The Contradictory Stance on Jury Nullification

Kenneth J Duvall
The Contradictory Stance on Jury Nullification

BY KENNETH DUVALL*

Arguments about jury nullification in both courts and academia proceed under the assumption that either proponents and opponents of nullification could decisively carry the day. But as current Supreme Court law stands, nullification is at once prohibited and protected. This Article shines a light on the uneasy, confusing compromise in the doctrine, and finds that the two ways out of the dilemma—fully embracing nullification, or rejecting it—are equally taboo to the American legal mind.

In Part I, this Article briefly explains the contested history of nullification. In Part II, it examines modern courts’ intermittent recognition of nullification. Part III then determines that nullification is, without a doubt, officially illegal, despite the raging normative controversy. Finally, Part IV grapples with the revelation that the prohibition on criminal jury control mechanisms, e.g., directed verdicts, serves only to protect the illegal act of nullification. Part V concludes be examining the ways forward for this muddled area of the law. If the Supreme Court was sincere in condemning nullification, the Court would stamp out the practice by allowing civil jury control devices in criminal proceedings; conversely, if the Court determined to honestly sanction nullification, it would justify the currently incoherent ban on criminal jury controls. However, based on my examination of the Court’s current make-up and the entrenched positions on both sides, the Court will not bring itself to either encroach on the jury or openly endorse nullification. Instead, the contradiction at the heart of this issue will continue to exist as a frozen conflict, awaiting a thaw that is unlikely to come.

Contents

INTRODUCTION 2

I. HISTORY OF NULLIFICATION 4

II. MODERN TREATMENT OF NULLIFICATION IN VARIOUS CONTEXTS 7

A. Nullification Not Recognized in Most Circumstances 7
   1. Jury Instructions 7
   2. Post-conviction 8

* Kenneth Duvall graduated from the University of Virginia School of Law and is currently a clerk to the Honorable Alok Ahuja for the Missouri Court of Appeals, Western District. All of the usual caveats that one would expect to apply are in full force: my views are not those of the Court, or even of my own Judge. Also, thank you to my lovely wife Kelly who was patient during this process in allowing me to stay late at work on occasion to work on this article.
3. Exclusion of Nullifying Jurors

B. Nullification Recognized in Limited Circumstances
   1. Inconsistent Verdicts
   2. Death Penalty Sentencing Phase

III. “POWER” VS. “RIGHT”
A. Descriptive Issue: Nullification Is an Illegal Power, Not a Legal Right
B. Normative Issue: Should Nullification Be Legal?

IV. IMPLICATIONS FROM RECOGNITION THAT NULLIFICATION IS ILLEGAL
A. A Lack of Judicial Sincerity
B. The Judiciary Protects an Illegal Power in Nullification
   1. Prohibition of Jury Control Devices: Tail Wagging the Dog?
   2. The Supreme Court’s Rationale for Banning Jury Controls: The Sixth Amendment Right to Jury in Criminal Trials

V. THE POSSIBLE FUTURES OF NULLIFICATION DOCTRINE
A. Fixing the Cognitive Dissonance
   1. Recognizing the Right to Nullify
   2. Living with the Cognitive Dissonance
   3. Recognizing the Ban on Criminal Jury Controls as Anachronistic
B. What Would the Supreme Court Likely Say upon Revisiting the Issue?
   1. Justice Scalia
   2. Justice Thomas
   3. Justice Ginsburg
   4. Justices Breyer and Kennedy

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

In Part I, this Article will briefly outline the history of nullification in Anglo-American jurisprudence, taking us up to modern times. Part II then focuses on the various manifestations of nullification in modern legal contexts, and finds that, while in most instances nullification is treated as if it did not exist, it is recognized to exist in a couple of limited contexts. Reflecting on the contemporary treatment of nullification, Part III focuses on the twin questions of whether nullification is, under Supreme Court precedent, truly legal, and whether nullification should be legal. Finally, based on the answer to the descriptive question in Part III, Part IV assesses the consequences of nullification’s current legal status, finding a startling consequence, namely, that judges in criminal cases should be allowed to control juries through devices like directed verdicts if the judiciary really means what it says when it declares that jury nullification is illegal. Conversely, if one follows the rationale for jury protection devices to their terminal end, then it appears that nullification may be a constitutional right. It is this tension that clouds nullification jurisprudence and calls out for resolution. Yet this Article settles on the forecast that this frozen conflict between pro- and anti-nullification advocates will not thaw anytime soon, leaving

---

American courts perpetually locked in a position where nullification is openly condemned and surreptitiously fostered.

I. History of Nullification

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

According to many, scholars, the majority of Founding Fathers were in agreement with Judge Vaughan. Approval of the jury’s right to nullify is found in “the writings of some of the most eminent American lawyers of the age—Jefferson, Adams, Wilson, Iredell, and Kent, to mention just a few.” Thus, it was not only anti-Federalists who sought to use the jury as a check against the government, but also well-established Federalists, including even the first Chief

---

5 McClanahan, supra note 3, at 731.
6 Id.
7 For a collection of the various views on nullification—for, against, and somewhere in-between—, see Roger Roots, The Rise and Fall of the American Jury, 8 SETON HALL CIR. REV. 1, Appx. A-C (2011).
9 Roots, supra note 7, at 14 (noting that Anti-Federalist proponents of a powerful jury included Luther Martin, Arthur Lee (“Cincinnatus”), and the Federal Farmer).
Justice of the Supreme Court, John Jay. Many modern cases refer to this distinguished history flowing from Bushell’s case through the Founding period in defending the practice of nullification. Still, others argue that, while “nullification” was alive and well at the Founding in some form, the “nullification” of this era was always tempered by the duty of juries to heed both the law and the judge; in other words, while the jury may have interpreted the law on its own, it was still under a duty to do so in a conscientious fashion.

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

---

11 Christopher C. Schwan, Comment, Right up to the Line: The Ethics of Advancing Nullification Arguments to the Jury, 29 J. Legal Prof. 293, 294 (2005) (citing Georgia v. Brailsford, 3 U.S. 1, 4 (1794) (“[Y]ou [the jury] have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.”)).
12 Dougherty, supra note 4, at 1131 n.34.
13 See Lars Noah, Civil Jury Nullification, 86 Iowa L. Rev. 1601, 1620 (2001) (“Although Eighteenth Century juries were invited to find both law and facts and not feel bound by the interpretation of the law offered by trial judges, they were admonished to apply the law as they understood it. The independence of jurors in this regard did not countenance deciding disputes in total disregard of the applicable common or other law.”); see also David A. Pepper, Nullifying History: Modern-Day Misuse of the Right to Decide the Law, 50 Case W. Res. L. Rev. 599, 609 (2000). (“the right to decide the law was neither equivalent to today’s proposed right to nullify, nor did it encompass the right to nullify. To the contrary, the right to decide the law swept narrowly, placing a clear duty on juries to follow the law as they saw it, rather than reject the law as pro-nullification scholars would have them do.”).
14 Dougherty, supra note 4, at 1132 (“T]he protection of citizens [lies] not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.”).
16 See Schwan, supra note 11, at 294.
firmly against nullification in *Sparf v. United States*. All of the federal circuits have since fallen in line, agreeing that, “[w]hile juries have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so.” As far as state courts are concerned, they are, for the most part, in accord with the federal courts. A few exceptions, like Maryland, Indiana, and Georgia tell jurors that they are to determine the law as well as the facts, though they do not expressly instruct about a right to nullify.

Despite the official judicial consensus against jury nullification, the practice continues, and courts proclaim their inability to rein in runaway juries. The common justification for this incongruous arrangement is that nullification serves a valid purpose, but to acknowledge it directly would allow it to run amok. This uneasy balance is often challenged in academia, especially by proponents of nullification who would like it to be placed back in the light and

---

20 MD. CONST. Declaration of Rights art. XXIII (“In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”); see also *Wyley v. Warden*, 372 F.2d 742 (4th Cir. 1967) (rejecting defendant’s claim that Maryland’s nullification provision is illegal under the federal constitution). *Wyley* was later overruled on the ground that any instruction that relieves the State of the burden of proving elements beyond a reasonable doubt is not harmless error, i.e., merits automatic reversal. *Jenkins v. Hutchinson*, 221 F.3d 679, 685-86 (4th Cir. 2000) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993)).
21 IND. CONST. art. I, § 19 (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”); see also *Bridgewater v. State*, 55 N.E. 737, 739 (Ind. 1899). Indiana Supreme Court found that it was not error for trial judge to refuse to instruct jury that the judge’s instructions on the law were advisory only and may be disregarded so that the jury could determine the law for itself. While Court did not say a trial judge would commit error by giving such an instruction, it at least spoke strongly against doing so.
23 *Horning v. District of Columbia*, 254 U.S. 135 (1920) (“the jury has the power to bring in a verdict in the teeth of both law and facts.”).
24 Dougherty, *supra* note 4, at 1134-35.
acknowledged as a right of the defendant, and maybe even the jurors, but the courts seem content to allow nullification doctrine to remain exactly where it is: in the twilight.

II. Modern Treatment of Nullification in Various Contexts

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

A. Nullification Not Recognized in Most Circumstances

The following examples illustrate the general rule regarding nullification’s current status in American jurisprudence: that jury nullification is invalid.

