

UNIVERSITY OF  
**COLORADO LAW REVIEW**

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*Volume 84, Issue 2*

*2013*

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**JURY INSTRUCTIONS AS  
CONSTITUTIONAL EDUCATION**

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*Juries are central to the constitutional structure of America. This Article articulates a theory of the jury as a “constitutional teaching moment,” establishing a historical and theoretical basis for reclaiming the educative value of jury service. This Article addresses the fundamental question of why, despite an unquestioned acceptance of a constitutional role of the jury, our criminal justice system does not explain this role to jurors on jury duty. This Article seeks to answer the question of how we can educate jurors about the jury’s constitutional role, while at the same time exploring the larger theoretical concerns with using the jury to renew civic engagement. Tracing the theme of the jury as a place of constitutional education from the Founding to the modern Supreme Court, this Article argues that this constitutional awareness was central to the jury’s reputation and status in society. This Article concludes that reclaiming this sense of constitutional awareness through jury service will strengthen the jury as an institution, as a decision-maker, and as a creator of democratic citizens. This Article offers sample jury instructions to begin this project of constitutional awareness suitable for trial courts to adopt and implement.*

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## INTRODUCTION

*Among the most vigorous productions of the American pen, may be justly enumerated the various charges, delivered by the Judges of the United States, at the opening of their respective courts. In these useful addresses to the jury, we not only discern sound legal information, conveyed in a style at once popular and condensed, but much political and constitutional knowledge.<sup>1</sup>*

Every day, in courtrooms all across America, the same dramatic scene takes place: a jury foreperson stands and reads the verdict in a criminal case. Citizens nod in assent as a jury verdict determines liberty, guilt, or even death. Facts have been found and a decision rendered. Jurors have fulfilled their civic duty, justice has been negotiated into a final decision, and another case has been processed by the criminal justice system. The jury system has worked as designed. Or has it?

If you stopped those jurors on the way out of the courtroom and asked them why they had been given such an outsized power, how many citizens would be able to point to the constitutional underpinnings of the jury system? How many would know why the right to a jury trial is the only right included in both the original Constitution and the Bill of Rights?<sup>2</sup> How many would know that the “right to a jury” was considered equal to the “right to vote” at the time of the Founding?<sup>3</sup> How many would know that the jury was constitutionally designed to keep judicial power in the hands of the people and to teach the skills necessary for participatory

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1. *Incidents at Home*, 7 FARMERS WKLY. MUSEUM 324 (1799).

2. U.S. CONST. art. III; U.S. CONST. amends. VI, VII.

3. “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. The execution of the laws is more important than the making them.” Letter from Thomas Jefferson to Monsieur Arnold L’Abbé, (July 19, 1789), in 3 THE WRITINGS OF THOMAS JEFFERSON, at 82 (H. A. Washington ed., 1854).

democracy?<sup>4</sup> As a matter of historical fact, such an understanding about the constitutional role of the jury is uncontested.<sup>5</sup> As a matter of legal theory, acknowledged in court opinions and scholarly articles, this constitutional role has been well-established.<sup>6</sup> Yet, rarely at any point in the formal legal process of a criminal trial does anyone bother to explain this role to the jury. No one explains the constitutional principles that are embedded in the jury trial process. No one explains the constitutional role of a participatory institution that emphasizes fairness, equality, deliberation, structural accountability, and civic virtue. The jury is left out of understanding its connection to the Constitution.<sup>7</sup>

The result of this omission is a gap in awareness about the role of the jury in a constitutional system. This gap not only betrays the historic importance of the jury in America, but weakens the jury system.<sup>8</sup> Central to the strength of the jury, its reputation in society, and its role in fostering the democratic skills of citizenship is an understanding that the jury plays a foundational role in the constitutional structure of government.<sup>9</sup>

This Article addresses this lack of constitutional

4. See WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY* 152–53 (Thomas Dunne Books, St. Martin's Press 2002).

5. See e.g., Albert Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1170 (1995); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 54 (2003).

6. See generally *United States v. Booker*, 543 U.S. 220 (2005); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) [hereinafter Amar, *The Bill of Rights*]; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 207 n.26 (1995) [hereinafter Amar, *Jury Service*].

7. See Susan Carol Losh, Adina W. Wasserman & Michael A. Wasserman, *Reluctant Jurors*, 83 JUDICATURE 304, 310 (2000) (“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.”).

8. See *infra* Part II.C.

9. *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (“[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 ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

awareness in the context of criminal jury trials—why the larger educative and constitutional role of the jury is never explained to the jury. It seeks to answer the question of how we can educate jurors both about the jury’s constitutional role and the constitutional principles animating the jury experience. In addition, it explores the larger theoretical concerns with using the jury to renew civic engagement. Its proposal is straightforward and easy to implement—use jury instructions to educate jurors about the Constitution.<sup>10</sup> Symbolically and practically, the jury instructions proposed in this Article take the first step in remedying the lack of constitutional awareness by identifying the constitutional lessons of jury service. Most importantly, this constitutional education will have four positive effects on juries today: (1) constitutionally-educated jurors will improve baseline constitutional literacy for citizens; (2) constitutionally-educated jurors will improve the jury’s reputation in society; (3) constitutionally-educated jurors will strengthen democratic practice outside of jury service including voting and other civic activities; and (4) constitutionally-educated jurors will improve jury deliberations while on jury duty.

This Article begins with the assumption that, theoretically and practically, the modern jury has been circumscribed to the functional role of finding the facts and applying the facts to the law.<sup>11</sup> With minor exception, the jury is instructed “to determine what the facts are in this case.”<sup>12</sup> While there is little doubt that this role should be a central role—there are lives and liberty at stake—it need not be the only role. Jury duty also serves an educative function. Jurors participate as

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10. See *infra* Part IV.

11. See *United States v. Gaudin*, 515 U.S. 506, 514 (1995) (“[T]he 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.”); *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.”); see also Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. MICH. J.L. 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.”).

12. See, e.g., CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 60 (Barbara E. Bergman ed., 4th rev. ed. 2008) (“Your function, as the jury, is to determine what the facts are in this case. You are the sole judges of the facts . . . [Y]ou alone decide what weight, if any, to give to that evidence [presented during the trial]. You alone decide the credibility or believability of the witnesses.”).

constitutional pupils.<sup>13</sup> Jurors learn rules of fairness,<sup>14</sup> study modes of deliberation,<sup>15</sup> practice principles of equality,<sup>16</sup> tolerate different views, act as forces of political accountability,<sup>17</sup> and fulfill their historic role as a bulwark against government overreaching.<sup>18</sup> These are constitutional roles and constitutional values, yet this other constitutional function of the jury is not explained to jurors participating in the process.

This Article suggests that the current jury process fails to educate the jury about the constitutional role of the jury in society. It suggests that by reworking jury instructions, we can remedy this omission without interfering with the fact-finding process. At the same time, we can improve the deliberative process, and equally importantly, improve the democratic, participatory status of the juror-citizen in society. Finally, this Article offers proposed jury instructions that can be added in every state and federal court to accomplish the goal of educating the jury about the constitutional role of the jury. The purpose is not to distract jurors from deciding the case before them, but to put their decisional role in a larger democratic and

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13. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 285 (Vintage Books 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 gratuitous public school ever open, in which every juror learns to exercise his rights . . .”).

14. The rules can include procedural rules, evidentiary rules, and constitutional rules (such as confrontation and compulsory process). *See generally* U.S. CONST. amend. VI. In many ways the entire trial is a lesson on how to structure a fair adversarial process.

15. Alan Hirsh, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 188–89 (2002) (“The Framers regarded deliberation as the *sine qua non* of lawmaking. In the very first sentence of *The Federalist Papers*, Alexander Hamilton reminded people that they were called upon not merely to vote but to ‘deliberate on a new Constitution.’” (quoting THE FEDERALIST NO. 1 (Alexander Hamilton))).

16. *Local 36 of Int’l Fishermen & Allied Workers of Am. v. United States*, 177 F.2d 320, 340 (9th Cir. 1949) (“The jury of criminal cases is the epitome of democracy in our modern state . . . . Our democracy is founded upon the proposition of equality of each citizen to each other as far as political rights are concerned.”).

17. David S. Willis, Note, *Juror Privacy: The Compromise Between Judicial Discretion and the First Amendment*, 37 SUFFOLK U. L. REV. 1195 (2004) (“The functional importance of an identifiable jury is as essential today as it was in early colonial society, for it ensures that judgment is rendered by members of the community who are ultimately accountable to the accused.”).

18. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 540–41 (4th ed. 1873)); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 396 (1999).

constitutional framework.

Why constitutional education? This Article arises within the larger context of the renewed debate about the level of constitutional literacy in America. Leading bar journals,<sup>19</sup> Supreme Court justices,<sup>20</sup> scholars,<sup>21</sup> and mainstream media outlets<sup>22</sup> have raised an alarm about the decreasing level of civic awareness of citizens today.<sup>23</sup> These are the same citizens deciding the liberty of defendants or the fortunes of litigants. This constitutional ignorance threatens democratic institutions and has helped undermine the jury's reputation.<sup>24</sup> While similar concerns about juror competence have been raised throughout history,<sup>25</sup> today's renewed conversation opens a space for proposals to address the lack of constitutional awareness.<sup>26</sup> Obviously, brief jury instructions cannot replace a complete civics or legal education; however, the constitutional lessons within jury service can be made transparent and

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19. The ABA Journal decried the woeful state of "civics" knowledge among the American public. See Mark Hansen, *Flunking Civics: Why America's Kids Know So Little*, ABA JOURNAL, May 1, 2011, <http://www.abajournal.com/magazine/article/civics/>.

20. C. Ronald Baird, *Each of Us Has a Role to Play in Improving Civic Literacy*, 62 J. MO. B. 298, 299 (2006) ("Former U.S. Supreme Court Justice Sandra Day O'Connor has been appointed as an honorary co-chair to the Commission on Civic Education and Separation of Powers. She has warned that a lack of knowledge about the distinct roles of the three branches of government can have very real world consequences."); Sam D. Elliot, *Educating the Public*, 46 TENN. B.J. 3 (2010) ("In August 2009, retiring Justice David Souter addressed the opening assembly of the American Bar Association's annual meeting in Chicago, sounding an alarm relative to the general public's lack of understanding of our system of government. Souter noted the sad reality that a 'majority of the public is unaware of the structure of government,' and fails to understand the notion of separation of powers, which itself threatens the judicial independence that we as lawyers deem critical to the continued viability of constitutional government.").

21. Eric Lane, *Are We Still Americans?*, 36 HOFSTRA L. REV. 13, 15 (2007).

22. See *infra* note 176.

23. Lane, *supra* note 21, at 15 ("[F]rom the 1960s onward civic education has been declining and by the 1980s had nearly vanished.").

24. See *infra* Part III.

25. Daniel D. Blinka, *"This Germ of Rottedness": Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135, 139 (2003) ("St. George Tucker, one of Virginia's (and the nation's) leading lawyers and judges, lamented the sad decline of trial by jury. The problem rested, Tucker thought, squarely with the types of men who sat on juries." (citation omitted)); see also *id.* ("Courts habitually impaneled juries consisting largely of 'idle loiterers' who were 'unfit' to decide the cases presented to them. Often times juries were stacked with parties' friends or neighbors, which permitted 'friendship' or 'dislikes' to exert an 'imperceptible influence' on the outcome.").

26. As a general matter, the reaction to juror incompetence has been to restrict juror power, rather than uplift jurors in terms of providing education or guidance. See *infra* Part II.A.

relevant to jurors. The constitutional principles of democratic participation, equality of opportunity, due process/fairness, respecting diversity, and balanced and accountable government are directly connected with the constitutional role of the jury.<sup>27</sup> By identifying those constitutional principles and creating the space to practice and reflect on those principles, jury instructions can enrich the jury experience, both during deliberations and after court is over.

Why jury instructions? Jury instructions provide the official decisional framework for jurors. Jury instructions are not just rules, but a framing mechanism for how the jury should approach the process of decision-making. Jury instructions establish principles of law, burdens of proof, standards to weigh evidence, and a structural framework for decision.<sup>28</sup> Read by the court, jury instructions have the stamp of legitimacy and authority. Jury instructions educate the jury, and they should educate the jury *about the jury*. Jury instructions also offer a focused moment of constitutional connection. At that moment, jurors are ready to listen and learn about the law and the legal system. While the entire trial process involves a participatory and educative experience, it is at the moment of instruction that jurors are formally taught about their responsibilities, role, and the system's expectation of them.<sup>29</sup>

Part I of this Article explores the theme of the jury as a "teaching moment." From early in our history, Americans have believed that juries existed not simply to decide cases, but to be a classroom to teach constitutional values and the skills of citizenship.<sup>30</sup> Echoes of the idea that the jury is a "free public school" for democracy can be traced from the Founding to the current Supreme Court.<sup>31</sup> The mythologized ideal was that well-educated, civic-minded citizens would enter the

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27. See ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION* (forthcoming 2013).

28. See John P. Cronan, *Is Any of this Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1193–94 (2002) (describing the purposes of instructions).

29. Of course, some judges inform jurors about their important role in the system. Some judges, recognizing the lack of systemic education, purposely take it upon themselves to educate jurors about the history of the jury in America. These informal mechanisms are important but insufficient to convey the important role of the jury. See also *infra* Part III (further discussing the teaching moment of jury instructions).

30. See *infra* Part III.

31. *Id.*



democratic space of the jury and share and develop that accumulated constitutional understanding.

Part II of this Article contrasts that idealized version of the jury to the modern image of the jury. This section examines how the role of the jury has shifted over two centuries. The jury has gone from an almost co-equal branch of government with the power to decide the law, to a more cabined institution that is limited in constitutional power and focused on simply “finding the facts.”<sup>32</sup> This familiar history has been well considered by other scholars,<sup>33</sup> so the focus here is on how these changes in responsibility affect the educative impact of jury service. As will be discussed, today’s jury is more democratic and diverse<sup>34</sup> and yet less knowledgeable about constitutional matters.<sup>35</sup> These factors are neither causal, nor necessarily negative, as juries may well perform better today than at any other time in our history.<sup>36</sup> At the same time, these changes point to a need to reevaluate the educative role of the jury experience to remedy the limitations in constitutional awareness.

Part III of this Article examines why constitutional

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32. *Id.*; Amar, *Jury Service*, *supra* note 6, at 220–21 (“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 . . . .” (quoting *Essays by a Farmer (IV)*, in 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert V. Storing ed., 1981)); Barkow, *supra* note 5, at 56 (“The Maryland Farmer, an Anti-Federalist, described the jury as ‘the democratic branch of the judiciary power—more necessary than representatives in the legislature.’” (quoting another source)).

33. *See, e.g.*, Barkow, *supra* note 5, at 57; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939); Kemmitt, *supra* note 11, at 103; Jon P. McClanahan, *The ‘True’ Right to Trial By Jury: The Founders’ Formulation and Its Demise*, 111 W. VA. L. REV. 791, 799 (2009); Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 354 (2004); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 441 (1996).

34. *See* Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 610 (1994); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13–32 (1990); Lisa Lee Mancini Harden, *The End of the Peremptory Challenge? The Implications of J.E.B. v. Alabama ex rel. T.B. for Jury Selection in Alabama*, 47 ALA. L. REV. 243, 247–57 (1995).

35. Smith, *supra* note 33, at 459 (“Jurors in early English and American juries were on average more experienced in trial practice than modern jurors because of the large number of trials for which they were impaneled and previous experience they often had serving on juries.”).

36. *See infra* Part II.

education matters to the jury today. This Article argues that ensuring a sustained level of constitutional awareness about the jury will improve both the jury experience and jury deliberations.<sup>37</sup> In addition, this education will counteract some of the negative media portrayals of the jury and jury service.<sup>38</sup> Most fundamentally, this Article suggests that constitutional and civic education through jury instructions will reopen the door to the public schoolhouse, opening up a national dialogue about the intersection of criminal justice institutions and civic engagement. Jury service may well present an untapped method to teach citizens how to think critically, deliberate respectfully, understand the political process, appreciate history, and cultivate public virtue.

Part IV describes how jury instructions in criminal cases can be modified to encourage constitutional awareness about the role of juries. This section traces how jurors experience jury service, including the informational inputs that can shape their understanding about their role as jurors. It shows how jury instructions, over other proposed mechanisms, provide the most effective way to educate jurors. This section also explores what these jury instructions might look like in criminal cases. Taking language and principles directly from Supreme Court cases, these proposed instructions form the basis of suggested constitutional jury instructions.

Part V addresses the potential arguments against this proposal. As with any proposed change in the existing jury process, there are concerns about inefficiency, improper influence, and a general inertia against change. These concerns, however, do not outweigh the merits of the proposal.

## I. THE FOUNDING JURY IDEAL

Juries play a central and almost mythic role in American history.<sup>39</sup> Juries represent democracy in action—ordinary

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37. See *infra* Part III.

38. *Id.*

39. Amar, *The Bill of Rights*, *supra* note 6 (“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). So too, the double jeopardy clause, which makes no explicit mention of juries, should be understood to safeguard not simply the individual defendant’s interest in avoiding vexation, but also the integrity of the initial petit jury’s judgment (much like the Seventh

citizens coming together to solve difficult problems affecting their local community.<sup>40</sup> The pedigree of the jury as a legitimate forum for dispute resolution dates back to the original Jamestown Colony.<sup>41</sup> Jury trials arrived along with the earliest American settlers<sup>42</sup> and were soon enshrined in the governing structures of each of the Thirteen Colonies.<sup>43</sup> Trial by jury was considered such an important natural right that a restriction on the use of jury trials during the colonial period helped ignite the American Revolution.<sup>44</sup> Among the British outrages justifying a call to revolution, the Declaration of Independence complained of the deprivation “*of the benefit of Trial by Jury.*”<sup>45</sup> After independence, jury trials for criminal cases were protected in every state constitution.<sup>46</sup> The protection of criminal juries was enshrined in Article III of the original Constitution and the Sixth Amendment to the United States Constitution,<sup>47</sup> making it the only right protected in both the original Constitution and the Bill of Rights.<sup>48</sup> Juries

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Amendment’s rule against ‘re-examin[ation]’ of the civil jury’s verdict). The due process clause also implicated the jury, for its core meaning was to require lawful indictment or presentment (thus triggering the Fifth Amendment grand jury clause.”).

