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CRIMINAL LAW — JURY NULLIFICATION — FEDERAL COURT DISMISSES JUROR REFUSING TO APPLY LAW AS INSTRUCTED. — *United States v. Luisi*, 568 F. Supp. 2d 106 (D. Mass. 2008).

Recent Supreme Court decisions have emphasized the significance of originalism in contemporary Sixth Amendment jurisprudence.<sup>1</sup> For issue after issue — from evidence to verdicts to sentencing<sup>2</sup> — the Court has analyzed Founding-era history to determine the original meaning of the constitutional texts<sup>3</sup> that protect the right to criminal trial by jury.<sup>4</sup> Yet, notwithstanding its ubiquity in criminal jury law, originalism has failed to penetrate one realm that the Framers considered among the most important — jury nullification.<sup>5</sup>

Last year, in *United States v. Luisi*,<sup>6</sup> a federal district court dismissed a juror who refused to apply the law as instructed by the court. Endeavoring to justify the modern bar against nullification, the court grounded its dismissal in the nineteenth-century delegitimation of the once-accepted practice.<sup>7</sup> Although it accurately reflected the current law, the court's failure to recognize how the Framers embraced nullification as a right inherent to jury trial masked a contradiction in contemporary jurisprudence. On the one hand, the Supreme Court claims to mandate Founding-era interpretations of rights in criminal trials; on

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<sup>1</sup> See Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 185 (2005) (“Originalism, in short, is a powerful force in criminal procedure . . .”); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1516 (2006) (noting that originalism has “figured prominently” in recent Sixth Amendment cases); Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL’Y 871, 871 (2008) (“Originalism is in the game, even if it does not always prevail. Sometimes . . . it does prevail, as in [recent Sixth Amendment cases].”).

<sup>2</sup> See, e.g., *Giles v. California*, 128 S. Ct. 2678 (2008) (evidence); *Blakely v. Washington*, 542 U.S. 296 (2004) (sentencing); *Crawford v. Washington*, 541 U.S. 36 (2004) (evidence); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (sentencing); *Jones v. United States*, 526 U.S. 227 (1999) (verdicts); *United States v. Gaudin*, 515 U.S. 506 (1995) (verdicts).

<sup>3</sup> U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

<sup>4</sup> See *Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008) (“[*Crawford*] ‘turn[ed] to the historical background of the [Confrontation] Clause to understand its meaning,’ and relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation.” (second alteration in original) (citations omitted) (quoting *Crawford*, 541 U.S. at 43)); *Blakely*, 542 U.S. at 306 (noting that without the sentencing restrictions required by *Apprendi*, “the jury would not exercise the control that the Framers intended”).

<sup>5</sup> The Supreme Court has not seriously considered nullification since *Sparf v. United States*, 156 U.S. 51 (1895). See Douglas D. Koski & Hui-Yu Lee, *Jury Nullification in the United States of America: A Brief History and 21st Century Conception*, in *THE JURY TRIAL IN CRIMINAL JUSTICE* 322, 326 (Douglas D. Koski ed., 2003) (“In *Sparf and Hansen v. United States*, the Supreme Court had its first and only say in the matter [of nullification].”).

<sup>6</sup> 568 F. Supp. 2d 106 (D. Mass. 2008).

<sup>7</sup> See *id.* at 110–16. Although nullification is conventionally defined as a “jury’s knowing and deliberate rejection of the evidence or refusal to apply the law,” BLACK’S LAW DICTIONARY 875 (8th ed. 2004), the concept has expanded to include single holdout jurors who prevent conviction, see, e.g., Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 887 (1999).

the other hand, courts refuse to authorize what was then among the most consequential rights of all. The district court's descriptive and normative reasoning failed to bridge this gap, for it privileged the century and methods of change that are least persuasive in constitutional adjudication. The Supreme Court should resolve the inconsistency it has created either by relegitimizing nullification in accord with its newfound originalism or by explaining why nullification doctrine should be unaligned with its broader Sixth Amendment jurisprudence.

