THE PHILOSOPHER'S STONE: DUALIST DEMOCRACY AND THE JURY

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It is emphatically the province and duty of the judicial department to say what the law is.

—John Marshall[1]

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

—John Jay[2]

INTRODUCTION

Of all our civic institutions, none is as charged with symbolism as the petit jury. The abiding faith in popular sovereignty that has motivated our constitutional struggles for over two centuries finds no greater expression than in the tense deliberations of twelve ordinary citizens struggling to reconcile law and justice. Whether those deliberations are confined to the tragic situation created by a single crime, or implicate the broad political and constitutional questions raised by the Fugitive Slave Act of 1850,[3] few public duties demand so much and engage passions so completely.[4]

Every generation has endeavored to reforge the links between its juries and the law. Due in large part to Paul Butler's advocacy

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

2. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794), *overruled sub silentio by* Sparf and Hansen v. United States, 156 U.S. 51 (1895).

3. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

4. Although there will be references to civil juries sprinkled throughout, the focus of this paper will be on the criminal jury. Not only does this simplify the analysis, but the higher stakes presented by criminal law help to sharpen the questions I will be asking about the proper role of the jury.

of jury nullification by African-Americans for drug offenses committed by African-American defendants, the combatants in the age-old debate over the legitimate scope of the jury's authority have returned to their ramparts.[5] In just such a drug case involving the dismissal of a lone African-American juror accused of harboring thoughts of nullifying, the Second Circuit recently opined that a dismissal could be proper even in the midst of deliberations.[6] The court described its dilemma this way:

> If it is true that the jury's "prerogative of lenity" introduces "a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions," then, as part and parcel of the system of checks and balances embedded in the very structure of the American criminal trial, there is a countervailing duty and authority of the judge to assure that jurors follow the law.[7]

This clash between the duties of judge and jury is hardly a new phenomenon. Although the centrality of the jury in our constitutional design has been recognized, its proper role has always been controversial.[8] One of the ironies of the Republic's history "is that as the jury's composition became more democratic, its role in American civic life declined."[9] From an institution described by Hamilton as "the very palladium of free government,"[10] which had the power to decide questions of law as well as fact,[11] the jury's status has receded to the point that even its

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5. *Compare* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (advocating nullification of drug statutes), *with* United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) (implicitly rejecting the drug nullification effort).

6. *See Thomas*, 116 F.3d at 608.

7. *Id.* at 616 (citations omitted).

8. On the importance of the jury, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991), who asserts that "[i]f we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury." The literature seeking to secure the jury within a particular theoretical paradigm is extensive. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY (1994); Martin A. Kolter, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123 (1985); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723 (1993).

9. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 868 (1994).

10. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. *Compare* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (recognizing jury right to decide questions of law), *with* Sparf and Hansen v. United States, 156 U.S.

competence as a factfinder has come under scrutiny.[12] But while its power has diminished, the jury remains a rich source of information on the practice and theory of American democracy, albeit one that resists traditional legal analysis by communicating through the enigmatic instrument of a general verdict.

To interpret the vagaries of the general verdict and reveal underlying patterns in the jury's operation over time, this article will place it within the analytical framework elaborated by Bruce Ackerman in his theory of dualist democracy.[13] As part of his effort to legitimate the New Deal Court's 1937 "switch in time," Ackerman has advanced a comprehensive reinterpretation of our constitutional past emphasizing the procedural analogies between the Founding, Reconstruction, and New Deal.[14] While juries remain an unexplored aspect of Ackerman's approach, that approach can help explain the decline of the jury's status as part of a broader institutional struggle and point the way towards a reformulation of the jury's adjudicatory role that incorporates the current nullification debate.

Dualism offers an interpretation of the Republic's political development that stresses the critical distinction between periods of normal politics, filled with factional struggle and a citizenry detached from the hurly-burly of political life, and constitutional politics, where mobilized citizens actively seek to overhaul fundamental principles in the name of the people.[15] The key to distinguishing normal from constitutional periods, as well as understanding the process through which new higher law is hammered out, lies in recognizing when an incipient political movement has *signaled* its intention to transcend political logrolling and present a new constitutional agenda.[16] Much of Ackerman's work focuses on elections as the mechanism by which such signals are sent, but little attention is paid to the means by

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51 (1895) (rejecting that right).

12. *Cf. In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (holding that complex civil cases decided by juries violate due process).

13. *See generally* 1 BRUCE ACKERMAN, WE, THE PEOPLE: FOUNDATIONS (1991) (outlining dualist democratic approach).

14. *See, e.g.*, Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); *see also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (marking "switch in time" by Justice Roberts).

15. *See* 1 ACKERMAN, *supra* note 13, at 230-94.

16. *See* 1 *id.* at 272-75.

which political movements are converted from the rantings of crackpots into the wisdom of statesman.[17]

In addition to its normal function of facilitating the administration of criminal law, I shall argue that the jury system has a profound constitutional role to play in signaling and mobilizing support for higher lawmaking movements within the dualist framework.[18] More specifically, the jury acts as a leading indicator of citizen support for the standing constitutional order by validating criminal charges brought under it, but can also be transformed into the primary institutional vehicle through which that order is first challenged. If "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[19] it is emphatically the province and duty of the jury to signal what the law should be.

Harmonizing positivism with justice is difficult enough for academics, but in the courtroom judges, who have a responsibility to uphold the law, have to share decisional space with juries, whose role is often to fire the first shot of a new constitutional critique. Not surprisingly, tensions developed between the two that erupted in nineteenth-century cases delineating the jury's ultimate authority.[20] The eventual extinction of jury signaling as a formal device by courts seeking to control "lawless" juries was inevitable given the system's inability to mitigate the incompatibility of their respective roles, but the result has left higher lawmaking movements without an important element of legitimacy during an era of profound uncertainty about the direction of constitutional politics.[21] By restoring the jury's original signaling role, we will be better able to sift genuine movements for change from the puffery of self-aggrandizing politicians, thereby building a more efficient system of higher lawmaking.

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17. *See, e.g.*, 2 BRUCE ACKERMAN, WE, THE PEOPLE: TRANSFORMATIONS (forthcoming 1998) (manuscript at 602, on file with author).

18. *See* 1 ACKERMAN, *supra* note 13, at 272-80 (describing signaling function as the first step toward creation of higher law). I use the term "jury system" to emphasize that only a series of jury decisions can gain enough constitutional heft to be of any real significance. *See infra* text accompanying notes 66-67.

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

20. *See, e.g.*, Sparf and Hansen v. United States, 156 U.S. 51 (1895); United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (Curtis, J.); United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.); Commonwealth v. Anthes, 71 Mass. (5 Gray) 185 (1855).

21. *See* 1 ACKERMAN, *supra* note 13, at 52-56; *infra* text accompanying notes 187-88.

The argument for the jury's constitutional role begins with considerations of structure and history. Part I begins with an outline of Ackerman's theory of dualist democracy, and then explains why juries are well-suited within that theory to signal movements for profound political change. Although it is convened under the auspices of the state, the jury otherwise possesses a decision-making structure and special relationship to the people similar to the anomalous entities, such as constitutional conventions, that dualism identifies as the fulcrum of previous efforts at constitutional reform.[22] Juries are not merely adjuncts of the judicial branch that share the duties and limits of courts.[23] Instead, they have the capability and legitimacy to take on a more substantial role in signaling the impending arrival of constitutional politics.

In Part II, I show how the Framers adapted the anomalous institution of the jury to be a signaling device by affirmatively breaking with English precedent to give juries the right to decide questions of law as well as fact.[24] In so doing, they were drawing upon colonial practice that often left de facto lawmaking to juries, but this custom was soon transformed by revolutionary activists into a formal doctrine to resist and register discontent with the status quo.[25] Widespread jury repudiation of Imperial statutes, which has been characterized as "legal stagesetting" in formulating the conditions of rebellion, could more accurately be described as dualist signaling.[26] With an eye towards clarifying future efforts at higher lawmaking, the Framers moved after the Revolution to guarantee jury lawmaking rights and leave open the signaling mechanism, culminating in Chief Justice Jay's opinion quoted at the opening.[27] When the constitutional system was confronted with tumult again in the first half of the nine-

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22. *See generally* 2 ACKERMAN, *supra* note 17 (analyzing formal illegality of Founding, Reconstruction, and New Deal).

23. *But cf.* Amar, *supra* note 8, at 1193 (describing judiciary as a "two-house" body with jury and judge sharing similar responsibilities).

24. The traditional view was expressed by Lord Chief Justice Coke's maxim: *ad quaestionem facti non respondent judices . . . ad quaestionem juris non respondent juratores* ("Judges do not answer a question of fact, juries do not answer a question of law"). 1 EDWARD COKE, COMMENTARY ON LITTLETON § 234 (19th ed. 1832).

25. *See* ABRAMSON, *supra* note 8, at 31.

26. *See* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN LAW 10 (1990); John Phillip Reid, *In an Inherited Way: English Constitutional Rights, the Stamp Act Debates, and the Coming of the American Revolution*, 49 S. CAL. L. REV. 1109 (1976).

27. *See supra* text accompanying note 2.

teenth century, all political factions continued to accept as a matter of course the legitimacy of constitutional appeals to the jury.[28]

Part III examines how the principle of jury signaling was transformed by its interaction with the new federal judiciary in periods of normal and constitutional politics. First, I take up the question of how the jury lawmaking right ultimately came to be rejected in non-constitutional cases through Justice Story's opinion in *United States v. Battiste*.[29] Although it may seem clear to the modern mind that the grant of plenary discretion to juries is inconsistent with the norms of uniformity and impartiality behind the rule of law, this was not so obvious to the early Republic for reasons that implicate dualist themes.[30]

Next, by examining the case law preceding two constitutional epochs, the Revolution of 1800 and Reconstruction, we will see a similar pattern underlying the clashes between court and jury. In the midst of constitutional movements, courts have been faced with a choice between supporting existing higher law, or permitting the critique of that higher law to bubble up through the jury. When presented with these alternatives, courts generally adhered to the function laid out for them by dualist theory and squelched the jury's right to signal constitutional discontent, even though individual judges were forced to seriously strain their interpretative abilities to succeed.[31] These precedents formed the basis of

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28. *See, e.g.*, United States v. The William, 28 F. Cas. 614 (C.C.D. Mass. 1808) (No. 16,700), *as described in* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 345-46 n.2 (1928).

29. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).

30. *Compare* Sparf and Hansen v. United States, 156 U.S. 51, 101 (1895) (stating that jury lawmaking "would bring confusion and uncertainty in the administration of the criminal law"); *Battiste*, 24 F. Cas. at 1043 ("Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it."), *with* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794). *See also* Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997) (exposing weaknesses in efforts to resuscitate jury lawmaking in ordinary criminal cases).

31. *See*, e.g., Morris v. United States, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (Curtis, J.); United States v. Shive, 27 F. Cas. 1065 (C.C.E.D. Pa. 1832) (No. 16,278) (Baldwin, J.); United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.); Lyon's Case, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646) (Patterson, J.) In contrast, when constitutional arguments were made to juries without reference to a broader constitutional movement, courts tended to be more flexible. *See e.g.*, Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127) (Chase, J.); *William*, 28 F. Cas. at 614; 1 WARREN, *supra* note 28, at 345-46 n.2.

the complete eradication of the jury lawmaking right in *Sparf and Hansen v. United States*,[32] but they ignored the surrounding political context and thereby erroneously conflated the signaling function with the very different demands raised by ordinary criminal cases. Nevertheless, through dualism we can understand this judicial behavior to be a genuine effort to fulfill an institutional duty rather than a crude power play.

