

# Mandatory Voting in Constitutional Context

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Tavi Unger\*

*This Article develops an analogy between jury service and the electoral process to argue that the Constitution requires the United States to institute a system of mandatory voting.*

*The inquiry opens by clarifying the democratic implications at stake in electoral reform. The Framers grounded the people's sovereignty in political representation. Nonetheless, low voter turnout in American elections has long prevented the legislature from accurately representing the electorate, thus eroding the sovereignty that the Constitution pledges to all citizens.*

*The Article argues that mandatory voting could provide a method for remedying the misrepresentative legislature. Advocates who have championed the proposal in the past, however, have adopted a policy-oriented approach enabling them to forgo any search for a unified legal basis that demands so far-reaching a measure.*

*The Article fills the gap and complements the existing literature by locating the precedent that renders mandatory voting a constitutional necessity. The argument centers on the Supreme Court cases that invalidated state laws excluding African Americans and women from mandatory jury service. A close analysis of the holdings uncovers an unexplored foundation for mandatory democratic rights in the Fourteenth Amendment. By applying this principle of mandatory democratic rights to the electoral process, the Article identifies the jury exclusion cases as precedent requiring that the United States mandate universal exercise of the right to vote.*

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For my mother, always.

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The people exercise the sovereignty that the Constitution bestows upon them by delegating authority to political representatives through the electoral process.<sup>1</sup> The “right to choose a representative” thus composes “every man’s portion of sovereign power,”<sup>2</sup> and the democratic autonomy of the people would seem to depend upon widespread voter turnout.<sup>3</sup>

Nevertheless, even the federal government’s brazen mishandling of the COVID-19 pandemic and the resulting deaths of over 245,000 Americans could not push turnout for the 2020 election beyond 66% of eligible voters.<sup>4</sup> In fact, notwithstanding 2020, voter turnout for presidential elections in the United States has seldom surpassed 60%.<sup>5</sup> For midterm elections, the number typically falls by another ten percentage points.<sup>6</sup> And not all voting groups vote at the same rate.<sup>7</sup> People who are Black or white vote more than

<sup>1</sup> See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (“It is for the people, through their elected representatives, to choose the rules that will govern their future conduct.”); *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) (“[I]n a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws.”); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[R]epresentative government is in essence self-government through the medium of elected representatives of the people.”); *Taylor v. Beckham*, 178 U.S. 548, 579 (1900); *Gibson v. Mason*, 5 Nev. 283, 291 (1869) (“By the institution of government the people surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who at least theoretically represent the supreme will of their constituents.”); *Luther v. Borden*, 48 U.S. (7 How.) 1, 34 (1849) (“[T]his sovereign power has been delegated to government, which represents and speaks the will of the people as far as they chose to delegate their power.”); ROBERT DAHL, *ON DEMOCRACY* 99 (2000) (“Self-government is exercised through elections. The collective decision-making process operates indirectly: Citizens choose parties or candidates authorizing them to make decisions on behalf of the collectivity.”).

<sup>2</sup> *Luther*, 48 U.S. at 34.

<sup>3</sup> See Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 *LOY. L.A. L. REV.* 1539, 1569–70 (1997); Ryan J. Silver, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 *DREXEL L. REV.* 239, 249 (2017); Kimberly Wehle, *Low Voter Registration Poses a Threat to American Democracy*, *THE HILL* (June 21, 2020, 1:00 PM), <https://thehill.com/opinion/campaign/503791-low-voter-registration-poses-a-threat-to-democracy-in-america>, archived at <https://perma.cc/BCL3-LQLN>.

<sup>4</sup> See RUTH IGIELNIK, SCOTT KEETER, & HANNAH HARTIG, *BEHIND BIDEN’S 2020 VICTORY*, 3 (2021), [https://pewresearch.org/politics/wp-content/uploads/sites/4/2021/06/PP\\_2021.06.30\\_validated-voters\\_REPORT.pdf](https://pewresearch.org/politics/wp-content/uploads/sites/4/2021/06/PP_2021.06.30_validated-voters_REPORT.pdf), archived at <https://perma.cc/NW7L-UBGT>.

<sup>5</sup> See generally Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 *N.Y.U. L. REV.* 1120, 1151 (2018); BROOKINGS INST. & HARV. KENNEDY SCH., *WORKING GROUP ON UNIVERSAL VOTING, LIFT EVERY VOICE: THE URGENCY OF UNIVERSAL CIVIC DUTY VOTING*, 12 (2020), [https://www.brookings.edu/wp-content/uploads/2020/07/Br\\_LIFT\\_Every\\_Voice\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2020/07/Br_LIFT_Every_Voice_final.pdf), archived at <https://perma.cc/8EKC-SL9X>.

<sup>6</sup> See *Ross supra* note 5, at 1151.

