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ECHOES OF THE FOUNDING: THE JURY IN CIVIL CASES AS CONFERRER OF LEGITIMACY

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"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; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." – Alexander Hamilton[1]

I. THE JURY AS A POLITICAL INSTITUTION

The Framers of the United States Constitution developed a political system to protect American citizens against tyranny. To guard against tyranny by a minority, the Framers adopted a system of majority rule. To protect against tyranny of the majority, they developed an elaborate system of checks and balances in which political power and authority were split among various political institutions.[2] This framework, coupled with the Bill of Rights added to the Constitution during the first session of Congress, created a limited government that flows from the popular sovereignty of the American citizenry and at the same time protects that sovereignty.

After Alexis de Tocqueville traveled throughout America, he compiled his insights on the still new American political system in the classic *Democracy in America.* At the end of his discussion of "what tempers the tyranny of the majority,"[3] Tocqueville distinguished the jury system as a political institution as compared to a judicial one. In terms of the jury's role in "facilitat[ing] the good administration of justice," he acknowledged, "its usefulness can be contested."[4] But in terms of the jury as a political institution, he insisted that it "should be regarded as one form of the sovereignty of the people."[5] The jury system provided a means by which the American citizenry could participate in and make decisions regarding the political system: "[T]here is always a republican character in it, inasmuch as it puts the real control of affairs into the hands of the ruled, or some of them, rather than into those of the rulers."[6] For Tocqueville, the jury's role represented as important an expression of popular sovereignty as voting.[7]

Tocqueville also noted that the use of the jury system is "bound to have a great influence on national character" and that such "influence is im-

1. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST 83].

2. *See generally* THE FEDERALIST NO. 10 (James Madison).

3. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270-76 (J.P. Mayer ed., HarperPerennial Books 1988) (1840) (Part II, Chapter 8).

4. *Id.* at 271 (noting that this characterization is particularly true for the jury in civil cases). Tocqueville also observed, "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." *Id.* at 275.

5. *Id.* at 273.

6. *Id.* at 272.

7. *See id.* at 273 ("The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail.").

measurably increased the more [juries] are used in civil cases."[8] Among the ways in which Tocqueville saw the jury system enhancing the national character:

- "Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free."[9]
- "It spreads respect for the courts' decisions and for the idea of right throughout all classes."[10]
- "Juries teach men equity in practice. Each man, when judging his neighbor, thinks that he may be judged himself."[11]
- "Juries teach each individual not to shirk responsibility for his own acts, and without that manly characteristic no political virtue is possible."[12]
- "Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government."[13]
- "Juries are wonderfully effective in shaping a nation's judgment and increasing its natural lights. That, in my view, is its greatest advantage."[14]
- "I regard it as one of the most effective means of popular education at society's disposal."[15]

For Tocqueville, jurors were more than just participants in the legal process. They served as a vital component of the American political system.

Let us now fast-forward approximately two centuries from the framing of the Constitution and Tocqueville's travels. The American experiment in guarding against tyranny has proved successful, and the country has grown up from the youthful nation that Tocqueville experienced. One change that has accompanied America's growth is that the jury system's role as a political institution seems to have receded into the background.[16] Instead of the positive benefits that the jury system provides, news stories on juries focus more on their excesses and the ways in which jurors pervert the legal process. Most Americans probably are familiar with the jury that awarded $2.7 million to an elderly woman who, after spilling coffee on herself, sued McDonald's for serving the drink too hot[17]; or with the jury in Florida that arguably ignored the judge's instruc-

8. *Id.* at 274.
9. TOCQUEVILLE, *supra* note 3, at 274.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 275.
15. *Id.*
16. *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 332 (1995) (noting a power shift from juries to judges manifested through procedural mechanisms such as special verdicts and directed verdicts).
17. *See Suit Says McDonald's Hot Pickle Left Scar*, LOS ANGELES TIMES, October 8, 2000, at A27 ("a judge later lowered the award to about $500,000, and the parties reportedly settled for a lesser amount").

tions in awarding $145 billion in a suit brought against tobacco companies.[18] Juries are often seen as out of control and in need of being reigned in.

As hinted at by the reference to the McDonald's and tobacco litigation, this criticism is levied largely against the use of juries in civil proceedings. But it is not a recent development. Tocqueville's words of praise aside, ever since the days of America's Founding and continuing today, many have questioned the need for juries in civil cases. If the jury system does help educate the citizenry and "gives them added confidence in democracy," as Judge Jerome Frank asked, "[c]an that contention be proved? Do not many jurors become cynical about the court-house aspects of government? And should education in government be obtained at the expense of litigants?"[19] For critics of the jury system, one of the best ways to reign in juries would be to limit the role of the jury in resolving civil disputes.[20]

In this article, we examine the current state of the jury system by contrasting the calls for restricting the authority that juries possess with the system's seemingly forgotten political role. But before we discuss further what this article is about, we need to acknowledge what it is *not*. First, we will focus on calls to limit the jury's role in civil disputes, not criminal cases. As noted below, both supporters and opponents of the Constitution at the time it was written acknowledged the need for popular participation in the judicial process where one party in the proceeding was the government exercising its police authority over its citizens.[21] Such recognition continues today as well.[22]

Second, and more importantly, this article is not about the proper constitutional interpretation that should be afforded to the Seventh Amendment, which preserved the right of trial by jury in suits at common law.[23] That amendment has a well developed, if difficult to administer, doctrine in which judges apply a historical test[24] "requir[ing] a court to compare

18. *See, e.g.*, Mark Curriden, *Smokers Awarded Record $145 Billion in Lawsuit*, DALLAS MORNING NEWS, July 15, 2000, at 1A; Mark Kaufman, *Tobacco Suit Award: $145 Billion*, WASH. POST, July 15, 2000, at A1.

19. JEROME FRANK, COURTS ON TRIAL 135 (1949). *But cf.* STEPHEN J. ADLER, THE JURY: DISORDER IN THE AMERICAN COURTS 186 (1994) ("nearly three-quarters of those who do serve come away with a more favorable view of the system than they had before").

20. *See, e.g.*, FRANK, *supra* note 19, at 108-145.

21. *See* FEDERALIST 83, *supra* note 1, at 499.

22. *See, e.g.*, Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1502 (1999) (In criminal cases, "[d]istrust of officials is too great in America for people to be willing to entrust their liberty solely to professional judges") [hereinafter "*Posner Evidence*"].

23. The Seventh Amendment reads: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

24. *See* Dimick v. Schiedt, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791").

the right at issue to 18th-century English forms of action to determine whether the historically analogous right was vindicated in an action at law or in equity, and to examine whether the remedy sought is legal or equitable in nature."[25]

Some commentators have written on the constitutional history of the Seventh Amendment,[26] others about its political history.[27] This article, however, considers the Seventh Amendment as an expression of political theory. We examine the political philosophy of the Federalists that shaped the Constitution and, more importantly, the philosophy of the Anti-Federalists, whose efforts ensured that the Constitution included the right to a trial by jury in civil cases via the Seventh Amendment. In doing this, we will tie the jury system's past with its present, and with a look to the future.

In the next section, we consider the philosophical understanding that both the proponents and opponents of the Constitution held regarding the jury's position in the American political system. In Section III, we analyze the results of a survey of federal and Texas state court trial judges to understand their views on whether the use of trial by jury in civil cases should be restricted. Finally, in Section IV, we tie together the historical discussion with the current data to assess what role the jury system can and should play in the modern American political system.

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25. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 574 (1990) (Brennan, J., concurring in part and concurring in the judgment); *see also* Tull v. United States, 481 U.S. 412, 421 (1987) ("characterizing the relief sought is more important than finding a precisely analogous common-law cause of action" (internal quotations omitted)); Curtis v. Loether, 415 U.S. 189 (1974).

