The "True" Right to Trial by Jury: The Founders' Formulation and Its Demise

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THE ‘TRUE’ RIGHT TO TRIAL BY JURY: THE FOUNDERS’ FORMULATION AND ITS DEMISE

Jon P. McClanahan*

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I. INTRODUCTION

[S]hould the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental [constitutional] principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, no. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.¹

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To a reader who is untrained in American legal history, the above passage might seem like it advocates a radical departure from the American legal system as it has existed throughout history. Indeed, one of the basic tenets of the modern jury system is that issues of law are reserved for the court, while issues of fact are to be determined by the jury;\(^2\) that there should be jury review of the constitutionality of laws seems an almost unthinkable proposition today. Yet, this passage was taken from the diary of John Adams and was written in 1771.\(^3\) What happened to the Founders’ conception of a powerful jury, poised to decide not only questions of fact but also questions of law, and when called on, to resist enforcing laws that they deemed to be unconstitutional?

The early American legal system was strongly influenced by its British ancestry. Not only did the American legal system often directly adopt Britain’s substantive law and procedures,\(^4\) but it also developed its own legal constructs in response to what many colonists believed was oppressive British control.\(^5\) In particular, the trial of John Peter Zenger became a rallying cry for the Revolution.\(^6\) Zenger, who was charged with seditious libel for publishing statements that were critical of British rule, was ultimately acquitted by a colonial jury, despite the fact that the jury was only to determine whether Zenger had published the statements and not whether the statements themselves were seditious.\(^7\) In response to the colonial juries’ increasing refusal to convict colonists of crimes committed against the Crown, Britain eliminated the right to jury trials in particular categories of cases or declared that the trials be conducted in England, thus denying colonists the right to trial by a jury of their peers.\(^8\) Given the British interference with the colonial judicial system, it is no surprise that the Decla-

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2. James B. Thayer, "Law and Fact" in Jury Trials, 4 HARV. L. REV. 147, 147 (1890) (discussing the dichotomy between matters of law and fact). It is interesting to note that even though this Article was written in 1890, it adheres to this strict division of labor between the judge and jury, and dismisses any notion that the jury should decide questions of law not in accordance with the court’s direction. See id. at 170.
7. Id. at 383–84.
8. Brief History, supra note 5, at 875.
ration of Independence included among its grievances against King George III that he had "deprive[ed] us, in many cases, of the benefits of Trial by Jury."9

The right to a jury trial, particularly in the case of criminal matters, continued to be of central importance in the drafting of both the Constitution10 and the Bill of Rights.11 Furthermore, all twelve states that had adopted state constitutions prior to the Constitutional Convention included a right to jury trial in criminal matters as one of the rights granted to their citizens.12 Although the Founders considered the right to a jury trial to be of the utmost importance to American citizens, there was little guidance provided on how the right to jury trial should be implemented; consequently, there was much variation among the states in a litigant’s right to a jury trial and the role of the jury in deciding cases.13 Perhaps this omission was an intentional one, giving states the power to implement the right to a jury trial in such a way that they deemed most appropriate.14 Yet, if the right to a jury trial is to be an effective one and not a mere formalism, jurors must be given a minimum amount of power over deciding particular types of cases.15 By examining the statements of the Founders and their contemporaries around the time of the drafting of the Constitution, one can begin to get a sense of the different functions that were to be carried out by the jury, as a protector of the people against overreaching by the government,16 as a participant in the democratic process,17 and as a central figure in the administra-

9 The Declaration of Independence para. 20 (U.S. 1776); see also Brief History, supra note 5, at 875 (suggesting the connection between the right of the British and American colonists over the role of jury and the inclusion of the deprivation of the right to trial by jury among the grievances in the Declaration of Independence).

10 See U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed"); see also Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170, 171 (1964) [hereinafter Changing Role] (indicating colonial opposition to the Federal Constitution because of its failure to guarantee the right to trial by jury in civil matters).

11 See Akhil Reed Amar, The Bill of Rights 83 (1998) [hereinafter Amar’s Bill of Rights] ("Indeed, the entire debate at the Philadelphia convention over whether to add a Bill of Rights was triggered when George Mason picked up on a casual comment from another delegate that ‘no provision was yet made for juries in Civil cases.’") (quoting 2 Records of the Federal Convention of 1787 587 (Max Farrand ed., Yale Univ. Press 1937) (1787))); see also Akhil Reed Amar, America’s Constitution 233–35 (2005) [hereinafter Amar’s America’s Constitution] (discussing the debate between the Federalists and Anti-Federalists over the failure to guarantee the right to jury trial for civil cases in the Constitution, prompting the swift passage of the Seventh Amendment).


13 Smith, supra note 4, at 422.

14 See The Federalist No. 83 (Alexander Hamilton).

15 See Parmenter, supra note 6, at 384.

16 Amar’s Bill of Rights, supra note 11, at 83.
tion of justice. The right of the jury to decide questions of both law and fact comports with these goals, and indeed the jury’s right to decide questions of law in criminal cases was widely accepted around the country from the time of the passage of the Constitution until the middle of the 1800s. In 1794, the United States Supreme Court even acknowledged the power of juries to decide questions of law when it presided over the jury trial in Georgia v. Brailsford, explicitly including such language in its instructions to the jury.

While the jury’s right to decide questions of law was commonly accepted at this time, the right to jury review was not so favorably looked upon by the courts, when that right was explicitly considered at all. Nevertheless, some courts did allow defense counsel to argue the unconstitutionality of a law to the jury, confirming the view shared by some scholars that the jury was vested with the right to refuse to follow a law if the law were deemed by the jury to be unconstitutional. While this concept is often conflated with the modern notion of jury nullification, this right of jury review should be considered as distinct from jury nullification, since the right to jury review would enable jurors to refuse to follow a law if they found the law to be unconstitutional, while the latter would enable them to refuse to follow a law if they found the law or application of the law to be unjust.

With the passage of time, mounting opposition arose to the recognition of a jury’s right to decide issues of law. While this opposition was by no means uniform across the country, the gradual denial of this right continued until 1895, at which time the Supreme Court’s decision in Sparf v. United States effectively turned any hope for the right of the jury to decide issues of law into a

17 Id. at 94.
18 Id. at 96.
20 See Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 3 (1794) (instructing the jury on its right to decide questions of law as well as fact, even though acknowledging a court’s better position in deciding the law); see also Smith, supra note 4, at 449 (describing the jury instructions in Brailsford).
21 See David A. Pepper, Nullifying History: Modern-Day Misuse of the Right to Decide the Law, 50 CASE W. RES. L. REV. 599, 626–27 (2000) (arguing that jury review was uniformly denied by federal courts).
23 AMAR’S BILL OF RIGHTS, supra note 11, at 98 & n.64 (distinguishing between jury review and jury nullification).
24 See Changing Role, supra note 10 (detailing the progressive denial of the jury’s right to decide issues of law in Massachusetts as an example of such changes throughout the country); Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582 (1939) (describing the prevalence of the right of the jury to decide questions of law in the early 1800s and the weakening of the right in various parts of the country).
25 See Smith, supra note 4, at 452 (indicating that as late as 1851, fifteen states acknowledged the jury’s right to decide issues of law by constitution, statute, or judicial decision).
dead letter. The great divide between judges deciding issues of law and juries deciding issues of fact was complete, and scholars tried to reconcile inconsistent precedent and statements to the contrary.

This Article argues that the Founders’ conception of a strong, independent jury necessarily included the right of the jury to decide issues of law and fact, as well as the related right to refuse to apply laws it deemed to be unconstitutional. During the course of the nineteenth century, the ideals of an active jury, involved in the administration of justice, poised to defend against governmental overreaching, was replaced with the conception of a passive jury that was only asked to dutifully decide disputed issues of fact. Justifications given by legal scholars for this shift in practice, while appealing facially, are premised on an idea that this shift was an inevitable response to the social changes in the nineteenth century, but fail to fully acknowledge that the shift in practice itself might have contributed to the failure to achieve the Founders’ ideals of the jury. It is important to note at the outset that this Article is intended to be primarily descriptive in nature, detailing the role of the jury from the colonial American era until the end of the nineteenth century. This Article does not purport to explore the normative question of whether the modern jury should have these roles, leaving this topic for a subsequent article. Nevertheless, if one believes that the Founders’ conception of the jury should influence its modern formulation, this Article will help inform that discourse.

Part II of this Article briefly describes the evolution of the role of the jury in Britain and its impact on the conception of the jury in colonial America, focusing primarily on the right of the jury to decide issues of law. Moreover, Part II examines the tension between Britain and colonial America concerning the administration of justice, and how this tension helped shape the Founders’ vision of the jury. Part III of this Article examines the conception of the jury around the time of the enactment of the Constitution and Bill of Rights through statements of the Founding Fathers and other contemporaries, in order to develop an understanding of the different ideological roles that were to be fulfilled by an inclusion of the right to a jury trial. In addition, Part III will examine how the jury’s right to decide issues of law and jury review fit within this ideological framework. Part IV of this Article traces the erosion of the jury’s right to decide issues of law during the nineteenth century. This Article concludes by exploring


27 See, e.g., Thayer, supra note 2, at 170–72 (attempting to reconcile the language of Georgia v. Brailsford with the division of labor between the judge and jury by providing limited exceptions to the rule governing the division of labor). But see Howe, supra note 24, at 583–84 (suggesting that Thayer’s vision of the division of labor between judge and jury does not comport with the actual practices in the 1800s).

28 See, e.g., Howe, supra note 24, at 614–16; Brief History, supra note 5, at 915–20; Pepper, supra note 21, at 639–40; Middlebrooks, supra note 26, at 408.
proposed justifications for this erosion, but ultimately finds that such justifications are inconsistent with the Founders’ conception of the jury.

II. THE BRITISH INFLUENCE ON THE EARLY AMERICAN RIGHT TO TRIAL BY JURY

This Part discusses the relationship between judges and juries in Britain, and in particular the tight control that judges traditionally exercised over judicial proceedings and jury verdicts. By the seventeenth century, British judges exerted considerably less control over juries. While the legal system in colonial America was influenced by the growing independence of juries in Britain, it went even further in giving juries the power to decide issues of law, independent from judges.

A. Historical Evolution of the Role of the Jury in Britain

A comprehensive treatment of the British jury system is beyond the scope of this Article; consequently, this Article will focus on the right of the British jury to decide issues of law, as well as the evolution of judicial control over the jury in reaching verdicts. Traditionally, there was a sharp division between the judge deciding issues of law and the jury deciding issues of fact. Moreover, the judge had coercive measures at his disposal to ensure that the jury’s verdict was consistent with his wishes. Over time, however, British courts began to recognize the need for an independent jury, which through the rendering of a general verdict could decide issues of law.

