

NOTE

“The Great Bulwark of . . . Political Liberties”: The Decline of Jury Power and the Rise of Slave Interests in the Early American Republic

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INTRODUCTION

It is no stretch to say that “jury” and “fact finder” have become nearly synonymous terms in the language of modern American law.¹ Yet this has the unfortunate side effect of obscuring an essential part of the jury’s institutional history—specifically, that until the end of the nineteenth century, juries were regularly called on to decide questions of law as well as fact.² Though the

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1. Black’s Law Dictionary defines “jury” as a “group of persons selected according to law and given the power to *decide questions of fact* and return a verdict in the case submitted to them.” *Jury*, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added).

2. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 67–88 (1994). For the purposes of this Note, I will reference juries as deciding questions of law rather than nullifying particular laws. This language mirrors Founding-era usage, and clearly delineates between the

decline of the jury's law-judging role no doubt owes itself to several factors, one in particular remains relatively unexamined: slavery.

More than any other issue, slavery defined divisions in the early American republic.³ Fugitive slave laws, in particular, sowed discord between slaveholders and antislavery interests.⁴ It should therefore come as no surprise that citizens of northern states began leveraging the one popular element of the judicial system they had at their disposal to complicate the enforcement of those laws: the jury.

In this Note, I intend to show that the decline in power and purview of the American criminal jury is directly correlated with the rise of slave interests in the federal government. To be clear, I do not endorse the authority of juries to act as judges of legal questions; indeed, there are extremely compelling arguments against taking such a position today.⁵ Nor do I argue that the decline of the American jury's power to consider questions of law was caused solely by the issue of slavery. Instead, I contend that a temporal correlation between the decline of the criminal jury and the rise of slave interests is a likely factor in the loss of jury power in the federal courts.

At the birth of the United States, juries were at the apex of their popularity; for proof, one need only consider the institution's unique place in the U.S. Constitution.⁶ Though the Constitution's ratification is often framed as a no-holds-barred battle between Federalists and Antifederalists, Alexander Hamilton himself recognized that both camps—"friends and adversaries of the plan of the convention"—agreed "at least in the value they set upon the trial by jury."⁷ These were not empty words on paper. After the drafting of the Constitution, Federalist James Madison acknowledged that "[t]rial by jury . . . is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."⁸

law-judging and fact-finding roles of juries. Nevertheless, the weight of modern scholarship employs the language of jury nullification to refer to the refusal of juries to apply a given law against a criminal defendant, even when facts are established beyond a reasonable doubt. *See, e.g.,* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995).

3. DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 17 (2009) ("Slavery, in part because of the U.S. Constitution's manner of dealing with it, became central to American national politics in the nineteenth century.").

4. *See* ABRAMSON, *supra* note 2, at 80.

5. *See* Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 *TEX. L. REV.* 488, 525 (1976) (arguing that "there is no reason for courts to countenance the degree of jury autonomy that would accompany official recognition of the jury's power to disregard the judge's view of the law"). I only aim to examine the loss of jury authority alongside the implementation of fugitive slave laws.

6. The jury is singled out for protection in four separate provisions. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."); *id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed. . . ."); *id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .").

7. THE FEDERALIST NO. 83, at 432 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

8. 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834).

Antifederalist Patrick Henry concurred, noting that “[t]rial by jury is the best appendage of freedom.”⁹

In this Note, I will argue that these overwhelmingly positive views of criminal juries grew out of local and state concerns about an all-powerful federal judiciary. Juries were seen as a check against federal power, and specifically against federal judges who would be unaccountable to the communities in which they would sit. Juries, empowered to decide questions of fact and law in criminal cases, would serve to protect local standards of justice.

Part I begins with an examination of the early development of the Article III Jury Trial Clause and the Sixth Amendment.¹⁰ Support for wide-ranging jury trial guarantees was nearly universal at the Founding, particularly in the criminal context where juries were responsible for answering questions of law in addition to questions of fact. For this reason, the Jury Trial Clause was one of the few rights enumerated in the Convention’s unamended Constitution. The Sixth Amendment, in turn, was a politically astute measure that served only to strengthen its Article III counterpart.

Part II considers the power of Founding-era juries separately from their historical development surveyed in the previous section. Specifically, I will draw on the scholarship of authors who argue that jury trial rights were intended to protect the rights of jury members rather than defendants, and that the power to resolve questions of law was an essential aspect of these rights. Building on this scholarship, I will demonstrate that the Founders viewed juries as a bulwark against a federal judiciary that could impose unpopular federal laws across the entire country.

Finally, Part III of this Note’s analysis considers the factors behind the decline of the jury’s authority over legal questions. In particular, I will set the partial fall of the American jury system against the rise of slave interests in the early republic. I will argue that the effectiveness of juries in blocking oppressive federal fugitive slave laws led to their constraint by the federal judiciary. As antislavery juries began applying their own standards of justice to slavery statutes, judges began acting to restrict their ability to answer questions of law. Later, after a more draconian fugitive slave law replaced its decades-old counterpart, many northern juries simply defied the judiciary and refused to convict abolitionists who sheltered and abetted fugitive slaves who had escaped to northern jurisdictions. Juries were performing their designed role as a federalist check within the national court system—ensuring that communities retained the right to mete out

9. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 324 (Jonathan Elliot ed., 2d ed. 1836).

10. Because of this Note’s focus on the right of juries to judge law as well as fact, I will not dwell extensively on civil juries (and thus will make infrequent mention of the Seventh Amendment). Unlike criminal juries, civil juries did not retain their ability to judge questions of law into the nineteenth century. See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116 (1998) (“[T]he conventional wisdom is that [British North American] juries acquired the right to determine the law as well as the facts in colonial times and that, while they lost that right in civil cases somewhat earlier, they retained it in criminal cases until well into the nineteenth century.”).

justice to their own members—but slave interests were now more concerned with implementing federal law than shielding themselves from it. The federal bench thus began a slow but pronounced rollback of the authority of juries over questions of law, attempting to ensure that fugitive slave laws would be enforced to their letter without the distracting effect of uncooperative antislavery juries. As a result, the law-judging authority of criminal juries was restricted to a purely fact-finding sphere.

I. ORIGINS OF THE AMERICAN JURY SYSTEM

The American criminal jury is a product of centuries of common law and pre-revolutionary history. Partially out of its role in resisting authority,¹¹ and partially out of adherence to democratic ideals,¹² the importance of the Founding-era jury represented an uncommon point of consensus within the federal judiciary.¹³

Few aspects of the modern American legal system can be traced back further in time than the concept of trial by jury; a full exposition of its origin would require a return to 1215 and the signing of the Magna Carta,¹⁴ or arguably even further into the past.¹⁵ For purposes of this Note, however, it is enough to acknowledge that the jury trial existed as a beloved and valued institution in colonial America well before the outbreak of the Revolutionary War.¹⁶ The first mention of a jury trial in an American governing document was made in the Massachusetts Body of Liberties of 1641, which mandated that town leaders “shall forthwith summon [sic] a Jury of twelve free men” in cases of untimely death “to inquire of the cause and manner of their death, and shall present a true verdict thereof.”¹⁷

The right to a trial by jury maintained its preeminent place in colonial America over the next century and became a particularly potent flashpoint in the years preceding the American Revolution. Indeed, in 1765 the Stamp Act Congress resolved “[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies.”¹⁸ Nine years later, the First Continental Congress declared that “the respective colonies are entitled to the common law of England,

11. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994) (“The framers’ enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution.”).

12. See *id.* at 876 (discussing Tocqueville’s observation that the jury was “one form of the sovereignty of the people”).

13. *Id.* at 871 (“At the Constitutional Convention, the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists.”).

14. John Clark, *The Social Psychology of Jury Nullification*, 24 L. & PSYCHOL. REV. 39, 40 (2000).

15. See Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 427–33 (1961) (tracing the history of the jury through a number of ancient institutions predating the Magna Carta); see also generally LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* (1999).

16. See Alschuler & Deiss, *supra* note 11, at 871 (detailing many of the reasons behind the Framers’ “enthusiastic support for the jury”).

17. THE BODY OF LIBERTIES OF 1641 ¶ 57, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 44–45 (William H. Whitmore ed., Boston, Rockwell & Churchill 1889).

