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The Contradictory Stance on Jury Nullification

Kenneth Duvall

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THE CONTRADICTION STANCE ON JURY NULLIFICATION

KENNETH DUVALL*

ABSTRACT

Arguments about jury nullification in both courts and academia typically proceed under the assumption that either proponents or opponents of nullification could decisively carry the day. But as current Supreme Court precedent stands, jury nullification is both prohibited and protected in a unique way. This Article shines a light on the uneasy, confusing compromise in the doctrines that prohibit and protect jury nullification, and finds the two ways out of this seemingly contradictory stance – fully embracing nullification, or rejecting it – are equally taboo to the American legal mind.

If the Supreme Court is sincere in condemning nullification, the Court would stamp out the practice by allowing jury control devices in criminal proceedings. Conversely, if the Court is determined to honestly sanction nullification, it would justify the currently incoherent ban on criminal jury controls. However, based on examinations of the Court's current make-up and the entrenched positions on both sides, this Article contends the Court will not bring itself to either encroach on the jury or openly endorse nullification. Instead, the contradiction at the heart of this issue will continue to exist as a frozen conflict, awaiting a thaw that is unlikely to come.

Part II briefly explains the contested history of nullification. Part III examines modern courts' intermittent recognition of nullification. Part IV expounds upon the laws defining and impacting criminal jury nullification. Part V grapples with the revelation that the prohibition on criminal jury control mechanisms, such as directed verdicts, serve only to protect and allow nullification. Finally, Part VI concludes by examining the three ways in which this muddled and contradictory area of the law may evolve.

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I. INTRODUCTION

Jury nullification has long fascinated courts, academics, and society in general.¹ The power, or maybe even right, of a jury to either convict or acquit a criminal defendant, despite the jury's belief that the law and evidence demand a contrary result, has stirred controversy since its inception, and continues to polarize. As it currently stands, nullification occupies a position in the twilight, officially condemned by the United States Supreme Court,² yet allowed – even encouraged – to survive by various, unyielding protections of jury decision-making. Echoing the sentiments of courts around the country, juries undoubtedly have no right to nullify, but they also surely have the power to do so, as no one, not even the judge, is allowed to do much to control a rogue jury in a criminal trial.³

Part II will briefly outline the history of nullification in Anglo-American jurisprudence, including modern developments. Part III then focuses on the various manifestations of nullification in modern legal contexts, and finds, that while in most instances nullification is treated as if it did not exist, it is recognized to exist in a couple of limited contexts. Reflecting on the contemporary treatment of nullification, Part IV focuses on the twin questions of whether nullification is, under Supreme Court

1. *See generally* CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998).

2. *Sparf v. United States*, 156 U.S. 51, 101 (1895).

3. Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 131-32.

precedent, truly legal, and whether nullification should be legal. Finally, based on the answer to the descriptive question in Part IV, Part V assesses the consequences of nullification's current legal status, finding a startling consequence. Namely, judges in criminal cases should be allowed to control juries through devices like directed verdicts if the judiciary really means what it says when it declares jury nullification illegal.

Conversely, if one follows the rationale for jury protection devices to its terminal end, then it appears nullification may be a constitutional right. It is this tension that clouds nullification jurisprudence and calls out for resolution. Yet this Article settles on the forecast that this frozen conflict between pro- and anti- nullification advocates will not thaw anytime soon, leaving American courts perpetually locked in a position where nullification is openly condemned and surreptitiously fostered.

II. HISTORY OF NULLIFICATION

Most histories of jury nullification begin with *Bushell's Case*.⁴ Up until this precedent, courts in England had apparently exercised significant control over jury decision-making.⁵ As a result of *Bushell's Case*, nullification came into being, and would cross the ocean to the colonies.⁶ In *Bushell's Case*, the English Crown prosecuted William Penn and William Mead for congregating to discuss a religion besides that of the Church of England.⁷ The judge was convinced the verdict should be guilty, but the jury refused to convict.⁸ After the jury refused for the third time, the judge jailed the jury for contempt.⁹ However, the petition for writ of habeas corpus by one of the jurors was granted by Judge Vaughan, as he found that no juror could be punished for rendering a verdict contrary to the court's opinion.¹⁰

According to many scholars, the majority of Founding Fathers were in agreement with Judge Vaughan.¹¹ Approval of the jury's right to nullify is found in "the writings of some of the most eminent American lawyers of the age – Jefferson, Adams, Wilson, Iredell, and Kent, to mention just a

4. *Bushell's Case*, (1610) 124 Eng. Rep. 1006 (C.P.) 1006.

5. Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States*, 37 N.C. J. INT'L L. & COM. REG. 725, 731-32 (2012).

6. *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

7. McClanahan, *supra* note 5, at 731.

8. *Id.*

9. *Id.*

10. *Id.*

11. For a collection of the various views on nullification – for, against, and somewhere in-between –, see Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIR. REV. 1, 33-42 apps. A-C (2011).

few.”¹² Thus, it was not only Anti-Federalists who sought to use the jury as a check against the government,¹³ but also well-established Federalists,¹⁴ including even the first Chief Justice of the Supreme Court, John Jay.¹⁵ Many modern cases refer to this distinguished history flowing from *Bushell’s Case* through the Founding period in defending the practice of nullification.¹⁶ Others argue, while “nullification” was alive and well at the Founding in some form, the “nullification” of this era was always tempered by the duty of juries to heed both the law and the judge; in other words, while the jury may have interpreted the law on its own, it was still under a duty to do so in a conscientious fashion.¹⁷

Whatever the exact contours of the right to nullify at the Founding, momentum would turn in the other direction as the legislature earned more trust from society, precluding the need for juries to defy statutes.¹⁸ In *United States v. Battiste*,¹⁹ the first significant blow to nullification came.²⁰ Writing for the majority, Justice Story stated the jury must accept the law as given by the judge.²¹ In another famous case, *United States v. Morris*,²² the federal district court of Massachusetts interrupted defense counsel during a nullification argument to the jury, holding juries have no right to pass on legal questions.²³ The issue in federal courts was settled firmly against

12. AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 101 (1998).

13. Roots, *supra* note 11, at 14 (noting that Anti-Federalist proponents of a powerful jury included Luther Martin, Arthur Lee (Cincinnatus), and the Federal Farmer).

14. Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1859 (2002).

15. Christopher C. Schwan, Comment, *Right up to the Line: The Ethics of Advancing Nullification Arguments to the Jury*, 29 J. LEGAL PROF. 293, 294 (2005) (“[Y]ou [the jury] have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.” (citing *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794))).

16. *United States v. Dougherty*, 473 F.2d 1113, 1131 n.34 (D.C. Cir. 1972).

17. See Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1620 (2001) (“Although Eighteenth Century juries were invited to find both law and facts and not feel bound by the interpretation of the law offered by trial judges, they were admonished to apply the law as they understood it. The independence of jurors in this regard did not countenance deciding disputes in total disregard of the applicable common or other law.”); David A. Stern, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 609 (2000) (“[T]he right to decide the law was neither equivalent to today’s proposed right to nullify, nor did it encompass the right to nullify. To the contrary, the right to decide the law swept narrowly, placing a clear duty on juries to follow the law as they saw it, rather than reject the law as pro-nullification scholars would have them do.” (emphasis in original)).

18. *Dougherty*, 473 F.2d at 1132 (“[T]he protection of citizens [lies] not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.”).

19. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

20. *Battiste*, 24 F. Cas. at 1043.

21. See Schwan, *supra* note 15, at 294.

22. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).

23. *Morris*, 24 F. Cas. at 1328.

nullification in *Sparf v. United States*.²⁴ As such, all of the federal circuits have since fallen in line, agreeing, “[w]hile juries have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so.”²⁵ As far as state courts are concerned, they are, for the most part, in accord with the federal courts. A few exceptions, like Maryland,²⁶ Indiana,²⁷ and Georgia²⁸ tell jurors that they are to determine the law as well as the facts, though they do not expressly allow for an instruction sanctioning the right to nullify.

Despite the official judicial consensus against jury nullification, the practice continues, and courts proclaim their inability to rein in runaway juries.²⁹ The common justification for this incongruous arrangement is that nullification serves a valid purpose, but to acknowledge it directly would allow it to run amok.³⁰ This uneasy balance is often challenged in academia, especially by proponents of nullification who would like it to be placed back in the light and acknowledged as a right of the defendant, and maybe even the jurors.³¹ However, the courts seem content to allow the nullification doctrine to remain exactly where it is: in the twilight.

24. 156 U.S. 51, 102 (1895).

25. See *United States v. Edwards*, 101 F.3d 17, 19-20 (2d Cir. 1996) (collecting circuit cases).

26. MD. CONST. Declaration of Right, art. 23 (“In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”); see also *Wyley v. Warden*, 372 F.2d 742, 747 (4th Cir. 1967) (rejecting defendant’s claim that Maryland’s nullification provision is illegal under the Federal Constitution). *Wyley* was later overruled on the ground that any instruction that relieves the State of the burden of proving elements beyond a reasonable doubt is not harmless error, i.e., merits automatic reversal. *Jenkins v. Hutchinson*, 221 F.3d 679, 685-86 (4th Cir. 2000) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993)).

27. IND. CONST. art. I, § 19 (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”); see also *Bridgewater v. State*, 55 N.E. 737, 739 (Ind. 1899). The Indiana Supreme Court found that it was not error for trial judge to refuse to instruct jury that the judge’s instructions on the law were advisory only and may be disregarded so that the jury could determine the law for itself. *Id.* While the court did not say a trial judge would commit error by giving such an instruction, it at least spoke strongly against doing so. *Id.*

28. GA. CONST. art. I, § 1, ¶ 11(a) (“In criminal cases . . . the jury shall be the judges of the law and the facts.”). For further discussion of constitutional recognition of jury nullification powers in Maryland, Indiana, and Georgia, see Richard St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2566-74 (1997). Credit to Jeffrey Zahler, Note, *Allowing Defendants to Present Evidence of Prison Conditions to Convince Juries to Nullify: Can Only the Prosecutor Present “Moral” Evidence?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 485, 494 n.63-66 (2008), for collecting these state provisions.

29. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (“[T]he jury has the power to bring in a verdict in the teeth of both law and facts.”).

30. *United States v. Dougherty*, 473 F.2d 1113, 1134-35 (D.C. Cir. 1972).

31. *Id.* at 1138 (Bazelon, J., concurring in part and dissenting in part).

III. MODERN TREATMENT OF NULLIFICATION IN VARIOUS CONTEXTS

This Article now turns to the contemporary treatment of nullification in certain, concrete legal settings. As noted in Part II, the current consensus is that nullification should not be openly recognized, but there are a few instances wherein nullification is at least acknowledged, and sometimes even grudgingly accepted by courts.³² This Part will examine a few instances demonstrating the general rule that nullification is not recognized, followed by a couple specific exceptions to this rule.

A. NULLIFICATION NOT RECOGNIZED IN MOST CIRCUMSTANCES

The following examples illustrate the general rule regarding nullification's current status in American jurisprudence: jury nullification is invalid. The first example is the bar against presenting nullification to a jury. A second is the unwillingness of courts to consider the possibility of nullification in granting post-conviction relief. Finally, the third is the willingness of courts to preclude nullifying venire persons from becoming jurors.

1. *Jury Instructions*

The most salient demonstration of the prohibition against nullification is the ban on instructing juries about their power to nullify. Across the country, courts cannot instruct juries about their power to nullify.³³ Moreover, as noted earlier, defense counsel cannot advance nullification arguments.³⁴ Instead, standard jury instructions direct the jury to apply the law before them, which is a tacit means of discouraging nullification.³⁵

2. *Post-Conviction Relief*

Similarly, in the post-conviction relief context, courts cannot consider the possibility the movants were prejudiced by the alleged failure of their

32. *See infra* Part III.B.