1. Jury Instructions

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

25 Id. at 1139 (Bazelon, C.J., concurring in part and dissenting in part).
27 NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES, 197 (2d ed. 2009) ("Concomitant with the refusal to instruct the jury concerning nullification, courts have further held that counsel may not argue that theory in closing
2. Post-conviction

Similarly, in the post-conviction relief context, courts cannot consider the possibility that the movants were prejudiced by the alleged failure of their counsel to prevail based on a jury’s merciful nullification. The lodestar of post-conviction jurisprudence, *Strickland v. Anderson*, so held:

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

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

---

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

3. Exclusion of Nullifying Jurors

As a final example of the general rule, courts are up-front about the illegality of nullification when it comes to whether jurors with a penchant for nullifying can be struck during voir dire: the answer is a clear yes. “[C]ourts have excluded potential nullifiers from the jury before or even during trial.”30 This general rule, though, is subject to one cabined, but important, exception, which we will reach shortly.

B. Nullification Recognized in Limited Circumstances

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

1. Inconsistent Verdicts

The first situation we will examine is when appellate courts must explain an inconsistent verdict. The leading case in the area is U.S. v. Powell.31 In Powell, the Supreme Court declared:

The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or leniency, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.32

30 Noah, supra note 13, at 1621-22 (collecting cases).
32 Id. at 64-65, 105.
Thus, there are two possibilities with an inconsistent verdict: that the jury was convinced of guilt as to both charges but was lenient as to one charge; or that the jury was convinced of innocence as to both charges but was vindictive as to one charge. Given both the impossibility of knowing which type of nullification occurred and the inability of the State to remedy a lenient nullification due to the Double Jeopardy Clause, the Court decided to simply allow the verdict, which necessarily contained a nullification of one kind or another, to stand. The Court did not base its holding simply on this rationale of indeterminacy and fairness to both parties, however.

Besides placing the defendant on a level playing field with the State such that neither can appeal the pertinent inconsistent verdict, the Court further justified letting the verdicts stand because doing so simply recognizes the historic function of the jury.33 The Court stopped short of justifying its holding simply based on the power of the jury to nullify, though, relying on both the fairness and role of the jury bases.34 As the Court stated: “The fact that the inconsistency may be the result of lenity, coupled with the Government’s inability to invoke review, suggests that inconsistent verdicts should not be reviewable.”35 The Court’s hesitation to ground its holding exclusively on the power to nullify stemmed from its continued ambivalence on the topic, for despite recognizing its historic function, it also reiterated its mantra since Sparf that “the jury has no right to exercise” the power of nullification.36

Therefore, inconsistent verdicts are not justified merely because they exemplify jury nullification. If the State could challenge the acquittal half of the inconsistent verdict equation as lenient nullification, then conceivably the Court would allow the defendant to challenge the

33 Id. at 65.
34 Some commentators have claimed that the Supreme Court, by allowing inconsistent verdicts, has effectively sanctioned the jury’s power to nullify. See, e.g., Barkow, supra note 147, at 81-82; Noah, supra note 13, at 1633 n.120; Alschuler, supra note , at 212-14; Bickel, supra note, at 651-52.
35 Id. at 66 (emphasis added).
36 Id.
conviction half of the equation, and thereby refuse to acknowledge nullification. This is, after all, what occurs in civil cases with inconsistent verdicts, and if the Double Jeopardy Clause was not a factor in criminal cases, it is possible that the Supreme Court would not find the arguments in favor of jury nullification sufficient to allow inconsistent criminal verdicts to stand. In sum, while one could, upon first glance at the case, believe that Powell is evidence of the Court’s sanction of nullification, a closer reading reveals a more ambiguous picture.

2. Death Penalty Sentencing Phase

Another example of a measured authorization of nullification is in the death penalty context, as the Supreme Court has disallowed the striking of nullifying jurors in death penalty sentencing. Although (as noted above) the Supreme Court allows lower courts to screen would-be nullifying jurors from the guilt phase, the Court has also indicated that such jurors cannot be screened from the sentencing phase. The reasoning goes that, if nullification should be recognized at all, it should be recognized at the moment when a jury can, through its mercy, preserve life. Thus, in Gregg v. Georgia, a plurality of the Court stated that a mandatory death penalty scheme would be unconstitutional in part because it would not permit “the discretionary act of jury nullification.”

37 Noah, supra note 13, at 1633 (“The civil jury has no power to dispense clemency, and verdicts in the teeth of the evidence may be set right.”) (quoting Will v. Comprehensive Acct. Corp., 776 F.2d 665, 677 (7th Cir. 1985)). See also Fed. R. Civ. P. 50(b); see also, e.g., Sauer, 1253 (citing Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967) (upholding judgment notwithstanding the verdict against Seventh Amendment challenge)).
38 Lockhart v. McCree, 476 U.S. 162, 177 (1986) (holding “that ‘death qualification’ does not violate the fair-cross-section requirement.”).
‘deserve to be sentenced to death.’”\textsuperscript{41} In another mandatory death penalty scheme case, \textit{Woodson v. North Carolina}, a Court plurality again struck down the scheme, this time noting that the statute in question had no means of guiding the jury’s “inevitable exercise of the power to determine which first-degree murders shall live and which shall die. . . . [A] mandatory scheme may well exacerbate the problem identified in \textit{Furman} by resting the penalty determination on the particular jury’s willingness to act lawlessly.”\textsuperscript{42} In this statement the Court openly granted that some juries inexorably will nullify, and that, at least in the context of life and death, this power to nullify should be standardized as much as possible by bifurcating the guilt and sentencing phases so that merciful nullifying jurors can focus their energies on the sentencing phase alone.

Taken together, these two instances—inconsistent verdicts and death penalty sentencing—appear only as outliers in the general attitude towards nullification, the former distinguished by Double Jeopardy concerns and the latter by the unique stakes involved.

\section*{III. \textit{“Power” vs. “Right”}}

So it is that, after a back-and-forth battle over the last few centuries over issue, nullification is now largely maligned in the courts, though it still holds on to semi-official status in a couple of isolated, and peculiar, corners. Perhaps more importantly, as a functional matter, it continues to be a force to be reckoned with well-beyond these rare, sanctioned situations. At this point, we must answer the question: how exactly can one describe the current status of nullification? To do so, we must parse the language of the Supreme Court, which has in fact

\textsuperscript{41} Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in judgment) (citation omitted)).

stated that nullification is an illegal act by the jury, and yet curiously capitulates to the jury’s capacity to nullify at will.

A. Descriptive Issue: Nullification Is an Illegal Power, Not a Legal Right

No matter what one’s position on the virtues and vices of nullification (positions we will examine shortly), current case law is clear under Sparf: juries are under a legal duty to follow the law, thereby rendering any act of nullification illegal. “The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them.”43 The “power” is recognized because no one can control the jury; this is power in the raw, illegal sense. As Justice Holmes clarified a quarter century after Sparf in Horning v. District of Columbia, “[t]he judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. . . . [T]he judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found . . . but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts.”44 Granted, in some contexts, power can mean the “legal right or authorization to act or not act; a person’s or organization’s ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or another.”45 However, given that Justices Harlan (in Sparf) and Holmes (in Horning) noted that the jury has the duty to follow the law as instructed by the judge,46 or, in other words,

43 Sparf, supra note 18, at 99.
44 Horning, supra note 23, at 138. Although Horning was not explicitly invoking the Hohfeldian common law distinctions of common law relationships, which included rights and powers, reference to Hohfeld shows that a right is not the same thing as a power. See Hohfeld, Fundamental Legal Conceptions II, supra note 410, at 718-20.
46 Sparf, supra note 18, at 106 (“[I]t was the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them.”) (emphasis added); Horning, supra note 23, at 138 (“The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal.”) (emphasis added).
“no right to exercise” the power of nullification,\textsuperscript{47} we know that the jury’s power to nullify is not an actual right to nullify.\textsuperscript{48} Rather, the power of the jury to nullify must mean the sheer ability to do so regardless of its legality. In this fashion, courts of last resort have the power to render decisions in the teeth of the law because of the lack of review of their decisions, but this does not necessarily give them a legal imprimatur.

\textbf{B. Normative Issue: Should Nullification Be Legal?}

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

Onto the question, then: is nullification a “[f]undamental necessity of a democratic system”\textsuperscript{49} or “a sick doctrine that has occasional good days?”\textsuperscript{50}

The following are common arguments in favor of nullification. Some contend that, if prosecutorial discretion is valid, why not jury nullification?\textsuperscript{51} Others justify nullification because it provides just the right amount of nullification.\textsuperscript{52} Along these lines, some claim that open recognition of nullification would not unleash more “bad” versions of nullification, but instead

\begin{flushright}
\textsuperscript{47} Dunn, 284 U.S. at 393.
\textsuperscript{48} As noted in the text, Justice Holmes made sure to qualify the jury’s “right” to nullify in two ways: first, by limiting the “right” with the narrow adjective “technical;” and second, by tempering even that measured phrase with the skeptical description “if it can be called so.” Horning, supra note 23, at 139.
\textsuperscript{49} United States v. Moylan (4th Cir.1969) 417 F.2d 1002, 1005.
\textsuperscript{50} People v. Dillon (1983) 34 Cal.3d 441, 493, 194 Cal.Rptr. 390, 668 P.2d 697 (Kraus, J., concurring).
\textsuperscript{52} See, e.g., Dougherty, supra note 4, at 1134 (“An equilibrium has evolved—an often marvelous balance—with the jury acting as a ‘safety valve’ for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.”).
\end{flushright}
more “good” versions because those who nullify without being told they can are ignoring the rules while those who would nullify when being told would be following the rules. Yet others find nullification to be the only means of protecting the community in some instances, or community values in other instances. Similarly, juries can counterbalance against institutional actors: legislators, judges, prosecutors, police. Of course, many would uphold jury nullification because of the claimed historical right of juries to do so, and because it seemingly follows from the Double Jeopardy Clause. In addition, juries, unlike the legislatures crafting the laws, can respond to unanticipated situations.

