

A Man for All Reasons:  
The Uses of Alexis de Tocqueville's Writing in U S. Judicial Opinions

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*Before Saul Litvinoff appeared on U. S. shores, another aristocratic comparativist, Alexis de Tocqueville, came to cast a critical yet affectionate eye on this republic. Since I am fond of both of these thinkers, I offer this overview of the judicial uses of the writings of the earlier scholar in appreciation of the later one.*

I. Introduction

The United States has never been given to particular adoration of foreign observers of its mores, who quite often turn out to be critics rather than admirers. Nevertheless, one of its favorite visitors<sup>1</sup> since his one and only appearance on the scene in 1831-1832<sup>2</sup> is the 25-year-old magistrate Alexis de Tocqueville (1805-1859), sent by his government to study penal reform in the new republic.<sup>3</sup> Tocqueville and his good friend Gustave de Beaumont, like young adventurers before and since, took the opportunity to extend their stay, and turned their tour of prisons into a journey through the young nation that furnished the raw material for what readers ever since have considered to be the single most insightful study of the United States ever written. Since the publication of Tocqueville's study, titled De la democratie en Amerique<sup>4</sup> (Democracy in America)<sup>5</sup>, which appeared in English in 1835, the second volume following in 1840, all manner of students of U. S. society have pored over it, studying it, quoting and

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<sup>1</sup> Others on the limited list include the Frenchman Gilbert de Motier, Marquis de Lafayette (1757-1834), whose service in the Revolutionary Army under General Washington occasioned the famous phrase, "Lafayette, we are here", at his tomb in 1917. Spoken by Colonel C. E. Stanton, the words represented payment for what the Americans considered a debt of honor. *See* [http://www.unc.edu/depts/diplomat/AD\\_Issues/amdipl\\_16/edit16\\_print.html](http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_16/edit16_print.html) (visited November 6, 2004).

<sup>2</sup> ANDRÉ JARDIN, TOCQUEVILLE: A BIOGRAPHY (1990), at 101.

<sup>3</sup> JARDIN, *supra* note 2 at 91.

<sup>4</sup> ALEXIS DE TOCQUEVILLE, DE LA DÉMOCRATIE EN AMÉRIQUE: TOME PREMIER (PARIS; C. GOSSELIN, 1835).

<sup>5</sup> The first translation, by Henry Reeve, appeared in London in 1835 and slightly later in the United States.

misquoting it, and claiming it as support for their varied ideas. Both conservatives and liberals have claimed Tocqueville as a founding father of their thought.<sup>6</sup> But as John Lukacs points out, Tocqueville cannot be so simply categorized.

Even though the term “conservative” poses a certain difficulty (it was not applied to politics until after Napoleon, and certainly not in Burke’s lifetime), what separates Tocqueville from Burke and from his own contemporary conservatives may be summed up under three headings: religion, monarchy, liberty. Tocqueville did not believe that religion (and particularly the Roman Catholic religion) and democracy were incompatible, whereas for all of the great conservative thinkers (Burke being a partial exception) that incompatibility was their fundamental article of belief. Tocqueville, who regretted the end of the French Bourbon monarchy but who also saw that in the history of peoples continuity plays as much, if not greater, a role than does change, did not think that during the eighteenth century the divine right of kings mattered very much, whereas the conservatives believed that the democratic revolutions constituted a break with the entire order of the providential universe. Most important, the conservatives’ criticism of the principle of equality was often combined with their criticism of the principle of liberty; this was very different from the convictions of Tocqueville who, throughout his life, regarded liberty—and by no means in an abstract sense—as the most precious possession of persons and of peoples.<sup>7</sup>

Similarly, political scientists have asserted that he is one of them; the Encyclopedia Britannica so identifies him.<sup>8</sup> Sociologists claim him as their own.<sup>9</sup> Witold Rybczynski has dubbed him an “urban critic.”<sup>10</sup> Political philosophers<sup>11</sup> and historians<sup>12</sup> have claimed

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<sup>6</sup> See generally <http://www.tocqueville.org/chap3.htm> (visited November 6, 2004). The Conservative Book Club offers *Democracy in America* as a book club choice (<http://www.conservativebookclub.com/ASpecialSale.asp?type=LEADER>) (visited November 6, 2004). But the liberals also think he is one of them. See MANNING CLARK, *THE IDEAL OF ALEXIS DE TOCQUEVILLE* (2001), one of the most recent of these restatements of Tocqueville’s thought in the left wing mode.

