

The Missing Branch of the Jury

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Over time, the criminal, civil, and grand juries have declined in power. Cost, incompetence, inaccuracy, and inefficiency are often cited as the reasons for this fall. Recognizing that authority that formerly resided in the jury has shifted to the traditional constitutional actors of the executive, the legislature, the judiciary, and the states, this Article explores a new theory for the decline of the jury. In the past, the Supreme Court has used the doctrines of the separation of powers and federalism to protect the power of the traditional actors including the branches, while it has not used any similar doctrine to preserve jury authority. At the same time, the power of the jury has eroded. This Article argues that the jury is effectively a “branch” of government—similar to the executive, the legislature, and the judiciary—that has not been recognized and protected. In many instances the Court originally found authority in the jury to later take the same authority and give it to a traditional actor. A novel study helps explain why the status of the jury has changed. It shows that legal elites and corporations appear to have influenced this shift against jury authority.

TABLE OF CONTENTS

| | | |
|------|---|------|
| I. | INTRODUCTION | 1262 |
| II. | REASONS PROFFERED FOR THE FALLS OF THE CRIMINAL, CIVIL, AND GRAND JURIES | 1265 |
| | A. <i>The Criminal Jury</i> | 1265 |
| | B. <i>The Civil Jury</i> | 1267 |
| | C. <i>The Grand Jury</i> | 1269 |
| III. | A NEW THEORY FOR THE FALL OF THE JURIES | 1271 |
| | A. <i>The Other Branch</i> | 1271 |
| | 1. <i>The Constitutional Text</i> | 1272 |
| | a. <i>The Executive</i> | 1272 |
| | b. <i>The Legislature</i> | 1272 |
| | c. <i>The Judiciary</i> | 1273 |
| | d. <i>The States</i> | 1273 |
| | e. <i>The Criminal Jury</i> | 1273 |

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| | |
|---|------|
| f. <i>The Civil Jury</i> | 1274 |
| g. <i>The Grand Jury</i> | 1274 |
| 2. <i>The Founders and Ratifiers</i> | 1274 |
| a. <i>On the Executive, the Legislature, the Judiciary, and the States</i> | 1275 |
| b. <i>On the Criminal, Civil, and Grand Juries</i> | 1278 |
| 3. <i>The Interpretation of Power</i> | 1284 |
| a. <i>The Executive, the Legislature, the Judiciary, and the States Under Separation of Powers and Federalism</i> | 1285 |
| b. <i>A Missing Constitutional Role for the Jury?</i> | 1290 |
| 4. <i>The Missing Branch in the Supreme Court's Jurisprudence</i> | 1299 |
| a. <i>Right to Jury Trial Versus Power of Jury</i> | 1301 |
| b. <i>Other Arguments Against the Jury as a Branch</i> | 1304 |
| B. <i>Further Assessing the Decline of the Criminal, Civil, and Grand Juries</i> | 1305 |
| 1. <i>Unique Characteristics of the Jury</i> | 1306 |
| 2. <i>The Supreme Court's Shifting Opinions of the Jury</i> | 1308 |
| 3. <i>Public Opinion About the Jury</i> | 1311 |
| IV. CONCLUSION..... | 1320 |

I. INTRODUCTION

The American jury was derived from the vibrant late eighteenth-century English criminal, civil, and grand juries.¹ Despite this model, juries hear few cases in the United States today.² They try around 1%–4% of criminal cases in federal and state courts and hear less than one percent of civil cases in federal

¹ See Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1197–99 (2014).

² See ADMIN. OFFICE OF THE U.S. COURTS, TABLE C—U.S. DISTRICT COURTS—CIVIL JUDICIAL BUSINESS (Sept. 2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C00Sep13.pdf> [<https://perma.cc/HM9D-7BDC>]; ADMIN. OFFICE OF THE U.S. COURTS, TABLE D CASES—U.S. DISTRICT COURTS—CRIMINAL JUDICIAL BUSINESS (Sept. 2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/D00CSep13.pdf> [<https://perma.cc/X6BX-C28Q>]; ADMIN. OFFICE OF THE U.S. COURTS, TABLE T-1—U.S. DISTRICT COURTS—TRIALS JUDICIAL BUSINESS (Sept. 2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/T01Sep13.pdf> [<https://perma.cc/YR9L-WZT3>]; see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 507 tbl.4, 510 (2004).

and state courts.³ Also, grand juries do not sit in many state courts.⁴ Even when juries hear cases, judges often second-guess them, taking cases from them using procedures that did not exist at the time of the founding. At the same time that the jury has declined in authority, the “traditional constitutional actors” of the executive, the legislature, the judiciary, and the states have gained power.⁵ For example, under the Dodd–Frank Act, Congress permitted the Securities and Exchange Commission to shift more authority from juries in federal courts to itself.⁶ So, civil insider trading cases that were formerly tried by juries are now often tried by SEC judges.⁷ This shift from juries is the subject of several recent lawsuits.⁸ Similar shifts from juries to the traditional actors can also be seen in the criminal context.⁹

Although various reasons have been offered for the jury’s decline, these reasons have not taken into account that the power of the executive, the legislature, the judiciary, and the states (the traditional actors) has risen in conjunction with the jury’s decline in authority. Also, the reasons do not factor in that no Supreme Court doctrine protects the jury’s authority while the traditional actors’ powers have been guarded through the court-created doctrines of separation of powers and federalism.

This Article introduces a new theory accounting for the fall of the three juries and the related increase in authority of the traditional actors. Namely, the jury’s independent authority has never been recognized. The jury has never been given branch-like status through the use of doctrines similar to the separation of powers and federalism that protect the power of the traditional actors.

This Article analyzes the reasons behind the decline related to the shift from the jury to traditional actors. It does not discuss, however, other phenomena, such as arbitration and settlement, that have affected the decline in the jury and that do not directly involve such shifts in authority from the jury to traditional actors.

Understanding why the jury does not hear many cases can influence decisions on whether the jury should hear more cases. This Article reframes

³ See Galanter, *supra* note 2, at 510, 512 tbl.7.

⁴ See SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE 1-2 to 1-3 (2d ed. 2008).

⁵ See generally Thomas, *supra* note 1 (arguing that juries play almost no role in government today).

⁶ See, e.g., Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL STREET J., <http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590> [<https://perma.cc/22YT-L6ZV>] (last updated Oct. 21, 2014).

⁷ *Id.*

⁸ See, e.g., *Duka v. U.S. Sec. & Exch. Comm’n*, No. 15 Civ. 357(RMB)(SN), 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015), *Tilton v. Sec. & Exch. Comm’n*, No. 15-CV-472 (RA), 2015 WL 4006165 (S.D.N.Y. June 30, 2015); *Hill v. Sec. & Exch. Comm’n*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016).

⁹ Thomas, *supra* note 1, at 1215–23.

the future debate over the decline of the jury to whether the traditional actors should hold authority that was intended for the people through the jury.

This Article also begins to explore why the jury's authority has not been protected. The jury's inability to act on its own and protect its own authority is described. Next, the shift in the opinions of the Supreme Court from pro-jury to anti-jury in several areas over time is shown. Finally, a novel empirical study that studies the time period when the Court shifts its positions suggests why the Court overturned several pro-jury decisions, in turn indicating why jury authority continues to decline.

Part I describes reasons previously offered for the declines of the criminal, civil, and grand juries. These reasons include cost, incompetence, inaccuracy, and inefficiency.

Part II describes the new theory for the fall of the jury—that the jury has not been treated in a manner similar to the traditional actors of the executive, the legislature, the judiciary, and the states—as a separate branch-like constitutional actor with authority. The similarity between the constitutional text granting power to the traditional actors and the jury is first set forth. Next, the congruence between the founders' discussion of the traditional actors and the jury as important components of the government whose authority must be protected is described. Thereafter, the disparate treatments of the traditional actors and the jury by the Supreme Court are shown. Specifically, the Court has used separation of powers and federalism to carve out particular roles for the traditional actors. On the other hand, the Court has failed to use similar doctrine to protect the jury. Instead, over time, the Court has overturned numerous important decisions in which the jury was first granted significant authority.

This Article then explores whether the jury should be given status in the constitutional structure similar to the traditional actors. Part of this question depends on whether the founders set forth power in the jury or instead simply gave people a right to a jury. Justice Thomas has stated that “[t]here is some dispute whether the guarantee of a jury trial protects an individual right, a structural right, or both.”¹⁰ He reiterated his view that the jury is a “fundamental reservation of power in our constitutional structure.”¹¹

After concluding that the jury should be considered effectively a “branch” of the government because of the authority granted to it under the Constitution, this Article further explores why the authority of the jury has declined. It first recognizes the unique characteristics of the jury as unable to protect its own authority. It goes on to analyze the time period when the Supreme Court made many shifts in its decisions on jury authority against jury authority. By using public news articles in that time period, it concludes that legal elites and corporations likely influenced the Court.

¹⁰ *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1961 n.1 (2015) (Thomas, J., dissenting).

¹¹ *Id.* (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004)).

This Article concludes that understanding the traditional actors' roles in the jury's fall permits a more accurate assessment of the role that the jury should play in the government. Looking forward, the debate about the jury's decline must be reframed to consider the respective roles that the traditional actors and the people through the jury should play in the government.

II. REASONS PROFFERED FOR THE FALLS OF THE CRIMINAL, CIVIL, AND GRAND JURIES

Commentators generally do not recognize the similarity of the reasons proffered for the criminal, civil, and grand juries' declines. However, cost, incompetence, inaccuracy, and inefficiency are commonly touted as explanations for why each hears few cases, and why, even when each hears cases, its authority may be disregarded. This part summarizes these reasons for the falls of the juries.

A. *The Criminal Jury*

Much of the decline of the criminal jury in the United States is attributed to plea bargaining. Its systematic use is first traced to the early nineteenth century.¹² While defendants pled to different crimes at various rates, it appears that they generally pled guilty only about 20% of the time.¹³ By the early twentieth century, the proportion of defendants who took pleas grew to more than 90%—a figure that continues to climb.¹⁴

Different reasons have been offered for the increase in plea bargaining and subsequent decrease in jury trials.¹⁵ The rise in the number of plea-bargained cases has been associated with changing caseloads.¹⁶ As the absolute number of criminal defendants has increased over time—for example, doubling in the federal courts from 1946 to 2002—some argue that pleas have become necessary to dispose of cases quickly without trial.¹⁷ Faced with heavy loads, prosecutors and judges alike have similar incentives for promoting plea bargaining.¹⁸ In the 1970s, the Supreme Court's Chief Justice Warren Burger stated that “plea bargaining is to be encouraged because ‘[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal

¹² See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 12 (2003).

¹³ *Id.* at 140 (drawing on statistic from the city of Boston).

¹⁴ *Id.* at 137.

¹⁵ See MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 1–13 (2005).

¹⁶ See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 156 (2005).

¹⁷ See *id.* at 156 & n.16.

¹⁸ See Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131, 133–34 (2005).

Government would need to multiply by many times the number of judges and court facilities.”¹⁹ Or, as John Langbein translates Burger’s sentiment, “We cannot afford the Constitution and the Bill of Rights. Sheer expediency is rationale enough for disregarding the constitutional texts.”²⁰

Scholars have also suggested that plea bargaining substituted for jury trials after legislators introduced mandatory minimum sentencing and mandatory sentencing guidelines in the 1980s.²¹ Under the mandatory minimum regime, charges carry particular minimum sentences. The prosecutor can choose a charge with a lesser mandatory sentence for a defendant who foregoes a jury trial and accepts a plea. In such a system, defendants—even innocent ones—have significant incentives to plead guilty and waive their jury trial right. When a jury decides a case, unlike in the past,²² the jury will acquit or convict on the charges without knowing the punishment associated with the charges. In these circumstances, the jury may acquit on the charges, it may give a verdict on the charge that comes with the greatest punishment, or it may convict on the charge that presents the least time in prison.²³ For a variety of reasons, including that the jury does not know the possible sentences and the prosecutor may not prosecute the charge with the lesser punishment that was offered in plea bargaining, the defendant is unlikely to take his chance with a jury.

In addition to the impact of mandatory minimums on plea bargaining, sentencing guidelines (although now advisory) also encourage guilty pleas.²⁴ Judges use these protocols to determine the baseline sentence and whether it should be increased or decreased. The guidelines incentivize defendants to take pleas by providing certain discounts to sentences—for example, acceptance of responsibility—that will not be available upon being convicted at trial. Prosecutors also can influence the effect of the guidelines in certain ways, including by recommending a particular sentence within the sentencing range or recommending a departure from that range.²⁵

Under another view, elected district attorneys who sought to advance particular political agendas in the nineteenth century caused plea bargains to supplant jury trials.²⁶ The state was said to have adopted “its own social and

¹⁹ John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 125 (1992) (alteration in original) (quoting *Santobello v. New York*, 404 U.S. 257, 260 (1971)); see Smith, *supra* note 18, at 132.

²⁰ Langbein, *supra* note 19, at 125.

²¹ See, e.g., Nancy Gertner, *From “Rites” to “Rights”: The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMAN. 433, 436–37 (2012).

²² Thomas, *supra* note 1, at 1205.

²³ Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 375–79 (2011).

²⁴ See Gertner, *supra* note 21, at 437.

²⁵ See *id.*

²⁶ MCCONVILLE & MIRSKY, *supra* note 15, at 327–37.

political agenda,” including “aggregate justice” and “certainty,” which encouraged pleas over jury trials.²⁷

Other explanations are offered for the fall of the criminal jury—among them emotional reactions of jury members and the expansion of jury membership across economic lines, sexes, and races—possibly leading to perceptions that juries may render verdicts in favor of criminal defendants, influenced by reasons unrelated to the law.²⁸ At the same time, democratization of the jury simply may have led certain segments of the population not to desire juries any longer because of the possible results.²⁹

B. *The Civil Jury*

Commentators criticize the civil jury in some of the same ways as they do the criminal jury. Civil juries have been widely characterized as biased, and some say these inclinations are due to increasing diversity.³⁰ Moreover, members of the general public who comprise the jury are chastised as unable to understand cases involving complicated issues.³¹ One of the most common explanations for why the civil jury has fallen derives in part from such assessments.³² It asserts that parties, such as corporations, have sought alternative methods of dispute resolution, particularly arbitration or settlement, because juries harbor bias for underdog plaintiffs and are unable to decide complicated cases accurately.³³

Corporations have also actively sought to limit juries’ authority when juries actually try cases.³⁴ While the nature of any jury decision is unpredictable, proponents of jury reform argue that because juries are not held

²⁷ See *id.* at 336–37.

²⁸ See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 3–4 (1994); JON ELSTER, *SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS* 102–09 (2013). In addition to discussing this possible explanation, Robert Burns sets forth several potential reasons for the decline of the criminal and civil trials, including the jury trial. See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 88–108 (2009).

²⁹ See Stephen C. Thaman, *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial*, in *WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL* 297, 327–28 (Stephen C. Thaman ed., 2010).

³⁰ Hans & Eisenberg, *supra* note 23, at 376–78.

³¹ NANCY S. MARDER, *THE JURY PROCESS* 232 (2005).

³² *Id.*

³³ See NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995) (examining the role of the civil jury in medical malpractice lawsuits); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1263, 1266–68 (2005); Hans & Eisenberg, *supra* note 23, at 376–78.

³⁴ Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 *WM. & MARY L. REV.* 1241, 1254–55 (2014).

accountable for their decisions and can choose not to follow the law, corporations are subject to unacceptable uncertainty.³⁵ Successfully advocating for tort reform, corporations have secured greater predictability in certain cases through limits on the monetary damages that juries can award.³⁶

In addition to the possibility of large jury verdicts being rendered against them, corporations and other defendants must pay attorneys' fees, which increase dramatically when a matter goes to trial. Pursuant to the "so-called 'American rule,'" in the vast majority of cases, defendants pay their own attorneys' fees even if they win at trial.³⁷ As a result, defendants and—in many cases—plaintiffs are incentivized to avoid trial.

Along with corporations and other parties seeking to avoid litigation costs, courts have incentives to avoid civil juries. Like their criminal caseloads, courts' civil dockets have grown exponentially.³⁸ Although some resources have been devoted to this growth, a perception exists that courts' dockets remain overcrowded.³⁹ There is also congressional pressure for processing cases in a timely manner. Congress requires federal judges to report cases pending for more than three years and motions pending more than six months.⁴⁰ Under such pressure, juries, which take time and money to compose, may be disfavored. Judges have also actively reduced their civil caseloads through the use of procedures such as summary judgment that preclude jury trials.⁴¹

Additionally, increased access to courts "for outsiders," including civil rights plaintiffs, may have led to reform efforts, resulting in more limitations on claims such as caps on monetary damages.⁴² Legislatures have also shifted

³⁵ See Hans & Eisenberg, *supra* note 23, at 376–78. See generally Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1601 (2001) (discussing the "debate over criminal jury nullification as a prelude to considering the possible arguments for and against its counterpart in civil litigation").

³⁶ See Whitehouse, *supra* note 34, at 1262–64.

³⁷ John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 572 (2012).

³⁸ ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 136 (2001).

³⁹ See *id.* at 136–38. For a historical perspective on civil juries, see Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 831, 848 (2014).

⁴⁰ Civil Justice Reform Act of 1990, 28 U.S.C. § 476 (1990).

⁴¹ See Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (arguing for mandatory summary judgment as a solution to the nuisance-value settlement problem); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982).

