provide a unique opportunity for laypeople to learn about and participate in American constitutionalism. Additionally, trusting the jury to apply constitutional law is consistent with the jury's enduring role in the American legal system as a source of normative content in ordinary negligence cases.

A. Democratic Legitimacy

The jury lends democratic legitimacy, both descriptively and normatively, to the application of constitutional law. To be descriptively legitimate, theorists argue, law in a liberal society must attain the assent of the governed.[270] Studies suggest that the public may prefer controversial cases to be resolved by a jury;[271] the public may view the jury's popular composition as a way to promote procedural fairness.[272] Consistent with this, by incorporating multiple perspectives, a jury symbolically represents

270. *See, e.g.*, C.K. Ansell, *Legitimacy: Political*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8704 (Neil Smelser & Paul B. Baltes eds., 2001).

271. *See* VIDMAR & HANS, *supra* note 3, at 248–49.

272. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 346–47 (1988); *see also* Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury*, 106 COLUM L. REV. 959, 983 (2006) ("[T]he jury is not at its core a mechanism for seeking truth; it is a tool for injecting democracy into the judicial process . . . .").

a range of community sentiment that a solitary judge cannot.[273] Conversely, privileging the professional judiciary's view of constitutional law may send a message of exclusion to the members of groups that have little say in the political process that resulted in the judge's appointment.[274]

Law is *normatively* legitimate, according to theorists, when it morally deserves assent.[275] Liberal political theories usually deem law to be worthy of assent when it arises from procedures designed to ensure that those governed by the law have a meaningful say over its requirements.[276] In the United States, laypeople ordinarily have a chance to shape Constitutional law indirectly at best. The Constitution itself was drafted and ratified by a handful of men who had been delegated authority by a somewhat larger handful of men who were said to represent "the People."[277] Constitutional law as we know it today depends on the constructions placed on the Constitution by judges nominated and confirmed by the President and the Senate, and by the acquiescence to those constructions by a host of federal and state officers who are responsible, to varying degrees, to the electorate.

By contrast, "the People" have an opportunity to directly bring popular sentiment to bear on constitutional law through the jury's application of constitutional standards to the facts of a case. Any given jury will never be perfectly representative, of course, but courts and legislatures can work to ensure that juries are more representative across the run of cases. And any given case will call for a relatively modest influence over the content of constitutional law; a constitutional doctrine may admit of a range of reasonable applications, but that range will be relatively limited in scope, and any given jury will have the chance to affect its meaning in only one case.

The jury's application of constitutional law gives the people not only a direct opportunity to *assent* to constitutional law but also to participate in self-governance. When the jury applies constitutional law, ordinary citizens have a unique opportunity to affect the limits of their own government. Deciding constitutional questions transforms the jury from a hollowed-out symbol of democracy to a living institution of self-rule.

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273. *See* MacCoun & Tyler, *supra* note 272, at 346–47; Kahan et al., *Whose Eyes*, *supra* note 4, at 886 ("[J]uries can lend legitimacy to law by assuring *minorities* that their perspective is being respected . . . .").

274. Kahan et al., *Whose Eyes*, *supra* note 4, at 899.

275. Ansell, *supra* note 270.

276. Kahan et al., *Whose Eyes*, *supra* note 4, at 884; *see generally* IAN SHAPIRO, THE MORAL FOUNDATIONS OF POLITICS 109–15 (2003).

277. *See, e.g.*, EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 267 (1988).

B. A Unique Perspective

As Professor Dan Kahan and others have shown in a series of empirical studies, laypeople sometimes evaluate constitutional issues differently than judges do.[278] Which way should this cut?

One prevailing narrative depicts juries as irremediably biased and deeply incompetent in run-of-the-mill cases, to say nothing of cases involving technical legal questions. On this account, difficult and morally-freighted legal questions should be entrusted to judges who have been trained in legal reasoning and acculturated into the mental disciplines of objectivity. The empirical evidence belies this account. Trial judges and juries normally agree.[279] Given that law is, in some sense, more a matter of art than geometrical precision even for lawyers,[280] it is often impossible to know whether the differences between the way a judge and a jury would resolve a matter depends more on "accuracy" or moral perception. As an epistemological matter, the distinction may be ephemeral.[281]

A particular concern, expressed by Professor David Faigman, is that *because* it is a popular institution, a jury will be less likely than a judge to protect individual rights commonly believed to be "countermajoritarian."[282] This concern may be overstated. Put simply, people like rights. The people overwhelmingly ratified the Bill of Rights and continue to overwhelmingly support it. And a growing body of empirical data suggests that, if anything, lay people are more likely than judges to protect at least some individual rights. Demography drives the salience of facts and the application of constitutional standards, especially standards that apply to executive officers. "Beliefs about the extent to which the police in general abuse their authority (particularly against minorities), and correspondingly the relative preponderance of licit and illicit reasons for attempting to avoid police encounters, vary across sociodemographic and political groups."[283] In

278. Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083–87 (2006) (book review) (on "cultural cognition" of risk); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 54–56 (2008).