<sup>7</sup> John Lukacs, *Alexis de Tocqueville: A Historical Appreciation*, 5 LIT. LIBERTY 8 (1982). Note that when this article first appeared *Literature of Liberty* was published by the Cato Institute, a libertarian think tank.

<sup>8</sup> <http://www.britannica.com/eb/article?tocId=9072717> (visited November 6, 2004).

<sup>9</sup> See for example Matt Kaufmann, *Foundations of Freedom*, Citizen: A Website of Focus on the Family at <http://www.family.org/cforum/citizenmag/departments/a0030977.cfm> (visited November 6, 2004).

<sup>10</sup> *Alexis de Tocqueville, Urban Critic*, 3 IDEAS & OBSERVATIONS ([http://www.city-journal.org/dev/html/3\\_3\\_ideas-alexis.html](http://www.city-journal.org/dev/html/3_3_ideas-alexis.html)) (visited November 6, 2004).

<sup>11</sup> See PETER AUGUSTINE LAWLER, *THE RESTLESS MIND: ALEXIS DE TOCQUEVILLE ON THE ORIGIN AND PERPETUATION OF HUMAN LIBERTY* (1993).

him as a member of their disciplines. Through all of these evaluations, assessments and hagiographies, commentators sometimes lose sight of the fact that Tocqueville was, by training and choice, an attorney, and what is more, a civil law trained attorney, a magistrate, a member of the Legislative Assembly, a drafter of the Constitution of France's Second Republic and a member of Louis-Napoleon Bonaparte's Cabinet.<sup>13</sup> Ultimately, as one student of his thought points out, it may not matter.<sup>14</sup>

As a civilian, Tocqueville was trained in a newly formed legal regime. As an attorney practicing within a code enacted only a year before his birth,<sup>15</sup> he had a vital interest in determining how such new codes could be integrated into existing social, political, and legal environments. His interest in the new republic across the ocean, which was engaged in a similar experiment, was at once philosophical and practical. Thus, what use U. S. judges have made of his words in their own opinions is certainly of interest.

## II. Tocqueville's Legal Education

Because of the French Revolution, and the subsequent overhaul of the French legal system by Napoleon I, which culminated in the Napoleon Code of 1804, Alexis de Tocqueville's legal education was quite different from that which a French attorney would have received prior to 1789. Indeed, relatively few French lawyers had been educated under the new system by the time Tocqueville began his legal studies in 1823.

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<sup>12</sup> See MARTIN J. BERGIN, *TOCQUEVILLE AS HISTORIAN: AN EXAMINATION OF THE INFLUENCES ON HIS THOUGHT AND HIS APPROACH TO HISTORY* (1985).

<sup>13</sup> The now standard biography of Tocqueville is ANDRE JARDIN, *TOCQUEVILLE*, *supra* note 2, first published in French in 1984 and translated into English in 1988. Hugh Brogan has also recently published a comprehensive biography, *ALEXIS DE TOCQUEVILLE: A LIFE* (2007).

<sup>14</sup> François Bourricaud, *Foreword*, JEAN-CLAUDE LAMBERTI, *TOCQUEVILLE AND THE TWO DEMOCRACIES* vii (1989).

<sup>15</sup> The Civil Code, originally enacted as the Napoleonic Code, took effect in France in 1804.

The French government had reformed French legal education in 1819; it now took three years. In his biography of Tocqueville, André Jardin describes the French law curriculum that Tocqueville followed.

