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## The Transformation of the American Civil Trial: The Silent Judge

Renée Lettow Lerner

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# THE TRANSFORMATION OF THE AMERICAN CIVIL TRIAL: THE SILENT JUDGE

RENÉE LETTOW LERNER\*

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## INTRODUCTION

The power juries wield over civil verdicts has caused concern in recent decades. Critics claim that unpredictable jury verdicts have undermined confidence in our civil justice system.<sup>1</sup> Many remedies have been proposed. Some advocate more vigorous use of summary judgment, or limits on awards—especially punitive damages—or greater use of mediation and arbitration.<sup>2</sup> Some even recommend abolishing the civil jury in certain types of cases.<sup>3</sup> This Article will explore the history of a method of jury guidance that is both rooted in tradition and respectful of juries' power: judicial comment on the evidence.<sup>4</sup>

Much has been made of the independence of juries in America's early history. But it is not so well understood that this formal independence coexisted with a large amount of informal influence by the judge on the jury.<sup>5</sup> Judicial comment on the evidence was one of these informal practices, and has deep roots in our legal traditions.

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1. See, e.g., Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, LAW & CONTEMP. PROBS., Summer 1997, at 73, 74-75 (arguing that "[s]ince juries receive minimum guidance from judges, awards are unpredictable"); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 163 & n.270 (1996) (claiming that American commerce is perceived to be hampered as a result of unpredictable jury damages).

2. See, e.g., Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 988-95, 1030-33 (1998) (advocating more vigorous use of summary judgment to cure jury unpredictability); Russel Myles & Kelly Reese, *Arbitration: Avoiding the Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129, 142-43 (1999); Jason Micah Ross, Note, "Baseball Litigation": A New Calculus for Awarding Damages in Tort Trials, 78 TEX. L. REV. 439 (1999) (arguing that jury damage awards are inconsistent and proposing "baseball litigation" as a reform). The concern about punitive damages is especially strong. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986) (contending that "the American civil liability system is approaching a crisis"); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2077-78 (1998).

3. See, e.g., *Abolition of Jury Trials in Patent Cases*, 34 IDEA 77 (1994); Josef Athanas, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 530-31.

4. Throughout this Article, "comment" refers to the practice of the trial judge giving his opinion on the facts at any point during the trial. "Summing up" or "summation" refers to the trial judge summarizing the facts at the end of a trial. It should be noted that restrictions on comment tend to have a chilling effect on all judicial interaction with the jury, including summing up evidence.

5. See Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 522-23, 527-29 (1996).

It was widely used in America for some time after the founding. In several states and in the federal courts, it remained vigorous into the twentieth century.<sup>6</sup> The practice grew out of the English courts, which continued to exercise the power to comment until the abolition of civil juries in England after the First World War.

Several seminal thinkers about the American legal system believed that the judge's ability to comment on evidence was crucial to the proper functioning of juries, especially civil juries. Tocqueville stressed how important it was in civil cases that the judge help to guide the jury: "It is he who unravels the various arguments they are finding it so hard to remember and takes them by the hand to guide them through procedural intricacies."<sup>7</sup> He acts as "a disinterested arbitrator between the litigants' passions."<sup>8</sup> Comments from the judge performed two important functions according to Tocqueville: They helped to ensure that justice was done and they served to educate jurors in the responsibilities of government.<sup>9</sup> "[T]he judge's advice," together with the lawyers' arguments and even the passions of the litigants, helped to give the

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6. The U.S. Supreme Court has repeatedly confirmed federal district courts' power to comment on evidence, the leading case being *Quercia v. United States*, 289 U.S. 466 (1933). There, the Court stated:

It is within [the district court's] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

*Id.* at 469. The Supreme Court has warned, however, that judges should be cautious in expressing an opinion on the ultimate fact of guilt in a criminal case. *See United States v. Murdock*, 290 U.S. 389, 394 (1933). Today, use of the power to comment on evidence is highly controversial. Some federal circuits have limited the district court's power more strictly, apparently contradicting *Quercia*. *See, e.g., Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 780 (9th Cir. 1990) ("Comments by the judge require reversal if the judge expresses his opinion on an ultimate issue of fact in front of the jury . . ."). My colleague Stephen Saltzburg has opposed judicial powers of comment, while Judge Jack Weinstein supports such powers. Compare Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 35-46 (1978), with Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988).

7. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1988) (1840).

8. *Id.*

9. *See id.*

jury "practical lessons in the law" so important in a democracy.<sup>10</sup> Indeed, Tocqueville says that for these reasons, the jury should be regarded as a "free school" for democracy.<sup>11</sup>

The gradual loss of the judges' power to give such advice was of great concern to some later observers. In the beginning of the twentieth century, John Wigmore wrote that the loss of judicial power to comment on evidence "has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice."<sup>12</sup> If the power were restored, he predicted "[a] new birth of long life will then be open for the great and beneficent institution of Trial by Jury."<sup>13</sup>

This Article will describe how this important power of judicial comment on the evidence was used earlier in our history and how it was lost. It was lost, the Article will propose, on a regional basis. Southern and western states led the way before the Civil War in restricting judges' ability to comment. Fortunately, legal historians have shown a growing appreciation of the role of regional differences in shaping law.<sup>14</sup> Regional distinctiveness is important,

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10. *Id.*

11. *See id.*

12. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2551, at 557 (2d ed. 1923).

13. *Id.*

14. Previously, regional differences had not been emphasized. Partly, this was because legal historians' work tended to focus on northern states, where records are better. An exception was a recognition of the importance of western states in the spread of the Field Code and codification generally. *See, e.g.,* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981). Western legal history is beginning to get more attention. *See, e.g.,* LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST (John McLaren et al. eds., 1992). Work on southern legal history tended to concentrate on one state at a time, making broader comparisons difficult. That, however, is also beginning to change. James Ely, Kermit Hall, James Bodenhamer, and Paul Finkelman have played important roles in encouraging work on the legal history of the South. *See* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (David J. Bodenhamer & James W. Ely, Jr. eds., 1984); AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr. eds., 1989); James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and American Legal History: The Southern Experience*, 39 VAND. L. REV. 539 (1986); Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985); *see also* MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878 (1980). Timothy Huebner has recently focused on southern judges. *See* TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 (1999). Huebner's work is a

and highlights the part that legal and social culture play in delineating the role of the judge, jury, and lawyers—in that or in any other time. Certain social and political conditions make it very difficult for a judge to take the jury “by the hand” to guide them, after the arguments of counsel.<sup>15</sup> If these conditions exist today, and it is not possible for judges to give meaningful guidance, we might well consider whether civil juries are worth the trouble. Jurors are denied the benefit of dispassionate advice from the judge, thus limiting the value of the “free school” of civil jury service.<sup>16</sup> And not least, jury awards are likely to remain unpredictable.

Historians and legal scholars have not examined the loss of judicial power to comment on evidence in much depth, despite its importance to the functioning of jury trials.<sup>17</sup> This most likely

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sensitive series of portraits of prominent southern judges, drawing mainly on appellate opinions and judges' papers. The book is part of a new series entitled “Studies in the Legal History of the South,” edited by Paul Finkelman and Kermit L. Hall. Peter Karsten has also recognized the importance of regionalism in the development of law, arguing that northeastern judges tended to follow a jurisprudence of the “Head,” while southerners and westerners were more inclined to follow their “Heart.” PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 77, 306-12 (1997).

15. TOCQUEVILLE, *supra* note 7, at 275.

16. *See id.*

17. The only reasonably thorough effort in the late twentieth century to deal with the loss of American judges' power to comment on evidence is a piece by Kenneth Krasity in the mid-1980s. *See* Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595 (1985). He tentatively proposes the “division of functions” explanation described *infra*. *See id.* at 621. Others have simply noted the change. Friedman, for instance, laments the loss of clarity and metaphor caused by “hamstringing” the judge, but points out that these restrictions did further jury autonomy. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 155 (2d ed. 1985). The importance of losing this judicial power was far better recognized earlier in the century. A roster of heavy-hitting historians mourned the loss of judges' comments on evidence, without going into detail about why that loss might have occurred. *See, e.g.,* JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 97 (1950) (noting in passing that this loss had the effect of empowering lawyers); ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 310-11 (1952); JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 188 n.2 (Augustus M. Kelly Publishers 1969) (1898) (noting the “separate spheres” principle); 5 WIGMORE, *supra* note 12, § 2551, at 557. For a time, the Journal of the American Judicature Society put some emphasis on this issue, and a few of its pieces placed the blame squarely on lawyers. *See* George M. Hogan, *The Strangled Judge*, 14 J. AM. JUDICATURE SOC'Y 116 (1930); Kenneth M. Johnson, *Province of the Judge in Jury Trials*, 12 J. AM. JUDICATURE SOC'Y 76 (1928). One early writer, arguing that “no single reform would have so wide-reaching and wholesome an effect” on procedure as a return to the common law practice permitting judicial comment on evidence, noted that the movement was indigenous

reflects the greater attention paid to the history of substantive law compared to the history of procedure,<sup>18</sup> and the difficulty of understanding informal practices such as comment on the evidence. To the extent there has been any investigation of the subject, scholars have tended to suggest two broad reasons for the loss of the power to comment. First, loss of the power is thought to be a natural outcome of division of functions between judge and jury into separate spheres, with the judge deciding the law and the jury the facts.<sup>19</sup> Second, populist tendencies associated with Jacksonian democracy are said to have encouraged such limitations on the judges' power.<sup>20</sup> These limitations included popular election of judges as well as prohibitions on comment.

There is truth to both explanations, although the story is more interesting than that. Both of these reasons leave out the important role of regional differences in determining whether judges retained or lost the power.<sup>21</sup> The two explanations above would seem to be valid in many parts of America before the Civil War, whereas in fact judges lost the power almost exclusively in the South and West during this period. Certain conditions in the South and West seem

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to the South. Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 307-08, 316 (1915).

18. This lack of emphasis on the history of procedure is especially regrettable because, as Holmes pointed out, procedural law is more dependent on past arrangements than substantive law. "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past." OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark De Wolfe Howe ed., 1963) (1881). There have been and are now some first-rate legal historians interested in the history of procedure and institutions, such as John Dawson, James Hurst, John Langbein, William Nelson, and Daniel Ernst.

19. See, e.g., THAYER, *supra* note 17, at 188 n.2; Krasity, *supra* note 17, at 621.

20. See, e.g., Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 193 (1993).

21. George Fisher has discovered a regional pattern of change in other procedural rules in the nineteenth century: allowing sworn testimony by criminal defendants and testimony by civil parties. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 667-73 (1997). In both of these cases, he notes that the North was in the vanguard of change and convincingly argues that the reason the South was reluctant to adopt reforms has to do with rules barring testimony by nonwhite people in the South. See *id.* at 673-76. Similarly, this Article argues that the South (and West) were in the *forefront* of change prohibiting judges to comment on evidence because of social and political differences in those areas. As Fisher suggests, neither region should be viewed as more "reformist" overall than the other. See *id.* at 670-71.

to have made these areas more likely to restrict judges' power by prohibiting comment.

First, in many parts of the South and West, governmental or official authority, such as that of judges, was little respected. Physical and verbal violence abounded, and the courtroom was no exception. Coupled with this violence and disdain for official authority was a fierce independence and faith in "plain common sense," as opposed to legal learning or traditions such as the judge commenting on evidence. Sometimes judges themselves were physically or verbally violent, and shared the common perception that legal learning and traditions were pedantic and useless. Such an atmosphere did not encourage judges to calmly comment on evidence, even if they wanted to.

Second, the legal profession was different in the South and West. It is important to remember that judges and juries are not the only players where judicial powers such as comment on evidence are concerned. Lawyers stand to gain more control over a trial if the judge is prevented from exercising such powers.<sup>22</sup> The "separate spheres" and "democratic populism" arguments described above tend to obscure this point. Lawyers in the antebellum South and West for the most part seem to have been extremely aggressive and jealous of courtroom control. They were fully as physically

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22. This point was well understood by commentators in an era when judicial comment on evidence was still used, and could be contrasted with those jurisdictions where the judge's role was more sharply limited. See Hogan, *supra* note 17; Johnson, *supra* note 17. The differing interests of lawyers and strong judges have often been overlooked. In part, this may be because historians such as Morton Horwitz have tended to lump lawyers and judges together as part of a monolithic monied elite, and have failed to make more subtle distinctions between the two. Horwitz's influence has of course been great. To mention but one example, directly relevant to the inquiry here, see Kenneth Krasity's citation of Horwitz for the statement that "[p]owerful elements of the bar and merchant community formed a coalition interested in limiting the jury and strengthening the judiciary." Krasity, *supra* note 17, at 610 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 141 (1977)). Horwitz is not alone; Roscoe Pound was also guilty of lumping the bench and bar together inappropriately. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953). In part, this downplaying of the different interests may be the result of a focus on substantive law, with its great questions of judicial review and the countermajoritarian difficulty. Lawyers as a group are not necessarily opposed to powers such as judicial review; they may well welcome the opportunity to persuade a judge to exercise this sort of authority. But trial procedure is more of a zero-sum game between the lawyers and the judge. The more important the role of the judge, the less important that of the lawyers. This is evident to those who are familiar with trials in an inquisitorial system.

violent as their nonlawyer peers, and even more given to abusive language. They reveled in the culture of passionate rhetoric prevalent at the time. They were entrepreneurial and independent of court control in the matter of fees. Perhaps most importantly, they were deeply involved in politics and partisan struggles, to a greater extent than their northern counterparts. This gave them (or a significant number of them) power in the legislatures and constitutional conventions to put in place prohibitions on judicial comment—comment that could interfere with their efforts to sway the jury.

The Article draws on a wide variety of nineteenth-century sources to clarify how comment on the evidence was used, and the reasons for its loss. These sources include treatises, appellate opinions, trial court records,<sup>23</sup> reports of debates in state constitutional conventions, legal periodicals, newspapers, memoirs, and letters of lawyers and judges. In addition, the Article employs a range of secondary material from the legal and historical fields.

The Article will begin in Part I by describing how judicial comment on the evidence worked in the early nineteenth century, and the reasons why it was considered important. Most American judges followed the English style of an informal, close relationship with the jury. They freely commented on evidence, and appellate courts rarely interfered.

In Part II, the Article turns to the question of how the power was lost. That part first considers the thesis that judicial elections were closely linked to the movement to prohibit comment, and concludes that such a link did not exist except in parts of the South and West. Part II then discusses the distinct legal and social culture of the South and West to help explain the curtailing of judges' power. The Article describes the extraordinary atmosphere of southern and

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23. For the purposes of this topic, trial court records turned out to add little information beyond what was reported in appellate opinions. The report of the case contained in the appellate opinion was often simply copied verbatim from the trial judge's or counsel's report, which was usually the only source of information about the judge's charge to the jury in the trial court records. If the trial judge wrote the report, counsel examined it before it went to the appellate court; if counsel wrote the report, the trial judge examined it. Sometimes these reports were thorough, sometimes not. Before the Civil War, there were no court stenographers taking down a verbatim transcript of proceedings; the technology first came into use in courtrooms shortly after the war. See *infra* note 343 and accompanying text.

western courtrooms, permeated with rowdiness, violence, insults, and passionate rhetoric from the lawyers. This milieu made it very difficult for a judge to assert control by means of unruffled comment on evidence. The aggressive southern and western legal professions are considered and contrasted with their more traditional northern counterparts.

Part III then builds on this groundwork by describing exactly how change occurred in the southern and western states. That part gives details of the specific legislative and constitutional provisions adopted and the debates surrounding them—debates that were conducted almost exclusively by lawyers and that reflect the cultural factors discussed earlier. Part III also discusses how courts reacted to these legislative and constitutional provisions, and concludes that courts in the end put heavier emphasis on the expensive, formal remedy of new trial.

The conclusion compares our legal and social culture today with that of the South and West before the Civil War. This is a step toward ascertaining what the role of the judge might be today, including whether it is even possible to resurrect judicial comment on evidence.

## I. JUDICIAL POWER TO COMMENT ON THE EVIDENCE IN ANTEBELLUM AMERICA

### *A. Following in English Footsteps: Informal Control of Juries*

Early American judges understood the influence English judges had over the jury concerning questions of fact, and for the most part, they copied it as best they could. It is hard for us today, with our rigid rules governing speaking in the courtroom, to picture how close and informal the relationship between English judges and juries was in the eighteenth and early nineteenth centuries.<sup>24</sup> Comments and questions continually went back and forth between them at trial.

The English judges had at their disposal many means of influencing the jury, but chief among them was the power to

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24. See, e.g., John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285 (1978).

comment on the evidence. Matthew Hale described the trial judge's power in the seventeenth century:

Herein he is able in Matters of Law emerging upon the Evidence to direct them; and also, in Matters of Fact, to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by sh[ow]ing them his Opinion even in matter of Fact, which is a great Advantage and Light to Laymen.<sup>25</sup>

After *Bushell's Case*, jurors could no longer be imprisoned for finding a verdict against the judge's wishes.<sup>26</sup> But judges found other means that were almost as effective—jurors could be cajoled, argued to, reasoned with, influenced informally even before instructions, and sent out to deliberate again if their proposed verdict was not to the judge's liking.<sup>27</sup> The result was that the jury very often followed the judge's lead.<sup>28</sup> Judges viewed verdicts as the fruit of a partnership between judge and jury, and there was no doubt as to who was the senior partner.<sup>29</sup> To be sure, English judges acknowledged the traditional division of labor between judges and juries: Judges were to determine the law and juries to decide the facts.<sup>30</sup> But English judges had so much influence over jury fact

25. MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 164-65 (Charles M. Gray ed., The University of Chicago Press 1971) (1713).

26. 1 Vaughan 135, 146-47, 124 Eng. Rep. 1006, 1011-12 (C.P. 1670).

27. See Langbein, *supra* note 24, at 284, 300.

28. See *id.* at 285.

29. Bryce gives the flavor of the judges' position in English society and the state, which had not changed from the eighteenth century:

For some centuries Englishmen have associated the ideas of power, dignity, and intellectual eminence with the judicial office. . . . When [the judges] traverse the country on their circuits, they are received by the High Sheriff of each county with the ceremonious pomp of the Middle Ages, and followed hither and thither by admiring crowds. The criticisms of an outspoken press rarely assail their ability, hardly ever their fairness. Even the Bar . . . treats them with more respect than is commonly shown by the clergy to the bishops.

2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 511 (2d ed., London, MacMillan 1891).

30. Mansfield glorified this proposition with a Latin tag—"*[a]d quaestionem juris non respondent juratores; ad quaestionem facti non respondent iudices*"—even as he enforced sharp limitations on the jury's power in seditious libel cases. *The King v. Shipley* (Dean of St. Asaph), 4 Dougl. 73, 169, 99 Eng. Rep. 774, 824 (K.B. 1784).

finding that the division in practice rarely mattered. Lawyers were not permitted to interfere with this close and informal relationship.

After a brief revolutionary period in which American lawyers and politicians extolled jury power and independence, the new nation settled down to the serious business of building a fair and predictable legal system.<sup>31</sup> Like their English counterparts, American judges asserted control over law, but also had to maintain some control over fact; otherwise control over law could rarely affect the outcome of cases. To do this, American judges turned to English precedents and developed a similar panoply of methods to control juries.<sup>32</sup> One of the main tools they used was new trial for verdict against evidence.<sup>33</sup> The standard was changed in many states to allow freer use of this form of new trial; instead of requiring that there be no evidence on one side, courts began to say simply that the evidence on the other side must "greatly preponderate."<sup>34</sup> Especially in commercial cases, judges were careful to control outcomes in this way; they recognized that predictability was important to economic growth.<sup>35</sup> Granting new trials, however, was not a cheap remedy; obviously, the whole thing had to be done again, consuming time and money. Perhaps for this reason, lawyers tended to favor this method of jury control.<sup>36</sup>

But American judges also developed the much less expensive, informal methods of jury control favored by their English counterparts.<sup>37</sup> They saw their job, at least in part, as making sure

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31. See Lettow, *supra* note 5, at 518-21.