33. Nancy Gertner, *From "Rites" to "Rights": The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMAN. 433, 435 n.10 (2012) (collecting cases).

34. NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES* 197 (2d ed. 2009) ("Concomitant with the refusal to instruct the jury concerning nullification, courts have further held that counsel may not argue that theory in closing argument. . . ."); Roots, *supra* note 11, at 15-16 ("Many judges will not even allow a defense attorney to argue for nullification (or even to inform jurors of their power to nullify) during closing arguments.") (collecting cases).

35. Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 503 (2001) ("[T]he courts consistently hold that criminal juries should be instructed that it is their duty to apply the law as defined by the trial court, and that defendants' requests for an instruction on juries' power of nullification should be denied.")

counsel to prevail based on a jury's merciful nullification. The lodestar of post-conviction jurisprudence, *Strickland v. Washington*³⁶, so held:

In making the determination whether the specified errors resulted in the required prejudice, *a court should presume*, absent challenge to the judgment on grounds of evidentiary insufficiency, *that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like.* A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. *It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.* Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.³⁷

Therefore, just as trial courts will prohibit defense counsel from arguing nullification to the jury, appellate courts will not consider the possibility that the jury nullified, presenting a form of doctrinal symmetry and consistency in an area of the law often fraught with contradiction.

3. *Exclusion of Nullifying Jurors*

As a final example of the general rule, courts are forthright about the illegality of nullification when it comes to whether jurors with a penchant for nullifying can be struck during voir dire: the answer is a clear yes. "[C]ourts have excluded potential nullifiers from the jury before or even during trial."³⁸ This general rule, though, is subject to one limited, but important, exception, discussed further in Section B.

36. 466 U.S. 668 (1984).

37. *Strickland*, 466 U.S. at 694-95 (emphasis added).

38. Noah, *supra* note 17, at 1621-22 (collecting cases).

B. NULLIFICATION RECOGNIZED IN LIMITED CIRCUMSTANCES

In contrast to these examples demonstrating the rule, there are at least two situations in which nullification is recognized, if not justified. The first example is when juries return inconsistent verdicts. A second example is when juries are deliberating in the sentencing phase of a death penalty case.

1. *Inconsistent Verdicts*

The first situation requiring examination is when appellate courts must explain an inconsistent verdict. The leading case in the area is *United States v. Powell*.³⁹ In *Powell*, the Supreme Court declared:

The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts – even verdicts that acquit on a predicate offense while convicting on the compound offense – should not necessarily be interpreted as a windfall to the Government at the defendant’s expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury’s error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution’s Double Jeopardy Clause.⁴⁰

Thus, there are two possibilities with an inconsistent verdict: the jury was convinced of guilt as to both charges but was lenient as to one charge, or the jury was convinced of innocence as to both charges but was vindictive as to one charge.⁴¹ Given both the impossibility of knowing which type of nullification occurred and the inability of the State to remedy a lenient nullification due to the Double Jeopardy Clause,⁴² the Court decided to simply allow the verdict.⁴³ Under this reasoning, a nullification of one kind or another stood as valid.⁴⁴ The Court, however, did not base its holding simply on this rationale of indeterminacy and fairness to both parties.⁴⁵

39. 469 U.S. 57 (1984).

40. *Powell*, 469 U.S. at 65.

41. *See generally id.*

42. *Id.* at 65.

43. *Id.* at 69.

44. *Id.* at 65.

45. *Id.*

Besides placing the defendant on a level playing field with the Government such that neither can appeal the pertinent inconsistent verdict, the Court further justified letting the verdicts stand because doing so simply recognizes the historic function of the jury.⁴⁶ The Court stopped short of justifying its holding simply based on the power of the jury to nullify, though, relying on both fairness and the role of the jury.⁴⁷ As the Court stated: “[t]he fact that the inconsistency may be the result of lenity, *coupled with the Government’s inability to invoke review*, suggests that inconsistent verdicts should not be reviewable.”⁴⁸ The Court’s hesitation to ground its holding exclusively on the power to nullify stemmed from its continued ambivalence on the topic. Despite recognizing its historic function, the Court also reiterated its mantra in *Sparf* that “the jury has no right to exercise” the power of nullification.⁴⁹

Therefore, inconsistent verdicts are not justified merely because they exemplify jury nullification.⁵⁰ If the Government could challenge the acquittal half of the inconsistent verdict equation as lenient nullification, then conceivably the court would allow the defendant to challenge the conviction half of the equation, and thereby refuse to acknowledge nullification. This is, after all, what occurs in civil cases with inconsistent verdicts,⁵¹ and if the Double Jeopardy Clause was not a factor in criminal cases, it is possible the Supreme Court would not find arguments in favor of jury nullification sufficient to allow inconsistent criminal verdicts to stand. In sum, while one could initially believe *Powell* is evidence of the Court’s sanction of nullification, a closer reading reveals a more ambiguous picture.⁵²

46. *Id.*

47. Some commentators have claimed that the Supreme Court, by allowing inconsistent verdicts, has effectively sanctioned the jury’s power to nullify. *See, e.g.,* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 81-82 (2003); Noah, *supra* note 17, at 1633 n.120; Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 212-14 (1989); Alexander M. Bickel, *Judge and Jury - Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 651-52 (1950).

48. *Powell*, 469 U.S. at 66 (emphasis added).

49. *Id.* (quoting *Dunn v. United States*, 284 U.S. 390, 393 (1932)).

50. *Id.*

51. Noah, *supra* note 17, at 1633 (“The civil jury has no power to dispense clemency, and verdicts in the teeth of the evidence may be set right.” (quoting *Will v. Comprehensive Acct. Corp.*, 776 F.2d 665, 677 (7th Cir. 1985))); *see also* FED. R. CIV. P. 50(b); *see also, e.g.,* Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1251 (1995) (citing *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) (upholding judgment notwithstanding the verdict against Seventh Amendment challenge)).

52. *See generally Powell*, 469 U.S. at 66.

2. *Death Penalty Sentencing Phase*

Another example of a measured authorization of nullification is in the death penalty context, as the Supreme Court has disallowed the striking of nullifying jurors in death penalty sentencing.⁵³ Although (as noted above) the Supreme Court allows lower courts to screen would-be nullifying jurors from the guilt phase,⁵⁴ the Court has also indicated that such jurors cannot be screened from the sentencing phase.⁵⁵ The reasoning is such that, if nullification should be recognized at all, it should be recognized at the moment when a jury can, through its mercy, preserve life.⁵⁶ Thus, in *Gregg v. Georgia*,⁵⁷ a plurality of the Court stated a mandatory death penalty scheme would be unconstitutional in part because it would not permit “the discretionary act of jury nullification.”⁵⁸ “[T]he sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not ‘deserve to be sentenced to death.’”⁵⁹ In another mandatory death penalty scheme case, *Woodson v. North Carolina*,⁶⁰ a Court plurality again struck down the scheme, this time noting the statute in question had no means of guiding the jury’s “inevitable exercise of the power to determine which first-degree murders shall live and which shall die [A] mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury’s willingness to act lawlessly.”⁶¹ The Court openly granted that some juries inexorably will nullify, and, at least in the context of life and death, found that this power to nullify should be standardized as much as possible by bifurcating the guilt and sentencing phases so that merciful nullifying jurors can focus their energies on the sentencing phase alone.⁶²

Taken together, these two instances – inconsistent verdicts and death penalty sentencing – appear only as outliers in the general attitude towards nullification. The recognition of nullification in the inconsistent verdict

53. James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1623 (2006).

54. *Lockhart v. McCree*, 476 U.S. 162, 177 (1986) (“[D]eath qualification’ does not violate the fair-cross-section requirement.”).

55. Liebman & Marshall, *supra* note 53, at 1623.

56. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

57. 428 U.S. 153 (1976).

58. *Gregg*, 428 U.S. at 199 n.50.

59. *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in judgment) (citation omitted).

60. 428 U.S. 280 (1976).

61. *Woodson*, 428 U.S. at 303.

62. *See id.*

context is a result of the unique features of Double Jeopardy concerns. Similarly, acknowledgment of nullification in the death penalty context occurs only because of the exceptional stakes involved.

IV. “POWER” VERSUS “RIGHT”

As the result of a back and forth battle over jury nullification lasting centuries, different courts and jurisdictions remain maligned over the issue. Although courts currently disagree over their power and control over jury nullification as well as the role it plays in the criminal justice system, the United States Supreme Court has attempted to resolve these issues. In order to understand the current role of jury nullification, we must parse the language of the Supreme Court, which has in fact stated nullification is an illegal act by the jury, and yet curiously capitulates to the jury’s capacity to nullify at will.

A. DESCRIPTIVE ISSUE: NULLIFICATION IS AN ILLEGAL POWER, NOT A LEGAL RIGHT

No matter what one’s position is on the virtues and vices of nullification, current case law is clear that, under *Sparf*, juries are under a legal duty to follow the law, thereby rendering any act of nullification illegal.⁶³ Specifically, *Sparf* explains “[t]he law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them.”⁶⁴ The “power” is recognized because no one can control the jury; this is power in the raw, illegal sense. As Justice Holmes clarified, a quarter century after *Sparf*, in *Horning v. District of Columbia*⁶⁵:

[T]he judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. . . . [T]he judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found . . . but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts.⁶⁶

In some contexts, power can mean the “legal right or authorization to act or not act; a person’s or organization’s ability to alter, by an act of will, the

63. *Sparf v. United States*, 156 U.S. 51, 99 (1895).

64. *Id.*

65. 254 U.S. 135 (1920).

66. *Horning*, 254 U.S. at 138. Although *Horning* was not explicitly invoking the Hohfeldian common law distinctions of common law relationships, which included rights and powers, reference to Hohfeld shows that a right is not the same thing as a power. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718-20 (1917).

rights, duties, liabilities, or other legal relations either of that person or another.”⁶⁷ Justices Harlan (in *Sparf*) and Holmes (in *Horning*) noted the jury has the duty to follow the law as instructed by the judge,⁶⁸ or, in other words, “no right to exercise” the power of nullification.⁶⁹ Therefore, it is clear the jury’s power to nullify is not an actual right to nullify.⁷⁰ Rather, the power of the jury to nullify must mean the sheer ability to do so regardless of its legality.⁷¹ In this fashion, courts of last resort have the power to render decisions in the teeth of the law because of the lack of review of their decisions, but this does not necessarily give them a legal imprimatur.

B. NORMATIVE ISSUE: SHOULD NULLIFICATION BE LEGAL?

Unlike much of the writing dedicated to the topic of nullification, this Article is not necessarily concerned with whether nullification should or should not be legal, but instead with the fallout from the current decision of courts that nullification is illegal. Still, this Article would be remiss if it did not concisely account for the arguments raging on each side of the issue, as the effects of attaining doctrinal consistency would inure to the benefit of one faction at the expense of the other.

Put simply, the debate over the legitimacy of jury nullification can be broken down into two camps. One group views nullification as a “[f]undamental necessity of a democratic system.”⁷² In contrast, others view nullification as “a sick doctrine that has occasional good days?”⁷³

The following are common arguments in favor of nullification. Some contend that, if prosecutorial discretion is valid, why not jury nullification?⁷⁴ Others justify nullification because it provides just the right

67. BLACK’S LAW DICTIONARY (9th ed. 2009) (definition of “power”).

68. *Sparf*, 156 U.S. at 106 (“[I]t was the *duty* of the court to expound the law, and *that* of the jury to apply the law as thus declared to the facts as ascertained by them.” (emphasis added)); *Horning*, 254 U.S. at 138 (“The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their *duty* is little more than formal.” (emphasis added)).