British common-law courts traditionally adhered to a distinct division of labor between judges deciding issues of law and juries determining issues of fact, similar to that found in modern-day American courts. According to the words of the British legal scholar Sir Edward Coke, “The most usual triall of matters of fact is by twelve such men; for ad quaestionem facti non respondent judices; and matters in law the judges ought to decide and discusse; for ad quaestionem juris non respondent juratores.” While Coke’s statement accurately described the general rule, there were exceptions, the most famous of which appeared in the trials of John Lilburne. During his 1649 trial on charges of treason for publishing anti-government pamphlets, Lilburne asked the court

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29 For a detailed description of the British jury system, see generally Smith, supra note 4.
30 See id. at 416.
31 See Thayer, supra note 2, at 149.
to allow him to address the jury on issues of both law and fact.\textsuperscript{34} In response, the judge stated, "Master Lilburne quietly express yourself, and you do well; the jury are judges of matter of fact altogether, and Judge Coke says so: But I tell you the opinion of the Court, they are not judges of matter of law."\textsuperscript{35} Although he was formally denied the opportunity to argue issues of law to the jury, Lilburne continued to advocate his right to do so in his closing statement, and ultimately he was found to be not guilty on the charge of treason.\textsuperscript{36} In 1653, Lilburne faced a second trial, and again he advocated the jury's role in deciding issues of law.\textsuperscript{37} In this trial, Lilburne went further, "invok[ing] the jury as a shield, adjuring them to reject 'void' law and to act on behalf of the people, whose powers of delegation of authority to true representatives had been wrongfully usurped."\textsuperscript{38} In its acquittal of Lilburne, the jury found that Lilburne was "not guilty of any crime worthy of death."\textsuperscript{39}

A closer inspection of Lilburne's writings and statements during his trials reveal that Lilburne was arguing for more than just a version of jury nullification as it is conceived in modern legal scholarship; instead, he was advocating for the jury to decide pure issues of law as a judge and even engage in a type of jury review.\textsuperscript{40} In the 1649 trial, he advocated that the jury should be able to find that the statute was "null and void under the true law of England."\textsuperscript{41} Furthermore, in the 1653 trial, he argued that the jury should be able to assess whether a recently enacted statute was not in accordance with "due process" because the statute imposed sanctions that did not previously exist under the common law.\textsuperscript{42} Beyond modern notions of failing to apply an unjust law, Lilburne was advocating a juror role similar to that of a judge, vested with the right to decide purely legal issues as well as the right to decide whether a statute was repugnant to Britain's unwritten constitution.\textsuperscript{43}

In the British courts, judicial control over the proceeding and the jury was initially quite strong, with the judge taking an inquisitorial role in questioning the witnesses and "compel[ling] jurors to reconsider decisions with which he did not agree."\textsuperscript{44} As time went on, direct methods of compelling jurors to re-

\textsuperscript{34} Id. at 100–01.
\textsuperscript{35} THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 173 (1985).
\textsuperscript{36} Id.; Pepper, supra note 21, at 611; see Parmenter, supra note 6, at 381.
\textsuperscript{37} Fernandes, supra note 33, at 102.
\textsuperscript{38} GREEN, supra note 35, at 197–98.
\textsuperscript{39} Id. at 197.
\textsuperscript{40} See Pepper, supra note 21, at 611 (exploring what Lilburne meant when he stated that the jury should decide issues of law). Unlike this Article, the author uses Lilburne's statements in the context of jury nullification. See id.
\textsuperscript{41} GREEN, supra note 35, at 195.
\textsuperscript{42} Id. at 196.
\textsuperscript{43} Pepper, supra note 21, at 611.
consider decisions were replaced with indirect, yet arguably equally coercive measures.\(^{45}\) Due to the fact that jurors were traditionally considered to be witnesses by the British courts, jurors could be found guilty of perjury for reaching a "false" verdict.\(^{46}\) Through the writ of attaint, the court would impanel a new jury to review the verdict, and if the second jury found the verdict to be incorrect, "the members of the first jury were subject to imprisonment, forfeiture of lands and chattels, and denial of credit to borrow money."\(^{47}\)

The coercive tactics of the judiciary towards the jury were limited as a result of Bushell's Case, decided in 1670.\(^{48}\) Edward Bushell was a member of the jury in the prosecution of Quakers William Penn and William Mead on charges of preaching to an unlawful assembly and breach of the peace.\(^{49}\) After twice refusing to follow the instructions of the court, which had instructed the jury to return a guilty verdict on all charges, "[t]he judge admonished the jury, threatening not to release them until they returned an acceptable verdict: 'you shall be locked up, without meat, drink, fire, and tobacco . . . we will have a verdict, by the help of God, or you shall starve for it.'"\(^{50}\) In fact, the judge detained the jury for two days without food, water, and heat, yet the jury did not waiver in its decision.\(^{51}\) As a result of the jury's refusal to return a guilty verdict, the judge imposed a fine on the jurors and imprisoned those who refused to pay the fine, including Bushell.\(^{52}\) Bushell filed a *habeas corpus* petition, and Chief Justice Vaughan declared in *Bushell's Case* that judges could not fine or imprison jurors for rendering a verdict with which the judge did not agree.\(^{53}\) It is interesting to note that Vaughan's reasoning was not based on the idea that the jury had the right to decide issues of law; in fact, the opinion stated that a juror is obligated to follow the law laid down by the judge.\(^{54}\) Nevertheless, the "case established the independence of the English jury and cemented its position


\(^{46}\) Id.

\(^{47}\) Id. at 395; see also James B. Thayer, *The Jury and Its Development: III*, 5 HARV. L. REV. 357, 364 (1892) (describing the procedure for the writ of attaint in further detail).


\(^{49}\) Parmenter, supra note 6, at 381.

\(^{50}\) Id. (quoting *Trial of Penn and Mead*, in 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 951, 963 (1810)).

\(^{51}\) Id.

\(^{52}\) Smith, supra note 4, at 408.

\(^{53}\) Id.; *The Civil Jury*, 110 HARV. L. REV. 1408, 1417 (1997); Parmenter, supra note 6, at 382.

\(^{54}\) See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 YALE L.J. 1815, 1815–16 (2002). But see Parmenter, supra note 6, at 382 (finding that "Vaughan declared that the jury determines the law in all matters decided by a general verdict.").
as a guarantor of liberty in the face of state oppression."\textsuperscript{55} Despite Vaughan's language to the contrary, the case was soon viewed as generally supporting a jury's right to decide both issues of law and fact.\textsuperscript{56}

In addition to a few prominent cases where British courts considered the right of the jury to decide issues of law and the related power of courts to coerce jurors to issue particular verdicts, the very nature of a general verdict itself arguably gave juries a "de facto power" to decide issues of law.\textsuperscript{57} Although British courts could minimize the effect of enabling juries to decide issues of law through procedural devices such as the special pleading and the special verdict,\textsuperscript{58} when such procedural devices were not employed, juries could effectively decide issues of law through a general verdict. Moreover, after the decision in \textit{Bushell's Case}, such verdicts could be made without fear of retribution by the court.\textsuperscript{59}

While British juries clearly did not have a recognized right to decide issues of law, by the seventeenth century they had gained more freedom to decide cases in accordance with their own views of the law, independent from that of judges.

\begin{enumerate}
\item \textbf{Tension between Britain and Colonial America Regarding Administration of Justice}

As the struggle between Britain and colonial America escalated in the time leading up to the Revolution, colonial juries played a vital role in mounting opposition to oppressive British control.\textsuperscript{60} Not only were colonial American jurors free of the extreme coercive judicial tactics that were once practiced in Britain due to the result in \textit{Bushell's Case}, but the colonies accorded judges even less control over juries than did their British counterparts.\textsuperscript{61} Among the greater powers given to colonial juries, the courts allowed lawyers to argue the validity of laws to juries.\textsuperscript{62} Colonial juries, equipped with this relatively unchecked power to render general verdicts, refused to convict defendants accused

\begin{itemize}
\item \textsuperscript{55} Smith, supra note 4, at 408; see also Matthew P. Harrington, \textit{The Law-Finding Function of the American Jury}, 1999 Wis. L. Rev. 377, 384 (1999) (discussing the impact of \textit{Bushell's Case} on the independence of the jury and the jury's role as a defender against governmental abuses).
\item \textsuperscript{56} Stern, supra note 54, at 1816.
\item \textsuperscript{57} Smith, supra note 4, at 416 (emphasis added).
\item \textsuperscript{58} See William E. Nelson, \textit{The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence}, 76 Mich. L. Rev. 893, 905-06 (1978) (describing some of the procedures used in Britain that were not extensively used in the American colonies in the mid-eighteenth century).
\item \textsuperscript{59} Smith, supra note 4, at 408.
\item \textsuperscript{60} Bradley J. Huestis, \textit{Jury Nullification: Calling for Candor from the Bench and Bar}, 173 Mil. L. Rev. 68, 74 (2002); see also Brief History, supra note 5, at 871.
\item \textsuperscript{61} See Smith, supra note 4, at 439-41.
\item \textsuperscript{62} Huestis, supra note 60, at 74.
\end{itemize}
of violating British laws, in particular those involving seditious libel\textsuperscript{63} and trade restrictions.\textsuperscript{64} As an example of the colonial jury's influence on the administration of justice, in 1768 John Hancock refused to allow British customs inspectors aboard his ship, in clear violation of a statute requiring such access.\textsuperscript{65} However, the attorney general thought it futile to prosecute the case because a colonial jury would refuse to indict or convict Hancock.\textsuperscript{66} One of the governors of Massachusetts lamented that "a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers."\textsuperscript{67}

Undoubtedly, the most celebrated and influential case of a colonial jury refusing to convict an accused despite the weight of evidence was that of John Peter Zenger, a printer who was charged with seditious libel for criticizing the governor of New York.\textsuperscript{68} Initially, the judge charged three separate grand juries to indict Zenger for seditious libel, but all refused to do so; consequently, Zenger was charged by information.\textsuperscript{69} When Zenger's original lawyers objected to the chief justice presiding over the trial on grounds of lack of independence since his service was at the will of the Crown, the chief justice not only refused to disqualify himself but also had the lawyers disbarred.\textsuperscript{70} Under the then-prevailing rules governing seditious libel prosecutions, the jury was not to determine whether a publication was libelous, for that was deemed a question of law to be decided by the court.\textsuperscript{71} Instead, the jury was only to determine whether the defendant had published the materials that were the subject of the charge.\textsuperscript{72} Furthermore, truth was not considered a defense to a libel prosecu-

\textsuperscript{63} See Brief History, supra note 5, at 874 ("Hundreds of defendants were convicted of [seditionious libel] in England during the seventeenth and eighteenth centuries, but there seem to have been no more than a half-dozen prosecutions and only two convictions in America throughout the colonial period.").

\textsuperscript{64} See Robert E. Kororch & Michael J. Davidson, Jury Nullification: A Call for Justice or an Invitation to Anarchy?, 139 MIL. L. REV. 131, 134 (1993) (noting that colonial juries refused to convict defendants for violating navigation acts that were created to ensure that trade flowed through Britain).

\textsuperscript{65} Huestis, supra note 60, at 74–75.

\textsuperscript{66} Id. at 75.

\textsuperscript{67} Stephen Botein, Early American Law and Society 57 (1983) (quoting Governor William Shirley).


\textsuperscript{69} Harrington, supra note 55, at 393.

\textsuperscript{70} Brief History, supra note 5, at 872.

\textsuperscript{71} Pepper, supra note 21, at 614.

\textsuperscript{72} Parmenter, supra note 6, at 383.
Andrew Hamilton, Zenger’s attorney, conceded that Zenger had published the materials in question, but he nevertheless maintained that the jury should determine whether the materials were libelous; central to Hamilton’s argument was that the jury had a right to determine the law. The chief justice disagreed with Hamilton, and the following exchange ensued:

Chief Justice: “[T]he jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous; you know this is very common; it is in the nature of a special verdict, where the jury leave the matter of law to the Court.”