In Part IV, I explain why the loss of jury signaling should be of concern for advocates of sound higher lawmaking, and explore other justifications proffered for the *Sparf and Hansen* decision.[33] Not only has the elimination of jury lawmaking obliterated a rich tradition of our Republic, but that constitutional tradition has been replaced by the seriously inadequate alternative of underground nullification. Loss of signaling clarity in both quality and quantity is the cost of keeping citizens in the dark about the nullification right, and this makes true constitutional movements all the more difficult to identify, particularly in a modern era where formal amendments through the Article Five process[34] have often been replaced by amendment via new Supreme Court appointees. Nevertheless, an accurate interpretive account of jury lawmaking must somehow synthesize the profound changes wrought by Reconstruction and the New Deal upon traditional jury adjudication.

Therefore, in Part V, I put forward a proposal for a new formal mechanism that will enable courts to accommodate juries as higher lawmaking signalers. For dualists, the difficulty in preserving the jury as a signaler under the legal regime prior to *Sparf and Hansen* is that there was no way to distinguish when the jury sat as an ordinary adjudicator instead of as a true constitutional actor. If Congress or the President seeks to initiate constitutional change, we are able to judge the legitimacy of their claim to speak for the people because decisive campaigns, elections, or other signaling actions have already occurred.[35] All it takes to turn the jury into a quasi-constitutional tribunal is a

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32. 156 U.S. 51 (1895).

33. Indiana and Maryland still give juries the right to decide questions of law, but that right has been eviscerated by state court decisions. *See* IND. CONST. art. I, § 19; MD. DECLARATION OF RIGHTS art. 23; Stevenson v. State, 423 A.2d 558 (Md. 1980); Carolyn White Spengler, *The Jury's Role under the Indiana Constitution*, 52 IND. L.J. 793 (1977).

34. *See* U.S. CONST. art. V.

35. *See* 1 ACKERMAN, *supra* note 13, at 272-80.

clever lawyer. No wonder courts seeking to guard the stability of the rule of law have turned a skeptical eye upon jury arguments invoking natural law and constitutional predicates.

My proposal seeks to reestablish the jury's signaling role by clarifying those situations in which it sits as a true constitutional actor. When defendants want to spark deliberation on our collective values, they should be given the option of demurring to the facts and the law, leaving only the constitutional question available to the jury.[36] A specially convened constitutional jury would be permitted to hear a broad range of evidence and arguments, but would have to find unanimously for the defendant to avoid a conviction. In other words, a hung constitutional jury would still lead to a conviction. Although the jury's decision would not be binding beyond the defendant in that particular case, such a reform would clearly demonstrate to all concerned whether the jury was sitting within the realm of normal or constitutional politics. By making the remedy difficult to obtain, a "constitutional demurrer" would guard against the abuse of jury lawmaking in everyday criminal cases. On the other hand, it would ensure "that a constitutional road to the decision of the people [will be] marked out and kept open for certain great and extraordinary occasions"[37] when the following special conditions are met: (1) a defendant is so motivated by the injustice of current law that he is willing to waive significant procedural protections to get the issue openly addressed by fellow citizens; and (2) citizens feel so strongly about the inadequacy of standing higher law principles that they would unanimously free an admittedly guilty defendant.

Although juries cannot turn lead into gold, they are a medium through which ordinary legal disputes can be transmuted into constitutional struggles of the highest order. Harnessing this power through the accumulated haze of two centuries is the task before us.

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36. Of course, juries could still nullify *sub rosa*, just as they do now, but might be discouraged from so doing in opposition to the substantive law if a constitutional demurrer was established as an alternative. *See infra* Part V.

37. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

I. JURIES AS THE TRIBUNATE OF THE PEOPLE

A. Dualist Democracy Explained

Ackerman's theory of dualist democracy has advanced a novel reinterpretation of the processes by which Americans have renewed the constitutional values of the Republic, while taking yet another swipe at the Gordian knot that is Alexander Bickel's "countermajoritarian difficulty" with judicial review.[38] Drawing heavily upon *The Federalist*, dualism begins the project of legitimating judicial review by distinguishing statutes passed by Congress from constitutional law ratified by the people as different not only in degree but in kind, with the distinction resting upon the intensity of citizen involvement in each lawmaking process.[39] According to this view, most of the time citizens pay only scant attention to political developments, hence their votes are relatively uninformed and statutes passed in their name must be viewed with skepticism.[40] Rather than lament this state of affairs, Ackerman recognizes it as a common phenomenon of democratic life during what he calls periods of "normal politics."[41] Given this, the genius of the Framers was to design a political system that "*tries to economize on* [citizen] *virtue*" through institutional mechanisms.[42]

When citizens are not engaged by the politics of the day, dualism contends that the institutions of government should be treated only as multiple "stand-ins" for a sovereign people that does not really exist.[43] Here is where the standard structural elements of separation of powers, checks and balances, federalism, and bicameralism elaborated by Madison have an important role to play.[44] By dividing governmental power to keep it accountable, political factions are prevented from exaggerating their mandate in order to break free from the constitutional

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38. *See* 1 ACKERMAN, *supra* note 13; ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986). *But cf.* RICHARD A. POSNER, OVERCOMING LAW 215-28 (1995) (criticizing dualism as "wrong and even dangerous").

39. *See* 1 ACKERMAN, *supra* note 13, at 6.

40. *See* 1 *id.* at 240-41.

41. *See* 1 *id.* at 230-65.

42. *See* 1 *id.* at 198.

43. *See* 1 *id.* at 263.

44. *See* THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

solutions previously enacted by the sovereign people.[45] In a similar vein, dualism defends judicial review as a necessary impediment to keep ordinary politicians within the Constitution through the invalidation of suspect statutes, exactly as Hamilton described it in *Federalist No. 78*.[46] Indeed, for Ackerman the primary function of judges is to preserve the constitutional achievements of the people against erosion by mere politicians during periods of normal politics.[47]

Bleak as this picture sounds, we are not always in the realm of normal politics. When citizen passions are aflame and ideology moves front and center to define the mainstream political debate, the possibility exists for a successful effort at constitutional reform.[48] There are two points about the dualist understanding of constitutional politics that are of importance for the analysis of juries. First, the transition between normal politics and constitutional politics must be signaled by a burgeoning movement so as to confer legitimacy upon any subsequent claims that they truly represent a new manifestation of an actively engaged sovereign people.[49] To obtain credibility, dualism demands that the signal given reflect support that is deep (qualitatively strong), broad (quantitatively strong), and decisive (able to clearly defeat all other alternatives).[50] When tested against this trinity, juries turn out to be ideal signalers for Ackerman's schema of higher lawmaking.[51]

The second relevant point lies at the heart of Professor Ackerman's controversial claim that the Founding, Reconstruction and New Deal were all formally illegal, but nonetheless follow a similar pattern that confers legal legitimacy upon them.[52] Dualist democracy rejects the notion that popular sovereignty can be cabined by legal rules such as those specified by Article Five,

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45. *See* 1 ACKERMAN, *supra* note 13, at 181-86.

46. *See* 1 *id.* at 261-65. *Compare* THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."), *with* BICKEL, *supra* note 38, 16-17 (rejecting Hamilton's assertion that the concept of "the people" can be made analytically rigorous).

47. *See* 1 ACKERMAN, *supra* note 13, at 10.

48. *See* 1 *id.* at 266-94.

49. *See* 1 *id.* at 272.

50. *See* 1 *id.* at 272-80.

51. *See infra* text accompanying notes 65-68.

52. *See* 2 ACKERMAN, *supra* note 17.

and documents how constitutional reformers have often broken the rules in the past to allow the *vox populi* to be heard.[53] Although Article Thirteen of the Articles of Confederation required unanimity for any amendments to be enacted, the 1787 Philadelphia Convention made the approval of only nine states necessary for ratification.[54] Not only was this constitutionally unauthorized, but the decision was taken by an unelected body that disregarded the instructions given it by the lawful authority of the Continental Congress.[55] Similarly, despite Article Five's requirement that amendments be proposed by two-thirds of Congress and approved or rejected independently by the states, a rump Congress representing only 25 of the 36 states proposed the Reconstruction Amendments while making ratification of the Fourteenth Amendment a condition of the readmission of the Southern states into the Union.[56] Finally, in this century, the New Deal transformed the Constitution through judicial appointments rather than the amendment process of Article Five, a precedent repeated by President Reagan in the 1980s.[57]

Of particular interest for the jury in this dualist narrative is the influence of anomalous institutions upon our constitutional development. By anomalous, I refer to decision-making entities, such as the Philadelphia Convention and the rump Reconstruction Congress, that exist temporarily and in contradistinction to the standard institutions of government. Why should these groupings have so much political influence when they have no clear legal authority? For the Framers, the answer was articulated in terms of popular sovereignty. In one sense, anomalous institutions such as conventions were perceived to have an

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53. *See* U.S. CONST. art. V. I can offer only a brief summary of the evidence here. For more, see 2 ACKERMAN, *supra* note 17.

54. *See* U.S. CONST. art. VII; 2 ACKERMAN, *supra* note 17 (manuscript at 59).

55. For Madison's defense of the Convention's illegal actions, see THE FEDERALIST NO. 40 (James Madison).

56. *See* U.S. CONST. art. V; First Reconstruction Act, 14 Stat. 428 (1867); 2 ACKERMAN, *supra* note 17 (manuscript at ch. 4-6). There were other legal problems with the enactment of the Reconstruction Amendments, but raising them will not advance my argument further. *See id.*

57. *See* 1 ACKERMAN, *supra* note 13, at 50-56. Ackerman's claim that the Reagan Revolution was an unsuccessful effort at constitutional politics may be belied by the precedent of Andrew Jackson's presidency and the substantial shift in doctrine now underway on issues of race, federalism, and the scope of governmental authority. That question awaits further exploration.

especially close relationship to the people.[58] Madison, for example, used the terms convention and people interchangeably throughout *The Federalist*.[59] Beyond this representational argument, however, was the contention that anomalous institutions were more legitimate vessels of popular sentiment because they only came into being for specific and limited constitutional purposes clearly understood by all concerned, and therefore stood safely apart from ordinary State organs that had corrupt incentives for self-dealing.[60] Whether these legitimacy arguments are convincing or not, the fact remains that our constitutional heritage is filled with appeals to anomalous bodies for guidance at critical times, and it is my contention that the jury should be understood as a vital part of that heritage.

B. The Jury as Pre-Signaler

Before we wander back into the thicket of constitutional politics, our attention must first focus on dualism's demand that a deep, broad, and decisive signal be given before the expectations of normal politics can be suspended.[61] What is the most effective mechanism available to the people to signal their discontent for politics as usual? Ackerman's answer is elections, usually at the presidential level, but this leaves unanswered the important *ex ante* question of which elections have constitutional significance.[62] If popular movements could be identified as vessels of higher lawmaking before they gain clout at the polls, we would be in a better position to separate the meaningful elections from the pretenders when they happen. Moreover, Ackerman's account does not tell us much about how political movements gain the strength to make a dent at the polls. Presumably the organs of civil society, such as churches, schools, private interest groups, and the media are important in stimulating new thinking about

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58. *See* 1 *id.* at 175.

59. *See* 1 *id.* at 177-78.

60. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 306 (1969) ("[I]t would be a novel and dangerous doctrine that a Legislature could change the constitution under which it held its existence.") (quoting Oliver Ellsworth at the Constitutional Convention).

61. *See* 1 ACKERMAN, *supra* note 13, at 272-75.