In 2002, a federal jury in the District of Massachusetts convicted Robert Luisi of conspiracy to possess and possession of cocaine with intent to distribute, but the First Circuit found that the judge's instructions to the jury were erroneous, vacated Luisi's conviction, and remanded his case to the district court.<sup>8</sup> In 2008, after a new trial presided over by Judge Young, Luisi's case was again sent to the jury.<sup>9</sup> Almost immediately, juror Thomas Eddlem<sup>10</sup> objected to the relevant drug laws, denying that the Constitution empowered Congress to ban drug possession.<sup>11</sup> Judge Young informed the jurors that the laws at issue were constitutional and that the jurors were not to determine questions of law, yet Eddlem maintained that the trial, charges, and jurisdiction were invalid.<sup>12</sup> Finding that Eddlem was engaging in juror nullification by refusing to apply the law as instructed, Judge Young removed him from the jury, and the reconstituted jury convicted Luisi of the charged offenses.<sup>13</sup> Luisi decided not to appeal.<sup>14</sup>

Judge Young justified his decision to dismiss Eddlem in a memorandum that dissected the history of jury nullification. According to Judge Young, the jury's right to interpret the law was "a matter of debate in the early Republic" because, as the legal profession was still in its nascent stage, judges lacked formal training enabling them to interpret laws better than jurors could; thus, there was little reason to divest juries of their right to evaluate the law.<sup>15</sup> As the law grew more complex, however, and the judiciary became professionalized in the nineteenth century, commercial interests criticized the power of volatile juries, asserting that allowing jurors to interpret laws undermined the predictable rule of law that was important to American economic

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<sup>8</sup> *United States v. Luisi*, 482 F.3d 43, 45, 51 (1st Cir. 2007).

<sup>9</sup> *Luisi*, 568 F. Supp. 2d at 108.

<sup>10</sup> For the juror's name, see Jonathan Saltzman, *Juror's Challenge Raises Legal Issue*, BOSTON GLOBE, Aug. 10, 2008, at B1. Judge Young refers to Eddlem only as "Juror No. 2."

<sup>11</sup> *Luisi*, 568 F. Supp. 2d at 108.

<sup>12</sup> *Id.* at 108-10.

<sup>13</sup> *Id.* at 108, 110.

<sup>14</sup> Owing to his vacated conviction, Luisi had already served most of his sentence. Telephone Interview with John H. LaChance, Att'y, Law Office of John H. LaChance (Aug. 22, 2008).

<sup>15</sup> *Luisi*, 568 F. Supp. 2d at 111 (citing AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 239-41 (2005)).

growth.<sup>16</sup> Judge Young noted that the judiciary, therefore influenced by these interests, fostered the view that there was “a sharp distinction between law and fact and a correspondingly clear separation between judge and jury,” and it made clear that court instructions were mandatory and that juries did not possess the right to determine the law.<sup>17</sup>

Judge Young then explained why he thought the disallowance of jury nullification should be permanent. Descriptively, he asserted that jurors and litigants ratified the delegitimation. “Juries,” he contended, “have established district courts’ authority to ‘say what the law is.’”<sup>18</sup> Moreover, litigants asking judges to strike down various laws “have established the courts — all the federal courts — as an authoritative check against the popularly elected branches” through the courts’ power to decide questions of law.<sup>19</sup> Along those lines, Judge Young claimed that at “no time since *Marbury* has the fundamental principle in Justice Chase’s declaration” against nullification “been seriously questioned.”<sup>20</sup> Normatively, he argued that nullification is incompatible with democracy and the rule of law, adding that allowing nullification would undermine the jury system, judicial independence, and the Constitution itself.<sup>21</sup> In support, he noted several modern federal precedents holding that, although they may have the power, juries have no legal or moral right to nullify.<sup>22</sup>

Although Judge Young accurately reported the fact that nineteenth-century juries lost the right to nullify<sup>23</sup> and the modern judicial antagonism toward nullification,<sup>24</sup> he did not recognize nullification’s significance during the Founding era, and he advanced the permanency of disallowing nullification on faulty descriptive and normative fronts. One problem is that he relied heavily upon a book by Professor Morton J. Horwitz discussing the antebellum *transformation* of law in-

<sup>16</sup> *Id.* at 111–13 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 4–6, 26–28, 141–43 (1977)).