Hamilton: “I know . . . the jury may do so; but I do likewise know they may do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so . . . . [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless . . . .”

Hamilton, citing *Bushell’s Case* as precedent, posited that “it is very plain that the jury are by law at liberty . . . to find both the law and the fact in our case.” Hamilton argued for more jury involvement to combat a “wide-spread fear” that a judge’s already vast powers were incompatible with a judge also having the sole power to interpret laws. Although the judge did not agree with Hamilton’s contentions, he did allow the jurors to return a general verdict, and Zenger was acquitted. An account of the Zenger trial was widely published throughout the colonies, and it “became the American primer on the role and duties of jurors.”

The Zenger trial has often been cited by scholars as a prime example of the colonial jury’s resistance to unpopular prosecutions by the British-controlled

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73 Pepper, *supra* note 21, at 614; see also *Brief History, supra* note 5, at 873 (“The well-established rule was: The greater the truth, the greater the libel.”).

74 *Brief History, supra* note 5, at 873.

75 Pepper, *supra* note 21, at 615.


78 Pepper, *supra* note 21, at 615.

79 *Brief History, supra* note 5, at 873.

80 *Id.* at 874.
government, and indeed it is such a case. Proponents of jury nullification have relied upon the Zenger case as support for the practice in colonial times, and the two have almost become synonymous with each other. Taking a closer look at Hamilton’s arguments, however, reveals that his arguments for the jury deciding issues of law were broader than merely advocating the jury’s right to refuse to uphold an unjust law. In particular, he argued to the jury that the court had misinterpreted the elements of libel in the common law by failing to allow the truth of the publication as a defense to the claim, using prior precedent and legislation in support of this contention. Hamilton also made policy arguments to the jury against the judge’s interpretation of the elements of libel. Finally, he called upon the jury to consider inherent legal rights accorded to colonial Americans, stating that “[t]he nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power . . . by speaking and writing truth.” Taken together, Hamilton’s arguments to the jury were similar to that which would be made to a judge faced with making a purely legal interpretation of the elements of a crime—considering the common law and past precedent, statutes that concern the subject, and public policy arguments in favor of a particular interpretation. In addition, even though this case predated the Revolution and subsequent adoption of the Constitution, Hamilton’s statement regarding the inherent liberty of colonists to oppose governmental power through truthful language can be seen as a precursor to arguments regarding the constitutionality of the law of seditious libel. Consequently, Hamilton’s statements could be read to advocate not only the jury deciding issues of law, but also a rudimentary type of jury review.

Faced with increasingly hostile colonial juries, the British government responded by limiting their ability to hear contentious cases. First, the British expanded the jurisdiction of admiralty courts, which did not have juries, to allow the courts to hear cases involving revenue owed to the British. Under the

81 See, e.g., AMAR’S BILL OF RIGHTS, supra note 11, at 84 (citing Zenger for the proposition that “[c]olonial grand juries flexed their muscles to resist unpopular prosecutions.”); Magliocca, supra note 22, at 191 ("[T]he Zenger trial was but the first example of jury resistance to Imperial authority, and soon revolutionary activists adapted [sic] colonial practice to fulfill the jury's potential as a mobilizer of constitutional change.").
82 See, e.g., Huestis, supra note 60, at 74 (describing the Zenger trial as one of the most famous trials of jury nullification); Parmenter, supra note 6, at 383–84 (indicating that the Zenger trial popularized jury nullification in the time leading up to the Revolution); John T. Reed, Comment, PENN, ZENGER AND O.J.: JURY NULLIFICATION—JUSTICE OR THE "WACKO-FRINGE'S" ATTEMPT TO FURTHER ITS ANTI-GOVERNMENT AGENDA?, 34 DUQ. L. REV. 1125, 1132 (1996) (citing Zenger as an example of jury nullification of oppressive colonial laws).
83 See Pepper, supra note 21, at 615–17.
84 See id. at 616.
85 Id.
86 ALEXANDER, supra note 77, at 99; Pepper, supra note 21, at 616.
87 See Brief History, supra note 5, at 875; Harrington, supra note 55, at 394–96.
88 Brief History, supra note 5, at 875.
Administration of Justice Act of 1774, English officials charged with crimes could be tried in England instead of the colonies, where they would have undoubtedly faced more hostile juries. In addition, Parliament stated that colonists accused of treason would be tried in Britain instead of in America, effectively denying the accused the right to be tried by a jury of his peers. Edmund Burke, a member of the House of Commons yet sympathetic towards the American colonies, described the unjustness of this practice: “[B]rought hither in the dungeon of a ship’s hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence . . .” Not surprisingly, the attempts by the British to limit the role of the jury only escalated the tensions between the British and the colonists, and these actions greatly contributed to the desire to fight for colonial independence.

Thus, juries in colonial America had even more power than their British counterparts to render verdicts in accordance with their own views of the law. Colonial jurists sometimes used this power to rebel against oppressive British control, with the Zenger trial being the most notable example. British attempts to curtail this power only heightened the already considerable tension between themselves and the colonists, and it ultimately played a part in the American revolution.

III. FOUNDERS’ CONCEPTION OF THE RIGHT TO TRIAL BY JURY

This part analyzes the right to trial by jury as it was envisioned by the Founders. In particular, the Founders staunchly believed that juries played an essential role in the success of a democracy, by protecting against governmental overreaching, by enabling citizens to participate in the democratic process, and by operating as a central figure in the administration of justice. The right to decide issues of law and the related right to decide the constitutionality of laws fit in with the Founders’ conception of the jury, as evidenced by the writings of the Founders and the actual practices at that time.

89 Harrington, supra note 55, at 394.
90 See id. at 394.
93 See THE DECLARATION OF INDEPENDENCE para. 20–21 (U.S. 1776) (listing among the grievances against King George III “depriving us in many cases, of the benefits of Trial by Jury” and “transporting us beyond Seas to be tried for pretended offences.”); see also Smith, supra note 4, at 424 (describing several actions leading up to the Declaration of Independence that indicated colonists’ anger over the deprivation of the right to trial by jury).
A. Prevailing Theories on the Nature of the Right to Trial by Jury

The right to trial by jury held a central place in the Founding Fathers’ vision of an ideal democratic society, with the right to trial by jury in criminal cases protected by the Constitution\textsuperscript{94} and Sixth Amendment,\textsuperscript{95} and the right to trial by jury in civil cases protected by the Seventh Amendment.\textsuperscript{96} During the Constitutional Convention, the protection of the right to trial by jury had widespread support among both Federalists and Anti-Federalists, as evidenced by Alexander Hamilton in Federalist 83:

The friends and adversaries of the plan of the [Constitutional] Convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.\textsuperscript{97}

Elbridge Gerry, a staunch advocate of jury rights, declared that “the jury was ‘adapted to the investigation of truth beyond any other [system] the world can produce.’”\textsuperscript{98}

Given the great importance the Founders put on securing the right to trial by jury, it might seem odd that the specifics of the right were not well delineated in the Constitution or in the Bill of Rights,\textsuperscript{99} and indeed the implementation of the right varied throughout the country.\textsuperscript{100} Such flexibility may well have been by design; according to Alexander Hamilton, “It would be extremely difficult, if not impossible, to suggest any general regulation [on the right to trial

\textsuperscript{94} U.S. Const. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . .”).

\textsuperscript{95} U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”).

\textsuperscript{96} U.S. Const. 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, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”).

\textsuperscript{97} The Federalist No. 83 (Alexander Hamilton); see also Brief History, supra note 5, at 871. But see Harrington, supra note 55, at 398–99 (suggesting that the Founders may have become wary of the power of the jury).

\textsuperscript{98} Changing Role, supra note 10, at 171–72 (quoting Elbridge Gerry, Observations on the New Constitution, in 2 The Federalist and Other Constitutional Papers 714, 720 (E.H. Scott ed., 1894)).

\textsuperscript{99} See U.S. Const. amend. VII; U.S. Const. amend VI; U.S. Const. art. III, § 2, cl. 3; The Declaration of Independence para. 20–21 (U.S. 1776).

\textsuperscript{100} Howe, supra note 24, at 596–98 and nn.57–58.
by jury] that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions."101 Nevertheless, if a jury is to be a "safeguard to liberty" or the "palladium of free government" as the Founders so intended,102 one must endeavor to understand the Founders' conception of the jury, so that the jury is equipped with the powers necessary to carry out this vision. Among the most important functions of the jury are as protector against government overreaching, as an essential participant in democracy, and as a central figure in the judicial system.103

Given the prominent role of juries in colonial America in cases such as the trial of John Peter Zenger and other instances in which juries used their powers of indictment and rendering verdicts to rebel against British control, the Founders conceived of the jury as a "bulwark against the unjust use of governmental power."104 Writings and statements by the Founders and their contemporaries provide the best evidence of how wide-spread this conception of the jury was among the Founders, irrespective of other political differences. Alexander Hamilton, a leading Federalist, wrote that "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism" and that the right to trial by jury in criminal cases operates as a check on these arbitrary government actions.105 In response to complaints that the then-proposed Constitution did not contain provisions protecting the right to jury trial in civil cases, Theophilus Parsons, a Federalist, stated that

[t]he people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government; yet only his fellow citizens can convict him; They are his jury, and if they pronounce him innocent, not all the powers of congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.106

The Anti-Federalists were likewise concerned about the abuses of governmental power, and even moreso than the Federalists, they advocated for more
explicit protections of the jury in the Constitution. According to an Anti-Federalist pamphlet, "[j]udges, unincumbered [sic] by juries, have been ever found much better friends to government than to the people. Such judges will always be more desirable than juries to . . . those who wish to enslave the people . . . ." The Anti-Federalists felt so strongly about the jury’s protective role that they threatened to block ratification of the Constitution if the right was not expressly included. Summing up his personal views on the meaning of the right to trial by jury, Thomas Jefferson declared that "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."

In addition to the Founders’ conception of the jury as a protector against government oppression, the jury was viewed more generally as an outlet for participation in the fledgling democratic government. Again, the words of the Founders themselves provide the best insight into this role. Thomas Jefferson, considering the citizens’ participation in government, wrote that "[w]here I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." According to Herbert J. Storing, a historian of Anti-Federalists, "The question was not fundamentally whether the lack of an adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved), but whether it would fatally weaken the role of the people in

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109 Jeffrey R. White, State Farm and Punitive Damages: Call the Jury Back, 5 J. HIGH TECH. L. 79 (2005). William Blackstone, a contemporary of the Anti-Federalists, wrote that "[t]he impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spight [sic] of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity: it is not to be expected from human nature that the few should always be attentive to the interests and good of the many."