62. *See* 1 *id.* at 278. *But cf.* 1 *id.* at 139 (discussing *Brown v. Board of Education* as catalyst of Civil Rights movement).

political justice, but none of these groups can claim any special influence over the lawmaking process.[63]

Juries mark the point where civil society first interacts with the legal system, and hence they have at least the potential to be quite effective at dualist signaling.[64] To see whether that potential has substance, let us compare jury service with the dualist signaling criteria of depth, breadth, and decisiveness.[65] On the question of depth, jury service demands more sacrifice and intensity than any other citizen duty except military service, while focusing attention on a narrow range of issues whose resolution often places a defendant's entire future in the hands of his fellow citizens. I submit that this combination of significant

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63. To facilitate their educational role, the Framers threw significant protections around the institutions of civil society in the Bill of Rights. *See, e.g.*, U.S. CONST. amend. I (protecting free exercise of religion, freedom of speech, freedom of the press, right of assembly, and right to petition for redress of grievances).

64. In the dualist schema for constitutional change (signaling, proposing, deliberating, codifying), juries are basically only suited for signaling. *See* 1 ACKERMAN, *supra* note 13, at 266-67. Because they make decisions without offering justifications, they are in no position to propose or codify legal text. Conceivably, juries could join the ongoing deliberation about higher lawmaking proposals by turning the nullification power against them, but there is little evidence to suggest that this has ever happened. Juries did systematically refuse to enforce the Volsted Act under the Eighteenth Amendment, helping to spark a countermobilization that led to its repeal, but Prohibition can hardly be described as part of a broad constitutional movement. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 71.

Another potential example of the jury system acting as a critic in the deliberative phase relates to the refusal of Southern juries to enforce Civil Rights statutes. *See, e.g.*, John P. Relman, *Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study in Jury Nullification*, 61 MISS. L.J. 579, 589-92 (1991). Analyzing this episode in nullification within dualist principles is problematic for two reasons. First, the juries doing the critique were unrepresentative of those eligible to serve, hence the accuracy of citizen input was questionable. *See infra* text accompanying notes 195-200. Second, white Southern juries had never really enforced laws drafted for the benefit of African-Americans, so it is hard to describe their practice during the Civil Rights period as presenting a new and vital critique of anything, except perhaps the Reconstruction Amendments!

With this background in mind, some aspects of the Second Circuit's recent analysis of the nullification question appear troubling. *See* United States v. Thomas, 116 F.3d 606 (2d Cir. 1997). For one thing, the court failed to address the obvious analogy between current attempts to nullify drug statutes and the history of jury action against Prohibition. For another, the court's invocation of the precedent of all-white jury nullification in the South during the Civil Rights era seems particularly inapt in a case concerning an effort to get rid of the only African-American juror in a trial of African-Americans. *See id.* at 616.

65. *See* 1 ACKERMAN, *supra* note 13, at 272-75; *supra* text accompanying note 49.

influence, significant stakes, and focused debate leads to far more careful consideration of the issues by individual jurors than voting ever does, and hence juries can generate the intense participation dualism demands in its signaling triad.[66] When it comes to breadth, the jury system has the obvious advantage of operating as a signal all over the nation, with perhaps hundreds of juries sitting at any given time to hear potential constitutional challenges. Finally, concerning the issue of decisiveness, juries are uniquely qualified because they are the only democratic institution that generally requires unanimity to render a decision, thereby ensuring that the outcome selected has prevailed over all the other options considered.[67] At first blush then, the use of juries to signal the constitutional claims of political movements appears plausible.

To confirm the legitimacy of jury signaling in the abstract, I now want to dispel the notion that juries are merely a part of the judicial branch bound to uphold positive law like a court.[68] Juries might very well make effective higher lawmaking signalers, but what would justify their exercise of that power? This question brings us back to the dualist observation about the importance of anomalous entities in constitutional change, for the jury has an anomalous structure that helps confer legitimacy upon it as a sounding board for the people.[69] Just as the Framers conceived of conventions as possessing a special relationship with the sovereign people, strikingly similar views were held about juries, from Jefferson's description of them as "trials by the people themselves,"[70] to Adams' equation of them with "the voice of the people."[71] Moreover, juries are similar to conventions because any

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66. For a discussion of the quality of deliberation behind most votes, see 1 ACKERMAN, *supra* note 13, at 240-43.

67. *But cf.* Apodaca v. Oregon, 406 U.S. 404 (1972) (holding that the Sixth Amendment does not require unanimity for state juries).

68. The notion of the jury and judges as co-equal actors within the judicial branch had been advanced by James Wilson and John Taylor of Caroline. *See* 2 WORKS OF JAMES WILSON 223 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896); Amar, *supra* note 8, at 1188-89 (citing J. TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (Stark ed., 1950)).

69. *See supra* text accompanying notes 58-60.

70. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 464, 466 (Adrienne Koch et al. eds., 1944).

71. Sparf and Hansen v. United States, 156 U.S. 51, 143 (1895) (Gray, J., dissenting) (quoting Adams).

single jury is convened only once for a specific purpose before being permanently disbanded, and therefore maintains a certain distance from the standing organs of the State.[72] This independence is reinforced by the random method by which juries are impaneled, which ensures that individual jurors have no personal stake in anything but the case before them.[73]

For those who would still describe the jury as just an appendage of the judiciary, it makes sense to examine how juries measure up to the expectations that underlie the operation of courts. After all, perhaps juries only look like conventions, while behaving like the judges under whom they serve. Two considerations undermine this view. First, courts gain their authority from the quality of the reasoning in their opinions. This authority is reinforced by the fact that these opinions are accountable through appellate review and public scrutiny. In sharp contrast, jurors deliberate in secret, provide decisions without reasons, and are insulated from any review of their acquittals. All of these factors make the jury far less accountable than other democratic institutions.[74] Second, courts are generally thought to derive legitimacy from acting according to what Herbert Wechsler called "neutral principles," by which he meant that rules of decision had to be applied with consistency to fact-patterns similar to the one that spawned the original rule.[75] Juries, on the other hand, act in an *ad hoc* fashion with virtually unlimited ability to ignore

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72. One particularly interesting analogy is between jury nullification, in which juries ignore the legal instructions they receive from the state in the person of a judge, and the operation of the Philadelphia Convention, where the delegates ignored their legal instructions from state legislatures and the Continental Congress. *See* THE FEDERALIST NO. 40 (James Madison). Other similarities between the Constitutional Convention and the jury include their sharply focused agendas and use of secret debate to prevent undue factional lobbying from undermining the pursuit of the public interest.

It could be argued that it is disingenuous to describe juries as ephemeral bodies because, unlike conventions, the jury system operates all the time. At the level of the individual jury, however, the comparison holds up.

73. Jury autonomy from ordinary political institutions was protected in the Bill of Rights. *See* U.S. CONST. amend. V (preventing review of criminal acquittal); U.S. CONST. amend. VI (safeguarding local juries in all criminal cases); U.S. CONST. amend. VII (preventing review of civil jury findings of fact). For a penetrating account of the implications of the jury's status as "other-government," see Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (1997).

74. *See* U.S. CONST. amend. V (Double Jeopardy Clause).

75. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

neutral principles in deciding when laws should be applied to given sets of facts. That function is more prosecutorial than judicial in nature, and lies beyond the power of a judge. Therefore, not only do juries look like conventions, but they possess anomalous attributes unlike those of the courts to which they are often compared.

II. JURIES AS JUDGES OF LAW

While the jury's potential as a medium of signaling constitutional change was waiting to be tapped, the question remained as to how that potential would be realized. The means the Framers eventually settled on—giving juries the right to decide questions of law—drew upon colonial precedent, but in an imaginative fashion worthy of their other experiments in constitutional design.[76] This section will trace the history of jury action as a vanguard of constitutional change.

A. The Colonial Background

The *power* of juries to bring in a general verdict contrary to law has been a part of Anglo-American jurisprudence since the Lord Chief Justice Vaughn's opinion in *Bushell's Case*,[77] but the *right* of juries to disregard the law is distinctly American in origin.[78] As a practical matter, the early rough-hewn world of the colonial frontier often called upon juries to decide the law of the case due to a dearth of trained judges.[79] This lack of professional instruction was compounded by the colonial practices of either providing no jury instructions at all, or having multiple trial

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76. Another possible tool the Framers could have seized upon was the tradition of grand jury presentment, with the petit jury gaining an analogous power to issue opinions and express citizen outrage. *Cf.* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1193-94 (1995) (citing James Wilson on value of grand jury presentment).

77. 124 Eng. Rep. 1006 (C.P. 1670).

78. Despite Chatham's ringing declaration in the Lords that he "always understood that the jury were competent judges of the law as well as the fact; and indeed, if they were not, I can see no essential benefit from their institution to the community," English jurisprudence never accepted a general jury lawmaking right. *See* Sparf and Hansen v. United States, 156 U.S. 51, 131 (1895) (Gray, J., dissenting); Rex v. Dean of St. Asaph, 100 Eng. Rep. 657 (K.B. 1785) (Mansfield, C.J.).

79. *See* ABRAMSON, *supra* note 8, at 31; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939).

judges sit to deliver instructions seriatim, leaving jurors to pick their favorite as the law.[80] However, this de facto jury lawmaking was not conceived of as an affirmative right until the famed libel trial of John Peter Zenger in 1735, where Zenger's counsel argued successfully during summation that the jury "have the right beyond all dispute to determine both the law and the fact."[81]

As a quasi-constitutional case of seditious libel, the Zenger trial was but the first example of jury resistance to Imperial authority, and soon revolutionary activists adapted colonial practice to fulfill the jury's potential as a mobilizer of constitutional change. Contrary to the romance surrounding nullification as a spontaneous product of outraged citizens, the Framers consciously articulated the right of juries to express discontent with the status quo through lawmaking against the wishes of the court, then argued as much to their juries.[82] Speaking in 1771, John Adams defended jury signaling this way:

> The great principles of the constitution are intimately known .... Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this direction .... Every man, of any feeling or conscience, will answer, No. *It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the Court.*[83]

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80. *See* Commonwealth v. Anthes, 71 Mass. (5 Gray) 185 (1855) (Thomas, J. dissenting) (describing practice in Massachusetts); STIMSON, *supra* note 26, at 58. In Connecticut, Rhode Island, New Hampshire, and New York, the presiding judge merely summarized counsel's arguments on the law without expressing an opinion. *See* ABRAMSON, *supra* note 8, at 31; STIMSON, *supra* note 26, at 49; Howe, *supra* note 79, at 601. Pennsylvania's common law held "that the jury were the judges of the law and fact." Howe, *supra* note 79, at 594-95 (quoting Edward Tilghman at impeachment of Justice Samuel Chase).

I do not mean to imply that every colony approved of jury lawmaking, only that enough did to establish a foundation upon which jury signaling could be built.

81. ABRAMSON, *supra* note 8, at 74. Zenger was acquitted of seditious libel against the Governor, even though truth was not considered a defense at the time. *See* Alschuler & Deiss, *supra* note 9, at 871-73.

82. For a classic description of the spontaneous rationale for nullification, see *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972).

83. *Sparf and Hansen*, 156 U.S. at 143-44 (Gray, J., dissenting) (emphasis added) (quoting 2 John Adams's Works 253-55).

