

Michigan Law Review

Volume 117 | Issue 4


2019

The New Impartial Jury Mandate

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Recommended Citation

Richard L. Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713 (2019).

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THE NEW IMPARTIAL JURY MANDATE

Richard Lorren Jolly*

Impartiality is the cornerstone of the Constitution’s jury trial protections. Courts have historically treated impartiality as procedural in nature, meaning that the Constitution requires certain prophylactic procedures that secure a jury that is more likely to reach verdicts impartially. But in Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), the Supreme Court recognized for the first time an enforceable, substantive component to the mandate. There, the Court held that criminal litigants have a Sixth Amendment right to jury decisions made without reliance on extreme bias, specifically on the basis of race or national origin. The Court did not provide a standard for determining when evidence of partiality is sufficient to set aside a verdict but made clear that an otherwise procedurally adequate decision may fall to substantive deficiencies.

This Article advances a structural theory of the Constitution’s impartial jury mandate, focusing on the interplay between its ex ante procedural and ex post substantive components. The Article argues that the mandate has traditionally taken shape as a collection of procedural guarantees because of a common law prohibition on reviewing the substance of jury deliberations. Peña-Rodriguez tosses this constraint, allowing judges for the first time to review the rationales upon which jurors base their verdicts. The Article then offers a novel approach for applying substantive impartiality more broadly by looking to the Equal Protection Clause’s tiers of scrutiny. It concludes that ex ante procedural rules and ex post substantive review can operate in conjunction to tease out undesirable, impermissible forms of jury bias, while still allowing for desirable, permissible forms of jury bias.

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INTRODUCTION

Impartiality is the cornerstone of the Constitution's jury trial protections.¹ The Sixth Amendment is explicit in its guarantee that the criminally accused shall enjoy the right to "trial[] by an *impartial* jury."² And while by its terms the Seventh Amendment does not command that impartial juries resolve private disputes, courts and scholars agree that such a requirement is implicit.³ The Fifth Amendment similarly protects in the grand jury context.⁴ And if a state chooses to provide a jury trial in circumstances in which a jury is not constitutionally required, that jury must nevertheless be impartial.⁵ Indeed, impartiality as a concept is deeply entangled with what it means to involve lay citizens in the administration of justice. Simply put: a partial jury is no jury at all.

Yet despite the concept's centrality, there is little agreement on what makes a jury impartial. Jurors must lack *specific* biases against the parties, such as having a personal interest in the outcome of the case, but defining impermissible *general* biases beyond that is far more difficult. This difficulty is the result of competing understandings of the jury's core institutional responsibilities. On the one hand, the law invites—and at times requires—

1. See, e.g., *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) ("[T]he impartiality of the adjudicator goes to the very integrity of the legal system . . .").

2. U.S. CONST. amend. VI (emphasis added). The impartial jury right applies to the states through the Fourteenth Amendment's Due Process Clause. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

3. See, e.g., *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984); *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

4. That grand juries' need to be impartial flows from due process considerations. For a discussion, see Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1220 n.172 (1995).

5. See *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) ("[I]f a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.").

jurors to bring their unique political, moral, and psychological insights to bear on a dispute. In this sense, the jury sits as a democratic check on the application and development of law, ensuring that powerful social and political actors do not operate in a manner unconstrained by popular notions of justice.⁶ On the other hand, the jury is conceived of as a blank slate. It is a *tabula rasa* upon which only the facts presented within the courtroom are considered and the law as described by the judge is applied. To this end, the jury is a purely neutral arbiter.⁷

Balancing the tension between the jury's competing responsibilities is critical to gaining the benefits and controlling the detriments of lay judicial involvement. It is within this balance that a jury's impartiality must be assessed: the law requires some kinds of preconceptions (what we often call common sense) and fundamentally rejects others (called biases). If the jury brings too much of its own outside opinions, or the wrong kind of opinions, into the courtroom, the parties are denied impartial consideration of their dispute. Alternatively, it is unrealistic, and perhaps undesirable, to treat jurors as if they are mere automatons. Facts and laws are fuzzy, and ignoring a diversity of opinions robs the litigants of public consideration of their multifaceted dispute.⁸ Our system of justice expects the impartial jury to be both wise and blind.

But historically, there has been no mechanism by which to check whether a jury was sufficiently impartial. This is because of the Mansfield Rule, also known as the jury no-impeachment rule. This rule was first advanced in 1785 when Lord Mansfield refused to accept two affidavits from jurors who claimed that the jury had reached its decision by flipping a coin.⁹ Although scholars debate how firmly this rule was established before Lord Mansfield's articulation, that the jury could not impeach its own verdict became readily established in the common law.¹⁰ The United States accepted the rule almost unquestionably,¹¹ and it is now reflected in Federal Rule of Evidence 606(b), and every state has a least some version of the rule.¹² Generally speaking, then, up until very recently only jury inputs and outputs were reviewable.

6. See, e.g., Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 976–78 (2016) (describing juries as “fully inscribed chalkboards filled with all sorts of preconceived notions that affect their judgments about witnesses, facts, scientific evidence, and ultimately their final verdicts”).

7. See, e.g., Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 966 (2010) (“The idealized modern jury . . . acts as a blank slate upon which litigants may sketch their versions of the facts. The facts are the focus because today's ideal jurors are finders of fact only.”).

8. See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007).

9. *Vaise v. Delaval* (1785) 99 Eng. Rep. 944, 944 (KB).

10. *Id.*

11. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRAILS AT COMMON LAW § 2352 (John T. McNaughton ed., rev. ed. 1961).

12. See *Peña-Rodríguez v. Colorado*, 137 S. Ct. 855, 857, 864–65 (2017) (noting the widespread use of the jury no-impeachment rule).

Courts could check the jury-selection process as well as the verdicts reached but were unable to assess whether jurors actually reached their verdicts impartially. This is why the jury is colloquially referred to as a black box.

Because courts historically lacked the ability to review jury deliberations for bias, the Constitution's impartial jury mandate¹³ has taken form as prophylactic guarantees. That is, courts have mandated certain processes designed to procure what is *likely* to be an impartial jury. For instance, jurors must be summoned according to principles of nondiscrimination¹⁴ and must reflect a fair cross section of the community,¹⁵ and parties must be given opportunity to challenge jurors before the final verdict.¹⁶ But these prophylactic safeguards offer a far-from-perfect solution. Jurors with improper biases, both conscious and unconscious, still slip by and influence decisions. While there is no way to confidently assert exactly how often this occurs, there is strong reason to believe that biased juries pose a serious concern for the fair administration of justice.¹⁷

The 2017 Supreme Court case *Peña-Rodriguez v. Colorado* addressed the issue of juror bias during deliberations, with the Court adopting an expansive new understanding of the impartial jury mandate.¹⁸ In that case, a Colorado state jury found Mr. Peña-Rodriguez guilty of sexual assault. After the verdict, two jurors told the defense attorney that another juror had purportedly stated that based on his experience as a former law enforcement officer, "nine times out of ten Mexican men [are] guilty of being aggressive toward women and young girls," and concluded that "[Mr. Peña-Rodriguez] did it because he's Mexican and Mexican men take whatever they want."¹⁹ Mr. Peña-Rodriguez's lawyers asked the trial judge to investigate the comments, but the judge held that Colorado's jury no-impeachment rule barred him from

13. This term refers collectively to the Constitution's requirement that jurors in all contexts must sufficiently lack partiality. While there are distinctions in how this requirement is realized in the civil, criminal, and grand jury contexts, these distinctions are not so significant as to prevent recognition of and discussion on the Constitution's overarching mandate. 12 LONNIE E. GRIFFITH, JR. ET AL., *CYCLOPEDIA OF FEDERAL PROCEDURE* § 48:62 (3d ed., 2018 update).

14. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880).

15. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 184 (1986) ("[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial . . .").

16. See, e.g., *Tanner v. United States*, 483 U.S. 107, 113–16, 127 (1987).

17. See, e.g., *Peña-Rodriguez*, 137 S. Ct. at 862; *United States v. Benally*, 546 F.3d 1230, 1231–32 (10th Cir. 2008), *abrogated by Peña-Rodriguez*, 137 S. Ct. 855 (quoting and describing juror statements such as "[w]hen Indians get alcohol, they all get drunk," "when they get drunk, they get violent," and "[we need to] send a message back to the reservation" (internal quotation marks omitted)); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) ("[The Defendant's] black and he sees a seventeen year old white girl—I know the type." (quoting juror)).

18. 137 S. Ct. 855.

19. *Peña-Rodriguez*, 137 S. Ct. at 862.

doing so.²⁰ Mr. Peña-Rodriguez petitioned up to the United States Supreme Court, which granted certiorari and reversed.

Writing for the majority, Justice Kennedy held that

where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.²¹

But the Court warned that “[n]ot every offhand comment . . . will justify setting aside the no-impeachment bar;” rather, only those “showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”²² It stressed that the decision was limited to racial bias in criminal cases, noting the “unique historical, constitutional, and institutional concerns” implicated by racism.²³

Peña-Rodriguez v. Colorado represents a dramatic development in impartial jury mandate jurisprudence. Allowing judges to check jurors’ rationales—rather than just the processes by which the jurors were selected and the trial conducted—fundamentally alters what was previously thought the Constitution mandated. Read broadly, *Peña-Rodriguez* seems to recognize a Sixth Amendment right to have jury decisions made only according to constitutionally permitted rationales.²⁴ But questions persist. Most problematically, it remains unclear whether deliberations may be reviewed for bias against other suspect and nonsuspect classes of individuals, or whether the rule applies outside the criminal context. Moreover, the value of certain prophylactic rules, such as peremptory challenges, might be suspect when deliberations are reviewable. The case thus offers an opportunity to reassess the many strands and motivations of the impartial jury mandate.

This Article addresses the Constitution’s jury requirements in light of *Peña-Rodriguez*, with the treatment existing on two distinct levels. On the most concrete plane, it offers a structural theory of the historical ex ante procedural and the newly formed ex post substantive components of the impartial jury mandate, stressing that each of these advances a competing idea of the jury’s institutional responsibilities. Yet on another level, the Article is concerned with the broader implications of applying that new substantive right and how it fits within existing notions of the jury as an institution. It thus attempts to redirect the conversation on the role of the jury within the judiciary, the federal structure, and society.

20. *Id.*

21. *Id.* at 869.

22. *Id.*

23. *Id.* at 868.

24. *Id.* at 883–84 (Alito, J., dissenting) (arguing that the majority decision sounds more in the Equal Protection Clause than in the Sixth Amendment).

To these ends, the Article is divided into four parts. Part I reviews the emergence of the jury's competing institutional responsibilities. It contends that the transformation of the jury from a fact-knowing to a fact-finding institution precipitated the need for jurors who were unfamiliar with and neutral in relation to the dispute.²⁵ This transformation also granted jurors the political power to deliver more easily verdicts against the weight of the facts, law, or both.²⁶ This political power proved attractive to the Founders of the United States, who constitutionalized the jury in the Bill of Rights to serve as a bulwark against powerful political and social actors.²⁷ Since then, competing notions of impartiality have focused either on the jury's responsibility as a neutral dispenser of individualized justice or a politically active representative body.²⁸

Part II analyzes and reframes the *ex ante* procedural aspects of the impartial jury mandate. It argues that by prohibiting review of the mental processes by which jurors make their decisions, the jury no-impeachment rule has required courts to enact imperfect prophylactic procedures aimed at securing a jury that is likely, though by no means certain, to resolve disputes with sufficient impartiality.²⁹ These procedures are addressed in terms of whether they occur pre- or post-venire. Pre-venire procedures are concerned with empanelling a jury that will reflect society's heterogeneity, whereas post-venire procedures are concerned with ensuring that the selected jury will be neutral in its decisionmaking.³⁰

Next, Part III reviews the emergence and eventual recognition of an *ex post* substantive component of the impartial jury mandate. It notes that while the Supreme Court and others have long suggested that there may be instances in which the no-impeachment rule must yield to address injustices, it was not until *Peña-Rodriguez* that the Court identified such an instance.³¹ Up until this decision, all violations of the impartial jury right were framed in terms of some failure of the prophylactic procedures. *Peña-Rodriguez*, however, advances a new constitutional right to have a jury that is not merely selected according to pre- and post-venire mandates but rather to have a jury that actually decides a case without extreme partiality—that is, at least with respect to overt racial prejudices.³²

25. David Torrance, *Evidence, in TWO CENTURIES' GROWTH OF AMERICAN LAW: 1701–1901*, at 319 (1901) (reviewing the jury's transformation).

26. See *infra* note 60 and accompanying text.

27. See *infra* notes 66–70 and accompanying text.

28. See *infra* Section I.B.

29. See, e.g., James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 314 (1988) (“The need to focus on a priori juror impartiality stems from the inability to examine the impartiality of the decision making process in the Anglo-American legal system.”).

30. See *infra* Section II.B.

31. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 866–69 (2017).

32. See *infra* Section III.B.

Finally, Part IV aims to contextualize ex post substantive review within the Court's impartial jury mandate jurisprudence. It contends that while the Court is adamant that the *Peña-Rodriguez* holding is limited to racial bias,³³ it is unlikely the Court can identify a limiting principle to exclude biases against other classes. It suggests that the Equal Protection Clause's tiers of scrutiny offer guidance, recognizing that although concepts such as strict scrutiny and rational basis are conceptually imperfect outside the legislative context, they nevertheless provide direction for how to think about permissible and impermissible jury biases.³⁴ It concludes by arguing that ex ante procedures and ex post substantive review can work together to balance the jury's competing responsibilities.

I. THE JURY'S COMPETING RESPONSIBILITIES

The jury is an ancient institution. While scholars debate its precise origins,³⁵ most place the emergence of English common law juries at around the time of the Norman Conquest.³⁶ But to note this beginning without qualification is misleading. As much as the jury is ancient, it is also ever-evolving. Fundamental changes in the jury's form and function have created an institution that is animated today by judicial and political responsibilities much different than eight hundred years ago. Critically, these modern responsibilities are in conflict. Today's jury is expected to resolve the immediate dispute without preconceptions, while also injecting a degree of democratic flexibility into the administration of law. Understanding the tension between these two responsibilities is necessary to explain the difficulty in defining what the Constitution requires when it guarantees an impartial jury. It is also central to the structural theory presented here on how ex ante procedural and ex post substantive tools work together to root out impermissible juror biases.