18. DECLARATION OF RIGHTS AND GRIEVANCES OF THE STAMP ACT CONGRESS (Oct. 19, 1765), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 196, 197 (Bernard Schwartz ed., 1971).

and more especially to the great and inestimable privilege of being tried by their peers of the vicinage. . . .”¹⁹ Juries consistently made colonial administration more difficult for British authorities; Crown-appointed Governor Francis Bernard once complained that a “Custom house officer ha[d] no chance with a jury” in Massachusetts.²⁰ The capstone of these colonial jury grievances can be found in the Declaration of Independence, wherein Thomas Jefferson accused King George III of “depriving [the North American colonies] in many cases, of the benefits of Trial by Jury.”²¹

Following separation from Great Britain, state governments enshrined the jury system in their state constitutions. Pennsylvania called for “impartial jur[ies] of the country” in all criminal cases, “without the unanimous consent of which jury [an accused] cannot be found guilty.”²² New York ensured “that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever.”²³ Drafted by John Adams,²⁴ the Massachusetts Constitution provided that “the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, . . . without trial by jury.”²⁵ These three states were not anomalies; in fact, the right to trial by jury was probably the only right guaranteed in each of the first thirteen states’ constitutions.²⁶

It is therefore unsurprising that a provision protecting the right to a jury trial would be included in the Convention’s draft of the U.S. Constitution. The first reference to juries appears in a note from John Rutledge contained in the files of the Committee on Detail.²⁷ In a draft of what eventually became the Article III Jury Trial Clause, Rutledge provided that “Trials for Criml. Offences be in the State where the Offe was comd—by Jury . . . [.]”²⁸ The full Convention later amended this language to read, in part, that “[t]he Trial of all Crimes . . . shall be

The source of this particular complaint was the Stamp Act’s reliance on admiralty courts for enforcement, which denied colonists access to a jury. *See* Pope, *supra* note 15, at 445.

19. DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, at 1, 3 (Charles C. Tansill ed., 1927).

20. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 777 (1994) (quoting *Notes on Erving v. Cradock*, in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 553, 557 (1865)).

21. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

22. PA. CONST. art. IX.

23. N.Y. CONST. art. XLI.

24. *See* S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 TEMP. L. REV. 883, 884 (1997).

25. MASS. CONST. art. XII.

26. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960).

27. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137–44 (Max Farrand ed., Yale Univ. Press 1911).

28. *Id.* In its report to the whole Convention, the Committee on Detail’s draft read that “[t]he trial of all criminal offenses (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury.” *Id.* at 187.

by jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . .”²⁹

Despite the jury trial guarantee representing one of the only rights explicitly provided for by the unamended Constitution, fears abounded that it did not do enough to protect the institution that Alexander Hamilton would later refer to as “the very palladium of free government.”³⁰ In September 1787, a North Carolina delegate voiced his concern over the absence of a civil jury trial guarantee.³¹ Other delegates echoed these worries, with Elbridge Gerry in particular opining that juries would be essential to guard against “corrupt judges.”³²

Such complaints about the Constitution’s perceived shortcomings in protecting juries became one of the Antifederalists’ main points of contention during the ratification debates. In Virginia, George Mason used the absence of a civil jury provision or vicinage requirement to reinforce his arguments about an all-powerful federal judiciary. Without firmer protection for juries, he warned, disputes would not be resolved by “men in whom the community can place confidence” but rather “decided by federal judges.”³³ The Federal Farmer emphasized that juries were of supreme importance, insofar as the “common people should have a part and share of influence, in the judicial as well as in the legislative department.”³⁴ In another letter, he wrote that “by holding the jury’s right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul [sic] in the judicial department.”³⁵ Another Antifederalist pamphleteer argued that “[j]udges, unincumberd [sic] by juries, have been ever found much better friends to government than to the people.”³⁶ Such arguments dovetailed well with other Antifederalist contentions, which principally focused on the new federal government’s increased power relative to states.

The Federalists responded to these critiques forcefully. Though published after the Constitution had effectively been ratified, Alexander Hamilton devoted his longest essay in *The Federalist* to express his admiration for juries and to argue that criminal and civil juries were distinct.³⁷ In acknowledging that he could not “readily discern the inseparable connexion [sic] between the existence of liberty,

29. U.S. CONST. art. III, § 2, cl. 3.

30. THE FEDERALIST NO. 83, *supra* note 7, at 432–33.

31. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 587 (“Mr. Williamson, observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.”).

32. Daniel D. Blinka, “*This Germ of Rottedness*”: *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135, 150 (2003) (citing 2 THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 187 (Max Farrand ed., Yale University Press 1966) (1911)).

33. THE VIRGINIA CONVENTION (June 18, 1788), *reprinted in* 3 THE PAPERS OF GEORGE MASON 1725–1792, at 1099, 1104 (Robert A. Rutland ed., 1970).

34. FEDERAL FARMER IV (Oct. 12, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 214, 249 (Herbert J. Storing ed., 1981).

35. FEDERAL FARMER XV (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 34, at 214, 320.

36. AN OLD WHIG VIII (Feb. 6, 1788), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 34, at 17, 49.

37. See THE FEDERALIST NO. 83, *supra* note 7.

and the trial by jury, in civil cases,” Hamilton attempted to point out flaws in Antifederalist arguments that sought to tie the lack of a civil jury provision to tyranny.³⁸ He did, however, draw a connection between criminal juries and their prerogative to resist unjust laws; indeed, he noted that these juries would be just as valuable “as a barrier to the tyranny of popular magistrates” as they were “as a defence [sic] against the oppressions of an hereditary monarch. . . .”³⁹

Upon ratification, Madison moved quickly to compile a series of amendments to the Constitution that would eventually become the Bill of Rights. Though he had received over two hundred amendments from state ratifying conventions,⁴⁰ Madison narrowed this list significantly, and Congress eventually sent twelve proposed amendments to the various state legislatures for ratification.⁴¹ The eighth and ninth of these—eventually the Sixth and Seventh Amendments—directly strengthened the role of petit juries⁴² in the judicial system.

The Sixth Amendment, in final form, required in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”⁴³ This provision included a vicinage requirement absent from the Article III jury clause, further localizing jury pools to ensure a community role in the judicial system.⁴⁴ The Seventh Amendment preserved the right of trial by jury in civil cases “where the value in controversy shall exceed twenty dollars. . . .”⁴⁵ Taken together, the Article III Jury Trial Clause and the Sixth Amendment demonstrate an intense attachment to criminal juries that filtered across Federalist and Antifederalist lines.

The next Part of this Note explains why this attachment was so common. Americans across factional boundaries viewed juries as a republican check on the untested (and potentially tyrannical) power of the federal judiciary. These local

38. *Id.* at 433.

39. *Id.* Hamilton’s praise for juries is particularly striking when compared with similar praise from his soon-to-be archrival, Thomas Jefferson. In a letter to a member of the French court while serving as ambassador, the Virginian opined that “[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making them.” LETTER FROM THOMAS JEFFERSON TO THE ABBÉ ARNOUX (July 19, 1789), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr., eds., 1958).

40. See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, at xi (Helen E. Veit et al. eds., 1991).

41. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 459 (2010).

42. A petit jury is “[a] jury (usu[ally] consisting of 6 or 12 persons) summoned and empaneled in the trial of a specific case.” *Jury*, BLACK’S LAW DICTIONARY (10th ed. 2014).

43. U.S. CONST. amend. VI. Though not a focus of this Note, the Seventh Amendment went on to address Anti-Federalist concerns about civil juries. See *id.* amend. VII.

44. See *id.* amend. VI (providing for “an impartial jury of the State and district wherein the crime shall have been committed”) (emphasis added).

45. *Id.* amend. VII. Though civil juries are not the topic of this Note, their protection in the Bill of Rights further evinces their importance to Framers.

juries would be popular institutions, established to protect the ability of average citizens in a given community to be their own judges of law.

II. JURIES AS CITIZEN-JUDGES OF FEDERAL LAW

Perhaps the most common modern explanation of the various jury trial provisions located throughout the Constitution is that jury trial rights were intended to guarantee the individual right of an accused to a trial by a jury of his or her peers. Much of the Supreme Court's own jurisprudence supports such a reading, presenting the jury as a means of protecting an accused from prosecutorial oppression.⁴⁶ Yet this interpretation alone is misleading, especially given the political and legal context in which the jury trial provisions were written. In particular, juries were viewed as having two key roles in Founding-era America: to check the power of the federal judiciary, and to answer questions of federal law.