Like Lincoln's reference to the Declaration of Independence in the *Gettysburg Address*, Adams cloaked his revolutionary constitutional aims by appealing to intimately known first principles, the application of which were clearly not the subject of consensus.[84] Adams and many of his colleagues put theory into practice by following the *Zenger* precedent to argue for jury lawmaking with spectacular results.[85]

B. Action by Anonymity

Jury signaling in the pre-Revolutionary period was deep and widespread, not only to negate British law, but to point the way to new higher law principles. Since this all had its roots in the Zenger acquittal, it is first worth noting that only one other prosecution for seditious libel succeeded in the colonies after 1735, which helped to develop a consensus for the broader guarantees of the First Amendment.[86] Of more serious concern to the vitality of royal authority was the inability of the Crown to obtain convictions from juries related to violations of customs statutes, such as the Townshend Acts, due to their passage under the hated theory of virtual representation.[87] This inability sparked further debate among the colonials on the relationship between suffrage and self-government.[88]

Because Parliament had removed these customs cases to admiralty courts sitting without juries, civil juries stepped in to fill the breach and reaffirm the signals coming from the criminal side. Colonial leaders like John Hancock sued officials enforcing Imperial statutes in trespass and won large judgments, despite judicial instruction to those juries not to traverse the admiralty convictions.[89] Trespass suits were also commonly employed

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84. *See* President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* THE AMERICAN TESTAMENT 119 (Mortimer J. Adler et al. eds., 1975).

85. *See* STIMSON, *supra* note 26, at 78; *see also* JOHN PHILLIP REID, IN A REBELLIOUS SPIRIT 32 & 135 n.32 (1979) (describing James Otis' role in advising Hancock during the *Lydia* affair); Amar, *supra* note 8, at 1192 (outlining James Wilson's jurisprudential philosophy).

86. *See* STIMSON, *supra* note 26, at 51, 170 n.61.

87. *See* ABRAMSON, *supra* note 8, at 23-24. The most common act of jury defiance in the customs cases involved the acquittal of those accused of tarring and feathering royal officials. *See* Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791, 804 n.64 (1981).

88. *See* WOOD, *supra* note 59, at 173-96.

89. *See* ABRAMSON, *supra* note 8, at 24; *see also* STIMSON, *supra* note 26, at 71-

against officials executing writs of general assistance, and the opposition to this echoes in the Fourth Amendment's requirement of probable cause and specificity for warrants to issue.[90]

In contrast to modern practice, these civil juries were structurally similar to their criminal cousins. The ordering of new trials was rare, and appeals in most colonies could only be made when the judgment had been over £300, and even then only to the Privy Council in London, an expensive endeavor for any appellant.[91] As a result, civil verdicts were practically unreviewable, and therefore quite effective at deterring officialdom. Eventually, Parliament responded by eliminating civil jury proceedings involving customs inspections in the Sugar Act of 1764.[92] This effort to cut the jury out of the business of expressing its constitutional views is part of a recurring pattern that we will see in slightly different forms before both the Revolution of 1800 and Reconstruction.[93]

By holding people liable in trespass despite the color of law and collateral admiralty verdicts, jurors were indicating more than mere concern over prosecutorial abuse. They were sending a higher lawmaking signal and mobilizing further debate about both the substantive law and encroachments upon the right to jury trial that had necessitated additional civil proceedings.[94] Again, these concerns about maintaining the jury's adjudicatory role were eventually given concrete expression in the guarantees of the Sixth and Seventh Amendments.[95] If any doubt remains about the clarity of the constitutional signal being sent and

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72 (describing general practice).

90. *See* U.S. CONST. amend. IV; REID, *supra* note 85, at 30. Tort remedies against writs of assistance were not limited to Massachusetts, as they were also granted in South Carolina and Rhode Island. *See* REID, *supra* note 85, at 136 n.37.

91. *See* REID, *supra* note 85, at 32 & 136 n.37; STIMSON, *supra* note 26, at 51.

92. *See* Bacigal, *supra* note 88, at 803-04.

93. *See infra* text accompanying note 112; *infra* note 146. One point worthy of further examination is whether civil punitive damage awards constitute a signaling device comparable to jury nullification, and if so, whether recent congressional attempts to limit punitive awards by statute reflect an ongoing effort to silence juries seeking to question settled understandings of redistributive justice. *See* H.R. 956, 104th Cong. (1995).

94. *See* STIMSON, *supra* note 26, at 78. John Adams argued that the jury's right to adjudge constitutionality in these cases came from the fact that this initial jury trial right had been strangled by the admiralty courts. *See id.*

95. *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved . . . .").

received by jury lawmaking, listen to British revenue commissioner Henry Hulton, who asked how his men were supposed to carry out their duties "before a Jury of the People [who] had held the very Laws under which the officers acted, to be Unconstitutional."[96]

C. Leaving the Signal On

Although the pyrotechnics of rebellion faded as the Federalists set in motion the march towards a new constitution, steps were taken to secure jury lawmaking and its signaling function for another day. Far from operating as a convenient tool of revolution to be shelved once the new class was in power, jury lawmaking was enshrined by the Framers in constitutions and statutes, in keeping with the dualist understanding of the possibility for future popular renewal.[97] Theophilus Parsons spoke during the debate on ratification of the Federal Constitution in Massachusetts and summarized a generation's experience in signaling higher lawmaking:

> [T]he people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law, and any man may be justified in his resistance. Let him be considered as a criminal by the general government. Yet only his own fellowcitizens [sic] can convict him; they are his jury; and if they pronounce him innocent, not all the powers of congress can hurt him; and innocent they will pronounce him, if the supposed law he resisted was an act of usurpation.[98]

Like Adams before him, Parsons referred to jury action as only a tool to prevent violations of established first principles (usurpation), but a reinterpretation of those principles by Revolutionary juries had signaled a desire for new higher law. Parsons' formulation left open the same possibility. Six years later, the

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96. REID, *supra* note 85, at 34.

97. *See, e.g.*, GA. CONST. of 1777, art. 41; PA. CONST of 1790, art. IX, § 7; STIMSON, *supra* note 26, at 60.

98. Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 269-70 (1855) (Thomas, J., dissenting) (citing DEBATES OF CONVENTION OF 1788, 194-95 (ed. of 1856). Judge Thomas pointed out that this protection would be rendered nugatory if juries did not have the right to pass judgment on the law. *See id.* at 270 (Thomas, J., dissenting).

Supreme Court decided *Georgia v. Brailsford*,[99] an action in assumpsit that was heard in original jurisdiction, and instructed the jury that they had the right to decide the law and the fact at issue.[100] Although the Court did not reach the question of jury constitutional review, subsequent case law confirmed jury lawmaking rights in a variety of common-law and statutory contexts.[101]

A long struggle was required to bring forth new higher law and the jury role that signaled and mobilized the Framers' movement.[102] Over the next half-century, that crucible of reform would be subjected to new and even more difficult challenges.

D. A Tradition Retained

The Founding tradition of appealing to the jury as a constitutional arbiter was renewed during the political crises accompanying Jefferson's rise to power. As we shall explore further in the next Part, Jefferson's sweeping electoral victory in 1800 over the Federalists was preceded by a major constitutional challenge to their Alien and Sedition Act before a jury in Virginia.[103] To Jefferson's contemporaries, an equally prominent question was at stake eight years later in *United States v. The William*,[104] a highly

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99. 3 U.S. (3 Dall.) 1 (1794).

100. *See id.* at 1, 4. The Justices who joined Chief Justice Jay's opinion included James Wilson, James Iredell, and William Patterson.

101. *See, e.g.*, Bingham v. Cabbot, 3 U.S. (3 Dall.) 19, 33 (1795) (Iredell, J., seriatim opinion); Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127) (Chase, J.); Henfield's Case, 11 F. Cas. 1099, 1121 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, J.). In civil cases, jury lawmaking rights were abandoned quite a bit earlier than on the criminal side. For an explanation of the decline of civil jury lawmaking, see Renée B. Lettow, *New Trial for Verdict Against Law*, 71 NOTRE DAME L. REV. 505 (1996).

102. I have concentrated on the jury's role as a pre-signaler of higher lawmaking reform, but the jury's significance as a signal in a more direct sense is worth mentioning. Well before the Annapolis Convention of 1785 cited by Ackerman as the signal that led to the Philadelphia Convention, James Wilson attempted to deal with the lack of a final tribunal under the Articles of Confederation by creating a "National Jury" at the Trenton Trial to weigh the claims of competing states. *See* 2 ACKERMAN, *supra* note 17 (manuscript at 78-82); STIMSON, *supra* note 26, at 133-34.

103. *See* United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.); *infra* Part III.C. For more on the profound impact of Jefferson's election on our constitutional development, see U.S. CONST. amend. XII; 1 ACKERMAN, *supra* note 13, at 71-73.

104. 28 F. Cas. 614 (C.C.D. Mass. 1808) (No. 16,700).

charged case challenging the constitutionality of the Embargo Act.[105] Although this ban on exports to the warring parties in Napoleonic Europe has left little lasting legal impact, at the time "excitement grew more and more intense; violations of the laws became frequent; obstruction to their enforcement arose on all sides; in some places open violence and forcible resistance had taken place."[106] Despite the controversy swirling around him in *The William*,[107] Judge John Davis allowed Federalist defense counsel to argue successfully against the constitutionality of the Act before the jury, even after Davis himself had issued a lengthy opinion upholding it before trial in its first judicial test.[108] So both Federalists and Jeffersonians spoke the language of jury lawmaking as an instrument of constitutional reform, despite their sharp differences on other structural questions. Jury signaling had been preserved for an unknown future, one that soon arrived under the label of abolitionism.[109]

E. Slavery

The 1850s opened by mirroring the 1760s. Once again statutes embodying the old order were under attack by a new constitutional movement.[110] Again the organs of the state sought to insulate the law from jury review, but found juries at work anyway, mobilizing the people and signaling another effort at constitutional creativity. Only this time the issue was slavery, and the key statute was the Fugitive Slave Act of 1850.[111] Under the Act, federal commissioners, rather than juries, decided whether a runaway was to be sent back, but juries nevertheless

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105. *See* 2 Stat. 451 (1807).

106. 1 WARREN, *supra* note 28, at 324; *see also id.* at 324-45 (evaluating furor over Embargo Act's passage).

107. 28 F. Cas. 614 (C.C.D. Mass. 1808) (No. 16,700).

108. *See* ABRAMSON, *supra* note 8, at 77; 1 WARREN, *supra* note 28, at 345-46 n.2.

109. Other similarities between the American Revolution, the Revolution of 1800, and Reconstruction concerning juries might have presented themselves if the pre-1800 movement had been of longer duration. By the time the *Callender* trial had concluded, Jefferson was already on the verge of capturing the White House, so there was no time for the type of extensive jury nullification seen in the other periods.

110. For examples of the arguments of the era, see Van Metre v. Mitchell, 28 F. Cas. 1036 (C.C.W.D. Pa. 1853) (No. 16,865); Norris v. Newton, 18 F. Cas. 322 (C.C.D. Ind. 1850) (No. 10,307).

111. 9 Stat. 462 (1850) (repealed 1864).

got in their licks when felony prosecutions were brought against "aiders and abettors" of those slaves.[112] Pennsylvania and Massachusetts juries were particularly noted for their resistance to such charges, and mimicked their colonial predecessors by acting as leading indicators and sparks of the movement that led to the development of the Republican Party and Reconstruction.[113] Antebellum juries were not just rejecting the idea of slavery as embodied in the Act, but also expressing disquiet at the Act's severe limitations on the procedural rights of runaway slaves threatened with return—which reverberates in the Fourteenth Amendment's extension of national citizenship and equal protection to African-Americans.[114]

The success of jury lawmaking in defeating the application of the Fugitive Slave Act marked both the high tide and mysterious ebb of this great constitutional tradition. Although the Republic has seen many subsequent political upheavals, none since have been accompanied by active constitutional challenges raised before the people in the jury box. Accounting for this disappearance of jury lawmaking must be our next objective.