<sup>7</sup> IGIELNIK et al., *supra* note 4, at 24 (“Although turnout was strong, stark demographic differences between voters and nonvoters similar to those seen in past U.S. elections were present in 2020, a pattern familiar to political observers.”).

those who are Hispanic or Asian, the rich vote more than the poor, the educated vote more than the uneducated, and the old vote more than the young.<sup>8</sup> This imbalance has fostered a government that over-represents some citizens and under-represents others.<sup>9</sup>

Commentators have warned of the democratic repercussions from so many citizens refraining from participating in the political process.<sup>10</sup> Floundering turnout has driven historian Jared Diamond to designate the United States as “barely half-deserving of being called a democracy.”<sup>11</sup> He is not alone in cautioning that “low voter turnout . . . will lead to a nonrepresentative governing body just as [it] might lead to nonrepresentative laws.”<sup>12</sup>

A patchwork of proposals has developed in an effort to repair the deficient turnout rate. These proposals include same-day registration, automatic registration, a multi-party system, early voting, and expanded voter outreach.<sup>13</sup> Nonetheless, the fractured suggestions demand an amount of coordination and political capital that renders their success unlikely.

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<sup>8</sup> See *id.* at 24; Burt Neuborne, *Making the Law Safe for Democracy: A Review of “The Law of Democracy Etc.”*, 97 MICH. L. REV. 1578, 1583, 1588–89 (2011) (“[T]urnouts are skewed by race and economic status, so that the voting electorate is much richer and whiter than the nation.”); Ross, *supra* note 5, at 1124; Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL’Y REV. 71 (2014).

<sup>9</sup> See Ihaab Syed, *How Much Electoral Participation Does Democracy Require? The Case for Minimum Turnout Requirements in Candidate Elections*, 66 UCLA L. REV. 2024, 2049–50 (2019); Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 595 (2007).

<sup>10</sup> See, e.g., Ceridwen Cherry, *Increasing Youth Participation: The Case for a National Voter Pre-Registration Law*, 45 U. MICH. J.L. REFORM 481, 489 (2012) (“[P]oor or uneven voter turnout undermines democracy as who votes, and who doesn’t, has important consequences for who gets elected and for the content of public policies.”); Syed, *supra* note 9, at 2049–50; James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, U. CHI. L. REV. ONLINE 24 (2020).

<sup>11</sup> JARED DIAMOND, *UPHEAVAL* 358 (2019) (“If a country has a constitution or laws specifying democratic government but the country’s citizens don’t or can’t vote, such a country doesn’t deserve to be called a democracy.”).

<sup>12</sup> Ariel Jurov Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1931 (2020); see also William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 295 (2004) (“When a majority of citizens do not participate in the democratic process, the resulting political decisions represent only the preferences of the few, arguably negating the democratic premise.”); Syed, *supra* note 9, at 2037–38.

<sup>13</sup> See, e.g., Phillip Dawkins, *Restoring Power to the People: Problems with Voter Registration and Ideas for a More Participatory Democracy*, 7 LAW & SOC’Y J. UCSB 17, 28 (2008); Emma Olson, *Changing Attitudes About Democratic Participation Through a Catalytic Experience*, 11 NW. J. L. & SOC. POL’Y 78, 88 (2016); James Sample, *The Electorate as More Than an Afterthought*, 2015 U. CHI. LEGAL F. 383, 400 (2015); Silver, *supra* note 3, at 266–67; Syed, *supra* note 9, at 2063; Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CENTER FOR AM. PROGRESS (July 11, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/>, archived at <https://perma.cc/2HCM-QUMZ>.

Some have envisioned a more comprehensive solution: compulsory electoral participation. In the twenty-two countries that maintain systems of mandatory voting, turnout regularly exceeds 80%.<sup>14</sup>

Numerous normative reasons exist for putting this proposal into practice. Proponents argue that mandating all citizens vote would reduce the role of money in politics, render politicians responsive to more voters, and build a legislature that better represents disadvantaged and devalued minorities.<sup>15</sup> Nonetheless, by relying almost wholly on piecemeal normative claims, campaigns for mandatory voting steer clear of the legal analysis that could most effectively convert a seemingly radical idea into an appropriate and equitable alternative.

The underdeveloped literature on compulsory rights could be the reason that scholars have yet to identify any unified basis in law demanding that the United States establish a system of mandatory voting. In particular, scholars have not fully examined the legal grounds that enabled the United States to mandate another fundamental right: the right to jury service.

In fact, the cases that barred states from excluding African Americans and women from the jury selection process already rest on reasoning that labels mandatory voting a constitutional necessity. These cases identify the constitutional rights of criminal defendants as depending upon jury venires that represent the community.<sup>16</sup> As juries could never represent the community so long as state law systemically excluded entire classes of citizens from service, the constitutional guarantee of a representative jury, the Supreme Court concluded, requires that jury service include the entire citizen body.<sup>17</sup>

The robust judicial inquiry into jury service ultimately reveals an unexplored principle of mandatory rights. This principle dictates that the law should mandate that individuals participate in the representative process when constitutional guarantees depend on the representative body that the process produces.