40. Nancy S. Marder, *Juries, Justice, & Multiculturalism*, 75 S. CAL. L. REV. 659, 661–62 (2002); *see also* VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 114 (1986); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 66, 80 (Prometheus Books 2007).

41. *See* Barkow, *supra* note 5, 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.”); Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 445 (1961) (recognizing that the jury trial came over with the colonists of the Massachusetts Bay Colony in 1641).

42. Alschuler & Deiss, *supra* note 5, at 870 n.15; *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1468 (1997).

43. Smith, *supra* note 33, at 423–24 (“All of the thirteen original states retained the institution of civil jury trial through express constitutional provision, by statute, or through judicial practice.”); *see also* Pope, *supra* note 41, at 446 (stating that all states used jury trials before the Declaration of Independence).

44. Barkow, *supra* note 5, at 53 (“Among the jury-related events leading to the American Revolution, some of the greatest instigators were the various Acts of Parliament that deprived colonists of their right to jury trial. For instance, although the Stamp Act earned its infamy as an instance of taxation without representation, colonists were also outraged that violators of the Act were to be tried in admiralty courts in London, thereby depriving them of a local jury.”).

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

46. Alschuler & Deiss, *supra* note 5, at 869–70; *see also* Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 415 (2002) (discussing the early history of the civil jury).

47. U.S. CONST. art. III, § 3; U.S. CONST. amend. VI.

48. Alschuler & Deiss, *supra* note 5, at 870 (“The right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the

were central to both Federalist and Anti-Federalist positions in the era immediately following the birth of the new government.<sup>49</sup> In fact, some Founding commentators held the jury in higher esteem than other institutions of democratic representation.<sup>50</sup>

The reason for this almost universal respect for the criminal jury was partly due to history and partly due to the institution's resonance with other core values of the era.<sup>51</sup> Certainly, a few well-publicized jury verdicts helped sway public opinion to view juries as guardians of liberty during a time of British oppression.<sup>52</sup> But, more fundamentally in the early days of the republic, juries were considered democratic, accountable, local institutions<sup>53</sup> organized around principles of public virtue<sup>54</sup> and common sense<sup>55</sup>—all values that fit the

Constitution of 1789, and it was the only guarantee to appear in both the original document and the Bill of Rights.”).

49. See THE FEDERALIST NO. 83 (Alexander Hamilton). As is well known, the Federalists supported the establishment of a stronger centralized federal government. This push towards a more robust federal power necessitated a strong defense of the federal Constitution. In contrast, the Anti-Federalists raised concerns with the increased federal power and demanded a Bill of Rights to limit what was perceived as encroaching central power.

50. Barkow, *supra* note 5, at 54 (“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 MASSACHUSETT’S SOCIETY, 1760–1830*, at 96 (1991))).

51. This was an era marked by calls for liberty, renewed civic sacrifice, new governing orders, and a collective coming together to form a new country.

52. William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B. J. 48, 49 (1996); see also *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 540–41 (4th ed. 1873)); Harrington, *supra* note 18, at 396.

53. Kemmitt, *supra* note 11, at 105 (“John Taylor of Caroline, a leading constitutional theorist of the early Republic, likened the jury to the ‘lower judicial bench’ in a bicameral judiciary. The Maryland Farmer echoed Taylor, describing the jury as ‘the democratic branch of the judiciary power,’ and the anti-Federalist John Hampden extended the metaphor, explaining that trial by jury was ‘the democratical balance in the Judiciary power.’” (citations omitted)); Kory A. Langhoder, Comment, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823, 1825 (2006) (“[V]enire persons in the Founding era were local, drawn from relatively intimate communities.”).

54. See Kathryn Abrams, *Law’s Republicanism*, 97 YALE L.J. 1591, 1599–1602 (1988); Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1636–39 (1988); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1652 (1988); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 750–51 (1992); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 988–98 (1990); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29

democratic experiment called America.

This section traces one aspect of the jury ideal that existed at the time of the Founding: the intersection of legal and constitutional education and the jury. It begins by looking at the ideal of the citizen-juror—part myth, part reality—but an image of the juror as a participatory, educated citizen that helped establish its power in early America. It then looks at the explicit theme of the jury as a “public school” traced through the writings of Anti-Federalist thinkers and observers like Alexis de Tocqueville. Finally, it explores how these themes have continued through the modern day, such that one can observe the creation of a uniquely American “constitutional awareness” centered around the role of the jury.

Scholars have well canvassed the complex history of juries in America.<sup>56</sup> This Article demonstrates, at least in the ideal, that jury service was intended as a mechanism to enhance constitutional and legal understanding. Further, this ideal of a constitutionally aware jury was intertwined with the power and status of the early jury. Jurors were powerful and respected because of their constitutional connection. Jurors’ knowledge about their constitutional role informed the process and deliberations in a way that strengthened the institution.

#### *A. The Ideal of the Constitutionally Educated Citizen-Juror*

The American faith in juries must be understood in the context of the “ideal” American juror.<sup>57</sup> While the institution

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WM. & MARY L. REV. 57, 67 (1987); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1503–04 (1988); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 371–77 (1992); H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 548–50 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564–65 (1988).

55. Barkow, *supra* note 5, at 59 (“The purpose of the jury was to inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community’s sense of fundamental law and equity.”).

56. See *supra* notes 5–6, 41 and accompanying text.

57. As will be discussed, this ideal juror was not, in fact, the person who always sat on the jury, as wealth and privilege could also offer avenues to escape jury service. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 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 summonses 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.”).

represents a successful and surprisingly durable mechanism for decision-making, much of the reverence for American juries emerged from the ideal of the citizen-juror.<sup>58</sup> Ordinary, faceless, self-sacrificing, but identifiably a participatory citizen, such an individual represented a common democratic connection.<sup>59</sup> The fact that such an ideal juror never fully existed does not change the fact that the perception of the ideal had direct effects. The citizen-juror ideal justified an unprecedented grant of power to juries to decide the law.<sup>60</sup> It legitimized verdicts that ran counter to legislative and executive branch decisions.<sup>61</sup> It localized judicial power to unaccountable and unelected citizens.<sup>62</sup> It also allowed an ever-changing jury population to evolve an identity to match the developing country.<sup>63</sup>

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58. Gene Schaerr & Jed Brinton, *Business and Jury Trials: The Framers' Vision Versus Modern Reality*, 71 OHIO ST. L.J. 1055, 1055 (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[.]'" (alteration in original) (quoting *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))).

59. See Hon. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1238 (1993).

60. Middlebrooks, *supra* note 33, at 354 (stating that "the juries [are] our judges of all fact, and of the law when they choose it." (alteration in original) (quoting *Letter from Thomas Jefferson to Samuel Kercheval*, 1816, in 3 PAPERS OF THOMAS JEFFERSON 282–83 (1951))).

61. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 55 (2011) ("The ability to decide matters of law allowed for greater jury independence; it entitled the people lawfully to take action opposing the policy preferences of the executive or the judiciary.").

62. *Green v. United States*, 356 U.S. 165, 215 (1958) (Black, J., dissenting) ("In the words of Chief Justice Cooley: 'The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice.'" (quoting *People v. Garbutt*, 17 Mich. 9, 27 (1868))), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968).

63. The revolutionary ideal of noble colonial jurors standing up to tyrannical British authorities invokes qualities of bravery, principle, independence, and intelligence. These were precisely the qualities envisioned for the new nation. Similarly, the post-Revolutionary states trying to establish order, stability, and prosperity looked for jurors who would embody those same characteristics of

Pulling apart this image, it should be noted that at least in the ideal, the early American juror shared certain characteristics. All jurors were male, as only males had the right to vote.<sup>64</sup> Jurors were men of property, having some ownership interest in the community.<sup>65</sup> Jurors were white, mirroring the franchise requirements of most states.<sup>66</sup> Almost all jurors also had to be established enough in the community to be chosen by the jury selection officer<sup>67</sup> (usually a federal marshal or state court official).<sup>68</sup> While plainly inadequate in terms of diversity or democratic equality, this homogenous jury pool of white, male, established property owners did share another important characteristic—the jurors were by-and-large educated about civic and constitutional matters.<sup>69</sup> This

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economically established leaders of the community.

64. Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L. REV. 49, 54 (1997) (“At the time of the Revolutionary War, jury service was restricted to white male property holders . . .”).

65. *Id.*

66. Alschuler & Deiss, *supra* note 5, at 878 (“The Federal Judiciary Act of 1789 left the determination of juror qualifications in the federal courts to the states, and state qualifications for jury service frequently matched those for voting.”); Andrew G. Deiss, Comment, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 344 (1996) (“The fact that during the early years of the Republic, juries were comprised almost solely of white male property holders undoubtedly increased the chance for consensus in the jury box.”).

67. Amar, *Jury Service*, *supra* note 6, at 207 n.26 (“Under a key man system, citizens of good reputation in the community (the ‘key’ men) recommend persons to fill the jury venire.”); Daniel D. Blinka, *Trial By Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529, 563 (2003) (“[The early court] may have swept in its share of idlers and miscreants, but it more naturally attracted men actively involved in local social and economic life.”).

68. It has to be remembered that unlike today, those eligible to serve on juries were not necessarily the people who did serve. It was not the random selection of today, but more controlled. “Instead, public officials called selectmen, supervisors, trustees, or ‘sheriffs of the parish’ exercised what Tocqueville called ‘very extensive and very arbitrary’ powers in summoning jurors.” Alschuler & Deiss, *supra* note 5, at 879–80 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 359–60 (Alfred A. Knopf ed. 1945) (1835)).

69. *United States v. Polizzi*, 549 F. Supp. 2d 308, 408 (E.D.N.Y. 2008) (“Goebel’s seminal work demonstrate[s] that the vicinage and property requirements for jurors—that they be local “freeholders,” responsible men having some stake in the community—assumed the jury’s knowledge of the law and awareness of its power to control penalties.”), *vacated and remanded on other grounds by United States v. Polouizzi*, 564 F.3d 142 (2009); Smith, *supra* note 33, at 432 (“Selection procedures were often devised to ensure that better-qualified individuals were impaneled on juries.”); *see also Polizzi*, 549 F. Supp. 2d at 409 (“The English statutes had long set for petit jurors a high property qualification. This policy, which rested upon the presumed higher responsibility and intelligence of propertied persons, had found expression in a series of statutes going back to the fifteenth century.”).

education derived from a combination of life experience, formal schooling, and an understanding that a juror had a creative role in developing the law.

In the very early days of the United States, jurors were aware of constitutional issues because most had lived through the framing of the United States Constitution.<sup>70</sup> Colonial “subjects” became American “citizens”—an identity symbolized by jury participation.<sup>71</sup> Early jurors were a generation that had personally experienced the American Revolution, the Articles of Confederation, and the Ratification debates about forming a new government.<sup>72</sup> The constitutional debate alone took years.<sup>73</sup> These national discussions in newspapers and journals involved elected leaders and regular citizens in a public debate about constitutional principles.<sup>74</sup> Even after ratification, issues of federal power, states’ rights, and individual freedoms reverberated through many of the early political contests.<sup>75</sup>

Jurors, thus, as early citizens, brought to jury service an awareness of the Constitution and the legal system.<sup>76</sup> As John Adams stated, “The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to regular jurors. The great principles of the constitution are intimately

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70. Historically, one of the most central issues of the day was the War of Independence and the forming of a new national government.

71. See Robert Mark Savage, *Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750–1776*, at 24 (2011) (unpublished Ph.D. dissertation, Columbia University), available at <http://academiccommons.columbia.edu/catalog/ac:131400>.

72. See e.g., GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 614–15 (Univ. of North Carolina Press 1998) (1969).

73. The United States Constitution was signed in 1787 and the Bill of Rights in 1791.

74. See generally *THE FEDERALIST PAPERS; THE ANTI-FEDERALIST PAPERS*.

75. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 237 (2005); DAVID MCCULLOUGH, *JOHN ADAMS* 65 (2001).

76. James Madison stated, “The people who are the authors of this blessing [the Constitution], must also be its guardians.” 14 *THE PAPERS OF JAMES MADISON* 218 (Robert A. Rutland et al. eds., 1983); see also MICHAEL G. KAMMEN, *A MACHINE THAT WOULD GO ON OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 77 (1986) (stating that it took almost a generation for the first books about the Constitution to be written: “For a full generation after 1789, few books or pamphlets about the Constitution appeared. The earliest ones of any consequence were first published between 1823 and 1826, such as John Taylor of Caroline’s *New Views of the Constitution of the United States* (1823) and Thomas Cooper’s *On the Constitution of the United States, and the Questions that Have Arisen Under It* (1826) . . . .”); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 727 n.100 (1999).



known.”<sup>77</sup> Although not all jurors could claim Adams’s level of formal education, many jurors were among the more educated of the society.<sup>78</sup> As Douglas Smith noted, “Not only were [early] jurors more experienced with trial practice than modern jurors, but they were also, unlike modern jurors, among the better-educated members of society.”<sup>79</sup> In fact, many juries in colonial America consisted of individuals who had actually served in other branches of government<sup>80</sup> or were of the station to become elected officials.<sup>81</sup>

In practice, this higher level of education did not merely correlate with more learned jurors, but with jurors more educated about the role of the jury in society.<sup>82</sup> Jurors understood that the common law in America was still

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77. Middlebrooks, *supra* note 33, at 374 (quoting *Sparf v. United States*, 156 U.S. 51, 143–44 (1895)); *United States v. Polizzi*, 549 F. Supp. 2d 308, 407 (E.D.N.Y. 2008) (“It is not strange that jurors should, in the second half of the eighteenth century, know details of criminal law and punishment—matters of punishment of which many of our present jurors do not know and are deliberately kept from knowing. Criminal law then was much simpler than today . . .”), *vacated and remanded on other grounds by United States v. Polouizzi*, 564 F.3d 142 (2009).

78. Smith, *supra* note 33, at 460 (“While it is true that not all property holders necessarily were more educated than the average citizen (and the same might be said of women), on average, property holders could be expected to have the requisite wealth and leisure time necessary to obtain a greater amount of education.”).

79. *Id.* at 459–60.

80. Grand jurors in Virginia were generally men of high social standing. 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.”).

81. Savage, *supra* note 71, at 61 (“[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.”); *see also id.* at 62 (“Many of Topsfield’s [Massachusetts] political and social leaders from the late 1740s to the end of the 1770s learned early civic responsibility through jury service in the inferior and superior courts of Massachusetts.”); *id.* at 66–67 (“But the records of Topsfield do suggest that jury duty was a steppingstone toward a future of public responsibility and civic service. Of some eighty-six Topsfield jurors studied between 1748 and 1778, including some sixty-eight who were landowners enumerated in the Topsfield property allocations list of 1754, nearly all of them appear to have entered into law court culture at an early stage in their civic lives, as jurors.”).

82. Smith, *supra* note 33, at 434 (“[I]t was common for states to maintain requirements that individuals serving as jurors be well-informed and intelligent.”).

developing and that they had a role in that development.<sup>83</sup> Jurors were to be interpreters of the law, as well as decision-makers about the facts of a case.<sup>84</sup> To interpret the law meant to understand the law. While quite different from the role of the jury today, this idea of jurors judging law and fact had wide support among leading jury proponents. Thomas Jefferson,<sup>85</sup> John Adams,<sup>86</sup> Alexander Hamilton,<sup>87</sup> John Jay,<sup>88</sup> John Marshall,<sup>89</sup> and James Wilson<sup>90</sup> all are recorded as supporting a more participatory ideal of the jury role in interpreting the law.

Legal historians point to several reasons for this power of juries to judge the law. First, the common law tradition had

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83. See Amar, *Jury Service*, *supra* note 6, at 219.

84. Middlebrooks, *supra* note 33, at 388; see *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 189–91 (1964) [hereinafter *The Changing Role of the Jury*].

85. Middlebrooks, *supra* note 33, 354 (“If the question before [the magistrates] be a question of law only, they decide on it themselves; but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case of a combination of law and fact, it is usual for the jurors to decide the fact and to refer the law arising on it to the decision of the judges. But this diversion of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.” (alteration in original) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA QUERY XIV 1782 (1984))).

86. Middlebrooks, *supra* note 33, at 374 (“Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction of the court in point of law, was a legal determination of the issue. Therefore, the jury has a power of deciding an issue upon a general verdict. And if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience?” (quoting *Sparf v. United States*, 156 U.S. 51, 143 (1895))).

87. Middlebrooks, *supra* note 33, at 375 (“[I]t is not only the province of the jury, in all criminal cases, to judge of the intent with which the act was done, as being parcel of the fact; they are also authorized to judge of the law as connected with the fact.” (alteration in original) (quoting *People v. Croswell*, 3 Johns. Cas. 337, 355 (N.Y. Sup. Ct. 1804))).

88. See *Georgia v. Brailsford*, 3 U.S. 1 (1794).

89. Jon P. McClanahan, *The ‘True’ Right to Trial By Jury: The Founders’ Formulation and Its Demise*, 111 W. VA. L. REV. 791, 816 (2009) (“In the treason trial of Aaron Burr in 1807, Chief Justice Marshall declared in his jury instructions that ‘[t]he jury have now heard the opinions of the court on the law of the case. They will apply that law to the facts and will find a verdict of guilty or not guilty as their own consciences may direct.’”) (alteration in original).