The second clause of the Seventh Amendment (*supra* note 23), the reexamination clause, also has developed its own lineage of jurisprudence. This clause historically had limited the scope of appellate review of trial court decisions pertaining to a jury's findings; for example, "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive . . . was once deemed inconsonant with the Seventh Amendment's Reexamination Clause." Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 434 (1996) (citing Lincoln v. Power, 151 U.S. 436, 437-438 (1994); Williamson v. Osenton, 220 F. 653, 655 (4th Cir. 1915)). Over time, however, the power of appellate courts under the reexamination clause has expanded in reviewing such matters as a jury's assessment of damages, a trial judge's determination that the jury's "verdict is not contrary to the clear weight of the evidence," a judge's findings in a bench trial based on documentary review, and trial judges' discretionary decisions on interlocutory procedural matters. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778 (1957) (Professor Wright's classic treatment of the subject). For a review of more recent developments, *see Gasperini*, 518 U.S. at 431-36 (Section III(B) of the majority opinion); *id.* at 441-47 (Stevens, J., dissenting); Amy McCullough, Comment, Gasperini v. Center for Humanities: *Clarifying Federal Appellate Review or Judicial License in Tort Reform*?, 32 NEW ENG. L. REV. 853, 855-70 (1998). Finally, the most recent Supreme Court decision assessing the scope of the reexamination clause is Cooper Indus., Inc. v. Leatherman Tools Group, Inc., __ U.S. __, 2001 LEXIS 3520, *25 (2001) ("Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns").

26. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

27. *See* Dooley, *supra* note 16, at 349-361; *cf.* Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25 (1990).

II. THE FOUNDING DEBATE: THE FEDERALISTS AND THE ANTI-FEDERALISTS

A. OVERVIEW: UNDERSTANDING THE DIFFERENT PHILOSOPHIES[28]

The creation of the new Constitution in 1787 was a compromise of ideals and strategies. The main goal of the Constitutional Convention was to find a way to fix the Articles of Confederation and to end the trade wars among the states. It quickly became evident to the Founding Fathers that merely amending a system that was already defunct would lead to more difficulties. Under this guise, the Founders sought to forge a new pathway, one that would alter the very understandings of some of the key concepts that drove American philosophy and culture at the time. They wanted a system that would draw upon the beliefs of Montesqieu, Locke, and Hobbes to create a new conception of the word "federal" and craft two spheres of power. This challenge was not an easy one. Several members of the Convention left in protest once this new order of business was posed. The Constitution itself was a series of compromises regarding the size of the republic, how representation would function, what human nature really is like, what the power and role of government should be, and who should control the power. The Founding Fathers present at the crafting of this new Constitution would become its ardent advocates—the Federalists. Those who took differing opinions to the very foundations of the constitutional design would ally themselves in opposition—the Anti-Federalists.

The Federalists and Anti-Federalists had differing understandings of the most basic concepts that would underlie the new design. These differences (summarized in Table 1) would lead to what many have referred to as the "Founding Debate," which continues to echo in the very discussions surrounding the issue discussed herein.

TABLE 1: SUMMARY OF FEDERALIST AND ANTI-FEDERALIST POSITIONS ON KEY CONCEPTS

	FEDERALISTS	ANTI-FEDERALISTS
Size of Republic	Large	Small
Representation	Filter	Mirror
Human Nature	Selfish	Virtuous
Power/Role of Government	National Centered	State Centered
Power Lies with . . .	Elite	Yeomentry

28. *See generally* THE FEDERALIST; THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986) [hereinafter AF PAPERS]; HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

1. Size Of Republic and the Power/Role of Government

At the time of the Founding, a republican form of government had long been seen as needing to be small in order to be successful. This way those in the republic would feel a part of the process and share in its governance. The Federalists knew this argument and used it as a means for contending that their new conception of federalism, where the states and the national government each would have their own sphere of power, would make this larger republic possible. The Anti-Federalists held fast to the idea that, even in an expanded notion of a republic, without the continued close attachment of the people to the localities they would become distrustful of government.

The government formed under the new Constitution was "limited" and kept from being abused by those involved through a system of checks and balances and separation of powers. As Madison noted in *Federalist No.* 51, "If men were angels, no government would be necessary."[29] The Federalists were satisfied that this new limited government would provide the balance necessary between parochial and national needs. It too would offer the necessary protections for citizen rights while providing for the "common good." The Anti-Federalists feared this arrangement and worried that the new national government would become too large and too remote for the governed to feel attached. The new national government would grow through the Necessary and Proper and Supremacy Clauses, thus making the states a mere puppet of federal control. Further, this limited-government plan did not mention specific protections for the citizens, and this silence for the Anti-Federalists called into question their existence under the new plan. The Federalists stated these rights were commonly understood; the Anti-Federalists harkened back to a system that the fledging nation had just liberated itself from and argued that without clear guarantees meaning can get lost.

2. Representation, Human Nature, and Power Lies With . . .

The Federalists countered that, in the representative democracy where the governed would relinquish some of their authority under popular sovereignty to the government and in turn their representatives, all would be heard. The representatives would not merely do the governed's bidding, but would "filter" the public passions into what would be best for the common good. The Federalists' understanding here was bolstered by their arguments that ultimately through the electoral process the power would reside with the people to determine who their representatives would be. Their underlying notion of human nature, however, was of self-interest. People could not be trusted to seek the common good, but rather would be out for themselves. Parochial interests would tear apart the new government, like it had the Articles of Confederation, if there were not a representative structure. This notion is built on not only hav-

29. THE FEDERALIST NO. 51 (James Madison).

ing representatives of the people govern, but also having different kinds of governing structures: the Senate to balance the House, the three branches of the federal government to balance each other, the electoral college to balance the popular presidential vote, and the federal government to balance the state governments. The Federalists, however, looked to the white, male landowner to vote. They saw other elites like themselves as future representatives and governing decision makers.

The Anti-Federalists, although not opposed fully to these concepts, raised issues with how each would come about. First, representation for them should be more about mirroring the will of the people. After all, if the representatives lost track of what the public desired, they would not be doing their jobs effectively. Second, the Anti-Federalists had more trust of human nature. Through education and participation they felt that humans could nurture their virtuous selves. They also felt it should not be the elite, but rather the middle class—the yeomentry—who would make the best representatives. The yeomentry were in better touch with what the community was like. They could better judge the problems facing the nation given their middling status. Third, the Anti-Federalists also were concerned about this new layer of government. While not opposed to the notion of having a federal government, their concern for the detachment people would feel from this remote entity might cause grave problems. They feared this detachment undermined the Federalists' core assumption of the need for participation and popular sovereignty. The Anti-Federalists saw the potential for the Federal government as not only a means for taking away power from the local and state governments, but also leading to the populous becoming complacent or at worst turned off to governing.

As these different core issues demonstrate, although the Federalists eventually won the debate with the ratification of the new Constitution, the Anti-Federalists raised key concerns that continue to drive much of today's political context. One such concern of particular note here is the Anti-Federalists' insistence that the first order of business of the new government be the passage of a series of protections. The Anti-Federalists had enough clout in key states (e.g., George Clinton in New York) to prevent, or at least impede, the ratification of the new Constitution. Thus, the Federalists gave in to the demands to enumerate some of the limitations of the new government. The first ten protections, later dubbed the Bill of Rights, incorporated some of the key protections for citizens in our republic and laid the foundation for the limitation of the federal government.[30] The relevant provision for our purposes here is the right to trial by jury in civil cases. Its importance needs to be assessed

30. These amendments originally were intended to protect individuals' rights vis-à-vis the national government. Most, but not all, of these protections have been incorporated into the Fourteenth Amendment and now apply to the states as well. One notable exception of a right that has not been incorporated is the Seventh Amendment right to a trial by jury in a civil case. *See infra* section III.D.

within the context of the Founding Debate and the key arguments that the Anti-Federalists put forth.

