



[GW Law Faculty Publications & Other Works](#)

[Faculty Scholarship](#)

2020

The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges

Renée Lettow Lerner

George Washington University Law School, rlerner@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges*, 81 *Louisiana Law Review* 1 (2020).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges

Renée Lettow Lerner^{*1}

ABSTRACT

Both Montesquieu and Tocqueville thought that an independent judiciary was key to maintaining a moderate government of ordered liberty. But judicial power should not be exercised too openly, or the people would view judges as tyrannical. In Montesquieu's and Tocqueville's view, the jury was an excellent mask for the power of judges. Both Montesquieu and Tocqueville thought that popular juries had many weaknesses in deciding cases. But, as Tocqueville made clear, the firm guidance of the judge in instructions on law and comments on evidence could prevent juries from going astray and make the institution a "free school" for democracy.

The Article explores Montesquieu's legacy concerning judges and juries in the arguments of both the Federalists and the Anti-Federalists. It also examines the American antecedents of Tocqueville's idea of the jury as a school for democracy.

TABLE OF CONTENTS

Introduction	2
I. Montesquieu on Judges and Juries	7
A. Montesquieu's Position as a Judge, His Stay in England, and <i>Spirit of the Laws</i>	7
B. Professional Judges: The Key to Preserving Liberty	11

Copyright 2020, by RENÉE LETTOW LERNER.

* Donald Phillip Rothchild Research Professor of Law, George Washington University. I am grateful for the comments of Donald Braman, Paul Carrese, Bradford Clark, Robert Cottrol, Peter Hansen, John Harper, Dmitry Karshtedt, Amalia Kessler, Cynthia Lee, Craig Lerner, Manuel Lopez, Nelson Lund, Hank Molinengo, Sean Murphy, Richard Pierce, Edward Swaine, and Arthur Wilmarth. Karen Wahl provided expert library assistance, at a time when many libraries were closed.

1. This Article is intended mainly for an English-speaking audience, and so, wherever possible, I use sources in English. Fortunately, many of the major works of French scholarship concerning Montesquieu and Tocqueville have been translated into English.

C. Problems with Lay Juries.....	12
D. Advantages of Lay Juries.....	15
E. English Judges' Control over Juries	19
F. Montesquieu among the American Founders: The Anti-Federalists and Hamilton on Judges and Juries	23
II. Tocqueville on Judges and Juries.....	30
A. Tocqueville's Judicial Career, Travels in America, and <i>Democracy in America</i>	31
B. Tocqueville on the American Legal Profession.....	35
C. Tocqueville on the Jury as a Judicial Institution.....	38
D. Tocqueville on the Jury as a Political Institution: "A Free School".....	40
1. Tocqueville's Similarity to Montesquieu, and His New Idea	40
2. American Antecedents for the Idea of the Jury as a School.....	42
3. The Judge as Teacher and Firm Guide.....	46
E. American Transformation of Tocqueville's Idea.....	50
Conclusion.....	52

INTRODUCTION

We American legal professionals think we know about Montesquieu and Tocqueville. Or, at least, we think we know enough. Montesquieu developed the three-fold separation of powers embodied in the structure of the U.S. Constitution and the federal government.² He also supported use of lay juries.³ Tocqueville wrote that the jury is a school for democracy.⁴ He also quipped that, in America, sooner or later, almost every political question becomes a judicial question.⁵ The vast majority of us stop there and call it a day, without bothering actually to read them, or, if we do, only in tiny, isolated, and easily digested snippets.

2. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156–57 (bk. 11, ch. 6) (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., 1989) (1748).

3. *Id.* at 158.

4. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).

5. *Id.* at 270.

That is a mistake. These men were deep and influential thinkers. Americans have too often found in Montesquieu and Tocqueville what they wanted to find, not what is actually there. And of no topic is that more true than the jury.

My own rude awakening came first about Tocqueville. I am writing a book about the history of the civil jury in America. During my research, I have come across scores of quotations of and paraphrases from Tocqueville by American lawyers, judges, legal academics, and politicians that the jury is a vital institution because it is a school for democracy. These references began in the 1840s, soon after the publication of the first American edition of *Democracy in America* in 1838.⁶ They have continued without a break to the present.⁷ Having encountered so many of these references to Tocqueville, I figured it was time to read him carefully myself.

When I did, I was stunned. Tocqueville was not praising the jury at all. At least, he was not praising the jury for anything that seemed familiar. Tocqueville was praising the jury *because the institution amplified the influence of judges*.

Shaken by that revelation, I turned to work on another book. The other book is a condensed but sweeping account of the jury across time and the globe. It was time now to be systematic, I thought, in describing the purposes of the jury. I knew that Montesquieu praised the use of juries. I also knew that he greatly influenced the American founders and the French revolutionaries who introduced trial by jury to France in criminal cases.⁸

6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (John C. Spencer ed., Henry Reeve trans., 1838) (1835).

7. See, e.g., *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 205–06 (1848) (Joseph Lumpkin, C.J.); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 93 (1998); Nancy S. Marder, *The Jury as a 'Free School' for Democracy*, 5 *INSIGHTS ON L. & SOC'Y* 4, 4–6 (2005); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 *WM. & MARY L. REV.* 1241, 1268–69 (2014). Judges have also frequently quoted Tocqueville's characterization of the jury as a form of direct democracy. See, e.g., William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 *SUFFOLK U. L. REV.* 67, 71 (2006).

8. See, e.g., JAMES M. DONOVAN, *JURIES AND THE TRANSFORMATION OF CRIMINAL JUSTICE IN FRANCE IN THE NINETEENTH AND TWENTIETH CENTURIES* 28, 31 (2010); ADHÉMAR ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* 416 (John Simpson trans., 1914) (1882). Esmein explained that Montesquieu especially influenced the French revolutionaries by his insistence that the jury could only decide one fact. See *infra* text accompanying note 49. This led the revolutionaries to decree that juries should only be presented with questions about facts, essentially in the form of a special verdict.

During the nineteenth century, the institution of the criminal jury spread to other parts of Europe, particularly as governments made concessions to liberals after the revolutions of 1848. France's jury practice, influenced by Montesquieu, was the initial European model.⁹ Montesquieu also influenced early nineteenth-century Latin American liberals, who introduced rights to jury trial after countries declared independence from Spain and Portugal.¹⁰ In Montesquieu, I thought, I would get insight into the attraction of the institution beyond the common-law world. With some trepidation, because I was aware that Montesquieu can be obscure, I opened the *Spirit of the Laws*.

Once again, I was astounded. Montesquieu was not praising the jury for anything that seemed familiar. He advocated use of juries *because the institution masked the power of judges*.

My first thought was that this could not be a coincidence. While Tocqueville was writing *Democracy in America*, he told his cousin and close friend that there were "three men with whom I commune a bit every day, Pascal, Montesquieu, and Rousseau."¹¹

My second thought was that I could not be the first person to have noticed this. Montesquieu and Tocqueville are major thinkers and have been much studied. Someone must have seen that they valued juries mainly for how the institution protected and augmented the power of judges.

I found that almost no one has remarked on this distinctive feature of Montesquieu's work. Many scholars, French and otherwise, have treated Montesquieu's views of judges and juries as simply typical of eighteenth-century enlightenment views. They have indiscriminately lumped his

9. See Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 136–38 (1972). Casper and Zeisel explained that most of the German states borrowed the French practice of the special verdict. *Id.* at 137–38.

10. On the influence of Montesquieu and French liberals on Mexican liberals in the 1820s, and the introduction of jury trial in Mexico, see Charles A. Hale, *José María Luis Mora and the Structure of Mexican Liberalism*, 45 HISPANIC AM. HIST. REV. 196, 200–02 (1965); Hiroshi Fukurai, Clark R. Knudtson & Susan I. Lopez, *Is Mexico Ready for a Jury Trial? Comparative Analysis of Lay Justice Systems in Mexico, the United States, Japan, New Zealand, South Korea, and Ireland*, 2 MEXICAN L. REV. 3, 12 (2009).

11. Alexis de Tocqueville, *Letter to Louis de Kergorlay, 10 November 1836*, in 13 OEUUVRES COMPLÈTES 148 (J.P. Mayer ed., 1951). On this triad, see PAUL O. CARRESE, *DEMOCRACY IN MODERATION: MONTESQUIEU, TOCQUEVILLE, AND SUSTAINABLE LIBERALISM* 85–86 (2016).

thinking on these topics with, for example, that of Voltaire and Beccaria.¹² Some scholars have found in Montesquieu a more distinctive teaching about judges and judicial independence.¹³ The work of American political scientist James Stoner is especially instructive.¹⁴

Then I discovered the work of Paul Carrese, in particular his 2003 book *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism*. Carrese had seen that Montesquieu put judges and judging at the center of his political ideas for protecting liberty.¹⁵ He also had seen that Montesquieu recommended using lay juries in order to mask the power of the judges.¹⁶

Carrese studies political philosophy. He is not a lawyer or legal academic. This particular training, and lack of training, most likely encouraged him to see what lawyers and legal academics have failed to see. He makes profound observations about law and the place of judges in government. He has drawn important connections between Montesquieu, Blackstone, Hamilton, and Tocqueville.

But Carrese's training in political philosophy also means that he is less interested in, and knowledgeable about, a part of the legal system that legal professionals are deeply concerned with: the process of adjudication. Montesquieu, Blackstone, Hamilton, and Tocqueville were all legal professionals, and closely concerned with adjudication. As a legal historian, I am able to delve into the mechanisms that Montesquieu and Tocqueville suggest for the exercise of judicial power. I can identify more

12. See, e.g., ESMEIN, *supra* note 8, at 359, 362–63, 369; ELIE CARCASSONNE, *MONTESQUIEU ET LE PROBLÈME DE LA CONSTITUTION FRANÇAISE AU XVIIIÈME SIÈCLE* Chs. 4–6 (1927); FRANKLIN L. FORD, *ROBE AND SWORD: THE REGROUPING OF THE FRENCH ARISTOCRACY AFTER LOUIS XIV* 238–45 (1953).

13. Simone Goyard-Fabre, *Le Réformisme de Montesquieu: Progrès juridique et histoire*, in *LA PENSÉE POLITIQUE DE MONTESQUIEU: CAHIERS DE PHILOSOPHIE POLITIQUE ET JURIDIQUE DE L'UNIVERSITÉ DE CAEN* 66–67 (1985); LOUIS ALTHUSSER, *MONTESQUIEU: LA POLITIQUE ET L'HISTOIRE* 98–103 (1959); JUDITH SHKLAR, *MONTESQUIEU* 81, 88–91, 113, 124–25 (1987); René Cassin, *Montesquieu et la protection juridictionnelle des libertés*, in *ACTES DU CONGRÈS MONTESQUIEU* 249–56 (Louis Desgraves ed., 1956); Georges Vlachos, *Le Pouvoir judiciaire dans L'Esprit des lois*, in *PROBLÈMES DE DROIT PUBLIC CONTEMPORAIN: MÉLANGES EN L'HONNEUR DU PROFESSEUR MICHEL STASSINOPOULOS* (1974).

14. JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 154, 158 (1992).

15. PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* 16–17 (2003).

16. *Id.* at 49–50.

clearly their criticisms of the use of lay juries. I am also able to evaluate their ideas in light of the history of legal systems.

Briefly, my argument is this: Montesquieu and Tocqueville could see the appeal of popular government. Both set liberty as the highest goal that government could achieve. They saw that popular government could lead to abuses and curtailments of liberty. Democracies and republics could easily descend into tyranny. For Montesquieu and Tocqueville, one of the central questions was how to incorporate popular participation in government while tempering its excesses and preserving liberty. The main answer they both gave was professional judges. An independent judiciary, they thought, should focus on the rights of the individual and shield individuals from tyranny. Such a judiciary would be an aristocratic, moderating element in a republic.

But the judiciary must be careful in how it exercises this moderating power. It must not exercise power too openly. If it did, then the people would start to resent the judiciary as yet another tyrannical power. Judicial power, to be effective, must be masked. There were different ways to do this masking. One important way was to use juries.

For Montesquieu and Tocqueville, then, the main point of juries was to mask judicial power. In their view, the primary purpose of juries was not one of the standard justifications given by common-law lawyers and judges: to provide direct popular participation in government, to render more accurate decisions, or to counteract the biases of judges. Those goals could be achieved by other means. But juries were a wonderful way of deflecting attention and responsibility from judges. The judges could claim that they were simply handing a case to a group of laypeople. The result was not the judges' fault, not their responsibility.

Meanwhile, of course, judges were supposed to exercise considerable power in less obvious ways. Montesquieu seems to have assumed the English practice of the judge giving firm guidance to the jury through instructions on law and, even more importantly, comment on the evidence.¹⁷ Tocqueville was more open in describing and praising this practice. In Tocqueville's view, judges should gently but authoritatively guide jurors to a proper understanding of law and facts. According to Tocqueville, the main point of jurors' education in the "free school" for democracy was to learn to defer to a more competent authority—the judge.¹⁸

Along the way, I discuss Montesquieu's influence on the American founding. Both the Federalists and the Anti-Federalists drew on his work,

17. *See infra* Part I.E.

18. *See infra* Part II.B.

but reached different conclusions about the need to constrain judges and the role of the jury. The Anti-Federalists worried that the U.S. Constitution provided no check on the federal judiciary. They thought that rights to jury trial should be expanded so that the jury could serve as such a check. In his response, Alexander Hamilton was especially Montesquieuan. He commended juries, at least in criminal cases, but he advocated a judicial power beyond what even Montesquieu may have thought advisable.¹⁹

I also shed new light on the antecedents of Tocqueville's idea of the jury as a school. With the advent of a modern democratic regime, the education of large numbers of citizens in self-governance became critical. Already before Tocqueville arrived, Americans were developing the concept of the jury as a school. But Tocqueville made clearer the vital role of the judge as teacher and guide.

At the end, I offer thoughts about whether Montesquieu and Tocqueville were accurate in their belief in the potential of juries to mask judicial power. I also briefly consider the question of whether the considerable costs that the jury imposes on the legal system, in many ways, are worth the benefit that Montesquieu and Tocqueville suggest. Both of these authors anticipated this question. That is not surprising. They were both judges, and they were both judges in an inquisitorial system, so able to take a clearer view of the subject than a common-law judge. They did not take juries for granted, nor did they try to justify the institution simply because it existed, was old, and had been praised by others. Both of them recognized and described many of the weaknesses of juries.