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

53 Dougherty, supra note 4, at 1141 (Bazelon, J., concurring in part and dissenting in part).
54 Otis B. Grant, Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification, 14 GEO. MASON U. CIV. RTS. L.J. 145, 185-86 (2004) (“Beyond optimal deterrence, however, jury nullification may be a solution to racism and discrimination in the criminal justice system. As a rational choice, jury nullification can encourage socially desirable behavior and discourage undesirable conduct by the police.”).
56 David C. Brody, Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right, 33 AM.CRI M. L.REV. 89, 92(1995); Dougherty, supra note 4, at 473 F.2d at 1138 & n.1.
57 Brody, supra note 56, at 92.
58 The Supreme Court may have suggested this in Jackson v. Virginia, 443 U.S. 307 (1979) (“[T]he factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of ‘not guilty.’ This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming.”). I am supposing that the “rule that there can be no appeal from a judgment of acquittal” refers, directly or indirectly, to the Double Jeopardy Clause.
59 Brody, supra note 56, at 92; Dougherty, supra note 4, at 1142.
60 See, e.g., Brody, supra note 56, at 92; Sparf, 156 U.S. at 101; Dougherty, supra note 4, at 1133, 154.
undermines the popular will expressed through laws.\textsuperscript{63} Nullification may also violate the defendant’s rights,\textsuperscript{64} and, from at least one point of view, results in unjust verdicts.\textsuperscript{65} Instructing on nullification might even overwhelm jurors already stressed with their heavy civic responsibility.\textsuperscript{66}

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

IV. Implications from Recognition That Nullification Is Illegal

With the normative question simmering in the background, this Article moves onto the next logical question under the current state of the law, in which nullification is illegal. What exactly is the point of leaving juries with the power to nullify if it is out-and-out illegal?

A. A Lack of Judicial Sincerity

First, and maybe foremost, this compromise offends one’s moral sense in that the judicial system should be honest in the role of nullification. If it is illegal, it should say so in no uncertain terms, or vice versa. When juries ask about nullification, courts give opaque

\textsuperscript{64} Brody, \textit{supra} note 56, at 92; Simson, \textit{supra} note 63, at 518-19
\textsuperscript{65} Brody, \textit{supra} note 56, at 92; Simson, \textit{supra} note 63, at 518-19.
\textsuperscript{66} Brody, \textit{supra} note 56, at 92; Dougherty, \textit{supra} note 4, at 116.
answers. Just as there is value in judges being sincere, i.e., “believ[ing] the reasons they give in their legal opinions,” so too is there value in ensuring that juries are held to the same standard. Perhaps it sounds naïve, but ensuring that juries are doing what they are legally bound to do does not sound like an unreasonable request. David Shapiro contends that judge should be forthright in dealing with other judicial actors because a lack of candor implies “that the listener is less capable of dealing with the truth, and thus less worth of respect, than the speaker.” This animating principle for our distaste for dishonesty plays strongly in the nullification context, as the judiciary’s failure to fully apprise juror’s of their power to nullify—while simultaneously protecting that power through sundry prohibitions on jury control devices—could easily be taken as patronizing.

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

---

67 See, e.g., U.S. v. Sepulveda 15 F.3d 1161, 1189 (C.A.1 (N.H.),1993) (“Federal trial judges are forbidden to instruct on jury nullification”).
69 David L. Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731, 736-37 (1987); see also Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L.J. 353, 401-02 (1989) (“[T]he unspoken premise for almost all of the prior calls for candor, is that deception in judging undermines the integrity of the judiciary. The almost universal condemnation of lying suggests that those who call for judicial candor have staked out the moral high ground.”); see generally Chad M. Oldfather, Defining Judicial Inactivism: Models of Adjudication andthe Duty to Decide, 94 GEO. L. J. 121, 155-60 (2005) (discussing the literature on judicial candor).
Many scholars acknowledge that there are exceptions to the general rule that judicial candor should be required.71 One of the reasons might be at play here: “a case may present a conflict between fundamental values, in which instance full candor would require a court to acknowledge that it is sacrificing one of those values for the sake of the other.”72 Facing such a dilemma, courts have often downplayed the sacrifice of one value for another because society would not be able to accept such a result.73 “[S]omething less than complete candor would be acceptable, according to [Guido] Calabresi, simply because we place a lesser premium on candor as compared to the other values at stake in the case.”74 Perhaps, then, the reason that courts tell juries that they must follow the law, which is not true at least as a functional matter, is that they are sacrificing the community’s right to dispense its own form of justice through the hallowed institution of the jury for the sake of the rule of law.

The problem with this justification for departing from a prescription of candor would be that the apparent sacrifice of the jury’s prerogative to nullify at the altar of the rule of law is not a true sacrifice, both because clever juries realize their prerogative lives on in the dark of the jury room and since the trade-off has not actually been hidden from society. Opinions such as Sparf took the historic claims of the jury’s nullification rights head-on and, rightly or wrongly, denied them. Thus, the judiciary’s hedging on both sides of the nullification equation, in saying that the rule of law is paramount and yet allowing the jury to subvert it, cannot be defended because courts are unwilling to pit the two values at stake against one another, as they the Supreme Court definitively decided the question on the side of the rule of law in Sparf.

---

71 See Oldfather, supra note 69, at 159-60.
72 Id. at 160.
73 Id. (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172-73 (1982)).
74 Oldfather, supra note 69, at 160 (quoting Calabresi, supra note 73, at 172-73.)
Another possible reason to depart from full candor might be the need to employ “absolute language to describe a legal doctrine or justification . . ., even if not completely accurate, simply because it functions to neutralize potential slippery-slope problems.”75 For instance, Calabresi posits that we might use absolutist terminology in condemning torture even though we might recognize that extreme circumstances might call for it, or that we might claim that there is an absolute prohibition on regulating religion despite the need to sometimes interfere.76 This reason, more than the previous one, helps explain the judiciary’s odd dissonance between words and actions. Dougherty embraces this rationale, reasoning that informing the jury that it cannot nullify sets a rule from which some deviation can be expected, just as in setting a speed limit.77 Because the rule of law is paramount, judges unequivocally declare that judges must do their duty even though they might recognize that extreme circumstances might call for a deviation.

The regime created under Sparf, Horning, and lower cases like Dougherty may have struck the exact balance that American judges are content with, and will be satisfied with for centuries to come. Maybe it is the case that everyone wants some nullification to occur, but only that little bit that will occur under a regime that ostensibly bars the practice while simultaneously enabling it. This compromise position is explored further in Part IV-C-2, infra.

While this slippery-slope, pro-compromise reason may help explain the judiciary’s behavior, though, it does not necessarily justify it. First, how does the judiciary know that the level of jury nullification associated by this regime is optimum, i.e., that the juries will know the extreme cases warranting deviation from the rule when they see them? The nullifying juries in such a system are, after all, breaking the law. Furthermore, one must assume that slippery-slope issues are a real problem, at least in this instance, which is not necessarily the case. If juries are

75 Oldfather, supra note 69, at 159 (citing Calabresi, supra note 73, at 173).
76 Oldfather, supra note 69, at 159 (citing Calabresi, supra note 73, at 173).
77 Dougherty, supra note 4, at 1135.
told they have the power to nullify, many assume that nullification would occur too often, and in the wrong cases. Upon empirical study, though, this “chaos theory,” has received only mixed reviews. Many earlier studies found that nullification instructions did not unleash any such chaos, as juries tended to nullify only in arguably warranted, merciful fashion, and, by and large, the social science on the issue still “shows that jurors do use information about their power to nullify in a circumscribed and careful manner.” If the judiciary actually believes that some nullification is necessary and proper, these reasons could be used to support a candid embrace of nullification, even through jury instructions, a possibility considered in Part IV-C-1, infra.

