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

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

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3 U.S. CONST. art. III, § 2, cl. 3; id. amend. VI.

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


7 *See id.* at 110–16. Although nullification is conventionally defined as a “jury’s knowing and deliberate rejection of the evidence or refusal to apply the law,” BLACK’S LAW DICTIONARY 875 (8th ed. 2004), the concept has expanded to include single holdout jurors who prevent conviction, *see, e.g.*, Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 887 (1999).
the other hand, courts refuse to authorize what was then among the most consequential rights of all. The district court’s descriptive and normative reasoning failed to bridge this gap, for it privileged the century and methods of change that are least persuasive in constitutional adjudication. The Supreme Court should resolve the inconsistency it has created either by relegitimating nullification in accord with its newfound originalism or by explaining why nullification doctrine should be unaligned with its broader Sixth Amendment jurisprudence.

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

Judge Young justified his decision to dismiss Eddlem in a memorandum that dissected the history of jury nullification. According to Judge Young, the jury’s right to interpret the law was “a matter of debate in the early Republic” because, as the legal profession was still in its nascent stage, judges lacked formal training enabling them to interpret laws better than jurors could; thus, there was little reason to divest juries of their right to evaluate the law. As the law grew more complex, however, and the judiciary became professionalized in the nineteenth century, commercial interests criticized the power of volatile juries, asserting that allowing jurors to interpret laws undermined the predictable rule of law that was important to American economic (citing AKHIL REED AMAR, AMERICA’S CONSTITUTION 239–41 (2005)).
growth. Judge Young noted that the judiciary, therefore influenced by these interests, fostered the view that there was “a sharp distinction between law and fact and a correspondingly clear separation between judge and jury,” and it made clear that court instructions were mandatory and that juries did not possess the right to determine the law. Judge Young then explained why he thought the disallowance of jury nullification should be permanent. Descriptively, he asserted that jurors and litigants ratified the delegitimation. “Juries,” he contended, “have established district courts’ authority to ‘say what the law is.’” Moreover, litigants asking judges to strike down various laws “have established the courts — all the federal courts — as an authoritative check against the popularly elected branches” through the courts’ power to decide questions of law. Along those lines, Judge Young claimed that at “no time since Marbury has the fundamental principle in Justice Chase’s declaration” against nullification “been seriously questioned.” Normatively, he argued that nullification is incompatible with democracy and the rule of law, adding that allowing nullification would undermine the jury system, judicial independence, and the Constitution itself. In support, he noted several modern federal precedents holding that, although they may have the power, juries have no legal or moral right to nullify.

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

16 Id. at 111–13 (citing Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 4–6, 26–28, 141–43 (1977)).
17 Id. at 113 (quoting HORWITZ, supra note 16, at 143) (internal quotation mark omitted).
18 Id. at 114 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
19 Id. at 116.
20 Id. at 114.
21 Id. at 111, 119–22.
22 Id. at 120, 122 (citing United States v. Boone, 458 F.3d 321, 329 (3d Cir. 2006); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993); United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969)).
24 See, e.g., United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (rejecting the idea that “jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent”); see also Neil Vidmar & Valerie P. Hans, American Juries 227 (2007) (“Since the late nineteenth century, American courts have consistently held that although juries have the power to disregard the law . . . , they do not have the legal right to do so.”).
instead of analyzing the late-eighteenth century foundations that lie at
the heart of the Sixth Amendment’s original meaning.25 Offering only
a cursory treatment of Founding-era law, Judge Young classified the
existence of a right to nullify as debatable in the late eighteenth cen-
tury26 and opined that John Adams’s famous line in the Massachusetts
Constitution that ours is “a government of laws and not of men”27 sup-
ported “the impropriety of nullification.”28 Founding-era Americans,
however, embraced nullification and viewed the jury’s interpretation
of law as not merely a power but also a right.29 Indeed, Adams de-
clared, “It is not only [the juror’s] right, but his duty . . . to find the
verdict according to his own best understanding, judgment, and con-
science, though in direct opposition to the direction of the court.”30