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (16th ed. 1825); see White, supra at 134.
111 See AMAR’S BILL OF RIGHTS, supra note 11, at 94.
112 Letter from Thomas Jefferson to Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed., 1958). John Adams echoed Jefferson’s sentiment that citizens should be involved in the democratic process through serving on juries, writing that “the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature” as in the legislature. ADAMS, supra note 1, at 253.
the administration of government."\(^{113}\) The early American jury may in fact have fulfilled this role; Alexis de Tocqueville, describing a visit to America, called the jury "first and foremost a political institution"\(^{114}\) and "a form of popular sovereignty."\(^{115}\)

What were the Founders' reasons for ensuring that citizens had the opportunity to participate in government through serving on the jury? Legal scholars have suggested several theories, which include benefits to the citizens themselves, as well as benefits to the government as a whole.\(^{116}\) First, service on a jury enables jurors to learn more about their legal rights, ultimately teaching them to function more effectively as citizens in a democratic society.\(^{117}\) According to the Federal Farmer, service on a jury was the "means by which the people are let into the knowledge of public affairs—are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them."\(^{118}\) Alexis de Tocqueville described this function of jury service in America, noting that "the jury . . . is also the most effective means of teaching the people how to rule."\(^{119}\) In this way, the right to jury trial can be seen not only as an individual right accorded to litigants, but also as a valuable legal institution benefiting jurors themselves.\(^{120}\)

In addition to the role that service on a jury plays in teaching citizens about democracy and their legal rights, the jury also can be seen as an integral part of the judicial branch, in what has been termed by the constitutional theorist John Taylor of Caroline as the "lower judicial bench" in a bicameral judiciary.\(^{121}\) Such a formulation of the judicial branch is appealing given the checks-and-balances that are prevalent throughout the branches of government, in particular the bicameralism found in the legislative branch.\(^{122}\)


\(^{115}\) Id. at 315.

\(^{116}\) See, e.g., AMAR'S BILL OF RIGHTS, supra note 11, at 93–96 (jurors as students of the law and as lower branch in bicameral judiciary); Brief History, supra note 5, at 876 (jurors as students of the law); Scheiner, supra note 107, at 153–56 (jurors as last redoubt of self-government); Middlebrooks, supra note 26, at 387–88 (jurors as part of lower branch in bicameral judiciary).

\(^{117}\) See AMAR'S BILL OF RIGHTS, supra note 11, at 93–94.

\(^{118}\) Letters From The Federal Farmer, in 2 THE COMPLETE ANTI-FEDERALIST 320 (Herbert J. Storing ed., 1981) [hereinafter Federal Farmer]; see also Scheiner, supra note 107, at 154.

\(^{119}\) DE TOCQUEVILLE, supra note 114, at 318; see also AMAR'S BILL OF RIGHTS, supra note 11, at 93 (using de Tocqueville's descriptions of the American juror as evidence of the role of juror as student).

\(^{120}\) See Scheiner, supra note 107, at 155 (describing the "empowering and enabling" functions of jury service).

\(^{121}\) JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (Yale Univ. Press 1950) (1814); AMAR'S BILL OF RIGHTS, supra note 11, at 95; Middlebrooks, supra note 26, at 387.

\(^{122}\) See AMAR'S BILL OF RIGHTS, supra note 11, at 95.
ings from that time confirm that some Founders shared this conception of the jury. Furthermore, the arguments made by Andrew Hamilton in the trial of John Peter Zenger illustrate this role of the jury in action; Hamilton called upon the jurors to make purely legal determinations similar to those made by a judge, and to further provide a check on the judge’s legal determinations. Given the wide publicity of Zenger’s trial, these arguments no doubt influenced the Founders’ conception of the proper role of the jury.

In carrying out its functions as a protector against governmental overreaching and as a participant in the democratic processes, the jury was conceived by the Founders to be a central figure in the administration of justice. Not only were the rights to jury trials guaranteed through the federal Constitution and Bill of Rights, but the right to jury trials in criminal cases was also widely guaranteed by the states in their own constitutions enacted prior to the Constitutional Convention. In fact, all of the original states preserved the right to jury trials in civil cases through constitutional provision, statute, or by judicial decision. The Federal Farmer declared that “[t]he jury trial ... is by far the most important feature in the judicial department in a free country ... .” In addition, the influence of the jury extended outside the courtroom and into the society at large. Alexis de Tocqueville described the unique role of the jury thusly: “It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large.”

B. The Founders’ Conception of the Right of the Jury to Decide Issues of Law

At the time of the Founding, it was almost universally accepted that juries in criminal cases had the right to decide issues of law; in addition, juries

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123 See, e.g., Essays by a Farmer (IV), in 5 The Complete Anti-Federalist 38 (Herbert J. Storing ed., 1981) (describing the jury as “the democratic branch of the judicial power more necessary than representatives in the legislature.”); Federal Farmer, supra note 118, at 320 (declaring that through juries “drawn from the body of the people ... we secure to the people at large, their just and rightful control [sic] in the judicial department.”).
124 See discussion supra Part II.B.
125 See Brief History, supra note 5, at 873–74.
126 See AMAR’S BILL OF RIGHTS, supra note 11, at 96–98.
127 See Levy, supra note 12, at 269.
128 Smith, supra note 4, at 423–24.
129 Federal Farmer, supra note 118, at 320.
130 Smith, supra note 4, at 421–22.
generally decided issues of law in civil cases during this time.132 Often, these rights were codified in state constitutions or statutes, or were accorded in judicial decisions.133 A contemporary dictionary even recognized this right in the context of criminal cases in its definition of the word "jury," stating that juries, "consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide both the law and the facts in criminal prosecutions."134

Several scholars who have examined the jury's right to decide issues of law in early America have theorized that this right developed more as a result of practical considerations instead of strongly-held philosophical beliefs about the role of the jury.135 Unlike judges in England, most judges in America had little formal legal training,136 American judges were often administrative or legislative officials or other prominent members of the local community.137 In Rhode Island, for instance, knowledge of the law was not a requirement for holding a judicial office.138 In fact, judges in Rhode Island apparently did not issue jury instructions until 1833.139 Judges in Rhode Island "held office not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury."140 Given that jurors were often as knowledgeable as judges regarding issues of law, it may have been natural for jurors to decide both issues of law and fact in a case.141

132 R.J. Farley, Instructions to Juries—Their Role in the Judicial Process, 42 YALE L.J. 194, 202 (1932); Smith, supra note 4, at 446–47; Changing Role, supra note 10, at 172–73.
133 See Smith, supra note 4, at 446–48 and n.300–02 (providing examples of state constitutions and statutes adopted around the time of the Revolution that guaranteed the jury’s right to decide issues of law).
134 NOAH WEBSTER, DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828); Clay S. Conrad, Jury Nullification as a Defense Strategy, 2 TEX. F. ON C.L. & C.R. 1, 6 (1995). Another legal dictionary widely used in colonial Virginia stated that "[i]f a jury take upon them the knowledge of the law, and give a general verdict, it is good; but in cases of difficulty, it is best and safest to find the special matter, and to leave it to the judges to determine what is the law upon the fact." JACOB'S LAW DICTIONARY (10th ed. 1782).
135 See, e.g., Brief History, supra note 5, at 903–06 (suggesting that the jury's role in deciding issues of law arose due to the lack of judges who were educated in the law); Harrington, supra note 55, at 378–79 (citing the lack of formal legal training of judges as a contributing factor to the power of the jury); WILLIAM EDWARD NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830 28–30 (Univ. of Ga Press 1994) (1975) (describing how the Massachusetts judicial system itself contributed to the jury's role in deciding issues of law in Massachusetts courts).
136 See Brief History, supra note 5, at 903–05 (describing the lack of formal legal training among judges in Massachusetts, Rhode Island, New Jersey, and New Hampshire).
137 Harrington, supra note 55, at 378.
139 Brief History, supra note 5, at 904.
140 Howe, supra note 24, at 591 (citation omitted) (internal quotations omitted).
141 See Harrington, supra note 55, at 378–79; Brief History, supra note 5, at 904.
Along with the relative lack of formal legal training among judges, some of the early American court systems themselves may have given juries the *de facto* power to decide issues of law. One of the most prominent of these systems was that of Massachusetts, which held trials before at least three judges who would each give their own opinions concerning the law in the jury instructions.\(^{142}\) When the judges’ opinions conflicted with one another, the jury was free to decide which of the opinions to follow.\(^{143}\) Professor William E. Nelson concluded from the structure of this system that juries in Massachusetts had virtually unlimited authority to decide the law.\(^{144}\) Even judges in other jurisdictions made it clear that their interpretation of the law was not binding upon the jurors.\(^{145}\)

Based on the aforementioned circumstances, one might conclude that the jury’s right to decide issues of law arose solely from considerations of practicality, and thus the right should not be considered an integral part of the Founders’ conception of the jury. On the contrary, even though the jury’s right to decide issues of law “may have arisen from haphazard practice at the time,”\(^ {146}\) by the time of the Revolution the right to decide issues of law was central to the jury’s role in society. As defense counsel in the case of *People v. Croswell*,\(^ {147}\) Alexander Hamilton argued that

it is not only the province of the jury, in all criminal cases, to judge of the intent with which the act was done, as being parcel of the fact; they are also authorized to judge of the law as connected with the fact. . . . In *England*, trial by jury has always been cherished, as the great security of the subject against the oppression of government; but it never could have been a solid refuge and security, unless the jury had the right to judge of the intent and the law.\(^ {148}\)

Hamilton further stated that the jury should make legal determinations based not only upon the judge’s opinion, but also upon arguments of counsel and “law authorities that are read,” suggesting that the jury should have an active, independent role in deciding issues of law.\(^ {149}\) These arguments indicate that Hamil-


\(^{143}\) *Id.*

\(^{144}\) *Id.* at 28; see also Smith, *supra* note 4, at 448.


\(^{146}\) See Brief History, *supra* note 5, at 906.

\(^{147}\) 3 Johns Cas. 337, 362 (N.Y. 1804) (emphasis in original).

\(^{148}\) *Id.*

\(^{149}\) *Id.*

(The jury ought, undoubtedly, to pay every respectful regard to the opinion of the court; but suppose a trial in a capital case, and the jury are satisfied from
ton viewed the jury’s right to decide issues of law to be of much more significance than considerations of practicality and convenience, for he directly linked the jury’s right to decide issues of law to the role of the jury in protecting against governmental overreaching. His statements further indicate that he believed that the right included making pure legal determinations, and not just refusing to apply an unjust law.

Like Hamilton, Thomas Jefferson recognized the right of jurors to decide issues of law under circumstances in which there could be the potential for governmental or judicial oppression. In Notes on the State of Virginia, he wrote:

[I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.\(^{150}\)

This passage also suggests that Jefferson viewed the right to decide issues of law as essential to the jury’s role as a “bulwark of liberty.”\(^{151}\)

James Wilson, an extensive contributor to the Constitution, also confirmed the right of the jury to decide issues of law when he wrote:

Suppose that, after all the precautions taken to avoid it, a difference of sentiment takes place between the judges and the jury with regard to a point of law. . . . What must the jury do? The jury must do their duty and their whole duty. They must decide the law as well as the fact.\(^{152}\)

Wilson’s writings reveal that his conception of the jury’s role in deciding issues of law was similar to the idea that the jury was to act like the lower branch in a bicameral judiciary, empowered to decide issues of law in a similar manner as a

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the arguments of counsel, the law authorities that are read, and their own judgment, . . . that the law arising in the case is different from that which the court advances, are they not bound by their oaths, by their duty to their creator and themselves, to pronounce according to their own convictions?)

Id.; see also Middlebrooks, supra note 26, at 375 (discussing People v. Croswell and Hamilton’s arguments to the jury).


