Red Juries & Blue Juries

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The United States is a democracy divided. Perhaps not since the Civil War have Americans been so deeply and bitterly at odds with one another. This polarization stretches beyond mere policy disagreements and has become a type of identity that studies show is, for many, of greater importance than race, gender, and religious faith. The result of this division has been a loss of confidence across the nation's institutions, with potentially dire implications. This Article is the first to examine the jury as an institution in light of partisan hyperpolarization. It reviews the history and underlying purposes of the jury as a democratic body, stressing that political biases are an inherent—and at times desirable—part of the institution. But, in drawing on extensive empirical socio-psychological scholarship, it demonstrates that today's partisan polarization is so extreme that fresh approaches are necessary. In order to ensure procedural and substantive legitimacy, courts must be diligent in seeking partisan representation in venires and policing partisan partiality among jurors in all cases, not just those that are explicitly political. Critically, it concludes that potential jurors should not be excluded solely on the basis of political affiliation or past votes cast. The jury as an institution demands the voices of many in order to fulfill its role as the democratic bench of the judiciary. And it modestly suggests that through jury service, the nation can start on a path toward reunification.

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INTRODUCTION

The United States is in a period of partisan hyperpolarization.[1] This divide stretches beyond policy disagreements; in fact, studies show that hyperpolarization frequently has little to do with substantive differences.[2] Instead, partisan membership today is a dominant social cleavage—an identity that, for many, is of greater importance than race, gender, and religious faith.[3] This social ordering is increasingly associated with interparty disdain, with Americans describing members of the opposing political party as "lazy," "immoral," and "threaten[ing to] the nation's well-being."[4] And Americans regularly draw upon partisan affiliation to socially and economically discriminate against one another.[5] Americans are thus increasingly sorted into politically segregated communities, which they seek to maintain.[6] Put simply: Americans don't like each other anymore.

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1. *See, e.g.*, PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC (2014), https://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf [https://perma.cc/94EY-HHVM] (offering empirical evidence of increasing partisan polarization in the United States from 1994 through 2014); Michael Dimock & Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/short-reads/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide [https://perma.cc/83ZQ-992A] ("Americans have rarely been as polarized as they are today.").

2. *See, e.g.*, Nicholas Dias & Yphtach Lelkes, *The Nature of Affective Polarization: Disentangling Policy Disagreement from Partisan Identity*, 66 AM. J. POL. SCI. 775, 776 (2022); LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 88 (2018).

3. *See, e.g.*, Sean J. Westwood et al., *The Tie That Divides: Cross-National Evidence of the Primacy of Partyism*, 57 EUR. J. POL. RSCH. 333, 334 (2018) (finding that Americans' partisan identities are stronger than race and ethnicity); Jonathan Mummolo & Clayton Nall, *Why Partisans Do Not Sort: The Constraints on Political Segregation*, 79 J. POL. 45, 45 (2016). This is not to overlook the overlap among these cleavages. *See, e.g.*, Sean J. Westwood & Erik Peterson, *The Inseparability of Race and Partisanship in the United States*, 44 POL. BEHAV. 1125, 1126 (2022).

4. PEW RSCH. CTR., PARTISANSHIP AND POLITICAL ANIMOSITY IN 2016, at 5, 32 (2016), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2016/06/06-22-16-Partisanship-and-animosity-release.pdf [https://perma.cc/HH9K-WKBA].

5. *See, e.g.*, James N. Druckman & Richard M. Shafranek, *The Intersection of Racial and Partisan Discrimination: Evidence from a Correspondence Study of Four-Year Colleges*, 82 J. POL. 1602, 1602 (2020) (collecting sources and noting that partisan discrimination has been found in college admissions).

6. *See, e.g.*, Jacob R. Brown & Ryan D. Enos, *The Measurement of Partisan Sorting for 180 Million Voters*, 5 NATURE HUM. BEHAV. 998, 1000 (2021) (demonstrating that Americans live in politically segregated communities). *See generally* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008) (explaining Americans' collective movement into like-minded political communities).

This collapse in esteem for one another has far-reaching and severe consequences.[7] Studies from around the world show that as pernicious political polarization increases, institutional and political behavioral norms erode.[8] The result is a crisis of trust and confidence across society, which surveys show the United States is already experiencing.[9] Today, public confidence across nearly every American institution is at or near all-time lows.[10] Perhaps most concerning, this includes confidence in democratic elections.[11] The most evident manifestation of this occurred on January 6, 2021, when a violent mob attacked the nation's capital in an attempt to prevent the peaceful transition of power.[12] Beyond this, surveys show that

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7. *See* SARAH REPUCCI, FROM CRISIS TO REFORM: A CALL TO STRENGTHEN AMERICA'S BATTERED DEMOCRACY 1 (2021) (noting the United States' rapid democratic decline in relation to other established democracies).

8. *See generally* Jennifer McCoy et al., *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAV. SCIENTIST 16 (2018) (describing the causes and providing examples of institutional collapse).

9. Henry E. Brady & Thomas B. Kent, *Fifty Years of Declining Confidence & Increasing Polarization in Trust in American Institutions*, 151 DAEDALUS 43, 44, 50 (2022).

10. *See* Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx [https://perma.cc/V8WZ-5NA7].

11. The depths of this loss of faith in democracy are truly startling. Surveys show that only 7% of Donald Trump voters concede that Joe Biden definitely won the 2020 election. PEW RSCH. CTR., BIDEN BEGINS PRESIDENCY WITH POSITIVE RATINGS; TRUMP DEPARTS WITH LOWEST-EVER JOB MARK 30 (2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/01/PP_2021.01.15_biden-trump-views_REPORT.pdf [https://perma.cc/TKQ6-T84R]. And a majority of Republicans say that too much attention is being paid to the January 6 attack on the Capitol. PEW RSCH. CTR., LARGE MAJORITY OF THE PUBLIC VIEWS PROSECUTION OF CAPITOL RIOTERS AS 'VERY IMPORTANT' 6 (2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/03/PP_2021.03.18_capitol-riot-views_REPORT.pdf [https://perma.cc/TUL2-MXY8]. While running as the Republican presidential nominee, Donald Trump seized on this disaffection and promised that if reelected he would pardon the January 6 convicts, whom he called "hostages." Donald Trump (@realDonaldTrump), TRUTH SOC. (Mar. 11, 2024), https://truthsocial.com/@realDonaldTrump/posts/112079753989223875 [https://perma.cc/5D2G-ZSGZ]; Rebecca Falconer, *Trump Pledges to Free Jan. 6 Rioters in Early Act as President if Elected*, AXIOS (Mar. 11, 2024), https://www.axios.com/2024/03/12/trump-free-jan-6-rioters-election-vow [https://perma.cc/F5ZN-DAJE]. Trump went so far as to organize these convicts into a "J6 Prison Choir" and record them singing the national anthem, which he played at his political rallies. David Klepper, *Music to Trump's Ears: Whitewashing Jan. 6 Riot with Song*, ASSOCIATED PRESS (Apr. 21, 2023), https://apnews.com/article/j6-choir-trump-national-anthem-capitol-riot-79618f1f2a689c308dfdc34d54d327ea [https://perma.cc/S8BG-CGKG].

12. *See* Kat Lonsdorf et al., *A Timeline of the Jan. 6 Capitol Attack—Including When and How Trump Responded*, NPR (Jan. 5, 2024), https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when [https://

roughly 20% of Americans say that the use of political violence may be justified "to advance an important political objective."[13] This extremism has not gone unnoticed: a majority of Americans anticipate an increase in political violence in the coming years, with over one-third of young Americans believing that the United States is on a path to civil war.[14] Some scholars claim the war is already here.[15]

Though often overlooked, the grand, criminal, and civil juries are not immune from the Republic's widespread democratic malaise. Recall that the jury is not merely a judicial dispute resolution body; instead, it is a constitutionally cemented *political* institution.[16] Laypeople are hailed from the community, deputized as temporary constitutional actors, and charged with translating static law into realized justice.[17] Through this process, individuals necessarily bring their unique perspectives, experiences, and biases with them into the jury box.[18] The law welcomes—celebrates, even—these diverse viewpoints.[19] By lashing the hands of the law to the mast of the public conscience, greater systemic legitimacy is achieved. Because of this

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perma.cc/CPT7-TD3Q]. There are of course other instances of shocking violence, including the attempted assassination of Trump, the attack on California representative Nancy Pelosi's husband, and the plot to kidnap Michigan governor Gretchen Whitmer. *See* Michael Gold et al., *Trump Is Safe After Assassination Attempt; Suspected Gunman Is Dead*, N.Y. TIMES (Dec. 5, 2024), https://www.nytimes.com/live/2024/07/13/us/biden-trump-election; Kellen Browning et al., *Who Is the Man Accused of Attacking Nancy Pelosi's Husband?*, N.Y. TIMES (Oct. 30, 2022), https://www.nytimes.com/2022/10/30/us/suspect-attack-nancy-pelosi-husband.html; Nicholas Bogel-Burroughs et al., *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html.

13. Garen J. Wintemute et al., *Views of Democracy and Society and Support for Political Violence in the USA: Findings from a Nationally Representative Survey*, INJ. EPIDEMIOLOGY, No. 10:45, at 9 (Sept. 29, 2023), https://injepijournal.biomedcentral.com/articles/10.1186/s40621-023-00456-3 [https://perma.cc/XR2S-JY48].

14. *See, e.g.*, *id.* at 1; HARV. KENNEDY SCH. INST. POL., HARVARD YOUTH POLL (42d ed. 2021) ("Young Americans place the chances that they will see a second civil war in their lifetime at 35%.").

15. *See, e.g.*, BRADLEY ONISHI, PREPARING FOR WAR 4 (2023) (describing the United States as in the midst of a "cold civil war").

16. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (J.P. Mayer ed., George Lawrence trans., 2000) (1840) ("The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.").

17. *See, e.g.*, ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 102 (2012) ("[T]he jury renders transparent the complicated norms, rules, and procedures best understood in practice.").

18. *See, e.g.*, Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1108 (2014).

19. *See, e.g.*, J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 145–46 (1994); Taylor v. Louisiana, 419 U.S. 522, 535–36 (1975); Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

central institutional role, the jury has long been recognized as "the lower judicial bench" in a bicameral judiciary,[20] and referred to as "the democratic branch of the judiciary power."[21]

Emphasizing the jury's *political* role, however, is not to discount its significance also as a *judicial* institution. The jury is not a mini legislature of twelve people (or fewer, in some states[22]) capriciously voting its political preferences in resolving disputes. Nor should it be. As one federal judge wrote, "No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable."[23] Thus, while the jury as a political institution has the absolute power to exert force in favor of or against government, social, and economic actors, its responsibility as a judicial institution is to issue verdicts according to the law's dictates.[24] As the Supreme Court has explained, "Due process means a jury capable and willing to decide the case solely on the evidence before it."[25]

But it is uncertain if hyperpolarized juries today are so capable and willing to set aside their partisan disdain for one another, and the result has been the emergence of a new concept: "Red Juries" and "Blue Juries."[26] As Americans grow ever more partisanly polarized, they are suspicious that jurors are not basing their verdicts on sound application of fact and law informed by their unique worldviews, but instead on their commitment to advancing partisan

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20. *See* JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 217–18 (W. Stark ed., 1950) (1814).

21. *Essays by a Farmer (IV)*, MD. GAZETTE, Mar. 21, 1788*, reprinted in* 5 THE COMPLETE ANTI-FEDERALIST ¶¶ 5.1.61, 5.1.65 (Herbert J. Storing & Murray Dry eds., 1981).

22. *See* Williams v. Florida, 399 U.S. 78, 103 (1970) (upholding criminal juries composed of fewer than twelve people).

23. United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969).

24. *See, e.g.*, Sparf v. United States, 156 U.S. 51, 172–73 (1895) (explaining that jurors have "the power" but not "the right" to issue law noncompliant verdicts).

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

26. The first mainstream use of this term came from Donald Trump's legal spokesperson Alina Habba, who described the criminal proceedings concerning Trump's alleged hush money payments to adult film star Stormy Daniels thusly: "The facts are on our side. The issue [is] we have politicized judges and blue juries . . . ." Ewan Palmer, *Alina Habba Complains Donald Trump Does Have 'Fair Jury*,*'* NEWSWEEK (May 1, 2024), https://www.newsweek.com/alina-habba-trump-jury-hush-money-trial-new-york-1895981 [https://perma.cc/97Z3-VTQW]. But stray online references to this concept can be found earlier. *See, e.g.*, Micah6v8, Comment to Suzanne Downing, *Cancel Culture: Juneau Turns Wrath on Local Artist over Alleged 'Terroristic Threats*,*'* MUST READ ALASKA (Apr. 7, 2023), https://mustreadalaska.com/cancel-culture-juneau-turns-wrath-on-local-artist-over-alleged-terroristic-threats [https://perma.cc/C56R-AF3R] ("I have been telling those to whom it may be of concern to limit their activities in blue areas, because if you get caught up in blue law and blue juries it can be equivalent to a witch trial as far as fair jurisprudence.").

causes and punishing partisan others.[27] This concept necessarily recalls the "all white" juries of the nineteenth and twentieth centuries, in which juries composed solely of white people adjudicated disputes to impose and maintain racial hierarchy.[28] And just the same, the institution's legitimacy is threatened by the reality or perception of ideologically homogenous and adversarial jurors determining legal outcomes impacting out-group members.[29] To be clear, one need not find that all Democrat jurors or all Republican jurors will deliberate and vote the same way in order to conclude that the absence of one from the courtroom today undermines faith in impartial adjudication.[30]

The various trials of Donald Trump and the January 6 defendants evidence the Red Jury/Blue Jury phenomenon.[31] Given his pulpit, Trump was extraordinarily vocal in criticizing the jurors in his own cases.[32] For instance, in critiquing the jurors in the criminal trial concerning his secret payments to adult film star Stormy Daniels, Trump was held in contempt of court for publicly complaining that the Manhattan, New York jury pool is "95%

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27. Consider this statement from Stephen Miller, Donald Trump's former advisor: "The 1st Amendment is being erased before our eyes. Erased by government censors, ESG bankers, leftist prosecutors, marxist judges & vengeful partisan deep blue juries. Your neighbors with 'hate has no home' yard signs wouldn't blink before shouting 'guilty' & taking all you have." Stephen Miller (@StephenM), X (Jan. 27, 2024), https://x.com/StephenM/status/1751260380930679142 [https://perma.cc/27C9-8DSK].

28. *See generally* Thomas Ward Frampton, *The First Black Jurors and the Integration of the American Jury*, 99 N.Y.U. L. REV. 515 (2024) (reviewing this history).

29. *See, e.g.*, Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003) (discussing racial diversity and noting that "[r]egardless of any direct effects on verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes").

30. *Cf.* Peters v. Kiff, 407 U.S. 493, 503–04 (1972) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").

31. Prior to being reelected, Donald Trump faced dozens of criminal counts and multiple civil proceedings across multiple jurisdictions, including for fraud, sexual assault, and defamation. *See* David A. Graham, *The Cases Against Trump: A Guide*, ATLANTIC (Nov. 25, 2024), https://www.theatlantic.com/ideas/archive/2024/11/donald-trump-legal-cases-charges/675531 [https://perma.cc/FB82-42GR] (providing a full accounting of these cases). And before being pardoned by the reelected President Trump, there were approximately 1,500 January 6 defendants. Ryan J. Reilly, *Trump Pardons Roughly 1,500 Criminal Defendants Charged in the Jan. 6 Capitol Attack*, NBC NEWS (Jan. 21, 2025), https://www.nbcnews.com/politics/justice-department/trump-set-pardon-defendants-stormed-capitol-jan-6-2021-rcna187735 [https://perma.cc/2VMV-PPSV].

32. *See* Ben Protess & William K. Rashbaum, *Judge Imposes Gag Order on Trump in Manhattan Criminal Trial*, N.Y. TIMES (Mar. 26, 2024), https://www.nytimes.com/2024/03/26/nyregion/trump-trial-gag-order.html.

Democrats," adding: "The area's mostly all Democrat . . . . It's a very unfair situation, that I can tell you."[33] Similar arguments were advanced by dozens of January 6 defendants in motions for change of venue from Washington, D.C., to what they hoped would be a more partisanly favorable jurisdiction.[34] As one defendant argued in support of his motion, "Approximately 93% of voters in Washington voted against Donald Trump, rendering it the least diverse political population in the country."[35] The underlying claim implicit through all of these arguments is that Democratic voters cannot fairly adjudicate disputes involving Republican parties.