⁴² See Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 606–09 (1993).

matters to administrative agencies for more efficiency, uniformity, and control than they think juries offer.⁴³

As Marc Galanter has stated, the decline in the civil jury has been associated with

a mutually supportive complex of beliefs and practices—beliefs that we are suffering from a litigation explosion; that juries are biased against corporate defendants; that courts should not be expanding the edges of rights; that litigation is hurting the economy; and that the solution is to curtail remedies, privatize, and deregulate.⁴⁴

In his article on the disappearance of the civil trial, John Langbein asserted another reason for the decline, claiming that, “Litigants no longer go to trial because they no longer need to.”⁴⁵ Cases are tried through discovery.⁴⁶ Formerly at common law, the trial was the only method available to discover the facts of a case.⁴⁷ After the separate courts of law and equity merged under the federal rules (and analogous state rules), fact-finding began to occur earlier when parties exchanged information before trial.⁴⁸ Using this evidence and new procedures, judges bypassed juries by dismissing cases that they deemed factually insufficient, and they encouraged settlement in other cases.⁴⁹ Langbein argues that this system makes the trial unnecessary because the parties and courts know the facts earlier in litigation, permitting the disposition of cases before trial, through dismissal or settlement.⁵⁰

C. *The Grand Jury*

Some early criticisms of the grand jury echo commentary on the criminal and civil jury regarding it as useless and inefficient.⁵¹ In the early twentieth century, studies concluded that grand juries simply rubberstamped prosecutors’ decisions to charge defendants.⁵² In the 1940s, and culminating in the 1970s, allegations emerged that prosecutors abused the powers of the grand jury, leading to a call for the grand jury’s abolition.⁵³

⁴³ See SWARD, *supra* note 38, at 130–38.

⁴⁴ Galanter, *supra* note 33, at 1272.

⁴⁵ Langbein, *supra* note 37, at 569.

⁴⁶ *Id.* at 570.

⁴⁷ *Id.* at 569.

⁴⁸ *Id.* at 570.

⁴⁹ *Id.* at 570–71.

⁵⁰ *Id.* at 572.

⁵¹ See RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941*, at 60 (1963).

⁵² *Id.* at 229.

⁵³ See MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 52–59, 117, 119 (1977); Michael E. Deutsch, *The Improper Use of the Federal*

Today, people continue to denounce grand juries for being unready to deviate from the direction of prosecutors. Since 1985, following the lead of the then-New York State Chief Judge, the grand jury has often been characterized as willing to “indict a ‘ham sandwich.’”⁵⁴ Available statistics show indictments in many cases, greater than 99% of federal cases and 84%–94% of New York state cases, for example.⁵⁵ Although these statistics can be interpreted in different ways, one interpretation is that the use of grand juries misallocates resources. Many prosecutors believe, however, that grand juries deliberately approach their task of judging evidence in cases and provide a “sounding board” regarding whether sufficient evidence to convict exists.⁵⁶

A related attack is that the grand jury is duplicative, rendering the work of grand juries unnecessarily costly and inefficient.⁵⁷ Under this argument, prosecutors, police, and lawyers, all of whom played almost no role at the founding, are now an integral part of the system. Police and prosecutors do in concert what the grand jury did at common law: help to ensure that charges are accurate.⁵⁸ Defense lawyers, provided by the state in some circumstances, might offer protections similar to those provided by the grand jury at common law.⁵⁹ Judges also obviate the need for grand juries by reviewing charges at preliminary hearings where grand juries have not been employed.⁶⁰

Similar to criminal and civil jurors, grand jurors are often disparaged for their lack of qualifications and ignorance of the law.⁶¹ Commentators complain that grand jurors are insufficiently experienced and untrained to determine whether there is probable cause for the alleged crime.⁶²

In summary, several reasons have been offered for the declines of the criminal, civil, and grand juries. Their falls are associated with beliefs that

Grand Jury: An Instrument for the Internment of Political Activists, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1176–83 (1984).

⁵⁴ *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 (Sup. Ct. 1989) (quoting Chief Judge).

⁵⁵ Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0, at 195, 196 (Roger Anthony Fairfax, Jr. ed., 2011); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 31–39 (2002).

⁵⁶ James C. McKinley Jr. & Al Baker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), http://www.nytimes.com/2014/12/08/n-yregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0 [<https://perma.cc/VM6V-JFHT>].

⁵⁷ See YOUNGER, *supra* note 51, at 145–46; Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 341–45 (2010).

⁵⁸ Fairfax, *supra* note 57, at 345.

⁵⁹ *Id.* at 344–45.

⁶⁰ *Id.* at 345, n.33.

⁶¹ See YOUNGER, *supra* note 51, at 66, 69, 141; Simmons, *supra* note 55, at 69.

⁶² See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 294–304 (1995).

juries cannot reach nonbiased, accurate decisions, and that they take too much time and money to constitute when better alternatives exist.

III. A NEW THEORY FOR THE FALL OF THE JURIES

Despite the repeated themes of cost, incompetence, inaccuracy, and inefficiency, the jury occupies a prominent role in the Constitution in the original text and three different Amendments.⁶³ So, the fall of the jury remains puzzling. Even if costly, incompetent, inaccurate, and inefficient, the jury is constitutionally required.⁶⁴ The executive, the legislature, the judiciary, and the states have also been criticized as being costly, incompetent, inaccurate, and inefficient⁶⁵—but have not declined in use like the jury has. Nor have those actors been disparaged as useless. And arguments for their abolishment have not enjoyed serious consideration.⁶⁶ At the same time, these actors have taken substantial authority from the criminal, civil, and grand juries. Why have these similarly-criticized other actors reaped power while the jury has declined?

To understand the fall of the jury and the continued rise of the executive, the legislature, the judiciary, and the states, we need to examine the relationships between the jury and the other actors, as well as the characteristics of each. Several features distinguish the jury. The first, which is the focus of the following section, concerns the treatment of the jury in relation to the other actors in the Constitution. It has been subjugated to a place of unequal footing with them. The other features, which are addressed at the end of this Article, concern the inability of the jury to act on its own.

A. *The Other Branch*

The text of the Constitution, in addition to evidence at the founding and at the ratification of the Fourteenth Amendment, reveals commonalities among the roles that the jury, the executive, the legislature, the judiciary, and the states were to play. These bodies were constituted as separate, independent, powerful, and interrelated actors. However, the nonjury actors, led by the Supreme Court, have recognized only their own separate powers and

⁶³ U.S. CONST. art. III; *id.* amends. V, VI, VII.

⁶⁴ *Id.* art. III, § 2.

⁶⁵ See Marco Battaglini & Stephen Coate, *Inefficiency in Legislative Policymaking: A Dynamic Analysis*, 97 AM. ECON. REV. 118, 118–20 (2007); *cf.* Charles M. Blow, *The Do-Even-Less Congress*, N.Y. TIMES (Aug. 3, 2014), <http://www.nytimes.com/2014/08/04/opinion/charles-blow-the-do-even-less-congress.html> [<https://perma.cc/AR26-QZCB>] (citing research on the declining number of laws enacted by Congress, mentioning little veto of laws by the President, and stating that Congress is sitting for fewer days than in the past).

⁶⁶ See WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 2 (2002).

independence. They have denied the jury's similar authority, and instead, have almost invariably appropriated its powers.

1. *The Constitutional Text*

An examination of the constitutional text reveals that the executive, the legislature, the judiciary, the states, the criminal jury, the civil jury, and the grand jury similarly all have powers and limitations as well as interdependences.

a. *The Executive*

Article II establishes the powers and limitations of the executive.⁶⁷ For example, the President can pardon defendants convicted of federal offenses, but cannot do so in impeachment cases.⁶⁸ The President can make treaties, but only with the advice and consent of the Senate.⁶⁹ The President can also appoint Supreme Court Justices and all other officers of the United States, but also only with the advice and consent of the Senate.⁷⁰ As a final example, the President is empowered to fill all vacancies that occur during the recess of the Senate.⁷¹ However, these commissions are limited as they expire at the end of the next session of the Senate.⁷²

b. *The Legislature*

Similar to Article II, Article I establishes the powers and limitations of the legislature.⁷³ Such powers include the Senate's authority to try all impeachments.⁷⁴ The legislature can enact laws on only certain subjects and is explicitly prohibited from passing a bill of attainder or *ex post facto* law.⁷⁵ A majority in the House of Representatives and the Senate must approve a bill, and the President must sign it in order for the bill to become law.⁷⁶ Without presidential approval, two-thirds of each of the House of Representatives and Senate must approve the bill for it to become law.⁷⁷

⁶⁷ U.S. CONST. art. II.

⁶⁸ *Id.* art. II, § 2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ U.S. CONST. art. I.

⁷⁴ *Id.* art. I, § 3.

⁷⁵ *Id.* art. I, § 9.

⁷⁶ *Id.* art. I, § 7.

⁷⁷ *Id.*

c. *The Judiciary*

Most of the express powers and limitations of the judiciary are established by Article III.⁷⁸ Under this Article, judges hold their offices unless they have acted unlawfully, and Congress cannot decrease their compensation during their time in office.⁷⁹ Moreover, Article III gives the judiciary jurisdiction over all cases in law and equity that arise under the Constitution, the laws of the United States, and treaties.⁸⁰ Among other powers, it has authority over controversies between citizens of different states.⁸¹ Article III also limits the power of the judiciary by giving a different body—the jury—power to try all crimes except impeachment cases.⁸²

d. *The States*

Article IV and the Tenth Amendment establish the powers and limitations of the states.⁸³ Article IV guarantees that the acts of each state will be recognized by the other states,⁸⁴ and the Tenth Amendment broadly grants power to states.⁸⁵ It gives those powers not granted to the United States and those that the states are not prohibited from possessing to the states or the people.⁸⁶ Under Article I, states also can take certain actions such as imposing duties on imports or exports upon the consent of Congress.⁸⁷

e. *The Criminal Jury*

Article III and the Sixth Amendment establish the powers and limitations of the criminal jury.⁸⁸ Article III provides a jury trial for all crimes except impeachment cases.⁸⁹ Additionally, the Sixth Amendment grants that a person accused of a crime has rights associated with the jury trial, including an impartial jury.⁹⁰ No other constitutional provisions further explicitly limit the criminal jury.⁹¹ For example, under the previously mentioned articles and

⁷⁸ *Id.* art. III.

⁷⁹ U.S. CONST. art. III, § 1.

⁸⁰ *Id.* art. III, § 2.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* art. IV; *id.* amend. X.

⁸⁴ *Id.* art. IV, § 1.

⁸⁵ U.S. CONST. amend. X.

⁸⁶ *Id.* art. IV; *id.* amend. X.

⁸⁷ *Id.* art. I, § 10.

⁸⁸ *Id.* art. III; *id.* amend. VI.

⁸⁹ *Id.* art. III, § 2.

⁹⁰ *Id.* amend. VI.

⁹¹ U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”); *id.* amend. VI.

amendments, the executive, the legislature, the judiciary, and the states possess no express authority over the criminal jury.

f. *The Civil Jury*

The Seventh Amendment establishes the authority of the civil jury.⁹² It “preserved” the right to a jury trial in “[s]uits at common law” where the amount in dispute is more than twenty dollars and grants the judiciary limited authority to re-examine facts tried by a jury “according to the rules of the common law.”⁹³ Pursuant to the Amendment, then, in cases above twenty dollars, the right to a jury trial at common law is preserved. Moreover, the judiciary is given express common law authority over facts tried by a civil jury.⁹⁴ Other than this common law authority, the executive, the legislature, the judiciary, and the states have no other explicit constitutional authority over the civil jury.

g. *The Grand Jury*

The Fifth Amendment establishes the grand jury requirement.⁹⁵ With the exception of some cases that involve the military or state militia, it provides that a grand jury must present or indict in order for a person to be prosecuted “for a capital, or otherwise infamous crime.”⁹⁶ Thus, the grand jury has almost exclusive authority to initiate prosecutions for serious crimes.⁹⁷

In summary, in the constitutional text, specific authority is granted to the executive, the legislature, the judiciary, the states, the criminal jury, the civil jury, and the grand jury. Moreover, limitations are placed on all of those actors, often in relationship to one another.

2. *The Founders and Ratifiers*

In addition to the text of the Constitution, the Supreme Court has utilized evidence from the founding to limit the authority of the executive, the legislature, the judiciary, and the states in relationship to each other. It has not

⁹² *Id.* amend. VII.

⁹³ *Id.*

⁹⁴ *Id.* (“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.”).

⁹⁵ *Id.* amend. V.

⁹⁶ *Id.*

⁹⁷ U.S. CONST. amend. V. (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”); *id.* art. I, § 8, cls. 14, 16.

similarly acted to limit their power in relationship to the jury. This section shows that the Supreme Court has used such founding evidence to support employing the doctrines of separation of powers to protect the powers of the executive, the legislature, and the judiciary and the concept of federalism to protect the authority of the federal government and the states. At the same time, the Court has refused to use a similar doctrine to limit the authority of the executive, the legislature, the judiciary, and the states in relationship to the jury.

a. *On the Executive, the Legislature, the Judiciary, and the States*

The founders extolled the distinct responsibilities of the executive, the legislature, the judiciary, and the states and those actors' powers to keep one another in check.⁹⁸ These checks and balances were necessary to maintain each actor's independence.⁹⁹ Prior to the adoption of the Constitution, James Madison stated, "If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised."¹⁰⁰ At that time, George Mason also stated that the three departments should "be kept as separate as possible."¹⁰¹

After the Constitution was adopted, writing about the importance of the division of the powers of the executive, the legislature, and the judiciary in *The Federalist*, James Madison stated that, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."¹⁰² "[T]he fundamental principles of a free constitution [would be] subverted" if one department exercised all of the power of another department.¹⁰³ Madison emphasized that limits must be imposed on the powers of these departments vis-à-vis the others.¹⁰⁴ Accordingly, "none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it."¹⁰⁵ Additionally, the independence of the departments was emphasized:

⁹⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56 (Max Farrand ed., 1911) [hereinafter RECORDS]; see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328 (2001).

⁹⁹ Clark, *supra* note 98, at 1328.

¹⁰⁰ RECORDS, *supra* note 98, at 56.

¹⁰¹ *Id.* at 537.

¹⁰² THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰³ *Id.* at 303.

¹⁰⁴ *Id.*

¹⁰⁵ THE FEDERALIST NO. 48, *supra* note 102, at 308 (James Madison).

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.¹⁰⁶

The mutual interrelationships made the division of their powers possible. As Madison stated, “[T]he defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”¹⁰⁷ Madison illustrated these significant interrelationships:

The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.¹⁰⁸

The founders focused on the relationships between the departments because of their potential to overreach.¹⁰⁹ At the federal convention, Governor Morris discussed the need for a “check” on the legislature, which posed the “greater danger” to “public liberty” than any other department.¹¹⁰ Executive power was also feared.¹¹¹ George Mason discussed how it could turn into a “Monarchy.”¹¹² Elbridge Gerry made similar comments about the judiciary, claiming it could be “oppressive.”¹¹³

Similar to their discussion of this division of authority, the Founders examined the distinct powers of the states and the federal government in the governmental structure, although there was clear disagreement on the subject. “[I]t is widely recognized that ‘The Federalist reads with a split personality’ on

¹⁰⁶ THE FEDERALIST NO. 51, *supra* note 102, at 321 (James Madison).

¹⁰⁷ *Id.* at 320.

¹⁰⁸ THE FEDERALIST NO. 47, *supra* note 102, at 303 (James Madison).

¹⁰⁹ *Id.*

¹¹⁰ RECORDS, *supra* note 98, at 75–76.

¹¹¹ *Id.* at 35.

¹¹² *Id.*

¹¹³ Letter from Elbridge Gerry to the Legislature (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 6, 6–7 (Herbert J. Storing ed., 1981).

matters of federalism.”¹¹⁴ As a general matter, Hamilton was very nationalistic in his interpretation of the Constitution, and Madison interpreted the powers of the states more broadly.¹¹⁵

Regardless of this difference, Hamilton and Madison agreed that divisions of power between the federal government and the states existed. When Hamilton discussed power held by the states, he emphasized corresponding constitutional limitations on the federal government’s power. “[A]n attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.”¹¹⁶ He emphasized that states would retain powers that they possessed before the Constitution was enacted, as the states were limited in their authority only

where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.¹¹⁷

Consistent with the notion of the limited power of the Union, Madison stated, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹¹⁸ The power of the states included the aspects of “the ordinary course of affairs . . . and the internal order” of the state.¹¹⁹ And the states’ powers were greatest in “times of peace and security,” whereas the power of the federal government was primarily limited to externalities with its most extensive power in the rare events “of war and danger.”¹²⁰

Madison discussed “the disposition and the faculty [the federal and state governments] may respectively possess to resist and frustrate the measures of each other.”¹²¹ The natural emphasis on local interest would serve as a check on the power of the federal government because the officers would retain concerns about their own states.¹²² Also, if the federal government encroached on the states, the states would unite against the federal government.¹²³

¹¹⁴ *Printz v. United States*, 521 U.S. 898, 916 n.9 (1997) (quoting D. BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 198–99 (3d ed. 1996)).

¹¹⁵ *See id.*; THE FEDERALIST NO. 45, *supra* note 102, at 292 (James Madison).

¹¹⁶ THE FEDERALIST NO. 32, *supra* note 102, at 198 (Alexander Hamilton).

¹¹⁷ *Id.*

¹¹⁸ THE FEDERALIST NO. 45, *supra* note 102, at 292 (James Madison).

¹¹⁹ *Id.* at 293.

¹²⁰ *Id.*

¹²¹ THE FEDERALIST NO. 46, *supra* note 102, at 295 (James Madison).

¹²² *See id.* at 296.