32. See *id.* at 521-23.

33. See *id.* at 524-26. Early on, judges used juror affidavits about what happened during deliberations to justify their decisions to grant new trials for verdict against evidence. But as time went on and judicial confidence built, judges came to rely simply on their own judgment of the evidence presented at trial. See *id.* at 526. Among other reasons, there were fears that parties might tamper with jurors after a verdict was brought in. See *id.* at 534-35.

34. See *id.* at 544-46.

35. See *id.* at 546-47. The question of whether a new trial for verdict against evidence should be granted was technically a question of law—a question of the sufficiency of proof. A favorite method of gaining control over jury verdicts was to convert what had been questions of fact for the jury into questions of law for the judge. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 169 (1975).

36. See, e.g., *Trial by Jury: Remarks of Mr. Deford of Fayette*, 1 PA. L.J. 99, 103 (1842)[hereinafter *Trial by Jury*].

37. Often those courts that were most vigorous in granting new trials were also most supportive of informal methods of control. See Lettow, *supra* note 5, at 521-26.

that the substantive result was correct the first time around. A typical example comes from a nineteenth-century federal court trying a railroad accident case.<sup>38</sup> The plaintiff was a passenger injured in the caboose when the train broke in two.<sup>39</sup> The train conductor made a written report at the time, suggesting negligence on the part of the railroad, but at trial testified "flippantly" to a wholly different set of facts.<sup>40</sup> When confronted with his written report, he said it was made "in order to hold his job."<sup>41</sup> The judge summed up the evidence for the jury, adding:

It is for you, gentlemen, to say what weight is to be given to the testimony of this witness under these circumstances. For my own part, I should consider how likely he is now to be testifying 'in order to hold his job,' and if I had to weigh his testimony would make no account of it at all, except so far as it is corroborated by other testimony or by circumstances.<sup>42</sup>

The jury followed the judge's suggestion and brought in a verdict showing that they had disregarded the witness's testimony.<sup>43</sup>

After the Revolution, American judges gained the confidence to discuss frankly with the jury what the result should be. Judges were not forced into rigid channels of formal communication. Their relations with juries were almost as informal and free-flowing as that of the English judges, allowing for give and take throughout the trial and beyond. Even after instructions were given, the jury might come back to the judge for guidance and discuss with him their doubts about the facts and the weight of different pieces of evidence. The judge was then permitted to guide the jury, though he could not positively direct them to find a certain way.<sup>44</sup>

And when the jury came in with its verdict, discussions were not necessarily over. Judges in several American jurisdictions asked jurors the grounds of their decision when they gave their verdict.

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38. The account of the trial is given in William G. Hastings, Book Review, 10 ILL. L. REV. 673, 677 (1916).

39. *See id.*

40. *See id.*

41. *Id.*

42. *Id.*

43. *See id.*

44. *See, e.g., Allen v. Kopman*, 32 Ky. 222, 2 Dana 221 (1834).

This then opened a colloquy about the soundness of those reasons. As in England, the jury could be instructed again and sent out to redeliberate. The practice was especially strong in Connecticut, and seems to have spread from there to several New England states.<sup>45</sup> There are suggestions in some cases that the judge may have had an idea of which way the jury was leaning before it went out to deliberate.<sup>46</sup> This knowledge would undoubtedly have helped judges tailor their instructions, emphasizing certain points as necessary. All of this informal discussion, so unlike the modern black box, helped judges ensure that the result reached was correct according to the facts and the law.<sup>47</sup> It also saved a great deal of time and money, sparing judges from having to order the expensive remedy of new trial. Not surprisingly, lawyers were on the whole less enthusiastic about judges using these informal methods of jury control.

### B. *The Treatises*

American judges supported their use of informal methods of jury control by quoting English caselaw and treatises. The treatises were especially influential in an era when legal professionals needed a compact, concise statement of the law. The first treatises in America were English ones, often in special American editions with homegrown annotations. These clearly set forth the extensive English power of comment on the evidence.

The old standby, which everyone with any pretensions to legal learning had read, was of course Blackstone's *Commentaries*.

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45. See Lettow, *supra* note 5, at 523.

46. See *Train v. Collins*, 19 Mass. 144, 152-54, 2 Pick. 145, 153-54 (1824).

47. It is interesting to compare the older, more informal approach to judge-jury interaction with the modern hesitation of trial judges to communicate with the jury on anything but the most rigidly formal level. This modern rigidity is especially pronounced in cases in which appellate courts have laid down extensive pattern instructions, as in death penalty cases. Sometimes, this rigidity works to prevent the jury from getting simple clarification of instructions. In *Weeks v. Angelone*, for example, the trial court would not answer the jury's question whether it was required to impose the death penalty if it found an aggravating factor beyond a reasonable doubt. 120 S. Ct. 727, 730-31 (2000). The answer was clearly "no," *see id.* at 732; however, the judge, no doubt fearful of being reversed on appeal should he deviate even slightly from the approved instruction, merely directed the jury's attention to a paragraph of the written instructions already given. *See id.* at 730-31. The instructions had been previously approved in *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998). *See Weeks*, 120 S. Ct. at 732.

Blackstone made clear the trial judge's power to comment on evidence.<sup>48</sup> Most forceful of all was the popular English treatise Joseph Chitty's *General Practice*.<sup>49</sup> Nineteenth-century American lawyers carried around Chitty as they would carry their Bible. One Missouri judge described the lawyer's legal arsenal: "By memorizing Chitty, the Missouri statutes and decisions of the Missouri Supreme Court, he is armed at all points."<sup>50</sup> When Abraham Lincoln was asked to give advice on what a young lawyer should read, he named Chitty second only after Blackstone on a very short list.<sup>51</sup>

Chitty said that, at the conclusion of the trial, the judge states the substance of the plaintiff's claim and of the defendant's grounds of defense:

He then, from his notes, (sometimes reading them *verbatim*) states the *evidence* adduced for each party, pointing out as he proceeds to which material question or issue this or that particular part of the evidence may apply, and commenting occasionally on the nature of the evidence and circumstances which attach credit to it.<sup>52</sup>

This comment could be powerful:

It is the practice for the judge at nisi prius not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, *and even to advise them as regards the verdict they should give, so that it may accord with his view of the law and justice*; so that in effect, in general, the jury only give their opinion on the *existence of facts*, and even then, in general, they follow the advice of the judge, and therefore *in substance, the verdict is found or anticipated by the judge's direction*.<sup>53</sup>

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48. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375 (George Tucker ed., Augustus M. Kelly Publishers 1969) (1803).

49. See JOSEPH CHITTY, THE PRACTICE OF LAW IN ALL ITS DEPARTMENTS (Philadelphia, P.H. Nicklin & T. Johnson 1836).

50. Judge William B. Napton, *quoted in* WILLIAM FRANCIS ENGLISH, PIONEER LAWYER AND JURIST IN MISSOURI 98 (1947).

51. See Letter from Abraham Lincoln to James T. Thornton (Dec. 2, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 344 (Roy P. Basler ed., 1953).

52. 3 CHITTY, *supra* note 49, at 911-12.

53. 3 *id.* at 913 (emphasis added).

In Chitty's view, this great influence over the jury was necessary to curb the power of strong advocacy: "[W]ithout this assistance from the learned judge, few juries would, in a contested cause, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending leaders [i.e., counsel]."<sup>54</sup> The lawyers could not be left to sway the jury without the intervention of the judge.

Eventually, Americans produced treatises of their own, and these also emphasized the English practice of commenting on evidence. The first American treatise to be devoted entirely to new trials—what we would now think of as grounds for appeal—was written by David Graham and published in New York in 1834.<sup>55</sup> For several pages, Graham tackled the question "[w]hether, and how far, the judges may transcend the limits assigned them, on questions of law, and express their opinions on the truth or weight of the testimony in their charge to the jury."<sup>56</sup> He concluded, "[i]t would appear from the practice in England, and in this country, in most, if not all of the states, a large discretion is allowed, and unless abused to the subversion of justice, the courts are disinclined to interfere."<sup>57</sup>

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54. 3 *id.*

55. See DAVID GRAHAM, AN ESSAY ON NEW TRIALS (New York, Halsted & Voorhies 1834). Graham (1808-1852) was a well-educated, well-respected legal writer, practitioner, and sometime Whig politician. The son of a cultured Presbyterian minister from northern Ireland who became a lawyer after arriving in New York City, Graham was educated by his father and entered into practice with him in 1829. In 1832, when he was only 24, he published *A Treatise on the Practice of the Supreme Court of the State of New York*, which was "received with enthusiasm by the profession" and replaced existing books on practice until the code of procedure was promulgated in 1850. 7 *DICTIONARY OF AMERICAN BIOGRAPHY* 472 (Allen Johnson & Dumas Malone eds., 1931). In 1834, the same year he published *An Essay on New Trials*, he was elected, at the age of 26, an alderman of New York City as a Whig. He published *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York* in 1839. In addition to his legal writing, he had considerable success as a courtroom advocate, most notably appearing as defense counsel in the capital murder case of *The People v. White*. In 1848, the New York legislature appointed him to be one of the commissioners on practice and pleadings. This commission was dominated by David Dudley Field and produced what came to be known as the Field Code, although there is some suggestion Graham played an active role in drafting the code of civil procedure. See 7 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra*, at 471-72.

56. GRAHAM, *supra* note 55, at 310.

57. *Id.*

Graham's treatise was revised and reissued by Thomas Waterman in 1855, so thoroughly that it should be considered a separate treatise.<sup>58</sup> Waterman's summary of practice in 1855 is the same as Graham's in 1834:

The expression, by the judge, of an opinion upon the evidence, therefore, however strong or decided, has been held not to be objectionable, where it is given merely as his opinion, and the jury, notwithstanding it, are at full liberty to entertain their own views, and to decide accordingly: it being deemed to be in the nature of a simple avowal, and not an authoritative direction.<sup>59</sup>

Waterman, however, disapproved of this rule as undemocratic, and lamented that "it is too strongly established to be suddenly overthrown."<sup>60</sup> In the time between Graham and Waterman, the practice had become more controversial in some quarters.

### C. *The Necessity of Comment: Reasons for the Power*

Graham and Waterman accurately described most states' approach; most early-nineteenth-century judges firmly believed in the necessity of judges commenting on evidence, for two reasons. First, they said, jurors were often less educated and more inexperienced in sifting through evidence than judges. Second, and more importantly, a particularly skilled lawyer could unjustly influence the jury to give a verdict in favor of his client.

On the first point, appellate courts noted that judges by and large possessed the valuable qualities of impartiality and intelligence and

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58. See THOMAS W. WATERMAN, A TREATISE ON THE PRINCIPLES OF LAW AND EQUITY WHICH GOVERN COURTS IN THE GRANTING OF NEW TRIALS IN CASES CIVIL AND CRIMINAL (New York, Banks, Gould & Co. 1855). Waterman (1821-1898) was, on paper at least, better educated than Graham. The son of a Yale-educated district attorney and businessman in Binghamton, New York, he entered Yale college himself in 1838. After three years at Yale, he traveled throughout England and the Continent for several years. He began practice in New York City in 1848, and wrote extensively and edited legal works throughout his career. His best-known work was the three-volume *American Chancery Digest*, published in 1851, which included state and federal equity decisions and an introduction describing equity courts and their jurisdiction. See 19 DICTIONARY OF AMERICAN BIOGRAPHY 535-36 (Dumas Malone ed., 1936).

59. 3 WATERMAN, *supra* note 58, at 726.

60. 3 *id.* at 730.

were, in addition, more experienced in sorting through evidence than the average juror. Well-respected Judge Ruffin of the North Carolina Supreme Court said that "elucidations from an upright, learned, and discreet" judge, who was "habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so, but really reconcilable, would be of infinite utility to a conscientious jury in arriving at just conclusions."<sup>61</sup> Impartial judges could help to control jurors subject to the sway of popular opinion or passion against an unpopular group or cause. Federalists such as Joseph Story were especially concerned about anti-insurance company bias among jurors.<sup>62</sup>

On the second point, American judges' prime concern echoed Chitty: Without judicial comment, jurors would succumb to the influence of partisan lawyers. Lawyers would be able to take advantage of the jury's most salient weaknesses by introducing unjustified confusion about the evidence or by playing upon jurors' preexisting biases. Judicial comment was viewed as a much-needed antidote to counteract lawyerly excesses. Judge Ruffin of North Carolina believed that "after the able and ingenious, but interested and partial arguments of counsel," justice would be better served by the judge following with "his own calm, discreet, sensible and impartial summary of the case, including both law and fact."<sup>63</sup> The judge should be empowered to "aid[ ] the jury by rescuing the case from the false glosses of powerful advocates."<sup>64</sup>

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61. *State v. Moses*, 13 N.C. 292, 296, 2 Dev. 452, 458 (1830). Ruffin hailed from the Virginia Tidewater elite and was a well-educated man, having studied, like his fellow Virginian James Madison, at the College of New Jersey (later Princeton). As a young man he was strongly attracted to Jefferson's party. But over the course of his career he became a staunch defender of the independence of the judiciary against both the legislature and the people. See HUEBNER, *supra* note 14, at 131-35. In *Hoke v. Henderson*, he struck down as unconstitutional a statute providing for popular election of court clerks, on the grounds that the office taken was property. 15 N.C. 1, 12-15, 4 Dev. 1, 15-19 (1833). In the opinion he issued a stern warning about judicial independence being necessary for impartiality on the bench. See *id.* at 18, 4 Dev. at 23; see also Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW AND HIST. REV. 129, 148-58 (1986) (discussing Ruffin's decision in *Hoke*).

62. See Lettow, *supra* note 5, at 546-47. Story wrote in the context of a marine insurance case that "in mercantile causes, [merchants] are not fond of juries." 1 LIFE AND LETTERS OF JOSEPH STORY 270 (William W. Story ed., Boston, C.C. Little and J. Brown 1851).

63. *Moses*, 13 N.C. at 296, 2 Dev. at 458.

64. *Id.* at 299, 2 Dev. at 462.

Ruffin knew whereof he spoke; he had been a powerful advocate himself, with a manner that was "rough and often offensive,"<sup>65</sup> and he could become so excited during an examination or argument that he "would sometimes knock the floor instead of the table with his knuckles."<sup>66</sup> Ruffin criticized the North Carolina statute forbidding judges to give their opinion on a case<sup>67</sup> and maintained that "[i]f this duty [of comment] were imposed on the judge, it is not to be questioned, that success would oftener than it does depend on the justice of the case, rather than the ability or adroitness of the advocate."<sup>68</sup>

### *D. Appellate Encouragement of Commenting on Evidence*

Most appellate courts, animated by these arguments in favor of judicial comment, gave trial judges great leeway in this area. In case after case in the first half of the nineteenth century, appellate judges affirmed the power of trial judges to give their opinion on the evidence. For the most part, American appellate courts emphasized that the relationship between judge and jury was a collaboration, not a combat or competition. Again and again, opinions speak of judges "aiding" the jury, and vice versa. They were partners working together to reach a verdict.

The opinions borrowed the rhetoric of English courts, together with their doctrine. Many of the judges who asserted this power most forcefully were in states that used the English *nisi prius* system, whereby appellate judges also acted as trial judges. These judges thus did not feel the strong division between the trial and appellate bench that exists today.<sup>69</sup> The ability to comment was

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65. 2 THE PAPERS OF ARCHIBALD D. MURPHEY 427 (William Henry Hoyt ed., 1914).

66. Fannie Memory Farmer, *Legal Practice and Ethics in North Carolina, 1820-1860*, 30 N.C. HIST. REV. 329, 339 (1953).

67. See *infra* note 244 and accompanying text.

68. *Moses*, 13 N.C. at 296, 2 Dev. at 458.

69. Hurst noted the "unfortunate significance" of terms such as "inferior courts" and judges and "the court below," which crept into the legal vocabulary once the states abandoned the English *nisi prius* system and put in place appellate courts with separate personnel. See HURST, *supra* note 17, at 98-99. In Hurst's view, these terms "implied that such courts were less important and could get along with something less than first-rate judges or standards of operation." *Id.* at 98. The shift doubtless encouraged appellate courts to limit trial judges' informal powers, such as commenting on the evidence.

generally the same in both civil and criminal cases, and often had considerable influence on the jury.

Judges often asserted their power vigorously.<sup>70</sup> In Massachusetts, a state that used the English *nisi prius* system, Chief Justice Parker was impatient of an argument that a trial judge had improperly commented on evidence in a criminal libel case: "We know of no rule requiring the judge to conceal his opinion. He is to comment upon the evidence."<sup>71</sup> He asked rhetorically: "Is he to do it by merely stating that one witness says this thing and another says that? Has he not power to say, this evidence is weak and that evidence is strong?"<sup>72</sup> Chief Justice Parker said that, for his part, where the evidence on both sides was nearly balanced, "I endeavour to leave it to the jury to decide which scale preponderates; but if the evidence on one side is strong, compared with that on the other side, I think it my duty to make the jury comprehend that it is so."<sup>73</sup> Parker aggressively rejected challenges to the judges' discretion: "The next step will be, to move for a new trial on account of the expression of countenance of the judge. . . . Confidence must be reposed in the [judiciary]."<sup>74</sup>

In several key jurisdictions, the only remedy for inappropriate judicial comment was a new trial for verdict against evidence.<sup>75</sup> In

70. See, e.g., *Governor v. Shelby*, 2 Blackf. 26 (Ind. 1826); *Jarman v. Howard*, 10 Ky. 1209, 3 A.K. Marsh. 383 (1821); *Burt v. Gwinn*, 8 Md. 404, 4 H. & J. 507 (1819); *Sneed v. Creath*, 8 N.C. 157, 1 Hawks 309 (1821); *Stouffer v. Latshaw*, 2 Watts 165 (Pa. 1834); *Malson v. Fry*, 1 Watts 433 (Pa. 1833); *Conner v. State*, 10 Tenn. 111, 4 Yer. 136 (1833); *Roper v. Stone*, 3 Tenn. (1 Cooke) 497 (1814); *Gordon v. Tabor*, 5 Vt. 31 (1833).

71. *Commonwealth v. Child*, 27 Mass. 252, 256, 10 Pick. 252, 256 (1830). *Commonwealth v. Child* was a criminal libel case laden with political overtones. David Child allegedly libeled John Keyes, a member of the Senate of the General Court of Massachusetts and chairman of the Committee of Accounts, by accusing Keyes in the *Massachusetts Journal* of having rigged a bidding contest for a government printing job in favor of the Jacksonian newspaper the *Boston Statesman*. See Presentment of the Grand Jury, *Commonwealth v. Child*, in *Supreme Judicial Court Records 1830-1834*, at 259-60 (Oct. 1832) (available at the Massachusetts State Archives). Note that Chief Justice Parker, a federalist, was approving of a judge who summed up a case against a (presumably federalist) opponent of a Jacksonian. On Chief Justice Parker's politics and judicial career, see Russell K. Osgood, *Isaac Parker: Republican Judge, Federalist Values*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, at 153 (Russell K. Osgood ed., 1992).

72. *Id.* at 256, 10 Pick. at 256.