While there are many things to find troubling about this claim, perhaps most troubling is that it is not clear that Donald Trump and the January 6 defendants are patently wrong—or at the very least, that their perceptions of partisan partiality among jurors are not clearly irrational.[36] Yet courts, scholars, and other commentators have routinely hushed such concerns. Courts have largely resisted allegations of partisanly corrupt jurors undermining the judiciary, emphasizing that through diligent jury selection procedures—including representative venires, written juror surveys, individualized voir dire questioning, and vigorous exercise of for cause and peremptory challenges—only individuals who can judge cases impartially will be impaneled.[37] Scholars and other court watchers urge respect for the jury as an institution, celebrating individuals' ability to overcome biases and

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33. Graham Kates & Stefan Becket, *Trump Held in Contempt Again for Violating Gag Order as Judge Threatens Jail Time*, CBS NEWS (May 6, 2024), https://www.cbsnews.com/news/trump-trial-gag-order-contempt [https://perma.cc/2PEX-8ZN2].

34. *See* Roger Parloff, *Escape from D.C.: Analyzing Jan. 6 Venue Transfer Motions*, LAWFARE (Aug. 23, 2022), https://www.lawfaremedia.org/article/escape-dc-analyzing-jan-6-venue-transfer-motions [https://perma.cc/54FC-AFQF] (collecting and reviewing these motions).

35. United States v. Garcia, No. CR 21-0129, 2022 WL 2904352, at *11 n.22 (D.D.C. July 22, 2022).

36. Consider the criminal trial of Paul Manafort, who served as Trump's campaign manager and faced charges for conspiracy against the United States. As one juror in that case, Paula Duncan, later admitted, she was a staunch Trump supporter and believed that the District Attorney's main target in bringing the charges was not Manafort but instead Trump. In fact, she stated that upon being selected for jury service she "did not want Paul Manafort to be guilty." Though Ms. Duncan ultimately was persuaded to convict Manafort based on what she called "overwhelming" evidence, the prosecutor was forced to overcome the psychological hurdle of partisan bias in order to secure a conviction. *See* Matthew Haag & Sharon LaFraniere, *Manafort Jury Holdout Blocked Guilty Verdicts on 10 of 18 Charges, Juror Says*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/manafort-juror-paula-duncan.html.

37. *See, e.g.*, *Garcia*, 2022 WL 2904352, at *14 (rejecting claims that Washington, D.C., is partisanly incompatible with fairly judging a January 6 insurrectionist because "the overwhelming majority of [D.C. residents] are not political appointees" and their "day-to-day activities have nothing to do with politics," so there was no basis to conclude they were "incapable of being fair to this individual defendant").

deliver fair and impartial verdicts.[38] But given the prevalence of partisan hyperpolarization today, these claims sound pollyannaish at best and oblivious at worst.

This Article is the first to take the social science seriously and address the effects of partisan hyperpolarization among jurors. It is chiefly divided into three parts. Part I reviews the history of the jury as a political institution. It emphasizes that the Constitution cements juries as a bulwark against abuses by political, economic, and social actors. Juror biases are thus a desirable and critical part of the jury's institutional role.[39] But it stresses that the judiciary's procedural legitimacy requires that jurors are perceived by the public as delivering verdicts that sound only in impartial law application.[40] Throughout American history and into the present, however, courts have generally not permitted the partisanship of potential jurors to be considered in assembling representative jury venires or in questioning them during jury selection.[41]

Part II demonstrates that ignoring jurors' partisan identities is no longer tenable in today's environment. It extensively reviews the socio-psychological research and demonstrates the emergence of Red Juries and Blue Juries as a distinct concept. It argues that while Americans are divided by many social cleavages, partisan hyperpolarization is unique in its potential to undermine the fair administration of justice.[42] This is true in all proceedings, not just those that directly implicate partisan issues or partisanly polarizing figures. Next, it argues that even if most jurors are unlikely to act upon their partisan biases in most cases, extreme affective polarization undercuts the perception of impartiality.[43] It is reasonable for all parties—particularly criminal defendants, who risk their liberty and potentially their lives at trial—to perceive juror members of the opposing political party as biased.

Part III aims to provide a balanced path forward. It contends that to secure substantive and procedural legitimacy, courts must take fresh approaches to

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38. Professor Richard Lempert, for instance, suggests that the conviction of Paul Manafort despite an ardent Trump supporter on the jury shows the jury system functioning well. Richard Lempert, *The Manafort Verdict Shows the Jury System at Its Finest*, BROOKINGS (Aug. 24, 2018), https://www.brookings.edu/articles/the-manafort-verdict-shows-the-jury-system-at-its-finest [https://perma.cc/7HLD-GXSRv].

39. *See infra* Section I.A.

40. *See infra* Section I.B.

41. *See, e.g.*, Thomas Marten, *Politics, Religion, and Voir Dire*, 68 DRAKE L. REV. 723, 728 (2020); Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 627–28 (2004).

42. *See infra* Section II.A.

43. *See infra* Section II.B.

addressing partisan hyperpolarization.[44] First, courts should expand procedures to ensure that the venires from which jurors are selected are partisanly representative.[45] Second, it contends that direct and explicit interrogation of jurors' partisan leanings should be conducted in jury selection.[46] It concludes by arguing that individuals should not be dismissed on the basis of mere party affiliation or past votes cast.[47] The jury must reflect the diversity of the community if the institution is to fulfill its constitutional role as the democratic bench of the judiciary. And it modestly suggests that through jury service, the nation can start on a path toward reunification.

I. THE HISTORY AND LAW OF POLARIZED JURIES

While the severity of modern partisan polarization is new, the jury has long been a place of political power and divisions. This is by design. The jury is simultaneously meant to serve as a local political institution checking the authority of favored and disfavored actors while also serving as a judicial institution, providing fair and impartial adjudication for all. In order to fully understand this complex and conflicted institutional role, and how today's partisan polarization impacts fulfillment of that role, we must first interrogate (A) the history of the jury as primarily a political institution, and (B) the procedures for ensuring that jurors' political preferences do not overwhelm its ability to serve as a judicial institution.

A. The Jury as a Political Institution

The jury is, by its nature, a political institution.[48] Incorporating local lay people into the administration of justice necessarily transforms the relationship between the individual and the sovereign.[49] This political role has been implicit since the institution emerged over eight hundred years ago, and explicit for at least the last four hundred.[50] It was this political institution that

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44. *See infra* Section III.A.
45. *See infra* Section III.A.1.
46. *See infra* Section III.A.2.
47. *See infra* Section III.B.
48. *See, e.g.*, TOCQUEVILLE, *supra* note 16, at 272.
49. *See id.* at 260 ("[The jury] places the real direction of society in the hands of the governed or in a portion of them.").
50. A full accounting of the jury's historical role is beyond the scope of this paper. For a fantastic review, see generally Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87.

the American Founders referenced in the Declaration of Independence,[51] cemented in the Constitution,[52] and secured in three separate amendments.[53] And as a conspicuous political institution, the American jury has long been a locus of prevailing political struggles. That the winds of partisan polarization blow through deliberation rooms today is unsurprising.

The common law jury emerged in the eleventh century following the Norman Conquest.[54] The use of juries expanded after 1215, with the Magna Carta's signing—in which the barons secured that "no freeman shall be . . . in any way molested . . . unless by the lawful judgment of his peers"[55]—as well as the Roman Catholic Church's refusal to give religious sanction to certain barbaric dispute resolution procedures.[56] In these nascent years, the jury served as a tool for reaching outcomes in simple disputes that royal authorities had no other mechanism for determining.[57] Jurors were essentially witnesses who relied on their own information in reaching an outcome; evidence was generally not presented in court.[58]

Over time these simple proceedings evolved, with the jury taking on a more modern and recognizable form as a neutral body. Slowly, the distinction between jurors and witnesses became more formalized, with witnesses and jurors appearing at first together and later separately.[59] While it is difficult to pinpoint when the jury fully shifted from being a fact-knowing institution into a fact-finding one,[60] the transformation was complete by the seventeenth century, with one jurist explaining: "[A] witness swears but to what he hath heard or seen . . . . But a jury-man swears to what he can infer[] and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after . . . ."[61] In this new role, ideal

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

52. U.S. CONST. art. III, § 2.

53. *Id.* amends. V, VI, VII.

54. *See, e.g.*, WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 2–5 (London, John W. Parker & Son 1852).

55. *E.g.*, EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 10–11 (1996) (quoting WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 436 (1905)).

56. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 584 (1993).

57. *See* Yeazell, *supra* note 50, at 89–90.

58. *See id.* at 91.

59. *See* David Torrance, *Evidence*, *in* TWO CENTURIES' GROWTH OF AMERICAN LAW: 1701–1901, at 321–22 (1901).

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

61. Bushell's Case (1670) 124 Eng. Rep. 1006, 1009.

jurors knew nothing of the parties or underlying dispute; their decisions instead were to be based on the evidence presented.[62]

No longer bound by their personal knowledge, the jury began to take shape as a full-fledged political institution. This was especially true during the political trials of the seventeenth century, in which the Crown frequently brought charges against its critics.[63] Repeatedly and triumphantly, English jurors refused to convict political and religious dissidents despite strong royal pressure.[64] Among the most noteworthy of these trials was *Bushell's Case* in 1670.[65] There, William Penn and William Mead held a Quaker public meeting and were subsequently charged by the Crown with unlawful assembly and disturbing the peace.[66] There was no question that they had held the meeting, and yet at trial the jurors refused to convict.[67] Presuming untruth in the verdict, the judge initially ordered the jurors "locked up, without meat, drink, fire, and tobacco" and instructed: "[W]e will have a verdict, by the help of God, or you shall starve for it."[68] The jury still refused to convict, returning a not guilty verdict.[69]

As a result, the court ordered each juror to pay a punitive fine, which one of the jurors, Edward Bushell, refused to pay and was subsequently imprisoned.[70] Bushell brought a habeas corpus petition, which eventually reached Chief Justice Sir John Vaughan of the Court of Common Pleas who ordered Bushell released.[71] In his decision, Vaughan famously explained that the judge "can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence."[72] In effect, the decision meant that jurors could not be punished for the alleged falsity of their verdicts. This ruling had major consequences. By removing the potential for punishment, jurors could exercise authority

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62. *See generally* 3 WILLIAM BLACKSTONE, COMMENTARIES *359–60 (noting that common law required juries to come "*de vicineto*, from the . . . place where the cause of action was laid" because "they better knew what credit to give to the facts alleged in evidence," but this created the unavoidable consequence that "jurors coming out of the immediate neighbourhood would be apt to intermix their prejudices and partialities in the trial of right").

63. *See, e.g.*, DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 18–27 (2016) (reviewing this history).

64. *See id.*

65. 124 Eng. Rep. 1006.

66. *Id.* at 1006.

67. *Id.* at 1009.

68. *See* FORSYTH, *supra* note 54, at 340.

69. *Id.* at 341.

70. *Bushell's Case*, 124 Eng. Rep. at 1012.

71. *Id.* at 1017–18.

72. *Id.* at 1006.

with caprice. They could easily issue verdicts against the direction of law, fact, or both without fear of retribution. In this way, by the seventeenth century, the jury was unleashed as a mighty political institution, exercising power as jurors saw fit.[73]

It was this political body that the American colonists turned to in the run-up to the Revolutionary War.[74] Like their British brethren, colonial jurors routinely refused to enforce laws against alleged colonial criminals and debtors. The most famous example of this is the seditious libel case of John Peter Zenger, in which jurors acquitted Zenger of seditious libel despite his admitted guilt.[75] But in the decades preceding the war's outbreak, jury obstinance in all kinds of cases became routine. For instance, colonists regularly refused to enforce penalties against smugglers who evaded payment of taxes and tariffs, and they would award damages to those same smugglers in private lawsuits against royal officers.[76] The resulting breakdown of royal authority was palpable. As one governor put it, "a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers."[77] Another governor warned in 1761: "A Custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken at home [(London)] for the defense of the officers, whether there be any Custom house here at all."[78] The colonial jurors were winning.

The Crown responded with a series of acts restricting jury trials in North America, collectively and derisively referred to as The Intolerable Acts. Among the legislation was the Administration of Justice Act, which allowed the trial of British officials accused of capital crimes to take place in Britain

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73. *See, e.g.*, J.M. Beattie, *London Juries in the 1690s*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800, at 214, 214 (J.S. Cockburn & Thomas A. Green eds., 1988) (calling this period "the heroic age of the English jury").

74. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 702 (1995) ("American colonial law incorporated the common law prerogative of jurors to vote according to their consciences after the British government began prosecuting American revolutionaries for political crimes.").

75. *See generally* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley Nider Katz ed., 1963) (reviewing the case and noting that the verdict was widely celebrated at the time as a turning point in the sentiment against the Crown).

76. *See Notes on* Erving v. Cradock, *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 553, 557 (Samuel M. Quincy ed., 1865) (discussing *Erving v. Cradock*).

77. STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 57 (1983) (statement of Governor William Shirley).

78. QUINCY, *supra* note 76, at 557 n.4 (quoting Letter from Governor Francis Bernard to the Lords of Trade and Plantations (Aug. 2, 1761)).

to avoid certain convictions before colonial jurors.[79] The Massachusetts Government Act, which gave the royally appointed colonial governor the authority to appoint local sheriffs to hand assemble jury lists—a power they used to stack juries with loyalists.[80] And the Stamp Act, which imposed heavy taxes to be enforced in juryless vice-admiralty courts, thus eliminating jury rights in many cases.[81] Colonists met these acts with fierce responses.[82] And on July 4, 1776, the colonists declared independence, noting among their rationales the Crown's acts depriving them of the benefits of trial by jury.[83]

Following the Revolutionary War and the short-lived Articles of Confederation, the jury remained the focus of attention. During the ratification debates, the Constitution's lack of robust jury protections was quickly perceived as its greatest weakness.[84] Anti-Federalists hammered on the lack of jury protections, forecasting the coming parade of horribles should local jurors not be integrated into the government structure.[85] Even some Federalists agreed on the jury's importance.[86] And although Alexander Hamilton tried to allay fears of the new Constitution's jury shortcomings,[87] he was unsuccessful. When, as part of the ratification process, states returned proposed amendments to the document, eight of them offered specific language for adding additional jury protections.[88] Among the significant

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79. Administration of Justice Act 1774, 14 Geo. 3 c. 39 (Gr. Brit.).

80. Massachusetts Government Act 1774, 14 Geo. 3 c. 45 (Gr. Brit.); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 36 (1986) (noting that after the law passed, "the Crown had a more or less free hand to compose the jury list so as to favor the Tory cause").

81. Stamp Act 1765, 5 Geo. 3 c. 12 (Gr. Brit.).

82. Such legislation also prompted the first congress of the American colonies. *See generally* RESOLUTIONS OF THE STAMP ACT CONGRESS (1765), *reprinted in* SOURCES OF OUR LIBERTIES 270 (Richard L. Perry ed., rev. ed. 1978).

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

84. THE FEDERALIST NO. 83 (Alexander Hamilton).

85. *See, e.g.*, *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981) ("[W]hat satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed?"); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 633 (Max Farrand ed., 1911) ("[T]he rights of the Citizens [a]re . . . rendered insecure . . . by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star Chamber as to Civil cases.").

86. *See* JAMES WILSON, *Of Juries*, *in* 2 COLLECTED WORKS OF JAMES WILSON 1001 (Kermit L. Hall & Mark David Hall eds., 2007) (1896) (describing the jury as the "ultimate interpreters of the law").

87. *See* THE FEDERALIST NO. 83 (Alexander Hamilton).

88. *See* Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 BYU L. REV. 331, 353.

prices paid for ratification were the jury protections contained in the Fifth, Sixth, and Seventh Amendments.[89]

Accordingly, the jury as an institution—the one that motivated the Revolution; that nearly derailed ratification of the Constitution; and that three constitutional amendments solidified—is not simply a preferred dispute resolution tool. Americans fought and died for this right not because they believed lay people were more accurate adjudicators than judges,[90] but rather to ensure that all legal authority ultimately remained in the hands of the nation's true sovereigns. As historian Herbert Storing writes, "The question [at the founding] was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government."[91] And as Professor Akhil Amar explains, the jury sits at the center of the Bill of Rights, "strongly influenc[ing] the judge-restricting doctrines underlying [the First, Fourth, and Eighth] amendments."[92]

The jury, then, is an integral component of the Constitution's complex system of checks and balances.[93] It serves this controlling role with respect to all three branches of government. As to the legislature, the jury ensures that no legislation impacting legal interests will be enforced without first passing through a democratic body of local laypeople.[94] Similarly, the jury checks the executive branch by ensuring that abuses of executive power can be rectified at the local level and, therefore, discouraged.[95] And with respect to the

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89. *See* U.S. CONST. amend. V (requiring grand jury indictments to bring most federal felony charges); *id.* amend. VI (right to criminal jury trial); *id.* amend. VII (right to civil jury trial).