¹²³ *See id.* at 294–300.

b. *On the Criminal, Civil, and Grand Juries*

As described above, the founders of the Constitution emphasized the important interrelationships among the executive, the legislature, and the judiciary, as well as each actor's independence. The significant connection between the federal government and the states was also stressed along with their independence from one another. The Constitution's founders and the Fourteenth Amendment's ratifiers similarly discussed the interrelationships between the jury and these other actors. The founders and the ratifiers also understood that the American jury had an independent role like the executive, the legislature, the judiciary, and the states—specifically to protect against actions by those other actors.

Early on, people who favored a greater role for states (Anti-Federalists) expressed concern about the continued vitality of the jury's role because of the constitutional power over law and fact granted to the Supreme Court on appeal.¹²⁴ During this same period, Thomas Jefferson extensively discussed the importance of the people in every part of the government, including through the jury. The people elected the President, they selected legislators, and juries checked the judiciary. For example, juries could counter possible judicial bias:

[W]e all know that permanent judges acquire an *Esprit de corps*; that being known, they are liable to be tempted by bribery; that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative power; that it is better to leave a cause to the decision of cross and pile, than to that of a judge biased to one side; and that the opinion of twelve honest jurymen gives still a better hope of right, than cross and pile does.¹²⁵

Jefferson emphasized the power that the jury held in relationship to the judge—that a jury could decide the law in addition to the facts where the jurors believed the judge was biased.¹²⁶

Similarly, James Wilson discussed the division of authority between judges and jurors. Recognizing the possibility that issues of law and fact sometimes intermix, he stated that in such circumstances juries must decide both the law and fact.¹²⁷ The Federal Farmer—an Anti-Federalist who wrote anonymously about the proposed Constitution—citing the support of English legal commentators Edward Coke, Matthew Hale, Sir John Holt, Blackstone,

¹²⁴ See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966).

¹²⁵ THOMAS JEFFERSON ON DEMOCRACY 62 (Saul K. Padover ed., 1939).

¹²⁶ See *id.*; see also Letters from the Federal Farmer to the Republican No. XV (Jan. 18, 1788) [hereinafter Letters from the Federal Farmer] (explaining that in civil law, where there are no juries, judges are “often corrupted by ministerial influence, or by parties”), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 113, at 315, 321.

¹²⁷ See 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 1000–01 (Kermit L. Hall & Mark David Hall eds., 2007).

and Jean Louis De Lolme—acknowledged the civil jury’s power specifically to determine both fact and law, including through a general verdict.¹²⁸ More generally, emphasizing the importance of the jury’s possible role as law-finder, Jefferson stated that if people were to be excluded from a governmental department, it would be better that the people be left out of the legislature because “[t]he execution of the laws [of which the jury plays a role] is more important than the making” of the laws.¹²⁹ Referring to the jury as “*the democratic branch of the judiciary power*,” the Maryland Farmer, another Anti-Federalist, agreed that the jury was more important than people in the legislature.¹³⁰

John Adams also addressed the role of the jury as a check on the judiciary and compared its role in government to the legislature:

As the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.¹³¹

Alexander Hamilton also discussed the interrelationship between the jury and the judiciary.¹³² He described the civil jury as “a security against corruption” of judges.¹³³ Hamilton further explained the importance of the dual existence of the judiciary and the civil jury to the integrity of both institutions.¹³⁴ He called the judiciary and the civil jury

a double security; 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. The temptations to prostitution which the judges might have to surmount must certainly be much fewer, while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes.¹³⁵

Hamilton also discussed the necessity of the criminal jury in light of possible judicial wrongdoing. He described fear of “judicial despotism” through the use

¹²⁸ See Letters from the Federal Farmer, *supra* note 126, at 319–20.

¹²⁹ 3 THE WORKS OF THOMAS JEFFERSON 82 (H.A. Washington ed., New York, Townsend MacCoun 1884) (appearing to discuss both the criminal and civil juries).

¹³⁰ Essays by a Farmer No. IV (Mar. 21, 1788) [hereinafter Essays by a Farmer], *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 113, at 36, 38.

¹³¹ 2 THE WORKS OF JOHN ADAMS 253 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1865).

¹³² See THE FEDERALIST NO. 83, *supra* note 102, at 499–501 (Alexander Hamilton).

¹³³ *Id.* at 500.

¹³⁴ See *id.* at 499–501.

¹³⁵ *Id.* at 501.

of “arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”¹³⁶

In addition to addressing the division of authority between the jury and the judiciary, the founders considered the relationship between the legislature and the jury. Those discussions reveal that the legislature was to hold no power over the jury beyond those expressly stated in the text of the Constitution. Thomas Jefferson insisted that the jury should remain separate and independent from the legislature.¹³⁷ He stressed that the civil jury should be constitutionalized because the legislature should not be able to alter this institution that had helped secure the freedom to think and act, freedom with which the government had interfered.¹³⁸ Alexander Hamilton recognized that if a civil jury trial provision were not enacted, the legislature would be free to establish a jury trial or not to do so.¹³⁹ He further acknowledged that by the creation of the jury trial in criminal cases, the legislature’s “discretion . . . [was] abridged.”¹⁴⁰ This quote suggests Hamilton’s belief that if the founders established a jury trial in the Constitution, the legislature would have no authority over it. Along similar lines, James Monroe affirmatively stated that the civil jury should be constitutionally established to prevent the legislature from abolishing it.¹⁴¹ And George Mason discussed the need for constitutional inclusion of the civil jury, because otherwise Congress could have as much influence as it desired on the decisions of the jury.¹⁴²

In proposing the civil jury right’s inclusion in the Bill of Rights, Madison discussed that, while the English’s declaration of rights had not limited the legislature, “a different opinion prevail[ed] in the United States” on whether the legislature and other parts of the government could be trusted.¹⁴³ He highlighted why many states that had proposed constitutional amendments or made declarations for certain rights, including the jury right:

[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these

¹³⁶ *Id.* at 499. At the Philadelphia Convention, Mr. Gerry, a delegate, said juries were necessary “to guard agst. corrupt Judges.” RECORDS, *supra* note 98, at 587.

¹³⁷ THOMAS JEFFERSON ON DEMOCRACY, *supra* note 125, at 14, 47.

¹³⁸ *Id.*

¹³⁹ THE FEDERALIST NO. 83, *supra* note 102, at 496–97 (Alexander Hamilton).

¹⁴⁰ *Id.*

¹⁴¹ *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 217–18 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891).

¹⁴² *See id.* at 431; *see also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653, 707 n.186 (1973) (“The effort [to pass the Amendment] was quite clearly to require juries to sit in civil cases as a check on what the popular mind might regard as legislative as well as judicial excesses.”).

¹⁴³ 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1028–29 (Leon Friedman et al. eds., 1971).

exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.¹⁴⁴

Madison further described the trial by jury as “a right resulting from a social compact which regulates the action of the community,” and stated it was “as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”¹⁴⁵

The founders also understood the civil jury to provide a mechanism by which laws could be nullified. For example, “paper money and British debt claims were the most prominently discussed civil jury trial issues during the ratification debates.”¹⁴⁶ Juries gave debtors relief against the suits by creditors, whose claims may have been inflated due to the past excessive printing of currency by states.¹⁴⁷

Similar to the founders’ discussion about the relationship between the civil jury and the legislature, the interdependency between the criminal jury and the legislature was discussed. Addressing the constitutionally established criminal jury, James Wilson emphasized the jury’s existing power to pass judgment on criminal defendants and the related lack of power of the federal legislature to find people guilty of crimes through acts of attainder for treason or felony.¹⁴⁸

The jury also provided a buffer between the executive and the people. The Declaration of Independence had described King George III as “depriving us, in many Cases, of the Benefits of Trial by Jury.”¹⁴⁹ So the significance of the jury derived in part from possible abuses of the executive. James Wilson had recognized “the oppression of government is effectually barred, by declaring that in all criminal cases, the trial by jury shall be preserved.”¹⁵⁰ The history of the use of sedition laws appears to have motivated the founders, as the Crown had attempted to prosecute people, including Peter Zenger, for publishing material critical of the government.¹⁵¹ American juries checked the executive by refusing to convict under these laws.¹⁵² Juries also curbed the legislature by “virtually repeal[ing]” the law, and restrained the legislature and executive by not convicting defendants under other English trade and revenue laws.¹⁵³

Civil juries were also expected to check the government. Discussing an improper search by a constable and a rendering of monetary damages by a jury

¹⁴⁴ *Id.* at 1029.

¹⁴⁵ *Id.*

¹⁴⁶ Wolfram, *supra* note 142, at 705.

¹⁴⁷ *See id.* at 673–705.

¹⁴⁸ *See* 2 WILSON, *supra* note 127, at 1009.

¹⁴⁹ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

¹⁵⁰ PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 157 (Paul Leicester Ford ed., Da Capo Press 1968) (1888).

¹⁵¹ *See* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 23–24 (2003).

¹⁵² *Id.* at 24.

¹⁵³ *Id.*

against the government, Anti-Federalists recognized the civil jury was necessary in suits against the government.¹⁵⁴

The grand jury served as another check on the executive. Discussing it, James Wilson stated, “In the annals of the world, there cannot be found an institution so well fitted for avoiding abuses, which might otherwise arise from malice, from rigour, from negligence, or from partiality, in the prosecution of crimes.”¹⁵⁵ He also said, “They are not appointed for the prosecutor or for the court: they are appointed for the government and for the people”¹⁵⁶ Moreover, “All the operations of government, and of its ministers and officers, [were] within the compass of their view and research.”¹⁵⁷ The Zenger case illustrates the grand jury’s check on the executive. There, the colonial grand jury had refused to indict when the Crown acted against Zenger for his criticism of it.¹⁵⁸

The founders warned of the possible shift in authority if the jury were to lose power. Indeed, the Maryland Farmer appeared to predict our present state of affairs regarding plea bargaining. He stated that with the elimination of juries, “The judiciary power is immediately absorbed, or placed under the direction of the executive Thus we find the judiciary and executive branches united, or the *former* totally dependent on the *latter* in most of the governments in the world.”¹⁵⁹

In addition to the founders’ more specific statements about jury authority in relationship to the executive, the legislature, and the judiciary, general language was also used to discuss the value of an independent jury to the government. Thomas Jefferson described “Trial by jury . . . as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”¹⁶⁰ After the establishment of the civil and criminal jury trials, Jefferson named the jury trial among the “essential principles” of the government.¹⁶¹ James Wilson stated that the jury, “this beautiful and sublime effect of our judicial system,” promoted the principles of “an habitual courage, and dignity, and independence of sentiment and of actions in the citizens,” which he thought “should be the aim of every wise and good government.”¹⁶² He further acclaimed that “within its walls, strong and

¹⁵⁴ Essays by Hampden (Jan. 26, 1788) (emphasizing that the civil jury was necessary because of the “abuse of private citizens” by “High Officers of State”), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 113, at 198, 200; *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 775–81 (1994) (describing connections between the Fourth Amendment and Seventh Amendment).

¹⁵⁵ 2 WILSON, *supra* note 127, at 992.

¹⁵⁶ *Id.* at 995.

¹⁵⁷ *Id.* at 996.

¹⁵⁸ *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2343 (2008).

¹⁵⁹ Essays by a Farmer, *supra* note 130, at 39.

¹⁶⁰ THOMAS JEFFERSON ON DEMOCRACY, *supra* note 125, at 160.

¹⁶¹ *Id.* at 32–33, 160.

¹⁶² 2 WILSON, *supra* note 127, at 1009.

lofty as well as finely proportioned, freedom enjoys protection, and innocence rests secure.”¹⁶³ Also, Hamilton believed that the criminal jury trial was “a valuable safeguard to liberty,” while others more strongly considered it “the very palladium of free government.”¹⁶⁴

While recognizing the necessity of the jury to the Constitution, the founders also acknowledged that the jury was not infallible. Thomas Jefferson conceded that the jury could do wrong, but he insisted that more wrong would be done without it.¹⁶⁵ Similarly, James Wilson accepted that juries made mistakes, but asserted that such mistakes could “never grow into a dangerous system.”¹⁶⁶ Indeed, a jury’s mistakes generally could be corrected.¹⁶⁷ If a grand jury indicted, a criminal jury might not convict.¹⁶⁸ Even if the criminal jury convicted, a judge could order a new trial before a new jury.¹⁶⁹ Also, mistakes could be avoided by the dismissal of jurors who showed bias against the defendant.¹⁷⁰ Moreover, if a grand jury did not indict, another grand jury might still indict the defendant.¹⁷¹ Wilson emphasized the importance of this power to prevent or correct error, but also knew that regardless of the possibility of mistakes, the jury—not another tribunal—was the best body to decide cases.¹⁷²

Along with the founders viewing the jury as protection against the executive, the legislature, and the judiciary, the ratifiers of the Fourteenth Amendment saw the jury as an important safeguard against the states. Various people involved in the ratification discussed the importance of the first eight rights in the Bill of Rights, which included the criminal, civil, and grand juries. Representative Rogers stated that privileges in the Fourteenth Amendment that the states could not abridge included “[t]he right to be a juror.”¹⁷³ Representative Bingham also asserted that the Fourteenth Amendment actually

¹⁶³ *Id.* at 1011.

¹⁶⁴ THE FEDERALIST NO. 83, *supra* note 102, at 499 (Alexander Hamilton).

¹⁶⁵ See THOMAS JEFFERSON ON DEMOCRACY, *supra* note 125, at 47.

¹⁶⁶ 2 WILSON, *supra* note 127, at 1001.

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 1009.

¹⁷¹ See *id.* at 1001.

¹⁷² 2 WILSON, *supra* note 127, at 1001–02, 1009. Wilson appears to be discussing the English common law practice and describing the possibility of new trials in any type of case, including felonies. However, there is other authority that asserts that new trials were not available for felonies. Henderson, *supra* note 124, at 323, 325 (describing English procedure where there is no new trial for a felony conviction, but also describing a practice in states in the late eighteenth century or early nineteenth century where a new trial was permitted after a felony conviction).

¹⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866).

corrected for previous violations by the states of the rights that resided in the Bill of Rights.¹⁷⁴

In summary, the founders recognized significant divisions of authority between the executive, the legislature, the judiciary, and the states, along with their independent governmental roles. The founders of the Constitution and the ratifiers of the Fourteenth Amendment also acknowledged similar divisions of authority between the jury and the executive, the legislature, the judiciary, and the states. Moreover, they understood the criminal, civil, and grand juries' independent roles. The jury and the other actors were related, and the founders and the ratifiers intended that the jury play an important role to check the powers of those actors.

3. *The Interpretation of Power*

As shown above, the constitutional text that establishes the executive, the legislature, the judiciary, and the states is similar to the constitutional text that creates the criminal, civil, and grand juries. Both grant power to those actors while simultaneously limiting their authority. Also, as previously discussed, the founders spoke about the relationships among the executive, the legislature, the judiciary, and the states, as well as their respective powers, very much like the founders and the Fourteenth Amendment ratifiers expressed the relationships between the jury and those same actors as well as their particular powers. Although all of this—the constitutional text, evidence from the founding, and evidence at the Fourteenth Amendment's ratification—suggests that the executive, the legislature, the judiciary, and the states (referred to here as “the traditional constitutional actors” or “traditional actors”) should interpret the jury's authority in the same manner as they interpret each other's powers, the traditional actors have not done so. They have subjugated the jury while recognizing significant power in each other. Using Supreme Court case law, the following section first explores the authority that the traditional actors have recognized in each other and next explains how the traditional actors have failed to acknowledge the jury's authority. Because the Court exercises final decisionmaking authority, and case law is the primary evidence of the interaction among the traditional actors as well as the interrelationship between the traditional actors and the jury, this case law is used to illustrate the respective, disparate treatments of the traditional actors and the jury.

¹⁷⁴ See *id.* at 2542. This evidence is considered without discussing the general debate on the incorporation of the Bill of Rights against the states and the proper method of incorporation. See also Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 162–65, 177–80 (2012).

a. *The Executive, the Legislature, the Judiciary, and the States Under Separation of Powers and Federalism*

Scholars and the courts regularly describe the traditional actors—excluding the states—as “[b]ranches.”¹⁷⁵ The traditional actors, along with the states, are also often depicted as “constitutional actor[s].”¹⁷⁶ These terms of “branch” and “constitutional actor” denote bodies that possess authority delegated by or recognized under the Constitution. These powers of the executive, the legislature, the judiciary, and the states are said to derive from different sources. They hold power that originated with the adoption of the Constitution. They are formally granted power that they possessed prior to the Constitution’s adoption. Or they are acknowledged as having certain authority not specifically bestowed by the Constitution. The executive, the legislature, the judiciary, and the states all have such constitutional authority thereby delegated to, or recognized in, them.

The importance of the traditional actors as branches and constitutional actors has been recognized through the doctrines of separation of powers and federalism. Separation of powers governs the boundaries between the executive, the legislature, and the judiciary, while federalism polices the division between the federal government and the states. Although the Constitution does not specifically refer to separation of powers or federalism, the Supreme Court has deployed these doctrines to empower and limit the traditional actors, informed by the constitutional text, as well as the founders’ views of the interrelationships among the traditional actors and their particular powers.

An example of separation of powers is found in *Immigration and Naturalization Service v. Chadha*. There, the Supreme Court pushed back against Congress’s effort to exert special authority against the executive branch.¹⁷⁷ Through the Immigration and Nationality Act, Congress permitted the executive to suspend alien deportations.¹⁷⁸ However, one House of Congress could override the executive’s decision.¹⁷⁹ The Supreme Court, in an oft-cited illustration of its exercise of separation of powers to prevent the aggrandizement of the power of the branches, described limited circumstances

¹⁷⁵ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 409, 412 (1989); Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 854–55 (2009).