III. INTERPRETATION AND THE DUALIST DILEMMA

In this Part, I shall examine how the principle of jury lawmaking was reforged by its interaction with an institution that did not exist during the Revolutionary period: an independent federal judiciary. The creation of an alternative body with the ability and duty to uphold positive law raised two questions for jury authority. First, how could a right developed to convey higher lawmaking signals survive the long interludes of normal politics where the rule of law was highly prized? Second, in periods of constitutional politics which would prevail: the preservationist courts of the *ancien regime* or the signaling juries of the rising movement?[115] In analyzing the case law of constitu-

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112. *See* 9 Stat. 462 § 7; ROBERT M. COVER, JUSTICE ACCUSED 175 (1975).

113. *See* David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 874 (1995).

114. *See* U.S. CONST. amend. XIV, § 1. The Fugitive Slave Act of 1850 barred the alleged fugitive from testifying or bringing forth evidence in his own defense and gave a special federal commissioner, who was appointed to hear the fugitive rendition proceedings, ten dollars if the fugitive was returned, but only five if he went free. *See* COVER, *supra* note 112.

115. I use the term rising movement to emphasize that not every movement

tional clashes between judge and jury, I shall emphasize: (1) the inherent instability of a system that asked these two very different legal actors to commingle so completely, as reflected in the strained reasoning of the opinions discussing the question; and (2) the fact that the interpretation that did occur demonstrated a judicial understanding, albeit imperfect, of its institutional function within our constitutional system, even though it may not have accurately reflected the law.

A. Normal Politics and Battiste

To understand the clash between courts and juries in major constitutional cases, it is useful to begin by reviewing how jury lawmaking came to be understood in non-constitutional cases. Surveying the wreckage of Imperial authority in colonial Massachusetts, Chief Judge Thomas Hutchinson complained that juries were willing to convict ordinary criminals, but "connive at and pass over in Silence and entirely smother other Crimes of an alarming Nature."[116] Of course, what he meant was that juries were only carrying out their signaling function in cases involving controversial political questions. Nevertheless, Hutchinson did put his finger on a fundamental difference between the jury and other anomalous institutions involved in constitutional change; namely, juries hear both constitutional and ordinary legal disputes. Dualism generally draws sharp distinctions between these legal genres, yet the jury's right to decide questions of law recognizes no such difference.[117] Judges throughout the nineteenth century were forced to grapple with this contradiction.

One of the motivations behind the dualist effort to place significantly greater obstacles in the way of higher lawmaking as opposed to ordinary lawmaking was the Framers' recognition that change brought with it the risk of anarchy if first principles were constantly scrutinized. In contrast to Jefferson's suggestion that constitutions be drafted anew for every generation, Madison argued that "[t]he danger of disturbing the public tranquility by

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that passes the signaling phase ultimately succeeds. *See* 1 ACKERMAN, *supra* note 13, at 83-84, 112-13 (describing Election of 1896 and defeat of Bork nomination as failed constitutional moments).

116. ABRAMSON, *supra* note 8, at 23.

117. *Compare* 1 ACKERMAN, *supra* note 13, at 230-65 (describing normal politics), *with* 1 *id.* at 266-94 (describing constitutional politics).

interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society."[118] Yet, by operationalizing jury signals through a right to decide the law in all cases, were not the Framers opening up just such a window for public passions to erupt and corrode the rule of law?

The duty of addressing this question as it pertained to ordinary cases fell to Justice Joseph Story in *United States v. Battiste*.[119] In *Battiste*, Story issued a ringing declaration that juries had no "moral right to decide the law according to their own notions, or pleasure" when ordinary criminal law was implicated.[120] At issue was an indictment for participation in the foreign slave trade, which had been banned by Congress. Daniel Webster, counsel for the defendant, sought to argue a question of statutory interpretation to the jury, but Story, riding circuit, rejected this in a short opinion.[121] The Justice pointed out that:

> If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as had been settled by the jury.[122]

By ruling against jury lawmaking in ordinary cases, Story ignored the precedents but grasped an important difference between the demands of normal and constitutional politics.[123] Having various juries express views on the law without the possibility of reversal yields excellent feedback during constitutional periods, but when viewed through the lens of everyday life those same qualities of numerosity and unreviewability destroy the neutral and uniform application of law that citizens need to

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118. THE FEDERALIST NO. 49, *supra* note 37, at 315.
119. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).
120. *See id.* at 1043.
121. *See id.*
122. *Id.* at 1043.
123. The fact that *Battiste* involved slavery, the source of another constitutional movement, does not make it a case of constitutional dimension. Far from stifling a jury signal for abolition, Story was interpreting an anti-slavery statute. *See id.* at 1042. But the decision does fit into a larger pattern of abolitionist judges straining to enforce the positive law of slavery. *See generally* COVER, *supra* note 112 (analyzing slavery decisions in context of "moral-formal" dilemma).

structure their lives in a meaningful manner.[124] Not only is the rule of law a positive good, but the structures of normal politics implicitly rely upon it to function. Political accountability and separation of powers, for example, are unlikely to function well if the legal norms that constrain arbitrary action by politicians are unevenly enforced.[125]

Perhaps Story's paean to the rule of law seems obvious and unremarkable. That view might change if it is recalled that "[u]ntil nearly forty years after the adoption of the Constitution of the United States, not a single decision . . . has been found, denying the right of the jury . . . to decide, according to their own judgment and consciences, the law involved in that issue."[126] Although the *Battiste* decision turned the tide in state courts, as late as 1853, the Massachusetts Constitutional Convention passed an amendment giving juries lawmaking rights in all criminal cases.[127] As one delegate to that convention put it: "I should prefer to take my chance for life or liberty, with twelve of my friends and neighbors—to let them determine the fact and the law, the violation and the intent—rather than to be in the power of any one man. . . ."[128] Why, if the distinction between normal and constitutional roles for other institutions was reasonably clear, did the Framers conflate the two within the jury box and manage to sustain that fusion?

The answer lies in the suspicion bred by the colonial experience with judges as impartial and neutral adjudicators, and the resulting credibility gap for the new federal judiciary that had to be overcome before the jury safeguard would be abandoned. The Court has characterized the colonial experience this way: "[I]n many of the States the arbitrary temper of the colonial judges,

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124. For more on the inconsistency between the rule of law and plenary jury discretion, see, for example, ABRAMSON, *supra* note 8, at 79; Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512-16 (1976).

125. *See* 1 ACKERMAN, *supra* note 13, at 191, 236-43.

126. Sparf and Hansen v. United States, 156 U.S. 51, 168 (1895) (Gray, J., dissenting).

127. See, e.g., Commonwealth v. Porter, 51 Mass. (10 Met.) 263 (1845); Pierce v. State, 13 N.H. 536 (1843). The Massachusetts Convention's debate on jury rights constitutes a rich source for contemporary views on the judicial process. *See* 3 DEBATES AND PROCEEDINGS IN THE MASSACHUSETTS CONVENTION 437-64, 497-515 (Boston, White & Potter 1853) [hereinafter DEBATES]. The entire constitutional package was defeated in a referendum. *See* ABRAMSON, *supra* note 8, at 84.

128. DEBATES, *supra* note 127, at 440 (statement of Mr. Burlingame).

holding office directly from the Crown, had made the independence of the jury in law as well as in fact of much popular importance."[129] For the most part, though, the "arbitrary" actions of Imperial judges amounted to nothing more than the diligent enforcement of a legal order that was shortly thereafter totally discredited and transformed. Chief Justice Taney's vilification after the repudiation of *Dred Scott v. Sandford*[130] by the Fourteenth Amendment and Justice Peckham's dim reputation following the demise of the laissez-faire principle of *Lochner v. New York*[131] are more recent examples of the phenomenon of "blaming the past judicial messenger" to buttress the new constitutional order.[132] Unique to the colonial experience was the role of trial rather than appellate judges in enunciating the old principles—only a limited appellate process existed[133]—so one can at least understand why early Americans were slow to accept the notion that life-tenured judges would be more impartial and supportive of the rule of law than patriotic fellow citizens. In the end, there was no real misunderstanding of the difference between normal and constitutional politics on the part of the Framers. They simply confronted a different institutional alignment between jury and court than faced Story two generations later following the development of judicial credibility.

Story's opinion in *Battiste* did not address the relevance of the new federal judiciary to the constitutional side of the normal/constitutional dichotomy.[134] That aspect of jury authority has an intricate jurisprudence of its own.

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129. *Sparf and Hansen*, 156 U.S. at 89.

130. 60 U.S. (19 How.) 393 (1857).

131. 198 U.S. 45 (1905).

132. 1 ACKERMAN, *supra* note 13, at 63-67; *see also* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 73 (1873) (holding that Section 1 of Fourteenth Amendment overruled *Dred Scott*).

133. *See supra* text accompanying notes 91-92.

134. It is doubtful that this omission was an oversight. Story had been a prosecutor in the *William* case, where Samuel Dexter successfully argued the unconstitutionality of the Embargo Act to the jury. *See* ABRAMSON, *supra* note 8, at 77; 1 WARREN, *supra* note 28, at 344; *supra* text accompanying notes 107-08.

B. Preserving and Signaling at Constitutional Moments

It is no coincidence that the debate on jury rights alluded to earlier in the Massachusetts Constitutional Convention of 1853 was joined during the heart of the controversy over the Fugitive Slave Act of 1850. Discussion in the Convention turned from the rule of law questions that had confronted Story to the more urgent constitutional dimensions of the jury lawmaking right. Delegate James Allen offered this concise defense of the jury's signaling role: "There are great cases which sometimes arise in the history of a nation, in which fundamental principles are assailed, when you cannot rely entirely upon the legislature or upon the courts; when your defence must come from the people themselves, from the juries who are of the people."[135] John Adams could not have put it better.[136]

Nevertheless, advocates of jury signaling in the nineteenth century were confronted by a federal judiciary unknown to Adams and determined to preserve existing higher law against any encroachment pursued outside Article Five. Indeed, as I will soon demonstrate, every case in which courts ruled against jury constitutional review arose out of a rising higher lawmaking movement that ultimately succeeded.[137] The seriousness with

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135. DEBATES, *supra* note 127, at 454 (statement of Mr. Allen).

136. *See supra* text accompanying notes 83-84.

137. *See, e.g.*, Morris v. United States, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (Curtis, J.); United States v. Shive, 27 F. Cas. 1065 (C.C.E.D. Pa. 1832) (No. 16,278) (Baldwin, J.); United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.); Lyon's Case, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646) (Patterson, J.); *see also* United States v. The William, 28 F. Cas. 614 (C.C.D. Mass. 1808) (No. 16,700), *as described in* 1 WARREN, *supra* note 28, at 345-46 n.2. *Shive* concerned a jury challenge to the constitutionality of the Bank of the United States at the height of the struggle between Andrew Jackson and the Bank. *See Shive*, 27 F. Cas. 1065; *cf.* 1 ACKERMAN, *supra* note 13, at 75 (reviewing debate between the Marshall Court and Jackson before 1837). *Lyon's Case* involved the Sedition Act, as did *Callender*, and contains only one line from Justice Patterson's jury charge denying the jury's constitutional authority. *See Lyon's Case*, 15 F. Cas. at 1185 ("You have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law.").

