The Jury As Constitutional Identity

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I have on my desk at this moment twelve five-by-seven ruled index cards. On each of them the same two words appear: “not guilty.”... The twelve cards represent the potent residue of the most intense sixty-six hours of my life, a period during which I served as the foreman of a jury charged to decide whether Monte Milcroy was guilty of murdering Randolph Cuffee. During that period, twelve individuals of considerable diversity engaged in a total of twenty-three hours of sustained conversation in a small, bare room. We ran the gamut of group dynamics, a clutch of strangers yelled, cursed, rolled on the floor, vomited, whispered, embraced, sobbed, and invoked both God and necromancy.... During significant stretches in this trying time, we considered two weeks of testimony ... and struggled to understand two things: what happened in Cuffee’s apartment on the night of August 1, 1998, and what responsibilities we had as citizens and jurors.

- A Trial By Jury†

INTRODUCTION

In his memoir about his experience as a jury foreman, D. Graham Burnett isolates the two questions at the center of every jury trial: first, how should jurors determine the facts and, second, how should jurors understand their role as citizens in a constitutional democracy. The duality of fact-finder and participatory citizen has always existed during jury service.² Jurors must decide the case, and they must do so within a special institutional role as a constitutional actor.

Today, there is little debate about the first role of the juror as fact-finder.³ In every state and federal court in America, jury instructions guide jurors to find the facts.⁴ The “role of the jury” instruction has been standardized and cabined: jurors apply the law to the facts, nothing more.⁵

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³ “Today, with a few notable exceptions, it is well-accepted that the judge instructs the law, and the jury determines the facts in evidence and applies the law as instructed.” Judge Robert M. Young, Using Social Science to Assess the Need for Jury Reform in South Carolina, 52 S.C. L. Rev. 135, 147 (2000); Shannon v. United States, 512 U.S. 573, 579 (1994) (“The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.”)

⁴ See Part II infra and accompanying notes.

⁵ See e.g., 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 3:2 (“We are both judges in a very real sense. I am the judge of the law and you, Ladies and Gentlemen, are the judges of the facts. I now instruct you that each of you is bound to accept the law as I give it to you.”); 1-1 Arkansas Model Jury Instructions - Criminal AMCI 2d 101 (“It is your duty to determine the facts from the evidence produced in this trial. You are
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The Supreme Court has reaffirmed this limited, task-oriented role in cases dating back over a century. The result is that citizens called to jury service justifiably focus on the discrete, problem-solving nature of the task. For most people, jury service means going to a particular place (federal or state court) to participate in a specific event (criminal or civil trial). Jurors do not prepare for it. Jurors do not consider their role or identity outside of the task presented at that particular time and place.

In contrast, the second role of the juror as a constitutional actor has largely been forgotten. While court systems promote the abstract ideal of the participatory citizen, there is little effort to link jury service to constitutional identity. Inside the court system, from jury summons through final instructions, jurors are not educated about their historic, constitutional role. Outside of the judicial system, there is almost no recognition that the identity of the juror might extend beyond the courthouse. The identity of the juror as connected to the broader political responsibilities of citizenship has been lost.

The result is precisely the opposite of the jury envisioned by those who drafted the United States Constitution. At the time of the Founding, jurors were not mere fact-finders, but equal participants in a constitutional structure of shared power. Some Founding Fathers considered the right to a jury even more fundamental to constitutional and political identity than the right to vote. To identify as a full citizen meant to be a participating voter and juror. It was a lifetime status, not an isolated task. This
to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law.

7 See Part II infra.
8 Jenny E. Carroll, The Jury’s Second Coming, 100 Geo. L.J. 657, 673 (2012) (“In drafting the Constitution, the Founders cemented the role of the jury as a political and constitutional actor.”)
9 See Andrew Guthrie Ferguson, Jury Instructions as Constitutional Education, 84 Univ. Colo. L. Rev. 322 (forthcoming 2013).
10 To be clear, this does not mean that court systems and jury task forces or commissions have not sought to improve jury service. But, that almost all of the efforts are focused on improving jury service during the time of jury duty, and not before or after that time.
11 See Part II infra.
12 Alan Hirsh, Direct Democracy and Civic Maturation, 29 Hastings Const. L.Q. 185, 210 (2002) (“The Framers recognized that the vote would not be enough to restrain government officials. Accordingly, the Constitution also gives the People, in their respective roles as jurors and militia members, crucial responsibility for administering justice and protecting national security.”); Douglas A. Berman, Making the Framers’ Case, and a Modern Case, For Jury Involvement in Habeas Adjudication, 71 Ohio St. L.J. 887, 893 (2010) (“In short, the Framers were eager to create a permanent role for juries in the very framework of America’s new system of government. The Constitution’s text was intended to make certain that the citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases.”)
13 Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”)
14 Kenneth Starr, Luncheon Speech, 24 Pepp. L. Rev. 829, 832 (1997) (“From the pamphleteers of the Revolution to the Antifederalists and to Tocqueville, I think we can clearly identify roles for the jury going beyond the functional, practical need for achieving hopefully a just outcome in a particular case. We can thus view the jury as a check on official power, a way of bringing the public into the judicial branch and educating the jury, the people, about the law and the values of the rule of law.”).
understanding of constitutional identity reappeared in the movements to expand political rights for those disenfranchised from the original constitutional promise. To be a juror was a symbol of constitutional equality before and after the debates over the Reconstruction Amendments and the Nineteenth Amendment. Advocates for constitutional reform risked death, arrest, and discrimination to gain the right to participate in jury service. After the civil rights movement, the right to serve on a jury became a badge of citizenship, not because it was necessary to find facts in a particular case, but because equal participation was necessary for strong, democratic citizens.

This article examines how we ended up inverting the role of the jury in society. Particularly, it addresses the loss of constitutional identity and how jurors no longer view themselves as constitutional actors. It argues that this loss of constitutional identity has come at a cost to the jury’s reputation, its power in the constitutional structure, its efficiency in processing cases, and its role as an educative institution. This loss has contributed to a growing apathy to jury service, in particular, and the jury, in general. It then looks to reclaim the civic and constitutional identity valued by the Framers and those who fought for political equality during other constitutional moments in history. It seeks to broadly reframe the debate to rebuild the image of the juror in America.

This project of “juror renewal” is urgently needed. In raw numbers, jury use has decreased in criminal and civil trials. Currently, over 95% of criminal cases are resolved short of trial, let alone a jury trial. The number

13 See Part I infra (discussing the history of jury service inclusion).
14 Id.
15 See Part I sections B&C infra.
16 Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 Va.L.Rev. 1413, 1430 n.62, 1485-86 (1991); Reva Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947 (2002); Peters v. Kiff, 407 U.S. 493, 502 (1972) (“Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.”)
17 The statistics from federal courts show a slow decline just over the past few years, but a much larger decline over the last few decades. As but one benchmark for the decrease in the number of jury trials, the Federal Courts report annual statistics of the number of juries selected. A comparison of the last reported five years (2007-2011) with the reported years from 1993-1997 shows a significant decrease. Compare http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/tabless15Sep11.pdf (2007 (6,193), 2008 (6,039), 2009 (5,378), 2010 (5,332), 2011 (5,565)) With http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tabless17sep97.pdf (1993 (11,112), 1994 (10,439), 1995 (9,822), 1996 (10,338), 1997 (9,771)); As one judge recently summarized, “In 1962, there were about 5,800 civil trials in the federal district courts. In 2004, there were only about 4,000 civil trials, despite the fact that five times as many cases were filed. ... The same story is playing out in the state courts. The available data shows that the number of jury trials fell by one-third between 1976 and 2002, with less than 1% of cases being disposed of by a jury in 2002.” See Hon. Jennifer Walker Elrod, Is the Jury Still Out?: A Case for the Continued Viability of the American Jury, 44 Tex. Tech L. Rev. 303, 318-19 (2012); Scott Brister, The Decline in Jury Trials: What Would Wal-Mart Do?, 47 S. Tex. L. Rev. 191, 208-11 (2005).
18 See Padilla v. Kentucky, 130 S.Ct. 1473, 1485 n.13 (2011) (providing 95% figure); see also T. Ward Frampton, The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary By State, 100 Cal. L. Rev. 183, 190 n.46 (2012) (“Overall, for the period 1976-2002, the number of criminal jury trials has declined by 15 percent (from 42,049 to 35,664) while the number of bench trials has declined by 10 percent (from 61,382 to 55,447.”)
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of civil juries has experienced a similar decline.\textsuperscript{21} Fewer trials results in fewer citizens identifying as jurors. In addition, a number of high profile criminal acquittals and excessive civil damage awards have led to sensationalized media coverage. This, in turn, has led to direct attacks on jurors as being incompetent or erratic.\textsuperscript{22} These stories, encouraged by interests seeking to reduce the litigation expenses from tort and class-action lawsuits, have resulted in several decades of negative juror stories – challenging the jurors’ ability even to find the facts.\textsuperscript{23} While numerous studies and scholars have warned about the “vanishing trial,” few have concerned themselves with the “vanishing juror.”\textsuperscript{24}

To fulfill this project of juror renewal, this article proposes a new way of viewing jury service – not simply as a task to be completed, but as an ongoing constitutional identity – a status – like being a voter or elected official.\textsuperscript{25} It suggests embracing the “potentiality of jury service” – a shift in perception that focuses on the juror beyond just the moments in the courthouse. Right now, assuming other qualifications, most adult citizens are potential jurors.\textsuperscript{26} Before jury service, those citizens were potential jurors. After jury service, those citizens are again potential jurors. Yet, most citizens do not consider that there is any ongoing jury role outside the courthouse. No one prepares for jury service. Few citizens engage the court after their jury service ends. The potentiality of jury service confronts this limited conception of being a juror. It broadens the focus along a


\textsuperscript{21} Marc Galanter, A World Without Trials? 2006 J. Disp. Resol. 7, 9 (“In the [state] courts of general jurisdiction of 22 states (and the District of Columbia) that contain 58 percent of the U.S. population, the portion of cases reaching jury trial declined from 1.8 percent of dispositions in 1976 to 0.6 percent in 2002…. The absolute number of jury trials is down by one-third.”); see also id. at 10 (“On the criminal side, the trial rate has moved in the same direction in the state courts as in the federal courts. From 1976 to 2002, the overall rate of criminal trials in courts of general jurisdiction in the 22 states for which data is available dropped from 8.5 percent of dispositions to 3.3 percent.”)


\textsuperscript{23} Michael Saks, "Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions," 48 DePaul L. Rev. 221, 231 (1998) (“Daniel Bailis and Robert MacCoun’s content analysis of several major publications reveals that their choice of stories to report systematically distorts the impression created of the types of cases that are litigated and the outcomes of the cases, especially the amounts awarded.”) (citing Daniel S. Bailis & Robert J. MacCoun, Estimating Liability Risks With the Media as Your Guide, 80 Judicature 64, 64-67 (1996)).


\textsuperscript{25} Traditionally, voting, jury service, and being elected to public office were considered the core political rights in the United States Constitution. See Cristina M. Rodriguez, Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys’ Network in Nineteenth-Century America, 108 YALE L.J. 1805 (1999)

continuum of civic life. It also recognizes that this potential status requires some action on our part – primarily education and reflection – to prepare for this constitutional responsibility. In developing this constitutional awareness about the jury, citizens will be able to reclaim a sense of constitutional identity that will strengthen the reputation, efficiency, and institution of the jury.\(^\text{27}\)

Embracing a broader constitutional identity involves asking the questions of why jurors in a democratic society are given this constitutional responsibility. Further, it challenges potential jurors to engage the constitutional questions that a juror will face as a sitting juror. There is no legal or structural reason to wait until jury deliberations to think about the role of the jury.\(^\text{28}\) In fact, from the perspective of the litigant whose life or property interests are at stake, this lack of preparation represents a remarkable lack of foresight on the part of the juror to never have considered the issues or role that the juror will play on the jury. After all, before that particular jury was selected, each one of those citizens was a potential juror. We are all potential jurors every day of our lives. Yet, we compartmentalize this constitutional duty, and minimize a core constitutional responsibility to the detriment of the legal system.

This article builds on numerous scholarly critiques of the limited, fact-finding role of the jury.\(^\text{29}\) In recent years, scholars have called for a larger jury role in legal interpretation,\(^\text{30}\) sentencing,\(^\text{31}\) habeas corpus,\(^\text{32}\) and even judging the morality of certain criminal laws.\(^\text{33}\) Much of the focus has been on the lost “law-finding” or “law interpreting” role of the jury.\(^\text{34}\) Left unexamined, however, has been how relatively recent changes to reduce the

\(^{27}\) See Part III infra.

\(^{28}\) There may be practical reasons, but the inclusion of legal trained lawyers, judges and other legal professionals demonstrates that knowledge or even study of legal principles does not undermine the jury system.


\(^{32}\) Douglas A. Berman, *Making the Framer’s Case, and a Modern Case, For Jury Involvement in Habeas Adjudication*, 71 Ohio St. L.J. 887, 891 (2010).


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burden on jurors, to streamline the jury selection process, and to make jury service more user-friendly have also affected the constitutional identity of jurors.\(^{35}\) This article seeks to trace how this increasingly limited role for juries has negatively impacted constitutional identity.

Part one explores the idea of constitutional identity – of how being a juror became intertwined with the idea of being a citizen. This role begins at the founding with clear expressions of the connection between juror and citizen in the constitutional debates. As Alexis de Tocqueville famously observed on the value of jurors, “It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large.”\(^{36}\) This initial understanding reappears at other constitutional moments including the ratification of the Reconstruction Amendments, the Nineteenth Amendment, and through Supreme Court cases addressing the importance of equal participation in the jury process.\(^{37}\)

Part two sets out the contrasting modern reality of a task-oriented jury. Over the last century, several important, and in many cases beneficial, developments have shaped the role of juries. First, court opinions have reduced the responsibilities of juries in deciding legal issues.\(^{38}\) The broad powers of Founding Era juries have been limited to much more restricted tasks.\(^{39}\) Second, formalized jury instructions have reinforced this task-oriented role. Jurors are now almost uniformly instructed about their role during jury trials.\(^{40}\) In addition, court systems have sought to reduce the individual burdens on potential jurors. In recent decades, programs such as “one day one trial” have been adopted by many states.\(^{41}\) Court systems have curtailed professional exemptions and broadened the jury pools, expanding the jury venire and dispersing the burdens of serving.\(^{42}\) Jurors have internalized these improvements, with a begrudging acceptance that they are willing to do their civic duty as long as it is not too time consuming. The result however is that potential jurors approach jury service with an understanding that theirs is a task limited in scope, time, and

\(^{35}\) See Part II infra.

\(^{36}\) Alexis de Tocqueville, DEMOCRACY IN AMERICA, 282 (4th rev. trans. Ed. 1948)

\(^{37}\) See Part I.b infra.

\(^{38}\) See e.g., Shannon v. United States, 512 U.S. 573, 579 (1994); but see United States v. Polizzi, 549 F.Supp.2d 308, 408 (2008)


\(^{40}\) Nancy S. Marder, Bringing Jury Instructions into the Twenty-First Century, 81 Notre Dame L. Rev. 449, 451 (2006); Peter Tiersma, The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 Brook. L. Rev. 1081, 1102-03 (2001)


role.\textsuperscript{43} Jurors now see their roles as functional, not formative.

Part three sets out the theory of “the potentiality of jury service” in an attempt to reclaim the constitutional identity of jury service within a modern jury system. Primarily, it looks to the educative and identifying potential of thinking about jury service in preparation for the actual duty. The potentiality of jury service involves two component parts: first, a re-conceptualization of jury service as an important, ongoing, constitutional status, not a discrete task; and second, recognition that because jury service is an ongoing identity, it requires ongoing investment in terms of education and reflection before and after the actual moments in the courthouse. Changing the expectations of jury identity offers several concrete benefits including improving constitutional literacy and legal knowledge, strengthening democratic practice and engagement, uplifting the image of the juror and the institution of the jury, and opening up a dialogue about other ways to encourage civic engagement, necessary for a democracy.\textsuperscript{44}

The final section offers a brief conclusion that in order to improve jury service, a new understanding of jury identity is necessary. By re-conceiving jury service to reflect a broader constitutional role courts can reclaim the power of the juror in America.