90. Though jurors may very well often be the superior adjudicator. *See, e.g.*, Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 23 (2001) (describing the importance of deliberation in juries rendering fair verdicts).

91. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 19 (Murray Dry ed., 1981).

92. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

93. *See generally* SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL AND GRAND JURIES (2016) (articulating the jury's role within the Constitution's system of checks and balances).

94. *See, e.g.*, *id.* at 64–66; Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1102 (1999) (reviewing the history and concluding that it "suggests that the Seventh Amendment was born of an unwillingness to trust Congress to do the right thing with respect to the right to a civil jury and is therefore an independent check on Congress's powers to determine the mode of adjudication").

95. *See, e.g.*, THOMAS, *supra* note 93, at 6; *see also* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (describing the jury's role as a "guard against a spirit of oppression and tyranny on

judiciary, the jury independently implements the law and, in so doing, checks the biases of unelected and unrepresentative judges.[96] As Thomas Jefferson famously wrote: "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 of them."[97] Again, the jury is a political institution.

Since its founding, the jury has repeatedly played its political role to both despicable and laudable effects. During the run-up to the Civil War, northern jurors flexed their power and refused to convict those involved in the Underground Railroad.[98] In the Jim Crow Era South, all-white juries halted reconstruction efforts and imposed racial hierarchies by convicting clearly innocent Black defendants and acquitting clearly guilty white defendants.[99] And in the twentieth century, jurors regularly acquitted bootleggers and rumrunners during prohibition,[100] and draft dodgers and protesters during the Vietnam War.[101] Time and time again, the jury—like all democratic institutions—has both risen to meet and shirked its duties. Today, some are concerned that Red Juries and Blue Juries are exercising this power to convict and acquit according to partisan interests. Our conversation turns next to the procedures long established for controlling the political leanings of jurors and ensuring, although certainly not without fault, the impartial administration of justice.

B. Procedures for Securing Political Impartiality

While the jury's political power is critical to its position within the Constitution, jurors are not free to rule with political caprice. The judiciary's legitimacy—indeed, the legitimacy of the state itself—requires that jury verdicts be founded in the law and facts as presented in open court. For this

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the part of rulers" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 (4th ed., Boston, Little, Brown, & Co. 1873))).

96. *See, e.g.*, Letter from Thomas Jefferson to Arnoud (1789), *in* THOMAS JEFFERSON ON DEMOCRACY 62, 62 (Saul K. Padover ed., 1939) (privileging "the opinion of twelve honest jurymen" over permanent judges, who "are liable to be tempted by bribery [and] misled by favor, by relationship, by a spirit of party, [and] by a devotion to the executive or legislative power").

97. *Id.*

98. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 57, 57–95 (1994).

99. *See, e.g.*, Owen M. Fiss, *The Awkwardness of the Criminal Law*, 11 HUM. RTS. Q. 1, 5 (1989).

100. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 291–97 (1966).

101. *See* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 124–27 (1998).

reason, courts have long controlled the prejudices of juries primarily through jury selection procedures, including (1) drawing representative jury venires and (2) extensive voir dire questioning. As will be later shown, however, the effectiveness of these procedures in controlling extreme partisanship today is highly suspect.[102]

1. Drawing the Venire

Americans have long been politically divided, and concern over procedures for securing politically impartial juries goes back to the Republic's earliest days. In many ways, these early years strongly resemble today. Near the turn of the nineteenth century, Americans were bitterly divided along partisan lines of the Federalist and Republican parties and, not unlike today, the outbreak of war seemed possible.[103] It was not just the politicians who despised each other; rather, "party loyalties became more intense and began to override personal ties, as every aspect of American life became politicized."[104] As one historian notes, "People who had known one another their whole lives now crossed streets to avoid confrontations," and "[p]ersonal differences easily spilled into violence."[105]

This polarization had particularly acute effects on the impaneling of juries. Although the Judiciary Act of 1789 gave states the authority to set qualifications for jury service, it also allowed federal officials to compile the lists from which jurors would be selected.[106] Just like the pre-Revolution royal officials, federal officials used their discretion to choose individuals for jury service that they suspected would rule in ways aligned with their partisan preferences.[107] For instance, in 1798, Federalist Secretary of State Timothy Pickering—who was appointed by Federalist President John Adams and confirmed by a Federalist-controlled Senate—appointed Federalist marshals to work under the federal judges, all of whom had been appointed by Federalist presidents and confirmed by Federalist-controlled senates.[108] Unsurprisingly, these Federalist marshals exercised their discretion to select

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102. *See infra* Section III.A.

103. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 209 (2009).

104. *Id.*

105. *Id.*

106. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88.

107. *See supra* note 80 and accompanying text.

108. *See* HALE, *supra* note 63, at 110.

reliably Federalist jurors from Federalist towns while avoiding reliably Republican jurors from Republican towns.[109]

Such partisan jury stacking was particularly common in cases involving alleged violations of the Sedition Act at the close of the century.[110] Consider the famous case of printer James Callender, who was prosecuted for publishing the anti-Federalist pamphlet *The Prospect Before Us*.[111] In assembling the jury, the United States marshal for Virginia, David M. Randolph, "rigged" the jury selection process by "cooperat[ing] with the presiding judges" to ensure "a wholly Federalist jury" tried the case.[112] The resulting proceedings were a travesty of justice, and the Federalist jury convicted Callender after less than two hours of deliberation.[113] Federal marshals employed this partisan stacking strategy around the nation.[114] "[T]he practice of the marshals in empanelling Federalists for jury service," as one historian explained, "converted the law into an engine of the Federalist political machine."[115] The jury, like the other political branches, had been partisanly captured.

Republicans complained loudly.[116] In fact, Thomas Jefferson—once a celebrator of trial by jury, who had once called it "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution"[117]—began to lose faith. Jefferson would come to write that a "germ of rottenness" had infected the institution and even proposed

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109. *Id.*

110. CARL E. PRINCE, THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE 264 (1977) (noting that "marshals rigged juries" during this period); Frank M. Anderson, *The Enforcement of the Alien and Sedition Laws*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 113, 125–26 (1914) (discussing multiple grand juries that "were composed preponderantly, if not exclusively, of Federalists").

111. *See* United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709); *see also* PRINCE, *supra* note 110, at 264.

112. PRINCE, *supra* note 110, at 264.

113. *Callender*, 25 F. Cas. at 258.

114. For instance, the marshal of South Carolina, Charles B. Cochran, was described by Republicans as "a factious and wrong-headed youngster" who "unremittingly checked the free course of justice by his partial selection of jurymen." *See* PRINCE, *supra* note 110, at 264 (first quoting Letter from Charles Goodwin (Apr. 30, 1801); and then quoting Letter from Ephraim Ramsey to Thomas Jefferson (May 1, 1801)).

115. MANNING J. DAUER, THE ADAMS FEDERALISTS 165 (1953).

116. *See* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 271 (Maeva Marcus ed., 1992) ("[D]uring the sedition trials of Matthew Lyon, Thomas Cooper, and James Callender, marshals were persistently pilloried for rigging juries.").

117. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* THE SCHOLAR'S THOMAS JEFFERSON: VITAL WRITINGS OF A VITAL AMERICAN 74 (M. Andrew Holowchak ed., 2021).

eliminating traditional jury selection practices in favor of elected juries.[118] While that solution would never come to be, Jefferson was able to achieve some remedy to partisan jury stacking upon his election to the presidency. Jefferson warned that "the prostitution of justice by [the] packing of juries cannot be passed over,"[119] and almost immediately upon taking office replaced six of the incumbent federal marshals.[120]

Beyond Jefferson's executive acts, Republicans in Congress also proposed legislative solutions to the partisan jury problem. Charles Pinckney of South Carolina was among the most vocal critics and introduced a bill that would have mandated that jurors be selected by lot from a list of "all the taxable male inhabitants," and noting in its preamble that "the drawing of juries by lot appears to be the most safe and impartial mode for securing the due and upright administration of justice."[121] Pinckney further justified the need for this bill elsewhere, explaining: "[To the marshal is] left the monstrous and dangerous power of summoning proper or improper, dishonest or upright men—men who may be the friends or enemies to the parties who are on their trial, or *who on political questions may be known to be opposed to them* . . . ."[122] The Federalist majority killed Pinckney's bill in committee.[123]

While legislators remained divided over federal marshal discretion,[124] political will for altering jury selection procedures waned as the partisan rancor of the early century calmed.[125] It was not until after the Civil War that

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118. Thomas Jefferson, Petition on the Election of Jurors (Oct. 1798), *in* 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 1076, 1077 (James Morton Smith ed., 1995); *see also* Daniel D. Blinka, *"This Germ of Rottedness": Federal Trials in the New Republic, 1789–1807*, 36 CREIGHTON L. REV. 135, 140 (2003) (reviewing this history).

119. *See* Letter from Thomas Jefferson to Thomas Mann Randolph (Mar. 12, 1801), *in* 33 WRITINGS OF THOMAS JEFFERSON 259, 260 (Barbara B. Oberg ed, 2007).

120. *See* PRINCE, *supra* note 110, at 263 ("Of all the incumbent Federalist officeholders whose official fates Thomas Jefferson pondered before his inauguration, he reacted most vehemently to the incumbent marshals."). As to why Jefferson did not replace all the marshals, Richard Ellis contends that he was swayed by party moderates who "advised against a policy of sweeping removals in order to further reconciliation." RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 32 (1971).

121. A Bill to Establish an Uniform Mode of Drawing Jurors by Lot, in All the Courts of the United States, 8th Cong., 1st Sess. (1804), *microformed on* Early American Imprints, Ser. 1, no. 38715 (Readex).

122. 10 ANNALS OF CONG. 37 (1800) (emphasis added).

123. *See* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 116, at 273.

124. *See* United States v. Coit, 25 F. Cas. 489 (D.N.Y. 1812) (No. 14,829) ("[T]he marshal has for years persevered in summoning such jurors as he at his pleasure thought fit, and from such parts of the district as suited his own views of propriety or convenience.").

125. *See* HALE, *supra* note 63, at 111.

the issue of marshal discretion again grabbed attention.[126] In 1879, the fortieth Congress—the first post-war Democratic majority—was primarily concerned with halting and undoing Reconstruction and turned its efforts to reforming jury selection procedures.[127] Democrats complained of the perceived packing of jury boxes by Republican officials.[128] As Democrat Senator Allen Thurman noted: "There still remains the power of the marshal and the clerk to fill the jury box with partisans and mere partisans alone; partisans of one political party, and but one."[129] Democratic supporters of new legislation explained that while partisan juries had been an issue since the nation's founding, it had been done in isolated cases, whereas after the war, "the federal courts had been granted enlarged jurisdiction by recent Republican congresses to protect Republican officeholders from corruption prosecutions in state courts, and that now the federal courts were primarily concerned with the prosecution of political crimes, especially alleged election frauds."[130]

The Democratic congressional majority was successful, and the result was the Federal Jury Selection Act of 1879.[131] Rather than employing federal marshals to hand select individuals for jury service, the act authorized the selection of federal jury pools by two separate officials—each of whom would supply half the names.[132] One of these officials would be the clerk of the federal court.[133] The other would be "a well-known member of the principal political party . . . opposing that to which the clerk may belong."[134]

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126. *See* Drew L. Kershen, *The Jury Selection Act of 1879: Theory and Practice of Citizen Participation in the Judicial System*, 1980 U. ILL. L.F. 707, 735 ("In 1879, Democrats considered federal marshals as biased political partisans, while Republicans simultaneously viewed federal marshals as defenders of the integrity of federal laws.").

127. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 887 (1994) (noting that the resulting Federal Jury Selection Act of 1879 "facilitated discriminatory jury selection in the federal courts[] and brought Reconstruction in the jury box to an end").

128. Some politicians alleged that federal jurors were themselves frequently Republican employees, and one Senator from Tennessee protested that federal marshals exacted promises from jurors to decide in the government's favor. *See id.*

129. 9 CONG. REC. app. at 92 (1879) (statement of Rep. A.G. Thurman).

130. Kershen, *supra* note 126, at 732.

131. Federal Jury Selection Act of 1879, ch. 52, 21 Stat. 43.

132. *Id.* § 2.

133. *Id.*

134. *Id.* There was great debate about whether this bipartisan approach would have the effect of inviting partisanship in jury selection and result in venires packed with partisan activists that would be incapable of reaching unanimous verdicts. But as Representative McMahon (D-Ohio) reasoned in response, "Now, if they are to be packed at all, I prefer that they be packed half and half." 9 CONG. REC. 1900 (1879). For a full discussion on the legislative history and debate of the act, see Kershen, *supra* note 126.

The purpose of this act was no doubt to undermine the Fourteenth Amendment and restrict the right of Black Americans from serving on juries,[135] but this end was achieved and framed through restraining the political partisanship of federal marshals that long served as the foundation of jury selection.

It was not until the civil rights movement of the twentieth century that truly random jury selection would be legislatively mandated at the federal level. The Jury Selection and Service Act of 1968 requires that federal jury panels be "selected at random from a fair cross section of the community"[136] and prohibits exclusion from petit juries based on "race, color, religion, sex, national origin, or economic status."[137] Conspicuously absent from this list is membership in a political party.[138] Around the same time, key decisions from the Supreme Court concluded that the Constitution mandated that juries be drawn from a "fair cross section of the community."[139] Potential jurors thus may not be hailed from the community in such a way as to exclude, intentionally or unintentionally, any "distinctive groups" of individuals.[140] While the Court has "never attempted to precisely define the term 'distinctive group,'"[141] it notes "economic, social, religious, racial, political and geographic" groups as examples among those that may not be excluded.[142]

Despite this Supreme Court language, courts that have considered whether membership in a political party constitutes a distinctive group for purposes of fair-cross-section analysis have uniformly held in the negative.[143] This is likely in part because courts do not view most demographic groups as

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135. The result of the bill was, as one observer in Georgia noted, that the names of freedmen seemed to be "nailed to the bottom" of the venire boxes. *See* Alschuler & Deiss, *supra* note 127, at 895.

136. 28 U.S.C. § 1861.

137. *Id.* § 1862.

138. State legislation is similar; the Author finds that no state secures against discrimination on the basis of political party in jury selection.

139. Taylor v. Louisiana, 419 U.S. 522, 528, 535–36 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.").

140. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 363–64 (1979).

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

142. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946).

143. *See, e.g.*, United States v. Allen, No. 16-CR-10141, 2018 WL 453725, at *7 (D. Kan. Jan. 17, 2018) ("Defendants have not shown that members of the Republican Party are a 'distinctive group.' While this group may be defined by a limiting quality, Defendants have not shown that the group shares a basic similarity in attitude, or that there are interests unique to the group that would not be adequately represented if the group is excluded from the jury selection process.").

ideologically distinctive in ways that matter in most cases.[144] Courts have been wary of recognizing nonideological categories as proxies for ideology, partly due to the uncomfortable practice of extending stereotypes to demographic groups.[145] As such, it is clear that race and gender are distinctive characteristics, but courts generally do not specify beyond those two groups.[146] While the procedures established under the 1968 law generally have the effect of preventing discrimination based on partisan affiliation, black letter law remains that the exclusion of political partisans from jury venires—despite the nation's centuries-long grappling with the issue—currently poses no legislative or constitutional fault.[147] And case law suggests that Republicans and Democrats can be lawfully overlooked or perhaps outright excluded from jury venires.[148]

2. Extensive Voir Dire Questioning

Moving beyond those procedures for drawing venires, the other main way for ensuring that jurors are not overly politicized is through extensive voir dire questioning.[149] At common law, jury selection was a perfunctory affair with parties sharply limited in what types of questions they were permitted to ask.[150] A veniremember was not even "obliged to disclose whether he ha[d] formed and delivered an opinion on the prisoner's case."[151] The strategic use of for cause and peremptory challenges was thus generally not possible.

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144. Scott W. Howe, *Juror Neutrality or an Impartial Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1209 (1995).

