

**JURY INSTRUCTIONS AS CONSTITUTIONAL EDUCATION:
RECLAIMING THE LESSONS OF JURY SERVICE**

By Andrew Guthrie Ferguson¹

“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.”² (1799)

INTRODUCTION

Every day, in courtrooms all across America, the same dramatic scene takes place: a jury foreman stands and reads the verdict in a criminal case. Twelve 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 had they 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?³ How many would know that the “right to a jury” was considered equal to the “right to vote” at the time of the founding?⁴ 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 democracy? As a matter of historical fact, this understanding about the constitutional role of the jury is uncontested.⁵ As a matter of legal theory,

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² Farmers Weekly Museum, June 17, 1799 (Walpole, NH).

³ U.S. Const. Article III, U.S. Const. amend. VI, VII.

⁴ “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 of Thomas Jefferson to L'Abbé Armond, July 19, 1789, in 3 WORKS OF THOMAS JEFFERSON (Wash. ed. 1854) 81, 82.

⁵ See e.g., 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); Albert Alschuler and Andrew Deiss, *A Brief History of Criminal Jury In the United States*, 61 U. Chi. L. Rev. 867, 870 (1994); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Ideas*, 28 U.C. Davis L. Rev. 1169, 1170 (1995); William L. Dwyer, IN THE HANDS OF THE

acknowledged in court opinions and scholarly articles, this constitutional role has been well-established.⁶ 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.⁷

The result of this omission is a gap in constitutional 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. 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.

This article addresses this lack of constitutional 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.⁸ Its proposal is straightforward and easy to implement – use jury instructions to educate jurors about the Constitution.⁹ 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 base-line 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

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⁶ *Blakely v. Washington*, 124 S. Ct. 2531, 2538-39 (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.”).

⁷ 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 Part III *infra*.

⁹ See Part IV *infra*.

practically, the modern jury has been circumscribed to the functional role of finding the facts and applying the facts to the law.¹⁰ With minor exception, the jury is instructed “to determine what the facts are in this case.”¹¹ While there is little doubt that this role should be a central role, because there are lives and liberty at stake, it need not be the only role. Jury duty also serves an educative function. Jurors participate as constitutional pupils.¹² Jurors learn rules of fairness,¹³ study modes of deliberation,¹⁴ practice principles of equality,¹⁵ tolerate different views, act as forces of political accountability,¹⁶ and fulfill their historic role as a bulwark against government overreaching.¹⁷ These are constitutional roles and constitutional values, yet this other, constitutional function of the jury is never 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 the current jury instructions, we can remedy this omission without interfering with the current 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, it 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 constitutional framework.

¹⁰ See *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.”); *United States v. Gaudin*, 515 U.S. 506, 514 (1995) (“[T]he jury’s constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.”); see also Chris Kemmitt, *Function over Form: Reviving the Criminal Jury’s Historical Role as Sentencing Body*, 40 U. Mich. L. J. Reform 93,112 (2006) (“The party line typically hewn to by modern American courts is that the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.”).

¹¹ See DISTRICT OF COLUMBIA CRIMINAL JURY INSTRUCTION (4th Ed. Revised 2005) (The Red Book Form Criminal Jury Instructions): FUNCTION OF THE JURY (“Your function, as the jury, is to determine what the facts are in this case. You are the sole judges of the facts. You alone decide what weight to give to the evidence presented during the trial. You decide the value of the evidence and the believability of the witnesses.”).

¹² Alexis De Tocqueville, *DEMOCRACY IN AMERICA*, 282 (4th rev. trans. Ed. 1948)

¹³ The rules can include procedural rules, evidentiary rules, constitutional rules (such as confrontation and compulsory process). In many ways the entire trial is a lesson on how to structure a fair adversarial process.

¹⁴ 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))

¹⁵ *Local 36 of Intern. Fishermen & Allied Workers of America v. U.S.*, 177 F.2d 320, 339 (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.”)

¹⁶ David S. Willis, *Note, Juror Privacy: The Compromise Between Judicial Discretion and the First Amendment*, 37 *Suffolk U. L. Rev.* 1195, 1196 (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.”)

¹⁷ 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 (4 ed., 1873); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 *Wis. L. Rev.* 377, 396 (1999)).

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,¹⁸ Supreme Court Justices,¹⁹ scholars,²⁰ and mainstream media outlets²¹ have raised an alarm about the decreasing level of civic knowledge understood by citizens today.²² 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.²³ While similar concerns about juror competence have been raised throughout history,²⁴ today's renewed conversation opens a space for proposals to address the lack of constitutional awareness. Obviously, brief jury instructions cannot replace a complete civics or legal education, however, the constitutional lessons within jury service can be made transparent and 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.²⁵ 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 it is over.

Why jury instructions? Jury instructions provide the official decisional framework for jurors. Jury instructions are not just rules, but a framing mechanism about how the jury should approach the process of decision-making. Jury instructions establish principles of law, burdens of

¹⁸ The ABA Journal decried the woeful state of "civics" knowledge among the American public. See *Flunking Civics: Why America's Kids Know so Little*, (ABA Journal) (May 1, 2011).

¹⁹ Sam D. Elliot, *Educating the Public*, 46-JUL Tenn. B.J. 3, 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."); 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.");

²⁰ Eric Lane, *Are We Still Americans*, 36 Hof. L. Rev. 13, 15 (2007)

²¹ See note xx *infra*.

²² Eric Lane, *Are We Still Americans*, 36 Hof. L. Rev. 13, 15 (2007) ("[F]rom the 1960s onward civic education has been declining and by the 1980s had nearly vanished.");

²³ See Part III *infra*.

²⁴ Daniel L. Blinks, *The 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.") (citing 4 St. George Tucker, *Blackstone's Commentaries* Note F, 64-66 (Paul Finkelman & David Cobin eds., The Lawbook Exchange 1996) (1803); 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.").

²⁵ See Andrew Guthrie Ferguson, *WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION* (NYU Press 2012)

proof, standards to weigh evidence, and a structural framework for decision.²⁶ 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 educated about their responsibilities, role, and the system's expectation of them.

Part one 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.²⁷ 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.²⁸ The mythologized ideal was that well-educated, civic-minded citizens would enter the democratic space of the jury and share and develop that accumulated constitutional understanding.

Part two of the 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 limited in constitutional power, and focused on simply "finding the facts."²⁹ This familiar history has been well considered by other scholars,³⁰ 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,³¹ and yet less knowledgeable about constitutional matters.³² These factors are neither causal, nor necessarily

²⁶ 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).

²⁷ See Part xxx *infra*.

²⁸ See Part xxx *infra*.

²⁹ See Part xxx *infra*.

³⁰ See e.g., Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 441 (1996) (hereinafter *Jury Reform*); 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); Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 57 (2003); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 591 (1939); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as Sentencing Body*, 40 U. Mich. L. J. Reform 93,103 (2006).

³¹ 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); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 Wis. L. Rev. 511 (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).

³² Smith, *Jury Reform*, 25 Hofstra L. Rev. 377, 459 (1996) ("Jurors in early English and American juries were on average more experienced in trial practice than modern jurors because of the large number of trial for

negative, as juries may well perform better today than at any other time in our history.³³ 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 three of the article examines why constitutional 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.³⁴ In addition, this education will counteract some of the negative media portrayals of the jury and jury service.³⁵ Most fundamentally, this article argues 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 four describes how jury instructions in criminal cases can be modified to encourage constitutional literacy about 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 modified constitutional jury instructions.

Part five 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.³⁶

which they were impaneled and previous experience they often had serving on juries.”).

³³ See discussion Part II *infra*.

³⁴ See Part III *infra*.

³⁵ See Part III *infra*.

³⁶ Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 Yale L.J. 113, 1190 (1991) (“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 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”).

Juries represent democracy in action – ordinary citizens coming together to solve difficult problems affecting their local community.³⁷ The pedigree of the jury as a legitimate forum for dispute resolution dates back to the original Jamestown Colony.³⁸ Jury trials arrived along with the earliest American settlers³⁹ and were soon enshrined in the governing structures of each of the Thirteen Colonies.⁴⁰ The lack of jury trials helped ignite the American Revolution.⁴¹ Among the British outrages justifying a call to revolution, the Declaration of Independence complained of the deprivation “of the benefit of Trial by Jury.”⁴² After independence, jury trials for criminal cases were protected in every state constitution.⁴³ The protection of criminal juries was enshrined in Article III of the original Constitution and the Sixth Amendment to the United States Constitution,⁴⁴ making it the only right protected in both the original Constitution and the Bill of Rights.⁴⁵ Juries were central to both Federalist and Anti-Federalist positions in the era immediately following the birth of a new government.⁴⁶ In fact, some founding commentators held the jury in higher esteem than the institutions of democratic representation.⁴⁷

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

³⁷ Nancy S. Marder, *Juries, Justice, and Multiculturalism*, 75 S. Cal. L. Rev. 659, 661-62 (2002); Neil Vidmar & Valerie P. Hans, *AMERICAN JURIES: THE VERDICT*, 80 (Prometheus Books 2007); Valerie P. Hans & Neil Vidmar, *JUDGING THE JURY*, 114 (Perseus Publishing 1986).

³⁸ See 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); Rachel Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 51 n.73 (2003) (“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 case.”).

³⁹ Albert Alschuler and Andrew Deiss, *A Brief History of Criminal Jury In the United States*, 61 U. Chi. L. Rev. 867, 870, n.15 (1994); *Developments in the Law: The Civil Jury: IV. Unshrinking the Federal Civil Jury*, 110 Harv. L. Rev. 1466, 1468 (1997).

⁴⁰ Smith, *Jury Reform*, 25 Hofstra L. Rev. 377, 423-24 (1996) (“All of the thirteen original states retained the institution of civil jury trial through express constitutional provision, by statute, or through judicial practice.”); See Jack Pope, *The Jury*, 39 Tex. L. Rev. 426, 445 (1961) (All states used jury trials before the Declaration of Independence.).

⁴¹ Rachel Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 53 (2003) (“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.”).

⁴² The Declaration of Independence para. 20 (U.S. 1776).

⁴³ Alschuler, *A Brief History of Criminal Jury In the United States* 61 U. Chi. L. Rev. 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 (2002).

⁴⁴ U.S. Const. Art. III, Amend. VI.

⁴⁵ Alschuler, *A Brief History of Criminal Jury In the United States*, 61 U. Chi. L. Rev. at 870.

⁴⁶ The Federalist No. 83 (Alexander Hamilton).