\section{I. A Constitutionally-Oriented Juror}

The juror was a central figure in the creation of America. As an individual hero,\textsuperscript{45} a collective voice of protest,\textsuperscript{46} or a part of an institution that symbolized a democratic, local, and leveling power, jurors intertwined themselves with the American character.\textsuperscript{47} The United States Constitution was, after all, not simply the founding charter for a government, but also a statement of American identity.\textsuperscript{48} The “American juror” began as archetype, representing an independent, deliberative, participant in a community-centered institution.\textsuperscript{49} Part myth, part aspiration, the juror-as-citizen ideal has been held up as an example that self-government can work.\textsuperscript{50} While this ideal has been undercut by a history of exclusion and
unfair application, the sense that the jury is a uniquely democratic institution remains a recurring theme in cases and commentary about the American jury.\(^{51}\)

Jury trials, of course, predated the United States Constitution, but their almost universal acceptance in the colonies\(^{52}\) and then states\(^{53}\) made them a central point of agreement in establishing the constitutional principles of government.\(^{54}\) Juries more than other established institutions served as a reminder that citizens were the ultimate decision-makers in a democratic society.\(^{55}\) In parallel importance to the other democratic rights of voting and serving as an elected official, jury service was a responsibility that required on-going engagement, education, and an understanding of the constitutional structure.

This section attempts to show that jury service was part of a constitutional identity in three different eras: the framing of the United States Constitution and the Bill of Rights, the Reconstruction Amendments, and the Nineteenth Amendment. In each case, those drafting or seeking to amend the Constitution considered jury service directly connected with constitutional identity.

A. The Founding Era and Beyond

An analysis of constitutional identity must begin with the language of the Constitution. Textually, the jury stands alone in its prominence in the Constitution.\(^{56}\) The right to a criminal jury trial is the only constitutional right to be included in both the original text and the Bill of Rights.\(^{57}\) The failure to include an explicit right to a civil jury trial almost defeated constitutional ratification, as the Anti-Federalists took this omission as portending a new form of tyranny.\(^{58}\) Thus, the Seventh Amendment’s right

\(^{51}\) See infra Part II B & C.


\(^{53}\) Alschuler, A Brief History of Criminal Jury in the United States, 61 U. Chi. L. Rev. at 870.

\(^{54}\) Federalist No. 83, (Alexander Hamilton) (“The friends and adversaries of the plan of the [Constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”)

\(^{55}\) For more on the central role of juries at the founding, see Andrew Guthrie Ferguson, Jury Instructions as Constitutional Education, 82 Colorado Law Review xx (2012).


\(^{57}\) Id.

\(^{58}\) Edith G. Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 292 (1966);
to a civil jury complements the Sixth Amendment’s right to a criminal jury, and the Fifth Amendment’s right to indictment by Grand Jury.\textsuperscript{59} As Akhil Amar has written, “If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its absence strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth).”\textsuperscript{60} This textual influence was not by accident as the history and symbolism of the jury in early America led those drafting the Constitution to agree on its central place in the constitutional structure.\textsuperscript{61}

As a historic matter, juries had been well accepted in the colonies and the states.\textsuperscript{62} While varying in use and prestige, all jurisdictions had a jury system.\textsuperscript{63} Further, because of the restrictive qualifications for jury service limited by race, gender, and class, those white, male, property-owning citizens served to elevate the status of jurors.\textsuperscript{64} As some scholars have recognized, the founding juror was also quite literally the same person you might elect to be your local or state representative or be in a leadership position in your community.\textsuperscript{65} Juries were considered an equal governing institution, in part because it was populated by the same sort of people in the actual governing institutions.\textsuperscript{66} Jurors were thus linked to political power, which in early America was seen as constitutional power.

Symbolically, this role resonated with a new American self-image.\textsuperscript{67} Juries had played a role in the American Revolution, with colonial juries nullifying British prosecutions and protecting American interests.\textsuperscript{68} The

\textsuperscript{60} Id.
\textsuperscript{61} See note xx, supra.
\textsuperscript{62} See note xx, supra.
\textsuperscript{63} Alschuler, A Brief History of Criminal Jury In the United States, 61 U. Chi. L. Rev. at 871, n.17 (describing the variation in jury use in the colonies).
\textsuperscript{64} Gene Schaerr, Business and Jury Trials: The Framers’ Vision Versus Modern Reality, 71 Ohio St. L.J. 1055, 1056 (2010) (“At the time the Sixth Amendment was ratified, jury service was limited to men in every state; and in every state but Vermont, jury service was also limited to property owners or taxpayers.”)
\textsuperscript{65} Robert Mark Savage, Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776, at 61 (unpublished Ph.D thesis, COLUMBIA UNIVERSITY 2011 (available at http://academiccommons.columbia.edu/catalog/ac:131400) (“[T]he evidence suggests that jury service frequently was a steppingstone to further social and political responsibility, beginning in the early public lives of these men.”)
\textsuperscript{66} Brent Tarter & Wythe Holt, The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1901, 49 Am. J. Legal Hist. 257, 263 (2007) (“Full biographical details are not available for all of the grand jurors, but it is evident that the grand jury members were on the whole more respectable than representative. Every grand jury included several men who were or recently had been members of Virginia's General Assembly or of Congress, and more than a few served prominently in one or the other legislative body or as governor after they were on the grand jury.”) Id., 49 Am. J. Legal Hist. at 263-65 (listing the family backgrounds of the first grand jurors).
\textsuperscript{68} Jon P. McClanahan, The True Right to Trial By Jury: The Founders Formulation and Its Demise, 111 W.
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denial of the right to a jury trial even made it into the list of grievances against the British Crown in the Declaration of Independence.\textsuperscript{59} For a new government predicated on democratic self-government and motivated by a fear of arbitrary central power, the jury as a local, citizen-based institution had much appeal.\textsuperscript{70} Juries were participatory, predicated on equality and due process and devoted to protecting accountability and liberty.\textsuperscript{71} These values were constitutional values, and this identity of what it meant to be a constitutional citizen became associated with jury service.\textsuperscript{72}

In fact, some Anti-Federalists argued that the right to a jury was even more central to the new government than the right to vote.\textsuperscript{73} This sentiment was echoed by Thomas Jefferson and others who felt that the jurors’ influence on the judicial system was more critical to democratic freedoms than the voters’ influence on the legislature.\textsuperscript{74} In the hierarchy of political rights, the jury trumped voting in importance.

From this beginning, jury service became a valued civil\textsuperscript{75} and political right.\textsuperscript{76} Legally, it became a definitional part of the identity of an American citizen.\textsuperscript{77} To be a full citizen meant to accept the constitutional rights and responsibilities of citizenship.\textsuperscript{78} These definitions, identifying

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  \item The Declaration of Independence para. 20 (U.S. 1776).
  \item Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 405-39 (2009).
  \item Gene Schaerr, Business and Jury Trials: The Framers’ Vision Versus Modern Reality, 71 Ohio St. L.J. 1055, 1056 (2010) (“During the Founding Period, the right to jury trial enjoyed a level of esteem bordering on religious reverence. As one delegate to Virginia’s convention considering ratification of the federal Constitution put it, that right was generally regarded as an “inestimable privilege, the most important which freemen can enjoy[.]” (citing Journal Notes of the Virginia Ratification Convention Proceedings (June 24, 1788), in 10 The Documentary History of the Ratification of the Constitution 1494 (John P. Kaminski & Gaspare J. Saladino eds., 1993)).
  \item “The trial by jury is . . . more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks . . .”, Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 220-21 (1995) (quoting Essays by a Farmer (IV), reprinted in 5 The Complete Anti-Federalist at 36, 38 (Herbert V. Storing ed., 1981); Rachel Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 56 (2003).
  \item See note 12 supra.
  \item Rachel Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 54 (2003) (“For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights.”) (quoting William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 96 (1994)).
  \item Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 204 (1995) (arguing that “jury service, like voting and office holding, was conceived of as a political right”)
  \item Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877-78 (1994) (“Even before the triumph of universal suffrage, at least half and perhaps three-quarters of the white adult male population were qualified to vote. Most, though not all, of these voters were probably eligible for jury service as well.”)
  \item Brent Tarter & Wytche Holt, The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1901, 49 Am. J. Legal Hist. 257, 257 (2007) (“Juries were understood to be the most intimate and useful way in which citizens took part in their own governance, in the adjudication of civil and criminal controversies.”); Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 218 (1995) (“Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one
citizens and excluding others, while negative in many ways, did have the effect of linking jury service and constitutional rights.79

Finally, in creating the ground rules for democratic government, the Constitution also created expectations for citizens in that democracy. Citizenship meant active participation.80 Active participation itself entailed understanding the role to be played in the constitutional structure.81 Since founding jurors had lived through the Framing Era, they were familiar with the structural role of the jury as it had been debated for a generation.82 In addition, it was recognized that the jury would serve as a place of continuing education about legal and constitutional matters necessary for that active citizenry.83 Citizens with different educational backgrounds would bring differing understandings about law, share it with other citizens, learn more, and then bring that enriched legal and constitutional knowledge back to their communities.84 As Alexis de Tocqueville famously observed, the jury was a “free public school” where citizens could learn and practice their constitutional rights.85 Like school, the learning would not all take place in the courthouse building but would be a place of learning for a lifetime of civic participation.86 Like formal education, this participatory

of the fundamental prerequisites to majoritarian self-government.”)

79 Andrew G. Deiss, Negotiating Justice: The Criminal Trial Jury In a Pluralist America, 3 U. Chi. L. Sch. Roundtable 323, 349 (1996) (“In the United States jury service has long been linked to the right to vote: from at least the late nineteenth century, state officials have used lists of registered voters to identify qualified jurors, and qualifications for jury service often paralleled those for suffrage.”); Vikram David Amar, Jury Service as Political Participationakin to Voting, 80 Cornell L. Rev. 203, 205 (1995) (“Jury service eligibility historically has been tied to voter registration as a general matter.”)

80 Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION, 33 (First Vintage Books 2006)

81 Robert Mark Savage, Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776, at 58-59 (unpublished Ph.D thesis, COLUMBIA UNIVERSITY 2011 (available at http://academiccommons.columbia.edu/catalog/ac:131400) (“In Tocqueville’s view, the jury’s main pedagogical function was to “instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.” In essence, here was the foundation of citizenship, laid by late-colonial American law court culture and its jurors—in the civic education of early Americans.”)


83 Jon P. McClanahan, The True Right to Trial By Jury: The Founders Formulation and Its Demise, 111 W. Va. L. Rev. 791, 807 (2009) (“According to the Federal Farmer, service on a jury was the “means by which the people are let into the knowledge of public affairs—are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them.”) (quoting Letters From The Federal Farmer, in 2 THE COMPLETE ANTI-FEDERALIST 320 (Herbert J. Storing ed., 1981))


85 Alexis de Tocqueville, DEMOCRACY IN AMERICA, VOL. 1 285 (Phillips Bradley ed. 1945) (Vintage Books ed. 1990) (1835) (“The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitious public school ever open, in which every juror learns to exercise his rights ....”).

86 Valerie P. Hans & Neil Vidmar, The Verdict on Juries, 91 Judicature 226, 226-27 (2008) (“Jury service itself educates the public about the law and the legal system and produces more positive views of the courts. What is more, jury service can increase other forms of civic participation such as voting. Research done by the Jury and Democracy Project has discovered that citizens who vote only infrequently and then deliberate with fellow citizens in criminal jury trials are subsequently more likely to vote.”) (citing John Gastil, E. Perry Deess, Phil Weiser & J. Larner); HARRY KALVEN, JR. & HANS ZIESEL, THE AMERICAN JURY 3, 7 (1966) (the American jury “provides an important civic experience for the citizen”)


process would shape a civic identity.

As can be seen, textually, historically, symbolically, legally, and practically, the juror became connected with the constitutional identity of America. This identity was participatory, engaged, and required constitutional understanding. In addition, it recognized that the jury was a space to engage constitutional principles, but it was not limited to that space. Jury service was but one of many participatory spaces to foster constitutional action. And, while of course, the founding jury sanctioned exclusion based on race, gender, and class, those barriers became the focus of advocates seeking to correct the original discrimination. These movements for equality are discussed in the next two sections.

B. The Reconstruction Era and Beyond

To simplify a complex and contested historical debate, the Reconstruction Amendments were, at base, about extending civil and political rights. The prevailing thinking is that the Fourteenth Amendment guaranteed civil rights, precluding the caste-like apartheid of the post-Civil War South and the Fifteenth Amendment guaranteed political rights including the right to vote, serve on juries, and hold elected office. Exactly to whom those rights were granted, and exactly where the line between civil and political rights should be drawn, is still debated by scholars. For our purposes, this section takes a portion of the debate and

87 Robert Mark Savage, Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776, at 69-70 (unpublished Ph.D thesis, COLUMBIA UNIVERSITY 2011 (available at http://academiccommons.columbia.edu/catalog/ac:131400) ("["In Virginia as in Massachusetts, jury service was also a typical preparation for higher public service. Jury duty introduced the king’s subjects to great responsibility and gave them sometimes enormous decision-making authority, …. Jury service often was the first step toward larger social and political responsibility, giving men immediate authority over the lives and property of others, within the colonial law court culture.")

88 See Part I.b infra.

89 Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 Tex. L. Rev. 1, 71 (2011) ("Traditionally, political rights were thought to be those concerned with governance: voting, jury service, and holding office. … Political rights were bestowed on select citizens with especially good judgment; civil rights, on the other hand, were the natural rights to which every person, or at least every citizen including even children, was entitled.")

90 Id.

91 Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 Tex. L. Rev. 1, 74-75 (2011) ("The prevailing understanding in 1868 was that Section One of the Fourteenth Amendment guaranteed equal civil rights, but it did not touch the subject of political rights, which remained the province of the states. Congressmen and senators expressed this view repeatedly.")

92 Id.

93 Note that the there has been considerable academic debate about whether the 14th Amendment includes the right to serve on a jury. Benno C. Schmidt, Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 Tex. L. Rev. 1401, 1423 (1983) ("The right to serve on juries without racial discrimination was conspicuous by its absence in the 1866 Act, leading proponents of the narrow 'civil-rights-only' scope of the fourteenth amendment, …"); but see id. at 1425-26 ("The language of the Act could easily be read to embrace jury service. The 1866 Act itself was broader than its enumeration. Thus, even if it were accepted that section one of the fourteenth amendment guaranteed only the civil rights covered by the 1866 Act, it by no means follows that only the specifically enumerated rights were covered. The Act, after all, follows its enumeration with broad language guaranteeing ‘full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”).
looks at how jury service – as one of those rights – was connected to the movement for constitutional change before and after the Reconstruction Amendments. As will be argued, the fight for racial equality was framed in terms of a struggle for equal constitutional status, including being a juror.

While it soon became an understood part of the bundle of political rights granted by the Fifteenth Amendment, jury service was seen as a central point of contention during the Reconstruction Era. Proponents of each of the Reconstruction Amendments were required to finesse furthering the cause of equality with the practicalities of a racially divided country. Most early debates completely ignored the issue for fear of political backlash. Later debates, informed by the experience of some communities experimenting with racially mixed juries, argued for including jury service as part of the promise of constitutional equality.

Post Reconstruction, there were moments of progress where African-Americans served on juries. “Almost one-third of the citizens

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93 Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 206 (1995) (“[The] voting-jury service linkage was recognized by the Framers in the 1780s, by those responsible for drafting the reconstruction amendments and implementing legislation, and still later by authors of twentieth century amendments that protect various groups against discrimination in voting. Moreover, each of the groups the Supreme Court has already determined should be protected against discrimination in jury service is also protected by one of the voting discrimination amendments.”)