73. *Id.*

74. *Id.*

75. See, e.g., *Sims v. Reed*, 51 Ky. (12 B. Mon.) 51, 54-55 (1851); *Child*, 27 Mass. at 256, 10 Pick. at 257; *Flanders v. Colby*, 28 N.H. 34, 39 (1853); *Woodbeck v. Keller*, 6 Cow. 118, 123

other words, appellate courts would step in only if the jury's verdict was clearly wrong.<sup>76</sup> Courts in other states did not explicitly adopt that standard, but still allowed trial judges considerable discretion. In almost every state, judges could even direct a jury to find a particular verdict as long as, if the jury found the opposite way, a new trial for verdict against evidence would be granted.<sup>77</sup> An expensive additional trial could therefore be prevented. The jury itself, according to some judges, would help to police problematic comment. "Though an undue influence may be exerted upon the jury by the manner of a judge, yet the law presumes intelligence in the jury," and if they see any improper attempt to influence them, said Parker in *Commonwealth v. Child*, they would more likely find "against the opinion of the judge" than with him.<sup>78</sup>

In view of the benefits of judges commenting on evidence, some appellate courts were concerned that trial judges might comment too little. They devised ways to force judges to comment, mainly by turning what would appear to be questions of fact into questions of law.<sup>79</sup> In *Dunlop v. Patterson*, an 1825 case of trover for a boat, the Supreme Court of New York actually granted a new trial because

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(N.Y. Sup. Ct. 1826) (citing *Beers v. Root*, 9 Johns. 264 (N.Y. Sup. Ct. 1812), and *Feeter v. Whipple*, 8 Johns. 369 (N.Y. Sup. Ct. 1811)).

76. See *supra* notes 33-36 and accompanying text for a discussion of the standard for new trial for verdict against evidence. Note that using this standard to determine if judicial comment went too far relieved the appellate court of the duty to speculate about the subjective effect the comment might have had on the jury. The reviewing court simply looked at whether the jury's verdict was in line with the evidence at trial, an objective standard. The debate over whether judges reviewing mistakes in jury instructions should focus more on the correctness of the verdict or on possible effects on the jury crops up today in discussions of harmless error. Compare *Neder v. United States*, 527 U.S. 1, 15 (1999) (stating that the proper inquiry is whether the "error complained of did not contribute to the verdict obtained"), with *id.* at 17 (finding that the verdict was "supported by overwhelming evidence").

77. See *Dean v. Hewit*, 5 Wend. 257, 261 (N.Y. Sup. Ct. 1830). See, e.g., *Henderson v. Mabry*, 13 Ala. 713 (1848); *Coit v. Tracy*, 9 Conn. 1 (1831); *Tefft v. Ashbaugh*, 13 Ill. 602 (1852); *Crookshank v. Kellogg*, 8 Blackf. 256 (Ind. 1846); *Sawyer v. Nichols*, 40 Me. 212 (1855); *Davis v. Barney*, 2 G. & J. 382 (Md. 1830); *O'Kelly v. O'Kelly*, 49 Mass. (8 Met.) 436 (1844); *Perry v. Clarke*, 4 Miss. 199, 5 Howard 495 (1841); *Speed v. Herrin*, 4 Mo. 356 (1836); *Wells v. Clements*, 48 N.C. 174, 3 Jones 168 (1855); *Roddy v. Kingsbury*, 5 Tex. 151 (1849).

78. *Child*, 27 Mass. at 256, 10 Pick. at 257.

79. There were other mechanisms as well. A judge could also be required to comment on evidence, through the mechanism of granting a new trial, if a party had requested comment and the jury had erred because of lack of instruction. See GRAHAM, *supra* note 55, at 277-78.

a judge failed to comment adequately on a witness's credibility.<sup>80</sup> A crucial witness for the plaintiff, one Fuller, testified under cross-examination that he had perjured himself on the exact point in issue in a previous case between the same two parties.<sup>81</sup> The trial judge charged the jury that "Fuller was a competent witness, whose testimony should go to the jury, *who might give that weight to it which they thought it deserved*."<sup>82</sup> The jury found for the plaintiff. Judge Woodworth of the Supreme Court called the charge "manifestly erroneous."<sup>83</sup> He admitted that the jury "are judges of fact, and the credibility of witnesses," but said that the jury "have no arbitrary discretion. It is their duty to follow the advice of the court as to the law."<sup>84</sup> Woodworth reasoned, "[t]he law will not permit either life or property to be put in jeopardy by such testimony. If it would, there must be but little security for either."<sup>85</sup> The trial judge should have instructed the jury that Fuller's testimony "was not entitled to credit, and ought not to be regarded."<sup>86</sup> The New York court believed that predictability and accurate fact finding in commercial cases required judges to guide the jury.

### *E. Judicial Limitations on the Power to Comment: Fear of Partisanship*

But appellate judges were also concerned about trial judges overstepping their bounds. A few appellate judges appeared to agree with Waterman that jurors were well-equipped to find facts based on their common sense.<sup>87</sup> Others relied on variations of an

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80. 5 Cow. 243, 246-47 (N.Y. Sup. Ct. 1825).

81. *See id.* at 244.

82. *Id.* at 244.

83. *Id.* at 246.

84. *Id.*

85. *Id.* at 247.

86. *Id.* at 248. Graham and Waterman both made a point of citing *Dunlop*, and did not confine its rule to New York. *See GRAHAM, supra* note 55, at 276-77; *WATERMAN, supra* note 58, at 809-10. Graham also cited for this proposition *Newell v. Wright*, 8 Conn. 319 (1831) and *Allen v. Young*, 22 Ky. (6 T.B. Mon.) 136 (1827). *See GRAHAM, supra* note 55, at 277 n.1. Waterman cited *Bakeman v. Rose*, 14 Wen. 105 (N.Y. Sup. Ct. 1835). *See WATERMAN, supra* note 58, at 819 n.1.

87. *See, e.g., Potts v. House*, 6 Ga. 324, 345 (1849) ("[T]he general diffusion of knowledge and education among the people of this country, much better fits them for weighing and

argument that trial judges had political or personal biases that needed to be counteracted.

In the widely quoted 1815 case *New York Firemen Insurance Co. v. Walden*, no less a supporter of judicial authority than Chancellor Kent of New York explained why the "salutary" power of comment on evidence should have some limits.<sup>88</sup> Kent hastened to say he encouraged judges to offer their opinions on fact to the jury, and to grant new trials to correct juries if the need arose.

I am far from wishing to restrain the judges of the Courts of law from expressing freely their opinions to the jury on matters of fact, and still less from interfering with their power of controlling the mistaken verdicts of juries, by a liberal exercise of the discretion of awarding new trials.<sup>89</sup>

He declared that "[n]o man can be more deeply sensible of the value and salutary tendency of this judicial aid and discretion."<sup>90</sup>

All Kent asked was that, when a judge commented on fact, "it shall be delivered as mere opinion, and not as direction, and that the jury shall be left to understand, clearly, that *they* are to decide the fact, upon their own view of the evidence."<sup>91</sup> According to Kent, "the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt."<sup>92</sup>

He was anxious to reinforce the formal divide between questions of fact and questions of law, between the province of the jury and that of the court. "I am disposed to hand to posterity the institution of juries as perfect, in all respects, as we now enjoy it," he wrote, "for I believe it may, in times hereafter, be found to be no

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comparing the evidence, than in any other nation or age since the institution of trial by Jury."); cf. *Trial by Jury*, *supra* note 36, at 102-03 ("The common mind . . . unsophisticated by false logic and technical nicety, is more likely to receive a just impression from the facts and arrive at the simple truth than the Court. This the experience of ages and wisdom have proved.")

88. 12 Johns. 513, 519, 520 n.2 (N.Y. 1815) (citing *Fisher's Ex'r v. Duncan*, 11 Va. (1 Hen. & M.) 563 (1807)). Waterman made much of Kent's opinion in *Walden*, holding it out as a model of the judge-jury relation. See WATERMAN, *supra* note 58, at 750-51.

89. *Walden*, 12 Johns. at 519.

90. *Id.*

91. *Id.*

92. *Id.*

inconsiderable security against the *systematic influence and tyranny of party spirit, in inferior tribunals.*"<sup>93</sup>

While Kent disclaimed any particular problem in this case, presumably hoping to cool party sentiment, this was nevertheless a case in which a trial judge had essentially directed a verdict for a plaintiff against an insurance company in a relatively close case.<sup>94</sup> The strong inference was that party affiliations had affected him. Insurance cases were likely to provoke partisan squabbles, since Jeffersonians, and later Jacksonians, were generally suspicious of such financial institutions while Federalists, and later Whigs, viewed them as necessary elements of economic development that needed protection from dangerous populists.<sup>95</sup> The Federalist Kent's warning about partisanship on the lower bench came at a time of rising party feeling.<sup>96</sup> This tension is reflected in the New York Court of Errors, in which the *Walden* appeal was heard. The Court of Errors was a highly political body composed of the chancellor, the judges of the supreme court, and the senators of the state legislature.<sup>97</sup> The vote in *Walden* was a close one, eleven to eight in favor of Kent's position. Not surprisingly, Van Buren, a Jeffersonian state senator at the time, voted against Kent.<sup>98</sup>

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93. *Id.* (emphasis added).

94. *See id.* at 514-15, 519.

95. *See* RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 280 (1971).

96. Early-nineteenth-century New York politics were partly controlled by a complex Jeffersonian machine guided by, in turn, Aaron Burr, DeWitt Clinton, and, most successfully, the dapper Martin Van Buren. *See generally* JEROME MUSHKAT AND JOSEPH G. RAYBACK, *MARTIN VAN BUREN: LAW, POLITICS, AND THE SHAPING OF REPUBLICAN IDEOLOGY* (1997) (discussing the political career of Van Buren and his contemporaries). This machine was devoted to filling every possible government office, including judgeships, with Jeffersonians of the proper stripe and to limiting the influence of hated Federalists such as Kent. Jefferson's grand inaugural phrase, "We are all Republicans; we are all Federalists," rang hollow in actual practice, as his supporters, with his knowledge and at least tacit approval, discharged Federalists and filled government offices with Republicans. ELLIS, *supra* note 95, at 30-35. Sometimes this was done with a thoroughness that caused consternation even among those sympathetic to him politically. *See* Letter from Margaret Bayard Smith to Samuel H. Smith (May 17, 1803), in *THE FIRST FORTY YEARS OF WASHINGTON SOCIETY* 37 (Gaillard Hunt ed., 1906). In part, this was a reaction to Federalist office-packing, especially John Adams' famous "midnight" judicial appointments that sparked the controversy between Messrs. Marbury and Madison. *See* ELLIS, *supra* note 95, at 32.

97. This was the court of last resort in New York until it was abolished in 1847. *See* Lettow, *supra* note 5, at 520 n.92.

98. *See Walden*, 12 Johns. at 520 n.1. Kent, Bishop, Bloom, Cochrane, Crosby, Keys, P.W.

If Kent was concerned about the influence of Jeffersonian judges, Jeffersonian concerns about Federalist judges were greater. Jefferson himself was constantly irritated by the Federalist John Marshall's exercise of judicial review in favor of commercial interests, and was thoroughly provoked when Marshall subpoenaed him in Aaron Burr's treason trial.<sup>99</sup> The midnight appointments of 1800, the enactment and repeal of the Federalists' Judiciary Act, and the fracas surrounding the impeachment of Justice Chase all fueled Jeffersonian concerns about the judiciary.<sup>100</sup>

But there was also a question of broader principle: Jeffersonians, and their political heirs, the Jacksonian Democrats, were on principle more wary of judicial power, following their populist ideology. Adherents of these parties agreed with Tocqueville that the judiciary was an aristocratic element in society, but took exactly the opposite view of its benignity: They believed judges needed to be subjected to the people's will.<sup>101</sup>

Waterman himself perfectly expressed the Democratic view. The pernicious power of comment, he said,

had its rise in England, where the judges are high dignitaries, claiming all the power and influence which the monarchical system under which they live gives to them; and where juries coming from the middle class are looked down upon as inferior in intelligence, as well as in position.<sup>102</sup>

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Radcliff, Stewart, Swift, Tabor, and Van Schoonhoven voted to reverse; Arnold, Atwater, Hager, Prendergast, Rouse, Tibbits, Van Buren, and Van Bryck voted to affirm. *See id.*

99. Jefferson told Madison that, "[t]he judiciary of the United States . . . is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric." 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, at 33 (James Morton Smith ed., 1995); *see also* GRANT GILMORE, THE AGES OF AMERICAN LAW 23-29 (1977) (discussing the impact of industrialization on Jefferson's agricultural ideal of society). He rejoiced in attacks on Marshall, in particular. *See* Laurance M. Hyde, *Judges: Their Selection and Tenure*, 22 N.Y.U. L. REV. 389, 391 (1947) (citing Jefferson's differences with Marshall as one of the reasons for his support of an elected judiciary).

100. *See* Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805; Political Forces and Press Reaction*, 14 AM. J. LEGAL HIST. 55, 60-63 (1970).

101. For example, one Jacksonian writer proclaimed that life tenure for judges was an "odious and aristocratical" practice that must be abolished. JOSEPH HOPKINSON, SPEECHES OF JOSEPH HOPKINSON AND CHARLES CHAUNCEY, ON THE JUDICIAL TENURE 21-22 (Philadelphia, E.L. Carey & A. Hart 1838).

102. WATERMAN, *supra* note 58, at 730.

Alas, "[w]e have copied it from the English practice, without regard to our democratic notions, which ought to invest our juries with more character."<sup>103</sup> In the South and West, as we shall see, this populist strand of thinking combined with an antiauthoritarian, emotional legal culture—a combination that fostered measures limiting judges' ability to comment on evidence.

## II. POLITICAL AND CULTURAL BACKGROUND TO MEASURES RESTRICTING JUDGES' POWER

While the power of judges to comment on the evidence was vigorous in many states before the Civil War, in the South and West it was being limited. This was done at different times and by different means—by constitutional amendment, statute, and even judicial decision. In this section we will consider common factors among the states that adopted restrictions on judicial comment in order to understand better the social and legal conditions that gave rise to those restrictions. This knowledge will shed light on the discussion of individual states' moves to restrict comment in Part III.

We will first address the thesis that popular election of judges—part of the general movement to subject government officials to greater popular control—caused the restrictions on comment. We will then turn to the question of regional differences, and the very different legal culture of the South and West compared to that of the North. In particular, the lawyer's approach to advocacy and the courtroom atmosphere was notably different in the South and West. Despite their potency, these differences have not been well examined in terms of their impact on procedure.

### A. *Electing Judges*

It has been suggested that there may be a link between the practice of electing judges, which was spreading at breakneck speed in the middle of the nineteenth century, and limiting judges' ability

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103. *Id.*

to comment on evidence.<sup>104</sup> This link could take two forms. First, experience with elected judges might have caused citizens and appellate judges to mistrust the competence and impartiality of trial judges, and so led to limitations on comment. Second, electing judges and limiting judicial comment might simply have been part of the same broad-based popular movement to limit judges' power.

The first theory was held by late-nineteenth and early-twentieth-century leaders of the bar and bench. They attributed the curtailing of judges' power in the courtroom to the deplorable effects of electing judges. The idea was that elections yielded poor judges, which in turn triggered the desire to prevent them from commenting.<sup>105</sup> Charles Eliot, Harvard's innovative president, said judicial elections were largely responsible for keeping the judge from his rightful place as "the principal person in the court room."<sup>106</sup> This may have been true later in the century, when restrictions on the ability to comment spread throughout the country. But it simply was not true before the Civil War. Every single state that had both types of provisions in the antebellum era restricted the judge's ability to comment *before or at the same time as* it adopted judicial elections.<sup>107</sup> Before the Civil War, bad experiences with elected judges did not cause restrictions on comment.

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104. See, e.g., Krasity, *supra* note 17, at 611-12.

105. See George E. Brand, *Selection of Judges—The Fiction of Majority Election*, 34 J. AM. JUDICATURE SOC'Y 136, 142-43 (1951); Stewart H. Perry, *Politics and Judicial Administration*, 17 J. AM. JUDICATURE SOC'Y 133, 134 (1934).

106. Charles W. Eliot, *The Instant Duty of the Legal Profession to the Community*, in THIRD ANNUAL REPORT OF THE MASSACHUSETTS BAR ASSOCIATION 36, 40 (1913). There were also suggestions that elected judges grew timid in their own courtrooms for fear of offending influential lawyers, and therefore were happy to refrain from comment on evidence. See Frederick Bausman, *Election of Federal Judges*, 37 AM. L. REV. 886, 887 (1903). Eliot believed "[u]nwise legislation" was responsible for judges losing control of their courtrooms to lawyers, and claimed that "[l]awyers dissatisfied with the control exercised over themselves by individual judges have originated some of this pernicious legislation." Eliot, *supra*, at 40.

107. Compare *infra* notes 206-338 and accompanying text, and Krasity, *supra* note 17, at app. A (listing the dates on which states prohibited judicial comment), with Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 337 & n.2 (1983) (listing the dates on which states adopted the elective method). It could be noted that Alabama modified its judicial comment statute in 1852, two years after it began electing judges. See ALA. CODE § 2274 (1852); Hall, *supra*, at 337 n.2 (noting that Alabama amended its constitution to require election of judges in 1850). But Alabama had banned comment in 1802 when it was part of the Mississippi Territory. See *infra* note 242 and accompanying text.

As for the second theory, it too seems to be incorrect. As Table 1 illustrates, there was in general little correlation before the Civil War between states that restricted the judges' ability to comment and those that adopted judicial election.

**Table 1:**

**Electing Judges and Restricting Judicial Comment Before the Civil War**

	<b>States that elected judges<sup>108</sup></b>	<b>States that did not elect judges</b>
<b>States that restricted comment on evidence<sup>109</sup></b>	Alabama, Arkansas, California, Georgia, Illinois, Iowa, Louisiana, Maryland, Mississippi, Ohio, Tennessee, Texas, Virginia	Florida, Massachusetts, North Carolina
<b>States that did not restrict comment on evidence</b>	Connecticut, Indiana, Kentucky, Michigan, Minnesota, New York, Oregon, Pennsylvania, Vermont, Wisconsin	Delaware, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina

After 1846, when Iowa entered the Union with a constitution providing for elected judges and New York amended its constitution to provide the same, every new state elected judges and most of the

108. See Hall, *supra* note 107, at 337 n.2.

109. For details of how and when these states restricted judicial comment on evidence, see *infra* notes 206-338 and accompanying text; Krasity, *supra* note 17, at app. A.

existing states switched over.<sup>110</sup> The judicial elections movement seemed to know no geographic boundaries, except for resistance in a few New England states.<sup>111</sup> In contrast, the movement to limit judicial comment before the Civil War was much more strictly confined to the South and West. In those regions we do see a correlation between electing judges and limiting judicial comment, with the two developments often occurring close together in time.<sup>112</sup>

The debate over electing judges roughly followed party lines; Democrats were in favor and Whigs opposed.<sup>113</sup> The dominant Democrats were generally suspicious of government authority—in whatever branch, executive, legislative, or judicial—and were doing their best to limit that authority. The idea was to subject officials to the control of the electorate in the most direct possible way, to ensure the people's will would be done and not thwarted. Caleb Nelson points out that the same conventions that removed the

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110. See Nelson, *supra* note 20, at 190.

111. The only exceptions to the rule that a constitutional convention called at this time produced an elected judiciary were Massachusetts and New Hampshire. See Hall, *supra* note 107, at 337-38. In Massachusetts, the constitutional convention decided against proposing an elective judiciary, but its proposed constitution was voted down anyway. See Nelson, *supra* note 20, at 202.