The study of law had undergone a thorough reform in 1819, stimulated by Royer-Collard. The three years of preparation for the degree could be done in either of two sections; each section included the Napoleonic Civil Code, the Institutes of Roman law, and civil procedure, along with the subjects proper to it: commercial law in the first; public and administrative law, the philosophical history of Roman and French law, and political economy in the second. The reform was complete by 1820, except for the introduction of political economy. But the ordinance of September 6—December 1, 1822, suppressed everything in these reforms that was oriented toward the study of human societies. In its preamble, the new ordinance stated that its purpose was to “encourage the development of the study of Roman law” and to arrange the other courses in the Paris law school so that “the students there would acquire only commonsense knowledge of the prevailing legal practice.” Except for a few notions of legal history, the material taught was reduced to the Institutes and Pandects of Justinian, along with the commentary on the Civil Code, civil and criminal procedure, and commercial law.<sup>16</sup>

Jardin suggests that Tocqueville’s French legal training had in fact little or no effect on his ability to think analytically or to analogize;<sup>17</sup> the amazing abilities to which Democracy in America and his other writings are testaments seem to owe nothing developmentally to the crabbed early legal education to which the system exposed him.

Tocqueville graduated in 1826, apparently without distinction,<sup>18</sup> and obtained an appointment as *juge auditeur* in 1827, a position that those with an interest in his future seemed to have created for him.<sup>19</sup>

This young man, educated under a new system, then set off in 1831 to study yet another nascent system, already on its way to developing a new path. His declared

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<sup>16</sup> JARDIN, *supra* note 2 at 69.

<sup>17</sup> JARDIN, *supra* note 2 at 70.

<sup>18</sup> JARDIN, *supra* note 2 at 70.

<sup>19</sup> JARDIN, *supra* note 2 at 73.

purpose was to study the U.S. penal system, but as we know very well, this objective was very likely little more than an excuse.<sup>20</sup> As his friend Gustave de Beaumont (who would later marry the granddaughter of the man the Americans considered a hero, the Marquis de Lafayette) confided to his father, “We have ambitious plans... We will see America as we survey its prisons. We will survey its inhabitants, its cities, its institutions, its mores. We will learn how the republican government works. This government is not at all well known in Europe... Wouldn’t it be good to have a book that gives an accurate notion of the American people...?”<sup>21</sup>

### III. Uses of Tocqueville’s Writings and Quotations

When judges first began to cite to Tocqueville, beginning in 1839, when his most acclaimed work was first easily available in English, they noted with pleasure that he was a lawyer, and they cited him for his legal, rather than for his sociological or political acumen. In Bank of Augusta v. Earle<sup>22</sup>, facing a complicated jurisdictional question, the U. S. Supreme Court turned to Tocqueville’s Democracy in America for an apposite quotation.

A learned foreign lawyer, M. de Tocqueville..., considers these United States so many foreign nations, whose whole form the Union, of which originally, even every township was a sort of independent sovereignty. Nothing like law can be more foreign than that of Massachusetts and Louisiana to each other. It may be politic, it may be wise to try to abolish or mitigate these estrangements of locality: but it is no more practicable to extirpate them than the barbarisms of war.<sup>23</sup>

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<sup>20</sup> JARDIN, *supra note 2* at 91-95.

<sup>21</sup> JARDIN, *supra note 2* at 94 (citing Gustave de Beaumont, Lettres d’Amérique, 28).

<sup>22</sup> 38 U. S. 519 (1839)(*hereinafter* Bank of Augusta v. Earle).

<sup>23</sup> Bank of Augusta v. Earle, *supra fn. 22* at --. (citation omitted). The citation is to the Henry Reeve translation, the first to appear in English, of which Tocqueville does not seem altogether to have approved. See <http://www.press.uchicago.edu/Misc/Chicago/805328note.html> (visited November 6, 2004) and (get letter of Tocqueville to Henry Reeve). Since Tocqueville was himself fluent in English he read Reeve’s translation with interest and attention.

This particular question, whether the Court had jurisdiction over interstate commerce is one that Tocqueville obviously identified in 1831, as did the Framers even earlier.

By 1851, a state supreme court had found a useful citation for its purposes in Tocqueville's Democracy. In Crow v. State<sup>24</sup>, defendants were accused of illegally importing goods into the state of Missouri without a license. They pled that the license requirement violated the U. S. Constitution, and in addition that the fees due under the license scheme fell unequally on the persons having to pay them, similarly situated importers paying different amounts. In an effort to explain why such treatment would be deemed inequitable, the Missouri Supreme Court turned to Tocqueville, as well as other commentators. It found clarity in his discussion of the "tyranny of the majority."