A. *The Emergence of the Modern Jury*

England did not always use juries. Through the turn of the first millennium, disputes were mostly resolved through the imprecise and barbaric practices of trial by ordeal, in which the accused was forced to prove his innocence through withstanding some form of torture,³⁷ and trial by combat,

33. *Peña-Rodriguez*, 137 S. Ct. at 868.

34. See *infra* Section IV.A.

35. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY 2* (New York, James Cockcroft & Co. 1875) ("Few subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury.").

36. See, e.g., F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 122 (1908).

37. For example, one common practice required the accused to carry in his bare hands a red-hot iron and to some days later subject his wounds to inspection by a clergyman who would determine whether they were sufficiently healed so as to prove him innocent. See Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 117 (2000).

in which two parties physically battled over property rights to the point of death or embarrassment.³⁸ Supernatural faith was the common foundation of these practices, the prevailing thought being that God would vindicate the innocent and punish the guilty.³⁹ But this faith was undermined in 1215 when the Fourth Lateran Council forbade the clergy from further involvement in these practices.⁴⁰ Without divine sanction, trial by ordeal and battle fell out of favor.⁴¹

A new form of dispute resolution was required. England turned to the jury, which had been used for resolving certain land disputes since at least 1166.⁴² The jury was most likely selected because of a need to economize on the time of professional judges. The administration of justice was an expensive and time-consuming obligation for the medieval monarchy, and juries were cheap.⁴³ Local laypersons were hailed without pay to the courthouse and questioned on their knowledge of the dispute.⁴⁴ Evidence was not provided to those unfamiliar with the issues; instead, more and more people were questioned until a body was formed that could competently resolve the case.⁴⁵ Professor Yeazell explains that this procedure “spared the judges the task of hearing witnesses, sifting kernels of fact from the chaff of mutual perjury, and reconstructing events.”⁴⁶ More importantly, it shifted the difficult responsibility of passing judgment away from the monarch’s judges and onto a local institution. Thus, a litigant would more aptly blame his countryman rather than the Crown for an unfavorable verdict.⁴⁷ And because evidence was not presented in open court, litigants could not easily attack the jury’s verdict as erroneous or perjurious.⁴⁸

38. It was not uncommon for disputants to hire professional fighters to battle in their stead. Because proficient fighters were more expensive, the individual with a greater financial interest at stake was more likely to emerge victorious. See Peter T. Leeson, *Trial by Battle*, 3 J. LEGAL ANALYSIS 341, 342 (2011).

39. Olson, *supra* note 37, at 118.

40. See George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 586 (1997).

41. See JOHN P. DAWSON, A HISTORY OF LAY JUDGES 293 (1960).

42. *Id.*

43. *Id.* at 128 (“[T]he early common law jury was an essential means of conserving trained manpower in a government that had taken on new tasks of immense scope and complexity.”).

44. Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 89–90.

45. *Id.* at 91.

46. *Id.* at 90.

47. *Id.* This rationale persists. See *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (discussing how jurors deflect responsibility away from judges).

48. Yeazell, *supra* note 44, at 91; see also John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203 (1988) (explaining that jurors could be punished through the attain process—similar to perjury—where if a second jury “found that the first jury had erred, the members of the first jury were punished severely”).

Over time, the practice of selecting jurors with preexisting knowledge of the dispute became increasingly onerous. Sometimes it was not possible to find twelve people acquainted with the facts, while at other times there were far more than twelve with relevant knowledge.⁴⁹ It became common for jurors to informally consult witnesses and other outside information before rendering their verdicts.⁵⁰ By the fourteenth century, this process of interrogation was becoming formalized, with both jurors and witnesses appearing before the court either together or as distinct groups.⁵¹ The subsequent three centuries saw the development of more modern trial practices, such as litigants nominating witnesses to testify, the court compelling attendance, and counsel cross-examination.⁵² With these developments, the jury's function gradually shifted away from fact-knowing and toward fact-finding.⁵³ By at least 1670 the transformation was complete; for instance, Chief Justice of Common Pleas John Vaughan could easily distinguish between witnesses and jurors: "[A] witness swears but to what he hath heard or seen But a jury-man swears to what he can inferr [sic] and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after"⁵⁴

Employing jurors as fact-finders carried a number of unintended consequences, two of which are important for our discussion.⁵⁵ First, it became necessary to ensure that the selected jurors were capable of making determinations without favor toward the litigants. Writing in the eighteenth century, William Blackstone explained that "if a juror knows any thing of the matter in issue, he may be sworn as a witness and give his evidence publicly in court."⁵⁶ And around the same time, the requirement that jurors come from the local community was eliminated, and jurors began to be selected at large.⁵⁷ William Blackstone, again, explained: "Common law required the ju-

49. See W.R. CORNISH, *THE JURY* 11, 275 (1968).

50. See Mitnick, *supra* note 48, at 204.

51. *Id.*

52. *Id.*

53. Torrance, *supra* note 25, at 321 ("This radical change . . . came about quite gradually, and it is probably as difficult to determine the exact time when it became complete as it is to determine at what precise moment daylight ends and darkness begins.").

54. *Bushell's Case* (1670) 124 Eng. Rep. 1006, 1009. Even at this time, however, the court allowed jurors to draw upon their own knowledge to some degree. Indeed, in the same decision quoted above, the Chief Justice wrote, "To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general?" *Id.* at 1012. On this basis, he concluded that it was inappropriate to punish jurors for decisions against the evidence, because judges "know[] not what [the evidence] is." *Id.* at 1013. The tension between whether a juror must disregard his personal knowledge in place of the evidence presented at trial has long been central to the institution.

55. Yeazell, *supra* note 44, at 88 ("[T]he designers of the jury did not attempt to create a complex political institution.").

56. 3 WILLIAM BLACKSTONE, *COMMENTARIES* *375.

57. See Mitnick, *supra* note 48, at 204–05.

ries to be brought from the vicinage; because they were supposed to know the facts[;] But . . . this is changed, because it is found that such jurors were apt to intermix their prejudices and partialities in the trial of right.⁵⁸ The ideal juror had become one unacquainted with the parties or their dispute and entirely removed from the pending resolution. If a juror had nothing to gain, it was thought that he would determine the case truthfully.⁵⁹

The second critical result of the jury's shift to a fact-finding body was that the institution came to harness great political power. Unlocked from the requirement that their verdicts be based on personal knowledge, jurors could more readily reach outcomes that were contrary to the law, the facts, or both.⁶⁰ They often did so to soften aspects of the law. As Professor Green explains, "Jury discretion was most common in cases of sudden, unplanned homicides and in thefts that did not involve physical violence or housebreaking. In these cases . . . juries frequently manipulated the fact-finding process to prevent the imposition of capital punishment."⁶¹ By exercising authority over facts, jurors could throttle justice in favor or against litigants that it found so deserving, or even with total caprice. In this way, the jury's control over the facts became control over law. The institution's political power was growing.

This political power proved particularly attractive across the Atlantic, where American colonists were becoming increasingly discontented with the Crown. The jury proved to be one of the core channels through which colonists could exert local, democratic authority against the distant, unrepresentative monarchy. The most famous example of this might be the seditious libel case of John Peter Zenger,⁶² but instances of jury activism were frequent in the run-up to the Revolution. Colonists regularly used the jury both defensively and offensively to challenge the Crown. Defensively, colonial juries would refuse to enforce penalties against smugglers who evaded payment of taxes and tariffs.⁶³ Offensively, those same smugglers would often subject of-

58. BLACKSTONE, *supra* note 56, at *360.

59. As Lord Coke famously described, a juror should be "indifferent as he stands unsworn." 3 J.H. THOMAS ET AL., COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 400 (1818).

60. See THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 241, 254 (1985). True, some juries going back centuries had acted with obstinacy. But by this time, developments in the common law prevented judges from punishing jurors or requiring them to provide rationales for their verdicts, meaning that jurors could more easily flex their institutional muscles. See *id.* at 200; Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 591 (1923).

61. GREEN, *supra* note 60, at xv.

62. See generally JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., 1963) (reviewing the circumstances of the case and noting that it was widely celebrated at the time as a turning point in the sentiment against the Crown).

63. See, e.g., STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 57 (1983).

ficers to private lawsuits for damages attendant to searches.⁶⁴ So intransigent were colonial juries that one governor complained, “[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.”⁶⁵

Following the Revolutionary War and the short-lived Articles of Confederation, the Framers cemented the jury’s political power in the Constitution and in three separate amendments. The jury was anticipated to serve as a bulwark against the new federal government, much in the same way that it had against the Crown.⁶⁶ Indeed, before the Bill of Rights, anti-federalists wrote frequently on the parade of horrors that would result if the federal government were not constrained by local jurymen.⁶⁷ And one of the most popular criticisms lobbed against the initial Constitution was its lack of civil jury protections.⁶⁸ For these reasons, Professor Amar has described the jury as “a paradigmatic image underlying the original Bill of Rights” and noted that the jury’s initial “absence strongly influenced the judge-restricting doctrines underlying [the First, Fourth, and Eighth] amendments.”⁶⁹ Similarly, Professor Thomas has likened the jury to a governmental “branch” in that it is responsible for balancing abuses by the executive, legislature, and judiciary.⁷⁰ In this way, the jury was established as a critical component of the constitutional framework.

Beyond the authority to check abuses of power, the jury was also seen as an opportunity for local involvement in the administration of the new government. As historian Herbert Storing argues, “The question [at the founding] was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government.”⁷¹ French sociologist Alexis de

64. That famously occurred in *Erving v. Cradock*, Quincy 553 (Mass. 1761). There, a civil jury awarded large damages against a customs officer who seized the plaintiff’s ship pursuant to a writ of assistance from the Court of Admiralty, despite the plaintiff’s admission that he was liable for forfeiture. See JOSIAH QUINCY, JR., *Notes on Erving v. Cradock*, in *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF THE JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772*, at 553, 557 (Samuel M. Quincy ed., Boston, Little, Brown, & Co. 1865).

65. See BOTEIN, *supra* note 63, at 57 (quoting Governor William Shirley).

66. See, e.g., 1 *THE COMPLETE ANTI-FEDERALIST* 64 (Herbert J. Storing ed., 1981); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 *HARV. L. REV.* 289, 298 (1966).

67. See, e.g., *Essay of a Democratic Federalist*, in 3 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 66, at 58, 61 (“[If an officer searching] for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource . . .”).

68. See, e.g., *THE FEDERALIST NO. 83* (Alexander Hamilton) (Clinton Rossiter ed., 1961).

69. AKHIL REED AMAR, *THE BILL OF RIGHTS* 96 (1998).

70. SUJA A. THOMAS, *THE MISSING AMERICAN JURY* 84 (2016).

71. *THE COMPLETE ANTI-FEDERALIST*, *supra* note 66, at 19 (emphasis omitted); see also AMAR, *supra* note 69, at 97 (“The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”).

Tocqueville recognized this same sentiment. He famously described the jury as a distinctly political institution that teaches citizens how to engage in participatory democracy.⁷² This is perhaps why serving on a jury has been a hard-fought civil right through much of the United States' blemished history.⁷³ To be a juror in America is a political designation: it is to be a constitutionally recognized participant in the state.

As this concise historical review shows, the American jury occupies a unique position in the constitutional structure and carries competing responsibilities. At its most basic, the jury is an adjudicative actor entrusted with resolving private and public disputes. But inherent to exercising this responsibility, the jury shapes the law and its application. This power was written into the Constitution and inures the jury with an import that extends beyond mere dispute resolution. Any concept of impartiality must account for all for this.

B. *The Difficulty with Defining Impartiality*

Courts have struggled to advance a cohesive definition of impartiality that can reflect the jury's competing responsibilities.⁷⁴ There is general agreement that a juror should not have a personal interest in the outcome of the particular case. She should not, for instance, be familiarly related to the litigants or stand to personally gain from the resolution.⁷⁵ Similarly, she should not have formed or expressed an unqualified opinion or belief about the specific matter in advance of the trial.⁷⁶ But underlying this base consensus is disagreement over the degree to which jurors must be devoid of all general opinions and whether jurors can draw upon their opinions to decipher the facts and apply the law.

On one side of the debate are pure jury formalists. Formalists view the jury as a fact-finding body in which facts are a set of discoverable, objective phenomena that jurors of different backgrounds will perceive similarly.⁷⁷ The jurors' unique experiences are unnecessary because outside information

72. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (J.P. Mayer ed., George Lawrence trans., 2000) (1838).

73. See, e.g., Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1115–34 (2014) (reviewing the expansion of the civil right to serve as a juror).

74. Howe, *supra* note 4, at 1183 (“A brief, self-explanatory standard appears impossible to provide.”).

75. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 35–37 (1986).

76. See, e.g., *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (“The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions.”).

77. Burt Neuborne, *Essay, Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 443 (1992).

is irrelevant to the dispute.⁷⁸ For example, consider the jury charges from Eastern District of California Judge Garland Burrell:

[B]eing a juror is hard . . . because it's probably the only time in your life that you are ever asked to take all of you[r] experiences . . . that have contributed to how you think about everything . . . and to lay those experiences aside We call them your biases and your prejudices, and we all have them. . . . [B]ut you can't depend upon them when you are jurors.⁷⁹

To such formalists, the jury is a passive administrative body, silently examining evidence and delivering dispassionate outcomes.⁸⁰ The Supreme Court has at times championed this approach, stating, "An impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'"⁸¹ It has further claimed that the jury must be "capable and willing to decide the case solely on the evidence before it."⁸²

On the other side of the debate are pure jury realists. Realists view facts as malleable and reality as constructed by the experiences of decisionmakers.⁸³ They argue that one need not regress to solipsism to acknowledge that a person's understanding about the world is built on that individual's experiential background.⁸⁴ To realists, the jurors' general biases are precisely the institution's strength as a representative body. For instance, consider the jury charges of California State Court Judge Judith Champagne:

You are going to judge whether or not the testimony is reliable makes sense [and] is reasonable. You are going to do probably what you do regularly in your normal lives, which is to take in information, assess it using common sense and then make decisions. There is nothing magical about your jobs here.⁸⁵

To such realists, the jury represents the community's wisdom. The Supreme Court has championed this perspective at times, too.⁸⁶ It has supported the

78. NANCY S. MARDER, *THE JURY PROCESS* 105 (2005) ("[T]he traditional view of the juror's role throughout trial is that of an empty vessel into which information presented in the form of exhibits, testimony, argument, and judicial instructions will be poured.").