Finally, returning to the doctrinal emphasis of this Article, justifying the judiciary’s inconsistent words and actions because of slippery-slope considerations is problematic because the Supreme Court’s label of jury nullification as illegal does not contain exceptions. Of course, the entire point of compromising on candidness to avoid slippery-slope issues is to avoid creating any exceptions as a matter of law so that the inevitable exceptions down the road are rare and hopefully fully justified, but the rule in Sparf is not only a rule of law in and of itself, but one of the rules of law that allows all of the other rules of law to function as such. If the judiciary means to build in exceptions to its anti-nullifying jury instructions through its other behavior in preventing jury control mechanisms in criminal trials, then it is undercutting its own precedent. Moreover, even though most empirical studies of jury behavior have shown that jurors aware of

---

78 Irwin A. Horowitz, Jury Nullification: An Empirical Perspective, 28 N. Ill. U.L. Rev. 425, 449 (2008) (“[W]hile a considerable body of prior research [has] contradicted the Dougherty court’s chaos theory . . . recent findings support a narrow version of that theory: that nullification instructions can exacerbate a certain kind of juror bias (emotional biases) in a certain kind of case (one in which the fairness of the law is in question). But those findings also left open an important possibility—that differently worded instructions might mitigate the bias-enhancing effect of instructions informing jurors that they could nullify.”).  
80 Horowitz, supra note 78, at 450.  
81 Id. at 450.
their ability to nullify have not abused this power, some recent research has shown that “caution is warranted with respect to informing juries of their nullification powers, at least in trials where emotionally-biasing information is intrinsic to the trial.”82 These reasons correspond with the possibility of courts fully embracing the anti-nullification principle of *Sparf* in Part IV-C-3, *infra.*

**B. The Judiciary Protects an Illegal Power in Nullification**

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

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

Almost invariably, when courts state that juries do not have the right to nullify, they qualify that statement with an admission that juries have the power to do so. This hand-wringing falls on deaf ears, though, when one considers that juries have this power because judges allow them to have it. There are many possible devices by which to control the jury, and yet the courts refuse to implement them: directed verdicts for the State, JNOV’s, interrogatories with general verdicts, special verdicts, ordering new trials based on inconsistent verdicts, judicial comments on the evidence, issue preclusion, and appeals or new trial based on legal errors affecting the

---

82 Id. at 450.
verdict. The Supreme Court has always been careful to keep these options off the table, even in moments where it is most strongly condemning the act of nullification.

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

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

---

84 See, e.g., Sparf, supra note 18, at 105 (“In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside.”).
85 Lissa Griffin, Untangling Double Jeopardy in Mixed-Verdict Cases, 63 SMU LAW REV. 1033, 1044, n. 111 (2010) (“As other commentators have noted, the “only legitimate justification” for this refusal to inquire into jury deliberations “is the historic prerogative of the jury to acquit against the evidence--that is, to nullify the law.” [Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 49 (1995)].”); Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 129; Andrew D. Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253, 258 (1996) (“[P]rocedural devices that are available in most trials to correct or prevent errors--special verdicts, judgments as a matter of law, and appeals--are not available to the prosecution in criminal cases…. [T]he unavailability of these procedures flows from a desire to protect the nullification power from infringement ….”).
86 Powell, supra note 31, at 67, 477-78 (citations omitted).
As seen previously in this Article, double-jeopardy steps into the void, or is already there, as a justification for precluding the review of jury verdicts. When the defendant is acquitted, there is no reason to review the jury because nothing could come of it due to the Double Jeopardy Clause. This much is undisputed, with courts in virtually unanimous agreement.

But outside of the inconsistent verdict context and its concerns about windfall should the defendant alone be allowed to challenge, why should stand-alone verdicts that appear to result from merciful nullification be unreviewable? Perhaps one could generalize the double-jeopardy rationale from inconsistent verdict cases to all cases as follows: if the State can never review a jury’s decision-making in the event of an acquittal, defendants should never be able to review a jury’s decision-making in the event of a conviction.

Yet the lack of review of possible vindictive nullifications has not been justified on double-jeopardy grounds, and still there is no review. Granted, convictions can be reviewed, but they are not reviewed for possible nullification. “The only limit on this power [to vindictively nullify] is the due process requirement that the jury base the conviction on legally sufficient evidence. . . . [But] defendants have no protection against a jury that chooses to convict on

---


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


90 I question the windfall argument. The Double Jeopardy clause applies against the State, and not the defendant. So why does the Court feel the need to prevent the defendant from appealing a possibly illegal conviction based upon a restriction against the State?
evidence it does not actually believe meets the beyond a reasonable doubt standard, so long as---given the benefit of every doubt---another reasonable jury could have found sufficient proof.**91**

Even assuming that double-jeopardy considerations could be invoked to insulate all verdicts from review for nullification so that the entire appellate playing field is level as between the parties, such considerations cannot justify the prohibition of the other jury controls in criminal cases. Jurists cite other considerations validating the lack of criminal jury controls, though. “Many judges appear to view the jury's power to nullify as an unfortunate byproduct of the vigorous protection of other important constitutional values, not an end in itself.”92 For example, some judges merely believe that they are protecting the jury’s independent assessment of the facts.93 *Sparf* itself relies on this rationale.94

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

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

---

91 Courselle, *supra* note 87, at 212 n.37.
92 King, *supra* note 112, at 437.
93 Id. at 446, n.58.
94 Sparf, *supra* note 18, at 106 (“We are of opinion that the court below did not err in saying to the jury that they could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged; that if the defendants were not guilty of the offense charged, the duty of the jury was to return a verdict of not guilty. *No instruction was given that questioned the right of the jury to determine whether the witnesses were to be believed or not, nor whether the defendant was guilty or not guilty of the offense charged.* On the contrary, the court was careful to say that the jury were the exclusive judges of the facts, and that they were to determine—applying to the facts the principles of law announced by the court—whether the evidence established the guilt or innocence of the defendants of the charge set out in the indictment.”).
make in declaring constitutional errors to be harmless beyond a reasonable doubt.\footnote{See Neder v. U.S., 527 U.S. 1 (1999). As discussed in more depth below, Neder and other cases have applied harmless error review in such a way as to be fairly characterized as directing verdicts. Justice Scalia has repeatedly pointed this out, arguing that harmless error review in erroneous jury instruction cases is unconstitutional because it amounts to a directed verdict. However, the majority of the Court has signed off on harmless error review in such cases, though there remains tension in the precedent on this point, as some earlier cases indicate that harmless error review should not infringe on a jury’s fact-finding duties. Compare Rose v. Clark 478 U.S. 570, 578 (1986) (“harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that ‘a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict … regardless of how overwhelmingly the evidence may point in that direction.’”) with Neder (“Justice SCALIA, in his opinion concurring in part and dissenting in part, also suggests that if a failure to charge on an uncontested element of the offense may be harmless error, the next step will be to allow a directed verdict against a defendant in a criminal case contrary to Rose v. Clark,478 U.S. 570, 578 (1986). Happily, our course of constitutional adjudication has not been characterized by this “in for a penny, in for a pound” approach. We have no hesitation reaffirming Rose at the same time that we subject the narrow class of cases like the present one to harmless-error review.”).}

Nor can the prohibition on directed verdicts be based on a belief that while the criminal jury has no legitimate right to nullify the law, it somehow has an unpreventable power to do so. After all, the very purpose of the directed verdict (and other jury-control devices) is to prevent juries from exercising the power to decide the law when they have no right to do so. If the legal system wished to prevent the criminal jury from nullifying the law, it would respond the way it does in civil cases — by directing verdicts whenever the trial evidence contains no genuine issue of fact. To say that a judge may not constitutionally direct a verdict against a defendant in a criminal case means that he may not constitutionally confine the criminal jury to the role of fact-finding. The same is true, too, of other jury-control devices. By eschewing the use of jury-control devices that would cabin the criminal jury in a fact-finding role, the system reveals that the jury’s prerogative to acquit against the evidence is not only a “power,” but a power the jury exercises as of “right.”\footnote{Westen, supra note 83, at 1016-17 (footnotes omitted).}

To sum up this line of thinking, “[o]ne could argue that the absence of these devices in criminal procedure reflects the system’s unwillingness to limit the criminal trial jury to the role of fact-finding.\footnote{Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies, 72 GEO. L.J. 185, 215 (1983).} “[A]t some level, at least, nullification is implicit in the constitutional notion of trial by jury, because nothing else explains why a criminal defendant has a right to resist a directed verdict of conviction, why he has a right to insist on a general verdict... and why...
neither he nor the prosecutor has the right to challenge a verdict for factual inconsistency. If these devices are based solely upon preserving nullification, as these astute scholars agree, and nullification is illegal, as the Supreme Court says, how can we stand to let these devices remain in place?

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

In Sparf, the Court found, over a vigorous dissent on the point, that the right to nullification did not exist at the Founding. If this is the case, then, as discussed above, there would appear to be no reason to bar jury control devices. Yet we are immediately confronted with the fact that Sparf may have been wrong about the Framers’ views, at least according to many scholars on the issue. The criminal jury, at least in some colonies, did seemingly have the right to nullify at the Founding, even if that right is not exactly what modern proponents of nullification mean by the term, and even if that right has since expired.