\(^{151}\) Harrington, supra note 55, at 388.

judge.\textsuperscript{153} Wilson wrote that juries "must determine [legal] questions, as judges must determine them, according to law."\textsuperscript{154} Wilson clarified the types of sources that should be relied upon by juries in making decisions, stating that "law, particularly the common law, is governed by precedents, and customs, and authorities, and maxims: those precedents, and customs, and authorities, and maxims are alike obligatory upon jurors as upon judges, in deciding questions of law."\textsuperscript{155} While other Founders recognized that the jury’s right to decide issues of law furthered its role as a protector of the people against governmental overreaching, Wilson associated the jury’s right to decide issues of law with its role as a central participant in the administration of justice.\textsuperscript{156}

John Adams, a vigorous proponent of the jury’s right to decide issues of law, arguably went further in his writings than did other Founders, for his writings overtly recognized the jury’s right to decide the constitutionality of laws.\textsuperscript{157} According to Adams,

\begin{quote}
[t]he general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the constitution are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse’s milk and first air.\textsuperscript{158}
\end{quote}

If a judge made a ruling that violated one of these fundamental constitutional principles, Adams believed that a juror had a duty "to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."\textsuperscript{159} Scholars commenting upon Adams’ writings have associated them with the now-defunct "natural rights" theory—the theory that there was a natural law independent of positive law developed by society, and that the natural law should be used as the preferred source of law when the two conflicted.\textsuperscript{160} While his writings do share similarities with the natural rights theory, they are distinguishable in that Adams focused on the jurors’ understanding of the positive law and constitutional principles, rather than

\begin{flushleft}
\textsuperscript{153} See \textsc{Wilson, supra} note 152, at 542.\\
\textsuperscript{154} \textit{Id.}\\
\textsuperscript{155} \textit{Id.}\\
\textsuperscript{156} See \textsc{Pepper, supra} note 21, at 617–18.\\
\textsuperscript{157} See \textsc{Adams, supra} note 1, at 254–55.\\
\textsuperscript{158} \textit{Id.} at 255.\\
\textsuperscript{159} \textit{Id.} at 254–55; \textit{see also id.} at 254 ("Therefore, the jury have a power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience?").\\
\textsuperscript{160} See, e.g., \textsc{Changing Role, supra} note 10, at 172. \textit{See generally \textsc{Pound, supra} note 4, at 129–32} (describing the natural rights theory and its effect on the philosophy of jury verdicts).
\end{flushleft}
calling upon jurors to render verdicts based solely on their conception of a "natural law."  \(^{161}\)

Adams’ conception of the jury having the right to decide the constitutionality of laws was not just theoretically plausible, it was in fact happening in colonial America prior to the Revolution. Henry Hulton, the British revenue commissioner, asked how his men could perform their duties “before a Jury of the People [who] had held the very Laws under which the officers acted, to be Unconstitutional.”  \(^{162}\) Moreover, as noted in Part III.B, Andrew Hamilton had advocated a form of jury review in the Zenger case itself. Given the statements regarding the role of the jury from Founders such as Thomas Jefferson, who considered a jury trial “the only anchor . . . by which a government can be held to the principles of its constitution,”  \(^{163}\) it appears that many Founders considered the right to jury review as necessary to ensure that the jury would be able to execute its roles as a protector against governmental overreaching and as an independent actor in the judicial system.

Even assuming that the jury’s right to decide issues of law arose out of conditions in colonial America, the Founders seemingly integrated that right into their conception of the jury’s roles in American society—as a protector against governmental overreaching, as a participant in the democratic process, and as a central figure in the administration of justice. Arguably, the Founders also considered the jury’s right to decide the constitutionality of laws as essential to fulfilling these roles.

IV. EROSION OF THE JURY’S RIGHT TO DECIDE ISSUES OF LAW IN THE NINETEENTH CENTURY

This Part first details the recognition of the jury’s right to decide issues of law immediately following the Revolution and continuing into the early part of the nineteenth century. While there was no uniformity among the federal courts and the states, the right to decide issues of law was accepted as commonplace, and the right to decide the constitutionality of laws was at least somewhat implicitly accepted. In the 1830s, courts began narrowing the role of the jury in deciding issues of law, which culminated in the 1895 decision in Sparf v. United States. Accordingly, by the end of the nineteenth century, juries no longer had the right to decide issues of law, and, to the extent that juries ever had the right to decide the constitutionality of laws, that right was completely foreclosed.

\(^{161}\) See Pepper, supra note 21, at 618 (suggesting that Adams' use of the term "conscience" should be interpreted in the context of making legal determinations and not interpreted more broadly).

\(^{162}\) John Phillip Reid, In a Rebellious Spirit 34 (1979); Magliocca, supra note 22, at 194.

A. Early Recognition of the Right to Decide Issues of Law

If there was any doubt about whether the jury’s right to decide issues of law had survived the American Revolution, such doubt was promptly laid to rest in the 1794 case of Georgia v. Brailsford,164 a civil trial in which the United States Supreme Court had original jurisdiction.165 The case involved a dispute between the state of Georgia and a British subject regarding which party was legally entitled to an outstanding debt.166 The facts of the case were agreed upon by the parties, leaving the jury to decide the case based on its determination of the law.167 In Chief Justice Jay’s instructions to the jury, he first gave the jury the unanimous opinion of the Court regarding the legal issues raised in the case.168 Rather than directing the jury to base its decision solely on the opinion of the Court, Chief Justice Jay continued:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court[s] are the best judges of law. But still both objects are lawfully, within your power of decision.169

During deliberations, the jury returned to ask the Court to advise the jury further on two purely legal questions.170 After receiving explanations on these two issues, the jury rendered a verdict that was consistent with the Court’s opinion on the matter.171

While many scholars have relied upon Georgia v. Brailsford in support of the proposition that the jury’s right to decide issues of law was widely ac-

164 3 U.S. (3 Dall.) 1, 3 (1794); see Pepper, supra note 21, at 620 (providing an analysis of Chief Justice Jay’s instructions to the jury regarding its right to decide issues of law and fact).
165 Jones, supra note 145, at 1035–36.
166 Brailsford, 3 U.S. (3 Dall.) at 1.
167 Id. at 4.
168 Id.
169 Id. at 4 (emphasis added).
170 Id.
171 See id.
accepted at this time,\textsuperscript{172} some scholars have downplayed its significance.\textsuperscript{173} In particular, scholars suggesting that the jury’s right to decide law should be more narrowly construed have relied upon Chief Justice Jay’s instructions to the jury that the court is best equipped to decide questions of law and that the jury should respect the court’s opinion as to these matters, going so far as to suggest that the Court was effectively giving a directed verdict in the case.\textsuperscript{174} Scholars have pointed out that the jury actually sought advice from the Court on legal issues and ultimately heeded the Court’s opinions, further giving credence to the idea that the jury did not decide issues of law for itself.\textsuperscript{175} While these contentions have appeal at first blush, they seem to confuse the existence of the right of the jury to decide issues of law with how that right was exercised in the particular case before the Court. It is true that the Court gave its opinion on the legal issues in the case; however, it also recognized that the final determination of the issues of law and issues of fact were “lawfully[] within [the jury’s] power of decision.”\textsuperscript{176} Although the jury sought the advice of the Court regarding several legal issues, this action was consistent with the notion that the jury should make its determinations based on an informed understanding of the law.\textsuperscript{177} The fact that the jury ultimately followed the Court’s opinion does not diminish its right to decide issues of law contrary to that of the court in other circumstances; rather, it only shows that such a departure was not warranted in this case.

Although the Supreme Court did not directly address the role of the jury in deciding issues of law for the next century,\textsuperscript{178} lower federal courts continued to recognize the right, including decisions involving Supreme Court Justices who were riding the circuit.\textsuperscript{179} For example, in \textit{Henfield’s Case},\textsuperscript{180} Justice Wilson first instructed the jury regarding the significance of its decision, stating that “[t]his is, gentlemen of the jury, a case of the first importance. Upon your verdict the interests of four millions of your fellow-citizens may be said to depend. But whatever be the consequence, it is your duty, it is our duty, to do only what

\textsuperscript{172} See, e.g., \textit{Changing Role}, supra note 10, at 173–74; \textit{Brief History}, supra note 5, at 907; Jones, supra note 145, at 1035–36; Farley, supra note 132, at 232.


\textsuperscript{174} Woolhandler & Collins, supra note 173, at 628–29.

\textsuperscript{175} Pepper, supra note 21, at 621.

\textsuperscript{176} Georgia v. Brailsford, U.S. (3 Dall.) 1, 4 (1794).

\textsuperscript{177} See \textit{Wilson}, supra note 152, at 540–42; discussion supra Part III.B.

\textsuperscript{178} Nevertheless, in \textit{Bingham v. Cabot}, Justice Iredell reaffirmed the right of the jury to decide issues of law contrary to the court’s opinion, asserting that “though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.” Bingham v. Cabot, 3 U.S. (3 Dall.) 19, 33 (1795).

\textsuperscript{179} Pepper, supra note 21, at 621. For an extensive listing of cases in which Supreme Court Justices reaffirmed the law-finding function of juries, see Howe, supra note 24, at 589 n.22.

\textsuperscript{180} Henfield’s Case, 11 F. Cas. 1099 (C.C. Pa. 1793).
is right."¹⁸¹ After explaining the court’s interpretation of the law to the jury, Justice Wilson concluded by stating “that the jury, in a general verdict, must decide both law and fact, but that this did not authorize them to decide it as they pleased; they were as much bound to decide by law as the judges: the responsibility was equal upon both.”¹⁸² In the treason trial of Aaron Burr in 1807, Chief Justice Marshall declared in his jury instructions that “[t]he jury have now heard the opinions 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.”¹⁸³ These jury instructions support the proposition that federal courts continued to recognize the jury’s right to decide issues of law in the early nineteenth century. Although the jury’s right to decide questions of law was not uniform throughout the states, evidence suggests that this right was widely accepted in the first half of the nineteenth century.¹⁸⁴ By 1851, at least nine states had given juries the right to decide issues of law through constitutional provision or statute, and at least six other states had recognized the jury’s right to decide issues of law by judicial decision.¹⁸⁵ For example, the Massachusetts legislature enacted a statute in 1808 giving the jury the right to decide both the facts and law when rendering a general verdict.¹⁸⁶ Although the precise effect of the statute is unknown, judicial decisions in Massachusetts prior to 1840 generally recognized the jury’s right to decide issues of law in criminal cases notwithstanding the statute.¹⁸⁷

In an 1804 seditious libel case in New York, People v. Croswell,¹⁸⁸ Judge Kent not only affirmed the jury’s right to decide issues of law in criminal cases, but he also addressed a distinction increasingly made by people between the jury’s power to decide issues of law and its right to make such decisions.¹⁸⁹ In rebuffing the notion that the jury merely had the power to decide issues of law, Judge Kent reasoned that

> [t]he law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The

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¹⁸¹ *Id.* at 1119.

¹⁸² *Id.* at 1120–21 (emphasis added). For more information regarding the significance of Justice Wilson’s instructions in *Henfield’s Case*, see Middlebrooks, *supra* note 26, at 377–79.

¹⁸³ *Brief History, supra* note 5, at 907.

¹⁸⁴ *Id.* at 910; see *Changing Role, supra* note 10, at 174–76 (describing the jury’s right to decide issues of law in Massachusetts). *See generally Howe, supra* note 24 (providing a detailed account of the decline of the jury’s right to decide issues of law in several states).

¹⁸⁵ *Brief History, supra* note 5, at 910.