279. *See* FAIGMAN, *supra* note 16, at 119–29.

280. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 681 (1984).

281. *See generally* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (considering the relation of legal epistemology to the early jury's authority to decide questions of law).

282. *See, e.g.*, FAIGMAN, *supra* note 16, at 123 ("Because the jury represents values associated with the political majority, it cannot fully be entrusted with protection of the values inherent in the Bill of Rights.").

283. Kahan et al., *Whose Eyes*, *supra* note 4, at 853 (footnote omitted); *see also id.* at 867 ("African Americans took a significantly more pro-plaintiff stance across all items. So did Democrats relative to Republicans, liberals relative to conservatives, and Egalitarians relative to Hierarchs. Communitarians were significantly more pro-plaintiff than Individualists for every item except risk to the public."); Daniel Lempert, *Belief in a Just World and Perceptions of Fair Treatment by Police: 2006 ANES Pilot Study Report* (Sept. 6, 2007), http://www.electionstudies.org/resources/papers/

general the judiciary is less representative of the population than jury pools, which are usually drawn from voter registries. By virtue of sheer numbers, the jury in a given case will almost inevitably reflect a wider demographic diversity than the judge. Sometimes that diversity will more closely reflect the population than others, but across the run of cases, the result of allowing juries to apply constitutional law will be a series of applications made by an institution that more closely reflects the aggregated perceptions of everyone who is a member of the political community.[284]

A separate objection to the jury's constitutional epistemology, raised by Professor Michael Wells, sounds in the jury's relative competence to decide the kinds of constitutional questions, such as Fourth Amendment claims, that trial judges routinely face.[285] This special experience may lend itself to more accurate judgments (or at least more consistent ones). Or this experience may actually distort judicial perceptions of police conduct because judges normally see "criminal cases in which police intuition proved accurate."[286] Those who are far more likely to encounter the police as citizens subject to governmental power, rather than as judges, may be in a better position to evaluate police action.[287]

Spearheaded by Professor Kahan, a number of recent social psychology studies marshal empirical data to support the anecdotal accounts of legal realists: adjudication and fact-finding are subconsciously driven by personal identity, values, and self-justification.[288] In light of the data, failing to admit the role of personal perspective in judgment may be a form of "naïve realism,"[289] and a number of scholars have urged judicial

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Pilot2006/nes012058.pdf (reporting in part I results of survey on perceived fairness of police toward criminal suspects); *see generally* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 156–57 (2006) (describing theory of cultural cognition); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 439–42, 452–53, 462–67, (1999) (describing culturally grounded status conflict between these types on issues such as the death penalty, gun control, and hate crimes).

284. *See, e.g.*, Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

285. Wells, *supra* note 8, at 90 ("Judges deal with Fourth Amendment issues every day in both criminal and civil contexts. Simply on account of their expertise, they may be better suited to resolve them than juries.").

286. Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 137 n.114 (1999).

287. Kahan et al., *Whose Eyes*, *supra* note 4, at 853.

288. *Id.* at 905 ("[B]ecause we inevitably recur to our cultural values to evaluate empirical claims about what conditions threaten our welfare and what policies promote it, styles of argumentation that feature facts can polarize us every bit as much as one that deals with differences of value in a transparent way." (footnote omitted)); *See* Kahan et al., *Fear*, *supra* note 278 (on "cultural cognition" of risk); Kahan & Bramen, *Self-Defensive*, *supra* note 278.

289. Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 414–16 (1995).

humility in the allocation of power between judge and jury.[290] Sending constitutional questions to the jury, without forgoing judicial review, would implement judicial humility without sacrificing the Court's duty to "say what the law is."[291]

C. Constitutional Pedagogy

Sending constitutional questions to the jury may also have reciprocal pedagogical benefits: jurors learn about constitutional rights and obligations, and courts have little choice but to learn how to simplify and clarify constitutional law. Alexis de Tocqueville eloquently sang the praises of the jury as:

> a gratuitous public school, ever open, in which every juror learns his rights . . . and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties.[292]

At its best, jury service teaches jurors to evaluate legal matters objectively, with an eye for the common good. The judge demonstrates this virtue throughout the trial and instructs the jury to do the same.[293]

In theory at least, jury deliberations likewise require jurors to give reasons to one another for their legal judgment, and to listen to one another's reasons.[294] When jurors deliberate about how to apply *constitutional* law, they articulate and learn about one another's perspectives on the proper role of government.