Whether its history is right or wrong, the modern Court views nullification as illegitimate; therefore, the prohibition on these jury control devices cannot come from a right to nullify. Instead, the prohibition apparently stems directly from the right to a jury in a criminal case. “The right [to trial by jury in criminal cases] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’” Interestingly, as noted above, the Supreme Court’s protection of the power is seen even in Sparf, where the Court noted that directed verdicts and the review of acquittal verdicts

---

98 Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 SUP. CT. REV. 81, 131-32 (footnotes omitted). See also Eric L. Muller, The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts, 111 HARV. L. R. 771, 827 (1998) (noting that special verdicts are disfavored because they would “foreclose the possibility of jury leniency or drive the jurors to be more lenient than they wished”); Weinberg-Brodt, supra note 85, at 838 n.80 (collecting commentators).
99 Sparf, supra note 18, at 64-90; id. at 142-69 (Gray, J., dissenting).
100 Sullivan v. Louisiana, 508 U.S. 275, 277 (U.S.La.,1993) (citing Sparf, 156 U.S. at 105-06)
Many observers thus believe that criminal courts recoil from directed verdicts because they would preclude even the possibility of nullification. Yet upon further examination, this appeal to the Sixth Amendment is nothing more than an appeal to the right to nullification, just as all prohibitions on jury control measures boil down to protecting nullification. Whenever someone contends that “a court may not enter a directed verdict of guilty even if the court is convinced that a rational juror could not vote for acquittal in light of the evidence presented . . . [b]ecause the Sixth Amendment gives criminal defendants a right to trial by jury,” the question should arise as to why one cannot say the same thing about civil defendants and the Seventh Amendment? After all, the Seventh Amendment likewise provides for a jury: “In Suits at common law. . . the right of trial by jury shall be preserved.” This guarantee to a jury trial does not appear materially different from that contained in the Sixth Amendment, providing: “In all criminal prosecutions, the accused shall enjoy the right to . . . a trial, by an impartial jury”.

As it now stands, in civil cases, the jury’s law declaring power is merely historic. Similarly, the government can appeal in civil cases under the Seventh Amendment. The fact that the constitutional right to civil juries does not preclude directed verdicts or governmental appeals illustrates that nullification drives the criminal jury’s resistance to judicial control. “It

---

101 Sparf, supra note 18, at 105-06, 294-95.
103 Article III also provides for juries for “The Trial of all Crimes.” U.S. Const. Art. III.
104 Leipold, supra note 84, at 266.
105 Pettys, supra note 28, at 498.
106 Const. Am. VII.
107 Const. Am. VI.
109 King, supra note 112, at 447 n. 61.
110 Leipold, supra note 84, at 267.
is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors.”111 Crucially, while there is disagreement as to whether either criminal or civil juries had nullification rights at the Founding, the general consensus now appears that both the Sixth and Seventh Amendment juries were put in place to preserve nullification, at least to some extent.112 Apparently, nullification was important in the civil context to protect debtors from creditors,113 a concern animating other parts of the Constitution as well.114 Thus, the right to nullification of some sort, inherent in the Seventh Amendment, has apparently been eliminated by the Supreme Court, raising the question as to whether the Supreme Court could do (or already has in Sparf) the same with the Sixth Amendment. Merely citing to the word “jury” in the Constitution, by itself, then, cannot explain the resistance to jury controls. In other words, the text of the Constitution does not appear to mandate nullification or the prohibition on criminal jury controls, at least insofar as the treatment of criminal and civil jury controls has diverged.

Moreover, the Supreme Court itself has indicated that any criminal jury nullification right that existed at the Founding—whatever its exact form—can be rolled back the conception of the constitutional jury is not frozen as of the time of the Founding. The Court has repeatedly held that the Seventh Amendment right to a jury in civil trials does not mean the right to a prohibition

112 See, e.g., Jonathan Bressler, “Reconstruction and the Transformation of Jury Nullification,” 78 U. Chi. L. Rev. 1133, 1155 (2011) (“the constitutional right to criminal jury trial implicitly protected the jury’s right to nullify.”); King, supra note 112, at 437 (“much of the commentary on jury nullification assumes that the Constitution affirmatively protects the jury’s power, describing that power as a personal constitutional right of every juror in a criminal case, as a right guaranteed to the defendant by the Fifth and Sixth Amendments, or as one of the checks and balances on other institutions of federal government provided by Article III”); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 3 (1794); but see Noah, supra note 13, at 1627-28 (“The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the [civil] jury would reach a result that the judge either could not or would not reach.”) (citing Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 671 (1973.).
113 Wolfram, supra note 122, at 673-705.
114 U.S. CONST. XI Amend.
against directed verdicts. In *Galloway v. U.S.*, the Court rejected the appellant’s contention that the Seventh Amendment barred directed verdicts. “If the intention is to claim generally that the . . . Seventh Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.” The longer answer was that “[t]he Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791 . . . . [T]he Amendment was designed to preserve the basic institution of jury trial only in its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.”

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

Still, the Supreme Court line of cases allowing for directed verdicts in civil cases was careful not to imply that directed verdicts were allowed in criminal cases. In *Hepner v. U.S.*, the

---

117 Id. at 389 (citing several Supreme Court precedents).
118 Id. at 390-92.
Court granted that directed verdicts are allowed under the constitution, but “restrict[ed] [its] decision to civil cases.”\(^{120}\) There is something different about the Sixth Amendment jury, evidently.

[The] constitutional right to a jury trial embodies “a profound judgment about the way in which law should be enforced and justice administered. It is a structural guarantee that reflect[s] a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.\(^{121}\)

These repeated distinctions between the criminal and civil juries just do not hold up under the scrutiny, though. Perhaps one could argue that the nullification embedded in the Seventh Amendment was never as powerful a right as its sister nullification innate in the Sixth Amendment. Along this line, Kirst has argued that the civil jury’s nullification power at the Founding was already curtailed by several devices, including some that took the facts away from the jury, some that reviewed the jury’s actions, and some that merely guided the jury.\(^{122}\) According to him, even new trial grants and directed verdicts were used in colonial days.\(^{123}\) Still, Kirst also noted that the Seventh Amendment jury was meant, in part, to placate the anti-Federalists who sought to have the jury determine the facts and the law.\(^{124}\) “The nullification roots of the seventh amendment need not be totally ignored.”\(^{125}\) Thus, even if the Sixth Amendment has a stronger claim to nullification, the Supreme Court’s complete disavowal of the

\(^{123}\) Id. at 17.
\(^{124}\) Id. at 18.
\(^{125}\) Id. at 20.
Seventh Amendment’s nullification roots paves the way to do the same to the Sixth Amendment as well.

Sifting away the superficial reasons to treat criminal juries differently than civil juries, the reasons for the prohibitions on jury controls offered by everyone, including the Supreme Court, reduce to protecting the power to nullify. As such, the analysis, when fully surfaced, exposes the bans on jury control mechanisms as anachronistic as long as there is no right to nullify.

V. The Possible Futures of Nullification Doctrine

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

A. Fixing the Cognitive Dissonance

At the this point, it leaves one to wonder as to why the Court, on several occasions since Sparf, insists on reminding us that juries have the power to nullify, so much so, and in such terms, as to make one wonder, as Westen did, if this power is really a right in everything but name. In Standefer v. U.S., the Court conceded that “[t]he absence of these [jury control] procedures in criminal cases permits juries to acquit out of compassion or compromise or because of their “‘assumption of a power which they had no right to exercise, but to which they were disposed through lenity.’”126 And, as mentioned before, in the death penalty case of

---

126 447 U.S. 10, 25 (1980) (citing Dunn v. United States, 284 U.S. 390, 393 (1932), quoting Steckler v. United States, 7 F.2d 59, 60 (CA2 1925)).
Gregg v. Georgia, a plurality of the Court stated that it would be unconstitutional to use jury control devices to preclude juries from nullifying.\textsuperscript{127} The ultimate question is: what are we to do about this cognitive dissonance in which nullification is illegal but protected at the same time? There are three apparent paths to choose from.

The first, most seen in academia, is to return to the Framers’ intent and recognize the right to nullify.\textsuperscript{128} The second path is the one currently chosen by the judiciary, which is to live with the incongruity, and the third path is to fully accept that nullification is illegal, and accept the consequences. We will march through these in order.

1. Recognizing the Right to Nullify

Perhaps Justices Scalia and Thomas would overrule Sparf based on its ahistorical reasoning, at least if the Founding Era is used as the reference point.\textsuperscript{129} Justice Scalia’s statements in Carella come as close as one will see post-Sparf to acknowledging that nullification is at the heart of the existence of the criminal jury.\textsuperscript{130} This seems unlikely to happen, as courts have, repeatedly and uniformly, rejected the right to nullify for decades at this point.

But this scenario is at least imaginable. One need only look at what happened with the Confrontation Clause. For years, whether a statement passed the bar against hearsay determined whether the statement would pass constitutional muster under the Confrontation Clause, as

\textsuperscript{127} Gregg v. Georgia, 428 U.S. 153, 199 (1976); see Westen, 1016 n.56.
\textsuperscript{129} In an intriguing recent article, Jonathan Bressler argues that an original-based perspective of the right \textit{vel non} to nullify need not take the Founding Era as the definitive time period; instead, the Reconstruction Era provides another important time period in the constitutional treatment of nullification, and perhaps a more relevant period at that. See generally Bressler, supra note 112. Working from a Reconstruction Era basis in which the Fourteenth Amendment reshaped the meaning of prior Amendments, including the Sixth, nullification may well be illegal on both a state and federal level, though other interpretations are possible as well. \textit{Id.} at 1199-1201.
\textsuperscript{130} Carella, supra note 121, at 263 (Scalia, J., concurring).
demonstrated by the leading case of *Ohio v. Roberts*. Yet the Supreme Court, with Justice Scalia writing, decoupled the Confrontation Clause from hearsay jurisprudence in *Crawford v. Washington*, thereby overruling *Roberts*. Animating the decision was a desire to return the Clause to its original understanding according to the Framers. Thus, it is conceivable that the Court could treat *Sparf* as it did *Roberts*, overruling it as a departure from the Framers’ understanding of the right at issue. If a right to a criminal jury meant a right to a jury with nullification power, then that would be the end of the matter, at least for an orthodox originalist.