A. JURIES AS A RESTRAINT ON THE JUDICIARY

To understand the intense Antifederalist focus on the Constitution's perceived lack of protection for juries, it is important to consider the novelty and ambiguity surrounding the establishment of the federal judiciary as a whole. Article III—by far the shortest and least concrete portion of the Constitution—left the structure of nearly the entire federal judiciary up to Congress,⁴⁷ and there was no precedent under the Articles of Confederation upon which it could be based.⁴⁸ The Constitution's third branch of government was thus something new and unsettling for many Antifederalists. This discomfort was not altogether unfounded, inasmuch as the judiciary had not been a traditional ally of liberty-minded Americans. Indeed, “[i]n ten of the thirteen colonies, the sitting chief justice or his equivalent ultimately chose George III over George Washington” in the midst of the Revolutionary War.⁴⁹

Juries were viewed as a means to restrict the federal judiciary's ability to tread on the rights of citizens in their respective localities. Commenting on the Constitution in 1833, Justice Joseph Story identified juries as the “great bulwark of . . . civil and political liberties.”⁵⁰ To Justice Story, “[t]he great object of a trial

46. *See, e.g.*, *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen. . . .”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”).

47. The only judicial office expressly provided for in the Constitution is that of Chief Justice, and even this position is left undefined in scope. *See* U.S. CONST. art. III.

48. Admittedly, the Articles did isolate certain limited jurisdictions for national judicial oversight; Congress could create courts “for the trial of piracies and felonies committed on the high seas” and “for receiving and determining finally appeals in all cases of captures,” for example. *See* ARTICLES OF CONFEDERATION of 1781, art. XI. These limited provisions were no basis for a full-fledged national judiciary, however.

49. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 207 (2005).

50. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* 3: §§ 1773–1775, *reprinted in* 4 *THE FOUNDERS' CONSTITUTION* 406, 406–07 (Phillip B. Kurland & Ralph Lerner eds., 1987).

by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.”⁵¹ While juries were no doubt viewed as an invaluable component of protecting the rights of defendants, their primary purpose was political: to use local participation in judicial proceedings to limit government overreach.⁵² Importantly, this purpose does not entirely discount the role of juries in safeguarding individual rights; after all, an accused individual would presumably benefit from the effects of a local pool of men to judge him. Yet at the heart of the jury trial guarantees was the goal of allowing community members to participate in the judicial process at the local level.⁵³

Juries were thus local institutions that would constrain the new national government while simultaneously ensuring fair trials for defendants. Possibly for this reason, the Jury Trial Clause is written in mandatory terms that seem to allow a defendant no room for determining the mode of trial.⁵⁴ One leading scholar of Antifederalist thought has noted that the question of jury trial guarantees “was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government.”⁵⁵ Put simply, jury trial rights were not to be exercised by individuals; they were to be exercised by communities as a form of popular participation in the judiciary.

Yet such popular participation would be meaningless if juries lacked the ability to halt perceived judicial overreach. As such, the American jury system came to rest upon the right of juries to decide questions of law in criminal matters.

51. *Id.* § 1774, at 407.

52. Other scholars have echoed this thinking, arguing that “the key role of the jury was to protect ordinary individuals against government overreaching.” *See, e.g.,* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1183 (1991).

53. *See id.* at 1186 (“[T]he jury would be composed of Citizens from the same community and its actions were expected to be informed by community values.”).

54. The Supreme Court has since read two exceptions into the Jury Trial Clause’s sweeping language. First, it has held that defendants can waive their right to a jury trial and proceed instead with a bench trial or with a guilty plea. *See Singer v. United States*, 380 U.S. 24, 26 (1965) (noting that bench trials “were clear departures from the common law”); *Patton v. United States*, 281 U.S. 276, 298 (1930) (“[W]e conclude that [the Jury Trial Clause] is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election.”). Second, it has found a “petty offense” exception to the jury trial guarantee, reasoning that “crime” at the time of the Founding had two meanings and that the Jury Trial Clause only guaranteed juries to those on trial for felonies. *See Schick v. United States*, 195 U.S. 65, 70 (1904) (“[I]t is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.”). Subsequent cases have confronted the difficult task of drawing a line between petty and serious offenses. *See, e.g., Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality opinion) (holding that crimes punishable by more than six months imprisonment are serious enough to warrant a jury trial).

55. HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19 (1981). Other scholars have since echoed Storing’s assessment, arguing that the Constitution’s jury trial guarantees were “meant to be a right of We the People to administer justice, not . . . a right of defendants to waive.” Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 *GEO. L.J.* 183, 196–97 (2005).

Although this prerogative certainly had its English antecedents,⁵⁶ the ability of juries to consider legal matters grew into a distinctly American judicial feature.⁵⁷

B. JURIES AS JUDGES OF QUESTIONS OF LAW

Though the purview of criminal juries is not explicitly defined at any point in the Constitution, several provisions effectively guarantee the ability of juries to consider questions of law. For example, the right of a jury to issue general verdicts has routinely been afforded constitutional protection;⁵⁸ although such verdicts combine questions of law and fact by their nature, a jury's right to issue them has never fallen seriously into question. Beyond this verdict authority, courts are unable to direct a jury to convict a defendant no matter how strong the evidence against her.⁵⁹ Even in the face of overwhelming factual evidence to the contrary, criminal juries are the only authority that can convict a criminal defendant, absent a waiver of that right.

Support for the notion that juries were viewed as law-judges as well as fact finders during the Founding era is not limited to the text of the Constitution itself. John Adams considered it "not only [a juror's] right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho[ugh] in Direct opposition to the Direction of the Court."⁶⁰ Chief Justice John Jay, presiding over the Supreme Court's first and only jury trial, noted that the jury maintained "a right . . . to determine the law as well as the fact in controversy."⁶¹ Jay was hardly alone on the Court in this opinion. Justice William Paterson, a former Governor of New Jersey and integral player at the Constitutional Convention, noted in a charge to a jury while riding circuit in Pennsylvania that "it frequently becomes necessary for juries to decide upon the law as well as the facts."⁶² Justice James Iredell observed that "though the jury will generally respect the

56. In his 1649 treason trial, John Lilburne became the first known person to argue in court that petit juries had the right to consider questions of law. *Rex v. Lilburne* [1816] 4 Howell's St. Trials 1269, 1379–81 (1649), *quoted by* THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE* 153 (1985).

57. *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES*, at xiv (Patrick T. Conley & John P. Kaminski eds., 1992) ("The American concept of trial by jury may well have gone beyond the English right because it also pertained to . . . the citizen as juror, for in the period when juries decided both law and fact, the jury itself served as the guardian of the people against unjust or unconstitutional laws. . ."). The editors go on to identify trial by jury as "the preeminent English right that Americans sought to preserve." *Id.*

58. *See, e.g.*, *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) ("The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.").

59. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977) ("[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." (citation omitted)).

60. John Adams, *Notes on the Right of Juries* (Feb. 12, 1771), *reprinted in* 1 *LEGAL PAPERS OF JOHN ADAMS* 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

61. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). The case has become well known for its "provocative language regarding the power of juries to decide the law as well as the facts" of a case. Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 *YALE L.J.* 208, 210 (2013).

62. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 307 (C.C.D. Pa. 1795).

sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.”⁶³

Under each Justice’s framework, a jury was free to consider the meaning of a law alongside a judge’s interpretation of it. At the opposite end of the spectrum, Justice Samuel Chase was impeached for (among other foibles) “endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law.”⁶⁴ Even the First Edition of Webster’s Dictionary defined a petit jury as “consisting usually of twelve men, [to] attend courts to try matters of fact in civil causes, and to decide *both the law and the fact in criminal prosecutions*.”⁶⁵ Whether juries were meant to consider questions of law was therefore far from a matter of debate. Indeed, “scholars almost unanimously agree that when the Constitution and Sixth Amendment were ratified in the late eighteenth century, the jury was understood to have the right, not merely the power, to decide questions of law. . . .”⁶⁶

This authority granted to Founding-era juries afforded them the ability to shape the contours of criminal law for their peers.⁶⁷ An essential justification for this power was the expectation that juries would leverage and apply community values in judging an accused individual.⁶⁸ Judging a “question of law” could involve either resolving ambiguities in a given statute or determining that a law was unconstitutional and therefore null and void; in either case, they determined legal questions that could restrict democratic authority. Juries were therefore an integral part of democratizing the most unrepresentative branch of government. In a country as expansive as the new United States, maintaining local standards and customs was viewed as an important priority alongside a national government. Juries, with all the popularity they had inherited from years of colonial resistance to British judges, were a means to that end.