90. Middlebrooks, *supra* note 33, at 377–78 (“[Justice] Wilson concluded by remarking ‘that the jury, in a general verdict must decide both law and fact, but this did not authorize them to decide it as they pleased: they were as much bound to decide by law as the judges; the responsibility was equal upon both.’” (quoting Justice Wilson’s jury charge in *Henfield’s Case*, 11 F. Cas. 1099 (1793))).

long tasked jurors with reflecting on the merits of the law.<sup>91</sup> Second, American legal systems were new, and so it made sense that juries would interpret the law to fit the developing sense of American justice.<sup>92</sup> Third, not all judges were actually lawyers, giving similarly situated citizen-jurors more claim to decide the legal issues presented.<sup>93</sup> Fourth, the codification process of criminal law had not developed, making legal determinations more of a case-by-case process.<sup>94</sup> Fifth, the influence of natural law philosophy allowed for more flexibility to ground legal determinations on moral principles.<sup>95</sup> Finally, jurors had vastly greater powers to determine the sentencing of convicted defendants—an equitable power that empowered them to make the law match the appropriate punishment.<sup>96</sup> No matter the justification, the result of this power was to entrust jurors with a greater responsibility to direct and shape the criminal justice system.

The argument that derives from this historical record is that in order for jurors to interpret the law, jurors also had to understand their role in the constitutional system.<sup>97</sup> This Article argues that one of the direct consequences of allowing juror interpretation was to force jurors to think about why they were able to interpret the law. To be a moral force in the community,<sup>98</sup> jurors had to think about how the jury fit into that community. To be a legitimate arbiter, citizens had to see the jury as rooted in a larger constitutional system. This, in turn, led to reflection on the participatory roots of the institution, the process of democratic deliberation, the

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91. *Id.* at 389 (citing SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 59 (1990)).

92. El-Haj, *supra* note 61, at 54 (“Moreover, the ‘law’ was much less certain than it is today. Written judicial opinions were infrequent and official reporters were uncommon at the Founding and through the early republic.”).

93. Alschuler & Deiss, *supra* note 5, at 905.

94. See Middlebrooks, *supra* note 33, at 409 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1975)).

95. *The Changing Role of the Jury*, *supra* note 84, at 172 (“Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.”).

96. Kemmitt, *supra* note 11, at 111–12.

97. Middlebrooks, *supra* note 33, at 389 (“[Adams’s, Jefferson’s, Hamilton’s, and Wilson’s] political and legal defense of an expanded jury role reflected a more basic and positive sense of men’s capabilities as knowers of law and of their own and the public interest.”).

98. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) (“The mere fact that a *jury* reached a particular decision lends moral force to that decision—much more than if it were reached solely by a judge.”).

importance of treating all citizens alike, and ultimately the fair accounting of a verdict. The process of jury service thus became a process of reflecting on and practicing foundational constitutional principles.<sup>99</sup>

Part of the educative effect of early juries also involved sharing this constitutional knowledge during jury service.<sup>100</sup> Jurors who were not traditionally educated were required to engage in this process with jurors who had more formal education.<sup>101</sup> As one scholar noted, “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.”<sup>102</sup> Jury service exposed ordinary citizens to other jurors who might have been taught constitutional principles through formal or informal education.

Importantly, this interchange meant that jury service became a space for discussion of constitutional principles. The jury allowed constitutionally aware citizens to interact and teach other citizens in a forum that encouraged discussion about the Constitution. Juries were not only a democratic space, but an educative space for constitutional principles to be learned, reflected upon, and practiced.<sup>103</sup>

Viewing juries as a space for ordinary citizens to learn and reflect about legal principles, including their own role in the justice system, goes a long way to explain the jury’s centrality to a developing democratic identity.<sup>104</sup> At a minimum, the

99. Middlebrooks, *supra* note 33, at 389 (“The American Revolution was not only about widening participation in the making of laws ‘but also about widening the space for reflective judgment about laws once made.’” (quoting STIMSON, *supra* note 91, at 59)).

100. Taslitz, *supra* note 76, at 732 (“Jury service teaches citizens their rights and duties, while requiring their active participation in Government.”).

101. Amar, *The Bill of Rights*, *supra* note 6, at 1186 (“The jury was also to be informed by judges—most obviously in the judges’ charges . . . Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct.”).

102. Blinka, *supra* note 67, at 562.

103. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 284 (1978) (“[J]uries were laden with veterans, who needed less instructing.”); Smith, *supra* note 33, at 459 (“[E]arly English and American juries were on average more experienced in trial practice than modern jurors because of the large number of trials for which they were impaneled and previous experience they often had serving on juries.”).

104. Savage, *supra* note 71, at 69–70 (“Yet in Virginia as in Massachusetts, jury service was also a typical preparation for higher public service. . . . 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

above summary demonstrates that the level of civic and constitutional understanding of jurors may have contributed to the positive reputation of the institution of the jury.

### B. *The Jury as “Public School”*

The theme of the “jury as a public school” established to teach the lessons required for democratic self-rule can be traced from the Founding Era to the present day. This section briefly outlines the landscape of this historical argument, looking at early writings around the ratification debates of the Constitution, at the observations of Alexis de Tocqueville a generational later, and then at how modern courts have embraced the same theme.

#### 1. Federalists/Anti-Federalists

The insight that the American jury could provide a teaching moment for constitutional discovery was recognized in parallel with its establishment as a constitutional right.<sup>105</sup> In the Constitutional Convention, the central role of the jury was one of the few issues adopted without significant disagreement.<sup>106</sup> Immediately after the Constitution was ratified without a civil jury right or a local criminal jury right, the Anti-Federalists initiated a national debate to establish a right to a civil jury trial, as well as a public and local criminal jury trial.<sup>107</sup> During the initial ratification debates, Anti-Federalists focused on the lack of jury protections in the constitutional text.<sup>108</sup> While the primary concern of Anti-

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colonial law court culture. And there is every reason to suspect that colonial Americans were willing to trust the courts precisely because they were willing to trust fellow citizen-jurors—their neighbors in the local community—who would be hearing their cause.”).

105. McClanahan, *supra* note 33, at 807 (“[S]ervice on a jury enables jurors to learn more about their legal rights, ultimately teaching them to function more effectively as citizens in a democratic society.”).

106. THE 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.”).

107. See Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292 (1966); Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L. J. 579, 598 (1993).

108. Robert L. Jones, *Finishing a Friendly Argument: The Jury and the*

Federalist writers involved the lack of a civil jury trial,<sup>109</sup> Anti-Federalist advocates also directly linked the institution of the jury to education.<sup>110</sup> It was through juries that citizens were expected to learn about public affairs and law.<sup>111</sup> As the Anti-Federalist author “Federal Farmer” wrote, “Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels [sic] and guardians of each other.”<sup>112</sup> Jurors were to acquire constitutional knowledge to protect the rights of other citizens.

Acquiring knowledge was necessary because not all jurors had the requisite legal education before jury service to decide the cases.<sup>113</sup> It was in jury service that the transfer of constitutional knowledge took place.<sup>114</sup> Further, because juries were entitled to interpret the law, this transfer of knowledge was necessary to legitimize the decisions in the eyes of the community.<sup>115</sup>

The Anti-Federalists also recognized the importance of educating the populace about constitutional values through formal declarations and practice.<sup>116</sup> Anti-Federalist theory maintained that foundational principles must be taught and

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*Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. Rev. 997, 1046–47 (2007).

109. *See generally id.*

110. *See* Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, at 245–51 (Herbert J. Storing ed., 1981); Letter from the Federal Farmer, No. 6 (Dec. 25, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 110, at 256–64.

111. *See* Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451 (2006).

112. Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), *supra* note 110, at 250.

113. Letter from the Federal Farmer, No. 15 (Jan. 18, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 110, at 350 (“[T]he freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties.”).

114. *Id.* (“[The jury] and the democratic branch in the legislature, . . . are the means by which the people are let into the knowledge of public affairs . . . .”); McClanahan, *supra* note 33, at 807.

115. Amar, *Jury Service*, *supra* note 6, at 219; *see, e.g.*, Letters from the Federal Farmer, No. 15 (Jan. 18, 1788), *supra* note 113, at 315 (“It is true, the laws are made by the legislature; but the judges *and juries* in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.”) (emphasis added).

116. *See* Amar, *Jury Service*, *supra* note 6, at 219.

experienced in order to enter the consciousness of the country.<sup>117</sup> Federal Farmer asked:

What is the usefulness of a [political or religious] truth in theory, unless it exists constantly in the minds of the people, and has their assent: — we discern certain rights [like] the trial by jury which the people . . . of America of course believe to be sacred, and essential to their political happiness. . . . [T]his belief . . . is the result of ideas at first suggested to them by a few able men, and of subsequent experience . . . it is the effect of education, a series of notions impressed upon the minds of the people by examples, precepts and declarations.<sup>118</sup>

In other words, principles like the importance of the jury must be taught because formal declarations were necessary to educate citizens about the underlying constitutional foundations.<sup>119</sup> Further, these principles “must be impressed upon the minds of the people” through a formalized process (like perhaps modern jury instructions) that reminds, declares, and serves as an example of the sacredness and relevance of constitutional principles.<sup>120</sup>

## 2. Alexis de Tocqueville

If the Anti-Federalists sketched the outline of the jury as an educational space, Alexis de Tocqueville, famed observer of American society, painted the full vision.<sup>121</sup> Traveling in America in the 1830s, Tocqueville studied political and cultural institutions, including the jury.<sup>122</sup> He documented the role these developing institutions had on American society, culture, and government.<sup>123</sup>

Tocqueville recognized explicitly that the American jury

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117. See Letter from the Federal Farmer, No. 16 (Jan. 20, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 110, at 196–203.

118. *Id.*

119. How these principles apply to the modern jury will be addressed in the next Part. See *infra* Part II.

120. Letter from the Federal Farmer, No. 16 (Jan. 20, 1788), *supra* note 113, at 196–203.

121. Amar, *The Bill of Rights*, *supra* note 6, at 1187.

122. TOCQUEVILLE, *supra* note 13, at 285.

123. Bruce Frohnen, *Tocqueville's Law: Integrative Jurisprudence in the American Context*, 39 AM. J. JURIS. 241, 241–43 (1994).

acted as a school to educate citizens about constitutional rights, governing law, and decision-making, and, thus, encouraged citizens to develop the skills and knowledge needed for democratic government.<sup>124</sup>

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 gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties.<sup>125</sup>

The “jury as public school” concept posits that it is on jury duty that the skills of citizenship get taught.<sup>126</sup> Judgment, natural intelligence, and substantive legal rights are all practiced with fellow citizens.<sup>127</sup> In addition, the public school idea accepts that the educative value of jury service involves imparting knowledge to ordinary citizens.<sup>128</sup> Again, this insight had been presumed by the Founding generation simply due to the reality of who could serve as jurors.<sup>129</sup>

Tocqueville saw that juries “exercise a powerful influence upon the national character.”<sup>130</sup> Juries in practice develop the skills and values of citizenship in a constitutional democracy. Tocqueville explicitly recognized that juries improved public virtue, equality,<sup>131</sup> deliberative judgment,<sup>132</sup> practical

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124. TOCQUEVILLE, *supra* note 13, at 285.

125. *Id.*

126. Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy the Majority Will, Individual Rights, Federalism, Religion, Civic Associations, and Originalist Constitutional Theory*, 59 ME. L. REV. 35, 44 (2007); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 480–81 (1997) (citing TOCQUEVILLE, *supra* note 13, at 284–85).

127. Amar, *The Bill of Rights*, *supra* note 6, at 1161.

128. *Id.* at 1187 (“In Tocqueville’s memorable phrase, ‘the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.’” (quoting TOCQUEVILLE, *supra* note 13, at 297)).

129. See *supra* notes 64–69 and accompanying text.

130. TOCQUEVILLE, *supra* note 13, at 284.

131. *Id.* (“It teaches [people] to practice equity; every [person] learns to judge his [or her] neighbor as he [or she] would [ ] be judged.”).



intelligence,<sup>133</sup> and raised the status of the jury as a “political” institution through this development.<sup>134</sup> He concluded that in terms of developing civically aware citizens, juries, and thus jury service, were one of “the most efficacious means” for the education of the people which society can employ.<sup>135</sup>

### 3. Continuing Echoes of the Jury as a Constitutional Classroom

The metaphor of the jury as a public school did not end in the 1830s. Modern courts still recognize that juries serve an educational role.<sup>136</sup> Court opinions recognize that this education is a constitutional one, emphasizing constitutional principles of democratic participation,<sup>137</sup> fairness,<sup>138</sup> equality,<sup>139</sup> civic responsibility,<sup>140</sup> deliberation,<sup>141</sup> and the

132. *Id.* (“The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right.”).

133. *Id.* at 285 (“I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.”).

134. *Id.* at 282–83 (“Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.”).

135. *Id.* at 287.

136. *Gannett Co. v. State*, 571 A.2d 735, 762 (Del. 1989) (Walsh, J., dissenting) (“The jury represents the public, bringing the public’s values and common sense to bear upon the problems of justice. In turn, the institution of the jury educates the public and heightens the civic awareness of each citizen.”); Kim Forde-Mazuri, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 351, 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.”).

137. *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (“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 a part of the judicial system of the country can prevent its arbitrary use or abuse.”).

138. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 501 (1993) (O’Connor, J., dissenting) (acknowledging the jury as the “traditional guarantor of fairness.”); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged*, 712 F. Supp. 994, 1005 (D. Mass. 1989) (“It is through the rule of law that liberty flourishes. Yet, ‘there can be no universal respect for the law unless all Americans feel that it is *their* law.’ . . . Through the jury, the citizenry takes part in the execution of the nation’s laws, and in that way each can rightly claim that the law partly belongs to her.” (quoting Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967))).

139. *See J.E.B. v. Alabama*, 511 U.S. 127, 145–46 (1994).

structural power of the jury.<sup>142</sup> As one court observed:

Perhaps what impressed de Tocqueville most about the jury system was the role which jury service plays in educating and enlightening those citizens selected as jurors and, through them, the citizenry as a whole . . . The lessons taught by this process are essentially those of fairness, equal treatment, and impartiality—the fundamental notions on which our democracy is based . . . When viewed in this light, jury service can be seen as an educational process which builds a greater sense of community and fills our citizens with a spirit of personal involvement in and commitment to their society. It educates our citizens and at the same time strengthens the entire social fabric.<sup>143</sup>

Echoing this theme, the Supreme Court in *Powers v. Ohio* directly linked jury service to political participation, reasoning:

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.<sup>144</sup>

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140. *State v. Allen*, 653 N.E.2d 1173, 1177 (N.Y. 1995) (describing jury service as “a privilege and duty of citizenship”).

141. Forde-Mazuri, *supra* note 136, at 364 (“Through deliberation with jurors from different groups or classes, jurors on representative panels learn to work together toward the shared goal of determining guilt or innocence in accordance with law and the community’s sense of justice.”).

142. *Anderson v. Miller*, 346 F.3d 315, 325 (2d Cir. 2003) (“For the Framers . . . the criminal jury was much more than an incorruptible fact finder. It was also, and more fundamentally, a political institution embodying popular sovereignty and republican self-government. Through jury service, citizens would learn their rights and duties, and actively participate in the governance of society.” (quoting AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 121–22 (1997))); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) (“The criminal jury is not simply a machine into which we insert data and out of which come ‘facts’ for judges’ use in legal rulings. It is also—and more importantly—an independent source of power in our constitutional system.”);

143. *Mitchell v. Superior Court (People)*, 729 P.2d 212, 230 (Cal. 1987), *vacated on other grounds by Mitchell v. Superior Court (People)*, 49 Cal. 3d 1230 (1989).

144. 499 U.S. 400, 407 (1991) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

Courts have recognized that the jury system “provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system.”<sup>145</sup> Like any school, the learning process is not simply one of receiving information, but learning to apply it to real problems and situations. So conceived by these courts, the jury plays an educational role that encourages constitutional awareness.

### C. *Creation of Constitutional Awareness*

The ideal of the jury as a space for constitutional education had significant effects on its reputation and power in American society. As stated, it justified a level of autonomy that equaled the other branches of government.<sup>146</sup> It also symbolized a linkage between ordinary citizens, educated citizens, and government that strengthened the legitimacy of the institution.<sup>147</sup> This shared constitutional knowledge of the jury’s role and its connection to constitutional principles elevated the institution of the jury in society.<sup>148</sup>

The ideal also had effects on the self-awareness of the jury. Primarily, this Article argues that this constitutional education meant that jurors understood their role and connection to the constitutional principles of jury service. As will be discussed in the next section, this constitutional awareness has been stunted in modern juries and needs to be examined. Before moving to that next section, however, it is necessary to develop a working definition of “constitutional awareness” for jurors.

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145. *United States v. Ibanga*, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (“The jury as an institution not only guards against judicial despotism, but also provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system.”), *vacated on other grounds by* *United States v. Ibanga*, 271 F. App’x. 298 (4th Cir. 2008); *see also* *Gannett Co. v. De Pasquale*, 443 U.S. 368, 428–29 (1979) (recognizing the public interest in “the manner in which criminal justice is administered”); Amar, *The Bill of Rights*, *supra* note 6, at 1190.

146. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1846 (1997).

147. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 94–95 (1998).

148. Of course, as will be discussed in the next section, those white, male, propertied citizens were only a small subset of the potential American citizenry and the reality of justice for non-white, male, property owners was starkly inadequate. *See, e.g.*, Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1145 (1993); James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 916 (2004); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1096 (1995).