⁴⁷ Rachel Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 54 (2003) (“For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights.”) (quoting William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, at 96 (1994)).

core values of the era.⁴⁸ Certainly, a few well publicized jury verdicts⁴⁹ helped sway public opinion to see juries as guardians of liberty during a time of British oppression.⁵⁰ But, more fundamentally in the early days of the republic, juries were considered democratic,⁵¹ accountable, local institutions⁵² organized around principles of public virtue⁵³ and common sense⁵⁴ – all values that fit the 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. Scholars have well canvassed the complex history of juries in America.⁵⁵ This article demonstrates, at least in the ideal, that jury service was intended as a mechanism to enhance constitutional and legal understanding. Further, that this ideal of a constitutionally aware jury was intertwined with the power and status of the early jury. In addition, jurors’ knowledge about their constitutional role informed the process and deliberations in a way that strengthened the institution.

A. *The Citizen-Juror Ideal As Educated About Constitutional Matters*

The American faith in juries must be understood in the context of the “ideal” American juror.⁵⁶ While the institution represents a successful

⁴⁸ 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.

⁴⁹ William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. St. B. J. 48, 49 (1996).

⁵⁰ 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 (4 ed., 1873); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377, 396 (1999)).

⁵¹ Chris Kemmitt, *Function over Form: Reviving the Criminal Jury’s Historical Role as Sentencing Body*, 40 U. Mich. L. J. Reform 93,105 (2006) (“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 and internal quotation marks omitted).

⁵² Kory A. Langhofer, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 Yale L.J. 1823, 1825 (2006) (“[V]enirepersons in the Founding era were local, drawn from relatively intimate communities.”)

⁵³ Frank Michelman, *Law’s Republic*, 97 Yale L J 1493, 1503-04 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L J 1539, 1564-65 (1988); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 Mich L Rev 685, 750-51 (1992); H. Jefferson Powell, *Reviving Republicanism*, 97 Yale L J 1703, 1707 (1988); Morton J. Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 Wm & Mary L Rev 57 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va L Rev 543, 548-50 (1986); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 Mich L Rev 983, 988-98 (1990); Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 Yale L J 1633, 1636-39 (1988); Kathryn Abrams, *Law’s Republicanism*, 97 Yale L J 1591, 1599-1602 (1988); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 Yale L J 1651, 1652 (1988); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 Harv CR-CL L Rev 371, 371-77 (1992).

⁵⁴ Rachel Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 59 (2003) (“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.”).

⁵⁵ See notes xx, xx, xx, xx, *infra*.

⁵⁶ As will be discussed, this ideal juror was not, in fact, the person who always sat on the jury, as wealth and

and surprisingly durable mechanism for decision-making, much of the reverence for American juries emerged from the ideal of the citizen-juror.⁵⁷ Ordinary, faceless, self-sacrificing, but identifiably a participatory citizen, these individuals represented a common democratic connection.⁵⁸ The fact that such an ideal 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.⁵⁹ It legitimized verdicts that ran counter to legislative and executive branch decisions.⁶⁰ It localized judicial power to unaccountable and unelected citizens.⁶¹ It also allowed an ever changing jury population to evolve an identity to match the developing country.⁶²

Pulling apart this idealized 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.⁶³ Jurors were men of property, having some ownership interest in the community.⁶⁴ Jurors were white, mirroring the franchise requirements of most states.⁶⁵ Almost all

privilege could also offer avenues to escape jury service. Nancy J. King, *Juror Delinquency in Criminal Trials*, 94 Mich. L. Rev. 2673, 2678 (1996) (“Early in the nineteenth century, jury avoidance was a continual nuisance for courts.”) *id.* at 2683 (“Fining those who failed to obey 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.”).

⁵⁷ Gene Schaerr, *Business and Jury Trials: The Framers’ Vision Versus Modern Reality*, 71 Ohio St. L.J. 1055, 1056 (2010) (“During the Founding Period, the right to jury trial enjoyed a level of esteem bordering on religious reverence. As one delegate to Virginia’s convention considering ratification of the federal Constitution put it, that right was generally regarded as an “inestimable privilege, the most important which freemen can enjoy[.]” (citing Journal Notes of the Virginia Ratification Convention Proceedings (June 24, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1494 (John P. Kaminski & Gaspare J. Saladino eds., 1993)).

⁵⁸ Michael Dunn, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Juries*, 68 Ind. L. J. 1229, 1232 (1993).

⁵⁹ “The juries [are] our judges of all fact, and of the law when they choose it.” Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury*, 46 Am. J. Legal Hist. 353, 354 (2004) (citing Letter from Thomas Jefferson to Samuel Kercheval, 1816 (reprinted in 3 Papers of Thomas Jefferson 282-83 (1951))).

⁶⁰ 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.”).

⁶¹ *Green v. U.S.*, 356 U.S. 165, 215 (1958) (overruled on other grounds by *Bloom v. State of Ill.*, 391 U.S. 194 (1968) (Frankfurter concurring)) (“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).

⁶² 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 in a new nation. Similarly, the post-Revolutionary States trying to establish order, stability, and prosperity looked for jurors who would embody those same characteristics of economically established leaders of the community.

⁶³ 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.”).

⁶⁴ *Id.*

⁶⁵ Andrew G. Deiss, *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.”); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev.

jurors were established enough in the community to be chosen by the jury selection officer⁶⁶ (usually a federal marshal or state court official).⁶⁷ While plainly inadequate in terms of diversity or democratic equality, this homogenous jury pool of white, male, established, property owners did have one common characteristic – the jurors were by and large educated about civic and constitutional matters.⁶⁸ This 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.⁶⁹ British “subjects” became independent “citizens” – an identity symbolized by jury participation.⁷⁰ 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.⁷¹ The Constitutional debate alone took years.⁷² These national discussions in newspapers and journals involved elected leaders and regular citizens in a public debate about constitutional principles.⁷³ Even after ratification, issues of federal power, states’ rights, and individual freedoms reverberated through many of the early political contests.⁷⁴

867, 878 (1994) (“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.”).

⁶⁶ Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 207 n.26 (1995) (“Under a key man system, citizens of good reputation in the community (the “key” men) recommend persons to fill the jury venire.”); Daniel D. Blinks, *Trial By Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. Rev. 529, 563 (2003) (“[Early courts] may have swept in its share of idlers and miscreants, but it more naturally attracted men actively involved in local social and economic life.”).

⁶⁷ 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. “ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.Rev. 867, 879-880 (1994) (citing Tocqueville, 2 DEMOCRACY IN AMERICA Alexis de Tocqueville, 1 DEMOCRACY IN AMERICA 359-60 (Knopf, 1945).

⁶⁸ Smith, *Jury Reform*, 25 Hofstra L. Rev. 377, 432 (1996) (“Selection procedures were often devised to ensure that better-qualified individuals were impaneled on juries.”); *United States v. Polizzi*, 549 F.Supp.2d 308, 408 (2008) (quoting Julius Goebel, Jr., *Law Enforcement in Colonial New York: A Study in Criminal Procedure* (1664-1776) (1944) (“Goebel’s seminal work demonstrate 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.”) (overturned on other grounds); see also *id.* 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.”) (overturned on other grounds).

⁶⁹ Historically, one of the most central issues of the day was the War of Independence and forming of a new national government.

⁷⁰ 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 (unpublished Ph.D thesis, COLUMBIA UNIVERSITY 2011 (available at <http://academiccommons.columbia.edu/catalog/ac:131400>).

⁷¹ See e.g., Gordon Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969, reprinted 1998, The University of North Carolina Press).

⁷² The United States Constitution was ratified in 1787 and the Bill of Rights in 1791.

⁷³ See generally, Federalist Papers, Anti-Federalist letters.

⁷⁴ See e.g., Akhil Reed Amar, *AMERICA’S CONSTITUTION: A BIOGRAPHY*, 237 (Random House 2005); David McCullough, *JOHN ADAMS*, 65 (Simon & Schuster), (New York 2001).

Jurors, thus, as early citizens, brought to jury service an awareness of the Constitution and the legal system.⁷⁵ 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 known.”⁷⁶ Although not all jurors could claim Adams’ level of formal education, many jurors were among the more educated of the society.⁷⁷ As Douglas Smith noted, “Not only were jurors more experienced with trial practice than modern jurors, but they were also, unlike modern jurors, among the better-educated members of society.”⁷⁸ In fact, many juries in colonial America consisted of individuals who had actually served in other branches of government,⁷⁹ or were of the station to be elected officials.⁸⁰

In practice, this higher level of education did not merely correlate with more learned jurors, but more educated jurors about the role of the jury in society.⁸¹ Jurors understood that the common law in America was still

⁷⁵ 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 Andrew 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); Michael G. Kammen, *A MACHINE THAT WOULD GO ON OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE*, 76 (Transaction Publishers 2006) (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)”).

⁷⁶ Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury*, 46 Am. J. Legal Hist. 353, 374 (2004) (citing *Sparf*, 15 S. Ct. at 309); *United States v. Polizzi*, 549 F.Supp.2d 308, 407 (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.”) (overturned on other grounds)

⁷⁷ Smith, *Jury Reform*, 25 Hofstra L. Rev. 377, 459-60 (1996) (“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.”).

⁷⁸ *Id.*

⁷⁹ 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.”).

⁸⁰ Robert Mark Savage, *Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776*, at 61 (unpublished Ph.D thesis, COLUMBIA UNIVERSITY 2011 (available at <http://academiccommons.columbia.edu/catalog/ac:131400>) (“[T]he evidence suggests that jury service frequently was a steppingstone to further social and political responsibility, beginning in the early public lives of these men.”); 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.* 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.”).

⁸¹ Smith, *Jury Reform*, 25 Hofstra L. Rev. 377, 434 (1996) (“It 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.⁸² Jurors were to be interpreters of the law, as well as decision-makers about the facts of a case.⁸³ 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,⁸⁴ John Adams,⁸⁵ Alexander Hamilton,⁸⁶ John Jay,⁸⁷ John Marshall,⁸⁸ and James Wilson⁸⁹ 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 long tasked jurors with reflecting on the merits of the law.⁹⁰ 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.⁹¹ Third, not all judges were actually lawyers, giving similarly situated citizen-jurors more claim to decide the legal issues presented.⁹² Fourth, the codification process of criminal law had not developed, making legal determinations more of a case-by-case process.⁹³ Fifth, principles of natural law philosophy provided more

⁸² Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 219 (1995).

⁸³ Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 334-335 (2004); Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L. J. 170, 189-191 (1964).

⁸⁴ "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." Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 354 (2004) (citing) THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA Query XIV 1782 (1984).

⁸⁵ "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 have 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, judgement, and conscience?" Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 374 (2004) (citing *Sparf*, 15 S. Ct. at 309).

⁸⁶ "[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." Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 375 (2004).

⁸⁷ *State v. Brailsford*, 3 Dall. 1 (1794) (Marshall CJ).