63. *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19, 33 (1795).

64. COMM. APPOINTED TO PREPARE ARTICLES OF IMPEACHMENT, 8TH CONG., REPORTED ARTICLES OF IMPEACHMENT (1804), reprinted in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE 9 (Samuel Butler & George Keatinge eds., Baltimore 1805). Presiding over a trial for seditious libel, Justice Chase allegedly interrupted defense counsel’s attempt to argue that the Sedition Act was unconstitutional during his closing statement to the jury. See *United States v. Callender*, 25 F. Cas. 239, 253 (C.C.D. Va. 1800) (No. 14,709) (“I am ready to explain my reasons for concluding that the petit jury have not a right to decide on the constitutionality of a law, and that such a power would be extremely dangerous.”). An ardent Federalist, Justice Chase’s actions were likely at least somewhat political in nature; he had no reason to like or respect the Republican scandalmonger James Callender, who was on trial for publishing several harsh criticisms of President Adams. See Robert Aitken & Marilyn Aitken, *The 1798 Sedition Act: President’s Party Prosecutes Press*, 33 LITIGATION 53, 53–54 (2007). Given the Sedition Act’s doubtful constitutionality, see *N.Y. Times Co. v. Sullivan v. Callender*, 376 U.S. 254, 276 (1964), Justice Chase’s conduct is not a promising early endorsement of limiting juries’ law-judging authority.

65. *Jury*, 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (emphasis added).

66. Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1139 (2011).

67. See Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 838 (1976) (“[P]opular participation in ‘making law’ would be preserved so long as the people were not excluded from the judiciary branch. . . .”).

68. See Amar, *supra* note 52, at 1186.

This understanding showed no signs of immediately abating after the Founding. In fact, juries retained their preeminent place in federal and state judicial systems for at least several more decades. In 1812, Judge Van Ness observed that a jury was “entitled to judge both . . . the law and the fact” in a debt collection action surrounding a sunken schooner because it was a criminal action “in its nature and essence, though not in its form.”⁶⁹ In an 1815 treason case, Justice Duval laid out his opinion of the law before noting that “[t]he jury are not bound to conform to this opinion, because they have a right in all criminal cases to decide on the law and the facts.”⁷⁰ Such treason cases in general provide powerful support for the criminal jury’s right to decide questions of law, insofar as the jury acted as a “safety net for political dissidents.”⁷¹

In 1817 Chief Justice John Marshall presided over a piracy case, *United States v. Hutchings*, while riding circuit in his home state of Virginia.⁷² Despite his own strong feelings on the prerogatives of the federal judiciary, the Chief Justice made no effort to contradict the defense attorney’s argument “that the jury in a capital case were judges, as well of the law as the fact.”⁷³ Indeed, he included the attorney’s statement in his opinion and even went on to note that a disagreement between two other judges in their interpretation of the law in question rendered any single interpretation “doubtful.”⁷⁴ As late as 1830, Justice Baldwin informed a jury without prompting that “you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court. . . .”⁷⁵

Yet around this same time, the consensus over the authority of juries to serve as judges of law began to fragment. Not even two years after his 1830 endorsement of a jury’s duty to consider questions of law, Justice Baldwin himself would expressly disclaim this right.⁷⁶ The rapidity of this change necessitates an inquiry into the forces at play in the American judicial system in the 1830s. And although no single factor is likely responsible on its own for the rapid constriction in the purview of juries, slavery is uniquely situated to explain the timing and focus of this early judicial limitation of juries. Other pressures were simultaneously mobilizing against juries. As the legal field became more professionalized, the notion of citizen judges of law was likely far less appealing to the average judge or lawyer.⁷⁷ Moreover, the desirability of certainty and uniformity in the practice of law inveighed against allowing individual juries to interpret law on their own.⁷⁸

69. *United States v. Poillon*, 27 F. Cas. 608, 611 (D.C.N.Y. 1812) (No. 16,081).

70. *United States v. Hodges*, 26 F. Cas. 332, 334 (C.C.D. Md. 1815) (No. 15,374).

71. Nathan S. Chapman, *The Jury’s Constitutional Judgment*, 67 ALA. L. REV. 189, 222 (2015).

72. 26 F. Cas. 440 (C.C.D. Va. 1817) (No. 15,429).

73. *Id.* at 442.

74. *Id.*

75. *United States v. Wilson*, 28 F. Cas. 699, 708 (C.C.E.D. Pa. 1830) (No. 16,730).

76. *United States v. Shive*, 27 F. Cas. 1065, 1067 (C.C.E.D. Pa. 1832) (No. 16,278) (Baldwin, J.) (noting that jurors did not “have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow citizens or for the court”).

77. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 405.

78. See Alschuler & Deiss, *supra* note 11, at 916.

Yet timing alone is enough to warrant particular examination of the effect of slavery on the power and authority of juries. Indeed, although juries did not finally lose their right to consider questions of law until the end of the nineteenth century,⁷⁹ one particular category of cases saw this right restricted far sooner. This category—fugitive slave cases—implicated a series of federal laws that northern juries had no interest in carrying into effect. The next Part of this Note considers the intersection between these laws and the decline of the original understanding of the criminal jury’s authority.

III. SLAVERY AND THE DECLINE OF THE AMERICAN JURY

Like the jury system, slavery received a great deal of attention and even greater protection throughout the drafting and ratification of the Constitution.⁸⁰ Thus, it is unsurprising, if underexamined, that the two institutions would press against each other in the formative decades of the American republic. This conflict would manifest itself in two principal pieces of legislation: the Fugitive Slave Act of 1793 and the even more radical Fugitive Slave Act of 1850. Together, they would pave the way for the limitation of jury decisionmaking over questions of law.

Though never mentioned by name, provisions relating to slavery appeared throughout the Constitution and implicated issues from representation⁸¹ to the slave trade⁸² to taxation.⁸³ For purposes of this Note, however, the Fugitive Slave Clause is most important. The Clause provided that:

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁸⁴

This language set the stage for nearly seventy years of conflict between antislavery and proslavery interests that would not be settled until the Civil War. It would also serve as the basis for a series of statutes that would challenge the law-judging authority of juries. Whereas the original Fugitive Slave Act of 1793 preserved a degree of local control over fugitive slave actions, a wave of subsequent sectional discontent motivated the passage of a more draconian law. This

79. *See Sparf v. United States*, 156 U.S. 51, 74 (1895) (“I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law.”). Though *Sparf* marked the absolute end of the right of juries to consider questions of law, there is some debate as to when this process began in general. Compare LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 164 (2004) (noting that “[b]y the 1820s and 1830s, law and legality were firmly associated with lawyers and judges and viewed as a professional process inaccessible to laymen”), with Harrington, *supra* note 77, at 396–400 (dating it to the end of the eighteenth century).

80. *See* WALDSTREICHER, *supra* note 3, at 17.

81. U.S. CONST. art. I, § 2, cl. 3.

82. *Id.* art. I, § 9, cl. 1.

83. *Id.* art. I, § 9, cl. 4.

84. *Id.* art. IV, § 2, cl. 3.

statute—the Fugitive Slave Act of 1850—practically eliminated the law-judging role of free-state juries in fugitive slave cases and paved the way for its eventual disappearance in other criminal cases.

A. JURIES AND THE FUGITIVE SLAVE ACT OF 1793

At just fifty-two words, the Fugitive Slave Clause is concise, relatively vague, and not self-executing. To remedy this, Congress passed the first Fugitive Slave Act in 1793.⁸⁵ The law empowered slave owners to “seize or arrest [a] fugitive from labour” and return that slave to his or her home state “upon proof to the satisfaction of [a] judge or magistrate. . . .”⁸⁶ The Act served as evidence of the out-sized political influence that proslavery interests would come to possess in the federal government, and particularly of their ability to shape the early Constitution into a proslavery document.⁸⁷ As biased toward slaveholders as the Act may have been, it did afford states and localities a measure of discretion in how they would go about “deliver[ing] up”⁸⁸ fugitive slaves to their owners. Slave reclamation was essentially a “local affair, determinable by either a state or federal magistrate. . . .”⁸⁹ Details were left to judges and legislatures to define, in the absence of nearly any clear procedural guidance from Congress.