While necessarily an over-generalization about early jury service, the ideal of constitutional awareness can be summarized as having six interrelated parts. First, juries understood that they were part of the constitutional structure.<sup>149</sup> Juries were expected to hold the legal system accountable as well as the individual defendant or parties to a legal action.<sup>150</sup> Second, juries understood that their role was participatory.<sup>151</sup> In explicit terms, the Founding generation saw juries as the participatory equivalent of democratic voting.<sup>152</sup> Third, juries embodied egalitarian principles.<sup>153</sup> Within the obviously undiverse reality of the times, juries promoted equality in voting (one person, one vote), equality in opinion, and equality in status.<sup>154</sup> Fourth, rules of due process promoted fairness and protections against arbitrary government actions.<sup>155</sup> Fifth, the jury was expected to deliberate to a decision.<sup>156</sup> Deliberation was a prized

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149. See *supra* note 9 and accompanying text.

150. See *supra* note 53 and accompanying text.

151. See *supra* note 4 and accompanying text.

152. Amar, *Jury Service*, *supra* note 6, at 218 (“Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government.”); see also 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”).

153. As Tocqueville noted, “The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.” See TOCQUEVILLE, *supra* note 13, at 282–83; Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 728 (1991) (“Lay participation in debates concerning public policies is a touchstone of a democracy. The Constitution enshrines this value not only by providing for a system of elected representatives, but also by recognizing the right to trial by jury.”).

154. Gretchen Ritter, *Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment*, 20 L. & HIST. REV. 479, 481 (2002) (“In the United States, jury service is historically tied to voting. In most states, a common qualification for jury service was the status of elector—that is, a citizen with the right to vote. This also fit with the nineteenth-century woman rights movement’s conception of citizenship. As equal voting citizens, women would obtain all of the rights and privileges of other first class citizens, including the right to serve on a jury.”).

155. See *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968) (detailing how juries protect against arbitrary or unfair prosecutions).

156. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 701 (2001); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*, 6 S. CAL. INTERDISC. L.J. 1, 40 (1997).

constitutional value that included the ability to reason, to communicate with others, and to debate and decide.<sup>157</sup> Finally, jurors recognized their educative role.<sup>158</sup> Their identity as citizen emerged from the lessons of jury service. Jurors saw themselves as democratic citizens educated to make decisions in a constitutional system.

From the perspective of a judge or jury scholar, an awareness of these concepts is unexceptional. Yet, strikingly, today's jurors are neither instructed about these foundational principles, nor the jury's constitutional role in practicing those principles. Worse, modern jurors cannot, like their historical counterparts, be assumed to know about these principles from formal education or life experience. This gap in modern constitutional awareness is the subject of the next section.

## II. THE JURY "IDEAL" TODAY

The ideal jury may never have existed, and it certainly does not exist today. Courts have stripped juries of the historic power to decide the law and have limited their role through jury instructions.<sup>159</sup> Juries today are problem-solvers and fact-finders that are asked to play a discrete task in the larger workings of the criminal justice system.<sup>160</sup> This shift in power has been well canvassed by others, so this Article will not retread this history of jury diminution.<sup>161</sup> Instead, this section focuses on how this power transfer has included a shift in the educative role of the jury and on the impact this has had on the public perception of the jury. More precisely, this section asks

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157. REID HASTIE ET AL., *INSIDE THE JURY* 45–58 (The Lawbook Exchange, Ltd. 1983); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 2, 23 (2001).

158. Amar, *The Bill of Rights*, *supra* note 6, at 1186 (“The jury was also to be informed by judges—most obviously in the judges’ charges . . . . Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct.”).

159. *See Sparf v. United States*, 156 U.S. 51, 90–91 (1895); Middlebrooks, *supra* note 33, at 334–35; *The Changing Role of the Jury*, *supra* note 84, at 189–91.

160. *See supra* text accompanying note 9 (describing “role of the jury” instruction).

161. *See, e.g.*, Blinka, *supra* note 25, at 179–81; McClanahan, *supra* note 33, at 813–16; Smith, *supra* note 33, at 447–49. Of course, the role of the jury has made a limited resurgence in terms of deciding all of the facts in criminal cases. *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

whether, compared to the jurors of the Founding era, today's jurors are more or less educated about the constitutional role of the jury, and whether that difference has had any effect.

At the outset, it is necessary to state that, empirically, there is no definitive answer to this question as it relates to jurors. There have been no national research studies to evaluate constitutional literacy among jurors. As will be discussed, while national studies on constitutional literacy have yielded disappointing results in terms of substantive knowledge, none of these reports can be directly tied to those on jury service.<sup>162</sup> Further, there is no necessary correlation between an unimpressive understanding of basic civics and competent jury verdicts. In fact, due to mandatory public schooling, the increased diversity of the jury pool, and the general increase in information in a digital age, today's jury may well be more educated about many subjects (even if not foundational constitutional principles) compared to a founding-era jury.

This section does not seek to judge the relative merits of juries in different eras, but rather, to point out how the different compositions and different roles reveal a gap in constitutional awareness. Today's jury is more diverse and more democratic, but did not experience the same lessons of constitutional formation (and cannot be assumed to bring to jury service the same level of constitutional knowledge).<sup>163</sup> In addition, today's jury is called on to perform a different role with more limitations than earlier juries. The result is that the naturally arising space created for constitutional discussion and reflection no longer exists in its traditional form. Whether because of or in spite of these changes, society's image of the jury no longer rises to a level of reverence and, on occasion, invites disappointment and outrage.<sup>164</sup> The question raised is whether this modern jury can be improved with an additional focus on educating jurors about their constitutional role while on jury duty.

#### A. *Democracy, Diversity, and Juror Education*

In practice today, the jury represents the full diversity of

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162. See *infra* Part II.A.

163. See *infra* notes 169–83 and accompanying text.

164. See, e.g., Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U.L. REV. 190, 191–92 (1990).

American citizenship.<sup>165</sup> *De jure* and *de facto* barriers to jury service based on race,<sup>166</sup> gender,<sup>167</sup> and class<sup>168</sup> have been

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165. This statement necessarily must be qualified by the reality that certain segments of the population are not represented on jury service. Felons and individuals without a fixed address are two obvious groups regularly excluded from jury summons.

166. See Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249 (1992); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 900–02 (2004); Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129 (1996). With the enactment of The Jury Selection and Service Act of 1968, Congress eliminated racial discrimination in federal jury trials. See JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99–100 (2001). By mandating a random selection method for jurors, this Act and the state equivalents have dramatically widened and diversified the jury pool. See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880); Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 733 (2006) (“The modern American jury is the product of a multi-stage selection process that typically begins with a list of potentially eligible jurors drawn from voter registration lists and often supplemented by individuals holding drivers’ licenses in the general geographic area where the court sits. If the list has not been recently updated, it becomes less representative of the population from which it is drawn.”).

167. The battle for gender equality in jury service began before the Women’s Suffrage Movement and lasted well past the passage of the Nineteenth Amendment. See JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 126–38 (1994); Ritter, *supra* note 154, at 497–500; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–76 (2002). It was not until 1975 that the Supreme Court invalidated gender discrimination in jury selection. *Taylor v. Louisiana*, 419 U.S. 522 (1975). In *Taylor*, the Court recognized that women could not be excluded from jury venires, invalidating the few state laws that still had antiquated jury exemption procedures on the books. See *id.* at 537–38. Today the ideal of racial and gender diversity in the jury venire is constitutionally required by the Fourteenth Amendment’s equal protection clause. See Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 518 (1994); Harden, *supra* note 34, at 247–57.

168. The movement toward diversity has also meant a rejection of property requirements and other class based considerations for jury service. See Nancy Gertner, *Juries and Originalism: Giving “Intelligible Content” To the Right To A Jury Trial*, 71 OHIO ST. L.J. 935, 939–40 (2010). State by state, the requirement of property ownership has been repealed. See Deiss, *supra* note 66, at 350. The Supreme Court has also rejected class-based criteria, such as laws that precluded non-salaried workers from serving on a jury. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). (“[R]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system.”). The result of federal, state, and judicial intervention is a representative cross-section ideal that strives for a diverse jury venire. Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*, 6 PSYCHOL. PUB. POL’Y & L. 788, 792 (2000) (“[W]ith 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.”).

broken down over two hundred years.

This expansion of jury access to mirror all eligible citizens has had a tremendously positive effect on the legitimacy of the jury system and has improved its everyday operations.<sup>169</sup> Jurors are now more diverse, bringing different life experiences and skills into the jury room.<sup>170</sup> Jury decisions incorporate these new perspectives.<sup>171</sup> Jury deliberations and verdicts can be said to more appropriately reflect community sentiment.<sup>172</sup>

At the same time, diversity has also resulted in a more educationally diverse jury pool.<sup>173</sup> An educationally diverse jury pool has not necessarily meant more or better educated jurors. In fact, one consequence of expanding the jury pool has been to lower the average education level of the average jury. Further, statistical studies show that a greater percentage of highly educated jurors are struck during jury selection, making the resulting jury on average less educated than the overall venire.<sup>174</sup>

This Article focuses on one component of that educational reality—constitutional knowledge. The national statistics on constitutional literacy in America should raise concerns in the

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169. Samuel R. Sommers & Pheobe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1022 (2003).

170. Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1326–28 (1996).

171. Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 227 (2008) (“One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury. Heterogeneous juries have an edge in fact finding, especially when the matters at issue incorporate social norms and judgments, as jury trials often do.”).

172. See Sommers & Ellsworth, *supra* note 169, at 1024 (“According to an informational explanation, the nature of the informational exchange in the jury room (i.e., the content of the discussion during deliberations) varies with the race of the jurors involved. For example, racial composition might influence the breadth of information considered by juries. Jurors of different races not only tend to enter deliberations with different verdict preferences, but they may also bring to the jury room different personal experiences, social perspectives, and concrete knowledge. Therefore, racially heterogeneous juries might be exposed to a wider range of viewpoints and interpretations than jurors on homogeneous juries.”)

173. Due to the fair cross-section requirement, juries are more educationally diverse. Friedland, *supra* note 164, at 193 (“[J]uries are composed of people from every walk of life, color, creed, and, perhaps most importantly, every level of intelligence and education.”); Honorable J. Scott Vowell, *Alabama Pattern Jury Instructions: Instructing Juries in Plain Language*, 29 AM. J. TRIAL ADVOC. 137, 141 (2005) (commenting on the wide variance in formal education in jurors).

174. Albert W. Alschusler, *Explaining the Public Wariness of Juries*, 48 DEPAUL L. REV. 407, 408 (1998) (explaining “the public who serve as jurors are less educated than the norm”).



jury context. Study after study<sup>175</sup> and article after article<sup>176</sup> have exposed a fundamental ignorance about basic constitutional principles.<sup>177</sup> Citizens do not know that there are three branches of government,<sup>178</sup> how many Justices serve on the Supreme Court,<sup>179</sup> what protections the Bill of Rights contains,<sup>180</sup> and are ignorant of the substance of basic

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175. See *infra* note 176 and accompanying text.

176. LARRY J. SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY 223 (2007); Brian Braiker, *Dunce-Cap Nation*, NEWSWEEK, Sept. 4, 2007, <http://www.thedailybeast.com/newsweek/2007/09/04/dunce-cap-nation.html>; Eric Lane, *Saving Democracy With Civic Literacy in America 101*, UTNE READER, (Jan.–Feb. 2009), <http://www.utne.com/Politics/America-101-Civic-Literacy-Saving-Constitutional-Democracy.aspx>; Julia Preston, *New Test Asks: What Does 'American' Mean?*, N.Y. TIMES, (Sept. 28, 2007), [www.nytimes.com/2007/09/28/washington/28citizen.html](http://www.nytimes.com/2007/09/28/washington/28citizen.html); Andrew Romano, *How Dumb Are We?*, NEWSWEEK, (Mar. 20, 2011), <http://www.thedailybeast.com/newsweek/2011/03/20/how-dumb-are-we.html>.

177. Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge As the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 988 (2008) (“There is no question that there is a gaping ignorance among the electorate as to the functioning of government in general, and the courts in particular. A variety of national studies indicate that American students know little about American history or concepts fundamental to our democracy. . . .”); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995) (“Among a group of seventy high school student leaders from all over the country, only seven had even *heard* of the *Federalist Papers*.” (citing WILLIAM J. BENNETT, NAT’L ENDOWMENT FOR THE HUMANITIES, TO RECLAIM A LEGACY: A REPORT ON THE HUMANITIES IN HIGHER EDUCATION 21 (1984))).

178. Lane, *supra* note 176 (“Forty-one percent of respondents to the National Constitution Center survey were not aware that there were three branches of government, and 62 percent couldn’t name them; 33 percent couldn’t even name one.”).

179. PENN, SCHOEN & BERLAND ASSOCS., C-SPAN SUPREME COURT SURVEY (July 9, 2009) (stating that 51 percent of respondents did not know or got wrong the number of justices on the Supreme Court); ANNENBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNENBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS (2007) (“Only one in seven Americans (15 [percent]) can correctly name John Roberts as Chief Justice of the United States; 78 [percent] don’t know. Two-thirds of Americans (66 [percent]) know at least one of the judges on the Fox television show American Idol. In a 2006 survey, less than one in ten (9 [percent]) could identify the Chief Justice.”).

180. Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 51 n.210 (2001) (discussing “a Roper poll asking Americans what the Bill of Rights was. Only 21 percent of Americans were correctly able to identify the Bill of Rights as part of the Constitution. Thirty-five percent claimed to have heard about it but could not identify it in any way, and 27 percent admitted that they had never heard of it. Four percent misidentified it but revealed that they had some idea about its content, while another 5 percent misidentified it while indicating no knowledge about its content, and 8 percent gave answers otherwise classified or no answers.” (citation omitted)).

constitutional rights.<sup>181</sup> While citizens know what juries do, most do not know why the jury right was included in the Constitution.<sup>182</sup>

Compounding general constitutional illiteracy, civics classes have been stripped from high school curricula, limiting any formal opportunity to learn the subject.<sup>183</sup>

Civics and current events courses were once common, even required, in American schools. But since the late 1960s, civic education in the country has declined. The main culprit in this sad tale is our educational system. Since the late 1960s, fewer and fewer schools require civics courses, and fewer include civic components in their American history courses.<sup>184</sup>

“More than half the states have no requirement for students to take a course—even for one semester—in American government.”<sup>185</sup> While several national educational projects have been initiated by nonprofit organizations and larger civic foundations, these private efforts have not stopped the decline in mastery of American civics.<sup>186</sup> The unpleasant reality is that

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181. FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT (2009) (“Thirty-nine percent of Americans could not name any of the freedoms in the First Amendment.”); *see also Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll*, NAT’L CONSTITUTION CTR., <http://ratify.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/index.shtml> (last visited Sept. 6, 2012) (stating that “more than half polled do NOT know the number of US Senators . . . only 6 [percent] can name all four rights guaranteed by the First Amendment . . . 84 [percent] incorrectly believe that the Constitution states that ‘all men are created equal’”).

182. While this assertion lacks empirical support from studies or formal proof, from experience as a trial lawyer, I think it a fair assumption that the history of, and the reason for the jury is not widely known among the citizenry.

183. Lane, *supra* note 21, at 15–16 (“Various surveys have evidenced this decline. One in 1976 ‘found that civic competence diminished markedly from 1969 to 1976.’ . . . Another in 1988 found that civic knowledge had continued declining since 1976, and another in 2002 found ‘that the nation’s citizenry is woefully under-educated about the fundamentals of our American Democracy.’”).

184. Lane, *supra* note 176.

185. Backus, *supra* note 177, at 988–89 (quoting Stephen Goldsmith, *The State of Our Civic Union*, in NATIONAL CONFERENCE ON CITIZENSHIP: REPORT ON THE 2005 ANNUAL CONFERENCE 7, 8, available at [http://www.civicenterprises.net/MediaLibrary/Docs/national\\_conference\\_on\\_citizenship\\_2005.pdf](http://www.civicenterprises.net/MediaLibrary/Docs/national_conference_on_citizenship_2005.pdf)).

186. There are many constitutional literacy projects that have been developed. For example, the Washington College of Law at American University developed the Marshall-Brennan Constitutional Literacy Project to teach constitutional law to high school students. Justice O’Connor developed an internet-based civics project entitled Icivics. The Center for Civic Education, the National Alliance for

juries today are composed of individuals who have less understanding about the constitutional role of juries than in the past because they have a weaker understanding of the Constitution.

While the national picture of constitutional illiteracy has been exposed, no one has seriously suggested altering the eligibility requirements of jurors.<sup>187</sup> Primarily, this reticence derives from the legitimate concern that any limitation on jury access would replicate the discriminatory practices that kept certain citizens off juries in the past.<sup>188</sup> Literacy tests, even tests involving constitutional knowledge were used as discriminatory screening mechanisms to restrict democratic participation.<sup>189</sup> Concerned about repeating the mistakes of the past, the decline of constitutional awareness by jurors has been left unaddressed by society.

The benefits of jury diversity plainly outweigh the costs to constitutional awareness.<sup>190</sup> Yet, if acknowledged as a result of

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Civic Education, the Civic Missions of the Schools, the American Bar Association, the National Constitution Center in Philadelphia, and the National Archives in Washington D.C., are all actively involved in promoting civic knowledge and awareness.

187. The Supreme Court has recognized the tension of wanting a representative cross-section of jurors but also the need to retain a method for determining competence of those jurors. *Glasser v. United States*, 315 U.S. 60, 85–86 (1942) (“[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a ‘body truly representative of the community,’ and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.”).