The case of *Commonwealth v. Anthes* may appear to present an exception. In a challenge to Massachusetts liquor laws under an 1855 statute giving the jury lawmaking rights, Chief Judge Lemuel Shaw ruled against the jury and declared the statute unconstitutional. 71 Mass. (5 Gray) 185 (1855). What do liquor laws have to do with constitutional moments? The answer supports the hypothesis set out later in this section. Shaw completely ignored the fact that the jury statute in question had almost identical language to the jury lawmaking provision approved by the 1853 Constitutional Convention but rejected at the polls. A review of that convention

which Justices like Samuel Chase and Benjamin Curtis took their preservationist role will be readily apparent once one reviews their abandonment of reasoned interpretation in the jury cases.[138]

As mentioned earlier, in contrast to Bickel's "countermajoritarian difficulty," dualism sees judicial review as playing an important role, along with other structural mechanisms, to keep the institutions of the State from encroaching upon the constitutional domain of the people.[139] The federal judiciary was established in large part to replace the jury as the body charged with preserving constitutional principles against diminution by the political branches.[140] However, there is one sense in which courts cannot replace the jury's constitutional function, and that involves signaling. Courts are the bodies *least* capable of expressing a critical view of higher law, precisely because of their duty to uphold the positive law and thereby "represent the *absent* People by forcing our elected politician/statesmen to measure their statutory conclusions against the principles reached by those who have most successfully represented the People in the past."[141]

As an institutional matter then, asking courts to preserve higher law while allowing juries to signal challenges to that law puts judges in a schizophrenic trap. Dualism recognizes very rare instances at the height of Reconstruction and the New Deal where courts have executed a "switch in time" and backed away from established constitutional principles when it became clear that other political actors spoke with the authority of a new manifestation of the people.[142] For the most part though, courts ought to be the last bastion of support for the old system. Can it be possible for a single jury to oust this institutional prerogative?

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establishes that "the Fugitive Slave Law seemed foremost in the minds of the amendment's proponents." *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 177 n.47 (1964). In this sense, *Anthes* acted to squash jury rights and preserve standing higher law, and in so doing displayed the questionable reasoning characteristic of this entire line of cases.

138. *See Morris*, 26 F. Cas. at 1323; *Callender*, 25 F. Cas. at 239.

139. *See* 1 ACKERMAN, *supra* note 13, at 261-65; *supra* text accompanying notes 43-47; *see also* THE FEDERALIST NO. 78, *supra* note 46 (defending judicial review).

140. *See generally* STIMSON, *supra* note 26 (tracing development of jury review into judicial review).

141. 1 ACKERMAN, *supra* note 13, at 264 (alteration in original).

142. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); 2 ACKERMAN, *supra* note 17 (manuscript at 500-09).

If the judiciary had reviewed the structural and historical evidence so far documented, the answer probably would have been a grudging yes, with judges then taking upon themselves the duty to synthesize jury signaling with positivist legal norms.[143] Instead, judges interpreted the question at a higher level of generality focused on their institutional role, which manifested itself in a stubborn refusal to acknowledge the reality of past cases and practice.[144]

C. *Justice Chase and* Callender

In 1798, the Federalist-dominated Congress passed the Sedition Act, making it a crime to "write, print, utter, or publish, . . . any false, scandalous, and malicious writing or writings against the government of the United States. . . ."[145] This law raised a firestorm of constitutional opposition which culminated in Jefferson's momentous electoral victory in 1800.[146] Tensions were high when Thomas Callender, an Anti-Federalist publisher, was put on trial in *United States v. Callender*,[147] for violating the Act shortly before the election. When Callender's attorney, Samuel Wirt, attempted to argue during summation that the

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143. Courts do not further the dialectic process by squashing jury expression in the name of past principle, mainly because the dialectic is already furthered by the affirmance of controversial statutes on appeal from convictions, and so there is little to gain by extending that into the trial process at the expense of valuable jury signals. *Cf.* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859) (upholding Fugitive Slave Act of 1850 shortly before Lincoln's election).

144. This bears some resemblance to the "moral-formal" dilemma that confronted abolitionist judges interpreting common law or statutes in the slave cases. *See* COVER, *supra* note 112.

145. Lyon's Case, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646) (Patterson, J.). Opponents of a jury right to adjudge constitutionality point to the legislative history of the Act for evidence. James Baynard of Delaware argued that a provision in the statute authorizing juries to decide questions of law "would be, to put it into the power of a jury to declare that this is an unconstitutional law, instead of leaving this to be determined, where it ought to be determined, by the Judiciary." *See* Howe, *supra* note 79, at 587. Albert Gallatin then offered compromise language "in order to avoid the difficulties now anticipated." *Id.* As will be explained shortly, this decision of the Federalist Congress, much like the Sedition Act itself, was decisively repudiated in the aftermath of Jefferson's election to the presidency. Moreover, it demonstrates the knee-jerk reaction of the political branches to shield statutes from jury scrutiny in periods of constitutional tumult. *See supra* text accompanying notes 92-93.

146. *See* 1 ACKERMAN, *supra* note 146, at 70-71; 1 WARREN, *supra* note 28, at 164-68 (laying out dimensions of the political debate).

147. 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.).

statute was unconstitutional, he was stopped by the presiding circuit judge, Justice Samuel Chase, and asked to explain his rationale.[148] The following exchange then took place:

> MR. WIRT: Since, then, the jury have a right to consider the law, and since the constitutionality is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.
> CHASE, CIRCUIT JUSTICE: A non sequitur, sir.[149]

Before reviewing the rationale behind Chase's brusque dismissal, it is worth noting that the Justice clearly recognized the dichotomy between normal and constitutional politics when it came to the jury. In response to Wirt's invocation of the jury's signaling role as no different from its ordinary legal right, Chase stated that "[i]t is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law."[150] So far so good. On the other hand, Chase's interpretation of the difference ended up denying the jury its signaling role in constitutional cases, but preserving its lawmaking function in all other contexts.[151] This reasoning not only ignores the Framers' contribution to higher lawmaking, but cannot survive scrutiny after *Battiste*.

Chase made several arguments in *Callender*, but I shall focus mainly on his understanding of constitutional change and how that related to the serious internal amnesia of his interpretive stance.[152] Despite having lived through profound constitutional change pursued under forms unauthorized by the Articles of

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148. *See id.* at 253.

149. *Id.* Although Justice Chase has been characterized as a highly partisan and intemperate judge (even in the notes after the *Callender* case, which quote Chase's "usual coarse jocularity" in declaring that "he would teach the lawyers in Virginia the difference between the liberty and the licentiousness of the press") and was impeached for his conduct at trial, this should not affect the analysis of his opinion. *See id.* at 258. Judges of unquestioned integrity like Lemuel Shaw and Benjamin Curtis reached conclusions similar to those of Chase when faced with the irresolvable inconsistency between the court's interpretive and institutional roles in supervising the jury. *See supra* note 137 and *infra* text accompanying notes 167-70.

150. *See Callender*, 25 F. Cas. at 255.

151. *See id.*

152. For an excellent critique of Chase's opinion, see Amar, *supra* note 8, at 1191-95.

Confederation, Chase rejected that precedent.[153] The preservationist judicial role was never so definitively stated:

> By the sixth article of the constitution [Supremacy Clause] . . . all judicial officers of the United States . . . shall be bound by an oath or affirmation to support the constitution. By this provision, I understand that every person, so sworn or affirmed, promises that he will *preserve the constitution as established*, and the distribution of powers thereby granted; *and that he will not assent to any amendment or alteration thereof, but in the mode prescribed in the fifth article. . . .*[154]

Given this dogmatic view of the prerogative of the judiciary and the illegitimacy of reform outside Article Five, it is little wonder that Chase was not receptive to precedents supporting jury signaling, which he called "extra-judicial."[155] As explained in Part I, this is precisely the point.[156]

As an interpretive matter, Chase dealt with these precedents and the tension they created between court and jury mainly by willful ignorance, but when he sought to grapple with them directly, odd twists of logic appeared. Because jury lawmaking was so well established, Chase was forced to concede that the first part of Wirt's syllogism was valid.[157] Nevertheless, the Justice sought to confine that lawmaking right to statutory rather than constitutional interpretation.[158] Whether such a distinction can be maintained is questionable, but the critical point is that Chase himself had conceded the jury's right to interpret constitutional law just a few months earlier.[159] In *Case of Fries*,[160] the defendant was accused of treason under Article III, Section 3, yet Chase still charged the jury that they were to decide "both the law and the facts."[161] It was one thing for Chase to argue that jury lawmaking

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153. *See* 2 ACKERMAN, *supra* note 17, (manuscript at ch. 2-3); THE FEDERALIST NO. 40, *supra* note 54.

154. *Callender*, 25 F. Cas. at 256 (emphasis added).

155. *Id.* at 257.

156. *See supra* text accompanying notes 68-76.

157. *See Callender*, 25 F. Cas. at 255.

158. *See id.*

159. *See* Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127) (Chase, J.); *see also* Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 249-50 (1855) (Bigelow, J., concurring). *Fries* was tried in April, 1800, while the *Callender* trial ended in June of that year. *See Fries*, 9 F. Cas. at 924; *Callender*, 25 F. Cas. at 241.

160. 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5,127) (Chase, J.).

161. *Id.* at 930.

applied only to statutory interpretation—a position rejected by *Fries*—but surely it cannot be valid to say that a distinction exists between interpreting constitutional law and holding a statute void under constitutional law as construed by the jury. To escape this box, Chase took the extraordinary step of ignoring his own previous decision, along with the Revolutionary precedents, to further his perceived institutional mandate to uphold higher law against any challenge.

Although the incoherent reasoning of *Callender* alone might cast doubt upon its reinterpretation of jury rights, two subsequent developments further weaken its precedential value. The first and most obvious is that Justice Chase was impeached by the Jeffersonian Congress for his conduct of Callender's trial, specifically for attempting "to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict they were required to give."[162] Although Chase escaped conviction by a few votes,[163] a clear message was sent reinforcing the new Jeffersonian constitutional order by validating past attempts to invoke the jury signal. If this understanding of Chase's impeachment seems a bit strained, more concrete judicial evidence emerged a few years later in *The William* case described in Part II.[164] There, Judge Davis rendered Chase's opinion a dead letter by allowing the jury to reach the constitutional question in a highly significant case.[165]

D. The Fugitive Slave Act and Morris.

Jefferson's presidency by no means marked the end of the clash between jury and court over the development of higher law principles. When juries in Massachusetts began actively defying the Fugitive Slave Act in the 1850s, another case arose in which the prerogatives of the preservationist court were asserted at the expense of the signaling jury.

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162. *Anthes*, 71 Mass. (5 Gray) at 271 (Thomas, J., dissenting) (quoting 2 CHASE'S TRIAL, App. 1).

163. *See* 1 WARREN, *supra* note 28, at 291.

164. *See supra* text accompanying notes 107-08.

165. *See* 1 WARREN, *supra* note 28, at 345-46 n.2.

In *United States v. Morris*,[166] the defendants were charged under the "aiding and abetting" portion of the Act, and counsel's attempt to argue its constitutionality to the jury during summation was quashed by another justice riding circuit, Benjamin Curtis.[167] In some ways, Curtis' rationale was markedly similar to Chase's position in *Callender*, with its heavy reliance on the Supremacy Clause to justify judicial resistance to jury action.[168] Yet, unlike Chase, Curtis perceived the seriousness of the moment and the special institutional difficulties it created for him as a judge:

> The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times, or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause, when a law, unpopular in some locality, is to be enforced there, *then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly bourne.*[169]

For Curtis, as with Chase, the strain was most firmly bourne on honest interpretation. Curtis' feat of judicial jujitsu came with his effort to evade Chief Justice Jay's opinion in *Georgia v. Brailsford* by arguing that the case must have been misreported![170] This argument, as far as can be determined, is unprecedented in a major case. Imagine what the reaction would be if counsel in an abortion case relied on the argument that our understanding of *Griswold v. Connecticut*[171] over the past three decades had all just been a big misunderstanding because the West Reporter had slipped up. Such blatant disregard for precedent was not the result of partisan or ill-conceived judging,

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166. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (Curtis, J.).