This degree of local control, though undoubtedly inconsequential to fugitive slaves, provided northern communities a say in the reclamation process and allowed them to alter the standards used in the law’s implementation. In the decades immediately following its enactment, a sort of truce developed between states and the federal judiciary regarding the Fugitive Slave Act. States would not work to prevent its enforcement, and the federal bench would respect local prerogatives.⁹⁰ The case of *Hill v. Low* is an illustrative example of this settlement in action: Justice Bushrod Washington, riding circuit in Pennsylvania in 1822, forcefully rebuked a lower court judge for taking the question of a fugitive slave’s identity from a jury.⁹¹ Justice Washington considered it “very clear” that a jury should be able to consider the question of the fugitive’s identity, even though it seemed to be beyond doubt in the present case.⁹² To hold otherwise would be “as much opposed to the policy, as it is to the [statute] on which this action is founded.”⁹³ Although the question of a fugitive’s identity may at first appear to be a question of pure fact, the particular facts in *Hill v. Low* left little doubt as to

85. 1 Stat. 302 (1793) (repealed 1864).

86. *Id.* at 302–03.

87. See H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133, 1134 (2012).

88. U.S. CONST. art. IV, § 2, cl. 3.

89. See Baker, *supra* note 87, at 1137.

90. The first meaningful personal liberty laws that sought to complicate enforcement of the Fugitive Slave Act were not enacted until the late 1820s. See THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861*, at 46 (1974).

91. 12 F. Cas. 172, 172 (C.C.E.D. Pa. 1822) (No. 6,494).

92. *Id.*

93. *Id.*

the slave's identity.⁹⁴ Justice Washington's comments can thus appropriately be construed as an invitation for the jury to consider questions of law alongside a seemingly ironclad set of facts.

It is perhaps ironic, then, that the local control that made the Fugitive Slave Act acceptable to northern interests for the decades following the Founding would prove to be the basis for its eventual undoing. Indeed, although the Fugitive Slave Act of 1793 would remain in force until 1850, an intensification of pressure from both antislavery and proslavery interests began in the 1820s and 1830s.⁹⁵ Abolitionists began the process of organization and evangelism, seeking to spread their message beyond the New England and Mid-Atlantic regions.⁹⁶ Proslavery interests responded by attempting to stifle dialogue wherever possible, whether on the floors of Congress,⁹⁷ in the mail,⁹⁸ or in abolitionist strongholds themselves.⁹⁹ Amidst this backdrop of increasingly heated rhetoric surrounding slavery, abolitionists and other northern antislavery advocates began working to petition their state governments for the passage of "personal liberty" laws that would afford some degree of protection to alleged fugitives and complicate their recovery.¹⁰⁰ These efforts gained momentum in the 1820s and 1830s, as abolitionists attempted to render the Fugitive Slave Act as ineffectual as possible.¹⁰¹ In 1826, Pennsylvania passed a personal liberty statute that "made it virtually impossible to recover fugitives in Pennsylvania."¹⁰² In 1828, New York passed a similar statute that went even further than Pennsylvania's. Intended specifically to restore the right of trial by jury, the law provided that an alleged fugitive could have a jury trial even if a claimant appealed a decision to federal courts.¹⁰³ Pennsylvania and New York were not alone in their legislative efforts: Vermont, Maine, Massachusetts, Indiana, and Ohio all passed personal liberty legislation in

94. *See id.* at 173.

95. *See Baker, supra* note 87, at 1137.

96. *See* RICHARD S. NEWMAN, *THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC* 152–53 (2002).

97. *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 L. & HIST. REV. 113, 113 (1991) (discussing the congressional "gag rule" on slavery).

98. *See* Susan Wyly-Jones, *The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy Over the Abolition Postal Campaign*, 47 CIV. WAR HIST. 289, 289 (2001) (detailing the proslavery response to abolitionist pamphlet campaigns in the south).

99. *See* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 836–46 (1995) (surveying southern efforts to convince northern states to criminalize abolitionist speech).

100. *See* James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHL-KENT L. REV. 1179, 1184 (1993) ("In most of New England, and in New York, New Jersey, and Pennsylvania officials tried to discourage the recovery of fugitives from within their boundaries by passing personal liberty laws.").

101. *See* MORRIS, *supra* note 90, at 46.

102. *Id.* at 46 (citing William R. Leslie, *The Pennsylvania Fugitive Slave Act of 1826*, 18 J. SOUTHERN HIST. 429 (1952) (referring to the Pennsylvania statute as a "precursor to later interference by northern states" in the recovery of fugitive slaves)).

103. *Id.* at 57. Importantly, the 1828 personal liberty law only guaranteed a jury trial where an alleged fugitive slave had a claim to freedom; twelve years later, a new law would remove this condition. *Id.* at 83.

some form before 1830, and New Hampshire, Illinois, Connecticut, Rhode Island, and New Jersey all did the same before 1850.¹⁰⁴

Proslavery interests reacted viscerally, even from within northern states. Anti-abolitionist riots broke out across several cities as tensions surrounding slavery continued to heighten,¹⁰⁵ and South Carolina Senator John Calhoun introduced a resolution calling on the federal government to begin actively supporting (rather than simply tolerating) his region's peculiar institution.¹⁰⁶ By the end of the 1830s, abolitionists openly asserted that "the political power of the free States is sufficient, if properly exercised, to ultimately exterminate slavery in the nation."¹⁰⁷ New York abolitionists pushed for a stronger personal liberty law to protect jury trial rights for alleged fugitives regardless of whether they had a claim for freedom, and sought support from leading state politicians.¹⁰⁸ Then-gubernatorial candidate William H. Seward opined that "it seems that the more humble or degraded the individual over whom arbitrary power is attempted to be exercised, the stronger is his claim to the protection of a trial by jury."¹⁰⁹ Once elected, he signed such a bill into law. Supplanting its 1828 predecessor, New York's new personal liberty law mandated jury trials in all fugitive slave proceedings and guaranteed assistance in preparing a defense by state attorneys.¹¹⁰

The federal judiciary observed the proliferation of personal liberty laws with discomfort, particularly given the proslavery interests in the federal government that had begun asserting their own prerogatives more forcefully. The conflict between these laws and the Fugitive Slave Act evidently left judges exasperated. Justice Henry Baldwin, riding circuit in Pennsylvania, questioned the fairness of the state's personal liberty law in asking whether "a wise, just, or humane body of men [would] pass a law which would put on a level the man who reclaimed his own property by lawful means, and the wretch who would drag a freeman into bondage . . .?"¹¹¹

It was in this context that juries first became politicized on a national level. Trial by jury was now a central demand of nearly all antislavery advocates as they pushed their own states to develop stricter procedures for the return of fugitive slaves.¹¹² On the moderate side of the movement, jury trials were viewed as a means of ensuring fair outcomes. A Whig state representative from Ohio opined that juries were the best institution to decide whether a man was, in fact, a fugitive

104. *Id.* app. at 219–22.

105. *Id.* at 62.

106. CONG. GLOBE, 25th Cong., 2d Sess. 55 (1837) ("[T]his Government is bound so to exercise its powers as to give . . . increased stability and security to the domestic institutions of the States that compose the Union. . .").

107. AM. ANTI-SLAVERY SOC'Y, SIXTH ANNUAL REPORT OF THE EXECUTIVE COMMITTEE OF THE AMERICAN ANTI-SLAVERY SOCIETY 12 (New York, William S. Dorr 1839) (statement of H.B. Stanton).

108. See MORRIS, *supra* note 90, at 80.

109. *Id.*

110. *Id.* at 83.