69. *Dunn v. United States*, 284 U.S. 390, 393 (1932).

70. As noted in the text, Justice Holmes made sure to qualify the jury’s “right” to nullify in two ways: first, by limiting the “right” with the narrow adjective “technical;” and second, by tempering even that measured phrase with the skeptical description “if it can be called so.” *Horning*, 254 U.S. at 139.

71. *Id.* at 138.

72. *United States v. Moylan*, 417 F.2d 1002, 1005 (4th Cir. 1969).

73. *People v. Dillon*, 668 P.2d 697, 730 (1983) (Kraus, J., concurring).

74. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1247 n.17 (2011).

amount of nullification.⁷⁵ Along these lines, proponents claim open recognition of nullification would not unleash more “bad” versions of nullification, but instead more “good” versions; because those who nullify without being told they can are ignoring the rules, while those who would nullify when being told would be following the rules.⁷⁶ Yet others find nullification to be the only means of protecting the community in some instances,⁷⁷ or community values in other instances.⁷⁸ Similarly, juries can counterbalance against institutional actors: legislators, judges, prosecutors, and police.⁷⁹ Of course, many would uphold jury nullification because of the claimed historical right of juries to do so,⁸⁰ and because it seemingly follows from the Double Jeopardy Clause.⁸¹ In addition, juries, unlike the legislatures crafting the laws, can respond to unanticipated situations.⁸²

Regarding arguments raised against nullification, the chief one may be that nullification invites anarchy.⁸³ After all, the United States aspires to be a government of laws, not men.⁸⁴ Moreover, the judge is the courtroom’s expert on legal matters.⁸⁵ In a retort to the democracy-enhancing virtue of nullification, nullification opponents claim that nullification undermines the

75. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972) (“An equilibrium has evolved – an often marvelous balance – with the jury acting as a ‘safety valve’ for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.”).

76. *Id.* at 1141 (Bazelon, J., concurring in part and dissenting in part).

77. Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. C.R. L.J. 145, 185-86 (2004) (“Beyond optimal deterrence, however, jury nullification may be a solution to racism and discrimination in the criminal justice system. As a rational choice, jury nullification can encourage socially desirable behavior and discourage undesirable conduct by the police.”).

78. Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1355 (1994).

79. *Dougherty*, 473 F.2d at 1138 & n.13; David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 92 (1995).

80. Brody, *supra* note 79, at 92.

81. The Supreme Court may have suggested this in *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (“[T]he factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of ‘not guilty.’ This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming.”). I am supposing that the “rule that there can be no appeal from a judgment of acquittal” refers, directly or indirectly, to the Double Jeopardy Clause. *Id.*

82. *Dougherty*, 473 F.2d at 1142; Brody, *supra* note 79, at 92.

83. See, e.g., *Sparf v. United States*, 156 U.S. 51, 101 (1895); *Dougherty*, 473 F.2d at 1133; Brody, *supra* note 79, at 92.

84. See, e.g., *United States v. Luisi*, 568 F. Supp. 2d 106, 120 (D. Mass. 2008).

85. See, e.g., *United States v. Urfer*, 287 F.3d 663, 665 (7th Cir. 2002).

popular will expressed through laws.⁸⁶ Nullification may also violate the defendant's rights,⁸⁷ and, from at least one point of view, results in unjust verdicts.⁸⁸ Instructing on nullification might even overwhelm jurors already stressed with their heavy civic responsibility.⁸⁹

Enough ink has been spilled in both directions that this Article need not pile onto the normative issue. However, an unbiased observer likely grants that both sides have valid points, and following from this recognition, one can understand why the debate over nullification remains alive and well. The inability of either side to settle the question decisively in its favor may lie at the heart of the uneasy compromise struck by the Supreme Court. As this Article shortly explores, it may explain why this compromise is likely to remain in place.

V. IMPLICATIONS FROM RECOGNITION THAT NULLIFICATION IS ILLEGAL

Current court precedent appears to indicate jury nullification in criminal trials is illegal. After addressing the formation of jury nullification and arguments both in favor and against it, this Article must consider a contradictory stance of jury nullification. The specific contradiction at hand revolves around judicial mechanisms purporting to protect and honor the decision of the jury, but which also limit the opportunity for nullification.

A. A LACK OF JUDICIAL SINCERITY

First, this compromise offends one's moral sense in that the judicial system should be honest in the role of nullification. If it is illegal, it should say so in no uncertain terms, or vice versa. When juries ask about nullification, courts give opaque answers.⁹⁰ Just as there is value in judges being sincere and "believ[ing] the reasons they give in their legal opinions,"⁹¹ so too, is there value in ensuring juries are held to the same standard. Specifically, ensuring juries are doing what they are legally bound to do does not sound like an unreasonable request. David Shapiro contends judges should be forthright in dealing with other judicial actors,

86. Brody, *supra* note 79, at 92; Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512 (1976).

87. Brody, *supra* note 79, at 92; Simson, *supra* note 86, at 518-19.

88. Brody, *supra* note 79, at 92; Simson, *supra* note 86, at 518-19.

89. *United States v. Dougherty*, 473 F.2d 1113, 1116 (D.C. Cir. 1972); Brody, *supra* note 79, at 92.

90. *See, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1189 (1st Cir. 1993) ("Federal trial judges are forbidden to instruct on jury nullification.").

91. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 987 (2008).

because a lack of candor implies “the listener is less capable of dealing with the truth, and thus are of less worth, of respect, than the speaker.”⁹² This animating principle of our distaste for dishonesty plays strongly in the nullification context, as the judiciary’s failure to fully apprise jurors of their power to nullify – while simultaneously protecting that power through sundry prohibitions on jury control devices – could easily be construed as patronizing.

Arguments in favor of judicial candor are not only based on a sense of moral obligation. As Scott Idleman argues, there are at least eight more potential justifications for requiring judges to give an honest account for their decision-making, ranging from considerations of accountability and judicial restraint to meeting the needs of the immediate parties and the development of future precedent.⁹³ While discussions of judicial candor usually revolve around decisions made by judges (especially at the appellate level), rather than by juries, the system’s need for judicial candor seems no less pressing when judges are shaping the decision of the cases indirectly by informing the jury of their rights and powers, or lack thereof.

Many scholars acknowledge there are exceptions to the general rule that judicial candor should be required.⁹⁴ One such example may be: “a case may present a conflict between fundamental values, in which instance full candor would require a court to acknowledge that it is sacrificing one of those values for the sake of the other.”⁹⁵ Facing such a dilemma, courts have often downplayed the sacrifice of one value for another because society would not be able to accept such a result.⁹⁶ “[S]omething less than complete candor would be acceptable, according to [Guido] Calabresi, simply because we place a lesser premium on candor as compared to the other values at stake in the case.”⁹⁷ Perhaps the reason that courts are not candid with juries about their power to nullify is that the judges do not want

92. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-37 (1987); see also Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 401-02 (1989) (“[T]he unspoken premise for almost all of the prior calls for candor, is that deception in judging undermines the integrity of the judiciary. The almost universal condemnation of lying suggests that those who call for judicial candor have staked out the moral high ground.”). See generally Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 155-60 (2005) (discussing the literature on judicial candor).

93. Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1335-73 (1995).

94. See Oldfather, *supra* note 92, at 159-60.

95. *Id.* at 160.

96. *Id.* (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE STATUTES 172-73 (1982)).

97. Oldfather, *supra* note 92, at 160 (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE STATUTES 172-73 (1982)).

to acknowledge to jurors that either the rule of law or the historical power of the jury (at least in the eyes of some) must give way to the other.

The problem with justifying judicial insincerity on the basis of not acknowledging the sacrifice of one legal value for another is that many juries know full well the trade-off at issue, rendering the obfuscation pointless. Clever juries realize this both because their prerogative lives on in the dark of the jury room and because the trade-off has not actually been hidden from society. Opinions such as *Sparf* addressed the historic claims of the jury's nullification rights directly and, rightly or wrongly, denied them.⁹⁸ Since *Sparf*, however, the judiciary has hedged on both sides of the nullification equation in saying the rule of law is paramount, and yet, allowing the jury to subvert it.⁹⁹ Jury nullification has not been sacrificed because it lives on, if only in the shadows, notwithstanding *Sparf*.¹⁰⁰

Another possible reason to depart from full candor might be the need to employ "absolute language to describe a legal doctrine or justification . . . even if not completely accurate, simply because it functions to neutralize potential slippery-slope problems."¹⁰¹ For instance, Calabresi posits we might use absolutist terminology in condemning torture even though we might recognize extreme circumstances might call for it, or we might claim there is an absolute prohibition on regulating religion despite the need to sometimes interfere.¹⁰² This reason, more than the previous one, helps explain the judiciary's odd dissonance between words and actions. *Dougherty* embraces this rationale, reasoning that informing the jury it cannot nullify sets a rule from which some deviation can be expected, just as in setting a speed limit.¹⁰³ Because the rule of law is paramount, judges unequivocally declare that judges must do their duty even though they may recognize extreme circumstances might call for a deviation.

The regime created under *Sparf*, *Horning*, and lower cases like *Dougherty* may have struck the exact balance that American judges are content with, and will be satisfied with for centuries to come.¹⁰⁴ Perhaps most interested parties actually desire for some nullification activity to occur, but only the limited amount of nullification that occur at the

98. *Sparf v. United States*, 156 U.S. 51, 100-01 (1895).

99. *Horning v. District of Columbia*, 254 U.S. 135, 138-39 (1920).

100. *Sparf*, 156 U.S. at 106.

101. Oldfather, *supra* note 92, at 159 (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE STATUTES 172-73 (1982)).

102. *Id.*

103. *United States v. Dougherty*, 473 F.2d, 1113, 1135 (D.C. Cir. 1972).

104. See *Horning*, 254 U.S. at 138-39; *Sparf*, 156 U.S. at 106-07; *Dougherty*, 473 F.2d at 1136-37.

margins of a regime banning the practice. This compromise position is explored further in Part V.B.2.

While this slippery slope, pro-compromise reason may help explain the judiciary's behavior, it does not necessarily justify it. First, how does the judiciary know the level of jury nullification associated by this regime is optimum, i.e., that the juries will know the extreme cases warranting deviation from the rule when they see them? The nullifying juries in such a system are, after all, breaking the law.¹⁰⁵ Furthermore, one must assume slippery-slope issues are a real problem, at least in this instance, which is not necessarily the case. If juries are told they have the power to nullify, critics assume nullification would occur too often, and in the wrong cases. Upon empirical study, though, this "chaos theory" has received only mixed reviews.¹⁰⁶ Many earlier studies found nullification instructions did not unleash any such chaos,¹⁰⁷ as juries tended to nullify only in arguably warranted, merciful fashion,¹⁰⁸ and, by and large, the social science on the issue still "shows that jurors do use information about their power to nullify in a circumscribed and careful manner."¹⁰⁹ If the judiciary actually believes some nullification is necessary and proper, these reasons could be used to support a candid embrace of nullification, even through jury instructions, a possibility considered in Part V.B.1.

Finally, returning to the doctrinal emphasis of this Article, justifying the judiciary's inconsistent words and actions because of slippery-slope considerations is problematic, because the Supreme Court labeling jury nullification as illegal does not contain exceptions.¹¹⁰ Thus, the intention of compromising on candidness regarding a rule of law to avoid slippery slope issues, is to avoid creating any exceptions as a matter of law, so that the only exceptions that do occur are rogue and, as such, rare. But the rule laid down in *Sparf* is not just any rule of law; instead, the behavior of the jury is the lynchpin of the entire criminal adjudication system. The jury has the

105. *Horning*, 254 U.S at 138.