79. *Taylor v. Sisto*, 606 F.3d 622, 623 (9th Cir. 2010).

80. See Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 198 (1990) ("[J]urors are expected to silently examine and listen carefully to all of the evidence, and then to evaluate that evidence during the deliberation phase of the trial.").

81. *Lockhart v. McCree*, 476 U.S. 162 (1986) (emphasis omitted) (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)).

82. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

83. See *Neuborne*, *supra* note 77, at 443.

84. See *id.*

85. *Victorian v. Cash*, No. CV 07-5514 JVS (FMO), 2011 WL 4337131, at *1 (C.D. Cal. Sept. 8, 2011) (emphasis omitted).

86. See, e.g., *Glasser v. United States*, 315 U.S. 60, 86 (1942) ("[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community' . . . [that] comport[s] with the concept of the jury as a cross-

notion of “diffused impartiality”⁸⁷ and recognized that “the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.”⁸⁸ And it has concluded that “the Constitution presupposes that a jury selected from a fair cross section of the community is impartial.”⁸⁹

Although the formalist and realist approaches are diametrically opposed, these Janus-faced articulations should not surprise. Neither a purely formalist nor purely realist approach would accurately reflect the responsibilities of the jury both to ensure individualized justice and to provide for the political capacity of the institution. If jurors were permitted to consult all their biases, trials would be unrestrained and lack even a veneer of ordered justice. As the Seventh Circuit noted, “The [Constitution] protect[s] . . . from a jury’s lynch mob mentality through the guarantees of due process of law and trial by an impartial jury.”⁹⁰ Alternatively, even if the Court wanted to privilege a neutral body over a representative one, it is unclear that such a jury could exist.⁹¹ “[A]lthough absolute justice may require as much,” Judge Learned Hand once explained, “it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court.”⁹² Judge Hand voiced his suspicion that few verdicts would withstand such a test, which he noted “has induced judges to take a middle course.”⁹³

Further complicating the definition of juror impartiality is that many aspects of the law anticipate and invite jurors to bring their outside knowledge to bear on a given dispute. These include, but are not limited to, framing the profile of negligence or causation in tort and criminal law⁹⁴ and the very definition of obscenity.⁹⁵ In these areas, “[t]he biases of the community are in effect the legal standard.”⁹⁶ But even beyond these specific areas of law, the jury’s untrained and often-biased eye is anticipated to ensure the

section of the community.” (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)); see also *Spaziano v. Florida*, 468 U.S. 447, 486–87 (1984) (Stevens, J., concurring in part and dissenting in part) (“[Jurors] reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.”).

87. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

88. *Ballew v. Georgia*, 435 U.S. 223, 234 (1978).

89. *Lockhart v. McCree* 476 U.S. 162, 184 (1986).

90. *United States v. McClinton*, 135 F.3d 1178, 1185 (7th Cir. 1998).

91. See, e.g., *Howe*, *supra* note 4, at 1190 (“Efforts to enforce a highly exacting standard of juror impartiality would require exclusion of almost most potential jurors in many cases.”).

92. *Jorgensen v. York Ice Mach. Corp.*, 160 F.2d 432, 435 (2d Cir. 1947).

93. *Id.*

94. *Gobert*, *supra* note 29, at 304 n.158.

95. *Id.*

96. *Id.* at 280.

community's sense of justice.⁹⁷ Jurors are expected to humanize the law, translating complicated legal standards into applicable rules.⁹⁸ As Second Circuit Judge Jerome Frank recognized, “[the decisionmaker who] strips himself of all predilections, becomes a passionless thinking machine” and thereby “ceases to be human.”⁹⁹ To some degree, the jurors’ biases are a feature, not a bug.

As such, a single definition of impartiality confounds. As the Supreme Court has recognized, bias is “such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence.”¹⁰⁰ And even if it were recognized, as other judges have noted, “[t]he point at which an impression too weak to warp the judgment ends and one too strong to suppress begins is difficult to discern.”¹⁰¹ Moreover, increasing amounts of social science show that most forms of bias are implicit, covertly influencing jurors’ thought processes and difficult to root out.¹⁰² Perhaps the best that can be said is that an impartial jury is one in which the composite jurors are drawn fairly and do not allow their inherent biases to irrationally affect their verdict.¹⁰³ Yet even this broad definition is unhelpful if courts cannot em-

97. See 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 349 (3d ed. 1922) (“[The jury system] tends to make the law intelligible by keeping it in touch with the common facts of life. . . . The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense.”).

98. As Albert W. Dzur explains,

By empowering outsiders, the jury trial injects a decalcifying antidote into the circulatory system of modern criminal justice. Pressing courthouse regulars to translate their language and share their ideas and experiences with lay citizens, forcing significant interaction between professionals and laypeople, the jury renders transparent the complicated norms, rules, and procedures best understood in practice.

ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 102 (2012).

99. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652–53 (2d Cir. 1943) (making this point with respect to judges, rather than jurors).

100. *Smith v. Phillips*, 455 U.S. 209, 231 (1982) (quoting *Crawford v. United States*, 212 U.S. 183, 196 (1909)).

101. *Briley v. Commonwealth*, 279 S.E.2d 151, 154 (Va. 1981). This point will be discussed in depth *infra* Part IV.

102. See, e.g., Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001).

103. Others have offered similar formulations. See Gobert, *supra* note 29, at 326 (“To be impartial is to assume a role which the legal system asks a juror to play.”); Howe, *supra* note 4, at 1183 (“[P]ersons who establish themselves in advance as likely to be strongly influenced by information gained extrajudicially regarding important factual issues, as likely to decide the case primarily on offensive, personal considerations or as likely to fail to consider relevant, in-court arguments, warrant a finding of bias.”); see also *Thiel v. S. Pac. Co.*, 328 U.S. 217, 232 (1946) (Frankfurter, J., dissenting) (“The object is to devise a [jury] system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system.”).

panel such a jury. Our conversation turns next to how courts have historically tried to do so.

II. IMPARTIALITY AS EX ANTE PROCEDURE

The Supreme Court has recognized that “for the ascertainment of . . . the prospective juror[’s] [impartiality], the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”¹⁰⁴ The key word here is *prospective*. This ex ante viewpoint results from the fact that judges have been for hundreds of years rigidly prohibited from reviewing jury deliberations.¹⁰⁵ Locked out of the deliberation room, courts have read the impartial jury mandate as requiring certain prophylactic procedures that are thought to secure a body that is likely to be impartial.¹⁰⁶ These procedures are best discussed in terms of whether they occur pre-venire or post-venire formation. Generally, pre-venire procedures aim to secure a representative, realist-type jury, while post-venire procedures aim to secure a neutral, formalist-type jury.¹⁰⁷

A. *The Jury No-Impeachment Rule*

The common law rule that a judge will not hear juror testimony impeaching the jury’s verdict originated in 1785. In *Vaise v. Delaval*, two jurors attempted to submit affidavits swearing that the jury broke their deadlocked deliberations by flipping a coin.¹⁰⁸ Lord Mansfield refused, ruling that “[t]he Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor.”¹⁰⁹ Mansfield’s decision was founded on the civil law maxim *nemo turpitudinem suam allegans audietur*, or “a witness shall not be heard to allege his own turpitude.”¹¹⁰ Because it was illegal for jurors to resolve their disagreement by a game of chance, their affidavits amounted to confessions of a crime.

Lord Mansfield’s application of this maxim broke with precedent. As Professor Wigmore notes in his prominent evidence treatise, “Up to Lord Mansfield’s time, and within a half decade of his decision in *Vaise v. Delaval*,

104. *United States v. Wood*, 299 U.S. 123, 145–46 (1936).

105. *See, e.g.*, Gobert, *supra* note 29, at 314 (“The need to focus on a priori juror impartiality stems from the inability to examine the impartiality of the decision making process in the Anglo-American legal system.”).

106. *See id.* at 312 (“The Supreme Court’s approach to impartiality has been one of indirection.”).

107. Other scholars have discussed these various procedures in terms of securing “group-impartiality” and “individual impartiality.” *See, e.g.*, Howe, *supra* note 4, at 1179–80, 1203. This approach is inadequate because it fails to acknowledge how these concepts tie into the jury’s competing responsibilities.

108. *Vaise v. Delaval* (1785) 99 Eng. Rep. 944 (KB).

109. *Id.* at 944 (citations omitted).

110. *See* WIGMORE, *supra* note 11, § 2352 (emphasis omitted).

the unquestioned practice had been to receive jurors' testimony or affidavits without scruple."¹¹¹ In fact, not long after the decision, one New York judge facetiously queried, "If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged? Are not criminals in England every day convicted, and even executed, on their own confession? And is not our state-prison filled in the same way?"¹¹² Such pushback was generally limited, however, and the jury no-impeachment became ingrained in the common law and embraced in the United States.¹¹³

By the twentieth century, Lord Mansfield's original and suspect rationale was replaced with new public policy considerations.¹¹⁴ In 1915, the Supreme Court comprehensively articulated these policies in *McDonald v. Pless* when it refused to accept juror testimony that a civil damage award was determined by quotient verdict.¹¹⁵ The Court stressed that it was pulled "between redressing the injury of the private litigant and inflicting the public injury."¹¹⁶ It then described three public injuries associated with admitting juror testimony. First, discarding the rule would threaten the finality of verdicts "solemnly made and publicly returned" by making deliberations the "constant subject of public investigation."¹¹⁷ Second, it would result in jurors being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict."¹¹⁸ Finally, it would destroy the "frankness and freedom of discussion and conference" during what was meant to be a private deliberation.¹¹⁹ The Court concluded that although the jury had "adopted an arbitrary and unjust method in arriving at their verdict," upholding the jury no-impeachment rule was the "the lesser of two evils."¹²⁰

Note, however, that the no-impeachment rule has never been an absolute bar on evidence derived from within the jury room. The most important carve-out federal courts have recognized is for "extraneous influences." This carve-out includes evidence of bribery or intimidation of jurors and extends to any other improper communication that crosses the formal boundaries protecting deliberation.¹²¹ For instance, in *Mattox v. United States*, the court accepted testimony that the jury consulted an inflammatory newspaper ac-

111. *Id.*

112. *See* *Smith v. Cheatham*, 3 Cai. 57, 59 (N.Y. Sup. Ct. 1805) (emphasis omitted).

113. *See* WIGMORE, *supra* note 11, § 2352.

114. *See id.*

115. Each of the jurors had written down the sum to which he thought the plaintiff was entitled, from which an average was determined and ultimately awarded. *See* 238 U.S. 264, 265–66 (1915).

116. *McDonald*, 238 U.S. at 267.

117. *Id.* at 267–68.

118. *Id.* at 267.

119. *Id.* at 267–68.

120. *Id.* at 267.

121. *See* WIGMORE, *supra* note 11, § 2354.

count of the trial,¹²² and in *Wheaton v. United States*, the court accepted evidence that the bailiff engaged the jury in discussion of the case.¹²³ Critically, a distinction is drawn between the specific influence and its effect on the juror.¹²⁴ As the Supreme Court explained, “[A juror] may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.”¹²⁵ This limitation is paramount. The Court has historically refused to assess the basis and propriety of jurors’ decisionmaking. With extraneous influences, it is the procedural breach that is problematic, not the substantive effect upon the decisionmakers.

This approach remained largely unquestioned at the federal level until the 1970s when it wavered slightly. At the time, a number of state legislatures and courts had begun recognizing additional exceptions to the no-impeachment rule, including exceptions for juror bias.¹²⁶ In the debate surrounding the initial Federal Rules of Evidence, the House of Representatives supported recognizing new exceptions to the no-impeachment rule, while the Senate preferred the common law approach.¹²⁷ Ultimately, the Conference Committee sided with the Senate, adopting Federal Rule of Evidence 606(b). That rule forbids jurors from testifying as to “any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.”¹²⁸ However, three limited exceptions were added to the traditional common law approach—jurors may testify as to whether “[1] extraneous prejudicial information was improperly brought to the jury’s attention; [2] an outside influence was improperly brought to bear on any juror; or [3] a mistake was made in entering the verdict on the verdict form.”¹²⁹ Some federal courts have stretched the “extraneous prejudicial information” exception to reach instances of partiality during deliberations,¹³⁰ but generally the exceptions have been narrowly applied.

122. 146 U.S. 140, 148 (1892).

123. 133 F.2d 522 (8th Cir. 1943).

124. See *Mattox*, 146 U.S. at 150.

125. *Id.* at 149.

126. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 876 (2017). The most popular of these alternatives is the Iowa Rule, which allows judges to accept juror testimony of “overt acts . . . accessible to the knowledge of all the jurors.” This would include quotient verdicts, for instance. See *Perry v. Bailey*, 12 Kan. 539, 544–45 (1874).

127. S. REP. NO. 93-1277 (1974).

128. FED. R. EVID. 606(b) (1975) (amended 2011).

129. FED. R. EVID. 606(b)(2)(A)–(C) (note that the third exception, for basic mistakes, was not added until the amendments of 2006).

130. See *infra* Section III.A.

Although the common law no-impeachment rule is now reflected in Rule 606(b), it would be specious to conclude that it is similar in kind to other evidentiary rules. To the contrary, the rule continues to reflect deep-rooted concerns about the jury as an institution and the need for independence and finality in decisionmaking.¹³¹ As such, the Supreme Court has remained exceedingly reluctant to impeach jury verdicts.¹³² Famously, in *Tanner v. United States*, the Court refused to accept juror testimony that several jurors had “consumed alcohol during the lunch breaks . . . causing them to sleep through the afternoons,” and that some had smoked cannabis and ingested cocaine during the trial.¹³³ Even in the face of this incredible circumstance, the Supreme Court repeated the common law refrain that “[s]ubstantial policy considerations support the common law rule against the admission of jury testimony to impeach a verdict.”¹³⁴ It further warned of the slippery slope flowing from an alternative result, stating that it is “not at all clear . . . that the jury system could survive such efforts to perfect it.”¹³⁵

This last point is worth stressing. By denying all forms of jury impeachment based on jurors’ mental processes, the Court has been relieved of the problematic task of dividing between permissible and impermissible biases influencing deliberations.¹³⁶ The no-impeachment rule privileges the jury’s independence as an institution over the litigants’ interest in individualized justice. True, courts have long overturned verdicts that are against the weight of the evidence.¹³⁷ But the no-impeachment rule prevents them from knowing whether seemingly accurate verdicts were achieved in a partial way. Without that knowledge, courts have sought impartiality through alternative means.