188. Because of concern with jury competence, “[s]election systems in several jurisdictions were overhauled in order to boost the education levels of jurors.” King, *supra* note 57, at 2692 (responding to criticisms like those voiced in the article *The Unfit Juror*: “America has long suffered from the false teaching that every citizen is the equal of every other citizen, and by right is entitled to perform any service or hold any office of the state.’ Better care had to be taken, the author said, to ‘screen out unfit jurors in order to improve the caliber of juries’” (quoting Albert S. Osborn, *The Unfit Juror*, 17 J. AM. JUDICATURE SOC’Y 113 (1933))).

189. See G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 444 (2010) (describing the requirement that voters recite the Preamble to the United States Constitution before being added to the voting rolls, and thus the jury venire).

190. One need not re-litigate the hard fought battles for equality to recognize that democratic diversity has improved society overall. A pluralistic America has resulted in numerous benefits beyond the jury sphere. Cf. Franklin Strier, *The*

the democratization of the jury (in an era of reduced basic civics education and constitutional understanding), this does not mean the problem should go unaddressed. Specifically, this Article proposes reclaiming the space for constitutional dialogue in a manner that raises the constitutional awareness of all jurors. As will be discussed later, this is what constitutionally focused jury instructions will accomplish.

### B. *The Role of the Fact Finder and Juror Education*

By some accounts, the fact that jurors are less educated about constitutional issues matters less today than in the Founding era.<sup>191</sup> This is because the role of the juror has been significantly restricted.<sup>192</sup> Juries are no longer asked to interpret the law.<sup>193</sup> “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.”<sup>194</sup>

This change in role began in the nineteenth century<sup>195</sup> with several prominent judges arguing to restrict juries’ traditional power to decide the law.<sup>196</sup> Judges were joined in

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*Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 59 (1997) (stating that some scholars have proposed a requirement of an educated jury for certain cases: “The major premise of the educated jury proposal is utility: All other factors being equal, the knowledge, discipline and cultivated intellect gained from a college education should render one better equipped to execute the juror’s fact-finding and application-of-law tasks. This is not elitism; it is merely functionalism.”); *id.* at 60 (“In sum, a predominantly college-educated jury, having superior capacity for understanding the relevant facts and law in complex cases, would render better informed and, thus, more just verdicts.”).

191. As will be discussed in this section, because the responsibilities of the jury have been limited significantly, it can be argued that there is less need for educated jurors.

192. Jonathan Lahn, *The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and Its Challenge for Contemporary Society*, 57 CLEV. ST. L. REV. 553, 556–59 (2009).

193. Harrington, *supra* note 18, at 435–37; Howe, *supra* note 33, at 583–84.

194. 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) (recognizing that Georgia, Maryland, and Indiana have state law protections for jurors to decide the law, but they are in large measure ignored).

195. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C. D. Mass. 1835) (No. 14,545); McClanahan, *supra* note 33, at 820. Alschuler & Deiss, *supra* note 5, at 910; *The Changing Role of the Jury*, *supra* note 84, at 170 (tracing the shift of juries in the nineteenth century as including both a limitation on the jury to determine the law, but also a limitation on the judge to comment on the law).

196. R. J. Farley, *Instructions to Juries: Their Role in the Judicial Process*, 42 YALE L. J. 194, 202–03 (1932) (citing Justice Story as a vocal critic).

their critiques by prominent national figures who took aim at the jury,<sup>197</sup> describing jurors as “miserable wretches,”<sup>198</sup> “drifters on the tide of life’s great activities,”<sup>199</sup> or “nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue.”<sup>200</sup> The Supreme Court formally stripped jurors of the right (if not the power) to decide the law in *Sparf v. United States*, declaring that the jury should no longer be instructed on their ability to interpret the law.<sup>201</sup> Jurors were fact finders, nothing more. State courts adopted this view, and it exists as the current understanding of the jury’s role.<sup>202</sup>

Scholars have offered several justifications for this change in jury role. Some scholars have argued that the change resulted from judges and lawyers who sought more control over trial procedures.<sup>203</sup> Both the professionalism in the legal field and the increased institutionalization of the legal system led to increased demands to retain this newly developed power.<sup>204</sup> At

197. See Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 SMU L. REV. 1857, 1881 (2001); Forde-Mazrui, *supra* note 136, at 354 (“Despite its crucial role, the jury is criticized as being inefficient, incompetent, confused, biased, and discriminatory.”).

198. Alschuler & Deiss, *supra* note 5, at 881 (“In Kentucky in 1858, a critic described jurors as ‘miserable wretches.’” (quoting EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH 113 (1984))).

199. A West Virginia Bar publication in 1896 asked: “What freeman ever dreamed in ancient days, and in the formative process of our inherited system, that his rights would be secured against the aggressions of the official class by a jury of hangers on, dependents, drifters on the tide of life’s great activities, desirous of drawing as a prize the pittance allowed by law for such service.” *The Federal Jury*, 3 W. VA. B. 11 (1896); Middlebrooks, *supra* note 33, at 411 n.281.

200. Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 221 (1999); Thomas L. Fowler, *Filling the Box: Responding to Jury Duty Avoidance*, 23 N.C. CENT. L.J. 1, 3 (1997–1998) (“In 1803, the American edition of Blackstone’s Commentaries reported that, after the first day or two, juries hearing civil lawsuits in the rural areas of Virginia were ‘made up, generally, of idle loiterers about the court . . . the most unfit persons to decide upon the controversies of suitors.’” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 64 (St. George Tucker ed. 1803))).

201. *Sparf v. United States*, 156 U.S. 51, 90–91 (1895).

202. Alschuler & Deiss, *supra* note 5, at 910.

203. Smith, *supra* note 33, at 445 (“[O]ne 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 fill the vacuum left by the erosion in the jury’s power.”).

204. See Middlebrooks, *supra* note 33, at 355 (“Lawyers and judges eager to gain professional prestige and alliances with economically powerful commercial parties attempted to represent the law as an objective, neutral, and apolitical system.”).

the same time, concerns with the level of competence of ordinary jurors grew, providing the justification for judges to assert more formal control.<sup>205</sup> In addition, legal institutions had to respond to a developing national economic system<sup>206</sup> that required stability and predictability.<sup>207</sup> Certainly in the civil context, economic interests favored the appearance of rationality that came from judges controlling the decisions of juries.<sup>208</sup> These economic pressures paralleled scholarly theories that prioritized legal formalism<sup>209</sup> and rejected the earlier influence of natural law.<sup>210</sup> Some scholars directly link a diminution in role to the democratized jury pool, arguing that increased jury diversity led to decreased jury power.<sup>211</sup> Others have blamed the complexity of legal claims that are outside the competence of most citizens.<sup>212</sup> No matter the cause for this diminished role, the result is the same—jurors now have a more limited role.

Current jury instructions contribute to the prevailing idea

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205. Landsman, *supra* note 107, at 607 (“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.”).

206. Economic development, which rebalanced the relationship between debtors and creditors, also led to a question of the role of the jury. Middlebrooks, *supra* note 33, at 408 (citation omitted).

207. *Id.* at 355 (“Economic shifts led to the need for certain and predictable rules of law.”).

208. *See id.*

209. *See id.* at 410.

210. *See id.* at 408 (citation omitted).

211. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Power of the Civil Jury*, 80 CORNELL L. REV. 325, 355 (1995); Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 923 (2003).

212. Alschuler & Deiss, *supra* note 5, at 916 (“Over the course of the nineteenth century, as American society grew more diverse and jury membership more inclusive (and as the legal issues presented to the courts grew more complicated), the belief that jurors’ consciences would yield sound, shared, consistent answers to legal questions undoubtedly faded.”); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1359 (1979) (concluding that jurors did not understand the jury instructions); Friedland, *supra* note 164, at 191 (“In the highly publicized criminal fraud, racketeering, and tax case of former automaker John DeLorean, the jury apparently misinterpreted the court’s instructions regarding the need for jury unanimity.”); *id.* at 197 (“Jurors also have been unable to follow the instructions given to them by the court. Several studies have suggested that jurors do not understand either the specific words used in the instructions or the overall meaning, disabling the jurors from adequately applying those instructions to the evidence in a case.”); *see also* Cecil, Hans & Wiggins, *supra* note 153, at 728.

that the role of the juror is limited.<sup>213</sup> Arising in the 1930s as a reaction to the new role of juries, these instructions create a framework for controlling jury decision-making.<sup>214</sup> Most standard jury instructions provide instruction on the “role of the jury.”<sup>215</sup> In almost all cases, the role is limited to finding the facts.<sup>216</sup> For example, the instruction in New York State 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. I now instruct you that each of you is bound to accept the law as I give it to you.”<sup>217</sup> This narrowed responsibility is a direct consequence of the *Sparf* decision and subsequent

213. Marder, *supra* note 111, at 451; 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, 164–65 (2004); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1102–03 (2001) (discussing problems in comprehension).

214. Strier, *supra* note 190, at 52–53 (recognizing that the first standardized jury instructions were developed in 1938, by “a committee of California judges and lawyers [who] published the Book of Approved Jury Instructions.”); Tiersma, *supra* note 213, at 1082–84 (history of jury instructions).

215. Each of the fifty states, the federal courts, and the District of Columbia have now established standard jury instructions. *See, e.g.*, ARK. SUP. CT. COMM. ON CRIMINAL JURY INSTRUCTIONS, 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 to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law.”); JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 200 (“You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial. . . . You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.”); 5 CONN. PRAC., CRIMINAL JURY INSTRUCTIONS § 2.1 (4th ed.) (“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.”); 2 GA. JURY INSTRUCTIONS—CRIMINAL § 0.01.00 (“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.”); 1 HAWAII STANDARD CRIMINAL JURY INSTRUCTIONS No. 3.01 (2011) (“You are the judges of the facts of this case. You will decide what facts were proved by the evidence. However, you must follow these instructions even if you disagree with them.”); SUP. CT. COMM. ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL 1.01 (4th ed.) (“It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case.”); 10 MINN. PRAC., JURY INSTRUCTION GUIDES—CRIMINAL CRIMJIG 3.01 (5th ed.) (“It is your duty to decide the questions of fact in this case. It is my duty to give you the rules of law you must apply in arriving at your verdict.”).

216. *See generally supra* text accompanying note 215.

217. 1 HOWARD G. LEVENTHAL, CHARGES TO JURY & REQUESTS TO CHARGE IN CRIMINAL CASE IN N.Y. § 3:2.

interpretations.<sup>218</sup>

The result is to eliminate any need to reflect on the jury role. It was in determining the law that jurors were directly asked to give moral weight to the decision. Many juries, because the jurors were aware of the sentencing effects of their verdict, redefined the law in order to reach a particular outcome.<sup>219</sup> The latitude given meant that jurors would ask the questions: why are we here, what is justice, and what is our role in defining justice? By defining the role of the jury as merely a fact-finding enterprise, the instructions obviate any need to discuss the jury role in the constitutional system. A juror does not have to think about what a juror does; he or she just has to complete the task presented. A juror does not have to understand why the jury is tasked to take on this particular adjudicatory role. The jury need not discuss what values the jury system promotes. The organically arising opportunity to discuss the participatory system of jury service or the principles embedded in the system has been lost and little has been offered to replace it.

*C. Reexamining the Jury Today and the Effect on Juror Education*

Today's jury involves a different juror and a different role. Jury instructions restricting the role of the jury now mirror the limited role delineated by Supreme Court precedent.<sup>220</sup> The question remains whether this limited role affects the educational function of the jury. In other words, since we expect jurors to know less and to do less, does that change how jurors participate in the jury system and learn from the jury

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218. There are a few states that allow some latitude in informing jurors about the jury's right to interpret the law. *See, e.g.*, ALASKA CRIMINAL PATTERN JURY INSTRUCTION 1.01 ("You have been selected as jurors in this case. Before you take the juror's oath, I want to remind you how serious and important it is to be a member of a jury. Trial by jury is a fundamental right. In a jury trial, the case is decided by citizens who are selected fairly, who are not biased, and who will try their best to give a fair verdict based on the evidence."); IND. PATTERN JURY INSTRUCTIONS CRIMINAL INSTRUCTION NO. 13.03 (2012) ("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."); MD. CONST. DECLARATION OF RIGHTS art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.").

219. Kemmitt, *supra* note 11, at 101-02.

220. *See supra* Part II.B.



experience? More precisely, does this limited instruction, combined with a less constitutionally educated population, mean that jurors miss the important constitutional teaching moment of jury service?

The working hypothesis of this Article is that a lack of instruction on the constitutional principles behind the jury system and a less constitutionally literate population has led to a lack of contextual understanding of the role of the jury.<sup>221</sup> Jurors are not told that they are in the public schoolhouse for citizens. Jurors unfamiliar with Tocqueville's theories would not be aware of the constitutional lessons at play. Current jury instructions do not focus on teaching constitutional principles.<sup>222</sup> While jurors are instructed to deliberate, they are not instructed about why deliberation matters. Jurors are instructed on burdens of proof and beyond a reasonable doubt, but not the underlying idea of due process. *Voir dire*, rules of evidence, and procedural protections control the trial, but jurors are not taught about the constitutional roots of fairness. Rules enforcing constitutional equality govern jury selection, even vesting the right to serve on a jury as a "juror's right,"<sup>223</sup> but jurors are not told about this right. The entire experience is a participatory constitutional act—from summons to excusal—but the jury instructions never explain this reality.

This, in turn, has led to three interrelated problems. First, this ignorance weakens the institution of the jury, its reputation, its legitimacy, and the self-perception of the citizen-juror. Second, the lack of constitutional awareness disconnects the jury experience from the larger participatory, democratic structure. Third, this lack of constitutional reflection may, in fact, unnecessarily limit jury deliberations, or at least change those deliberations from those of the Founding jury ideal. This assessment of the modern jury is, of course, necessarily an overstatement; some jurors are surely aware of the constitutional role of the jury.<sup>224</sup> The point here is less a challenge to the citizens asked to serve and more that the legal system itself has not taken steps to acknowledge this

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221. Cronan, *supra* note 28, at 1188 ("A growing mountain of empirical research is concluding, with shocking accord, that jurors retain alarmingly low comprehension of the most fundamental aspects of their roles.")

222. It is this omission that necessitates this article.

223. See *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

224. Although, from an informal sampling of friends and family, even highly educated lawyers are unfamiliar with the constitutional roots of jury duty and the jury's foundational place in the founding era.

significant absence of constitutional education and diminished space for constitutional discussion during jury service.

In an effort to elevate today's ordinary jurors to meet the level of constitutional awareness of the Founding era, some minimal education through jury instructions should be implemented. In essence, the goal is to replace what had been an organically developed space for constitutional education with a more formal education. As will be discussed in the next two sections, the result will be an effort to raise the constitutional-awareness levels of all sitting jurors. This means figuring out a way to make jury instructions a means of constitutional education for citizens.

### III. WHY CONSTITUTIONAL EDUCATION THROUGH JURY INSTRUCTIONS MATTERS

The fundamental questions are: (1) does constitutional awareness improve jury verdicts?; (2) does it improve democratic society?; and (3) are there other benefits to the legal system in ensuring constitutionally-educated jurors? This section answers these questions in the affirmative, arguing that basic understanding about the constitutional role of the jury improves basic constitutional literacy, jury deliberations, jury engagement, democratic engagement, and the reputation and legitimacy of the jury as an institution. In addition, it argues that while nothing can replace a strong civics or legal education, using the moment of jury service as a civic space to educate citizens is a positive first step.

Modern juries, just like their predecessors, still theoretically play the role of civic schoolhouse. Thus, the importance of understanding constitutional values does not diminish even as the role of the jury becomes narrowed. If, as has been demonstrated, jury participation can be a valuable teaching moment, then the court can use this still existing civic space to educate its citizens. The goal is to take the best of the educative qualities of the "ideal juror" and apply it to a democratized and diverse citizenry.

#### *A. Constitutionally-Educated Jurors Will Improve Constitutional Awareness*

At a pragmatic level, introducing a measure of constitutional education into the jury process will improve

baseline constitutional awareness. Formally instructing the jury about the constitutional principles underlying the jury process will highlight these lessons for the jury. Like an actual school, the jurors will experience a moment of instruction that will then require them to apply that knowledge to the task at hand. Just as jurors learn about the elements of crimes, jurors can also learn about the constitutional lineage and value of their current role.

While the next two Parts of this Article will examine how this jury education would work in practice, there is little doubt that direct instruction about the Constitution will remedy a measure of the constitutional illiteracy demonstrated in national surveys. Constitutional terms and definitions defining a new constitutional language will be provided to the jury. Attentive jurors would be given a basic overview of how constitutional principles are applied in the jury setting. Reflective jurors will ask themselves more searching questions about how these principles affect the world outside the jury room. Most importantly, the opportunity to discuss and debate these issues in the jury room will be presented through the instructions.

Such a modification, itself, should be considered a positive development. As a goal, it echoes the educational theories of Federal Farmer and Alexis de Tocqueville that jurors will learn during jury service and bring that legal understanding back to the community.<sup>225</sup> As a symbol, it flags that court systems think constitutional understanding is important for citizens. Direct learning reaffirms the notions that jurors are expected to be informed, reflective bodies. Direct instruction adds to a juror's basic civic knowledge.

To be clear, the gap in constitutional literacy is broad and deep.<sup>226</sup> Citizens may have only a limited knowledge of the history or theory behind the American legal system.<sup>227</sup> Jury instructions that simply alert jurors that they are participating within a constitutional structure or that deliberative decision-making is important to democracy cannot remedy the underlying educational deficiency. That said, identifying,

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225. See *supra* Part I.