I. MONTESQUIEU ON JUDGES AND JURIES

A. Montesquieu's Position as a Judge, His Stay in England, and Spirit of the Laws

Charles-Louis de Secondat, baron de La Brède et de Montesquieu (1689–1755), became a high-ranking judge in ancien régime France in the usual way: he inherited the job. When his uncle died in 1716, Montesquieu inherited his title and judicial office in the Parlement of Bordeaux. The French parlements were not, like the cognate English Parliament, legislatures. Rather, they were judicial and administrative bodies. For the next decade, Montesquieu presided over the Parlement of Bordeaux's criminal division. The criminal division heard appeals, supervised prisons, and administered punishments.²⁰ In thinking about Montesquieu's work as

19. See *infra* Part II.D.1–2.

20. REBECCA KINGSTON, MONTESQUIEU AND THE PARLEMENT OF BORDEAUX 219–71 (1996).

an appellate judge, it is important to remember that appeals were and are much more thorough in inquisitorial systems than in common-law systems. Appeals in inquisitorial systems involve a thorough review of an extensive written record and concern questions of fact as well as law. The truncated appeals in common-law systems are the result of using lay juries.²¹

Montesquieu's interests turned to literary and intellectual life. In 1725, he sold his judicial office, a common practice, and resigned from the Parlement. He travelled to Italy, Germany, Austria, and other places, finally ending up in England, where he lived for two years.²² The English political system made an enormous impression on him. At the time, England was developing a new constitution in the wake of the Glorious Revolution of 1688 to 1689. Key features of that new constitution were the supremacy of Parliament over royal prerogative and the independence of judges. The Act of Settlement of 1701 ensured that English judges could serve during their good behavior, not at the pleasure of the Crown.²³

Afflicted by failing eyesight, Montesquieu returned to France and began writing his culminating work *Spirit of the Laws*. He finally published the book anonymously in 1748 in Geneva, where controls on the press were less strict than in France. Even so, Montesquieu was careful not to make his meaning too plain. A book openly singing the praises of liberty would attract official ire. Often Montesquieu must be read between the lines, in effect esoterically. Montesquieu essentially asked for an esoteric reading of his book when he emphasized that the book must be read as a whole.²⁴ In the preface, he urged that his reader “not judge by a moment's reading the work of twenty years, that one approve or condemn the book as a whole and not some few sentences.”²⁵ He further explained

21. 1 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 309, 568–69 (1883); John H. Langbein, *Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary*, in JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES 67, 70 & n.17 (Paul Brand & Joshua Getzler eds., 2012).

22. ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 90–145 (1961).

23. 12 and 13 Will. 3 c. 2.

24. THOMAS L. PANGLE, MONTESQUIEU'S PHILOSOPHY OF LIBERALISM: A COMMENTARY ON *THE SPIRIT OF THE LAWS* 11–19 (1989). As Nelson Lund put it, anyone who tries to summarize *Spirit of the Laws* performs “a hazardous act of distillation.” Nelson Lund, *Montesquieu, Judicial Degeneracy, and the U.S. Supreme Court*, in NATURAL MORAL LAW IN CONTEMPORARY SOCIETY 285, 298 (Holger Zaborowski ed., 2010).

25. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at xliii (Preface).

that “one must not always so exhaust a subject that one leaves nothing for the reader to do,” and that he wanted the reader not just to read but to “think.”²⁶ Despite Montesquieu’s precautions, in 1751 the Vatican put *Spirit of the Laws* on its Index of Forbidden Books. The eighteenth-century censors at the Vatican understood his meaning well enough.

In *Spirit of the Laws*, Montesquieu quietly sang the praises of liberty. He thought that strenuous efforts to incorporate morality into law and politics were themselves likely to lead to tyranny, as in Cromwell’s England.²⁷ Montesquieu was one of the major architects of the modern project of lowering the aims of government—from justice and moral excellence, as in the ancient polities, to contented self-preservation and individual liberty.²⁸

In his book, Montesquieu offered several different definitions of liberty.²⁹ Montesquieu might thereby have been suggesting that the concept, and perhaps enjoyment, of liberty is elusive. Liberty may require a certain tempering or moderation of the mind, even in formulating the idea. In any event, at the beginning of his famous chapter on the constitution of England, Montesquieu gave a definition of political liberty. “Political liberty,” that most desired state of government, “is that tranquility of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen.”³⁰ No one person, or set of persons, should dominate the others.

In the ancient and medieval world, it was hoped that justice, including lack of oppression, would be achieved by the mixed regime.³¹ In this world view, society was deeply divided between different classes: the few (oligarchs or the aristocracy) and the many (the common people). In the ruling institutions, it was necessary to provide separate representation for each of the classes, and for each class to have a veto over the other. Otherwise one class would oppress the other. An example of the mixed

26. *Id.* at 186 (bk. 11, ch. 20).

27. *Id.* at 75 n.2 (bk. 6, ch. 2).

28. Any striving for excellence should occur in the private sphere. Montesquieu’s predecessors in the effort to lower the aims of government were Machiavelli, Hobbes, and Locke. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 177–184, 226–34 (1953); Martin Diamond, *The Separation of Powers and the Mixed Regime*, 8 *PUBLIUS* 33, 37–39 (1978).

29. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 154–57 (bk. 11, chs. 1–6); *id.* at 188 (bk. 12, ch. 2); Lund, *supra* note 24, at 300–01.

30. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 157 (bk. 11, ch. 6).

31. The differences between the ancient mixed regime and the modern separation of powers are described in Diamond, *supra* note 28, at 34–39.

regime was the English House of Lords and House of Commons. This was not the modern separation of powers. Although they represented different classes, the two houses of Parliament performed basically similar functions. Montesquieu praised the English mixed regime, including a hereditary nobility to oppose both a monarch's pretensions to absolute rule and the common people's desire to confiscate property.³²

But Montesquieu had something in mind beyond the old mixed regime. It was not enough to divide the institutions of government by class. He thought they should also be divided by function. This insight was so influential in part because division by function could readily be applied to a type of government that in theory had no privileged classes. That is, to democracy. The modern separation of powers does not divide institutions by classes, but by functions. Modern separation of powers is intended to moderate the effects of a political equality of citizens.

With the lowering of the aims of government, political equality of citizens became a possibility. The concern about democracy had always been that the common people were inadequate to the job of politics. But perhaps the people would be, or could become, capable enough to achieve modest aims.³³ As we have seen, one of these modest aims was individual liberty. Such liberty would require limits on government power, moderation. Therefore Montesquieu's aim was to produce a moderate government. "Political liberty is found only in moderate governments."³⁴

Forming a moderate government requires checks and balances, including the separation of powers by function. As Montesquieu put it:

In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterwork of legislation that chance rarely produces and prudence is rarely allowed to produce.³⁵

32. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 160–61 (bk. 11, ch. 6). At least in theory, the two houses of Parliament represented different classes. But in practice, this difference could be slight. Into the nineteenth century, the English nobility had a large influence on the House of Commons, through "rotten boroughs" and other patronage. And the interests of many of the landed gentry in the House of Commons were hard to distinguish from the interests of the nobility.

33. Diamond, *supra* note 28, at 39.

34. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 155 (bk. 11, ch. 4).

35. *Id.* at 63 (bk. 5, ch. 14).

B. Professional Judges: The Key to Preserving Liberty

Montesquieu's great innovation was adding the judiciary to the legislature and executive to form a triumvirate of governmental power. Hobbes gave the Leviathan all power; Locke divided sovereignty into the legislative and executive, law-making and law-enforcing.³⁶ For Locke, judging fell under the executive. Montesquieu separated the power to judge and raised it to be on par with the other powers.³⁷ For liberty to exist, Montesquieu wrote, the power of judging must be separate from the other two powers: "If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator."³⁸ Similarly, "If it were joined to executive power, the judge could have the force of an oppressor."³⁹

This third power, the judiciary, was supposed to focus on "civil law," that is, resolution of criminal and civil disputes that directly affect individuals. The judiciary was not supposed to focus on "political law" or public law.⁴⁰ By focusing on individual disputes with an eye to liberty, judges would be a moderating power that could help prevent tyranny.

Who were these judges supposed to be? A key quality was that they be independent from the other two powers, and from anyone else. In Montesquieu's France, that independence was assured in a way that seems odd to us today: many offices, including judicial offices, were treated as property—inherited, bought, and sold. As we have seen, Montesquieu inherited and sold his own judicial office. Montesquieu thought that that practice suited a monarchy.⁴¹ In a monarchy such as France, he believed, the system combined the best features of a hereditary nobility—its respect for custom and desire for stability—with the energy of the newly rich, the mercantile class.⁴² Treating offices as property would produce more independence than having to curry favor with the monarch for an appointment. But in a republic, Montesquieu suggested, officers should be selected based on competence and virtue.⁴³ In any case, in order for

36. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 364 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

37. MONTESQUIEU, SPIRIT OF THE LAWS, *supra* note 2, at 156–57 (bk. 6, ch. 11).

38. *Id.* at 157.

39. *Id.*

40. *Id.* at 8 (bk. 1, ch. 3) (defining political law and civil law); *id.* at 157 (bk. 11, ch. 6) (noting how the judicial power "punishes crimes or judges disputes between individuals").

41. *Id.* at 70–71 (bk. 5, ch. 19).

42. *Id.* at 350–51 (bk. 20, ch. 22).

43. *Id.* at 70 (bk. 5, ch. 19) (quoting PLATO, THE REPUBLIC bk. 8 [551c]).

Montesquieu's scheme of separation of powers to function properly, judges must be independent of the legislative and executive powers.

How were judges supposed to exercise this independent power? It was imperative that judges decide cases according to law. Otherwise, a judge would be a despot.⁴⁴ Montesquieu gave his most thorough account of professional judging in the context of monarchies. It seems likely that he presented this discussion in that context because he suggested that, in republics, the people did the real judging and professional judges had very little discretion.⁴⁵ This claim of lack of discretion in professional judges in a republic could help to conceal the aristocratic character of the office and its power. In monarchies, Montesquieu explained, judges followed the law when it was precise. When the law was not precise, the judges sought its spirit.⁴⁶ This could be a delicate business. In deciding particular cases, "judges assume the manner of arbitrators; they deliberate together, they share their thoughts, they come to an agreement; one modifies his opinion to make it like another's; opinions with the least support are incorporated into the two most widely held."⁴⁷

Such judicial deliberations were a collegial process and a learned one. The collegiality, based on discussing cases in panels, moderated the judges' decisions. Tempering came from within the judiciary, with power counteracting power, judge counteracting judge, just as, on a larger scale, the three branches of government counteracted each other. Also, the judges were supposed to be learned in the law and to follow it. Montesquieu insisted that legal "decisions should be preserved; they should be learned, so that one judges there today as one judged yesterday and so that the citizens' property and life are as secure and fixed as the very constitution of the state."⁴⁸ Proper judging was necessary to liberty and was a task for professionals, not amateurs.

C. Problems with Lay Juries

Immediately after his description of professional judging, Montesquieu contrasted the entirely different process of lay judging—judging by juries of the people. The first thing he pointed out was that any

44. On Blackstone's similar concerns about judicial arbitrariness, and exaggerated, even mendacious, claim about the certainty of law, see John H. Langbein, *Blackstone on Judging*, in *BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY* 65–68 (Wilfrid Prest ed., 2009).

45. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 76 (bk. 6, ch. 3).

46. *Id.*

47. *Id.*

48. *Id.* at 72 (bk. 6, ch. 1).

dispute decided by the people must be radically simplified. The “people are not jurists; the modifications and temperings of arbiters are not for them; they must be presented with a single object, a deed, and only one deed, and they have only to see whether they should condemn, absolve, or remand judgment.”⁴⁹ (Unlike Roman juries, English criminal juries only had the first two options.) Later in the book, Montesquieu even wrote favorably of the use of juries by the Romans and English in civil cases. But he attached a vital condition. Civil juries “decided only questions of fact; for example, if a sum had been paid or not, if an action had been committed or not.”⁵⁰ Jurors were strictly confined. “But because questions of right required a certain ability,” these questions were given to professional judges in Roman practice.⁵¹ Professional judges decided not only questions of law, but application of law to fact.

English common-law judges shared Montesquieu’s concerns about adjudication by lay jurors. At every turn, the common law was shaped by the need to simplify cases for the jury. This drastic simplification occurred even if that meant sacrificing accuracy of adjudication, as some disputes were unavoidably complicated. Early English judges required lawyers to plead down to a single factual issue in dispute.⁵² Over time, this requirement was slightly relaxed, but still, judges allowed only a few factual issues to go to a jury at a time. Courts strictly limited joinder of claims and joinder of parties. Remedies at common law became increasingly limited to damages, which were easy to announce, rather than specific performance.⁵³ Any case more complicated was either truncated to fit the jury’s need for simplicity, or else sent to a wholly different system of adjudication, one that did not use juries: equity, in the Court of Chancery.⁵⁴

A second problem that Montesquieu identified early in his discussion of lay jurors was bias. The people’s envy or passion could be so great that miscarriages of justice occurred. In describing his concern for such

49. *Id.* at 76–77 (bk. 6, ch. 4).

50. *Id.* at 179 (bk. 11, ch. 18).

51. *Id.* at 180.

52. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 147–52, 253–56 (2009). Langbein, *Bifurcation and the Bench*, *supra* note 21, at 71; J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 76–78 (4th ed. 2002); S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 79 (2d ed. 1981).

53. Langbein, *Bifurcation and the Bench*, *supra* note 21, at 71–72.

54. LANGBEIN, LERNER & SMITH, *supra* note 52, at 286–335; Langbein, *Bifurcation and the Bench*, *supra* note 21, at 72–74.

injustices, Montesquieu for the first time named Machiavelli. Machiavelli, he wrote, attributed the loss of liberty in Florence to the fact that the people as a body did not judge cases of high treason committed against them.⁵⁵ Montesquieu disagreed with him. In Montesquieu's view, liberty was more likely to be lost by the people judging than by the people not judging. "I would gladly adopt this great man's maxim," he explained, "but as in these cases of treason, political interest forces civil interest, so to speak (for it is always a drawback if the people themselves judge their offenses), the laws must provide, as much as they can, for the security of individuals in order to remedy this drawback."⁵⁶ Individuals needed protections from biased lay jurors.