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<sup>14</sup> See Brookings Inst. & Harv. Kennedy Sch., *supra* note 5, at 22; Mark Franklin, *Voter Participation in the United States Versus Other Democracies*, in 1 VOTING IN AMERICA 161 (Morgan E. Felchner ed., 2008); Rick Hasen, *Voting Without Law*, 144 U. PA. L. REV. 2135, 2171 (1996); Annabelle Lever, *Compulsory Voting: A Critical Perspective*, 40 BRITISH J. OF POL. SCI. 897, 902 (2010).

<sup>15</sup> See generally SARAH BIRCH, FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING (2009); Christopher Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLIN J. PUB. L. & POL'Y 255, 314 (2002); Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 AM. J. POL. SCI. 101 (2019); Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?*, 18 J. THEORETICAL POL. 207, 207–32 (2006); Eric Lund, *Compulsory Voting: A Possible Cure for Partisanship and Apathy in U.S. Politics*, 31 WIS. INT'L L.J. 90, 92 (2013).

<sup>16</sup> See generally Part II, *infra*.

<sup>17</sup> See *id.*

It is this representation-based precedent that provides the legal backing that proposals for mandatory voting have otherwise overlooked. That is, the Constitution bestows self-governance upon citizens through legislators that represent them.<sup>18</sup> On these grounds, James Madison identified “the principle of representation” as “the pivot” on which the American Republic depends.<sup>19</sup> Nonetheless, as this Article demonstrates, the legislature can represent the electorate accurately only when all members of the electorate participate in the electoral process.<sup>20</sup> The representation-based principle of mandatory rights, emerging from the jury cases, therefore indicates that the United States should mandate that all citizens exercise the right to vote.

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In four parts, this Article draws out the principle of mandatory rights that legitimizes calls for mandatory voting beyond normative appeals.

Part I describes the failure of the current electoral process to satisfy its constitutional mandate of producing a legislature that represents the American electorate. By noting that restrictive voting laws and other impediments to the ballot have especially skewed the current legislature far from its constitutional course, Part I brings the need for electoral reform to the forefront.

Part II surveys the histories of mandatory jury service in the United States for African Americans and for women. In recounting these histories, Part II explicates the relationship between mandatory exercise of the individual right to serve on the jury and the jury’s representative function. The similarities between jury service and the electoral process as methods of democratic self-governance would seem to justify uniform treatment of the two institutions under the law.

From the histories of mandatory jury service, Part III derives a principle of mandatory rights that the current literature on jury service and other mandatory rights has not explored. This principle, merging the jury precedent with the structural rights theory of constitutional law, suggests that the United States should mandate the right to engage in representative processes like jury service when sufficient constitutional commitments depend upon the representative body that the process produces. Part III identifies this principle as a legal basis for mandatory voting. Lastly, Part IV

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<sup>18</sup> See Richard W. Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 556 (2013) (“[V]oting is the means by which the elected people delegate their inherent right of self-governance to their representative mediums.”).

<sup>19</sup> THE FEDERALIST NO. 63 (James Madison); Nev. Comm’n on Ethics v. Carrigan, 564 U.S. 117, 131–32 (2011) (recognizing “the principles of participation and representation [as] at the heart of our democratic government.”) (Kennedy, J., concurring).

<sup>20</sup> See Taylor v. Beckham, 178 U.S. 548, 579 (1900) (observing that “the basis of representation is suffrage”); Luther v. Borden, 48 U.S. (7 How.) 1, 55 (1849).

addresses the most common legal critiques, and one pragmatic critique, of mandatory voting.

## I. THE NEED FOR REFORM

Only segments of the American electorate participate in the electoral process. Active voters also fall along the same racial, educational, age, and economic strata.<sup>21</sup> Because of these turnout trends, the legislature has over-represented some citizens while under-representing others.<sup>22</sup> The foundational liberal theorist John Stuart Mill would have appreciated the danger of the political status quo. In *Considerations on Representative Government*, he wrote, “[i]n a really equal democracy, every or any section would be represented, not disproportionately but proportionately.”<sup>23</sup> Otherwise, “contrary to the principle of democracy . . . one part of the people rule[sic] over the rest.”<sup>24</sup>

Restrictive voting laws at the state level, which depress turnout disproportionately within minority groups, are the most obvious culprits behind low turnout.<sup>25</sup> Politicians have justified these laws as necessary to protect against voter fraud. Nonetheless, studies have long determined that voter fraud hardly ever occurs in American elections.<sup>26</sup>

The discriminatory effects of restrictive voting laws have not discouraged legislatures from continuing to implement them.<sup>27</sup> Between the presidential elections of 2012 and 2016, seventeen states enacted new voting laws

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<sup>21</sup> See IGIELNIK et al. *supra* note 4, at 24-26.

<sup>22</sup> See Jeremy Gruber, Michael A. Hardy & Harry Kresky, *Let All Voters Vote: Independents and the Expansion of Voting Rights in the United States*, 35 *TOURO L. REV.* 649, 686 (2019).

<sup>23</sup> JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 146 (1861).

<sup>24</sup> *Id.*; THE FEDERALIST NO. 39 (James Madison) (“It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.”).

<sup>25</sup> See Ross, *supra* note 5, at 1126; *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966) (“[A] low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.”).