167. Curtis was the author of a famed dissent in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 564 (1856).

168. *See Morris*, 26 F. Cas. at 1332. Curtis actually makes the structural case for jury signaling by noting the mysterious and unreviewable quality of its decision making. *See id.*; *see also supra* text accompanying note 74.

169. *Morris*, 26 F. Cas. at 1336 (emphasis added).

170. *See id.* at 1334 ("I cannot help feeling much doubt respecting the accuracy of this report . . . .") (referring to Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794)). This unfounded assertion was reiterated by the full Court in *Sparf and Hansen*, but decisively refuted by the dissenters. *See* Sparf and Hansen v. United States, 156 U.S. 51, 65 (1895); *id.* at 156-57 (Gray, J., dissenting).

171. 381 U.S. 479 (1965).

but flowed directly from the cognitive dissonance created by giving judges an interpretive task that clashed so completely with their institutional role.[172]

Despite Justice Curtis' efforts, the jury he charged still acquitted the abolitionists, but the acquittal was a Pyhrric victory.[173] *Morris* was critical in framing the Supreme Court's final consideration of the jury lawmaking question in 1895.[174]

E. Sparf and Hansen *and the Triumph of the Judiciary*

When the issue of jury lawmaking finally returned to the Supreme Court in *Sparf and Hansen v. United States*,[175] the precedents of *Battiste*, *Callender*, and *Morris* were lumped together to eliminate jury lawmaking without any recognition of its signaling role or the dichotomy between normal and constitutional politics. In *Sparf and Hansen*, the defendants were charged with murder and then denied leave by the Court to instruct the jury that they could convict on a lesser charge of manslaughter because that expansive discretion was unauthorized by statute.[176] A subsequent dialogue between the Court and the jury foreman indicated that the jury was inclined to convict on the lesser charge, but believed it could not in accordance with the judge's instructions.[177] In rejecting the defendants' assertion that they had been denied their right to argue the law to the jury, Justice Harlan declared that the result of such a jury right would be that "our government will cease to be a government of laws, and become a government of men."[178] Given that this was just an ordinary legal dispute, Harlan's position was almost certainly correct, but neither Harlan nor the dissenters made any attempt

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172. *See generally* COVER, *supra* note 112 (establishing theory of judicial cognitive dissonance).

173. *See* ABRAMSON, *supra* note 8, at 82.

174. *See Sparf and Hansen*, 156 U.S. at 65, 74-78. No repudiation of the jury decisions followed Reconstruction as they had followed the election of 1800. This could be because the former had enshrined the substance of the movement by amendment, whereas the latter only acted through statute, and hence was more concerned about the procedural safeguards of its achievements. For other explanations about how Reconstruction should affect our understanding of jury authority, see *infra* Part IV.B.

175. 156 U.S. 51 (1895).

176. *See id.* at 52, 59-60.

177. *See id.* at 61 n.1.

178. *Id.* at 103.

to distinguish the precedents according to their critical political context, and thus laid down a rule that obliterated the jury's lawmaking rule in normal *and* constitutional cases.[179] Thus, *Sparf and Hansen* was the stake in the heart of the signaling jury. The bench had succeeded in reining in the jury, but in so doing had suffocated its special bifurcated role.

IV. A REGRETTABLE LOSS?

Perhaps courts did overreact by stripping the jury of its formal lawmaking right in constitutional cases, but before deciding whether and how that right can be salvaged, we need to consider two questions. First, does the preceding narrative of woe about the decline of the signaling jury matter? Second, even if its loss is something to worry about, are there alternative justifications for the decision in *Sparf and Hansen*? In this section, I explain why the jury nullification that still occurs in spite of its formal illegality is inadequate to the signaling task of higher lawmaking, and then discuss how the constitutional revolutions of Reconstruction and the New Deal should refine our interpretation of the proper scope of jury authority.

A. Jury Signaling Defended

So long as jury acquittals are immune from review, their power to disregard the law remains, but the type of nullification that results is of a questionable character.[180] For one thing, nullifying juries are often not concerned with the substantive law, but with the application of that law to a particular defendant.[181] While we might applaud the notion of the jury as a check on prosecutorial discretion, it does make it difficult to interpret the nullifications that do occur; for instance, was the jury challenging

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179. Justice Gray's dissent did point out that Justices had upheld jury lawmaking except in some constitutional cases, and "[i]t may well be doubted whether such a distinction can be maintained," but he then stated that the facts did not raise the constitutional question. *Id.* at 164 (Gray, J., dissenting). However, the majority opinion cited *Morris* with strong approval, and because this was the Court's first comment on that constitutional decision, it could be argued that the higher lawmaking question was implicitly before the Justices. *See id.* at 74-78.

180. *See* U.S. CONST. amend. V (Double Jeopardy Clause).

181. *See* Dorfman & Iijima, *supra* note 113, at 882-83 (citing HARRY KALVEN, JR. & HANS ZIESEL, THE AMERICAN JURY (1966)).

the law itself, or merely the facts under which the charge was brought? Moreover, there should be profound disquiet about operationalizing an important component of constitutional democracy by deliberately keeping the citizenry in the dark. Not only does this fly against the presumption that the people rule, but it raises the issue of just who will choose to nullify. Dissenting in *United States v. Dougherty*,[182] Chief Judge David Bazelon argued:

> The spontaneous and unsolicited act of nullification is thought less likely, on the whole, to reflect bias and a perverse sense of values than the act of nullification carried out by a jury carefully instructed on its power and responsibility.
>
> It seems substantially more plausible to me to assume that the very opposite is true. . . . The conscientious juror, who could make a careful effort to consider the blameworthiness of the defendant's action in light of prevailing community values, is the one most likely to obey the judge's admonition that the jury enforce strict principles of law.[183]

Verifying this claim empirically is difficult, of course, but it does raise additional questions about the quality of the signals one can expect to receive from juries uninformed of their formal lawmaking rights.

Quantity as well as quality in constitutional signaling is sacrificed when jury nullification is driven underground. We would expect that the active discouragement of jury review initiated by *Sparf and Hansen* would drastically reduce the frequency of its occurrence, and this is exactly what happened in the years prior to the New Deal.[184] Despite the fact that many of the landmark cases from that era involved jury trials, nullification was never an issue in any of them.[185] Now it could be argued

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182. 473 F.2d 1113 (D.C. Cir. 1972).

183. *Id.* at 1141 (Bazelon, C.J., dissenting).

184. How can this be reconciled with the contemporaneous nullification of the Volsted Act that helped bring down Prohibition? *See supra* note 64. As mentioned earlier, nullification can proceed either from opposition to the substantive law or opposition to its application. The constitutionality of the Volsted Act itself was never at issue during the 1920s, but there is a long tradition of nullifying alcohol laws on their facts (recall *Anthes*). *See supra* note 137.

185. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); United States v. A.L.A. Schechter Poultry Corp., 76 F.2d 617 (2d Cir. 1935), *rev'd*, 295 U.S. 495 (1935). There is another explanation for the lack of jury action before the New Deal; namely, that despite Professor Ackerman's protestations to the contrary, the New Deal

that this was indicative of constitutional approval by the people of the emerging welfare state, but it hardly seems likely that this jury approval could have been so overwhelming given the division of opinion that accompanied the New Deal program. In addition, there were many types of statutes, such as anti-union laws, that supported the old laissez-faire order, yet also escaped the scythe of nullification.[186]

The atrophy of the jury's signaling capacity takes on greater significance if the New Deal precedent of higher lawmaking through transformative Supreme Court appointments becomes the norm.[187] Without formal amendments in place, it becomes ever more critical to identify the difference between a true constitutional movement and a manufactured one, because the latter can so easily imitate the former if the presidency and Senate are held by the same party.[188] By serving as the bridge between politicians and the people, juries can act as particularly effective signalers of firmly held conviction. Imagine the impact that jury nullification of charges against abortion protesters would have had on the legitimacy of President Reagan's effort to transform the Court through the Scalia and Bork nominations. Alas, due to *Sparf and Hansen* we will never know, and are so much the poorer in understanding.

B. Reconstruction and Sparf and Hansen

While we have seen that the elimination of jury constitutional review was unjustified by the precedents and exacts a real cost on our system of higher lawmaking, other arguments have been put forward to justify the decision. In Akhil Amar's view, the repudiation of localism by the Fourteenth Amendment makes control of the substantive law by juries constitutionally untenable.[189] Although juries are the only political institution whose

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simply does not rise to the same level as the amendment-generating movements of the Founding and Reconstruction. This paper uses dualism to throw light upon the jury's development, but also can show how a critical difference between the New Deal and its predecessor higher lawmaking movements can be explained by the theory's own internal dynamics.

186. As was noted earlier, there was extensive nullification directed against African-Americans in the South prior to the Civil Rights era, but this nullification was not of the signaling variety. *See supra* note 64.

187. *See* 1 ACKERMAN, *supra* note 13, at 51-52.

188. *See* 1 *id.*

189. *See* Amar, *supra* note 8, at 1195.

operation is constitutionally protected at the local level, their lawmaking authority is difficult to square with the nationalizing enterprise of Reconstruction.[190] This interpretive concern should not be dismissed lightly, and indeed could have been a background assumption to the Court's resolution of the jury lawmaking question, but the argument does read the Reconstruction Amendments rather broadly. As was stated in *The Slaughterhouse Cases*, Reconstruction did not "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[191] Nevertheless, that great constitutional transformation suggests that only a more restricted version of local authority, including jury lawmaking, can survive scrutiny. However this is a far cry from the assertion that jury signaling is per se inconsistent with the Fourteenth Amendment. As I shall show in Part V, we are not faced with a Hobson's choice between unrestrained jury action and formally illegal jury nullification. A more limited and constrained version of jury signaling can meet the interpretive challenge of Reconstruction's impact on the traditional lawmaking function of the jury.[192]

C. Carolene Products *and the Representative Jury*

Though it goes unmentioned by *Sparf and Hansen*, another significant development in jury law that buttressed the result of that case was the almost total exclusion of African-Americans from the jury system following Reconstruction.[193] Although de jure discrimination in jury selection was barred by *Strauder v. West Virginia*,[194] the post-Reconstruction Court rejected a claim of discrimination by local jury commissioners in the companion case of *Virginia v. Rives*.[195] Presented with evidence that African-

190. *See* U.S. CONST. amend. VI (requiring criminal jury to be drawn from "State and district wherein the crime shall have been committed"); U.S. CONST. amend. XIV, § 1 (defining national citizenship as primary); *see id.* (placing new limits of equal protection and due process upon states).

191. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 78 (1873).

192. *See infra* text accompanying notes 210-11. Much the same argument can be made in response to the aftermath of the New Deal and its expansion of federal power at the expense of the states.

193. *See* ABRAMSON, *supra* note 8, at 105-12.

194. 100 U.S. 303 (1879).

195. 100 U.S. 313 (1879).

Americans had never served on juries in Patrick County, the Court blandly asserted that such a showing "fall[s] short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color."[196] Such a blatant discontinuity between the composition of the citizenry and those represented in the jury box belied the claim that juries possessed some special representative relationship to the people. As long as this discrimination went unremedied, even supporters of jury lawmaking at the time of *Sparf and Hansen* would have had to concede that such action commanded little legitimacy.