Montesquieu described several protections against miscarriages of justice by the people's biased decisions. The Romans allowed an accused person to exile himself before the judgment. They also wanted to make the goods of condemned men sacred so that the people could not confiscate them. It was a good idea, Montesquieu thought, to slow down prominent cases, in order to calm the people and allow them to judge with cool heads.⁵⁷

In Montesquieu's view, one of the best remedies for jury error was a new trial. The Athenian Solon, Montesquieu explained, "knew very well how to curb the people's abuses of their power when judging crimes."⁵⁸ Solon wanted to make the Areopagus, a court composed of those who had held high office, an appellate body judging the criminal decisions of the people. In Montesquieu's description of Solon's proposal, if the Areopagus thought the people had made a mistake, either in falsely acquitting or condemning, the Areopagus would send the case back to the people. This procedure was similar to that of the new trial in civil cases, so beloved of English judges for correcting jury error.⁵⁹ Montesquieu thought Solon's procedure was "an admirable law" because it "subjected the people to the censure of the magistracy they most respected and to their own censure as well!"⁶⁰ Like new trial, the procedure had the virtue of simply handing the case to a jury again, thus seeming to preserve the power of the people. Although Montesquieu did not mention this, new trial was and is a very expensive and time-consuming remedy. And there is no

55. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 77 n.7 (bk. 6, ch. 5) (citing NICCOLÒ MACHIAVELLI, *DISCOURSES ON THE FIRST TEN BOOKS OF LIVY* (bk. 1, ch. 7)).

56. *Id.* at 77–78.

57. *Id.* at 78.

58. *Id.*

59. LANGBEIN, LERNER & SMITH, *supra* note 52, at 439–50.

60. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 78 (bk. 6, ch. 5).

guaranty that a second jury, or a third, or a fourth, will reach an accurate verdict.

Later in the book, after he had exposed the reader to the pitfalls of lay juries, Montesquieu recommended taking certain criminal cases away from the jury altogether. This was because of the people's bias. In recommending this change, Montesquieu clearly contradicted the practice of ancient republics and democracies, as well as Machiavelli's opinion. "Important men are always exposed to envy; and if they were judged by the people, they could be endangered and would not enjoy the privilege of the last citizen of a free state, of being judged by his peers."⁶¹ Therefore Montesquieu commended the English practice of trying a nobleman not by an ordinary jury, but by his peers in the House of Lords.⁶²

Again and again, Montesquieu emphasized that the people must not play a direct role in government. He completely rejected popular referenda, a power that "altogether exceeds the people's capacity." "The people should not enter government except to choose their representatives."⁶³ A representative republic had a great advantage over the ancient democracies, in which the people had "an immediate power," because the people were so susceptible to demagogues. For, "when the orators agitated them, these agitations always had their effect."⁶⁴ Orators could have an effect on small groups of the people as well as large ones. Nineteenth-century American judges lamented the susceptibility of juries to being led astray by powerful advocates.⁶⁵

D. Advantages of Lay Juries

With all of these problems of incompetence and bias, what was a popular jury actually good for?

Montesquieu did recommend the institution. In fact, he claimed that, in England, the jurors were judges. And England was "the one nation in the world that has political liberty for its direct purpose."⁶⁶ In Montesquieu's view, England was really a republic masquerading as a monarchy. In the beginning of his chapter titled, "On the constitution of

61. *Id.* at 163 (bk. 11, ch. 6).

62. *Id.*

63. *Id.* at 160; *see also id.* at 159 ("The great advantage of representatives is that they are able to discuss public business. The people are not at all appropriate for such discussions; this forms one of the great drawbacks of democracy.").

64. *Id.* at 326 (bk. 19, ch. 27).

65. Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 213 (2000).

66. MONTESQUIEU, SPIRIT OF THE LAWS, *supra* note 2, at 156 (bk. 11, ch. 5).

England,” he set out the tripartite division of power into legislative, executive, and judicial. Soon after, he wrote, “The power of judging should not be given to a permanent senate but should be exercised by persons drawn from the body of the people at certain times of the year in the manner prescribed by law to form a tribunal which lasts only as long as necessity requires.”⁶⁷

The next two sentences explain the seemingly odd recommendation to give the power of judging to laypersons: “In this fashion, the power of judging, so terrible among men, being attached neither to a certain state [status, such as nobility] nor to a certain profession, becomes, so to speak, invisible and null. Judges are not continually in view; one fears the magistracy, not the magistrates.”⁶⁸ Just in case the reader missed it the first time, Montesquieu repeated a few pages later: “Among the three powers of which we have spoken, that of judging is in some fashion, null.”⁶⁹

“So to speak.” “In some fashion.” Montesquieu was inviting us to read between the lines. He had already described the importance of professional judges’ deliberations and judgments in preserving liberty. His very elevation of the judiciary to a separate power on par with the legislative and executive indicates the judiciary’s importance. The power of the judiciary is key to his whole constitutional scheme of liberty and moderation. It is not null.

But it may be made “invisible,” or at least disguised. As Montesquieu pointed out, the power of judging is indeed “terrible among men.” It is a great responsibility to apply the law directly to an individual, to pronounce a civil litigant liable or a criminal defendant guilty, or the reverse, and to decree a particular amount of damages or a sentence. Such a power may well produce internal anxiety and attract external criticism and anger. Many judges would just as soon be relieved of that responsibility. Exercise of this power could eventually attract the jealousy and wrath of the people and the curtailing of judges’ moderating power. Perhaps that is one reason why Montesquieu continually warns against lay juries—the people—judging the powerful. Those powerful persons could include judges.

Use of lay juries deflects attention from the judges. Judges can claim that they had no responsibility for the outcome—it was the work of the people themselves. The lay jurors do the dirty work of deciding the facts and pronouncing the verdict, not the judge. The jurors get the responsibility and thus the blame. Not only that, but jurors may help

67. *Id.* at 158 (bk. 11, ch. 6).

68. *Id.* In a footnote to this passage, Montesquieu clarified that he meant use of jurors, as in the English practice. *Id.* at 158 n.a.

69. *Id.* at 160.

conceal the enormous role that common-law judges play in developing the law.

Montesquieu went so far as to write that jurors are really “judges,” because “they make the judgments.”⁷⁰ The real judges are thus able to hide behind the mask of the “judges” from the people.

Professional judges are often reluctant to admit that they are glad that juries spare them the hard work and responsibility of judging. Judges praise juries for many other reasons, but almost never for the one that lies closest to their interests. Only rarely is a judge capable of discussing the subject with some candor. A striking example is Sir James Fitzjames Stephen, the late-nineteenth-century English High Court judge and criminologist. At the end of the first volume of his *History of the Criminal Law of England*, Stephen devoted a chapter to comparing French and English criminal justice.⁷¹ As with earlier English legal writers, knowledge of the French system provoked Stephen to explain and justify his own system.⁷²

Like Montesquieu, Stephen was quite open about the drawbacks of ordinary jurors. Stephen discussed their lack of intelligence and resulting confusion, bias, absence of legal training and knowledge, failure to pay attention to evidence, inability to give reasons for their decisions with resulting harm to appeal, and want of individual responsibility.⁷³

And yet, like Montesquieu, Stephen claimed that the jury was valuable. Not only did juries help to legitimize criminal judgments in the eyes of the people, but there was another reason. Stephen broached the

70. *Id.* at 158.

71. 1 STEPHEN, *supra* note 21, at 504–76.

72. Sir John Fortescue (c.1395–c.1477), author of *De Laudibus Legum Angliae*, and Sir Thomas Smith (1513–1577), author of *De Republica Anglorum*, were both inspired to write their books describing the English legal system by spending time in France. Fortescue was in political exile; Smith was a diplomat. See LANGBEIN, LERNER & SMITH, *supra* note 52, at 155–56, 589–92.

73. 1 STEPHEN, *supra* note 21, at 560 (“Many of the jury are men of little intelligence, and apt to follow any lead.”); *id.* at 561 (jurors lack individual responsibility and legal training); *id.* at 562 (a decision by a jury “is often founded on mistaken grounds, and is sometimes a compromise”); *id.* at 568–69 (jurors lack individual responsibility, give no reasons for their decisions, are not subject to appeal, and can exhibit “strong prejudice”); *id.* at 571 (during trial, “it continually happens that several [of the jurors] are half asleep, or listen mechanically, or think about something else, and that when the verdict is considered they follow the lead of any member of the jury who chooses to take the lead”); *id.* at 572 (“I strongly suspect that a large proportion of [jurors] would, if examined openly at the end of a trial as to the different matters which they had heard in the course of it, be found to be in a state of hopeless confusion and bewilderment.”).

topic with some hesitation. He admitted that he was, “as every judge must be, a prejudiced witness on the subject.”⁷⁴ After these warnings, he plunged in:

It is hardly necessary to say that to judges in general the maintenance of trial by jury is of more importance than to any other members of the community [presumably including criminal defendants]. It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner.⁷⁵

The nominally independent decision of the jury spared the judge both the internal pressure of making the decision entirely himself, and the external criticism that that decision might attract. He then pointed out that the judge acted as a guide and advisor to the jury through judicial comment on evidence. Stephen completely agreed with Montesquieu that juries deflected attention and responsibility from judges.

Montesquieu recommended that the jury system be tweaked to enhance the public perception of justice and to further disguise judicial power. The litigants themselves should play a role in selecting the jurors. In important criminal cases, Montesquieu wrote, “the criminal in cooperation with the law must choose the judges,” that is, the jurors. Here again, perception was more important than reality. “[O]r at least he must be able to challenge so many of them that those who remain are considered to be of his choice.”⁷⁶ Montesquieu did not describe the practice of challenges to jurors as a protection for the accused. The purpose was to hide the exercise of power under a veneer of choice.

From the beginning of the institution in England in the thirteenth century, the use of the criminal jury was proclaimed to be by the defendant’s choice. This was a highly coerced choice; if the defendant refused, he would be pressed to death by piling rocks on his chest. The legal term for this procedure was *peine forte et dure*—“strong and harsh punishment.” Under the circumstances, few defendants objected to jury

74. *Id.* at 573.

75. *Id.*

76. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 158 (bk.11, ch. 6). Montesquieu goes so far as to say that jurors should be of the same “condition” as the accused, his peers in terms of class and status, “so that he does not suppose that he has fallen into the hands of people inclined to do him violence.” *Id.* at 158–59. Here Montesquieu is considering the jury from the class-based perspective of the mixed regime. That was appropriate for eighteenth-century England, with its deep class divides.

trial. Still, every criminal defendant was ritually asked the question, “How wilt thou be tried?” and he was supposed to answer, “By God and by my country,” that is, by jury.⁷⁷

Not only was the institution of the jury supposedly used by the defendant’s choice, but the defendant supposedly had a large say in choosing the individual jurors. Blackstone praised “the extreme tenderness” of the English common law toward the accused, who at that time in felony cases was allowed 20 peremptory challenges to jurors.⁷⁸ What Blackstone did not mention was that the defendant hardly ever exercised any of these challenges, as he was allowed no *voir dire*.⁷⁹ This was part of what made eighteenth-century English jury trial so speedy. If English defendants had regularly exercised these challenges, or anything approaching that number, the jury system would have collapsed from lack of jurors.⁸⁰ Apparently Blackstone agreed with Montesquieu that the perception of “tenderness” was more important than the reality.

Later in the book, Montesquieu addressed the question of jurors in civil cases. He commented that, among the Romans, it was “very favorable to liberty” that the officials in charge of the civil justice system selected the jurors with the consent of both parties. In his view, the many objections that civil litigants in England could make to jurors was the functional equivalent of choosing jurors by consent of the parties.⁸¹ In England, therefore, litigants could choose their own judges. Or at least appear to do so.

E. English Judges’ Control over Juries

If lay jurors really were the judges in fact and not just in name, this would be a disaster for liberty. We have seen that Montesquieu emphasized the shortcomings of lay jurors and the importance of professional judges. While hiding behind the mask of lay jurors, the professional judges must be firmly in charge.

77. JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 75–76 (1977); LANGBEIN, LERNER & SMITH, *supra* note 52, at 61–62.

78. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *353.

79. LANGBEIN, LERNER & SMITH, *supra* note 52, at 594–95; John H. Langbein, *The English Criminal Jury Trial on the Eve of the French Revolution*, in *JURY TRIAL IN ENGLAND, FRANCE, GERMANY 1700-1900* 13, 28–29 (A. Padoa Schioppa ed., 1987).

80. J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800* 340, 390–94 (1986).

81. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 179 (bk. 11, ch. 18).

Montesquieu himself gave few clues about how professional judges were to enforce their control. As was well-known, English judges had considerable power to declare the law. But this power would be useless if juries could nullify the law through perverse findings of fact or applications of law to fact. English judges had many ways to prevent this.

One way to solve the problem was to take cases away from the jury altogether. For example, in civil cases the pleading process mentioned earlier sometimes resulted in no issues of fact for the jury, only questions of law. In that case, the English judges decided the law, which resolved the case. And English judges steadily expanded the law to embrace questions that had formerly been issues of fact.⁸² The judges also encouraged rules channeling evidence into written instruments, such as the Statute of Frauds of 1677.⁸³ The act was largely designed by Matthew Hale, Chief Justice of King's Bench, and had the effect of removing certain cases from the jury when there was no written instrument.⁸⁴

If jury trial did occur, English judges still had many powers. In England at the time, as Montesquieu may have known, the professional judges could and often did dominate juries. Judges mainly did this through what we would now call "instructions to the jury." Back then (and even now), an English judge's instructions looked quite different from the modern American practice of a dry, tedious, almost incomprehensible, and fact-free recitation of appellate-approved boilerplate. In both criminal and civil cases, an English judge could comment extensively on the evidence, and often gave the jury his opinion about how the case should come out.⁸⁵ Jurors were ordinarily eager to follow the judge's views.⁸⁶

82. Langbein, *Bifurcation and the Bench*, *supra* note 21, at 79; A. W. B. Simpson, *The Horowitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 600 (1979); J. H. Baker, *Book review of Patrick Atiyah, The Rise and Fall of Freedom of Contract (1979)*, 43 M.L.R. 467, 469 (1980); LANGBEIN, LERNER & SMITH, *supra* note 52, at 448–50.

83. 29 Car. 2 c. 3 (1677).

84. Through the legal incentives to landowners in the act, Hale also created the functional equivalent of a land registration system in England. The shrewd English judge killed two troublesome legal birds with one legislative stone. See Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354, 364–73 (1983).

85. LANGBEIN, LERNER & SMITH, *supra* note 52, at 431–33; Langbein, *Bifurcation and the Bench*, *supra* note 21, at 77–78; John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1191–93 (1996); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285–87 (1978).