¹⁷⁶ See, e.g., *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991); *United States v. Linder*, No. 12 CR 22, 2013 WL 812382, at *28 (N.D. Ill. Mar. 5, 2013); Spencer Overton, *Foreword: Political Law*, 81 GEO. WASH. L. REV. 1783, 1788 (2013); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 687 (2013).

¹⁷⁷ See generally *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (ruling that a legislative veto by one house violates constitutional separation of powers).

¹⁷⁸ *Id.* at 923–25.

¹⁷⁹ *Id.* at 923.

when one House could act without the other.¹⁸⁰ It decided that Article I of the Constitution required both Houses of Congress to pass on legislation.¹⁸¹ Adherence to these requirements constituted an essential check on the branches' powers.¹⁸² The Court described separation of powers not as "an abstract generalization in the minds of the Framers" but as "woven into" the Constitution.¹⁸³ "Although not 'hermetically' sealed from one another, the powers delegated to the three Branches [were] functionally identifiable."¹⁸⁴ The Court insisted that, "To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."¹⁸⁵ The Court emphasized that the text of the Constitution sets forth certain requirements to check the branches' powers and that those requirements could not be circumvented based on considerations such as convenience and efficiency that a procedure might provide.¹⁸⁶ Here, Congress had attempted to cede authority from the executive, and the Supreme Court intervened, invoking Congress's limited powers in particular, and separation of powers more generally, to maintain the branches' intended constitutional balance.¹⁸⁷

Marbury v. Madison is another example of separation of powers, there, where the judiciary blocked the legislature's attempted exertion of power over the executive.¹⁸⁸ Discussing the limitations on the power of the legislature (as applied to the judiciary), the Court had declared

[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed¹⁸⁹

Youngstown Sheet & Tube Co. v. Sawyer is another example where the Supreme Court deployed separation of powers to restrain one traditional actor in relationship to another. Here, steel companies and their employees were engaged in a dispute regarding the terms of a new collective bargaining agreement (CBA).¹⁹⁰ The union representing the employees indicated it would strike when the existing CBA expired.¹⁹¹ Because of the need for steel in war

¹⁸⁰ *Id.* at 955–56.

¹⁸¹ *See id.* at 956–58.

¹⁸² *See id.*

¹⁸³ *Chadha*, 462 U.S. at 946 (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

¹⁸⁴ *Id.* at 951 (citation omitted) (quoting *Buckley*, 424 U.S. at 121).

¹⁸⁵ *Id.* at 957–58.

¹⁸⁶ *See id.* at 944.

¹⁸⁷ *See generally Chadha*, 462 U.S. 919.

¹⁸⁸ *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁸⁹ *Id.* at 176.

¹⁹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–83 (1952).

¹⁹¹ *Id.*

materials, the President issued an executive order that gave authority to the Secretary of Commerce to seize the steel companies and continue operations.¹⁹² Thereafter, the President notified Congress, and Congress took no action.¹⁹³ In its decision reviewing the President's action of seizing the mills, the Supreme Court emphasized that the President's power must derive either from an act of Congress or the Constitution.¹⁹⁴ No congressional act had been passed granting the President the power to seize the mills, and the Constitution did not grant the executive this authority.¹⁹⁵ Concluding that the President's action was unconstitutional and that the legislature held the power that the President had tried to exercise, the Court stated that, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."¹⁹⁶ Here, the Court again emphasized the importance to the government of preserving limited powers in the different branches.

The Supreme Court has also discussed the importance of the division of, and limits on, the constitutional powers of the federal government and the states. An early example of federalism that recognized the national government's power along with the states' limitations is *McCulloch v. Maryland*. In this case, which involved Congress's establishment of a national bank and the state of Maryland's attempted taxation of the bank, the Court stated, "This [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent . . ."¹⁹⁷ Although the government was not granted express power to create a corporation, Congress possessed power to make laws "necessary and proper" to the execution of its powers, such as the power to raise revenue through a corporation.¹⁹⁸ The key question was whether the state could tax the federal bank.¹⁹⁹ The Court decided that although states had power to tax, granting states authority to tax the federal bank would empower the states to destroy the bank.²⁰⁰ Finding the Maryland law to tax the federal government unconstitutional, the Court discussed the limitation of state authority as related to the federal government's power:

The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers

¹⁹² *Id.* at 583.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 585.

¹⁹⁵ *Id.*

¹⁹⁶ *Youngstown Sheet & Tube Co.*, 343 U.S. at 589.

¹⁹⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

¹⁹⁸ *Id.* at 388, 391.

¹⁹⁹ *Id.* at 390.

²⁰⁰ *Id.* at 391.

conferred on that body by the people of the United States? We think it demonstrable that it does not.²⁰¹

Thus, the Court acknowledged the federal government's power to use means to execute its constitutional powers as well as the states' inability to interfere with that authority.²⁰²

The Supreme Court likewise has limited the federal government by holding many federal statutes unconstitutional based, at least in part, on violations of federalism. The trend of actively limiting the federal government began with *New York v. United States*, which involved the State of New York's challenge to the federal Low-Level Radioactive Waste Policy Amendments Act.²⁰³ The federal statute included three incentive provisions designed to encourage states to enact policies to manage waste generated within their borders.²⁰⁴ The Court held that Congress possessed authority to use two of the incentive provisions—monetary and disposal site access—to encourage states to plan for this waste disposal.²⁰⁵ But the Court determined that the Act's "take title" provision—forcing states to take ownership of radioactive waste if they were unable to provide appropriate disposal sites—was invalid.²⁰⁶ Congress lacked authority to compel states to enact legislation—the practical consequence of the Act's "take title" provision.²⁰⁷ The founders had given Congress legislative authority over individuals but not states.²⁰⁸ While Congress could have required the states to choose between implementing their own regulatory programs and accepting a program created by Congress—an arrangement of "cooperative federalism"—the "take title" provision constituted an unconstitutional "commandeer[ing]" of state governments.²⁰⁹ The Court compared the protection under federalism to the protection under the separation of powers: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."²¹⁰ Here, the Supreme Court recognized the particular authority held by the federal government and the states and the importance of federalism to the proper functioning of the government.

²⁰¹ *Id.* at 429.

²⁰² *See id.* at 405–29.

²⁰³ *See New York v. United States*, 505 U.S. 144 (1992).

²⁰⁴ *Id.* at 152–54.

²⁰⁵ *Id.* at 173–74.

²⁰⁶ *Id.* at 175–77.

²⁰⁷ *Id.* at 176.

²⁰⁸ *Id.* at 165–67.

²⁰⁹ *New York*, 505 U.S. at 167, 175 (quoting, in part, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981)).

²¹⁰ *Id.* at 181–82 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

At times, the Supreme Court and the other traditional actors act to limit their own authority. The most accessible examples occur when the Supreme Court acts to restrain itself. The Court has developed several doctrines limiting the judiciary's role under separation of powers. For example, the Court has defined the constitutional requirement that a federal court hear only "cases" or "controversies" as mandating that a plaintiff have standing, that a case is not moot, that a case is ripe, and that a case does not involve a political question.²¹¹ The Court has described these doctrines as "founded in concern about the proper—and properly limited—role of the courts in a democratic society."²¹²

Similarly, through the federalism-based doctrine of sovereign immunity, the judiciary has recognized specific limits on its power in relationship to the states. The Supreme Court has referred to sovereign immunity "as an essential component of federalism."²¹³ Under this doctrine, the judiciary's power to hear suits against states has been limited. The Court has emphasized that "each State is a sovereign entity in our federal system; and . . . "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."²¹⁴ While federal courts may order prospective enforcement of federal laws against the states, sovereign immunity sets limitations on the power of the federal courts to order states to pay damages.²¹⁵

The other traditional actors also sometimes restrain themselves in relationship to competing traditional actors when they believe they do not hold authority. Evidence of such self-restraint is not always apparent because it typically involves inaction—for example, Congress not enacting a statute that is beyond its power. Louis Fisher has argued that Congress attempts to stay within its legislative boundaries. He provided the example of the legislature's 1789 debate over the President's power to remove executive officials without legislative action.²¹⁶ Another example of the self-restraint exercised by the traditional actors is where a legislator votes for an official or judicial nominee that the President has recommended because of the legislator's view of the Constitution's requirements.²¹⁷ And a final example is the interpretation of the

²¹¹ See *Allen v. Wright*, 468 U.S. 737, 750 (1984), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

²¹² *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

²¹³ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 n.10 (1984) (quoting *Nevada v. Hall*, 440 U.S. 410, 430–31 (1979) (Blackmun, J., dissenting)).

²¹⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (alteration of "[i]" in original) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

²¹⁵ See generally *Ex parte Young*, 209 U.S. 123 (1908) (allowing suits to enjoin a state officer from enforcing unconstitutional laws in his or her official capacity).

²¹⁶ See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 709–11 (1985).

²¹⁷ See Nicole Allan, *Lindsey Graham Dramatically Casts His Vote for Elena Kagan*, ATLANTIC (July 20, 2010), <http://www.theatlantic.com/politics/archive/2010/07/lindsey-graham-dramatically-casts-his-vote-for-elena-kagan/60082/> [https://perma.cc/XY4T-DPLR].

states that the federal government has the power and responsibility to secure the borders.²¹⁸

Although separation of powers and federalism form a barrier against incursions on the traditional actors' powers, these doctrines do not provide impenetrable boundaries. The traditional actors can intrude upon each other's turf. When this happens, the actor whose authority has been infringed upon may have no recourse if it cannot successfully oppose the intrusion on its own or challenge the action in court. For example, the executive has circumvented the legislature in times of international crisis. The President has acted without Congress despite the power of Congress to declare war set forth in Article I.²¹⁹ Moreover, the Supreme Court (as a part of the federal government) has initially granted authority to a state and later overruled its decision in favor of federal power. For example, in *Garcia v. San Antonio Metropolitan Transit Authority*, it found constitutional a federal congressional act forcing state and local governments to pay their employees minimum wage and overtime.²²⁰

Despite these limitations, the Supreme Court has employed separation of powers and federalism to provide significant protection for the traditional actors to maintain their authority, and the traditional actors themselves have acted to restrain their own power. Moreover, the traditional actors have the ability to test the boundaries of their own authority even if their authority has been questioned by another traditional actor. A recurring example occurs in the context of abortion. After *Roe v. Wade*,²²¹ states have continued to enact statutes that restrict abortion procedure that may or may not be within the bounds of *Roe*.²²² While these statutes may be reviewed by the Court, the ability of the states to push back gives them at least temporary authority and also raises these issues in public fora.

b. *A Missing Constitutional Role for the Jury?*

The jury and the traditional actors hold similar roles in the Constitution. Just as the text of the Constitution divides and limits powers among the traditional actors, it divides and limits the powers of the traditional actors in relationship to the powers of the criminal, civil, and grand juries. Also, just as

²¹⁸ See U.S. CONST. art. IV, § 4; cf. Jason L. Riley, *Perry's Immigration Pose*, WALL STREET J. (July 23, 2014), <http://www.wsj.com/articles/political-diary-perrys-immigration-pose-1406126123> [<https://perma.cc/Y4VJ-TZMD>] (discussing the decision of Texas Governor Rick Perry to send the Texas National Guard to the border after his call to President Obama to secure the border).

²¹⁹ See, e.g., Charlie Savage, *Attack Renews Debate over Congressional Consent*, N.Y. TIMES (Mar. 21, 2011), http://www.nytimes.com/2011/03/22/world/africa/22powers.html?_r=0 [<https://perma.cc/3CDK-5RN6>].

²²⁰ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985).

²²¹ *Roe v. Wade*, 410 U.S. 113 (1973).

²²² See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (holding that Missouri's ban on the use of public employees and facilities for performance of nontherapeutic abortions was constitutional).

the founders planned empowering and restraining lines among the traditional actors, the founders of the Constitution and the ratifiers of the Fourteenth Amendment intended these types of divisions and limitations to preserve the jury's realm. Despite these similarities, the Supreme Court generally recognizes the traditional actors as branches or constitutional actors, but, as shown below, does not acknowledge such an authoritative role for criminal, civil, and grand juries. Consequently, they have not analyzed the authority of the criminal, civil, and grand juries under doctrines similar to separation of powers and federalism, which, as demonstrated above, have played a significant role in securing the traditional actors' powers.

The Supreme Court's differing treatment of the traditional actors and the jury, including the deference to the traditional actors, has contributed to the jury's decline. Unlike its treatment of the traditional actors, the Court has examined issues related to jury authority in a disjointed, piecemeal fashion that neither recognizes the jury as an essential part of the governmental structure in the Constitution nor acknowledges that it serves roles to protect against power grabs by the traditional actors. The Court has often initially recognized authority in the jury and then changed its decision to grant power instead to a traditional actor. A review of some of the primary cases where the Court has diminished the jury's authority while it has granted power to the traditional actors exhibits the different treatment of the jury and the traditional actors. Specifically, it shows how the omission of a separation of powers and federalism-type doctrine from the Court's jury jurisprudence has contributed to the jury's decline.

Although there have been substantial shifts in authority from the jury to other parts of the government, one area where there has been a shift in favor of jury power should be acknowledged first. In the last decade or so, in a series of decisions, the Court recognized that the jury holds authority regarding factual decisions related to sentencing. For example, the Court held unconstitutional provisions of the Federal Sentencing Act that permitted a judge—instead of a jury—to decide certain sentencing facts.²²³ In one of the decisions on the jury's role in sentencing, the Court referred to the criminal jury as “a fundamental reservation of power in our constitutional structure.”²²⁴ It emphasized that “the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”²²⁵

²²³ See *United States v. Booker*, 543 U.S. 220, 244, 250 (2005).

²²⁴ *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

²²⁵ *Id.* at 308; *cf.* *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1961 n.1 (2015) (Thomas, J., dissenting) (“There is some dispute whether the guarantee of a jury trial protects an individual right, a structural right, or both It is [however] a ‘fundamental reservation . . . in our constitutional structure,’ meaning its *violation* may not be authorized by the consent of the individual.” (citation omitted) (quoting *Blakely*, 542 U.S. at 306)).

Outside of this sentencing area (where, by the way, there remains some debate on the importance of these changes) there is little recognition of the jury as an important part of the constitutional structure and government. The Court has failed to acknowledge any specific authority in the jury or any necessity to guard that authority. Instead, the Supreme Court permits the traditional actors to decide many matters instead of juries. Moreover, it ultimately has held constitutional almost every modern procedure before and after a jury deliberation that has eliminated or reduced jury authority.

One example shows the Court initially valued the role that the grand jury could play against the government but changed its view over time. In the late nineteenth century, in *Ex parte Bain*, the Court considered whether a person could be convicted for a crime upon a grand jury's indictment that the government subsequently changed without the grand jury's consent.²²⁶ Upon the prosecutor's request, the judge had changed the indictment.²²⁷ The Supreme Court focused on the Fifth Amendment's language that requires a person not to answer for certain crimes "unless on a presentment or indictment of a grand jury," and cited the common law, under which an indictment could not be amended.²²⁸ Despite what the Court described as the present general trustworthiness of the government, the Court decided that the indictment could not be changed in this manner.²²⁹ It quoted a previous decision and emphasized that the grand jury checked governmental power:

In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country . . . and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.²³⁰

The Court discussed the present importance of the grand jury, including the possibility of bad behavior on the part of the executive:

[I]t remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of *Jones v. Robbins*, "individual citizens" "from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury;" and "in case of high

²²⁶ *Ex parte Bain*, 121 U.S. 1, 5 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002).

²²⁷ *Id.*

²²⁸ *Id.* at 6.

²²⁹ *See id.* at 13.

²³⁰ *Id.* at 11.

offences” it “is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions.”²³¹

Emphasizing the intentions of the Framers, who “had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence,” the Court stated that the indictment could not be changed, because a court held no power to hear the case except upon a grand jury’s indictment.²³²

But in 2002, in *United States v. Cotton*, the Supreme Court overruled this decision.²³³ In *Cotton*, the government failed to allege in the original indictment the amount of the drug that influenced the ultimate sentence that was imposed.²³⁴ The Court insisted that the previous decision of *Bain* was “a product of an era in which this Court’s authority to review criminal convictions was greatly circumscribed.”²³⁵ Concepts of jurisdiction had changed, and a defective indictment did not prevent a court from proceeding against a criminal defendant.²³⁶ Emphasizing the evidence presented in the trial, the Court stated “[s]urely” the grand jury would have indicted on the amount of cocaine under these circumstances where it had indicted on the conspiracy.²³⁷ Moreover, the defendant did not object to the indictment at trial so he waived the grand jury.²³⁸ Although the Court recognized the grand jury “as a check on prosecutorial power,” this served as window dressing, because, at the same time, it shifted power to the courts and the executive.²³⁹

The ability of a judge to try a criminal case, a power absent from the Constitution, is another power about which the Court changed its mind and transferred authority from the jury to the judiciary. In the late nineteenth century, in *Thompson v. Utah*, the Supreme Court originally determined that a defendant could not waive the required trial of twelve jurors.²⁴⁰ There, quoting an earlier case that cited Blackstone and emphasizing that the jury was the mechanism by which a criminal defendant was to be tried under the Constitution, the Court decided the Constitution required a unanimous jury of twelve.²⁴¹

²³¹ *Id.* at 12 (citation omitted) (quoting *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 344 (1857)).

²³² *Bain*, 121 U.S. at 12–13.