> [Those] who would see things differently from the Court . . . are members of groups who share a distinctive understanding of social reality that informs their view of the facts. . . . Perhaps the disclosure of the experiences and social influences on which the

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290. *See, e.g.*, Kahan et al., *Whose Eyes*, *supra* note 4, at 897; Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 769 (2005). For a more general theoretical account of judicial humility, see Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

291. Marbury v. Madison, 5 U.S. 137, 177 (1803).

292. DE TOCQUEVILLE, *supra* note 3 at 275.

293. *Id.* at 274 ("The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens, and this spirit, with the habits which attend it, is the soundest preparation for free institutions. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government.").

294. *See, e.g.*, Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

> minority's understanding rests could change the majority's view of social reality, and hence its view of the facts.[295]

By teaching citizens to see the government through one another's eyes, "the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well."[296] This has a unique potential to broaden a juror's view of citizenship, democracy, the constitutional order, and the judiciary's role within that order.

Conversely, allowing the jury to decide constitutional questions on a large scale may have lessons for judges. First, judges and advocates would be well served to make constitutional law as clear as possible to enable the jury to apply the law accurately.[297] Second, the diversity of jury judgments may prompt appellate courts to refine constitutional doctrines by carving out more categorical rules from constitutional standards. The result would be less judicial discretion (for judges *and* juries) and more deterrence and liability for government officials.[298]

Third, where the jury consistently decides certain constitutional cases the same way, courts may want to consider whether to refine the doctrine. The question is whether courts should refine the doctrine to *reflect* popular sentiment expressed through the jury, or to *prevent* popular bias. Suppose juries prove to be significantly more likely than judges to hold police officers liable for excessive force, or significantly more likely to hold libel defendants liable. Would the jury's systematic over-protection of, say, excessive force plaintiffs suggest that the doctrine is off-kilter, or that courts should not trust the jury to apply it? More generally, should constitutional doctrine be the result of a dialectical relationship between juries and courts? Presumably courts will decide legal questions according to their own view of the law, not according to a jury's view. But whether, why, and to what extent a jury's view should influence a court's view of the law are fascinating questions this Article can only flag for future consideration.

D. Normative Standards

Mixed questions of constitutional law and fact are akin to the kinds of questions that the common law has traditionally assigned to the jury. The

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295. Kahan et al., *Whose Eyes*, *supra* note 4, at 886.

296. DE TOCQUEVILLE, *supra* note 3, at 276.

297. *See* Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659 (2006) (suggesting how to go about such a project); *see generally* PETER M. TIERSMA, COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS (2006); Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163 (2004).

298. *See* Wells, *supra* note 8, at 82.

best example is the reasonableness standard in suits for negligence.[299] As nineteenth century common law courts shifted responsibility for commercial questions away from the jury, they conversely continued to entrust vague normative questions about everyday behavior *to* the jury.[300] The Third Restatement explains: "The jury is assigned the responsibility of rendering such judgments because several minds are better than one, and also because of the desirability of taking advantage of the insight and values of the community, as embodied in the jury, rather than relying on the professional knowledge of the judge."[301] In many cases, the common law trusts juries, not judges, to make the common sense moral judgment entailed in applying normative standards to the facts of a case.[302]

The application of many constitutional standards entails a judgment that is even more blatantly normative. Many provisions of the Bill of Rights are stated in moral and/or political terms.[303] Accordingly, constitutional doctrines incorporate normative standards.[304] Just as with

299. *See* Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. 657, 664 (1873) ("[T]welve men know more of the common affairs of life than does one man" so "they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."); Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224 (describing the ordinarily prudent man as the man on the "Clapham omnibus" and "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves"); OLIVER WENDELL HOLMES, THE COMMON LAW 87 (Mark DeWolfe Howe ed., Harvard University Press 1963).

300. *See, e.g.*, Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407 (1999).

301. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8 cmt. b (Tentative Draft No. 1, 2001).

302. Gergen, *supra* note 300, at 435 ("That the issue of breach is put to the jury even when facts are free of doubt shows that in negligence law independent value is put on the jury deciding what is reasonable conduct when the normative issue is open to debate. This is where what I call the values of popular judgment come into play. The many celebrations of the jury's role in negligence focus more on the jury's role in deciding normative issues than the jury's role in deciding factual issues." (footnote omitted)).