226. See *supra* Part II.

227. See Paul E. McGreal, *Review Essay of Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Contemporary Constitutional Issues*, 30 IND. L. REV. 693, 707 (1997) ("The problem of public ignorance of text is compounded by public ignorance of the historical setting and meaning of the Constitution.").

highlighting, and providing a formal structure to examine the concepts with fellow citizens begins the process of constitutional awareness.<sup>228</sup> Providing a new vocabulary of constitutional terms or reminding citizens of the application of those terms, adds to a citizen's knowledge. Requiring citizens to reflect on those values while applying them will add an additional level of reflective learning.<sup>229</sup>

More importantly, the formal setting of a courtroom with an authoritative judge and a class of fellow citizens, makes otherwise theoretical lessons immediately relevant.<sup>230</sup> Jury service may be one of the few remaining spaces where the Constitution is directly applied by ordinary citizens.<sup>231</sup> Like many moments of forced concentration, this is a real "teaching moment" in which the student must understand and then apply the principles with real consequences. The same juror who might ignore a lecture on "constitutional values," might engage the same principles in the jury room.

Experience shows that jurors engage constitutional principles throughout their jury experience. The change proposed here is to make jurors aware of that experiential education as it happens. Naming, defining, and emphasizing the constitutional role of juries requires an intentionality of teaching constitutional principles at the moment they are most relevant to a citizen. This public education about constitutional principles can only serve to remind citizen-students about the

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228. While one can envision other proposals to encourage civic participation and understanding in jury service—including discussion groups, seminars, book clubs, social media sites, virtual bulletin boards, etc.—the suggestion to use jury instructions is an easy way to implement the same goal of constitutional engagement. In addition, it will reach a broad and essentially captive audience.

229. Scholars who have studied reflective learning in law schools and through law school clinics offer relevant support for this argument. *See generally* Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49 (2004); Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000).

230. The work of scholars that study "adult learning theory" may add support to this moment of education. *See generally* Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982); Susan L. Brooks & Robert G. Madden, *Epistemology and Ethics in Relationship-Centered Legal Education and Practice*, 56 N.Y.L. SCH. L. REV. 331, 358 (2011–2012) (citing the work of Jack Mezirow and Fran Quigley); 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).

231. Other areas of direct constitutional action involve paying federal taxes and using the Federal Post Office. *See* U.S. CONST. art. 1, § 8.

importance of the underlying subject matter.<sup>232</sup>

*B. Constitutionally-Educated Jurors Will Improve the Jury's Reputation*

Beyond formally teaching the juror about the constitutional role of the jury, the process of educating through jury instructions will have positive collateral effects. Importantly, it may counteract the negative (if false) impression of jurors as ignorant or incompetent.<sup>233</sup> Again, while decision-making by juries has been vindicated by scholars and researchers as being generally competent and accurate, it is not always perceived as such.<sup>234</sup> Even if juries tend to get it right,<sup>235</sup> jurors are not seen as getting it right.<sup>236</sup>

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232. McGreal, *supra* note 227, at 713 (“By removing the Constitution from public debate and lawmaking, constitutional illiteracy threatens the vitality of the Constitution itself.”).

233. Cecil, Hans & Wiggins, *supra* note 153, at 745 (“My aim has simply been to show how an institution run by amateurs, directed and organized by ordinary people, using their common sense, and following formal rules can perform its duty in a consistently responsible manner; how it can stand above popular prejudice and deliver verdicts that experts steeped and trained in the law respect.” (citing RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 147 (1980))) (summarizing studies). These studies responded to criticisms of others. *See* Cecil, Hans & Wiggins, *supra* note 153, at 733 (“Chief Justice Warren Burger of the United States Supreme Court led the critics, suggesting that jurors lack the abilities required to deal with the complex issues often presented in federal civil trials.”).

234. *See* Hans & Vidmar, *supra* note 171, at 227 (“Furthermore, in systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases.”).

235. Leigh Buchanan Blenen, *The Appearance of Justice: Juries, Judges, and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1114 (1996) (quoting Judge LaDoris Cordell, who stated: “I have been talking to the jurors at the end of the case, with permission of counsel. They know the issues fairly well. They are fairly sophisticated in terms of who gave a good presentation. They understand the games being played by lawyers, and they really do want to do what’s fair and just. Are they hampered sometimes by rules of evidence? Yes. Have they been affected by some of the rhetoric concerning product liability law, tort law? Is there a dislike of lawyers? Yes. But in the end their verdicts, I think, are sound”); Honorable J. Scott Vowell, *Alabama Pattern Jury Instructions: Instructing Juries in Plain Language*, 29 AM. J. TRIAL ADVOC. 137, 151 (2005) (“Those of us who try cases and work with jurors in the Alabama courts are regularly amazed at the collective wisdom shown by our juries. The jury system in Alabama works, and it works very well.”).

236. *See* Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions*, 48 DEPAUL L. REV. 221, 235 (1998) (“Why do judges think so much more highly of juries than the public at large does? Perhaps it results from judges having the advantage of comparing their own judgments about a case with the verdict returned by the jury. When they find the juries’ verdicts usually

This perception problem can be improved by court-directed public education. Much of the criticism of the modern jury centers on legitimacy.<sup>237</sup> Jury verdicts are deemed illegitimate because of criticisms of the jurors, not the institution of the jury.<sup>238</sup> Jurors are accused of being ignorant, swayed by emotion, racial hostilities or sympathies, confusion, or charismatic lawyers.<sup>239</sup> Tasked to find the facts and apply the law to the facts, jurors are seen to be manipulated by the “show” of trial.<sup>240</sup> While inaccurate, this stereotype is not illogical.<sup>241</sup> Why would we consider jurors as competent as judges, when jurors, as opposed to judges, often have no formal education or training?<sup>242</sup> Why would we think of jurors as educated when there are no education requirements? In addition, the stereotype feeds from the narrative that jurors are merely fact finders, reduced to deciding which side tells a better story, rather than making a moral and legal judgment.

Infusing constitutional principles in jury instructions serves two purposes to counteract a reputation of ignorance or incompetence. First, as mentioned, jury instructions literally

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are the same as, or not unreasonably different from, their own, they find validation not only in their own thinking about the cases, but in the jury as well. We might wonder what the public would think of the jury if it could observe them as judges have the opportunity to observe them.”)

237. See Cecil, Hans & Wiggins, *supra* note 153, at 728; Ellsworth & Reifman, *supra* note 168, at 789–90 (“Solid, grey statistics, however reliable, are hardly likely to capture the public imagination, particularly when they show no major changes. A vivid example, an egregious verdict, the true-life story of a stubborn irrational juror: These attract our attention, enliven our conversations as we hear and repeat them again and again, and ultimately shape our attitudes.”); Saks, *supra* note 236, at 233.

238. Strier, *supra* note 190, at 55 (listing studies of jury misunderstanding in complex cases).

239. Even the Supreme Court has weighed in on this concern. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 473 (1993) (O’Connor, J., dissenting) (“Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking.”).

240. Blenen, *supra* note 235, at 1113 (quoting Judge LaDoris Cordell, who stated: “A jury trial really, I think, is no different today than a sporting event. Attorneys are the combatants, judges are inadequate referees. The jurors are passive spectators, and the half time show is filled with hired gun experts and trial consultants”); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1129 (2001).

241. Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside The Black Box*, 99 MICH. L. REV. 365, 368, 397 (2000).

242. Young, *supra* note 194, at 139 (“That a sophisticated people would leave decisions affecting fortune, honor and life to a fixed number of individuals, selected at random, without regard to intelligence, experience or education would seem to defy rational explanation. The reasons lie in history.” (quoting LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* vii (1973))).

counteract the lack of education by educating.<sup>243</sup> Second, jury instructions ground jury decisions in constitutional terms.<sup>244</sup> As the concern with jury outcomes is, in part, an appearance problem, adding a constitutional gloss to the decisions will help to legitimize the jury verdict. Potential critics will see jurors as constitutional actors playing a constitutional role, not ordinary citizens. Jury verdicts will be constitutional acts, not merely factual determinations.

This change will also have an internal effect, as jurors will see themselves as constitutional actors. Such an elevated role comes directly from the recognition that deciding the facts in the case is a constitutional act, not merely an adjudicatory decision. This does not change the fundamental task, but only puts it in the appropriate historical and constitutional context. Jurors will learn and appreciate their own role as contributing to a constitutional system of government. Then, as jurors go back to society as ordinary citizens, they will bring with them this improved vision of the jury. Again, the lessons learned inside the jury room will be taken outside, improving the overall reputation of the institution.

This constitutional awareness might also change the way potential jurors view jury service.<sup>245</sup> Since its inception, citizens have tried to avoid jury duty based on perceptions of inconvenience or simply out of fear or apathy.<sup>246</sup> Adding a constitutional overlay and an educational enrichment component might change that perception. Again, while jurors who serve on juries usually leave with positive feelings about

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243. Sherry, *supra* note 176, at 132 (“[A]n education for republican citizenship, however, is very different from the right to an education for its own sake or for the benefit of the individual.”).

244. See *infra* Part IV; Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1042–44 (2009) (describing the unifying myth created by America’s constitutional identity).

245. Even Justice Souter, an ardent supporter of juries, acknowledged that for citizens “[j]ury 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.” *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

246. *Local 36 of Int’l. Fishermen & Allied Workers of Am. v. United States*, 177 F.2d 320, 340 (9th Cir. 1949) (“Even in the time of Bracton . . . [j]ury duty was regarded as oppressive. As today, the rich and powerful received exemptions from service, and the very poor were often let off because of their situation. The conscience of democracy and the greater education of the members of the body politic in the necessities of government has neither been sufficient to overcome the feeling nor to prevent the results.” (footnotes omitted)).

the experience,<sup>247</sup> it has not changed the overall negative perception about this civic duty. Rebranding jury service as constitutional service might improve that perception about jury duty.<sup>248</sup>

As a final matter, a reinvigorated jury tradition will improve the overall reputation of the judiciary. As an independent judiciary has recently been under assault from some quarters, putting “we the people” back into the legal decision-making process will add to democratic legitimacy. Jurors will see that they are part of that independent judiciary, as a matter of constitutional structure. In many ways, this responds to concerns of judges and justices that constitutional ignorance will weaken the role of the judiciary in society.<sup>249</sup>

### C. Constitutionally-Educated Jurors Will Strengthen Democratic Practice

Constitutionally educated jurors will also strengthen democratic practice.<sup>250</sup> As seen in the earlier discussion, this is

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247. Marder, *supra* note 211, at 909 n.2 (“People who serve on juries may grumble about the inconvenience but they end up surprisingly satisfied with the experience, a nationwide survey says. More than 80 [percent] said they came away with a favorable view of their service, according to the survey of 8,468 jurors by the National Center for State Courts.” (quoting Stephanie Simon & Amy Dockser Marcus, *Jurors Don’t Mind Duty, Survey Finds*, WALL ST. J., July 31, 1991, at B3)); Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors?*, 20 JUST. SYS. J. 203, 213 (1999) (“Jurors who answered our exit interviews in United States District Court had a very favorable opinion of their jury service experience. They thought highly of the courthouse staff, had a favorable rating of the waiting room and other facilities, and found the overall jury experience to be worthwhile. Over 80 percent said they would be happy to serve again.”). *But see* Losh, Wasserman & Wasserman, *supra* note 7, at 306 (“Many attitudes were grim: less than one-third of those surveyed agreed that they enjoyed jury duty, were glad to be called, or anticipated service.” (quoting Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 81 JUDICATURE 58, 59 (1998))).

248. See Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC’Y REV. 667, 669 (2011) (“Satisfying jury experiences also increase confidence in the jury system and the legal system as a whole.”).

249. Justice Sandra Day O’Connor has stated, “I think the biggest challenge we face today in our judicial government is the lack of understanding of the public of the role of courts in our country.” Amanda Cohen, *Sandra Day O’Connor Discusses Civics Education*, INDEP. FLA. ALLIGATOR, Sept. 13, 2011, [http://www.alligator.org/news/campus/article\\_efadad00-ddc7-11e0-b3c7001cc4c03286.html](http://www.alligator.org/news/campus/article_efadad00-ddc7-11e0-b3c7001cc4c03286.html).

250. Sherry, *supra* note 176, at 132 (“The core of the claim that education is necessary to citizenship must instead be that education is necessary to the thoughtful or responsible exercise of citizenship rights.”).



the core message of Federal Farmer and Tocqueville.<sup>251</sup> The two-way street of jury service means that jurors who are educated about the rights, responsibilities, and skills of citizenship will make better democratic citizens.<sup>252</sup>

In recent years, this theoretical argument has been supported by scholarly research. In an ambitious and groundbreaking study, researchers from the Jury and Democracy Project set out to test whether jury service could improve civic engagement and democratic practice.<sup>253</sup> In a lengthy study involving surveys, questionnaires, and indepth interviews, these researchers followed actual jurors through the jury service process.<sup>254</sup> The study concluded that “[p]articipating in the jury process can be an invigorating experience for jurors that changes their understanding of themselves and their sense of political power and broader civic responsibilities.”<sup>255</sup> More specifically, the researchers looked at whether jury service could affect future voting participation, under the theory that one act of civic participation might influence other acts of civic participation.<sup>256</sup> The researchers found that “having a conclusive deliberative experience in a criminal trial was a statistically significant influence on post-service voting.”<sup>257</sup> In other words, jurors who participated in successful criminal jury deliberations were more likely to be engaged democratic voters in the next election. These statistics also showed, although in a less direct fashion, that jury service could affect other civic responsibilities and participation levels in their communities, especially for those who had only a

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251. See *supra* Part II.B.1–2.

252. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 766 (2010) (“The jury is generally acknowledged as a critical part of democratic government. The creation of jury-like systems in new democracies illustrates how important the incorporation of citizens into legal decision making can be to politics seeking democratic legitimacy. This is because of a sound belief that citizen participation in lawmaking promotes democracy.”); Hirsh, *supra* note 15, at 209 (“One oft-stated goal of democracy is the growth of individuals. Hence, the double meaning of ‘self-government’: in the course of participating in public affairs, individuals become more complete people (or ‘selves’) with richer lives. The converse is equally true: if self-government promotes better, more mature selves, so too the latter makes effective self-government possible.”).

253. JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* 4 (2010).

254. *Id.* at 5.

255. *Id.* at 4; see also John Gastil & Michael Xenos, *Of Attitudes and Engagement: Clarifying the Reciprocal Relationship Between Civic Attitudes and Political Participation*, 60 J. COMM. 318, 333 (2010).

256. GASTIL ET AL., *supra* note 253, at 35.

257. *Id.*; Hans & Vidmar, *supra* note 171, at 226–27.

previously weak commitment to civic engagement.<sup>258</sup>

The researchers went further to tie the educational value of jury service directly to traditional civics education. “For previously infrequent voters, the effect of deliberating on a criminal jury is comparable to the civic boost a high-school student gets from taking a mandatory civics course for a semester . . . Thus, the civic lessons gleaned from jury service compare quite favorably with more familiar means of instruction and experiential learning.”<sup>259</sup> The researchers concluded that Tocqueville’s insights still applied to the modern American and that jury service can positively affect the development of democratic values.<sup>260</sup> This study provides empirical support to the argument that jury service can serve an educative role.<sup>261</sup> It also provides support for a renewed emphasis on civic knowledge and public service as a means to strengthen self-government.<sup>262</sup>

If, as has been demonstrated, engaged jurors positively correlate with engaged citizenship, courts should be encouraging new ways to educate and engage jurors.<sup>263</sup> The public school for democracy is not meant simply to make “smarter” students while in school but to create citizens that can act intelligently in society. Jury service is a key moment of constitutional connection—it can and should be one of constitutional education.

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258. GASTIL ET AL., *supra* note 253, at 48; *see also* Appleman, *supra* note 252, at 768.

259. GASTIL ET AL., *supra* note 253, at 46.

260. *Id.*

261. Hans & Vidmar, *supra* note 171, at 230 (“Jury service itself educates the public about the law and the legal system and produces more positive views of the courts.”).

262. *See* Hirsh, *supra* note 15, at 209 (“Unless citizens develop sufficient knowledge, independence, and public-spiritedness, they cannot handle the responsibilities of self-government.”).

263. In prior eras, the government tried to instill a measure of formal constitutional literacy. The earliest example was in February 1847 when the United States began its first official attempt to educate citizens about the Constitution en masse. MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 80 (1986). On that date, Congress purchased two thousand copies of William Hickey’s *The Constitution of the United States, With an Alphabetical Analysis*. *Id.* The Congress eventually bought about 22,000 copies to distribute. *Id.* More recently the late Senator Robert Byrd instituted a federally mandated Constitution Day on September 17. *See* 36 U.S.C. § 106 (2004).

*D. Constitutionally-Educated Jurors Will Improve Jury Deliberations*

Constitutional education through jury instructions will have a significant impact on jury deliberations. Instructions on the role of the jury connected to principles of democratic participation, equality of opportunity, due process/fairness, popular sovereignty, and respecting diversity of ideas will provide a context for decision-making that elevates the role of the juror. This elevation will create the potential for more reflective deliberations in the jury room.<sup>264</sup>

For example, as will be demonstrated in the next section, a jury instruction on the importance of civic participation will have several direct effects. First, it will empower jurors.<sup>265</sup> Most jurors enter jury service unfamiliar with the legal system or what that system expects from them.<sup>266</sup> This ignorance invites a sense of disempowerment. Most jurors are not lawyers and have not studied the history of jury service in America. Providing contextual support for their individual decision will give jurors more confidence in rising to the challenge of deliberations. This information links jurors to a history of similar jury decisions, validates their role as more than an ordinary citizen, and provides a constitutional justification for why they (as ordinary citizens) have been given such an outsized power.

Second, awareness of the constitutional power shifts the focus of the decision away from the individual and toward the community. Jurors are proxies for the community, and instructions can place that idea in the consciousness of the jurors.<sup>267</sup> As jurors see themselves like legislators, elected

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264. To be clear, this does not mean that the decisions of any particular jury will be more or less accurate. Jury decisions are too individualized for that assessment.