²³³ *United States v. Cotton*, 535 U.S. 625, 631 (2002).

²³⁴ *Id.* at 627–28.

²³⁵ *Id.* at 629.

²³⁶ *See id.* at 630–31.

²³⁷ *Id.* at 633.

²³⁸ *Id.* at 628.

²³⁹ *See Cotton*, 535 U.S. at 634.

²⁴⁰ *Thompson v. Utah*, 170 U.S. 343, 350–51 (1898), *overruled by Collins v. Youngblood*, 497 U.S. 37 (1990).

²⁴¹ *Id.* at 355.

The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law.²⁴²

Later, in *Patton v. United States*, a case considering, among other questions, whether a judge could try a case instead of a jury, the Court rejected that the jury constituted a fundamental part of the governmental structure. Examining the question, “Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guaranty to the accused the right to such a trial?” the Court dismissed any notion that history supported a role for the jury as a part of the constitutional structure.²⁴³

The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court.²⁴⁴

After accepting that the jury trial was nothing more than a right that a defendant could exercise, the Court decided that judges had authority to try defendants through Congress’s creation of the district courts.²⁴⁵ In permitting judges to try cases instead of juries, the Court acted differently from how it had acted with respect to the traditional actors. Although the Constitution specifically gave certain types of cases to juries and judges, the Court ignored this text. It also failed to recognize Blackstone’s express warnings about trial by judge. Moreover, the Court did not acknowledge that the jury could not check the government if the government itself, through the judge, decided the case. Finally, the Court failed to recognize its own interest in the case. In contrast to its treatment of the traditional actors, perceiving them as mutual checks in the government, the Court took power from the jury and placed it in its own hands without any appreciation for the check that the jury was to play with respect to the judiciary.

More than trials by judges, plea bargaining is a primary reason cited for the decline of criminal jury trials.²⁴⁶ Although the Supreme Court has not thoroughly evaluated the constitutionality of plea bargaining, it officially

²⁴² *Id.* at 354 (citation omitted).

²⁴³ See *Patton v. United States*, 281 U.S. 276, 293, 297 (1930), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1970).

²⁴⁴ *Id.* at 296–97.

²⁴⁵ See *id.* at 298–302.

²⁴⁶ Timothy Lynch, *The Case Against Plea Bargaining*, REGULATION, Fall 2003, at 24.

legitimized it in *Bordenkircher v. Hayes*.²⁴⁷ In doing so, it again ignored the constitutional text and historical evidence that it has recognized when it has granted power to the traditional actors. There, the prosecutor offered the defendant five years of the possible sentence of two to ten years to plead guilty to the indicted offense.²⁴⁸ The State simultaneously informed the defendant that it would seek an indictment for a crime that could result in defendant's life imprisonment if the defendant insisted on a jury trial and refused to plead guilty.²⁴⁹ When the defendant refused to take the plea, the prosecutor obtained an indictment on the new charge.²⁵⁰ A jury then convicted the defendant on this charge, resulting in life imprisonment.²⁵¹

The defendant argued that the action of the prosecutor to seek this other charge as punishment for the defendant's exercise of his right to a jury trial was unconstitutional under the Due Process Clause of the Fourteenth Amendment.²⁵² The court of appeals decided that the prosecutor had acted vindictively to punish the defendant for exercising his right to a jury trial and invalidated the subsequent charge and conviction under the Due Process Clause.²⁵³ Reviewing the decision, the Supreme Court emphasized "that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."²⁵⁴ Finding no constitutional infirmity with the prosecutor's action, the Court stated, "It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."²⁵⁵ The Court failed to discuss the Article III criminal jury power and the Sixth Amendment and any possible role of the jury as a check on the government. Instead, it prioritized the executive's interest and did not consider the constitutional text and historical evidence that it had considered when it granted power to the traditional actors in other cases.²⁵⁶

²⁴⁷ See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). *But see* Lynch, *supra* note 246, at 24 (analyzing the decision in *Hayes* and arguing that plea bargaining is unconstitutional).

²⁴⁸ *Bordenkircher*, 434 U.S. at 358.

²⁴⁹ *Id.* at 358–59.

²⁵⁰ *Id.* at 359.

²⁵¹ *Id.*

²⁵² See *id.* at 358.

²⁵³ *Id.* at 360–61.

²⁵⁴ *Bordenkircher*, 434 U.S. at 361–62 (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)).

²⁵⁵ *Id.* at 364.

²⁵⁶ Dissenting, Justice Blackmun, joined by Justices Brennan and Marshall, agreed with the court of appeals that the behavior of the prosecutor violated the Due Process Clause and also suggested that overcharging the defendant in order to plea bargain was also unconstitutional behavior. *Id.* at 365–68, 368 n.2 (Blackmun, J., dissenting). Justice Powell also dissented. *Id.* at 368–73 (Powell, J., dissenting).

The Supreme Court also has treated the civil jury differently than the traditional actors. Again, the jury's diminution has occurred after the Court previously recognized jury authority. In the early twentieth century, in *Slocum v. New York Life Insurance Co.*, the Court considered whether after a jury verdict in a civil case, a judge could decide that the evidence was insufficient, reverse the verdict, and direct a judgment for the side that had lost before the jury.²⁵⁷ During the trial, after all of the evidence was presented, the court had denied the defendant's request that the court direct a verdict in its favor.²⁵⁸ After the jury found for the plaintiff, the court of appeals later reversed and found for the defendant.²⁵⁹ The Supreme Court acknowledged that it must examine the English common law to determine the meaning of the Seventh Amendment.²⁶⁰ At common law, another jury trial was the only method by which the determination of the first jury could be re-examined.²⁶¹ Deciding that the court of appeals acted improperly when it circumvented the jury in ruling in the defendant's favor, the Court emphasized the importance of both the judge and the jury and the relationship between them:

In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the cooperation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either or to permit one to disregard the province of the other is to impinge on that right.²⁶²

In its decision, the Court distinguished the demurrer to the evidence and the nonsuit, procedures at common law in England that differed from the procedure employed by the appellate court.²⁶³

Just over twenty years later, in *Baltimore & Carolina Line, Inc. v. Redman*, however, the Court took a different view of the roles of the judiciary and the jury. In that case, after evidence was presented at trial, the defense asked the judge to decide in its favor on the basis that the plaintiff had not presented sufficient evidence in support of his case.²⁶⁴ The court deferred consideration of the motion, and after a jury verdict for the plaintiff, decided that the evidence in favor of the plaintiff was sufficient.²⁶⁵ The court of appeals determined differently that the evidence was insufficient, ordered a

²⁵⁷ *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 369 (1913).

²⁵⁸ *Id.* at 368.

²⁵⁹ *Id.* at 369.

²⁶⁰ *Id.* at 377.

²⁶¹ *Id.* at 377-78.

²⁶² *Id.* at 382.

²⁶³ *See Slocum*, 228 U.S. at 388-98.

²⁶⁴ *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656 (1935).

²⁶⁵ *Id.*

new trial, and cited *Slocum* in support of its decision.²⁶⁶ Reviewing the decision of the court of appeals to order a new trial instead of a judgment for the defendant, the Supreme Court first recognized that the Amendment was “to retain the common-law distinction between the province of the court and that of the jury,” including that “issues of law are to be resolved by the court and issues of fact are to be determined by the jury.”²⁶⁷ It went on to take authority from the jury by incorrectly characterizing the sufficiency of the evidence as a common law issue of law that it could decide.²⁶⁸ It attempted to distinguish *Slocum* on the ground that the issue of the insufficiency of the evidence was not reserved for the lower court before the case was sent to the jury and claimed that the court of appeals in this case employed a practice similar to the common law practice, whereby such issues of law could be reserved for the court during trial.²⁶⁹ The Supreme Court concluded that a judge could decide the opposite of what the jury decided.²⁷⁰ Where the jury had found for one party, the judge could later dismiss the case in favor of the other party without ordering a new jury trial.²⁷¹ According to the Court, parts of *Slocum* went beyond the proper confines of the case and therefore did not apply, and in any event, the *Redman* decision “qualified” its holding in *Slocum*.²⁷²

The final case that shifted significant authority to the judge from the civil jury was decided soon after *Redman*. In *Galloway v. United States*, after the parties presented evidence at trial, the trial court decided that the evidence was “legally insufficient” and ruled in favor of the government.²⁷³ The Supreme Court considered the question of whether a judge could decide that the evidence was insufficient at trial and find for one party without sending the case to a jury.²⁷⁴ Deciding that the procedure did not violate the Seventh Amendment, the Court also stated that, “The objection therefore [came] too late.”²⁷⁵ This argument was “foreclosed by repeated decisions made [in the Court] consistently for nearly a century,” and the “approv[al] explicitly in the promulgation of the Federal Rules of Civil Procedure.”²⁷⁶ Despite its previous statement in *Redman* about the authority of the jury to find fact, the Court asserted that, “The jury was not absolute master of fact in 1791,” and it cited the demurrer to the evidence and the new trial in support of this assertion.²⁷⁷ Moreover, not acknowledging its prior statements about the demurrer to

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 657.

²⁶⁸ *Id.* at 659.

²⁶⁹ *Id.* at 657–59.

²⁷⁰ *Redman*, 295 U.S. at 660–61.

²⁷¹ *Id.* at 661.

²⁷² *Id.*

²⁷³ *Galloway v. United States*, 319 U.S. 372, 373 (1943).

²⁷⁴ *See id.*

²⁷⁵ *Id.* at 389.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 390.

evidence in *Slocum*, the Court attempted to favorably compare the directed verdict—the present procedure—to the demurrer to the evidence.²⁷⁸ It also discussed how the Seventh Amendment did not tie the judiciary to any specific procedure that occurred at the time of the adoption of the Seventh Amendment, and that the common law was continuously changing, even when the Amendment was adopted.²⁷⁹ The Court emphasized that the procedures of demurrer to the evidence and the new trial were inconsistent, and that differences between the common law procedures and the modern directed verdict were inconsequential.²⁸⁰

The Supreme Court also failed to recognize the authority of the jury in relationship to traditional actors in shifting authority from the jury to the executive in *NLRB v. Jones & Laughlin Steel Corp.* There, the Supreme Court considered whether the Seventh Amendment applied in circumstances in which Congress had established an executive agency to investigate and determine whether employers or employees engaged in unfair labor practices.²⁸¹ The NLRB—the agency—had ordered the employer to pay monetary damages to employees as the result of unfair labor practices by the employer.²⁸² The employer argued that a jury should decide the damages issue.²⁸³ Labeling the proceeding as “statutory,” the Supreme Court said that the matter was not a common law suit under the Seventh Amendment.²⁸⁴ Because Congress established this claim, there was no jury trial right.²⁸⁵ The Court failed to discuss the authority of the jury to decide damages, any related inability of the legislature itself to decide who determines damages, and the shift of authority from the jury to the executive.

Finally, “nonincorporation” of the civil and grand jury provisions demonstrates how the Court has shifted power from the jury to the states. In 1916 and 1884, respectively, the Supreme Court decided not to incorporate the Seventh Amendment civil jury provision and the Fifth Amendment grand jury clause against the states.²⁸⁶ When the Court did so, these cases were consistent with the other Supreme Court jurisprudence on whether parts of the Bill of Rights should be incorporated. Subsequently, the Court changed its decisions on the incorporation of the Bill of Rights, most recently in 2010 when it required states to recognize the Second Amendment right to bear arms.²⁸⁷ However, the Court has not acted similarly to require states to recognize the

²⁷⁸ *Id.*

²⁷⁹ *Galloway*, 319 U.S. at 390–91.

²⁸⁰ *Id.* at 389–95.

²⁸¹ *See* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24, 48–49 (1937).

²⁸² *Id.* at 22.

²⁸³ *See id.* at 48.

²⁸⁴ *Id.*

²⁸⁵ *See id.* at 48.

²⁸⁶ Thomas, *supra* note 174, at 166, 173.

²⁸⁷ *See* *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

civil jury and the grand jury provisions under the Seventh and Fifth Amendments, respectively.²⁸⁸

4. *The Missing Branch in the Supreme Court's Jurisprudence*

The Supreme Court presently does not acknowledge the jury's independent constitutional function and its role to check the powers of the traditional actors. On the other hand, the Court recognizes the traditional actors' independent constitutional functions to restrain one another through the use of the doctrines of separation of powers and federalism. Scholars and the Court generally agree that these doctrines are essential to the proper functioning of the government. The absence of doctrine affirming the jury's relative independent constitutional role plus the historical transfer of authority from the jury to the traditional actors suggest one conclusion: depriving the jury of its proper equal status—effectively as a branch or constitutional actor—among the traditional actors has contributed to its decline and its loss of power to the traditional actors.

The closest reference to the jury as a branch or constitutional actor is in the context of the grand jury. The Supreme Court has referred to the grand jury as “a constitutional fixture in its own right,”²⁸⁹ “belong[ing] to no branch of the institutional Government,”²⁹⁰ but instead, independent of them. In somewhat similar fashion, as previously mentioned, in a decision granting the criminal jury power, the Court described it as “a fundamental reservation of power in our constitutional structure.”²⁹¹ But, such designations by the Court are sparse, and some have been rejected by the Court in later decisions.²⁹²

Nonetheless, several scholars have recognized that the jury holds an important, branch-like role in the government. Notably, Akhil Amar has identified the jury as an important part of the constitutional structure.²⁹³ As he describes it, “The dominant strategy [of the Constitution] to keep agents of the central government under control was to use the populist and local institution of the jury.”²⁹⁴ The jury helped balance two of the branches; the grand jury counterbalanced prosecutors in the executive branch, while the civil jury equalized judges in the judicial branch.²⁹⁵ In these roles, juries could, for

²⁸⁸ Thomas, *supra* note 174, at 166, 173, 181–82.

²⁸⁹ *United States v. Williams*, 504 U.S. 36, 47 (1992) (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977)).

²⁹⁰ *Id.*

²⁹¹ *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also* *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1961 n.1 (2015) (Thomas, J., dissenting) (quoting *Blakely*, 542 U.S. at 306) (arguing that the guarantee of a jury trial is fundamental in our constitutional structure).

²⁹² *See supra* text accompanying notes 223–45.

²⁹³ *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81–118 (1998).

²⁹⁴ *Id.* at 83.

²⁹⁵ *Id.* at 84, 88; *see also* AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 237 (2006).

example, check abuses by the executive and determine compensation for people when the government took their property.²⁹⁶ Juries also provided knowledge about the government to jurors.²⁹⁷ Another scholar, Nancy Marder, has affirmatively referred to the jury as “a coordinate branch of government” that checks all of the branches.²⁹⁸

Others have also emphasized a significant role for grand, criminal and civil juries to check the government. Roger Fairfax stated, “[T]he grand jury is its own constitutional entity, which checks each of the three branches of government.”²⁹⁹ The grand jury is a barrier that must be crossed before the judge sentences a criminal defendant.³⁰⁰ Similar to its role to check the judiciary, the grand jury can act as a restraint on the executive by preventing it from proceeding with a prosecution.³⁰¹ It can also act as a check on the legislature by refusing to indict on a particular charge out of disagreement with a law.³⁰² Finally, local citizens can act against the federal government through their roles on the grand jury checking federal laws.³⁰³

Rachel Barkow has described the criminal jury as a check on the executive and the legislature due to its ability to nullify prosecutions or laws.³⁰⁴ She has also described the criminal jury as possessing powers similar to the traditional actors, to act and not act.³⁰⁵ Barkow stated that “The constitutional system of criminal justice protects the discretionary judgments of all key actors not to proceed criminally. That is why the executive has discretionary pardon and charging power, why the legislature has the freedom not to criminalize conduct, and the jury has the unreviewable power to acquit.”³⁰⁶

Randolph Jonakait has depicted the civil jury as serving the same function as the criminal jury—“as a check on the government,” and also referred to the civil jury as a check on “the powerful,” public or private.³⁰⁷ Renée Lettow Lerner similarly has discussed the civil jury as a political institution with the purpose of checking the legislature, the executive, and the judiciary.³⁰⁸

²⁹⁶ AMAR, *supra* note 293, at 88.

²⁹⁷ *See id.* at 93–94.

²⁹⁸ MARDER, *supra* note 31, at 11.

²⁹⁹ Roger A. Fairfax, Jr., *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, in GRAND JURY 2.0, *supra* note 55, at 57, 67.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 68.

³⁰³ *Id.* at 68–69.

³⁰⁴ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1042, 1048–49 (2006).

³⁰⁵ *See id.* at 1048–49.

³⁰⁶ *Id.* (emphasis omitted).

³⁰⁷ JONAKAIT, *supra* note 151, at 38.

³⁰⁸ *See* Lerner, *supra* note 39, at 828–31.

a. *Right to Jury Trial Versus Power of Jury*

Despite these perspectives, the Supreme Court considers the jury neither an independent powerful actor nor a check on the governmental structure. As described previously, while the Court originally recognized that the jury occupied this important position, over time it has become less enamored with the jury. The jury is now viewed only in terms of a right to a jury—relevant only when a party chooses to have their case decided by a jury. For example, a criminal defendant can simply waive his jury trial right, and a judge can try the case, or the defendant can plead guilty and in turn receive a lesser sentence.

Under this view, the jury may not have fallen so much as it is merely an individual right that does not always exist and that plaintiffs and defendants can waive. Moreover, in some circumstances, because no right may exist, the jury may not fall. For example, courts believe there is no jury right in civil cases when a judge decides no reasonable jury could find for one party.