106. Irwin A. Horowitz, *Jury Nullification: An Empirical Perspective*, 28 N. ILL. U. L. REV. 425, 449 (2008) ("[W]hile a considerable body of prior research [has] contradicted the *Dougherty* court's chaos theory . . . recent findings support a narrow version of that theory: that nullification instructions can exacerbate a certain kind of juror bias (emotional biases) in a certain kind of case (one in which the fairness of the law is in question). But those findings also left open an important possibility – that differently worded instructions might mitigate the bias-enhancing effect of instructions informing jurors that they could nullify.").

107. Julie Seaman, *Black Boxes: fMRI Lie Detection and the Role of the Jury*, 42 AKRON L. REV. 931, 938 (2009) (citing Irwin A. Horowitz et al., *Chaos in the Courtroom Reconsidered: Emotional Bias and Juror Nullification*, 30 LAW & HUM. BEHAV. 163, 165-66 (2006)).

108. Horowitz, *supra* note 106, at 450.

109. *Id.*

110. *Horning*, 254 U.S. at 138-39; *Sparf v. United States*, 156 U.S. 51, 105-06 (1895).

power to validate or invalidate all of the legal process leading up to its verdict, and any compromise of the jury compromises every other feature of criminal justice. If the judiciary means to build in exceptions to its anti-nullifying jury instructions through its other behavior in preventing jury control mechanisms in criminal trials, then it is undercutting its own precedent. Moreover, even though most empirical studies of jury behavior have shown jurors, aware of their ability to nullify, have not abused this power, some recent research has shown “caution is warranted with respect to informing juries of their nullification powers, at least in trials where emotionally-biasing information is intrinsic to the trial.”¹¹¹ These reasons correspond with the possibility of courts fully embracing the anti-nullification principle of *Sparf*.

B. THE JUDICIARY PROTECTS AN ILLEGAL POWER IN NULLIFICATION

If a call for jury sincerity is not enough to push the judicial system into controlling rogue criminal juries, then perhaps doctrinal consistency should be. Upon examination, many safeguards put in place long ago to protect the right or power to nullify remain even though nullification is, if *Sparf*, *Horning* and company are taken at face value, no longer worthy of legal protection.¹¹² First, this section will explain the circular logic of the power to nullify: nullification spawned the ban on jury-control devices, which now protect the power to nullify despite its illegal status. Next, this section finds the Supreme Court’s justification for leaving the power to nullify in place does not escape this logic, as nullification is the only reason for the ban on jury-control devices.¹¹³

1. *Prohibition of Jury Control Devices: Tail Wagging the Dog?*

Often, when courts state juries do not have the right to nullify, they qualify the statement with an admission that juries have the power to do so.¹¹⁴ This hand-wringing falls on deaf ears, though, when one considers that juries have this power because judges allow them to have it. There are many possible devices by which to control the jury, and yet the courts refuse to implement them: directed verdicts for the State, judgment notwithstanding the verdict, interrogatories with general verdicts, special verdicts, ordering new trials based on inconsistent verdicts, judicial

111. Horowitz, *supra* note 106, at 450.

112. *Horning*, 254 U.S. at 138-39; *Sparf*, 156 U.S. at 106-07.

113. See Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1014-19 (1980).

114. See, e.g., *Horning*, 254 U.S. at 138.

comments on the evidence, issue preclusion, and appeals or new trial based on legal errors affecting the verdict.¹¹⁵ The Supreme Court has always been careful to keep these options off the table, even in moments where it is most strongly condemning the act of nullification.¹¹⁶

As one might expect, some believe jury verdicts, at least insofar as they are inconsistent, are not reviewed so as to allow juries to nullify.¹¹⁷ If so, then the tail has apparently come to wag the dog. But, is it possible these anti-jury control devices serve another function besides insulating nullifying juries from review? These mechanisms preserve the illegitimate nullification power, but if they can, or must, stay in place for independent reasons, nullification might then be a mere by-product to be tolerated in service to these other goals.

For instance, we can question whether the inability to examine a jury's verdict after the fact – one of the most potent protections of the power to nullify – serves a purpose besides allowing jurors to nullify.¹¹⁸ [W]ith few exceptions . . . once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes . . . through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.¹¹⁹

As seen previously in this Article, double jeopardy frequently steps into the void as a justification for precluding the review of jury verdicts.¹²⁰ When

115. Westen, *supra* note 113, at 1012-18.

116. *See, e.g., Sparf*, 156 U.S. at 105 (“In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside.”).

117. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 49 (1995); *see also* Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases*, 63 SMU LAW REV. 1033, 1044 n.111 (2010) (“As other commentators have noted, the only legitimate justification for this refusal to inquire into jury deliberations is the historic prerogative of the jury to acquit against the evidence – that is, to nullify the law.” (internal quotation marks omitted)); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 258 (1996) (“[P]rocedural devices that are available in most trials to correct or prevent errors – special verdicts, judgments as a matter of law, and appeals – are not available to the prosecution in criminal cases. . . . [T]he unavailability of these procedures flows from a desire to protect the nullification power from infringement.”); Westen & Drubel, *supra* note 3, at 129; Chaya Weinberg-Brodth, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 838 n.80 (1990) (collecting commentators).

118. Westen & Drubel, *supra* note 3, at 112-18.

119. *United States v. Powell*, 469 U.S. 57, 67 (1984).

120. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 212 n.37 (2005) (“The jury's ability to acquit despite the law is rooted in double jeopardy principles.” (citing *Standefer v. United States*, 447 U.S. 10, 22 (1980))).

the defendant is acquitted, there is no reason to review the jury because nothing could come of it due to the Double Jeopardy Clause.¹²¹ This rule is undisputed, with courts in virtually unanimous agreement.¹²² But, outside of the inconsistent verdict context, and its concerns about windfall should the defendant alone be allowed to challenge,¹²³ why should stand-alone verdicts that appear to result from merciful nullification be unreviewable? Perhaps one could generalize the double jeopardy rationale from inconsistent verdict cases to all cases as follows: if the state or government can never review a jury's decision-making in the event of an acquittal, defendants should never be able to review a jury's decision-making in the event of a conviction.

Yet the lack of review of potential vindictive nullifications has not been justified on double jeopardy grounds, and still there is no review. Granted, convictions can be reviewed, but they are not reviewed for possible nullification.

The only limit on this power [to vindictively nullify] is the due process requirement that the jury base the conviction on legally sufficient evidence [But] defendants have no protection against a jury that chooses to convict on evidence it does not actually believe meets the beyond a reasonable doubt standard, so long as – given the benefit of every doubt – another reasonable jury could have found sufficient proof.¹²⁴

Even assuming double jeopardy considerations could be invoked to insulate all verdicts from review for nullification so the entire appellate playing field is level as between the parties, such considerations cannot justify the prohibition of the other jury controls in criminal cases. Jurists cite other considerations validating the lack of criminal jury controls, though. “Many judges appear to view the jury’s power to nullify as an unfortunate byproduct of the vigorous protection of other important

121. *See, e.g.*, *United States v. Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (“[The jury] has the power to acquit on bad grounds, because the government is not allowed to appeal from an acquittal by a jury.”).

122. *See, e.g.*, Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 446 n.59 (1998) (citing *United States v. DiFrancesco*, 449 U.S. 117, 128-36 (1980)) (discussing how the Double Jeopardy Clause protects the interest of the public and the defendant in the finality of judgments in criminal cases). For a rare modern example of a court taking a pro-nullification position, only to be reversed on appeal, *see United States v. Polizzi*, 549 F. Supp. 2d 308, 404, 449-50 (E.D.N.Y. 2008), *vacated sub. nom. United States v. Polouizzi*, 564 F.3d 142 (2d Cir 2009).

123. I question the windfall argument. The Double Jeopardy Clause applies against the State, and not the defendant. So why does the court feel the need to prevent the defendant from appealing a possibly illegal conviction based upon a restriction against the State?

124. *Courselle*, *supra* note 120, at 212 n.37.

constitutional values, not an end in itself.”¹²⁵ For example, some judges merely believe they are protecting the jury’s independent assessment of the facts.¹²⁶ *Sparf* itself relies on this rationale.¹²⁷

Peter Westen, however, has already cogently dismissed this and other possible justifications for the antipathy towards jury controls in our jurisprudence, indicating:

Why prohibit the prosecution from using a device designed to confine the criminal jury to the province of factfinding? It cannot be based on a desire to let the jury find the facts, because directed verdicts are used only where facts are not in dispute. Nor can it be based upon the stringent burden of proof applicable in criminal cases (and upon the consequent difficulty of saying that the state’s evidence of guilt is so overwhelming that reasonable men would have to convict), because that is precisely the assessment that trial judges now make in finding criminal defendants guilty in trials to the bench, and that appellate courts now make in declaring constitutional errors to be harmless beyond a reasonable doubt.¹²⁸

Nor can the prohibition on directed verdicts be based on a belief that while the criminal jury has no legitimate *right* to nullify the law, it somehow has an unpreventable *power* to do so. After all, the very purpose of the directed verdict (and other jury-control devices) is to prevent juries from exercising the power to decide the law when they have no right to do so. If the legal system wished to prevent the criminal jury from nullifying the law, it

125. King, *supra* note 122, at 437.

126. *Id.* at 446 n.58.

127. *Sparf v. United States*, 156 U.S. 51, 106 (1895).

128. Westen, *supra* note 113, at 1116; *see Neder v. United States*, 527 U.S. 1, 7-8 (1999). As discussed in more depth below, *Neder* and other cases have applied harmless error review in such a way as to be fairly characterized as directing verdicts. Justice Scalia has repeatedly pointed this out, arguing that harmless error review in erroneous jury instruction cases is unconstitutional because it amounts to a directed verdict. *Neder*, 527 U.S. at 30-40. However, the majority of the Court has signed off on harmless error review in such cases, though there remains tension in the precedent on this point, as some earlier cases indicate that harmless error review should not infringe on a jury’s fact-finding duties. *Compare* *Rose v. Clark*, 478 U.S. 570, 578 (1986) (“[H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that ‘a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.’”) *with Neder*, 527 U.S. at 17 n.2 (“Justice SCALIA, in his opinion concurring in part and dissenting in part, also suggests that if a failure to charge on an uncontested element of the offense may be harmless error, the next step will be to allow a directed verdict against a defendant in a criminal case contrary to *Rose v. Clark*, 478 U.S. 570, 578 (1986). Happily, our course of constitutional adjudication has not been characterized by this ‘in for a penny, in for a pound’ approach. We have no hesitation reaffirming *Rose* at the same time that we subject the narrow class of cases like the present one to harmless-error review.”).

would respond the way it does in civil cases – by directing verdicts whenever the trial evidence contains no genuine issues of fact. To say that a judge may not constitutionally direct a verdict against a defendant in a criminal case means he or she may not constitutionally confine the criminal jury to the role of factfinding. The same is true, too, of other jury-control devices. By eschewing the use of jury-control devices that would cabin the criminal jury in a factfinding role, the system reveals that the jury’s prerogative to acquit against the evidence is not only a “power,” but a power the jury exercises as of “right.”¹²⁹

“One could argue that the absence of these devices in criminal procedure reflects the system’s unwillingness to limit the criminal trial jury to the role of fact-finding.”¹³⁰ Furthermore,

at some level, at least, nullification is implicit in the constitutional notion of trial by jury, because nothing else explains why a criminal defendant has a right to resist a directed verdict of conviction, why he has a right to insist on a general verdict . . . and why neither he nor the prosecutor has the right to challenge a verdict for factual inconsistency.¹³¹

If these devices are based solely upon preserving nullification, as these astute scholars agree, and nullification is illegal, as the Supreme Court says, how can we stand to let these devices remain in place?