⁸⁸ 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.")

⁸⁹ In *Henfield's* case James Wilson instructed the jury, "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." Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 378 (2004) (citing *In re Henfield's Case*, 11 F. Cas. 1099).

⁹⁰ Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 389 (2004) (quoting SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 59 (1990)).

⁹¹ Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1, 54 (2011) ("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.")

⁹² Alschuler, 61 U. Chi. L. Rev. at 905.

⁹³ See Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 408 (2004) (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1975)).

flexibility to ground legal determinations in moral decisions.⁹⁴ 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.⁹⁵ 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.

In order for jurors to interpret the law, jurors also had to understand their role in the constitutional system.⁹⁶ 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,⁹⁷ jurors had to think about how the jury fit into that community. To be a legitimate arbiter, citizens had to see the juror as rooted in a larger constitutional system. This, in turn, led to reflection on the participatory roots of the institution,⁹⁸ the process of democratic deliberation, the 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.

Part of the educative effect of early juries also involved sharing this constitutional knowledge during jury service.⁹⁹ Jurors who were not traditionally educated were required to engage in this process with jurors who had more formal education.¹⁰⁰ 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.”¹⁰¹ Jury service exposed ordinary citizens to jurors who might have been taught to constitutional principles

⁹⁴ Note, *The Changing Role of the Jury in the 19th Century*, 74 Yale L. J. 170, 172 (1964) (“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.”).

⁹⁵ Chris Kemmitt, *Function over Form: Reviving the Criminal Jury’s Historical Role as Sentencing Body*, 40 U. Mich. L. J. Reform 93,112 (2006).

⁹⁶ [Adams, Jefferson, Hamilton, 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.” Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury*, 46 Am. J. Legal Hist. 353, 389 (2004) (quoting SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 59 (1990)).

⁹⁷ *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.”).

⁹⁸ “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.’” Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury*, 46 Am. J. Legal Hist. 353, 389 (2004) (quoting SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 59 (1990)).

⁹⁹ Andrew 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, 732 (1999) (“Jury service teaches citizens their rights and duties, while requiring their active participation in Government.”).

¹⁰⁰ Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 Yale L.J. 113, 1186 (1991) (“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.”).

¹⁰¹ Daniel D. Blinka, *Trial By Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. Rev. 529, 562 (2003)

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 so envisioned were not only a democratic space, but an educative space for constitutional principles to be learned, reflected upon, and practiced.¹⁰²

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.¹⁰³ At a minimum, 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"

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.¹⁰⁴ In the Constitutional Convention, the central role of the jury was one of the few issues adopted without disagreement.¹⁰⁵ During the initial ratification debates, Anti-Federalists focused on the lack of civil jury protections in the original Constitution.¹⁰⁶ While the primary concern of Anti-Federalist writers involved the lack of a

¹⁰² Smith, *Jury Reform*, 25 Hofstra L. Rev. 377, 458-59 (1996) ("[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."); 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").

¹⁰³ Robert Mark Savage, *Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776*, at 69-70 (unpublished Ph.D thesis, COLUMBIA UNIVERSITY 2011 (available at <http://academiccommons.columbia.edu/catalog/ac:131400>)) ("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 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.")

¹⁰⁴ Jon P. McClanahan, *The True Right to Trial By Jury: The Founders Formulation and Its Demise*, 111 W. Va. L. Rev. 791, 807 (2009) ("[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.")

¹⁰⁵ 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.")

¹⁰⁶ 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.

civil jury trial (and to a lesser extent the lack of a *local* jury trial),¹⁰⁷ Anti-Federalist advocates directly linked the jury to education.¹⁰⁸ It was through juries that citizens were expected to learn about public affairs and law. As the Anti-Federalist author “Federal Farmer” wrote, “[t]heir 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 and guardians of each other.”¹⁰⁹ 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.¹¹⁰ It was in jury service that the transfer of constitutional knowledge took place.¹¹¹ 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.¹¹²

The Anti-Federalists also recognized the importance of educating the populace about constitutional values through formal declarations and practice. Anti-Federalist theory argued that foundational principles must be taught and experienced to enter the consciousness of the country. 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.¹¹³

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

¹⁰⁸ Letter from the Federal Farmer (IV & XV).

¹⁰⁹ Letter from the Federal Farmer (IV).

¹¹⁰ Letter from the Federal Farmer (XV) (“[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.”)

¹¹¹ Letter from the Federal Farmer (XV) (“[The jury] and the democratic branch in the legislature, ... are the means by which the people are let into the knowledge of public affairs...”); Jon P. McClanahan, *The True Right to Trial By Jury: The Founders Formulation and Its Demise*, 111 *W. Va. L. Rev.* 791, 807 (2009).

¹¹² Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 *Cornell L. Rev.* 203, 219 (1995); See, e.g., Letters from the Federal Farmer XV (Jan. 18, 1788), reprinted in *THE COMPLETE ANTI-FEDERALIST* 315 (Herbert J. Storing ed., 1981) (“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.”).

¹¹³ Letter from the Federal Farmer (IV).

In other words, principles like the importance of the jury must be taught because formal declarations educate citizens about the underlying constitutional foundations. Further, these principles “must be impressed upon the minds of the people” through a formalized process (like perhaps modern jury instructions) which remind, declare, and serve as examples of the sacredness and relevance of constitutional principles.¹¹⁴

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, articulated the full vision.¹¹⁵ Travelling in America in the 1830s, Tocqueville studied political and cultural institutions like the jury.¹¹⁶ He documented the role these developing institutions had on American society, culture, and government.

Tocqueville recognized explicitly that the American jury acted as a school to educate citizens about constitutional rights, governing law, decision-making, and, thus develop the skills and knowledge needed for democratic government.¹¹⁷

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 by the passions of the parties.¹¹⁸

The “jury as public school” concept focuses on the idea that it is on jury duty that the skills of citizenship get taught. Judgment, natural intelligence, and substantive legal rights are all practiced with fellow citizens. In addition, the public school idea accepts that the educative value of jury service involves imparting knowledge to ordinary citizens.¹¹⁹ Again, this

¹¹⁴ *Id.*

¹¹⁵ Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 Yale L.J. 113, 1187 (1991).

¹¹⁶ Alexis de Tocqueville, *Democracy in America*, Vol. 1 285 (Phillips Bradley ed. 1945) (Vintage Books ed. 1990) (1835).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 Yale L.J. 113, 1187 (1991) (“In Tocqueville’s memorable phrase, ‘the jury, which is the most energetic means of making the people rule, is also the most

insight had been presumed by the founding generation simply due to the reality of who could serve as jurors.

Tocqueville saw that juries “exercise a powerful influence upon the national character.”¹²⁰ Juries in practice develop the skills and values of citizenship in a constitutional democracy. Tocqueville explicitly recognized that juries improved public virtue, equality,¹²¹ deliberative judgment,¹²² practical intelligence,¹²³ and raised the status of the jury as a “political” institution through this development.¹²⁴ He concluded that in terms of developing civically aware citizens, juries and thus jury service was “one of the most efficacious means for the education of the people which society can employ.”¹²⁵

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.¹²⁶ Court opinions recognize that this education is a constitutional education, emphasizing constitutional principles of democratic participation,¹²⁷ fairness,¹²⁸ equality,¹²⁹ civic responsibility,¹³⁰ deliberation,¹³¹ and the

efficacious means of teaching it how to rule well.”)

¹²⁰ Alexis de Tocqueville, *Democracy in America*, Vol. 1 285 (Phillips Bradley ed. 1945) (Vintage Books ed. 1990) (1835).

¹²¹ *Id.* (“It teaches men to practice equity, every man learns to judge his neighbor as he would himself be judged.”).

¹²² *Id.* (“The jury, and more especially the jury in civil cases, 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.”).

¹²³ *Id.* (“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.”)

¹²⁴ *Id.* (“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.”).

¹²⁵ *Id.*

¹²⁶ Kim Forde-Mazuri, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 Vand. L. Rev. 353, 364 (1999) (“Trial judges have long recognized the educational importance of jury service, taking the opportunity to teach the jurors about the responsibility of civic virtue and self-government.”); *Gannett Co., Inc. v. State*, 571 A.2d 735 (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.”).

¹²⁷ *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.”).

¹²⁸ *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 501 (1993) (O’Connor dissenting) (acknowledging the jury as the “traditional guarantor of fairness.”); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged*, 712 F.Supp. 994 (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.”).

¹²⁹ *J.E.B. v. Alabama*, 511 U.S. 127, 145-146 (1994).

¹³⁰ *New York v. Allen*, 653 N.E.2d 1173, 1177 (N.Y. 1995) (describing jury service as “a privilege and duty of citizenship”).

¹³¹ Kim Forde-Mazuri, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52

structural power of the jury.¹³² 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.¹³³

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.¹³⁴

Courts have recognized that the criminal justice system “provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system.”¹³⁵ Like any school, the learning process is not

Vand. L. Rev. 353, 364 (1999) (“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.”).

¹³² *U.S. v. Kandirakis*, 441 F.Supp.2d 282 (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.”); *Anderson v. Miller*, 346 F.3d 315 (2nd 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))

¹³³ *Mitchell v. Superior Court (People)*, 43 Cal.3d 107, (Cal.,1987) (reversed on other grounds)

¹³⁴ *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

¹³⁵ *U.S. v. Ibang*, 454 F.Supp.2d 532 (E.D.Va. 2006) (reversed on other grounds) (“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.”); *See also Gannett Co. v. De Pasquale*, 443 U.S. 368, 428-29 (1979) (recognizing the public interests in being “educated about the manner in which criminal justice is administered.”); Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 Yale L.J. 113, 1190 (1991)

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.

4. 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.¹³⁶ It also symbolized a linkage between ordinary citizens, educated citizens, and government that strengthened the legitimacy of the institution.¹³⁷ This shared constitutional knowledge of the jury's role and its connection to constitutional principles elevated the institution of the jury in society.¹³⁸

The ideal also had effects on the self-awareness of the jury. Primarily, 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.

While necessarily an over-generalization about the juries of the Founding, this ideal of constitutional awareness can be summarized as having six interrelated parts. First, juries understood that they were part of the constitutional structure.¹³⁹ Juries were expected to hold the legal system accountable as well as the individual defendant or parties to a legal action.¹⁴⁰ Second, juries understood that their role was participatory.¹⁴¹ In explicit terms, the Founding generation saw juries as the participatory equivalent of democratic voting.¹⁴² Third, juries embodied egalitarian

¹³⁶ Alexis de Tocqueville, *Democracy in America*, Vol. 1 285 (Phillips Bradley ed. 1945) (Vintage Books ed. 1990) (1835); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1846 (1997).