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

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26 Id. at 111–12.
27 Id. at 120 (quoting MASS. CONST. pt. 1, art. XXX) (internal quotation marks omitted).
28 Id.
29 See AMAR, supra note 15, at 238, 581 n.73 (listing leading Americans who accepted the
right to nullify). For the reasons why originalists analyze “intelligent and informed” Founding-era
Americans and not only the Constitution’s Framers, see Antonin Scalia, Common-Law Courts in a
Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and
30 John Adams, Diary (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 3, 255 (AMS Press
31 See generally AMAR, supra note 15, at 238–41; LARRY D. KRAMER, THE PEOPLE THEM-
32 Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1780), in 15 THE PAPERS OF
THOMAS JEFFERSON 283, 284 (Julian P. Boyd ed., 1958); see also Adams, supra note 30, at 253
(“The common people should have as complete a control, as decisive a negative, in every judg-
ment of a court of judicature” as they have through the legislature.).
33 See CLAY S. CONRAD, JURY NULLIFICATION 50 (1998).
34 See, e.g., People v. Croswell, 3 Johns. Cas. 337, 366 (N.Y. Sup. Ct. 1804) (opinion of Kent, J.)
(noting that in criminal cases jurors “must . . . take upon themselves the decision of the law”).
35 Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).
36 See sources cited supra note 23.
Judge Young’s nineteenth-century history was also inaccurate, under- 
mining his descriptive arguments against nullification. Nullifica-
 tion’s legitimacy was disputed long after *Marbury*. The House of 
Representatives actually impeached Justice Chase for, among other 
things, endeavoring “to wrest from the jury their indisputable right 
to . . . determine upon the question of the law,” and antebellum legis-
latures and courts repeatedly reaffirmed juries’ authority to decide 
questions of law. Judges did not deny juries’ right to nullify until a 
few key mid–nineteenth century cases, and the Supreme Court did 
not rule against nullification until 1895. Moreover, the eventual ac-
quiescence of nineteenth-century juries, litigants, and legislatures to 
judges’ having sole authority to decide questions of law does not estab-
lish the delegitimation’s constitutionality. Allowing nineteenth-century 
Americans to override the Constitution’s original meaning privileges 
the century that should be least important in constitutional adjudica-
tion, except when a nineteenth-century amendment illuminates con-
stitutional texts or when nineteenth-century “higher lawmaking” ef-
fectively amends the Constitution; the nineteenth century, after all, 
reflects neither original meaning nor contemporary standards. Disal-
lowance of nullification, however, implicated neither exception, as it 
was accomplished not by amendment or “higher lawmaking,” but by 
judicial fiat. Indeed, in the Horwitzian story Judge Young tells, it was 
the undemocratic, self-interested mercantile class, not the People, that 
persuaded judges to reduce jury power and disallow nullification.

37 See also Amar, supra note 31, at 1193 (criticizing the claim that Chief Justice Marshall’s *Marbury* opinion stands for principles that oppose jury nullification).
38 *Articles of Impeachment, Art. 1, § 3, in Report of the Trial of the Hon. Samuel Chase* app. at 3 (1805).
41 See *Sparf v. United States*, 156 U.S. 51, 102 (1895) (holding that “it is the duty of juries in criminal cases to take the law from the court”).
42 Indeed, this century is least important in the Court’s Sixth Amendment jurisprudence; the Court “almost never talks about Nineteenth-Century history in crafting and applying rules of criminal procedure.” Lecture Notes, David Alan Sklansky, The Missing Years: Nineteenth-Century History in Criminal Procedure (June 14, 2006) (on file with the Harvard Law School Library). Thus, any nineteenth-century explanation would contradict the Court’s jurisprudence.
43 See AKHIL REED AMAR, THE BILL OF RIGHTS (1998) (arguing that the Reconstruction Amendments transformed the Bill of Rights). But see AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE (1997) (arguing that the “first principles” to which the Constitution’s criminal procedure provisions should return are from the 1790s, not the 1860s).
44 See 1 BRUCE ACKERMAN, WE THE PEOPLE 44–47 (1991) (arguing that Reconstruction introduced new substantive principles into constitutional law without using the Article V process).
45 See HORWITZ, supra note 16, at 140–44; see also KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 425 (2d ed. 2009) (“Horwitz . . . argue[s] that judges crafted a body of common law that benefited a relatively few entrepreneurs at the ex-
This history also illustrates why Judge Young’s normative arguments do not justify the delegitimation. Judge Young asserted that nullification is undemocratic because it enables jurors to disregard democratically passed laws. Although an individual act of nullification may thwart the majority’s will, nullification itself may be democratic because of the constitutional ratification process. In ratifying the Constitution and the Sixth Amendment, the People superdemocratically established the right to jury trial, which then encompassed the jury’s right to nullify even if that right conflicted with Congress’s lawmaking function. In other words, the Framers had in mind a legislative process that incorporated a veto by jurors who had a right to nullify laws. Nineteenth-century judges, without pursuing the Article V or another higher-lawmaking process and against the will of some state legislatures, undemocratically altered the Constitution’s meaning by disallowing the right to nullify. Contra Judge Young, it was the nineteenth-century judicial delegitimation of nullification, not the late-eighteenth-century constitutional legitimation, that was undemocratic.