But constitutional text and evidence present a different perspective. The Fifth Amendment states a person cannot be convicted for serious crimes (“capital, or otherwise infamous”) without a presentment or indictment by a grand jury unless special specific circumstances arise.³⁰⁹ There is no reference to a “right” to jury trial in the Amendment, and it gives the grand jury alone (absent the stated special circumstances) the power to initiate proceedings against defendants accused of serious crimes.³¹⁰ No other constitutional text provides the executive, judges, or any other traditional actor authority to initiate a proceeding against defendants accused of serious crimes.

James Wilson acknowledged the power of the grand jury to both bring presentments of its own accord and act on charges brought by the prosecutor.³¹¹ He discussed this as “the right” and “the duty” of the grand jury to act “diligently” and “present truly.”³¹² He also emphasized the great power of the jury in comparison to the judiciary.³¹³

Like the Fifth Amendment grand jury provision, Article III gives the jury affirmative authority.³¹⁴ It grants the jury power to try all crimes except impeachment cases.³¹⁵ The Sixth Amendment, however, refers to a right—“the right to a speedy and public trial, by an impartial jury” in the area where the crime was committed.³¹⁶ So, the question becomes what power, if any, does the jury possess given the use of the term “right” in the Sixth Amendment? More specifically, does “right” in the Sixth Amendment limit the power of the criminal jury in Article III? There is no evidence that the

³⁰⁹ See U.S. CONST. amend. V.

³¹⁰ *Id.*

³¹¹ 1 WILSON, *supra* note 127, at 325.

³¹² *Id.*

³¹³ See 2 WILSON, *supra* note 127, at 996–1002.

³¹⁴ U.S. CONST. art. III, § 2.

³¹⁵ *Id.*

³¹⁶ *Id.* amend. VI.

Sixth Amendment limits or qualifies the jury power set forth in Article III. Moreover, the Sixth Amendment, other rights in the Bill of Rights, and the original Constitution do not grant authority to any institution other than the jury to try crimes (outside of impeachment).

At the time of the founding, language describing the criminal jury also referred or related to power. For example, James Wilson specifically described the criminal jury as “[a] man, or a body of men, habitually clothed with a power over the lives of their fellow citizens[.]”³¹⁷ The Federal Farmer also acknowledged the power of people on juries. Few could be elected to the legislature but they could be part of juries.³¹⁸ Both provided “their true proportion of influence.”³¹⁹ “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.”³²⁰

The civil jury under the Seventh Amendment—unlike the grand jury under the Fifth Amendment and the criminal jury under Article III—denotes a “right” of trial by jury.³²¹ However, evidence at the founding does not show a difference in the discussion of the roles of the three juries. At the time of the Constitution’s original enactment, many people had also wanted a guarantee of a civil jury trial.³²² Moreover, there is evidence that the intentions for the civil jury trial were similar to the intentions for the jury trial for crimes—i.e., to check the government.³²³ Add to this, in the time between the Constitution’s enactment and the enactment of the Bill of Rights, there is no evidence that intentions regarding the civil jury trial changed. This suggests that the “right” in the Seventh Amendment does not limit power granted to the civil jury.

The text of the Seventh Amendment further informs the meaning to be given to the civil jury trial. The text refers to the preservation of the right in suits at common law.³²⁴ At common law, almost invariably juries heard cases in which monetary damages were alleged.³²⁵ So the text suggests that juries were to continue to hear such cases. Also, the text states the specific conditions under which judges can be involved once a jury tries a case—thus setting forth limitations on the power of the judiciary as well as the authority of other traditional actors, which are granted no power at all.

³¹⁷ 2 WILSON, *supra* note 127, at 1008–09; *see* LAURA I APPLEMAN, DEFENDING THE JURY 13–36 (2015).

³¹⁸ Letters from the Federal Farmer to the Republican No. IV (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 113, at 245, 249.

³¹⁹ *Id.* at 249–50.

³²⁰ *Id.* at 250.

³²¹ U.S. CONST. amend. VII.

³²² Henderson, *supra* note 124, at 295.

³²³ *See* JONAKAIT, *supra* note 151, at 38.

³²⁴ U.S. CONST. amend. VII.

³²⁵ *See generally* Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law,”* 71 OHIO ST. L.J. 1071 (2010).

At times, the founders referred to the civil jury's power in a similar manner to the grand and criminal juries. Discussing the civil jury trial, the Federal Farmer, an Anti-Federalist, emphasized the importance of the jury as an institution through which the people could be educated and by which the people could exercise power to protect rights.³²⁶ He wrote that, "The body of the people, principally, bear the burdens of the community; they of right ought to have a controul [sic] in its important concerns, both in making and executing the laws"³²⁷ The legislature and the jury "are the means by which the people are let into the knowledge of public affairs—are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them."³²⁸

There is, however, some evidence that the civil jury amendment provided a right rather than a power. For example, when Massachusetts ratified the Constitution, it recommended "[i]n civil actions between citizens of different States, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it."³²⁹

Even if the Seventh Amendment created only a right that can be waived, in some circumstances, no waiver of the right occurs, and power shifts from the civil jury to traditional actors. The traditional actor affirmatively acts to usurp power that the jury previously held, such as when a judge decides a case on summary judgment or reduces a jury verdict after a jury trial through the use of remittitur, procedures that did not exist at English common law.³³⁰ Thus, although the Seventh Amendment's text denotes a "right," it nonetheless establishes the jury's power to decide certain cases and issues, in relationship to the traditional actors' corresponding limited powers.

To serve the role that it is supposed to play as a check on the power of the traditional actors, the jury itself must possess power. For example, through its choice of charges under the law, the executive can threaten a criminal defendant with more significant penalties to incentivize the defendant to waive the jury trial. Without any recognition of corresponding jury authority, these actions of the legislature and the executive go unchecked. As another example, a federal judge can dismiss a case seeking civil remedies from a jury for a federal officer's improper search of an individual's home. Again, without any recognition of corresponding authority in the jury to decide the case, the government's effort to stymie the constitutional check of its power goes unexamined.

³²⁶ Letters from the Federal Farmer, *supra* note 126, at 320.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 1788, at 80 (Boston, William White 1856).

³³⁰ See generally Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) (arguing that remittitur is unconstitutional).

b. *Other Arguments Against the Jury as a Branch*

In addition to the argument that the jury holds no separate power, other arguments can be made against the jury as an independent body. Many regard the jury as solely part of the judicial branch and thus related to the judiciary alone. The founders made many references to the jury as part of the judicial branch. For example, James Wilson stated that the people retained “part of the judicial authority” through its power to decide criminal cases.³³¹ Also, as previously described, some scholars believe the jury is part of some or all of the branches.³³²

This Article does not argue that the jury has never been characterized as part of a branch. It asserts that regardless of such descriptions, the constitutional text and other evidence show an independent, interrelated relationship between the jury and the traditional actors, similar to the relationship among the traditional actors, to the extent that the jury is functionally a branch with significant authority like the traditional actors.

A final argument against the jury as a branch is the criminal, civil, and grand juries are very different entities that cannot be grouped together as one branch or constitutional actor. But ascribing “branch” to the grand, criminal, and civil juries is not to aggregate them as indistinguishable. Instead, the reference to the jury as a branch is simply to describe a common history of diminution in power, the similar roles each was to play in opposition to the traditional actors, and the comparable reason for the declines of each.

Alexis de Tocqueville supported the view of the jury as a separate independent actor. In the early nineteenth century, after the adoption of the Constitution and Bill of Rights, Tocqueville characterized the jury as its own independent body.³³³ He referred to both criminal and civil juries as “before all else a political institution.”³³⁴ In fact, he distinguished the role of the jury as a judicial institution—its role in trials—from its political role.³³⁵ In discussing the importance of the political role of the jury, he equated its importance to voting.³³⁶ He stated, “the institution of the jury puts the people themselves, or at least a class of citizens, on the judge’s bench. So the institution of the jury really puts the leadership of society into the hands of the people or of this class.”³³⁷ Similar to some others previously mentioned, Tocqueville believed that the importance of the jury was particularly important to those on the jury.³³⁸ “I do not know if the jury is useful to those who have

³³¹ 2 WILSON, *supra* note 127, at 1008.

³³² *See, e.g.*, AMAR, *supra* note 293; MARDER, *supra* note 31, at 11.

³³³ 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 444 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835).

³³⁴ *See id.*

³³⁵ *Id.*

³³⁶ *See id.* at 445.

³³⁷ *Id.*

³³⁸ *See id.* at 448.

legal proceedings, but I am sure that it is very useful to those who judge them. I regard it as one of the most effective means that a society can use for the education of the people.”³³⁹ This view of the jury, as well as the view of the jury as a check on the traditional actors, has been lost.

So, why has the jury declined in authority? Comparison of the jury to the traditional actors provides insight. The Constitution grants authority to the traditional actors, as well as to the criminal, civil, and grand juries. Through the use of the doctrines of separation of powers and federalism, the Supreme Court has acknowledged that the traditional actors possess significant authority and are restrained by important limitations. Their power under this regime is evident. The President carries out activities. The legislature makes laws. Courts issue opinions. And states enact laws and carry out other activities. No significant decline in the authority of any of the traditional actors from the founding to the present time has been recognized—outside of a debated decline in state authority.³⁴⁰

The traditional actors’ status contrasts with the jury’s status. The jury is not considered to have power as a part of the constitutional structure or government. It hears few cases, and when it tries a case, its authority can be usurped. The similarities between the traditional actors and the jury along with the jury’s dissimilar decline show that the failure to give the jury branch-like status has contributed to the jury’s decline. While it is difficult to disprove that cost, incompetence, inaccuracy, or inefficiency have caused the decline of the jury, as mentioned previously, the traditional actors are also criticized for having similar characteristics. However, they thrive.

B. Further Assessing the Decline of the Criminal, Civil, and Grand Juries

As discussed, then, in contrast to its treatment of the traditional actors, the Supreme Court has denied the jury doctrine that establishes and protects its authority in the constitutional structure. If the jury was prescribed such doctrine analogous to separation of powers or federalism, the divisions of authority between the jury and the traditional actors could be better assured.

So why have the traditional actors not recognized the jury as part of the constitutional structure and not established doctrine for it similar to separation of powers and federalism? This underlying question is difficult to answer.

³³⁹DE TOCQUEVILLE, *supra* note 333, at 448; *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 220–21 (1995); Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1162 (2014). *See generally* JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995).

³⁴⁰*See, e.g.*, Roger C. Cramton, *The Supreme Court and the Decline of State Power*, 2 J.L. & ECON. 175, 176 (1959).

Different possibilities persist, including some of the reasons proffered in the first part of this Article—for example, democratization of the jury or the rise of the administrative state through the establishment of administrative agencies. To try to answer this question, a related question first must be answered. How were the traditional actors able to take authority from the jury?

1. *Unique Characteristics of the Jury*

The traditional actors can shift power from the jury to themselves because of certain characteristics of the jury. While the relationships among the traditional actors and between the traditional actors and the jury share some qualities, the unique characteristics of the jury can cause its relationships to function differently. Using the relationship between the judiciary and the jury as an example, the judiciary reviews the authority of the jury, just as it examines the power of the traditional actors. When the judiciary hears a case, it can compete for authority with traditional actors as it can with the jury. The judiciary may need to decide whether it, another traditional actor, or the jury has authority with regard to some matter. For example, the federal judiciary can decide whether a federal court or a state court hears a case, exercising final decisionmaking power as to this question. Also, the judiciary can determine whether a congressional act that takes authority from the judiciary is unconstitutional and, if it so finds, the law can no longer apply. Moreover, the judiciary can determine whether a federal rule authorizing a judge to appropriate power from the jury is constitutional and, if so, the rule empowers the judge and disempowers the jury.

In these competitive relationships, the jury differs from the traditional actors in ways that contribute to its non-branch-like status and its comparative decline. First, the jury cannot sit or otherwise perform without the action of the judiciary. The judiciary must constitute the jury before it can act. Contrast this with examples of the power of traditional actors to exercise power on their own: the legislature enacts laws; the President takes action as the Commander in Chief of the Army and Navy; and states enact legislation. Indeed, the judiciary's review of the power of traditional actors often takes place after a traditional actor acts in the first instance. Unlike its authority over the traditional actors, the judiciary can prevent the jury from acting at all. No jury is convened unless the judiciary facilitates the creation of one.

The second characteristic of the jury that differs from the traditional actors that has contributed to its decline is the significant interrelationship between its authority and the judiciary's. While the jury competes with the judiciary for authority like the traditional actors do, in contrast to the traditional actors, the judiciary's reviews of the jury's power most often involve the judiciary's review of its own competing authority. If the judiciary resolves a question of jury authority favorably toward the jury, the judiciary denies itself power.

Third, unlike the jury, the traditional actors have power to counter impingement on their own authority by the judiciary or another actor. When a

law is deemed unconstitutional, Congress is not without remedy. It can enact another piece of legislation testing the boundaries of its authority. Furthermore, the judiciary or another traditional actor may exercise self-restraint because of the power that the other traditional actors can exercise against them. Judges may act in a certain manner because legislators can impeach them or increase their salaries. Judges may take certain action because the President can promote them. States can influence the other traditional actors through voting.³⁴¹ The legislature can block the executive's choice of judges through filibuster or a vote of no confirmation. The legislature also can block the executive's appointments to the executive administrative agencies—for example, the National Labor Relations Board or the Consumer Protection Bureau. At the same time, through regulation, the executive can attempt to add law that Congress will not pass—for example, environmental rules. These interrelationships can affect the actions of the traditional actors. An actor may be more reticent to take action against another actor when they know the actor can affect them negatively.

In contrast, the jury has little ability to affect the power of judges or the other traditional actors. The criminal jury can nullify through its verdict after a judge constitutes the jury and gives the case to the jury. However, under modern rules, the judge can still acquit if a jury convicts. Because the jury can provide no benefit to the traditional actors that the actors cannot derive on their own, the jury also has no implicit effect on the traditional actors' authority against it. No mutual relationship incentivizes the traditional actors to aid the jury; for example, Congress has no incentive as a result of its relationship with the jury to create legislation granting the jury authority that has not been recognized under the Constitution.

Even if the other traditional actors want to help the jury, they do not have the power to fully counter the Supreme Court's impingement of the jury's authority. Arguably, Congress can legislate a jury trial right for crimes or claims that the Court has deemed not to require a jury trial right. But once a jury trial right exists, the Court retains significant power to affect that right through mechanisms that it deems constitutional.

At times, the other traditional actors work with the judiciary against jury authority instead of helping the jury counter the judiciary. Congress can enact criminal statutes with significant mandatory sentences. Prosecutors can use those statutes to charge defendants and incentivize pleas. The courts then decide whether the pleas are knowing and voluntary. The end result is juries are eliminated from the process.

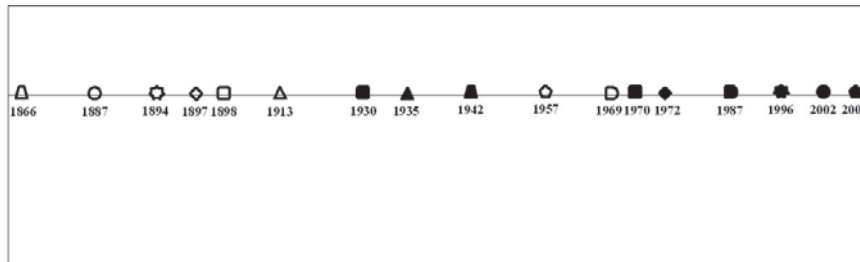
³⁴¹ Herbert Wechsler argued that while scholarship had been focused on the distribution of authority to states, the influence of the states on the national government through the selection of Congress and the President was actually more important to the balance between the states and the federal government under federalism than the particular authority distributed to the states. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954).

2. *The Supreme Court's Shifting Opinions of the Jury*

These differences between the jury and the traditional actors provide only a partial explanation of why the Court and other traditional actors have not acknowledged the jury as part of the constitutional structure and have taken its authority. If these were the sole causes of the jury's decline, the Court or the traditional actors would have taken authority from the jury continuously after the enactment of the Constitution. However, the Supreme Court has recognized significant authority in the jury at different times, including in the late nineteenth century. As a result, there must be some other reason or reasons for the shift in authority to the traditional actors and the decline of the jury.

Decisions of the Supreme Court first recognizing authority in the jury and later shifting authority away from the jury offer reasons for the decline. I have found nine circumstances in which the Supreme Court originally granted authority to the grand, criminal, or civil jury and later, decided against such authority. Some of these shifts have been described in this Article. In these decisions illustrated by the symbols in Figure A, the Court recognized significant authority in the jury in the late nineteenth century through the early twentieth century from 1866 to 1913.

Figure A: *Pro-Jury and Anti-Jury Cases, 1866–2007*³⁴²



By the 1930s, the Court had changed its mind and shifted authority from the jury to itself and other nonjury tribunals.³⁴³ In this specific set of cases, the

³⁴² No fill = pro-jury; solid fill = anti-jury.