¹³⁷ Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 94-95 (Yale Univ. Press 1998).

¹³⁸ 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., James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L. J. 895, 916 (2004). Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1145 (1993); Nancy S. Marder, "Beyond Gender: Peremptory Challenges and the Roles of the Jury," 73 Tex. L. Rev. 1041, 1096 (1995).

¹³⁹ See note xx *supra*.

¹⁴⁰ See note xx *supra*.

¹⁴¹ See note xx *supra*.

¹⁴² Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 207 n.26 (1995) ("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

principles.¹⁴³ Within the obviously un-diverse reality of the times, juries promoted equality in voting (one person one vote), equality in opinion, and equality in status. Fourth, rules of due process promoted fairness and protections against arbitrary government actions.¹⁴⁴ Fifth, the jury was expected to deliberate to a decision. Deliberation was a prized constitutional value that included the ability to reason, to communicate with other, and to debate and decide.¹⁴⁵ Finally, jurors understood that theirs' was an educative role.¹⁴⁶ 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, awareness about these ideas 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 modern constitutional awareness gap 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.¹⁴⁷ Juries today are problem-solvers, self-identified fact-finders, asked to play a discrete task in the larger working of the criminal justice system.¹⁴⁸ This shift in power has been well canvassed by others, so this article will not retrace this history of jury diminution.¹⁴⁹ Instead, this section focuses on is how this shift in

treated similarly for many constitutional purposes.).

¹⁴³ 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 Alexis De Tocqueville, *DEMOCRACY IN AMERICA*; 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.").

¹⁴⁴ See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (detailing how juries protect against arbitrary or unfair prosecutions).

¹⁴⁵ 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).

¹⁴⁶ Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 Yale L.J. 113, 1186 (1991) ("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.").

¹⁴⁷ *Sparf and Hansen v. United States*, 156 U.S. 51, 90-91 (1895); Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal. Hist. 353, 334-335 (2004); Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L. J. 170, 189-191 (1964).

¹⁴⁸ See note 10 *supra* describing "role of the jury" instruction.

¹⁴⁹ Jon P. McClanahan, *The "True" Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. Va. L. Rev. 791, 813-816 (2009); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury*

power and role has included a shift in the educative role of the jury, and on the impact that shift has had on the public perception of the jury. More precisely, this section asks 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.¹⁵⁰ As will be discussed, while national studies on constitutional literacy have yielded disappointing results in terms of substantive knowledge, none of these reports can directly be tied to those on jury service.¹⁵¹ 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 point out how the different compositions and different roles reveal a gap in constitutional awareness. Today's jury is more diverse, 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). 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, 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.¹⁵² The question raised is whether this modern jury image can be improved with an additional focus on educating jurors about their constitutional role while on jury duty.

A. *Democracy, Diversity & Juror Education*

In practice today, the jury represents the full diversity of American

Reform, 25 Hofstra L. Rev. 377, 447-449 (1996); Daniel D. Blinka, "This Germ of Rottedness": *Federal Trials in the New Republic*, 1789-1807, 36 Creighton L. Rev. 135, 179-181 (2003). Of course, the role of the jury has made a limited resurgence in terms of deciding all of the facts in criminal cases. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

¹⁵⁰ Nancy J. King, *Juror Delinquency in Criminal Trials*, 94 Mich. L. Rev. 2673, 2692 (1996).

¹⁵¹ See Section II, 1 *infra*.

¹⁵² See e.g., Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 191-192 (1990).

citizenship. *De jure* and *de facto* barriers to jury service based on race,¹⁵³ gender¹⁵⁴ and class¹⁵⁵ have been 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. Jurors are now more diverse, bringing different life experiences and skills into the jury room.¹⁵⁶ Jury decisions incorporate these new perspectives.¹⁵⁷ Jury deliberations and verdicts can be said to more appropriately reflect community sentiment.¹⁵⁸

¹⁵³ See 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); Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 Stan. L. Rev. 1249 (1992). 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 (Harvard University Press 2001). By mandating a random selection method for jurors, this Act and the state equivalents have dramatically widened and diversified the jury pool. See 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.").

¹⁵⁴ 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 Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 968-76 (2002); Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 Law & Hist. Rev. 479, 497-500 (2002); JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA Women's L.J. 103, 126-38 (1994). It was not until 1975 that the Supreme Court invalidated gender discrimination in jury selection. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), 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. Today the ideal of racial and gender diversity in the jury venire is constitutionally required by the Fourteenth Amendment's equal protection clause. See 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); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 Wis. L. Rev. 511 (1994).

¹⁵⁵ 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. Andrew G. Deiss, Comment, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. Chi. L. Sch. Roundtable 323, 350 (1996). The Supreme Court has also rejected class based criteria such laws that precluded non-salaried workers from serving on a jury. *Thiel v. Southern 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.").

¹⁵⁶ Kenneth S. Klein, *Unpacking the Jury Box*, 47 Hastings L.J. 1325, 1326-28 (1996).

¹⁵⁷ 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.").

¹⁵⁸ See Samuel R. Sommers & Phoebe 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, 1024 (2003) ("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.").

At the same time, diversity has also resulted in a more educationally diverse jury pool.¹⁵⁹ An educationally diverse jury pool has not necessarily meant more or better educated jurors.¹⁶⁰ In fact, one consequence of expanding the jury pool has been to lower the average education level of the average jury.¹⁶¹ Further, statistical studies show that a greater percentage of highly educated jurors are struck during jury selection,¹⁶² thus making the resulting jury on average less educated than the overall venire.¹⁶³

This article focuses on one component of that educational reality – constitutional knowledge. To begin, the national statistics on civic and constitutional literacy in America should raise concerns in the jury context. Study after study,¹⁶⁴ article after article,¹⁶⁵ all have exposed a fundamental ignorance about basic constitutional principles.¹⁶⁶ Citizens do not know that there are three branches of government,¹⁶⁷ how many Justices serve on the Supreme Court,¹⁶⁸ what protections the Bill of Rights contains,¹⁶⁹ and

¹⁵⁹ Due to the fair cross section requirement juries are more educationally diverse. Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 193 (1990) (“[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).

¹⁶⁰ See William D. Schreckhise & Charles H. Shelton, *The Search For Greater Juror Diversity: The Case of the U.S. District Court for the Eastern District of Washington*, 20 Just. Sys. J. 95, 110 (1998) (“It can be said without doubt that the 1995 sample is more diverse than the sample from 1992. Those individuals in the 1995 sample were younger, less educated, less likely to be employed in a professional field, and more likely to be a member of a racial minority, as the literature on nonvoters had predicted.”).

¹⁶¹ Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 191 (1990) (explaining that a one billion dollar civil case with complex legal issues was decided by a jury which had “an average education of the tenth grade”).

¹⁶² John Gastil, E. Pierre Deess, Philip J. Weiser & Cindy Simmons, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION*, 60 (Oxford University Press 2010) (In describing the effect of education status on a sample of Washington County jurors in Washington State, John Gastil and others commented, “[E]ach additional step on the education ladder reduced a juror’s odds of serving by roughly 10 percent. Relative to a prospective juror with no high-school education, one with a college degree was 40 percent less likely to end up empanelled and a graduate degree reduced one’s odds by twice that figure.”).

¹⁶³ 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”).

¹⁶⁴ See notes XXX-XXX *infra*.

¹⁶⁵ *How Dumb Are We*, Cover Story Newsweek (March, 20, 2011); Brian Braiker, *Dunce-Cap Nation*, Newsweek (Sept. 4, 2007); Eric Lane, *Saving Democracy With Civic Literacy in America 101*, Utne Reader, Democracy 2008-2009; Julia Preston, *Tough Question for a New Test: What Does ‘American’ Mean?*, N.Y. Times, Sept. 28, 2007, at A1; Larry J. Sabato, *A More Perfect Constitution: 23 Proposals to Revitalize Our Constitution and Make America a Fairer Country* 223 (2007).

¹⁶⁶ 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, *To Reclaim a Legacy: A Report on the Humanities in Higher Education* 21 (National Endowment for the Humanities, 1984))

¹⁶⁷ Eric Lane, *Saving Democracy With Civic Literacy in America 101*, Utne Reader, Democracy 2008-2009 (“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.”)

¹⁶⁸ See C-SPAN Supreme Court Survey (July 9, 2009) (prepared by Penn, Schoen & Berland Associates)

are ignorant of the substance of basic constitutional rights.¹⁷⁰ While citizens know what juries do, most do not know why the jury right was included in the Constitution.

Compounding general constitutional illiteracy, civics classes have been stripped from high school curriculums,¹⁷¹ limiting any formal opportunity to learn the subject.¹⁷² While, several national educational projects have been initiated by non-profit organizations and larger civic foundations, these private efforts have not stopped the decline in mastery of American civics.¹⁷³ The unpleasant reality is that juries today are composed of individuals who have less understanding about the constitutional role of juries than in the past, because they have less of an understanding of the Constitution.

At the same time, while the national picture of constitutional illiteracy has been exposed, no one has seriously suggested altering the eligibility requirements of jurors.¹⁷⁴ Primarily, this reticence derives from

(51% of respondents did not know or got wrong the number of justices on the Supreme Court.); 2007 Annenberg Public Policy Center Judicial Survey Results (Public Understanding of and Support for the Courts) (www.annenbergpublicpolicycenter.org) (“Only one in seven Americans (15%) can correctly name John Roberts as Chief Justice of the United States; 78% don’t know. Two-thirds of Americans (66%) know at least one of the judges on the Fox television show American Idol. In a 2006 survey, less than one in 10 (9%) could identify the Chief Justice.”).

¹⁶⁹ Michael Abramowicz, *Constitutional Circularity*, 29 U.C.L.A. 1, 51 n.210 (2001) (citing “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. See Roper Ctr. for Pub. Opinion Research, Question ID: USNORC.45239 (2000).”).

¹⁷⁰ See State of the First Amendment 2009 (First Amendment Center) (“Thirty-nine percent of Americans could not name any of the freedoms in the First Amendment.”); See 1997 National Constitution Center Poll of Constitutional Knowledge (“Only 6% can name all four rights guaranteed by the First Amendment; 84% incorrectly believe that the Constitution states that “all men are created equal,” more than half polled do not know the number of US Senators.”).

¹⁷¹ 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, 988-89 (2008) (“More than half the states have no requirement for students to take a course—even for one semester—in American government.”) (quoting Stephen Goldsmith, *The State of Our Civic Union*, in Report on the 2005 Annual Conference 7, 8, available at http://www.civicenterprises.net/pdfs/ncoc_report2005.pdf).