In the profound dissertation of M. De Tocqueville, an eminent French author, upon the institutions of this country, he expresses the conclusion with equal force and wisdom, that "if the free institutions of America are to be destroyed, it will be owing to the tyranny of majorities driving minorities to desperation." Of similar opinion are a number of the most eminent and disinterested English writers upon the same subject; and it may not, perhaps, be undeferential or improper to add, that the history and result of the political agitation through which the country has been called to pass during the last few years, must have inclined the minds of the most reflecting persons to the conclusion, that "however much may be predicated upon the patriotism, fraternalness and mere justice of political communities, there can be no security equal to that of the Constitution, and hence no errors (even) so safe as those which may be committed in deference to its supposed restraints of guaranties." "The world is governed TOO MUCH."<sup>25</sup>

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<sup>24</sup> 14 Mo. 237 (1851)(*hereinafter* Crow).

<sup>25</sup> Crow, *supra* note 24 at 282.

The Missouri Court made many other such references in its fifty-two page opinion, including a long and involved discussion of the history of taxes under the English kings, as if to warn the legislature of impending doom.<sup>26</sup>

When deciding the constitutionality of another taxation issue, the Louisiana Supreme Court made use of Democracy in America for an explanation of the reasons behind both political philosophy and factual information about the separation of powers issue as it was handled in Massachusetts.

Having thus considered the general power of the legislature to delegate to local political corporations the power to levy taxes of this nature, it remains to inquire, whether the conditions with which this grant of power is accompanied vitiate the grant-whether any invasion of the constitutional rights of individuals is involved in the peculiar mode in which the exercise of the power delegated is commanded to take place. In considering this branch of the subject, we will first examine the objection which is made to the submission of the ordinance to the approval of the taxpayers, in the manner specified in the statute. Is such a submission really inconsistent, as was suggested at bar, with the genius of our institutions? If the Legislature could constitutionally confer on the Police Jury authority to pass a taxing ordinance, it would seem rather a safeguard against oppression, than the reverse, to qualify the power of requiring it to be exercised with the approbation of a majority of those who are to bear the burden. Certainly, one would be inclined, with much show of reason, to suppose that a system, sanctioned by the legislative will, and tested by a long experience in one of the oldest States in this Union-a State which was amongst the foremost in the struggle for constitutional liberty-could not well be inconsistent with the principles of representative government. If we look to Massachusetts, how do we find municipal matters managed there? If any change is to be introduced into the existing state of things, or if they wish to undertake any new enterprise, the Selectmen are obliged to refer to the source of their power.... De Tocqueville, p. 65.<sup>27</sup>

Thus, as early as the 1850s the state Supreme Courts as well as the United States Supreme Court viewed Democracy in America as a useful tool for interpreting

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<sup>26</sup> Crow, *supra fn.* 24 at --.

<sup>27</sup> Police Jury v. Succession of John McDonogh, 8 La. Ann. 341 (1853)(*hereinafter* McDonogh).

Constitutional intent, along with such works as James Kent's Commentaries,<sup>28</sup> Thomas Cooley's Constitutional Limitations<sup>29</sup> and Joseph Story's Commentaries on the Constitution of the United States.<sup>30</sup> We might be surprised at this notion, but, Tocqueville, like Kent and Story, was someone fairly close in time to the Framers, and someone who took the opportunity to interview individuals who had themselves participated in discussions over the meaning of the nation's founding legal document.

Tocqueville also read widely in the writings of the Founders and in commentaries on the Constitution itself, which would also have been available to American jurists, which he freely acknowledged. In preparing the Democracy, he benefited from the copious notes he had taken while touring the United States, and once he returned to France, he continued an intensive program of reading and study.

...[T]here were three exceptionally important sources. When he was writing an opinion on the conflict, in 1835, between the French government and President Jackson, Tocqueville himself singled them out, and what he said on that occasion holds true for the whole of the Democracy: "I have consulted the three most respected commentaries: the Federalist, a work written by three of the principal authors of the federal Constitution, Kent's Commentaries, and those of Justice Story."<sup>31</sup>

Tocqueville actually met both Kent and Story during his American travels; they undoubtedly influenced him greatly. Indeed, Justice Story apparently felt some bitterness toward the younger man, whom he thought failed to credit him adequately.<sup>32</sup> Despite the

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<sup>28</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW (O. Halsted, 1826-1830).