<sup>17</sup> *Id.* at 113 (quoting HORWITZ, *supra* note 16, at 143) (internal quotation mark omitted).

<sup>18</sup> *Id.* at 114 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>19</sup> *Id.* at 116.

<sup>20</sup> *Id.* at 114.

<sup>21</sup> *Id.* at 111, 119–22.

<sup>22</sup> *Id.* at 120, 122 (citing *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam); *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969)).

<sup>23</sup> See generally HORWITZ, *supra* note 16, at 141–43; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 907–11 (1994); Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582, 590–613 (1939); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172–83 (1964).

<sup>24</sup> See, e.g., *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (rejecting the idea that “jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent”); see also NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES* 227 (2007) (“[S]ince the late nineteenth century, American courts have consistently held that although juries have the *power* to disregard the law . . . , they do not have the legal *right* to do so.”).

stead of analyzing the late-eighteenth century *foundations* that lie at the heart of the Sixth Amendment's original meaning.<sup>25</sup> Offering only a cursory treatment of Founding-era law, Judge Young classified the existence of a right to nullify as debatable in the late eighteenth century<sup>26</sup> and opined that John Adams's famous line in the Massachusetts Constitution that ours is "a government of laws and not of men"<sup>27</sup> supported "the impropriety of nullification."<sup>28</sup> Founding-era Americans, however, embraced nullification and viewed the jury's interpretation of law as not merely a power but also a *right*.<sup>29</sup> Indeed, Adams declared, "It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."<sup>30</sup>

The Framers considered the right to nullify essential to deter overzealous officials, check prosecutorial discretion, and enable jurors to serve as the People's voice.<sup>31</sup> For them, it was as critical as the right to vote. "Were I called upon," Thomas Jefferson wrote, "to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."<sup>32</sup> Even his rival Alexander Hamilton championed nullification in criminal cases.<sup>33</sup> Leading judges, moreover, consistently upheld the jury's right to interpret law.<sup>34</sup> When the Supreme Court, for example, sat in original jurisdiction in a civil trial, Chief Justice Jay instructed the jury: "[Y]ou have . . . a right to take upon yourselves to judge of both . . . the law as well as the fact in controversy."<sup>35</sup> Not until well into the nineteenth century did the jury lose its right to nullify.<sup>36</sup>

<sup>25</sup> See *Luisi*, 568 F. Supp. 2d at 111–13 (citing HORWITZ, *supra* note 16, nineteen times).

<sup>26</sup> *Id.* at 111–12.

<sup>27</sup> *Id.* at 120 (quoting MASS. CONST. pt. 1, art. XXX) (internal quotation marks omitted).

<sup>28</sup> *Id.*

<sup>29</sup> See AMAR, *supra* note 15, at 238, 581 n.73 (listing leading Americans who accepted the right to nullify). For the reasons why originalists analyze "intelligent and informed" Founding-era Americans and not only the Constitution's Framers, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

<sup>30</sup> John Adams, Diary (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 3, 255 (AMS Press 1971) (Charles Francis Adams ed., 1850).

<sup>31</sup> See generally AMAR, *supra* note 15, at 238–41; LARRY D. KRAMER, THE PEOPLE THEMSELVES 28–29, 157 (2004) Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1195 (1991).

<sup>32</sup> Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 283, 284 (Julian P. Boyd ed., 1958); see also Adams, *supra* note 30, at 253 ("The common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature" as they have through the legislature.).

<sup>33</sup> See CLAY S. CONRAD, JURY NULLIFICATION 50 (1998).

<sup>34</sup> See, e.g., *People v. Crosswell*, 3 Johns. Cas. 337, 366 (N.Y. Sup. Ct. 1804) (opinion of Kent, J.) (noting that in criminal cases jurors "must . . . take upon themselves the decision of the law").