94 Vikram David Amar & Alan Brownstein, The Hybrid Nature of Political Rights, 50 Stan. L. Rev. 915, 916-17 (1998) (arguing that “the architects of the Reconstruction Amendments linked voting and jury service textually, conceptually, and historically and that these two should therefore be seen as part of a package of political rights and should be treated similarly for many constitutional purposes.”); but see Michael J. Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 238 (1991) (“It is unclear whether the Reconstruction amendments’ drafters intended to prohibit racial discrimination in jury service, as they plainly did with regard to property ownership and voting; yet blacks’ right to serve on juries quickly was guaranteed by the Reconstruction Congress and then was endorsed resoundingly by the Supreme Court in Strauder v. West Virginia.”); James Forman, Jr, Juries and Race in the Nineteenth Century, 113 Yale L.J. 895, 917-18 (2004) (recognizing that the need for African-Americans on juries was discussed in the debates over the Thirteenth and Fourteenth Amendments)


96 James Forman, Jr, Juries and Race in the Nineteenth Century, 113 Yale L.J. 895, 912 (2004) (discussing the explicit reluctance of Congress to project the right for African-Americans to serve on juries before the Reconstruction Amendments, “These early [Congressional] debates are especially interesting for what was not argued. Nobody disputed that it would be inappropriate for Congress to grant blacks the right to serve on juries. The debate turned instead on whether the bill made sufficiently clear that it was not conferring such a right.”)

97 James E. Bond, NO EASY WALK TO FREEDOM, RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT, 156 (Praeger Publishers 1997) (recognizing that in Virginia, during Reconstruction African-Americans served on juries. But also that after Virginia was restored to the Union, and despite Federal court efforts, African Americans were excluded from jury service); Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L.Rev. 867, 886 (1994) (“During Reconstruction, African-Americans in some jurisdictions regularly served on juries.”); James Forman, Jr, Juries and Race in the Nineteenth Century, 113 Yale L.J. 895, 930 (2004) (“In Washington County, Texas, where blacks were approximately 50% of the population, blacks constituted about 30% of those who served on juries between 1870 and 1884.”)


99 Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L.Rev. 867, 886 (1994) (“In 1867, the military commander of South Carolina declared every taxpayer or registered voter to be eligible for jury service. Since the military itself had registered virtually every adult African-American male, integrated juries became common in this district.”); Michelle Alexander, The New Jim Crow:
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called for grand jury service in New Orleans between 1872 and 1878 were African-Americans—a percentage that matched the percentage of African-Americans in the population of Orleans Parish generally.” Briefly in the Upper Piedmont area of South Carolina, African-Americans could serve on juries and be represented in jury pools. But, these fleeting moments of equality were the exception, not the rule.

That jury service remained a central issue of debate can be seen both by those who used the prospect of racially mixed juries as a political argument against the Reconstruction Amendments, as well as, those who sought to claim the mantle of supporting African-American equality. For example, during the Virginia Constitutional Convention of 1868, Virginia Representative “Charles Potter introduced a resolution stating that voting, office-holding and jury service should be open to all. He declared that jury service was a right.” These debates responded to African American leaders who had directly advocated for jury service rights as a symbol of equal rights. As the Reverend James W. Hood argued after the Civil War, the priorities for constitutional equality were the right to testify, the right to serve on a jury, and then the right to vote:

First, the right to testify in courts of justice, in order that we may defend our property and our rights. Secondly, representation in the jury box. It is the right of every man accused of any offence, to be tried by a jury of his peers . . . . Thirdly and finally, the black man should have the right to carry his ballot to the ballot box.

While these arguments did not carry the day into a clear statement of the right to serve on a jury as part of the textual language of the Fourteenth or Fifteenth Amendments, the principles created the framework for such an understanding.

In fact, it took only a few short years after the passage of the Fifteenth Amendment to strike down most formal, legal restrictions

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101 W.J. Megginson, AFRICAN-AMERICAN LIFE IN UPPER PIEDMONT SOUTH CAROLINA 1870-1900 284 (South Carolina Press 2006).
102 Joseph Ranney, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW, 51 (Praeger Publishers 1952) (detailing how jury service was tied up with suffrage both in a positive way in that it was argued that voting enfranchisement meant access to jury service, but also in a negative way in that the prospect of African Americans on juries was an argument against enfranchisement.)
103 Hamilton James Eckenrode, THE POLITICAL HISTORY OF VIRGINIA DURING RECONSTRUCTION, 96 (Johns Hopkins Press 1904)
105 Id. at 886 (citing Leon F. Litwack, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 505 (Vintage Books, 1980)).
forbidding African-Americans to serve on juries. A general agreement emerged that at least in terms of constitutional principle (if not practice) the Fifteenth Amendment protected the right to serve on juries regardless of race. Once the Civil Rights Act of 1875 was passed, forbidding jury discrimination in the states, (and thus implicitly allowing all races to sit on juries) the connection between jury service and constitutional equality was complete. The Supreme Court emphatically reaffirmed this vision with sweeping language in *Strauder v. West Virginia*, declaring racial discrimination in jury service a constitutional violation. As the Court stated:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure.

Jury service became a recognized badge of citizenship, an identity that conveyed constitutional status.

As is well known, the ideal of equality quickly faltered in practice,

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107 Akhil Reed Amar, *The Bill of Rights, Creation and Reconstruction*, 274 (Yale University 1998); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 30 (Oxford University Press 2004) (finding that especially after the passage of the 15th Amendment the understanding that political equality included jury service was embraced.)
109 *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880)
110 Id. at 308.
111 Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 Chi.-Kent L. Rev. 909, 921 (2003) (“For African-American men and all women, who were excluded from jury service for much of our country’s past, jury duty now takes on added meaning. For those who once were excluded but who now can serve, jury duty is a hard-won badge of citizenship; it is an indicia of belonging and of counting as a citizen.”)
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and new barriers to jury participation were raised and enforced.113 Most juries in the South remained all-white.114 Even in Midwest states, the situation was not much better.115 Many jurisdictions did not see racial progress for many, many decades.116 In fact, in many cases, juries remained instruments of oppression and injustice, as racial discrimination tilted verdicts against minorities.117

Despite decades of unfair practice, juries remained a potent symbol of constitutional equality.118 Jury service became one of the central battlegrounds in the legal campaigns to challenge desegregation laws.119 The National Association of Colored People, Legal Defense Fund (NAACP-LDF) chose discriminatory jury practices to lead its litigation strategy in the South.120 Charles Hamilton Houston, the architect of the civil rights moment won his first Supreme Court case on a jury discrimination challenge.121 The civil rights leaders succeeded in getting the Federal Jury Selection Act of 1968 passed which reaffirmed the policy of the United States that “all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”122

As can be seen, in the battle for racial

114 Benno C. Schmidt, Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Straduer v. West Virginia, 61 Tex. L. Rev. 1401, 1406 (1983) (quoting 3 THE BOOKER T. WASHINGTON PAPERS 29 (L.R. Harlan ed. 1974) (“In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts,’ lamented Booker T. Washington toward the end of the nineteenth century.”); James E. Bond, NO EASY WALK TO FREEDOM, RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT, 241 (Prager Publishers 1997) (finding deep racism in Georgia, reporting that historical news accounts predicted that Whites would rather avoid jury cases that have cases decided by mixed jury); Jeffrey Abramson, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (Cambridge: Harvard University Press, 2001) (“In one Kentucky county in 1938, no African American had been summoned for jury duty (grand or petit) for thirty-two years, even though one-sixth of the population was African American. …In Mississippi, a county had qualified only 25 out of 12,511 African Americans for jury service, and no African American had served in the last thirty years.”).
115 Leslie A. Schwalm, EMANCIPATIONS DIASPORA: RACE AND RECONSTRUCTION IN THE UPPER MIDWEST 29 (Univ. North Carolina Press 2009) (finding that Midwestern States also denied suffrage in the 1850s and 1860s (Wisconsin, Iowa, Minnesota)).
118 id. (“[T]he jury was of central concern both before and after the Civil War.”)
119 This battle began earlier than the formal civil rights movement. See e.g., Lester C. Lamon, BLACK TENNESSEANS: 1900-1930, 9 (University of Tennessee Press 1977) (describing how as early as 1905 in Tennessee, Robert L. Mayfield challenged exclusion of African Americans from jury service, and again in 1907 John Early attempted to establish a test case to protest the discrimination). This was also true in the Midwest. Leslie A. Schwalm, EMANCIPATIONS DIASPORA: RACE AND RECONSTRUCTION IN THE UPPER MIDWEST 178 (Univ. North Carolina Press 2009) (detailing how the focus of advocates was to get jury service as part of right to franchise).
equality jury service was framed as an issue of constitutional identity. To be an equal constitutional citizen meant being a participating juror, voter, and political agent.

C. The Nineteenth Amendment and Beyond

In an even more direct way, advocates for woman’s suffrage linked jury service to constitutional citizenship. During the efforts to amend the Constitution to what would become the Nineteenth Amendment, a clear call to constitutional identity was heard. As Professor Vikram Amar has written, “There is much support for the proposition that the struggle for women’s suffrage was, from the outset, “also about the right to serve on juries [and that] . . . [t]he two causes were the twin indicia of full citizenship” for those who favored the elimination of gender discrimination at the polls.”

This constitutional connection was born as female Abolitionists recognized that the battle for racial equality would not necessarily result in gender equality. Political rights become the central focus. As Barbara Babcock has summarized:

The woman suffrage movement was born in the dawn of the realization that unless they were forced into it, neither politicians nor statesmen would ever go beyond the enfranchisement of black men. It took fifty-two years, roughly fifty national campaigns, and almost 1,000 state campaigns, as well as the whole adult life of many earnest women, to win the vote. From the beginning, their struggle was also about the right to serve on juries. The two causes were the twin indicia of full citizenship both in the minds of woman suffragists and in the attitudes of American society.
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Just as had happened at the time of the Founding those interested in redefining constitutional identity used jury service as a symbol of constitutional equality. Jury service and voting were purposefully linked in the minds and strategies of the advocates. Participation in jury service was understood to convey a dignity interest that symbolized civic equality. And, it was this civic equality that was expected to translate into a public identity of equality. Only by embracing the hard work and responsibilities of citizenship were women able to claim full equality.

Despite these arguments, in the early years the social movements seeking equal access to all civic responsibilities on gender grounds had limited legal success. Courts immediately curtailed women’s right to serve on juries. While the Nineteenth Amendment was ratified in 1920, and fourteen states granted the right to women to serve on juries, the constitutional changes did not open the courthouse doors in other states.

should have had just cause of protest, for not one of those men was my peer… a commoner of England, tried before a jury of lords, would have far less cause to complain than should I, a woman tried before a jury of men.” (“Suffrage Wins in Senate: Now Goes to the States.” New York Times, June 5, 1919).

127 Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 L. Rev. 1, 76 (2011) (“On their face, the Fifteenth and Nineteenth Amendments only forbid disenfranchisement, but originally they were understood to have implications beyond that…[T]hey were understood to guarantee full political rights, not simply the right to vote in elections.”)

128 Gretchen Ritter, Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment, 20 Law & Hist. Rev. 479, 498 (2002) (“For woman rights advocates, jury service and suffrage were not just civic activities but also markers of civic status. The role of voter and juror served not only to distinguish between citizens and noncitizens, but also between those citizens who had political rights and those without them.”)


131 Gretchen Ritter, Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment, 20 Law & Hist. Rev. 479, 506 (2002) (“Following the passage of the Nineteenth Amendment, women rights activists of the 1920s focused on women’s performance of citizenship. It was argued that women must not just enjoy the privileges of citizenship, but should also share in its duties.”); Joanna L. Grossman, Note, Women’s Jury Service: Right of Citizenship or Privilege of Difference, 46 Stan. L. Rev. 1115, 1141 (1994) (“The connection between jury service and citizenship has long been emphasized by women’s rights advocates. An important element of equality, commentators argue, is the right “to share the basic obligations of public citizenship.”); Shirley S. Abrahamson, Justice and Juror, 20 Ga. La. Rev. 257, 266-267 (1986).

132 This was so even in jurisdictions where access to jury service had preceded suffrage: Utah (1898), Washington (1911), Kansas (1913), California (1917), New Jersey (1918), and Michigan (1918). In other jurisdictions however, the right to serve immediately followed from the passage of the Nineteenth Amendment (Oregon 1921).

133 William N. Eskridge, Jr, Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2125-26 (2002) (“Women generally did not serve on juries before World War I. Once women gained the right to vote, some state courts construed their state jury service laws to include women because the laws tied jury venires to voting lists. Nonetheless, as the nation entered World War II, only thirteen states required the same jury service of women that they required of men; fifteen states allowed women to opt out of compulsory jury service; twenty states disqualified women as a class.”); Neil Vidmar & Valerie Hans, AMERICAN JURIES: THE VERDICT, at 217 (Prometheus Books 2007).

134 Gretchen Ritter, Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment, 20 Law & Hist. Rev. 479, 503 (2002) (“Around the time that the Nineteenth Amendment was passed, fourteen states granted women the right to serve on juries. In half of these states, women were found to be automatically eligible...”)
Courts distinguished the automatic right to vote from the privilege of sitting on a jury.\textsuperscript{135} Voluntary systems of participation, opt-in systems, and a general gendered prejudice made enacting the promise of universal jury service a disappointing reality for much of the Twentieth Century.\textsuperscript{136} Yet, throughout, activists still fought for jury equality, almost as “a second suffrage campaign.”\textsuperscript{137} The National League of Women Voters drafted a “Women’s Bill of Rights” which listed jury service as a top priority.\textsuperscript{138} They also provided advice for local activists to allow women on juries.\textsuperscript{139} Other women’s organizations tracked progress on the various state jury laws.\textsuperscript{140} As activist Burnita Shelton Matthews commented, “If there is one subject which all the woman’s organizations are agreed upon, it is, probably, jury service for women.”\textsuperscript{141} These were public battles attempting to link the political rights of voting to other civic duties. Before and after passage of the Nineteenth Amendment, women’s rights leaders specifically challenged jury service laws, seeking to reform access to jury duty as part of the larger struggle for constitutional equality.\textsuperscript{142}
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In a similar pattern to the racial discrimination cases, it was individual court cases, in the context of larger social movements that had the ultimate effect in changing the law.\textsuperscript{143} Again, the arguments of constitutional identity were central to these challenges. As but one example, William Eskridge describes the litigation strategy of the challenge to Florida’s jury service practices that resulted in the Supreme Court case \textit{Hoyt v. Florida}:

Dorothy Kenyon persuaded the ACLU to befriend Hoyt on the appeal, the [ACLU’s] first major feminist Supreme Court filing. Her remarkable amicus brief argued that representation on juries is an important civil right, as illustrated by the experience of blacks, who did not achieve genuine citizenship until the Court required that they be invited to its burdens such as jury service.\textsuperscript{144}

These arguments and others demonstrated that equal constitutional status required equal opportunity to serve on a jury.\textsuperscript{145} This message was finally adopted by the Supreme Court in \textit{Taylor v. Louisiana}\textsuperscript{146} which prohibited gender discrimination in establishing the jury venire,\textsuperscript{147} and \textit{J.E.B. v. Louisiana}\textsuperscript{148} which prohibited gender discrimination in jury selection.

\textbf{D. A Constitutional Identity}

While admittedly a sweeping analysis of several centuries of jury development, several themes appear in these foundational conceptions of the juror as constitutional citizen. First, the role of the juror in society was important – both to the legal system and to the political system. This elevated role stemmed directly from its connection to Constitution. At the founding, jurors considered themselves constitutional actors within a constitutional system, and undertook the responsibilities that the role required. After the founding, during the battles for political and social


\textsuperscript{145} See text and notes supra.