¹⁸⁶ *Changing Role, supra* note 10, at 174.

¹⁸⁷ *Id.* at 175–76.


¹⁸⁹ *Id.*; *Farley, supra* note 132, at 202–03 (describing the importance of the case).
true criterion of a legal power, is its capacity to produce a definitive effect liable neither to censure nor review. And the verdict of not guilty, in a criminal case, is, in every respect, absolutely final. The jury are not liable to punishment, nor the verdict to control. No attainbt lies, nor can a new trial be awarded. The exercise of this power in the jury has been sanctioned, and upheld in constant activity, from the earliest ages.\textsuperscript{190}

According to Judge Kent, the fact that the jury was given the power to decide issues of law without reservation implied that the jury not only had the power to decide issues of law, but the right to decide issues of law as well.

While the jury's right to decide issues of law was consistently recognized in America in the first several decades following the Revolution, the right to jury review was considerably less clear, likely due in part to the infrequency with which the right would be addressed in judicial proceedings. Typically, any debate regarding the existence of the right would only arise when an attorney attempted to argue the unconstitutionality of a statute to the jury.\textsuperscript{191} The most famous of these early cases was United States \textit{v.} Callender,\textsuperscript{192} which involved the prosecution of James Callender for seditious libel against the President of the United States.\textsuperscript{193} When William Wirt, counsel for the defense, attempted to argue the unconstitutionality of the Sedition Act, Justice Chase immediately interrupted him and told him to take a seat.\textsuperscript{194} Justice Chase told Wirt that arguing the constitutionality of a statute "is irregular and inadmissible; it is not competent to the jury to decide on this point . . ."\textsuperscript{195} An exchange between Justice Chase and William Wirt ensued, in which Wirt attempted to convince Chase that the jury's right to decide issues of law necessarily included a right to decide the constitutionality of laws:

CHASE, Circuit Justice. No man will deny your law—we all know that juries have the right to decide the law, as well as the fact—and the constitution is the supreme law of the land, which controls all laws which are repugnant to it.

Mr. Wirt. Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.

\textsuperscript{190} \textit{Croswell}, 3 Johns. Cas. at 366–68
\textsuperscript{191} \textit{AMAR'S BILL OF RIGHTS}, supra note 11, at 98.
\textsuperscript{192} United States \textit{v.} Callendar, 25 F. Cas. 239 (C.C. Va. 1800).
\textsuperscript{193} \textit{Id.}; see also \textit{AMAR'S BILL OF RIGHTS}, supra note 11, at 98–104 (analyzing Justice Chase's arguments against jury review); Magliocca, supra note 22, at 204–07 (analyzing the case in the larger context of jury review in the early 1800s).
\textsuperscript{194} \textit{Callendar}, 25 F. Cas. at 252–53.
\textsuperscript{195} \textit{Id.} at 253.
CHASE, Circuit Justice. A *non sequitur*, sir.\(^{196}\)

Justice Chase believed that the right to jury review was "very absurd and dangerous" and "has a direct tendency to dissolve the union of the United States," affording jurors greater power over laws than those in the national legislature and leading to a lack of uniformity in the laws.\(^ {197}\) Ultimately, Justice Chase did not allow Wirt to argue the unconstitutionality of the statute to the jury.\(^ {198}\)

Some scholars have been quick to attack the theoretical underpinnings and incoherent reasoning in Justice Chase's decision.\(^ {199}\) Notwithstanding these arguments, Justice Chase's arguments likely had little *de facto* precedential effect due to the subsequent impeachment of Chase as a result of his conduct in *Callender* and other cases.\(^ {200}\) Among the charges against Chase were that he had tried "to wrest from the jury their indisputable right to hear argument, and determine upon the question of the law, as well as on the question of fact, involved in the verdict they are required to give."\(^ {201}\) While the impeachment did not directly concern his refusal to allow counsel to argue the unconstitutionality of the Sedition Act in *Callender*, his impeachment undoubtedly called into question his handling of the *Callender* case specifically and his views of the law-finding function of juries more generally.\(^ {202}\)

Eight years after *Callender*, the right of counsel to argue the unconstitutionality of a law to the jury arose again in *United States v. The William*,\(^ {203}\) a case concerning the Embargo Act.\(^ {204}\) Prior to trial, Judge John Davis determined the Embargo Act to be constitutional;\(^ {205}\) nevertheless, he allowed defense

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\(^ {196}\) *Id.* (emphasis added).

\(^ {197}\) *Id.* at 256–57. In fact, Justice Chase suggested that allowing the jury to decide the constitutionality of laws would itself be unconstitutional. *See id.* at 257.

\(^ {198}\) *Id.* at 257.

\(^ {199}\) *See Magliocca, supra* note 22, at 205–07; *AMAR'S BILL OF RIGHTS, supra* note 11, at 98–104.

\(^ {200}\) Magliocca, *supra* note 22, at 205–07; *see also* Harrington, *supra* note 55, at 406–14 (providing a detailed account of Justice Chase's actions and his subsequent impeachment).

\(^ {201}\) Articles of Impeachment, Art. I, § 3, in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE app. 3 (1805). Even though Justice Chase seemed to accept the jury's right to decide issues of law in *Callender*, he narrowly interpreted this right to only include the jury's right to apply the legal standards determined by a judge to a particular case, not the right to determine the law itself. *See* Harrington, *supra* note 55, at 414.

\(^ {202}\) *See Magliocca, supra* note 22, at 207. *But see* Pepper, *supra* note 21, at 627–31 (suggesting that since the impeachment of Chase did not include any explicit criticism of Chase's refusal to allow the jury to decide the constitutionality of the Sedition Act, this lack of criticism implied that Congress tacitly agreed with his denial of jury review).

\(^ {203}\) 28 F. Cas. 614 (C.C. Mass. 1808).

\(^ {204}\) *Id.; Magliocca, supra* note 22, at 195–96.

\(^ {205}\) *See The William*, 28 F. Cas. 614.
counsel to argue the unconstitutionality of the Act to the jury.\textsuperscript{206} Ultimately, the jury found the law to be unconstitutional.\textsuperscript{207} More importantly, Judge Davis discussed \textit{Callender} in his judicial opinion, including Justice Chase's denial of the right to jury review.\textsuperscript{208} That Judge Davis allowed defense counsel to argue the unconstitutionality of the Embargo Act to the jury, despite recognizing Justice Chase's decision to the contrary, implies that Justice Chase's views on the right to jury review were not universally accepted by the early federal courts. Even though the aforementioned decisions are far from conclusive on the issue, they certainly do not foreclose the possibility that among the rights accorded to these early juries was an implicit right to determine the constitutionality of laws.\textsuperscript{209}

\section*{B. Tracing the Rapid Demise of the Jury's Right to Decide Issues of Law}

Beginning in the early 1830s, federal courts began to question the settled proposition that the jury possessed a broad right to decide issues of law.\textsuperscript{210} At first, courts made minor shifts in their jury instructions that implicitly limited the right. In \textit{United States v. Fenwick},\textsuperscript{211} the court instructed the jury that "[i]n criminal cases, the jury has a right to give a general verdict, and, in doing so, must, of necessity, decide upon the law as well as upon the facts of the case."\textsuperscript{212} In a more narrow formulation of the right, Judge Cranch declared in \textit{United States v. Stockwell}\textsuperscript{213} that

\begin{quote}
the right of the jury to decide the law, was \textit{only} the right to find a general verdict which includes both the law and the facts of the case. That the question whether one fact can be inferred
\end{quote}

\begin{footnotes}
\item[206] Magliocca, \textit{supra} note 22, at 196.
\item[207] \textit{Id}.
\item[208] \textit{See The William, 28 F. Cas. at 617} (The immediate question that the learned judge was then considering, was, whether the power of determining the constitutionality of the law belonged, exclusively, to the court, or whether it could be rightfully exercised by a jury. His remaining observations, appearing in the published account of the trial, more especially apply to that question).
\item[209] \textit{See Sparf v. United States, 156 U.S. 51, 162–63 (1895) (Gray, J., dissenting) (using United States v. The William to support the notion that historically the jury had a broad right to decide the law).}
\item[210] \textit{See Pepper, supra} note 21, at 636.
\item[211] \textit{United States v. Fenwick, 25 F. Cas. 1062 (C.C. D.C. 1836).}
\item[212] \textit{Id.} at 1064; Pepper, \textit{supra} note 21, at 636.
\item[213] \textit{United States v. Stockwell, 27 F. Cas. 1347 (C.C. D.C. 1836).}
\end{footnotes}
from another is a question of law, and to be decided by the court

If the jury’s right to decide issues of law had been quietly chipped away in the early 1830s, it was under direct attack in the 1835 case of United States v. Battiste. Battiste involved a prosecution for violation of a statute that prohibited slave trading; since the parties did not dispute the facts of the case, the decision rested on the interpretation of the statute. In his instructions to the jury, Justice Joseph Story acknowledged that when juries decide criminal and civil cases, “their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact.” However, he made an important qualification: “In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure.” Instructing the jury on its proper role, Justice Story declared that “[i]t is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.”

Justice Story justified his views of the proper role of the jury due to his fear that if juries were to decide purely legal questions, it would lead to a lack of uniformity and predictability in the law, as well as no remedy against errors made by the jury. He continued: “[B]elieving, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion.” Given the influence of Justice Story’s statements in Battiste on the future of the scope of the jury’s law-finding function, it is important to realize how his justifications directly conflict with the conceptions of the jury and judge at the time of the Revolution. The Founders did not fear that citizens’ rights would be inadequately protected by juries; rather, many feared that citizens’ rights could not be trusted in the hands of the government, and in particular in the hands of judges whose power was

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214 Id. at 1348 (emphasis added).
215 24 F. Cas. 1042 (C.C. Mass. 1835); see also Brief History, supra note 5, at 907–08.
216 See Battiste, 24 F. Cas. at 1042–45. For background information about the highly political nature of this case, see Middlebrooks, supra note 26, at 394–98.
217 Battiste, 24 F. Cas. at 1043.
218 Id.
219 Id.
220 Id.
221 Id.
223 See supra Part III.A.
left unchecked by juries.\textsuperscript{224} In support of this proposition, Akhil Amar noted the differences in the restrictions placed on judges and juries in the Bill of Rights, which suggest that the Founders were much more wary of judicial overreaching than of jury overreaching.\textsuperscript{225} While the theoretical underpinnings of Justice Story’s views may have been flawed, his decision undeniably signaled a major shift in courts’ attitudes toward the proper role of the jury.\textsuperscript{226}

The attack against the jury’s right to decide issues of law continued in the 1851 decision in \textit{United States v. Morris}.\textsuperscript{227} The \textit{Morris} decision arguably went further than \textit{Battiste} in limiting the right of the jury to decide issues of law; moreover, the decision was significant because it concerned whether defense counsel could argue the unconstitutionality of a law to the jury.\textsuperscript{228} The case involved the prosecution of Robert Morris for violation of the Fugitive Slave Act.\textsuperscript{229} When defense counsel attempted to argue the unconstitutionality of the Fugitive Slave Act to the jury, Justice Benjamin Curtis stopped him from doing so, and he only allowed counsel to make the argument to the court outside of the hearing of the jury.\textsuperscript{230} Thereafter, Justice Curtis denied that the jury had a right to determine the constitutionality of laws, looking to the structure of the Constitution to conclude that Congress did not intend to empower unqualified individuals to decide constitutional issues but rather left that power to judges, who were duty-bound by the Constitution to uphold the law and had to take an oath to uphold the Constitution.\textsuperscript{231} Justice Curtis went further in denying the jury’s right to decide any questions of law, declaring that

under the [C]onstitution of the United States, juries, in criminal trials, have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court.\textsuperscript{232}

\textsuperscript{224} \textit{Amar’s Bill of Rights}, \textit{ supra} note 11, at 83–86.