<sup>26</sup> See Lydia Hardy, *Voter Suppression Post-Shelby: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 *MERCER L. REV.* 857, 858 (2020); Hayden Johnson, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 *GEO. L.J.* 449, 460 (2019) (Restrictive voting “laws . . . are often justified by a claim of widespread voter fraud that is not based in empirical reality.”); Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of The Electorate, Voter Suppression, and the Voting Rights Act*, 18 *HARV. LATINO L. REV.* 99, 109 (2015) (“[E]mpirical research reveals that turnout among low-income and minority voters is more likely to be negatively affected by the[se] types of restrictive legislation.”). Even so, the Supreme Court recently declared, “it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.” *Brown v. Democratic Nat’l Comm.*, 141 S.Ct. 2321, 2348 (2021).

<sup>27</sup> See Vandewalker & Bentele, *supra* note 26, at 101.

that burdened access to the polls.<sup>28</sup> The extraordinary circumstances of the 2020 presidential election only galvanized the legislative efforts.<sup>29</sup> For example, during the COVID-19 pandemic, over 70% of voters cast ballots by mail or early in-person.<sup>30</sup> Despite the global health crisis, Governor Greg Abbott of Texas nonetheless limited each county in his state to a single ballot drop box—a restriction especially burdensome for the 4.7 million residents of the majority-minority Harris County.<sup>31</sup> Likewise, after over 3.5 million citizens in Georgia voted by mail, the state Senate Republican Caucus announced less than a month after Election Day that they intended to “secure our electoral process by eliminating at-will absentee voting[,] . . . requir[ing] photo identification for absentee voting for cause, and . . . crack[ing] down on ballot harvesting by outlawing drop boxes.”<sup>32</sup> States across the country have followed Georgia in imposing additional impediments to absentee voting.<sup>33</sup>

In recent years, however, state legislatures have most commonly disenfranchised citizens by curtailing voter registration periods.<sup>34</sup> For instance,

<sup>28</sup> Carmichael, *supra* note 15; *Voter Suppression Laws: What's New Since the 2012 Presidential Election*, ACLU, <https://www.aclu.org/map/voter-suppression-laws-whats-new-2012-presidential-election>, archived at <https://perma.cc/CA6H-XJU2>.

<sup>29</sup> See Michael Wines, *After Record Turnout, Republicans Are Trying to Make It Harder to Vote*, N.Y. TIMES (Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/us/republicans-voting-georgia-arizona.html?action=click&module=spotlight&pgtype=homepage>, archived at <https://perma.cc/P623-747H> (“[I]n statehouses nationwide, Republicans who echoed former President Donald J. Trump’s baseless claims of rampant fraud are proposing to make it harder to vote next time.”); Kelly Mena, *State Republican Lawmakers Eye Mail-In Voting Restrictions in Georgia and Other Key States*, CNN POL. (Jan. 29, 2021), <https://www.cnn.com/2021/01/29/politics/mail-in-voting-restrictions-georgia-arizona/index.html>, archived at <https://perma.cc/C9FE-M273>.

<sup>30</sup> See Laura Santhanam, *3 Voter Trends that Helped Biden*, PBS NEWS HOUR (Nov. 9, 2020, 7:49 PM), <https://www.pbs.org/newshour/politics/3-voter-trends-that-helped-biden>, archived at <https://perma.cc/F5CT-2LQN>; Wines, *supra* note 29.

<sup>31</sup> See *The Spreading Scourge of Voter Suppression*, THE ECONOMIST (Oct. 10, 2020), <https://www.economist.com/leaders/2020/10/10/the-spreading-scourge-of-voter-suppression>, archived at <https://perma.cc/V478-JJ8V>.

<sup>32</sup> *Majority Statement on Elections*, GA. SENATE REPUBLICAN CAUCUS (Dec. 8, 2020), <https://mailchi.mp/03a84530fbcc/for-immediate-release>, archived at <https://perma.cc/9FAT-DC9W>; Emil Moffatt, *Speaker Ralston Announced Election Integrity Committee that Will Focus on ‘Moving Forward,’* NPR (Jan 7, 2021), <https://www.wabe.org/speaker-ralston-announces-election-integrity-special-committee-that-will-focus-on-moving-forward>, archived at <https://perma.cc/97EX-DBPJ>.

<sup>33</sup> See, e.g., Michael Wines, *As Trump Disputes Election Results, Republicans Target Voting by Mail*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/mail-voting-absentee.html>, archived at <https://perma.cc/MAU2-S49V>; Ari Berman, *Republicans Are Laying the Groundwork to Make It Harder to Vote*, MOTHER JONES (Nov. 10, 2020), <https://www.motherjones.com/politics/2020/11/republicans-are-laying-the-groundwork-to-make-it-harder-to-vote/>, archived at <https://perma.cc/9BRC-2NMJ>; Jordain Carney, *Graham to Urge McConnell to Probe Mail-in Voting if GOP Controls Senate Next Year*, THE HILL (Nov. 9, 2020, 12:16 PM), <https://thehill.com/homenews/senate/525128-graham-to-urge-mcconnell-to-probe-mail-in-voting-if-gop-controls-senate-next>, archived at <https://perma.cc/L38W-N2RJ>.