<sup>35</sup> *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

<sup>36</sup> See sources cited *supra* note 23.

Judge Young's nineteenth-century history was also inaccurate, undermining his descriptive arguments against nullification. Nullification's legitimacy was disputed long after *Marbury*.<sup>37</sup> The House of Representatives actually impeached Justice Chase for, among other things, endeavoring "to wrest from the jury their indisputable right to . . . determine upon the question of the law,"<sup>38</sup> and antebellum legislatures and courts repeatedly reaffirmed juries' authority to decide questions of law.<sup>39</sup> Judges did not deny juries' right to nullify until a few key mid-nineteenth century cases,<sup>40</sup> and the Supreme Court did not rule against nullification until 1895.<sup>41</sup> Moreover, the eventual acquiescence of nineteenth-century juries, litigants, and legislatures to judges' having sole authority to decide questions of law does not establish the delegitimation's constitutionality. Allowing nineteenth-century Americans to override the Constitution's original meaning privileges the century that should be least important in constitutional adjudication,<sup>42</sup> except when a nineteenth-century amendment illuminates constitutional texts<sup>43</sup> or when nineteenth-century "higher lawmaking" effectively amends the Constitution;<sup>44</sup> the nineteenth century, after all, reflects neither original meaning nor contemporary standards. Disallowance of nullification, however, implicated neither exception, as it was accomplished not by amendment or "higher lawmaking," but by judicial fiat. Indeed, in the Horwitzian story Judge Young tells, it was the undemocratic, self-interested mercantile class, not the People, that persuaded judges to reduce jury power and disallow nullification.<sup>45</sup>

<sup>37</sup> See also Amar, *supra* note 31, at 1193 (criticizing the claim that Chief Justice Marshall's *Marbury* opinion stands for principles that oppose jury nullification).

<sup>38</sup> Articles of Impeachment, Art. 1, § 3, in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE app. at 3 (1805).

<sup>39</sup> See Howe, *supra* note 23, at 591–613, 614 n.125.

<sup>40</sup> E.g., *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545); *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 193 (1855); *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263, 285–86 (1845); *Duffy v. People*, 26 N.Y. (12 E.P. Smith) 588, 591, 597 (1863).

<sup>41</sup> See *Sparf v. United States*, 156 U.S. 51, 102 (1895) (holding that "it is the duty of juries in criminal cases to take the law from the court").

<sup>42</sup> Indeed, this century is least important in the Court's Sixth Amendment jurisprudence; the Court "almost never talks about Nineteenth-Century history in crafting and applying rules of criminal procedure." Lecture Notes, David Alan Sklansky, *The Missing Years: Nineteenth-Century History in Criminal Procedure* (June 14, 2006) (on file with the Harvard Law School Library). Thus, any nineteenth-century explanation would contradict the Court's jurisprudence.

<sup>43</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998) (arguing that the Reconstruction Amendments transformed the Bill of Rights). But see AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997) (arguing that the "first principles" to which the Constitution's criminal procedure provisions should return are from the 1790s, not the 1860s).

<sup>44</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE* 44–47 (1991) (arguing that Reconstruction introduced new substantive principles into constitutional law without using the Article V process).

<sup>45</sup> See HORWITZ, *supra* note 16, at 140–44; see also KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 425 (2d ed. 2009) ("Horwitz . . . argue[s] that judges crafted a body of common law that benefited a relatively few entrepreneurs at the ex-

This history also illustrates why Judge Young's normative arguments do not justify the delegitimation. Judge Young asserted that nullification is undemocratic because it enables jurors to disregard democratically passed laws.<sup>46</sup> Although an individual act of nullification may thwart the majority's will, nullification itself may be democratic because of the constitutional ratification process. In ratifying the Constitution and the Sixth Amendment, the People *superdemocratically* established the right to jury trial, which then encompassed the jury's right to nullify even if that right conflicted with Congress's lawmaking function. In other words, the Framers had in mind a legislative process that incorporated a veto by jurors who had a *right* to nullify laws. Nineteenth-century judges, without pursuing the Article V or another higher-lawmaking process and against the will of some state legislatures, undemocratically altered the Constitution's meaning by disallowing the right to nullify. Contra Judge Young, it was the nineteenth-century judicial delegitimation of nullification, not the late-eighteenth-century constitutional legitimation, that was undemocratic.