86. Langbein, *Blackstone on Judging*, *supra* note 44, at 70–71.

Should the jury nevertheless bring in a verdict against his advice, the judge could ask the jury for their reasons for a verdict, discuss with the jury their reasons, refuse to record a verdict, and require re-deliberation.⁸⁷ In criminal cases, judges also in effect wielded a pardon power. The Crown almost never refused a judge's recommendation for clemency.⁸⁸ In civil cases there was the remedy of new trial, discussed above.⁸⁹ In addition, for civil cases there was the backstop of Chancery, a court which sat without juries.⁹⁰

The only type of case in which English juries were apt to be resistant to this immense judicial control was what Lord Mansfield called "political cases."⁹¹ These were mainly cases involving laws about religious conformity and seditious libel, or what we would call today "free exercise of religion" and "free speech." Under modern political theory, these kinds of liberties are at the core of the modest aims of government. In these types of cases, English juries sometimes nullified the law. For example, in 1670 an English jury acquitted William Penn, the founder of Pennsylvania, and William Mead of charges of illegally participating in a Quaker assembly.⁹² There could be no doubt of Penn and Mead's guilt. They both openly preached Quakerism. Likewise, English juries sometimes acquitted defendants of charges of seditious libel, although it was obvious that these defendants had illegally criticized the government.⁹³

From a Montesquieuian perspective, the reaction of English judges to this kind of jury nullification was brilliant. English judges decided to maintain and even enhance the nominal power of juries. That way, judges could quietly promote liberty, if they chose, and, in any event, avoid political trouble.

The seminal decision was the opinion of John Vaughan, Chief Justice of Common Pleas, in 1670 in *Bushell's Case*.⁹⁴ *Bushell's Case* stemmed directly from the case against Penn and Mead. After the jury acquitted Penn and Mead "contrary to the full and manifest evidence," as the trial judge put it, and against his instructions, the trial judge fined the jurors. At

87. LANGBEIN, LERNER & SMITH, *supra* note 52, at 433–38. This post-verdict interaction with the jury became less frequent over time.

88. *Id.* at 430, 626–28.

89. *See supra* text accompanying notes 58–60.

90. *See sources cited supra* note 54.

91. 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 206 n.44 (1992).

92. *R. v. Penn & Mead*, 6 St. Tr. 951 (O.B. 1670). *See* CRAIG W. HORLE, *THE QUAKERS AND THE ENGLISH LEGAL SYSTEM: 1660-1688* 116–17 (1988).

93. LANGBEIN, LERNER & SMITH, *supra* note 52, at 430.

94. *Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).

the time, this was a recognized remedy for juror misconduct. Eight of the 12 jurors refused to pay the fine, and were imprisoned. Again, this was a recognized remedy. These jurors, including Edward Bushell, got a writ of habeas corpus from the court of Common Pleas, challenging the legality of their imprisonment. Chief Justice Vaughan gave an opinion declaring that jurors could not be fined for disobeying the trial judge's instructions.⁹⁵

In the opinion in *Bushell's Case*, Vaughan achieved his objective of giving nominal independence to jurors. He therefore got English judges out of the politically-charged business of making individual determinations on liberties, at least formally.⁹⁶ Judges could claim that if juries wanted to nullify the law in certain cases, that was the jurors' business and not the judges' fault. Rather than outright declaring substantive liberties, the English left these liberties to a procedural mechanism, the jury. English judges were willing to give up the formal power to fine and imprison jurors because they had so many other means of jury control.

Unfortunately, Montesquieu's travel journals for his stay in England were either lost or destroyed, so we do not know precisely how much he was aware of English legal practice. We do know that after he returned to France, he kept up a correspondence with Charles Yorke, the son of the Lord Chancellor and later Lord Chancellor himself.⁹⁷ So Montesquieu was familiar, at least, with the Court of Chancery and the practice of equity, and probably other features of the legal system as well. The likelihood is that he was aware that English judges dominated the jury. Such an awareness would have strengthened his belief that the jury could serve as a mask for the true judicial power: that of professional judges. Hiding behind the jury, judges could quietly continue to promote liberty and to serve as a moderating influence.

95. Vaughan's opinion is disingenuous, and attacks a series of straw men. See LANGBEIN, LERNER & SMITH, *supra* note 52, at 429, 431.

96. The issue of judges fining and imprisoning jurors was politically salient at the time Vaughan declared his opinion. A few years earlier, John Kelyng, Chief Justice of King's Bench, had almost been impeached for fining and imprisoning jurors. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 213 (1985). In 1668, Vaughan was a member of Parliament and chairman of a committee considering draft legislation to prohibit fining and imprisoning jurors. Shortly after, he was appointed to the bench. Langbein, *The Criminal Trial Before the Lawyers*, *supra* note 85, at 300 n.108.

97. CARRESE, THE CLOAKING OF POWER, *supra* note 15, at 27; SHACKLETON, *supra* note 22, at 278, 287, 383–84.

F. Montesquieu among the American Founders: The Anti-Federalists and Hamilton on Judges and Juries

Montesquieu's ideas were enormously influential among the American founders. Under Montesquieu's influence, the framers of the U.S. Constitution developed the tripartite division of power among the legislature, executive, and judiciary.

Raising the federal judicial power to the level of the legislative and executive, however, provoked serious concern and objection. As Montesquieu might have foreseen, the draft of the U.S. Constitution sent to the states for ratification triggered fears about an overweening power in federal judges. According to the draft, federal judges had life tenure and salary protection, and did not have to face election and re-election. This was a wonderful Montesquieuan recipe for independence. But it also meant that there was little control over the power of judges, so far as that power extended.

Added to this judicial independence was a potentially tremendous new power. Recall that Montesquieu had urged that judges confine themselves to deciding private disputes, those involving individuals. He pointedly recommended that judges not get involved in "political law," or disputes over public law.⁹⁸ Such disputes could attract too much criticism, and in the end lead to a curtailment of judges' power, with its promotion of liberty and moderation. England had found a way of controlling judges' power. Following the Glorious Revolution, English judges achieved full independence. They got life tenure and eventually salary protection. But there was a major limitation on English judges' power: Parliament was supreme. Parliament—not a court composed wholly of professional judges—was the highest court in the land. Therefore English judges had no power to void an act of Parliament. As American lawyers would put it, as to acts of Parliament, English judges had no power of judicial review.

The situation under the draft of the U.S. Constitution was far different. Although the U.S. Constitution nowhere explicitly states that judges had the power to void acts of Congress and actions of the executive, that power was implied. It was well understood that a higher law trumped a lower. In England, for example, judges routinely held that an act of Parliament voided a contrary municipal regulation. The U.S. Constitution was clearly a higher law than an act of Congress. Judges had a duty to interpret and apply the law. Therefore it was widely understood that, under the U.S. Constitution, judges could and should void contrary acts of the legislature

98. See *infra* Part II.B.

and actions of the executive.⁹⁹ Judges were the ones who would police the boundaries between the separate powers of the federal government.¹⁰⁰ Not only that, but judges would also police the boundary between the federal government and the states. Against Montesquieu's advice, American judges were enlisted to decide cases of "political law." The framers of the U.S. Constitution had taken Montesquieu's recommendation for more judicial power and raised it to an even greater level. That level was quite possibly injudicious and immoderate. No other nation had given independent professional judges such power.¹⁰¹

This independence and power of review, united in the federal judiciary, understandably frightened some Americans. The Anti-Federalists, like the Federalists, had read Montesquieu and celebrated his idea of checks on power.¹⁰² But they saw no checks on the federal judiciary. Anti-Federalists predicted that federal judges would become tyrannical. The Federal Farmer warned that "we are more in danger of sowing the seeds of arbitrary government in this department than in any

99. See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *GEO. WASH. L. REV.* 91 (2003) (arguing that the founders understood the Supremacy Clause to authorize judicial review); THE FEDERALIST NO. 78, at 403–05 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). In August 1786, future U.S. Supreme Court justice James Iredell published perhaps the first defense of judicial review in America, based on the Constitution of North Carolina. Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 *GEO. WASH. L. REV.* 113, 131–32 (2003).

100. THE FEDERALIST NO. 78, *supra* note 99, at 403–05.

101. But state judges were already engaging in judicial review under the state constitutions. See HAMBURGER, *supra* note 99; Wilmarth, *supra* note 99, at 131–32.

102. See, e.g., *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (18 Dec. 1787)*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 161–62 (Herbert J. Storing ed., 1981) (3.11.44) (quoting MONTESQUIEU, SPIRIT OF THE LAWS, *supra* note 2 (bk. 11, ch. 6)); FEDERAL FARMER, ESSAY VII (31 Dec. 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 266–67 (2.8.97) (quoting MONTESQUIEU, SPIRIT OF THE LAWS, *supra* note 2 (bk. 11, ch. 6)); BRUTUS, ESSAY III (15 Nov. 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 378 (2.9.39) (quoting MONTESQUIEU, SPIRIT OF THE LAWS, *supra* note 2 (bk. 11, ch. 6)). On the importance of the Anti-Federalists' arguments, particularly in generating amendments to the Constitution, see Paul Finkelman, *Antifederalists: The Loyal Opposition and the American Constitution*, 70 *CORNELL L. REV.* 182, 190–202 (1984) (reviewing THE COMPLETE ANTI-FEDERALIST, *supra*).

other.”¹⁰³ Of the Anti-Federalists, Brutus was the most far-sighted in his critique of the provisions for the federal judiciary. He pointed out that the judges of the U.S. Supreme Court were to be totally independent, and yet to have vast power. “I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.”¹⁰⁴ Certainly this combination was “altogether unprecedented in a free country.”¹⁰⁵ Brutus observed that the federal judges would have the power of judicial review over acts of Congress, and also over state legislatures. The U.S. Supreme Court’s natural tendency would be to enlarge the permitted scope of federal legislation—and its own power. The judges could adopt any method of reasoning, or unreasoning, they liked.¹⁰⁶

Unlike in England, where Parliament was supreme and the House of Commons faced elections, there would be no control on the decisions of the U.S. Supreme Court.¹⁰⁷ Impeachment could be used only for treason, bribery, or other high crimes and misdemeanors, not for wrong decisions.¹⁰⁸ The Constitution contained no check on the arbitrariness of the judges of the U.S. Supreme Court. “In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”¹⁰⁹ There would be no remedy for this judicial tyranny but forcible rebellion: “*with a high hand and an outstretched arm.*”¹¹⁰

This fear of unprecedented power in federal judges helps to explain the Anti-Federalists’ insistence on the need for jury trial in federal court. They viewed the division of the court between judge and jury as similar to bicameralism in the legislature. Jury trial would provide some way to control the decisions of the professional judges. Otherwise, there would be none.

103. FEDERAL FARMER, ESSAY XV (18 Jan. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 316 (2.8.185).

104. BRUTUS, ESSAY XV (20 Mar. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 438 (2.9.186).

105. BRUTUS, ESSAY XI (31 Jan. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 418 (2.9.130).

106. *Id.* at 419–22 (2.9.136–44); BRUTUS, ESSAY XII (7 Feb. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 422–25 (2.9.145–52); *id.* at 426–28 (2.9.153–58).

107. BRUTUS, ESSAY XV, *supra* note 104, at 438 (2.9.188).

108. BRUTUS, ESSAY XI, *supra* note 105, at 418 (2.9.131); BRUTUS, ESSAY XV, *supra* note 104, at 439–40 (2.9.192); *see* U.S. CONST. art. II, § 4.

109. BRUTUS, ESSAY XV, *supra* note 104, at 438 (2.9.189).

110. *Id.* at 442 (2.9.196).

The Anti-Federalists generally did not invoke the old mixed-regime argument about the class bias of judges and the need to counter that class with representation of another class, the common people.¹¹¹ As we will see, that was Blackstone's main justification for the jury.¹¹² Instead, most Anti-Federalists made an argument based on the modern separation of powers. According to that argument, all citizens had political equality, and power should be divided based not on class but rather function.¹¹³ In the case of courts, the Anti-Federalists explained, judges were supposed to decide the law and the jury the facts.

But the line between fact and law was murky and shifting. We have seen that common-law judges steadily expanded the scope of law at the expense of fact.¹¹⁴ Because fact and law could be blended together in a way difficult to separate, Anti-Federalists emphasized the importance of the jury being allowed to give a general verdict in civil cases, as opposed to special verdicts that more strictly confined juries.¹¹⁵

Lurking behind this question of the general verdict was the question of the jury's ability to decide the law, or to nullify. In the years leading up to the American Revolution, Americans had celebrated juries' nullification of unpopular British laws.¹¹⁶ American colonists had no

111. A (Maryland) Farmer came close to making the class-based mixed-regime argument for the jury, but even he made it mainly in the context of England. A (MARYLAND) FARMER, ESSAY IV (21 Mar. 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 38 (5.1.64). The Federal Farmer, in his *Essay IV*, suggested the old mixed-regime rationale. Trial by jury, he wrote, "is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department." FEDERAL FARMER, ESSAY IV (12 Oct. 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 249–50 (2.8.54–55). In *Essay VII*, the Federal Farmer emphasized the importance of representation of different classes in the legislature, which he hoped to achieve by increased numbers of representatives. FEDERAL FARMER, ESSAY VII, *supra* note 102, at 265–69 (2.8.97–99). But then in *Essay XV* he adopted the framework of the modern separation of powers, with division of functions. *See* FEDERAL FARMER, ESSAY XV, *supra* note 103, at 316–23 (2.8.185–95).

112. *See infra* text accompanying note 187.

113. *See supra* text accompanying notes 31–34.

114. *See supra* text accompanying note 82. On this development in the United States, *see* AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877* 168 n.69 (2017).

115. *See, e.g.*, FEDERAL FARMER, ESSAY XV, *supra* note 103, at 319–20 (2.8.190); A (MARYLAND) FARMER, ESSAY IV, *supra* note 111, at 38–39 (5.1.66).

116. LANGBEIN, LERNER & SMITH, *supra* note 52, at 475–85.

representation in the British Parliament, and colonial judges served at the pleasure of royal governors. Juries were therefore one of the only ways that colonial Americans, the people, had a voice in government.

But with the advent of the new republic, the political situation of the people was much different. This was presumably one of the reasons why Anti-Federalists almost never argued openly for the jury's ability to decide the law, or jury nullification. They hardly ever referred to jury nullification, including the celebrated cases during the run-up to the Revolution. Jury nullification seemed inappropriate in a modern democratic republic, with representation of the people and separation of powers. It certainly violated the idea of the division of functions between the judge and jury.

Properly limited to questions of fact or mixed questions of fact and law, the jury was necessary as a check on judges. And the jury's power, even its existence, appeared doubtful under the new constitution. Anti-Federalists worried that there was no guaranty of civil jury trial in the U.S. Constitution.¹¹⁷ They were almost equally concerned that the U.S. Supreme Court was to be given appellate jurisdiction as to both law and fact.¹¹⁸ The latter provision appeared to contradict the common-law principle that the factual findings of a jury were not subject to appeal.¹¹⁹

The pamphlets of Brutus, the Federal Farmer, and other Anti-Federalists were widely read and popular at the time the state ratifying conventions were elected and debating the provisions of the draft U.S. Constitution.¹²⁰ In order for the plan to be ratified, supporters of the draft constitution had to find a way to assuage these fears.