¹⁷² Eric Lane, *Saving Democracy With Civic Literacy in America 101*, Utne Reader, Democracy 2008-2009 (“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.”); Eric Lane, *Are We Still Americans*, 36 Hof. L. Rev. 13, 15 (2007) (“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.”)

¹⁷³ 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*.

¹⁷⁴ 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

the legitimate concern that any limitation on jury access would replicate the discriminatory practices that kept certain citizens off juries in the past.¹⁷⁵ Literacy tests, even tests involving constitutional knowledge were used as discriminatory screening mechanisms to restrict democratic participation.¹⁷⁶ Correctly not wanting to repeat past mistakes, the decline of constitutional awareness by jurors has been left largely unaddressed.

The benefits of jury diversity plainly outweigh the costs to constitutional awareness. Yet, if acknowledged as a result of the democratization of the jury (in an era of reduced basic civics and constitutional understanding), this does not mean the problem should go unaddressed. Specifically, the 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 the founding era. This is because the role of the juror has been significantly restricted. Juries are no longer asked to interpret the law. “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.”¹⁷⁷

This change in role began in the 19th Century¹⁷⁸ with several prominent judges arguing to restrict the traditional power of juries to decide

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”).

¹⁷⁵ Because of concern with jury competence, “Selection systems in several jurisdictions were overhauled in order to boost the education levels of jurors.” Nancy J. King, *Juror Delinquency in Criminal Trials*, 94 Mich. L. Rev. 2673, 2692 (1996) (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)).

¹⁷⁶ 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).

¹⁷⁷ 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).

¹⁷⁸ *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C. Mass. 1835); Jon P. McClanahan, *The True Right to Trial By Jury: The Founders Formulation and Its Demise*, 111 W. Va. L. Rev. 791, 820 (2009).

¹⁷⁸ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.Rev. 867, 910 (1994); Note, *The Changing Role of the Jury in the 19th Century*, 74 Yale L. J. 170, 170 (1964) (tracing the shift of juries in the 19th 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).

the law.¹⁷⁹ Judges were joined in their critiques by prominent national figures who took aim at the jury,¹⁸⁰ describing jurors as “miserable wretches,”¹⁸¹ “drifters on the tide of life’s great activities”¹⁸² or “nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue.”¹⁸³ The Supreme Court formally stripped jurors of the right (if not the power) to decide the law in *Sparf and Hansen v. United States* declaring that the jury should no longer be instructed on their ability to interpret the law.¹⁸⁴ Jurors were fact finders, nothing more. State courts adopted this view, and it exists as the current understanding of jury role.¹⁸⁵

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.¹⁸⁶ As the professionals in the legal system, increased institutionalization led to

¹⁷⁹ R. J. Farley, *Instructions to Juries: Their Role in the Judicial Process*, 42 Yale L. J. 194, 202 (1932) (“There is small room for doubt that the jury reached its zenith before 1835, when Justice Story, as circuit judge, instructing a jury, made a point upon which he had had a decided opinion during his whole professional life. He said that regardless of physical power and the necessity of compounding law and fact, the jury had no moral right to decide the law according to their own notions. On the contrary, he held it the most sacred constitutional right of every party accused of crime that the jury should respond as to the facts and the court as to the law.”); At the same time several states protected this ancient jury right in statute. See Jon P. McClanahan, *The True Right to Trial By Jury: The Founders Formulation and Its Demise*, 111 W. Va. L. Rev. 791, 816 (2009) (“By 1851, at least nine states had given juries the right to decide issues of law through constitutional provision or statute, and at least six other states had recognized the jury’s right to decide issues of law by judicial decision.”).

¹⁸⁰ Nancy J. King, *Juror Delinquency in Criminal Trials*, 94 Mich. L. Rev. 2673, 2691 (1996) (“The increasing criticism of the caliber of the jury, the growing number of cases, and the rise of court administration, all contributed to significant changes in the ways that jurors were selected and to enforcement of that selection process. In the late 1800s and the early 1900s, reformers set upon the jury system in earnest.”); Kim Forde-Mazuri, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 Vand. L. Rev. 353, 354 (1999) (“Despite its crucial role, the jury is criticized as being inefficient, incompetent, confused, biased, and discriminatory.”).

¹⁸¹ In Kentucky in 1858, a critic described jurors as “miserable wretches.” Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.Rev. 867, 878 (1994) (quoting Edward L. Ayers, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH 113 (Oxford, 1984)).

¹⁸² 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. BAR. 11 (1896). Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury*, 46 Am. J. Legal Hist. 353, 411 n.281 (2004)

¹⁸³ Phoebe C. Ellsworth, *Jury Reform at the end of the Century: Real Agreement, Real Changes*, 32 U. Mich. J. L. Ref. 213, 213 (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.”)

¹⁸⁴ *Sparf and Hansen v. United States*, 156 U.S. 51, 90-91 (1895).

¹⁸⁵ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.Rev. 867, 910 (1994) (“Between 1850 and 1931, the courts of at least eleven states (Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, New York, Pennsylvania, Tennessee, Vermont, and Virginia) rejected the view that juries should judge issues of law as well as fact.”).

¹⁸⁶ Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 445 (1996) (“One must not forget that two powerful interest groups had a vested interest in seeing certain aspects of the jury’s power curtailed. Both judges and lawyers would fill the vacuum left by the erosion in the jury’s power.”).

increased demands for power.¹⁸⁷ At the same time, concerns with the level of competence of ordinary jurors grew, providing the justification for judges to assert more formal control.¹⁸⁸ In addition, legal institutions had to respond to a developing national economic system¹⁸⁹ that required stability and predictability.¹⁹⁰ Certainly in the civil context, economic interests favored the appearance of rationality that came from judges controlling the decisions of juries. These economic pressures paralleled scholarly theories that prioritized legal formalism¹⁹¹ and rejected the earlier influence of natural law.¹⁹² Some scholars directly link a diminution in role to the democratized jury pool, arguing that increased jury diversity led to decreased jury power.¹⁹³ Others have blamed the complexity of legal claims that are outside the competence of most citizens.¹⁹⁴ No matter the cause for this diminished role, the result is the same – jurors now have a more limited role.

¹⁸⁷ Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 355 (2004) (“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.”).

¹⁸⁸ Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 607 (1993) (“The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury's authority.”).

¹⁸⁹ Economic development which rebalanced relationship between debtors and creditors, also led to a question of the role of the jury. Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 408 (2004) (citing WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW, THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760-1830*, 167 (1975)).

¹⁹⁰ “Economic shifts led to the need for certain and predictable rules of law.” Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 355 (2004).

¹⁹¹ See Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 410 (2004).

¹⁹² See Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury*, 46 Am. J. Legal Hist. 353, 408 (2004) (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1975)).

¹⁹³ Albert W. Alschuler, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.Rev. 867, 868 (1994) (“Our central theme is that as the jury's composition became more democratic, its role in American civic life declined.”); Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 Chi.-Kent L. Rev. 909, 923 (2003) (“My own working hypothesis is that, as service on the jury broadened to include more groups and the jury thus became more democratic and more representative of the larger society, there were moves to limit the power of the jury.”); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Power of the Civil Jury*, 80 Cornell L. Rev. 325, 355 (1996) (“Given the convergence in the late nineteenth century of the social movements designed to benefit women and minorities (particularly African-Americans), the growing distrust of juries during the same period takes on a new significance. The movement toward limiting jury power corresponds with the struggle of formerly excluded groups to gain access to jury service.”).

¹⁹⁴ Albert W. Alschuler, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.Rev. 867, 916 (1994) (“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); Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 191 (1990) (“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.”); see also *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.”); 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).

Current jury instructions contribute to the prevailing idea that the role of the juror is of a limited nature.¹⁹⁵ Arising in the 1930s as, among other things, a reaction to the new role of juries, these instructions create a framework for controlling jury decision-making.¹⁹⁶ Most standard jury instructions provide instruction on the “role of the jury.”¹⁹⁷ In almost all cases, the role is limited to finding the facts. 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.”¹⁹⁸ This narrowed responsibility is a direct result of the *Sparf* decision and subsequent interpretations.¹⁹⁹

The result is to eliminate any need to reflect on the jury role. 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

¹⁹⁵ Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 *Notre Dame L. Rev.* 449, 451 (2006); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 *Brook. L. Rev.* 1081, 1102-03 (2001) (discussing problems in comprehension); 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).

¹⁹⁶ Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 *Brook. L. Rev.* 1081, 1082-84 (2001) (history of jury instructions); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 *DePaul L. Rev.* 49, 53 (1997) (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.”).

¹⁹⁷ Each of the fifty states, the federal courts, and the District of Columbia has now established standard jury instructions. See e.g., 1-1 Arkansas Model Jury Instructions - Criminal AMCI 2d 101 (“It is your duty to determine the facts from the evidence produced in this trial. You are 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 Instruction 200, Judicial Council Of California Criminal Jury Instruction 20 (“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.”); 1.20.30 Jury; Judges of Law and Facts, Georgia Suggested Pattern Jury Instructions - Criminal 1.20.30 (“The jury has a very important role. It is your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence.”); HA.CR. JI INSTRUCTION NO. 3.01 (“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.”); Ill. Pattern Jury Instr.-Criminal 1.01 (4th ed.), Ill. Pattern Jury Instr.-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 Instr. 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.”).

¹⁹⁸ 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 3:2

¹⁹⁹ There are a few states that allow some latitude in informing jurors about the jury's right to interpret the law. See e.g., Indiana: 1-13 IN Pattern Jury Instructions Criminal Instruction No. 13.03 (“Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law.”); Maryland: Maryland 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.”); *Alaska Criminal Pattern Jury Instruction 1.01* (“You have been chosen as jurors in this case. Before you take the juror's oath, I want to impress upon you the seriousness and importance of being a member of a jury. Trial by jury is a fundamental right in Alaska. It assures that each case will be decided by citizens who are fairly selected, who come to a case without bias, and who will attempt to render a fair verdict upon the evidence presented.”)

system. 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. The question that remains is does this limited role affect 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 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.²⁰⁰ Jurors are not told that they are in the public schoolhouse for citizens. Jurors unfamiliar with the Tocqueville's theories would not be aware of the constitutional lessons at play. Current jury instructions do not focus on teaching constitutional principles. 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, 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,"²⁰¹ 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

²⁰⁰ John P. Cronan, *Is Any of this Making Sense, Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1188 (2002) ("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.").

²⁰¹ See note xx.

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; many jurors are perfectly aware of the constitutional role of the jury.²⁰² 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 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 service 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, which means figuring out a way to make jury service a means of constitutional education for citizens.

III: WHY CONSTITUTIONAL EDUCATION THROUGH JURY INSTRUCTIONS MATTERS

The fundamental question is – does constitutional awareness improve jury verdicts? Does it improve democratic society? 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, the court and the jury have historically played the role of teacher and teaching moment, then the court can use this 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.