265. Cf. Cornwell & Hans, *supra* note 248 at 690 (showing that education correlates with participation rates in jurors).

266. See Hon. Gail Hagerty, *Instructing the Jury? Watch Your Language!* 70 N.D. L. REV. 1007, 1017 (1994) (“The trial judge should . . . prepare and deliver instructions which are readily understood by individuals unfamiliar with the legal system.” (citing AM. BAR ASS’N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 16, 141 (1993))).

267. As jurors must search for justice, largely undefined, this discussion of contested narratives in a popular tribunal has the opportunity to expose jurors to the power of these smaller democratic institutions. Susan Waysdorf, *Popular Tribunals, Legal Storytelling, and the Pursuit of a Just Law*, 2 YALE J.L. & LIBR. 67, 72 (1991).

leaders, or even judges, this process highlights the deliberations as an important part of the administration of government.<sup>268</sup> This transformation mirrors the process Tocqueville observed in early jurors:

The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.<sup>269</sup>

In addition, educative jury instructions will deepen deliberations.<sup>270</sup> An often reoccurring finding in studies of jury deliberations is that diversity of ideas lengthens and enriches such deliberations.<sup>271</sup> Jury instructions, offering both a direct comment on the value of diverse opinions, as well as adding a layer of constitutional context to the decision-making process, will likewise add to deliberations.

Finally, some studies have shown a positive correlation between educated jurors and more engaged jury deliberations.<sup>272</sup> Others have shown a connection with more

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268. See Appleman, *supra* note 252, at 767 (“Jury service is the primary way that this country incorporates its citizens into the legal process, whether in grand juries or petit juries. Although surface complaints about the inconvenience of jury service are common, posttrial surveys of jurors who have actually served have shown that jury service seems to produce more public support for both the courts and the legal system.”).

269. TOCQUEVILLE, *supra* note 13, at 284–85.

270. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 70 (2001) (“[A] number of studies have shown that, at the least, a correlation exists between jurors’ educational levels and their ability to understand legal instructions.”); see, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 58–59 (1982); VALERIE P. HANS & ANDREA J. APPEL, THE JURY ON TRIAL, IN A HANDBOOK OF JURY RESEARCH § 18.04a, 53 (Walter F. Abbott & John Batt eds., 1999).

271. See VIDMAR & HANS, *supra* note 10, at 74–76.

272. See Strier, *supra* note 190, at 72 (“[S]tudies found that better educated jurors participated more actively during jury deliberation, and also gave more attention to procedural matters than did the lesser educated.”); *id.* at 60 (“In sum, a predominantly college-educated jury, having superior capacity for understanding the relevant facts and law in complex cases, would render better informed and, thus, more just verdicts.”).

educated jurors and accurate results.<sup>273</sup> While there are no existing studies on the effect of constitutionally educative jury instructions, the theory that additional information inputs will encourage reflection and turn otherwise passive citizens into active learners seems a logical result.<sup>274</sup>

The conclusion is that such constitutional education will improve the quality of deliberations. “Quality” here must be understood in the context of process, not result. Quality deliberations involve all of the previously discussed virtues, an elevated purpose, an empowered decision-maker, a contextual focus, deliberative depth, and personal engagement, but also something else that is unique to the role of a juror. Quality deliberations involve a transformative process whereby jurors see themselves not as individuals expressing personal, subjective preferences, but as a single, objective decision-maker speaking with one community voice.

Constitutional jury instructions remind jurors that they are undergoing that transformative process within an established system. Just as a trial judge puts aside personal feelings to rule on the evidence and the law, so must a jury recognize that its role is not simply to give an opinion on the evidence, but to evaluate the evidence within a system of burdens of proof, elements, and factual determinations. They are not merely fact-finders, but fact-finders within a larger constitutional structure. Their roles as individual citizens are different from their roles as jurors. Constitutional jury instructions remind jurors of that shift, increasing the weight of responsibility, objectivity, and seriousness in which to take deliberations. In short, jurors should know that theirs is a constitutional responsibility and should act with a purposefulness that respects that founding charter. Such a reminder can only serve to improve the process and quality of jury service.

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273. Amiram Elwork, James J. Alfini & Bruce Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 440 (1982) (finding that jurors with higher educational levels were more likely to answer questions correctly); accord Friedland, *supra* note 164, at 195–96 (“[I]f juries were composed of specially qualified individuals or groups—for example, those selected on different grounds, such as intelligence—a jury decision arguably would be more accurate.”).

274. Friedland, *supra* note 164, at 209 (“An active jury model also is supported by educational studies on learning and performance, which suggest that active learners are more effective than passive ones.”).

#### IV. CONSTITUTIONAL EDUCATION THROUGH JURY INSTRUCTIONS

Jury instructions can teach constitutional principles with minimal disruption to the jury process. Constitutional jury instructions can be incorporated into the standard pre-trial instructions and the standard pre-deliberation instructions. Primarily, the instructions will provide a constitutional context for the jury's role in a criminal case.<sup>275</sup> As will be demonstrated below, these types of instructions can be crafted using language from Supreme Court opinions without distortion or distraction to the other standard instructions. The goal is to provide a formal and direct instruction on the constitutional principles that justify the jury process and the juror's role in that process.

##### A. *Why Jury Instructions?*

Before addressing the proposed instructions, it is necessary to defend the choice of jury instructions as opposed to other mechanisms of jury education. After all, if the overall goal is to educate jurors, there are other "teaching moments" during the jury process. Most court systems now include some introductory speech,<sup>276</sup> video,<sup>277</sup> or handbook<sup>278</sup> about the jury process. Many judges contribute informal commentary thanking jurors for their service to the jury system.<sup>279</sup> Almost all jurisdictions allow jurors to bring in reading material to jury service that could include information about the jury.<sup>280</sup>

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275. The focus of this article is applying new jury instructions to criminal trials, but the lessons are equally relevant for civil cases.

276. Many judges have created their own informal discussion of the jury process to introduce jurors to the *voir dire* process.

277. See *Jury Selection, Trial and Deliberations: Resource Guide*, NAT'L CTR. FOR STATE COURTS (Sept. 8, 2012), <http://www.ncsc.org/Topics/Jury/Jury-Selection-Trial-and-Deliberations/Resource-Guide.aspx> (listing links to jury duty orientation videos). State jury duty orientation videos are also accessible on the internet. *Id.*

278. *E.g.*, ADMIN. OFFICE OF THE U.S. COURTS, HB100, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES COURTS (2003).

279. See GASTIL ET AL., *supra* note 253, at 109 (observing that many judges provide brief words of thanks and remind jurors of their importance); Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601, 604-05 (2005) ("Often, the judge's opening comments to the panel assembled included reminders about the importance of a working jury system. Throughout questioning, outright appeals to a sense of duty were commonplace.").

280. A juror could always bring a book on jury duty or on the history of jury service.

With these other educational avenues available, why choose jury instructions?

First, jury instructions are official and formal. In fact, jury instructions are the only official statement of the law the jury receives.<sup>281</sup> A judge formally reads the instructions.<sup>282</sup> They are usually written down in black and white.<sup>283</sup> Jurors, like students, are provided the text to master their assignment. Jurors can read the instructions and think about them in a deliberative manner. Jury instructions, thus, are formally packaged and come with the weight and authority of the court. This legitimacy is only strengthened by the fact that jurors have sworn an oath to follow the instructions.<sup>284</sup>

Second, jury instructions provide the framework for decision making.<sup>285</sup> If one of the goals of educating jurors is to have them see their role within the constitutional structure, then the constitutional context needs to be explained. Jury instructions set out the framework at a time where there are no other guideposts for decision.<sup>286</sup> While trial lawyers and judges understand the legal issues in a case, jurors do not have the experience, training, or perspective about the case to be able to think about the evidence without these governing rules. Thus, jury instructions present the only formalized declaration of the legal context of the jury's decision.

From a teaching perspective, jury instructions provide two advantages. Jury instructions are presented in a way that mirrors traditional teaching moments.<sup>287</sup> At the time of jury

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281. It is during jury instructions that the judge, as opposed to the parties, explains the legal principles upon which a decision must be brought.

282. Marder, *supra* note 111, at 491 (describing how jury instructions are typically presented).

283. See HON. GREGORY E. MIZE, PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 31* (2007), for the most recent State-of-the-States survey concluding that 68 percent of jurisdictions surveyed provided written instructions to the jury. See generally Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, 10 *SCRIBES J. OF LEGAL WRITING* 1 (2005–2006), reprinted in *NAT'L CTR. FOR ST. CTS.* (2006).

284. 6 *WASH. PRAC.*, *WASH. PATTERN JURY INSTR. CIV. WPI 6.01* (2012).

285. See Diamond, *supra* note 166, at 749 (“Simulations, post-trial interviews with real jurors, and the analysis of jury behavior during deliberations in real trials show that jurors see themselves as obligated to apply the law, and that they spend a significant portion of their time during deliberations discussing the law.”).

286. See *id.* at 752. (“Jury instructions rarely receive the attention from the parties and their lawyers that is consistent with the attention that the instructions receive from the jury.”).

287. One traditional teaching format is the lecture. See Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over*

instructions, jurors really are students, listening to the judge lecture them about the law. In addition, final jury instructions lead right into jury deliberations, providing a moment of active learning in which jurors must apply the instructions to the facts at hand.<sup>288</sup> Studies have shown that active learning techniques improve legal comprehension.<sup>289</sup>

Finally, jury instructions present a moment of intense focus in the trial. Trials tend to follow disjointed story lines, with witnesses providing a patchwork of information. During trial, jurors may not know which facts are important or how to evaluate the evidence. The finality of jury instructions and closing arguments provide the moment of closure and reflection. Jurors, thus, tend to pay most attention to the final rules over other parts of the trial that may or may not turn out to be important.<sup>290</sup> It is here that the contextual role of the jury—an institution infused with constitutional principles—can be effectively explained.

### *B. Constitutional Jury Instructions: Examples and Explanation*

Jury instructions that promote constitutional understanding about the jury can take a variety of forms. Depending on the jurisdiction, particular constitutional lessons might be emphasized or particular language used. For purposes of demonstrating the possibilities, this Article emphasizes five constitutional principles centered on the jury role, using excerpts from Supreme Court cases to create the

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*Teaching Method Continues*, 1998 B.Y.U. EDUC. & L.J. 1, 4 (1998) (describing different teaching methods focused on legal education).

288. See Hans & Vidmar, *supra* note 171, at 229 (“The American Bar Association adopted a revised set of Principles for Juries and Jury Trials (2005) that includes active jury reforms. Although many judges have not yet adopted them, active jury reforms are based on cognitive and educational research that shows the well-documented benefits of active and interactive learning.”). See generally AM. B. ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS (August 2005).

289. See Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law Schools: Shifting Energy From Professor to Student*, 81 U. DET. MERCY L. REV. 1, 3–4 (2003); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 102 (2002); Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 116 (1999).

290. Studies have shown that pre-instruction and continued instruction directly improves juror comprehension. See Dann, *supra* note 59; see also Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 690–91 (2000).



sample jury instructions. These values include encouraging democratic participation, ensuring due process/fairness, promoting diversity of ideas, establishing equality of opportunity, and protecting structural checks and balances.<sup>291</sup> The constitutional values here are not exclusive, but represent what courts and litigants might choose to cover in an effort to educate citizens about the constitutional role of the jury. The instructions are merely examples to show that such a constitutional lesson plan can be developed from existing case law.<sup>292</sup> By linking constitutional lessons to the role of the jury through instructions, the goal is to raise the level of constitutional awareness without distorting the fact-finding process.

### 1. Lesson One: Democratic Participation and the Jury

The Constitution begins with the words “We the People.”<sup>293</sup> In its most inclusive form, it invites the people to join in the creation and maintenance of government. Democratic political theory recognizes that the power of a constitutional republic comes from the people.<sup>294</sup> Voting, becoming an elected official, or serving as a juror are foundational acts of political participation.<sup>295</sup>

The principle of participation should thus be conveyed to jurors on jury duty. Their role is a participatory one—mirroring the other participatory requirements in a democracy. A jury

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291. Liberty would also be a constitutional principle that could be taught through jury instructions. Juries were considered the bulwark of liberty. See Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 578 (2012). Many of the rights-protecting provisions in the Constitution and the Bill of Rights were focused on protecting individual liberty. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 536, 552 (1998). Despite its centrality, however, a specific focus on liberty might have some unintended consequences that could distort the fact-finding process if the concept was equated with the defendant’s freedom.

292. In fact, because the language comes directly from Supreme Court cases, adopters of this proposal may wish to simplify the language to make it more easily understandable for jurors.

293. U.S. CONST. pmb1.

294. See THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (declaring that a “fundamental maxim of republican government . . . requires that the sense of the majority should prevail”); see also THE FEDERALIST NO. 58, at 361 (James Madison) (Clinton Rossiter ed., 1961) (proclaiming majority rule “the fundamental principle of free government”).

295. See Amar, *Jury Service*, *supra* note 6, at 244–45.

instruction reflecting this value would include an acknowledgment of the opportunity to contribute as a citizen. Jury duty is not only a civic duty, but a constitutional duty.<sup>296</sup> A sample instruction inspired from the Supreme Court's language in *Powers v. Ohio* would read:

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. Our constitutional jury system postulates a conscious duty of participation in the machinery of justice. It is the opportunity for you as an ordinary citizen to participate in the administration of justice—an opportunity that has been recognized as one of the principal justifications for retaining the jury system under our Constitution. Your 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. Your service provides a valuable opportunity to participate in the process of government, an experience that fosters a respect for law.<sup>297</sup>

This instruction could be added to the “role of the jury” instruction or be a stand-alone instruction.<sup>298</sup> It would convey the real place of jurors as democratic, constitutional actors in the legal system.<sup>299</sup>

## 2. Lesson Two: Due Process and the Jury

The principle of due process and fair treatment can be observed throughout the Constitution.<sup>300</sup> Guarantees of due

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296. See FERGUSON, *supra* note 27, at 7.

297. See 499 U.S. 400, 402, 407 (1991).

298. See *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (“[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.”).

299. Cornwell & Hans, *supra* note 248, at 668 (“High levels of participation may be especially beneficial for jury fact-finding when jurors are drawn from all segments of the community. Full participation by jurors from diverse backgrounds allows the jury to draw on personal experiences, social perspectives, and knowledge that differ across individuals and social groups. Diverse juries may engage in wider-ranging deliberations that include topics and considerations that might be missed, or even avoided by, less diverse juries.”).

300. See David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT’L L. 863, 911 (2003)

process are explicitly included in the Fifth and Fourteenth Amendments.<sup>301</sup> Echoes of fair treatment emerge from the founding document as checks on government power. Prohibitions against *ex post facto* laws,<sup>302</sup> bills of attainder,<sup>303</sup> and the protection of *habeas corpus*<sup>304</sup> restrict potential abusive governmental acts. The protections of the Sixth Amendment, including the right to counsel, confrontation, and compulsory process, protect individuals from government abuse of the criminal justice system.<sup>305</sup>

This principle of fairness and due process should be conveyed to the jury. After all, it is the jury that must practice the principles of fairness in evaluating the evidence and reaching a verdict. Jurors undertake the role of arbiters of fairness by holding the parties to their respective burdens of proof.<sup>306</sup> Recognizing this important role, this instruction explains the role of the jury:

Our constitutional system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations . . . . Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.<sup>307</sup>

This instruction might be included in the “role of the juror” instruction or exist as a separate stand-alone instruction. One study found that even simple instructions at the beginning of jury service had a real impact on jurors’ understanding of the

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(“Canada and the United States are good examples of definitive constitutional arrangements in the common-law tradition, as their constitutions establish strictly enforceable procedural requirements in the making of law, its application according to the rule of law, and substantive limits grounded in federalism and a bill of rights.”); *see also* *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

301. U.S. CONST. amends. V, XIV.

302. U.S. CONST. art. I, § 9.

303. *Id.*

304. *Id.*

305. U.S. CONST. amend. VI.

306. *See In re Winship*, 397 U.S. 358, 361–62 (1970).

307. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 473 (1993) (citations omitted).

importance of due process.<sup>308</sup> The author of the study concluded that jurors, “especially those serving for the first time, seemed to develop some greater depth of understanding and appreciation of the due process principles which they applied during their service.”<sup>309</sup>

### 3. Lesson Three: Diversity of Views and the Jury

America is a nation created out of the diversity of ideas and religious faiths. The First Amendment speaks to a freedom from government imposed ideas<sup>310</sup> and the explicit openness to practice one’s religious faith.<sup>311</sup> Tolerance is an unstated value in the constitutional order. Tolerance of religious faiths, dissenting voices, and new ideas was a driving principle behind the creation of America.<sup>312</sup> The Tenth Amendment allows States to experiment with new ways of doing things.<sup>313</sup> The acceptance of hung juries and even the unanimity requirement encourages tolerance of differing views within the jury room.<sup>314</sup> Jurors, as citizens, must learn to tolerate and engage with the conflict that arises from different cultural, religious, and political faiths.

Jurors should be made aware that the jury system embraces this enforced tolerance. By design, people of different backgrounds are compelled to work together to resolve a difficult legal problem.<sup>315</sup> The value is not only the end result, but the process of encouraging tolerance among diverse opinions. A juror’s role is one of required engagement with

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308. A doctoral student at the University of California-Berkeley, Paula Consolini, conducted a survey at a San Francisco courthouse to determine the civic effect of jury service. GASTIL ET AL., *supra* note 253, at 129 (“Consolini found that most trial jurors and even some of those who did not become empanelled ‘reported greater depth of appreciation of general procedural rights like the right to an attorney and the presumption of innocence.’”).