<sup>29</sup> THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston: Little, Brown, 1868).

<sup>30</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Cambridge: Hillard, Gray, 1833).

<sup>31</sup> JARDIN, *supra note 2* at 201.

<sup>32</sup> JARDIN, *supra note 2* at 203 (citing GEORGE W. PIERSON, TOCQUEVILLE AND BEAUMONT IN AMERICA, 730-732, (1938)).

American's misgivings, however, most students of Tocqueville's work recognize the French thinker's originality; the most direct influence on him is likely to have been the French jurist and philosopher Montesquieu,<sup>33</sup> rather than the American jurist and commentator Story.

Note, however, that few jurists ventured very far afield to quote Tocqueville's observations on slavery, or the press.<sup>34</sup> They were most interested in his analysis of the legal institutions that formed the republic and in his readings of what constituted their founding documents, just as they scabbled for any insight into the proper method of interpreting—and living with—the Constitution and statutes of the new nation. Once a substantial body of American commentators arose, Tocqueville and his Democracy seems to have been more often relegated to an occasional citation, an interesting oddity for the historically or philosophically minded judge or her law clerk to consult.<sup>35</sup> Tocqueville was no longer a primary interpreter of the Constitution, the man who was a direct link with the Framers. He was, however, and remains a commentator for purposes of such matters as the importance of the jury system.<sup>36</sup>

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<sup>33</sup> Tocqueville attended the historian (and *doctrinaire*) François Guizot's lectures after finishing his legal studies. See JARDIN, *supra* note 2 at 81-82. Antoine Leca suggests that the two thinkers who most influenced Tocqueville in his formative years were Guizot and Montesquieu. See ANTOINE LECA, LECTURE CRITIQUE D'ALEXIS DE TOCQUEVILLE 26-32 (1988). See also Melvin Richter, *The Uses of Theory: Tocqueville's Adaptation of Montesquieu*, in ESSAYS IN THEORY AND HISTORY: AN APPROACH TO THE SOCIAL SCIENCES 74 (1970). See also the list maintained at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=667&chapter=67168&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=667&chapter=67168&layout=html&Itemid=27) (last visited November 8, 2007) for a listing of Tocqueville's likely primary reading sources.

<sup>34</sup> At least one court did quote Tocqueville on the press. "Nothing is easier than to set up a newspaper." *Collard v. Smith Newspapers*, 915 F. Supp. 805, 810 (U.S.D.C., So. Dist. W. Va., Huntington Division)(1996)(citing the 1954 Vintage Books edition. The notion that no license was required to begin printing a newspaper would have been surprising to Tocqueville, educated in the French setting. Jardin discusses his reaction in his biography of Tocqueville. See JARDIN, TOCQUEVILLE, *supra* note 2 at 213-214.

<sup>35</sup> For what use judges make of philosophers in their opinions, see Neomi Rao, *Comment: A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371 (1998)(finding that fewer than fifty Supreme Court opinions make use of the work of major philosophers, including Tocqueville).

<sup>36</sup> See *infra* note 38 and accompanying text.

In a 1913 case, one Alabama Supreme Court justice delved into Tocqueville's work for some assistance with both constitutional interpretation and comparative law.

Other nations have what they call Constitutions or fundamental laws. England, for example. But no provision is beyond the transcendent and omnipotent power of Parliament. And therefore De Tocqueville denied that England had in reality a Constitution. His striking passage on this subject is: "The Parliament has an acknowledged right to modify the Constitution; as therefore the Constitution may undergo perpetual changes, *it does not in reality exist*; the Parliament is at once a legislative and a constituent assembly.' In the American conception of the office and effect of a Constitution, De Tocqueville's criticism is just. Belgium and France have written Constitutions, but, since they have no legal sanction, they are mere glittering declarations of abstract principles of political morality of action, having no force except such as public opinion may give them. They are not laws, since their restrictions and directions will not be enforced by the courts.<sup>37</sup>

The most popular quotations include, not surprisingly, Tocqueville's observations on judges and juries. Jurists have not seemed to cite his work for passages in which he criticized the young Republic, most particularly for its unhappier institutions like slavery.