Here is where the jurisprudence of the New Deal adds another layer to the interpretive onion. The touchstone is Footnote Four of *United States v. Carolene Products*,[197] where the Court indicated its hostility to "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[198] The impact of this doctrinal revolution on jury selection came only two years later, when a unanimous Court rejected *Rives* in principle by declaring its intention "that the jury be a body truly representative of the community."[199] Over the next two generations, venires were opened to African-Americans and women by statute and judicial decision.[200] With the redemption of the ideal of full citizen participation in the jury box, the possibility of the revival of jury lawmaking in constitutional cases becomes ripe for reconsideration.

V. RECAPTURING THE PHILOSOPHER'S STONE

If courts from *Callender* to *Sparf and Hansen* misinterpreted the dichotomy between ordinary and constitutional cases as it applied to jury lawmaking, is there any way to address the source of their confusion? Let us begin by reexamining the dicta of Chief

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196. *Id.* at 313, 322. The Court was ruling on the question of whether the case had been properly removed from state court, but the dicta makes its views on the merits quite clear.

197. 304 U.S. 144 (1938).

198. *Id.* at 152 n.4.

199. Smith v. Texas, 311 U.S. 128, 130 (1940).

200. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1985); Taylor v. Louisiana, 419 U.S. 522 (1975); Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1994); ABRAMSON, *supra* note 8, at 115-18.

Justice Jay in *Brailsford* that set forth the standard for jury lawmaking rights:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.[201]

A state court commenting on this statement fifty years later said that it "cannot be regarded as of any authority on this point, because it is . . . inconsistent with itself."[202] In this Part, I suggest that the jury's bifurcated role in dualism has been misconstrued because courts have been unable to accurately identify which decisional hat any particular jury wears, and I then offer a proposal for a new formal distinction in jury procedure in order to clarify the nature of the claim at issue.

A. The Original Misunderstanding

Far from being inconsistent, Jay's description of jury lawmaking makes perfect sense if we understand that the Framers were placing heavy reliance on the civic virtue of jurors. The Chief Justice's position can be understood to say that in ordinary cases, people ought to follow the "reasonable jurisdiction" of the "good old rule" and stick to the positive law enunciated by the court, but in certain special constitutional cases, jurors had the right to ignore the law and take up signaling.[203] Only the wisdom and patriotism of the jurors themselves could guide them as to when it was appropriate to do one or the other, as there was no structural mechanism provided. As Justice Chase said in *Callender*, "no line can be drawn, no restriction imposed on the exercise of such power; it must rest in discretion only."[204] Not only was the establishment of such an informal

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201. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).
202. Pierce v. State, 13 N.H. 536, 564 (1843).
203. *See Brailsford*, 3 U.S. (3 Dall.) at 4.
204. United States v. Callender, 25 F. Cas. 239, 256 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.).

relationship between court and jury unusual for a political generation that emphasized the intracacies of formal constitutional design, but the constitutional jury cases described in Part III demonstrate that this unusual decision has proved woefully unsuccessful.[205]

The lack of a formal structure to separate the normal/constitutional dichotomy within the jury thoroughly confused courts as to the actual threat presented to rule of law values in special cases. As Story indicated in *Battiste*, most of the time we want the positive law enforced. When other institutions of government seek to propose constitutional reform, they usually do so after a political movement has already sent its signal, and we can therefore judge whether their proposals for change deserve support.[206] In contrast, juries act only to spark the signal itself, therefore no ex ante test is available to help courts identify when juries are acting normally or with a special constitutional authority. The mere argument of a defendant that his or hers is such a special case is hardly enough, for as a delegate to the 1853 Massachusetts Constitutional Convention said, "where there is any room for question, every man conscientiously believes a law to be unconstitutional which he dislikes."[207] Given this perpetual uncertainty surrounding the jury's constitutional position, along with the virtual certainty of the damage inflicted upon the rule of law by lawmaking juries, is it any wonder that courts have chosen to emphasize the latter concern?

B. A Proposal for Reconstruction

Since the informal system utilized by the Framers collapsed under its internal inconsistencies, a formal structure supporting jury signaling is unavoidable for a restoration of the tradition to succeed. Rules framing constitutional jury procedure would have to separate the serious revolutionaries from the career criminals seeking another defense to muddy the waters. Ideally, they would also provide the proper incentives for both prospective defendants and jurors to supply accurate constitutional signals to

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205. *See* 1 ACKERMAN, *supra* note 13, at 198; THE FEDERALIST NO. 10, *supra* note 44.

206. *See* 1 ACKERMAN, *supra* note 13, at 266-67.

207. DEBATES, *supra* note 127, at 442 (statement of Mr. Hillard).

the rest of the polity. With these constraints as background, I consider two options for future jury lawmaking.

One possibility would be to allow juries to declare their constitutional views in a special verdict appended to the actual verdict, but this system would be but a shadow of the constitutional jury the Republic once knew. By failing to give the jury's constitutional judgment real bite, considerable problems will arise for both defendants and jurors seeking to activate the signal. This is because there will be no way for a declaratory system to separate ordinary and constitutional cases. Defendants will face no legal cost if they raise constitutional arguments at trial, and jurors will have no incentive to restrain their declarations of unconstitutionality, because in both cases the decision will have no practical effect on the certainty of conviction and sentence. This malfunction on both the demand and supply sides of the signaling equation represents no advance from the informal system repudiated by the nineteenth-century cases previously canvassed.

The second and more elaborate alternative would create a formal system that leaves the possibility of jury signaling open while sharply focusing its consequences for both defendant and jury in order to separate the special political cases from the run-of-the-mill crimes. Under this approach, if a defendant wants to use the jury to transmute the case into a higher lawmaking signal, he or she will have to specifically petition the court through a "constitutional demurrer." Only some relevant link between the defendant's action and the constitutional question presented would need to be shown to allow the proceeding to commence, for the imposition of a higher standard would defeat the whole purpose of circumventing the court to appeal to the jury. A constitutional demurrer would force a defendant to stipulate to the facts and law of the case as presented by the government, thereby waiving the right of appeal on any issue except the constitutional question presented to the jury.[208] The jury would be allowed to hear virtually any type of argument and evidence, but would have to unanimously find for the defendant to prevent a conviction. This would remove the beneficial effect

208. To avoid confusion, I do not mean to suggest that the State can concoct a false fact pattern in the indictment and force defendants to concede. Rather, the litigation of factual issues would be deemed irrelevant to the proceeding, much as they are in appellate argument.

of a hung jury for a defendant.[209] The jury's verdict will bind only the defendant in that case and establish no legal precedent.

By sharply limiting the remedies available to defendants, the constitutional demurrer would enhance the clarity of the signal sent by the jury while concentrating the mind of anyone seeking to employ it without good cause. One obvious problem with funneling constitutional arguments through standard trial procedures is that the constitutional defense would be only one of many defenses proffered. With the tradition of general verdicts in criminal cases firmly established, the limitation of argument solely to the constitutional question is necessary to glean a clear signal from a jury decision. Moreover, forcing the exclusive presentation of constitutional argument when other superior defenses exist would limit its use to those truly determined to present their higher lawmaking aspirations in spite of the serious risk of conviction. I submit that requiring defendants to petition for this type of unorthodox constitutional jury procedure will be the most effective way of distinguishing ordinary cases from constitutional claims, while simultaneously creating an easy rule of recognition for supervising courts.

From the perspective of the jury, the constitutional demurrer is designed to conform to new constitutional understandings while bringing home the seriousness of the jury's duty. By transforming a hung jury from a defense advantage into a prosecutorial windfall, the size of the local jury "veto" required to suspend the operation of national laws will be increased from one lone juror to all twelve on the panel.[210] This is designed to accommodate the spirit of the Fourteenth Amendment and Reconstruction generally, which both imposed greater restraints upon the exercise of local discretion than had existed under the jury signaling system contemplated by the Framers.[211] However, neither a constitutional demurrer nor the Fourteenth Amend-

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209. Giving juries such an enhanced role corresponds broadly to arguments for a more republican orientation to public life. *See, e.g.*, David C. Williams, *Civic Republican and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

210. This proposal could also work with a less stringent supermajority requirement, but unanimity generally helps to enhance the quality of deliberation. *See* ABRAMSON, *supra* note 8, at 199-200. *But cf.* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding non-unanimous verdicts under Sixth Amendment).

211. *See supra* text accompanying note 193.

ment makes local discretion illegal, as it has been for the jury since *Sparf and Hansen*. When deliberating on the exercise of this constitutional function, however, the jury will not be able to lightly toss aside settled law without sending a criminal back into society. As the average juror is loath to act as the operator of the criminal justice system's revolving door, this constraint will discipline constitutional decisions on the jury side far more than a declaratory system ever could.

C. Special Concerns

While many questions of practical administration would undoubtedly arise if such a proposal were implemented, two merit special attention. First, on the question of how such a jury would be selected, it is my belief that while the peremptory challenge is essential to preserving a defendant's guarantee of an impartial jury in the Sixth Amendment, that would not be true in a case argued under a constitutional demurrer.[212] For one thing, when we speak of impartiality we generally refer to factual analysis or the neutral application of standing law. Once the content of the law is thrown open to debate, however, the notion of impartiality loses all meaning outside the realm of personal bias. We want citizens acting politically to have opinions and vigorously debate them on a constitutional jury. Therefore, permitting the dismissal of jurors without cause has no relevance to the goal of jury signaling. Moreover, a defendant arguing constitutionality to the jury is engaged in a profoundly public act by transforming his civil disobedience into a broader debate about fundamental principles. This tilts the normal peremptory challenge debate between the public value of jury representativeness and the defendant's interest in impartiality heavily toward the public side.

Second, there is a legitimate question of how past jury decisions would affect the future consideration of constitutional issues. Although each jury verdict would bind only the defendant in that particular case, an argument at trial to the effect that ten juries had or had not already held the statute at issue unconstitutional would clearly have an effect. Indeed, the consideration of the actions of many different juries is precisely what dualism

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212. *See* U.S. CONST. amend. VI.

demands when it seeks signals that have a breadth of support.[213] Just how many jury verdicts against the status quo would be enough to achieve "critical mass" will depend upon the dimensions of the issue under consideration, but one way or the other the popular will as expressed through the jury will eventually reach elite ears.

By reestablishing the formal jury signaling role through structural reform, we will sweep away the fog that has enshrouded interpreting courts, while keeping "a constitutional road to the decision of the people . . . marked out and kept open for certain great and extraordinary occasions."[214]

CONCLUSION

Political cases present the legal system with special legitimacy problems, but those problems cannot be swept under the rug when it comes to jury adjudication. Rather than applying a one-size-fits-all approach to nullifying juries, we need a more nuanced approach that respects the potential for constitutional change. It is not the fate of the individual drug defendant or Dr. Kevorkian that matters, but rather society's response to their challenges that will be paramount during some future period of constitutional change.

At the height of the struggle over slavery, a delegate stood in the Massachusetts Constitutional Convention to defend one of the highest callings of our citizenry:

> [When] great political questions are to be decided, then, of all times, it is the business for the jury to be felt. . . . There is no danger from these political questions, because they do not often come in contact with the judiciary, and neither the judges nor the jury are often affected. . . . But the very existence of a doubt on this question is, in my opinion, enough to make it necessary that it should be settled one way or the other.[215]

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213. *See supra* text accompanying notes 66-67. After all, even the rejection of constitutional demurrers matters when the measure of a rising political movement is taken.

214. THE FEDERALIST NO. 49, *supra* note 37.

215. DEBATES, *supra* note 127, at 444 (statement of Mr. Keyes).

That question still remains to be settled, by juries that compose a critical crucible in the alchemy of higher lawmaking.


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