B. Differing Views of the Jury System in Civil Cases

The right to trial by jury in civil cases was not a new conception at the Founding; Blackstone considered it as "the glory of the English law."[31] The Founders, particularly the Anti-Federalists, borrowed this conception as a means for assuring representation of the public in the new judiciary structure and fortifying the educational and participatory elements they deemed so vital to keep the people engaged in government. More importantly though, the Anti-Federalists deemed this existence of the trial by jury so important because beyond participation, the public's role here placed a check on the governing elite (i.e., in this case the judges) and placed the public in the role of conferrer of legitimacy. The Anti-Federalists argued that if popular sovereignty meant anything then in order for the new judiciary, powerless to implement its own decisions, to have authority among the general public, it would need the public's support and veneration. The Federalists, as it will be noted below, had difficulty fending off this line of reasoning and thus we have the jury provisions contained in the Sixth and Seventh Amendments to the Constitution.[32]

As written, the original Constitution did not include any provision regarding the use of the jury system in civil disputes.[33] The Anti-Federalists often cited this omission as one of the many defects of the proposed Constitution.[34] One of the common lines of attack that Anti-Federalist writers used was that the lack of protection in Constitution indicated that the trial by jury in civil disputes had been eliminated or, at a minimum, had the potential to be eliminated by Congress.[35] To this argument, the Federalists countered that the Constitution did not abolish the trial by jury, but instead gave Congress the flexibility to determine the scope of the

31. Quoted in *Chauffeurs*, 494 U.S. at 580 (Brennan, J., concurring in part and concurring in judgment); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting).

32. The Sixth Amendment deals with jury trials in criminal cases and, as noted at the outset of this article, is beyond our scope.

33. Article III, section 2 did provide for trial by jury in criminal cases.

34. *See, e.g.*, Centinel, No. 1 (Oct. 5, 1787), *reprinted in* AF Papers, *supra* note 28, at 236 ("and that trial by *jury* in *civil* cases is taken away) (emphasis in original); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents* (Dec. 18, 1787), *reprinted in* AF Papers, *supra* note 28, at 239 ("That in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several states").

35. *See, e.g.*, Patrick Henry, *Speech* (June 5, 1788), *reprinted in* AF Papers, *supra* note 28, at 202 ("How does your trial by jury stand? In civil cases . . . this best privilege is gone: But we are told that we need not fear, because those in power being our Representatives, will not abuse the powers we put in their hands: I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers? I imagine, Sir, you will find the balance on the side of tyranny.").

jury system over time.[36] Another defense that the Federalists employed was that the scope of the use of trial by jury varied among the states and that, therefore, the federal government should not impose a singular system.[37] The Anti-Federalists retorted that the jury system was of such central importance that the general principle could and should be preserved within the Constitution.[38]

These arguments, Federalist and Anti-Federalist alike, appear to be more partisan in nature—that is, they were geared more toward the specific issue of ratifying the Constitution.[39] They do not, in themselves, reflect the philosophical basis underlying each side's view of the proper role of the jury in the American political system.[40] Such views are summarized in the quotation from Alexander Hamilton at the start of this article. But to understand them more fully, one must turn to *Federalist No.* 83 and the Anti-Federalist writings of the Federal Farmer.

In *Federalist No.* 83, Alexander Hamilton distinguished between the use of a jury in a criminal proceeding and in a civil dispute. Hamilton saw the connection between the jury in a criminal trial and the preservation of liberty. In that context, the jury would be an important check on the government against arbitrary proceedings and convictions.[41] Civil cases, however, do not present a situation in which the government is exercising its powers against the citizens. They are by definition disputes between two private interests with a government official—the judge—serving as a

36. *See* FEDERALIST 83, *supra* note 1, at 509 ("I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature").

37. *Id.* at 507 ("It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions").

38. *See, e.g.*, Federal Farmer, *Arguments for a Bill of Rights* (Jan. 20, 1788), *reprinted in* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 109 (Walter Hartwell Bennett ed., The Univ. of Ala. Press 1978) ("it is *the jury trial* we want; the little different appendages and modifications tacked to it in the different states, are no more than a drop in the ocean: the jury trial is a solid uniform feature in a free government; it is the substance we would save, not the little articles of form") [hereinafter FEDERAL FARMER]; Thomas Jefferson, Letter to James Madison (Dec. 20, 1787), *reprinted in* THE ESSENTIAL BILL OF RIGHTS 320 (Gordon Lloyd and Margie Lloyd eds., Univ. Press of Am. 1998) (arguing that it would be better to establish the "general right" of having a trial by jury than the "general wrong" of not providing for it in the Constitution).

39. *See* Wolfram, *supra* note 26, at 668 ("It is difficult to escape the feeling the that 'bill of rights' and 'civil jury trial' issues . . . were . . . make-weight arguments designed mainly to stimulate public opposition to the Constitution"); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 34-36 (1990) (examining "the political origin of the Seventh Amendment").

40. *Cf.* Wolfram, *supra* note 26, at 668 ("But an appreciation of the possible 'political' motive which caused many of the antifederalists to raise the civil jury trial issue should not be permitted to obscure the constitutional significance of public reaction to the issue"). The same argument applies to understanding the impact of the Anti-Federalists' political philosophy had on shaping the Seventh Amendment.

41. *See* FEDERALIST 83, *supra* note 1, at 499 ("Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings").

neutral party; they do not pose a threat to personal liberty. Thus, the Federalists did not consider juries in civil disputes to be a vital component in preserving liberty.

The jury system's usefulness in civil proceedings lay primarily as a check against corrupt judges: "the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success."[42] "Here then is a double security;" Hamilton wrote, "and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either."[43] Thus, the use of a jury allows the judicial system to operate more honestly. But, for Hamilton, this did not equate to being a fundamental hallmark of a free, republican government.

Hamilton tended to view the jury as a legal institution. The Constitution granted Congress the power to constitute inferior courts, and within this power was the ability to determine the scope of the jury system.[44] The Hamiltonian perspective became the predominant view of the jury during the nineteenth century as the jury system fell "from virtual omnipotence to near subjugation."[45] Of the explanations offered for the jury system's decline during the 1800s, all reflect the Federalist philosophic understanding of the government they had created: the passions of the citizenry should be tempered by formal structures and the filtering of the public good through the calm deliberations of the governing elite.[46]

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42. *Id.* at 501.

43. *Id.*

44. *See id.* at 496 ("A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution [the trial by jury] or to let it alone").

45. Dooley, *supra* note 16, at 354.

46. *See infra* note 67 and accompanying text. Dooley summarizes previous explanations for the jury's decline and then proffers one of her own. Dooley, *supra* note 16, at 354-56. These explanations include: that the law of science, with an emphasis on uniform and predictable rules, began to emerge; that the temporal distance from English colonial oppression and the increase of well-trained judges reduced the need for juries to check against corrupt judges; and that the jurors' passions may lead them to find against large corporate interests and thus counter the nation's movement toward industrialization. Dooley's explanation is that juries "had become a dangerous vehicle for upsetting the status quo"; as democratic social movements opened up the political process to greater numbers of previously excluded groups, including women and minorities, the movement toward judge-controlled decision-making became more prevalent.

Like the first clause of the Seventh Amendment, the reexamination clause also has been interpreted over time in a manner that has moved away from the jury as a predominant institution. *See supra* note 25. The specific mechanisms used and case law effecting this movement have been addressed by other authors; *see, e.g.*, Wright and McCullough, both cited *supra* note 25. For purposes here, the important issue to mention is that, as with the interpretations afforded to the Seventh Amendment's first clause, the changes in the reexamination clause's meaning reflect the Hamiltonian perspective regarding the balance between the judiciary and jury system. Hamilton believed that the federal judicial system should be given the flexibility to adapt its procedures to changing times (although Hamilton believed that the power to alter the federal judiciary rested with Congress). *See supra* note 36. Interpreting the reexamination clause to grant more power to appellate courts generally exhibits this view.