117. See, e.g., FEDERAL FARMER, ESSAY XV, *supra* note 103, at 321–22 (2.8.193). A (Maryland) Farmer admitted that there was “some truth” to the allegations that jurors in civil cases were “too ignorant—that they cannot distinguish between right and wrong—that decisions on property are submitted to chance; and that the last word, commonly determines the cause.” He tried to relieve such concerns by claiming that jurors would rise to the occasion if given a chance. “Give them power and they will find the understanding to use it.” In any event, he argued that civil juries were an “important check to judiciary usurpation.” A (MARYLAND) FARMER, ESSAY IV, *supra* note 111, at 39 (5.1.67).

118. BRUTUS, ESSAY XIV (28 Feb. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 431–33 (2.9.169–75); *id.* (6 Mar. 1788) (2.9.176–85); FEDERAL FARMER XV, *supra* note 103, at 319 (2.8.189); see U.S. CONST. art. III, § 2.

119. FEDERAL FARMER XV, *supra* note 103, at 322 (2.8.194).

120. Herbert J. Storing, *Notes on Observations of The Federal Farmer*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 214; Herbert J. Storing, *Notes on Essays of Brutus*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 102, at 358.

What better way to do that than to turn to Montesquieu again? Judges' enormous power could be masked. Well-versed in Montesquieuan tactics, Alexander Hamilton took on the task. His essays in *The Federalist* numbers 78 through 83 are a direct response to Brutus's critique of the federal judiciary.¹²¹ Hamilton's essays rigorously and analytically defend the provisions of the draft U.S. Constitution concerning judicial independence and the precise grants of jurisdiction to federal courts in Article III, as well as the implication of judicial review. And yet, in important respects, Hamilton's essays are a lullaby addressed to Americans crying out against excessive judicial power.

Hamilton quickly revealed the source of his inspiration. In his first essay on the judiciary, in *The Federalist* number 78, he announced that "the judiciary is beyond comparison the weakest of the three departments of power."¹²² He dropped a footnote to that statement: "The celebrated Montesquieu, speaking of [the judges] says, 'of the three powers above mentioned, the JUDICIARY is next to nothing.' Spirit of Laws, vol. 1, page 186."¹²³

Again, following Montesquieu, one of Hamilton's soothing arguments was that judges would follow the law and precedent, and not be self-willed.¹²⁴ This argument echoed passages in *Spirit of the Laws* in which Montesquieu implied that, in a republic, judges had no discretion in determining the law, and simply followed it mechanically.¹²⁵ (As we have seen, in other passages Montesquieu made clear that judges did in fact have discretion in shaping and applying law.¹²⁶)

Hamilton devoted his very last and longest essay on the judiciary to trial by jury. In *The Federalist* number 83, Hamilton was at his most

121. Wilmarth, *supra* note 99, at 139–42.

122. THE FEDERALIST NO. 78, *supra* note 99, at 402. Just before this statement, Hamilton argued that in a system of separation of powers, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." *Id.*

123. *Id.* at n.*. Hamilton omitted the words "in some measure" from his quotation of Montesquieu. The translation Hamilton used reads: "Of the three powers above mentioned, the judiciary is in some measure next to nothing." Hamilton also failed to mention that, in the context of that statement, Montesquieu was referring to English juries as judges. These omissions were almost certainly deliberate, as Hamilton was a careful reader of Montesquieu. See Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169, 180 n.21 (2009) (book review of HAMBURGER, *supra* note 99).

124. THE FEDERALIST NO. 78, *supra* note 99, at 405, 407.

125. See *supra* text accompanying note 45.

126. See *supra* text accompanying notes 46–48.

reassuring. At least, he was reassuring as to the need for the jury in criminal cases. But sustained reading reveals Hamilton's grave misgivings about the civil jury. Ever since, supporters of the jury have downplayed his criticisms. Like his predecessor Montesquieu, Hamilton saw serious drawbacks to adjudication by lay jurors.

Hamilton opened his essay on the jury by explaining that the most successful objection to the draft U.S. Constitution was the lack of a guarantee of jury trial in civil cases.¹²⁷ This was a remarkable admission, and suggests the depth of concern about a tyrannical federal judiciary. Criminal jury trial was guaranteed in Article III, section 2 of the draft U.S. Constitution, but the draft included no right to civil jury trial. Hamilton protested that silence did not mean abolition.¹²⁸

Hamilton's next move was to lavish praise on jury trial while emphasizing agreement between Federalists and Anti-Federalists. "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury" The only difference between them was that "the former regard it as a valuable safeguard to liberty," while "the latter represent it as the very palladium of free government."¹²⁹ This is the language that American lawyers and judges have quoted ever since. They ignore the rest of the essay, in which Hamilton made quite a different point.

Having emphasized this harmonious unity about jury trial in the beginning of a paragraph, in the middle of that paragraph Hamilton suddenly pivoted. He injected the critical word "but." "But I must acknowledge, that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury, in civil cases."¹³⁰ Criminal jury trial prevented tyranny, but civil jury trial was a different matter.

Hamilton spent the rest of the essay, the considerable majority of the longest essay he wrote on the judiciary, attacking civil jury trial. He also explained why it would be extraordinarily difficult to draft a right to civil jury trial for the federal constitution. His criticisms of the civil jury deserve close attention, which I cannot give here but plan to in future writing. For this Article, it is enough to point out that his two main criticisms of lay adjudication in civil cases agree with criticisms that Montesquieu made. First, jury trial requires radical simplification of a dispute: "the matter to

127. THE FEDERALIST NO. 83, at 430 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

128. *Id.*

129. *Id.* at 432–33.

130. *Id.* at 433.

be decided should be reduced to some single and obvious point.”¹³¹ This made civil jury trial ineligible for many cases, which required more complicated adjudication. Second, jurors were not learned in the law and therefore were not able to handle critical cases turning on, for example, the law of nations.¹³² Under this latter objection lay the fear of jury bias, especially bias against foreigners. Such bias had been well-demonstrated in states that had allowed maritime and admiralty prize cases to go to juries.¹³³ The results in those cases threatened to upset the crucial foreign relations of the fledgling republic.

The best—indeed, almost the only—reason Hamilton saw for civil jury trial depended on a circumstance that he described as “foreign to the preservation of liberty.”¹³⁴ That was corruption in the judiciary. In Hamilton’s view, civil jury trial did not have many virtues in itself, but it could check corrupt judges, if absolutely necessary, as a second-best measure. Hamilton implied that the evil of corrupt judges should be addressed at its source. As we will see in the conclusion of this Article, the problem of corrupt judges is significant today.

Hamilton, like Montesquieu before him, advocated for a strong judiciary but tried to mask its powers. Also like Montesquieu, he endorsed jury trial, which had the happy effect of deflecting attention from judges. But the drawbacks that he and Montesquieu saw in lay adjudication suggested significant limitations on the scope of jury trial, especially civil jury trial. Four decades later, another follower of Montesquieu was to analyze the American civil jury, and also conclude that it could enhance the power of judges.

II. TOCQUEVILLE ON JUDGES AND JURIES

Alexis Charles-Henri-Maurice Clérel de Tocqueville (1805–1859) was, like Montesquieu, a Frenchman, a nobleman, and a judge. Also like Montesquieu, he spent some time living in an English-speaking country with a common-law legal system. But with Tocqueville, we seem to be in a different world. He was writing a century later than Montesquieu. France had passed through an initially promising but then bloody revolution, a dictatorship, and several regime changes after that. The American Revolution had established a republic, with Montesquieuan separation of powers, including a fully independent judiciary as a co-equal branch of

131. *Id.* at 438.

132. *Id.* at 437.

133. See ANTHONY J. BELLIA, JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* 121–24 (2017).

134. *THE FEDERALIST* NO. 83, *supra* note 127, at 434.

government. At the time Tocqueville visited America, the nation was in the grip of an enthusiasm for democracy never equaled before or since. In France, the nobility had been partly killed off during the revolution, and the remnant had lost its former legal privileges and considerable property, though it retained social prestige. Tocqueville entered a French judiciary that was organized more or less along modern bureaucratic lines; offices were no longer inherited, bought, and sold. The French government had loosened controls on the press, and Tocqueville had no trouble publishing his works in Paris under his own name. His style is much more direct than Montesquieu's. Although, like Montesquieu, he was trained in the classics, he made far fewer references to ancient Greek and Roman literature and practices. Tocqueville's world is more familiar to us.

Yet, as we will see, many of his concerns were the same. Montesquieu greatly influenced his thinking, as Tocqueville's letter to his cousin, quoted in the Introduction, suggests. Like Montesquieu, Tocqueville believed that the judiciary was a moderating force that was key to preserving liberty. And he believed that the purpose of juries was to enhance the judges' power. He was much more open about the mechanism: judicial comment on evidence and instructions to the jury.

A. Tocqueville's Judicial Career, Travels in America, and Democracy in America

Tocqueville had reasons to be interested in political stability and moderation. He was an aristocrat with family estates in Normandy. During the French Revolution, his parents were imprisoned in a dungeon and many of his relatives guillotined. After that, France went through a republic, an imperial dictatorship under Napoleon, and a restored monarchy.

Tocqueville also had a particular interest in law and the legal system; he was a judge. Americans often overlook his judicial career. But his close involvement with the legal system sheds light on his views about America and democracy. And his operating in an inquisitorial system provides a striking contrast with, and perspective on, the common-law system.

Tocqueville got his job as a judge through family influence. Under the Bourbon Restoration (1814–1830), the old nobility was in favor, and Tocqueville's family achieved some political prominence. His father became the prefect of Versailles. Thanks to his father, in 1827 after a period of legal studies the 21-year-old Tocqueville got a job in the Versailles prefecture as a *juge-auditeur*.¹³⁵ French courts were divided into

135. HUGH BROGAN, ALEXIS DE TOCQUEVILLE: A LIFE 76–77 (2006).

two chambers, one for hearing and deciding cases, and the other for investigating and prosecuting. The latter was and is known as the *parquet*, from the parquet floors on which its members stood to speak. The *juge-auditeur* was the lowest position in the *parquet*. This was an unsalaried position for young gentlemen. Tocqueville's job was to investigate both civil and criminal matters and to prepare written reports on his findings for the adjudicating chamber of the court. In a common-law system, this work would have been done almost entirely by the lawyers or other agents of the parties, not by a judge.

The ambitious young man worked hard. During his time as a *juge-auditeur*, he investigated and prepared reports in about 60 cases, and the reports were thorough. Some of the civil cases were suits by nobles to recover lands and other property lost during the revolution. Understandably, given his background, he sympathized with the dispossessed nobles, but he concluded that the intervening transactions could not be undone. He also, on occasion, appeared as a prosecutor before the highest criminal court of Versailles. His immediate boss, Gustave de Beaumont, another aristocrat a few years older who became Tocqueville's close friend, wrote that Tocqueville impressed the judges with his intelligence and maturity of judgment.¹³⁶

Tocqueville expected that this position would be the beginning of a legal career. He was eager for promotion to a higher-level—and salaried—position in the judiciary. But political events intervened. In July 1830, France underwent yet another revolution. Tocqueville was in Paris when it happened, and at the time he wrote to his future wife about hearing the “cries of fury and despair” in the street and his horror at seeing “Frenchmen cutting each other's throats for fun.”¹³⁷ The July Revolution produced the new king Louis-Philippe, the “bourgeois king,” and once again the old aristocracy was suspect. The upheaval stymied Tocqueville's judicial career.

America was an escape. Tocqueville's relative, the poet and political figure François-René de Chateaubriand, inspired him to take an interest in America. Thirty-five years before, during another time of political turmoil in France, Chateaubriand had visited America. He had recently written two books about it.¹³⁸ Why not Tocqueville? Tocqueville hatched a plan to visit America with his friend Beaumont. But neither wanted to resign his

136. *Id.* at 78–84. On Tocqueville's lifelong friendship with Beaumont, see ANDRÉ JARDIN, *TOCQUEVILLE: A BIOGRAPHY* 79–81 (Lydia Davis trans., 1988) (first published in French in 1984).

137. BROGAN, *supra* note 135, at 129–30 (Tocqueville to Mary Mottley).

138. FRANÇOIS-RÉNÉ DE CHATEAUBRIAND, *LES NATCHEZ* (1826); FRANÇOIS-RÉNÉ DE CHATEAUBRIAND, *VOYAGE EN AMÉRIQUE* (1827).

judicial post. The new regime was interested in reform movements. Tocqueville and Beaumont declared to their superiors that they wanted to go on a fact-finding mission to study American prisons. America was then viewed as at the forefront of penal reform. Official permission was granted, their two families agreed to pay for the trip, and off they went.¹³⁹

From the first, Tocqueville had in mind a broad study of American society. In May 1831, he and Beaumont landed in New York City and spent the next nine months touring the United States, with an excursion into Canada. They collected documents, read books and newspapers, attended public meetings and private social functions, and spoke with Americans in all regions. Their voyages remind us of the vast geography and variety of North America: from New York City into upstate New York, across Lake Erie to Detroit, up to Québec and Montréal, down to Boston and Hartford, then to Philadelphia and Baltimore, over to Pittsburg and Cincinnati, and overland through Kentucky and Tennessee. From Memphis, Tocqueville and Beaumont chugged down the Mississippi River by steamboat to New Orleans and over to Mobile, and from there overland up to Norfolk, Virginia. During that grueling 900-mile journey, they passed through Alabama, Georgia, South Carolina, and North Carolina. From Norfolk they headed up to the capital in Washington. Finally, in late February 1832, they sailed from New York for France.¹⁴⁰

Back in France, in 1835 Tocqueville published the first volume of his *Democracy in America*. The second volume followed in 1840. Tocqueville was fascinated by the new type of government he observed in America. He saw that a trend toward democracy was likely in France. In a letter home, he wrote that unlimited democracy in his native country was “an irresistible force.” He added, “I don’t say this is a good thing.”¹⁴¹ So for Tocqueville, the visit to America was like a glimpse into the future of his own society.

In *Democracy in America*, Tocqueville was aiming to reveal how democracy was sustained and controlled. What interested him was not so much Americans’ fractiousness, but what contained their fractiousness. He wanted to understand the forces that curbed democracy and partisanship, that made it sustainable, at least in the medium term, without resort to the bloodshed so familiar in France. Like Montesquieu, he was looking for moderating forces. And, like Montesquieu, he believed that one of these was an aristocracy.

139. BROGAN, *supra* note 135, at 135–47.

140. *Id.* at 148–213.