³⁴³ See *O'Callahan v. Parker*, 395 U.S. 258 (1969) (holding that a grand jury is required for an alleged off-base rape), *overruled by Solorio v. United States*, 483 U.S. 435 (1987) (holding that a military tribunal can try an alleged off-base sexual assault); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (holding that a dismissal cannot occur unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief”), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (adopting a plausibility standard and holding that the previous “no set of facts” standard “is best forgotten as an incomplete, negative gloss on an accepted pleading standard”); *City of Lincoln v. Power*, 151 U.S. 436 (1894) (holding that appellate review of a trial court denial of motion to set aside a verdict as excessive violates the Seventh Amendment), *abrogated by Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996) (holding that appellate review of a trial denial of motion to set aside an excessive verdict is constitutional); *Ex parte Bain*, 121 U.S. 1 (1887) (holding that the court has no power over

trend of shifting authority away from the jury remained consistent from the 1930s onward except for two times in 1957 and 1969,³⁴⁴ when the Court recognized significant authority in the jury, but later changed its mind in 2007 and 1987, respectively.³⁴⁵

Commentaries do reveal significant restrictions on jury authority prior to the shifts of authority from the jury to the traditional actors that are illustrated in Figure A. Scholars have written about constraints on the jury's authority that judges and legislatures have imposed since the founding and have emphasized the influence of legal elites. William Nelson has written that distrust of juries to find law came with economic development and differences in "ethical values and assumptions" among people in states such as Massachusetts in the nineteenth century.³⁴⁶ In this time period, states began to set aside jury verdicts that judges deemed contrary to the weight of the evidence.³⁴⁷ Nelson concluded that "the law came to be a tool by which those interest groups that had emerged victorious in the competition for control of law-making institutions could seize most of society's wealth for themselves and enforce their seizure upon the losers."³⁴⁸

a criminal defendant who was prosecuted under a grand jury indictment that was amended without grand jury approval), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002) (holding that a defect in the indictment did not deprive the court of power over the defendant). *Compare* *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913) (holding that once a judge finds that the evidence is insufficient, only a new trial can be ordered), *with* *Balt. & Carolina Line v. Redman*, 295 U.S. 654 (1935) (holding, instead, that once a judge finds insufficient evidence, a dismissal on the merits may be issued); *Thompson v. Utah*, 170 U.S. 343 (1898) (holding that the defendant cannot waive a jury of twelve), *overruled by* *Collins v. Youngblood*, 497 U.S. 37 (1990), *with* *Patton v. United States*, 281 U.S. 276 (1930) (holding that a defendant can waive a jury and instead, a judge can decide guilt), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1970) (holding that twelve jurors are not required); *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897) (holding that unanimity is a constitutional hurdle to a conviction), *with* *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that the unanimity requirement applies only to federal courts); *Ex parte Milligan*, 71 U.S. 2 (1866) (supporting juries for citizens and noncitizens), *with* *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that a noncitizen and an apparent nonmilitary citizen is subject to a military tribunal).

³⁴⁴ *See* *O'Callahan*, 395 U.S. at 274 (holding that a grand jury is required for an alleged off-base rape in 1969); *Conley*, 355 U.S. at 45–46 (holding that dismissal cannot occur unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief" in 1957).

³⁴⁵ *See* *Bell Atl. Corp.*, 550 U.S. at 562–63 (adopting plausibility standard and holding that the previous "no set of facts" standard "is best forgotten as an incomplete, negative gloss on an accepted pleading standard" in 2007); *Solorio*, 483 U.S. at 440–41 (holding that a military tribunal can try an alleged off-base sexual assault in 1987).

³⁴⁶ WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 165–66 (1975).

³⁴⁷ *Id.* at 170.

³⁴⁸ *Id.* at 174. Juries continued to have some ability to find the law and fact in criminal cases. *See id.* at 257 n.37.

Morton Horwitz also wrote that “judges regularly set aside jury verdicts as contrary to law.”³⁴⁹ They also began to characterize other matters as “matters of law,” on which they could rule.³⁵⁰ This included ordering new trials for jury decisions they deemed contrary to the weight of the evidence.³⁵¹ State legislatures also removed some damages issues from the jury’s purview.³⁵² Horwitz wrote about the alliance between the bar and corporate interests as well as the alliance between the bar and the judiciary in this period.³⁵³ He stated that a measure of the alliance was the “swiftness with which the power of the jury [was] curtailed after 1790.”³⁵⁴ This was accomplished through the use of procedures that gave judges authority to decide questions that effectively took the cases away from the jury.³⁵⁵ Horwitz wrote about the growing relationship between judges and companies and stated, “One of the great American transformations in the relations between judge and jury arose out of marine insurance cases at the beginning of the nineteenth century, when courts forged new procedural weapons that enabled them to reverse damage awards by juries.”³⁵⁶

Consistent with these views, in the first period from 1866 to 1913 in Figure A³⁵⁷ when the Court decided several cases in favor of jury authority, there were also some cases in which the Court did not favor jury authority. For example, the Court decided several cases that supported the judge’s power to direct the jury to find in a certain way if the judge thought the evidence supported that decision.³⁵⁸ In this period, the Court also decided that juries could not find law.³⁵⁹

In the period from 1930 to 2007, when we see the Court decide several cases that disfavor jury authority, there were also other cases that favored jury authority. The so-called four horsemen, known for their conservative decisions, even decided cases that granted authority to the jury at times. Barry Cushman points out, however, that it could have been to support the corporate greed of defendants who committed crimes.³⁶⁰ Additional examples of cases favoring jury authority in the period from 1930 to 2007 include a recent series of criminal cases about fact-finding for sentencing.³⁶¹

³⁴⁹ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 28 (1977).

³⁵⁰ *Id.*

³⁵¹ *Id.* at 29.

³⁵² *Id.*

³⁵³ *See id.* at 141–43.

³⁵⁴ *Id.* at 141.

³⁵⁵ HORWITZ, *supra* note 349, at 141–43.

³⁵⁶ *Id.* at 228.

³⁵⁷ *See infra* Figure A.

³⁵⁸ *See* *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 369 (1913).

³⁵⁹ *See* *Sparf v. United States*, 156 U.S. 51, 65, 74, 106 (1895).

³⁶⁰ Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 579–80 (1997).

³⁶¹ *See supra* text accompanying notes 223–25.

The Supreme Court's historical treatment of the jury clearly varies with some decisions in favor and against jury authority in the nineteenth century and some decisions in favor and against jury authority in the twentieth century. With this said, examining decisions in which the Court changed its view of the jury's authority and reviewing the associated time periods reveals some information on why the jury has declined over time.

In the decisions discussed above in which authority changed from pro-jury to anti-jury, the Court altered its characterization and corresponding treatment of the jury to deny it an essential role in government. In these cases, the Court proffered different reasons for the changes—none of which is sufficiently explanatory. It said that a previous case contained only dicta on an issue.³⁶² It also overruled decisions.³⁶³ And it asserted that the facts encompassed by a past case were different from the ones in the case at hand.³⁶⁴

3. *Public Opinion About the Jury*

Information on why the shift against jury authority occurred may be derived from public articles written in the time period when the Supreme Court changed its mind. There is much scholarly literature on how the Supreme Court reacts to public opinion. Barry Friedman has argued that the Supreme Court is influenced by public opinion.³⁶⁵ Studying this influence, Epstein and Martin stated, “What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes”³⁶⁶ “When the ‘mood of the public’ is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions.”³⁶⁷

³⁶² See *Apodaca v. Oregon*, 406 U.S. 404, 408–09 & n.4 (1972) (citing negatively *Am. Publ'g Co. v. Fisher*, 166 U.S. 464 (1897)); *Williams v. Florida*, 399 U.S. 78, 90–92 (1970) (regarding *Thompson v. Utah*, 170 U.S. 343 (1898)); *Patton v. United States*, 281 U.S. 276, 293 (1930) (regarding *Thompson*, 170 U.S. 343), *abrogated by Williams*, 399 U.S. 78.

³⁶³ See *O'Callahan v. Parker*, 395 U.S. 258 (1969), *overruled by Solorio v. United States*, 483 U.S. 435, 436 (1987); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (discussing and abandoning the standard of *Conley v. Gibson*, 355 U.S. 41 (1957)); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 661 (1935) (limiting the holding of *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913), to that particular case).

³⁶⁴ See *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942) (discussing *Ex parte Milligan*, 71 U.S. 2 (1866)); *Redman*, 295 U.S. at 657–58 (discussing *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913)).

³⁶⁵ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009) (“Supreme Court decisions tend to converge with the considered judgment of the American people.”).

³⁶⁶ Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (but We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 279 (2010).

³⁶⁷ *Id.* at 263.

They do not know why.³⁶⁸ It could be that the Court is following public opinion or, as members of the public, their opinions are similarly affected.³⁶⁹ They conclude that there is some association between public opinion and the decisions of the Court but cannot say definitely whether public mood influences decisions.³⁷⁰ Lawrence Baum and Neal Devins add to this literature through their argument that the Court is more influenced by legal elites than by the public.³⁷¹

Accepting that public opinion influences the Court, I analyzed public opinion in the time period surrounding the cases that were decided when the Supreme Court recognized jury authority (1866–1913) and when it began to change its decisions to not recognize such authority (1930–1942). I reviewed *New York Times* articles from 1851 (the date when *The New York Times* was established)³⁷² to 1945 to encompass a time period before and after the time period in question. I specifically examined the articles that contained the term “juries.” *The New York Times* has been intended to appeal to a more cultured, intellectual readership,³⁷³ and thus these articles present information about public sentiment—though often the elite public sentiment—about the jury at the time. Indeed, this elite public sentiment could be different than public sentiment more generally.

The articles revealed much information regarding the jury, much of which is consistent with Nelson and Horwitz’s opinions. Beliefs about the jury were mixed. From the 1850s, criticism of the criminal, civil, and grand juries abounded. The jury was said to be too sympathetic, swayed by emotion. It was too easy on criminals.³⁷⁴ Some complained that grand juries would not find an

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 264.

³⁷⁰ *Id.* at 280–81.

³⁷¹ See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010).

³⁷² *Our History*, N.Y. TIMES, <http://www.nytimes.com/who-we-are/culture/our-history/#1835-1880> [<https://perma.cc/4UFV-7BTP>].

³⁷³ See *The New York Times*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/The-New-York-Times> [<https://perma.cc/FUL3-PE9G>] (last updated Apr. 21, 2015). See generally SUSAN E. TIFFT & ALEX S. JONES, *THE TRUST: THE PRIVATE AND POWERFUL FAMILY BEHIND THE NEW YORK TIMES* (1999) (documenting the history of the two families that have owned *The New York Times* for over a century and the development of the paper itself).

³⁷⁴ A correspondent for the *Cincinnati Gazette* criticized the result of a Cincinnati criminal case decided by a jury by stating that:

[T]he passions, prejudices and sympathies of the jury are clearly studied and brought to influence the decision; all the resources of eloquence and of ingenuity are exhausted in the endeavor, not to clear up obscurities and ascertain the truth, but to swerve the minds of the jury, and induce them to render a verdict, in violation of their oath, on other grounds than those of fact—on grounds of prejudice, of sympathy, or of some other sentiment, honorable and just it may be, but utterly out of place in a judicial determination of matters of fact.

indictment when a person was guilty.³⁷⁵ New York juries were referred to as “an infallible protection of lawlessness and license,”³⁷⁶ and people who avoided jury service were blamed for this situation.³⁷⁷ Moreover, workingmen were criticized as not having the qualifications to serve as jurors, and businessmen were viewed as the best jurors.³⁷⁸

In the wake of such criticism, efforts to reform the jury were attempted. These attempts included broadening the membership of the jury to include more businessmen by taking away exemptions and discouraging bribery to avoid service,³⁷⁹ not requiring unanimity, which “puts it in the power of one stupid or prejudiced person to block the course of justice altogether,”³⁸⁰ and eliminating cast-iron jurymen, who were controlled by officials who chose them.³⁸¹

Not only were juries criticized. Judges were called corrupt.³⁸² In this arena, the jury was recognized as the best method for resolving disputes. One article described the jury in the following manner: “At its best estate, trial by jury is only tolerable because no better way of approximating to the truth of guilt, or innocence, has been invented. That it abounds with defects, and results too frequently in serious injustice, is the experience and opinion of the highest legal authorities.”³⁸³

Criminal Trials, N.Y. DAILY TIMES, May 5, 1854, at 4 (emphasis omitted); *see also Charge to a Grand Jury by a Philadelphia Judge*, N.Y. TIMES, Apr. 6, 1869, at 5 (“It is time that the bad should be made to feel the power of the law.”); *Sympathy for Criminals*, N.Y. TIMES, Mar. 27, 1858, at 4.

³⁷⁵ *See The Courts and the People*, N.Y. TIMES, Oct. 14, 1871, at 4; *The Grand Jury Investigating the City Frauds*, N.Y. TIMES, Nov. 28, 1871, at 8.

³⁷⁶ *Our Juries*, N.Y. TIMES, Mar. 11, 1873, at 4.

³⁷⁷ *Id.*; *see* Civis, Letter to the Editor, *The Ethics of the Bar*, N.Y. TIMES, Mar. 11, 1873; Henry L. Clinton, Letter to the Editor, *Law Reforms*, N.Y. TIMES, Dec. 28, 1872, at 5.

³⁷⁸ *See Service on Juries*, N.Y. TIMES, May 10, 1867, at 4; *The Jury System and Its Defects*, N.Y. TIMES, Sept. 25, 1867, at 4 (discussing the cost of repeated criminal trials when juries disagree and the difficulty of obtaining sufficiently knowledgeable jurors for civil cases).

³⁷⁹ *Working of the New Jury Law*, N.Y. TIMES, Oct. 18, 1870, at 3.

³⁸⁰ *Trial By Jury*, N.Y. TIMES, June 1, 1871, at 4.

³⁸¹ For many years in the federal courts, the officials who selected jurors (who were thus able to give them pay) controlled them; the same people were selected time and time again for grand and criminal juries. The jurors were referred to as “cast-iron jurymen.” *Our Jury System*, N.Y. TIMES, Feb. 6, 1873, at 4. While this changed, at times, criticisms were lodged that the same type of corruption continued to occur in certain cases. *See id.*; *see also Cast Iron Juries*, N.Y. TIMES, Oct. 23, 1860, at 4; *Juries in the Federal Courts*, N.Y. TIMES, Nov. 12, 1867, at 4.

³⁸² *See “Let Him Go,”* N.Y. TIMES, Jan. 4, 1871, at 4.

³⁸³ *Disagreeing Juries*, N.Y. TIMES, Jan. 16, 1856, at 4; *see How to Stop the Slave-Trade*, N.Y. TIMES, Dec. 10, 1858, at 4 (recognizing that juries would not convict slave-dealers but that “it does, in the long run, and on the whole, more good and less harm than any other system that has ever been devised, and we can only improve it by improving the public itself”); *Sentence of Another Slave-Trader*, N.Y. TIMES, Nov. 17, 1862, at 4

Around this time, Wisconsin abolished grand juries, and Justice Miller of the United States Supreme Court criticized this action.³⁸⁴ He stated “that, could the fathers of this Republic see today the Grand Jury abolished, they would think us a very degraded people.”³⁸⁵

The late nineteenth century brought more reasons to fault the jury. Railway ticket scalpers asserted that they did not fear the law because at least one juror would “refuse to allow wrong to be done.”³⁸⁶ An African-American congressman proposed a bill to have the federal courts try those accused of lynchings because southern juries would not convict.³⁸⁷ In this period there were also complaints from labor organizations that workingmen were not selected for grand juries and that the people “selected represented wealth or property.”³⁸⁸

A general confidence in the jury system nonetheless persisted. In the late nineteenth century, Joseph Choate, the president of the American Bar Association, gave a speech before the ABA that extolled the virtues of the jury system and its immortality.³⁸⁹ He said:

[H]e had no fears for the safety of the jury system in this country. The “learned essayists and philosophers,” whom he described as its enemies [who describe the jury as “rotten” and “out of date”], are never likely to become numerous or powerful enough to menace its existence. All the evils of the system are in the practice, not in the principle of it, and these are trivial, indeed, as compared with its benefits.³⁹⁰

Around this same time period, a call for reform from the business community received praise. “It is an extremely encouraging sign that the scheme for securing jury reform is being taken up by the Chamber of Commerce and other business organizations.”³⁹¹ The Chamber represented those who were “deeply interested in good juries and that suffer most from the present imperfect and unequal system for obtaining juries.”³⁹² The article insisted that juries should be populated with these classes of people because of

(describing the change to convictions under “Anti-Slave-trade laws, which were before considered little else than a dead letter on the statute book”).

³⁸⁴ *The Abolition of Grand Juries in Wisconsin*, N.Y. TIMES, July 10, 1871, at 5.

³⁸⁵ *Id.*

³⁸⁶ *Scalpers and Juries*, N.Y. TIMES, May 21, 1897, at 6.

³⁸⁷ *The Trial of Lynchers*, N.Y. TIMES, Nov. 29, 1899, at 2.

³⁸⁸ “*Labor*” and the Grand Jury, N.Y. TIMES, Dec. 2, 1896, at 4. The article discounted the complaint, stating that there was no showing that justice had not been accomplished under grand juries as constituted. *Id.*

³⁸⁹ *Mr. Choate on the Jury System*, N.Y. TIMES, Aug. 19, 1898, at 6.

³⁹⁰ *Id.* He remarked that the instructions of judges were as responsible for jury disagreement as were the incompetence of jurors. *Id.*

³⁹¹ *Good Juries*, N.Y. TIMES, Jan. 6, 1898, at 8.