Although the Federalists won the battle for ratifying the Constitution, the Anti-Federalists' views have been called the "philosophy of . . . the Bill of Rights."[47] The Federal Farmer[48] provided the most extensive writings setting forth the philosophical basis for the Anti-Federalists' insistence on a Constitutional protection of the trial by jury even in civil cases.[49] At the heart of the Anti-Federalists' views was that the jury system, as a political institution, was on par with a representative legislature for ensuring freedom. "Representation, and the jury trial, are the best features of a free government ever as yet discovered, and the only means by which the body of the people can have their proper influence in the affairs of government."[50]

The jury system provided ordinary people a voice in the affairs of the government; they did not have to be part of the ruling elite to make decisions that would affect the community.[51] After all, according to the Federal Farmer, "[t]he body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined."[52] In addition, the jury system allowed citizens to learn about how to govern themselves as well: "Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other."[53]

The Federal Farmer's arguments reflect the special role of the jury in the American political system. Juries offer an invaluable connection between the government and the governed. The jury is the most direct expression of popular sovereignty and communal values within the political system. Here, the will of the people is not filtered through their representatives. It is not subject to compromise between competing factions

47. William Hartwell Bennett, *Preface* to FEDERAL FARMER, *supra* note 38, at vii.

48. Scholars traditionally have considered Richard Henry Lee to be the Federal Farmer. *See* William Hartwell Bennett, *Editor's Introduction* to FEDERAL FARMER, *supra* note 38, at xiv. But some recent historians have begun to question this. *See* Gordon S. Wood, *The Authorship of the Letters from this Federal Farmer*, 31 WILLIAM AND MARY QUARTERLY 299, 300 (1974). One possible alternative is that Melancton Smith penned the Federal Farmer's works. *See* Ralph Ketcham, *Editor's Note* in AF PAPERS, *supra* note 28, at 257.

49. For an additional overview of the Antifederalists' conception of the civil jury's role, *see* Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148-156 (1991).

50. Federal Farmer, *The Struggle Over Ratification of the Constitution II* (Dec. 25, 1787), *reprinted in* FEDERAL FARMER, *supra* note 38, at 43.

51. "It 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. To hold open to them the offices of senators, judges, and offices to fill which an expensive education is required, cannot answer any valuable purposes for them." Federal Farmer, *Organization and Powers of the Proposed Government II* (Oct. 12, 1787), *reprinted in* FEDERAL FARMER, *supra* note 38, at 29.

52. Federal Farmer, *The Judiciary* (Jan. 18, 1788), *reprinted in* FEDERAL FARMER, *supra* note 38, at 102.

53. Federal Farmer, *Organization and Powers of the Proposed Government II* (Oct. 12, 1787), *reprinted in* FEDERAL FARMER, *supra* note 38, at 29.

within the walls of the legislature. The Anti-Federalists recognized the benefit both to the government and to the citizenry in promoting this form of the general populace's involvement, albeit a limited one, in determining public affairs.

The Anti-Federalists also recognized that the jury played an important role within the judicial process as well. The jury system provided legitimacy to this process and to judges' authority[54], a role that was not lost on Tocqueville either during his travels: "civil cases have established the authority of the English or American judge . . . [t]hus the jury, though seeming to diminish the magistrate's rights, in reality enlarges his sway, and in no other country are judges so powerful as in those where the people have a share in their privileges."[55] Moreover, according to the Federal Farmer, although the general public might not possess the necessary legal skills to make detailed legal judgment, they had the ability to understand core principles of the law and apply those principles to community values.[56]

The Antifederalists' desire to preserve the jury system in civil cases extended beyond preserving that right only in the first instance. If a jury's expression of popular sovereignty were to have its full meaning, the jury's findings of facts as well as its general verdict could not be disturbed on appeal.[57] This "most noble and important principle of the common law"[58] was threatened, however, by the language of the original Constitution, which granted the Supreme Court "appellate Jurisdiction, both as to Law and Fact."[59] For the Antifederalists, this language's potential for al-

54. "If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases." Federal Farmer, *The Judiciary* (Jan. 18, 1788), *reprinted in* FEDERAL FARMER, *supra* note 38, at 102.

55. TOCQUEVILLE, *supra* note 3, at 276.

56. "It is true, the freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties." Federal Farmer, *The Judiciary* (Jan. 18, 1788), *reprinted in* FEDERAL FARMER, *supra* note 38, at 102.

57. *See id.* ("I hold it the established right of the jury by the common law, and the fundamental laws of this country, to give a general verdict in all cases when they chuse to do it, to decide both as to law and fact, whenever blended together in the issue put to them. Their right to determine as to facts will not be disputed, and their right to give a general verdict has never been disputed . . .").

58. *Id.* at 101.

59. U.S. CONST. art. III, § 2. The Antifederalists attacked this provision. For example, Brutus, a noted critic of the Constitution's provisions for the judiciary, contended:

> [T]he superior tribunal will re-examine all the facts as well as the law, and frequently new facts will be introduced, so as many times to render the cause in the court of appeals very different from what it was in the court below . . . . Who are the supreme court? Does it not consist of the judges? And they are to have the same jurisdiction of the fact as they are to have of the law. They will therefore have the same authority to determine the fact as they will have to determine the law, and *no room is left for a jury on appeals to the supreme court.*

Brutus, *No. XIV*, *reprinted in* THE ANTIFEDERALIST PAPERS, at 235 (Morton Borden ed., 1965) (1788) (included as part of Borden's *Antifederalist No.* 81) (emphasis added); *cf.* Ralph Ketcham, *Editor's Note* in AF PAPERS, *supra* note 28, at 269 ("Brutus takes particu-

lowing an appellate court to ignore a jury's factual decisions bordered on "despotic principles" and endangered the fundamental role of the jury.[60] Therefore, the Antifederalists pressed for the new Constitution to provide for both an individual's right to trial by jury in a civil case and for limitations on appellate reexamination of facts presented at trial.

Because of the many benefits it provided, the jury system was something to be honored, not disdained: "The jury trial, especially politically considered, is by far the most important feature in the judicial department in a free country, and the right in question is far the most valuable part, and the last that ought to be yielded, of this trial."[61] Perhaps foreshadowing the modern debate regarding the scope of the jury system, the Federal Farmer noted, "I am very sorry that even a few of our countrymen should consider jurors and representatives in a different point of view, as ignorant troublesome bodies, which ought not to have any share in the concerns of government."[62] For the Anti-Federalists, these views threatened the very foundation of the freedom for which the American colonists fought England to obtain.

III. THE JURY AT THE NEW MILENNIUM: ANALYZING HOW JUDGES VIEW THE JURY SYSTEM IN CIVIL DISPUTES

A. DEFINING THE SCOPE OF THE PROBLEM

We turn now from the theoretical discussion of the philosophical views of the Framers to a more concrete issue: whether the use of jury should be restricted. To do this, we shall use the comprehensive survey of federal and Texas state court trial judges undertaken by the Dallas Morning News and the SMU Law Review Association. But we shall not leave the Founding Debate altogether. Resonating throughout the questions and responses in this survey can be found the tension regarding the role of juries that Federalists and Anti-Federalists experienced.

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lar pains, in Nos. XI-XV, to attack the wide powers and unrepublican tenure of the federal judiciary").

Alexander Hamilton tried to counter the Antifederalists' re-examination arguments in *Federalist* 81. *See generally* THE FEDERALIST 81, at 489-491 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> I contend therefore. . .that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts. . . .To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe.

Id. at 489-90 (emphasis in the original). Hamilton's arguments aside, the inclusion of the re-examination clause in the Seventh Amendment reflects that the Antifederalists generally won on this particular issue.

60. Federal Farmer, *The Judiciary* (Jan. 18, 1788), *reprinted in* FEDERAL FARMER, *supra* note 38, at 102.

61. *Id.*

62. Federal Farmer, *Organization and Powers of the Proposed Government II* (Oct. 12, 1787), *reprinted in* FEDERAL FARMER, *supra* note 38, at 29.