2. *The Supreme Court’s Rationale for Banning Jury Controls: The Sixth Amendment Right to Jury in Criminal Trials*

In *Sparf*, the Court found, over a vigorous dissent, the right to nullification did not exist at the Founding.¹³² If this is the case, there would appear to be no reason to bar jury control devices in criminal cases.¹³³ Yet we are immediately confronted with the fact that *Sparf* may have been

129. Westen, *supra* note 113, at 1016-17 (footnotes omitted); *see, e.g.*, MO. SUP. CT. R. 72.01(a) (“A party may move for a directed verdict at the close of the evidence offered by an opponent. . . . The order of the court granting a motion for a directed verdict is effective without any assent of the jury.”).

130. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 215 (1983).

131. Westen & Drubel, *supra* note 3, at 131-32 (footnotes omitted); *see also* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 827 (1998) (noting that special verdicts are disfavored because they would “foreclose the possibility of jury leniency or drive the jurors to be more lenient than they wished”); Weinberg-Brodt, *supra* note 117, at 838 n.80 (collecting commentators).

132. *Sparf*, 156 U.S. at 64-90; *id.* at 142-69 (Gray, J., dissenting).

133. *See generally id.*

wrong about the Framers' views, at least according to many scholars on the issue.¹³⁴ In some colonies, the criminal jury did have the right to nullify at the Founding, even if that right is not exactly what modern proponents of nullification mean by the term, and even if that right has since expired.¹³⁵

Whether its history is right or wrong, the modern court views nullification as illegitimate; therefore, the prohibition on these jury control devices cannot legitimately come from a right to nullify. Instead, the prohibition apparently stems directly from the right to a jury in a criminal case.¹³⁶ "The right [to trial by jury in criminal cases] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"¹³⁷ Interestingly, as noted above, the Supreme Court's protection of the power is seen even in *Sparf*, where the Court noted directed verdicts and the review of acquittal verdicts are anathema.¹³⁸ Many observers thus believe criminal courts recoil from directed verdicts because they would preclude even the possibility of nullification.¹³⁹

Yet, upon further examination, this appeal to the Sixth Amendment¹⁴⁰ is nothing more than an appeal to the right to nullification, just as all prohibitions on jury control measures boil down to protecting nullification.¹⁴¹ Whenever someone contends "a court may not enter a directed verdict of guilty even if the court is convinced that a rational juror could not vote for acquittal in light of the evidence presented . . . [b]ecause the Sixth Amendment gives criminal defendants a right to trial by jury,"¹⁴² the question arises as to why one cannot say the same thing about civil defendants and the Seventh Amendment. After all, the Seventh Amendment similarly provides for a jury: "[i]n Suits at common law . . . the right of trial by jury shall be preserved."¹⁴³ This guarantee to a jury trial does not appear materially different from that contained in the

134. See, e.g., Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 354 (2004).

135. Brody, *supra* note 79, at 95.

136. See generally Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)).

137. *Id.*

138. *Sparf*, 156 U.S. at 105-06, 294-95.

139. Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2436 n.119 (1999); D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force" - Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 407 n.14 (1998); Leipold, *supra* note 117, 298 n.172.

140. Article III also provides for juries for "The Trial of all Crimes." U.S. CONST. art. III., § 2, cl. 3.

141. Leipold, *supra* note 117, at 266-67.

142. Pettys, *supra* note 35, at 498-99.

143. U.S. CONST. amend. VII.

Sixth Amendment, providing: “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . a trial, by an impartial jury.”¹⁴⁴

Currently, in civil cases, the jury’s law declaring power is merely historic.¹⁴⁵ Similarly, the government can appeal in civil cases under the Seventh Amendment.¹⁴⁶ The fact the constitutional right to civil juries does not preclude directed verdicts or governmental appeals, illustrates that nullification drives the criminal jury’s resistance to judicial control.¹⁴⁷ “It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the government has no similar avenue to correct errors.”¹⁴⁸ Crucially, while there is disagreement as to whether either criminal or civil juries had nullification rights at the Founding, the general consensus now appears that both the Sixth *and* Seventh Amendment juries were put in place to preserve nullification, at least to some extent.¹⁴⁹ Apparently, nullification was important in the civil context to protect debtors from creditors,¹⁵⁰ a concern animating other parts of the Constitution as well.¹⁵¹ Thus, the right to nullification of some sort, inherent in the Seventh Amendment, has apparently been eliminated by the Supreme Court, raising the question as to whether the Supreme Court could do the same with the Sixth Amendment.¹⁵² Merely citing to the word “jury” in the Constitution, by itself, then, cannot explain the resistance to jury controls. In other words, the text of the Constitution does not appear to mandate nullification or the

144. U.S. CONST. amend. VI.

145. Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg is Now (or Ever Was) Good Law*, 44 TEX. TECH L. REV. 1, 44 n.289 (2011).

146. King, *supra* note 122, at 447 n.61.

147. Leipold, *supra* note 117, at 267.

148. *Standefer v. United States*, 447 U.S. 10, 23 (1980).

149. *See, e.g., Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 3 (1794); Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1155 (2011) (“[T]he constitutional right to criminal jury trial implicitly protected the jury’s right to nullify.”); King, *supra* note 122, at 437 (“[M]uch of the commentary on jury nullification assumes that the Constitution affirmatively protects the jury’s power, describing that power as a personal constitutional right of every juror in a criminal case, as a right guaranteed to the defendant by the Fifth and Sixth Amendments, or as one of the checks and balances on other institutions of federal government provided by Article III.”). *But see* Noah, *supra* note 17, at 1627-28 (“The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the [civil] jury would reach a result that the judge either could not or would not reach.” (citing Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 671 (1973))).

150. Wolfram, *supra* note 149, at 673-705.

151. *See generally* U.S. CONST. amend. XI.

152. *See generally id.*

prohibition on criminal jury controls, at least insofar as the treatment of criminal and civil jury controls has diverged.

Moreover, the Supreme Court itself has indicated any criminal jury nullification right that existed at the Founding – whatever its exact form – can be rolled back. The conception of the constitutional jury is not frozen as of the time of the Founding. The courts have repeatedly held the Seventh Amendment right to a jury in civil trials does not mean the right to a prohibition against directed verdicts.¹⁵³ In *Galloway v. United States*,¹⁵⁴ the Court rejected the appellant’s contention that the Seventh Amendment barred directed verdicts.¹⁵⁵ “If the intention is to claim generally that the . . . [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.”¹⁵⁶ The longer answer was:

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791 [T]he Amendment was designed to preserve the basic institution of jury trial only in its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.¹⁵⁷

In *Gasperini v. Center for Humanities*,¹⁵⁸ the Court explicitly acknowledged the Seventh Amendment jury had changed over time, and yet the basic guarantee of a civil jury could still be, and was being, honored.¹⁵⁹ The changes to the civil jury include: six-member panels instead of twelve; new trials restricted to the determination of damages; motions for judgment as a matter of law; the use of issue preclusion absent the mutuality of parties; and, in *Gasperini* itself, appellate review of trial court’s refusal to vacate a jury’s award as against the weight of the evidence.¹⁶⁰ Thus, the treatment of the Seventh Amendment indicates any historical understanding of the right to nullify is not necessarily dispositive under the Sixth Amendment either.

153. Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court’s Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 335-36 (2002).

154. 319 U.S. 372 (1943).

155. *Galloway*, 319 U.S. at 389.

156. *Id.* (citations omitted).

157. *Id.* at 390-92.

158. 518 U.S. 415 (1996).

159. *Gasperini*, 518 U.S. at 436 n.20.

160. *Id.*

Still, the Supreme Court line of cases allowing for directed verdicts in civil cases was careful not to imply that directed verdicts were allowed in criminal cases. In *Hepner v. United States*,¹⁶¹ the Court granted that directed verdicts are allowed under the Constitution, but “restrict[ed] [its] decision to civil cases.”¹⁶² The Sixth Amendment jury, however, is viewed differently:

The constitutional right to a jury trial embodies ‘a profound judgment about the way in which law should be enforced and justice administered. . . .’ It is a structural guarantee that ‘reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. . . .’ A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.¹⁶³

These repeated distinctions between the criminal and civil juries simply do not hold up under scrutiny. Perhaps one could argue the nullification embedded in the Seventh Amendment was never as powerful a right as its sister nullification innate in the Sixth Amendment. Along this line, Roger Kirst has argued the civil jury’s nullification power at the Founding was already curtailed by several devices, including some that took the facts away from the jury, some that reviewed the jury’s actions, and some that merely guided the jury.¹⁶⁴ According to Kirst, even new trial grants and directed verdicts were used in colonial days.¹⁶⁵ Still, Kirst also noted the Seventh Amendment jury was meant, in part, to placate the anti-Federalists who sought to have the jury determine the facts and the law.¹⁶⁶ “The nullification roots of the [S]eventh [A]mendment need not be totally ignored.”¹⁶⁷ Thus, even if the Sixth Amendment has a stronger claim to nullification, the Supreme Court’s complete disavowal of the Seventh

161. 213 U.S. 103 (1909).

162. *Hepner*, 213 U.S. at 115.

163. *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

164. Roger W. Kirst, *The Jury’s Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 15 (1982).

165. *Id.* at 17.

166. *Id.* at 18.

167. *Id.* at 20.

Amendment's nullification roots paves the way to do the same to the Sixth Amendment.¹⁶⁸

VI. THE POSSIBLE FUTURE OF NULLIFICATION DOCTRINES

When laid bare, this contradiction lying at the heart of the nullification doctrine should be discomfiting for all jurists. Even as the judiciary denounces nullification in form, the judiciary protects nullification in substance. In this section, three possible routes the doctrine can take are explored, followed by a prediction of what the Supreme Court will actually do with the doctrine in the future.

A. FIXING THE COGNITIVE DISSONANCE

At this point, it leaves one questioning as to why the courts, on several occasions since *Sparf*, insist on reminding us that juries have the power to nullify.¹⁶⁹ In *Standefer v. United States*,¹⁷⁰ the Court conceded “[t]he absence of these [jury control] procedures in criminal cases permits juries to acquit out of compassion or compromise or because of ‘their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.’”¹⁷¹ And, as mentioned previously, in *Gregg*, a plurality of the Court stated it would be unconstitutional to use jury control devices to preclude juries from nullifying.¹⁷² The ultimate question is: what are we to do about this cognitive dissonance in which nullification is illegal but protected at the same time? There are three apparent paths to choose from. The first, most seen in academia, is to return to the Framers’ intent and recognize the right to nullify.¹⁷³ The second path is the one currently chosen by the judiciary, which is to live with the incongruity, and the third path is to fully accept that nullification is illegal and accept the consequences.

1. *Recognizing the Right to Nullify*

Perhaps Justices Scalia and Thomas would overrule *Sparf* based on its ahistorical reasoning, at least if the Founding Era is used as the reference

168. *See generally id.*

169. *See generally Sparf v. United States*, 156 U.S. 51 (1895).

170. 447 U.S. 10 (1980).

171. *Standefer*, 447 U.S. at 25 (quoting *Dunn v. United States*, 284 U.S. 390, 393 (1932)).

172. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); see Westen, *supra* note 113, 1016 n.56.

173. *See, e.g.*, Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 140 (1988).

point.¹⁷⁴ Justice Scalia's statements in *Carella v. California*¹⁷⁵ comes as close as one will see, post-*Sparf*, to acknowledging that nullification is at the heart of the existence of the criminal jury, as his "circuit breaker" appears a metaphor for the act of nullification.¹⁷⁶ However, this seems unlikely to happen, as courts have, for decades, repeatedly and uniformly, rejected the right to nullify for decades at this point.