Both federal and state court judges have continued to cite Tocqueville approvingly today, overwhelmingly to Democracy in America, and to the better known passages. In a 1987 case, Mitchell v. Superior Court, California Chief Justice Rose Byrd quoted Tocqueville extensively on the importance of the jury trial.<sup>38</sup>

Turning his analytical gaze on the jury system in the United States, de Tocqueville perceived the critical counterbalance that juries provide to the power and persuasiveness of lawyers and judges. He was struck by the genius of the American concept of the jury--an institution of the people, imbued with their common sense, embodying the customs of the community, and valuing liberty and freedom. Indeed, de Tocqueville viewed the institution of the jury as the very heart and soul of the American justice system, serving to give the judiciary legitimacy in the eyes of the people and serving to give the people a deep, personal appreciation of the central role of the courts in preserving the rule of law. "The jury, then," he remarked, "which seems to restrict the rights of the judiciary,

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<sup>37</sup> Ex parte Bozeman, 183 Ala. 91, 112 (1913)(Mayfield, J., dissenting).

<sup>38</sup> Mitchell v. Superior Court, 43 Cal. 3d 107 (1987)(Byrd, C.J. concurring)(rehearing granted, opinion withdrawn).

does in reality consolidate its power; and in no country are the judges so powerful as where the people share their privileges.”... As he put it, the institution of the jury "places the real direction of society in the hands of the governed . . . and not in that of the government. . . . [It] raises the people itself . . . to the bench of judges . . . . [and] consequently invests the people . . . with the direction of society." De Tocqueville also astutely observed that juries, particularly civil juries, tend to temper the sometimes rigid procedural and substantive requirements of the law with the evolving customs, values, and common sense of the lay community at large. Thus, in the process of serving on juries, citizens are able to participate directly in the constant reshaping and refinement of both the laws and the attitudes of their government. Perhaps what impressed de Tocqueville most about the jury system was the role which jury service plays in educating and enlightening those citizens selected as jurors and, through them, the citizenry as a whole....De Tocqueville stated it well: "[The jury] imbues all classes with a respect for the thing judged and with the notion of right. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. . . . [It] teaches every man," he concluded, "not to recoil before the responsibility of his own actions . . . “<sup>39</sup>

Judges have cited Tocqueville in First Amendment matters as well. In the recent and highly contentious “Ten Commandments” case, in which Alabama Supreme Court Chief Justice Roy Moore tangled with the federal courts, the district court cited Tocqueville approvingly on the matter of the separation of church and state.

With deeper reflection, however, this “notion” may not be so “strange.” It is generally accepted that, at the time of the framing of the Constitution, this country was predominantly Christian, and it appears that Christianity was not merely tolerated but viewed as essential to this country’s democratic success...Alexis de Tocqueville, *Democracy in America* 445 (George Lawrence trans., J. P. Mayer ed.; Perennial Classics 2000)(“Religious nations are therefore naturally strong on the point on which democratic nations are weak; this shows of what importance it is for men to preserve their religion as their conditions become more equal.”). Thus, it makes sense that something viewed at the time as so essential as was religion at the time would be given “preferred treatment” by being addressed in the First Amendment to the United States Constitution. But what history also taught at that time was that religion, and particularly Christianity, made this contribution working as a private institution and outside the framework of formal government. Alexis de Tocqueville, *Democracy in America* 47 (George Lawrence trans., J.P. Mayer ed.; Perennial Classics 2000) “Religion, being free and powerful within its own sphere and content with the position reserved for it, realized that its sway is all the better established because it relies only on its own

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<sup>39</sup> Mitchell v. Superior Court....citing to the Vintage edition, translated by Henry Reeve, edited by Phillips Bradley (citations omitted).

powers and rules men's hearts without external support.”). Indeed, this same history taught that when government interfered with religion (and, in particular, Christianity) suffered. This is evidenced by the many instances in which people have been persecuted for their religious beliefs, well-known to anyone who has studied American history.”<sup>40</sup>

Notice the judge's appeal to Tocqueville as both firsthand reporter (“what history taught at that time”) and as analyst—the point of quoting him in the opinion.