²⁰² 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.

A. *Constitutionally Educated Jurors Will Improve Constitutional Awareness*

At a pragmatic level, introducing a measure of constitutional education into the jury process will improve base-line 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.²⁰³ 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 jurors' base-level civic knowledge.

To be clear, the gap in constitutional literacy is broad and deep.²⁰⁴ Citizens may have only a limited knowledge of the history or theory behind the American legal system.²⁰⁵ 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, highlighting, and providing a formal structure to examine the concepts with fellow citizens begins the

²⁰³ See part I.

²⁰⁴ See part II.

²⁰⁵ Paul E. McGreal, *Constitutional Illiteracy, Review Essay of Louis Michael Seidman and Mark Tushnet*, 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.")

process of constitutional awareness.²⁰⁶ Providing a new vocabulary of constitutional terms, or reminding citizens of the application of those terms in practical application, adds to a citizen's knowledge. Requiring citizens to reflect on those values while applying them, will add an additional level of reflective learning.²⁰⁷

More important, the formal setting of a courtroom with an authoritative judge and a class of fellow citizens, makes otherwise theoretical lessons immediately relevant.²⁰⁸ Jury service may be one of the few remaining spaces where the Constitution is directly applied by ordinary citizens.²⁰⁹ 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.

Studies show that jurors experience constitutional principles throughout their jury experience. The change proposed here is to make jurors aware of that experiential education as it happens. Naming, defining, emphasizing the constitutional role of juries involves an intentionality of teaching constitutional principles at the moment they are most relevant to a citizen. This public education about constitution principles, can only serve to remind citizen-students about the importance of the underlying subject matter.²¹⁰

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

²⁰⁶ 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 but an easy to implement example.

²⁰⁷ 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).

²⁰⁸ The work of scholars that study "adult learning theory" may add support to this moment of education. 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); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 Vand. L. Rev. 321 (1982)

²⁰⁹ Perhaps the only other areas of direct constitutional action involve paying federal taxes and using the Federal Post Office. See U.S. Const. Art. 1, Sec. 8.

²¹⁰ Paul E. McGreal, *Constitutional Illiteracy, Review Essay of Louis Michael Seidman and Mark Tushnet*, 30. Ind. L. Rev. 693, 713 (1997) ("By removing the Constitution from public debate and lawmaking, constitutional illiteracy threatens the vitality of the Constitution itself.")

false) impression of jurors as ignorant or incompetent.²¹¹ 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.²¹² Even if juries tend to get it right,²¹³ jurors are not seen as getting it right.²¹⁴

This perception problem can be improved by court-directed public education. Much of the criticism of the modern jury centers on legitimacy.²¹⁵ Jury verdicts are deemed illegitimate because of criticisms of the jurors, not the institution of the jury.²¹⁶ Jurors are accused of being ignorant, swayed by emotion, racial hostilities or sympathies, confusion, or charismatic lawyers.²¹⁷ Tasked to find the facts and apply the law to the facts, jurors are seen to be manipulated by the “show” of trial.²¹⁸ While

²¹¹ 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, 745 (1991) (summarizing studies); see also *id.* citing R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 147 (1980) (“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.”). These studies responded to criticisms of others. See 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, 733 (1991) (“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.”).

²¹² Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 *Judicature* 226, 227 (2008) (“Furthermore, in systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases.”)

²¹³ Leigh Buchanan Blenen, *The Appearance of Justice: Juries, Justice, and the Media Transcript*, 86 J. Crim. L. & Criminology 1096, 1114 (1996) (“Judge LaDoris Cordell 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, 141 (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.”).

²¹⁴ Michael 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 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.”)

²¹⁵ Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*, 6 Psychol. Pub. Pol'y & L. 788, 789-90 (2000) (“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.”); 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); Michael Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions*, 48 DePaul L. Rev. 221, 233 (1998).

²¹⁶ Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DePaul L. Rev. 49, 55 (1997) (listing studies of jury misunderstanding in complex cases)

²¹⁷ Even the Supreme Court has weighed in on this concern. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 473 (1993) (“Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking.”)

²¹⁸ Leigh Buchanan Blenen, *The Appearance of Justice: Juries, Justice, and the Media Transcript*, 86 J. Crim. L. & Criminology 1096, 1113 (1996) (Judge LaDoris Cordell stated, “A jury trial really, I think, is no

inaccurate, this stereotype is not illogical. Why would we consider jurors as competent as judges, when jurors as opposed to judges have no formal education or training?²¹⁹ 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 counteract the lack of education by educating.²²⁰ Second, jury instructions ground jury decisions in constitutional terms.²²¹ As the concern with jury outcomes is, in part, an appearance problem, adding a constitutional gloss to the decisions will legitimate 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 directly comes from the recognition that the decision of the facts in the case is a constitutional decision, 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 sense 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.²²² Since its inception, citizens have tried to avoid jury duty based on perceptions of inconvenience, or simply out of fear or apathy.²²³ Adding a constitutional overlay and an educational enrichment

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).

²¹⁹ Judge Robert M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 *S.C. L. Rev.* 135, 139 (2000) (“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)).

²²⁰ Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 *U. Chi. L. Rev.* 131, 132 (1995) (“[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.”).

²²¹ See Part IV *supra*.

²²² 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 (1997).

²²³ *Local 36 of Intern. Fishermen & Allied Workers of America v. U.S.*, 177 F.2d 320, 339 (C.A.9 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

component might change that perception. Again, while jurors who serve on juries usually leave with positive feelings about the experience,²²⁴ it has not changed the overall negative perception about this civic duty. Linking jury service as constitutional service might move a bit toward changing that perception about jury duty.²²⁵

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 people back into the legal decision making process will add 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.²²⁶

C. Constitutionally Educated Jurors Will Strengthen Democratic Practice

Constitutionally educated jurors will also strengthen democratic practice.²²⁷ As seen in the earlier discussion, this is the core message of Federal Farmer and Tocqueville. 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.²²⁸

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.”)

²²⁴ Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors*, 20 Just. Sys. J. 203, 215 (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.”); Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 Chi.-Kent L. Rev. 909, 910 n.2 (2003) (“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% 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.”) (citing Stephanie Simon & Amy Dockser Marcus, *Jurors Don't Mind Duty, Survey Finds*, Wall St. J., July 3, 1991, at B3); *but see* Susan Carol Losh, Adina W. Wasserman, Michael A. Wasserman, *Reluctant Jurors*, 83 Judicature 304, 306 (2000) (from a Florida survey, “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.”).

²²⁵ 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.”)

²²⁶ 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.” *See* Amanda Cohen, *Justice O'Connor Discusses Civics Education*, The Independent Florida Alligator, Sept. 13, 2011.

²²⁷ Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 132 (1995) (“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.”).

²²⁸ Alan Hirsh, *Direct Democracy and Civic Maturation*, 29 Hastings Const. L.Q. 185, 209 (2002). (“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.”); Laura I Appleman, *The Plea Jury*, 85 Ind. L.J. 731, 766 (2010) (“The jury

In recent years this theoretical argument has been supported by scholarly research. In an ambitious and groundbreaking study, John Gastil, E. Pierre Deess, Philip Weiser and Cindy Simmons set out to test whether jury service could improve civic engagement and democratic practice.²²⁹ In a lengthy study involving surveys, questionnaires, and in-depth interviews these researchers followed actual jurors through the jury service process.²³⁰ 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.”²³¹ 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. The researchers found that “having a conclusive deliberative experience in a criminal trial was a statistically significant influence on post-service voting.”²³² In other words, jurors who participated in successful criminal jury deliberations were statistically more like 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, especially for those who had only a previously weak commitment to voting.²³³

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.”²³⁴ The researchers concluded that Tocqueville’s insights still applied to modern American and that jury service can positively affect the development of democratic values. This study provides empirical support to the argument that jury service can serve an educative role.²³⁵ It also provides support for a renewed emphasis on civic knowledge

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 polities seeking democratic legitimacy. This is because of a sound belief that citizen participation in lawmaking promotes democracy.”)

²²⁹ John Gastil, et.al., *THE JURY AND DEMOCRACY*, at, 4 (Oxford University Press 2010)

²³⁰ John Gastil, et.al., *THE JURY AND DEMOCRACY*, at, 5 (Oxford University Press 2010)

²³¹ John Gastil, et.al., *THE JURY AND DEMOCRACY*, at, 4 (Oxford University Press 2010); see also John Gastil and Michael Xenos, *Of Attitudes and Engagement: Clarifying the Reciprocal Relationship Between Civic Attitudes and Political Participation*, 60 *Journal of Communication* 318, 333 (2010).

²³² John Gastil, et.al., *THE JURY AND DEMOCRACY*, at, 35 (Oxford University Press 2010); Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 *Judicature* 226, 226-27 (2008).

²³³ John Gastil, et.al., *THE JURY AND DEMOCRACY*, at, 48 (Oxford University Press 2010); Laura I Appelman, *The Plea Jury*, 85 *Ind. L.J.* 731, 768 (2010).

²³⁴ John Gastil, et.al., *THE JURY AND DEMOCRACY*, at, 46 (Oxford University Press 2010)

²³⁵ Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 *Judicature* 226, 226-27 (2008) (“Jury service itself educates the public about the law and the legal system and produces more positive views of the courts.”)

and public service as a means to strengthen self-government.²³⁶

If, as has been demonstrated, engaged jurors are positively correlated with engaged citizenship, courts should be encouraging new ways to educate and engage citizens.²³⁷ The public school for democracy is not simply to make “smarter” students while in school, but to create citizens that can act intelligently in society. Jury service is the moment of constitutional connection, and can be one of constitutional education.

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 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.²³⁸

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.²³⁹ Most jurors enter jury service unfamiliar with the legal system or what that system expects from them. This ignorance invites a sense of disempowerment. As in the past, 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.

²³⁶ Alan Hirsh, *Direct Democracy and Civic Maturation*, 29 *Hastings Const. L.Q.* 185, 210 (2002) (“Unless citizens develop sufficient knowledge, independence, and public-spiritedness, they cannot handle the responsibilities of self-government.”)

²³⁷ 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. On that date, Congress purchased 2000 copies of William Hickey’s *The Constitution of the United States, With an Alphabetical Index*. The Congress eventually bought about 22000 copies to distribute. Michael G. Kammen, *A MACHINE THAT WOULD GO ON OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE*, 80 (Transaction Publishers 2006). More recently the late Senator Robert Byrd instituted a federally mandated Constitution Day on September 17.

²³⁸ 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.