The predicted outcome of this situation can be interpreted by viewing a court's reaction to other issues, such as Confrontation Clause issues. For example, many years of precedent indicated that whether a statement passed the bar against hearsay would determine whether the statement would pass constitutional muster under the Confrontation Clause, as demonstrated by the leading case of *Ohio v. Roberts*.¹⁷⁷ Yet, with Justice Scalia writing, the Supreme Court decoupled the Confrontation Clause from hearsay jurisprudence in *Crawford v. Washington*,¹⁷⁸ thereby overruling *Roberts*.¹⁷⁹ Animating the decision was a desire to return the clause to its original understanding according to the Framers.¹⁸⁰ Thus, it is conceivable a court could treat *Sparf* as it did *Roberts*, overruling it as a departure from the Framers' understanding of the right at issue. If a right to a criminal jury meant a right to a jury with nullification power, then that would be the end of the matter, at least for an orthodox originalist.

2. *Living with the Cognitive Dissonance*

However, the United States Supreme Court will likely continue with the status quo. As one commentator indicated, "[w]hen faced with the obvious illogic of legally protecting a power whose exercise has been declared 'wrongful' by the Supreme Court, judges explicitly have chosen to

174. In an intriguing recent article, Jonathan Bressler argues that an originalism-based perspective of the right vel non to nullify need not take the Founding Era as the definitive time period; instead, the Reconstruction Era provides another important time period in the constitutional treatment of nullification, and perhaps a more relevant period at that. *See generally* Bressler, *supra* note 149. Working from a Reconstruction Era basis in which the Fourteenth Amendment reshaped the meaning of prior amendments, including the Sixth Amendment, nullification may well be illegal on both a state and federal level, though other interpretations are possible as well. *Id.* at 1199-1201.

175. 491 U.S. 263 (1989).

176. *Carella*, 491 U.S. at 268 (Scalia, J., concurring).

177. 448 U.S. 56, 62 (1980).

178. 541 U.S. 36 (2004).

179. *Crawford*, 541 U.S. at 36.

180. *Id.* at 59 ("Our cases have thus remained faithful to the Framers' understanding: [t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.").

discard logic rather than the model.”¹⁸¹ Nullification is wrong, but if it still exists despite our admonitions to the contrary, we will do nothing further about it. We have already seen that textualists would have a problem arguing for nullification based on the Sixth Amendment, given use of the identical term “jury” in the Seventh Amendment, and yet, consensus that civil juries have no nullification right or power.

Interestingly, originalists¹⁸² too would have an issue in attempting to reinvigorate the jury with the right to nullify. Even originalists, when seeking to take the Constitution back to its roots, have found it necessary to make concessions to changes in the law that have accrued since the Founding, even though they may not admit doing so. “[O]riginalism is a fundamentally flawed approach to constitutional interpretation in criminal procedure issues because originalists fail to grasp – or to admit – the degree to which legal doctrine and legal institutions have changed since the Framing.”¹⁸³ Thomas Davies has argued even *Crawford*, which many think of as a landmark in Justice Scalia’s long crusade to return the Constitution to its original meaning or intent, compromises the Founders’ view of the constitutional right at issue because of changes in the law over the centuries.¹⁸⁴ According to Davies, “[c]ontrary to *Crawford*’s claims, the confrontation right was not limited to ‘testimonial hearsay’ at the time of the framing, and framing-era sources did not draw any distinction between testimonial and nontestimonial hearsay.”¹⁸⁵ Therefore, despite whatever the originalists may argue about the purity of their endeavor, even “[o]riginalism is dependent upon the historical fiction that the content of constitutional rights can somehow have remained constant when the law that shaped and informed the content of those rights plainly has not.”¹⁸⁶

In other words, even for originalists, there is no returning to the time of the Founding, not with all the water that has since passed under the bridge of time. The Court did not repeal all of the hearsay exceptions that judges

181. Weinberg-Brod, *supra* note 117, at 838 n.80. The result is that criminal juries should be controlled just like civil juries. Retrials may not be allowed in the event of a nullifying acquittal because of Double Jeopardy, and the Court’s fairness rationale in *Dougherty* might prevent retrial of nullifying convictions as well, but what about allowing directed verdicts and special verdicts?

182. See, e.g., Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 915 (2009). Originalism seeks to interpret laws according to the meaning of the laws at the time of their enactment. *Id.*

183. Thomas Y. Davies, *Not “The Framers’ Design”*: *How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 354-55 (2007).

184. *Id.* at 465.

185. *Id.*

186. *Id.* at 466.

have invented since the Framing; instead, the Court protected many of them by calling the evidence “non-testimonial,” a category the Framers did not recognize.¹⁸⁷ Similarly, it seems we are not going to undo over a century of precedent and suddenly recognize the right of juries to nullify; instead, we are likely to live with it while ignoring it.¹⁸⁸ Justice Jackson put this sentiment as follows in a related context:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.¹⁸⁹

As it is with the law of evidence, so it is with nullification, with the current regime being “paradoxical and full of compromises and compensations,” but “somehow . . . [it] has proved a workable even if clumsy system.”¹⁹⁰ The best Justice Scalia and other originalists can probably hope for regarding the right to nullify is an uneasy compromise, such as was forged in *Crawford*. In general, compromise on the issue of nullification was reached years ago, and will continue to be an uneasy truce for the foreseeable future unless one of the other two drastic paths is taken.

3. *Recognizing the Ban on Criminal Jury Controls as Anachronistic*

Although the path of compromise is the one most likely to be traveled by the Supreme Court for the foreseeable future, the path compelled by the logic of current precedent is to allow jury control devices in criminal cases. This path will strike almost every judge, many scholars, and many regular citizens as anathema. The right to be judged by one’s peers is surely near

187. *Id.* at 467-68.

188. The tempering of pure originalism by longstanding tradition, including stare decisis, has been seen in the work of Justice Scalia, though the other originalist justice on the Supreme Court, Justice Thomas, refuses to compromise his originalism in this way. See Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 CONST. COMM. 621, 641 (2011) (reviewing DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)); Bradley W. Joondeph, *Beyond the Doctrine: Five Questions That Will Determine the ACA’s Constitutional Fate*, 46 UNIV. RICH. L. REV. 763, 770 n.26. (2012).

189. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

190. *Id.*

and dear to many Americans, so much so that it would be difficult to conceive of allowing directed verdicts in criminal cases. But, is it much harder to conceive of courts openly acknowledging that juries have a right to nullify? Perhaps, if courts were put to the choice between controlling the jury and openly allowing nullification, more courts would be willing to acknowledge the right to nullify before they would be willing to direct a verdict in a criminal case. If so, as this author believes to be true, then this third path is the most unlikely.

Nonetheless, paths one and three are the only ones that sincerely and openly deal with the irrational and intellectually dishonest compromise currently reigning in nullification jurisprudence. Furthermore, path three is the only of those two that comports with the Supreme Court's definitive statement that nullification is illegal.¹⁹¹ The rest of the Court's precedents on jury controls do not gainsay *Sparf*'s reasoning, but instead perpetuate an illegal practice.¹⁹² Whatever one thinks of the competing historical narratives of nullification, and the courts' treatment of nullification for civil and criminal juries, several tenets are evident. Nullification is illegal, and the absence of jury control devices serves solely to perpetuate this practice.¹⁹³

The nature of the jury has changed over time, and this incontrovertible fact may be reason enough for courts to reevaluate what the right to a criminal jury means in present times. The evolution of the right to testify is a corresponding example of a sea change in the understanding of a legal issue from the Founding to present, and a change resulting in a new reading of the Constitution.¹⁹⁴ At early common law, which presumably impacted the thinking of the Framers, interested witnesses were not competent to testify at criminal trials.¹⁹⁵ This included even criminal defendants.¹⁹⁶ Yet, in *Rock v. Arkansas*,¹⁹⁷ the Court recognized a criminal defendant has a constitutional right to testify.¹⁹⁸ As such, the Court had found a right the Founders could not have even imagined.¹⁹⁹ Granted, finding a

191. See *Sparf v. United States*, 156 U.S. 51, 102 (1895).

192. See generally *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (holding that directed guilty verdicts are not allowed in a criminal trial).

193. Westen, *supra* note 113, at 1015-18.

194. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987).

195. Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Credibility: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 147-48 (1995).

196. *Id.* at 148.

197. 483 U.S. 44 (1987).

198. *Rock*, 483 U.S. at 49.

199. The *Rock* Court found the constitutional right to testify in three amendments: the Fifth, Sixth, and Fourteenth. *Id.* at 51-53. One could argue that the Fourteenth Amendment imported mid-nineteenth century jurisprudence into the calculus, and by this time, courts had perhaps begun

constitutional right the Founders would have disavowed is not necessarily equivalent to not finding a right that the Founders would have affirmed. In the former case one could at least argue that the Founders had not explicitly spoken on the issue, leaving some room for implication, whereas in the latter case, one would have to disagree with the Founder's interpretation of words positively enacted into the Constitution. Still, *Rock* demonstrates the Court's willingness to interpret constitutional rights in light of the last two-plus centuries of change to the legal background against which those rights were enacted.²⁰⁰ As noted above, such a development seems to have already occurred with the Seventh Amendment jury.²⁰¹ If the Supreme Court has changed what the civil *jury* means,²⁰² why not the criminal *jury*?

Therefore, it is conceivable the Court, over the objections of its originalist members would hold that the right to nullification, if it existed in the Constitution at the Founding, no longer exists. Accordingly, they would continue to argue that the criminal jury's safeguards no longer serve a legitimate purpose. There would be other difficulties in sweeping away the jury control devices. For instance, the Double Jeopardy Clause would still loom large for attempts to control the jury after verdict, like new trial and judgments notwithstanding, but these concerns can at least theoretically be addressed.²⁰³ Also, while directed verdicts are currently completely banned, special verdicts are not completely banned as directed verdicts are: sentencing determinations hinging on a particular fact, and in treason cases, special verdicts are actually allowed.²⁰⁴

allowing criminal defendants to testify in their own case. However, insofar as the Court relies on the original Bill of Rights, the Court is taking a starkly non-originalist position. *Id.* at 49 ("At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. This, of course, is a change from the historic common-law view, which was that all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial.").

200. *Rock*, 483 U.S. at 49 ("At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." (emphasis added)).

201. *See supra* Part V.B.2.

202. Noah, *supra* note 17, at 1629.

203. If the courts were to determine that jeopardy does not attach until after the judge loses jurisdiction over the case, rather than when the jury is sworn in, then perhaps these jury-control devices could survive the Double Jeopardy Clause.

204. Barkow, *supra* note 47, at 50 n.67 (citing *United States v. Spock*, 416 F.2d 165, 182 n.66 (1st Cir. 1969)).

B. WHAT WOULD THE SUPREME COURT LIKELY SAY UPON REVISITING THE ISSUE?

So far in this Article, the discussion about the right *vel non* to nullify has taken for granted that nullification is illegal, and has faced the consequences of the baseline result from *Sparf*.²⁰⁵ Given that opponents of nullification may be satisfied with the right being openly rejected, and that proponents of nullification can be comforted with the knowledge that the power is still exercised because of lack of jury controls in criminal trials, neither side may wish to upset the balance that has been struck over time. But should the Supreme Court decide to revisit *Sparf*, what would be the likely result?