<sup>34</sup> See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL’Y REV. 71, 90 (2014); see also RICHARD K. SCHER, *THE POLITICS OF DISENFRANCHISEMENT: WHY IS IT SO HARD TO VOTE IN AMERICA?* 82 (2011); Matthew J. Streb, *RETHINKING AMERICAN ELECTORAL DEMOCRACY* 16 (2008) (stating that the United States deviates from many other countries in not registering citizens to vote automatically).

fifteen states require voters to register between twenty-eight and thirty days before Election Day.<sup>35</sup> Another eleven states schedule registration deadlines twenty to twenty-seven days in advance.<sup>36</sup> Together, in the 2012 presidential election, such restrictions prevented as many as three to four million citizens from voting.<sup>37</sup>

Successfully registering to vote does not leave citizens in the clear. In twenty-seven states, voter purges routinely remove voters who supposedly register in more than one state from “error-ridden” registration lists.<sup>38</sup> The rates of removal from these purges are hardly negligible. Between 2016 and 2018, the state-sanctioned removals disenfranchised almost seven million citizens.<sup>39</sup> During the same period, Wisconsin purged around 14% of all its registered voters.<sup>40</sup> Likewise, before the 2020 election, Georgia alone allegedly purged almost 200,000 eligible voters from the registration rolls.<sup>41</sup>

The timing of elections can also prevent citizens from participating in the electoral process. While working-class voters often have jobs that constrain them from traveling to the polls between 7:00 AM and 8:00 PM,<sup>42</sup> several states have nonetheless abolished early and late voting.<sup>43</sup> The United States only aggravates the burden by scheduling elections on Tuesdays rather than weekends or holidays like most established democracies.<sup>44</sup>

On election day, long lines at too-sparse polling places raise the cost of participation even higher.<sup>45</sup> Studies have long suggested that wait times of

<sup>35</sup> *Voter Registration Deadline*, NAT. CONF. OF STATE LEGISLATURES (Sept. 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>, archived at <https://perma.cc/AS6R-UHXC>.

<sup>36</sup> *Id.*

<sup>37</sup> Sean J. Young, *The Validity of Voter Registration Deadlines Under State Constitutions*, 66 SYRACUSE L. REV. 289, 289 (2016).

<sup>38</sup> Olson, *supra* note 13, at 86–91; MYRNA PEREZ, *VOTER PURGES 2* (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf>, archived at <https://perma.cc/RY74-5YNQ> (observing that “error-ridden” registration lists often underlie purges); ELIZABETH HIRA, JULIA BOLAND & JULIA KIRSCHENBAUM, *EQUITY FOR THE PEOPLE* 12 (June 17, 2021), <https://www.brennancenter.org/our-work/research-reports/equity-people>, archived at <https://perma.cc/6TZZ-TGNL> (“A 2020 analysis of [Wisconsin] found that predominantly Black zip codes and zip codes heavily populated by students were twice as likely as other areas to have voters flagged for removal, often in error.”).

<sup>39</sup> Olson, *supra* note 13, at 86–91.

<sup>40</sup> See Ari Berman, *Republicans Are Trying to Kick Thousands of Voters Off the Rolls During a Pandemic*, MOTHER JONES (April 14, 2020) at <https://www.motherjones.com/politics/2020/04/voter-purges-wisconsin-republican-election/>.

<sup>41</sup> See Eileen Sullivan, *A Lawsuit in Georgia Claims that Nearly 200,000 Registered Voters Were Improperly Purged*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/us/a-lawsuit-in-georgia-claims-that-nearly-200000-registered-voters-were-improperly-purged.html>, archived at <https://perma.cc/8ADT-9TD7>.

<sup>42</sup> See Robert V. Ward Jr., *The Second Reconstruction Is Over*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 75, 76–77 (2015).

<sup>43</sup> *Id.*; see also Olson, *supra* note 13, at 86–91.

<sup>44</sup> See Streb, *supra* note 34, at 22.

<sup>45</sup> See WILLIAM WILDER, *VOTER SUPPRESSION IN 2020* 10 (Aug. 20, 2021) at [https://www.brennancenter.org/sites/default/files/2021-08/2021\\_08\\_Racial\\_Voter\\_Suppression\\_2020.pdf](https://www.brennancenter.org/sites/default/files/2021-08/2021_08_Racial_Voter_Suppression_2020.pdf), archived at <https://perma.cc/9MFW-2BUF>.



even an hour can discourage 40% of registered voters from voting.<sup>46</sup> Indeed, in the 2012 election, long lines deterred as many as 730,000 citizens from voting.<sup>47</sup> The trend has predictably proven most prevalent in majority-minority counties.<sup>48</sup> In the 2016 elections, residents of Black neighborhoods waited in line to vote for, on average, 29% longer than did residents of white neighborhoods.<sup>49</sup> Likewise, in the 2018 elections, both Black and Hispanic voters waited in line for, on average, 45% longer than white voters.<sup>50</sup>

Obstacles beyond long lines face voters at the polls. While the United States Government Accountability Office has estimated that voter identification laws decrease turnout by between two and three percentage points,<sup>51</sup> thirty-five states require voters to show identification upon arrival.<sup>52</sup> Eighteen of these states require photo identification in particular.<sup>53</sup>

Unsurprisingly, the “nontrivial burdens” of obtaining identification fall heaviest on low-turnout groups.<sup>54</sup> A quarter of Black citizens do not have government-issued photo identification, compared to around 12% of all eligible voters.<sup>55</sup> Even so, between 2000 and 2016, thirty-four states chose to narrow—rather than expand—the forms of identification sufficient to vote.<sup>56</sup>

<sup>46</sup> Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 212 (2009).