\textsuperscript{146} See Taylor v. Louisiana, J.E.B. v. Alabama; see also Gretchen Ritter, \textit{Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment}, 20 Law & Hist. Rev. 479, 483 (2002) (“Jury service may be regarded as either a political right, that is, as a form of democratic participation in the exercise of law and justice, or as a civil right—as a matter of individual protection against state authority. Woman rights activists of the nineteenth century understood this dual character of jury service, and thought of political and civil rights as intimately connected, with political rights providing a mandate for broader claims of civil rights.”)

\textsuperscript{147} 419 U.S. 522 (1975).

\textsuperscript{148} 511 U.S. 127 (1994).
equality, this elevated role served as a symbol of equal constitutional status. The battles for equality were fought both to create a more diverse fact-finding body and because jury service involved a respected constitutional identity. The potential right to serve on a jury was as important as the actual service.

Second, this important role was also an ongoing role. The desire to serve on a jury was not satisfied by a single summons, but by a continuing status of being a citizen. This identity drew its power not simply for what a juror could do in the courthouse, but what it meant to be invited as an equal participant in the constitutional structure.

Third, this important, ongoing, constitutional role required some work on the part of the jurors before, during, and after jury service. The jury was a more active body, which required more active and educated jurors. This education involved an awareness of the constitutional role of the jury, as well as the responsibilities of citizens in a democracy.

The modern Supreme Court has acknowledged the juror’s connection to constitutional identity and at least rhetorically reaffirmed its importance. Justice Kennedy’s majority opinion in Powers v. Ohio presents the clearest example of this linkage. Justice Kennedy begins the opinion by stating that “Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.” Citing to Strauder and then the series of first generation cases that followed, the Court sets out the long-standing connection between the jury and constitutional citizenship. Quoting Alexis de Tocqueville about the jury’s educative value and highlighting the jury’s recognized importance in the constitutional structure, Justice Kennedy asserts:

\[\text{Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It “affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.” Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.}\]

\[150\] Id. at 407.
\[151\] Id. (citing Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667 (1880); Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880); see generally Smith v. Texas, 311 U.S. 128, 130 (1940) (“For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government” (footnote omitted)); Brown v. Allen, 344 U.S. 443, 470 (1953).
\[152\] Id. at 407.
The Jury As Constitutional Identity

In reversing Larry Joe Powers’ conviction because racial discrimination infected the jury selection process, Justice Kennedy located the source of the violated right with the potential juror struck from the jury panel. It is the potential juror struck from the jury venire (not the defendant) whose constitutional right has been violated by racial discrimination. Finding third party standing, the Supreme Court located the harm as the reputational harm of excluding the potential juror based on racial discrimination. Such exclusion undermines the potential juror’s connection to the legal system and a claim to constitutional equality. It also risks undermining the larger court system.

In so linking potential jury service and constitutional identity, Powers reaffirms several central rhetorical and substantive claims that the Supreme Court has stood by in its jury decisions. First, the potential right to serve on a jury is a constitutional right. Second, that this right is not merely the private right of the defendant or juror, but connects to the public right for a jury free from discriminatory exclusion. Third, that the participatory aspect of jury service (even the potential for jury service) is an important component to our national identity. These insights directly emerge from the conception of constitutional identity seen in the suffrage and civil rights movements.

It is also an image bolstered by the Supreme Court’s opinions about the historic role of jurors in the constitutional structure outside the equal protection context. In cases involving the importance of jurors deciding the facts that determine a sentence, the court has shown great respect to the

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153 Mr. Powers was white and the excluded jurors non-white, and thus the claim was not made that the constitutional injury was to Mr. Powers. Instead the court stated, “Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law.” Id. at 412.

154 Id. at 413-14 (“Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror.”)

155 Id. at 412.

156 Id.

157 See also Johnson v. California, 545 U.S. 162, 172 (2005) (“Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the “harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” (quoting Batson)).

158 As some justices have criticized, this placement of the right with the potential juror “exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.” Georgia v. McCollum, 505 U.S. 42, 62 (1992) (Thomas, J. concurring).

159 Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting Balzac v. Porto Rico, 258 U.S. 298, 310 (1922)) See id., (“The jury system postulates a conscious duty of participation in the machinery of justice... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.”)
historical link between the jury and the Constitution. As Justice Scalia wrote in Blakely v. Washington, “[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” It is a structural vision that posits the jury as outside the judicial branch, but necessary to the larger constitutional structure.

While undoubtedly the Court has provided some powerful rhetoric in support of this jury role, much appears to be aspirational rather than a reflection of the current reality. In fact, the reality points to a much less powerful institution with much less involved citizens. This is the subject of the next Part.

II. A TASK-ORIENTED JURY

Today, in courts all over America there is a remarkable consensus on the role of the jury. The jury finds facts. It is a utilitarian, practical identity. As the Supreme Court has stated in the criminal context, “The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.” In practical reality, this means that jurors listen to witnesses, evidence, and argument and make judgments based on the submitted information. Then, the jurors apply the law as provided by the judge to those facts and the standards of proof provided. As described, it is a stand-alone responsibility that takes place at the

160 Vikram David Amar, Implementing An Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines, 47 S. Tex. L. Rev. 291, 293 (2005) (“The basic constitutional vision underlying the Booker/Blakely/Apprendi line of cases focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people.”)
162 Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue, 46 Rutgers L. Rev. 1473, 1477 (1994) (“The text of the Bill of Rights serves both a commemorative function, as it reminds us of the founding aspirations from which our polity is derived, and a challenging function, as it exhorts us to respond to those aspirations in the present and as we construct the future. Viewed thusly, the Constitution expresses a political-moral ideal, using aspirational rhetoric to articulate societal goals and values.”)
163 See note xx supra.
164 Chris Kemmitt, Function over Form: Reviving the Criminal Jury’s Historical Role as Sentencing Body, 40 U. Mich. L. J. Reform 93,112 (2006) (“The party line typically hewn to by modern American courts is that the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.”); Judge Robert M. Young, Using Social Science to Assess the Need for Jury Reform in South Carolina, 52 S.C. L. Rev. 135, 147 (2000) (Georgia, Maryland, and Indiana have state law protections for jurors to decide the law, but they are in large measure ignored);
166 Each of the fifty states, the federal courts, and the District of Columbia has now established standard jury instructions that detail these responsibilities.
167 United States v. Gauldin, 515 U.S. 506, 514 (1995) (”[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.”).
courthouse and only on infrequent occasion. Unquestionably, this role as fact-finder is important, central, and based on a long history of the fact-finding abilities of citizen jurors. This article seeks no quarrel with the successful mechanism for decision-making that is the modern jury. Instead, this article seeks to understand how a consensus emerged that this is the only role for a jury. Juries have become a task-oriented enterprise, limited in time and scope. This article examines whether in emphasizing a new task-oriented process, jurors have lost a sense of constitutional identity.

This section focuses on three major changes that have affected the jury. First, it looks at the changes in legal responsibility given to and taken from jurors over the last two hundred years. Through a series of court decisions in the later part of the Nineteenth Century, juries were stripped of their law finding power, thus reducing their responsibilities. Second, it looks at the use of formalized jury instructions to standardize the role of the jury across the country. These instructions have had a dramatic impact on the constitutional identity of the jury, because of what they affirmatively instruct jurors about role. The final section examines the impact of jury service reforms on shaping the identity of the jury. In the past several decades, new federal and state programs to make jury service more user-friendly and less time-consuming have swept the country. Developments like “one day and one trial” systems have been remarkably effective in lessening the burden on citizens of jury duty. However, at the same time, these improvements have reinforced the message to jurors that jury service is a limited, discrete, task-oriented job. As will be discussed, these natural and perhaps understandable changes to the jury, have had a negative impact on preserving a robust sense of constitutional identity.

A. From Law-Finders to Fact-Finders

As originally conceived, jurors in America did more than merely find the facts. As a matter of practice, juries were empowered to interpret, if not decide the law. Because of the limited state of legal

168 From soon after the first ships landed near Plymouth in 1620 to the present day, jurors have resolved contested versions of events. See Barkow, supra at 51 n.73 (“The only existing recorded law from the first five years of the Plymouth Colony, for example, is a list of criminal offenses and a provision for jury trials in all criminal cases.”)

169 J. GUINTHER, THE JURY IN AMERICA, 230-231 (1988). (“We also have good reason to believe that juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of the research method, has reached that conclusion. . . . The capabilities of jurors—perhaps not as individuals but as a group—even appear to extend to cases of the greatest complexity.”)

170 See infra note xx.

171 Rachel Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 57 (2003) (“The Framers continued to believe that the criminal jury was much more than “a utilitarian fact-finding body.”)

172 Jenny E. Carroll, The Jury’s Second Coming, 100 Geo. L.J. 657, 670 (2012) (“This vision of jurors and
training and the immaturity of the legal system, jurors were encouraged to
evaluate the merits of criminal law, and determine much of civil law. As a
result, lawyers routinely argued the law to juries, and expected juries to
understand these arguments. Leading Founding Fathers such as
Alexander Hamilton, John Adams, Thomas Jefferson, John Jay, and Chief
Justice John Marshall expressed support for the law-finding nature of the jury.
While scholars have counseled some caution in not overstating the
law-finding power of the Framing Era jury, recognition of a broader jury role
was part of the debate.

This outsized jury role arose not simply out of necessity, but design.
The jury existed as a check against government power (both the prosecution
and the courts). In addition, it reflected the democratic, participatory
deals of the new constitutional structure. As has been discussed, the jury
represented a citizen-constitutional check in parallel to the other
citizenship power sources in society. As has been well detailed by

their role as political actors is present in the Founders' discussion of the Constitution and the role of the law in
post-Revolutionary America. They conceived of the jury as the space where the law met the governed and, in so
doing, became whole.”; Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 592-96
(1939).

R. J. Farley, Instructions to Juries: Their Role in the Judicial Process, 42 Yale L. J. 194, 202 (1932) (“In America by the
time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to
have been almost universally accorded the jury and quite generally, it determined the law in civil cases.”)

L. Rev. 791, 799 (2009) (“Among the greater powers given to colonial juries, the courts allowed lawyers to
argue the validity of laws to juries.”)

Donald M. Middlebrooks, Reviving Thomas Jefferson’s Jury: Sparf and Hansen v. United States
Reconsidered, 46 Am. J. Legal Hist. 353, 374-75 (2004); see also State v. Brailsford, 3 Dall. 1 (1794) (Jay, J.);
instructions that “[t]he jury have now heard the opinions of the court on the law of the case. They will apply that
to the facts and will find a verdict of guilty or not guilty as their own consciences may direct.”

Stanton D. Strauss, An Inquiry Into the Right of Criminal Juries to Find the Law in Colonial America, 89
J. Crim. L. & Criminology 111, 121-22 (1998) (“My conclusion is that the published records I have studied do
not support the conventional wisdom. In fact, this data only proves that the criminal jury's right in any real sense
to determine the law was firmly established in one colony, offbeat Rhode Island. While there is sporadic evidence
that criminal juries may have had some form of lawfinding authority at times in colonial Pennsylvania and New
York, there is at least as strong an indication that they had no such right for much of the colonial era in Georgia,
Maryland, and Massachusetts. For the most part, however, we just don't know enough to say what lawfinding
authority colonial criminal juries had.”) see id. at 213 (“Although that evidence includes statements by judges,
lawyers, jurors, litigants, and others asserting that criminal juries had the right to determine what the law was, I
have found no evidence that anyone claimed that these juries had the right to ignore what they deemed the
applicable law.”); William E. Nelson, The Lawfinding Power of Colonial American Juries, 71 Ohio St. L.J. 1003,
1029 (2010).

Constitution because they were unwilling to trust government to mark out the role of the jury.”) see id. at 313
(“[u]r Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are
better discovered by judicial inquisition than by adversarial testing before a jury”)

Akhil Amar has said juries were the “embodiments of late-eighteenth-century republican ideology.”
Akhil Reed Amar, AMERICAN'S CONSTITUTION: A BIOGRAPHY 234 (2005); Jon P. McClanahan, Citizen
Participation in Japanese Criminal Trials: Reimagining the Right to Trial By Jury in the United States, 37 N.C.
J. Int'l L. & Com. Reg. 725, 736 (2012) (“The Founders believed that there were two primary benefits to allowing
citizen participation through jury service. First, the jury was seen as an educational tool, teaching citizens about
the government and their rights and responsibilities. . . Second, the Founders conceived of the jury as one part of
the judicial branch, a type of “lower judicial bench” in a bicameral judiciary.”)

Rachel E. Barkow, Recharging the Jury: the Criminal Jury's Constitutional Role in an Era of Mandatory
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others, this law-finding role involved shaping verdicts to avoid certain punishments or even challenging the appropriateness of prosecuting certain crimes.\(^{180}\)

Over time, however, this law-finding power became a contested issue in a developing American legal system. Federal judges began restricting this power, reasoning that in a democratic society unelected jurors had no right to usurp the role of the legislature or the courts.\(^ {181}\) Some states followed suit,\(^ {182}\) even as others continued to protect the historic jury power.\(^ {183}\) Adding to the turmoil, increasing economic pressures from a developing industrial economy furthered a call to have more predictable verdicts decided by established judges and not itinerant juries.\(^ {184}\) Jurors themselves were on occasion challenged as being erratic, uneducated, or incompetent.\(^ {185}\) In addition, the growing professionalism of judges and lawyers, seeking to control the legal market added incentive to reduce reliance on non-professional citizen-jurors to decide the law.\(^ {186}\)

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\(^{181}\) R. J. Farley, *Instructions to Juries: Their Role in the Judicial Process* (1932) 42 Yale L. J. 194, 202 (1932) (“There is small room for doubt that the jury reached its zenith before 1835, when Justice Story, as circuit judge, instructing a jury, made a point upon which he had had a decided opinion during his whole professional life. He said that regardless of physical power and the necessity of compounding law and fact, the jury had no moral right to decide the law according to their own notions. On the contrary, he held it the most sacred constitutional right of every party accused of crime that the jury should respond as to the facts and the court as to the law.”); see also Jon P. McClanahan, *The True Right to Trial by Jury: The Founders’ Formulation and Its Demise* (1993) 111 W. Va. L. Rev. 791, 819-20 (2009) (citing United States v. Stockwell, 27 F. Cas. 1347, 1348 (C.C. D.C. 1886)); see id. (citing Justice Story declared that “[i]t is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.” *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C. Mass. 1835)).


\(^{183}\) Jon P. McClanahan, *The True Right to Trial by Jury: The Founders’ Formulation and Its Demise* (2009) 111 W. Va. L. Rev. 791, 816 (2009) (“By 1851, at least nine states had given juries the right to decide issues of law through constitutional provision or statute, and at least six other states had recognized the jury's right to decide issues of law by judicial decision.”); see id. at 822 (“The Massachusetts legislature responded by enacting a statute explicitly giving criminal juries the right to decide questions of law and fact in criminal cases. … In Vermont, an 1849 supreme court decision affirmed the jury's right to decide the law in a manner contrary to that of the judge, rejecting the reasoning in *United States v. Battiste*.”)

\(^{184}\) Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform* (1996) 25 Hofstra L. Rev. 377, 445 (1996) (“However, over time, there was some feeling that juries tended to act irrationally and could not function well when the issues to be tried were complex. Thus, it is not altogether surprising that as legal principles (and society in general) grew increasingly complex, the role of the jury in adjudicating disputes decreased. Furthermore, one must not forget that two powerful interest groups had a vested interest in seeing certain aspects of the jury’s power curtailed. Both judges and lawyers would find the vacuum left by the erosion in the jury's power.”); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History* (2003) 44 Hastings L.J. 579, 607 (1993) (“The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury's authority.”).

\(^{185}\) Id.