Analyzing the opinions of trial judges regarding restricting the use of juries in civil cases offers several important benefits. First, trial judges, more than any other participant in the legal and political processes, understand the benefits and foibles associated with the jury system. They see everyday a group of twelve (or fewer) otherwise ordinary individuals come together to have a say in developing the rules that guide their community. But they also see the instances in which jurors, perhaps corrupted by the power they hold, exceed their authority. Second, to the extent that the scope of the jury system is changed, trial judges, as a collective institution, will feel the most impact. On one hand, when the power of the jury is restricted, trial judges most likely are granted the power stripped away from juries. On the other hand, as Tocqueville noted, to the extent that juries legitimize the authority of the judiciary and of trial judges, if the jury system's scope were narrowed, that might affect the judiciary's legitimacy. Third, and perhaps most importantly, the decision to restrict a jury's authority usually is made on a case-by-case basis by judges themselves using tools such as Judgment as a Matter of Law. Thus, understanding how the surveyed judges view the role of juries will provide an indication of the future of the jury system.

Table 2 presents selected responses to survey questions regarding the judges' assessment of how well the jury system works.[63] These results show that, on average, judges and juries likely will reach the same result in any given case. Almost unanimously, judges responded that they would reach the same verdict as the jury all or most of the time. Judges generally think that jurors are competent to analyze evidence, are neutral at the outset of a civil case, and do not greatly abuse their positions.

63. *Cf.* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063 (1964) ("When one asserts that jury adjudication is of low quality, he must be asserting that jury decisions vary in some significant degree from those a judge would have made in the same cases. If he denies this and wishes to include the judge, he has lost any baseline, and with it any force, for his criticism.").

TABLE 2: SURVEY RESULTS REGARDING THE JURY SYSTEM'S EFFECTIVENESS

Question/Response	Federal Judges	Texas Judges
Do you think the jury system is . . . fine the way it it . . . [or] is in good condition/needs minor work	91.1%	87.8%
With the continuing debate over tort reform and ADR, do you believe that . . . the jury system is fine	67.8%	62.5%
How often do you agree with jury verdicts in your cases? . . . All of the time [or] most of the time	96.8%	95.9%
The right of individuals to have their civil disputes decided by a jury needs to be . . . left the same	66.5%	71.4%
In general, how well do you think the average juror understands the legal and evidentiary issues in cases? . . . Very well [or] moderately well	93.4%	83.9%
In general, how well do you think juries do in actually reaching a just and fair verdict? . . . Very well [or] moderately well	98.6%	98.3%
If you were personally a litigant in a civil case, how would you prefer the dispute to be decided? . . . By a jury	59.3%	57.9%
Coming into a civil case, do you think most jurors . . . favor neither side	81.6%	66.3%
Have you ever had what you consider a runaway jury? . . . No	76.4%	76.3%
Do you believe you've had a jury use a verdict to send a message about a broader, political, ethical or social subject? . . . No	59.6%	52.8%

Table 2 also indicates that, as a general proposition, the average judge in the survey believes that the jury system generally works most of the time.[64] Much like the general consensus in favor of the jury system during the Founding, this survey indicates that the jury system at its core remains an important and functioning part of the judicial process. Thus, to the extent that the jury system may need to be reformed, any changes would appear to be needed only at the margins of the system.

B. FUNDAMENTAL REFORM?

Based on this survey, the need for wholesale changes to the jury system would not have support of a majority of judges. Nevertheless, a significant minority of the judges surveyed would seem to support a fundamental reform on the jury system, specifically by limiting its scope in civil cases. One question in the survey asked the following:

64. If there is one area that may run counter to this general proposition, it is the issue of awarding damages. When asked whether they "ever decreased/eliminated a verdict on compensatory or punitive damages because you didn't believe it was based on fact or law," 62.5% of federal judges answered yes, but only 23.7% of Texas judges responded affirmatively.

The right of individuals to have their civil disputes decided by a jury needs to be:

	Federal Judges	Texas Judges
Expanded	29	28
Reduced	155	76
Eliminated	8	1
Left the Same	395	281
No Answer	7	7

Thus, nearly one-quarter (24.3%) of the judges believe that the role of the jury in civil cases should be reduced or eliminated.

This proposition—reducing an individual's right to a jury trial in a civil case—represents more than just a marginal adjustment to the trial by jury. This is a fundamental attack on the institution as it seeks to reduce structurally the jury system's scope. The idea of restricting the right to access a jury in civil disputes would be antithetical to the Anti-Federalists' view. Because the jury system represents the "very palladium of free government," restricting its use would in effect be a restriction on freedom. In addition, the Anti-Federalists saw a distinct class difference between the elite judges and the common people who would make up a jury pool.[65] Restricting or eliminating an individual's right to a jury trial in a civil dispute would introduce a class bias into the judicial system.[66] With such a change, the system would lose its connection with the average citizen and, as a result, its legitimacy would be weakened.

For the Federalists, restricting the use of the jury system in civil disputes would not infringe on liberty, although eliminating it altogether probably would. In fact, Federalists might support some restrictions. As discussed above, the Federalists trusted the ruling elite, which presumably included judges, to filter the passions of the citizens into the common good. Thus, transferring power from the masses (the jury) to the elite (judges), so long as the system provided sufficient checks on corrupt judges, would be consistent with the rest of the governmental framework the Federalists established. Furthermore, as Hamilton contended in *Federalist No.* 83, other means of answering questions that traditionally had been determined by juries may arise, and the Constitution should allow such methods to be used in lieu of the trial by jury.[67] But these views do

65. *See supra* notes 51-52 and accompanying text.

66. "The few, the well born, &c. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description." Federal Farmer, *Organization and Powers of the Proposed Government II* (Oct. 12, 1787), *reprinted in* FEDERAL FARMER, *supra* note 38, at 29.

67. FEDERALIST 83, *supra* note 1, at 509 ("changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails . . . I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution [the jury system] ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature").

not represent the philosophy of the Anti-Federalists, the philosophy of the Bill of Rights, which secured the right to a jury in civil disputes.

The tenets of the Anti-Federalists' view regarding juries still exist today and can be found within the survey of judges. For example, one survey question asked the judges to characterize the proper role of the jury; one of the responses—that the jury represented the "conscience of the community"—reflects a value very close to those of the Anti-Federalists.[68] Of the Federal judges, 29.6% listed "conscience of the community" as one of their choices; for judges in Texas, this figures jumps to 46.6%. Given this, the question arises: do the judges who believe that the jury reflects the conscience of the community support restricting the right to a trial by jury in civil disputes. One would expect that, generally, they would not.

Table 3 breaks down support for restricting or eliminating the right to a jury by whether the judge considered the jury as the community's conscience. The survey responses were recoded to develop two dichotomous variables. For the variable RESTRICT, if a judge answered that he or she believed that the right to a jury should be reduced or eliminated, the response was coded as "1"; otherwise the response was "0". Similarly, for CONSCIENCE, if a judge indicated that he or she believed that the jury represented the conscience of the community, that response was coded as a "1", even if the judge selected other characterizations as well. Only if the judge did not select "conscience of the community" at all was the response coded as "0".