In light of the Supreme Court's criminal jury decisions grounded in originalism, the history of nullification reveals a contradiction in contemporary jurisprudence, which Judge Young was unable to resolve. On the one hand, the Court has mandated Founding-era interpretations of rights in criminal jury trials. On the other hand, courts refuse to permit what late-eighteenth century Americans considered among the most important of jury trial rights.<sup>47</sup> Since the original meaning of the criminal jury trial, protected by the Constitution, encompassed the right of nullification, an originalist-leaning Court should reaffirm the jury's right — not merely its power — to nullify. While this would produce significant doctrinal change — the Court held more than a century ago that nullification is not a right<sup>48</sup> — the contemporary Court, in overturning well-established precedents and statutes through its Sixth Amendment originalism,<sup>49</sup> has already demonstrated its willingness to reject *stare decisis* and repudiate criminal law doctrine that misunderstands the Constitution's original meaning.<sup>50</sup>

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pense of workers and farmers."); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 98 (1984) (noting that Horwitz charges "common law judges with class-biased rulemaking").

<sup>46</sup> *Luisi*, 568 F. Supp. 2d at 120–21.

<sup>47</sup> This right, moreover, was no "accident." Cf. *Williams v. Florida*, 399 U.S. 78, 89–90 (1970) (calling the right to a jury of twelve "a historical accident" unprotected by the Sixth Amendment), *abrogating* *Patton v. United States*, 281 U.S. 276, 288 (1930) ("[Trial by jury] means a trial by jury as understood and applied at common law, and includes all the elements as they were recognized in this country and England when the Constitution was adopted," including a jury of twelve.).

<sup>48</sup> See *Sparf v. United States*, 156 U.S. 51, 102 (1895).

<sup>49</sup> E.g., *Crawford v. Washington*, 541 U.S. 36 (2004), *abrogating* *Ohio v. Roberts*, 448 U.S. 56 (1980); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (overturning state sentencing statutes).

<sup>50</sup> See, e.g., *Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008) ("In *Crawford* we accepted the petitioner's argument that the interpretation of the Sixth Amendment right to confrontation that

Modern Supreme Court decisions have even recognized the jury's historic purpose in checking prosecutorial discretion, a principal reason behind nullification.<sup>51</sup> The Court recently opined that "there is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern."<sup>52</sup> If the Court is serious about retaining the amendment's original meaning, then the diminution of the jury's importance by denying its right to nullify deserves attention. If it does not re-legitimize nullification, the Court should at least offer a coherent rationale for why the amendment no longer encompasses that right today. Otherwise, lower courts must choose between rejecting the Court's Sixth Amendment originalism and rejecting the modern precedents against nullification.

If there is a justification against nullification, it is found not in text, history, or doctrine,<sup>53</sup> but rather in the notion of a "living Constitution," which posits that the Constitution evolves to reflect societal change.<sup>54</sup> Some evidence suggests that society has accepted nullification's delegitimation. Voters have overwhelmingly rejected ballot initiatives that would allow defendants to make nullification arguments to jurors, and state legislatures have failed to pass proposed bills that would require judges to instruct juries about their power to nullify.<sup>55</sup> The Federal Rules of Criminal Procedure, moreover, permit judges to dismiss jurors for "good cause,"<sup>56</sup> which courts interpret to include jury nullification.<sup>57</sup> Current support for nullification, though, casts doubt on whether there actually is a societal consensus against it.<sup>58</sup>

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we had previously endorsed . . . needed reconsideration because it 'stray[ed] from the original meaning of the Confrontation Clause.'" (quoting *Crawford*, 541 U.S. at 42).