141. *Id.* at 159 (Tocqueville to Kergorlay). Tocqueville’s interest in curbs on democracy is the theme of Paul Carrese’s recent work. CARRESE, *DEMOCRACY IN MODERATION*, *supra* note 11, at 78–104.

But where was an aristocratic principle to be found in America? Americans seemed more ferociously egalitarian by the day. That is, they were egalitarian as to white men. In 1828, shortly before Tocqueville's visit, Andrew Jackson was elected president. The era of Jacksonian Democracy had begun. The first half of the nineteenth century in America was the age of popular elections. Large numbers of white men, of all classes, began to vote in elections and to participate in civil discourse. In state after state, property restrictions on voting fell. By 1830, virtually all white men 21 years or older could vote. No longer was politics mainly a gentleman's game. Gone were speeches and writings filled with classical allusions, and pseudonyms drawn from the Roman republic, such as Brutus and Publius. In their place, a plainer style of discourse emerged, aimed at all classes. Vanished were closed party caucuses and many executive and legislative appointments. Parties met to pick candidates in open, raucous conventions.¹⁴²

Soon it seemed that every office possible was popularly elected, from militia officers to judges. One delegate to a state constitutional convention quipped, "We have provided for the popular election of every public officer save the dog catcher, and if the dogs could vote, we should have that as well."¹⁴³ Secrecy was abhorred.¹⁴⁴ Citizens had to see proceedings to have a role in decision-making. Ordinary Americans took an intense interest in politics. Tocqueville struggled to describe Americans' "ceaseless agitation" over politics. "It is hard to explain the place filled by political concerns in the life of an American. To take a hand in the government of society and to talk about it is his most important business and, so to say, the only pleasure he knows."¹⁴⁵ This preoccupation pervaded all of life and society. Even the women, he wrote, went to public meetings and listened to political speeches as recreation from their household labors. For Americans, debating clubs substituted for theaters.¹⁴⁶

Amidst this democratic frenzy, Tocqueville believed that he found the most important curbing force: the legal profession.

142. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 21, 67–68 (1995).

143. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 *HISTORIAN* 337, 340–41 (1983).

144. On distrust of secrecy and turn toward public debate beginning in eighteenth-century Europe, see KESSLER, *supra* note 114, at 109–11.

145. 1 TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 4, at 243.

146. *Id.*

B. Tocqueville on the American Legal Profession

To understand Tocqueville's views about the jury, we must understand his opinion of American lawyers and judges. The section immediately before his famous discussion of the jury concerns lawyers and judges. Tocqueville characterized the legal profession as "the only aristocratic element" which could mingle with democracy and temper the tyranny of the majority. "It is at the bar or the bench that the American aristocracy is to be found."¹⁴⁷ In American towns and cities, lawyers were typically the most intellectual citizens. The study of law gave lawyers a natural preference for order and formalities. Every day they had to direct "the blind passions of litigants" toward legal objectives, which gave lawyers "a certain scorn for the judgment of the crowd."¹⁴⁸ Tocqueville attributed to American lawyers the aristocratic and moderating influence that Montesquieu reserved for judges.

In painting his picture of order-loving lawyers, Tocqueville glossed over lawyers' potential for demagoguery. Recall that Montesquieu had warned about the people's susceptibility to demagogues.¹⁴⁹ This demagoguery could function on a grand scale, whipping up emotion on great political issues, or on a smaller scale, fomenting among the jury and populace "blind passions" in favor of their clients. Contemporary American observers—including artists—thought that lawyers' potential for demagoguery was a great danger, both to politics and to the legal system.¹⁵⁰ One of these critics was Abraham Lincoln, himself a lawyer and politician, and a successful advocate before juries. In his famous Springfield Lyceum address in 1838, Lincoln pleaded with Americans to reject a political discourse of emotion in favor of reason. Otherwise, he warned, American democratic institutions were in danger.¹⁵¹ Some of the greatest skeptics about the civil jury were judges who had been lawyers with extraordinary skill at rousing juror emotion.¹⁵² Tocqueville seems to

147. *Id.* at 266, 268. The chapter is entitled "The Temper of the American Legal Profession and How It Serves to Counterbalance Democracy." *Id.* at 263.

148. *Id.* at 264.

149. *See supra* text accompanying note 64.

150. Lerner, *The Transformation of the American Civil Trial*, *supra* note 65, at 233–39; LANGBEIN, LERNER & SMITH, *supra* note 52, at 516–21.

151. DAVID HERBERT DONALD, LINCOLN 80–82 (1995).

152. One of these judges was Joseph Lumpkin, Chief Judge of the Georgia Supreme Court. *See* Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL OF RIGHTS J. 811, 834–35 (2014).

have counted on the judge's firm guidance in instructions and comment on evidence to the jury to counteract the effects of lawyers' rhetoric.

Tocqueville also ignored lawyers' character as a special-interest group. Not everything that was good for lawyers was good for the nation. The American legal system was widely believed to be too unpredictable, prone to delays, and expensive.¹⁵³ Under these conditions, lawyers prospered.

Why did Tocqueville have such a favorable view of American lawyers? Why did he tend to overlook the harm that lawyers did? It is possible that Tocqueville may have been too influenced by a bias in his sources. In his travel notebooks, he recorded conversations with a large number of "distinguished lawyers."¹⁵⁴ It was natural that Tocqueville would seek out lawyers. He shared with them a professional interest in law. And lawyers tended to be more educated, and to have more intellectual tastes and a deeper knowledge of government, than other Americans. He may have been too swayed by their flattering portrait of their profession.

But it is also possible that his favorable view of American lawyers was part of his admiration for the common-law legal system. Throughout his writings, this admiration was a significant theme. Like Montesquieu, he viewed the common-law system as liberty-enhancing. From personal experience, he was deeply aware of the flaws of his own legal system in France. Tocqueville was not blind to the flaws of the common-law, adversarial systems. He could portray them as grievous. In the notes to his 1856 book on the French Ancien Régime, he laid out the common-law system's flaws with devastating clarity. In England, he wrote, justice was expensive and full of delays. There was a striking lack of inferior courts with power to render speedy and inexpensive justice to poor litigants.¹⁵⁵ (England had begun to address this problem with the County Courts Act

153. *Id.* at 846–50.

154. "Avocats distingués." ALEXIS DE TOCQUEVILLE, *JOURNEY TO AMERICA* 52–54, 221–22 (J.P. Mayer ed., George Lawrence trans., 1960) (1831). *See* GEORGE W. PIERSON, *TOCQUEVILLE AND BEAUMONT IN AMERICA* 383–89, 530 (1938); BROGAN, *supra* note 135, at 192; DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830* 301–02 (2005); Albert W. Dzur, *Democracy's "Free School": Tocqueville and Lieber on the Value of the Jury*, 38 *POL. THEORY* 603, 606–07, 610–12 (2010).

155. ALEXIS DE TOCQUEVILLE, *THE ANCIEN RÉGIME AND THE FRENCH REVOLUTION* 254–256 (Arthur Goldhammer trans., Jon Elster ed., 2011) (1856).

of 1846.¹⁵⁶) In comparison, the French legal system was a model of efficiency and rationality.

Still, Tocqueville believed the advantages of the common-law system outweighed the disadvantages, at least in curbing government tyranny. He was impressed with the English and American ability to maintain political order with a measure of freedom. A striking difference between France and those two countries was a subject close to him: the legal system. A major reason for the relative stability and liberty of the nations must lie there.

The key, Tocqueville believed, was the small number, high quality, and independence of the common-law judges. Such judges inspired respect and could effectively check political excesses. They were a sort of aristocracy that could serve as a moderating, liberty-promoting force.

In his travel journal, Tocqueville commented on the special role that judges played in the American scheme of separation of powers—which was the first fully modern scheme, because America was the first true mass democracy. “A completely democratic government is so dangerous an instrument that, even in America, men have been obliged to take a host of precautions against the errors and passions of Democracy. The establishment of two chambers, the governor’s veto, and above all the establishment of the judges.”¹⁵⁷

American judges, Tocqueville wrote, combined the usual conservative, lawyerly tendencies with an interest in maintaining order for the sake of their office.¹⁵⁸ That office carried great political power. Tocqueville made much of the power of judicial review.¹⁵⁹ This power did not exist in England or in France. At least, in England there was no power to declare acts of Parliament void. American judges, armed with the power to declare laws unconstitutional, were constantly intervening in political affairs. A judge “cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves.”¹⁶⁰ An important constraint on this “immense political power” was that judges were passive and had to wait for an actual dispute to arise and be presented to them.¹⁶¹ On the surface at least, Tocqueville did not share the Anti-Federalists’ concern that there was no check if judges abused the power of judicial review. He explained that the federal Constitution could be amended, and the people could thereby “reduce the

156. 9 & 10 Vict. c. 95.

157. TOCQUEVILLE, *JOURNEY TO AMERICA*, *supra* note 154, at 149.

158. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 4, at 269.

159. *See, e.g., id.* at 100–04, 269.

160. *Id.* at 263–70.

161. *Id.* at 100–04.

judges to obedience.”¹⁶² In this context, Tocqueville glossed over the difficulty of amending the federal Constitution.

Tocqueville’s writing returned again and again to the fact that England and America, compared with France, had very few judges. Their small numbers made the judges more prestigious and powerful. At least, it did if the judges had long, guaranteed tenure. Tocqueville was alarmed that some American states elected judges for short tenures. He predicted that, sooner or later, judicial elections would have “dire results.” Such elections subverted judges’ independence and made it impossible for judges to play their proper role in curbing democracy.¹⁶³

Tocqueville’s emphasis on the power of judges immensely affected his view of the value of the jury. According to Tocqueville, the jury was actually a curb on democracy and the tyranny of the majority. To many Americans, the jury seemed like a manifestation of direct democracy. How could the jury be a restraint on democracy?

C. Tocqueville on the Jury as a Judicial Institution

Tocqueville did not repeat Anglo-American cheerleading slogans about the jury. He wrote that the jury could be considered as a judicial institution, or as a political institution.¹⁶⁴

As a judicial institution, Tocqueville strongly implied, the jury fell short. It fell short particularly in civil cases. “If it were a question of deciding how far the jury, especially the jury in civil cases, facilitates the good administration of justice, I admit that its usefulness can be contested.”¹⁶⁵ The jury system, he wrote, arose “in the infancy of society,” when the English were “a semibarbarian people.” At that time, courts decided only simple questions of fact. It was “no easy task to adapt it to the needs of a highly civilized nation, where the relations between men have multiplied exceedingly and have been thoughtfully elaborated in a learned manner.”¹⁶⁶ As a judicial institution, the jury did not seem at all suited to a complex commercial society with necessarily elaborate laws.

Nevertheless, Tocqueville wrote, the English had hastened to establish juries in their colonies all over the globe, and everywhere alike extolled the institution. The institution “cannot be contrary to the spirit of justice.”¹⁶⁷

162. *Id.* at 102.

163. *Id.* at 269.

164. *Id.* at 270.

165. *Id.* at 270–71.

166. *Id.* at 271.

167. *Id.* at 272.

Tocqueville did mention one advantage of the jury considered as a judicial institution. He discussed this point in a footnote in his chapter on the jury considered as a political institution.¹⁶⁸ In Tocqueville's view, the great advantage of the jury considered as a judicial institution was one that no one from the common-law world had discussed. The jury allowed the number of judges to be reduced.¹⁶⁹ Instead of having to investigate and decide the facts himself, as on the continent of Europe, a judge could simply allow the parties to investigate and present facts and hand the case to a jury. Thus, the system needed fewer judges.

Tocqueville did not mention the enormous role that advocates play in investigating and presenting facts in an adversarial system. That feature, more than juries, reduces the number of judges needed. In England and the United States, the work that Tocqueville had done as a junior judge investigating cases would have been done entirely by the parties.

This reliance on the parties to investigate and present facts produces two major problems: the bias effect and the wealth effect.¹⁷⁰ It is the responsibility of parties—meaning their lawyers—to find and “prepare” witnesses. This party control of witnesses, together with the likelihood that the other party will vigorously attack witness credibility on cross-examination, tends to drive witnesses to shade testimony heavily in favor of the side that called them. And wealthier parties have an advantage in being able to fund more extensive investigation and skillful presentation. These problems of the adversarial system persist regardless of the quality of the judge.

For Tocqueville, fewer judges were a “great advantage” for two reasons. First, in a large and hierarchical judiciary, as in France, death was constantly producing gaps that ambitious judges strove to fill, by moving up the hierarchy. Their independence was therefore questionable, as they were apt to curry favor with whatever group or individual was making the appointment. Tocqueville analogized judicial promotion to promotion in the military.¹⁷¹ His argument about lack of judicial independence may reflect his frustration at having his career stalled because of his family being disfavored under the Louis-Phillipe monarchy. Tocqueville had been an ambitious young judge himself. He had worked hard and well in order to get promoted. In the judiciary of modern European countries, as in the U.S. military, this ambition is not so much considered a problem but a feature. It helps to encourage good performance in the job.

168. *Id.* at 272 n.4.

169. *Id.*

170. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 102–05, 265–66 (2003).

171. TOCQUEVILLE, DEMOCRACY IN AMERICA, *supra* note 4, at 272 n.4.

Second, Tocqueville wrote, in a smaller judiciary the quality of judges was likely to be higher.¹⁷² The key to making the jury system work properly, therefore, was for the judge to guide the jury. “For my part, I would rather have a case decided by an ignorant jury *guided by a skilled judge* than hand it over to judges, most of whom have an incomplete knowledge both of jurisprudence and of the laws.”¹⁷³ In other words, better an ignorant jury guided by a good judge than mediocre judges.

D. Tocqueville on the Jury as a Political Institution: “A Free School”

Tocqueville’s brief discussion of the jury as a judicial institution set the stage for his famous argument about the jury as a political institution. Those who quote Tocqueville superficially miss this point. The key to Tocqueville’s argument about the jury as a political institution is that the jurors must be firmly guided by a good judge.

1. Tocqueville’s Similarity to Montesquieu, and His New Idea

Tocqueville was at his most Montesquieuian in the beginning of his chapter on the jury as a political institution. Like Montesquieu, he proclaimed that the jurors actually were the judges. At least, Tocqueville wrote that they were so in criminal cases. Tocqueville seemed to be saying that criminal jurors were even more powerful than Montesquieu had suggested. Tocqueville wrote: “[T]he man who is judge in *criminal* trial is the real master of society. Now, a jury puts the people themselves or at least one class of citizen on the judge’s bench. Therefore the jury as an institution really puts control of society into the hands of the people or of that class.”¹⁷⁴

172. *Id.*; see also 1 STEPHEN, *supra* note 21, at 521–22 (“The largeness of the number of the French judges cannot but diminish very greatly their importance in comparison with that of English judges.”).

173. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 4, at 272 n.4 (emphasis added). The French reads, “Quant à moi, j’aimerais mieux abandonner la décision d’un procès à des jurés ignorants dirigés par un magistrat habile, que de la livrer à des juges dont la majorité n’aurait qu’une connaissance incomplète de la jurisprudence et des lois.”

174. *Id.* at 272–73. Tocqueville mentions the idea that the jury might be drawn from “one class” because he was also referring to the English jury. He thought of English jurors as being “aristocratic.” (English petty jurors had to meet property qualifications, but to call them aristocratic was quite a stretch. Generally, they were of the middling sort. In contrast, English grand jurors did come from the upper classes.) Tocqueville stated that, in America, every citizen could vote and be a juror. *Id.* at 273. So in America the jurors were from the people as a whole.

So far, Tocqueville seemed to be closely following Montesquieu's playbook. But then he made a series of strange statements about juries in civil cases. Montesquieu had claimed that the jurors were the judges in both criminal and civil cases.¹⁷⁵ Tocqueville distinguished the two. Tocqueville did not say that the jurors were the judges in civil cases. He did write that in civil cases, because juries were so prominent, they affected so many interests, and "everyone serves on them," "it is hardly too much to say that the idea of justice becomes identified with" the civil jury.¹⁷⁶ He claimed that the jury was always vulnerable as long as juries were only used in criminal cases. But if juries were also used in civil cases, the institution became permanent. So it was "the civil jury that really saved the liberties of England."¹⁷⁷

That statement about civil juries seemed dramatic and counterintuitive, but more was to come. Tocqueville wrote that no matter how a nation used juries, juries were bound to have an influence on the national character. "But that influence is immeasurably increased the more they are used in civil cases."¹⁷⁸

At this point, the reader should be puzzled. We have seen that Tocqueville, like Montesquieu, had grave misgivings about the ability of the people to judge. Tocqueville has just told us that his misgivings were especially strong in civil cases. We have also seen that Tocqueville, like Montesquieu, extolled the power of the professional judiciary and thought that it was vital to moderating government and preserving liberty. Why, then, did he think that civil juries were so important?

Tocqueville next proclaimed a startling idea.

The point of the jury, especially the civil jury, was not to judge fairly between litigants. Nor was it to prevent tyranny, at least not directly. Nor was it to legitimize judgments in the eyes of the people. Instead, explained Tocqueville, the purpose of the jury was *to educate the jurors*. The jurors were not a means to an end; they were the end. The institution existed for them. Tocqueville declared that the jury was "a free school" for democracy. "I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it

175. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 157 (claiming that the typical juror "punishes crimes or judges disputes between individuals"; "judging the crimes or the disputes of individuals"). Though he did emphasize criminal cases. *Id.* at 158–59.

176. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 4, at 274.

177. *Id.*

178. *Id.*

as one of the most effective means of popular education at society's disposal."¹⁷⁹

In a moment, we will see how Tocqueville thought that education was supposed to take place. Again, we will encounter a startling idea. But first, we will take a look at the antecedents of Tocqueville's concept of the jury as a school and that concept's inseparable connection with democracy.

2. American Antecedents for the Idea of the Jury as a School

The rationale of the jury as a school could only have arisen in the context of a democracy. And the United States was the first mass democracy. Recall the classic concern about democracies, that the people would be inadequate to the demands of politics.¹⁸⁰ As Martin Diamond put it, "The history of modern democracy is a history of the effort to balance the equation between the demands of the political and the capacity of the many."¹⁸¹ Lowering the demands of the political, by setting out modest aims for government, could help—so could raising the capacity of the many. Hence in almost all democracies there is a strong faith in popular education.

Montesquieu emphasized that in a republic, and especially a democracy, education was vital. Democratic republics depended on citizens having political virtue. This virtue was difficult to achieve. "[S]uch virtue is a renunciation of oneself, which is always a very painful thing."¹⁸² He defined this virtue as love of the laws and the homeland. Education should attentively cultivate this love. Without love of the laws and the homeland, a democratic republic would fail. "Now government is like all things in the world; in order to preserve it, one must love it."¹⁸³ Montesquieu did not mention the jury as a possible way to educate the citizenry in love of the laws and the homeland, but one of his careful readers did.

To see the importance of democracy in changing the rationale of the jury, a comparison with England is instructive. Blackstone praised the jury to the skies.¹⁸⁴ He had learned well from his mentor Montesquieu how to conceal judicial power.¹⁸⁵ He pretended, along with Montesquieu, that

179. *Id.* at 275.

180. *See supra* text accompanying note 33.

181. Diamond, *supra* note 28, at 39.

182. MONTESQUIEU, *SPIRIT OF THE LAWS*, *supra* note 2, at 35 (bk. 4, ch. 5).

183. *Id.* at 36.

184. *See, e.g.*, 3 BLACKSTONE, *supra* note 78, at *379, *385.

185. On Blackstone's relationship to Montesquieu, see CARRESE, *THE CLOAKING OF POWER*, *supra* note 15, at 111–12.

English jurors really did decide the facts all by themselves. He entirely omitted any discussion of judges' dominance of the jury through comment and instruction.¹⁸⁶ When one cuts through Blackstone's voluminous hyperbole and finds his reasons for the institution, the main one he gave reflected the mixed regime: class bias. Class divides were deep in eighteenth-century England. Because the judges might have "an involuntary bias toward those of their own rank and dignity,"¹⁸⁷ the common people, the jurors, should be and were incorporated into judicial decision-making. Blackstone did not suggest any purpose of educating jurors in self-governance. There would be no point. England in the eighteenth century was not a democracy.

But a democracy did arise a few decades later across the ocean, and there we see the first stirrings of the idea that jury service could be used for education in the art of politics. Democracy, modern separation of powers, and the idea of the jury as a school for self-governance developed together.

In America, there were precedents for Tocqueville's idea of the educative purpose of the jury. One precedent was the practice in the early republic of federal grand jury charges. Soon after the new nation was formed, the justices of the U.S. Supreme Court began riding circuit around the country. During the 1790s, many of them delivered charges to federal grand juries that were explicitly intended to educate jurors in the knowledge and manners needed for republican self-governance.¹⁸⁸ Often local newspapers printed these charges. Justice James Wilson even incorporated parts of his academic lectures on law into grand jury charges.¹⁸⁹ But the justices had to be careful not to be too overtly political

186. On Blackstone's concealment of the realities of judge-jury relations, see Langbein, *Blackstone on Judging*, *supra* note 44, at 70–71. On the dominance of English judges over the jury, see *supra* text accompanying notes 82–90.

187. 3 BLACKSTONE, *supra* note 78, at *379.

188. Wilmarth, *supra* note 99, at 162–63; Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 131–55; David J. Katz, *Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s*, 14 CARDOZO L. REV. 1045, 1054–62, 1072–83 (1993). A number of federal grand jury charges are printed and annotated in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 (Maeva Marcus ed., 1988). Lengthy grand jury charges were a long-standing American practice. In their charges to grand juries, American colonial and state judges sometimes covered a wide range of topics involving government. STANTON D. KRAUSS, GENTLEMEN OF THE GRAND JURY: THE SURVIVING GRAND JURY CHARGES FROM COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801 (2012) (2 volumes).

189. Wilmarth, *supra* note 99, at 162 n.292.

in teaching grand jurors, as the impeachment of Justice Samuel Chase in 1804 showed.¹⁹⁰

Whether Tocqueville was aware of this earlier practice of educative grand jury charges is unclear. If Tocqueville knew about it, he transformed the idea considerably in *Democracy in America*. Federal judges had used mainly criminal cases and especially grand jury charges to educate jurors. Tocqueville, as we will see, thought that jurors needed little education in criminal matters. For him, civil cases were the main classroom for judges to teach jurors.

There was another source from which Tocqueville might have derived the idea of the jury as a school. This was Edward Livingston's widely-read 1822 report on the penal code he had drafted for Louisiana.¹⁹¹ Livingston was originally from New York. In his report, Livingston explained that he was giving a thorough account of reasons for the jury because Louisiana had no practice of jury trial under Spanish or French rule.¹⁹² Again, an encounter with the civil law prompted an important explanation of the common-law institution. In the context of arguing for the rule that a criminal defendant should not be able to waive jury trial, Livingston pointed to the institution's benefits to the public. One of the reasons Livingston gave was thoroughly American: "It diffuses the most valuable information among every rank of citizens; *it is a school*, of which every jury that is empaneled, is a separate class; where the dictates of the laws, and the consequences of disobedience to them, are practically taught."¹⁹³

It would be surprising if Tocqueville had not read Livingston's report. Tocqueville was especially interested in Louisiana because of the mixture of civil law and common law elements in its legal system. Livingston's report was published in London in 1824. Tocqueville met with Livingston, then Secretary of State, in Washington. In *Democracy in America*, Livingston is the only interlocutor whom Tocqueville mentions by name. There Tocqueville says of him, "Mr. Livingston is one of those rare men

190. Among U.S. Supreme Court justices, the practice of educative grand jury charges came to a halt with the impeachment of Justice Samuel Chase in 1804 in part for what were perceived to be his partisan charges to grand juries. Demonstrating that the Anti-Federalists had been right about the limits of impeachment, the politically hostile Senate voted to acquit Chase by significant margins.

191. EDWARD LIVINGSTON, PROJECT OF A NEW PENAL CODE FOR THE STATE OF LOUISIANA (London, Baldwin, Cradock, and Joy 1824). The General Assembly of Louisiana originally published the report. *Id.* at iii. See Dzur, *supra* note 154, at 611–12.

192. LIVINGSTON, *supra* note 191, at 13.

193. *Id.* at 15 (emphasis added).

whose writings inspire affection, so that we admire and respect them even before we know them.”¹⁹⁴

But Tocqueville significantly altered Livingston’s idea. For Livingston, as for early federal judges, criminal cases were the vital classroom. And Livingston portrayed the judge as distant, more like a principal in this school than a teacher.¹⁹⁵

It was in conversations with officials, lawyers, and judges in Boston and Philadelphia that Tocqueville more fully developed his idea of the civil jury as a school, with the judge as skillful teacher. These persons had doubts about the competence of jurors to decide cases.¹⁹⁶ According to Tocqueville’s notes, in Boston, Francis Calley Gray, a prison inspector and state senator, told him that the courts were the most powerful part of government in the state and that civil trials, especially, encouraged a “union and mutual confidence” between “the people and the magistracy.”¹⁹⁷ Charles Pelham Curtis, the legal solicitor of Boston, emphasized that civil juries were less competent than judges but, nevertheless, enjoyed great public support. Soon after these conversations, Tocqueville drafted a short essay on the jury arguing that the use of juries supported the power of judges.¹⁹⁸

Tocqueville saw jury trials in Boston, New York, Philadelphia, and Cincinnati. Tocqueville met with a federal judge in Boston, but does not appear to have been overly moved by the judge telling him that American judges often deferred to juries, even when the judges disagreed with verdicts and had the power to overturn them.¹⁹⁹

Probably Tocqueville’s most significant conversation about the jury occurred in Philadelphia with Henry D. Gilpin. The two men spoke for half a day. Considering his background, Gilpin’s politics were unusual. Despite an elite banking and manufacturing family, extensive English connections, a fine classical education, literary interests, and success at the

194. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 4, at 19–20 n.2. Tocqueville mentioned that Livingston was later U.S. Minister to France, and living in Paris. Livingston served in that role from 1833 to 1835, while Tocqueville was also in Paris and writing *Democracy in America*.

195. I am indebted to Albert Dzur for this analogy. Dzur, *supra* note 154, at 612.

196. *See id.* at 611.

197. TOCQUEVILLE, *JOURNEY TO AMERICA*, *supra* note 154, at 52–54.

198. *Id.* at 295–97. In a letter to his friend Chabrol dated November 26, 1831, Tocqueville described how jury trial, influenced by the judge, contributed to the education of citizens. JARDIN, *supra* note 136, at 159–60.

199. TOCQUEVILLE, *JOURNEY TO AMERICA*, *supra* note 154, at 222.

Philadelphia bar, Gilpin became a fervent Jacksonian Democrat.²⁰⁰ In 1831, Jackson appointed him U.S. Attorney for the Eastern District of Pennsylvania, and in 1840, under President Martin Van Buren, he became Attorney General of the United States. This strange phenomenon of a highly elite Northern Jacksonian provided Tocqueville an important key to his view of democracy in America.

According to Tocqueville's notes, Gilpin expressed doubts about the jury as a judicial institution in terms similar to what Tocqueville later wrote in *Democracy in America*.²⁰¹ But Tocqueville was more critical of the jury in that respect than Gilpin. Apparently Gilpin, like Livingston, referred to the jury as a school. Notwithstanding his Jacksonian politics, Gilpin seems to have believed that this school was effective because of the elite qualities of the teachers, lawyers, and judges:

The jury is a school where the people come to learn their rights, where they come into contact with the most learned and enlightened of the upper classes, where the laws are taught in a practical way and one within the scope of their intelligence, by the most intelligent minds.²⁰²

And Gilpin thought that, viewing the jury as a school, the civil jury was more important than the criminal.²⁰³ Civil cases affected interests throughout society, even more pervasively than criminal cases.

Here was the germ of Tocqueville's idea, the answer to his search for the aristocratic, moderating element in American society.

3. The Judge as Teacher and Firm Guide

The implications of the jury as a school are almost never fully aired. What are the benefits of this education? How is this education

200. His conversion to the Jacksonian cause occurred immediately after the election of John Quincy Adams in the bargain of 1824. Ralph D. Gray, *Henry D. Gilpin: A Pennsylvania Jacksonian*, 37 PA. HIST. J. MID-ATL. STUD. 340, 340-45 (1970). Thereafter Gilpin wholeheartedly supported Jacksonian positions, including Indian removal and attacks on Nicholas Biddle's control over the Bank of the United States. *Id.* at 345-46.

201. Tocqueville recorded that Gilpin told him: "As far as the correct decision in each case is concerned, it seems to me that the superiority of the jury as an institution can be contested, though in this respect I am still inclined to think it better than permanent tribunals." TOCQUEVILLE, *JOURNEY TO AMERICA*, *supra* note 154, at 286.

202. *Id.* at 287.

203. *Id.* at 286.

accomplished? What does this rationale imply about the proper scope and practice of jury trial? And, dare we ask, what are its costs?

In *Democracy in America*, Tocqueville largely ignored the question of costs. “A free school,” Tocqueville called the jury. But it was not free—not to the jurors, the litigants, nor the legal system. He addressed the other three questions above, but many of the answers he gave differ sharply from the answers given today. Despite hundreds of quotations of Tocqueville on the jury as a school for democracy, his rationale for the jury is misunderstood.