2. Living with the Cognitive Dissonance

More likely, though, the Court will continue with the status quo. As one commentator has put it, “[w]hen faced with the obvious illogic of legally protecting a power whose exercise has been declared ‘wrongful’ by the Supreme Court, judges explicitly have chosen to discard logic rather than the model.” Nullification is wrong, but if it still exists despite our admonitions to the contrary, we will do nothing further about it. We have already seen that textualists would have a problem arguing for nullification based on the Sixth Amendment, given use of the identical term “jury” in the Seventh Amendment and yet consensus that civil juries have no nullification right or power. (Would they go so far as to say that civil juries have the power to nullify and that jury control devices in civil case are unconstitutional?) Interestingly, originalists, too, would have an issue in attempting to reinvigorate the jury with the right to nullify.

---

131 *Ohio v. Roberts*, 448 U.S. 56.
133 Id. at 59 (“Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”).
134 Weinberg-Brodt, 838 n.80. The result is that criminal juries should be controlled just like civil juries. Retrials may not be allowed in the event of a nullifying acquittal because of Double Jeopardy, and the Court’s fairness rationale in *Dougherty* might prevent retrial of nullifying convictions as well, but what about allowing directed verdicts and special verdicts?
Even originalists, when seeking to take the Constitution back to its roots, have found it necessary to make concessions to changes in the law that have accrued since the Founding, even though they may not admit doing so. “[O]riginalism is a fundamentally flawed approach to constitutional interpretation in criminal procedure issues because originalists fail to grasp--or to admit--the degree to which legal doctrine and legal institutions have changed since the framing.”

Thomas Davies has argued that even *Crawford*, which many think of as a landmark in Justice Scalia’s long crusade to return the Constitution to its original meaning/intent, compromises the Founders’ view of the constitutional right at issue because of changes in the law over the centuries. According to Davies, “[c]ontrary to Crawford’s claims, the confrontation right was not limited to ‘testimonial hearsay’ at the time of the framing, and framing-era sources did not draw any distinction between testimonial and nontestimonial hearsay.”

Therefore, despite whatever the originalists may say about the purity of their endeavor, even “[o]riginalism is dependent upon the historical fiction that the content of constitutional rights can somehow have remained constant when the law that shaped and informed the content of those rights plainly has not.”

In other words, even for originalists, there is no going home again. The Court did not repeal all of the hearsay exceptions that judges have invented since the Framing; instead, the Court protected many of them by calling the evidence “non-testimonial,” a category the Framers did not recognize. Similarly, it seems that we are not going to undo over a century of

---

136 Id. at 465.
137 Id. at 466.
138 Id. at 467-68.
precedent and suddenly recognize the right of juries to nullify; instead, we are likely to live with it while ignoring it. Justice Jackson put this sentiment as follows in a related context:

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

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

3. Recognizing the Ban on Criminal Jury Controls as Anachronistic

Although this last path of compromise is the one most likely to be travelled by the Supreme Court for the foreseeable future, the path compelled by the logic of current precedent is to allow jury control devices in criminal cases. This path will strike almost every judge, many

---

139 The tempering of pure originalism by long-standing tradition, including stare decisis, has been seen in the work of Justice Scalia, though the other originalist Justice on the Supreme Court, Justice Thomas, refuses to compromise his originalism in this way. See Brannon P. Denning, Common Law Constitutional Interpretation: A Critique, 27 CONST. COMM. 621, 641 (2011) (reviewing David A. Strauss, The Living Constitution (2010)).

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

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

The nature of the jury has changed over time, and this incontrovertible fact may be reason enough for the Court to re-evaluate what the right to a criminal jury means nowadays. The evolution of the right to testify is a corresponding example of a sea change in the understanding of a legal issue from the Founding to present times, and a change resulting in a new reading of the Constitution. At early common law, which presumably impacted the thinking of the
Framers, interested witnesses were not competent to testify at criminal trials.\textsuperscript{141} This included even criminal defendants.\textsuperscript{142} Yet in \textit{Rock v. Arkansas}, the Court recognized that a criminal defendant has a constitutional right to testify.\textsuperscript{143} As such, the Court had found a right that the Founders could not have even imagined.\textsuperscript{144} Granted, finding a constitutional right that the Founders would have disavowed is not necessarily equivalent to not finding a right that the Founders would have affirmed, as in the former case one could at least argue that the Founders had not explicitly spoken on the issue and in the latter case one would have to disagree with the Founder’s interpretation of words positively enacted into the Constitution. Still, \textit{Rock} demonstrates the Court’s willingness to interpret constitutional rights in light of the last two-plus centuries of change to the legal background against which those rights were enacted. As noted above, such a development seems to have already occurred with the Seventh Amendment jury. If the Supreme Court has changed what the civil “jury” means,\textsuperscript{145} why not the criminal “jury?”

Therefore, it is conceivable that the Court, over the objections of its originalist members such as Justices Scalia and Thomas, would hold that the right to nullification, if it existed in the Constitution at the Founding, no longer exists, and therefore its safeguards no longer serve a legitimate purpose. There would be other difficulties in sweeping away the jury control devices. For instance, the Double Jeopardy Clause would still loom large for attempts to control the jury after verdict, like new trial and judgments notwithstanding, but these concerns can at least

\begin{flushright}
\textsuperscript{142} Id. at 148.
\textsuperscript{144} The \textit{Rock} Court found the constitutional right to testify in three Amendments: the Fifth, Sixth, and Fourteenth. I suppose that one could argue that the Fourteenth Amendment imported mid-19\textsuperscript{th} century jurisprudence into the calculus, and by this time, courts had perhaps begun allowing criminal defendants to testify in their own case. However, insofar as the Court relies on the Bill of Rights Amendments, the Court is taking a starkly non-originalist position.
\textsuperscript{145} Noah, \textit{supra} note 13, at 1629.
\end{flushright}
theoretically be addressed.\textsuperscript{146} Also, while directed verdicts are currently completely banned, special verdicts are not completely banned as directed verdicts are. In sentencing determinations hinging on a particular fact, and in treason cases, special verdicts are actually allowed.\textsuperscript{147}

B. What Would the Supreme Court Likely Say upon Revisiting the Issue?

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

That the Supreme Court may yet revisit jury’s power/right to nullify is plausible because of concerns over diminution of the role of the jury.\textsuperscript{148} We will use as our entry point in the Court’s recent jurisprudence as \textit{Jones v. U.S.}, wherein the Court was worried about jury’s diminished significance since Sixth Amendment’s enactment.\textsuperscript{149} The issue was whether certain facts must be found by a jury instead of the judge, and the Court found that the facts at issue were elements, rather than mere enhancements, of the crime, and thus must be put before the jury.\textsuperscript{150} “\textit{[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the

\textsuperscript{146} If the courts were to determine that jeopardy does not attach until after the judge loses jurisdiction over the case, rather than when the jury is sworn in, then perhaps these jury-control devices could survive the Double-Jeopardy Clause.

\textsuperscript{147} Rachel E. Barkow, 152 U. Penn. L.Rev. 33, 50 n.67 (2004) (citing United States v. Spock, 416 F.2d 165, 182 n.41 (1st Cir. 1969)).


\textsuperscript{149} Id. at 227.

\textsuperscript{150} Id. at 329.
maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”

Jones is only about the fact-finding function of the jury, which by definition does not approach the nullifying function of the jury. Still, the varying degrees of defensiveness shown on behalf of the jury might be telling in the nullification context. As often happens in the criminal context, the usual liberal-conservative lines are blurred: the opinion was written by Justice Souter, and joined by Justices Stevens, Scalia, Thomas, and Ginsburg. Of those three still on the Court, there are other data points suggesting that they all might support a right to nullification to some degree.

1. Justice Scalia

Justice Scalia’s support for a strong jury is particularly salient on the Court. He has stated that the jury right is “the spinal column of American democracy.” In addition to Carella, Justice Scalia has also sought to protect the jury in other harmless error cases. In both California v. Roy and Neder v. U.S., Justice Scalia wrote separately from the majority to state his position that the failure to instruct a jury on an element of a crime cannot be considered harmless error. In Roy, Justice Scalia was merely speaking to an issue not before

---

151 Id. at 243 n.6.
152 Rachel E. Barkow, Originalists, Politics, and Criminal Law on the Rehnquist Court, 74 GEO. WASH. L. REV. 1043, 1071 (2006). (“the conservative Justices cannot be neatly arrayed according to the attitudinal models when it comes to criminal matters.”).
153 Fairfax, supra note 51, at 2047 (“Justice Antonin Scalia . . . has been the leading voice on the Court in favor of the jury trial right”).
154 Neder, supra note 95, at 30.
155 Carella, supra note 121, at 267.
157 Neder, supra note 95, at 33 (Scalia, J., concurring in part and dissenting in part).
158 Roy, supra note 156, at 7 (Scalia, J., concurring); Neder, supra note 95, at 33 (Scalia, J., concurring in part and dissenting in part).
the Court on that occasion, drawing a line in the sand for a future case. But in Neder, the issue of erroneous jury instructions was squarely presented, giving Justice Scalia a fuller opportunity to discuss his view of the role of the jury in our system. According to Justice Scalia, allowing appellate judges to conduct harmless error review in cases where the jury did not have the opportunity to render a verdict based on a proper recitation of the law is tantamount to a directed verdict. And as Justice Scalia noted, the majority hardly disputes this comparison, instead sidestepping the charge on the ground that “our course of constitutional adjudication has not been characterized by this ‘in for a penny, in for a pound’ approach,” which apparently means that taking one element away from the jury is, at most, a partial directed verdict, and thus tolerable to the Court.