145. *See id.*

146. *Id.* at 1207. Though it should be noted that many nonideological categories of people have been litigated. *See, e.g.*, James M. Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 VA. J. SOC. POL'Y & L. 1, 18 (2009) ("'[T]hough felons almost certainly meet the ambiguous legal interpretation of "distinctiveness,"' no litigant has prevailed in a fair cross-section claim." (footnote omitted) (quoting Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 82 (2003)); *see also* Bryan D. Smith, *Young Adults: A Distinctive Group Under the Sixth Amendment's Fair Cross-Section Requirement*, 19 PAC. L.J. 1519, 1531 (1988) (noting that age-defined groups have generally not been recognized as distinctive).

147. *See infra* Section III.A.1.

148. *See infra* Section I.B.2.

149. Voir dire questioning also finds its beginning in the early American period. *See* April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J.C.R. & C.L. 1, 17–20 (2020).

150. *See id.* at 15.

151. *E.g.*, Sprouce v. Commonwealth, 4 Va. (2 Va. Cas.) 375, 378 (1823).

This practice changed in the early American period, with the turning point being the infamous trial of Aaron Burr.[152] Burr was tried for treason after he allegedly sought to establish an independent country in the southwestern United States.[153] The case was presided over by Supreme Court Chief Justice John Marshall, who was riding circuit.[154] Given the extreme partisanship of the time, there was some difficulty in assembling a jury that had not already prejudged Burr, particularly since he had famously shot Alexander Hamilton.[155] Noting that a complete lack of knowledge was not possible, Justice Marshall explained that "light impression[s] . . . which may leave the mind open to a fair consideration . . . constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind . . . do constitute a sufficient objection to him."[156] To determine a prospective juror's impressions, it was required that he openly answer probing questions so that all could "hear the statement" before deciding on the appropriateness of the veniremember's impartiality and inclusion.[157] After protracted jury selection and the subsequent trial, Burr was acquitted.[158]

After *Burr*, jury selection in the United States became more searching. Courts took heed of the Chief Justice's words as they reformulated jury selection procedures to ensure impartiality.[159] Parties began to use expanded voir dire to effectively use for-cause challenges and strategically use peremptory challenges.[160] By the late nineteenth century, jury selection was elevated to the status of "fine art," which attorneys studied in order to secure any possible advantage.[161] Legal periodicals counseled attorneys to exercise strikes on the basis of religious faith, employment type, political association, and other forms of social status.[162] Courts generally allowed such far-reaching questions. The California Supreme Court explained in 1887: "[C]ounsel have a right to make such inquiries as will bring out the character and force of the

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152. United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14692G).

153. *Id.*

154. For a full accounting of the political intrigue, see generally PETER CHARLES HOFFER, THE TREASON TRIALS OF AARON BURR (2008).

155. *See* 1 DAVID ROBERTSON, TRIAL OF AARON BURR FOR TREASON 403–82 (New York, James Cockcroft & Company 1875) (documenting the jury selection process).

156. *Burr*, 25 F. Cas. at 50.

157. *Id.* at 51.

158. ROBERTSON, *supra* note 155, at 482.

159. *E.g.*, State v. Johnson, 1 Miss. (1 Walker) 392, 397 (1831) ("[*Burr*] has been looked to by the state courts as the pole star by which they were to be guided.").

160. *See* BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, THE WORK OF THE ADVOCATE: A PRACTICAL TREATISE 134 (Indianapolis, Bowen-Merrill Co. 1888).

161. Anderson, *supra* note 149, at 15.

162. *Id.*

conviction he has. How else can the court determine whether he is able, notwithstanding his prejudice, to act fairly and impartially?"[163]

But more expansive questioning did not mean unlimited voir dire. Courts still required some type of connection between the facts of the case and the questions posed—particularly as to partisan affiliation. The Supreme Court made this clear in 1895 in *Connors v. United States*.[164] There, James Connors was charged with unlawfully interfering with an election after he "with force and arms [did] seize, carry away, and secrete the ballot box" from the eighteenth voting precinct of Arapahoe County, Colorado.[165] During jury selection, defense counsel sought to ask veniremembers about their political affiliations, including the question: "To what political party do you belong, and what were your party affiliations in November, A.D. 1890?"[166] The trial court rejected this line of voir dire questioning.[167] Connors was convicted and appealed.[168]

The Supreme Court found no error and affirmed the decision, explaining:

> The law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute.[169]

For this reason, "active participation in politics cannot be said, as matter of law, to imply either unwillingness to enforce the statutes designed to insure honest elections and due returns of the votes cast, or inability to do justice to those charged with violating the provisions of those statutes."[170]

But the Court went on to explain that the question of a potential juror's partisan affiliation may be permitted under certain, limited circumstances. The Court explained that "[i]f the previous examination of a juror on his voir dire, or the statements of counsel, or any facts brought to the attention of the court . . . indicate[] that the juror might, or possibly would, be influenced in giving a verdict by his political surroundings," it is within the trial judge's discretion to allow further questioning to determine "whether the juror's political affiliations or party predilections would bias his judgment as a

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163. People v. Brown, 14 P. 90, 91 (Cal. 1887).
164. Connors v. United States, 158 U.S. 408, 414–15 (1895).
165. *Id.* at 409–10.
166. *Id.* at 412.
167. *Id.*
168. *Id.* at 410.
169. *Id.* at 414.
170. *Id.*

juror."[171] But again, it is only if the potential juror "has himself, by his conduct or declarations, given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law" that such questing should be permitted.[172]

This approach to identifying partisan bias among potential jurors persisted through the twentieth century and into the present.[173] Trial judges are afforded broad discretion in determining what questions are permitted given the circumstances of the case and the veniremembers' specific responses.[174] And while case law is limited on the specific topic, individuals' partisan affiliations are still generally considered irrelevant in most cases.[175] Courts will only allow interrogation of an individual's political tendencies if the case in its subject matter directly implicates partisan interests.[176] It should be stressed, however, that there is no formal test for determining how partisan a given case's subject matter needs to be before voir dire questioning as to partisan affiliation is considered appropriate. As one judge explained: "The trial court's discretion is limited by the party's right to inquiry sufficient to inform a challenge. The party's right to ask such questions is limited by the trial judge's very broad discretion."[177]

The 1975 case of *United States v. Chapin* demonstrates this point.[178] Dwight Chapin had been a member of President Richard Nixon's administration and lied to a grand jury to help cover up the Watergate Hotel burglary.[179] Because the crime was committed in the Capital, charges were brought in the United States District Court for the District of Columbia.

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171. *Id.* at 415.

172. *Id.*

173. Consider the case of *State v. Longo*, 3 A.2d 127 (N.J. Sup. Ct. 1938). The appellant alleged that the district court had erred in refusing to allow him to interrogate potential jurors on their membership in the Democratic party and participation in the Democratic primary election. *Id.* at 127–28. The New Jersey court rejected his claim, stating:

> Since most of the citizens of this state are members of one or the other of the leading political parties, we fail to see how a jury could be impaneled to try a violation of the election law if mere membership in one or the other of the political parties should be regarded as evidence of bias and prejudice in the performance of a public duty.

Id. at 128.

174. *See* Goode, *supra* note 41, at 603.

175. Marten, *supra* note 41, at 728, 736 ("Case law addressing political affiliation and its impact on jury selection is . . . scarce.").

176. *See* Cordero v. United States, 456 A.2d 837 (D.C. 1983).

177. Goode, *supra* note 41, at 604–05.

178. United States v. Chapin, 515 F.2d 1274 (D.C. Cir. 1975).

179. *Id.* at 1287.

Chapin objected to this venue, alleging that as a Republican, he could not receive a fair trial given the District's "overwhelmingly Democratic[] population."[180] The district court denied the change of venue request.[181] Not satisfied, at jury selection Chapin sought to question potential jurors concerning their partisan affiliations, including their voter registration, whom they had voted for, and which political parties they had "contributed to, worked for, etc."[182] The trial judge rejected these various questions.[183] Chapin was tried, convicted, and appealed.[184]

The United States Court of Appeals for the District of Columbia affirmed.[185] The court explained that the decision to allow or disallow the specific questions is firmly within the trial judge's discretion.[186] And citing the Supreme Court's *Connors* decision, the court explained: "[Q]uestions about political affiliation should be disallowed, *even in a case involving politics*, except where preliminary questioning . . . had indicated that a potential juror 'might, or possibly would, be influenced in giving a verdict by his political surroundings.'"[187] Given that extensive questioning was conducted as to the potential jurors' general partisanship, the appellate court concluded that these more specific questions as to partisan affiliation and activities were unnecessary and thus that the district court did not abuse its discretion.[188]

Subsequent case law is largely in accord. Courts will generally prohibit interrogation during voir dire into a potential juror's political association with a dominant political party, and such membership alone will not give rise to a successful for cause challenge.[189] Courts are loathe to suggest that a Democrat or a Republican juror is, by their mere partisan registration, biased and incapable of impartiality.[190] With that said, if an individual suggests that partisanship may play a role in their consideration of a dispute, then courts

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180. *Id.* at 1286.
181. *Id.* at 1287, 1289.
182. *Id.* at 1289.
183. *Id.*
184. *Id.* at 1276, 1278.
185. *Id.* at 1290.
186. *Id.* at 1289.
187. *Id.* at 1290 (emphasis added) (quoting Connors v. United States, 158 U.S. 408, 415 (1895)).
188. *Id.* at 1289–90.
189. Marten, *supra* note 41, at 736. There are a handful of mid-twentieth-century decisions holding that for cause challenges against members of the Communist party are permissible on the rationale that such membership indicates an unwillingness to fairly enforce the law. Goode, *supra* note 41, at 656.
190. Goode, *supra* note 41, at 656.

will typically allow questions about an individual's level of partisanship, partisan activities, and whether the individual feels that their partisan affiliations would undermine their ability to fairly adjudicate the case. However, it remains uncertain in today's hyperpolarized environment that any case can exist that does not implicate political partisanship.

II. PARTISAN HYPERPOLARIZATION OF THE MODERN JURY

While the jury selection procedures discussed above may have historically helped control political partisanship among jurors, there is a question as to whether they are sufficient given the severity of partisan hyperpolarization today. To begin answering this question, this Part (A) reviews the empirical socio-psychological scholarship demonstrating the depths and effects of the disdain that Americans harbor toward one another on the basis of partisan affiliation; and (B) addresses how these divisions may be driving a crisis of confidence in the ability of jurors to adjudicate disputes fairly. It concludes that the reasonable perception, if not the reality, of Red Juries and Blue Juries is undermining the legitimacy of the American judicial system.

A. Partisan Hyperpolarization as a Distinct Phenomenon

America's partisan polarization is extreme and accelerating. Studies show that the degree of polarization today goes beyond mere partisanship and is instead a form of political sectarianism, akin to a type of "political religion"—with all the behavioral and psychological magnifications that metaphor implies.[191] Partisan members demonstrate "strong faith in the moral correctness and superiority" of their group,[192] and the result is "prejudice, discrimination, and cognitive distortion."[193] That is to say, political polarization results in precisely the type of effects that undermine the fair administration of justice.

That Americans are extraordinarily divided may not be surprising to most readers, but what may be surprising is that what chiefly divides them is not substantive policy differences. Quite the contrary. Studies overwhelmingly

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191. Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCIENCE 533, 533 (2020).

192. *Id.*

193. Stephanie Kulke, *Study: Republicans and Democrats Hate the Other Side More Than They Love Their Own Side*, NW. NOW NEWS (Oct. 29, 2020), https://news.northwestern.edu/stories/2020/10/study-republicans-and-democrats-hate-the-other-side-more-than-they-love-their-own-side [https://perma.cc/PA5R-7JKE] (quoting the study's lead author, Eli Finkel, about the effect of the current state of political sectarianism).

show that partisan polarization is *not* primarily driven by policy differences between the dominant political groups.[194] Instead, partisans experience strong affective polarization, meaning that they "hold[] opposing partisans in contempt on the basis of their identity alone."[195] In fact, policy preferences are secondary in partisan sorting; studies show that partisans adjust their policy preferences to align with their party identity rather than the other way around.[196] As political psychologist Lilliana Mason explains: "Identity-based ideology can drive affective ideological polarization even when individuals are naïve about policy. The passion and prejudice with which we approach politics is driven not only by what we think, but also powerfully by who we think we are."[197] And who Americans think they are increasingly infiltrates all aspects of their lives.[198]

This form of affective political division has led Professor Eli Finkel and his colleagues to conclude that the United States is experiencing not mere political polarization but instead "political sectarianism"—which they call a "poisonous cocktail . . . [that] poses a threat to democracy."[199] They explain that the "foundational metaphor for political sectarianism is religion, which evokes analogies focusing less on genetic relatedness than on strong faith in the moral correctness and superiority of one's sect."[200] And they note that the core ingredients of political sectarianism are: "othering—the tendency to view opposing partisans as essentially different or alien to oneself; aversion—the tendency to dislike and distrust opposing partisans; and

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194. *See* Finkel, *supra* note 191, at 533, 536.

195. *Id.* at 533. For a broader exploration of this phenomenon, see generally Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129 (2019); MASON, *supra* note 2; Murat Somer & Jennifer McCoy, *Déjà Vu? Polarization and Endangered Democracies in the 21st Century*, 62 AM. BEHAV. SCIENTIST 3 (2018); Jennifer McCoy et al., *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAV. SCIENTIST 16 (2018); Lilliana Mason, *A Cross-Cutting Calm: How Social Sorting Drives Affective Polarization*, 80 PUB. OP. Q. 351 (2016).

196. *See, e.g.*, Michael Bang Petersen et al., *Physiological Responses and Partisan Bias: Beyond Self-Reported Measures of Party Identification*, PLOS ONE, e0126922, at 1 (May 26, 2015), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0126922 [https://perma.cc/YB5S-ESUP] ("People are biased partisans: they tend to agree with policies from political parties they identify with, independent of policy content.").

197. Lilliana Mason, *Ideologues Without Issues: The Polarizing Consequences of Ideological Identities*, 82 PUB. OP. Q. 866, 885 (2018).

198. *See, e.g.*, Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1 PARTY POL. 5, 6 (1995) (finding that party membership is "bound up in all aspects of the individual's life.").

199. Finkel, *supra* note 191, at 533.

200. *Id.*

moralization—the tendency to view opposing partisans as iniquitous."[201] This cocktail results in "prejudice, discrimination, and cognitive distortion" among political partisans.[202]

Numerous studies bolster these findings. Prejudice between partisan groups is widespread, with surveys showing that the majority of Americans associate the opposing party with a number of negative characteristics. One 2022 study by the Pew Research Center, for instance, found that the majority of partisan Americans increasingly consider members of the opposing party to be more closed-minded, dishonest, unintelligent, immoral, and lazy compared to other Americans.[203] And not by small measures.[204] Americans also increasingly associate their own political group with positive attributes, with a majority of partisans in both parties saying that their group is "a lot or somewhat more moral than other Americans."[205] To be sure, Americans tie partisan identification with broad moral positioning: 59% of Democrats and 40% of Republicans go so far as to agree that party membership is indicative of whether someone is a "a good or bad person."[206]

Painting partisan others with such a broad, prejudicial brush has severe consequences. It drives a process of othering, such that Americans regularly describe members of the opposing party as "alien."[207] Through this process, political partisans come to see the opposing side not merely as political opponents but as an "existential threat[]."[208] Open threats of physical violence on this basis are made at an increasing rate. For instance, in July 2024, the President of the Heritage Foundation, an activist conservative think tank that has helped shape Republican policy proposals, claimed: "[W]e are in the process of the second American Revolution, which will remain bloodless if the left allows it to be."[209] But it is not just party insiders promoting partisan violence. One startling survey from 2019 shows that 15% of Republicans and

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201. *Id.*

202. Kulke, *supra* note 193.

203. PEW RSCH. CTR., AS PARTISAN HOSTILITY GROWS, SIGNS OF FRUSTRATION WITH THE TWO-PARTY SYSTEM 6 (Aug. 9, 2022), https://www.pewresearch.org/wp-content/uploads/sites/20/2022/08/PP_2022.09.08_partisan-hostility_REPORT.pdf [https://perma.cc/RR77-MP8U].

204. Over 50% of Republicans and Democrats associate opposing partisans with these terms, save for "lazy," which 26% of Democrats call Republicans. *See id.*

205. *Id.* at 10.

206. *Id.* at 30.

207. Finkel, *supra* note 191, at 533.

208. *Id.*

209. *See* Maggie Astor, *Heritage Foundation Head Refers to 'Second American Revolution*,*'* N.Y. TIMES (July 3, 2024), https://www.nytimes.com/2024/07/03/us/politics/heritage-foundation-2025-policy-america.html.

20% of Democrats agreed that the country would be better off if large numbers of opposing partisans "just died."[210] Read that again.