<sup>47</sup> Charles Stewart III, *Managing Polling Place Resources*, CALTECH/MIT VOTING TECH. PROJECT 10 (Dec. 2015), <https://web.mit.edu/vtp/Managing%20Polling%20Place%20Resources.pdf>, archived at <https://perma.cc/M96U-8CX3>; MATTHEW WEIL, TIM HARPER, CHARLES STEWART III & CHRISTOPHER THOMAS, *THE 2018 VOTING EXPERIENCE: POLLING PLACE LINES* 30 (Nov. 2019), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/11/The-2018-Votin-Experience.pdf>, archived at <https://perma.cc/67G7-UK6L> (“Longer lines are correlated with . . . precincts that are more urban, denser, and have higher minority populations.”).

<sup>48</sup> *See Block the Vote: Voter Suppression in 2020*, AM. C.L. UNION (Aug. 17, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>, archived at <https://perma.cc/DAN7-MH77>.

<sup>49</sup> *See* Spencer Bokat-Lindell, *The Voting Suppression Tipping Point*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/opinion/voter-suppression-election.html>, archived at <https://perma.cc/3NZD-LMB7>.

<sup>50</sup> HANNAH KLAIN, KEVIN MORRIS, MAX FELDMAN & REBECCA AYALA, *WAITING TO VOTE: RACIAL DISPARITIES IN ELECTION DAY EXPERIENCES* 4 (June 3, 2020), [https://www.brennancenter.org/sites/default/files/2020-06/6\\_02\\_WaitingtoVote\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf), archived at <https://perma.cc/2B6C-5ZCM>.

<sup>51</sup> *Block the Vote: Voter Suppression in 2020*, *supra* note 48.

<sup>52</sup> *See Voter Identification Requirements / Voter ID laws*, NAT. CONF. FOR STATE LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>, archived at <https://perma.cc/724L-E797>.

<sup>53</sup> *See id.*

<sup>54</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Souter, J., dissenting).

<sup>55</sup> Lloyd Cox, *Why Is It So Hard for Americans to Vote?*, MACQUARIE UNIV. (Sept. 7, 2020), <https://lighthouse.mq.edu.au/article/please-explain/september-2020/Why-is-it-so-hard-for-so-many-Americans-to-vote>, archived at <https://perma.cc/B8J7-EKRP>; Hira et al., *supra* note 38, at 10 (“Voter ID laws disproportionately impact people of color, at times inadvertently and at times by design. Across several states, various studies have also shown that ID ownership is lower among eligible Black and Latino voters than among white voters.”).

<sup>56</sup> *See* Hardy, *supra* note 26, at 861.

The high number of restrictive voting laws should not be a surprise. The federal government has long granted groups the right to vote only to have local legislatures subvert members of these groups from voting.<sup>57</sup> Discriminatory state laws—poll taxes, literacy tests, and grandfather clauses—disenfranchised African Americans only a decade after the Reconstruction Congress had granted them the right to vote.<sup>58</sup> For example, Jim Crow laws in Mississippi reduced the percentage of Black citizens eligible to vote from over 90% after Congress ratified the Fifteenth Amendment to less than 6% twenty-two years later.<sup>59</sup> States similarly responded to the Nineteenth Amendment by enacting laws that, “while gender-neutral on their face, nonetheless cut more heavily against women than men.”<sup>60</sup> The histories of suffrage for African Americans and for women demonstrate that “[e]ven constitutional amendments [have] not stop[ped] years of laws that continue[ ] to suppress voting rights of large swaths of entitled voters.”<sup>61</sup> In systematically excluding minority voters from the electoral process, restrictive voting laws will continue to undermine our constitutional commitment to representative democracy.

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<sup>57</sup> See Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1020–22 (2012); Erin A. Penrod, *Disenfranchisement 2.0: Recent Voter ID Laws and the Implications Thereof*, 14 U. ST. THOMAS L.J. 207, 213 (2018) (“Recent voter ID laws are modern iterations of historical disenfranchisement laws designed to prevent black [sic] and other minority Americans from voting.”).