Furthermore, in his solo concurrence in Apprendi v. New Jersey and in the majority opinion in Blakely v. Washington, Justice Scalia ardently defended the jury from what he perceives as the statist encroachment of experts; in other words, he continues to defend the turf of law against the advances of equity. It was in Blakely that he somewhat famously referred to the jury as the “circuit-breaker” in the machinery of the criminal justice system. Further

159 Roy, supra note 156, at 6 (Scalia, J., concurring) (“I do not understand the opinion, however, to address the question of what constitutes the harmlessness to which this more deferential standard is applied”).
160 Neder, supra note 95, at 33 (Scalia, J., concurring in part and dissenting in part).
161 Id. at 17 n.2 (majority opinion).
162 Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (“The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”).
163 Blakely v. Washington, 542 U.S. 296, 312-13 (“Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”).
164 Apprendi, supra note 162, at 498-99 (“In Justice BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (Justice BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dissenters that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee-what it has been assumed to guarantee throughout our history-the right to have a jury determine those facts that determine the maximum sentence the law allows.”).
165 Blakely, supra note 163, at 306.
tracing this line of precedent, he joined majority in *Booker* holding that the Sixth Amendment jury trial right applies to the Sentencing Guidelines, but did not join the other majority in making the Guidelines advisory, as he would have held that the Guidelines were properly mandatory, with the caveat being that the jury should be used in cases where a fact is “legally essential to the sentence imposed”.\(^\text{166}\) Another piece of evidence as to his views comes in *Gasperini v. Center for Humanities, Inc.*, in which he wrote the dissent, arguing that federal courts should not review refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence., which was an attempt to protect civil juries from meddling.\(^\text{167}\)

This insistence by Justice Scalia on the right to a jury, especially in the harmless error cases when the evidence is overwhelming as to guilt, implies that Justice Scalia believes in the right of the jury to nullify. Such a belief would not be surprising, as Justice Scalia generally supports an understanding of constitutional rights that aligns with the understanding of the Framers.\(^\text{168}\) Then again, holding a firm line against directed verdicts in any form, whether directing the entire verdict or just one element, can be distinguished from recognizing the right to nullify—after all, the party line of the Court is that directed verdicts are illegal, but so is nullification. Still, if these skirmishes over the jury would erupt into an open confrontation over nullification, many would probably expect Justice Scalia to defend that right based on an originalist understanding, though the long-standing nature of *Sparf*, clocking in now at over a

---

166 *Booker*, 543 U.S. at 304 (Scalia, J., dissenting) (“Inexplicably, however, the opinion concludes that the manner of achieving uniform sentences was more important to Congress than actually achieving uniformity—that Congress was so attached to having judges determine ‘real conduct’ on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having juries find the facts that expose a defendant to increased prison time.”).
167 See generally *Gasperini*, supra note 119.
century, may dissuade even Justice Scalia from razing such precedent. The larger question becomes, if Justice Scalia places originalism over stare decisis in this situation, would anyone else make the leap with him?

2. Justice Thomas

Justice Thomas is, if anything, a more orthodox practitioner of originalism than Justice Scalia. Yet when it comes to the right to a jury in a criminal trial, Justice Thomas has not joined in Justice Scalia’s opinions in either Roy or Neder, putting him in the unusual position of being alongside the Court’s pragmatists. In another context, though Justice Thomas seemed more sympathetic to nullification.

In Penry v. Johnson, Justice Thomas, along with Justices Scalia and Rehnquist, appears to approve of a so-called “nullifying instruction.” The issue in that case, often termed Penry II, was whether the trial court had adequately instructed the jury regarding its ability to consider mitigating evidence. In finding that the trial court had done its duty, Justice Thomas noted that the Texas Court of Criminal Appeals had concluded that the trial court had given adequate instructions because it had given a “nullification instruction.” Thus, Justice Thomas, by adopting this characterization of the instruction and finding the instruction adequate, approved, in a limited fashion, of nullification. Still, as noted in Part II, the death penalty

169 See Karl S. Coplan, Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy, 86 Tulane L.R. 181, 213 n.89 (“Justice Scalia has described himself as a ‘faint hearted originalist’ who would allow originalist principles to yield to stare decisis.”).
170 Lawrence Rosenthal, Originalism in Practice, 87 Ind. L.J. 1183, 1203 (2012) (“Justice Thomas may more often be faithful to original expected applications than Justice Scalia”).
171 Roy, supra note 156, at 519 U.S. at 3, 5 (noting that that majority opinion is per curiam and that only Justice Ginsburg joined in Justice Scalia’s separate opinion).
172 Neder, supra note 95, at 3 (noting that Justice Thomas joined in the majority opinion, not Justice Scalia separate opinion).
173 Barkow, supra note 152, at 1068.
175 Id. at 786 (majority opinion).
176 Id. at 806 n.2 (Thomas, J., concurring in part and dissenting in part).
sentencing area may be considered *sui generis* when it comes to nullification, as the justification for considering non-legal mitigating factors and dispensing mercy, and not only justice, is at its greatest.¹⁷⁷ (Intriguingly, Justice Thomas has joined Justice Scalia in criticizing their colleagues for treating criminal procedure differently in the death penalty context.)¹⁷⁸

But further evidence of Justice Thomas’ sympathies with nullification is found in his signing onto Justice Scalia’s opinions in *Gasperini*, which granted judges more power at the expense of juries, and in *Apprendi* and *Blakely*, holding that a jury must find any fact that allows for imposition of an exceptional sentence, i.e., one beyond the standard maximum,¹⁷⁹ and voted with Justice Scalia in *Booker*.¹⁸⁰

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

### 3. Justice Ginsburg

We turn next to the other still-active member of the Court from *Jones* to join Justice Scalia, Justice Ginsburg. In *Roy* and *Neder* as well, Justice Ginsburg joined Justice Scalia, indicating that she might favor the right of a jury to acquit in the face of overwhelming evidence,

---


¹⁷⁹ Blakely, *supra* note 163, at 300-01.

¹⁸⁰ Booker, *supra* note 166, at 225.
i.e., nullify. She also joined Justices Scalia and Thomas in *Blakely*,\(^{181}\) and in the *Booker* majority holding that the Sentencing Guidelines are only advisory, though she did not vote with them on the other issue, as she helped uphold the rest of the Guidelines. Most recently, in *Cunningham v. California*,\(^{182}\) she authored the majority opinion, holding that California’s system of allowing the “the judge, not the jury, to find the facts permitting an upper term sentence” violated the Sixth Amendment.\(^{183}\) As expected, she was joined by Justices Scalia and Thomas.\(^{184}\)

Then again, she did not join Justices Thomas and Scalia in *Penry*, but given that the majority opinion did not truly confront the issue of nullification, it would be a stretch to say that Justice Ginsburg and the others joining Justice O’Connor’s majority opinion believed that they were stating a view on nullification.\(^{185}\) Furthermore, she did not protect the civil jury in *Gasperini* with Justices Scalia and Thomas, which is no surprise, given that her constitutional theory is not as dependent on original meaning or intent.\(^{186}\) Still, her treatment of the Seventh Amendment may not fairly predict her handling of the Sixth Amendment, as the Supreme Court has long distinguished the two types of juries, rightly or wrongly.

In sum, given her solidarity with Justice Scalia in the harmless error cases, Justice Ginsburg is perhaps even more likely than Justice Thomas to join with Justice Scalia in recognizing the right to nullify.

---

\(^{181}\) *Blakely*, *supra* note 163, at 297.


\(^{183}\) Id. at 293.

\(^{184}\) Id. at 225.

\(^{185}\) The majority found the instructions inadequate largely because the instructions were incompatible, such that the “nullifying instruction” was directly at odds with other instructions such that the jurors might find it impossible to follow the nullifying instruction, rendering the issue of whether the nullifying instruction was appropriate or effective moot.

4. Justices Breyer and Kennedy

Justices Breyer and Kennedy’s voting pattern indicate that they are less likely than either Justice Thomas or Justice Ginsburg, and much less likely than Justice Scalia, to favor the right to nullify. They, as Justice Thomas, voted against Scalia in Roy and Neder (and Gasperini), and Justice Kennedy, unlike Justices Breyer and Thomas, was around to cast his vote with the majority opinion in Carella rather than throw his lot in with the concurring opinion of Justice Scalia.\(^{187}\) Moreover, they both voted against Justices Scalia and Thomas in Jones\(^{188}\) (and Penry II for that matter),\(^{189}\) arguably showing less concern than the majority for a relatively lesser role for the jury.\(^{190}\) Finally, they found themselves on the opposite side of Justices Scalia, Thomas, and Ginsburg in the sentencing cases as well.\(^{191}\)

On the other hand, they did join Justices Scalia and Thomas in dissent in Smith v. Texas (Smith II) defending a trial court’s death penalty sentencing instructions that included the nullification instruction at issue in Penry II.\(^{192}\) However, Smith II was largely concerned with the preservation of the argument that the nullification instruction was an inadequate cure to the lack of consideration of mitigating circumstances, not with the propriety of nullification, rendering this case of dubious value in predicting the votes of Justices Breyer and Kennedy.