111. Johnson v. Tompkins, 13 F. Cas. 840, 848 (C.C.E.D. Pa. 1833) (No. 7,416).

112. See MORRIS, *supra* note 90, at 93.

slave.¹¹³ Under such a view, the objective of expanding access to juries was to secure the liberty of free individuals while respecting the legitimate claims of slaveholders who had found a fugitive they owned.¹¹⁴ More strident abolitionists had loftier goals, recognizing that juries could be a means to virtually eliminate the return of fugitive slaves to their owners.¹¹⁵ If fugitives were afforded “this inestimable right [of trial by jury] in every northern State,” then they would be safe; after all, “where can you find twelve impartial men . . . who will decide on their oaths, that a man has not a better right to himself than another has to him . . . that the right to liberty is not inalienable?”¹¹⁶

It was in the midst of these early reckonings with slavery that courts began to reevaluate the role of juries in settling questions of law. Justice Baldwin took one of the first steps in this process in 1832 while riding circuit in Pennsylvania and presiding over *United States v. Shive*.¹¹⁷ The case, involving the prosecution of a counterfeiter for passing fraudulent notes to the Bank of the United States, left few factual questions to be settled by a jury. The defense attorney, however, raised President Jackson’s recent veto of the Bank’s renewal and “contended that the act . . . chartering the bank which created the offence, was unconstitutional, and that therefore the jury ought to acquit the defendant.”¹¹⁸ In his opinion, Justice Baldwin contradicted the attorney in no uncertain terms: juries did not “have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow [sic] citizens or for the court.”¹¹⁹ In somewhat apocalyptic terms, Justice Baldwin closed by warning that if juries could exercise the power to declare what law is, “[w]e shall cease to have a government of law, when what is the law, depends on the arbitrary and fluctuating opinions of judges and jurors.”¹²⁰

Justice Baldwin’s decision in *Shive* is important for several reasons. First, it represented a significant change in his own thinking regarding juries as law-judges; as noted above, Justice Baldwin had expressly affirmed a jury’s right to consider and decide questions of law just two years earlier.¹²¹ Second, it marked a change in the federal judiciary’s approach to juries even if its immediate effects were somewhat limited. Prior to Baldwin’s decision, the record of federal judges limiting the power of juries was inauspicious. The last Supreme Court Justice to

113. *Id.* (statement of Representative Albert A. Bliss).

114. *Id.*

115. 3 AMERICAN ANTI-SLAVERY SOCIETY, THE ANTI-SLAVERY REC. 1, 163 (R.G. Williams ed., 1837) (“If then we have shown that the compact or compromise does not destroy the right of any person to a jury trial, we are bound to rescue all the slaves we fairly can, by that means.”).

116. See AM. ANTI-SLAVERY SOC’Y, *supra* note 107, at 16.

117. 27 F. Cas. 1065 (C.C.E.D. Pa. 1832) (No. 16,278).

118. *Id.* at 1066.

119. *Id.* at 1067.

120. *Id.*

121. See *United States v. Wilson*, 28 F. Cas. 669, 708 (C.C.E.D. Pa. 1830) (No. 16,730) (“[Jurors] are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court. . .”).

do so had been Samuel Chase, who was subsequently impeached for it.¹²² However, *Shive* would not be enough to alter the trajectory of the jury system altogether on its own.

That task instead fell to Justice Joseph Story three years later as he presided over *United States v. Battiste*.¹²³ Riding circuit in Massachusetts, Justice Story was responsible for interpreting an 1820 federal statute that had made it a crime for any sailor to “seize any negro or mulatto . . . with intent to make such negro or mulatto a slave. . . .”¹²⁴ In such a case, that “citizen or person shall be adjudged a pirate, and on conviction thereof . . . shall suffer death.”¹²⁵ During the trial, Battiste’s lawyer—Senator Daniel Webster—raised questions about what Congress intended by the words “to make . . . a slave.”¹²⁶ Justice Story concluded that the law did not apply when a third party transported another person’s slaves without any financial interest in their future status, and went on to strictly limit the jury’s ability to challenge his interpretation.¹²⁷ After upholding the jury’s right to issue a general verdict that combined questions of law and fact, he denied that juries “have the moral right to decide the law according to their own notions. . . .”¹²⁸ “On the contrary,” he continued,

I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.¹²⁹

Story’s opinion represented a relatively new and uncommonly narrow interpretation of a jury’s power to review legal questions. This was particularly the case in Massachusetts, where the right of juries to consider questions of law was unusually sacrosanct. Indeed, in 1808, the Massachusetts legislature had codified the jury’s right to “decide at their discretion . . . both the fact and the law, involved in the issue.”¹³⁰ Twelve years later, the Massachusetts Constitutional Convention elected not to include this protection in their revised state constitution because “that the jury have the right of deciding on the law as well as the fact, is a part of the common law of the country. . . .”¹³¹ Geographic peculiarities aside,

122. See COMM. APPOINTED TO PREPARE ARTICLES OF IMPEACHMENT, *supra* note 64, at 9.

123. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

124. *Id.* at 1044.

125. *Id.*

126. *Id.* at 1043 (“I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner. . . . It is, that in criminal cases . . . the jury are the judges of the law, as well as of the fact.”).

127. *Id.* at 1043–44.

128. *Id.* at 1043.

129. *Id.*

130. Act of Mar. 12, 1808, ch. 139, § 15, 1808 Mass. Acts 382, 389.

131. JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 540 (Bos., Daily Advertiser 1853).

Justice Story's stature combined with the strong language of his opinion rendered *Battiste* a novel limitation on the right of juries to consider questions of law.¹³²

Significant though his legal reasoning was, it is important to avoid losing sight of the factual background that Story confronted in *Battiste*: a New England jury trial of an alleged slave trader. In establishing threshold elements of law for the jury to rule on—in this case, *intent* to gain financially—he attempted to eliminate the possibility of the jury ignoring the statute's requirements and finding the defendant guilty without regard for his intent.¹³³ Story no doubt recognized the difficulty in asking a Massachusetts jury to consider “the kind of intent that differentiated a slave trader from a mere sailor,” particularly where much of the region was “[i]n the throes of antislavery sentiment. . . .”¹³⁴ Thus, his move to limit the purview of the jury in *Battiste* arguably depended as much on the issue of slavery as it did on the issue of jury authority itself.

Of course, the federal bench's interactions with slavery did not start and end with questions of jury power. In 1842, the Supreme Court held Pennsylvania's personal liberty law unconstitutional in *Prigg v. Pennsylvania*.¹³⁵ Justice Story, writing for the Court, reasoned that the law conflicted with the Fugitive Slave Clause of the Constitution and the Fugitive Slave Act of 1793 in restricting an owner's rights to have his property delivered up to him.¹³⁶ The ruling was undeniably a blow to northern antislavery interests, save for one note Story included in his opinion: that state authorities were bound to exercise their authority under the Fugitive Slave Act “unless prohibited by state legislation.”¹³⁷

Northern states treated Story's dicta as direction, and passed a series of new personal liberty laws prohibiting their state authorities from enforcing the Fugitive Slave Act.¹³⁸ This state legislation effectively gutted the law and led to an outcry from proslavery interests for a stronger federal statute to

132. See Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590 (1939) (noting that *Battiste* “more effectively than any other decision [seems] to have deflected the current of American judicial opinion away from the recognition of the jury's right”).

133. A jury considering a pure question of fact could very well conclude that a defendant did not possess the requisite intent to gain financially from slave trading. Yet in requiring that a jury find intent, Justice Story established a threshold element of law that a purely fact-finding jury would be unable to reason around.

134. ABRAMSON, *supra* note 2, at 79.

135. 41 U.S. (16 Pet.) 539 (1842). Edward Prigg and a party of several other slavecatchers had been hired to effectively kidnap a family's former slave from her home in Pennsylvania, and were subsequently arrested and tried under Pennsylvania's personal liberty law for doing so. See Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1122–23 (1993).

136. *Prigg*, 41 U.S. (16 Pet.) at 673 (“[T]he act of the Commonwealth of Pennsylvania, upon which the indictment [against Edward Prigg] is founded, is repugnant to the Constitution . . . and, therefore, void. . .”).

137. *Id.* at 622.

138. See MORRIS, *supra* note 90, app. at 219–22. In particular, Massachusetts, Vermont, Connecticut, New Hampshire, Pennsylvania, and Rhode Island all passed laws in the five years following *Prigg* that banned state officials from assisting in the rendition process in any way. See Timothy S. Huebner, *The Taney Court*, in 1 THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 193, 241 (Paul Finkelman ed., 2014).

replace it.¹³⁹ The draconian provisions of this next statute would trigger a wave of animosity between judges and juries, and would lead directly to the latter's restriction in fugitive slave cases.