303. *See, e.g.*, U.S. CONST. amend. VIII (prohibiting "[e]xcessive bail . . . , excessive fines . . . , [and] cruel and unusual punishments").

304. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (qualified immunity doctrine includes an "objectively reasonable officer" standard); *see* Georgia v. Randolph, 547 U.S. 103, 111 (2006) (in Fourth Amendment consent cases, "[t]he constant element in assessing . . . reasonableness . . . is the great significance given to widely shared social expectations."); Whren v. United States, 517 U.S. 806, 813 (1996) (articulating the Fourth Amendment's prohibition on "unreasonable searches and seizures" as prohibiting stops without "probable cause" based on what an objectively reasonable officer would have believed); Graham v. Connor, 490 U.S. 386, 395–96 (1989) (articulating the Fourth Amendment's prohibition on unreasonable searches and seizures as prohibiting the "excessive use of force"); Whitley v. Albers, 475 U.S. 312, 322 (1986) (articulating Eighth Amendment "malicious conduct" standard); McConkie v. Nichols, 446 F.3d 258 (1st Cir. 2006) (affirming district court's grant of summary judgment on ground that "no reasonable juror could find that [the defendant]'s conduct shocked the conscience"); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) (describing the standard as "negligence with respect to illegality"). *But see* Mason v. Stock, 955 F. Supp. 1293, 1308 (D. Kan. 1997) ("[T]he 'shock the conscience' determination is not a jury question.").

negligence, constitutional standards are highly fact-sensitive.[305] The relevance of particular historical facts and the legal standard's meaning emerge in light of one another. As in negligence cases, when the jury applies constitutional standards it relies on the community's common sense and practical experience to determine which facts are relevant, and to decide how the law applies to those facts.[306]

Some decision maker must apply constitutional standards to the facts of a case. The questions are who will fill the normative gap, and what they will fill it with. Juries, according to Oliver Wendell Holmes, Jr., "introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community."[307] As Professor Kenneth Karst explains, by "popular prejudice," Holmes "has in mind not racism or political hostility or some other invidious discrimination, but a popular sense of justice, bubbling upward from the particulars of a case to the doctrine."[308]

The key difference between garden variety torts and constitutional law—even constitutional torts—is that the former requires a judgment about actions common to the average person and the latter requires a judgment about the reasonable scope of government action. Judges are more experienced with the day-to-day affairs of police officers and other government agents, encountering them routinely in criminal cases. The judge's familiarity with police procedures, however, is of a distinct sort. The judge typically meets the police and prosecutors at the end of a successful investigation, when government agents are at their best.[309] Jurors, however, are more likely to have encountered, or to have a loved one who has encountered, government agents at their workaday—or even at their worst.[310] Allowing the jury to introduce popular prejudice into

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305. *See* Scott v. Harris, 550 U.S. 372, 384 (adding the "relative culpability" of the officer and plaintiff to this list); *Graham*, 490 U.S. at 396 (stating that the Fourth Amendment reasonableness standard for private actions against officers "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight") (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

306. Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1370 (2006).

307. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

308. Karst, *supra* note 306, at 1369; *see also id.* at 1370 ("The role of jurors, bringing commonsense judgments to this branch of the [constitutional] lawmaking process, is not to be lamented, but applauded . . . ." (footnote omitted)).

309. *See* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 137 n.114 (1999) (judges normally see "criminal cases in which police intuition proved accurate").

310. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *380 ("But in settling and adjusting a question of act, when intrusted [sic] to any single magistrate, partiality and

constitutional decision making promotes a structural check on executive and judicial power through a mechanism that is entirely familiar to the American legal tradition.

VI. CONCLUSION

As a symbol the jury continues to shape our democratic imaginations. The framers expected the jury to be a powerful structural check on overreaching executive agents and judges. But the jury's power to do so has suffered a thousand cuts. Outside of the criminal jury's de facto power to ignore the judge's legal instructions, the contemporary jury is a marginal structural check, a speed bump on the route to judicial supremacy.

This Article has suggested a practical and modest way for the jury to regain a meaningful measure of its original structural role. Deferring to the jury's reasonable constitutional judgment not only affects the Constitution's meaning on the ground, case-by-case; it also holds the potential to increase the democratic legitimacy of constitutional law and the Court's responsiveness to popular constitutional morality. Courts can do this without foregoing their primary responsibility for articulating constitutional doctrine. Making space for the jury's constitutional judgment holds the promise of a more symbolically and substantively democratic constitutional law.

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injustice have an ample field to range in . . . . Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hand of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.).