309. *Id.*

310. *See* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

311. U.S. CONST. amend. I.

312. *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 513–15 (1991); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1424–27 (1990); Martha Nussbaum, *Living Together: The Roots of Respect*, 2008 U. ILL. L. REV. 1623, 1636–37 (2008).

313. U.S. CONST. amend. X.

314. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971).

315. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285–86 (2000).

diverse viewpoints. A jury's role is to embody that democratic diversity of America. A jury instruction that captures this ideal of tolerance and recognition of civility comes from *Peters v. Kiff*:

Our Constitution requires that the jury venire you came from represents a cross-section of the community. Each identifiable segment of the community brings to the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. A jury includes diverse perspectives on human events that may have unsuspected importance in any case that may be presented.<sup>316</sup> You should respect and keep an open mind during deliberations recognizing that the diversity of opinion is a goal of the jury system.<sup>317</sup>

This instruction could be included during the instructions that explain how juries should deliberate or how to begin their deliberations.

#### 4. Lesson Four: Equality of Opportunity and the Jury

The constitutional principle of democratic equality remains a core value in America. Similar to the principle of tolerance, equality involves the explicit recognition that each citizen is equally able to contribute to democracy.<sup>318</sup> One person, one vote,<sup>319</sup> a republican form of government,<sup>320</sup> rejections of titles of nobility,<sup>321</sup> and the Thirteenth,<sup>322</sup> Fourteenth,<sup>323</sup> Fifteenth,<sup>324</sup> Nineteenth,<sup>325</sup> and Twenty-Sixth Amendments<sup>326</sup>

316. *Id.*

317. *Peters v. Kiff*, 407 U.S. 493, 501 (1972).

318. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138–40 (1994); Alschuler & Deiss, *supra* note 5, at 879; Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 117–23 (2003).

319. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.”) (quoting *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963)).

320. U.S. CONST. art. IV, § 4.

321. U.S. CONST. art. I, § 9.

322. U.S. CONST. amend. XIII.

323. U.S. CONST. amend. XIV.

324. U.S. CONST. amend. XV.

325. U.S. CONST. amend. XIX.

are all examples of the principle of constitutional equality.

As one judge has written, “[t]he jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial.”<sup>327</sup> The Supreme Court has been diligent in policing the equal opportunity to serve on juries, prohibiting racial and gender discrimination in criminal and civil cases,<sup>328</sup> by both the prosecutor and the defense.<sup>329</sup> In the third-party standing context, the Supreme Court has located the constitutional right to jury participation as the juror’s right.<sup>330</sup> Yet, no citizen who shows up for jury service is told that the right to serve on a jury is the juror’s constitutional right.<sup>331</sup>

To convey a part of that important constitutional value of equal opportunity, the jury should be instructed about the importance of equal access to jury service. A jury instruction like the following excerpt derived from *J.E.B. v. Alabama*<sup>332</sup> provides an example:

Under our Constitution, equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system, it reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.<sup>333</sup>

This instruction could be given at the beginning of the trial or again during the role-of-the-jury portion of the instructions.

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326. U.S. CONST. amend. XXVI.

327. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) (quoting P. DIPERNA, *JURIES ON TRIAL* 21 (1984)).

328. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138–40 (1994); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

329. *See Powers v. Ohio*, 499 U.S. 400, 409 (1991); *see also Georgia v. McCollum*, 505 U.S. 42, 55–56 (1992).

330. *See Powers*, 499 U.S. at 409.

331. Technically this “right” to serve on a jury is an unenforceable right relating to third-party standing. *See* J. David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of Batson*, 23 TEX. TECH. L. REV. 407, 460 (1992); *see, e.g., Marder, supra* note 148, at 1116.

332. 511 U.S. at 127.

333. *Id.* at 145–46.

### 5. Lesson Five: Popular Sovereignty, Checks and Balances, and the Jury

The Constitution is a document of structural accountability. It holds the government accountable to the people.<sup>334</sup> It creates a government framework of interrelated checks and balances,<sup>335</sup> with a bicameral legislature,<sup>336</sup> three branches of government,<sup>337</sup> and judicial review.<sup>338</sup> As a document of enumerated powers, it reserves all other power to the people and the States.<sup>339</sup> With the Bill of Rights, it consciously protects certain fundamental liberties.<sup>340</sup> The Tenth Amendment explicitly enshrines the principle of federalism in the constitutional structure.<sup>341</sup> In intricate detail, the drafters of the Constitution created a system of interrelated powers governing spending, taxes, the military, appointments, and government authority.<sup>342</sup>

The jury is part of that system of accountability, playing the role both as a check on the judiciary, as well as a check on the collective power of the three branches of government.<sup>343</sup> In the criminal context, jurors also hold individuals accountable for the crimes they are accused of committing against society.<sup>344</sup> As one judge wrote, “The very essence of the jury’s function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.”<sup>345</sup> Jurors should thus be informed of this structural role.<sup>346</sup> One

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334. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 552 (1998).

335. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 574 (1995).

336. U.S. CONST. art. I.

337. U.S. CONST. arts. I–III.

338. *Marbury v. Madison*, 5 U.S. 137, 174–75 (1803).

339. U.S. CONST. amends. IX, X.

340. U.S. CONST. amends. I–X.

341. U.S. CONST. amend. X.

342. *See* U.S. CONST. art. I, § 8.

343. Douglas A. Berman, *Making the Framers’ Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 892 (2010) (“The Framers regarded jury rights as a critical component of the Constitution’s checks-and-balances protection of individual freedom against potential excesses of other governmental actors: on both federal and state levels, the jury was to ensure that legislatures, prosecutors, and judges could not conspire to convict and harshly punish politically unpopular defendants.”).

344. Barkow, *supra* note 5, at 64–65.

345. *Id.* at 122.

346. Berman, *supra* note 343, at 893 (“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

suggestion of an instruction on constitutional accountability, deriving from Justice Scalia's opinion in *Blakely v. Washington*, could read:

Under our Constitution, 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.<sup>347</sup>

Again, this instruction would probably fit best within the juror-role instruction.

## 6. Other Areas of Instruction

The sample instructions above provide examples of how jury instructions can be used to instill constitutional lessons about the jury role without harm to the existing jury process. The instructions are short, relevant, and provide the basics of a contextual understanding that jurors have had in the past and, for the purposes of constitutional competency, should have in the future. Importantly, the sample instructions try not to distract from the other instructions that are equally important for jurors to decide the case before them.

There is no reason why instructions modeled on the ones suggested in this Article cannot be crafted from existing appellate law in different jurisdictions and modified or expanded as needed. In the appendix to this Article, a suggested instruction incorporating the language of all of the aforementioned instructions, but simplified, is produced. For those who accept the need to educate about the Constitution through jury instructions, these proposed instructions are the floor—not the ceiling—of possible subject areas. One could even go beyond language taken directly from Supreme Court or appellate court cases, and bring in other language from scholars, Framers, or observers like Alexis de Tocqueville about the jury.

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citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases.”).

347. See *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004).



## V. CONCERNS

A cluster of concerns can be raised about modifying jury instructions to increase awareness about the constitutional role of the jury. These concerns range from the theoretical to the practical. A few representative concerns will be addressed in turn.

### A. *Theoretical Objections*

As a theoretical matter, one might challenge the idea of using jury service, as opposed to other methods of non-jury service education, to teach constitutional lessons. One could easily imagine other educational mechanisms that focus on the role of the jury. Potential jurors could be required to take a class on civics and constitutional knowledge before serving. Schools could remedy the absence by reinstating civics classes.<sup>348</sup> On-line videos or websites could be created with the information necessary for citizen-jurors. Without denigrating those ideas, the current reality is that, in general, society does not consider jury service as requiring additional education, and thus none of these options appears to have much support.

The argument for education through jury instructions rests on the simple fact that it is during jury duty that constitutional knowledge is the most relevant. To jurors serving on jury duty, the Constitution is a central organizing principle of their civic role and responsibilities.<sup>349</sup> Jurors are present and practicing in a constitutional role. If they have not had prior instruction, this is the moment in which the instruction will be most meaningful. Thus, it offers the most appropriate moment for instruction.

### B. *Instructions will be Ineffectual*

A more fundamental concern might be raised that jury instructions as a whole do not educate jurors in the regular course of practice and, thus, should not be presumed to educate about the jury's constitutional role.<sup>350</sup> As Judge Learned Hand commented, "It is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any

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348. See *supra* note 183 and accompanying text.

349. See FERGUSON, *supra* note 27, at 7.

350. See *supra* note 283 and accompanying text.

effect but to give [jurors] a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience. . . .”<sup>351</sup> A legitimate objection can be raised about whether adding constitutional principles to the long list of instructions will add any value.

In some respects, this objection challenges the value of jury instructions in general—an objection rebutted by scholars who have studied the value of carefully written jury instructions.<sup>352</sup> In addition, it runs contrary to the governing presumption understood by courts that juries follow and understand jury instructions.<sup>353</sup> In other respects, the objection has merit. Brief instructions cannot claim to be a complete answer to a widespread societal problem, especially when we cannot be certain that jurors comprehend these instructions as written.

The strongest response to this objection involves clarifying the goal of these new instructions as not attempting to teach substantive knowledge but to encourage discussion. The instructions, so conceived, are meant to flag the role of the jury as a discussion point for deliberations. The instructions do not teach the elements of the Constitution, like one would instruct on the elements of a crime, but offer a reminder to place the discussion in its constitutional context. In this way, it matters less that jury instructions might be largely ineffectual in conveying the substantive law contained in the written text, as long as they are acknowledged and reflected upon in the deliberations.

In other words, if adequately understood, these instructions will improve the status and practice of the jury. However, even if imperfectly understood, there will still be some added value in their inclusion. Further, if the impact on the instructions extends beyond the jury and into the larger practice of a participatory democratic system, the education may have greater impact.

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351. *United States v. Cohen*, 145 F.2d 82, 93 (2d Cir. 1944).

352. See Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 96 (1988); Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L. Q. 1159, 1182–84 (1986).

353. *United States v. Johnson*, 587 F.3d 625, 631 (4th Cir. 2009) (“We presume that juries follow such [jury] instructions.”) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); see also Ritter, *supra* note 213, at 164–65.

### C. *Inefficiency*

From a pragmatic position, judges may object to additional instructions as being a waste of time in an already crowded trial docket. From an informal poll of trial judges, the oral recitation of jury instructions ranks among judges' least favorite job responsibilities.<sup>354</sup> Usually, a court's recitation of criminal jury instructions can take between twenty and forty-five minutes, depending on the complexity of the case and the speed of the judge. Any additional instructions, no matter their value or merit, may rightly be objected to as an unnecessary burden on the court's time and energy.

While conceding that the proposed instructions will tax judges' time, I would submit that, on balance, the information provided outweighs the additional moments of instruction. The value must be considered not just in the benefits to that particular jury or its deliberations, but also that the point of the instructions is to elevate the institution of the jury after jury service is over and to democratic practice at large. The expectation is that the process of reflective deliberation and consideration of the jury role will encourage jurors—who are also potential future jurors—to have a positive image of the institution of the jury. A positive conception of future jury service and an improved image of the jury will benefit judges and court systems in the long run.<sup>355</sup>

### D. *Improper Influence*

Some might object that the proposed instructions are in tension with the Supreme Court's decision in *Sparf*, limiting the role of the jury, and the clear jury instructions detailing the fact-finding role of the jury.<sup>356</sup> More pointedly, the argument would be that these instructions provide jurors with the ability to nullify cases based on a conception of the constitutional role of the jury. Arguments for and against a jury's historic, moral, and legal right to nullify have been presented by other scholars.<sup>357</sup> It is not the argument presented here. In fact,

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354. The author bases this assertion on his nine years practicing as a trial lawyer before judges in the District of Columbia Superior Court.

355. GASTIL ET AL., *supra* note 279, at 131–33 (finding that informational sources including orientation at the beginning of jury service improves the learning experience for jurors on second or returning trips to jury duty).

356. See discussion *supra* Part II.B.

357. See Paul Butler, *Racially Based Jury Nullification: Black Power in the*

arguably the constitutional principle most historically tied to the history of the jury—"liberty"—has been consciously omitted to preclude any suggestion of jury nullification.<sup>358</sup> While one could craft jury instructions positing the liberty-protecting role of the jury as independent of the judicial branch, and in opposition to the executive branch, on balance, these instructions might do more to distract the jury than educate it. For that reason, this Article avoids contested constitutional principles that might lead to objections that they interfere with the current practice of jury instruction.

This objection highlights, however, how minimally disruptive these proposed instructions would be to the current practice. The instructions focus on the juror's role in the jury system, separate from the juror's decision-making responsibilities. Focusing on the importance of citizen participation, fairness, equality, diversity of ideas, and popular sovereignty should not change how the jurors will vote. These ideas will, however, change how jurors see themselves in the process. Moreover, as has been discussed earlier, these new instructions change how jurors see the jury institution after jury service is over.

#### *E. Inertia*

The final concern recognizes that the history of improving jury instructions has been one of slow progress and frustration. For decades, judges and jury scholars have been arguing that jury instructions need to be improved to make the instructions understandable.<sup>359</sup> The "plain language" movement has produced studies and reports documenting the difficulty in lawyer-crafted instructions.<sup>360</sup> State panels have been enacted

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*Criminal Justice System*, 105 YALE L.J. 677, 701–02 (1995); see also Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1 (1997); David A. Pepper, *Nullifying History: Modern Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 612–13 (2000).

358. See 1 INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 9 (2000) (inaugural address by George Washington) ("[T]he preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered . . . deeply, . . . finally, staked on the experiment entrusted to the hands of the American people.").

359. See generally AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005); Tiersma, *supra* note 283. See also Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 96 (1988).

360. VICKI L. SMITH, HOW JURORS MAKE DECISIONS: THE VALUE OF TRIAL

to improve the process, but progress has been slow.<sup>361</sup> This natural inertia potentially impedes the adoption of any proposed changes, including those in this Article.

Three arguments respond to this reality. First, while the history of modifying trial practice (and more particularly, jury instructions) has been slow, it has not been nonexistent.<sup>362</sup> Advocates for jury reform have managed great success in changing the practice of jury selection, conducting *voir dire*, and instructing the jury on certain issues.<sup>363</sup> In addition, courts have embraced pilot programs of jury innovation.<sup>364</sup> Accordingly, certain modifications can take root and grow.

Second, the proposed instructions suggested in this Article derive directly from Supreme Court cases and are, thus, not objectionable in terms of language or substance. One difficulty in changing jury instructions is that defense lawyers, prosecutors, and judges may have different views on the relative merits of the changes based on tactical considerations. As can be observed in the suggestions, the proposed instructions avoid contested issues and terminology. Third, the goal of improving the jury experience (and the constitutional awareness of citizens in a democracy) is shared by all the parties in the courtroom. While the courts have the most interest in creating engaged and reflective citizen-jurors, the prosecution and defenders are also dependent on good juries. In addition, jurors live in a democracy that benefits from constitutionally literate, democratic citizens. While it is likely that none of the institutional players has an overriding interest to change the system, neither should they have any objection to such a proposed change.

## CONCLUSION

Every year millions of Americans participate in jury

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INNOVATIONS, IN JURY TRIAL INNOVATIONS 5 (G. Thomas Munsterman et al. eds., 1997).

361. See Tiersma, *supra* note 213, at 1099.

362. See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 217 (1996); see also MIZE, HANNAFORD-AGOR & WATERS, *supra* note 283, at 2.

363. See Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 3 CT. REV. 10, 10–15 (1999); see also Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1857 (2001).

364. See Dunn, *supra* note 59, at 1232.

service.<sup>365</sup> Juries still play an important constitutional role in America. The proposed jury instructions are suggestions for one way to begin the education process about that role. As one court commented:

Tocqueville was firmly convinced that ‘the practical intelligence and political good sense of the Americans’ were primarily the result of our long history of using the jury system . . . . A citizen learns about our judicial system by serving on a jury one day, and the next day he or she returns to the community to share that educational experience with others. In this manner, the benefits of the jury system are spread throughout the society and “the spirit of the judges,” to use de Tocqueville’s phrase, is communicated “to the minds of all the citizens.”<sup>366</sup>

There is no reason why courts cannot assist in ensuring that these benefits and this spirit continue by explicitly embracing the constitutional lessons of jury service.

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365. See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 283, at 2 (stating that NCSC statistics estimate that there were 148,558 state jury trials, 5,940 federal jury trials, with 1,526,520 citizens impaneled.).

366. *Mitchell v. Superior Court (People)*, 729 P.2d 212, 230 (Cal. 1987), *vacated on other grounds by Mitchell v. Superior Court (People)*, 49 Cal. 3d 1230 (1989).

**APPENDIX 1**MODEL JURY INSTRUCTION<sup>367</sup>

Our constitutional system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. Our faith in the jury system is founded on longstanding tradition reflected in constitutional text, and is supported by sound considerations of justice and democratic theory.

The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. The right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as voting ensures the people’s ultimate control in the legislative and executive branches, a jury trial is meant to ensure their control in the judiciary.

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. Under our Constitution, equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. Our Constitution requires that the jury pool you came from represent a cross-section of the community. This constitutional requirement not only furthers the goals of the jury system, it reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.

Our jury system postulates a conscious duty of participation in the machinery of justice. Being on a jury provides the opportunity for you as an ordinary citizen to participate in the administration of justice—an opportunity that has been recognized as one of the principal justifications for retaining the jury system under our Constitution. Your 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. Your service provides a valuable opportunity to participate in a process of government, an experience that we hope fosters a respect for law.

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367. The sample instruction is derived from the language of the Supreme Court cases discussed in Part IV with only minor editing of the language. The citations can be found in that section corresponding to the appropriate quotation.