These extreme prejudices do not merely exist in the hypothetical; rather, they are realized in the form of partisan discrimination across settings.[211] In fact, Americans sort many aspects of their lives around partisan prejudices. Studies show that Americans choose who to romantically engage with based on political association.[212] The magnitude of this political homophily is comparable to that of educational homophily and half as large as racial homophily.[213] This desire to engage with those who share one's political beliefs is not just about finding partners with compatible political preferences; another study found that Americans' perceptions of physical attractiveness turn, in part, on partisan affiliation.[214] Republicans find Republicans prettier; Democrats find Democrats prettier.

Even beyond potential romantic mates, partisans discriminate socially against members of the opposing party. For instance, in 2019 Professor Richard Shafranek designed a study of roommate preferences among college students.[215] He presented students with a choice of prospective roommates' characteristics, including their partisan affiliation, cleanliness, preferred bedtime, musical tastes, hobbies, values, race, and religion.[216] He found that respondents strongly preferred co-partisan roommates.[217] In fact, partisans preferred to avoid living with a member of the opposing party at roughly the same level that they preferred to avoid someone that is described as "not at all clean and tidy."[218] Democrats would prefer to live with a messy Democrat over a cleanly Republican.

More broadly, Americans are also choosing where to live geographically based, in part, on partisan considerations. Studies have found that a large

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210. Nathan P. Kalmoe & Lilliana Mason, Lethal Mass Partisanship: Prevalence, Correlates, & Electoral Contingencies 22 (Jan. 2019) (unpublished manuscript), https://www.dannyhayes.org/uploads/6/9/8/5/69858539/kalmoe___mason_ncapsa_2019_-_lethal_partisanship_-_final_lmedit.pdf [https://perma.cc/RB9H-FTA8].

211. *See* Druckman & Shafranek, *supra* note 5, at 1602.

212. *See* Gregory A. Huber & Neil Malhortra, *Political Homophily in Social Relationships: Evidence from Online Dating Behavior*, 79 J. POL. 269, 269 (2017) (finding that people evaluate potential dating partners more favorably when they have similar political affiliations).

213. *Id.*

214. Stephen P. Nicholson et al., *The Politics of Beauty: The Effects of Partisan Bias on Physical Attractiveness*, 38 POL. BEHAV. 883, 883 (2016).

215. Richard M. Shafranek, *Political Considerations in Nonpolitical Decisions: A Conjoint Analysis of Roommate Choice*, 43 POL. BEHAV. 271, 271 (2019).

216. *Id.* at 277.

217. *Id.* at 282.

218. *Id.*

proportion of Americans live in areas highly segregated by partisanship.[219] Political sociologist Bill Bishop contends that people are not consciously deciding to live with fellow Democrats or Republicans alone.[220] This type of geographic political segregation, he argues, results from a correlation between political views and other demographic and lifestyle indicators. The clear result, however, is that American communities have become "pockets of like-minded citizens that . . . [are] so ideologically inbred that [members] don't know, can't understand, and can barely conceive of 'those people' who live just a few miles away."[221] And studies show that living in a politically incongruent area makes it more difficult for people to form friendships.[222] Partisan enclaves are the norm.[223]

Partisan discrimination is also apparent in people's economic choices. In one study of online labor markets, Professor Christopher McConnell and his colleagues found that potential employees are systematically willing to work for lower wages when the employer shares their political stances than when the employer does not.[224] But it is not just employees. Employers also discriminate based on partisanship in choosing which employees to hire. One study found that job seekers with minority partisan affiliations are less likely to obtain a callback than candidates without any partisan affiliation.[225] These findings suggest that partisanship is shaping cooperation in everyday economic behavior.[226]

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219. *See* Jacob R. Brown & Ryan D. Enos, *The Measurement of Partisan Sorting for 180 Million Voters*, 5 NAT. HUM. BEHAV. 998, 998 (2021).

220. *See* BISHOP, *supra* note 6, at 5.

221. *Id.* at 40. *But see* Ryan Strickler, *A "Sorted": America? Geographic Polarization and Value Overlap in the American Electorate*, 97 SOC. SCI. Q. 439 (challenging these findings).

222. William J. Chopik & Matt Motyl, *Ideological Fit Enhances Interpersonal Orientations*, 7 SOC. PSYCH. PERSONALITY SCI. 759, 760 (2016).

223. Across American neighborhoods, it is not uncommon to see rainbow flags on lawns proudly declaring what has become a sort of creed of modern liberalism: "In this house we believe: Black lives matter; Women's rights are human rights; No human is illegal; Science is real; Love is love; Kindness is everything." *See* Amanda Hess, *'In this House' Yard Signs, and Their Curious Power*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/arts/in-this-house-yard-signs.html (reporting on the emergence and prevalence of these signs). These explicit ideological commitments go far beyond public statements of political affiliation in which Americans have long engaged; to be sure, "I like Ike" is hardly a philosophical commitment. But today's political identities are wrapped in the virtues of partisan ideology, infiltrating daily lives, and not reserved for election season.

224. Christopher McConnell et al., *The Economic Consequences of Partisanship in a Polarized Era*, 62 AM. J. POL. SCI. 5, 10 (2018).

225. Karen Gift & Thomas Gift, *Does Politics Influence Hiring? Evidence from a Randomized Experiment*, 37 POL. BEHAV. 653, 653 (2015).

226. McConnell et al., *supra* note 224, at 7 ("[P]artisan-based discrimination may occur even in the most basic economic settings.").

Remarkably, Americans do not reserve partisan discrimination only for adults; they also discriminate against politically affiliated adolescents. In 2015, Professors Shanto Iyengar and Sean J. Westwood designed an experiment to determine the effects of partisanship on the task of awarding merit-based college scholarships.[227] Their experiment presented reviewers with resumes that differed in three ways: first, the high school senior could have either a 3.5 or 4.0 GPA; second, the senior could have been the president of the Young Democrats or Young Republicans club; and third, the senior could have a stereotypically African-American name and been president of the African-American Student Association or could have a stereotypically European-American name.[228] The experiment was designed to test how political cues affected nonpolitical tasks compared to race.

The results were unequivocal. When a resume included a political identity cue, about 80% of Democrats and Republicans awarded the scholarship to their co-partisan.[229] This result held true whether or not the co-partisan had the highest GPA—when the Republican student was more qualified, Democrats chose him 30% of the time, and when the Democrat was more qualified, Republicans only chose him 15% of the time.[230] The authors found that "candidate qualifications were never significant; partisanship simply trumped academic excellence in this task."[231] They also found that the rate of partisan discrimination exceeded discrimination on the basis of race.[232]

Partisan discrimination has also been shown to occur based solely on visual cues. A 2022 study by Professors Jeffrey Lyons and Stephen Utych showed pictures of faces to respondents and asked if they believed that the face belonged to a Democrat, Republican, or neither.[233] The results showed that it was common for respondents to identify faces as partisans of one persuasion or the other.[234] Next, using the assigned partisan identifications, the researchers introduced the pictures to respondents and asked about their likelihood of engaging in economic and interpersonal interactions with them.[235] The results showed that the perceived partisanship was linked to

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227. Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 697 (2015).

228. *Id.* at 698.

229. *Id.*

230. *Id.* at 699.

231. *Id.*

232. *Id.* at 696.

233. *See* Jeffrey Lyons & Stephen M Utych, *Partisan Discrimination Without Explicit Partisan Cues*, 10 J. SOC. & POL. PSYCH. 288, 288 (2022).

234. *Id.* at 290.

235. *See id.* at 299.

discriminatory behavior in evaluating job applicants and in accepting other social interactions.[236]

Beyond the prevalence of partisan prejudice and discrimination, partisan hyperpolarization is also associated with cognitive distortions. Partisans demonstrate a tendency to evaluate otherwise identical information more favorably when it supports, versus challenges, one's political allegiances.[237] As Professor Angus Campbell and his colleagues explain: "Identification with a party raises a perceptual screen through which the individual tends to see what is favorable to his partisan orientation. The stronger the party bond, the more exaggerated the process of selection and perceptual distortion will be."[238] Furthermore, partisans tend to seek out information to confirm their initial intuitions and biases rather than neutrally collecting and judging information.[239] Such partisan-motivated reasoning is symmetrical across the political spectrum—Republicans and Democrats demonstrate it in equal measure.[240] And troublingly, Americans are unable to identify their own partisan biases.[241]

Critics will note that prejudice, discrimination, and cognitive distortions are not unique to partisanship. These effects are associated with many identities, including age, gender, race, and religion.[242] What is more, there are considerable overlaps between these categories and partisan membership—particularly regarding religion and race. Studies show that self-identifying Mormons and Protestants are substantially more likely to be registered as

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236. *Id.* at 301.

237. *See* Geofrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCH. 808, 808 (2003).

238. ANGUS CAMPBELL ET AL., THE AMERICAN VOTER 133 (1960).

239. DANIEL KAHNEMAN, THINKING FAST AND SLOW 430 (2013).

240. *See* Peter H. Ditto et al., *At Least Bias Is Bipartisan: A Meta-Analytic Comparison of Partisan Bias in Liberals and Conservatives*, 14 PERSPS. PSYCH. SCI. 273, 273 (2019).

241. *See id.*

242. *See generally* Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCH. 612 (2006) (finding that individual wishes and preferences influence precocious processing of visual stimuli, affecting conscious perception); Roger Giner-Sorolla & Shelly Chaiken, *Selective Use of Heuristic and Systematic Processing Under Defense Motivation*, 23 PERSONALITY & SOC. PSYCH. BULL. 84 (1997) (suggesting that individuals selectively process heuristic cues with biased evaluations depending on whether the cues threaten or support their interests); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990) (proposing that cognitive processing pathways—including which beliefs and strategies are applied—are dictated by an individual's motivations, namely to be correct or to reach a particular conclusion).

Republicans.[243] Likewise, race continues to be closely associated with partisan membership; Black Americans register as Democrats 83% of the time.[244] As Professor Mark Satta suggests, "The two partisan teams in the United States offer 'mega-identities' for members through the homogenization of additional markers of identity like race and religion within each partisan team."[245]

But while it may be difficult to tease out entirely these crisscrossing identities, partisanship itself carries unique salience. As Professor Sean Westwood and his colleagues have shown, partisan identities are stronger than race and ethnicity in today's hyperpolarized environment.[246] While Americans hold dear their racial and cultural heritage, the language they speak, and their religious practices, it is to their political affiliation that they attribute the strongest attachment.[247] While there may be many reasons for this extreme partisan attachment, the authors conclude that unlike those other identities, which are often assigned or channeled at birth, "partisan affiliation is voluntary" and is therefore considered "a much more informative measure of attitudes and belief structures than, for example, knowing what skin colour someone has."[248]

Not only is partisan membership of greater importance in individuals' self-identification, but discrimination based on partisanship is more socially acceptable than discrimination on other demographic bases. The Supreme Court itself has recognized that voicing bias on the basis of race or national origin is socially loathsome.[249] But as scholars point out, "[T]here are no corresponding pressures or sanctions that mute disapproval of political

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243. PEW RSCH. CTR., CHANGING PARTISAN COALITIONS IN A POLITICALLY DIVIDED NATION 33–34 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/04/PP_2024.4.9_partisan-coalitions_REPORT.pdf [https://perma.cc/EE58-9E9M].

244. *Id.* at 14.

245. Mark Satta, *Political Partisanship and Sincere Religious Conviction*, 47 BYU L. REV. 1221, 1251 (2022).

246. *See* Westwood et al., *supra* note 3, at 334; *see also* PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS 5 (2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP_2019.12.17_Political-Values_FINAL.pdf [https://perma.cc/PB6L-LAM9] ("Partisanship continues to be *the* dividing line in the American public's political attitudes, far surpassing differences by age, race and ethnicity, gender, educational attainment, religious affiliation or other factors.").

247. *See* Westwood et al., *supra* note 3, at 335–36.

248. *Id.* at 351.

249. *See, e.g.*, Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017) ("The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot.").

opponents. In fact, the rhetoric and behaviour of party leaders suggests to voters that it is perfectly acceptable to treat opponents with disdain."[250] As Professor Shanto Iyengar bluntly puts it: "Political identity is fair game for hatred. Racial identity is not. Gender identity is not. . . . A Republican is someone who chooses to be Republican, so I can say whatever I want about them."[251]

Partisan enmity has thus found social acceptability in the hearts of Americans. Americans increasingly associate opposing partisans with negative characteristics and discriminate against them in both personal and professional settings. So extreme is this division that, for some, political violence no longer seems taboo. Our conversation turns next to how these startling divisions impact both the reality and the perception of lay participation in the administration of justice.

B. (Un)Reasonable Perceptions of Jury Partisanship

The extreme polarization discussed above has deleterious effects on lay participation in the administration of justice. Studies show that the degree of political partisanship has meaningful effects on jurors' perception of evidence and colors their deliberation and verdicts. And though these differences are unlikely to regularly translate into nakedly partisan verdicts, it is clear that attorneys and courts perceive partisanship among jurors to play a meaningful role. This perception, if not the reality, of Red and Blue Juries relying on partisan biases in resolving criminal and civil disputes undermines judicial legitimacy.

Scholars have widely observed that partisanship influences jurors' assessment of cases, particularly in politically charged disputes. Consider a 2012 study conducted by Professor Dan M. Kahan and his colleagues concerning the unconscious influence of individuals' group commitments on their perceptions of legally consequential facts.[252] In the experiment, the researchers showed subjects a video of a political demonstration: half of the subjects were told that the demonstrators were protesting abortion outside of an abortion clinic, while the other half were told that the demonstrators were protesting the military's since-repealed "don't ask, don't tell" policy outside

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250. Westwood et al., *supra* note 3, at 336.

251. Ezra Klein & Alvin Chang, *"Political Identity Is Fair Game for Hatred": How Republicans and Democrats Discriminate*, VOX (Dec. 7, 2015), https://www.vox.com/2015/12/7/9790764/partisan-discrimination [https://perma.cc/9JNV-WFXN].

252. Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 854–55 (2012).

of a military recruitment center.[253] Subjects were then asked to assume the role of a juror in determining whether the protesters were "intimidating, interfering, obstructing, or threatening" people who were trying to enter either the alleged clinic or recruitment center.[254] Subjects were further asked to recommend proper disposition of the dispute, including a hypothetical award of damages or entry of an injunction.[255]

The results are telling. Despite watching the exact same video, subjects had dramatically differing views of the basic facts depending on the congruence of the protestors' positions with the subjects' own.[256] Although the researchers were testing cultural values and not partisan membership, their findings demonstrated a correlation along party lines. For instance, the researchers found that "in the abortion clinic condition, the majority of Democrats (57%) opposed an injunctive remedy, and a majority of Republicans (62%) favored it; in the recruitment center condition, a majority of Republicans (67%) opposed and a majority of Democrats (61%) favored such an outcome."[257] And from the full study, the authors concluded that "what people *see* in trial proof will often turn on who they *are*."[258]

This cognitive effect is not limited only to partisanly charged settings. Partisan identities have also been shown to shape jurors' predispositions even in cases that may not be immediately so coded. Differences between Republicans and Democrats have been found in cases involving rape,[259] self-defense,[260] and more.[261] In fact, consider the case of *Scott v. Harris*: there, Victor Harris was a motorist who had been rendered a quadriplegic after police officer Timothy Scott deliberately rammed Harris's vehicle during a

253. *Id.*

254. *Id.* at 871.

255. *Id.* at 875.

256. *Id.* at 884.

257. *Id.* at 884 n.118 ("[A]mong the one-third of the sample that did not identify themselves as either Democrats or Republicans, there was again no difference between the abortion clinic and military recruitment conditions.").

258. *Id.* at 890.

259. *See* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 775 (2010).

260. *See* Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 34 (2008).