\(^{186}\) “Lawyers and judges eager to gain professional prestige and alliances with economically powerful
In 1895, the United States Supreme Court ended the debate and settled the juror’s role in the American legal system. In *Sparf and Hansen v. United States*, the Supreme Court held that it was not error for a judge to instruct the jury that it must follow the court’s instruction on the law. Justice Harlan wrote what stands as the controlling understanding of the jury role: “[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.”

In short, judges decide the law and juries decide the facts. This understanding remains the law of the land. Jurors identify themselves as mere fact-finders because the Supreme Court and other courts have told them to think that way.

This reduction in role was but one of several contributing factors to the change in constitutional identity. However, the end of the law-finding nature of the jury did result in a different role that affected constitutional identity. Jurors went from being an independent body with quasi-judicial, quasi-legislative powers, structurally apart from the judge, to becoming merely a fact-finding appendage of the court. Instead of deciding the case, jurors were only asked to decide a portion of the case. Instead of seeing themselves as a check on the judge and judicial system, they became a part of the judicial system. This meant reduced constitutional authority, and minimized any separate sense of constitutional identity.

**B. Standardized Jury Instructions**

The rise of standardized jury instructions has also contributed to the narrowing of the jury role. Beginning in the 1930s, courts began to write down instructions on how jurors should consider evidence, how to deliberate, and how to decide a case. The “role of the jury” instruction became a part of a comprehensive list of instructions to be read to all jurors in a jurisdiction. Studying how these instructions influenced the task-oriented nature of the jury is the subject of this section.

Before looking at jury instructions in general and the “role of the

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187 *Id.* at 102-103.


190 Obviously, even after the 1895 *Sparf* decision, formally disempowered juries, citizens still sought equal treatment through equal political rights. Finding facts as a representative member of a jury still carried significant constitutional import, and the literal and symbolic connection to constitutional power did not change.

191 Nancy S. Mander, *Bringing Jury Instructions into the Twenty-First Century*, 81 Notre Dame L. Rev. 449, 494 (2006) (“With the advent of pattern jury instructions in the 1930s, the judge prepared written instructions based on the pattern instructions and delivered them word for word to the jurors as they sat and listened.”)

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jury” instruction in particular, it is necessary to mention a few contextual points that frame the larger argument. First, as a matter of practice in early courts, a lack of formal, written jury instructions contributed to the broader law-finding role of the early jury. Through much of the Founding Era and beyond, jury instructions were oral and usually the product of the individual judge or drafted by the parties. In fact, because in early trials judges could comment on the evidence, the instructions came with editorializing or specific suggestions by the judge. Further, without a sophisticated system of transmitting appellate decisions, “the law” was less formalized than it is now and jurors brought their own sense of the law to court. Thus, the move to formalized jury instructions reified a move to a more limited role.

As a general matter, standardized, “pattern” jury instructions are common in all federal and state courts. These instructions are usually the product of court-led committees. As Professor Nancy Marder has written, “Pattern jury instructions are created in different ways. They can be written by a committee of lawyers and judges, as is the practice in Illinois, by a committee of judges, as was the practice in California, or by a judge, who collects his own and other judges’ instructions, refines them, and ultimately

194 R. J. Farley, Instructions to Juries: Their Role in the Judicial Process, 42 Yale L. J. 194, 204-05 (1932) (“Under the common law, instructions were oral and before the statutory change it was incumbent upon the person excepting to get them reduced to writing, for recordation was discretionary with the trial judge.”)
196 Cf. Judge Robert M. Young, Using Social Science to Assess the Need for Jury Reform in South Carolina, 52 S.C. L. Rev. 135, 147 (2000) (“According to one treatise published in 1877, many states required jury instructions be in writing in order to prevent uncertainty as to their language and terms.”) JOHN PROFFATT, A TREATISE ON TRIAL BY JURY 416 (1877).
197 Judith L. Ritter, Your Lips are Moving … But the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions, 69 Mo. L. Rev. 163, 188-89 (2004) (“[E]ra from the seventeenth century through much of the nineteenth century, when jurors took it upon themselves or in some settings were even encouraged to determine questions of law as well as questions of fact. During this period, there was a commonly held belief that jurors already knew the law as well as anyone else.”); Roger Roots, The Rise and Fall of the American Jury, 8 Seton Hall Circuit Rev. 1, 5-6 (2011) (“Common citizens of early America were known to have been highly interested in and knowledgeable about legal issues. Nearly 2,500 copies of Blackstone’s Commentaries were sold in the colonies in the ten years prior to the Revolution.”)
198 Finally, it should be recognized that Sparf was, itself, a jury instructions case. The precise issue in Sparf was whether a judge had erred in instructing the jury that their role was to apply the facts to the law as given by the judge. Thus, when states began the process of writing down instructions, the “role of the jury” instruction could be derived straight from a Supreme Court decision.
199 Judith L. Ritter, Your Lips are Moving … But the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions, 69 Mo. L. Rev. 163, 192 (2004) (“[F]or quite a number of years now American trial courts have been delivering relatively uniform jury instructions.”); Handbook for Trial Jurors Serving in the United States District Courts 2, available at http://www.nynd.uscourts.gov/pdf/trialhandbook.pdf. (“The judge in a criminal case tells the jury what the law is. The jury must determine what the true facts are. On that basis the jury has only to determine whether the defendant is guilty or not guilty as to each offense charged. What happens thereafter is not for the jury's consideration, but is the sole responsibility of the judge.”)
makes them available to all judges by publishing them.” Notably, in each of the possibilities judges play a central role, with trial judges making the first drafts, trial judges rewriting them, and appellate judges essentially editing them through their opinions.

The resulting instructions determine the official word of what jurors understand their role to be in the court system. In most cases, jury instructions are the only guide to inform jurors of their role. Thus, it is important to study the various jury instructions to see how modern jurors understand their role. As will be discussed, there is a remarkable similarity across jurisdictions, with jurors relegated to a very limited role.

First, most jury instructions tell jurors to find the facts. The jury’s “duty” is to determine the facts. It is the jury’s “exclusive province” to “determine what the real facts are.” In almost every jurisdiction, the division between jury and judge is clear. As the New York State jury instruction reads: “We are both judges in a very real sense. I am the judge of the law and you, Ladies and Gentlemen, are the judges of the facts.”

Jury instructions, thus, provide a clear demarcation of role. Judges provide the law that juries must accept without question. Juries are

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200 Nancy S. Marder, Bringing Jury Instructions into the Twenty-First Century, 81 Notre Dame L. Rev. 449, 458-59 (2006)
201 Id. at 451 (recognizing that jury instructions “are the sole vehicle by which judges instruct jurors on the law and on their tasks before the jury begins its deliberations.”)
202 In fact, one federal handbook for jurors so clearly divides the fact-finding role of the jury in contrast to the law-giving role of the judge, that a commentator analogized it to the Taylorism model of building Model-T cars, with jurors as the factory workers. See Joan L. Larsen Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury, 71 Ohio St. L.J. 959, 966-67 (2010) (“This division of labor between the modern jury and judge is so complementary that the federal juror handbook tells jurors that they and the judge are a team. Conjuring images of Henry Ford’s assembly line, with each worker doing his part to build a great American car, the handbook tells jurors that “through . . . teamwork . . . judge and jury . . . working together in a common effort, put into practice the principles of our great heritage of freedom.”)
203 See e.g., Arizona, RAJI (Criminal) SDCI 1 (3rd ed.) (“It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court.”); Georgia, 0.01.00 Preliminary Jury Instructions, Georgia Suggested Pattern Jury Instructions - Criminal 1.20.30 Jury, Judges of Law and Facts, Georgia Suggested Pattern Jury Instructions - Criminal 1.20.30 (“The jury has a very important role. It is your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence.”).
204 Connecticut, 5 Conn. Prac., Criminal Jury Instructions § 2.1 (4th ed.) (“In the performance of our duties, yours and mine, you as the jury and I as the court have separate functions. To put it briefly, it is my duty to state to you the rules of law involved in the decision of this case and it is your duty to find the facts. You alone are responsible for determining the facts. It is your exclusive province to deal with the evidence and determine what the real facts were, and to reach the final conclusion as to the guilt or innocence of the accused. By applying the law, as I give it to you, to the facts as you find them to be, you will arrive at your verdict. You must perform that duty with strict regard to the law as given to you by the court, because the court alone is responsible for stating the law and the legal principles involved.”)
205 New York, 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 3.2 (“
206 See e.g., Pennsylvania, Pa. SSJI (Crim) 7.05 (“It is my responsibility to decide all questions of law. Therefore, you must accept and follow my rulings and instructions on matters of law. I am not, however, the judge of the facts. It is not for me to decide what are the true facts concerning the charges against the defendant. You, the jurors, are the sole judges of the facts. It will be your responsibility to consider the evidence, to find the facts, and, applying the law to the facts as you find them, to decide whether the defendant has been proven guilty beyond a reasonable doubt.”)
207 Colorado, Colo. Jury Instr., Criminal 3:01 (“It is my job to decide what rules of law apply to the case. … You must follow all of the rules as I explain them to you. Even if you disagree or don’t understand the reasons for
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merely required to apply the instructions to the facts. With only minimal variation these instructions frame the understanding of the juror role.

The unsurprising result of these almost uniform instructions is that jurors see themselves as fact-finders and nothing more. Jurors swear an oath to follow those instructions, and the courts presume they follow that oath. Since jury instructions are silent about any broader constitutional duty, jurors are left without any other conception of a different role. As such, jurors adopt a more limited vision of the jury—a vision that focuses on what the juror is expected to do in the courthouse, not who a juror is expected to be in a constitutional democracy.

C. Jury Streamlining Efforts

In the last several decades, jury reform movements have made marked improvements in the process of jury service. These reforms were necessitated by citizen complaints that jury service took too long and court systems were too inefficient. By most measures these reform projects have been quite successful. Juror waiting time has been cut down. Jurors are summoned less often. And, in combination with better outreach and a wider jury pool, the burden of jury duty has been spread out to more

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some of the rules, you must follow them. No single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole. During the course of the trial you received all of the evidence that you may properly consider to decide the case. Your decision must be made by applying the rules of law which I give you to the evidence presented at trial.

Utah, MUII 2d CR CR202, ("You have two main duties as jurors. The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.")

Indiana, 1-13 IN Pattern Jury Instructions Criminal Instruction No. 13.03 ("Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law.")

See Federal Juror's Oath.

See Andrew Guthrie Ferguson, Jury Instructions as Constitutional Education, 82 Colo. L. Rev. 322 (2013).

G. Thomas Munsterman, A Brief History of State Jury Reform Efforts, 79 Judicature 216, 216 (1996) ("Beginning in the 1960s the pace of jury system change accelerated. Fueling efforts were the development of court Management, challenges to the representativeness and the randomness of the jury selection process, the desire to make jury systems mindful of the citizen's time and the cost to communities, and the availability of automation."); see also Judge Robert M. Young, Using Social Science to Assess the Need for Jury Reform in South Carolina, 52 S.C. L. Rev. 135, 148 (2000)

Hillel Y. Levin & John W. Emerson, Is There a Bias Against Education In the Jury Selection Process, 38 Conn. L. Rev. 325, 330-31 (2006) (In an effort to combat educated jurors from being excused, “A few [scholars] have suggested that jury duty be made more attractive by shortening terms of service or raising pay.”); Juror Handbook, The Circuit Court of Jefferson County, Tenth Judicial Circuit of Alabama Birmingham Division, J. Scott Vowell, Presiding Judge, http://10jc.alacourt.gov/forms/Handbook_April_2007.pdf. ("We know that jury duty is inconvenient for most of you but it is one of the most important obligations of citizenship. We will do our best to make efficient use of your time here.")

Nancy S. Marder, Juries and Technology: Equipping Jurors for the Twenty First Century, 66 Brook. L. Rev. 1257, 1272 n.66 (2001) (recognizing that systems like one day one trial "shows respect for a juror's time and has gone a long way toward convincing prospective jurors to respond to their summons.")

citizens who had previously been exempted or excluded.\textsuperscript{216} Yet, the benefits of efficiency have had consequences on juror self-perception. One consequence involves the largely unintended effect that jury service marketing campaigns have focused on the limited nature of jury service. In promoting the fact that jury duty is less of a burden, court administrators have also promoted the fact that jury duty is a task to be completed. As will be discussed, jury streamlining projects like “one day one trial” by their nature reinforce the task-oriented sense of jury service. Again, the point is not to criticize these efforts (making jury duty more pleasant is a good thing), but examine the consequences to jury identity from the change.

The need for jury reform started well before the recent reforms. People have avoided jury duty since the advent of jury duty.\textsuperscript{217} This has resulted in poor attendance\textsuperscript{218} and a perception that certain classes of people could avoid service.\textsuperscript{219} For our purposes, the story of jury reform starts in the 1990s,\textsuperscript{220} with a series of studies that called for major jury improvements.\textsuperscript{221} The American Bar Association (ABA) and state jury commissions undertook comprehensive evaluations of how to improve the quality of the jury process.\textsuperscript{222} In fact, in the ten years spanning 1997-2007, three-quarters of the states (38) appointed a jury reform body to oversee

\textsuperscript{216} Phoebe C. Ellsworth & Alan Reifman, \textit{Juror Comprehension and Public Policy}, 6 Psychol. Pub. Pol'y & L. 788, 792 (2000) (“With the increased representativeness of the jury pool and the growing prevalence of one-day/one-trial systems of jury service, America has gone a great distance toward full representativeness of the venire in the past few decades.”)

\textsuperscript{217} Nancy J. King, \textit{Juror Delinquency in Criminal Trials}, 94 Mich. L. Rev. 2673, 2678 (1996) (“Early in the nineteenth century, jury avoidance was a continual nuisance for courts.”); id at. 2683 (“Fining those who failed to obey summons appeared to be a universal response to jury dodging throughout the colonial period, and in the early 1800s statutes in most states authorized fines ranging from one dollar to $250.”) However, a caveat to this reality is that wealthy jurors could on occasion buy their way out of jury service. \textit{Id}. 2684

\textsuperscript{218} Joanna Sobol, \textit{Hardship Excuses and Occupational Exemptions, The Impairment of the Fair Cross-Section of the Community}, 69 S. Cal. L. Rev. 155, 158 (1996) (“Although jury duty is an obligation of citizenship, many people do not consider it as such, and millions have not fulfilled this duty when called to serve.”)


\textsuperscript{220} Nancy J. King, \textit{Juror Delinquency in Criminal Trials}, 94 Mich. L. Rev. 2673, 2685-86 (1996) (“In the decades between the Civil War and World War II, inconvenience and financial loss still topped the list of reasons for avoiding jury service, and courts and legislatures took their first steps to ease these burdens.”)


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proposed changes. These commissions led to state reforms in dozens of jurisdictions.

For example, Massachusetts became the first state to institute a “one-day one-trial” system. A “one-day, one-trial” jurisdiction is one in which a juror completes his or her service in one day if he or she is not selected to serve as a juror in a trial. For citizens in Massachusetts this meant that instead of being summoned for a period of 20-30 days, jurors only served for a single day or a single trial. Ten states now have adopted a similar “one-day one-trial model.” These states (Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Indiana, Massachusetts, and Oklahoma) make up over one quarter of the US population. New York and South Carolina limit jury service to two-five days. Georgia, Kentucky, Maine, New Hampshire, North Dakota, Ohio, and Rhode Island limit jury service to six days-one month. This group of jurisdictions, making up almost half the US population (46.7%), have all instituted some public notice to potential jurors of these efficiency improvements to jury service.