Because of concerns over diminution of the role of the jury, it is plausible the Supreme Court may revisit a jury's power or right to nullify.²⁰⁶ Recently, the Court began developing this jurisprudence in *Jones v. United States*,²⁰⁷ in which the Court addressed a jury's diminished significance since the Sixth Amendment's enactment.²⁰⁸ The Court considered whether certain facts must be found by a jury instead of the judge, and found the facts at issue were elements, rather than mere enhancements of the crime, and thus must be put before the jury.²⁰⁹

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.²¹⁰

Jones only discusses the fact-finding function of the jury, which by definition does not approach the nullifying function of the jury.²¹¹ Still, the varying degrees of defensiveness shown on behalf of the jury might be telling in the nullification context. As often happens in the criminal context, the stereotypical liberal-conservative lines are blurred,²¹² considering the opinion was written by Justice Souter, and joined by

205. See generally *Sparf v. United States*, 156 U.S. 51 (1895).

206. *Jones v. United States*, 526 U.S. 227, 248 (1999).

207. 526 U.S. 227 (1999).

208. *Jones*, 526 U.S. at 248.

209. *Id.* at 229.

210. *Id.* at 243 n.6.

211. *Id.* at 244.

212. Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1071 (2006) (“[T]he conservative Justices cannot be neatly arrayed according to the attitudinal models when it comes to criminal matters.”).

Justices Stevens, Scalia, Thomas, and Ginsburg.²¹³ Of those three still on the Court, there are other data points suggesting they all might support a right to nullification to some degree.

1. *Justice Scalia*

Justice Scalia's support for a strong jury is particularly salient on the Court.²¹⁴ He has stated the jury right is "the spinal column of American democracy."²¹⁵ In addition to *Carella*,²¹⁶ Justice Scalia has also sought to protect the jury in other harmless error cases. In both *California v. Roy*²¹⁷ and *Neder v. United States*,²¹⁸ Justice Scalia wrote separately from the majority to state his position that the failure to instruct a jury on an element of a crime cannot be considered harmless error.²¹⁹ In *Roy*, Justice Scalia was merely speaking to an issue not before the Court on that occasion, drawing a line in the sand for a future case.²²⁰ But in *Neder*, the issue of erroneous jury instructions was squarely presented, giving Justice Scalia a fuller opportunity to discuss his view of the role of the jury in our system.²²¹ According to Justice Scalia, allowing appellate judges to conduct harmless error review in cases where the jury did not have the opportunity to render a verdict based on a proper recitation of the law is tantamount to a directed verdict.²²² And as Justice Scalia noted, the majority hardly disputes this comparison, instead sidestepping the charge on the ground that "our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach," which apparently means that taking one element away from the jury is, at most, a partial directed verdict, and thus tolerable to the Court.²²³

Furthermore, in his solo concurrence in *Apprendi v. New Jersey*²²⁴ and in the majority opinion in *Blakely v. Washington*,²²⁵ Justice Scalia ardently

213. *Jones*, 526 U.S. at 229.

214. Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2047 (2008) ("Justice Antonin Scalia . . . has been the leading voice on the Court in favor of the jury trial right . . .").

215. *Neder v. United States*, 527 U.S. 1, 30 (1999).

216. *Carella v. California*, 491 U.S. 263, 267 (1989) (Scalia, J. concurring).

217. 519 U.S. 2 (1996).

218. 527 U.S. 1 (1999).

219. *Neder*, 527 U.S. at 33 (Scalia, J., concurring in part and dissenting in part); *Roy*, 519 U.S. at 7 (Scalia, J., concurring).

220. *Roy*, 519 U.S. at 6 (Scalia, J., concurring) ("I do not understand the opinion, however, to address the question of what *constitutes* the harmless error to which this more deferential standard is applied." (emphasis in original)).

221. *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part).

222. *Id.* at 33.

223. *Id.* at 17 n.2 (majority opinion).

224. 530 U.S. 466 (2000).

defended the jury from what he perceives as the statist encroachment of experts; in other words, he continues to defend the turf of law against the advances of equity.²²⁶ It was in *Blakely* he somewhat famously referred to the jury as the “circuit-breaker” in the machinery of the criminal justice system.²²⁷ Further tracing this line of precedent, he joined the majority in *United States v. Booker*,²²⁸ holding the Sixth Amendment jury trial right applies to the Sentencing Guidelines, but did not join the other majority in making the Guidelines advisory.²²⁹ He would have held the Guidelines were properly mandatory, with the caveat being the jury should be used in cases where a fact is “legally essential to the sentence imposed.”²³⁰ Justice Scalia’s dissent in *Gasperini*, provides another piece of evidence, arguing federal courts should not review refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence in an attempt to protect civil juries from meddling.²³¹

Justice Scalia’s insistence on the right to a jury, especially in the harmless error cases when the evidence is overwhelming as to guilt, implies Justice Scalia believes in the right of the jury to nullify. Such a belief would not be surprising, as Justice Scalia generally supports an understanding of constitutional rights that aligns with the understanding of the Framers.²³² Then again, holding a firm line against directed verdicts in any form, whether directing the entire verdict or just one element, can be distinguished from recognizing the right to nullify – after all, the party line of the Court is that directed verdicts are illegal, but so is nullification. Still, if these skirmishes over the jury would erupt into an open confrontation over nullification, many would probably expect Justice Scalia to defend that right based on an originalist understanding, though the long-standing nature

225. 542 U.S. 296 (2004).

226. *Apprendi*, 530 U.S. at 498-99 (Scalia, J. concurring) (“The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”); *Blakely*, 542 U.S. at 313 (“Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”).

227. *Blakely*, 542 U.S. at 306.

228. 543 U.S. 220 (2005).

229. *Booker*, 543 U.S. at 225.

230. *Id.* at 303-04 (Scalia, J., dissenting) (“Inexplicably, however, the opinion concludes that the manner of achieving uniform sentences was more important to Congress than actually achieving uniformity – that Congress was so attached to having *judges* determine ‘real conduct’ on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having *juries* find the facts that expose a defendant to increased prison time.” (emphasis in original)).

231. See generally *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

232. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 187 (2005).

of *Sparf*, clocking in now at over a century, may dissuade even Justice Scalia from razing such precedent.²³³ The larger question becomes, if Justice Scalia places originalism over *stare decisis* in this situation, would anyone else make the leap with him?

2. Justice Thomas

Justice Thomas is, if anything, a more orthodox practitioner of originalism than Justice Scalia.²³⁴ Yet when it involves the right to a jury in a criminal trial, Justice Thomas has not joined in Justice Scalia's opinions in either *Roy*²³⁵ or *Neder*,²³⁶ putting him in the unusual position of being alongside the Court's pragmatists.²³⁷ In another context, however, Justice Thomas seemed more sympathetic to nullification, to which we now turn.

In *Penry v. Johnson*,²³⁸ Justice Thomas, along with Justice Scalia and Chief Justice Rehnquist, appear to approve of a so-called "nullifying instruction."²³⁹ The issue in that case, often termed *Penry II*, was whether the trial court had adequately instructed the jury regarding its ability to consider mitigating evidence.²⁴⁰ In finding the trial court had done its duty, Justice Thomas noted the Texas Court of Criminal Appeals had concluded the trial court had given adequate instructions because it had given a "nullification instruction."²⁴¹ Thus, Justice Thomas, by adopting this characterization of the instruction and finding the instruction adequate, approved, in a limited fashion, of nullification.²⁴² Still, as noted in Part II, the death penalty sentencing area may be considered unique when it comes to nullification, as the justification for considering non-legal mitigating factors and dispensing mercy, and not only justice, is at its greatest.²⁴³

233. See Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 213 n.89 ("Justice Scalia has described himself as a 'faint hearted originalist' who would allow originalist principles to yield to *stare decisis*.").

234. Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1203 (2012) ("Justice Thomas may more often be faithful to original expected applications than Justice Scalia.").

235. *California v. Roy*, 519 U.S. 2, 3, 5 (1996) (noting that that majority opinion is per curiam and that only Justice Ginsburg joined in Justice Scalia's separate opinion).

236. *Neder v. United States*, 527 U.S. 1, 3 (1999) (noting that Justice Thomas joined in the majority opinion, not Justice Scalia's separate opinion).

237. Barkow, *supra* note 212, at 1068.

238. 532 U.S. 782 (2001).

239. *Penry*, 532 U.S. at 806 (Thomas, J., concurring in part and dissenting in part).

240. *Id.* at 786 (majority opinion).

241. *Id.* at 806 n.2 (Thomas, J., concurring in part and dissenting in part).

242. See generally *id.*

243. Barkow, *supra* note 212, at 1065 ("[T]he Court itself has recognized that 'death is different.'") (citing *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.")).

Intriguingly, Justice Thomas has joined Justice Scalia in criticizing their colleagues for treating criminal procedure different in the death penalty context.²⁴⁴

Further evidence of Justice Thomas' sympathies with nullification is found in his signing onto Justice Scalia's opinions. This occurred in *Gasperini*, which granted judges more power at the expense of juries, and in *Apprendi* and *Blakely*, holding that a jury must find any fact that allows for imposition of an exceptional sentence, i.e., one beyond the standard maximum.²⁴⁵ Justices Thomas and Scalia voted together in *Booker* as well.²⁴⁶

In the end, Justice Thomas' voting record is ambivalent. He has shown a tendency to protect the jury in the *Apprendi* line of cases, disputing the roles of the jury and the judge, but did not do so in the harmless error cases.²⁴⁷ Because the exercise of harmless error approximates the use of a directed verdict, those cases seem particularly instructive, meaning that Justice Thomas, given his austere judicial philosophy, is not as strong an ally of the pro-nullification camp as one may first expect.

3. *Justice Ginsburg*

We turn next to Justice Ginsburg, the other still-active member of the Court from *Jones* to join Justice Scalia. Joining Justice Scalia in *Roy* and *Neder* as well, Justice Ginsburg indicates she might favor the right of a jury to acquit in the face of overwhelming evidence, i.e., nullify.²⁴⁸ She also joined Justices Scalia and Thomas in *Blakely*,²⁴⁹ and in the *Booker* majority holding that the Sentencing Guidelines are only advisory, though she did not vote with them on the other issue, as she helped uphold the rest of the Guidelines.²⁵⁰ Most recently, in *Cunningham v. California*,²⁵¹ she authored the majority opinion, holding California's system of allowing "the judge, not the jury, to find the facts permitting an upper term sentence" violated

244. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (referring to the Court's "death-is-different jurisprudence").

245. *Blakely v. Washington*, 542 U.S. 296, 300-01 (2003); *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 448 (1996) (Scalia, J., dissenting).

246. *United States v. Booker*, 543 U.S. 220, 225 (2005).

247. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 11 (1999).

248. *Id.* at 30 (Scalia, J., dissenting); *California v. Roy*, 519 U.S. 2, 6 (1996) (Scalia, J., concurring).

249. *Blakely*, 542 U.S. at 297.

250. *Booker*, 543 U.S. at 244.

251. 549 U.S. 270 (2007).

the Sixth Amendment.²⁵² As expected, she was joined by Justices Scalia and Thomas.²⁵³

However, she did not join Justices Thomas and Scalia in *Penry*.²⁵⁴ That said, the majority opinion did not truly confront the issue of nullification, and it would be a stretch to say Justice Ginsburg and the others joining Justice O'Connor's majority opinion believed that they were stating a view on nullification.²⁵⁵ Furthermore, she did not protect the civil jury in *Gasperini* with Justices Scalia and Thomas, which is no surprise, given that her constitutional theory is not as dependent on original meaning or intent.²⁵⁶ Still, her treatment of the Seventh Amendment may not fairly predict her handling of the Sixth Amendment, as the Supreme Court has long distinguished the two types of juries, rightly or wrongly.²⁵⁷ In sum, given her solidarity with Justice Scalia in the harmless error cases, Justice Ginsburg is perhaps even more likely than Justice Thomas to join with Justice Scalia in recognizing the right to nullify.