²³⁹ Erin York Cornwell, Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 *Law & Soc’y Rev.* 667, 690 (2011) (“[Juror] participation increases with both education and income. Jurors who have postgraduate education report particularly high participation compared to those who lack college degrees. Even after accounting for the role of education, jurors who have higher incomes also tend to report more participation. These findings are consistent with sociological research suggesting that social class is increasingly the most pervasive status distinction in American society.”)

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 consciously place them in that role.²⁴⁰ This process shifts the discussion, as jurors see themselves like legislators, elected leaders, or even judges, as playing an important part in the administration of government.²⁴¹ 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.²⁴²

In addition, educative jury instructions will deepen deliberations.²⁴³ One of the repeated findings in studies of jury deliberations is that diversity of ideas lengthens and enriches jury deliberations.²⁴⁴ Jury instructions, offering both a direct comment on the value of diverse opinions, as well as adding a layer of constitutional context to decision-making process will likewise add to deliberations. At a minimum, jurors will reflect on the constitutional basis of their decision.

Finally, some studies have shown a positive correlation between educated jurors and more engaged jury deliberations.²⁴⁵ Others have shown

²⁴⁰ 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. See Susan Waysdorf, *Popular Tribunals, Legal Storytelling and the Pursuit of a Just Law*, 2 Yale J. Law & Liberation, 67, 72 (1991).

²⁴¹ Laura I Appleman, *The Plea Jury*, 85 Ind. L.J. 731, 767 (2010) (“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.”).

²⁴² Tocqueville, *DEMOCRACY IN AMERICA* Vol. 1 at 178

²⁴³ 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.”) (citing 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* (Walter F. Abbott & John Batt eds., 1999)).

²⁴⁴ Vidmar & Hans, *AMERICAN JURIES: THE VERDICT* at 74-76.

²⁴⁵ Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DePaul L. Rev. 49, 72 (1997) (citing “studies found that better educated jurors participated more actively during jury deliberation, and also gave more attention to procedural matters than did the lesser educated.” (citing Rita James, *Status and Competence of Jurors*, 64 Am. J. of Soc. 563 (1959)); see *id.* (“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.”))

a connection with more educated jurors and accurate results.²⁴⁶ 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 outcome.²⁴⁷

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 twelve individuals expressing personal, subjective preferences, but as a single, objective decision-maker speaking with one 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 their role is not simply to give their 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 role as individual citizen is different from their role as juror. 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/quality of jury service.

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-

²⁴⁶ Amiram Elwork, James J. Alfani & Bruce Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 440 (1982) (finding that jurors with higher educational level were more likely to answer questions correctly); Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 195-96 (1990) (“[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.”)

²⁴⁷ Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 209 (1990) (“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.”)

deliberation instructions. Primarily, the instructions will provide a constitutional context for the jury's role in a criminal case. 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,²⁴⁸ video,²⁴⁹ or handbook²⁵⁰ about the jury process. Many judges contribute informal commentary thanking jurors for their service to the jury system.²⁵¹ Almost all jurisdictions allow jurors to bring in reading material on the jury to this day of constitutional activity.²⁵² 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 or process the jury receives. A judge formally reads the instructions. They are usually written down in black and white.²⁵³ 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

²⁴⁸ Many judges have created their own informal discussion of the jury process to introduce jurors to the voir dire process.

²⁴⁹ The National Center for State Courts maintains a list of links to jury duty orientation videos. See <http://www.ncsc.org/Topics/Jury/Jury-Selection-Trial-and-Deliberations/Resource-Guide.aspx>. State jury duty orientation videos are also accessible on the internet.

²⁵⁰ Federal Judicial Center, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES COURTS (Admin. Office of the United States Courts 2007)

²⁵¹ John Gastil, et.al., THE JURY AND DEMOCRACY, AT, 109 (Oxford University Press 2010) (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."); id. at 108-11, 116-17 (finding that the words said to jurors by judges are highly influential).

²⁵² A juror could always bring a book on jury duty or on the history of the jury to jury service.

²⁵³ The most recent State of the State survey concluded that 68% of jurisdictions surveyed provided written instructions to the jury. Gregory E. Mize, Paula L. Hannaford-Agor, Nicole Waters, *The State of the States Survey of Jury Improvement Efforts*, National Center for State Courts, at 32 Table 24 (2007); Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, National Center for State Courts, Williamsburg, VA, 2006 [originally published in 10 Scribes J. Legal Writing 1 (2005-2006)].

follow the instructions.²⁵⁴

Second, jury instructions provide the framework for decision making.²⁵⁵ 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 in a situation in which there are no other guideposts for decision.²⁵⁶ While trial lawyers and judges understand the legal issues in a case, jurors do not have the experience, training, or insight 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 teaching perspective, jury instructions provide two advantages. Jury instructions are presented in a way that mirrors traditional teaching moments.²⁵⁷ At the time of jury 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.²⁵⁸ Studies have shown that active learning techniques improve legal comprehension.²⁵⁹

Finally, jury instructions present a moment of intense focus in the trial. Jury 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 argument 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.²⁶⁰ It is

²⁵⁴ See generally, Washington State Civil Pattern Jury Instruction 6.01.

²⁵⁵ Shari Seidman Diamond, *Beyond Fantasy and Nightmare, A Portrait of the Jury*, 54 Buff. L. Rev. 717, 749 (2006) ("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.")

²⁵⁶ "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." Shari Seidman Diamond, *Beyond Fantasy and Nightmare, A Portrait of the Jury*, 54 Buff. L. Rev. 717, 749 (2006)

²⁵⁷ One traditional teaching format is the lecture. See Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 B.Y.U. Educ. & L.J. 1, 4 (1998) (describing different teaching methods focused on legal education).

²⁵⁸ Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 Judicature 226, 226-27 (2008) ("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 American Bar Association, *Principles for Juries and Jury Trials* (August 2005).

²⁵⁹ 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); Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. Legal Educ. 75, 102 (March/June 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).

²⁶⁰ Studies have shown that pre-instruction and continued instruction directly improves juror comprehension. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L. J. 1229 (1993); Neil P. Cohen, *The Timing of Jury Instructions*, 67 Tenn. L. Rev. 681, 690-91, n.37 (2000).

here that the contextual role of the jury – as 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, I have chosen to emphasize five constitutional principles centered on the jury role, using excerpts from Supreme Court cases to create the sample jury instructions. These values include democratic participation, equality of opportunity, due process/fairness, structural checks and balances, and respecting diversity.²⁶¹ The constitutional values here are not exclusive, but representative of 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. 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.”²⁶² 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.²⁶³ Voting, becoming an elected official, or serving as a juror are foundational acts of political participation.²⁶⁴

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. Those citizens have been compelled to participate; their presence is proof of the necessity of the people to contribute to government. A jury instruction reflecting this value

²⁶¹ Liberty would also be a constitutional principle that could be taught through jury instructions. Juries were considered the bulwark of liberty, and many of the rights protecting provisions in the Constitution and the Bill of Rights were focused on protecting individual liberty. Despite its centrality, however, a specific focus on liberty might have some unintended consequences could distort the fact finding process if the concept was equated with the defendant’s freedom.

²⁶² U.S. Const., Preamble

²⁶³ 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”); *id.* No. 58, at 361 (James Madison) (proclaiming majority rule “the fundamental principle of free government”).

²⁶⁴ Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 *Cornell L. Rev.* 203, 244-45 (1995).

would include an acknowledgment of the opportunity to contribute as a citizen. Jury duty is not only a civic duty, but a constitutional duty. A sample instruction inspired from the Supreme Court's language in *Powers v. Ohio*²⁶⁵ 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 a process of government, an experience fostering a respect for law.²⁶⁶

This instruction could be added to the role of the jury instruction or be a stand-alone instruction.²⁶⁷ It would convey the real place of jurors as constitutional actors in the legal system.²⁶⁸

2. Lesson Two: Due Process and the Jury

The principle of due process and fair treatment can be observed throughout the Constitution. The United States has a written Constitution.²⁶⁹ The rule of law is written down, public, accessible, fixed, and enforceable.²⁷⁰ Guarantees of due process are explicitly included in the

²⁶⁵ *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

²⁶⁶ *Id.*

²⁶⁷ See note 10 *supra*.

²⁶⁸ Erin York Cornwell, Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 Law & Soc'y Rev. 667, 668 (2011) ("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.") (internal citations omitted).

²⁶⁹ Some constitutions, like the British Constitution are unwritten. See George Anastaplo, *Constitutionalism, Rule of Rules: Explorations*, 39 Brandeis L.J. 17 (2000).

²⁷⁰ David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 Vand. J. Transnat'l L. 863, 911 (2003) ("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."); *Marbury v. Madison*, 5 U.S. 137 (1803).

Fifth and Fourteenth Amendment.²⁷¹ Echoes of fair treatment emerge from the founding document as checks on government power. Prohibitions against *ex post facto* laws,²⁷² or bills of attainder,²⁷³ and the protection of *habeas corpus*²⁷⁴ 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.²⁷⁵

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 the burden of proof.²⁷⁶ 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.²⁷⁷

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 the juror’s understanding of the importance of due process.²⁷⁸ 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.”²⁷⁹

3. Lesson Three: Diversity of Views and the Jury

²⁷¹ U.S. Const. Amend. V, XIV

²⁷² U.S. Const. Art. 1, sec. 9

²⁷³ U.S. Const. Art. 1, sec. 9

²⁷⁴ U.S. Const. Art. 1, sec. 9

²⁷⁵ U.S. Const. Amend. VI

²⁷⁶ *In re Winship*, 397 U.S. 358, 361-62 (1970).

²⁷⁷ *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 473 (1993)

²⁷⁸ 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. Quoted in John Gastil, et.al., *THE JURY AND DEMOCRACY*, AT, 129 (Oxford University Press 2010); *See id.* (“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.’”).

²⁷⁹ *Id.*

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,²⁸⁰ and the explicit openness to practice one's religious faith.²⁸¹ Tolerance is an unstated value in the constitutional order.²⁸² Tolerance of religious faiths, dissenting voices, and new ideas was a driving principle behind the creation of America.²⁸³ The Tenth Amendment allows States to experiment with new ways of doing things.²⁸⁴ The acceptance of hung juries and even the unanimity requirement encourages tolerance of differing views within the jury room.²⁸⁵ Jurors 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 in resolving a difficult legal problem.²⁸⁶ 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 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*:²⁸⁷

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.²⁸⁸ You should respect and keep an open mind during deliberations recognizing that the diversity of opinion is a goal of the jury system.

²⁸⁰ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandies J. concurring).

²⁸¹ U.S. Const. Amend. I

²⁸² The word "tolerance" is not in the actual U.S. Constitution.

²⁸³ Martha Nussbaum, *Living Together: The Roots of Respect*, 2008 U. Ill. L. Rev. 1623 (2008); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B. U. L. Rev. 455 (1991); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1424-27 (1990).