261. Imposition of the death penalty has sharp divisions between partisan members. *See* PEW RSCH. CTR., MOST AMERICANS FAVOR THE DEATH PENALTY DESPITE CONCERNS ABOUT ITS ADMINISTRATION 7 (2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/06/PP_2021.06.02_death-penalty_REPORT.pdf [https://perma.cc/CWD4-8UQN] (finding that 77% of Republicans favor the death penalty, compared to 46% of Democrats).

high-speed chase.[262] The entire episode was captured on video.[263] Harris sued Scott, alleging a violation of his Fourth Amendment rights.[264] Scott moved for summary judgment, claiming that the video footage foreclosed any genuine issue of material fact that Harris's driving posed a danger to the public sufficient to justify Scott's use of deadly force.[265] The district court granted the motion.[266] Harris appealed to the Eleventh Circuit, which affirmed, and then he appealed to the Supreme Court.[267]

At oral arguments, much discussion focused on the contents of the video. Justice Samuel Alito remarked, "I looked at the videotape . . . . It seemed to me that [Harris] created a tremendous risk."[268] Justice Stephen Breyer agreed, describing what he saw on the video:

> [T]hat tape shows [Harris] . . . weaving on both sides of the lane, swerving around automobiles that are coming in the opposite direction with their lights on, goes through a red light where there are several cars that are right there, weaves around them, and there are cars coming the other way, weaves back, goes down the road.[269]

An 8–1 majority affirmed summary judgment, with Justice Antonin Scalia writing: "[Harris's] version of events is so utterly discredited by the record that no reasonable jury could have believed him."[270] He went so far as to include a hyperlink to the video in the opinion, stating: "We are happy to let the videotape speak for itself."[271]

Yet perhaps all was not so clear. Professor Kahan, again, designed an empirical study to test whether the video really did speak for itself by showing the footage to a diverse sample of approximately 1,350 Americans and asking their views on the issues the Court had found dispositive.[272] While a substantial majority of Americans agreed with the Supreme Court, members of various subcommunities did not.[273] "Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and

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262. Scott v. Harris, 550 U.S. 372, 375 (2007).
263. *Id.* at 378.
264. *Id.* at 375–76.
265. *Id.*
266. *Id.*
267. *Id.*
268. Transcript of Oral Argument at 27, *Scott*, 550 U.S. 372 (No. 05-1631).
269. *Id.* at 44.
270. *Scott*, 550 U.S. at 380.
271. *Id.* at 378 n.5.
272. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).
273. *Id.*

Westerners, liberals and conservatives," and importantly for our purposes, "Republicans and Democrats—all varied significantly in their perceptions of the risk that Harris posed, of the risk the police created by deciding to pursue him, and of the need to use deadly force against Harris in the interest of reducing public risk."[274] Democrats took a significantly more pro-plaintiff stance across all issues relative to Republicans.[275] The authors concluded that these different responses were likely driven by "value-motivated cognition," or "the tendency of people to resolve factual ambiguities in a manner that generates conclusions congenial to self-defining values."[276] Democrats and Republicans wanted their responses to align with their self-conceptions.

The results of these studies should not surprise. Regardless of whether the circumstances are immediately viewed as political or apolitical, individuals bring with them and draw upon their diverse worldviews to reach verdicts. This is precisely why juries are so politically valuable. By drawing upon their diverse perspectives, the jury is more able to serve its democratic role. As jury scholars Hans Zeisel and Shari Seidman Diamond explain: "All jurors' experiences have shaped their values and attitudes, and these, in turn, are likely to shape jurors' perceptions of the trial evidence and hence their votes."[277] They add, "In this sense, 'prejudice' is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial."[278] The fact that Red and Blue jurors draw upon their partisan identities in assessing evidence and reaching verdicts may be considered a feature, not a bug.

Critics will challenge this characterization. They will note that the difficulty arises not when Republican and Democratic jurors simply draw upon their partisan identities and worldviews in assessing ambiguous evidence but instead when they consciously disregard the evidence to reach verdicts advancing their partisan interests. This is the implicit argument inherent to the modern characterization of Red Juries and Blue Juries.[279] Partisans will be so driven by the prejudice and cognitive distortions discussed above that they will actively discriminate against partisan others in reaching unsupported verdicts. The language of Red Juries and Blue Juries

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274. *Id.* at 903.

275. *Id.* at 867.

276. *Id.* at 903.

277. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978).

278. *Id.*

279. *See supra* notes 26–31 and accompanying text.

traffics in these characterizations, painting partisans as incapable of adjudicating fairly those disputes impacting the out-group.

However, there are no studies demonstrating this type of extreme partisan decision making among jurors. On the contrary, studies overwhelmingly show that jurors reach verdicts in line with the evidence. It is only in circumstances in which evidence conflates that jurors will yield the law to their biases.[280] As Harry Kalven and Hans Zeisel note in their preeminent study on the American jury, "[T]he jury by and large responds to the discipline of the evidence, and where it does not, it conceals from itself its own response to sentiment, under the guise of resolving issues of evidential doubt."[281] There is no question that jurors bring their partisanship with them into the jury box and rely on their sentiments as partisans in reaching verdicts, but it is unclear whether it is a serious or unique problem in most cases.

Recent observations support this conclusion. One study of civil jury verdicts concluded that "[w]hile there is a general pro-plaintiff inclination among Democrats and a general pro-defendant inclination among Republicans, these inclinations tend to be on abstract matters and do not correspond with actual juror decisions on damages."[282] Another study of criminal juries found "that the views of rank-and-file Democrats and Republicans do not differ much for most crimes" and are unlikely to result in different outcomes.[283] The authors of that study concluded by instructing attorneys that in jury selection they would be "wasting their time trying to determine whether a potential juror is a Democrat or Republican."[284]

But attorneys seem happy to waste their time. Despite these studies, the specter of Red and Blue Juries looms over jury selection as the parties and their attorneys rely upon veniremembers' political affiliation in determining how to exercise peremptory strikes. Jury consultants counsel that knowledge about a prospective juror's political activities—including voting registration, contributions, and petition signatures—can be extraordinarily helpful in

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280. KALVEN & ZEISEL, *supra* note 100, at 165.

281. *Id.* at 427.

282. Alan M. Tuerkheimer, *Politics in Civil Jury Selection*, WIS. LAW. (Dec. 4, 2008), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=81&Issue=12&ArticleID=1573 [https://perma.cc/DDK4-68SP]; *see also* Reid Hastie et al., *Juror Judgements in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445, 463–67 (1999) (finding no effect between award size and partisan affiliation).

283. Robert W. McGee et al., *Democrats v. Republicans: Is Political Party Affiliation a Significant Demographic Variable in Jury Selection?*, 17 CHARLESTON L. REV. 153, 155 (2022).

284. *Id.*

identifying those jurors likely to render an unfavorable verdict.[285] What is more, it has become common for attorneys to dig into prospective jurors' online posts to identify partisan affiliation. For instance, in Donald Trump's hush money criminal case, counsel probed each prospective juror's social media history going back nearly a decade in search of statements that might indicate impermissible partisanship.[286]

Courts have blessed such outside research. Consider again *United States v. Chapin*, discussed above.[287] There, although the appellate court affirmed the district court's denial of a question concerning prospective jurors' voter registration, it suggested that questioning "voter registration" of jurors may be permissible, given that the information is publicly available.[288] But there was no abuse of discretion, the appellate court concluded, since it would "have been possible for Chapin's attorneys, armed with the list of names and addresses of veniremen, to get part of the information directly from the Board of Elections."[289] So while most courts will not allow direct questioning into jurors' political affiliations, parties are free—perhaps even encouraged—to seek out the information elsewhere.

Recently the United States Supreme Court has also given oxygen to the notion that partisanship infects jury impartiality. In *Trump v. United States*, the Court held that President Trump enjoyed absolute immunity for core executive acts and that official acts could not serve as evidence in cases concerning unofficial acts.[290] The Court explained:

> Presidential acts frequently deal with "matters likely to 'arouse the most intense feelings.'" Allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office. The prosaic tools on which the Government would have courts rely are an inadequate safeguard against the peculiar constitutional concerns implicated in the prosecution of a former President.[291]

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285. Carol L. Bauss, *Streamlining Juror Research*, TRIAL, Sept. 2019, at 58, 59.

286. Larry Neumeister & Jake Offenhartz, *Social Media Searches Play Central Role at Jury Selection for Trump's First Criminal Trial*, ASSOCIATED PRESS (Apr. 18, 2024), https://apnews.com/article/trump-hush-money-criminal-trial-jurors-e47b0494de7688bde0e877ccb90aeca2 [https://perma.cc/W4P3-NEWB].

287. 515 F.2d 1274 (D.C. Cir. 1975).

288. *Id.* at 1290.

289. *Id.*

290. 603 U.S. 593, 609, 631 (2024).

291. *Id.* at 631 (citations omitted).

Thus, it is not merely that the full exercise of the President's Article II authority requires privileged communications. Instead, the Court concludes that the privilege must apply because the potential partisan leanings of jurors must be protected against. Red or Blue Juries are the real threat to the Executive, says the Court.

Accordingly, regardless of whether the existence of Red Juries and Blue Juries—as politically motivated actors—is a serious concern, the perception of juries stacked with political partisans is salient. And given the hyperpolarized state of the Republic, it is reasonable for actors to proceed with trepidation when put on trial before partisan others. As United States Supreme Court Justice Frankfurter once noted, "The appearance of impartiality is an essential manifestation of its reality."[292] Our conversation turns next to how courts and others might enhance the perception of partisan impartiality.

III. PROPOSED REFORMS AND BALANCING OF INTERESTS

Given hyperpolarization among Republicans and Democrats and the empirical evidence showing that partisanship influences jurors' perception of facts and their resolution of disputes, courts should take seriously concerns that partisan juries are undermining the fair administration of justice. They should (A) adopt procedures that have shown to be effective in controlling racial discrimination in jury selection and decision making, such as taking affirmative steps to increase representative venires, expanding voir dire questioning on partiality, and providing jurors with anti-bias instructions.[293] Regardless of which strategies are adopted, it is critical that courts also (B) be conscientious not to intrude unduly on the institution's foundational political role.[294]

A. Securing a Fair Trial for the Parties

Americans loathe each other and rationally believe that Red and Blue Juries are unfairly relying on their partisan ideologies in resolving disputes. Courts should acknowledge this affectation and adopt procedures that can help to secure the judiciary's substantive and procedural legitimacy. To this end, courts should (1) take affirmative steps to ensure that juries are selected

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292. Dennis v. United States, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting).
293. *See infra* Section III.A.
294. *See infra* Section III.B.

from partisanly representative venires and (2) permit more searching jury selection procedures and anti-bias instructions so that the selected jurors do not overly rely on their partisan ideologies.

1. Distinctive Groups and Partisan Jurymandering

As scholars and jurists have long recognized, unrepresentative juries compromise the procedural legitimacy and substantive accuracy of jury verdicts.[295] To address this, the Supreme Court has read the Constitution to demand that jury venires be drawn from a fair cross section of the community, such that no distinctive group of individuals may be intentionally or unintentionally overlooked.[296] While courts have generally only enforced this requirement in the context of groups excluded on the basis of race and gender, such myopia misses the full protection of the right. Courts should extend the fair-cross-section requirement to partisan groups and take further affirmative steps to ensure representative jury venires.

Because the jury is a democratic body, it must represent the community from which it is drawn. As psychologist Lawrence Wrightsman explains: "[W]hen the jury does not include all the components of the community, its voice is seen as false, and the community is likely to reject its outcome as invalid. . . . If members of underrepresented groups . . . do not serve, they are more likely to develop hostile attitudes toward the legal process."[297] This is no novel observation. Plato recognized the point over two millennia ago: "He who has no share in the administration of justice is apt to imagine that he has no share in the State at all."[298] The United States Supreme Court has agreed, explaining that jury service "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."[299] For this reason, as the Court has added elsewhere, *our democracy itself* requires that the jury be a "body truly representative of the community."[300]

To ensure community representation, the Supreme Court has held that the Constitution guarantees the right to a jury drawn from a "fair cross section"

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295. *See, e.g.*, Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 347 (1988).

296. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 527–28 (1975).

297. LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM 226–27 (1987).

298. PLATO, LAWS bk. VI, at 768, *reprinted in* 2 THE DIALOGUES OF PLATO 529 (B. Jowett trans., Random House rev. ed. 1937).

299. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

300. Smith v. Texas, 311 U.S. 128, 130 (1940).

of the community.[301] To advance a prima facie case that such a cross section is lacking, a party must show:

> (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[302]

Critically, the party need not demonstrate that the distinctive group's underrepresentation resulted from intentional discrimination.[303] Nor must he demonstrate that he suffered harm from the alleged underrepresentation.[304] The Constitution imposes on the state an affirmative obligation to provide representative jury venires.[305]

Although the term distinctive group sits at the center of the fair-cross-section guarantee, the Court has by its own admission "never attempted to precisely define the term."[306] Instead, it has relied on loose metaphors in trying to capture the essence of the protection.[307] When a distinctive group is excluded, the Court has explained, "the effect is to remove from the jury room qualities of human nature and varieties of human experiences, the range of

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301. *See, e.g.*, *Taylor*, 419 U.S. at 528 ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered *in connection with either criminal or civil proceedings*, necessarily contemplates an impartial jury drawn from a cross-section of the community." (emphasis added)).

302. Duren v. Missouri, 439 U.S. 357, 364 (1979).

303. *See* United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989) ("While the equal protection clause of the fourteenth amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, 'the sixth amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of . . . motive.'" (citations omitted)).

304. *See* Peters v. Kiff, 407 U.S. 493, 504 (1972).

305. *See Duren*, 439 U.S. at 363–64 ("[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.").

306. Lockhart v. McCree, 476 U.S. 162, 174 (1986). Some lower courts have advanced a more searching test, with *United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y. 1972), offering the most common articulation. Under *Guzman*, (1) membership in the group must be definite and ascertainable; (2) the group must share basically similar ideas, attitudes, or experiences, which are not shared by the general public; and (3) the group must have a community of interests that will not be adequately represented by other segments of society if the group is excluded from the jury pool. *Id.* at 143.

307. Justice William Rehnquist, for instance, openly mocked the Court's characterization as "smack[ing] more of mysticism than of law." Taylor v. Louisiana, 419 U.S. 522*,* 542 (1975) (Rehnquist, J., dissenting).

which is unknown and perhaps unknowable."[308] It has noted that "a flavor, a distinct quality is lost" when such groups are excluded.[309] Officially, the Supreme Court has only recognized race,[310] gender,[311] and ethnic background[312] as constituting "distinctive groups" that may not be overlooked. Some lower courts have extended the protection to certain religious groups.[313] But groups defined by occupation, income, geography, age, and education have been largely rebuffed.[314] And, as noted above, no court has ever found that political party membership constitutes a distinctive group for purposes of this analysis.

The Supreme Court's lack of clarity has led to some confusion. Given the seeming overlap between the distinctive groups covered by the fair-cross-section requirement and suspect classes covered by the Equal Protection Clause, courts often conflate the two provisions.[315] Yet they are emphatically distinct. The concept of distinctive group grows out of the Fifth, Sixth, and Seventh Amendments' use of the word "jury."[316] For this reason, the protection is focused on securing the democratic representativeness of the jury as an *institution*, not ensuring equal protection for those *individuals* that may be selected for the jury, as the Fourteenth Amendment does. With violations of the fair-cross requirement, "[t]he injury is not limited to the defendant," the Supreme Court has explained, "there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts."[317]

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308. *Kiff*, 407 U.S. at 503–04.

309. Ballard v. United States, 329 U.S. 187, 194 (1946).

310. *See Kiff*, 407 U.S. at 504.

311. *See Taylor*, 419 U.S. at 531.

312. *See* Castaneda v. Partida, 430 U.S. 482, 494–95 (1977).

313. *See, e.g.*, Grech v. Wainwright, 492 F.2d 747, 750 (5th Cir. 1974) (finding people of Jewish faith to be a distinctive group); United States v. Suskin, 450 F.2d 596, 599 (2d Cir. 1971) (same).

314. *See* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 968–69 (1998) (noting that courts have at various times upheld exclusion of "old people, poor people, deaf people, less educated people, college students, resident aliens, blue-collar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis").

315. *See, e.g.*, Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 J. CONST. L. 931, 947 (2011) (demonstrating this conflation); Leipold, *supra* note 314, at 972–73 (same).

316. *See, e.g.*, *Taylor*, 419 U.S. at 531.

317. Ballard v. United States, 329 U.S. 187, 195 (1946).

For this reason, it is the animating institutional purposes of the jury that guide fair-cross-section analysis. The Supreme Court has explained these purposes as

> (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of the justice is a phase of civic responsibility."[318]

"Without [the fair-cross-section] requirement," the Court opined elsewhere, "the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition."[319]

Given these motivating interests, the concept of distinctive group is both expansive and malleable. It is not tied to any specific time[320] or geographic place.[321] It has nothing to do with addressing the nation's history of discrimination or exclusion from the political process. As the predominant divisions within society shift, so too will the type of diversity that the jury as an institution requires. As the Supreme Court has acknowledged in other contexts, "[c]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."[322] To ensure that the jury can be a body truly representative of the community, courts must be diligent, always viewing society and its divisions with fresh eyes.