68. The question asked: "What do you see as the proper role of the jury?" The responses were "score-keepers," "truth-seekers," "conscience of the community," "arbiters of justice," and "other." Judges were allowed to choose more than one response. The responses broke down as follows:

	Federal Judges (n=594)	Texas Judges (n=393)
Score-keepers	270 (45.5%)	194 (49.4%)
Truth-seekers	523 (88.0%)	333 (84.7%)
Conscience of the community	176 (29.6%)	183 (46.6%)
Arbiters of Justice	131 (22.1%)	97 (24.7%)
Other	30 (5.1%)	0 (0.0%)
No answer	4 (0.7%)	15 (3.8%)

TABLE 3: SUPPORT FOR REDUCING/ELIMINATING THE TRIAL BY JURY IN CIVIL DISPUTES BY WHETHER A JUDGE VIEWS THE JURY AS THE "CONSCIENCE OF THE COMMUNITY"[69]

		RESTRICT		
		0	1	Total
CONSCIENCE	0	447	169	616
	1	284	70	354
	Total	731	239	970

$\chi^2 = 7.10587$ Significance = 0.00768

Given the chi-square (χ^2) value, we can say that the expected relationship between the two variables is statistically significant. Those judges who view the jury as the conscience of the community generally do not support restricting the use of the jury. Only seventy judges (7.2%) saw the jury as the conscience *and* supported restricting its use. More commonly, if a response were coded as a "1" for either variable, then the corresponding response for the other variable probably was a "0". Thus, to the extent that the philosophy of the Anti-Federalists still sounds in today's political and legal thinking, we can say that this philosophy still would oppose restricting or eliminating an individual's right to trial by jury in a civil dispute.

C. Developing a Model to Predict a Judge's Position on Whether to Restrict or Eliminate an Individual's Right to a Trial By Jury in a Civil Dispute

Given the importance of the jury system as an institution in America's political system, the next question to consider is why a judge would support restricting or eliminating the trial by jury in civil disputes. To begin to answer this, one should consider what characteristics might a judge possess to lead him or her to hold this view. We turn again to the survey responses and use a logistic regression model to develop this analysis. A logistic regression model can be used when the dependent variable is dichotomous—that is, where the variable has only two values. In this regard, we will use the dichotomous variable RESTRICT (see description above) as the dependent variable. We shall use four independent variables in the equation[70]:

69. Seventeen responses were omitted from this analysis because of missing observations.

70. In selecting independent variables, we were limited to information contained in the survey itself. On one hand, certain demographic variables in the survey (e.g., gender, whether a judge's background was in private practice or public service) turned out to be statistically insignificant in preliminary runs of the model. On the other hand, we believe that other variables that could not be derived from the data set would have been useful. For example, given the importance of farming interests underlying the Anti-Federalists' views, we would have liked to include a variable somehow reflecting whether the judge served in an agricultural or urban area. But we were unable to come up with a sufficient

CONSERVATIVE: A dichotomous variable coded as "1" if the judge characterized him- or herself as "conservative" and "0" for other self-characterizations[71];

MESSAGE: A dichotomous variable coded as "1" if the judge believed that he or she had a jury use a verdict to send a message about a broader political, ethical, or social subject and "0" if not[72];

RUNAWAY: A dichotomous variable coded as "1" if the judge ever had what he or she considered a runaway jury and "0" if not[73]; and

FEDSTATE: A dichotomous variable coded as "1" if the judge was a federal judge and "0" if a Texas state judge.[74]

Table 4 reports the results of this model.

TABLE 4: RESULTS OF LOGISTIC REGRESSION MODEL

	β	Standard Error	Significance	R^2
CONSERVATIVE	0.6066	0.1731	0.0005	0.1010
MESSAGE	0.3967	0.1615	0.0140	0.0633
RUNAWAY	0.6394	0.1763	0.0003	0.1053
FEDSTATE	0.6860	0.1778	0.0001	0.1132
Constant	-2.1327	0.1968	0.0000	

Model χ^2 = 44.880 Significance = 0.0000 N = 902[75]

Each of the independent variables is statistically significant and has a positive beta coefficient. This reflects a direct relationship between each variable and a judge's position on whether to restrict or eliminate an individual's right to a jury trial in a civil dispute. Thus, a conservative judge is more likely to support restricting this right, as are judges who have seen a jury use a verdict to send a message or had a runaway jury. Finally, fed-

variable to measure this for both Federal and Texas judges. In preliminary runs of the model using only Federal judges' responses, however, a variable along these lines turned out to be significant.

71. One survey question asked: "How do you consider yourself in interpreting the law?" Judges could respond "Conservative" [Federal = 128 (21.5%), Texas = 217 (55.2%)], "Liberal" [Federal = 27 (4.5%), Texas = 6 (1.5%)], or Moderate [Federal = 388 (65.3%), Texas = 160 (40.7%)]. In addition, 51 (8.6%) Federal judges and 10 (2.5%) Texas judges did not answer this question. Trial versions of the model also included a dichotomous variable reflecting whether the judge indicated if he or she were "moderate." Including both CONSERVATIVE and the proposed MODERATE variable would have allowed us to test the distinct impacts of each response—conservative, moderate, and liberal. The MODERATE variable, however, turned out to be statistically insignificant, thus suggesting that the primary ideological difference among the judges cuts along the lines of conservative/non-conservative.

72. The survey asked: "Do you believe you've had a jury use a verdict to send a message about a broader political, ethical, or social subject?" The results were: Yes [Federal = 234 (39.4%), Texas = 182 (46.3%)], No [Federal = 354 (59.6%), Texas = 208 (52.9%)], and No Answer [Federal = 6 (1.0%), Texas = 3 (0.8%)].

73. The survey asked: "Have you ever had what you considered a runaway jury?" The results were: Yes [Federal = 137 (23.1%), Texas = 90 (22.9%)], No [Federal = 454 (76.4%), Texas = 299 (76.1%)], and No Answer [Federal = 3 (0.5%), Texas = 4 (1.0%)].

74. N: Federal judges = 594; Texas judges = 393.

75. A total of 85 cases were omitted from the analysis due to missing observations.

eral judges are more likely than Texas state court judges to support this position.

The impact that the independent variables have on predicting the dependent variable cannot be interpreted directly from the results of a logistic regression model. To assess their meaning, we calculated a range of probabilities.[76] One indication of the explanatory strength of a logistic regression model is the spread between the lowest and highest probabilities—that is, the greater the spread, the better the model explains the dependent variable. Table 5 reflects probabilities calculated based on the model's results for the model as a whole and for each independent variable.[77] The model as a whole has a sizable spread, which reflects that this model provides a useful way to understand which judges likely would support restricting the use of a jury in a civil dispute. Also note that CONSERVATIVE, FEDSTATE, and RUNAWAY had approximately equal spreads among their respective probabilities. This indicates that they are each relatively equal predictors of the dependent variable. Although MESSAGE is not as strong a predictor, it does contribute to the model's explanatory power.

TABLE 5: PROBABILITIES CALCULATED FOR MODEL AND INDEPENDENT VARIABLES

	Model	CONSERVATIVE	FEDSTATE	MESSAGE	RUNAWAY
$Prob_0$	10.60%	19.74%	16.95%	20.67%	21.00%
$Prob_{Mean}$	23.57%	23.57%	23.57%	23.57%	23.57%
$Prob_1$	54.88%	31.08%	28.83%	27.92%	33.50%
Spread	44.29%	11.35%	11.89%	7.25%	12.50%

Another aspect to consider is the rate of change as one moves from the low to mean to high probabilities, as reflected in Table 6. This analysis allows us to map out where each variable is located on the logistic regression S-curve; this indicates the relative effect of each independent variable on a judge's position regarding restricting or eliminating the trial by jury in civil cases. For CONSERVATIVE, MESSAGE, and RUNAWAY, the differential of $Prob_{Mean}$-$Prob_1$ is greater than the differential between $Prob_0$-$Prob_{Mean}$. Thus, these variables are lower on the S-curve, but also at a point where the presence of one of these variables starts to have an increasing effect on knowing whether a judge would support restricting jury usage. This is particularly true for CONSERVATIVE and RUNAWAY, where the difference between the two differentials is significantly

76. To do this, we multiplied the beta coefficients in the logistic regression equation with the dichotomous values of the independent variables and their mean values. The formula for calculating the probability that a judge would support restricting or eliminating an individual's right to a jury trial in a civil dispute is:
$P=1/(1+e^{-(\alpha + \beta 1(CONSERVATIVE) + \beta 2(FEDSTATE) + \beta 3(MESSAGE) + \beta 4(RUNAWAY))})$.