B. JURIES AND THE FUGITIVE SLAVE ACT OF 1850

Demands for a less compromising Fugitive Slave Act became reality as part of a broader compromise over slavery brokered by Henry Clay in 1850.¹⁴⁰ As part of the compromise, the Fugitive Slave Act of 1793 was replaced by a far more oppressive statute with significantly fewer opportunities for escaped slaves to contest their capture.¹⁴¹ The law was transparently biased in favor of slave interests, going so far as to award commissioners presiding over fugitive slave proceedings a five-dollar fee if the alleged fugitive was found to be free, but a ten-dollar fee if he was found to be a slave.¹⁴² Suspected runaways were not afforded jury trials, and the process for obtaining their return was significantly streamlined; an alleged owner was required only to present an affidavit to a federal official in order to capture (and in many cases, kidnap) a fugitive slave.¹⁴³

In the wake of the law's passage, slavery reemerged as the primary issue forcing debate about whether criminal juries should have the power to determine questions of law.¹⁴⁴ By this point, the dynamic surrounding juries had shifted considerably. Story's ruling in *Battiste* had rendered once-settled law an open question, and the right of juries to act as judges of law was no longer presupposed. Because the recently passed Fugitive Slave Act eliminated the opportunity for fugitive slaves to obtain jury trials before their reclamation, much of the new debate over juries centered around the trials of those abolitionists who were charged with aiding fugitive slaves under the statute.¹⁴⁵ In the context of widespread outrage in northern states, "it became difficult, if not impossible, for prosecutors to obtain convictions from jurors who opposed the slavery laws."¹⁴⁶ The stage was thus set for federal judges to continue to restrict the authority of juries to consider questions of law.

An opportunity presented itself for the judiciary to begin that process in 1851. A year earlier, a slave named Shadrach had escaped to Boston from Norfolk, Virginia, and assumed the name Frederick Jenkins.¹⁴⁷ After spending several

139. See Huebner, *supra* note 138, at 241.

140. See Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 848 (2011) (referencing "the heroic role of Henry Clay in coming out of retirement to craft a compromise in 1850 as he had done in 1820").

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

142. *Id.* at 464 ("[W]here the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars . . . upon the delivery of the said certificate . . . or a fee of five dollars . . . where the proof shall not . . . warrant such certificate. . .").

143. *Id.* at 463. Under the statute, an "affidavit in writing" sufficed as proof in summary proceedings to reclaim a slave. *Id.*

144. See ABRAMSON, *supra* note 2, at 80.

145. *Id.*

146. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 893–94 (1999).

147. See ABRAMSON, *supra* note 2, at 80.

months working at a coffee house, an agent of his former owner discovered him and initiated proceedings to have him returned to Virginia. During a summary hearing, however, an enormous crowd burst through the Boston courthouse doors and swept Jenkins away.¹⁴⁸ He eventually escaped to Canada,¹⁴⁹ but his rescuers were arrested and tried under the Fugitive Slave Act on the direct orders of President Fillmore.¹⁵⁰

A jury trial in *United States v. Morris* commenced in May 1851 for three of Jenkins's rescuers, presided over by soon-to-be Supreme Court Justice Benjamin Curtis.¹⁵¹ The defense attorney representing the rescuers—New Hampshire Senator John P. Hale—argued that “the jury were rightfully the judges of the law,” and that “if any of them conscientiously believed the act of 1850 . . . to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary.”¹⁵² Justice Curtis stopped Hale in the middle of his argument, and countered that the jury had “not the right to decide any question of law.”¹⁵³ Instead, Justice Curtis echoed Justice Story's reasoning in *Battiste*, noting that “it is the duty of the court to decide every question of law which arises in a criminal trial. . . .”¹⁵⁴ He based his opinion on the requirement that judges and other officers swear an oath or affirmation to support the Constitution and its laws, whereas “no such oath or affirmation is required of jurors.”¹⁵⁵ To Justice Curtis, it would be improper for juries to consider questions of law. Unbound by any sworn allegiance to the Constitution and its laws, jurors considering such questions would expose defendants to fleeting changes in public opinion.

Yet, in an embarrassing postscript that Justice Story had managed to avoid in *Battiste*, the jury ignored Justice Curtis and acquitted all three defendants.¹⁵⁶ Perhaps because of the well-established Massachusetts tradition of affording juries discretion over questions of law,¹⁵⁷ or because Justice Curtis's “brother was the slave commissioner from whom [Jenkins] had escaped,”¹⁵⁸ the New England jury apparently accepted Hale's invitation to act as judges of constitutional law

148. *See id.*

149. *See id.*

150. *See* President Millard Fillmore, Proclamation No. 56 (Feb. 18, 1851), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/proclamation-56-calling-citizens-assist-the-recapture-fugitive-slave-arrested-boston> [<https://perma.cc/G4BQ-D98F>] (last visited Apr. 25, 2019). President Fillmore, a moderate Whig under intense pressure from proslavery interests, commanded “that the district attorney of the United States . . . cause the foregoing offenders and all such as aided, abetted, or assisted them or shall be found to have harbored or concealed such fugitive . . . to be immediately arrested and proceeded with according to law.” *Id.*

151. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).

152. *Id.* at 1331.

153. *Id.* at 1336.

154. *Id.* at 1333.

155. *Id.*

156. *See* ABRAMSON, *supra* note 2, at 82.

157. *See* Act of Mar. 12, 1808, ch. 139, § 15, 1808 Mass. Acts 382, 389.

158. Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 404 (2004).

and rendered the Fugitive Slave Act effectively unenforceable.¹⁵⁹ Recognizing the futility of bringing further charges, prosecutors went on to drop their cases against Jenkins's five other rescuers.¹⁶⁰ But the Fugitive Slave Act had left a mark on Massachusetts, where it remained unpopular until the outbreak of Civil War. One delegate to the 1853 Massachusetts Constitutional Convention singled the Act out for criticism, referencing it in his argument that "whenever the rights which we reserve to the people are invaded by any law . . . a jury coming from the people may be allowed to come in and give their judgment, and rescue the people. . . ."¹⁶¹ Put simply, a juror's proximity to his own community made him a fairer judge of law than any member of the federal bench.

The Fugitive Slave Act of 1850 put the conflict between judges and juries on full display and became pervasive enough that judges began preempting the question of whether juries had the right to judge questions of law at the indictment stage. Riding circuit in New York, Justice Samuel Nelson warned a grand jury that civil war could result from their failure to return an indictment in the case of a fugitive slave. "No government," he opined, "is worth preserving that does not or cannot enforce obedience to its laws."¹⁶² A Massachusetts district judge warned that "[s]ubmission is a moral duty," and that grand jurors had an obligation to return an indictment for individuals accused of aiding fugitive slaves regardless of any conscientious objections.¹⁶³ He went on to rather colorfully argue that those who ignored the law and believed they answered to a higher authority were "beyond the scope of human reason, and fit subjects either of consecration, or a mad-house."¹⁶⁴ Such preclusive language was not limited to grand jury charges. Justice McLean, the sole dissenter in *Prigg* and arguably the most antislavery member of the Court, suggested on six separate occasions that juries were unable to decide questions of law related to the Fugitive Slave Act.¹⁶⁵ Justice Kane, presiding over a treason trial stemming from a fugitive slave case, clarified that the Fugitive Slave Act was constitutional before releasing the jury to deliberate upon the evidence they had heard.¹⁶⁶

159. See ABRAMSON, *supra* note 2, at 80–82 (outlining Senator Hale's argument and the jury's decision to acquit the defendants).

160. Middlebrooks, *supra* note 158, at 405.

161. 3 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 455 (Bos., White & Porter 1853).

162. *In re Charge to Grand Jury*, 30 F. Cas. 1013, 1013 (C.C.N.D.N.Y. 1851) (No. 18,262). He also warned that states "would have a right to regard the compact as at an end, and to withdraw from a confederacy of faithless associates" if the Fugitive Slave Clause were not enforced. *Id.* at 1014.

163. *In re Charge to Grand Jury*, 30 F. Cas. 1015, 1017 (D.C.D. Mass. 1851) (No. 18,263).

164. *Id.*

165. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 191 (1975); see, e.g., *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9,583) (recalling a fugitive slave case where "a strong anti-slavery man, called an Abolitionist" had "rightly determined that his own opinions could not govern him in deciding a controversy between parties").

166. *United States v. Hanway*, 26 F. Cas. 105, 124 (C.C.E.D. Pa. 1851) (No. 15,299) ("Let it suffice for the present to say to you, gentlemen of the jury, that this law is constitutional; that the

These decisions demonstrate not only that federal judges were limiting jury prerogatives as northern juries became more intractable on the issue of fugitive slaves, but also that they did so decades before the Court held that juries were bound to consider a court's interpretation of the law in *all* criminal cases.¹⁶⁷ Although juries maintained their law-judging authorities in many cases until *Sparf v. United States* in 1895, their authority was significantly curtailed in fugitive slave cases almost fifty years earlier.¹⁶⁸ That is, the role of juries in fugitive slave cases was narrowed significantly earlier than in other types of criminal cases. Evidently, then, the role of the jury in challenging the effective enforcement of the Fugitive Slave Act was uniquely troublesome to the federal bench.