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318. Lockhart v. McCree, 476 U.S. 162, 174–75 (1986) (alteration in original) (quoting *Taylor*, 419 U.S. at 530–31).

319. Holland v. Illinois, 493 U.S. 474, 480–81 (1990).

320. *See* United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970), *overruled on other grounds by* Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985) (referencing "the contemporary national preoccupation with a 'generation gap'" in concluding that neither younger nor older adults could be excluded without some justification).

321. *See, e.g.*, United States v. De Alba-Conrado, 481 F.2d 1266, 1270 n.7 (5th Cir. 1973) (remanding to determine if Latin-Americans constitute a distinctive group in Miami, Florida); Quadra v. Super. Ct. of S.F., 378 F. Supp. 605, 617 n.19 (N.D. Cal. 1974) ("[P]ersons of Latin-American descent and of Chinese and Japanese ethnic origin are identifiable groups *within San Francisco*." (emphasis added)).

322. Hernandez v. Texas, 347 U.S. 475, 478–79 (1954) (holding that "persons of Mexican descent [can] constitute a separate class" under the Fourteenth Amendment because the Equal Protection Clause is not "directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro").

Today, partisan membership should be recognized and enforced as a distinctive group. As the above Sections demonstrate, Republicans and Democrats are not fungible. They maintain separate communities, separate morals, and—at least believe themselves to have—entirely separate worldviews.[323] They distrust one another, harbor extreme bias toward each other, and openly discriminate against each other.[324] And they are skeptical of government power exercised by opposing partisans.[325] These are precisely the concerns that have animated the Court to recognize other distinctive groups.[326]

This is not to suggest that all Republicans or all Democrats are likely to think the same and to issue verdicts in line with their partisan interests. Excluding Republicans or Democrats from the courtroom may not make one iota of difference to the actual verdict, but to exclude one or the other is to rob the parties, the institution, and the public of full democratic consideration of the dispute.[327] Without one or the other, public confidence in court proceedings will suffer as the perception of partisan jurors issuing partisan verdicts creeps into the national consciousness.[328] The courthouse is viewed as another partisan battleground, delivering not impartial justice to all but partisan goods to its adherents.

Critics will be quick to note that it is not at all clear that Republicans or Democrats are being overlooked, intentionally or unintentionally, in assembling venires. To be sure, there are many reasons why the underrepresentation of political partisans may result, including simply that Americans are geographically polarized along partisan lines.[329] But demonstrating that members of the dominant political parties should be

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323. *See supra* Section II.A.

324. *See supra* notes 194–210 and accompanying text.

325. *See supra* notes 194–210 and accompanying text.

326. Quick critics will note that the Supreme Court has held that "groups defined solely in terms of shared attitudes" are insufficient to give rise to a distinctive group. United States v. Salamone, 800 F.2d 1216, 1220 (3d Cir. 1986) (reasoning that "'shared attitudes' of a given group is insufficient to qualify it as a 'distinctive group' in society for purposes of the sixth amendment"). But to suggest that political partisanship today amounts to little more than a "shared attitude" is to misunderstand fundamentally the foundations and salience of partisan political identity. Partisan bias turns largely not on political attitudes but instead on deeply held self-identification—identification that many hold more closely than the group classifications courts have previously recognized as distinctive.

327. *Cf.* Ballard v. United States, 329 U.S. 187, 193 (1946) (recognizing that excluding women from the venire may not change trial outcomes, but it unconstitutionally makes the body less representative).

328. *See supra* notes 32–36.

329. *See supra* note 6 and accompanying text.

treated as distinctive groups and showing that they are not represented on a given jury is sufficient to shift the burden to the state to prove that the disparities in representation results from something other than discrimination.[330] Mere allegations of good faith are insufficient given the state's affirmative obligations.[331] Courts should therefore take seriously their responsibility to ensure cross-representative venires and, under certain circumstances, force the state to prove that it is not discriminating along partisan lines.

Consider again the January 6 defendants' complaints about D.C.'s overwhelmingly Democratic majority. Trial courts uniformly refused to grant motions to transfer venue on this basis.[332] But this does not mean that such concerns of impartiality can be so readily dismissed. Similar claims were made in *Haldeman,* the Watergate case described above.[333] In dissenting from the denial to transfer venue, Judge Mackinnon acknowledged:

> [I]n Washington, D.C., there most emphatically does appear to be a unique island of political bias, and in this case, with its massive political aspects, it would be futile to ignore the possibility that prior to the trial potential jurors may have formed prejudgments of the case based on their political affiliation or leanings.[334]

It should be stressed that when these observations were made in 1976, the Democratic Party candidate for President in 1972 received 78.2% of the total votes cast—in 2020, that share was 92.1%.[335] Such optics matter in the administration of justice, even if the state played no role in creating the unrepresentative venire and the ultimate result is likely to make no difference in the jury reaching its verdict.

For this reason, even if courts today are unpersuaded that partisan membership constitutes a distinctive group or that underrepresentation of partisans has unfairly resulted,[336] court administrators can nevertheless take affirmative steps to increase the partisan representativeness of jury venires. Such affirmative steps have been termed "Jurymandering," and historically have been largely focused on increasing racial diversity among jury

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330. *See* Castaneda v. Partida, 430 U.S. 482, 494–95 (1977).

331. *Id.* at 498 n.19.

332. *See* Parloff, *supra* note 34.

333. *See* United States v. Haldeman, 559 F.2d 31, 131 (D.C. Cir. 1976).

334. *Id.* at 161 (MacKinnon, J., dissenting).

335. *See District of Columbia Election Results*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-district-of-columbia.html.

336. This will likely be the case. Courts seem loathe to extend the fair-cross-section requirement to its fullest extent. *See* Leipold, *supra* note 314, at 970 (noting courts' "anemic interpretation of the cross-section doctrine").

venires.[337] For instance, in 1992, Hennepin County, Minnesota, assembled a task force to address the use of all-white grand juries and developed a proposal for racial quotas.[338] A policy was implemented requiring that at least two minority grand jurors sit on every twenty-three-member grand jury.[339] Or consider that the U.S. District Court for the Eastern District of Michigan once sought to maintain a racially balanced jury wheel by sending extra jury questionnaires to areas in which Black Americans constituted 65% or more of the population.[340] Or that in DeKalb County, Georgia, jury commissioners divided jury lists into thirty-six demographic groups consisting of age, gender, and race, and used a computer to ensure proportional representation on every jury venire.[341]

Just as conscious jury assembling can be effective at "balancing the box" to achieve age, gender, and racial diversity, it can also be employed to achieve partisan diversity. This would hardly be impractical. Whereas one's race is often an amorphous construct, rarely fitting within clearly defined boundaries,[342] partisan membership is limited. Many jury administrators already use voter rolls to assemble venires and thus already have access to the party registration of potential jurors.[343] Courts could deliberately ensure that Republicans, Democrats, and Independents are hailed in proportional parts for jury service. Or, perhaps, courts could even make affirmative efforts to achieve *disproportional* partisan representation, for instance, by sending additional summons to partisan minorities, thus increasing the likelihood that the petit jury is partisanly diverse.

There is common law support for such jurymandering. For instance, the ancient rule of *jury de medietate linguae* ensured that a noncitizen would receive a trial of "one-half denizens and the other aliens" to ensure impartiality.[344] This was no aberration. It was employed by members of the Plymouth Colony in 1674, in which they added six Indians to a jury of twelve

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337. The term "jurymandering" was coined by Jeffrey Rosen. *See* Jeffrey Rosen, *Jurymandering*, NEW REPUBLIC, Nov. 30, 1992, at 15; *see also* Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 707 (1993).

338. OFF. OF THE HENNEPIN CNTY. ATT'Y, HENNEPIN COUNTY ATTORNEY'S TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY, FINAL REPORT 45 (1992).

339. *Id.*

340. *See* King, *supra* note 337, at 722–23.

341. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 711 (1995).

342. For a discussion on the difficulties this poses for affirmative action in jury selection, see HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION 20–60 (2003).

343. For a discussion on how jury lists are assembled, see *id.* at 149–75.

344. *See* United States v. Wood, 299 U.S. 123, 145 (1936).

colonists to try three Indians for murder.[345] Likewise, in 1823, Chief Justice John Marshall, riding circuit, used the practice to impanel a mixed jury to try a noncitizen charged with piracy and murder.[346]And today, while the Supreme Court has held that the Sixth Amendment does not require that mixed juries be assembled,[347] it likewise does not prohibit it. True, there may be some question as to whether racial affirmative action in assembling venires has survived the Supreme Court's overruling of its prior Fourteenth Amendment decisions,[348] but efforts to increase representative venires as to partisan classes fall victim to no such constitutional shortcoming.[349]

It must be stressed that while the jury venire should be partisanly representative, this does not mean that Republicans and Democrats may not be constitutionally excluded at jury selection. The Supreme Court has rejected "an extension of the fair-cross-section requirement from the venire to the petit jury."[350] As the Court has reasoned,

> [I]f it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on.[351]

But while petit juries do not require partisan balancing, efforts to control partisan bias represented in criminal and civil juries can be undertaken.

2. Jury Selection and Policing Partisan Bias

Beyond adopting procedures to ensure partisanly representative venires, jury selection procedures should be overhauled to ensure that the impaneled jurors do not overly rely on partisan prejudices. Specifically, courts should allow parties to freely and explicitly probe jurors' partisan affiliations during voir dire and exercise peremptory challenges to ensure that the impaneled

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345. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of de Medietate Linguae: A History of a Proposal for Change*, 74 B.U. L. REV. 777, 790–91 (1994).

346. *See* United States v. Cartacho, 25 F. Cas. 312, 313 (D. Va. 1823) (No. 14,738).

347. *See Wood*, 299 U.S. at 145.

348. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

349. *See* King, *supra* note 337, at 730–36 (discussing potential constitutional shortcoming associated with racial affirmative action in jury selection).

350. Holland v. Illinois, 493 U.S. 474, 477 (1990).

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

jury is politically impartial to the parties' satisfaction. Subsequently, the court should provide jurors with anti-bias instructions to help them understand and check their implicit and explicit partisan prejudices.

As discussed above, judges enjoy great discretion over jury selection. But the general approach is that judges will not allow parties to interrogate potential jurors' partisan affiliations.[352] Courts have largely concluded that partisan membership is, on its own, irrelevant to an individual's qualifications in resolving disputes and may remain private.[353] Therefore, as the Supreme Court has explained, it is only when there is some reason to believe from the veniremember's statements or demeanor that the individual might "be influenced in giving a verdict by his political surroundings" that courts will allow additional probing to determine if "the juror's political affiliations or party predilections would bias his judgment as a juror."[354]

This head-in-the-sand approach to political partisan bias is a mistake. To be sure, the Supreme Court has long rejected the underlying rationale, at least in the context of racial bias and perhaps other biases. In *Aldridge v. United States*, the Supreme Court reversed a Black defendant's murder conviction where the trial judge had refused the defense's request to interrogate veniremembers as to their potential racial prejudice.[355] The Court noted the prevalence of anti-Black racism, stating, "[W]e do not think that it can be said that that possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry."[356] And though the government advanced the argument that it would be "detrimental to the administration of the law . . . to allow questions to jurors as to racial or religious prejudices," the Court disagreed.[357] "[I]t would be far more injurious," the Court retorted, "to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."[358]

So important is the idea that the jury be free from impermissible bias that the Supreme Court would soon go one step further. In *Ham v. South Carolina*, the Court held that "the Due Process Clause of the Fourteenth Amendment *requires* that . . . the [defendant] be permitted to have the jurors interrogated on the issue of racial bias."[359] The Court acknowledged that there also may

352. *See supra* Section I.B.2.
353. *See supra* notes 164–88 and accompanying text.
354. Connors v. United States, 158 U.S. 408, 415 (1895).
355. Aldridge v. United States, 283 U.S. 308, 318 (1931).
356. *Id.* at 314.
357. *Id.* at 314–15.
358. *Id.* at 315.
359. Ham v. South Carolina, 409 U.S. 524, 527 (1973) (emphasis added).

be other types of prejudice on which the Due Process Clause requires trial judges to allow interrogation.[360] In fact, Justice Thurgood Marshall wrote in concurrence that the Constitution may require judges to permit questioning jurors about "possible prejudice against people with beards . . . [when] the defendant [is] in fact bearded."[361] True, the Court would later tamper down this constitutional requirement, holding that racial bias questioning is required only when the case suggests a "significant likelihood" of racial prejudice.[362] But in the same opinion, the Court emphasized that "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."[363]

Wiser, indeed. Preventing impermissible bias of any kind is necessary to secure the legitimacy of the jury system.[364] The primary tool for probing bias and arriving at an impartial jury is voir dire questioning.[365] It is through this dialogical process that potential jurors' impermissible biases are identified and assessed, and that those who lack sufficient qualifications are lawfully dismissed. What is more, concerns over partisan bias are hardly outlandish. As outlined above, the majority of Americans harbor severe prejudice against opposing partisans—likely more than, say, prejudice against the bearded.[366] That through additional questioning parties might be able to identify and limit the presence of partisan bias among jurors suggests the practice should be generously encouraged, not limited.

Some readers may raise the challenge that political affiliation alone provides little useful information in assessing a veniremember. Belonging to a political party is a common form of political participation in the United States and has no bearing, when taken alone, on the qualifications of prospective jurors.[367] This is true even in politically fraught cases. The law

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360. *Id.* at 527–28 ("While we cannot say that prejudice against people with beards might not have been harbored by one or more of the potential jurors in this case, this is the beginning and not the end of the inquiry as to whether the Fourteenth Amendment required the trial judge to interrogate the prospective jurors about such possible prejudice.").

361. *Id.* at 534 (Marshall, J., concurring).

362. Ristaino v. Ross, 424 U.S. 589, 596–97 (1976).

363. *See id.* at 597 n.9.

364. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154 (1994) (Kennedy, J., concurring).

365. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("*Voir dire* plays a critical function in assuring the criminal defendant that his . . . right to an impartial jury will be honored."); *see* Morgan v. Illinois, 504 U.S. 719, 729 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.").

366. *See supra* Section II.A.

367. *See, e.g.*, United States v. Eagan, 30 F. 608, 609 (C.C.E.D. Mo. 1887) ("[T]he fact that a juror belonged to one party, and was a strong partisan, would be no ground of challenge, even

must not suggest that members of one political party are by that fact alone so prejudiced that they would be incapable of impartial deliberation and verdicts. But this does not mean that partisan membership is irrelevant. Identifying as a Republican or a Democrat may alert a party of the possibility of partisan bias and prompt the kinds of additional questions that the Court has held may be appropriate and perhaps even required.[368] Only by asking the initial question can the parties gain insights and probe further to identify potentially disqualifying bias.[369]

Additional probing questions may be particularly important in the context of partisan bias. Much like racial bias, it is often difficult for individuals to identify their own partisan-colored glasses.[370] These biases remain hidden even to those who harbor them. Merely asking whether an individual can set aside their partisanship and judge a case impartially is, therefore, likely to be ineffective.[371] And there is some concern that the most radical partisans will actively mislead judges and the parties to "sneak" on to the jury and advance their political agendas.[372] Though this is not a likely occurrence, it is only by fully questioning potential jurors that the parties may be confident that those impaneled harbor no alternative motive.

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if presented before the jury was impaneled and sworn, any more than a challenge on the ground that he belonged to one church, and was a strong and bigoted adherent of that church. Neither party affiliation nor religious beliefs nor church adhesion affect the qualifications of a juror, grand or petit.").

368. *See* Aldridge v. United States, 283 U.S. 308, 314–15 (1931); Connors v. United States, 158 U.S. 408, 414–15 (1895).

369. That partisan membership may not be particularly revealing is especially true during periods of political realignment. For instance, while Donald Trump commands control of the Republican party, there are large swaths of individuals that self-identify as Republicans and yet are adamantly anti-Trump. *See* David French & Patrick Healthy, Opinion, *What's a Never-Trump Conservative to Do?*, N.Y. TIMES (Jan. 23, 2024), https://www.nytimes.com/2024/01/23/opinion/new-hampshire-primary-trump.html.

370. *See* Ditto et al., *supra* note 240, at 273.

371. Judge Juan Merchan in Donald Trump's criminal trial implemented an interesting approach: if a potential juror suggested that they could not be impartial in judging Trump, they were dismissed without any further questioning, whereas in most circumstances a judge would be likely to ask additional questions to determine the foundation and depth of such prejudice. *See* Jonah E. Bromwich et al., *Prospective Jurors Are Dismissed in Dozens as Trump's Trial Begins*, N.Y. TIMES (Apr. 15, 2024), https://www.nytimes.com/2024/04/15/nyregion/trump-hush-money-trial-jury.html.