³⁹² *Id.*

their intelligence, experience, and responsibility.³⁹³ Special juries, which included people selected for their intelligence and experience, were established in New York in this time period, and later were criticized as intended to convict.³⁹⁴

In the early twentieth century, sentiments toward the jury remained mixed. Judge O'Sullivan of a New York state court spoke of his change of mind from observing juries over time, that though the system could be improved, juries should be trusted in both criminal and civil cases.³⁹⁵ On the other hand, others, including some lawyers, continued to distrust juries.³⁹⁶ Civil juries could hold prejudice against corporations.³⁹⁷ One former juror wrote that the jurors on the jury on which he sat expressed opinions that the corporation should pay regardless of its fault and that judges were biased in favor of the corporations so their instructions should be ignored.³⁹⁸ At the same time, there were allegations that jurors and judges were paid by corporations to find in their favor.³⁹⁹ Criminal juries likewise could be biased. In the opinion of the former attorney general of Massachusetts, criminals in Boston did not fear conviction because juries could be bribed.⁴⁰⁰ Moreover, southern juries might not convict someone of murder of an African-American because of bribery or friendship.⁴⁰¹ Around this time period, at a meeting of the Committee on Law Enforcement of the American Bar Association, American juries were criticized as too lenient on crime, in comparison to juries in England and Canada.⁴⁰² It was said that in most areas of the country, in capital cases, juries included "a large proportion of sentimental or imbecile jurymen."⁴⁰³ And as a result, changes in the composition of juries were advocated.⁴⁰⁴

³⁹³ *Id.*; cf. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 202–03 (1992) (recognizing that insurance companies tried to avoid juries in 1870).

³⁹⁴ See *Fay v. New York*, 332 U.S. 261, 269, 290 (1947); 'Blue-Ribbon' Jury Held Un-American, N.Y. TIMES, Jan. 17, 1939, at 23 (criticizing jury system as "un-American" (quoting Judicial Council of New York)); *Stryker Condemns Blue Ribbon Juries*, N.Y. TIMES, July 2, 1939, at 3 (criticizing jury system as "un-American and indefensible" (quoting Lloyd Paul Stryker)). Those selected represented "the upper economic and social stratum in New York County," were conservative, and convicted more often. *Fay*, 332 U.S. at 290.

³⁹⁵ *Is Our Jury System a Failure?*, N.Y. TIMES, July 8, 1906, at SM1.

³⁹⁶ See *id.*; *English Recorder's View. Tells Grand Jury the British Trust Juries More than Americans Do*, N.Y. TIMES, Apr. 14, 1907, at 2.

³⁹⁷ See *Juries and Corporations*, N.Y. TIMES, June 5, 1901, at 8.

³⁹⁸ Letter to Editor, *Business Men at Fault*, N.Y. TIMES, Apr. 19, 1905, at 10. He said that sufficient business men generally were on juries and this ensured proper results but that business men should not avoid jury service because of these consequences. *Id.*

³⁹⁹ *Hired to Swing Juries in Car Suits, He Says*, N.Y. TIMES, Jan. 25, 1906, at 16.

⁴⁰⁰ *Says Boston Juries Have Proved Corrupt*, N.Y. TIMES, Sept. 12, 1923, at 21.

⁴⁰¹ See *Grand Juries and Bribery*, N.Y. TIMES, July 7, 1901, at 9.

⁴⁰² *Criminal Justice*, N.Y. TIMES, June 3, 1922, at 8.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

In the late 1920s, the intensity of the criticism of the jury increased. Public officials spoke affirmatively in favor of a shift in authority from juries to judges to promote justice and democracy. In 1928, at a meeting of the New York branch of the Federal Bar Association, Charles Evans Hughes, a former and future United States Supreme Court Justice, advocated greater power for judges and diminished authority for juries:⁴⁰⁵

Our hope for the progress of the administration of justice . . . lies not with juries, but with conscientious, able, industrious judges in the control of the business of their courts. Give the judge all the power he has and more, too. Of course, you must have able, conscientious men on the bench, but you will not get better judges by curtailing their functions and making them mere moderators of juries.⁴⁰⁶

He urged “[g]et[ting] rid of jury trials as much as possible” and said, “Often it is almost impossible to get a satisfactory one.”⁴⁰⁷ He called “the judge, the best servant in our democracy.”⁴⁰⁸ Fifteen years earlier Justice Hughes was one of the Justices in dissent in *Slocum*, one of the last significant pro-jury cases. Thus, he had earlier been against jury authority and now publicly expressed why: that the judge was the better decision maker.

The toastmaster of the event in which Hughes spoke, the United States Attorney, Charles H. Tuttle, echoed Hughes’s comments, recommending that Congress pass legislation passing more authority from the jury to the judge.⁴⁰⁹ While Tuttle discussed independent investigation by the grand jury, he also suggested that minor felonies should not require a grand jury indictment.⁴¹⁰ The fact that Hughes and Tuttle held significant authority respectively in the Supreme Court and in the executive, in addition to their obvious authority by their selection to address the New York branch of the Federal Bar Association, suggests that their anti-jury attitudes were not uncommon among other influential members of the bar. Hughes’s previous election as the President of the American Bar Association in 1925 also suggests that his views may have been common to the legal community.⁴¹¹

In this same time period, a lawyer gave a speech in favor of “retention of the jury system,” because “without it the United States would become corrupt.”⁴¹² This speech arguing for keeping the jury shows that there was a strong tide occurring against jury power. This same year, Justice McCook of the New York state courts advocated judges over juries:

⁴⁰⁵ See *Fewer Jury Trials Urged by Hughes*, N.Y. TIMES, Dec. 7, 1928, at 3.

⁴⁰⁶ *Id.* (quoting Charles Evan Hughes).

⁴⁰⁷ *Id.* (quoting Charles Evan Hughes).

⁴⁰⁸ *Id.* (quoting Charles Evan Hughes).

⁴⁰⁹ *Id.*

⁴¹⁰ See *Grand Jury Revives an Ancient Function*, N.Y. TIMES, Aug. 26, 1928, at 127.

⁴¹¹ See AM. BAR ASS’N, AMERICAN BAR ASSOCIATION 2014–2015 LEADERSHIP DIRECTORY 287 (2014).

⁴¹² *Steuer Says Juries Usually Are Right*, N.Y. TIMES, Dec. 28, 1928, at 30.

The jury is far from an efficient body, and never can be made so Also, a Judge should be preferred to a jury because of the time saved to the public and to the citizen compelled to serve. The jury represents democracy applied to legal problems. Of these it often makes a mess, just as the voters often do of *political problems*.⁴¹³

Again, that this justice advocated publicly against jury authority and in favor of his own authority suggests that there was significant sentiment against the jury in important circles.

In this time frame, there is evidence that the jury acted against the law. Through the jury, the community was said to react against harsh sentences for violations of liquor laws, with decisions to acquit or verdicts of guilt of a lesser charge.⁴¹⁴ At the same time, the business community continued to push for reform. The Merchants' Association released statistics that showed "clerks and salesmen predominate on the juries of New York County, and that merchants, bankers and manufacturers rarely are talesmen."⁴¹⁵ It asserted more convictions for crimes would occur if more executives served.⁴¹⁶ The importance of juries to companies is further demonstrated by Macy's decision to pay its employees while they served on juries.⁴¹⁷ The Executive Vice President of Macy's explained that

"[t]he Merchants' Association report reveals that from one-half to two-thirds of those drawn for jury duty in 1927 successfully evaded it This unwillingness on the part of a class best qualified to serve [merchants, bankers, and manufacturers] interferes seriously with the administration of justice in our courts."⁴¹⁸

Some years later in the 1930s, past concern that juries would be biased against business persisted. An article discussed the increase in car insurance premiums because juries rendered "sympathetic and excessive verdicts."⁴¹⁹ Also elsewhere there was continued reference to "[i]f we are to retain the

⁴¹³ *Justice Decries Juries*, N.Y. TIMES, Mar. 2, 1928, at 13 (emphasis added) (quoting Philip J. McCook, J.). In a letter to the editor in this period, the author discusses the civil congestion due to trial by jury, most of which are negligence cases. He states that although companies insist on jury trials, judges could decide the cases better than juries and in less time. Henry Waldman, Letter to the Editor, *Trials Without Juries*, N.Y. TIMES, Nov. 25, 1935, at 18.

⁴¹⁴ See *Liquor Laws and Juries*, N.Y. TIMES, Jan. 22, 1929, at 23.

⁴¹⁵ *Jury Duty Falls Mostly to Clerks*, N.Y. TIMES, July 12, 1928, at 14.

⁴¹⁶ *Id.* (quoting William J. Wells, Executive Vice President, Macy's).

⁴¹⁷ *Macy's to Pay Employees While They Serve on Juries*, N.Y. TIMES, Aug. 10, 1928, at 11.

⁴¹⁸ *Id.* (quoting William J. Wells, Executive Vice President, Macy's).

⁴¹⁹ C.L. Mosher, *Fake Claims Bring High Rates*, N.Y. TIMES, Nov. 8, 1936, at A8; see also Vincent T. Russo, Letter to Editor, 'Sympathy Decisions,' N.Y. TIMES, Nov. 4, 1936, at 30 (arguing that decisions by judges and jurors increase cost for insurance).

jury,” an intimation that there continued to be opinion expressed that juries should decide fewer cases.⁴²⁰

At the same time that juries were criticized because they did not include sufficient businessmen, juries became more diverse in other ways. While African-Americans and women had served on juries in some parts of the country in the past, the rights of these groups became firmer in this period. The right of women to serve on juries was debated and upheld in certain localities.⁴²¹ The Supreme Court also decided that African-Americans could not be excluded from juries based on race or color.⁴²²

In the 1940s, different interest groups continued their efforts to diversify the jury by eliminating exemptions⁴²³ and to include more women and African-Americans. However, judges had significant discretion to choose jurors.⁴²⁴ During the war, when many men were away, it became more difficult to find jurors deemed qualified.⁴²⁵ And in some places, only four jurors sat in civil cases.⁴²⁶ At the same time, blue-ribbon juries—“generally . . . drawn from a social and economic class different from that of the accused”—continued to be criticized as insufficiently representative of the community.⁴²⁷

While grand juries continued to serve important roles, for example in one instance issuing a report regarding bribery by public officials that involved the construction industry,⁴²⁸ criticisms persisted, including allegations that the

⁴²⁰ Charles S. Lobingier, Letter to the Editor, *Juries and Questions of Law*, N.Y. TIMES, Sept. 11, 1936, at 24.

⁴²¹ See *Frees Women from Juries*, N.Y. TIMES, Feb. 15, 1939, at 12; *Grand Jury Group Bars Women as Members in Westchester County*, N.Y. TIMES, Mar. 8, 1939, at 19; *Law Expert Doubts Women's Right to Serve on Grand Juries Here*, N.Y. TIMES, Sept. 28, 1938, at 27; *States That Admit Women Jurors*, N.Y. TIMES, Jan. 17, 1937, at 87; *Woman Juries Upheld*, N.Y. TIMES, Aug. 9, 1939, at 14; *Women 'Juries' Differ in Trying Same Case*, N.Y. TIMES, Sept. 23, 1937, at 31 (describing the first instance in which a woman was selected for a grand jury in federal court in New York); *Women on the Juries: A Continuing Debate*, N.Y. TIMES, Mar. 15, 1931, at 135 (debating in New York).

⁴²² *Norris v. Alabama*, 294 U.S. 587, 589 (1935); see also *High Court States Negro Rights Anew*, N.Y. TIMES, May 14, 1935, at 11; *The Scottsboro Case*, N.Y. TIMES, Jan. 25, 1936, at 14 (describing the unfair jury selection process that resulted in no African-Americans on the jury). The Supreme Court ordered a new trial of an African-American man convicted of murder of a white man by a jury that had excluded African-American membership. *Court Saves Negro Doomed by Whites*, N.Y. TIMES, Dec. 9, 1947, at 1.

⁴²³ See *Sheriffs' Juries*, N.Y. TIMES, Mar. 12, 1945, at 18.

⁴²⁴ *Ask Women Serve on Federal Juries*, N.Y. TIMES, Nov. 30, 1942, at 1.

⁴²⁵ See John C. Knox, 'Twelve Good Men and True,' N.Y. TIMES, Oct. 31, 1943, at SM16.

⁴²⁶ *Ohio Courts Cut Jurors to 4*, N.Y. TIMES, Jan. 22, 1942, at 19.

⁴²⁷ *Bars Blue-Ribbon Jury*, N.Y. TIMES, Feb. 26, 1941, at 23.

⁴²⁸ *Amen Juries Warn of Graft in City*, N.Y. TIMES, June 12, 1942, at 16.

grand jury failed to indict when it should.⁴²⁹ A measure to give juries additional power to recommend life sentences in all first-degree murder cases in New York carried few votes.⁴³⁰ One legislator stated that the jury “would ‘pass the buck’” and judges would join in this recommendation.⁴³¹

There was further emphasis that judges could better decide cases than jurors. “[A] judge, at worst, is apt to be more often right than a jury, and the poison of politics is a thing of the past, or almost so. It is not as much to be feared as bias among jurymen, especially in these times.”⁴³² Also, in this time period, the selection of jurors in the United States was referred to as “so often” “the long farce” and was unfavorably compared to the proper selection of jurors in England.⁴³³

The articles reviewed here do not discuss the executive. At the time, the executive aided by the legislature also demonstrated a desire to shift matters from the jury to other tribunals over which it had control. These shifts coincide with the beginning of the rise of the administrative state around the time of the New Deal in the 1930s.⁴³⁴ For example, on the labor side, Congress gave authority to the executive agency of the National Labor Relations Board to decide certain damages issues that arguably juries instead had authority to decide.

The articles reveal growing resistance to the jury’s authority over time. The public statements of judges against jury authority and in favor of judicial authority in the late 1920s coincide with the shift in the case law against jury authority in the 1930s, illustrated in Figure A.⁴³⁵ Moreover, criticisms that the jury did not include sufficient businessmen occurred around this time period, as did legislative efforts to include businessmen on juries. Also, as the jury continued to be more diverse in gender and race, the jury was less desirable to judges and corporations. It appears that the legal elites opposed jury authority and acted against it, ultimately succeeding in influencing the Supreme Court.⁴³⁶

⁴²⁹ See *Grand Jury Laxity Held Weakening Motor Law*, N.Y. TIMES, Aug. 14, 1943, at 12 (New Jersey); *Hudson Vote Frauds Are Linked to Juries*, N.Y. TIMES, May 27, 1943, at 17 (same).

⁴³⁰ *State Senate Kills Mercy Verdict Bill*, N.Y. TIMES, Apr. 2, 1941, at 17.

⁴³¹ *Id.* (quoting Sen. Quinn).

⁴³² J.W.A., Letter to the Editor, *Jury Trials Decreasing*, N.Y. TIMES, Sept. 7, 1941, at 77.

⁴³³ *An Old Right Suspended*, N.Y. TIMES, Aug. 30, 1941, at 12.

⁴³⁴ See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

⁴³⁵ See *infra* Figure A.

⁴³⁶ Indeed, connected to this idea of the influence of elites on the jury, the New Deal has been said to “possess an ideological character, a moral perspective, and a set of political relationships among policy elites, interest groups, and electoral constituencies that decidedly shaped American political life for forty years.” THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, at xi (Steve Fraser & Gary Gerstle eds., 1989).

These articles are consistent with the theory that over time legal elites and corporations sought to shift authority from the jury to the traditional actors. For example, in reaction to the *Slocum* case in which the Supreme Court decided that the procedure of judgment notwithstanding the verdict violated the Seventh Amendment, a committee of the American Bar Association was empanelled to draft federal legislation to permit judges to direct a judgment.⁴³⁷ Some state legislatures themselves actually enacted such procedures.⁴³⁸ This activity culminated in the *Redman* decision in which the Court changed its decision in favor of jury authority to find against jury authority.⁴³⁹ This result was praised as consistent with the value of efficiency.⁴⁴⁰

The traditional actors led by the Supreme Court have treated the jury differently than they have treated each other by denying any place for the jury in the constitutional structure. This has shifted jury authority to the traditional actors. As discussed here, why this shift has occurred, particularly in the 1930s, is a difficult question. While many reasons have been offered for the decline of the jury, such as the democratization of the jury, the question remains why has that “reason” contributed to the fall. For example, why has jury authority declined with the democratization of the jury? Previous literature, as well as public articles from the time period, reveals that the Supreme Court likely has been influenced by legal elites as well as by corporations to reduce jury authority over time.⁴⁴¹ There have been relationships between these actors and all of them have something to gain when the jury loses authority. They acquire power.

IV. CONCLUSION

Over the years, many different reasons have been offered for the declines of the criminal, civil, and grand juries, and their falls have not been connected. Primarily blamed are their purported incompetency, inaccuracy, inefficiency, and cost. The falls have not been associated with the previously unrecognized phenomenon of the usurpation by the executive, the legislature, the judiciary, and the states of the jury’s authority.

While the Supreme Court has protected and limited the traditional actors’ powers under the doctrines of separation of powers and federalism, it has not recognized a similar doctrine to protect and limit the separate power of the jury despite similar empowering text in the Constitution and the like intentions of the founders of the Constitution and ratifiers of the Fourteenth Amendment.

⁴³⁷ Lerner, *supra* note 39, at 876.

⁴³⁸ *Id.* at 877.

⁴³⁹ *Id.* at 877–78.

⁴⁴⁰ *Id.* at 878.

⁴⁴¹ See BURNS, *supra* note 28, at 96–97; Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13. See generally Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570 (1974) (arguing for abolishing jury trial by the Chief Judge of the United States District Court for Minnesota).

Instead, the Court has often originally acknowledged the jury's power, only to later redistribute that authority to a traditional actor. Deprived of doctrine legitimizing the jury as a separate power, the jury has lost significance with each decision in which the Court shifted its authority. This doctrinal void along with the jury's unique characteristics as unable to combat infringements on its authority places the jury in a precarious position in the constitutional structure. The cause of this treatment of the jury and thus its decline likely includes the influence of legal elites and corporations on the Supreme Court. This new theory of the jury's fall requires the debate over the jury to be reframed to the role that the traditional actors should play in our government in relationship to the role of the people or the jury.