C. SLAVE POWER VERSUS JURY POWER

Although it is impossible to locate any indisputable causal link between anti-slavery jury activity and anti-jury judicial activity, the correlation between the two variables is difficult to miss. As proslavery interests became more confident of their hold on the federal judiciary (to say nothing of the federal government as a whole), the desire for juries to act as a check on federal power declined. The presence of such a check bothered a federal government interested in seeing its fugitive slave laws carried out to their letter.¹⁶⁹ It seems likely that southern annoyance with northern juries—coupled with Americans' increasing comfort with the national judiciary—slowly chipped away at the ability of juries to decide questions of law.

question of its constitutionality is to be settled by the courts, and not by conventions either of laymen or ecclesiastics. . .”).

167. The trend towards limiting the jury's role to that of fact-finder did not reach its final conclusion until 1895 when the Supreme Court considered *Sparf v. United States*, 156 U.S. 51, 102 (1895). The case involved the dramatic murder of a ship's second mate, for which three sailors were arrested, tried, and found guilty. See Middlebrooks, *supra* note 158, at 353. Appealing their convictions, the sailors argued that their trial judge had improperly instructed the jury on elements of murder and manslaughter and had precluded the jurors from issuing a verdict that considered legal questions. See *id.* at 365. Writing at length for a five-Justice majority, Justice John Marshall Harlan held that juries were bound by a court's interpretation of the law in criminal cases. *Sparf*, 156 U.S. at 102. Justice Harlan recounted the evolution of the responsibility of juries to determine questions of law as well as fact, paying particular attention to Justice Story's *Battiste* opinion and Justice Curtis's *Morris* opinion. *Id.* at 73–74. Notably, Harlan made no mention of the legal context—the slave trade and the reclamation of fugitive slaves, respectively—in which both cases had arisen. Nevertheless, in no uncertain terms he said that “[w]e must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.” *Id.* at 102. Since *Sparf*, the Supreme Court has never again directly confronted the question of juries' law-judging authority.

168. See *supra* text accompanying notes 147–63.

169. See Daniel Webster, Speech at Syracuse (May 1851), in 1 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER HITHERTO UNCOLLECTED 408, 419 (1903). As Secretary of State, Webster was responsible for the implementation of the Fugitive Slave Act and had been an important supporter of the bill while a senator. He argued that “[T]he Judges of the Supreme Court of the United States, of New York, of Massachusetts, all say [the Fugitive Slave Act] is a constitutional [law], passed in perfect conformity to the requirements of the Constitution.” *Id.* As such, jurors who would stand in the way of its implementation “are traitors, and are guilty of treason, and bring upon themselves the penalties of the law.” *Id.* (emphasis in original).

At the Founding, the idea of white male property holders deciding legal questions and thereby limiting the powers of an overreaching government was appealing. Indeed, “[t]he colonial jury was a celebrated institution *not* because of its ability to make well reasoned legal judgments about existing law, but because it routinely refused to enforce unpopular laws.”¹⁷⁰ With time, however, the concept of increasingly democratized juries actively countering laws benefiting powerful interests changed the political and legal dynamics surrounding them. As one commentator has noted, “[t]he limitation of the jury’s role may have been at least partially motivated by a distrust of the increasingly diverse jury pool and the possibility that it might defy America’s ruling, wealthy, white elite.”¹⁷¹

Slavery therefore provides a compelling explanation for the judiciary’s restriction of jury authority. This rationale is perhaps most straightforward when applied against overtly proslavery judges and justices, who would have had every interest in preserving the prerogatives of slaveholders and slave interests. Under this line of thinking, the clash between jury power and slave power was a zero-sum game that required juries to yield to the rights of slaveholders in capturing their runaway slaves.

However, establishing such a connection becomes more difficult in the context of judges with no special attachment to slavery. Robert Cover offers a possible solution to this apparent disconnect: that judges, north and south, became increasingly uncomfortable with violating positivist legal structures in the middle of the nineteenth century.¹⁷² Whereas juries had no compunction about judging individuals against extra-legal notions of justice (and, arguably, against common sense), judges restricted themselves to the text of statutes and the Constitution. In doing so, judges implicitly refused to confront the moral wrongs inherent in a statute like the Fugitive Slave Law of 1850.¹⁷³ The antebellum judiciary was thus biased in favor of formal interpretations of law, with judges finding barriers to their own judgment wherever they looked in an attempt to avoid non-positivist decision-making.¹⁷⁴ It is not unreasonable to ascribe the judiciary’s simultaneous limitation of juries’ law-judging authority in fugitive slave cases to these formalist

170. Andrew J. Parmenter, Note, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 418–19 (2007) (emphasis added).

171. *Id.* at 387. In considering such a possibility, it is notable the Supreme Court ruled in 1880 that black men could not be excluded from juries on the basis of race. *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 312 (1880). Just fifteen years later, the Court would issue its ruling in *Sparf* eliminating the right of juries to consider questions of law. *Sparf*, 156 U.S. at 102. Where slavery played a role in eliminating a jury’s right to decide questions of law in fugitive slave cases, race arguably played a role in eliminating a jury’s right to decide questions of law in any cases whatsoever.

172. See COVER, *supra* note 165, at 192–93.

173. Justice McLean is an illustrative example of this tendency. As noted earlier, Justice McLean disclaimed the right of juries to judge questions of law on six separate occasions in fugitive slave cases despite his own antislavery sentiments. See *supra* note 165. In the same cases, however, he also disclaimed the right of judges to question the morality of laws; indeed, a “disregard of this, by the judicial powers, would undermine and overturn the social compact.” *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9,583).

174. See COVER, *supra* note 165, at 258.

motivations. If judges considered themselves unable to apply notions of a higher morality and justice in their own decisions, then it seems logical that they would restrain juries from doing so as well.

Ironically, then, the decline of the jury owes itself to the very basis for its high esteem during the Founding. Juries *did* serve to make moral judgments about the laws put before them. Juries *did* serve as local checks on the federal government's ability to implement such unjust laws. And juries *did* serve to push back against antebellum federal judges who sought to establish their supremacy over community decisionmaking. Of course, these were precisely the roles the Founders imagined and hoped that juries would play. It was a moral fortune and institutional misfortune that the jury's most prominent use of its law-judging authority came with respect to slavery.

CONCLUSION

The criminal jury and slavery are both institutions with distinctly American histories and meanings. Both predated the Founding, and both would exist in relative isolation from each other for the first several decades of the American republic. Yet where the Framers originally saw juries as a means of protecting local prerogatives, proslavery interests eventually discovered that juries' autonomy in northern states rendered the Constitution's Fugitive Slave Clause a dead letter. The response of the federal judiciary was to begin expressly limiting the power of juries in cases involving slavery, a trend that predated the eventual wholesale elimination of a jury's right to consider questions of law by approximately forty years.

Though the correlation between slavery and the decline of the American jury is not obvious, it should come as no surprise to the modern observer. Although neither slavery nor criminal juries were directly tied to each other, the limitation of the American jury system—or at least of its right to decide questions of law—owes itself to the jury's unique ability to confront the institution of slavery outside legislative boundaries. It bears repeating that I do not mean to endorse the idea that juries ought to decide questions of law in modern America,¹⁷⁵ but their relevance to early American disputes over slavery is unquestionable.

Indeed, even today the relationship between race and jury power is readily apparent. Where defendants of color are concerned, for example, certain scholars have suggested harnessing jury nullification as a means to ensure that racially based prosecutions do not result in convictions for nonviolent offenses.¹⁷⁶ Others have suggested that courts adopt measures explicitly allowing for nullification while stopping short of encouraging it.¹⁷⁷ Such proponents of jury nullification draw from the historical background of fugitive slave cases to inform their

175. See *supra* text accompanying note 5.

176. See generally Butler, *supra* note 2 (recommending jury nullification as a framework to regulate racial bias in the criminal justice system).

177. See Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. REV. 1103, 1104.

present-day arguments,¹⁷⁸ a sign of the continued relevance of early juries' refusals to convict individuals under the color of legislation they perceived to be unconstitutional.

In light of this storied background, it seems evident that juries earned their position as the great bulwark of political liberties in confronting slavery but lost their position as judges of law in the process. Yet if much of the power and authority of juries was an early casualty in the fight against slavery, it was surely a worthy one that befitted the uncommon trust and admiration afforded to them by the Founders.

178. See Butler, *supra* note 2, at 703.