These improvements directly target the problem of jury avoidance. Courts had long struggled with “juror yield” – meaning the percentage of people summoned to service who actually show up. Now because jurors can be certain that their time in court will be limited, more

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224 Nancy S. Marder, Bringing Jury Instructions into the Twenty-First Century, 81 Notre Dame L. Rev. 449, 481 (2006) (listing efforts); Judith S. Kaye, My Life as Chief Judge: The Chapter on Juries, 78-Oct N.Y. St. B.J. 10, 11 (2006) (“By the early 1990s in New York, we were calling the same people every two years like clockwork, and they served on average two full weeks, even if not selected for a trial.”)
225 G. Thomas Munsterman, A Brief History of State Jury Reform Efforts, 79 Judicature 216, 217 (1996); Michael Saks, Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions, 48 DePaul L. Rev. 221, 225 n16 (1998) (“A jurisdiction using a “one-day-one-trial” jury system requires citizens called for jury service to serve only for a single day or, if chosen to sit on a jury, for a single trial. Jury Trial Innovations § II-2 (Thomas Munsterman et al. eds., 1997)).
227 Pamela J. Wood, Massachusetts Leadership in the American Jury System, 55-SPG B. B.J. 13, 14 (2011) (“Massachusetts was the first in the country to implement the One Day or One Trial system statewide, in the 1980s. Jurors serve for one day or, if impaneled on a case, for the duration of one trial, after which they are disqualified from service for three years.”); G. Thomas Munsterman, A Brief History of State Jury Reform Efforts, 79 Judicature 216, 217 (1996) (Massachusetts moved from a 20 day jury service to a 1 day one trial).
228 State of the States Report, NCSC at 10
231 State of the States Report.
232 Richard Seltzer, The Vanishing Juror: Why Are There Not Enough Available Jurors, 20 Just. Sys. J. 203, 204 (1999) (in 1999 the District of Columbia Jury system “found that approximately 20 percent of jurors ignore the jury qualification questionnaire and another 40 percent did not receive it at all. Only 18 percent of potential jurors actually served.”); see also id. (“New York City had a nonresponse rate of 58 percent before they began an enhanced enforcement program (New York State Unified Court System, 1996).”)
233 Pamela J. Wood, Massachusetts Leadership in the American Jury System, 55-SPG B. B.J. 13, 14 (2011) (“Juror yield” is the percentage of people summoned for jury service that actually appear at the courthouse.; Thomas L. Fowler, Filling the Box: Responding to Jury Duty Avoidance, 23 N.C. Cent. L.J. 1, 3 (1997-1998) (Since colonial days, citizens have sought to avoid jury duty, and legislatures and court officials have searched for effective methods to secure their service.) (citing State v. Hogg, 6 N.C. (2 Mar.) 319 (1818))
are willing to appear.\textsuperscript{234} While other barriers to service still exist,\textsuperscript{235} these court streamlining processes have received a very positive response both from courts and jurors.

A quick review of these new jury streamlining campaigns shows how jury duty is marketed as easier, shorter, and less of a burden for citizens. Many jurisdictions that have adopted jury reform innovations overtly advertise this reduced burden of citizenship on publically available websites.\textsuperscript{236} Judges promote it directly to the public.\textsuperscript{237} Court systems actively engage reporters and news sources to publicize the changes.\textsuperscript{238}

These successful changes offer several insights for this article. First, jury reforms were (and are) necessary in order to improve the overall jury system. However, the success of those reforms may have had unintended consequences that has reduced the status of the jury in society. These programs encouraged the perception that the burden of jury service is limited. Almost all of the reform efforts have been implicitly or explicitly intended to reduce the investment of time and effort of jurors. While “limited” does not mean unimportant, the emphasis does undercut the centrality of juries in society. Simply stated, advertising that jury service will not be “too inconvenient” does not elevate the status of constitutional responsibilities. Jurors have necessarily internalized the efforts of judges

\textsuperscript{234} Pamela J. Wood, \textit{Massachusetts Leadership in the American Jury System}, 55-SPG B. B.J. 13, 15 (2011) (“Under the One Day or One Trial system, about 90% of those who appear for jury duty in Massachusetts complete their service in one day, and over 95% are done in three days or fewer.”)

\textsuperscript{235} Susan Carol Losh, Adina W. Wasserman, Michael A. Wasserman, \textit{Reluctant Jurors}, 83 Judicature 304, 309 (2000) (“There are many obstacles to jury duty: poor public transit, conflicts with work or school, and child care expenses are just a few.”); Patricia Lee Refo, \textit{A Roadmap for Trials: The Ethical Treatment of Jurors}, 871 PLI/Lit 661, 668 (2011) (“Many courts across the country are innovating—the District of Columbia has a child care center in the courthouse, available for jurors and witnesses with child care needs.”).

\textsuperscript{236} See e.g., Superior Court of California, County of San Diego Website, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1406353&_dad=portal&_schema=PORTAL, (“The Superior Court uses the “One Day/One Trial” program under California Rules of Court, rule 2.1002, which is intended to make jury service more convenient by shortening the time that a person is required to serve to one day or one trial.”); Macomb Country, Michigan Clerk’s Office Press Release, Carmella Sabaugh, Macomb County Clerk/Register of Deeds (Nov. 1, 2005) http://macombcountymi.gov/clerksoffice/news.htm/OneDayOneTrialfirstdaysuccess.htm, (“Macomb County’s one-day, one-trial jury system started today and Macomb County Clerk / Register of Deeds Carmella Sabaugh reports a near record turnout. … The new system shortens jury duty from one week to just one day for most jurors.”)

\textsuperscript{237} Message from Chief Judge Timothy C. Evans, Chief Judge, Circuit Court of Cook County (http://cookcountycourt.org/jury/message.html) (“Jury service is a serious, meaningful and important responsibility. My goal is to make jury service convenient and easy.”); New Jury Duty System, Chief Judge Kathy Bradshaw Elliott is pleased to announce the beginning of the one day/one trial system for jury duty, Russell Publications, http://www.russell-publications.com/articles/1293/new-jury-duty-system (“In the on-going attempt to make jury duty less burdensome for citizens in Kankakee County, Chief Judge Kathy Bradshaw Elliott is pleased to announce the beginning of the one day/one trial system for jury duty.”)

\textsuperscript{238} Caitlin Francke, “Keeping Jurors From Being Boxed In “One-trial” System Reduces Service Time, Expands Prospect List,” Baltimore Sun (May 7, 1996) (“A new jury system makes it easier to fulfill your civic duty in Howard County, reducing the required service from one month to one week. The system – planned since last year and begun last week – means most residents will fill their sometimes dreaded duty in only one day.”); Jan Hoffman, “Making Jury Duty Less Painful and More Efficient,” New York Times, (April 7, 1994) (reporting on improvements in New York State); Bob Merrifield, “Jury Duty Revamped in Will County Courts,” Chicago Tribune, Nov. 19, 1991 (detailing changes in country courts).
and court administrators to lessen the burden of serving.

Second, these programs intentionally have focused attention on a limited timeframe. Program titles like “one-day, one-trial” suggest that the role is discrete and defined, not ongoing. There is no acknowledgment that being a juror involves a political or constitutional status.

Third, the perception has been created that jury service is something citizens do for the courts, not themselves – that juries are summoned by the court, not the Constitution. This is a significant shift in the source of jury power. In essence, juries have become to be seen as a fact-finding arm of the court, not a separate institution in the constitutional structure.

Finally, these modifications, emphasizing the easy or limited role of the jury, have discouraged any discussion that jurors might have responsibilities before jury service to understand and prepare for their role, or any connection after jury service to share that knowledge to the larger community. The perception is that all you have to do is show up, which again limits the sense of responsibility to be a constitutional actor.

D. Result: A Task-Oriented Institution

The result of these relatively recent changes in the jury system, in addition to larger systemic changes in role, has led to a task-oriented institution. While still an important task, this shrinking of role has undermined a robust sense of constitutional identity. In contrast to a constitutionally-oriented jury, the modern jury is perceived to require less effort, less time, no preparation, and is relatively unimportant in comparison to other responsibilities.

Of course, these changes discussed above are not the sole cause of the jury’s diminished status in society. Within the court system, rules of evidence and trial practices have also undercut a more engaged jury. Jurors are, by in large, passive recipients of information. Many trial procedures are not well explained to citizens. Outside court, financial pressures and other obligations of citizens have increased the cost of serving. Further, unlike voting, jury service involves no apparent self-

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  \item \cite{Ellsworth2000}
  \item \cite{Friedland1990}
  \item \cite{Blenen1996}
  \item \cite{Donaldson2012}
\end{itemize}
interest, thus making the value of service harder to appreciate.\textsuperscript{243} Finally, there has been no national education project to explain why juries matter.\textsuperscript{244} While efforts to engage and uplift jurors continue in court systems and within bar associations, jurors have internalized the message of a weakened institution.

Why does this change in orientation matter? The consequences of this task-oriented role have tracked several troubling developments about the strength of the jury system. First, the reputation of jurors has been challenged as being not up to the job.\textsuperscript{245} This, in turn, has led to a sustained attack on the jury, with some commentators celebrating the death of the civil jury.\textsuperscript{246} Public attacks have also undermined jury participating rates, with jury yield numbers at embarrassingly low levels.\textsuperscript{247} Finally, while it is difficult to measure citizen attitudes about jury service, it seems that jury service remains a dreaded duty that is representative of a general decline in civic engagement.\textsuperscript{248} While such relationships are not necessarily causal (and are likely too complex to link), the solutions proposed in this article seek to improve these negative attitudes. As will be discussed in the next section, a reframing of jury service to emphasize its constitutional character will address these concerns.

\textsuperscript{243} Susan Carol Losh, Adina W. Wasserman, Michael A. Wasserman, \textit{Reluctant Jurors}, 83 Judicature 304, 309 (2000) (“The ramifications of "jury economics" extend beyond wages. Unlike other forms of civic involvement (e.g., voting), which partially draw on self-interest, the rewards of jury duty involve the internal satisfaction of fulfilling a civic obligation.”)

\textsuperscript{244} Id. at 310 (“Jury duty is unfamiliar territory for most. Our youth are taught about other civic duties, most notably the vote, and public service advertising about voting is pervasive. Meanwhile, information about jury duty is confined to fiction, sensationalist trials, personal experience, or second-hand data.”)


\textsuperscript{246} Jeffrey Robert White, \textit{The Civil Jury: 200 Years Under Siege}, 36 JUN Trial 18 (2000) (detailing the various attacks on the institution of the jury from the perspective of the trial bar).

\textsuperscript{247} Ted M. Eades, \textit{Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County}, 54 SMU L. Rev. 1813, 1816 (2001) (“In one survey study implemented by the Dallas Morning News and the SMU Law Review “Dallas County officials mailed out 13,027 summonses in anticipation of the fifty-five civil and criminal trials scheduled to begin the week of March 6, 2000. An additional 585 people--not included in the mail-out figure--were expected to show up at the courthouse because they had answered summonses for earlier court dates but asked to reschedule to this date. Of the 13,612 who were supposed to show up for jury service, only 2214 did.”)


The question to be answered is how to reclaim the benefits of the jury’s traditional, constitutional identity without running up against the real problems that caused the courts to limit the role of the jury in the first place. The proposed answer is not to disturb the changes made to create the modern jury we know today. Instead, this article looks to affect jury service before and after the event and, thus, to reframe it as an ongoing, constitutional identity. In a separate article, I have proposed re-crafting jury instructions (within the jury experience) to facilitate a similar goal.250

Becoming aware of the potentiality of jury service involves two interrelated steps. First, it requires a change in perception so that jury service is seen as an important, on-going constitutional identity, and not simply a stand-alone task. Recognition of this direct constitutional connection will have tangible benefits on the reputation and effectiveness of juries. Second, it requires personal and civic engagement before and after jury service. Potential jurors would be encouraged to educate themselves about the constitutional role of the jury prior to serving. Jurors who have served should be encouraged to reflect on and teach others from this experience. Courts and communities should promote this civic investment in the jury role. This on-going education will have both substantive and procedural benefits to the internal workings of the jury process. So conceived, jury service as a constitutional identity, will not begin or end with the actual service, but will be seen as part of a continuum of civic responsibilities.

A. Changing the Expectations of Jury Service

This article seeks to re-imagine the idea of jury service into a broader constitutional identity. This involves shifting the expectations of modern jurors back to a more constitutionally-oriented focus. It seeks to begin a conversation about renewing jury service within the new space carved out by this broader way of considering the juror.

The first part of this section sets out the “what” and “why” – what is meant by changing expectations and why it is important. The second section offers suggestions on “how” – how to make this potentiality of jury service an actuality.

1. Reimagining the Importance of Jury Service

250 Andrew Guthrie Ferguson, Jury Instructions as Constitutional Education, 82 Colo. L. Rev. 322 (2012)
The first change in expectation involves elevating the juror’s importance in society. From the Revolutionary War to the Civil Rights Movement, the right to serve on a jury was a marker of full constitutional citizenship.\textsuperscript{251} Then, as now, jury duty is a constitutional duty. Yet, how many ordinary citizens waiting in line at the local courthouse would risk death or arrest to protest for jury duty? How many would start a revolution to protect the right to be summoned to court? How many citizens even know about these battles to establish jury service as a constitutional right? Without a sense of constitutional identity, the average citizen will understandably overlook the importance of the experience. The first step then is to make jurors aware of the value of jury service by reminding them of this past constitutional connection. This is not a mere history lesson, but a linkage to the constitutional mythology of America. If citizens see jury duty as constitution duty it becomes of elevated importance. As a similar example, the right to bear arms might be a deeply held individual belief, but the fact that the Second Amendment protects it makes it an even more central part of the American identity.\textsuperscript{252} Constitutional rights are our most sacred of rights, and recognizing jury service as one of those rights only elevates it to that status.

This constitutional linkage will not only shape how potential jurors react to the summons, but will shape how jurors act during jury service. Jurors are not mere fact-finders, but fact-finders within a constitutional structure. As such, they must see that jury service is a connecting point to the larger constitutional system. It is a constitutional awareness that gives moral weight to the jury’s verdict. It gives legitimacy to the jury’s verdict and the judge’s sentence.\textsuperscript{253} Simply stated, a juror that has embraced this constitutional identity will approach jury duty with the understanding that he or she has been deputized to act in a constitutional system. It is a great and unfamiliar power. It is also a democratic power. It instills a heightened sense of seriousness, purpose, and respect for the institution.\textsuperscript{254} After all, as a juror you are symbolically sitting in the seats of those who fought for the right. It might not change the outcome, but it will improve and legitimize the process and the ultimate decision.

To be clear, while there may be some perceived overlap with theories that have tried to reclaim the law-finding nature of the jury, this proposal stops well short of that argument. The idea is not to give the jury the authority to decide the law, but the vision to understand its role within the constitutional structure. An informed juror can both understand the history and original power of the jury and still find the facts as instructed.

\textsuperscript{251} See part xx supra.
\textsuperscript{252} U.S. Const. Amend. II.
\textsuperscript{253} Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968); Taylor v. Louisiana, 419 U.S. 522, 532 (1975)
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Judges, lawyers, law professors, and legal historians sit on juries all the time and do not alter their decisions because they know about the history of the jury. Yet, this contextual understanding of the role of the jury may well enrich the experience by placing the juror’s decision in a larger constitutional framework.

2. Expanding the Temporal Understanding of Jury Service

The second change in expectation involves considering jury service as a status or identity that extends beyond the time at the courthouse. It looks at the responsibilities of a citizen as a potential juror. Before jury service, all potential jurors know that as actual jurors they will be called on to do certain actions within a certain system. That role will require certain knowledge, including some understanding of substantive law, procedural rules, and the constitutional structure of decision. This, in turn, requires awareness that jurors may need to prepare in advance of the actual jury service.

Recognizing this reality, one would think that jurors would prepare for the event. Yet, there is no institutional educational program for jurors prior to service and most jurors do not take it upon themselves to educate themselves. The reason for this lack of preparation turns on the fact that jurors do not see their job as having begun quite yet. Jury service is equated with the courthouse not an identity outside the task at hand.