4. *Justices Breyer and Kennedy*

Justices Breyer and Kennedy's voting pattern indicates they are less likely than either Justice Thomas or Justice Ginsburg, and much less likely than Justice Scalia, to favor the right to nullify. They voted against Scalia in *Roy*, *Neder*, and *Gasperini*.²⁵⁸ However, Justice Kennedy, unlike Justices Breyer and Thomas, was around to cast his vote with the majority opinion in *Carella*, rather than throw his lot in with the concurring opinion of Justice Scalia.²⁵⁹ Moreover, they both voted against Justices Scalia and Thomas in *Jones*,²⁶⁰ (and *Penry II* for that matter),²⁶¹ arguably showing less

252. *Cunningham*, 549 U.S. at 293.

253. *Id.* at 273.

254. *Penry v. Johnson*, 532 U.S. 782, 785 (2001).

255. The majority found the instructions inadequate largely because the instructions were incompatible, such that the "nullifying instruction" was directly at odds with other instructions and the jurors might find it impossible to follow the nullifying instruction, rendering the issue of whether the nullifying instruction was appropriate or effective moot. *Id.* at 796-800.

256. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436 (1999); Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Instructions*, 47 GONZ. L. REV. 51, 94-95 (2011).

257. See generally Noah, *supra* note 17.

258. *Neder v. United States*, 527 U.S. 1, 3 (1999); *California v. Roy*, 519 U.S. 2, 3 (1996); *Gasperini*, 518 U.S. at 418.

259. *Carella v. California*, 491 U.S. 263, 263 (1989) (noting that majority opinion is per curiam and that only Justices Brennan, Marshall, and Blackmun joined Justice Scalia's separate opinion).

260. *Jones v. United States*, 526 U.S. 227, 229 (1999).

261. *Penry v. Johnson*, 532 U.S. 782, 785 (2001).

concern than the majority for a relatively lesser role for the jury.²⁶² Finally, they found themselves on the opposite side of Justices Scalia, Thomas, and Ginsburg in the sentencing cases as well.²⁶³

On the other hand, Justice Breyer and Justice Kennedy did join Justices Scalia and Thomas in dissent in *Smith v. Texas (Smith II)*.²⁶⁴ In *Smith II*, they defended a trial court's death penalty sentencing instructions that included the nullification instruction at issue in *Penry II*.²⁶⁵ However, *Smith II* was largely concerned with the preservation of the argument that the nullification instruction was an inadequate cure to the lack of consideration of mitigating circumstances, rather than the propriety of nullification. This renders *Smith II* of dubious value in predicting the votes of Justices Breyer and Kennedy.²⁶⁶

Assuming Justices Thomas, Breyer, and Kennedy's acceptance of harmless error in instructional error cases, and Justices Breyer and Kennedy's relatively unsympathetic response to the jury's potentially lessened role in cases like *Jones* and *Apprendi*, this would leave Justices Scalia and Ginsburg in a presumptive deficit in garnering the necessary votes to recognize the right to nullify. Giving the right to nullify the benefit of the doubt, and supposing the tally would now be two against recognizing the right to nullify (Justices Kennedy and Breyer), and three in favor (Justices Scalia, Thomas, and Ginsburg), that would leave the four newer Justices on the Court left to decide the issue.

5. *Chief Justice Roberts, and Justices Alito, Sotomayor, and Kagan*

Unfortunately for proponents of jury nullification, the other four Justices on the current Court are unlikely to vote to overrule *Sparf*. Justices Roberts and Alito may be considered in some ways as conservative as Justices Thomas and Scalia, but they are not viewed as pure originalists.²⁶⁷

262. The majority in *Jones* likely saw the dissent as giving short shrift to the role of the jury. *Jones*, 526 U.S. at 242-52. The dissent, though, would disagree, as it believes that the jury's role was not "unconstitutionally diminished" because it still resolved the "gravamen of the offense." *Id.* at 271 (Kennedy, J., dissenting).

263. *Cunningham v. California*, 548 U.S. 270, 273 (2007); *Booker v. United States*, 543 U.S. 220, 225 (2005); *Blakely v. Washington*, 542 U.S. 296, 297 (2004); *Apprendi v. New Jersey*, 530 U.S.466, 468 (2000).

264. 550 U.S. 297 (2007).

265. *Smith*, 550 U.S. at 316 (Alito, J., dissenting); *Penry*, 532 U.S. at 782.

266. *See generally Smith*, 550 U.S. 297.

267. *See generally* Charles W. "Rocky" Rhoes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 22-29 (2011) (finding that Justices Roberts and Alito have some affinity for originalism, but also rely on other theories of adjudication). "Chief Justice Roberts

In criminal cases, they are more likely to be conservative in the sense of pro law-and-order. For instance, the pair is more likely to find harmless error applicable than Justice Scalia.²⁶⁸ Evidence of their voting patterns is not as thorough as the five Justices already noted, but Chief Justice Roberts and Justice Alito were present to cast their votes in *Cunningham*, and somewhat surprisingly split their vote.²⁶⁹ Whereas Justice Alito joined with Justices Kennedy and Breyer, indicating a possible dearth of support from him for any pro-nullification faction, Chief Justice Roberts sided with Justice Ginsburg and the majority, extending the *Apprendi* line of cases.²⁷⁰ But concluding that Chief Justice Robert's vote was strictly, or even largely, based on considerations of nullification is likely a rash assumption. It seems unlikely that the Chief Justice, who likely values the institutional credibility and durability of the Court more than any other member, would overturn the long understanding that nullification is illegal.²⁷¹

possesses some sympathy for originalism, as he expressed in his confirmation hearing, but his has not been a historically frozen search for the original understanding. Instead, he has tempered the original understanding with judicial precedent and sometimes American traditions"; "Justice Alito is attracted to originalism, as he testified during his confirmation hearing. . . . But his jurisprudence to date has not sought a historically frozen original understanding.") (footnote omitted). For an example of Justice Alito bucking originalism, *see, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 958-62 (2012) (Alito, J., concurring in the judgment) (criticizing the majority's originalist approach as inconsistent with precedent and unworkable); *see also* Orin S. Kerr, *Response, Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 88 (2011). For an example of Chief Justice Roberts doing the same, *see, e.g.*, *Turner v. Rogers*, 131 S. Ct. 2507, 2520-21 (2011) (Thomas, J., dissenting), in which Justice Roberts did not join the portion of the dissent privileging originalism over precedent.

268. *See* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 142, 152 (2006); *see also* Kenneth Duvall, *The Defendant Was Not Heard . . . Now What?: Prejudice Analysis, Harmless Error Review, and the Right to Testify*, 35 HAMLINE L. REV. 279, 318 (2012).

269. *Cunningham*, 548 U.S. at 273.

270. *Id.* (collecting cases).

271. Granted, Chief Justice Roberts has overruled precedent before, probably most famously in reaching the *Citizens United* decision. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010), *overruling* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). *Sparf*, clocking in at over a century, and with decades of precedent building up to its result, stands on a wholly different footing. Some might answer that *Citizens United* overruled far more than *Austin*, as Congress had placed special limit on corporate campaign spending since 1907. *Citizens United*, 130 S. Ct. at 930 (Stevens, J., dissenting). Even if Justice Stevens is right that the majority was turning its back on much more than two decades of history, and that regulating campaign finance had been going on for over a century, the majority could at least note that the issues in corporate speech and campaign finance have been evolving for years as a practical and a legal matter. *Id.* at 912-13 (majority opinion). In contrast, the issue of jury nullification remains as straightforward as ever, and overruling *Sparf* would not be justified on any changes in circumstance or doctrine over time, as the propriety of nullification remains a moral judgment. Moreover, the Chief Justice's decision to vote with the liberal wing of the Court in upholding President Obama's signature healthcare legislation has roundly been considered a move motivated by a desire to preserve the legitimacy of the Court above other considerations. *See, e.g.*, David L. Franklin, *Why Did Roberts Do It? To Save the Court*, SLATE (June 28, 2012, 3:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html.

Meanwhile, just as Chief Justice Roberts and Justice Alito are not conservatives in the mold of Justices Thomas and Scalia, Justices Sotomayor and Kagan are not necessarily liberals in the mold of Justice Ginsburg – the Court’s liberal most likely to support the jury’s right to nullify. For instance, in *Bullcoming v. New Mexico*,²⁷² Justices Thomas and Kagan joined in Justice Ginsburg’s majority opinion holding that the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.²⁷³ Yet the pair did not join the last part of the majority opinion in an apparent effort to mitigate the effects of the opinion on the State and leave the door open to a more State-friendly result in similar, but possibly distinguishable, cases.²⁷⁴ Moreover, the pair joined the other liberals on the Court in *Citizens United*,²⁷⁵ emphasizing the primacy of precedent,²⁷⁶ rather than the majority’s prime focus on a correct result, at least from its point of view.²⁷⁷ It seems highly unlikely that Justices Sotomayer and Kagan would seek to resurrect an originalist understanding of the jury’s right to nullify in the face of such long-standing precedent as *Sparf*. Justice Kagan may have remarked that “we are all originalists” in her confirmation hearings,²⁷⁸ but as we have seen, even originalists like Justice Scalia have their limits, such as when precedent is over a century old.

VII. CONCLUSION

Jurists will continue to disagree about nullification’s proper role in trials, just as they will continue to disagree over the exact role that nullification played historically. This disagreement, though, is merely

272. 131 S. Ct. 2705 (2011).

273. See *Bullcoming*, 131 S. Ct. at 2709.

274. *Id.* at 2721-22; see also Duvall, *supra* note 268, at 319-20.

275. See generally *Citizens United*, 130 S. Ct. at 876.

276. *Id.* at 930, 938 (Stevens, J., dissenting) (“Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law The final principle of judicial process that the majority violates is the most transparent: *stare decisis*.” (emphasis in original) (citations omitted)). The dissent does eventually join battle with the majority’s originalist understandings of free speech regarding corporate entities, but only long after it has put precedent first. *Id.* at 948.

277. *Id.* at 912 (Kennedy, J., majority opinion) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision.” (emphasis in original) (alteration in original) (citation omitted)).

278. See *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010).

academic, as nullification is undoubtedly illegal at this point in time, as juries are shirking their legal duty to follow and apply the law when they nullify. If courts, led by the Supreme Court, intend to follow through with this rule of law, then the consequences are evident, if unnerving: criminal juries should be regulated just as civil juries are regulated. The use of such jury control devices as directed verdicts and special verdicts may seem anathema to most – given the hallowed place that the jury continues to hold in the United States. However, given that the only possible justification for banning such control devices is to protect the power to nullify, the absence of these mechanisms has made no doctrinal sense since *Sparf*.

It is likely the Supreme Court will avoid confronting this issue. Instead, the Court will allow the uneasy balance to continue, wherein juries are told to apply the law as instructed and yet, are free to ignore the law because of the lack of oversight and direction. That the jury has the power, but not right, to nullify, is an illogical, insincere, and maybe even unnecessary compromise, yet it has lasted for over a century now, and looks to continue into the foreseeable future. Similarly, the few instances of the recognition of nullification in our system also appear here to stay as part of the de facto settlement between the two factions. However, should the Court decide to face the fact that under the Sixth Amendment, the prohibition on jury control devices merely serves to safeguard a banned practice, then the Court must either follow *Sparf* through to its inevitable conclusion and allow jury control mechanisms in criminal trials in order to purge an anachronistic practice; or, overrule *Sparf* in recognition of nullification's place in the Sixth Amendment so that the prohibition on jury control devices becomes justified. Either course of action – openly recognizing the jury's right to nullify or openly recognizing the judge's right to direct verdicts – would be a shock, until one realizes both scenarios would be cause for surprise, indicating our collective cognitive dissonance on the issue. This author hopes this issue will be resolved one way or the other, but, the middle path is the most comfortable one, and the likely path for the foreseeable future.