112. Brand new California put both provisions in its constitution of 1849. See CAL. CONST. of 1849, art. VI, §§ 5, 17. Illinois, Iowa, Missouri, and Texas enacted legislation restricting judges' power to comment in the late 1830s and mid '40s, see *infra* notes 246-49 and accompanying text, and adopted judicial election soon thereafter in the late '40s or early '50s. See Hall, *supra* note 107, at 337 n.2. Georgia enacted legislation limiting judges' power to comment in 1850, see *infra* note 298 and accompanying text, and decided to elect judges in 1852. See Hall, *supra* note 107, at 337 n.2. Alabama modified its statute restricting judge's power to comment in 1852, see ALA. CODE § 2274 (1852), and decided to elect judges in 1850. See Hall, *supra* note 107, at 337 n.2.

113. See, e.g., *Constitutional Reform*, 13 U.S. MAG. & DEMOCRATIC REV. 565, 569 (1843); *The Convention-Reorganization of the Judiciary*, 2 AM. REV.: WHIG J. POL. LITERATURE ART & SCI. 474, 477-78 (1845); *Elective Judiciary*, 22 U.S. MAG. & DEMOCRATIC REV. 199 (1848); *History of Constitutional Reform in the United States*, 18 U.S. MAG. & DEMOCRATIC REV. 403, 417 (1846); *The New Constitution: Article VI-The Judiciary*, 4 AM. REV.: WHIG J. POL. LITERATURE ART & SCI. 520, 525-28 (1846); *Responsibility of the Ballot Box*, 4 AM. REV.: WHIG J. POL. LITERATURE ART & SCI. 435, 435-36, 439-41 (1846). Kermit Hall suggests that such partisan alignments were somewhat superficial and highlights the importance of a group of "moderates" on whose votes the outcomes of the state conventions largely depended. In his view, these moderates favored judicial election as a means of increasing the power of the judiciary by providing them with an independent political base. See Hall, *supra* note 107, at 341-43. Caleb Nelson convincingly argues that the more important factor in the success of judicial election was the desire—mostly associated with Jacksonian Democrats—to limit judicial power, and indeed the power of government officials generally. See Nelson, *supra* note 20, at 224.

power of governors and legislatures to appoint judges removed their power to appoint many other officials.<sup>114</sup> The principle of election reigned. As one disenchanted representative at the Kentucky convention put it, "We have provided for the popular election of every public officer save the dog catcher, and if the dogs could vote, we should have that as well."<sup>115</sup>

Territorial residents writing new state constitutions were so confident of the superiority of judicial election that they hardly considered the question, having had bitter experience with federal judicial appointees. As one Kansas editor put it in 1859, territorial residents had "suffered beyond imagination from the judicial despots who have lorded it over us. Of course, the . . . judiciary will be elected."<sup>116</sup>

Those who favored judicial election sometimes referred to trial judges' charges as a judicial usurpation of the jury's right. The jury, after all, was the direct voice of the people and needed to be freed from interference by the judge—just another government official—on the facts. One delegate to the Kentucky convention declared, in the midst of a debate about whether to elect the judiciary, "A jury decides the facts of the case, and your judges the law of the case. Questions of fact are much more difficult to be decided than questions of law."<sup>117</sup> Electing judges, the theory ran, would subject them to the will of the people and thus help to prevent judicial intrusion on facts—an important province of the people alone.<sup>118</sup>

Such was the theory; and it was lawyers who were espousing it and making sure provisions for electing judges were included in the

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114. See Nelson, *supra* note 20, at 207.

115. Hall, *supra* note 107, at 340-41 (quoting 1 THE OLD GUARD 22 (Thomas F. Marshall & J.H. Holeman eds., Frankfort 1850)).

116. Hall, *supra* note 107, at 339 (quoting LAWRENCE REPUBLICAN, July 6, 1859); see also KERMIT L. HALL, THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-61, at 12-13, 100-10, 134-41 (1979) (describing the territorial judiciary).

117. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION FOR THE STATE OF KENTUCKY, 1849-1850, at 175 (Frankfort 1850) (remarks of George Kavanaugh).

118. See, e.g., SAMUEL MEDARY, THE NEW CONSTITUTION 153 (Columbus 1849); 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, at 585 (Columbus 1851); Hall, *supra* note 107, at 348 (citing IS IT EXPEDIENT THAT A STATE CONVENTION SHOULD BE CALLED TO REMODEL THE CONSTITUTION? 7-8 (Boston 1852)).

new state constitutions. Hall notes "the overwhelming role of lawyer-delegates in the conventions"; lawyers "controlled the committees on the judiciary" and "also dominated debate over the issue once it reached the full conventions."<sup>119</sup> In the South and West, lawyers were able to build on popular enthusiasm for limiting officials' power to achieve not only election of judges, but explicit constitutional and statutory limitations on comment as well. In this, they were aided by the peculiar southern and western legal culture.

### *B. The Significance of the South and West*

The real divide was thus not between the states that elected judges and those that did not, but rather between the Northeast, Mid-Atlantic, and Northwest on the one hand, and the South and West on the other. What was it about the southern and western states that led them to restrict judges' ability to comment? They certainly had a strong populist strain, and tended to be democratic in politics. But several states in the North, such as Maine and Wisconsin, fit that description without adopting such restrictions.<sup>120</sup>

One distinction worth exploring is that the southern and western states by and large had a very different legal culture from those of the North. It was more violent, aggressive, emotional, and far less respectful of authority and decorum. This suited many of the new style of lawyer very well—they flourished in such an environment, with their greater control over trial.<sup>121</sup> This was not the sort of

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119. Hall, *supra* note 107, at 342.

120. See Nelson, *supra* note 20, at 198.

121. Many legal commentators in the late nineteenth and early twentieth centuries were much more blunt than their early-nineteenth-century counterparts in noting lawyers' fierce interest in prohibiting judges from commenting on the evidence. For example, the president of the University of North Carolina noted in 1888 that "this practice inevitably provokes the wrath of lawyers." Kemp P. Battle, *An Address on the History of the Supreme Court (of North Carolina)*, in 103 N.C. 441, 469 (1889). Another legal writer criticized the persistence of restrictions on comment and said, "[t]he secret trouble is the presence of that unworthy spirit of chicanery on the practitioner's part that dreads such an interference with his manipulation of the jury, as the taking away of this trammel upon the judge's action would cause." Hastings, *supra* note 38, at 678. Modern law and economics theory has provided a theoretical underpinning for the idea that lawyers' earnings increase if the outcomes of cases are more unpredictable and dependent upon their own skill. See, e.g., John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis*

atmosphere in which a judge's taking the jury "by the hand to guide them,"<sup>122</sup> in Tocqueville's phrase, would be tolerated—either by the population at large, or especially by the lawyers.

### 1. *The Exceptions: Kentucky and South Carolina*

The cases of the two southern states that did not prohibit judicial comment, Kentucky and South Carolina, are instructive. Kentucky was rare, if not unique, among southern states in being a Whig stronghold. Dominated by Henry Clay and his political allies, the Whig party in Kentucky held sway for years over the governorship and both houses of the legislature.<sup>123</sup> While Kentuckians might suffer an occasional bout of populism and begin electing judges, they were not likely to copy every attempt to limit government officials' power. In the case of Kentucky, the prevailing political views overcame its likeness in other respects to its southern and western neighbors. In addition, the early-nineteenth-century bar of Kentucky was unusual in having a significant number of lawyers trained formally in a law school, especially at the law departments at Transylvania University and the University of Louisville.<sup>124</sup> This formal training encouraged conservative tendencies in Kentucky lawyers.

South Carolina was also *sui generis*: It had had a romance with aristocracy since its founding by Barbadian planters in the mid-seventeenth century. Members of the early South Carolina elite had even tried to call themselves "landgraves" and "cassiques."<sup>125</sup> The South Carolina bar in the late eighteenth and early nineteenth centuries was the closest to the English model of any colony or state. It was tiny, highly educated, and, at the top end, fabulously well compensated. In the colonial period, the highest court exercised centralized control over admissions to the bar, and by the

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*of the Courts*, 14 J. L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

122. TOCQUEVILLE, *supra* note 7, at 275.

123. See JAMES W. GORDON, *LAWYERS IN POLITICS: MID-NINETEENTH CENTURY KENTUCKY AS A CASE STUDY* 102-04 (1990); MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 116, 926 (1999).

124. See GORDON, *supra* note 123, at 94-95.

125. See M. EUGENE SIRMANS, *COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY, 1663-1763*, at 10-11 (1966).

Revolution had deemed only fifty-eight people worthy to practice. Of these fifty-eight, no fewer than forty-seven had been educated in the English Inns of Court.<sup>126</sup>

The Middle Temple was a favorite destination for South Carolinians, and there they developed connections with prominent English Whigs.<sup>127</sup> Many members of the South Carolina bar had also been to Eton, Westminster, Wakefield, Oxford, and Cambridge.<sup>128</sup> These were the scions of the dominant planter families—Rutledges, Pinckneys, and Middletons—who enjoyed the vast wealth generated by their slaves in the rice fields. For them, England was the only place where an education befitting a member of the landed gentry could be had.<sup>129</sup> When they returned to Charleston, their compensation was on a lordly scale. John Rutledge is said to have earned twenty thousand dollars a year at the bar in early-nineteenth-century Charleston, “for that time a fabulous sum of money.”<sup>130</sup>

This was the type of man who sat on the South Carolina bench—steeped in the English legal tradition, and backed by the immense power of the rice-planter caste. It is not surprising to find the South Carolina Constitutional Court, sitting regally in Charleston, waving away objections to a judge’s comments on the evidence by quoting Hale.<sup>131</sup> South Carolina held to the English idea that the judge and jury were partners, not combatants: “[A]s the jury assists the judge in determining matters of fact; so the judge assists the jury in determining matters of law.”<sup>132</sup> In the best English style, it was a judge’s “duty to aid the jury, in forming an opinion of the evidence.”<sup>133</sup>

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126. See 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 302-04 (1965).

127. See HOYT P. CANADY, *GENTLEMEN OF THE BAR: LAWYERS IN COLONIAL SOUTH CAROLINA* 212-15 (Harold Hyman & Stuart Bruchey eds., 1987).

128. See 1 CHROUST, *supra* note 126, at 304.

129. See CANADY, *supra* note 127, at 206; CHROUST, *supra* note 126, at 304.

130. 1 CHROUST, *supra* note 126, at 306. See also CANADY, *supra* note 127, at 319-22 (discussing the relative wealth of prominent Charleston lawyers).

131. See *Kinloch v. Palmer*, 8 S.C.L. (1 Mill) 216, 227-28 (1817).

132. HALE, *supra* note 25, at 256-57, quoted in *Kinloch*, 8 S.C.L. (1 Mill) at 227-28.

133. *State v. Bennet*, 5 S.C.L. (3 Brev.) 514, 514 (1815).

## 2. *The Courtrooms of the South and West*

In contrast, the atmosphere of most southern and western courtrooms often made it difficult for a judge to maintain basic order, let alone control of counsel and a guiding role respecting the jury. The courtrooms of the Southwest and West were a far cry from the decorous scenes of the eastern cities. The East had imposing or at least solid courthouses, and the formal dress of judges, lawyers, and audience fostered judicial dignity. But the courtrooms of the frontier were often built of "round logs, fresh from the adjacent forest," with the people inside dressed to match in hunting shirts and moccasins.<sup>134</sup>

One lawyer visiting from New York described the scene he encountered in an Illinois courtroom: "To us, just from the city of New York with the sleek lawyers and the prim and dignified judges, and audiences to correspond, there was a contrast so great, that it was almost impossible to repress a burst of laughter."<sup>135</sup> Judge Stephen T. Logan—who was, as it happened, a good lawyer—was seated on the bench, "with his chair tilted back and his heel as high as his head, and in his mouth a veritable corn cob pipe; his hair standing nine ways for Sunday, while his clothing was more like that worn by a woodchopper than anybody else."<sup>136</sup> A railing held the audience at bay, "outside of which smoking and spitting and chewing of tobacco seemed to be the principal employment."<sup>137</sup>

Liquor flowed freely at court sessions, and the audiences, lawyers, and judges were frequently mildly tipsy and sometimes more than that. A Virginia lawyer noted:

Many terms of court in the olden days have been marked by heavy drinking at the Virginia county seats. When court convened it was an event of widespread interest among the people and the lawyers, as well as the citizens in many instances, imbibed freely in celebration of the occasion.<sup>138</sup>

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134. J.G.M. RAMSEY, *ANNALS OF TENNESSEE* 281 (Charleston, J. Russell 1853).

135. *HISTORY OF SANGAMON COUNTY, ILLINOIS* 183 (Chicago, Inter-State Publ'g Co. 1881).

136. *Id.*

137. *Id.*

138. JOHN H. GWATHMEY, *LEGENDS OF VIRGINIA COURTHOUSES* 69 (1933); *see also id.* at 69-73 (linking drinking with impassioned oratory and lawyers insulting the judge in open court). After being challenged to a duel by a drunken lawyer in open court, "[t]he old Judge,

In the 1820s, Judge Child of Mississippi was often found on the bench in some of the newly settled counties "when so much [overpowered] with the draughts of intoxicating drink which he had recently imbibed, that, notwithstanding his ability and learning, he was wholly incapable of conducting the business of the court in a decent and orderly manner."<sup>139</sup> On one infamous occasion, during the trial of an important case, he called up to the bench "a drunken attorney to preside in his stead, whilst he went across the public square to a low drinking shop to 'wet his whistle,' as he said."<sup>140</sup> A prominent Mississippi lawyer later wrote that Child's conduct led directly to Mississippi's relatively early provision for election of judges.<sup>141</sup> It seems not unlikely that this and similar incidents also led to Mississippi's especially draconian statutes against trial judges commenting on evidence.<sup>142</sup> In such an atmosphere, judges, lawyers, jurors, and the audience were not well disposed to calm and dispassionate comment on the facts.

### 3. *The Homines Novi: Southwestern Lawyers*

The bench and bar of the South and Southwest corresponded with their raw surroundings. Lawyers were often rough and ready, far from learned in English or any other law, and independent-minded. Eager to take advantage of opportunities on the new frontier, they flooded into new areas where litigation was likely to be common.<sup>143</sup> They would not even submit to the forms of showing respect for the judges, which helps explain why battles between the bench and bar could grow so fierce in these areas. Lawyers and

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realizing that all the lawyers and most of the court officials and jurymen were about three sheets in the wind and that he had taken a few that morning himself, adjourned court *sine die*, and they all went over to the tavern." *Id.* at 72.

139. HENRY S. FOOTE, *THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST* 21 (St. Louis, Soule, Thomas & Wentworth 1876).

140. *Id.*

141. *See id.* at 22; Hall, *supra* note 107, at 337.

142. *See infra* notes 242-44 and accompanying text.

143. Andrew Jackson's policy of removing Indians from the Southwest led to a swarm of lawyers descending on Mississippi and nearby states in the early-to-mid-1830s to take advantage of the land litigation that would inevitably follow. *See* FOOTE, *supra* note 139, at 45.

judges hurled insults at each other in open court and challenged each other to duels.<sup>144</sup> The prevalence of physical and verbal violence on a frontier composed of settlers from diverse backgrounds is readily understandable—in the South, it was exacerbated by the violence associated with slaveholding.<sup>145</sup> Such conduct was far less tolerated in the North, where judges commanded at least the outward forms of respect and maintained their closer, informal relationship to the jury.

Contemporary observers noted the increased aggressiveness of the new lawyers of the South. These new men or *homines novi*, as they were known in the South, with its love of classical allusion, generated an atmosphere of intense competition in both the political and legal arenas.<sup>146</sup> They had no patience for anyone who tried to stand in their way, including judges. One contemporary observer described this type of man as “an able speaker and good lawyer; bold, ready, regardless of respect to opposing counsel, witnesses, or clients, and unscrupulous as to the language in which he expressed his contempt; *skilled in cajoling the jury and bullying the judge*.”<sup>147</sup> Lawyers of the old school feared to face him as an adversary. “One purpose only seemed to govern him—the purpose to gain his case at all hazards.”<sup>148</sup>

Andrew Jackson is a case in point. A destitute orphan from South Carolina, he moved to frontier Tennessee at age seventeen and

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144. See, e.g., *infra* note 216 and accompanying text (describing Archibald MacLaine of North Carolina storming and ranting against Judge Spencer in open court—a not uncommon event); *supra* note 138 (describing a Virginia lawyer swearing at the judge and challenging him to a duel in open court).

145. Robert Cottrol has suggested that much of what we think of as nineteenth-century frontier violence was more southern than western in character and often associated with slaveholding. See Robert J. Cottrol, *Submission is not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1050-51 (1998); see also HINDUS, *supra* note 14, at 33-55 (describing the extralegal authority existing in South Carolina, including mobs, duels and regulation of morals); ROGER LANE, *MURDER IN AMERICA: A HISTORY* 151-56 (1997) (discussing the prevalence of lynching in the South); Warren F. Schwartz et al., *The Duel: Can These Gentlemen be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 325-29 (1984) (addressing the relationship between dueling and the legal system).

146. See 2 CHROUST, *supra* note 126, at 87.

147. WILLIAM J. GRAYSON, JAMES LOUIS PETIGRU: A BIOGRAPHICAL SKETCH 89-90 (New York, Harper & Bros. 1866) (emphasis added); see WILLIAM R. TAYLOR, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER* 58-59 (1963).

148. GRAYSON, *supra* note 147, at 90.

joined a law office as a student.<sup>149</sup> His studies, however, seem to have taken a back seat to his considerable penchant for horseplay.<sup>150</sup> A few years later, he hung out his shingle and became in turn a pleader in court, attorney general for a local district, and a judge-advocate in the militia. Like many of his brothers in the law on the frontier, he plunged into land speculation, politics, and dueling.

Dueling was rampant in the South among the bar and as a method of settling legal disputes in general. It was widely acknowledged at the time—even by southerners themselves—that such dueling led to a general breakdown in respect for the rule of law and greater violence beyond the actual duels.<sup>151</sup> Dueling eroded the authority of those in formal positions of power, including judges. A judge, like anyone else, could be called out and forced to put his life on the line. The southern code of honor was powerful,<sup>152</sup> and among lawyers and politicians a handy way of intimidating opponents. Jackson was a celebrated master of the art. His first duel, at the age of twenty-one, arose out of name calling in a courtroom—a typical cause.<sup>153</sup> On that occasion, he shot into the air, but thereafter he generally shot to kill and succeeded.<sup>154</sup>

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149. See 11 AMERICAN NATIONAL BIOGRAPHY 732-37 (John A. Garraty & Mark C. Carnes eds., 1999).

150. See James W. Ely, Jr., *The Legal Practice of Andrew Jackson*, reprinted in THE LEGAL PROFESSION: MAJOR HISTORICAL INTERPRETATIONS 259, 260-61 (Kermit L. Hall ed., 1987).

151. See, e.g., REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 248 (John Ross Browne ed., Arno Press 1973) (1850) [hereinafter BROWNE DEBATES] (remarks of W.M. Gwin) ("Sir, I have all my life lived in States where dueling was countenanced; and I have had sad cause to know and feel its evil consequences. [In Mississippi,] whenever a man got into a warm political contest, he went about with pistols."); *id.* at 247 (remarks of W.S. Sherwood) ("Where duelling is most practised, you see other evils; you see street fights every day. The very fact that duelling is permitted, seems to encourage all kinds of sanguinary conflicts between man and man.").