Another way to think about what an ongoing constitutional identity means is to ask the question: why among the twin political rights of voting and jury service, has jury service not attached to our modern identity? After all, when citizens consider “being a voter” they are not simply focused on checking the box to vote. The act of voting does not delimit the identity of being a voter. Instead, their identity as voters includes all of the educative and identifying qualities that go into voting before choosing a candidate. At least in the ideal, voters educate themselves about the issues, weigh personal and political values, and balance party affiliations, personal self-interest, and public virtue all before (and sometimes after) they vote. Being a participatory voter in a democracy is part of our identity before and after the act of voting; being a participatory juror in a democracy is not. Yet, all citizens are also potential jurors even before the actual summons. All citizens, thus, should have a responsibility before and after the actual jury summons to educate themselves about this constitutional responsibility.

255 It is well recognized that voting participation in America is not near the ideal. Local election turnouts are usually under 50% of eligible voters. According to the Pew Center 61% of eligible voters voted in the 2008 Presidential election (a 40 year high). See Pew Center on the States, 2008 Election in Review (Dec. 2008), at 4.

256 Certain groups are excluded as a matter of law, such as felons Brian C. Kalt, The Exclusion of Felons from Jury Service, 53 Am. U. L. Rev. 65 (2003).
That jury service, like voting, is a “badge of citizenship”257 is not a new idea – the conceptual move in this article is to convince citizens that they are wearing that badge before they pin on the actual juror badge.

There also needs to be a change in expectation to counter the message that jury service has a defined end point. While part of jury service might end after one-day or one-trial, there are other parts that continue. Again, this is not to criticize the well-meaning jury improvement projects that have objectively improved jury service. It simply recognizes that a counterweight may be needed to make sure that the other benefits of jury service are not forgotten.

B. The Benefits of Changing the Expectation of Jury Service

What are the benefits of this changed expectation? After all, if one is satisfied with the fact-finding role of the modern jury, why do citizens need to be concerned about the potentiality of jury service or constitutional identity?

a. Reputational Benefit

There are several significant benefits to emphasizing the constitutional identity of the jury. The first is reputational. A broader conception of juror identity helps legitimize the jury process to a doubting public. One of the current complaints about the jury is that it is comprised of citizens not competent to handle the responsibilities.258 This attack on jurors spills over to attacks on the jury system.259 The more jury service is seen as the work of constitutional actors, the more respect will be given the institution. This is for two separate reasons (in addition to the already theory mentioned that anything is considered more important if “constitutionalized”). The first is that it shifts the focus from the people to the process. The focus becomes the stable constitutional process of jury decision-making, and not the people on the jury.260 Outlier decisions can be

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257 Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 234 (1974) (recognizing the right to vote as an “important badge of citizenship”).

258 Steven L. Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 Nw. U. L. Rev. 190, 191-192 (1990); Phoebe C. Ellsworth & Alan Reifman, Juror Comprehension and Public Policy, 6 Psychol. Pub. Pol'y & L. 788, 792 (2000) (“A major theme of popular criticism is that competent, responsible people rarely serve on juries; instead, American juries are made up of incompetent people—the uneducated, the jobless, the people who pay so little attention to the news that they have never heard of litigants who are major public figures.”)


260 Steven L. Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 Nw. U. L. Rev. 190, 195 (1990) (“This perception of fairness is as important to the proceedings as is actual fairness. A system
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rationalized by process considerations, as we do with many generally good processes that have occasional problems.

Second, it repositions the jury within the larger democratic structure. Citizens see jurors and jurors see themselves as a powerful, generative part of the legal structure with significant constitutional power. It provides a counter-narrative to explain otherwise aberrant jury decisions, allowing defenders of the jury to explain that even outlier verdicts were part of the constitutional design. Jurors represent the community, but they also represent a community voice in tension with governmental power. Attacking a jury verdict is a little like attacking democratic outcomes, you have no one to blame but yourself.

A related benefit is that an improved reputation of the jury may result in improved jury yields. As discussed earlier, one of the current realities of the modern jury system is a low turnout for summoned jurors to jury service. To efficiently function as a court system, courts need to encourage juror participation. With reduced participation from poor jury yields, certain citizens are overburdened or there will be an inadequate number of jurors. The current poor yields have caused Chief Judges to complain, issue contempt citations, and resort to public service announcements directed at uplifting the perception of jury service. If jury duty is considered a constitutional duty, this job of recruitment becomes slightly easier. Obviously, not everyone will feel patriotic about their civic duty, but the constitutional gloss of jury service may help in the margins.

b. Educational Benefit

The second benefit of a changed expectation focuses on the educational role of juries. As recognized by Alexis de Tocqueville and others, juries provide a place of civic learning for jurors where constitutional principles are translated into actual decisions. To be an effective moment of constitutional translation the translator-citizens must be informed of the vocabulary, context, and underlying structure of the task at

perceived as inaccurate undermines the public's confidence in the jury to reach fair—and accurate—results.”

261 See note xx supra.
263 Id.
264 See note xx.
265 Judith S. Kaye, Why Juries? Looking Back, Looking Ahead, 1:2 J. Court Innovation 184,185 (“Jury service is an opportunity like no other to educate the public about the justice system. This will, for many people, be their only real-life encounter with the courts.”); see also B. Michael Dunn, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 Ind. L. J. 1244-45 (1993) (recognizing the teaching parallels of jury service and formal education).
266 See note 91 infra (Alexis de Tocqueville, DEMOCRACY IN AMERICA, VOL. 1 285 (Phillips Bradley ed. 1945) (Vintage Books ed. 1990) (1835)).
hand before it happens. Without an intentional focus on the constitutional role of the jury, jurors fail to appreciate how the institution of the jury teaches the skills of democracy or provides the opportunity to participate in the experiment of self-government. Without preparation, jurors simply miss the constitutionally created teaching moment, because they do not see themselves as anything other than problem-solvers. This education about constitutional identity could take place both before and after the actual service.

At a minimum, this educational focus should create more knowledgeable citizens about basic civic principles. As an initial matter, people would be more likely to understand the constitutional structure and the relevant stakeholders and roles in the criminal justice system. It is somewhat striking that we impose no prerequisites or qualifications (save age and citizenship) to decide on the life, liberty, or property of litigants. In an era where average American citizens regularly flunk the basic United States citizenship test, it might be necessary to provide some basic level of information before the service. This information is not to exclude, but equalize. Obviously, one of the virtues of the jury is the diversity and backgrounds of the various individuals participating. However, from a constitutional knowledge perspective, most jurors are equally ignorant. Adding some constitutional instruction before arriving in court would level the playing field during deliberations. It would also protect against certain individuals dominating the discussions.

But, its real value would be its impact on improving the jury process. Constitutional knowledge will create better a deliberative process. Much of jury instruction discussions revolve around difficult legal concepts such as “beyond a reasonable doubt,” “the burden of proof,” “negligence,” “reasonable.”

References:

268 Seth Schiesel, Former Justice Promotes Web-Based Civics Lessons, N.Y. Times, June 9, 2008, at E7. (“Knowledge about our government is not handed down through the gene pool. Every generation has to learn it, and we have some work to do.”)… ‘The overwhelming consensus coming out of that conference [on constitutional literacy],’ [Justice Sandra Day O’Connor] reported, “was that public education is the only long-term solution to preserving a robust constitutional democracy.”
272 “I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion.” Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820).
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about the legal term in the jury room under the pressure of decision? It would create better jury deliberations if people had thought about the terms before they were asked to apply those difficult concepts in a real case with real consequences.\textsuperscript{275} Scholars have long recognized that jurors do not magically grasp complex concepts in the law by being read form jury instructions.\textsuperscript{276}

Social science research provides ample evidence that the greatest weakness of juries is their lack of understanding of the law. Most surprising jury decisions are not the result of a careful analysis of the law and a principled--or even an unprincipled--decision to ignore it, but of an inability to figure out what the instructions mean in the first place. Jurors work hard to understand the instructions, spending 20 percent or more of their deliberations discussing the law, feel frustrated, and sometimes ask for help but rarely get it. They finally muddle through with what seems like a plausible interpretation, an interpretation that is often incorrect.\textsuperscript{277}

Some jurors start out merely confused and some start out affirmatively incorrect in their understandings.\textsuperscript{278} While we can hope this erroneous understanding is cured by careful jury instructions and good arguments by counsel, this does not always occur.\textsuperscript{279}

Finally, it would personally empower jurors who might otherwise not fully contribute to deliberations due to unfamiliarity, confusion, or a fear of showing ignorance in front of their peers. For a first-time juror without any prior experience, context, or legal training, the concepts and responsibilities can be overwhelming.\textsuperscript{280} Some understanding can only help to remove the feeling of disempowerment. Knowledge will provide confidence to debate and discuss difficult issues. Like all knowledge it will also add a depth to admittedly complex topics without set answers. Finally, the focus on outside learning necessarily shifts some of the deliberation to

\textsuperscript{275} Julianna C. Chomos et. al., Increasing Juror Satisfaction: A Call to Action for Judges and Researchers, 59 Drake L. Rev. 707, 719 (2011) (“Often, jurors know very little about the law relevant to a case prior to the end of a trial, and they may not understand the instructions they are given. This can add to the stress of jury service. Research shows this stress may be alleviated by a more thorough pretrial orientation on the relevant law of the case.”).

\textsuperscript{276} Peter Tiersma, The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 Brook. L. Rev. 1081, 1101-1110 (2001).


\textsuperscript{278} Phoebe C. Ellsworth & Alan Reifman, Juror Comprehension and Public Policy, 6 Psychol. Pub. Pol'y & L. 788, 799 (2000) (“jurors often come into court with their own (frequently erroneous) preexisting knowledge frameworks about the law”) (citation omitted)

\textsuperscript{279} Id.

\textsuperscript{280} Id.
the community context of what and where jurors learned about jury service. In so doing, it links the experience in court to the educational experience outside of court, reinforcing that these are democratic lessons useful for other civic purposes. This educational empowerment will enrich the jury deliberations and the overall jury experience.

c. Process Benefit

Such an education also yields procedural benefits. One of the most striking commonalities from studying juror’s self-reported experiences with the legal system is how disorienting it is for most citizens. This disorienting moment can be remedied by orientation. By orientation, I do not mean instructions on the basics if where to show up, what to bring, what to wear, how long it will take, etc. This is necessary, but not sufficient. Even with a smart video or live instruction, jurors are still disoriented by the process. Not because they don’t know where to sit, or when the next break will be, but because they are asked to do something they have never done before. Lawyers and judges might be used to the deliberative process of applying law to facts, reasoned discussion, and weighty decisions based on a rule of law, but not everyone is so trained. Of course jurors do it, and they do it well, but it doesn’t mean it isn’t a disorienting moment. The question is how to overcome this disorienting sense and learn from it. Again, education of what to expect both procedurally and personally would help orient jurors to the experience. In some jurisdictions before the advent of the jury reforms, when long jury service was the norm, it would fall on the more experienced jurors to explain to the new jurors what to expect. In other jurisdictions, a more formal briefing system – poorly

281 Julianna C. Chomos et al., Increasing Juror Satisfaction: A Call to Action for Judges and Researchers, 59 Drake L. Rev. 707, 712 (2011) (“Lack of information regarding jury service may be a source of stress and dissatisfaction for many jurors.”) 282 Id. at 712–13 (“Overall, jurors have positive perceptions of orientation materials. For instance, jurors who were randomly selected to view a juror orientation videotape had significantly higher knowledge of courtroom procedures, felt more comfortable and confident in their role as jurors, and had more positive attitudes toward jury service than jurors who did not view the videotape.”) (citing Gregory S. Bradshaw et al., Fostering Juror Comfort: Effects of an Orientation Videotape, 29 Law & Hum. Behav. 457, 461-63 (2005)). 283 Christopher N. May, “What Do We Do Now?: Helping Juries Apply the Instructions, 28 Loy. L.A. L. Rev. 869, 870 (1995) (“What it comes down to is that these juries did not know how to apply the law to the facts. I have been teaching law for more than twenty years; the problem that these juries faced is identical to that which confounds most law students -- sometimes well into the second year. Lay jurors, who have received no more than an hour or two of legal instruction, cannot be expected to perform better than those who have studied diligently for months. It is all too easy for those of us who are lawyers or judges to forget what the world looked like before we entered law school.”) 284 Fran Quigley, Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics, 2 CLINICAL L. REV. 37 (1995); Deborah Schatz, The Trials of a Juror, 49 N.Y. St. B.J. 199 1977 (recounting the personal experience of a juror who felt “nervous and disoriented”) 285 Cf. Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service, Hon. Joseph T. Clark, ret. Chair (2004), at 13 (available at http://www.supremecourt.ohio.gov/Publications/juryTF/jurytf_proposal.pdf) 286 See New York.
titled an “indoctrination process” would be provided. Handouts or other materials were provided on a regular basis.\textsuperscript{287} These processes were both eventually changed, in part, because of the concern that past jurors might prejudice future jurors about the experience, or information would be provided to jurors without the parties present. This is, obviously, still a real concern. However, it would be minimized if the orientation happened before (or after) the moment of jury duty so it would not interfere with the court’s established process.

Such an orientation process is supported by learning theory that shows that providing information about the jury before actual service benefits jurors’ comprehension.\textsuperscript{288} At least within the jury trial context, early jury instructions increase comprehension.\textsuperscript{289} Such findings are not surprising and are seen in other educational contexts.\textsuperscript{290}

d. Systemic Benefit

Thinking of jury service along a continuum also changes what the lessons are to be learned about jury service. Citizens may begin to see jury service as an iterative process, learning from past experience and connected to the larger democratic structure. Scholars who have studied early juries saw this same interchange between knowledge gained on jury service as rubbing off on experience outside of jury service. “The courthouse doors swung both ways. Jurors brought their common knowledge and left instructed. Having witnessed the court’s activities, they imparted the lessons learned to their community.”\textsuperscript{291} Or as Tocqueville famously stated: “I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society’s disposal.”\textsuperscript{292}

Considering jury duty as a constitutional identity would open up a discussion along a continuum, recognizing that many citizens will be repeat players in the system.\textsuperscript{293} Currently, we treat these jurors the same as if they

\textsuperscript{287} Anna Roberts, \textit{Re-Forming the Jury: Detection and Disinfection of Implicit Bias}, 44 Conn. L. Rev. 827, 861 (2012) ("[J]uror orientation programs are “hap hazard and vary from state to state, county to county, and court to court . . . .” Many courts play a videotape or DVD in the room where potential jurors sit and wait for jury service, or, more typically, for dismissal. Prospective jurors pay more attention to the videos than to the juror handbooks that were previously the norm.").

\textsuperscript{288} Elizabeth Najdovski-Terziovski et al., \textit{What Are We Doing Here? An Analysis of Juror Orientation Programs}, 92 Judicature 70, 70 (2008) ("[W]hile there is a plethora of research on juror comprehension and decision making, the literature on juror orientation is virtually nonexistent.").

\textsuperscript{289} B. Michael Dann, \textit{"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries}, 68 Ind. L. J. 1229 (1993)

\textsuperscript{290} See e.g., Paula Lustbader, \textit{You Are Not In Kansas Anymore: Orientation Programs Can Help Students Fly Over the Rainbow}, 47 Washburn L.J. 327, 346 (2008).


\textsuperscript{292} Alexis De Tocqueville, \textit{DEMOCRACY IN AMERICA} 296 (Phillips Bradley ed., 1945).

\textsuperscript{293} Shari Seidman Diamond, \textit{Beyond Fantasy and Nightmare, A Portrait of the Jury}, 54 Buff. L. Rev. 717,
had never served, not using their developed experience and knowledge from prior service.\textsuperscript{294} This denial of the fact that jurors are repeat players in the jury system has several negative impacts.

First, we assume that there are no best practices to learn from the jury experience.\textsuperscript{295} This is probably untrue as a matter of practice, as successful deliberations share many similarities in terms of attitudes of civility, open-mindedness, attention to detail, etc.\textsuperscript{296} This assumption is certainly untrue as a matter of scholarly research into deliberative decision-making.\textsuperscript{297} While there are arguments to be made about not wanting to influence jury deliberations, the system loses out on studying what works and why.