<sup>58</sup> See *Brnovich*, 141 S.Ct. at 2352 (noting that “almost immediately [after the Fifteenth Amendment], legislators discovered that bloodless actions could also suffice to limit the electorate to white citizens. Many States, especially in the South, suppressed the black vote through a dizzying array of methods: literacy tests, poll taxes, registration requirements, and property qualifications.”) (Kagan, J., dissenting); Erin Blakemore, *Voter Fraud Used to Be Rampant. Now It’s an Anomaly*, NAT’L GEOGRAPHIC (Nov. 11, 2020), <https://www.nationalgeographic.com/history/2020/11/voter-fraud-used-to-be-rampant-now-an-anomaly/>, archived at <https://perma.cc/DG4Y-FLJ8> (“Starting in the 1870s, southern states also began making voting impossible for Black citizens . . . Poll taxes, literacy requirements, confusing tests, and state-sanctioned violence became the norm—and the number of Black voters dwindled.”).

<sup>59</sup> Amy McKeever, *Voter Suppression Has Haunted America Since It Was Founded*, NAT’L GEOGRAPHIC (Aug. 21, 2020), <https://www.nationalgeographic.com/history/reference/united-states-history/voter-suppression-haunted-united-states-since-founded/>, archived at <https://perma.cc/JB4V-RZ62>; Richard Pildes, *The Really Big Fight on Voting Rights Is Just Around the Corner*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/opinion/voting-rights-john-lewis-act.html?action=click&module=opinion&pptype=homepage>, archived at <https://perma.cc/5XMV-TV4X> (“In Louisiana . . . half of registered voters, more than 130,000 people, were Black in 1896; by 1910, that had fallen to 730 men.”).

<sup>60</sup> Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 543 (2016).

<sup>61</sup> Paulette Brown, *Protect the Vote, Promote the Vote: New Voting Laws Can Infringe on a Critical Constitutional Right*, ABA J. (July 1, 2016), [https://www.abajournal.com/magazine/article/protect\\_the\\_vote\\_promote\\_the\\_vote\\_new\\_voting\\_laws\\_can\\_infringe\\_on\\_a\\_critica](https://www.abajournal.com/magazine/article/protect_the_vote_promote_the_vote_new_voting_laws_can_infringe_on_a_critica), archived at <https://perma.cc/RXR3-TLG5>.

## II. THE HISTORY OF UNIVERSAL JURY SERVICE

While restricting the vote, state legislatures have generally left the right of citizens to serve on the jury unencumbered. Indeed, in 1791, the states entrenched the jury as a democratic mainstay by ratifying the Bill of Rights.<sup>62</sup> Among the guarantees, the Sixth Amendment promised criminal defendants in federal court “the right to a speedy and public trial, by an impartial jury.”<sup>63</sup> Local legislatures carried out the pledge by continuing the common law tradition of vesting the state with the authority to summon citizens to service.<sup>64</sup>

Yet the Supreme Court made little effort to parse the motivation behind subjecting all citizens to jury service until well into the twentieth century. Only when Reconstruction and the first wave of the Women’s Movement demanded that jury service expand to include African Americans and women did the Court fully articulate the grounds for compelling citizens to exercise the right to serve in the first place.<sup>65</sup>

The following surveys of the two movements uncover the evolving judicial reasoning that inspired the Court to summon African Americans and women to jury service. These narratives also demonstrate that, throughout both histories, Congress and the Court consistently analogized jury service to voting.

### A. African American Jury Service

On May 12, 1859, an all-white jury convicted the abolitionist Charles H. Langston of assisting in the escape of a fugitive slave.<sup>66</sup> Before issuing Langston’s sentence, Judge Hiram William of the District Court of Ohio offered Langston the opportunity to speak. Langston, a freed slave himself, did not hesitate.

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<sup>62</sup> *The Bill of Rights: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript>, archived at <https://perma.cc/JXM4-6LHJ> (last visited Sept. 5, 2020); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (“Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights.”).

<sup>63</sup> U.S. Const. amend VI.; see also *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (“Jury trial came to America with English colonists, and received strong support from them.”).

<sup>64</sup> *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14, (1899); *Glasser v. United States*, 315 U.S. 60, 85 (1942) (“For the mechanics of trial by jury we revert to the common law as it existed in this country and in England when the Constitution was adopted.”); see also 28 U.S.C.S. § 1861 (“It is . . . the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”).

<sup>65</sup> *Cf. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (“[W]ith respect to jury service, African-Americans and women share a history of total exclusion.”).

<sup>66</sup> Charles Langston, Speech at Cuyahoga County Courthouse (May 12, 1859), in *MASTERPIECES OF NEGRO ELOQUENCE: 1818-1913* 27, 27 (Alice Moore Dunbar ed., 2013).