B. *Procedures Tending to Secure an Impartial Jury*

Locked out of reviewing the basis upon which jurors make their decisions, Courts have read the impartial jury mandate as requiring a number of prophylactic procedures. These procedures are best discussed in terms of whether they are required before or after venire formation. Pre-venire for-

131. See *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008), *abrogated by Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (“Rule 606(b) is a rule of evidence, but its role in the criminal justice process is substantive: it insulates the deliberations of the jury from subsequent second-guessing by the judiciary.”).

132. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 218 (1989) (describing the courts’ “failure to hold jurors to ordinary standards of responsibility”).

133. 483 U.S. 107, 113–16 (1987).

134. *Tanner*, 483 U.S. at 119.

135. *Id.* at 120.

136. See Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 366 (1958) (arguing that the jury no-impeachment rule may be “explained as a substitute for a more restrictive rule concerning the grounds for impeachment”).

137. This power did not exist at common law. See THOMAS, *supra* note 70, at 80–82.

mation, the Constitution requires that citizens be hailed into court according to principles of nondiscrimination and that juries must reflect a “fair cross section” of the community. The Court has championed these procedures as necessary to secure a jury that can fulfill its responsibility as a democratic and representative body. Once the venire is formed, however, a different set of procedures is required, most importantly the voir dire process of individual jury selection. It is believed that these procedures make it more likely that the resulting jury will be capable of dispassionately applying the law to the facts.¹³⁸

1. Pre-Venire Procedures

For a jury to be constitutionally impartial, the venire from which it is empaneled must reflect a fair cross section of the community.¹³⁹ Indeed, “the Constitution presupposes that a jury selected from a fair cross section of the community is impartial.”¹⁴⁰ This notion reflects the realist principle that the jury is a democratic decisionmaking body and therefore must be representative of society’s heterogeneity. The Court has at various times recognized this principle as part of the Fourteenth Amendment’s Equal Protection Clause as well as the impartial jury mandate.

That a jury must reflect society was first recognized following the Civil War. In a groundbreaking 1880 case, *Strauder v. West Virginia*, the Supreme Court struck down a state law that deliberately excluded blacks from venires.¹⁴¹ The Court based its reasoning on the notion that black jurors were more likely to be prejudiced in favor of the black defendants, writing, “It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”¹⁴² The Court added: “[B]y reason of his being a colored man . . . he had reason to believe . . . he could not have the full and equal benefit of all laws and proceedings . . . for the security of his person as is enjoyed by white citizens.”¹⁴³ Thus, because a white defendant would be entitled to have jurors biased to his benefit, the disparate treatment of the

138. Compare *Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (accepting in the context of pre-venire procedures that “the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case”), with *Lockhart v. McCree*, 476 U.S. 162, 177–78 (1986) (rejecting in the context of post-venire procedures the notion that “because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by ‘balancing’ the various predispositions of the individual jurors” (emphasis omitted)).

139. See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

140. See *Lockhart*, 476 U.S. at 187.

141. 100 U.S. 303 (1880).

142. *Strauder*, 100 U.S. at 309.

143. *Id.* at 304.

black defendant denied him equal protection under the recently ratified Fourteenth Amendment.

In the decades following, the Supreme Court recognized the exclusion from juries of other “identifiable groups” as unconstitutional.¹⁴⁴ In the process, however, the Court began to move away from the nondiscrimination principle of *Strauder* and highlight the representative nature of the jury as a political body.¹⁴⁵ In *Glasser v. United States*, a 1942 case, the Court stated that to be a “body truly representative of the community,” a jury must reflect a “cross-section of the community.”¹⁴⁶ This was the first time the Court recognized a fair-cross-section requirement in the Constitution.¹⁴⁷ It was unclear at the time whether this requirement was derived from the Equal Protection Clause, or if the concept of the word “jury” as used in the Fifth, Sixth, and Seventh Amendments required this kind of representation.¹⁴⁸ It was not until 1975 that the Court explicitly recognized that “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial” and that “the exclusion [of certain classes] deprives a criminal defendant of his . . . right to trial by an *impartial* jury.”¹⁴⁹ The Court’s language further made clear that grand and civil juries must also reflect a fair cross section of the community.¹⁵⁰

Critically, these fair-cross-section decisions did not draw upon the stereotype that the excluded class would harbor beneficial bias toward litigants of the same class, as was the reasoning in *Strauder*. Instead, the decisions were guided by the notion of “diffused impartiality.”¹⁵¹ This idea first emerged in *Ballard v. United States*, decided in 1946, in which women were systematically excluded from the jury pool.¹⁵² Justice Douglas of the majority wrote: “To insulate the courtroom from either [sex] may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.”¹⁵³ And nearly thirty years later, the Court expounded:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the ex-

144. *Hernandez v. Texas*, 347 U.S. 475, 477–78 (1954).

145. *Smith v. Texas*, 311 U.S. 128, 130 (1940) (noting that the jury must be “a body truly representative of the community”).

146. 315 U.S. 60, 85–86 (1942).

147. *Glasser*, 315 U.S. at 85–86.

148. *Id.* at 85 (stating that notions of what a “proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government”).

149. *Taylor v. Louisiana*, 419 U.S. 522, 528, 535–36 (1975) (emphasis added).

150. *See id.*

151. *Id.* at 530–31 (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

152. 329 U.S. 187, 195 (1946).

153. *Ballard*, 329 U.S. at 194.

cluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.¹⁵⁴

The Court thus recognized that it is through the deliberative, interactive process that the jury delivers its wisdom. As such, “the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.”¹⁵⁵

Those classes of individuals who sufficiently add to deliberations that they cannot be excluded without violating the impartial jury mandate are called “distinctive groups.”¹⁵⁶ This concept differs from suspect classes in Fourteenth Amendment jurisprudence, although there is considerable overlap and courts often equivocate between the two.¹⁵⁷ This confusion is likely because, as the Supreme Court has admitted, it has “never attempted to precisely define the term ‘distinctive group.’”¹⁵⁸ Instead, it has offered a rather unhelpful three-prong test: first, “the group alleged to be excluded is a ‘distinctive’ group in the community”; second, “the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community”; and third, “this underrepresentation is due to systemic exclusion of the group in the jury-selection process.”¹⁵⁹ Officially, the Court has only recognized race,¹⁶⁰ gender,¹⁶¹ and ethnic background¹⁶² as “distinctive groups”; however, it has suggested that other immutable characteristics might qualify as well.¹⁶³ If a defendant makes out a prima facie case that a distinctive group has been excluded, states must show a significant interest in intentionally or unintentionally excluding this group.¹⁶⁴

154. *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) (opinion of Marshall, J.).

155. *Ballew v. Georgia*, 435 U.S. 223, 234 (1978).

156. *Duren v. Missouri*, 439 U.S. 357, 363–64 (1979).

157. See Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 947 (2011).

158. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986).

159. *Duren*, 439 U.S. at 364.

160. See *Peters v. Kiff*, 407 U.S. 493 (1972) (opinion of Marshall, J.).

161. See *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

162. See *Castaneda v. Partida*, 430 U.S. 482 (1977).

163. See, e.g., *Lockhart*, 476 U.S. at 176 (upholding exclusions based on ideology because they “are singled out for exclusion . . . on the basis of an attribute that is within the individual’s control”). Courts have at various times upheld the exclusion of “old people, poor people, deaf people, less educated people, college students, resident aliens, blue-collar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis.” See Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 968–69 (1998) (footnotes omitted).

164. See, e.g., *Taylor*, 419 U.S. at 533 (discussing a state’s possible justification in excluding women from jury selection).

The policy considerations motivating these procedural requirements at the pre-venire stage fall firmly into the realist conception of the jury as a democratic political institution. At various times the court has explained that the fair-cross-section requirement “guard[s] against the exercise of arbitrary power” by ensuring that “commonsense judgment of the community” will act as “a hedge against the overzealous or mistaken prosecutor.”¹⁶⁵ The Court has also stressed that representation bolsters the public’s confidence in procedural justice¹⁶⁶ and implements the belief that “sharing in the administration of justice is a phase of civic responsibility.”¹⁶⁷ Without being able to review jury deliberations to ensure impartial decisionmaking, these pre-venire procedures act as imperfect tools to empower the jury as an independent constitutional entity. They attempt to secure a body that can draw upon its inherent biases to administer the law in line with local concepts of justice. And they privilege the idea that different individuals will decide cases differently.

2. Post-Venire Procedures

Once the venire is assembled, the fair-cross-section requirement and its motivations fall away completely.¹⁶⁸ The Supreme Court has been overwhelmingly clear that there is “no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”¹⁶⁹ “[I]f it were true that the Constitution required a certain mix of individual viewpoints on the jury,” the Court has reasoned, “then trial judges would be required to undertake the Sisyphean task of ‘balancing’ juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers.”¹⁷⁰ At the post-venire stage, distinct procedures reflecting a formalist conception of the jury as a neutral arbiter are implicated. “[T]he quest is for jurors who will consciously apply the law and find the facts,” the Court has said, as “[t]hat is what an ‘impartial’ jury consists of.”¹⁷¹

The key procedure here is voir dire. This process of questioning potential jurors about biases that may be implicated during the trial “plays a critical function in assuring the criminal defendant that his . . . right to an impar-

165. *Id.* at 530.

166. *Id.*

167. *Id.* at 531.

168. See, e.g., *Holland v. Illinois*, 493 U.S. 474, 477–83 (1990) (rejecting “an extension of the fair-cross-section requirement from the venire to the petit jury,” and noting that “[t]he ‘representativeness’ constitutionally required at the venire stage can be disrupted at the jury-panel stage to serve a State’s ‘legitimate interest.’” (quoting *Lockhart*, 476 U.S. at 175)).

169. *Taylor*, 419 U.S. at 538.

170. *Lockhart v. McCree*, 476 U.S. 162, 178 (1986).

171. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

tial jury will be honored."¹⁷² Disqualifying biases are either actual or implied.¹⁷³ Actual bias "involves a determination of the juror's subjective state of mind, which normally turns on . . . the juror's own admission or denial of bias," whereas implied bias turns on an "objective determination of . . . whether the average man in the juror's situation could render an impartial verdict."¹⁷⁴ For instance, the Court has explained: "[Disqualifying bias] might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence," and so "bias is implied, and evidence of its actual existence need not be given."¹⁷⁵

Courts will strike individuals if their preconceptions appear to be so strong that they will not be overcome by evidence offered during the trial.¹⁷⁶ As Chief Justice Marshall explained back in the 1807 case of the infamous Aaron Burr:

The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.¹⁷⁷

The Court has since made clear that the reason for this permissiveness is not to limit encroachments on the representative component mandated at the pre-venire stage. Rather, it is borne out of a need for administrative efficiency.¹⁷⁸ The costs attendant to empaneling a jury that is purely neutral are simply too high.

Trial judges enjoy much discretion in conducting voir dire and identifying and striking unqualified jurors. Yet there are "special circumstances" in which the Constitution mandates that judges ask jurors specific questions regarding their biases.¹⁷⁹ The Supreme Court has described its decisions in this area as follows: "[T]he possibility of racial prejudice against a black de-

172. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); see also *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.").

173. See *Wainwright*, 469 U.S. at 423.

174. Sharon R. Gromer, *Sixth Amendment—The Demise of the Doctrine of Implied Juror Bias*, 73 J. CRIM. L. & CRIMINOLOGY 1507, 1516–17 (1983).

175. *Crawford v. United States*, 212 U.S. 183, 196 (1909).

176. See *Howe*, *supra* note 4, at 1184 (arguing that the court will only "require[] exclusion if it appears likely to influence a potential juror's decision to a powerful degree").

177. *United States v. Burr*, 25 F. Cas. 49, 50–51 (C.C.D. Va. 1807) (No. 14,692g).

178. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (acknowledging the effects of mass media and noting that "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard").

179. See, e.g., *Turner v. Murray*, 476 U.S. 28, 37 n.12, 37–38 (1986) (plurality opinion).

fendant charged with a violent crime against a white person is sufficiently real that the [Constitution] requires that inquiry be made into racial prejudice”¹⁸⁰ But this description is incomplete. A review of the cases reveals that the Court has equivocated on when a more searching voir dire is necessary and has only required specific questioning into racial prejudice when the criminal case involves both racially disparate parties as well as the potential for capital punishment.¹⁸¹ Outside this narrow circumstance, specific questioning of prospective jurors on their various biases concerning the parties or the facts of the case is not constitutionally required.¹⁸²

There are instances, however, in which the judge is constitutionally required to question prospective jurors on their ability to enforce the applicable *law*. Similar to the above exception for context biases, this exception applies only in criminal cases carrying the potential for capital punishment. In *Witherspoon v. Illinois*, decided in 1968, the Supreme Court struck down a death sentence imposed by a jury entirely comprising citizens who expressed no “qualms” about capital punishment.¹⁸³ The Court reasoned that the “jury fell woefully short of that impartiality to which the petitioner was entitled” and cited a decision related to the fair-cross-section requirement that applies pre-venire.¹⁸⁴ After sweeping away all potential jurors who expressed scruples about capital punishment, the resulting jury could not “express the conscience of the community” and therefore denied the defendant his constitutional right to an impartial jury.¹⁸⁵ *Witherspoon* and its immediate progeny are the only cases in which the Supreme Court has hinted that the representativeness component of the jury extends past venire formation and is implicated in petit jury selection.

This realist approach was abandoned not twenty years later, following a dramatic rereading of *Witherspoon*. In *Wainwright v. Witt* the Court confirmed that petit jury selection is chiefly concerned with empaneling a jury that will consider the facts and apply the law as articulated at trial. “[T]he

180. *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991).

181. *Compare* *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (“There is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice.” (citing *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976))), *with* *Turner*, 476 U.S. at 36–37 (“[A] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”), *and* *Aldridge v. United States* 283 U.S. 308, 314 (1931) (noting that the “risk [of racial bias] becomes most grave when the issue is of life or death”).

182. *See* *Ham v. South Carolina*, 409 U.S. 524, 527–28 (1973) (conceding that bias against bearded people was possible, but that the Court was unable “to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices”).