²⁸⁴ U.S. Const. Amend. X

²⁸⁵ Hans Zeisel, *...And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 711, 719 n.42 (1971).

²⁸⁶ See e.g., Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1285-86 (2000); Tammy B. Grubb, Note, *The Functional Effect of Eliminating Gender Bias in Jury Selection: A Critique and Analysis of J.E.B. v. Alabama*, 48 Okla. L. Rev. 173 (1995); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041 (1995); Deborah L. Forman, *What Difference Does it Make: Gender and Jury Selection*, 2 UCLA Women's L.J. 35 (1992).

²⁸⁷ *Peters v. Kiff*, 407 U.S. 493, 501 (1972)

²⁸⁸ *Id.*

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 equal to contribute to democracy.²⁸⁹ One person one vote, a republican form of government,²⁹⁰ rejections of titles of nobility,²⁹¹ the Thirteenth,²⁹² Fourteenth,²⁹³ Fifteenth,²⁹⁴ Nineteenth²⁹⁵ and Twenty-Sixth Amendments²⁹⁶ are all examples of the principle of constitutional equality.

As one judge has written, “The jury achieves symbolically what cannot be achieved practically – the presence of the entire populace at every trial.”²⁹⁷ 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,²⁹⁸ by both the prosecutor and the defense.²⁹⁹ In the third-party standing context, the Supreme Court has located the constitutional right to jury participation as the juror’s right.³⁰⁰ 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.³⁰¹

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 derived from *J.E.B. v. Alabama*³⁰² provides an example.

Under our Constitution equal opportunity to participate in the fair

²⁸⁹ *J.E.B. v. Alabama Ex Rel T.B.*, 511 U.S. 127 (1994); Albert Alschuler and Andrew Deiss, *A Brief History of Criminal Jury In the United States*, 61 U. Chi. L. Rev. 867, 879 (1994); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. U. L. Rev. 65, 117-23 (2003).

²⁹⁰ U.S. Const. Art. IV, Sec. 4

²⁹¹ U.S. Const. Art. I, Sec. 9

²⁹² U.S. Const. Amend. XIII

²⁹³ U.S. Const. Amend. XIV

²⁹⁴ U.S. Const. Amend. XV

²⁹⁵ U.S. Const. Amend. XIX

²⁹⁶ U.S. Const. Amend. XXVI

²⁹⁷ *United States v. Kandirakis*, 441 F. Supp.2d 282, 314 (D. Mass. 2006) (quoting P. DiPerna, *Juries on Trial* 21 (1984)).

²⁹⁸ *Batson v. Kentucky*, 476 U.S. 79, 82 (1986); *J.E.B. v. Alabama Ex Rel T.B.*, 511 U.S. 127 (1994); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)

²⁹⁹ *Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992).

³⁰⁰ *Powers v. Ohio*, 499 U.S. 400, 409 (1991)

³⁰¹ Technically this “right” to serve on a jury is an unenforceable right relating to third-party standing. See e.g., Nancy Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Texas L. Rev. 1041, 1116 (1995); Judge 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).

³⁰² *J.E.B. v. Alabama*, 511 U.S. 127, 145-146 (1994)

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.³⁰³

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

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. It creates a government framework of interrelated checks and balances,³⁰⁴ with a bicameral legislature,³⁰⁵ three branches of government,³⁰⁶ and judicial review.³⁰⁷ As a document of enumerated powers, it reserves all other power to the people and the States.³⁰⁸ With the Bill of Rights it consciously protects certain fundamental liberties.³⁰⁹ The Tenth Amendment explicitly enshrines the principle of federalism in the constitutional structure.³¹⁰ In intricate detail, the drafters of the Constitution created a system of interrelated powers governing spending, taxes, the military, appointments, and government authority.³¹¹

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.³¹² In the criminal context, jurors also hold the individual accountable for the crimes they are accused of committing against the society.³¹³ 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.”³¹⁴ Jurors should thus

³⁰³ *J.E.B. v. Alabama*, 511 U.S. 127, 145-146 (1994)

³⁰⁴ *See e.g., U.S. v. Lopez*, 514 U.S. 459, 574 (1995)

³⁰⁵ U.S. Const. Art. I

³⁰⁶ U.S. Const. Art. I. Art. II. Art. III.

³⁰⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803)

³⁰⁸ U.S. Const. Amend. IX, X

³⁰⁹ U.S. Const. Amend. X

³¹⁰ U.S. Const. Amend. I-X.

³¹¹ *See* U.S. Const. Art. I, Section 8

³¹² Douglas A. Berman, *Making the Framers Case, And A Modern Case, For Jury Involvement in Habeas Proceedings*, 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.”)

³¹³ Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 64-65 (2003).

³¹⁴ Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of*

be informed of this structural role.³¹⁵ One 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.³¹⁶

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 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 further 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.

V – CONCERNS

A cluster of concerns can be raised about modifying jury

Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 122 (2003).

³¹⁵ Douglas A. Berman, *Making the Framers Case, And A Modern Case, For Jury Involvement in Habeas Proceedings*, 71 Ohio St. L. J. 887, 893 (2010) (“In short, the Framers were eager to create a permanent role for juries in the very framework of America's new system of government. The Constitution's text was intended to make certain that the citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases.”)

³¹⁶ *Blakely v. Washington*, 124 S. Ct. 2531, 2538-39 (2004).

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 education. 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.³¹⁷ On-line videos or website could be created with the information. Without denigrating those ideas, the current reality is that, in general, society does not consider jury service as requiring additional education.

The argument for education through jury instructions rests simply on the fact that at that moment constitutional knowledge is the most relevant. To jurors on jury duty, the Constitution is a central organizing principle of their civic role and responsibilities. Jurors are present and practicing in a constitutional role. If they have not had prior instruction, this is the moment that the instruction will be most meaningful. Thus, it offers the most appropriate teaching 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.³¹⁸ As Judge Learned Hand commented, “[i]t is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any 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.”³¹⁹ A legitimate question 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 that have studied the value of carefully written jury instructions.³²⁰ In addition, it runs

³¹⁷ See note xx, *supra*.

³¹⁸ See note xx, *supra*.

³¹⁹ *United States v. Cohen*, 145 F.2d 82, 93 (2nd Cir. 1944) (cited in Honorable J. Scott Vowell, *Alabama Pattern Jury Instructions: Instructing Juries in Plain Language*, 29 Am. J. Trial Advoc. 137, 141 (2005)).

³²⁰ Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, National Center for State Courts, Williamsburg, VA, 2006 [originally published in 10 Scribes J. Legal Writing 1 (2005–2006)]; Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to*

contrary to the governing presumption understood by courts that juries follow and understand jury instructions.³²¹ In other respects, the objection has merit. Brief instructions cannot claim to be a complete solution to a wide-spread 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 are not, for example, teaching the elements of the Constitution, like one would instruction on the elements of a crime, but offering 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.

C. Inefficiency Concerns

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 up there with their least favorite job responsibilities. Usually, a court's recitation of criminal jury instructions can take between twenty to 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 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 again, 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

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 Temple L. Q. 1159, 1182-84 (1986).

³²¹ *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))).

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.³²²

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. 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.³²³ It is not the argument presented here. In fact, arguably the constitutional principle most historically tied to the history of the jury – “liberty” – has been consciously omitted to preclude any concerns of jury nullification.³²⁴ 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 or confuse the jury than educate it. For that reason, this article has chosen to avoid contested constitutional principles that might lead to objections that 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 do not change how the jurors will vote. These ideas will, however, change how the juror sees themselves in the process. Moreover, as has been discussed earlier, it changes how jurors see the jury institution after jury service is over.

³²² John Gastil, et.al., *THE JURY AND DEMOCRACY*, AT, 131-33 (Oxford University Press 2010) (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).

³²³ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 701-02 (1995); 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); Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 Loy. L.A. L. Rev. 1 (1997).

³²⁴ “The 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.” George Washington - First Inaugural Address, April 30, 1789. George Washington, First Inaugural Address (April 30, 1789), in *Inaugural Addresses of the Presidents of the United States*, Vol. 1 (2000), at 9.

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.³²⁵ The “plain language” movement has produced studies and reports documenting the difficulty in lawyer-crafted instructions.³²⁶ State panels have been enacted to improve the process, but progress has been slow. This natural inertia to improvements to jury instructions lies ahead of 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 non-existent. Advocates for jury reform have managed great success in changing the practice of jury selection, conducting *voir dire*, instructing the jury on certain issues.³²⁷ In addition, pilot programs of jury innovation have been embraced by courts.³²⁸ As such, certain modifications can take root and grow. Second, the proposed changes 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 both parties 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 possibly the constitutional awareness of citizens in a democracy) is shared (at least in principle) 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, as citizens they live in a democracy which 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

³²⁵ Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, National Center for State Courts, Williamsburg, VA, 2006 [originally published in 10 Scribes J. Legal Writing 1 (2005–2006)]; Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 96 (1988); American Bar Association, *Principles for Juries and Jury Trials* (August 2005).

³²⁶ Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *Jury Trial Innovations* (G. Thomas Munsterman et al. eds., 1997) at 5.

³²⁷ Gregory E. Mize, On Better Jury Selection: *Spotting UFO Jurors Before they Enter the Jury Room*, 3 Ct. Rev. 10, 10-15 (1999); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1857 (2001).

³²⁸ B. Michael Dunn, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Juries*, 68 Ind. L. J. 1229, 1232 (1993).

proposed change.

CONCLUSION

Every year millions of Americans participate in jury service.³²⁹ Juries still play an important role in America. It is a constitutional role. Jurors would be advantaged to know and practice that important role. The proposed jury instructions are suggestions for one way to begin the education process.

As one judge 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.’”³³⁰ There is no reason why courts cannot assist in ensuring that these benefits continue by explicitly embracing the constitutional lessons of jury service.

Appendix Sample Instruction³³¹ MODEL JURY INSTRUCTION

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, jury trial is meant to ensure their control in the judiciary.

³²⁹Gregory E. Mize, Paula L. Hannaford-Agor, Nicole Waters, *The State of the States Survey of Jury Improvement Efforts*, National Center for State Courts, Exec. Summary, at 2 (2010) (In the report NCSC statistics estimate that there were 148,558 state jury trials, 5940 federal jury trials, with 1,526,520 citizens impaneled).

³³⁰*Mitchell v. Superior Court (People)*, 43 Cal.3d 107, (Cal.,1987) (reversed on other grounds)

³³¹ The sample instruction is derived from the language of the Supreme Court cases discussed in Part IV with only minor editing of the language.

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 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. 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. 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 a process of government, an experience fostering a respect for law.