Tocqueville had no use for the argument often made today that what educates jurors is the act of deliberating with fellow jurors. According to this idea, jurors who deliberate together learn to listen to each other, to hear different points of view, and to continue to reason together to achieve a mutually agreeable outcome. Jury service therefore contributes to deliberative democracy.²⁰⁴ Proponents of this argument downplay the possibility that jurors might refuse to listen to each other, or be appalled at the incompetence and misguidedness of their fellows, or crudely compromise, or follow the leader. Tocqueville did not mention jurors learning from deliberations at all. Indeed, his discussion suggests that, without firm guidance from the judge, jury deliberations would be the blind leading the blind.

In Tocqueville’s view, the key mechanisms for juror education were not deliberations, but rather the juror’s individual situation and the judge’s powerful guidance. Simply being put in the position of deciding a case encouraged a juror to respect the laws and to realize that he was responsible for his own acts. This was especially true in civil cases, as a citizen was more likely to be a civil litigant than a criminal defendant.²⁰⁵ Such respect for the law and awareness of responsibility were essential in a democracy. With this argument, Tocqueville emphasized the liberal idea of individual responsibility. He also invoked civic republican ideas of the common good. By focusing on someone else’s dispute, a juror’s service

204. See, e.g., Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 697–98 (2014) (setting out the standard theory before discussing empirical findings); JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); JAMES FISHKIN, *DEMOCRACY AND DELIBERATION* (1991).

205. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 4, at 274.

combated “that individual selfishness which is like rust in society” and the particular danger of commercial democracies.²⁰⁶

For Tocqueville, at least equally important was education from the contact that jurors had with “the best-educated and most-enlightened members of the upper classes.” These were the lawyers and especially the judge. These legal professionals taught the jurors “practical lessons in the law.”²⁰⁷

In civil cases particularly, the judge provided that element of impartial, intelligent authority—an “aristocratic body”—without which democracy might descend into chaos. Criminal cases generally had simpler facts and more easily understandable law. So in criminal cases, jurors’ independent judgment could be more safely trusted.²⁰⁸ But in civil cases, jurors would often be at a loss without the judge. In civil cases, “the judge appears as a disinterested arbitrator between the litigants’ passions.” The jurors “feel confidence in him and listen to him with respect, for here his intelligence completely dominates theirs.”²⁰⁹ The judge cleared up confusion caused by testimony and by the arguments of counsel:

It is he who unravels the various arguments they are finding it so hard to remember and takes them by the hand to guide them through procedural intricacies; it is he who limits their task to the question of fact and tells them what answer to give on questions of law.²¹⁰

The result was that the jurors rendered the decision made by the judge. “He has almost unlimited power over them.”²¹¹

In other words, according to Tocqueville, a large part of the jurors’ education was to learn to defer to a more competent authority. Commentators on Tocqueville seldom mention, or perhaps notice, this point.²¹² The judge’s supposed dominance over the civil jury was why Tocqueville was not moved by arguments about the jury’s incompetence.²¹³ Jurors could be educated, and at the same time outcomes

206. *Id.* at 274. See LUCIEN JAUME, *TOCQUEVILLE: THE ARISTOCRATIC SOURCES OF LIBERTY* 82–91 (Arthur Goldhammer trans., 2013) (first published in French in 2008).

207. *TOCQUEVILLE, DEMOCRACY IN AMERICA*, *supra* note 4, at 275.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. An exception is Albert Dzur. See Dzur, *supra* note 154, at 613–14.

213. *TOCQUEVILLE, DEMOCRACY IN AMERICA*, *supra* note 4, at 275.

of cases would not suffer too greatly from the decisions of incompetent laypersons.

For Americans, Tocqueville's description of the judge dominating a civil jury is surprising, even shocking. That is not what happens today, and it was not what happened in many American courtrooms at the time Tocqueville was writing.²¹⁴ Tocqueville exaggerated the power of the judge, and he downplayed the power of the lawyers. He left out the sway of lawyers' rhetoric. His account softened the nature of the American adversarial system.

In fact, Tocqueville's account was accurate as a description of what happened in English courtrooms. By the nineteenth century, English judges had full independence. They enjoyed respect from the English legal profession and society at large for their integrity and competence. They had great powers to sum up and comment on evidence to the jury. English judges did indeed dominate civil jury verdicts. An editorial in *The Times* of London in 1850 suggested that 99 times out of 100, the verdict turned on the judge's view rather than the jury's, because the jury eagerly followed the judge. According to *The Times*, juries understood that the "judge advocates the cause of truth alone."²¹⁵ Not surprisingly, many persons in England thought that this judicial dominance was a good reason to get rid of civil juries. The process began with the County Courts Act of 1846 and the Common Law Procedure Act of 1854. By 1965, the English civil jury had virtually disappeared.²¹⁶

But in America in the mid- and late-nineteenth century, as Tocqueville feared, judicial elections undermined respect for the judiciary. Judges were no longer fully independent. They could no longer exert the moderating influence that Montesquieu and Tocqueville had hoped. Under pressure from aggressive lawyers and concerned appellate judges, American trial judges began to lose their powers to comment on evidence.²¹⁷ A weak judge could not guide jurors with authority.

214. For an example of a federal judge explaining to Tocqueville that even the federal judge and his colleagues deferred to civil juries, see *supra* text accompanying note 199.

215. Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 259 (2005) (quoting *Editorial*, *TIMES LONDON* (29 Mar. 1850), at 4).

216. *Id.* at 255–59, 261–62, 266–67, 275–78.

217. Lerner, *Transformation of the American Civil Trial*, *supra* note 65, at 241–61; Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595, 621 (1985); Renée Lettow Lerner, *How the*

Another difficulty with Tocqueville's rationale is that it required jurors to sit in civil cases, and plenty of them. How else were jurors to reap the educational benefits? But serving as jurors in lots of civil cases was exactly what more and more Americans were reluctant to do. In a market economy, time is money. Americans increasingly wanted either to attend to their own affairs, or to discuss matters of general public interest. They did not want to waste time, as they saw it, deciding others' individual business disputes.²¹⁸

E. American Transformation of Tocqueville's Idea

Despite these difficulties, the American press and legal profession soon picked up Tocqueville's argument that the purpose of the jury was to educate jurors. In the process, they transformed the rationale to make it more palatable to democratic tastes.

Already in 1838, just three years after the original publication of *Democracy in America* in Paris, a publisher in New York brought out an English translation of the first volume.²¹⁹ This American edition contained the striking section on juries.

After that, American periodicals and judicial opinions spread Tocqueville's rationale with significant changes. The advent of New York's Field Code of 1848 renewed American debate about the civil jury. In July 1848, the *Monthly Law Reporter*, a national periodical published in Boston, printed an article about New York's new code. The author was the periodical's 25-year-old editor, Stephen H. Phillips, a Massachusetts native who had graduated from Harvard College and studied at Harvard Law School under Joseph Story.²²⁰

Creation of Appellate Courts in England and the United States Limited Comment on Evidence to the Jury, 40 J. LEGAL PRO. 215, 257–64, 266–68 (2016).

218. See, e.g., REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 545 (Albany, Office of the Evening Atlas 1846) (remarks of Mr. Hunt) (“I would respect the just rights of all litigants, but at the same time remember that men who are not litigants have rights also and ought not to be dragged from their own business by the dozens to settle other people's quarrels . . .”); *id.* at 538 (remarks of Mr. Tallmadge); *id.* at 547 (remarks of Mr. Ruggles); *id.* at 829 (remarks of Mr. Brown); *Colt v. Eves*, 12 Conn. 243, 252 (1837); see Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, *supra* note 152, at 848–49.

219. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 6 (1838 American edition).

220. Stephen H. Phillips, *The New York Code of Procedure*, 11 MONTHLY L. REP. (n.s. vol. 1) 97 (July 1848). On Phillips's life, see 1 DUANE HAMILTON

Phillips eagerly propounded Tocqueville's description of the civil jury as a school. But this school was not one of deference to the judge. Rather, a juror learned "to weigh facts, to balance arguments" for himself. Tocqueville did not praise such independent thinking of the juror in civil cases. And Phillips brought out the argument used so often today, which Tocqueville never mentioned: the juror learned the habit of deliberation with fellow jurors. This civic education improved his vote and turned a man into a citizen.²²¹

Phillips threw in another idea that Tocqueville had not mentioned. In Tocqueville's view, the judge saved the jury from confusion. In Phillips's view, the jury saved the judge from "isolation from the people." That isolation was "the first step toward secret proceedings and arbitrary tribunals." In other words, Phillips equated jury trial with public proceedings, as if proceedings could not be public without a jury. He praised the movement on the continent of Europe toward public trial by jury.²²² But, significantly, continental Europeans used lay jurors almost exclusively in criminal cases.

American judicial opinions soon took up the refrain, with another change. Only a few months later, Joseph Lumpkin, Chief Judge of the Georgia Supreme Court, writing an opinion on the right to civil jury trial, tracked Phillips's argument almost exactly. He wrote that he and his colleagues cordially concurred in Phillips's "glowing" praise of trial by jury. He gave all the rationales that Phillips gave, in the same language, especially the idea of the jury as a school for democracy. But there was a major difference. Phillips wrote in praise of the civil jury. Lumpkin wrote that these rationales applied only to criminal juries.²²³ Lumpkin moved even further from Tocqueville's rationale, which applied mainly to civil juries. In fact, Lumpkin's praise of the criminal jury followed by his attack on the civil jury closely tracked Alexander Hamilton's arguments in *The Federalist* number 83.

American commentators and judges thus conveniently lopped off Tocqueville's bold assertions about judicial power and the importance of deference by jurors to judicial authority. Many of them also suppressed Tocqueville's doubts about the jury as a judicial institution. Such open

HURD, HISTORY OF ESSEX COUNTY, MASSACHUSETTS: WITH BIOGRAPHICAL SKETCHES OF MANY OF ITS PIONEERS AND PROMINENT MEN xlviii-li (Philadelphia, J.W. Lewis & Company 1888).

221. Phillips, *supra* note 220, at 109.

222. *Id.*

223. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 205–06 (1848); Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, *supra* note 152, at 834–35.

doubts about the jury's competence appeared unseemly at the peak of fervor for democracy, although in practice judges and legislators had begun to curtail jury power. After purging such uncomfortable points, American writers were happy to follow Tocqueville in calling the jury a "free school" for democracy. And so have American legal professionals ever since.

CONCLUSION

American experience suggests that Montesquieu was largely right that the jury acts as a mask for the power of the judiciary. The jury diverts responsibility and attention from the judges. Even though our system hardly holds jury trials anymore, the institution remains firmly planted in American minds as the standard way cases are resolved. American judges, both state and federal, are uniform in their glowing praise for the jury system (at least in public). Nary a peep is heard from them about the weaknesses of the jury. The judges have good professional reasons. This judicial praise for the jury takes on an even more exaggerated quality as judges assert ever greater power over the law and the other two branches of government. The boldness of the American judiciary today is far from the quiet, moderating influence that Montesquieu recommended. But arguably the current American judicial power is the descendant of his ideas.

Central to Montesquieu's and Tocqueville's notions of judges as the guardians of liberty is judicial independence. The American federal judiciary and that of some states are largely independent, free from concern about their continued tenure in office. But judicial elections, as Tocqueville feared, have undermined independence. As is well known, in some judicial campaigns today vast contributions are collected from interested parties. The donors expect that their contributions will have an effect, and generally, they are not disappointed.

Meanwhile, the Anti-Federalists have proved correct in many of their predictions about the federal judiciary. Appointed judges can be intensely willful and disregard prudent limitations on judicial power. There is, indeed, no control on them.

I think it fair to suggest that the use of juries in America has deflected attention from the need to clean up and to restrain the judiciary. Americans often pay too little attention to the integrity and competence of the state judiciaries, and the jury is one of the reasons. The U.S. Supreme Court is, predictably and inevitably, given our constitutional arrangements, the focus of fierce political controversy. But the lower federal courts, especially U.S. district judges, exercise considerable power with little

oversight and less public knowledge. In this respect, Montesquieu's idea of the jury acting as a mask for the judiciary may have backfired. The jury may act as a mask indeed, but for judicial corruption, incompetence, or willfulness. Americans might comfort themselves with the notion that the jury is acting as a backstop, but that is a false hope.

This Article points to some of the drawbacks of juries. Both Montesquieu and Tocqueville, as judges in an inquisitorial system, were attuned to this issue. Both recognized considerable weaknesses in the use of lay jurors. They counted on the influence of the judge to guide the jury to an appropriate decision.

But Montesquieu and Tocqueville did not anticipate the continued pressure of the adversarial system. Lawyers in the American adversarial system, especially, have worked hard to diminish the informal power of the judge over the jury. Today, for example, it is unthinkable that an American judge would comment on the evidence to the jury. John Wigmore wrote that this one change had done more than anything else to undermine the accuracy of jury trial.²²⁴ Juries are now at the mercy of opposing counsel, with no buffer. The unpredictability of verdicts, particularly as to damages, has caused rates of jury trial to plummet.²²⁵ Today, of federal civil cases reaching disposition after court action, jury trial occurred in 0.65%.²²⁶ Despite civil jury trial rates of less than 1%, the jury still affects outcomes. Settlement negotiations occur "in the shadow of the jury," trying to anticipate what a jury would do.²²⁷

Montesquieu and Tocqueville presupposed two important conditions for the use of juries: competent judges of integrity and the ability of those judges to guide and advise jurors. In the United States, those conditions no

224. 9 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2551, at 504–505 (3d ed. 1940).

225. In a 2016 survey, 936 lawyers gave as their top three reasons why jury-eligible cases did not go to jury trial: (1) "Parties reached a mutually agreeable settlement"; (2) "Uncertainty of jury decision-making on damages"; and (3) "Uncertainty of jury decision-making on liability." AMERICAN SOCIETY OF TRIAL CONSULTANTS & THE CIVIL JURY PROJECT AT NYU SCHOOL OF LAW, 2016 ATTORNEY SURVEY: DECLINING CIVIL JURY TRIALS 16 (Dec. 2016), <https://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Attorney-Survey-Report-2016.pdf>.

226. *Federal Judicial Caseload Statistics: March 31, 2019 (Table C-4)*, ADMIN. OFF. U.S. CTS., <https://www.uscourts.gov/federal-judicial-caseload-statistics-2019-tables> (1,645 civil jury trials out of 251,441 total dispositions after court action).

227. J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 68–80 (2016).

longer apply. At least in civil cases, it may be time to drop the mask. This society should see clearly what kind of judges it has, and their powers.