152. See, e.g., EDWARD AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 9-33 (1984); JOHN HOPE FRANKLIN, THE MILITANT SOUTH: 1800-1861, at 44-62 (1956); STEVEN M. STOWE, INTIMACY AND POWER IN THE OLD SOUTH: RITUAL IN THE LIVES OF THE PLANTERS 5-49 (1987); BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 350-61 (1982); see also CHRISTINE LEIGH HEYRMAN, SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT 245-49 (1997) (describing how the concept of southern honor was so pervasive that it influenced southern Christianity).

153. See ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767-1821, at 38-39 (1977).

154. See *id.* at 39, 120-23, 142, 184-85.

The "new men" heaped abuse on each other in the courtroom, provoking duels by accusations of the three worst crimes a southern man could think of: "lying, cheating, and cohabiting with Negroes."<sup>155</sup> The territorial government and legal system of Arkansas were essentially run by dueling, and in 1824, a superior court judge was killed in a duel by a colleague on the bench over a game of cards.<sup>156</sup> The intelligent and well-educated, but drunken and disorderly Judge Child of the Mississippi Supreme Court was said to have "believed devoutly in the dueling code"<sup>157</sup> and dueled with the prominent General Joor, a friend of John C. Calhoun. Both were severely wounded, though not fatally.<sup>158</sup>

The dueling situation was so bad in Tennessee that a duel in which a Tennessee lawyer killed a man in Kentucky provoked a long and impassioned opinion from a judge of the Tennessee Supreme Court, when the dueler tried to attack his disbarment. Respected Judge Catron did his best to impose order: "Let it be once understood that the bar of Tennessee *dare* not fight"; whoever did so would be disbarred.<sup>159</sup> "The truth is, such men are too often insolent and impudent bullies, who tyrannise over, and impose upon, all orderly men about them; who literally dragoon society, by fear of personal violence, into silence and seeming acquiescence, with respect to their conduct."<sup>160</sup> Despite the infamous northern

155. Frances McCurdy, *Courtroom Oratory of the Pioneer Period*, 56 MO. HIST. REV. 1, 7 (1961).

156. See MALCOLM J. ROHRBOUGH, *THE TRANS-APPALACHIAN FRONTIER: PEOPLE, SOCIETIES, AND INSTITUTIONS, 1775-1850*, at 273-77 (1978).

157. FOOTE, *supra* note 139, at 20.

158. *See id.* at 22-23.

159. *Smith v. State*, 7 Tenn. 207, 212, 1 Yer. 228, 234 (1829). Foote, a lawyer and contemporary of Catron's, quoted this opinion admiringly. *See* FOOTE, *supra* note 139, at 145, 150. Other lawyers did not hesitate to express their scorn for Catron's decision, even to his face. Judge Catron had been known as a fighting lawyer himself, and he wrote:

I was scorched with many a racy sarcasm; such as, that a sinner who had carried blank challenges in the crown of his hat, and slept with his pistols under his head, was a very proper man to turn saint and lecturer, to put down a vice he so well understood in all its bearings.

Biographical Letter from Justice Catron (Dec. 24, 1851), in *PORTRAITS OF EMINENT AMERICANS NOW LIVING* 73, 77 (John Livingston ed., New York, Sampson, Low, Son & Co. 1854). Interestingly, Judge Catron was a friend and protégé of Jackson's—Jackson put him on the U.S. Supreme Court a day or two before Jackson left office. *See id.* Huebner's book on the southern judiciary contains a fine portrait of Judge Catron and the *Smith* decision. *See* HUEBNER, *supra* note 14, at 40-41, 45-47, 64-65.

160. *Smith*, 7 Tenn. at 212, 1 Yer. at 234.

duel between Alexander Hamilton and Aaron Burr, dueling was very rare in the North and Northwest,<sup>161</sup> which helped greatly in maintaining respect for authority and decorum.

The swashbuckling *homines novi* were also financial buccaneers, and had won freedom from judges' control in the all-important matter of fees. In general, lawyers in America were more entrepreneurial and free from the control of the court than their English counterparts, and this was especially true in the South and West. In England, courts exercised a fair degree of control over fees. The two-way fee-shifting rule meant that legal fees were taxed as costs by the court, and so regulated.<sup>162</sup> In addition, English courts banned contingency fee contracts as champertous.<sup>163</sup>

American courts, in contrast, rejected fee shifting and so closed down one possible avenue of regulating fees.<sup>164</sup> In the early nineteenth century, if not before, American lawyers also managed to wriggle free of various attempts to create fee scales, insisting on freedom of contract.<sup>165</sup> The same emphasis on freedom of contract allowed them gradually to break down the barriers to contingency fee contracts, and by the mid-nineteenth century these were widespread.<sup>166</sup> Contingency fee litigation was especially dense in newly settled areas such as Kentucky, Ohio, and Tennessee, with their tangle of land claims.<sup>167</sup> The new South and West allowed this business-oriented, unrestrained approach to lawyering to deepen and flourish.

#### 4. *The New Style of Trial: Emotional Speechifying*

Southern and western lawyers at this time were similarly unrestrained in their rhetoric. We have seen how the main concern of the judges and lawyers who favored judges commenting on

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161. See, e.g., BROWNE DEBATES, *supra* note 151, at 247 ("You hear of no duelling, as a general thing, in the Northern States.").

162. See John Leubsdorf, *Toward a History of the American Rule on Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9, 16.

163. See Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 232 (1998).

164. See *id.* at 234-36.

165. See Leubsdorf, *supra* note 162, at 16.

166. See *id.*

167. See Karsten, *supra* note 163, at 236.

evidence was that the eloquence of counsel might unjustly carry away the jury.<sup>168</sup> This concern was entirely justified. The first half of the nineteenth century exalted what Sarah Barringer Gordon has called "a culture of emotional speechifying."<sup>169</sup> Lawyers took full advantage of it, and resented any interference caused by the judge commenting calmly on the evidence. It is no coincidence that those lawyers who were most in favor of restricting judges' ability to comment also used the most hyperbolic rhetoric.<sup>170</sup>

Conditions in the South and West made such rhetoric especially powerful. Frontier culture was not notably literate: in place of reading, frontiersmen and women relied on oral interaction.<sup>171</sup> The result was a tidal wave of popular emotional oratory that proved very difficult for southern and western judges to control. Lawyers there were entertainment stars; people came from miles around when the courts were in session to hear a good case.<sup>172</sup> Courtroom drama was also popular entertainment in England, but the focus there tended to be on the intrinsic interest of the testimony in a particular case.<sup>173</sup> In the American South and West, people came mainly to hear the lawyers.<sup>174</sup>

Mid-nineteenth-century lawyers followed the lead of religious revivalists such as Charles Grandison Finney, who elevated emotional intensity over intellect or traditional doctrinal authority.<sup>175</sup> The links between the genres of sermon and courtroom argument were profound. Finney himself was a "recovering lawyer" who preached in business clothes and "literally 'made a case' for

168. See *supra* text accompanying notes 63-68.

169. Sarah Barringer Gordon, *Blasphemy and Religious Liberty in Antebellum America* 5 (n.d.) (unpublished manuscript, cited with permission, copy on file with author).

170. See *infra* text accompanying notes 254-56.

171. See FRIEDMAN, *supra* note 17, at 312; RAMSEY, *supra* note 134, at 732-35.

172. See, e.g., FOOTE, *supra* note 139, at 10.

173. There were a few exceptional lawyers, such as Erskine and Curran, whom people came to hear, but even they were mainly famous for arguments in political cases. See SPEECHES OF LORD ERSKINE, WHILE AT THE BAR (James L. High ed., Fred B. Rothman & Co. 1993) (1876); THE SPEECHES OF THE RIGHT HONORABLE JOHN PHILPOT CURRAN (Thomas Davis ed., 3d ed., Dublin, J. Duffy 1862).

174. See FRIEDMAN, *supra* note 17, at 312. Some northern lawyers, most notably Daniel Webster, could also pack courtrooms with large crowds and play to them. See *id.* at 312-14.

175. See Gordon, *supra* note 169, at 9.

faith, exhorting his listeners as he would a jury, persuading them through eloquence of the merits of his client, Jesus."<sup>176</sup> Similar to the revivalists, many lawyers were happy to discard doctrinal rigor in favor of playing on the jury's emotions through vivid storytelling and inflammatory rhetoric. The growing lyceum movement—together with quasi-religious fora such as temperance movement speeches—provided a training ground for aspiring young lawyers to hone their impassioned rhetoric. By the end of the 1830s, almost every medium-sized town throughout the country had a lyceum, organizing speeches and sponsoring debates.<sup>177</sup> The terms "lawyer" and "speechmaker" were practically synonymous, and in 1819, attorneys in Missouri called themselves "orators."<sup>178</sup>

Courtroom forensics were the ultimate debate—a man's life could depend on it. The actual taking of testimony was much swifter than it is today, allowing excitement among the audience to build without boredom setting in, as it surely would now in virtually every significant trial. The excitement reached a climax at closing arguments. The lawyers went at it with every ounce of persuasive power they could muster. If a judge had then presumed to give an extensive charge, such as Judge Ruffin recommended, laying out "his own calm, discreet, sensible and impartial summary of the case,"<sup>179</sup> the effect would have been anticlimactic in the extreme. The whole effect on the jury and the audience that the lawyers had worked so hard to whip up might have collapsed. The lawyers'

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176. *Id.* at 10.

177. See PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920*, at 109-12 (1978); Mary Kupiec Cayton, *The Making of an American Prophet: Emerson, His Audiences, and the Rise of the Culture Industry in Nineteenth-Century America*, 92 AM. HIST. REV. 597, 604-07 (1987). Lincoln's astounding 1838 speech on "The Perpetuation of Our Political Institutions" was delivered at the Springfield Young Men's Lyceum, and illustrates the lyceum's value as an outlet for young, ambitious lawyers. See DAVID HERBERT DONALD, *LINCOLN* 80 (1995). In that speech, of course, Lincoln attacked the prevailing emotionalism of politics as a danger to the nation's "proud fabric of freedom." *Id.* He urged that the country turn to "reason, cold, calculating, unimpassioned reason" as a means of restraining men of overweening ambition (such as himself) from taking advantage of the slavery question to make a name for themselves. *Id.* at 81-82.

178. 2 CHROUST, *supra* note 126, at 108 (quoting John Moreland, Notice of Deposition, MO. INTELLIGENCER, Nov. 19, 1819, at 4).

179. *State v. Moses*, 13 N.C. 292, 296, 2 Dev. 452, 458 (1830).

professional reputations, and in many cases their political ambitions, depended on their powerful oratory. Southern—and many western—judges were not strong enough to assert this power in the teeth of the lawyers and the audience. They took a different tack: they fell back on the expensive remedy of new trial.

We see the true flavor of the southern courtroom in a trial near Huntsville, Alabama in the 1820s.<sup>180</sup> A bitter feud had sprung up between two wealthy men from northern Alabama: Smith, who had married the niece of one of Andrew Jackson's bitterest enemies, and Donelson, a nephew of Jackson's wife. Donelson publicly insulted Smith, and Smith sued him for slander. Donelson's defense was that his insult was justified. Trial was to be had in a small village, and as the day drew near, the friends and adherents of the litigants began to fill up the surrounding area. Donelson's witnesses were so numerous that they overflowed the local tavern and had to camp out in the fields. Each side had hired four or five lawyers to work on the case. The trial lasted several days—a long time for the period.<sup>181</sup>

All were waiting for the closing arguments. Finally they came. In Foote's estimation, "The speech of Judge Hopkins [then counsel for Smith, the plaintiff] was most masterly. I do not know that I have heard it since surpassed."<sup>182</sup> Hopkins "analyzed the testimony fully; he explained the legal principles involved with a power and earnestness which filled all present with admiration; his peroration was marked with the most soul-moving and overwhelming eloquence."<sup>183</sup> Judge Kelly, then counsel for Donelson, the defendant, began his response. Foote described the scene:

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180. The account is given in FOOTE, *supra* note 139, at 9-11.

181. Foote noted: "It had not then become fashionable to occupy seven or eight weeks in the trial of a single case, and the arts of procrastination, now so freely allowed in certain localities [Foote was writing in the 1870s], for the spread of social excitement and the diffusion of forensic fame, would have been then nowhere tolerated." *Id.* at 10. Foote was a former U.S. senator and a "moderate" Jacksonian Democrat. See 8 AMERICAN NATIONAL BIOGRAPHY, *supra* note 149, at 193-94.

182. FOOTE, *supra* note 139, at 10.

183. *Id.*

I doubt exceedingly whether a more telling and effective forensic speech has ever been made on either side of the Atlantic since the days of Erskine and Curran. He was logical, he was facetious, he was pathetic, he [sic] was denunciatory, by turns; and he seemed to wield the jury as a boy would do his playthings. The presidential contest between Jackson and Adams had just occurred, and the whole public mind of Alabama had been inflamed almost to madness by the fierce discussions of the period. The members of the jury were all *Jackson men*. Right well did Juge [sic] Kelly know this important fact, and right adroitly did he take advantage of it. He alluded more than once to the fact that Donelson was the nephew of the hero of New Orleans, and that his antagonist was the nephew, by marriage, of one of his bitterest foes. As he thundered forth his furious invective, the faces of the jury were ablaze with partzan [sic] excitement and indignation. They retired, under the charge of the court to the room assigned them for conference; but no conference there took place. Their minds were already made up. A loud "*hurrah for Jackson*" was heard as they left the court room, and a few minutes thereafter, they returned with a verdict for the defendant; which verdict the Judge, though himself an ardent Jackson man, set aside at once without waiting for a motion to be made for that purpose.<sup>184</sup>

A number of things are notable about this account. The lawyers—not the judge or the witnesses or the parties—were clearly the stars of the show. Their rhetorical powers are lionized, and in particular Kelly is praised for his skill in inflaming the partisanship of the jury. At trial, the judge did little to counteract that partisan appeal. His charge was deemed to be utterly unimportant, and only mentioned in passing. The jury seemed to take no notice of it whatever. The judge did have one remaining power to affect the verdict: grimly doing his duty despite his own partisan sentiments, he pulled out his ultimate weapon, the new trial. He was for all intents and purposes silenced during the trial, and could only resort to an expensive and limited remedy. The demands of the dramatic,

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184. *Id.* at 11.

entertainment style of trial thus ran into direct conflict with a judge's power to comment.

This dramatic style of trial caught on in the West as well as the South. People flocked to see the lawyers.<sup>185</sup> So great was the popular pressure to put on a good show that a judge on the western frontier was embarrassed if there was no ferocious rhetorical battle going on in his courtroom. Some judges would privately tell the lawyers to pull no punches (verbally, at least), and to give everyone their money's worth.<sup>186</sup>

Often the spectators were so swept away by a lawyer's speech that they started shouting and stamping on the floor. Courtrooms could resemble camp revivals, that other great staple of release and entertainment (as well as genuine religious fervor) on the frontier, complete with ecstatic cries. One listener in a Missouri courtroom shouted to the defense lawyer, "Go it my little Johnson! Rise and shine, honey; live in the milk and die in the cream!"<sup>187</sup>

Sometimes lawyers did not pull real punches; fistfights between lawyers in open court were not uncommon. Judges did not interfere immediately, so as not to ruin the entertainment, and afterwards simply fined the offenders—a fine that would be remitted once the pugilists had reconciled and asked the court's pardon.<sup>188</sup> Order and rationality were not keynotes of the western courtroom in the early days.

In a mode that is familiar to us today, southern and western lawyers used their rhetorical powers—unhampered by the judge—to play on national and regional prejudices to overcome legal arguments. Often, anything that smacked of the English common law was suspect.<sup>189</sup> That included judges commenting on the

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185. See, e.g., HISTORY OF SANGAMON COUNTY, ILLINOIS, *supra* note 135, at 183.

186. See O.H. SMITH, EARLY INDIANA TRIALS AND SKETCHES 5-7 (Cincinnati 1858).

187. Banton G. Boone, *A Cause Celebre—Birch vs. Benton*, in THE HISTORY OF THE BENCH AND BAR OF MISSOURI 381 (A.J.D. Stewart ed., St. Louis, Legal Publ'g Co. 1898).

188. See 2 CHROUST, *supra* note 126, at 102.

189. See *id.* at 105. An Indiana lawyer who had some learning in the law once dared refer to "the great English common law." *Id.* His opponent won the jury's approval by exclaiming, "If we are to be guided by English law at all, we want their best law, not their common law. We want a law as good as Queen Victoria herself makes use of; for, gentlemen, we are

evidence.<sup>190</sup> Eastern law was also viewed with suspicion. In Illinois, a lawyer once tried to support his argument in a case involving title to a mill by quoting Johnson's *New York Reports*.<sup>191</sup> Opposing counsel responded by telling the jury that Johnson was a "Yankee clock-peddler,"<sup>192</sup> who had been going up and down the country "gathering up rumors and floating stories against the people of the west, and had them published in a book entitled 'Johnson's Reports.'"<sup>193</sup> He indignantly exclaimed, "Gentlemen of the jury, I am sure you will not believe anything that comes from such a source; and, besides, what did Johnson know about Joe Duncan's mills?"<sup>194</sup> This argument carried the day, and the jury found for his client.<sup>195</sup>

### 5. *Lawyers in Politics*

Lawyers' rhetorical skills, and the renown gained by exercising them in the courtroom, served them well in another arena: politics. The southern or western lawyer was deeply involved in politics, to a greater extent than his northern counterpart.<sup>196</sup> Lawyers in the

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sovereigns here." *Id.* He went on:

But we don't want no English law. United States' law is good enough for us; yes, Indi-a-na law is good enough for an Indiana jury; and so I know you will convince the worthy gentleman who has come here to insult your patriotism and good sense, by attempting to influence your decision through the common law of England.

*Id.* Southern and western judges were themselves often impatient of citations of precedent and legal authorities. See, e.g., FOOTE, *supra* note 139, at 20-21 (describing Mississippi's Judge Child's impatience with lengthy citations from "musty volumes"); HUEBNER, *supra* note 14, at 44-45 (describing the view of Tennessean Judge Catron—a Jacksonian of humble origins and little formal education—that such citations were "an address of vanity to ignorance and pedantry").

190. See, e.g., BROWNE DEBATES, *supra* note 151, at 234-35 (remarks of C.T. Botts).

191. See JOSEPH GILLESPIE, RECOLLECTIONS OF EARLY ILLINOIS AND HER NOTED MEN 21 (Chicago, Fergus Printing Co. 1880) (Fergus Historical Series No. 13).

192. *Id.*

193. *Id.*

194. *Id.*

195. See *id.* Gillespie included this episode to illustrate the "'clap-trap' employed in early times to humbug the juries by a certain class of lawyers." *Id.*

196. Bloomfield has shown how the northern ideal of the lawyer during this period was withdrawn from politics. See Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306, 314-17 (1968); see also WILLIAM

North lamented that "[t]he day is past when the lawyer can call upon the legislature to assert his rights."<sup>197</sup> This was not so in the South and West. There, lawyers had some leverage within state legislatures and conventions to pass measures favorable to their interests, though they had to be careful how they used it. The difficulty was that lawyers were to some extent tarred with the same aristocratic brush that judges were, in the populist democratic view.

After the advent of Jacksonian democracy, despite the fact Jackson himself had been a lawyer, attacks on the organized bar grew apace. The bar, after all, claimed special privileges and monopolies based on expertise.<sup>198</sup> Legislatures cut down or in some cases even eliminated requirements for admission to the bar.<sup>199</sup> The result was that numerous bar associations, especially in New England, folded in the 1830s.<sup>200</sup> Interestingly, the southern bar associations seemed to have survived the populist storm better than the northern ones, perhaps because they more quickly adopted—and indeed took advantage of—the populist spirit of the times.<sup>201</sup>

Because of this populist spirit, lawyers sometimes had difficulty passing provisions favoring their interests.<sup>202</sup> But when it came to

WESTON FISHER III, *THE LAW OF THE LAND: AN INTELLECTUAL HISTORY OF AMERICAN PROPERTY DOCTRINE, 1776-1880*, at 74-77 (1991) (discussing the withdrawal of lawyers from electoral politics during the antebellum period). In contrast, southern lawyers were deeply involved in politics. See, e.g., JAMES W. GORDON, *LAWYERS IN POLITICS: MID-NINETEENTH CENTURY KENTUCKY AS A CASE STUDY* 47-80 (1990).