183. 391 U.S. 510 (1968).

184. *Witherspoon*, 391 U.S. at 518 (citing *Glasser v. United States*, 315 U.S. 60, 84–86 (1942)).

185. *Id.* at 519; *see also* *Wainwright v. Witt*, 469 U.S. 412, 416 (1985) (“In *Witherspoon*, this Court held that the State infringes a capital defendant’s right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment.”).

proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment," the Court explained, "is whether the juror's views would 'prevent or substantially impair the performance of his duties in accordance with his instructions and his oath.'"¹⁸⁶ No longer was the need for the community's heterogeneous perspectives on capital punishment to be reflected in the petit jury. Instead, the Court "recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate the administration of a State's death penalty scheme."¹⁸⁷ Thus, while jurors must still be questioned on their willingness to apply the death penalty, their responses are evaluated on the same standard as exclusions for any other cause.¹⁸⁸

Moving on from those instances in which jurors are dismissed due to some articulable rationale, impartial juries are also constructed through litigants dismissing jurors indiscriminately via peremptory challenges.¹⁸⁹ Peremptory challenges allow the parties to strike jurors for nearly any reason whatsoever, and litigants need not provide any rationale for their decisions. "[B]y enabling each side to exclude those jurors it believes will be most partial toward the other side," the Court has explained, peremptory challenges "eliminat[e] extremes of partiality on both sides, . . . thereby 'assuring the selection of a qualified and unbiased jury.'"¹⁹⁰ The Court has readily acknowledged that this process cuts against the fair-cross-section requirement of the pre-venire stage. As Justice Scalia noted in reference to peremptory challenges, "[t]he 'representativeness' constitutionally required at the venire stage can be disrupted at the jury-panel stage."¹⁹¹ All that is required post-venire is that "in the process of selecting the petit jury the prosecution and defense will compete on an equal basis."¹⁹² That each side may act with equal irrationality does not disturb the constitutionality of peremptory challenges. In this area, the interests of the institution are inferior to the impulses of the litigants.

186. *Witt*, 469 U.S. at 423 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

187. *See id.* at 416.

188. *Id.* at 439–40 (Brennan, J., dissenting) (arguing that the *Witt* decisions "abandons *Witherspoon's* strict limits on death-qualification and holds instead that death-qualification exclusions be evaluated under the same standards as exclusions for any other cause.").

189. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) ("The principal value of the peremptory is that it helps produce fair and impartial juries."); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (peremptory challenges are "one means of assuring the selection of a qualified and unbiased jury").

190. *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (emphasis omitted) (quoting *Batson*, 476 U.S. at 91).

191. *Id.* at 483.

192. *Id.* at 481; *see also id.* at 480 ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does).").

Note that there are some very narrow restrictions on litigants' near-plenary power to strike potential jurors. Litigants may not employ their strikes on the basis of racist¹⁹³ or sexist¹⁹⁴ stereotypes, for instance.¹⁹⁵ But these restrictions are emphatically derived from the Fourteenth Amendment under the notion that jury selection constitutes a type of state action.¹⁹⁶ The purpose of these prohibitions is to halt state discrimination; it is not to ensure the empaneling of an impartial jury. That is, the Sixth and Seventh Amendments are silent on how litigants may exercise their peremptory challenges in the empaneling of a petit jury. Litigants may therefore skew the representativeness of the empaneled jury with near-impunity.¹⁹⁷ And because a rational litigant will seek jurors favorable to her side and strike jurors opposed to her side, it is unclear, despite the Supreme Court's claims to the contrary, that peremptory challenges actually result in a less biased jury.¹⁹⁸ In fact, the opposite may very well be true: litigants may covertly traffic in stereotypes to silent voices they wish to exclude.¹⁹⁹ Allowing litigants to irrationally strike jurors on nothing more than a whim—or a flimsy justification²⁰⁰—sits on shaky constitutional footing.²⁰¹ It is unlikely that this post-venire procedure would persist if not for historical inertia.²⁰²

193. See *Batson*, 476 U.S. at 79.

194. See *J.E.B.*, 511 U.S. at 140.

195. The Ninth Circuit has added to this list discrimination on the basis of sexual orientation. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484–86 (9th Cir. 2014).

196. *J.E.B.*, 511 U.S. at 150 (O'Connor, J., concurring).

197. *Holland*, 493 U.S. at 480–81 (“[t]he Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does),” such “that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.”).

198. See Alschuler, *supra* note 132, at 210 (outlining the racist motivations of many prosecutors in exercising peremptory challenges).

199. See, e.g., Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 553–54 (1975) (arguing that peremptory challenges “avoid[] trafficking in the core of truth in most common stereotypes” and “allow[] the covert expression of what we dare not say but know is true more often than not”).

200. As Justice Thurgood Marshall warned in his *Batson v. Kentucky* concurrence, “The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” 476 U.S. 79, 102–03 (1986). Indeed, policing this line between permissible and impermissible strikes has proven extraordinarily difficult. *Foster v. Chatman*, 136 S. Ct. 1737 (2016), a recent Supreme Court case, evidences this point. There, the state used its peremptory challenges to strike all four black prospective jurors qualified to serve. *Id.* at 1742. In their notes, the prosecutors highlighted the black jurors' names; circled the answer “black” on the questionnaire; labeled three black jurors “B#1,” “B#2,” and “B#3”; and identified which person to keep “if we had to pick a black juror.” *Id.* at 1744. While the Supreme Court's decision was heavily concerned with the habeas issue, that numerous lower court judges considered this overwhelming evidence to not constitute a *Batson* violation evidences the depth of the problem. See, e.g., *Grant v. Royal*, 886 F.3d 874, 950–52 (10th Cir. 2018).

Finally, after the jury has been culled from the venire, there are a number of aspects of the trial process that serve to secure an impartial jury. These safeguards were first collected in *Tanner v. United States*, in which the Supreme Court refused to accept juror testimony that showed that some jurors had engaged in alcohol and drug consumption throughout the trial.²⁰³ The *Tanner* safeguards include: voir dire, which allow litigants to question the potential jurors in advance; observation of the jury during court, to see if they were intoxicated; reports by jurors of inappropriate behavior *before* they render a verdict, so that the judge may correct the behavior; and post-verdict impeachment by evidence other than juror testimony, the standard exception to the no-impeachment rule.²⁰⁴ While *Tanner* technically concerned juror competency, the Court extended the reasoning to juror impartiality in *Warger v. Shauers*.²⁰⁵ Citing the safeguards, the Court concluded: “[A] party’s right to an impartial jury remains protected despite Rule 606(b)’s removal of one means of ensuring that jurors are unbiased.”²⁰⁶ Thus, even when faced with clear evidence that the procedures have failed, the right to an impartial jury is limited by the jury no-impeachment rule.

This last point makes it abundantly clear that the impartial jury mandate has historically been realized as a collection of prophylactic procedures rather than the right to have jury verdicts decided impartially. Without being able to review deliberations, Courts have developed and refined selection procedures that attempt to produce a body that *a priori* will reflect and balance the institution’s competing responsibilities. These procedures are imperfect in predicting whether the empaneled jurors will actually decide a case impartially. And there is good reason to believe that impermissible biases—both harmless and invidious—regularly enhance and infect jury deliberations. The next Part speaks to those instances in which the Court has peeked into the jury room and recognized a substantive right to an impartial jury that goes beyond those prophylactic procedures outlined above.

III. IMPARTIALITY AS EX POST SUBSTANCE

While the impartial jury mandate has taken form as a series of prophylactic procedures, a substantive component to the right has long lingered in American jurisprudence. These cases suggested that the Constitution might require more than just a jury selected according to certain procedures, but

201. Alschuler, *supra* note 132, at 170 (“The Equal Protection Clause forbids the arbitrary classification of human beings, and peremptory challenges are inherently arbitrary. Even when exercised on grounds other than race, these challenges are unconstitutional.”).

202. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 639 (1991) (O’Connor, J., dissenting) (describing peremptory challenges as “a practice of ancient origin” and “part of our common law heritage”).

203. 483 U.S. 107 (1987).

204. *Tanner*, 483 U.S. at 127.

205. 135 S. Ct. 521 (2014).

206. *Warger*, 135 S. Ct. at 529.

also a jury that in fact delivers a verdict impartially. Indeed, in one early case upholding the no-impeachment rule, the Supreme Court added a tantalizing qualifier: “[C]ases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.”²⁰⁷ That was back in 1852, and while the Court teased the exception again in 1915,²⁰⁸ no examples were provided. However, following adoption of Federal Rule of Evidence 606(b), some lower courts began to recognize exceptions to the jury no-impeachment rule in order to rectify a specific type of injustice—jury decisions based on racial prejudices. The Supreme Court foreclosed these exceptions in 2014 but echoed again that old qualifier: “There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged.”²⁰⁹

The Court found such an instance three years later in *Peña-Rodriguez v. Colorado*.²¹⁰ There, the Court announced that the Sixth Amendment mandates an exception to the jury no-impeachment rule “when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt” and that such statements could amount to a “denial of the jury trial guarantee.”²¹¹ This holding significantly alters the Court’s approach to the impartial jury mandate. By setting aside the no-impeachment rule, it recognizes for the first time an enforceable substantive right to have the jurors’ internal mental processes be based only on certain permissible considerations. As such, the reasoning of jury verdicts—at least in the narrow case of racial bias—is now subject to judicial scrutiny.

A. *Rejected Exceptions to Rule 606(b)*

The right articulated in *Peña-Rodriguez* is best understood in light of those approaches rejected by the Supreme Court leading up to the decision. Starting in the 1980s, a number of scholars and judges began to recognize exceptions to the no-impeachment rule when juror evidence tended to show that racial animus influenced deliberations. Two approaches emerged: (1) finding racial animus to fall within the “extraneous evidence” exception to Federal Rule of Evidence 606(b); and (2) recognizing an exception to Rule 606(b) for evidence tending to show that the juror lied during voir dire.²¹² In 2014, the Supreme Court rejected both circumscriptions but, in so doing, expanded the Court’s power to recognize an enforceable substantive impartial jury right.

207. *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851).

208. *See McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (suggesting the possibility of exception in the “gravest and most important cases”).

209. *Warger*, 135 S. Ct. at 529 n.3.

210. 137 S. Ct. 855 (2017).

211. *Peña-Rodriguez*, 137 S. Ct. at 867, 869.

212. *See, e.g., Amanda R. Wolin, Comment, What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262 (2012) (documenting the various approaches).

The first approach taken by courts trying to probe racial bias during deliberation was to read broadly Rule 606(b)'s extraneous influence exception. That exception states, "A juror may testify about whether . . . extraneous prejudicial information was improperly brought to the jury's attention."²¹³ Scholars were the first to recognize that this language might be stretched to reach racial animus,²¹⁴ and soon thereafter a handful of district court judges agreed.²¹⁵ The logic was that by drawing conclusions on the basis of the defendant's race, "the juror was . . . trying to persuade his fellow jurors by bringing 'facts' outside the record to their attention."²¹⁶ In a 2001 case, *United States v. Henley*, the Ninth Circuit passed positively on this perspective: "[T]he broad language of Rule 606(b) could plausibly be read to exclude all juror testimony regarding racial bias during deliberations—at least to the extent that such testimony might reveal the influence of racial bias on a juror's verdict"; but the Ninth Circuit admitted that most courts had not taken this approach.²¹⁷ The court then added, "Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine."²¹⁸ Under this approach, the juror's consideration of race amounted to a breakdown in the trial protections that control which evidence jurors may consider. It was akin to an inflammatory newspaper or chatty bailiff in the deliberation room.

Ultimately, the Ninth Circuit did not decide *Henley* on the "extraneous information" exception, choosing instead to recognize a second implicit exception to Rule 606(b).²¹⁹ Under this new approach, the testimony of racist statements made during deliberations was admissible because it showed that the juror lied during voir dire when he answered affirmatively that he could decide the case impartially.²²⁰ The First and Fifth Circuits also recognized

213. FED. R. EVID. 606(b)(2).

214. See, e.g., Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 942 (1978) ("[I]t is . . . at least arguable that [considerations based on racial animus] amount to 'outside influence' as to which impeaching evidence should be allowed.").

215. See, e.g., *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 689–90 (Wis. 1982) (juror competent to testify as to anti-Semitic statements made by other jurors concerning defendant's witness since they were "extraneous prejudicial information"); see also *Tobias v. Smith*, 468 F. Supp. 1287, 1290–91 (W.D.N.Y. 1979) ("[T]he statements in the juror's affidavit are sufficient to raise a question as to whether the jury's verdict was discolored by improper influences . . .").

216. *State v. Shillcutt*, 350 N.W.2d 686, 707 (Wis. 1984) (Bablitch, J., dissenting).

217. 238 F.3d 1111, 1119 (9th Cir. 2001).

218. *Henley*, 238 F.3d at 1120; see also *id.* ("[A] juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide" (emphasis omitted) (quoting *Rushen v. Spain*, 464 U.S. 114, 121 n. 5 (1983))); *United States v. Hernandez*, 865 F.2d 925, 928 (7th Cir. 1989) (concluding that the "Constitution prohibits a prosecutor from making race-conscious arguments since it draws the jury's attention to a characteristic that the Constitution generally demands that the jury ignore").

219. *Henley*, 238 F.3d at 1121.

220. *Id.*

this dishonesty exception.²²¹ The foundation for this exception came from *McDonough Power Equipment, Inc. v. Greenwood*, a case in which the Supreme Court decided that jury verdicts could be impeached by *nonjuror* evidence showing that the juror lied during post-venire voir dire questioning.²²² The Supreme Court there ruled that if appellants can show “that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause,” then they are entitled to a new trial.²²³ By recognizing an implied exception to the no-impeachment rule in instances in which evidence from deliberations showed that the jurors had lied about their harboring of racial prejudices, the Ninth Circuit and other courts could rectify a breakdown in the traditional procedures. Under this approach, it is not the racism that is problematic; it is the initial lie.