In addition, the conception that jury service is a stand-alone experience runs against the court’s own view of jurors. Most judges voir\textit{ dire} on whether a citizen has ever served on a jury before, understanding that past jury experience could affect future experience.\textsuperscript{298} Yet, while courts might evaluate that fact to determine prejudice, there is no systemic focus on thinking about the juror as a repeat player in a constitutional system. Experiential building blocks are developed in each jury experience – skills that can be of use in future service or in other constitutional pursuits. Expanding the idea of the juror as being a repeat player impacted by past jury experiences, and capable of reflecting on those experiences, would open avenues to improve the jury experience for all potential jurors.

Second, treating jury duty as a task to be completed (without any continuing systemic connection) results in a loss of the voice of the experienced juror. One of the repeated findings of jury scholars is that

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\item \textsuperscript{294} This is similar to the way juries used to operate when they heard case after case and developed an expertise in the area. Douglas G. Smith, \textit{The Historical and Constitutional Contexts of Jury Reform, 25 Hofstra L. Rev.} 377, 460 (1996).
\item \textsuperscript{295} Nancy S. Marder, \textit{Bringing Jury Instructions into the Twenty-First Century, 81 Notre Dame L. Rev.} 449, 503 (2006) (“Judges tend not to instruct juries on how they should conduct their deliberations, but this is one area in which jurors have expressed the need for some guidance.”)
\item \textsuperscript{296} Andrew E. Taslitz, \textit{Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding, 94 Geo. L.J.} 1589, 1619 (2006) (“Jury service also may help to inculcate in jurors traits necessary to good citizenship, specifically, the willingness to compromise, to see another person's perspective, and to accept the need for change. They practice engaging in individual and collective self-rule-informed, norm-governed judgment—lessons they bring with them into the wider world.”)
\item \textsuperscript{298} In general, judges ask some question along the line of “would your prior experience affect your ability to be fair and impartial in this proceeding.” Carol M. Werner et al., \textit{The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts, 15 J. Applied Psychol.} 409, 423 (1985)
\end{itemize}
those citizens who have completed a jury trial (as an actual participating juror) have a positive feeling about the experience. Yet, despite this reality, the overall attitude toward jury service is negative. One reason why there is a disconnect is that the positive voice of experience is never heard. In fact, there is no place in the modern court system for it to be heard. Jurors finish their job and dissolve back into society. This is a loss for the court system as those stories of hard work, the pride of service, and the sense of accomplishment are all lost. Some jurors have life-changing positive experiences that no one save families or close friends hears about. The development of a forum for post-trial positive jury reflections (with an eye toward future jurors) can only improve jury yields and attitudes about jury service in general.

At the other end of the experience spectrum, there are many jurors who have a difficult time deciding. While the experience may ultimately be considered positive, it was not easy. Jurors are required to address some of the most heart-wrenching, morally challenging, and tragic cases. In addition, they may have to accept responsibility for sending a defendant to death or severe punishment. As Justice Souter acknowledged: “Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal.”

300 Julianna C. Chomos et al., Increasing Juror Satisfaction: A Call to Action for Judges and Researchers, 59 Drake L. Rev. 707, 709-10 (2011) (“Research shows Americans generally are positive about jury service, and this positive attitude increases after service. An NCSC study supports this conclusion, finding most jurors did not view jury service as a waste of time and were willing to serve on another jury in the future. These views were even more positive among those who actually served on a jury, as compared to those who were called but not selected.”); id. at (“The study also revealed the experience of jury service increased positive attitudes.” (citing Brian L. Cutler & Donna M. Hughes, Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey, 19 Behav. Sci. & L. 305, 305, 316, 319 (2001)); Washington State Jury Commission, Report to the Board for Judicial Administration July 2000, at Recommendations 3 (available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf). (“Surprisingly, .... citizens who have served on a jury in the past are rarely reluctant to serve again. Jurors are positive about their service and usually find the experience rewarding. They generally come away with a positive attitude towards the justice system.”)

301 Judge Paul J. Garotto, Jury Service – A Citizen’s Duty (Speech before the Omaha Bar Association, Sept. 24, 1964, 13 Neb. St. B. J. 111, 113 (1964) (“What else do we have that can teach, exercise, and strengthen so much political, social, moral and religious virtue as does serving on a jury.”)

302 United States ex rel. McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942) (as Judge Learned Hand wrote about the jury, “[t]he individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came.”)

303 Jack Kaplan, In Praise of Juries: A Personal Experience, 51 N.Y. St. B. J. 384, 385 (1979) (“As the discussion wore on, the jury was slowly transformed before my very eyes into the most amazing instrument of justice I have ever seen. It was exhilarating. It left me profoundly proud to be an American and to have the privilege of participating in such an adventure.”)

304 Sanford Levinson, What Should Citizens (as Participants in a Republican Form of Government) Know about the Constitution?, 50 Wm. & Mary L. Rev. 1239, 1247 (2009)


Despite the emotional investment and sometimes emotional trauma, the court system provides no space for reflection, catharsis, or healing. Some jurors report Post-traumatic Stress Disorder like symptoms, and others less dramatically suffer doubts and questioning. This uncertainty and unsettledness could be addressed by a post-juror place for discussion or reflection (if not counseling).\textsuperscript{306} Some jurors even just have basic questions of things they saw and experienced, and want to ask the court questions about it to overcome the sense of disorientation.\textsuperscript{307} Such a forum would be beneficial for the individual juror who may well be a juror again in the future, as well as, to prepare other jurors. Again, in emphasizing the constitutional role of juries, jurors can prepare for, contextualize, and understand the weight of this judgment. It will provide a time and a moment to reflect on the past service which may contribute to future deliberations.\textsuperscript{308}

Finally, by ignoring the constitutional identity of jury service, jurors do not see the connection of their service to other democratic responsibilities.\textsuperscript{309} With a sense of constitutional connection, jurors become inspired to replicate their civic success in other civic forums.\textsuperscript{310} In fact, The Washington State Jury Project led by John Gastil and others has demonstrated a significant correlation between jury service and democratic engagement.\textsuperscript{311} After an exhaustive study of jurors to determine whether their jury experience had any effect on other civic activities, the studies show that citizens who serve as jurors, also tended to vote more often, and participate in other civic minded activities.\textsuperscript{312} This is both good for democracy but also for the strength of the jury system, as these same jurors will be more experienced and invested in the jury system.

\textsuperscript{306} Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service, Hon. Joseph T. Clark, Chair, at 2 (2004). (Recommendation: “Counseling services should be made available to jurors after especially stressful trials.”)

\textsuperscript{307} Julianna C. Chomos et al., Increasing Juror Satisfaction: A Call to Action for Judges and Researchers, 59 Drake L. Rev. 707, 728 (2011) (“After the trial is finished, jurors may have questions regarding aspects of the legal system or general comments about their experience as a juror. Failure to address these concerns may lead jurors to think the courts do not care about their opinions.”)


\textsuperscript{310} Id. at 350 (“Studies of citizens’ juries show even more encouraging results—that not only a consensual outcome, but also mere deliberation, favorably changes jurors’ attitudes toward political activity. The evidence from these experiments reveals that some “jurors are more civically active long after the jury process has ended.”) (citing Graham Smith & Corinne Wales, Citizens’ Juries and Deliberative Democracy, 48 Pol. Stud. 51, 60 (2000)).


\textsuperscript{312} Id.
The Jury As Constitutional Identity

B. Strengthening Juror Identity

How can the current perception of jury service be changed without undermining the existing jury system? One answer is to look at mechanisms of change outside of the current jury process. If viewed as a broader constitutional identity, potential jurors can take concrete steps to prepare for jury service before the actual summons. In addition, jurors who have finished their service can take steps to improve future jury experiences for both themselves and others in their community.

The following considerations make no claim to be exhaustive, merely exploratory, seeking to open up questions about how to capitalize on a broader vision of jury service. The suggestions primarily focus on education and reflection, but this emphasis does not mean to suggest that other more social or dynamic methods should not be tried. Developing the potentiality of jury service into a strong constitutional identity will, like jury service, be a collective effort.

1. Formal Constitutional Education Efforts

One straightforward proposal would be to educate citizens about the constitutional context. If one of the consequences of the task-oriented jury has been to lose a sense of larger constitutional connection, one easy remedy for that loss is to teach that constitutional role to potential jurors. The history of juries in America is not a secret history. It should not be consciously hidden from modern jurors. Both the myth and reality could be explained in clear terms, similar to a high school civics text-book. Highlighting its importance at constitutional moments, including the Founding, as well as some of its tragic limitations in application can only heighten the jurors’ appreciation of their service. If crafted appropriately, there is nothing objectionable about informing jurors of the historical and constitutional context in which they exist.

This education project could be done through technology, via the internet or mobile devices, or other media. It could include self-guided

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316 Phoebe C. Ellsworth & Alan Reifman, Juror Comprehension and Public Policy, 6 Psychol. Pub. Pol'y & L. 788, 796 (2000) (“Providing relevant information to prospective jurors before trial, thus increasing their familiarity with the legal system and the case at hand, may improve their performance during the actual trial.”) (in the context of instructing before trial).

317 Kim Forde-Mazuri, Jural Districting: Selecting Impartial Juries Through Community Representation, 52 Vand. L. Rev. 353, 364 (1999) (“Trial judges have long recognized the educational importance of jury service, taking the opportunity to teach the jurors about the responsibility of civic virtue and self-government.”).
videos, interactive spaces of communication, and easily digestible information.\textsuperscript{318} On-line, it would be available before court, at court, or after court. The content exists and could be easily distilled from other source materials.\textsuperscript{319} One could even use Supreme Court language (some of which was discussed earlier) to frame the brief introduction to the jury role.\textsuperscript{320} This educational project need not be run by court systems, but could be hosted by local bar associations, non-profit organizations, or law schools. If courts wanted control of the material, courts could include educational links in their jury summons or in any follow up jury correspondence.\textsuperscript{321}

Complementing this technological approach could be a more direct court-directed education project in communities.\textsuperscript{322} This could be done through written materials or in person at the local courthouse, in schools, libraries, or public events.\textsuperscript{323} The constitutional basis of jury trials is a topic of relevance (if not obvious excitement) for citizens. While no one is proposing “jury duty lectures,” about abstract constitutional principles, every year there are several high profile jury trials that gain national attention.\textsuperscript{324} These trials could capture the interest of the public, and also provide the teaching moment for a deeper discussion on the role of the jury. These media and cultural opportunities are present, although currently underutilized to discuss the constitutional role of juries outside the actual jury process.\textsuperscript{325} There is no reason why the potentiality of jury service idea could not be included as part of the existing national dialogue on cases of public interest. Adapting media stories about juries to constitutional discussions about juries would be an easy and engaging way to reconnect

\begin{footnotesize}


\textsuperscript{320} Ferguson, Jury Instructions as Constitutional Education at 3.

\textsuperscript{321} Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service, Hon. Joseph T. Clark, ret. Chair (2004), at 5 (available at http://www.supremecourt.ohio.gov/Publications/juryTF/jurytf_proposal.pdf) (recommending that “Generic public service announcements (PSAs) regarding jury service should be produced for statewide dissemination” and that “Poster/Board campaigns should be organized around the same theme or slogan as the PSAs.”).


\textsuperscript{323} See "juror appreciation week" cites.

\textsuperscript{324} Cable news devotes significant airtime to the trials of celebrities and scandalous criminal cases. Newspapers regularly cover local trials. From 12 Angry Men to Law and Order, we are entertained by the efforts of ordinary citizens resolving the most elemental of human conflicts.

\textsuperscript{325} Washington State Jury Commission, Report to the Board for Judicial Administration July 2000, Executive Summary ix (available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf). ("Every opportunity should be taken to educate the public on the importance of jury service and to increase diversity on juries by extensive outreach to targeted communities. The implementation committee should coordinate efforts to accomplish this.")
\end{footnotesize}
the constitutional identity of juries to their everyday practice.\textsuperscript{326}

Of course, teaching about the jury may not be enough. Like the jury experience itself, success results from the transformative effect of participation in the process. It is well documented that the jury system works because ordinary citizens elevate themselves to meet the responsibility entrusted to them.\textsuperscript{327} Successful juries are engaged, impartial, deliberative, diverse, and clearly informed of the principles guiding the decision. For the potentiality of jury service to work, those same characteristics must be focused on discussing the constitutional role of the jury and the principles of law applied in jury trials. Deliberative debates, discussions, seminars in local courthouses and law schools would be avenues to educate the pool of potential jurors about constitutional identity.

2. Informal Juror Networks

The second proposed approach would focus on networks of individuals with prior jury experience. This organic approach would involve experienced jurors sharing experiences and insights about the role of the jury with potential jurors. While likely such a group would need to be coordinated in some institutional manner, perhaps through civic organizations or bar associations, this network would provide four advantages toward the goal of creating an ongoing juror identity.

First, a group of experienced jurors educating potential jurors about jury service would provide a mutually reinforcing educational experience.\textsuperscript{328} Experienced jurors could explain why juries matter to new jurors, which in turn will necessitate those jurors to think about and learn why jury service matters. Potential jurors will be provided context about the role of the jury such that they are better prepared for the experience. As discussed, this idea of experienced jurors instructing new jurors is not new, and had been the practice in some states.

Second, this group of experienced jurors would, by definition, extend the time of jury service beyond the time in the courthouse. By asking jurors to contribute to jury service after their formal service has ended the experience necessarily extends the responsibilities of the juror. Both symbolically and practically, jurors would be contributing to a conception of jury service that focuses on the before and after of service. The idea of juror identity along a continuum of civic life is thus encouraged.


\textsuperscript{327} Henry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY 3-4 (University of Chicago 1966).

\textsuperscript{328} See note 296 supra.
and strengthened.

Third, this new responsibility will require reflection and further education about the jury role in society. Experienced jurors would realize that their role includes giving back information and insights to the community. This role would require a level of reflection about jury service. Such reflection may also encourage jurors to learn more about the institution of the jury.

Fourth, by giving experienced jurors a voice to discuss jury service, you also create a new voice to support the institution of the jury. As discussed, one of the reasons why jury service is generally maligned in the public’s perception is that there are few positive stories to emerge from jury service. Jurors who have a positive experience and finish are provided no forum to discuss this positive experience. Courts do not encourage jurors to talk about their experiences. There is no institutional space. Thus, the positive voices of jury experience get lost. Creating an organic space for jurors to talk about their experience (good and bad) will provide a new voice in the dialogue about the worth of juries to society.

This imagined network need not be actual interpersonal meetings as social media technologies exist to allow this dialogue through other mediums. Virtually or in person, encouraging a dialogue about jury service after it has formally ended may well alter the image of the juror in society. The change is to give responsibility for jury service to jurors both before and after service.

VI. CONCLUSION

The potentiality of jury service offers a new way to conceptualize the role of the juror in society today. Throughout history jury service has been a moment of “constitutional translation”—when ideals become reality through the practice of citizens. Jury service presents a focused moment of constitutional relevancy and participation. Every year approximately 14 percent of American citizens receive a jury summons.329 Almost a third of all Americans serve on a jury in their lifetime.330 Many citizens serve more than once. Yet, even in jurisdictions in which jury summons are a regular occurrence, most people consider jury duty a discrete event to be experienced and then forgotten. Jurors plan to focus their attentions during the necessary time, not before, not after, and probably (deep down) hope to escape the process altogether.331 Jury service need not be so cabined to the

330 Id.
task in court. As a historical reality and as an American ideal, the jury has played a broader, more encompassing role in the American identity. This ideal embraces the potentiality of citizen engagement based on an understanding of the jury’s constitutional role. Only by re-conceiving jury service to reflect this constitutional role can we reclaim the power of the juror in America.


332 See note supra xx.