77. In calculating the probabilities for each independent variable, the mean responses for the other independent variables were used.

greater.[78] Conversely, the differentials for FEDSTATE reflect that it is near the top of the S-curve, given that the $Prob_0$-$Prob_{Mean}$ differential is greater than that for $Prob_{Mean}$-$Prob_1$. As a result, the FEDSTATE variable reflects a form of diminishing returns; although knowing whether a judge is a Federal or Texas state judge adds to the explanatory power of the model, its effect is not as significant as the other variables, particularly CONSERVATIVE and RUNAWAY.

TABLE 6: PROBABILITIES DIFFERENTIALS

	CONSERVATIVE	FEDSTATE	MESSAGE	RUNAWAY
$Prob_0$-$Prob_{Mean}$	3.83%	6.62%	2.90%	2.57%
$Prob_{Mean}$-$Prob_1$	7.52%	5.27%	4.35%	9.94%

D. MAKING THE MODEL SPEAK: INTERPRETING THE RESULTS

As noted above, each of the independent variables was statistically significant and in a positive direction. Given the spread of probabilities for CONSERVATIVE and RUNAWAY and their positions on the logistic regression S-curve, these variables provide slightly more explanatory power than the other two variables. We shall briefly analyze the findings for each independent variable. We will save the discussion of CONSERVATIVE's findings for last because we believe that this analysis merits special consideration.

In some regards, MESSAGE and RUNAWAY address a similar concept: the issue of whether juries go beyond their obligations related to the specific case for which they sit. Judges who have seen a jury that has sought to extend itself beyond the case at hand, either by sending a broader message or being a runaway jury, would be more likely to want to see juries reigned in somewhat. This is a logical response to a problem that they encountered.

An important difference, however, exists between the two variables, and this may account for the fact that RUNAWAY appears to be a better explanatory variable than MESSAGE. A jury that sends a broader message is not necessarily forsaking its obligations to the judicial process in doing so. For example, if a jury is allowed to choose damages in a lawsuit from a range of values, it can send a message by selecting a value at either the high or low end of the range and still be operating within the legal limits prescribed to it. But such is not the case for a runaway jury, which by definition is presumed to be acting beyond its legal authority. If a judge perceived runaway juries as a problem within the legal system, then one proper response to the problem would be to restrict the scope of the jury system.

78. For CONSERVATIVE, the $Prob_{Mean}$-$Prob_1$ differential is approximately twice the $Prob_0$-$Prob_{Mean}$ differential. For RUNAWAY, this greater differential is almost four times the lower differential.

Turning to FEDSTATE, federal judges are more likely than Texas state judges to support restricting or eliminating an individual's right to a jury trial in a civil case. First, consider the role of the trial by jury in Texas specifically and at the state level more generally. The Seventh Amendment right to a jury trial in civil cases, designed to apply solely to the federal government, has not been incorporated into the Fourteenth Amendment, as have other provisions in the Bill of Rights. Thus, as they were in 1791, states are permitted to develop their own standards for using juries in civil disputes. In Texas, the constitutional right to trial by jury is much stronger than that of the federal Constitution. This right is considered "inviolate" and the state legislature is directed to "maintain its purity and efficiency."[79] One would expect that this stronger constitutional preference for jury trials would be reflected in the view of Texas judges. Moreover, even if a Texas judge were to believe personally that jury trials in civil cases should be restricted, the Texas constitutional language seemingly would limit a judge's ability to effect such a view. In addition, state judges are much more likely to be connected to their immediate community than federal judges, particularly in states like Texas where judges are elected. The survey showed that Texas judges were more likely than Federal judges to consider a jury to be the "conscience of the community."[80] As shown above, judges who hold this view were not likely to support restricting the use of a jury.

The second way to assess the FEDSTATE results is to view them from a federal judge's perspective. The historical test used for interpreting the Seventh Amendment may tend to favor the use of jury trials[81], but it does provide more leeway than, for example, the Texas constitution to get around the jury system. Doing so may be important for federal judges given their increased caseload pressure. Because trials before a judge generally are heard and decided more quickly than a trial by jury[82], restricting the use of the right to trial by jury would be one way to ease this pressure.[83] Finally, federal judges hear cases on federal questions, as defined in Article III, Section 1 of the U.S. Constitution. The Federalists' perception of civil cases involving federal questions was that juries were not necessarily required to be used; moreover in some cases they should not be.[84] Such a position may be resounding today in the views held by some federal judges.

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79. TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.").

80. *See supra* Section III.B.

81. *See Chauffeurs*, 494 U.S. at 593 (Kennedy, J., dissenting) (noting that the Supreme Court's "application of the [historical test] analysis in some cases may seem biased in favor of jury trials").

82. *See Posner Evidence*, *supra* note 22, at 1491 ("In the federal courts, civil jury trials are on average more than twice as long as civil bench (that is, judge) trials.").

83. This would, however, provide additional work for judges to render and write their opinions. *See id.*

84. Hamilton wrote, "I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one." FEDERALIST 83, *supra* note 1, at 504.

The variable CONSERVATIVE requires special consideration. As discussed in the previous section, a judge who considered him- or herself to be conservative in interpreting the law is more likely to support restricting or eliminating the right of individuals to have their civil disputes decided by a jury. The term "conservative" is a broad label, and legal conservatism can take many different forms.

Conservative judges often will place great weight on the beliefs that the Framers of the Constitution held. Sometimes this weight takes the guise of strict constructionalism or original intent, or conservative judges may place their credence in the nation's traditions and values.[85] This view as it relates to the right to trial by jury can be found in Justice Rehnquist's dissent in *Parklane Hosiery Co. v. Shore*:

> It may be that if this Nation were to adopt a new Constitution today, the Seventh Amendment guaranteeing the right of jury trial in civil cases in federal courts would not be included among its provisions. But any present sentiment to that effect cannot obscure or dilute our obligation to enforce the Seventh Amendment, which *was* included in the Bill of Rights in 1791 and which has not since been repealed in the only manner provided by the Constitution for repeal of its provisions.[86]

Justice Rehnquist also contended that the "values that underlie the Seventh Amendment" should be kept in mind when a court approaches the decision of whether a jury trial is required in a civil case.[87]

Despite the strong emphasis on tradition and history sometimes found in conservative legal thinking, the survey showed that conservative judges tended to be more likely to support restricting the use of a jury trial than non-conservative judges. Thus, the obvious question is why this is so. The likely answer rests in the fact that legal conservatism can and does take on many different forms. One line of conservative thinking goes to the heart of the problems associated with jury trials better than the abstract appreciation for the Founders that Rehnquist expressed.

Another strand of legal conservatism, generally speaking, seeks to promote efficiency and certainty in judicial proceedings. The problem with juries is that they are inefficient and uncertain.[88] Jury trials are time-

85. *See, e.g., Chauffeurs*, 494 U.S. at 594 (Kennedy, J., dissenting, joined by O'Connor and Scalia, JJ.) ("But the judgment of our own times is not always preferable to the lessons of history. Our whole constitutional experience teaches that history must inform the judicial inquiry. Our obligation to the Constitution and its Bill of Rights, no less than the compact we have with the generation that wrote them for us, do not permit us to disregard provisions that some may think to be mere matters of historical form.").

86. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (Rehinquist, J., dissenting) (emphasis in the original).

87. *Id.* at 344.

88. *See, e.g.*, Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 488 (1975) ("As a practical matter, use of a jury in civil cases may present serious problems—most notably, delay, jury prejudice, and questionable jury competence in more complex cases").

consuming[89], require the formulation and application of special rules[90], and impose external costs on the private litigants.[91] Moreover, "the jurors' inexperience and naiveté will reduce the likelihood of an outcome that corresponds to the true facts of the case."[92] One way to reduce this inefficiency and uncertainty would be to restrict or eliminate the trial by jury in civil cases. Given this, we believe that this efficiency strand of legal conservatism underlies the results of the CONSERVATIVE variable; the desire to streamline the judicial process presumably outweighed the conservative judges' likely appreciation for tradition.