In 2014, the Supreme Court in *Warger v. Shauers* rejected both the extraneous influence and dishonesty exceptions to Rule 606.²²⁴ That was a civil case involving a dispute over a motorcycle accident in which Warger sustained serious injuries and sued a young woman for negligence.²²⁵ During voir dire, the jurors each confirmed that there was no reason why they thought they could not be “a fair and impartial juror on this kind of case.”²²⁶ But after the verdict was returned in favor of Shauers, one of the jurors informed Warger’s attorney that another juror had spoken during deliberations about “a motor vehicle collision in which her daughter was at fault for the collision and a man died,” and had further “related that if her daughter had been sued, it would have ruined her life.”²²⁷ Warger moved for a new trial, claiming that the juror had materially lied during voir dire when questioned about her ability to act as a fair and impartial juror.²²⁸ The district court denied that motion and the Eighth Circuit affirmed, adding that the juror’s testimony also did not fall within Rule 606(b)’s “extraneous information” exception.²²⁹ The Supreme Court granted certiorari and unanimously affirmed.

In addressing Warger’s claims, the Supreme Court first rejected his argument that there exists an implicit exception to Rule 606(b) for statements showing that a juror lied during voir dire.²³⁰ The Court noted that such a challenge amounts to an “inquiry into the validity of a verdict” and thus falls

221. See *Sampson v. United States*, 724 F.3d 150, 166–67 (1st Cir. 2013); *Martinez v. Food City, Inc.*, 658 F.2d 369, 372 (Former 5th Cir. Unit A Oct. 1981).

222. 464 U.S. 548, 556 (1984).

223. *McDonough Power Equip.*, 464 U.S. at 556.

224. 135 S. Ct. 521, 524 (2014).

225. *Warger*, 135 S. Ct. at 524.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 525.

230. *Id.* (quoting FED. R. EVID. 606(b)).

squarely into the plain terms of Rule 606(b)'s general prohibition.²³¹ Moreover, an exception could not be implied merely because one of the procedures tending to secure an impartial jury failed, as the broad ruling in *Tanner v. United States* foreclosed such an approach.²³² The Court thus concluded that “[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties’ ability to bring to the court’s attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered.”²³³

The Court then addressed Warger’s claim that the juror’s statements amounted to “extraneous prejudicial information . . . improperly brought to the jury’s attention.”²³⁴ But “[i]nformation is deemed ‘extraneous,’” the Court explained in rejecting the argument, “if it derives from a source ‘external’ to the jury.”²³⁵ The juror’s “daughter’s accident may well have informed her general views about negligence liability for car crashes, but it did not provide either her or the rest of the jury with any specific knowledge regarding Shauers’ collision with Warger.”²³⁶ Her general biases could not sneak through Rule 606(b)’s statutory exception to prove that the jury was infected with unchaperoned evidence. Accordingly, the Supreme Court ruled the testimony inadmissible.

The most important part of the *Warger* decision is not how it foreclosed those approaches taken by lower courts in the preceding decades; rather, it is a single footnote—Footnote Three. In highlighting that the *Tanner* protections persisted despite a failure of the procedures tending to secure an impartial jury, the Court recognized in Footnote Three a potential exception to the jury no-impeachment rule, stating, “There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged.”²³⁷ But unlike the Court’s expressions of this principle in 1851²³⁸ and 1915,²³⁹ the Court did not stop there. Instead, it went further to articulate how such an injustice could be identified: “If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process.”²⁴⁰ In so stating, the Court planted a seed for recognizing a general exception to the jury no-impeachment rule and an en-

231. *Id.*; see also *Williams v. Price*, 343 F.3d 223, 229 (3d Cir. 2003) (“*McDonough* addressed the right of a party to obtain a new trial upon making a particular showing, not the admissibility of evidence to make that showing.”).

232. *Warger*, 135 S. Ct. at 529.

233. *Id.*

234. *Id.* (quoting FED. R. EVID. 606(b)(2)(A)).

235. *Id.*

236. *Id.*

237. *Id.* at 529 n.3.

238. *United States v. Reid*, 53 U.S. (12 How.) 361 (1851).

239. *McDonald v. Pless*, 238 U.S. 264 (1915).

240. *Warger*, 135 S. Ct. at 529 (citing *Tanner v. United States*, 483 U.S. 107, 117 (1987)).

forceable right to ex post substantive review of jury decisionmaking rationales.²⁴¹ That seed would sprout just three years later.

B. Constitutionally Required Review of Deliberations

In 2017, the Supreme Court decided *Peña-Rodriguez v. Colorado* and dramatically reshaped the impartial jury mandate.²⁴² Drawing upon Footnote Three's framework, the Court identified for the first time an instance in which a jury verdict could be impeached—not because of a breakdown in prophylactic procedure but because of a juror's internal mental processes. In so identifying, the Court recognized an enforceable Sixth Amendment right not just to trial by a jury selected according to procedures that make it likely to decide a case impartially, but also to trial by one that actually did—that is, at least with respect to racial animus.²⁴³

The facts are straightforward. Mr. Peña-Rodriguez faced criminal charges in Colorado for harassment, unlawful sexual contact, and attempted sexual assault of two teenage sisters, which allegedly occurred in a bathroom at a horse racing facility.²⁴⁴ Before the trial, the jurors each confirmed orally and in writing that they foresaw no reason to believe that anything about them or the case would make it difficult for them to judge the matter impartially.²⁴⁵ Following a three-day trial, the jury convicted Mr. Peña-Rodriguez of unlawful sexual contact and harassment but did not reach agreement on the attempted sexual assault charge.²⁴⁶

After the jurors were discharged, two of them lingered to speak with Mr. Peña-Rodriguez's lawyer.²⁴⁷ They informed him that during deliberations one of the other jurors, identified as H.C., had expressed anti-Hispanic bias against Mr. Peña-Rodriguez and one of his alibi witnesses.²⁴⁸ The two jurors signed an affidavit swearing that H.C. had: (1) expressed his conviction that "Mexican men are physically controlling of women because of their sense of entitlement" and that he believed "[Mr. Peña-Rodriguez] did it because he's Mexican and Mexican men take whatever they want"; (2) noted that based on his "experience as an ex-law enforcement officer, Mexican men ha[ve] a

241. This approach put the Supreme Court in agreement with the First and Tenth Circuits, which had already rejected claims of voir dire dishonesty in favor of a *Tanner* analysis. Compare *United States v. Villar*, 586 F.3d 76, 88 (1st Cir. 2009) (concluding that the *Tanner* protections are often ineffective and that trial judges have discretion under the Fifth and Sixth Amendments to inquire into validity of the verdict due to alleged ethnic bias), with *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008) (concluding that the *Tanner* protections sufficiently guarded against racial bias).

242. 137 S. Ct. 855, 862 (2017).

243. *Peña-Rodriguez* 137 S. Ct. at 869.

244. *Id.* at 861.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 861–62.

bravado that cause[s] them to believe they [can] do whatever they want[] with women” and that “nine times out of ten Mexican men [are] guilty of being aggressive toward women and young girls”; and (3) erroneously cast doubt on the credibility of one of the alibi witnesses because he was “an illegal.”²⁴⁹ The affidavit was presented to the trial court judge, who refused the testimony due to Colorado’s version of the no-impeachment rule.²⁵⁰ Mr. Peña-Rodriguez appealed through to the Colorado Supreme Court, which affirmed.²⁵¹ The Supreme Court granted certiorari and, in a five–three decision, reversed and remanded the case.²⁵²

The Supreme Court began by reviewing the history of the jury no-impeachment rule, noting its “substantial merit” in advancing such policies as full and vigorous deliberation, preventing harassment of jurors, and promoting the finality of verdicts.²⁵³ It then traced the lurking history of substantive impartiality back to *Reid* in 1851, *McDonald* in 1915, and ultimately *Warger* in 2014, noting that the Court had long recognized that there may be instances of injustice in which the Constitution would compel the Court’s attention past the deliberation room door.²⁵⁴ It then reviewed the holdings in *Tanner* and *Warger*, noting that while the traditional procedures failed to prevent bacchanalia and bias from infecting jury deliberations in those instances, the safeguards were ordinarily “sufficient to protect the integrity of the process” from such problems.²⁵⁵

The racism in Mr. Peña-Rodriguez’s case was different for two reasons, the Court declared. First, despite the Fourteenth Amendment’s promise of “eliminat[ing] racial discrimination emanating from official sources,” racism has persisted.²⁵⁶ Because of this, since the Civil War the Court has at times recognized the need for added procedures—nondiscrimination in drawing a venire, restrictions on the use of peremptory challenges, and required certain questioning during voir dire—to ensure that individuals who sit on juries are free of racial prejudices.²⁵⁷ The common thread, the Court surmised, is that

249. *Id.* The Court made a point of noting that “the witnesses testified during trial that he was a legal resident of the United States,” presumably to suggest that H.C.’s skepticism was derived not from witness criminality but from racial profiling. *See id.*

250. *Id.*

251. *Id.*

252. *Id.* at 862–63, 871.

253. *Id.* at 865. Conspicuously absent from the Court’s list is the jury no-impeachment rule’s ability to ensure juror independence. This was certainly no mere oversight. The Court’s recognition of a substantive right to a jury that bases its decision only on constitutionally permissible rationales cuts to the core of the jury as an independent institution..

254. *Peña-Rodriguez*, 137 S. Ct. at 865–67.

255. *Id.*

256. *Id.* at 867–68 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

257. *See id.* Conspicuously absent from this list is the Impartial Jury Mandate’s fair-cross-section requirement. *See id.* at 868.

“discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’”²⁵⁸

Second, racial bias is distinct from *Tanner* and *Warger* due to its frequency and tendency to elude detection.²⁵⁹ The unacceptable acts in *Tanner* and *Warger* involved “anomalous behavior,” and “neither history nor common experience show that the jury system is rife with mischief of these or similar kinds.”²⁶⁰ Racial bias, on the other hand, the Court explained, is “a familiar and recurring evil.”²⁶¹ The traditional prophylactic safeguards may be compromised or prove insufficient in halting this evil: questioning potential jurors on racial animus during voir dire runs the risk of exacerbating prejudices,²⁶² and jurors might find it difficult to report racist statements to the judge due to the “stigma” of accusing a fellow juror of bigotry.²⁶³ Racial bias thus “implicates unique historical, constitutional and institutional concerns.”²⁶⁴

Following these conclusions, the Court announced the new rule: The Sixth Amendment requires an exception to the jury no-impeachment rule when a “juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, . . . in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”²⁶⁵ The Court warned that not every offhand comment necessitates judicial scrutiny; rather:

For the inquiry to proceed there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.²⁶⁶

The Court explicitly did not articulate a standard for “determining when evidence of racial bias is sufficient to require that a verdict be set aside and a new trial granted,” leaving that to the considerable discretion of trial judges.²⁶⁷

258. *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 869 (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring in result)).

263. *Id.* The Court provided zero support for this proposition. And it is far from clear that there is a greater stigma in calling a fellow juror a bigot as opposed to a drug user or a liar. *Id.*

264. *Id.* at 868.

265. *Id.* at 869.

266. *Id.*

267. *Id.* at 870.

To understand the substantive impartial jury right articulated in *Peña-Rodriguez* requires some unpacking of the above passage.²⁶⁸ There are ostensibly two separate inquiries required by the holding. First, the trial judge must determine whether racism played a significant role in a juror's decision to convict a criminal defendant. Upon that threshold showing, the trial judge is secondly required to determine whether there resulted a violation of the defendant's "jury trial guarantee."²⁶⁹ Here is where the trouble starts. The problem is that it is unclear to which "jury trial guarantee" the Court is referring. The opinion does not reference any of the traditional jury protections previously thought required by the Constitution. The only conclusion, then, is that the second *Peña-Rodriguez* inquiry collapses into the first. That is, the "jury trial guarantee" articulated is the right to a verdict in which racial animus was not a significant motivating factor in a juror's vote to convict.

Make no mistake, there is nothing in the opinion suggesting that juror testimony of racism is evidence for some other constitutional shortcoming. The Court is *not* saying that H.C.'s anti-Hispanic bias shows *ex post* that something went astray in empaneling the jury, and it was to this procedural right that Mr. Peña-Rodriguez was denied. *Warger* forecloses that reading.²⁷⁰ As the Court made clear in Footnote Three, it is not merely the failure of the *Tanner* protections but rather their inherent insufficiency at rooting out certain types of extreme bias that might require the Court to recognize an exception to the no-impeachment rule.²⁷¹ It is presumably for this reason that the *Peña-Rodriguez* Court spends so much time explaining that there is something unique about racial animus. In *Peña-Rodriguez*, the Supreme Court recognizes the insufficiency of the traditional safeguards; it does not announce a backstop for when those safeguards fail.

Moreover, the Court is not suggesting that the presence of a racist juror is itself a violation of the Sixth Amendment. That is, the Court is *not* stating that H.C.'s anti-Hispanic racism demonstrates that he was unable to decide the case impartially and that therefore Mr. Peña-Rodriguez was denied an impartial jury from the start. This reading is foreclosed by the Court in *Peña-Rodriguez* leaving open the possibility of a distinction between those instanc-

268. Some early, alternative approaches include: Lauren Crump, Comment, *Removing Race from the Jury Deliberation Room: The Shortcomings of Peña-Rodriguez v. Colorado and How to Address Them*, 52 U. RICHMOND L. REV. 475, 482 (2018) (describing the holding as "an exception to Rule 606(b)"); Carrie Leonetti, *Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 MARQUETTE L. REV. 205, 211 (2017) (describing the Court's willingness to "bend the procedural rules [in order to] open itself to claims of racial bias").

269. *Peña-Rodriguez*, 137 S. Ct. at 869.

270. *Warger v. Shauers*, 135 S. Ct. 521, 530 (2014) (holding that juror testimony cannot be used to show a violation of the impartial jury mandate); *see also* *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (holding that nonjuror testimony can be used to show a violation of the mandate).

271. *See Warger*, 135 S. Ct. at 529 n.3 (holding that when the Court considers injustices necessitating exceptions to the no-impeachment rule, it will "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process").

es in which there was a single racist juror and those in which racism pervaded the jury.²⁷² This potential opening runs counter to the established Sixth Amendment promise that defendants are “entitled to be tried by [twelve], not [nine] or even [ten], impartial and unprejudiced jurors.”²⁷³ Thus, while it may be true that H.C. should have been struck for cause and that Mr. Peña-Rodriguez was provided an insufficient number of impartial jurors, the Court is not concerned with that. Instead, it is H.C.’s mental processes that are constitutionally problematic. It is the substantive rationale upon which the verdict was reached.