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


46 Luisi, 568 F. Supp. 2d at 120–21.

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


50 See, e.g., Danforth v. Minnesota, 128 S. Ct. 1029, 1033 (2008) (“In Crawford we accepted the petitioner’s argument that the interpretation of the Sixth Amendment right to confrontation that
Modern Supreme Court decisions have even recognized the jury’s historic purpose in checking prosecutorial discretion, a principal reason behind nullification.\textsuperscript{51} The Court recently opined that “there is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury’s significance would merit Sixth Amendment concern.”\textsuperscript{52} If the Court is serious about retaining the amendment’s original meaning, then the diminution of the jury’s importance by denying its right to nullify deserves attention. If it does not relegitimate nullification, the Court should at least offer a coherent rationale for why the amendment no longer encompasses that right today. Otherwise, lower courts must choose between rejecting the Court’s Sixth Amendment originalism and rejecting the modern precedents against nullification.

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

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

\textsuperscript{52} Jones v. United States, 526 U.S. 227, 248 (1999).


\textsuperscript{56} FED. R. CRIM. P. 23(b).

\textsuperscript{57} E.g., United States v. Kemp, 500 F.3d 257, 304 (3d Cir. 2007) (holding that Rule 23 allows dismissal for bias, failure to follow the district court’s instructions, or jury nullification).

\textsuperscript{58} See, e.g., Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 65 U. CHI. L. REV. 433, 444–55, 448 (1998) (discussing the recent rise of pro-nullification activity, including the flourishing of academic support for jury nullification, the growth of the Fully Informed Jury Association, and many “Jury Rights Day” state proclamations).
Furthermore, the problem with justifying delegitimation through living constitutionalism is that it contradicts the Court’s originalist Sixth Amendment jurisprudence. That jurisprudence, however, may not be as enduring as it appears in the criminal jury context, and even the Court’s self-proclaimed originalists have ratified other changes in jury law at originalism’s expense. For example, among the nineteenth-century reforms introduced to curtail jury power was the civil special verdict, now enshrined in the Federal Rules of Civil Procedure. Justices Scalia and Thomas do not dispute the rule’s constitutionality, even though Justice Scalia has invoked authority stating that, under the original meaning of civil jury law protected by the Seventh Amendment, courts could not compel civil juries to return special verdicts. Thus, the Court’s originalists have effectively ratified this reduction of Seventh Amendment jury rights notwithstanding its inconsistency with originalism.

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

59 For an originalist’s criticism of living constitutionalism, see Scalia, supra note 29, at 38–44.
60 See Rachel E. Barkow, Originalists, Politics, and Criminal Law on the Rehnquist Court, 74 Geo. Wash. L. Rev. 1043, 1043 (2006) (discussing the role of nonoriginalist Justices in the “alliance” creating the originalist Sixth Amendment decisions); Frederick Schauer, The Supreme Court, 2005 Term—Foreword: The Court’s Agenda — and the Nation’s, 120 Harv. L. Rev. 4, 28 n.74 (2006) (noting that Crawford “relied heavily on a historical understanding . . . that might in the future be less important to Justices with equally strong views about the Confrontation Clause but less of a commitment to originalism as an interpretive methodology”).
63 United States v. Gaudin, 515 U.S. 506, 513 (1995) (Scalia, J.) (citing Edmund M. Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L.J. 575, 591 (1923)). Discussing special verdicts in the criminal context, Justice Scalia wrote that because judges could not require criminal special verdicts in the Founding era, they cannot require them now. The source he relied upon, however, observed that Founding-era civil juries had at least as much right as criminal juries to return general verdicts instead of special ones. See Morgan, supra, at 591.
64 For criticism of Justice Scalia as only a “faint-hearted originalist,” see Randy E. Barnett, Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism, 75 U. Cin. L. Rev. 7 (2006).