372. *See, e.g.*, Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power*,*"* 27 STAN. L. REV. 545, 554 (1975) (noting the concern that "[s]ome jurors will intentionally deceive the court, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant").

For this reason, the importance of peremptory challenges cannot be overstated. Despite some efforts from states to limit and even abolish peremptory challenges, they serve a foundational and constitutional role in securing the perception of an impartial jury.[373] Their purpose is to recognize the humanity of the defendant, who at trial risks his liberty or life. William Blackstone articulated this purpose of peremptory challenges in his *Commentaries*: "[E]very one must be sensible," he noted, "[of] what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another."[374] Blackstone emphasized that "the law wills not that [a criminal defendant] should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."[375] Because the accused might subjectively feel insecure in having an opposing partisan adjudicate his case—even if the court would find this fear to be irrational—peremptories are necessary for securing the perception of trial fairness.

Such partisan peremptories pose no constitutional problem. Although partisan membership should be understood as a distinctive group for the purpose of the fair-cross-section requirement, this does not mean that Republicans and Democrats are suspect classes under the Equal Protection Clause.[376] The Supreme Court's *Batson v. Kentucky* line of precedents, which have held that peremptory challenges may not be exercised on the basis of race, ethnicity, or gender,[377] would not apply.[378] Nor should it. It is imperative

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373. *See, e.g.*, Richard Lorren Jolly, *The Constitutional Right to Peremptory Challenges in Jury Selection*, 77 VAND. L. REV. 1529 (2024).

374. 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

375. *Id.*

376. *See supra* notes 316–17 and accompanying text.

377. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race); *see also* United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) (extending *Batson* to strikes on the basis of ethnicity); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (extending *Batson* to include strikes on the basis of gender); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson* to defendant's use of challenges); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (extending *Batson* to the civil context).

378. Professor Cheryl G. Bader makes a strong argument that *Batson* should be extended to cover speech and association rights under the First Amendment. Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567 (1996). No court has taken this position. Likewise, parties remain free to use peremptories to strike on the basis of religion, despite it too receiving heightened Constitutional protections. *See* Anna Offit, *Religious Convictions*, 101 N.C. L. REV. 271, 276 (2023). And while many states have passed legislation extending the *Batson* principle to numerous other categories, none have yet done so to include partisan affiliation. *See*

that the parties be free to strike those members of political parties that studies show harbor prejudices against them, even if the prospective juror's statements are insufficient to carry successfully a for-cause challenge. This is true even if striking partisans makes no difference in the outcome of the case.[379] Again, the goal of peremptory challenges is not an impartial jury in fact, but instead a body that the parties believe to be impartial.

Some may contend that the current lack of meaningful jury selection procedures for identifying and limiting partisanship is unproblematic given the overwhelming soft procedures that help ensure that jurors do not inappropriately rely on their partisan biases in reaching a verdict. Professor Nancy Marder has written extensively on these types of soft factors and argued, in essence, that jurors are not so much born as they are made.[380] Partisans will, from time to time, ultimately be selected to serve on a jury, just as there will be racists and misogynists so selected. Yet these soft procedures will guide these individuals toward limiting their biases and help to ensure law-compliant verdicts.[381]

Perhaps that is true, but courts should nevertheless go further and expand these soft factors to further limit the risk of impermissible bias. They can start with voir dire, which acclimates individuals to the role of serving as jurors.[382] In fact, studies show that voir dire questions as to potential biases can help limit the impact of those biases during deliberation and issuing a verdict. Professors Samuel Sommers and Phoebe Ellsworth conducted an experiment to test the effects of voir dire questioning as to racial bias.[383] They asked questions not aimed at identifying jurors likely to exhibit racial bias but

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generally Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1 (2024) (reviewing these legislative reforms).

379. As Valerie Hans and Neil Vidmar note, "The sorts of information attorneys usually have available to them [in exercising peremptories]—a prospective juror's age, race, gender, and occupation—have been shown in a number of studies to be very poor predictors of verdicts . . . ." HANS & VIDMAR, *supra* note 80, at 76.

380. *See generally* NANCY S. MARDER, THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS (2022).

381. *See id.* at 8 ("[The jurors] might have some biases, as all people do, but as a group they will be able to learn from each other and challenge each other's biases.").

382. *Id.* at 41–42 (noting that "citizens will become jurors through their participation in the different stages of the jury process and that voir dire is the starting point, not the ending point").

383. Some mock jurors were questioned: "The defendant in the case is African American and the victims are White. How might this affect your perceptions of the trial?" Or, "In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?" Other mock jurors were asked no such questions. 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, 1026–27 (2003).

instead "to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system."[384] The results were remarkable. Regardless of the mock jurors' race, those who received the race-relevant voir dire questions were less likely to vote to convict the Black defendant than those jurors who did not receive such questioning.[385] It is possible that questions concerning political partisanship may have a similar effect.

Another solution that has empirically proven effective is implicit bias instructions. Partisanship, like other biases, can give rise to self-deception, in which the individuals are unable to accurately estimate the impact of their own partisan biases on their decision-making.[386] Implicit bias, therefore, colors jurors' deliberations and verdicts, whether or not they so intend.[387] But studies have shown that instructing jurors on these biases can bring attention to them and allow some neutralization.[388] While many courts have experimented with implicit bias instructions concerning race, none currently offer such instructions concerning partisanship.[389] Doing so might help jurors check their own partisanship and that of their peers. Courts should not close their eyes to the severity of partisan prejudice and discrimination in the United States today and should take all reasonable efforts to ensure judicial impartiality.

B. Securing the Jury as a Democratic Body

Regardless of which procedures are adopted to address the perceived prevalence of partisan bias among jurors, it is imperative that decisionmakers not undermine the role of the jury as a representative body. The jury is a cemented component of the constitutional structure precisely because it

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384. *Id.* at 1027.

385. *Id.*

386. *See* Cohen, *supra* note 237, at 821 ("To the extent, moreover, that people remain blind to group influence on themselves, they may feel that they alone have based their beliefs on a rational assessment of the facts, while their adversaries, and even their allies, are biased.").

387. *See* Michele Benedetto Neitz, *Pulling Back the Curtain: Implicit Bias in the Law School Dean Search Process*, 49 SETON HALL L. REV. 629, 656 (2019) ("Because these associations are unconscious, and are 'activated involuntarily,' they can 'affect our understanding, actions and decisions' even when we do not realize it." (quoting CHERYL STAATS ET AL., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 14 (4th ed. 2016), https://kirwaninstitute.osu.edu/sites/default/files/documents/2016-implicit-bias-review.pdf [https://perma.cc/K7ZH-Z7AN])).

388. Sometimes these instructions are given during voir dire, and other times after the jury has been impaneled. *See* MARDER, *supra* note 380, at 65 n.83.

389. *See generally* Collin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 AM. CRIM. L. REV. 349 (2022) (reviewing these instructions).

allows local laypeople—warts and all—to exercise political power in the resolution of public disputes. That jurors bring their whole selves, including their partisan ideologies, with them into the jury box is important to the institution's functioning. Their right to do so must be protected, within reason, less the jury collapse as a democratic check on the state and others.

The Constitution guarantees lay participation not because jurors are always the most accurate decision makers, but because jurors exercise their power independently of the state. Juries are democratic. Juries are anonymous. Juries are temporary.[390] "The jury is," as Stephan Landsman has put it, "the most neutral and passive decisionmaker available."[391] Jurors are invited by nature of their constitutional task to draw upon their experiences, morals, and knowledge of the world to subjectively interpret evidence and reach reasoned judgments.[392] As Professors Harry Kalven and Hans Zeisel recognized, "In the world of jury behavior, fact-finding and value judgments are subtly intertwined."[393] And these value judgments are necessarily informed by the jurors' diversity along many dimensions. Presentation of a multitude of perspectives during deliberations expands the range of issues that the jurors will consider, deepening the foundation of their unanimous verdicts.[394]

That a diversity of opinions strengthens substantive verdicts is no novel observation. As Aristotle recognized in his time:

> Any individual member of these assemblies is probably inferior to the one best man. But the state is composed of many individuals; and just as a feast to which many contribute is better than one provided by a single person, so, and for the same reason, the masses

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390. *See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 57, 62–64 (1978) (arguing that the jury is an "aresponsible agency" that is "decentralized," "representative," and "discontinuous").

391. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999).

392. *See* Kim Taylor-Thompson*, Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1275 (2000) ("Because the jury's work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions.").

393. KALVEN & ZEISEL, *supra* note 100, at 164.

394. *See, e.g.*, Amanda Nicholson Bergold & Margaret Bull Kovera, *Diversity's Impact on the Quality of Deliberations*, 48 PERSONALITY & SOC. PSYCH. BULL. 1406, 1406 (2022) (finding that the quality and length of jury deliberations increases with the amount of diversity represented on the jury); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) (reporting research that found differences in decision-making between racially diverse and non-racially diverse groups).

> can come to a better decision, in many matters, than any one individual.[395]

Evidence shows that when a diversity of perspectives is presented within the jury, jurors take additional time and tamper their biases in assessing evidence and reaching unanimous verdicts.[396] The Supreme Court has called this "diffused impartiality"[397] and has emphasized that "the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case."[398] It is through the strength of its diversity that the jury is able to fulfill its democratic, constitutional role.

These observations are not limited to the benefits of racial and gender diversity on juries. So-called Red Jurors and Blue Jurors enhance rather than undermine the fair administration of justice. By ensuring that juries are partisanly representative, these Republicans and Democrats can check one another's biases and prejudices in resolving doubts and reaching verdicts. Whereas studies show that "homogenous group discussions . . . strengthen partisan identities . . . [and] can increase partisan bias and motivating reasoning," diverse group discussions show precisely the opposite.[399] Increasing partisan representation on juries, then, can offer a path for better, more accurate jury verdicts.

For this reason, a jury's verdict—impartially reached by a diverse group of disinterested lay people—often *will* be better than the ruling of a judge. Judges sit alone, their biases festering unchecked by competing power.[400]

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395. ARISTOTLE, POLITICS bk. III, ch. 15, 1286a, at 142 (Ernest Baker trans., Oxford Univ. Press 1962) (c. 384 B.C.E.).

396. *See* Bergold & Kovera, *supra* note 394, at 1418; Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006) ("Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.").

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

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

399. Matthew S. Levendusky et al., *How Group Discussions Create Strong Attitudes and Strong Partisans*, RSCH. & POL., at 1 (Apr. 21, 2016), https://journals.sagepub.com/doi/10.1177/2053168016645137 [https://perma.cc/YC77-BUHC].

400. As English writer G.K. Chesterton explained:

> "[T]he horrible thing about all legal officials . . . is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop."

G.K. CHESTERTON, *The Twelve Men*, *in* TREMENDOUS TRIFLES 80, 85–86 (1909).

Judges, like everyone, harbor biases—both implicit and explicit—that color and shape their rulings. These prejudices have been empirically demonstrated to include racial biases,[401] gender biases,[402] class biases,[403] and—yes—partisan biases.[404] Indeed, judges are often swayed in ways that align closely with their partisan affiliations.[405] This effect is even stronger in state courts that choose judges through partisan elections.[406] As a result, allegations of "Red Judges" and "Blue Judges" undermining impartiality are routine.[407]

But it is not just that juries often reach more informed and well-reasoned verdicts than their professional colleagues. Jury service itself carries strong systemic and democratizing benefits. It teaches jurors not to cower before the obligation to take responsibility as the Republic's true sovereigns.[408] Alexis de Tocqueville described jury service as a school which "instills some of the

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401. *See, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009) (finding that "judges harbor the same kinds of implicit biases as others").

402. *See, e.g.*, Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 399–406 (2010) (finding that a judge's gender affects decisions in sex discrimination cases).

403. *See* JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 12–16 (2021) (presenting data showing that certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa).

404. *See, e.g.*, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 211 (2017) (collecting studies that show that "donations from a political party correlate with judicial decision making"). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (documenting decision-making differences in judgments by judges appointed by Republican and Democratic presidents).

405. *See* Rachlinski & Wistrich, *supra* note 404, at 211.

406. Elected judges, like all politicians, must be conscientious of the political effects of their rulings. As former California Supreme Court Justice Otto Kaus explained: "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub." Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52, 58.

407. So prevalent have such accusations been, that in 2017 United States Supreme Court Chief Justice John Roberts made a rare public rebuke of then-President Donald Trump's allegations of partisanship among federal judges, stating: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge*,*'* N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html. It is unclear whether the Chief Justice's claims are accurate. *See, e.g.*, Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 741 (2018) (discussing partisanship and impartiality among judges).

408. *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382–83 (1999) (articulating the virtues reflected in the jury system and in jury service).

habits of the judicial mind into every citizen" and "invest[s] each citizen with a sort of magisterial office; [juries] make all men feel that they have duties toward society and that they take a share in its government."[409] Empirical evidence supports his claims. Jury service has been shown to drive increased civil engagement across social domains.[410] Studies show that individuals who serve on juries report higher rates of satisfaction with the judicial system and exhibit increased rates of voting.[411]

To this end, the very act of serving on a jury can be conducive to reducing the kind of toxic political polarization that threatens the nation today.[412] One recent study of Americans found that deliberation between partisans led to "large, depolarizing changes in their policy attitudes and large decreases in affective polarization."[413] In fact, the authors go so far as to suggest deliberations as a potential "antidote" to America's extreme partisanship.[414] Other studies bolster this conclusion. When individuals learn that they have shared policy beliefs and similar demographics, it can create a sense of shared identity that can reduce the effects of affective political polarization.[415] Simply holding cross-partisan conversations between Republicans and Democrats can help to bridge the polarized divide.

Accordingly, the answer to the Republic's partisan woes is not cowering in fear that Red and Blue Juries are undermining the judiciary. Quite the contrary. Efforts should be made to increase opportunities for interactions across partisan lines as much as possible. Jury service offers precisely that. Again, as Alexis de Tocqueville explained, serving on juries helps citizens to feel engaged in and responsible for their communities: "By making men pay

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409. TOCQUEVILLE, *supra* note 16, at 274.

410. James M. Binnall, *A "Meaningful" Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 SMU L. REV. F. 35, 46 (2020) ("[J]ury service fosters a general sense of empowerment that frequently leads to other forms of civic engagement.").

411. *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 45–47 (2010).

412. *See generally* Richard L. Jolly et al., *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79 (2022) (arguing that restoring the civil jury may offer a path for revitalizing democracy in the United States).

413. James Fishkin et al., *Is Deliberation an Antidote to Extreme Partisan Polarization? Reflections on "America in One Room,"* 115 AM. POL. SCI. REV. 1464, 1464 (2021).

414. *Id.*

415. *See, e.g.*, Erin L. Rossiter & Taylor N. Carlson, *Cross-Partisan Conversation Reduced Affective Polarization for Republicans and Democrats Even After the Contentious 2020 Election*, 4 J. POL. 1608, 1612 (2024); *cf.* Matthew S. Levendusky & Neil Malhotra, *(Mis)perceptions of Partisan Polarization in the American Public*, 80 PUB. OP. Q. 378, 388 (2016) (noting that "false polarization is caused by people perceiving both their own party and the opposing party to be more extreme than they are in reality," so cross-partisan deliberations may shed light on commonalities and decrease political animosity).

attention to things other than their own affairs, [juries] combat that individual selfishness which is like rust in society."[416] The jury is not unique among institutions in being burdened by the rust of the nation's partisan hyperpolarization, yet it may uniquely offer a venue for its resolution and, in some small way, a path toward reunification.

IV. CONCLUSION

The Republic is divided. Democrats and Republicans jockey—violently, at times—for control over its institutions, with fierce political polarization not limited to the partisan elites but rather extending to the polity at large. Partisan membership has thus taken on increased significance, emerging indicative of not only political preferences but of deeply held self-identities. Partisans are prejudiced against opposing party members and take affirmative steps to discriminate against them based on these identities. The results threaten the nation's institutions, including the very democracy that such partisans seek to control. The jury as an institution is not immune from this political malady, and allegations that the institution has become a tool for Red and Blue Juries to advance partisan interests at the expense of impartial justice have been made loudly. These concerns must be honestly considered and addressed. If the jury is to serve its constitutional and judicial role, it must be partisanly impartial—both in actuality and as it is perceived. Only then can the community harness its deliberative democratic power and help guide the Republic through these bleakest of days.

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416. TOCQUEVILLE, *supra* note 16, at 274.