197. *New Publications: Règles sur la Profession d'Avocat*, 7 PA. L.J. 98, 99 (1847) (book review).

198. One Jacksonian denounced the "secret trades union of lawyers, called the bar, that has always regulated the price of their own labor and by the strictest concert contrived to limit competition." FREDERICK ROBINSON, *A PROGRAM FOR LABOR* (1834), reprinted in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY* 329 (Joseph L. Blau ed., 1947). If the organized bar were investigated, Robinson claimed, "[w]e shall discover that by means of this regularly organized combination of lawyers throughout the land the whole government of the nation has always been in their hands." *Id.* at 330. Roscoe Pound thoroughly documented the Jacksonian anti-lawyer movement. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 232-42. (1953).

199. In 1800, fifteen out of nineteen states or territories insisted on minimum periods of preparation before joining the bar; by 1840, only eleven out of thirty did so. See 2 CHROUST, *supra* note 126, at 166-67. New Hampshire (after 1842), Maine (after 1843), and Wisconsin (after 1849) allowed any citizen to practice law on proof of good moral character. See *id.* at 158.

200. See *id.* at 157-60.

201. See *id.* at 152-53.

202. This was particularly true of broad rights of appeal, which lay people saw as simply

provisions limiting the power of judges to comment on evidence, lawyers could successfully wield populist rhetoric without worrying that it would be turned against them. They worked at casting judges as aristocrats seeking to trample the power of the people in the form of the jury.<sup>203</sup> To laypeople, it may well have seemed that, as between judges and lawyers, the more numerous lawyers were the less aristocratic of the two.

Lawyers did what they could to make themselves seem as democratic as possible, pointing out that they came from all social backgrounds and were involved in numerous pursuits besides law.<sup>204</sup> As we will see in the next part, lawyers played a leading role in putting these restrictions into law. This is not to say that *all* lawyers favored these restrictions, or favored the same degree of restriction; there were political differences among them just as there are political differences today.<sup>205</sup> But in the South and West, groups of lawyers succeeded in getting these limits on judges through legislatures and constitutional conventions. The culture was receptive to these limitations on the judge.

### III. THE MOVEMENT TO CURB THE POWER

Now that certain aspects of the South and West's legal and social culture have been described, we will examine how provisions

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opportunities for lawyers to fleece their clients. The North Carolina Assembly, for example, was reluctant to provide for an appellate court in the early nineteenth century because of "suspicion that the lawyers were pushing this measure for their own emolument." Battle, *supra* note 121, at 476. In the California Constitution Convention of 1849, delegates vigorously debated whether to have a \$200 minimum amount in controversy for appeal to the Supreme Court. See BROWNE DEBATES, *supra* note 151, at 225. Several laypeople forcefully accused lawyers of encouraging appeals in hopeless or trivial cases to pile up fees, one saying that lawyers "pounce upon" their clients "like vultures upon dead bodies." *Id.* at 228 (remarks of Mr. Noriego); see also *id.* at 226, 232 (remarks of Mr. McCarver); *id.* at 231 (remarks of E. Brown). The lawyers fought back, but the provision passed nonetheless. See *id.* at 233.

203. See the arguments of Waterman, *supra* text accompanying note 60, Deford, *infra* text accompanying notes 282-84, and Botts, *infra* text accompanying note 255-56.

204. See, e.g., *The Legal Profession*, 13 S. & W. LITERARY MESSENGER & REV. 356, 358 (1847); Hall, *supra* note 107, at *Inaugural Address of Hon. A. Caruthers, Professor of Law in Cumberland University, Lebanon, Tennessee*, 3 U.S. MONTHLY L. MAG. 542 (1851).

205. It is important to note, though, that law practice was not as specialized then as it became in the late nineteenth century. There was no separate plaintiffs' bar or defense bar; lawyers switched back and forth all the time in the early nineteenth century. Abraham Lincoln's career is a perfect example. See DONALD, *supra* note 177, at 97, 103-06. So we do not see then any division between a "populist" plaintiffs' bar or "conservative" defense bar.

restricting the judge's ability to comment passed into law in particular states. As we have seen, most states allowed judicial comment on evidence in the first half of the nineteenth century, New York being the recognized leader.<sup>206</sup> But, even early in the century, a few states struck out on their own and denied judges the power. These were all states of the upper South: North Carolina, Tennessee, and Maryland. Virginia courts, although they seem not to have explicitly barred comment on evidence until 1854, did not approve of it even early on. North Carolina's early restriction was born in part of a battle between the bench and bar. This battle was waged in the southern style described above; emotions ran high, and insults flew back and forth in open court. Tennessee, with its strong settler links to North Carolina, constitutionalized the rule in 1796 and from there it spread throughout the South and West. In a few states, the courts themselves imposed the restrictions without waiting for the legislature or a constitutional convention to do so. Throughout the South and West, lawyers were key players in the conventions and legislatures that imposed restrictions.

### *A. The Legislative and Constitutional Movement*

#### *1. North Carolina: A Battle Between the Bench and Bar*

North Carolina broke away from the common law practice in 1796, and it did so by statute.<sup>207</sup> In the years leading up to 1796, a feud raged between the bench and bar of North Carolina. Under the Constitution of 1776 of the Free State of North Carolina, the first judges elected by the legislature were Samuel Ashe, Samuel Spencer, and James Iredell.<sup>208</sup> Iredell (later a United States Supreme Court justice) soon resigned, and John Williams took his place.<sup>209</sup> These three men all held office until well into the 1790s—through war, economic depression, the adoption of the new federal Constitution, and the birth of the new party politics. They

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206. See, e.g., *Frederick v. Gaston*, 1 Greene 401, 404 (Iowa 1848) ("In many of the States of the Union, in New York in particular, it is the practice of the courts to charge the jury upon facts.").

207. See *An Act to Secure the Impartiality of Trial by Jury, and to Direct the Conduct of Judges in Charges to the Petit Jury*, ch. IV, § 1, 1796 N.C. Laws 3.

208. See *Battle*, *supra* note 121, at 468-69.

209. See *id.* at 469.

constituted the entire judiciary of the state, being both trial judges, sitting alone, and appellate judges, sitting en banc.<sup>210</sup>

None of these judges had any great legal training. Ashe, indeed, was a lawyer, but "the character of the practice and the turbulence of the tim[es]" did not allow him to devote himself to professional learning.<sup>211</sup> Spencer had been a clerk of Anson Court, but it is unclear whether he was in fact a lawyer.<sup>212</sup> Williams was a carpenter.<sup>213</sup> In addition to ignorance, the judges were charged with partiality.<sup>214</sup>

The lawyers who practiced before them chafed under their control. It was said of two of the most prominent lawyers—John Hay and Archibald Maclaine—that when they were irritated, they had "tongues sharp as a scorpion's sting."<sup>215</sup> One of the main sources of irritation was interference from the judge when they were presenting a case. A fellow lawyer, William Hooper, wrote to Iredell:

Our court at Wilmington went on in the old dilatory mode of doing business. Great threats of despatch accomplished in the usual way. Much conversation from Germanicus [Spencer] on the bench; his vanity has become insufferable, and is accompanied with the most overbearing insolence. Maclaine and he had a terrible "fracas." Germanicus, with those strong intuitive powers with which he is inspired, took up Maclaine's defence in an ejection, and ran away with it before it was opened. Maclaine expostulated, scolded, stormed, called names, abandoned the cause. I prevailed. Spencer made concessions; hostilities ceased, and peace was restored.<sup>216</sup>

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210. *See id.*

211. *Id.*

212. *See id.*

213. *See id.*

214. A member of the Assembly wrote to Iredell, "[t]he most shameful partiality disgraced the Bench," culminating in the near refusal of the judges to recognize an order they had previously made. Letter from Archibald Maclaine to James Iredell (Aug. 3, 1786), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 143 (photo. reprint 1949) (Griffith J. McRee ed., New York, Appleton 1857) [hereinafter MCREE]. In another letter, Maclaine reported: "The criminal business has been trifling, and no otherwise remarkable than for trifling fines for atrocious trespasses, when the favorites of the Court were defendants; and heavy fines, when the malice of the Judges was to be gratified." Letter from Archibald Maclaine to James Iredell (July 11, 1787), in 2 MCREE, *supra*, at 164.

215. Battle, *supra* note 121, at 470.

216. Letter from William Hooper to James Iredell (July 6, 1785), in 2 MCREE, *supra* note

It is hard to imagine a similar scene before Chancellor Kent or Justice Story. Right after this passage Hooper wrote that the courts must be reformed, and that "[a]gainst the present system the cries of the people are loud."<sup>217</sup> But, he said, "what affects me most is, that the censure is pointed at the Bar, when the occasion is seated much higher."<sup>218</sup> The judges were winning the public relations war against the lawyers.

Matters finally came to a head over the treatment of British Loyalists. In 1786 the legislature passed an act forbidding people whose property had been confiscated (Loyalists) from bringing suit.<sup>219</sup> This had been a profitable area of litigation for the lawyers; Hooper was so incensed by the act that he proposed to Iredell that it be called "a bill inflicting pains and penalties on attorneys."<sup>220</sup> The lawyers were further riled when the three judges proved vigorous in their enforcement of the act.<sup>221</sup> To top it all off, the court banished two Tories without any statutory authorization to do so.<sup>222</sup>

The bar was in an uproar, and in 1786 John Hay introduced resolutions of impeachment in the legislature against the three

214, at 125; see Battle, *supra* note 121, at 470. Such episodes were by no means uncommon. Hooper told Iredell of another, this one involving Judge Ashe and John Hay:

Ashe and Hay had a terrible squabble at Wilmington. Ashe, from the Bench, told Hay that his conduct in the Admiralty to the Judge thereof ought to have been answered with a cane; and directed the Attorney General to indict him and Speller for "champerty." Judge how Hay felt: he behaved with becoming temper, and decency; but nourishes, I fancy, a flame in his bosom that will burn furiously when it vents itself.

Letter from William Hooper to James Iredell (Feb. 7, 1784), in 2 MCREE, *supra* note 214, at 89-90; see also Letter from Archibald Maclaine to James Iredell (July 11, 1787), in 2 MCREE, *supra* note 214, at 164 (discussing Spiller's written demand for an apology from Ashe).

217. Letter from William Hooper to James Iredell (July 6, 1785), in 2 MCREE, *supra* note 214, at 125-26.

218. *Id.* at 126.

219. See 2 SAMUEL A'COURT ASHE, HISTORY OF NORTH CAROLINA 45 (1925).

220. Letter from William Hooper to James Iredell (Jan. 22, 1786), in 2 MCREE, *supra* note 214, at 133.

221. See Letter from Archibald Maclaine to James Iredell (Mar. 6, 1786), in 2 MCREE, *supra* note 214, at 137-38. The judges had actually tried to give the Loyalists a chance on one occasion, but "they learned that there was a clamor against them for the little good which they attempted." *Id.* at 138. So they decided to enforce the act to the letter, and go even further: "They believe that the Assembly will not censure them for misbehavior in office, when their vengeance is aimed at a defenceless Tory." *Id.*

222. See 2 ASHE, *supra* note 219, at 44-47, 51; Kenneth M. Johnson, Paper, *Province of the Judge in Jury Trials*, 12 J. AM. JUDICATURE SOC'Y 76, 78-79 (1928).

judges.<sup>223</sup> A committee of lawyers was appointed to investigate, and it returned a report charging the judges with numerous offenses.<sup>224</sup> In response, Judge Ashe wrote an open letter condemning the bar and claiming that the lawyers, not the judges, were themselves responsible for the failures of justice they described.<sup>225</sup> Despite the report, the legislature dismissed the charges<sup>226</sup> (concern for Tories was hardly a popular cause), and hostility between the bench and bar continued to fester. Problems continued because there was no appeal from these judges' decisions; they were the trial and appellate courts.<sup>227</sup> Not until 1818 did the North Carolina legislature create a wholly separate supreme court with appellate jurisdiction only.<sup>228</sup>

Ultimately, the lawyers succeeded in muzzling the judges, if not in ousting them. The statute passed in 1796 states that judges are forbidden in the charge to the jury to express any "opinion whether a fact was fully or sufficiently proved, such matter being the true office and province of the jury."<sup>229</sup>

While it seemed that the North Carolina bar had reason to complain, their objectives could have been met more directly by removing the offending judges. Popular pressure prevented this course,<sup>230</sup> so the indirect method of limiting comment prevailed—possibly influenced by North Carolina's new sister state Tennessee.

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223. See 18 STATE RECORDS OF NORTH CAROLINA 212-17, 421-25, 428 (Walter Clark ed., 1900). This was evidently not the first time Hay had gone after the judges. Hay had apparently initiated an earlier investigation into their misconduct which came to nought. Then, too, Ashe defended himself in a letter that attacked the lawyers. Hooper wrote to Iredell in January 1786: "This ridiculous pursuit of Hay's ended as we expected. It was conceived in spleen, and conducted with such headstrong passion, that, after the charges were made, evidence was wanting to support them." Letter from William Hooper to James Iredell (Jan. 22, 1786), in 2 MCREE, *supra* note 214, at 133.

224. See Letter from Alfred Moore to James Iredell (Dec. 14, 1786), in 2 MCREE, *supra* note 214, at 153-54; 18 STATE RECORDS OF NORTH CAROLINA, *supra* note 223, at 212-17.

225. See 2 MCREE, *supra* note 214, app. at 601 n.1.

226. See 18 STATE RECORDS OF NORTH CAROLINA, *supra* note 223, at 428.

227. See Battle, *supra* note 121, at 468-69.

228. See ASHE, *supra* note 219, at 261.

229. An Act to Secure the Impartiality of Trial by Jury, and to Direct the Conduct of Judges in Charges to the Petit Jury, ch. IV, § 1, 1796 N.C. Laws 3.

230. See ASHE, *supra* note 219, at 51-53.

## 2. *Tennessee and Its Followers*

The North Carolina statute seems to have been relatively little known outside the state. Waterman described it in his treatise, and urged other states to follow suit.<sup>231</sup> Georgia's supreme court took note of it in 1849.<sup>232</sup> But few other mentions appear in legal literature. The more prominent provision was that of the Tennessee Constitution of 1796, drafted shortly before the enactment of North Carolina's statute.<sup>233</sup> Tennessee had been part of North Carolina before it became a state in 1796, and many of its settlers were North Carolinians.<sup>234</sup> Indeed the 1796 Tennessee Constitution was based on the North Carolina Constitution of 1776.<sup>235</sup> It is not surprising, then, that Tennessee and North Carolina should have had similar provisions limiting judges.

At the Tennessee Constitutional Convention, the drafting committee put in the article on the judiciary a provision restricting the judge's charge: "The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."<sup>236</sup> It went through without recorded debate. A number of lawyers were members of that drafting committee, including Andrew Jackson himself, who was active throughout the Tennessee convention.<sup>237</sup> It would be astonishing if their influence on the judiciary article, in particular, were not profound.<sup>238</sup>

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231. See 3 WATERMAN, *supra* note 58, at 729.

232. See *Potts v. House*, 6 Ga. 324, 345 (1849).

233. The Tennessee Constitutional Convention assembled on January 11, 1796 and adjourned on February 6, 1796, having completed drafting the state constitution. See JOURNAL OF THE PROCEEDINGS OF A CONVENTION BEGAN AND HELD AT KNOXVILLE 1, 32 (Knoxville 1796). The North Carolina legislature convened at Raleigh on November 21, 1796 and adjourned by December 25 of the same year. See *List of Acts Passed*, N.C. J. (Halifax), Jan. 2, 1797, at 1; *Supplement*, ST. GAZETTE N.C. (Edenton), Jan. 12, 1797, at 1.

234. See RAMSEY, *supra* note 134, at 175.

235. See WALLACE MCCLURE, STATE CONSTITUTION-MAKING, WITH ESPECIAL REFERENCE TO TENNESSEE 29-51 (1916); JAMES PHELAN, HISTORY OF TENNESSEE: THE MAKING OF A STATE 200 (Boston, Houghton, Mifflin and Co. 1888).

236. TENN. CONST. of 1796, art. V, § 5; see JOURNAL OF THE PROCEEDINGS OF A CONVENTION BEGAN AND HELD AT KNOXVILLE, *supra* note 233, at 19.

237. See JOURNAL OF THE PROCEEDINGS OF A CONVENTION BEGAN AND HELD AT KNOXVILLE, *supra* note 233, at 1.

238. That was certainly the case where we have more complete convention records. See *supra* text accompanying note 119 (quoting Hall as pointing out that lawyers dominated the committees on the judiciary and floor debates about the judiciary).

The constitution of Tennessee was only the third state constitution to be drawn up for a new state not part of the original thirteen.<sup>239</sup> The Tennessee Constitution was widely praised and thought to be a good model for other states.<sup>240</sup> Jefferson declared it to be "the least imperfect and most republican" of the state constitutions to that date.<sup>241</sup> Its provisions were often copied by the new states that came after, and its provision on judicial comment was no exception.

Among the earliest copying was that done by statute in Mississippi and Alabama in 1802 when they were part of the Mississippi Territory; they simply lifted the provision verbatim from the Tennessee Constitution.<sup>242</sup> In 1822, after Mississippi had become a state, it modified the statute to make clear that any sort of judicial opinion on evidence was banned.<sup>243</sup> A further modification in 1830 placed extraordinary limitations on the judge, by far the strictest of the time: Judges were not allowed even to sum up testimony, much less give their opinion on it, and could not even charge the jury on law unless the parties agreed.<sup>244</sup>

239. See 27 *ENCYCLOPEDIA AMERICANA* 474 (int'l ed. 1991). Vermont was the first, admitted in 1791, followed by Kentucky in 1792. See *id.*

240. See RAMSEY, *supra* note 134, at 657.

241. *Id.*

242. See *An Act More Effectually to Secure the Rights and Interests of the Citizens of this Territory*, § 4, 1802 Miss. Terr. Acts 3, 4 (codified at MISS. TERR. STAT. pt. V, ch. II, § 5 (1807)); WILLIAM WARREN ROGERS ET AL., *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE* at xxi (1994) (noting that Alabama was part of the Mississippi Territory).

243. See *An Act, to Reduce Into One, the Several Acts and Parts of Acts, Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law*, § 144, 1822 Miss. Laws 35, 64 (codified at MISS. REV. CODE ch. 13, § 144 (1824)) ("No judge . . . shall charge the jury as to the weight of evidence in any cause, civil or criminal, but such judge may sum up the testimony and declare any matter of law arising thereon."). The act was passed as part of code revisions and consolidations proposed by respected lawyer George Poindexter, who had been appointed to the task by the legislature. See *Governor's Message*, MISS. REPUBLICAN (Natchez), June 20, 1822, at 4 (discussing code revisions and consolidations). On Poindexter, see DUNBAR ROWLAND, *COURTS, JUDGES, AND LAWYERS OF MISSISSIPPI 1798-1935*, at 30-43 (1935). The legislature passed all the bills Poindexter offered but one—a bill providing against champerty and maintenance. See *The Legislature*, GAZETTE (Natchez, Miss.), July 6, 1822, at 2. Lawyers were thus left more latitude to ply their trade.