Because H.C.’s racism is not being used as evidence for the denial of some preexisting Constitutional right, the “jury trial guarantee” to which the Court is referring must be the right to have jury decisions to convict not based significantly on racial stereotypes and animus. This is a new and distinct right from those the Court has recognized in the past. For the first time, the Court has acknowledged an enforceable right to have the substance of juror deliberations conform to notions of impartiality. No longer does the Constitution only require that the jurors be drawn from “a fair cross section of the community”²⁷⁴ and “capable and willing to decide the case solely on the evidence before it,”²⁷⁵ it now also requires that the jury actually reached its verdict impartially.

This new component of the impartial jury mandate evidences a transformation in the Court’s thinking of the jury as an institution. It privileges a formalist conception of the jury’s responsibility to dispense individualized justice over a realist conception of the jury’s role to provide the voice of the community. To be sure, that the community has throughout history spoken in vile tongues has never before justified an intrusion into the jury’s unique province to provide and deny individualized justice. It has long been thought that the prophylactic procedures, while certainly flawed, sufficiently balanced the institution’s responsibilities and inherent tension. By stripping away its veil of secrecy, however, the Court severely reduces the jury’s ability to act independently and incorporate extralegal considerations into its decisionmaking. And while some will surely celebrate the collapse of the jury’s political power in the narrow circumstance of racial animus, this newfound rise in judicial scrutiny of jury deliberations should give us pause. As more than a few scholars and jurists have warned, such scrutiny has the potential to turn every jury verdict into a judge’s verdict.²⁷⁶ The jury’s unique demo-

272. *Peña-Rodriguez*, 137 S. Ct. at 869–71 (refusing to articulate an appropriate standard for recognizing a violation of the “jury trial guarantee” and comparing *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (inquiring whether racial bias “pervaded the jury room”), with *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (“One racist juror would be enough.”)).

273. *Parker v. Gladden*, 385 U.S. 363, 364, 366 (1966) (per curiam).

274. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

275. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

276. See, e.g., *Tanner v. United States*, 483 U.S. 107, 120 (1987) (“It is not at all clear . . . that the jury system could survive such efforts to perfect it.”); see also Victor Gold,

cratic insights wilt before judges' supposed expertise. The waiting questions, which the next Part addresses, are how the holding in *Peña-Rodriguez* will grow, whether a principled doctrine can contain it, and whether it will impact the Court's approach to the traditional prophylactic procedures.

IV. APPLYING THE NEW IMPARTIAL JURY MANDATE

The degree to which the Supreme Court is willing to recognize a substantive impartial jury right is unclear. While the majority in *Peña-Rodriguez* is adamant that the decision is limited to racial biases in criminal cases, it is unlikely that the Court can identify a limiting principle to exclude testimony of bias against additional suspected classes or from applying the right in other jury contexts.²⁷⁷ Likewise, the language of *Warger's* Footnote Three leaves room for recognizing extreme biases against nonsuspect classes that no less evade detection and undermine the administration of justice.²⁷⁸ Without a constitutionally rooted framework, ad hoc judicial review will substantially undermine the jury's role as an independent constitutional actor.²⁷⁹ The Equal Protection Clause's tiers of scrutiny offer guidance for containing this newfound judicial power. Courts should apply more stringent review of bias against suspect classes, and deferential review to bias against nonsuspect classes. Properly implemented, such a restriction can allow ex post substantive review to operate alongside ex ante procedures to strengthen the jury's ability both to deliver individualized justice and to exercise political power.

A. A Tiered Approach to Scrutinizing Biases

Peña-Rodriguez is unquestionably a Sixth Amendment decision.²⁸⁰ By deciding the dispute as such, the majority avoided sticky questions such as whether Colorado jurors should be considered state actors or whether Colo-

Juror Competency to Testify That a Verdict Was the Product of Racial Bias, 9 ST. JOHN'S J. LEGAL COMMENT. 125, 136–37 (1993) (“If jurors could be made to testify as to the thought processes that formed the foundation of a verdict, then any exercise of their power inconsistent with the values of the judge could be detected and controlled.”).

277. Cf. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868–69 (2017) (noting that “discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice’” (emphasis added) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979))).

278. *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014) (noting that when the Court considers injustices necessitating exceptions to the no-impeachment rule, it can “consider whether the usual safeguards are or are not sufficient to protect the integrity of the process”).

279. See, e.g., *Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982) (noting that “[w]hile jurors may reach a verdict because of secret beliefs that have little to do with the law or the facts,” inquiry into such matters “would destroy the effectiveness of the jury process which substantial justice demands and the [C]onstitution guarantees” (quoting *United States v. D’Angelo*, 598 F.2d 1002, 1005 (5th Cir. 1979))).

280. *Peña-Rodriguez*, 137 S. Ct. at 869 (“[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way.”).

rado intentionally discriminated by upholding their verdict.²⁸¹ Nevertheless, as Justice Alito's dissent highlights, the holding seems to sound more in concepts drawn from the Fourteenth Amendment than it does in the Sixth Amendment.²⁸² The majority's emphasis on the nation's shameful history of racial discrimination suggests that the decision is not so much motivated by the denial of some implicit trial guarantee but rather the juror's consideration of a rationale deeply contrary to the Constitution. Furthermore, the majority's admission that "[a]ll forms of improper bias pose challenges to the trial process"²⁸³ hints at a "hierarchy of partiality."²⁸⁴ Identifying the contours of that hierarchy is necessary, lest all jury verdicts be opened to *Lochner*-esque judicial review.²⁸⁵

The Equal Protection Clause's tiers of scrutiny can serve as a framework to help guide this new area of impartial jury jurisprudence and identify those juror biases of which the Constitution is more or less tolerant. A cursory review of the tiers of scrutiny exposes its kinship to the substantive impartial jury guarantee. Although by its plain terms the Equal Protection Clause only demands that "[n]o [s]tate shall . . . deny any person equal protection of the laws,"²⁸⁶ a thick judicial gloss has been applied over eighty years to demarcate between permissible and impermissible state discrimination. The first brush of that gloss, not unlike the substantive impartial jury protection, came in a single footnote. In *United States v. Carolene Products Co.*, Justice Stone suggested in Footnote Four that "prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry."²⁸⁷ That is, the need for heightened judicial review of certain legislative acts arose from a presumptive failure in the democratic political processes.²⁸⁸ This is not unlike the procedural breakdown the Supreme Court recognized as motivating the need for a substantive impartial jury right in *Warger*: "If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process."²⁸⁹ Where democratic

281. For a review of the Fourteenth Amendment and the state action doctrine, see generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 886–88 (1987).

282. *Peña-Rodriguez*, 137 S. Ct. at 882–84 (Alito, J., dissenting). Note that judges have voiced this critique of the impartial jury mandate in other contexts. *E.g.*, *Duren v. Missouri*, 439 U.S. 357, 371–72 (1979) (Rehnquist, J., dissenting) (critiquing the fair-cross-section requirement).

283. *Pena-Rodriguez*, 137 S. Ct. at 869.

284. *Id.* at 883 (Alito, J., dissenting).

285. See generally Sunstein, *supra* note 281 (reviewing the history of controversy of *Lochner v. New York*, 198 U.S. 45 (1905)).

286. U.S. CONST. amend. XIV.

287. 304 U.S. 144, 153 n.4 (1938).

288. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 714 (1985).

289. *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014).

processes routinely fail to ensure equality to certain classes of individuals, the Court is wont to step in.

Over time, the Court refined its approach to the Equal Protection Clause according to the classifications upon which the law divided.²⁹⁰ Regulations discriminating on suspect classification—which include race, religion, national origin, and gender—must satisfy heightened scrutiny.²⁹¹ Under the typical test, the Court presumes that a law is unconstitutional unless it is narrowly tailored to meet a compelling state interest.²⁹² Discrimination on the basis of a nonsuspect classification—that is, any basis other than those falling into the suspect classes—need only satisfy deferential scrutiny.²⁹³ Under this typical test, a law is presumed constitutional so long as it is rationally related to some legitimate state interest.²⁹⁴ Adopting this tiered approach allows courts to guard against discrimination of groups traditionally locked out of the political process, while also restraining judges from second guessing the wisdom of every government act.²⁹⁵

The Fourteenth Amendment's division between suspect and nonsuspect classes can guide courts in extrapolating the substantive component of the impartial jury mandate. Already there is little doubt that *Peña-Rodriguez* will be extended to other suspect classifications. There is no hierarchy among the suspect classes; discrimination against any one is equally repugnant to the Constitution and the administration of justice. Further, note that the Court in *Peña-Rodriguez* makes little effort to discern whether the discrimination at issue is on the basis of race, ethnicity, or national origin.²⁹⁶ It is therefore no reach to suggest that all three fall within the holding. Likewise, it does not take much imagination to make out the hypothetical in which discrimination on the basis of religion or gender eludes—in the terms of *Warger's* Footnote Three—"the usual safeguards" and undermines the "integrity of the process."²⁹⁷ There is no reason to think that potential jurors are somehow less likely to voice racial bigotry during voir dire than they are to voice sexist

290. See generally James E. Fleming, "There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's *Equal Protection Jurisprudence*, 74 *FORDHAM L. REV.* 2301 (2006) (discussing how the Equal Protection Clause has grown).

291. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 *CALIF. L. REV.* 297, 303 (1997).

292. See *id.* at 300; *cf.* *United States v. Virginia*, 518 U.S. 515, 567–68 (1996) (Scalia, J., dissenting) (criticizing the rigid use of the tiers and accusing the court of employing heightened scrutiny to address gender discrimination).

293. Bhagwat, *supra* note 291, at 303.

294. *Id.*

295. See Sunstein, *supra* note 281.

296. See *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 863 (2017) (noting that the Court is referring to the discrimination as on the basis of race in keeping with the primary terminology employed by the parties).

297. See *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014); see also *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (involving a juror's anti-Semitic statements during deliberations).

and religious bigotry, as these positions are all socially loathsome.²⁹⁸ So while racism surely “implicates unique historical, constitutional, and institutional concerns,”²⁹⁹ it is unclear that these concerns are constitutionally distinct from bigotry toward other suspect classes.³⁰⁰

It is also unlikely that the Court can find a principled basis to limit *Peña-Rodriguez* to criminal cases. Although the Court has at times recognized constitutionally required jury procedures that only apply in the criminal context, these are limited to the unique circumstance of interracial violence and the potential for capital punishment.³⁰¹ Alternatively, courts and scholars generally agree that the impartiality required by the Sixth Amendment extends with equal force to the Constitution’s other jury trial guarantees.³⁰² Moreover, perhaps the strongest reason to suspect that the holding will be extended is the fact that *Warger v. Shauers*—the principle case that first articulated the test for identifying circumstances in which reviewing jury deliberations for substantive impartiality is required—was itself a civil case.³⁰³ It seems implausible that the Court could rely on that critical precedent while limiting its holding to the criminal context.

But while expanding *Peña-Rodriguez* as such may seem predetermined, there is still the question of whether the substantive impartial jury right applies to nonsuspect classes. As Justice Alito correctly notes in his *Peña-Rodriguez* dissent, “Nothing in . . . the inherent nature of the jury trial right suggests that the extent of the protection provided . . . depends on the nature of the jury’s partiality or bias.”³⁰⁴ To be sure, there is something repugnant about denying a person individualized justice before an impartial jury merely because the bias exerted against her does not implicate great historic or political concern. Justice Alito offers an extended hypothetical exposing the difficulty of dividing between biases within an institution responsible for delivering individualized justice:

At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror

298. See Babcock, *supra* note 199, at 554 (“Some jurors will intentionally deceive the court, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant.”).

299. *Peña-Rodriguez*, 137 S. Ct. at 868.

300. Cf. *After Hour Welding*, 324 N.W.2d at 690 (“Whenever it comes to a trial court’s attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender or national origin, judges should be especially sensitive to such allegations and conduct an investigation to ‘ferret out the truth.’” (quoting *Morgan v. United States*, 399 F.2d 93, 97 (5th Cir. 1968))).

301. See *supra* notes 174–181 and accompanying text.

302. See *supra* note 3 and accompanying text.

303. See *Warger v. Shauers*, 135 S. Ct. 521, 524, 529 n.3 (2014).

304. *Peña-Rodriguez*, 137 S. Ct. at 882 (Alito, J., dissenting).

said in the jury room. The Court would say to the first prisoner: “You are entitled to introduce the jurors’ testimony, because racial bias is damaging to our society.” To the second, the Court would say: “Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue.”³⁰⁵

As this example demonstrates, although “the constitutional interests of the affected party are at their strongest when a jury employs [suspect] bias in reaching its verdict,” this does not mean that the interests of other affected parties in receiving individualized justice are nonexistent.³⁰⁶ There must be a way to recognize the impartial jury rights of nonsuspect classes without directing judicial scrutiny at the jury’s every consideration.

This is the point at which the Equal Protection Clause analogy starts to break down. Unlike the legislature, which might discriminate against a non-suspect class to advance a legitimate state interest, a jury cannot be said to be advancing a goal separate from its decision to act upon its discriminatory rationale.³⁰⁷ That is, there is no “legitimate” or “compelling” interest in providing or denying a criminal defendant or civil litigant individualized justice on the basis of any bias. Thus, it is impossible to completely transport a doctrine chiseled for the purpose of governing broadly applicable legislation into the narrow context of individualized justice. The tiers-of-scrutiny analogy must therefore be modified for it to have any credence in the jury trial right context.

The Court must look beyond the legitimacy of the jury’s motivating rationales in discriminating against the litigants, of which there are likely none, and instead toward the degree to which the discrimination influenced the jury’s deliberations and verdict. The Court has already implicitly adopted this approach to scrutinizing the degree to which the bias influenced a juror’s decision. Note that the test articulated in *Peña-Rodriguez* requires that the racial bias must have served as a “*significant motivating factor* in the juror’s vote to convict” before a Constitutional violation is recognized.³⁰⁸ In so deciding, the Court concludes that some racism is fine, just not too much. If this approach is constitutionally acceptable for suspect classes, an even more deferential approach should be required for nonsuspect classes. The Court might require that bias on the basis of a nonsuspect classification be, perhaps, a *dispositive factor* for a constitutional violation to be recognized. Significant bias voiced in deliberation against a member of a nonprotected class—a police officer, for example³⁰⁹—would be acceptable so long as the

305. *Id.* at 883.

306. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6074, at 513 (2d ed. 2007).

307. See generally Bhagwat, *supra* note 291, at 299–303 (discussing the role of purpose scrutiny in judicial review).

308. *Peña-Rodriguez*, 137 S. Ct. at 869 (emphasis added).

309. It is critical that the jury maintain its power to act as a bulwark against abuses by the state and state actors.

jurors even slightly reviewed the contours of the case. This type of play in the joints would help ensure that the Court does not shirk its duty to guarantee an impartial jury to all litigants, while also preventing judges from scrutinizing jurors' every consideration.³¹⁰

This tiered approach, or one like it, has other benefits as well. It concedes that discrimination against suspect classes implicates political and social concerns more broadly than do other forms of discrimination. As a leading treatise on Federal Practice and Procedure notes, when biases against suspect classes infect deliberations it “undermines the jury’s ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression.”³¹¹ Indeed, there is an argument to be made that those who ratified the Fourteenth Amendment understood it as a restriction on the jury’s power to deny justice to discrete and insular minorities.³¹² Nonsuspect classes occupy a different sociopolitical space than suspect classes. Thus, as the Court has concluded in the Fourteenth Amendment context, nonsuspect classes require less—although not zero—judicial intervention for protection from the state. The jury as a state-like actor is similar in this respect and thus implicates similar concerns. The community’s democratic input must remain undisturbed except in the most glaring instances of discrimination. The different approaches for parsing bias against suspect and nonsuspect classes proposed here do not reflect the degree of the harm, which as Justice Alito’s dissent cogently contends, is similar,³¹³ but rather recognizes that different tools are necessary to ensure equality within our institutions.

Perhaps most importantly, this tiered approach preserves the jury’s ability to consider factors that the law and Constitution prohibit judges from considering. Juror partialities, whether under the auspices of common sense or the shadow of bigotry, supply the jury’s unique institutional power. While we dare not say it too loudly, the jury traffics in stereotypes and prejudices, some more acceptable and some more loathsome than others. Although the Constitution cannot tolerate the racial bias in *Peña-Rodriguez*, there must be flexibility for the decisionmaking shortcuts that jurors regularly rely on in reaching their decisions. As the Fifth Circuit noted in 1970, “We cannot ex-

310. This approach does not relieve courts of the difficult task of deciding when bias served as a significant, or even dispositive, motivating factor. Reasonable minds can likely not disagree that the racism in *Peña-Rodriguez* is problematic—Justice Kagan described the remarks as “the best smoking-gun evidence you’re ever going to see about race bias in the jury room.” Transcript of Oral Argument at 44, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606). There will, of course, be closer calls that will confound. But note that the proposed approach is no fuzzier than the tiers of scrutiny as applied to the legislature.

311. 27 WRIGHT & GOLD, *supra* note 306, § 6074, at 513.

312. E.g., Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1201 (2011) (“[One] plausible reading is that the Fourteenth Amendment disallowed the right [for juries] to nullify only in cases in which victims are discrete and insular minorities.”).

313. See *supra* note 305 and accompanying text.

punge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations.”³¹⁴

B. *Ex Ante Procedures Versus Ex Post Substantive Review*

The Supreme Court’s willingness to discard the no-impeachment rule in instances of extreme bias does not abruptly outmode the traditional *ex ante* procedures. While these procedures emerged out of a need to ensure impartiality in a world in which jury deliberations could not be reviewed,³¹⁵ the procedures nevertheless continue to serve a critical role in satisfying the Constitution’s impartial jury mandate. However, there are certain prophylactic procedures, specifically peremptory challenges, that are more difficult now than ever to justify as a means of ensuring an impartial jury.

First, those *ex ante* procedures that apply pre-venire formation are completely unaffected by the Court’s pronouncement of *ex post* substantive review. The two protections go toward securing completely separate conceptions of jury impartiality. Pre-venire procedures are concerned with securing a realist vision for the jury that reflects the heterogeneous perspectives of society, whereas *ex post* substantive review is concerned with rectifying those instances in which the community’s views run counter to the Constitution. Theoretically, at least, they complement one another in ensuring that the jury is capable of bringing its democratic legitimacy fairly to bear on a given dispute. More practically, however, it would be unrealistic to expect judges to review juror testimony for evidence tending to show that the discussion lacked the “qualities of human nature and varieties of human experience.”³¹⁶ For some of the same reasons that the Court does not require petit juries to be replications of society, it would be absurd for a judge to review jury deliberations in a vain attempt to ensure balanced biases were voiced.³¹⁷ As such, pre-venire procedures remain critical in securing an impartial jury.

Alternatively, the post-venire procedures are more open to criticism. The process of winnowing the carefully constructed and representative venire is historically justified on the basis of ensuring that the selected jurors are free from those biases that might affect their ability to decide the dispute impartially.³¹⁸ Courts accept that this practice cuts against the Constitution’s guarantee of a democratically representative body because it is necessary to

314. *United States v. McKinney*, 429 F.2d 1019, 1022–23 (5th Cir. 1970), *rev’d on other grounds on reh’g*, 434 F.2d 831 (5th Cir. 1970).

315. *See supra* notes 104–107 and accompanying text.

316. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (opinion of Marshall, J.).

317. *See Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (noting that this approach would require judges “to undertake the Sisyphean task of ‘balancing’ juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers”).

318. *See supra* notes 171–172 and accompanying text.

ensure that the parties are provided jurors that are likely to consider their dispute chiefly on the basis of the evidence provided.³¹⁹ But we might question whether this process of excluding citizens from meaningful political participation is justified after *Peña-Rodriguez*. That is to suggest, if the Court is willing to review the substance of jury deliberations to ensure that they are free of constitutionally impermissible rationales, it is less necessary for the Court to dictate the empaneling of the jury in the first instance, particularly when these practices stand so firmly against representativeness as an animating principle.

These criticisms, however, fail to understand the full benefits of *ex ante* procedure and the considerable limitations of *ex post* substantive review. The *voir dire* process of identifying and striking those potential jurors with actual and implied biases continues to advance a number of interests even post-*Peña-Rodriguez*. First, there are marked administrative considerations. As Professor Howe has explained, “[S]tates have a significant interest in excluding biased jurors efficiently,” which counsels “against a system involving purely random selection of impartial jurors.”³²⁰ It would be exceedingly wasteful to require states to wait until after the trial and verdict to realize that someone with a familiar relationship to the litigants or a personal interest in the outcome of the case somehow wound up on the jury.³²¹ Likewise, there are still circumstances in which the Court must be free to strike jurors because of implied biases. While in theory the Court could seat the juror who swears to be able to decide the case impartially and whistle until contrary evidence emerges, there is limited benefit and great expense associated with such dilatoriness.

Further, it is unclear whether *ex post* substantive review is even an effective tool for rooting out most forms of problematic biases. The test articulated in *Peña-Rodriguez* considers only “statements exhibiting overt . . . bias.”³²² As such, it does nothing to address unspoken, implicit, or unconscious forms of juror partiality.³²³ This is despite the fact that overwhelming empirical evidence suggests that most prejudices are automatic and invisible, even to those who harbor them.³²⁴ Accordingly, an objective standard of implied bias continues to be necessary earlier in the proceedings. It should certainly not be a stretch for a judge to conclude, for instance, that a Ku Klux Klan member is lying either to himself or to the court when he swears that he can put aside his prejudices and judge a case involving a black or Jewish litigant

319. See *supra* notes 168–178 and accompanying text.

320. Howe, *supra* note 4, at 1193, 1196.

321. See *supra* notes 176–178 and accompanying text.

322. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

323. See Crump, *supra* note 268, at 484 (reviewing the shortcomings of *Peña-Rodriguez*).

324. See, e.g., Rudman et al., *supra* note 102, at 856.

impartially.³²⁵ Note that this is true even if the judge had access to a complete transcript of the jury's deliberations and could confirm that no overt bias was apparent in its decisionmaking. The potentially surreptitious bias would ooze over the trial, washing away the Courts integrity.³²⁶ As Justice Frankfurter once wrote, "The appearance of impartiality is an essential manifestation of its reality."³²⁷

But while voir dire and for-cause challenges remain a central protection in securing an impartial jury post-*Peña-Rodriguez*, the ongoing need for peremptory challenges is less clear. Although the Supreme Court has described the peremptory challenge process as a "means to achieve an impartial jury,"³²⁸ its effectiveness is questionable. The supposed idea is that the parties will strike the most extreme potential jurors on either side of an issue, leaving a body with perspectives lying somewhere in the middle.³²⁹ Likewise, supporters of the practice claim that it allows litigants to strike those that they suspect harbor bias that cannot be sufficiently articulated or proven to a judge so as to justify challenge for cause.³³⁰ Finally, peremptory challenges might act as a safety valve for those situations in which voir dire questioning yields no productive basis for challenge but proves alienating to a potential juror.³³¹ But these justifications do not prove out. Studies show that litigants regularly use voir dire and peremptory challenges to indoctrinate jurors to their position and strike those opposed to it³³² or to discriminate on little more than vague stereotypes and hunches.³³³ True, the Fourteenth Amendment prohibits litigants from exercising peremptory challenges based on racist or sexist notions, but the Court has failed to create an adequate enforcement mechanism to police this restriction.³³⁴ As a result, litigants enjoy the awesome power to manipulate with near-total caprice the constituents of a

325. See James Forman, Jr., *Essay, Juries and Race in the Nineteenth Century*, 113 *YALE L.J.* 895, 921 (2004) (quoting a Klansman who explained that "if we could get on the jury we could save [the defendant]" (alteration in original)).

326. The Supreme Court has expressed concern in the past over how biases tend to infect a juror's ability to impartially review any aspect of a case implicating that bias. See, e.g., *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

327. *Dennis v. United States*, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting).

328. *Batson v. Kentucky*, 476 U.S. 79, 125 (1986) (Burger, C.J., dissenting).

329. *Holland v. Illinois*, 493 U.S. 474, 484 (1990).

330. JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 146 (1977).

331. *Babcock*, *supra* note 199, at 554–55; see also *Swain v. Alabama*, 380 U.S. 202, 219–20 (1965).

332. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 *S. CAL. L. REV.* 503, 528 (1965) (concluding from a series of studies that voir dire is more effectively used as a forum for indoctrination than as a means for screening out biased jurors).

333. See *Babcock*, *supra* note 199, at 553–54.

334. See, e.g., William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 *SUP. CT. REV.* 97, 134 (describing *Batson* as an "enforcement nightmare").

core constitutional actor, despite having no interest in ensuring impartiality or in guaranteeing the institution's integrity.

The continuing use of peremptory challenges is thus baffling from a constitutional perspective. Professor Alschuler cogently explains the tension: "The Equal Protection Clause says in essence, 'When the government treats people differently, it has to have a reason.' The peremptory challenge says in essence, 'No, it doesn't.'"³³⁵ To be sure, peremptory challenges are acts of discrimination that if made in any other state action context would be illegal. The availability of ex post substantive review serves only to further undermine the justification for this antiquated practice. Note that the Court already takes a glib look at the necessity of peremptory challenges. If a juror lies during voir dire questioning, the challenging party must show that the question dishonestly answered was "material" and then further show that a "correct response would have provided a valid basis for a challenge for cause" in order to find relief.³³⁶ This strongly suggests that only those biases that would subject a juror to for-cause challenge are constitutionally troubling. As the Court continues to expound the competing contours of the impartial jury mandate, it might find that the curious case of peremptory challenges can no longer be tolerated.

The need to ensure that that the jury can fulfill its competing responsibilities as dispenser of neutral and individualized justice as well as independent check on powerful political and social actors will at times require the Court to expand and contract what has been traditionally thought the Constitution requires. In this endeavor, the Court must tread lightly. If it opens the door to ex post substantive review of every slight juror comment, it will eradicate the jury's independence. But if it ignores blatant and indefensible injustice, the judiciary fails at one of its core objectives. By properly balancing the tension and compliments between ex ante procedures and ex post review, courts can strengthen the jury as a judicial, political, and social institution.

CONCLUSION

Impartiality is the guiding principle of the Constitution's jury trial protections. But when the Founders ratified those protections, they cemented an institution defined by conflict. On one hand, they expected the jury to receive and carefully consider evidence without preconceptions. On the other hand, the jury was anticipated to bring its experiences of the world and so guide the administration of the law. That core tension continues to define the court's approach to securing impartiality. Until very recently, the approach taken has been to empanel jurors according to procedures that make it more likely that the jury will be constitutionally impartial. Time and repeated experience have shown, however, that these ex ante procedures are

335. Alschuler, *supra* note 132, at 203.

336. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

imperfect. Jurors regularly bring too much or the wrong kind of bias to bear on disputes, with the weight falling regularly on those classes of individuals traditionally excluded from the political process.

The Court has thus chosen to take a new approach. It has recognized that where the traditional procedures prove inadequate, the Constitution requires *ex post* substantive review of jury deliberations. That is, under some circumstances judges are required to accept juror testimony of overt statements made during deliberations to ensure that the jurors' motivating rationales comport with the Constitution. While the Supreme Court has suggested that this will be limited only to those instances in which racial animus seemed to be a significant motivating factor in a jury's decision to convict a criminal defendant,³³⁷ it is unlikely that this rule will stay so confined. Substantive impartiality is likely to grow, and so represents a dramatic reformulating of the Constitution's jury trial protections.

Note that while the Court's new approach to the impartial jury mandate may help protect against certain institutional shortcomings, it too is imperfect. The persistent problem of jurors' implicit biases, which deny litigants fair consideration of their dispute, will continue to infect verdicts in felt but unseen ways.³³⁸ Likewise, swaths of individuals with unique viewpoints will continue to be systemically excluded from venues, their voices silenced in the administration of justice.³³⁹ As such, courts must continue their efforts to advance the promise of the Constitution's impartial jury mandate, always guided by the tension and balance that the institution requires.

Oliver Wendell Holmes famously claimed that "the life of the law has not been logic: it has been experience."³⁴⁰ If this is true, it must be the competing experiences of citizens that guide us forward. Indeed, it is the jurors who bear that burden.

337. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

338. See Rudman et al., *supra* note 102, at 856.

339. See Leipold, *supra* note 163, at 968–69.

340. Book Notice, 14 AM. L. REV. 233, 234 (1880) (Oliver Wendell Holmes, Jr. anonymously reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879)).