IV. IMPLICATIONS FOR THE FUTURE OF THE JURY SYSTEM IN CIVIL CASES

The issue of whether to restrict the right to trial by jury in civil cases is somewhat of a paradox. On one hand, support for doing so among the current judiciary is a minority position. Furthermore, the judges' perception as to the jury's effectiveness in reaching legal decisions would not seem to indicate a need for fundamental reform of the judicial process. On the other hand, however, the call for restricting the use of the jury existed at the Founding, continued throughout the years since then, and maintains itself today in what is at least a *significant* minority of the current judiciary. In addition, many prominent jurists and legal scholars of the past century or so have criticized or opposed the use of the jury system: James Bradley Thayer, Learned Hand, Benjamin Cardozo, Jerome Frank, Warren Burger, and Richard Posner, to name just a few.[93] Thus, the issue of restricting the use of trial by jury is one that likely will not go away anytime soon.

Without a doubt, the jury as a legal institution is inefficient and costly. Even the jury system's most ardent supporters going back to the Federal Farmer and Tocqueville have acknowledged this shortcoming. But the jury system, at least at the time of the Founding, had a distinct purpose as a political institution as well. The question with which we need to concern ourselves, therefore, is whether the jury still has such a purpose in the modern American political and legal system.

The jury system's critics tend to see the jury's political role as a histori-

89. *See supra* note 86.

90. *See Posner Evidence*, *supra* note 22, at 1491 (acknowledging the costs associated with "[t]he rules of evidence . . . [which] would be largely unnecessary if there were no jury trials; they are mainly designed to protect laymen from making cognitive errors as a result of inexperience").

91. *See* FRANK, *supra* note 19, at 135.

92. *Posner Evidence*, *supra* note 22, at 1492. Judge Posner also notes "[n]ot only do the jurors have higher information costs than professional judges do, but they also may be more subject to cognitive illusions and emotionalism than a professional judge who has 'seen it all before'." *Id.*

93. *See* FRANK, *supra* note 19, at 124 (quoting Thayer, Hand, and Cardozo); Dooley, *supra* note 16, at 346 (discussing Chief Justice Burger's views on civil juries); *Posner Evidence*, *supra* note 22, at 1487-1500 (criticizing juries for the costs they impose, but also noting "there is little evidence to support the often vociferous criticisms of the jury system").

cal artifact.[94] A modern democratic system does not require the use of a jury in civil cases, as evidenced by the fact that the United States is the only country that regularly uses juries in this way.[95] Moreover, even if juries play a role in educating the citizenry (a proposition critics view skeptically), the benefits of that role are not likely to outweigh the costs imposed by the jury system. As Judge Posner contends, "The direct cost of jury trials plainly exceeds that of bench trials. Only if a great deal of value is assigned to John Stuart Mill's 'education in citizenship' rationale, or to some other political value of jury trial, are the added costs likely to be offset by greater benefits."[96] Thus, the issue boils down to distinct legal costs versus intangible and possibly nonexistent political benefits, with the preference being to reduce the legal costs.

The jury system, however, even in civil cases remains an essential component in the American republic.[97] The American experiment may have proved successful, but that does not obviate the need to protect the fundamental tenets of liberty embodied in the Constitution and the Bill of Rights. This protection not only includes the assurance of a civil trial by jury, but also the jury's right—the community's right—to have its declarations of fact stand and not be reexamined by far-removed appellate courts.

An individual's access to a trial by jury in civil cases is not just a facet of the judicial process; at both the federal and state levels, it is a constitutional *right.* It also is, as Tocqueville noted, far more: an expression of popular sovereignty, a connection between the governors and the governed, and a tool of education. Perhaps because America does not now face the immediacy of a tyrannical government or the threat of a fragile, new nation failing, we take the jury's political roles for granted. But the fact that the country is secured in its liberty does not lessen the importance of the jury as a political institution or as a purveyor of community values.

We have lost the notion of juries as a vital organ of legitimacy. Caught up in troubling concerns, such as out-of-control juries, preemptions being used for the wrong reasons, judges overruling outcomes, and lack of representation of the community, some are quick to call for the elimination of trial by jury. These critics have forgotten what the trial by jury really provides our limited republic driven by popular sovereignty. They have forgotten that the trial by jury is more than mere window-dressing, more than a mere drag on the judicial process. Juries are a key foundation and political institution that not only confers legitimacy on judgments by

94. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 619 (4th ed. 1992) ("An important aspect of the separation of powers (*at least historically*) is the requirement that randomly selected private citizens (i.e., jurors) concur in the imposition of a criminal sanction or the award of civil damages") (emphasis added).

95. *See id.* at 582.

96. *See Posner Evidence, supra* note 22, at 1502.

97. *See* Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) (referring to "the essential guarantee of the Seventh Amendment").

elites, but also allows the community the ability to stay a part of the governing process and for individuals to feel a part of and participate in the development of government itself. These juries are a vital point of access that permits ordinary citizens to appreciate the power of government first hand. They also provide the average citizen with the ability to control the development of the fundamental principles that will guide the community. It is this latter power that fosters an appreciation in jurors that their decision does not affect just one case, but the development of law and in turn the community in general. As Justice Rehnquist argued, "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community."[98] With all these benefits that the jury system provides, to quote Justice Brennan (and cover the full range of the ideological spectrum), "If . . . a tie breaker is needed, let us break the tie in favor of jury trial."[99]

But what of the flaws we have seen reported above? Certainly, the jury is an imperfect institution, and its benefits not fully realized; such is the nature of our system of government. But are the savings in efficiency and certainty that would be gained by curtailing or eliminating the civil jury trial so great that we should do so? Looking back at the Founding Debate the answer would be no.

Those advocating the jury's demise generally see only the *judicial processes* that have been developed through practice and convention. These processes can be reformed without eliminating the benefits that juries offer the American political system.[100] Although an examination of how to reform these processes is beyond the scope of this article, suffice it to say that jury outcomes are only as good as the time, effort, and education that are given to the juries. Going through the motions of deliberation with a jury who is ill-equipped, ill-informed, and ill-instructed will yield the less-than-satisfactory results that the media and opponents love to lament. Juries who are not allowed to learn from their experience, ask questions, nor even treated with the respect their power and authority deserves are bound to fall short of our expectations. Any reform of the jury system needs to equip, inform, and instruct jurors to help them improve their participation in the legal process, but it cannot and should not limit or terminate their participation altogether.

We have forgotten the lesson that in order for the governed to confer legitimacy on the process, all citizens must be able to participate in the

98. *Parklane*, 439 U.S. at 344 (Rehnquist, J., dissenting) (quoting Oliver Wendell Holmes); *see also* ADLER, *supra* note 19, at 186 ("More than when they vote, or pay taxes, or attend a parade, [jurors] are realizing the democratic vision that still sustains our nation: They are governing themselves").

99. *Chauffeurs*, 494 U.S. at 580 (Brennan, J., concurring in part and concurring in judgment).

100. *See, e.g.*, *Posner Evidence*, *supra* note 22, at 1498-99 (offering eight general reforms "designed to make trial by jury more accurate").

process. The echoes of the Founding Debate remind us that participation is not a duty, but a precious right that must be nurtured and developed. For popular sovereignty and representative government to mean anything, it must have a foundation of people willing to guide, develop, and nurture its path. The trial by jury is a much-maligned institution, which in fact should be venerated for the legitimacy it confers. Reforms of the trial-by-jury system have skewed this meaning and lulled many into calling for restricting its scope. To these advocates it should be noted, the jury is a means for the ordinary citizens to express themselves in relation to the power of the state. This ultimate show of popular sovereignty is for the people alone to confer and alone to lose.