\textsuperscript{225} \textit{See} \textit{id.} at 96–97.

\textsuperscript{226} \textit{See} Harrington, \textit{ supra} note 55, at 425. Other federal cases denying the right of the jury to decide issues of law include \textit{United States v. Riley}, 27 F. Cas. 810 (C.C.S.D.N.Y. 1864); \textit{United States v. Greathouse}, 26 F. Cas. 18 (C.C.N.D. Cal. 1863); Stettinius v. United States, 22 F. Cas. 1322 (C.C. D.C. 1839); \textit{United States v. Shive}, 27 F. Cas. 1065 (C.C. E.D. Pa. 1832).

\textsuperscript{227} \textit{United States v. Morris}, 26 F. Cas. 1323 (C.C. Mass. 1851).

\textsuperscript{228} \textit{See} Magliocca, \textit{ supra} note 22, at 207–09 (discussing the parts of the \textit{Morris} decision concerning the right to jury review).

\textsuperscript{229} \textit{See} Middlebrooks, \textit{ supra} note 26, at 401–05 (providing a detailed account of the circumstances surrounding the Morris trial).

\textsuperscript{230} \textit{Morris}, 26 F. Cas. at 1331; Middlebrooks, \textit{ supra} note 26, at 403.

\textsuperscript{231} \textit{Morris}, 26 F. Cas. at 1332.

\textsuperscript{232} \textit{Id.} at 1336.
In dismissing decades of prior precedent to the contrary, Justice Curtis incredibly hypothesized that the Georgia v. Brailsford decision affirming the jury’s right to decide questions of law may have been misreported.\(^{233}\) The Morris decision thus represented another push towards the elimination of the jury’s law-finding function; whereas prior cases had acknowledged the tension between the elimination of the jury’s right to decide issues of law and the jury’s power to render a general verdict,\(^{234}\) Justice Curtis’ opinion suggested that even when rendering a general verdict, the jury had no right to decide the law but rather must always apply the law given to them by the court.\(^{235}\)

While federal courts were increasingly constraining the jury’s right to decide issues of law in the mid-nineteenth century, state courts and legislatures were slower to follow suit.\(^{236}\) Despite the inconsistency between states in their recognition of the jury’s right to decide questions of law, the general trend was toward limiting or eliminating the right.\(^{237}\) In Massachusetts, for example, an 1845 supreme court decision declared that juries had no right to decide issues of law, even though the right had been recognized in prior judicial decisions.\(^{238}\) The Massachusetts legislature responded by enacting a statute explicitly giving criminal juries the right to decide questions of law and fact in criminal cases.\(^{239}\) Within the same year, the Massachusetts supreme court decided a case in which it interpreted the statute as merely a codification of the common law right to render a general verdict and not a right to decide issues of law more generally.\(^{240}\)

In Vermont, an 1849 supreme court decision affirmed the jury’s right to decide the law in a manner contrary to that of the judge, rejecting the reasoning in United States v. Battiste.\(^{241}\) In this and later decisions, the supreme court reiterated the need for the right to ensure that the state’s citizens were protected from the undue bias of judges or oppression by the courts.\(^{242}\) By 1892, however, the same court announced that the jury’s right to decide questions of law was contrary to the common law, the practice in Great Britain and the United States, and the federal and state constitutions.\(^{243}\) All told, between 1850 and 1931 the

\(^{233}\) Id. at 1334; see Magliocca, supra note 22, at 208–09.

\(^{234}\) See, e.g., United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (acknowledging the jury’s power to decide questions of law when rendering general verdicts).

\(^{235}\) Morris, 26 F. Cas. at 1336.

\(^{236}\) Harrington, supra note 55, at 425–26; see Howe, supra note 24 (describing inconsistencies in the recognition of the right between states and the unevenness in the recognition of the right over time within states).


\(^{238}\) Changing Role, supra note 10, at 176–77 (analyzing Commonwealth v. Porter, 51 Mass. (10 Met.) 263 (1845)).

\(^{239}\) Id. at 183.

\(^{240}\) Id. (discussing Commonwealth v. Anthes, 71 Mass. (5 Gray) 185 (1855)).

\(^{241}\) See State v. Croteau, 23 Vt. 14 (1849); Howe, supra note 24, at 592.

\(^{242}\) Howe, supra note 24, at 592–93.

\(^{243}\) State v. Burpee, 25 A. 964, 974 (Vt. 1892); see Howe, supra note 24, at 593.
courts in at least eleven states rejected the right of the jury to decide questions of law.\textsuperscript{244}

The decision of the United States Supreme Court in \textit{Sparf v. United States}\textsuperscript{245} effectively shut the door on the jury's right to decide questions of law in this country.\textsuperscript{246} In \textit{Sparf}, the majority opinion relied heavily on the reasoning of the lower federal court decisions in \textit{Battiste} and \textit{Morris} and found that even though juries "have the physical power to disregard the law,"\textsuperscript{247} that "it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence."\textsuperscript{248} In spite of the prevalence of court decisions to the contrary and the unsettled nature of the issue, the Court declared that "the duty of the jury to receive the law from the court . . . has become firmly established."\textsuperscript{249} Moreover, the Court determined that such a system was necessary to protect societal and individual rights from the unpredictability of a wayward jury.\textsuperscript{250} According to the Court, without the benefit of a judge trained in the law to act as a buffer between the jury and the citizens, "our government will cease to be a government of laws, and become a government of men."\textsuperscript{251}

Although \textit{Sparf} did not specifically address the jury's right to decide the constitutionality of laws, its reliance on \textit{Callender} and \textit{Morris} in support of its denial of the jury's right to decide ordinary laws effectively doomed any right to jury review as well.\textsuperscript{252} More generally, the decision undoubtedly played a role in states denying the jury's right to decide issues of law.\textsuperscript{253} Only a few states have ostensibly retained that right, but judicial decisions have all but eliminated the practical effect of the right.\textsuperscript{254}

By the end of the nineteenth century, the jury's right to decide issues of law, expressly recognized by the Supreme Court in \textit{Georgia v. Brailsford} only one century earlier, was effectively eliminated in both federal and state courts. This dramatic shift occurred through a series of federal court decisions over the

\textsuperscript{244} \textit{Brief History}, supra note 5, at 910.
\textsuperscript{245} 156 U.S. 51 (1895).
\textsuperscript{246} Smith, supra note 4, at 452.
\textsuperscript{247} \textit{Sparf}, 156 U.S. at 74.
\textsuperscript{248} Id. at 102.
\textsuperscript{249} Id. at 64. \textit{But see} id. at 110–83 (Gray, J., dissenting) (reviewing historical cases and reaching the opposite conclusion).
\textsuperscript{250} \textit{See} id. at 102–03 ("Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights.").
\textsuperscript{251} Id. at 103.
\textsuperscript{252} \textit{See} Magliocca, supra note 22, at 209 (suggesting that the \textit{Sparf} decision should have separated ordinary legal interpretation from questions of constitutionality).
\textsuperscript{253} \textit{See} Wilson, supra note 45, at 398.
\textsuperscript{254} \textit{See} Smith, supra note 4, at 453; Wilson, supra note 45, at 398.
second half of the nineteenth century, which gained traction throughout the country and ultimately with a majority of the Supreme Court Justices in rendering their opinion in Sparf.

V. AN INEVITABLE CONCLUSION? EVALUATING THE DEMISE OF THE RIGHT OF THE JURY TO DECIDE ISSUES OF LAW IN LIGHT OF FOUNDERS’ CONCEPTION OF THE JURY

As Part IV.B illustrates, the erosion of the jury’s right to decide issues of law was relatively quick in light of the prominent place that the right held in the country’s struggle for independence. Given that the jury’s right to decide issues of law was arguably an integral part of the Founders’ conception of the jury, one might inquire as to the explanations for this shift, and whether any of these explanations serve as a justification for the drastic narrowing of the role of the jury. A number of reasons were put forth by courts deciding the issue at the time, including the need for judges to protect citizens from the vagrancies of an impassioned jury, the desire for uniformity in the interpretation of laws, and the structure of the federal government. Scholars have also posited theories regarding the demise of the right, such as the professionalization of the practice of law, the waning distrust of judges, and the diversification of the jury pool. However, none of these explanations fully considered the larger social and political roles fulfilled by the jury at the time of the Founding or how the jury’s law-finding functions comported with these roles.

The prominent federal court decisions of the nineteenth century that denied the right of the jury to decide questions of law shared much of the same basic reasoning for reaching this result. One of the consistent themes across several of the decisions was that the jury did not provide adequate protection for the citizens in safeguarding their individual rights, and that the judge was necessary to intercede on behalf of the citizens to interject the correct law into the proceedings. While this theory may have had elements of truth in particular judicial proceedings, it completely neglected the Founders’ conception of the

255 See supra Part III.B.
259 Brief History, supra note 5, at 915–17; Pepper, supra note 21, at 639–40.
260 See Pepper, supra note 21, at 639–40.
262 See, e.g., Sparf v. United States, 156 U.S. 51 (1895); Callender, 25 F. Cas. 239; Battiste, 24 F. Cas. 1042; Morris, 26 F. Cas. 1323.
263 See, e.g., Battiste, 24 F. Cas. at 1043; Sparf, 156 U.S. at 102–03.
roles of the judge and jury.\textsuperscript{264} The Founders were not worried about the jury subverting the citizens' rights; rather, the Founders realized the necessity of the jury to protect the citizens from governmental abuses.\textsuperscript{265} Nevertheless, judges in this era declared that it was they who could most impartially mete out justice, often adopting a paternalistic tone. According to Justice Curtis in his opinion in \textit{Morris}, "[W]hen a law, unpopular in some locality, is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne."\textsuperscript{266} Apparently, Justice Curtis and the other judges who adopted this line of reasoning did not grasp the irony that they were proclaiming judge impartiality while simultaneously making a decision that directly increased their own power at the expense of that of the jury.