Assuming that Justices Thomas, Breyer, and Kennedy’s acceptance of harmless error in instructional error cases, and Justice Breyer and Kennedy’s relatively unsympathetic response to the jury’s potentially lessened role in cases like Jones and Apprendi, means that they are less

\(^{187}\) See previous footnotes; Carella, supra note 121, at 263 (noting that majority opinion is per curiam and that only Justices Brennan, Marshall, and Blackmun joined Justice Scalia’s separate opinion).

\(^{188}\) Jones, supra note 148, at 229.

\(^{189}\) Peny, supra note 174, at 785.

\(^{190}\) The majority in Jones likely saw the dissent as giving short shrift to the role of the jury. The dissent, though, would disagree, as it believes that the jury’s role was not “unconstitutionally diminished” because it still resolved the “gravamen of the offense.” Id. at 271 (Kennedy, J., dissenting).

\(^{191}\) Apprendi, supra note 162, at 530 U.S. at 468; Blakely, supra note 163, at 542 U.S. at 297; Booker, supra note 166, at 220; Cunningham, supra note 182, at 872.

solicitous of the right of the jury to nullify, this would leave Justices Scalia and Ginsburg in a presumptive deficit in garnering the votes he would need to recognize the right to nullify.

Giving the right to nullify the benefit of the doubt, and supposing that the tally would now be two against recognizing the right to nullify (Justices Kennedy and Breyer) and three for (Justices Scalia, Thomas, and Ginsburg), that would leave the four newer Justices on the Court left to decide the issue.

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

Unfortunately for the right to nullification, none of these four Justices looks particularly likely to go so far as to overrule *Sparf*. Justices Roberts and Alito may be considered in some ways as conservative as Justices Thomas and Scalia, but they are not viewed as pure originalists. In criminal cases, they are more likely to be conservative in the sense of pro law-and-order. For instance, the pair is more likely to find harmless error applicable than Justice Scalia. Evidence of their voting patterns is not as thorough as the other five Justices, but Justices Roberts and Alito were around to cast their votes in *Cunningham*, and somewhat surprisingly split their vote. Whereas Justice Alito joined with Justices Kennedy and Breyer,

---

193 See generally Charles W. “Rocky” Rhoes, “What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court,” 64 Rutgers L. Rev. 1, 22-29 (finding that Justices Roberts and Alito have some affinity for originalism, but also rely on other theories of adjudication; “Chief Justice Roberts possesses some sympathy for originalism, as he expressed in his confirmation hearing, [FN119] but his has not been a historically frozen search for the original understanding. Instead, he has tempered the original understanding with judicial precedent and sometimes American traditions.” (footnote omitted); “Justice Alito is attracted to originalism, as he testified during his confirmation hearing. . . . But his jurisprudence to date has not sought a historically frozen original understanding.”). For an example of Justice Alito bucking originalism, see, e.g., U.S. v. Jones, 945 S.Ct. 945, 958-62 (Alito, J., concurring in the judgment) (criticizing the majority’s originalist approach as inconsistent with precedent and unworkable); see also Orin S. Kerr, Response, “Defending Equilibrium-Adjustment,” 125 Harvard L. Rev. 84, 88 (2011). For an example of Chief Justice Roberts doing the same, see, e.g., Turner v. Rogers, 131 S. Ct. 2507, 2520-21 (2011) (Thomas, J., dissenting), in which Justice Roberts did not join the portion of the dissent privileging originalism over precedent.


195 Cunningham, supra note 182, at 273.
indicating a possible dearth of support from him for any pro-nullification faction, Chief Justice Roberts sided with Justice Ginsburg and the majority, extending the Apprendi line of cases. Still, one should not read too much into this, as it seems unlikely that the Chief Justice, who likely values the institutional credibility and durability of the Court more than any other member, would overturn the long understanding that nullification is illegal.\(^{196}\)

Meanwhile, just as Justices Roberts and Alito are not conservatives in the mold of Justice Thomas and Scalia, Justices Sotomayor and Kagan are not necessarily liberals in the mold of Justice Ginsburg, the Court’s liberal most likely to support the jury’s right to nullify. For instance, in \textit{Bullcoming v. New Mexico}, these two Justices joined in Justice Ginsburg’s majority opinion holding that the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.\(^{197}\) Yet the pair did not join the last part of the majority opinion in an apparent effort to mitigate the effects of the opinion on the State and leave the door open to a more State-friendly result in similar, but possibly distinguishable, cases.\(^{198}\) Moreover, the pair joined the other liberals on the Court in \textit{Citizens United},\(^{199}\) emphasizing the primacy of

\(^{196}\) Granted, Chief Justice Roberts has overruled precedent before, probably most famously in reaching the Citizens United decision. 130 S.Ct. 876, 913 (2010), overruling Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). \textit{Sparf}, clocking in at over a century, and with decades of precedent building up to its result, stands on a wholly different footing. Some might answer that Citizens United overruled far more than Austin, as Congress had placed special limit on corporate campaign spending since 1907. Citizens United (Stevens, J., dissenting), at 930. Even if Justice Stevens is right that the majority was turning its back on much more than two decades of history, and that regulating campaign finance had been going on for over a century, the majority could at least note that the issues in corporate speech and campaign finance have been evolving for years as a practical and a legal matter. In contrast, the issue of jury nullification remains as straightforward as ever, and overruling \textit{Sparf} would not be justified on any changes in circumstance or doctrine over time.

\(^{197}\) See \textit{Bullcoming v. New Mexico}, 131 S.Ct. 2705, 2709.

\(^{198}\) Id. at 2721-22. See also Duvall, \textit{supra} note 194, at 319-20.

precedent,\textsuperscript{200} rather than majority’s focus on an \textit{ab initio} correct result, at least from its point of view.\textsuperscript{201} It seems highly unlikely that these two Justices would seek to resurrect an originalist understanding of the jury’s right to nullify in the face of such long-standing precedent as \textit{Sparf}. Justice Kagan may have remarked that “we are all originalists” in her confirmation hearings,\textsuperscript{202} but as we have seen, even originalists like Justice Scalia have their limits, such as when precedent is over a century old.

\textbf{Conclusion}

Jurists will continue to disagree about nullification’s proper role in trials, just as they will continue to disagree over the exact role that nullification played historically. This disagreement, though, is merely academic, as nullification is undoubtedly illegal at this point in time, as juries are shirking their legally duty to follow and apply the law when they nullify. If courts, led by the Supreme Court, intend to follow through with this rule of law, then the consequences are evident, if unnerving: criminal juries should be regulated just as civil juries are regulated. The use of such jury control devices as directed verdicts and special verdicts may seem anathema to most given the hallowed place that the jury continues to hold in the United States, but given that the only possible justification for banning such control devices is to protect the power to nullify, the absence of these mechanisms has made no doctrinal sense since the Supreme Court declared nullification unlawful in \textit{Sparf}.

\textsuperscript{200} Id. at 930, 938 (Stevens, J., dissenting) (“Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law;” “The final principle of judicial process that the majority violates is the most transparent: \textit{stare decisis}.”). The dissent does eventually join battle with the majority’s originalist understandings of free speech regarding corporate entities, but only long after it has put precedent first. \textit{Id.} at 948.

\textsuperscript{201} Id. at 912 (Kennedy, J., majority opinion) (“[S]\textit{tare decisis} is a principle of policy and not a mechanical formula of adherence to the latest decision.” (citation omitted)).

\textsuperscript{202} See \textit{The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 62} (2010).
It is likely that the Supreme Court will avoid confronting this issue, though, and instead allow the uneasy balance to continue wherein juries are told to apply the law as instructed and yet are free to ignore the law because of the lack of oversight and direction. That the jury has the power, but not right, to nullify, is an illogical, insincere, and maybe even unnecessary compromise, but it has lasted for over a century now, and looks to continue into the foreseeable future. Similarly, the few instances of the recognition of nullification in our system also appear here to stay as part of the de facto settlement between the two factions. However, should the Court decide to face up to the fact that the prohibition on jury control devices under the Sixth Amendment merely serve to safeguard a banned practice, then the Court must either follow Sparf through to its inevitable conclusion and allow jury control mechanisms in criminal trials in order to purge an anachronistic practice, or overrule Sparf in recognition of nullification’s place in the Sixth Amendment so that the prohibition on jury control devices becomes justified. Either course of action—openly recognizing the jury’s right to nullify or openly recognizing the judge’s right to direct verdicts—would be a shock, at least until one realizes that the fact that both scenarios would be cause for surprise indicates our collective cognitive dissonance on the issue. This author hopes that the issue will be resolved one way or the other, but the middle path is the comfortable one, and the likely one for the foreseeable future.