244. See *An Act, to Amend an Act, Entitled an Act, to Reduce Into One, the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law*, Passed June 28th, 1822, at § 3, 1830 Miss. Laws 50, 50-51 (codified at MISS. STAT. ch. XL, §§ 9, 53 (Howard & Hutchinson 1840)). The legislature was certainly mindful of the infamous Judge Child during the same session it passed this 1830 modification. See

Other states followed Tennessee's lead. Newly-admitted Arkansas' constitution of 1836 contained an exact copy of the Tennessee provision.<sup>245</sup> Missouri, admitted in 1821, adopted a Tennessee-type statute in 1845 for criminal cases.<sup>246</sup> Texas, admitted in 1845, adopted such a statute for both civil and criminal cases right away in 1846.<sup>247</sup> It seems likely that Florida, admitted in 1845, and Iowa, admitted in 1846, which both adopted statutes very similar to each other,<sup>248</sup> were influenced by the Tennessee

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*supra* notes 139-42 and accompanying text. The governor had recently nominated George Poindexter to fill a vacant seat for Mississippi in the U.S. Senate, but the legislature had to confirm the choice. The other candidate for the office was Judge Child. Poindexter won, 41 to 6. See *Election Results*, NATCHEZ GAZETTE (Natchez, Miss.), Dec. 1, 1830, at 3. One newspaper correspondent reported, "It was understood here, that the Judge [Child] intended to resign, and candidates started up like dragons' teeth. [The legislature elected judges at that point.] But the Judge declined the idea of giving up his comfortable seat, from some cause or other, which I do not undertake to assign." *Id.* It is possible that Judge Child's refusal to resign encouraged the legislature to restrict judicial comment. There were also problems with a judge of the Criminal Court in Adams County that the legislature was asked to address. See, e.g., Letter to the Editor from "Moderate," NATCHEZ (Natchez, Miss.), Nov. 20, 1830, at 372. The idea of judicial elections was also in the air at the same time, as the legislature considered proposing a constitutional convention for the state. See Editorial, *Convention*, PEARL RIVER ADVOC. & E. ADVERTISER (Monticello, Miss.), Sept. 24, 1830, at 2 (arguing that judges in Mississippi should be elected every four years because legal studies are calculated "to engender aristocratic feeling").

245. See ARK. CONST. of 1836, art. VI, §12; JOURNAL OF THE PROCEEDINGS OF THE CONVENTION MET TO FORM A CONSTITUTION AND SYSTEM OF STATE GOVERNMENT FOR THE PEOPLE OF ARKANSAS 11-13 (Little Rock 1836). The records of the Arkansas convention record motions and votes, but not verbatim debates.

246. See MO. REV. STAT. ch. 138, art. VI, § 28 (Jones 1845); 27 ENCYCLOPEDIA AMERICANA 474 (int'l ed. 1991) (noting Missouri's admission in 1821).

The court shall not . . . sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested so to do by the prosecuting attorney, and the defendant or his counsel, but the court may instruct the jury on any point of law arising in the cause . . . .

MO. REV. STAT. ch. 138, § 28.

247. See An Act Regulating Juries, § 25, 1846 Tex. Laws 170, 177 ("[N]o judge, in any cause, civil or criminal, shall charge the jury upon the weight of evidence, but he may sum up the testimony and shall charge the jury upon any matter of law arising thereon."); 27 ENCYCLOPEDIA AMERICANA 474 (int'l ed. 1991) (noting Texas' admission in 1845).

248. See An Act to Provide Writs of Error in Criminal Cases, § 8, 1847 Fla. Acts 8, 9 ("[C]harges made by Judges to Juries . . . shall be exclusively on points of law . . ."); An Act to Amend the Several Acts Regulating Judicial Proceedings, § 1, 1847 Fla. Acts 11, 12 (allowing the judge to "charge the Jury only upon the law of the case"); An Act Regulating Practice in the District Courts of the Territory of Iowa, § 36, 1839 Iowa Terr. Stat. 370, 379 ("The district court in charging the jury, shall only instruct them as to the law of the case."); 27 ENCYCLOPEDIA AMERICANA 474 (int'l ed. 1991) (noting Florida's admission in 1845, and Iowa's admission in 1846). The Code of Iowa adopted in 1851 contained stronger language.

provision. Florida may also have been influenced by Illinois' statute of 1845 for criminal cases: judges "shall only instruct as to the law."<sup>249</sup>

### 3. *California: Regional Differences Among Lawyers at the Convention*

The most influential follower of Tennessee was California. In September, 1849, a convention met to draft a constitution for the soon-to-be-admitted state. We have a good idea of how the Tennessee provision worked its way into the California Constitution. The delegates felt the question of the judge's charge was important enough to debate at length, and, unlike in the southern states, the convention reporter transcribed the debates in admirable detail.<sup>250</sup>

Regional differences turned up in the debates on this question. Lawyers originally from southern states tended to support a strong form of restricting judges, while lawyers of northern origin argued to allow judges more leeway. Through and through, the debate ran the question of the relative power and trustworthiness of counsel and the trial judge, despite the efforts of one outspoken delegate to focus on the jury.

The committee responsible for drafting an article on the judiciary produced a version which contained no restriction on a judge's

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See IOWA CODE § 1791 (1851) ("The charge of the court shall be confined strictly to matters of law . . .").

249. ILL. STAT. ch. 83, § 36 (Gross 1868). Illinois added a further restriction on the trial judge in 1847, with a statute prohibiting a judge from giving any instruction that was not reduced to writing. See ILL. STAT. ch. 83, § 37; *Humphreys v. Collier*, 1 Ill. (Breese) 297, 298 n.2 (1829) (editor's note). These restrictions evidently came about because of the conduct of Judge Thomas C. Browne, a justice of the supreme court during the entire period while the constitution of 1818 was in force (until the constitution of 1848 went into effect providing for election of judges). See ILL. CONST. of 1848, art. V, §§ 3, 7, 17; James H. Cartwright, *Present but Taking No Part*, 10 ILL. L. REV. 537, 538 (1916). Judge Browne was not reputed for learning in the law, but he reportedly did know how to get a jury verdict to match his views. Lawyers complained that he would instruct a jury in such a way as to get a particular verdict, and, when a bill of exceptions was presented to him for the appeal, he would refuse to sign it and deny that he had instructed the jury as stated. See Cartwright, *supra*, at 538-39. Leading lawyers on his circuit then went to the legislature for relief, and got the restrictions passed. See Cartwright, *supra*, at 539; George M. Hogan, *The Strangled Judge*, 14 J. AM. JUDICATURE SOC'Y 116, 121 (1930).

250. See BROWNE DEBATES, *supra* note 151, at 234-39.

charge.<sup>251</sup> Very likely, this was because a leading light on that committee was a relatively conservative lawyer from New York, W.S. Sherwood, who would have been used to judges commenting on evidence.<sup>252</sup>

Pacifus Ord, a delegate who supported various populist positions throughout the debates, proposed an amendment taken verbatim from the Tennessee Constitution: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."<sup>253</sup> Immediately, the Virginian lawyer C.T. Botts proposed a further amendment barring judges from summing up altogether.<sup>254</sup> Botts was an excitable populist given to grandiloquent speeches about the rights of the people (and his own rights in the convention) in the style of his fellow Virginian, Patrick Henry. The other delegates' styles were considerably more down-to-earth, and Botts's proposals met with little success.

In this case, Botts's amendment became a stalking horse that distracted attention from the main proposal. He argued fiercely that "great injustice" came from allowing judges to sum up the evidence; a judge could use his interpretation of the facts to infect the jury with his own biases.<sup>255</sup> The jury was powerless to resist the interpretation of the judge. Therefore, according to Botts, allowing

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251. *See id.* at 212-13.

252. It should be noted that not all New Yorkers advocated the practice of that state when they moved elsewhere. Edward Livingston was a New Yorker of a prominent legal family, who drafted a proposed Code of Criminal Procedure for Louisiana in the 1820s. *See* 13 AMERICAN NATIONAL BIOGRAPHY, *supra* note 149, at 763-64. The draft code stated emphatically that the judge "shall not recapitulate the testimony unless requested so to do by one or more of the jurors, if there should be any difference of opinion between them as to any particular part of the testimony," and even then he was to confine his remarks strictly to the part in question. EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA, Code of Procedure, art. 354 (Pittsburgh, John I. Kay & Co. 1833) (1824). It was "the intent of this article that the jury shall decide all questions of fact, in which is included the credit due to the witnesses who have been sworn, unbiassed [sic] by the opinion of the court." *Id.* Louisiana did not stray from the path Livingston had marked out; it prohibited judicial comment on the evidence in both civil and criminal cases. *See* LA. CODE PRAC. CIV. art. 516 (1825) ("In this charge the judge must limit himself to giving the jury a knowledge of the laws . . . and he shall abstain from saying anything about the facts, or even recapitulating them . . ."); LA. REV. STAT. CRIM. PROC. § 17 (1856).

253. BROWNE DEBATES, *supra* note 151, at 234; *see also* William Wirt Blume, *California Courts in Historical Perspective*, 22 HASTINGS L.J. 121, 130 (1970) (summarizing the debate over the proposal).

254. *See* BROWNE DEBATES, *supra* note 151, at 234-35.

255. *See id.*

the judge to sum up violated the great principle of separation of law and fact—the one for the judge, the other exclusively for the jury.<sup>256</sup> Botts thus painted a picture of a struggle between judge and jury, and left the lawyers out of the picture altogether.

Other delegates, though, quickly reminded him of the lawyers' role. Sherwood, the New Yorker, said that the "impartial umpire" of the judge summing up facts was absolutely necessary to counteract the influence of partial counsel.<sup>257</sup> In this he was echoing the arguments of judges such as Judge Ruffin of North Carolina.<sup>258</sup> Even in the most learned bodies upon earth, "men of genius" were capable of carrying away the majority by the influence of their eloquence.<sup>259</sup> How much more might a talented lawyer be capable of carrying away a jury, who in some cases were "not so well informed."<sup>260</sup> "If you refuse to this impartial umpire a recital of the facts after a long trial, and after the eloquent speech of the District Attorney, you probably send an innocent man to the scaffold."<sup>261</sup> Several other delegates supported Sherwood's assessment of the dangers of eloquent counsel.<sup>262</sup> One questioned Botts's assumption that "the judge will not be an honest judge" and that juries could resist the "eloquent appeals of the counsel" if they could not resist the judge's statement of facts.<sup>263</sup> Botts gave no coherent response to these arguments about counsel.

Even those delegates who supported Botts left the rhetoric about the jury to him, and concentrated instead on the judge and counsel.<sup>264</sup> Southerners tended to echo Botts's dim view of judges.<sup>265</sup> One native of Tennessee, who had also practiced law in Vicksburg, Mississippi and at least one other southern state, told the convention that the Tennessee provision came about because of the impeachment of two high-handed judges there, which "involved the State in great expense, and caused great excitement throughout the

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256. *See id.* at 236-37.

257. *See id.* at 235.

258. *See supra* text accompanying notes 63-68.

259. *See BROWNE DEBATES, supra* note 151, at 235.

260. *Id.*

261. *Id.* at 237.

262. *See id.* at 235-36 (remarks of M. Norton); *id.* at 237-38 (remarks of W.E. Shannon).

263. *Id.* at 237 (remarks of W.E. Shannon).

264. *See id.* at 235 (remarks of P. Ord); *id.* at 237 (remarks of Mr. Hastings).

265. *See supra* text accompanying notes 101-03.

country."<sup>266</sup> This was clearly mistaken: as explained above, the Tennessee provision was part of the 1796 constitution.<sup>267</sup> It seems that the Tennessean was referring to the impeachment of Judges Joshua Haskell and Nathaniel W. Williams in 1831,<sup>268</sup> but no one at the convention knew any better.

Another lawyer-delegate said that he had witnessed many abuses of the judge's power.<sup>269</sup> Unlike Botts, however, he emphasized counsel and not the jury. If the judge undertook to meddle in the facts at all, "he necessarily takes the place of counsel."<sup>270</sup> It was counsel's job to speak about the testimony, not the judge's.

Botts's proposal to prohibit judges from summing up facts was ultimately defeated.<sup>271</sup> To some extent, his proposal seems to have deflected attention from the original proposal drawn from the Tennessee Constitution, stating that judges may not "charge juries" on questions of fact, but could summarize the testimony.<sup>272</sup> That provision ultimately passed.<sup>273</sup> Even the lawyers who were most opposed to Botts's proposal did not speak out against it. The New Yorker Sherwood seemed to believe that the judge stating the facts impartially would be enough of a check on counsel.<sup>274</sup> As Botts suggested, however, the line between summarizing on the one hand, and "charging" or giving one's opinion on the other, could be thin. The California legislature elaborated on the question in its civil procedure legislation of 1851: "In charging the Jury the Court shall state to them all matters of law . . . and if it state the testimony of the case, it shall also inform the Jury that they are the exclusive judges of all questions of fact."<sup>275</sup>

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266. BROWNE DEBATES, *supra* note 151, at 235 (remarks of W.M. Gwin).

267. *See supra* text accompanying note 236.

268. *See* PHELAN, *supra* note 235, at 301. Phelan believed that life tenure for judges was at the root of the problem: "Feeling secure in their seats, many of the judges had become so high-handed and overbearing, and in many cases so neglectful of their duties, that a general protest went up from the people as well as the bar." *Id.* Again, the bar seems to have been closely involved in these impeachments.

269. *See* BROWNE DEBATES, *supra* note 151, at 237 (remarks of Mr. Hastings).

270. *Id.*

271. *See id.* at 239.

272. *See id.* at 234.

273. *See id.* at 239.

274. As Sherwood pointed out, counsel was always there to correct the judge if he made a mistake as to the facts. *See id.* at 235, 237 (remarks of W.S. Sherwood).

275. An Act to Regulate Proceedings in Civil Cases, in the Courts of Justice of this State,

Numerous states in the West adopted provisions either like that of the California Constitution or the California statute.<sup>276</sup> Looking at the bare constitutional provision or the statute, one might conclude that the debates were largely about judges and juries. In fact, the main focus of interest was the relative roles of the judge and counsel, and regional differences had a profound influence.

#### 4. *Limits on the Spread of Restrictions: The Case of Pennsylvania*

The parade of new states that had adopted constitutional provisions or statutes limiting the judge's ability to comment on evidence should not obscure the fact that a fair number of new states did not adopt any such provision before the Civil War. These included Kentucky (admitted 1792), Indiana (1816), Maine (1820), Michigan (1837), Wisconsin (1848), and Minnesota (1858).<sup>277</sup>

Most of the original states in the North simply continued their traditional practice of allowing the judge to comment on evidence. The Pennsylvania legislature had an episode in 1842 when it debated enacting a thoroughgoing bar on judges commenting on evidence.<sup>278</sup> The bill was ultimately defeated. We have the floor speech of the sponsor of the bill, Representative Deford, which he had published in the *Pennsylvania Law Journal* and the *Pennsylvania Reporter*, a Jacksonian newspaper.<sup>279</sup> The speech opens a window on efforts in the North to restrict comment.

In Pennsylvania, tensions between the bench and at least a segment of the bar had been rising. The bar (and apparently some members of the public) were protesting vigorously against two judges of the Court of General Sessions in Philadelphia, Barton and

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§ 165, 1851 Cal. Stat. 51, 76.

276. See Krasity, *supra* note 17, at 604-05.

277. See 27 *ENCYCLOPEDIA AMERICANA* 474 (int'l ed. 1991).

278. See *Trial by Jury*, *supra* note 36 at 105. The bill stated:

It shall not be lawful for any Court aforesaid to intimate or deliver to the jury, upon the trial of any cause, an opinion on the facts, and it shall be matter of reversal in every such case where the verdict of the jury is in favour of the opinion given.

*Id.* The bill also required the charge to be reduced to writing and prohibited the judge from saying anything to the jury beyond what was written down. See *id.*

279. *Remarks of Mr. Deford*, PENN. REP. (Harrisburg), July 22, 1842, at 1.

Conrad. These two were said to have engaged in "monstrous usurpation of the powers which belong to the grand jury . . . and subsequently to a petit jury."<sup>280</sup> Deford was a lawyer who reported the bill on behalf of a select committee.<sup>281</sup> Deford praised the jury as "the very secret of society itself," and wrongly claimed that it had been founded by King Alfred.<sup>282</sup> He then inveighed at length against a "judicial tyranny" that "approaches us unseen, with the stealthiness of a midnight assassin."<sup>283</sup> This judicial tyranny was none other than decisions by the Pennsylvania Supreme Court allowing trial judges to give their opinion on the evidence at trial, as long as they specified that the ultimate decision was for the jury. According to Deford, these decisions were a radical break with the common law. He latched unto the common law maxim that facts are for the jury to decide and ignored actual common law practice.<sup>284</sup>

Yet, while Deford began by lauding the jury, his most vehement arguments concerned counsel. "The only argument which I have ever heard in favour of this *new claim*, is, that unless the judges took upon themselves to direct the jury on the facts, ingenious counsel would distort them and mislead the jurors!"<sup>285</sup> This argument was "shallow" and "arrogant and assuming" for two reasons.<sup>286</sup> First, "it takes for granted that the jury are ignorant and incapable, and of course can be led in any direction."<sup>287</sup> This was "a slander upon the intelligence of the jury."<sup>288</sup> (Deford had said earlier in the very same paragraph that "[t]he jury being in most cases

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280. Editorial, *Let Justice Be Done, Though the Heavens Fall*, KEYSTONE (Harrisburg, Pa.), July 6, 1842, at 1. Barton and Conrad were accused of administering justice in a highly partial way, favoring their political supporters and the rich at the expense of their political opponents and the poor. See *id.* As a result, the state legislature was urged to either impeach the two judges or abolish the court on which they sat. See *id.*; see also *Pennsylvania Legislature*, PUB. LEDGER & DAILY TRANSCRIPT (Philadelphia), July 7, 1842, at 3 (describing bills and motions introduced); *id.* July 11, 1842, at 3 (same); *id.*, July 13, 1842, at 3 (same). Ultimately, a bill to abolish the court was defeated. See *The Legislature*, KEYSTONE (Harrisburg, Pa.), July 14, 1842, at 2; *Pennsylvania Legislature*, PUB. LEDGER & DAILY TRANSCRIPT (Philadelphia), July 16, 1842, at 3.

281. See *id.* at 104.

282. *Id.* at 99.

283. *Id.* at 104.

284. See *id.* at 101.

285. *Id.* at 102.

286. *Id.*

287. *Id.*

288. *Id.*

plain men, are as naturally led to the adoption of the opinion of the Court on the facts, as the sparks are to fly upwards, and render their verdict accordingly.<sup>289</sup>)

Second, Deford said, it was false to assume that a judge could control the influence of "the most ingenious lawyer" if his opposing counsel could not.<sup>290</sup> This was "bringing down the abilities and talents of the bar to a level with every ignoramus, who by fraud or accident may have got himself upon the bench—a position to which I am mistaken if the bar of Pennsylvania at least, will ever assent."<sup>291</sup> The judges were incapable of controlling their courtrooms and it was best to leave it to lawyers to control each other. If the jury erred on the facts, the judge could always grant a new trial; comment was entirely unnecessary. (Deford did not explain why an ignoramus judge could be trusted to grant a new trial fairly.) Deford made it clear that his ideal was a judge who was virtually silent at trial; he held up as an example a judge he had seen on the bench in Virginia who never said anything at all to the jury unless counsel disagreed on the law.<sup>292</sup>

But all of Deford's eloquence could not save the bill. Before the vote on the question, the legislature had "a pretty lengthy discussion"—unfortunately not reported—and the bill failed 52-29.<sup>293</sup>

##### *5. Change Among the Original States: The Cases of Georgia and Massachusetts*

Of the original states that did not adopt restrictions on comment early on, only Georgia and Massachusetts changed—both against the wishes of the judiciary. In 1849, the Georgia Supreme Court upheld the power to comment in *Potts v. House*.<sup>294</sup> Citing English and New York precedents, the Georgia court said such comment was a matter of discretion with the trial judge and would not be closely scrutinized on appeal.<sup>295</sup> The court went on to mention the North

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289. *Id.*

290. *Id.* at 103.