Another argument put forth by judges denying the jury's right to decide issues of law was the potential for a lack of uniformity in the laws if each jury were empowered to independently interpret the law.\textsuperscript{267} Undoubtedly, uniformity in the laws is a worthy aspiration; however, allowing lower court judges to interpret the laws and rule on the constitutionality of laws also leads to a lack of uniformity throughout the country.\textsuperscript{268} Even though the Supreme Court may have appellate jurisdiction over cases arising under federal laws or the Constitution, Congress also has the power to provide exceptions to this jurisdiction, and indeed there was no avenue for Supreme Court review of the \textit{Callender} case itself.\textsuperscript{269} The structure of state judicial systems, such as Massachusetts in which there were multiple judges each rendering their own interpretation of the law, also undercuts the proposition that historically judges were in a better position to provide uniformity to the legal system.\textsuperscript{270} More generally, the Founders conceived of a jury that would be an active participant in the administration of justice, and the trial itself would be used as a means of teaching the jury about the law and the citizens' rights.\textsuperscript{271} Under this theory, once a jury became educated in a particular area of law and received guidance from the judge, the jury should be equipped to make a sound interpretation of the law. Even though jury service is an infrequent event for any one juror, one could hope that juries could reach determinations that were nearly as uniform as those of judges, since judges would help educate the jurors on the law. Such a concept might seem foreign to the modern reader, but perhaps that is only because the decisions made by legis-

\begin{footnotesize}
\textsuperscript{264} See \textit{Changing Role}, supra note 10, at 172 (describing the Founders' conception of the role of the jury as protector against government oppression).
\textsuperscript{265} See id.
\textsuperscript{266} \textit{Morris}, 26 F. Cas. at 1336.
\textsuperscript{267} See, e.g., \textit{Battiste}, 24 F. Cas. at 1043; \textit{Callender}, 25 F. Cas. at 256–57.
\textsuperscript{268} See \textit{AMAR'S BILL OF RIGHTS}, supra note 11, at 101–02.
\textsuperscript{269} \textit{Id.} at 101.
\textsuperscript{270} See \textit{NELSON}, supra note 135, at 28–30.
\textsuperscript{271} See supra Part III.A–B.
\end{footnotesize}
latures and judges curtailing the power of the jury have also largely eliminated the education aspect of the judicial system.

In addition to the aforementioned reasons used by judges to deny the jury's right to decide issues of law, judges who have denied the right to jury review have pointed to the Constitution and the structure of the national government to infer that the right to decide the constitutionality of laws was to be vested solely in judges. In support of this claim, judges looked to the fact that federal judges must swear an oath to uphold the Constitution, whereas the Constitution puts no such requirement upon jurors. Furthermore, judges noted that both the sheer importance of such decisions and the potential to negate legislative acts dictate that neither the Constitution nor the Judiciary Act should be construed to give such an important right to juries, but rather to officers of the judicial branch. It is striking that none of these arguments address which part of the Constitution demands that judges decide the constitutionality of laws over other federal officials who take an oath to uphold the Constitution, perhaps because there is no such evidence. Instead, the arguments seem to rest on a more basic premise that because deciding the constitutionality of laws is important to the functioning of the country, the drafters of the Constitution and Congress certainly would not have left such a power in the hands of the jury. Again, this premise fails to acknowledge that the Founders conceived of a jury as a vital part of the democratic process, and arguably similar to a lower branch of a bicameral judiciary. If viewed in this manner, both the judge and jury should be able to act as a check on the legislative branch when it passes an unconstitutional law. Given that the Founders viewed the jury as a protector against governmental overreaching, it follows that the jury should not only have a role in protecting citizens from an incorrect interpretation of the law, but perhaps even more importantly from an unconstitutional law itself.

Legal scholars have chronicled the demise of the jury's right to decide questions of law; however, instead of analyzing whether this demise was warranted given that such a practice was commonplace at the time of the adoption of the Constitution and was arguably a part of the Founders' conception of the jury, scholars have instead focused on the practical circumstances that brought

273 Morris, 26 F. Cas. at 1333.
274 See Callender, 25 F. Cas. at 255–56.
275 See AMAR'S BILL OF RIGHTS, supra note 11, at 99.
276 See supra Part III.A-B; see also 3 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 71 (H.A. Washington ed., 1861) (writing that trial by jury is "the only anchor . . . by which a government can be held to the principles of its constitution.").
277 See AMAR'S BILL OF RIGHTS, supra note 11, at 93.
about the change. Moreover, rather than question the propriety of the demise of the right, scholars seem to suggest that it was an inevitable result of the maturation of American society. According to scholars, one of the factors that initially contributed to colonial juries deciding issues of law was that judges had little formal legal training and the written law was not readily available. As the nineteenth century progressed, the legal profession became more professionalized and the law became more complicated, and thus there was less desire for juries to decide questions of law. Simultaneously, the distrust of judges presumably waned in the nineteenth century, lessening the need for juries to protect the citizens from judicial abuses.

While the aforementioned theory provides a practical explanation for why the jury’s right to decide issues of law declined in the nineteenth century, it implicitly assumes that the distribution of authority in the early courts was a result of convenience or happenstance, rather than a deliberate choice to give the jury the right to decide issues of law. History shows that Founders with as disparate beliefs as Hamilton and Jefferson acknowledged that the jury’s right to decide issues of law was tied to its functions as a protector against governmental oppression, to suggest that the jury’s right to decide issues of law had no relationship to the Founders’ broader conception of the jury is simply a mistake. Even if legal concepts became more complicated in the nineteenth century, that circumstance alone should not preclude a jury from hearing a case. The Founders did not envision a courtroom in which the jury would listen to evidence and make legal determinations on their own; instead, the judge was to play an integral role in educating the jurors on the law and providing them with the tools to render informed verdicts.

Furthermore, the aforementioned theory relied on the fact that citizens were less distrusting of judges in the late nineteenth century than at the time of the Founding. Even if that fact is accepted as true, it does not negate the fact that the Founders thought the jury to be such a vital institution because of its ability to act as a check on governmental power. Just because the public opinion of judicial officers was generally higher in the late nineteenth century does

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278 See, e.g., Howe, supra note 24, at 614–16; Brief History, supra note 5, at 915–20; Pepper, supra note 21, at 639–40; Middlebrooks, supra note 26, at 408; Harrington, supra note 55, at 435–36.

279 See Brief History, supra note 5, at 917 (suggesting that the increase in the technical nature of the law, more extensive commercial transactions, and increase in efficiency in democratic lawmaking in the nineteenth century may have accounted for a decrease in the need for juries to decide issues of law).

280 See Harrington, supra note 55, at 378–79; Brief History, supra note 5, at 917.

281 See Brief History, supra note 5, at 915–17; Pepper, supra note 21, at 639–40.

282 See supra Part III.B.

283 See supra Part III.B (analogizing the role of the jury to a lower branch in a bicameral judiciary, with the judge informing the jury of the pertinent law on the subject).
not mean that there were no longer any biased judges on the bench.\textsuperscript{285} Indeed, the Founders did not necessarily think that the majority of judges were prone to abuses of power; instead, they wanted the jury to have the right to decide issues of law to protect against the decision of a rogue judge.\textsuperscript{286}

Another predominant theory espoused by scholars is that the narrowing of the role of the jury, including the right to decide issues of law, was due in large part to the drastic change in the composition of the jury pool.\textsuperscript{287} Under this theory, as the jury pool became more diverse and inclusive, the beliefs held by the jury members likewise became more heterogeneous, and consequently the verdicts became less uniform.\textsuperscript{288} As popular faith in the jury declined, the judge interceded to provide uniformity and continuity.\textsuperscript{289}

While on its face this theory may go far in explaining the demise of the right of the jury to decide issues of law, it raises many more questions about the impact of race, gender, and socioeconomic status on the narrowing of jury’s rights.\textsuperscript{290} An in-depth discussion of these issues is beyond the scope of this Article,\textsuperscript{291} but the resolution of any of these issues is not relevant to whether the narrowing of the jury’s right to decide issues of law comports with the Founders’ conception of the jury. The Founders thought of the jury as a majoritarian institution—an arm of the popular government.\textsuperscript{292} That the jury pool was becoming more “diverse” only meant that it was a more accurate representation of the people. While it is understandable that judges might want to limit the ability of the jury to use its power to subvert unpopular legislation,\textsuperscript{293} to wholly take away the jury’s right to decide issues of law strips them of the power needed to neutralize equally oppressive judicial action.

Scholars have paid considerably less attention to analyzing the denial of the right to jury review in the nineteenth century, perhaps because courts rarely acknowledged the right to jury review in the first instance. Nevertheless, some scholars have argued that the need for the jury to decide the constitutionality of laws diminished once a truly democratic legislature was in place to ensure that only constitutional statutes were enacted.\textsuperscript{294} This explanation is flawed, how-

\textsuperscript{285} In fact, one could argue that the judges who made decisions enlarging their own control over verdicts at the expense of juries were precisely the kind of biased judges of which the Founders were concerned.

\textsuperscript{286} See supra Part III.B.

\textsuperscript{287} See Brief History, supra note 5, at 916; Changing Role, supra note 10, at 191–92; Pepper, supra note 21, at 640; Harrington, supra note 55, at 435–36.

\textsuperscript{288} See Harrington, supra note 55, at 435–37; Brief History, supra note 5, at 916.

\textsuperscript{289} See Changing Role, supra note 10, at 191–92, Harrington, supra note 55, at 437.

\textsuperscript{290} See generally Brief History, supra note 5, at 876–901 (describing the changing composition of the jury).

\textsuperscript{291} For more information about this topic, see generally id. at 876–901.

\textsuperscript{292} See supra Part III.A.

\textsuperscript{293} See AMAR’S BILL OF RIGHTS, supra note 11, at 103.

\textsuperscript{294} Howe, supra note 24, at 615–16.
ever, for it does not account for why judges still have the power to decide the constitutionality of laws; if a democratic legislature could be trusted to always pass constitutional laws, judicial review would also be unnecessary.

In a related vein, some scholars have theorized that the jury’s right to decide issues of law and the constitutionality of laws is part of the “recurring cycle of rejection and return to law.” Roscoe Pound asserted that there are moments in history when “more or less reversion to justice without law becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions.” During this reversion, new legal rules are developed, and over time the rudimentary forms of justice are replaced by more uniform judicial action that is governed by the new rules. It has been argued that late colonial America was one such revolutionary moment in which there arose a belief that the common man, through his service on the jury, was able to understand legal and constitutional principles and apply them to administer justice. Once the growth in the body of law was complete, more specific legal rules developed, and the need for the jury to decide issues of law diminished.

The “recurring cycle” theory raises the point that there may be times when the traditional methods for administering justice will not be sufficient to meet the growing needs of society. However, it would be difficult, if not impossible, to predict when such a revolutionary moment will occur, and thus the “recurring cycle” theory might warrant the recognition of the right to jury review so that the jury can send a signal to the other branches that constitutional reform is needed. In fact, it could be argued that the right of the jury to decide the constitutionality of laws is more important than the right to decide issues of law that do not have constitutional implications, because of the need to act in the face of such a revolutionary moment. Indeed, an examination of the types of cases in which the right of the jury to decide the constitutionality of laws was implicated (for example, the Alien and Sedition Act and the Fugitive Slave Act) lends support to the idea that such cases were potentially revolutionary moments in which the jury needed to have such a right.

Neither the judicial opinions denying the jury’s right to decide questions of law nor the scholars’ analysis of the phenomenon fully considered how that right fit in with the Founders’ conception of the jury. According to the Foun-

295 Brief History, supra note 5, at 918.
298 Harrington, supra note 55, at 439.
299 Id. at 439–40.
300 See Magliocca, supra note 22, at 216.
ders, the rights of the jury to decide questions of law and the constitutionality of laws formed an essential part of the jury’s arsenal to combat governmental oppression and provided it with the tools to be a central figure in the administration of justice and democracy as a whole. Limitations of these rights—whether in the name of uniformity in the interpretation of laws, the greater expertise of the judiciary, or the protection of citizens against potential unjust actions by juries—are not in accordance with the Founders’ conception of the jury at the time of the adoption of the Constitution and Bill of Rights, and thus they are arguably unconstitutional under Article III and the Sixth and Seventh Amendments as a deprivation of the right to trial by jury.