Rather than discuss at length the reasons for his objections to the majority's holding in City of Chicago v. Morales, U. S. Supreme Court Justice Antonin Scalia cited, in addition to a few cases, Tocqueville's elegant analysis of the judiciary's role.

Respondents' consolidated appeal presents a facial challenge to the Chicago Ordinance on vagueness grounds. When a facial challenge is successful, the law in question is declared to be unenforceable in all its applications, and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration. The rationale for our power to review federal legislation for constitutionality, expressed in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), was that we had to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to this party, in the circumstances of this case. That limitation was fully grasped by Tocqueville, in his famous chapter on the power of the judiciary in American society:

“The second characteristic of judicial power is, that it pronounces on special cases, and not upon general principles. If a judge, in deciding a particular point, destroys a general principle by passing a judgment which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority; he assumes a more important, and perhaps a more useful influence, than that of the magistrate; but he ceases to represent the judicial power.

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“Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule . . . . But as soon

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<sup>40</sup> *Glassroth v. Moore*, 229 F. Supp. 2d 1290; 2002 U.S. Dist. LEXIS 22041 (U.S.D.C., Middle Dist. Ala., N.D., 2002).

as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force. Those to whom it is prejudicial learn that means exist of overcoming its authority; and similar suits are multiplied, until it becomes powerless. . . . The political power which the Americans have entrusted to their courts of justice is therefore immense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. . . . When a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its authority is not taken away; and its final destruction can be accomplished only by the reiterated attacks of judicial functionaries.’ *Democracy in America* 73, 75-76 (R. Heffner ed. 1956).<sup>41</sup>

#### IV. Suggestions For Further Investigations

One area that would repay study is the influence and the impact of the translation of Democracy in America. As the Italians say, “Traduttore, traditore.” The translator is a traitor. Tocqueville himself was not wholly satisfied with Henry Reeve’s translation of the Democracy when it appeared in 1835. Since then translators have attempted several other versions, the most recent being Harvey C. Mansfield and Delba Winthrop’s in 2001. As Caleb Crain points out in his review of the various Democracy translations, how one translates Tocqueville’s elegant prose may well color how the reader interprets the result, shifting Tocqueville as philosopher from liberal to conservative and back again along the political continuum. Such are the vagaries of linguistic politics.<sup>42</sup>

Other areas in which we could study judges’ use of Tocqueville’s writings would be:

- 1) to analyze the actual number of times judges use particular quotations from various Tocqueville works
- 2) to examine the uses to which the judges put those quotations in

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<sup>41</sup> *City of Chicago v. Morales*, 527 U.S. 41; 119 S. Ct. 1849; 144 L. Ed. 2d 67, (1999)(Scalia, J., dissenting).

<sup>42</sup> See Caleb Crain, *Tocqueville For the Neocons* at [http://www.nytimes.com/books/01/01/14/reviews/010114.14craint.html?\\_r=1&oref=slogin](http://www.nytimes.com/books/01/01/14/reviews/010114.14craint.html?_r=1&oref=slogin) (last visited November 8, 2007).

contrast to the actual context in which Tocqueville himself used those quotations and 3) to study whether judges use Tocqueville as a legal commentator or as a social, political or philosophical commentator. If as a legal commentator, has judicial use of Tocqueville increased or lessened over time?

## V. Conclusion

Numerous scholars in other fields have made Alexis de Tocqueville and his writings their life's work.<sup>43</sup> Relatively few legal scholars, however, have examined his impact on law, or his evaluation of the legal system of the United States.

Tocqueville's civil law training, in itself something quite novel, both in itself and as an approved and welcome commentator on a common law system gave him a unique insight into the functioning of the early U. S. Republic, one which allowed him to bring a unique comparative view to an analysis of the early American experiment.

Two hundred years after his birth is not too soon to begin to evaluate the use that U. S. jurists have made of his writings and the influence he has had upon them.

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<sup>43</sup> For a comprehensive bibliography of secondary sources *see* <http://faculty.law.lsu.edu/ccorcos/resume/tocquebib.htm> (last visited October 3, 2007).