<sup>51</sup> *E.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted . . . to prevent oppression . . .").

<sup>52</sup> *Jones v. United States*, 526 U.S. 227, 248 (1999).

<sup>53</sup> Neither the text nor the history supports the delegitimation. Moreover, doctrine inconsistent with the Constitution is not persuasive authority. See Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 963–67 (2008); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78–89 (2000).

<sup>54</sup> See, e.g., Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 31–32 (2003).

<sup>55</sup> See Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1343–44 & n.50 (2008).

<sup>56</sup> FED. R. CRIM. P. 23(b).

<sup>57</sup> *E.g.*, *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007) (holding that Rule 23 allows dismissal for bias, failure to follow the district court's instructions, or jury nullification).

<sup>58</sup> See, e.g., Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 434–35, 448 (1998) (discussing the recent rise of pro-nullification activity, including the flourishing of academic support for jury nullification, the growth of the Fully Informed Jury Association, and many "Jury Rights Day" state proclamations).

Furthermore, the problem with justifying delegitimation through living constitutionalism is that it contradicts the Court's originalist Sixth Amendment jurisprudence.<sup>59</sup> That jurisprudence, however, may not be as enduring as it appears in the criminal jury context,<sup>60</sup> and even the Court's self-proclaimed originalists have ratified other changes in jury law at originalism's expense. For example, among the nineteenth-century reforms introduced to curtail jury power was the civil special verdict, now enshrined in the Federal Rules of Civil Procedure.<sup>61</sup> Justices Scalia and Thomas do not dispute the rule's constitutionality,<sup>62</sup> even though Justice Scalia has invoked authority stating that, under the original meaning of civil jury law protected by the Seventh Amendment, courts could not compel civil juries to return special verdicts.<sup>63</sup> Thus, the Court's originalists have effectively ratified this reduction of Seventh Amendment jury rights notwithstanding its inconsistency with originalism.<sup>64</sup>

Yet the Court's trend in the Sixth Amendment context, where *liberty* is at stake, has been to insist upon rights as understood in the text's original meaning, not under a living Constitution. If the Court is committed to originalism in criminal jury jurisprudence, then it should address the contradiction in nullification law and do so more effectively than Judge Young did. With text and history aligned in favor of the jury's right to nullify, the Court's doctrine is misplaced.

<sup>59</sup> For an originalist's criticism of living constitutionalism, see Scalia, *supra* note 29, at 38–44.

<sup>60</sup> See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1043 (2006) (discussing the role of nonoriginalist Justices in the “alliance” creating the originalist Sixth Amendment decisions); Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda — and the Nation's*, 120 HARV. L. REV. 4, 28 n.74 (2006) (noting that *Crawford* “relied heavily on a historical understanding . . . that might in the future be less important to Justices with equally strong views about the Confrontation Clause but less of a commitment to originalism as an interpretive methodology”).

<sup>61</sup> See FED. R. CIV. P. 49(a). See generally Robert Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 483–88 (1965).

<sup>62</sup> See, e.g., *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39 n.8 (1997) (Thomas, J.) (advocating use of Rule 49(a) in patent cases); cf. *Order of Jan. 21, 1963*, 374 U.S. 865, 867–68 (1963) (statement of Black & Douglas, JJ.) (arguing that “Rule 49 should be repealed” because it is “utilized by courts to weaken the constitutional power of juries”).

<sup>63</sup> *United States v. Gaudin*, 515 U.S. 506, 513 (1995) (Scalia, J.) (citing Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 591 (1923)). Discussing special verdicts in the criminal context, Justice Scalia wrote that because judges could not require criminal special verdicts in the Founding era, they cannot require them now. The source he relied upon, however, observed that Founding-era civil juries had *at least* as much right as criminal juries to return general verdicts instead of special ones. See Morgan, *supra*, at 591.

<sup>64</sup> For criticism of Justice Scalia as only a “faint-hearted originalist,” see Randy E. Barnett, *Scalia's Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006).