291. *Id.*

292. *See id.*

293. *Pennsylvania Legislature*, PUB. LEDGER & DAILY TRANSCRIPT (Philadelphia), July 16, 1842, at 3.

294. 6 Ga. 324 (1849).

295. *See id.* at 344-45.

Carolina statute, impliedly criticizing its assumptions that the judge's opinion on the facts encroached on the powers of the jury "in every case" and that the jury would never question the judge's assessment.<sup>296</sup> To bolster its implied view that the jury was not so pliable as that, the Georgia court declared, "the general diffusion of knowledge and education among the people of this country, much better fits them for weighing and comparing [sic] the evidence, than in any other nation or age since the institution of trial by Jury."<sup>297</sup>

But the Georgia legislature either took this the wrong way, as an invitation to copy the North Carolina statute, or it consciously went against the wishes of the judiciary and enacted a verbatim copy the following year.<sup>298</sup> This would seem to be the North Carolina statute's only direct progeny. Georgia eventually fit in with its southern neighbors.

The Massachusetts statute was a regional anomaly, born of a covert personal battle with the judiciary. Benjamin Butler, a radical state representative, developed a grudge against the judiciary when he was attacked in a newspaper editorial and sued for libel.<sup>299</sup> The conservative presiding judge told the jury that the evidence did not warrant conviction, and the jury acquitted the newspaper.<sup>300</sup> A few years later, in 1854, the still-fuming Butler inserted a Tennessee-type restriction on judges' ability to comment on evidence into a piece of legislation having to do with another subject altogether.<sup>301</sup> In Justice Holmes' words, he "ran the thing through."<sup>302</sup>

Butler's sly tactics explain how such a piece of legislation could be enacted in Massachusetts, where the legal culture was so

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296. *Id.* at 345.

297. *Id.* at 345.

298. See An Act to Prevent Judges of the Several Superior Courts in this State from Making Certain Charges or Giving their Opinions to or in Hearing of the Jury, and to Define the Same as Error, § 1, 1850 Ga. Acts. 271, 271-72 (codified at GA. STAT. JUD. § 47 (Cobb 1851)) ("[No Judge shall] express or intimate his opinion as to what has or has not been proved . . ."). Krasity interprets the opinion differently. See Krasity, *supra* note 17, at 600, 616.

299. See Richard W. Hale, *Remarks of Richard W. Hale, Esq., at Bench and Bar Night Upon the History of the Statute Forbidding Judges to Charge Upon the Facts*, MASS. L.Q., Jan. 1926, at 57, 57-58.

300. See *id.* at 58.

301. See MASS. GEN. STAT. ch. 115, § 5 (1861); Hale, *supra* note 299, at 58-59.

302. Hale, *supra* note 299, at 59.

antithetical to such restrictions.<sup>303</sup> Massachusetts was also surrounded by states with strong judges who freely commented on evidence.<sup>304</sup> The legislation seems much more in keeping with Georgia's culture and its surrounding states.

### *B. The Reaction of the Courts*

How did courts react to these new provisions? The courts' reactions varied considerably, but in the end most seem to have put more emphasis on the formal remedy of new trial. In one respect they did not differ. In the case of statutes, judges did not attempt to declare them unconstitutional under state constitutional provisions securing the right to trial by jury. It would not seem to have been impossible to argue that trial by jury included as an essential element a judge's summing up and commenting on facts. As Kenneth Krasity pointed out, the United States Supreme Court said as much in 1929 in *Patton v. United States*:

[W]e first inquire what is embraced by the phrase "trial by jury." That means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.<sup>305</sup>

But *Patton* was decided after the vigorous movement by the likes of the American Judicature Society to restore judicial authority had been underway for several decades.<sup>306</sup> In the early and mid-nineteenth century, the tide was not running that way. Furthermore, judges in the first half of the nineteenth century were not so willing to strike down legislation as unconstitutional as they

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303. See *supra* text accompanying notes 71-74.

304. See *supra* p. 28 tbl. 1.

305. 281 U.S. 276, 288 (1929); see Krasity, *supra* note 17, at 607.

306. See *Introduction*, 1 J. AM. JUDICATURE SOC'Y 3, 3-4 (1917) (discussing the history and founding principles of the Society).

later became. The use of judicial review was growing, but still quite rare.<sup>307</sup> The issue does not seem to have been argued by counsel, and judges seem not to have suggested it.

This did not mean the judges were utterly powerless against such legislation if they were of a mind to limit it. This could be done in various ways. At least up to 1822, it seems that judges in North Carolina could in effect comment on evidence as long as they added the tag "*if the jury believe the witness.*"<sup>308</sup> The key thing, according to the North Carolina Supreme Court in the 1821 case *Sneed v. Creath*, was that the jury "feel themselves at liberty to estimate the weight of the evidence."<sup>309</sup> But a year later in *Executors of Reel v. Reel*, the court clamped down much harder on the practice, in effect saying that the trial judge could intimate no opinion whatever on the facts.<sup>310</sup> "It is not for this Court to discuss the wisdom or expediency of this law. . . . It is the will of the Legislature, and we are bound to obey it."<sup>311</sup>

There was also the possibility of converting questions of fact into questions of law. Judges preserved their power to direct a verdict, even under the statutes or constitutional provisions limiting comment. Sometimes they were rather coy about this, as the Arkansas Supreme Court was in *Hynson v. Terry* in 1838.<sup>312</sup> There,

307. The U.S. Supreme Court was also quiet in this respect during the Jacksonian era; between *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the Court invalidated no federal legislation. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 389-90 (1998).

308. *Sneed v. Creath*, 8 N.C. 157, 159, 1 Hawks 307, 312 (1821).

309. *Id.* In a suit on a debt where the defense was that it was already paid, the defendant called his brother William, a minister, to testify for him. See *id.* at 157, 1 Hawks at 309-10. Another witness said that William had been drunk when he saw what he was testifying about, and William denied it with an explanation of why she might have thought he was drunk. See *id.* at 158, 1 Hawks at 310. The judge charged the jury that "it did not appear that the witness William had any inducement to commit a perjury, that . . . they ought in charity to believe the witness; that there was nothing to impeach his testimony." *Id.* at 158-59, 1 Hawks at 311. The charge passed muster with the North Carolina Supreme Court as not violating the statute. See *id.* at 159, 1 Hawks at 311-12. The North Carolina Supreme Court did draw the line at the instruction that the witness's "being a preacher it ought to add weight to his evidence," but on the grounds that it was not automatically true, not that it violated the statute. *Id.* A new trial was granted because of that instruction. See *id.*

310. 9 N.C. 52, 52-53, 2 Hawks 63, 86-87 (1822).

311. *Id.* at 52, 2 Hawks at 86.

312. 1 Ark. 83 (1838).

the judge charged the jury that “from the law in this case, the court was of opinion that the plaintiff had not made out such a case as would enable him to recover, but that the facts were with the jury.”<sup>313</sup> The Arkansas Supreme Court approved: “The Judge leaves the matters of fact where the Constitution places them, for the consideration and judgment of the jury, and he merely declares his opinion of the law of the case, which he is bound to do under the most sacred obligations of his office.”<sup>314</sup> The court then went on to point out that there were no facts for the jury anyway; the plaintiff had not alleged that there was a gift in writing, as required for gifts of slaves under Arkansas law.<sup>315</sup>

Chief Justice Sharkey, the powerful and respected head of the Mississippi Supreme Court,<sup>316</sup> was much more forthright about the trial court’s power to direct a verdict. In *Perry v. Clarke* in 1841, he acknowledged the Mississippi statute’s prohibition on commenting on evidence.<sup>317</sup>

But at the same time it must be the prerogative of the court to determine whether the evidence conduces to prove the issue, otherwise a party might introduce whatever matter he pleased, and the court could not object: its power would be wholly paralyzed in regard to the introduction of evidence.<sup>318</sup>

The court would back up this power to direct a verdict by granting new trials: If the verdict had gone the other way, with or without instructions, “can it be supposed for a moment that the verdict would have been permitted to stand? It cannot! The court could not have hesitated in granting a new trial.”<sup>319</sup>

While most courts chafed under the constitutional or statutory restrictions, some seemed to glory in them. A few state appellate courts thought these restrictions were needed to protect “the

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313. *Id.* at 84 (quoting lower court).

314. *Id.* at 86.

315. *See id.* at 88-89.

316. On Sharkey’s extraordinary career as a Whig Unionist and elected politician in Mississippi, see FOOTE, *supra* note 139, at 61-70; ROWLAND, *supra* note 243, at 87-92.

317. 4 Miss. 199, 201, 5 Howard 495, 501 (1841).

318. *Id.* at 200, 5 Howard at 499.

319. *Id.* at 202, 5 Howard at 502.

province of the jury."<sup>320</sup> The Iowa Supreme Court, in its first year or so of existence, denounced the common law practice of comment, declaring that "this practice was frequently carried to so alarming an extent that the jury became but mere machines in the hands of the court to reflect back the verdict which the court would more than intimate."<sup>321</sup> It praised the legislature for deciding to "protect the people against any interference of the court," and stated that "[t]he only safe rule is to confine the courts to the law."<sup>322</sup> If courts were permitted to charge on facts, "it would be an invasion upon the trial by jury, which is so much favored in this country; the tendency of which would be mischievous, unjust and oppressive."<sup>323</sup> Notably, Iowa did not follow the *nisi prius* system, where the trial judges and appellate judges were the same people; the Iowa Supreme Court judges were separate from the trial judges.<sup>324</sup>

A few states even seem to have barred or at least discouraged judicial comment on the evidence by judicial decision alone, without a constitutional provision or statute. These include Maryland (1815), Missouri (1826), Ohio (1849), and Virginia (1854).<sup>325</sup> Virginia had never been hospitable to the practice of judges giving their opinion on the weight of evidence,<sup>326</sup> and the 1854 decision of the Supreme Court of Appeals in *McDowell's Ex'or v. Crawford* confirms existing practice there.<sup>327</sup> Deford gave a good illustration

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320. *Newnam's Lessee v. City of Cincinnati*, 18 Ohio 323, 334 (1849).

321. *Frederick v. Gaston*, 1 Greene 401, 404 (Iowa 1848).

322. *Id.*

323. *Id.*

324. See IOWA CONST. of 1846, art. 5, §§ 3-4.

325. See Krasity, *supra* note 17, at 605-06.

326. See *Hardaway v. Manson*, 16 Va. (2 Munf.) 230, 234 (1811) (stating that "the weight of the evidence . . . was a question belonging exclusively to the jury"); *Fisher's Ex'r v. Duncan & Turnbull*, 11 Va. (1 Hen. & M.) 563, 577 (1807) (opinion of Fleming, J.) (prohibiting the judge from expressing an opinion on the sufficiency of the evidence).

327. 52 Va. (11 Gratt.) 377, 402-06 (1854); see also *Berry v. Ensell*, 43 Va. (2 Gratt.) 333, 338 (1845) (reversing lower court for use of an instruction that precluded the jury from weighing the evidence themselves); *Gregory v. Baugh*, 29 Va. (2 Leigh) 665, 693 (1831) (reversing lower court for use of an instruction designed to mislead them as to a matter of fact); 1 CONWAY ROBINSON, *THE PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA* 338-44 (Richmond, Samuel Shepherd & Co. 1832) ("The . . . cases evince a jealous care to watch over and protect the legitimate powers of the jury."). The Virginia court, unlike that of Massachusetts, also appeared to be very strict about the trial judge submitting a proper report of the case to the appellate court; otherwise, the judgment would be reversed. See *McDowell's Ex'r*, 52 Va. (11 Gratt.) at 397-401.

of the silent Virginia judge in his 1842 speech to the Pennsylvania legislature.<sup>328</sup>

The Supreme Court of Missouri somewhat casually observed, in *LaBeaume v. Dodier* in 1826, that “[i]t is not the province of a court to say, testimony before a jury is insufficient to prove a fact in issue.”<sup>329</sup> In that case, the supreme court disagreed with the trial court’s characterization of the evidence as insufficient in any event.<sup>330</sup> Missouri enacted a Tennessee-type statute for criminal cases in 1845,<sup>331</sup> but the supreme court seems not to have bothered citing it, even in relevant cases.<sup>332</sup>

In Ohio, the courts considered the subject somewhat more deeply (though without relying on outside authority). Ohio’s highest court had allowed trial judges to comment on evidence,<sup>333</sup> but then prohibited the practice in 1849.<sup>334</sup> The Ohio court held that even if “it is apparent that right and justice have been done—that another trial must result in a similar verdict” the judgment would be reversed.<sup>335</sup> Allowing a judge to comment on the evidence was no “mere technical error.”<sup>336</sup> Rather, “we look upon it as an invasion, by the court, of the province of the jury, which should always be guarded against.”<sup>337</sup> If the jury went astray, the judge could always pull out the weapon of new trial.<sup>338</sup> This seems to be a nonsensical result, causing expense without any gain. New trial was not a cheap remedy. But it did preserve the illusion of jury power, and it did allow the lawyers to fight and be paid for another round.

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328. See *supra* text accompanying note 292. Interestingly, the silent judge Deford described sat in Morgantown, in what is now West Virginia. See *Trial by Jury*, *supra* note 36, at 103. It is possible that the greater populism of the piedmont, as opposed to the more aristocratic tidewater, led to quieter judges.

329. 1 Mo. 335, 336 (1826).

330. See *id.*

331. See MO. REV. STAT. ch. 138, art. VI, § 28 (Jones 1845).

332. See *State v. Homes*, 17 Mo. 379, 382 (1852) (responding to the trial judge’s refusal to give a requested instruction calling the jurors’ attention to certain facts by noting: “It is no error to fail to do this”).

333. See *Abram’s Lessee v. Will*, 6 Ohio 165, 165-66 (1833).

334. See *Newnam’s Lessee v. City of Cincinnati*, 18 Ohio 323, 333 (1849).

335. *Id.* at 334.

336. *Id.*

337. *Id.*

338. See, e.g., *id.*

## CONCLUSION

American practice in many states in the first half of the nineteenth century shows that the American jury system could easily accommodate judges commenting on evidence. Juries were free to reject the judge's opinion when they saw fit, thus preserving their separate sphere of authority, but had the benefit of judicial guidance. Tocqueville, Wigmore, and others, far from viewing judicial comment as a major impediment to jury trial, saw it as absolutely necessary to its proper functioning. The culture of the South and West, however, was far less conducive to such comment. Certain lawyers in those areas managed to put in place restrictions on the power that suited their interests in controlling trial and in moving the jury with intensely emotional rhetoric. The mechanism for controlling the jury that ultimately won out was new trial, a formal and expensive method.

The regional difference in restrictions on comment was so pronounced before the Civil War that it could not have been pure accident alone that led some states to adopt restrictions while others did not. It is apparent that legal and social culture played a considerable role. To what extent might our culture today be hospitable or inhospitable to judges commenting on evidence? Some preliminary observations are in order.

Our society is of course in some respects quite different from that of the South and West before the Civil War. Government officials have far more resources at their disposal to maintain order and enforce the law. This in turn leads to greater respect for (or, at least, fear of) government authority, including judicial authority. Although we are in the habit of complaining about growing violence and lack of civility, today lawyers and politicians do not shoot each other on a regular basis, and courtrooms rarely are the scene of rowdy, drunken crowds and equally drunken lawyers and judges trading colorful insults.

The nature of civil cases also has changed, as commerce, technology, and the laws that govern them have become increasingly specialized and complicated. Civil cases today are often so complex and confusing that jurors would be grateful for more

guidance from the judge. These changes suggest that judges would be better able to exercise powers of comment.

Other changes that have occurred since the Civil War, however, dim the prospects for a vigorous power of judicial comment. These changes concern the probable reasons why restrictions on the power to comment spread beyond the South and West after the war. Appellate courts have proved themselves very reluctant to allow trial judges to comment on the evidence.<sup>339</sup> This is so for a number of reasons. The personnel of appellate courts and trial courts are now different. In the early nineteenth century, when many states (and the federal Supreme Court) followed the *nisi prius* system and trial judges were simply appellate judges sitting singly, appellate judges were not anxious to limit their own power as trial judges. When states separated the personnel of trial and appellate courts, there was less hesitation about limiting someone else's power.<sup>340</sup>

In addition, when they abandoned the *nisi prius* system, states created a strong hierarchy of judicial officers. Trial judges' pay was lower and their formal qualifications less stringent.<sup>341</sup> Appellate courts were therefore encouraged to believe they should exercise considerable control over these "inferior" courts.<sup>342</sup> Coming on top of these developments was a new technology that allowed appellate courts to get an exact transcript of what was said at trial: stenography.<sup>343</sup> No longer would there be ambiguity about what was said or done at trial; losing counsel could pore over a transcript and point out a trial judge's arguable errors or misstatements in great detail to appellate judges. The result was that trial judges were prevented from maintaining a more relaxed, informal relationship with the jury that fostered comment on evidence.

Perhaps the most important factor of all in preventing trial judges from exercising the power to comment is one that is not too different from the situation in the South and West before the Civil

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339. See *supra* note 47.

340. See HURST, *supra* note 17, at 98-100.

341. See *id.*

342. See *id.* at 98, 101-02.

343. See *id.* at 103-04. Stenography was invented around the time of the Civil War and shortly thereafter states began to pass laws providing for court reporters to make official stenographic transcripts. By 1868, for example, New York was using court stenographers. See N.Y. CODE PROC. § 256 (Townsend 1868).

War: an aggressive legal profession with political clout. Economic analysis suggests that the more uncertain the outcome of trial is, and the more dependent on their own skill, the more money lawyers are likely to make.<sup>344</sup> National organizations such as the American Bar Association and the American Trial Lawyers' Association, together with a host of local bar associations, make sure that lawyers' voices are heard in the political arena. These organizations have been unfriendly to judges taking an active role at trial.<sup>345</sup> In addition, in some states lawyers' contributions to judicial campaigns ensure that judges will be reluctant to offend lawyers who regularly practice before them. Judges in these states would probably prefer not to comment on evidence if possible, to avoid offending actual or potential campaign supporters, and would rather just leave the case silently to the jury.<sup>346</sup>

Is it possible now to curb such an aggressive, lucrative legal profession, to persuade appellate judges that trial judges may be trusted to comment on evidence fairly, and to encourage trial judges to exercise this power appropriately? Care in training trial judges and in making sure they are not beholden to lawyers for political support may help. At the very least, we should be armed against rhetoric that jury power and democracy require that the trial judge remain silent. There is no such necessity in our traditions; the American jury system does not require a silent judge.

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344. See *supra* note 121. It should be noted that this is true for both the plaintiffs' and defense bar; the two have more interests in common than is generally supposed. See Posner, *supra* note 121, at 433-34.

345. See, e.g., AM. BAR ASS'N, CIVIL TRIAL PRACTICE STANDARDS, Standard 10 at 26-28 (1998) (advocating a tightly circumscribed role for the trial judge and emphasizing the importance of counsel for the parties).

346. Thoughtful observers would rightly worry about giving such judges the power to comment on evidence in any event, fearing that it would be used to support the most important contributor.