Langston began by reminding the courtroom that the Founders had claimed “that the fundamental doctrine of this government was that all men have a right to life and liberty.”<sup>67</sup> But his all-white jury, he continued, had facilitated “unjust laws [that] exclude colored men from the jury box and force [them] to be tried in every case by jurors . . . filled with prejudices against [them].”<sup>68</sup> The steadfast prejudices that oppressed African Americans had ensured that the white jurors “were neither impartial, nor were they a jury of [Langston’s] peers.”<sup>69</sup> By excluding Black Americans, the court had thereby infringed upon his constitutional right to an impartial jury.<sup>70</sup> Since the northern court had already been sympathetic to the crime, Langston received a jail sentence of only twenty days.<sup>71</sup>

It would take the Civil War for the federal government to heed Langston’s calls for racial equality. Equality had not been a central pledge of the pre-War Constitution. While the Declaration of Independence had announced all men equal, the Bill of Rights “studiously ignore[d]” the creed.<sup>72</sup> Only in 1868 did the Equal Protection Clause of the Fourteenth Amendment avow the equality that Langston and his compatriots had so sought.<sup>73</sup> In 1874, Representative Robert B. Elliot of South Carolina would sum up the Clause on the floor of Congress. He explained, “[w]hat you give to one class, you must give to all; what you deny to one class, you shall deny to all.”<sup>74</sup>

The newfangled constitutional equality did not take long to seep into the jury box. In 1870s New Orleans, Black citizens appeared on juries often enough to reflect the ratio of Blacks to whites in the city.<sup>75</sup> In Washington County, Texas, Black citizens composed half of the population and similarly made up around 36% of petit jurors.<sup>76</sup> Federal law, meanwhile, introduced the Civil Rights Act of 1875 to effect the guarantees of the Fourteenth

<sup>67</sup> *Id.* at 30.

<sup>68</sup> *Id.* at 32.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 33 (“I should not be subjected to the pains and penalties of this oppressive law, when I have not been tried, either by a jury of my peers, according to the principles of the common law, or by an impartial jury according to the Constitution of the United States.”).

<sup>71</sup> *See id.*

<sup>72</sup> *See* George P. Fletcher, *Political Correctness in Jury Selection*, 29 SUFFOLK U. L. REV. 1, 3 (1995) (“The Bill of Rights . . . studiously ignore[s] the principle of equality.”).

<sup>73</sup> *See* Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 952 (2019) (“Equality before the law did not exist in 1868, either in the South or in the North. The Fourteenth Amendment was a promise to create that equality.”); Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1586 (2012) (“The establishment via Reconstruction of civil and political equality represented a radical change in the nature of American public life.”); *see also* JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION* 256 (1983) (“[T]he framers of the Civil War amendments and the Reconstruction laws intended to enact into the Constitution the principles of the Declaration.”).

<sup>74</sup> 2 CONG. REC. at 408 (1874).

<sup>75</sup> Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1601 (2018).

<sup>76</sup> *Id.*

Amendment within the realm of jury service.<sup>77</sup> The Act prohibited discrimination against would-be jurors “on account of race, color, or previous condition of servitude.”<sup>78</sup> Separately, it accorded African Americans equal access and treatment within spaces like inns, theatres, and public transportation.<sup>79</sup>

During debates over the Civil Rights Act of 1875, Congress argued over the role of African American jurors in achieving equality for the criminal defendant on trial.<sup>80</sup> When an upfront Senator Justin Morrill of Vermont asked, “Do I understand [Senator John Sherman of Ohio] to argue that [it] is a right belonging to a citizen of the United States . . . to sit upon a jury?” Sherman responded, “No; I say it is the right of the person accused to have an impartial trial; that men of his own race, color, or condition shall not be excluded on that account.”<sup>81</sup> Senator George Edmunds of Vermont, meanwhile, warned more broadly that the promises of Reconstruction would remain illusory so long as the law excluded African Americans from service. He asked:

Where would be the value of declaring that a colored man should have equal rights of trial by jury and equal rights of judgment by his peers, if you are to say that the jurors are to be composed of the Ku Klux, and that the only status the colored man shall have in court, shall be that he shall stand either as a respondent or it may be as a witness?<sup>82</sup>

Senator Charles Sumner of Massachusetts repeated Edmunds’s urgency with a rhetorical question of his own, asking “[h]ow can justice be administered throughout States thronging with colored fellow-citizens unless you have them on the juries?”<sup>83</sup> Still, the final legislative text omitted any reference to the Black criminal defendant.

While the Act overlooked the stakes of criminal defendants in the jury system, the Supreme Court let just four years pass before correcting the statutory blind spot. On March 1, 1880, the Court decided two near identical

<sup>77</sup> See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1417 (2020) (Kavanaugh, J., concurring in part) (“[B]lack jurors . . . won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875.”); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (“In 1875, to help enforce the Fourteenth Amendment, Congress passed and President Ulysses S. Grant signed the Civil Rights Act of 1875.”).

<sup>78</sup> Civil Rights Act of 1875, 18 Stat. 336 (1875).

<sup>79</sup> *Id.*

<sup>80</sup> CONG. GLOBE, 42d Cong., 2d Sess. 845 (1872); see 3 CONG. REC. 1867 (1875) (Senator Thomas Bayard stated, “[t]he Senate ha[s] declared by their last vote that the right to sit upon a jury is one of those fundamental rights and privileges of a citizen of the United States that he cannot be deprived of on account of race, color, or persuasion, religious or political.”); 66 CONG. REC. 822 (1875) (Senator Charles Sumner stated, “[t]he right to be a jurymen . . . is a right to be guarded by the nation.”); 66 CONG. REC. 822 (1875) (Senator Matthew Carpenter stated that service was “one of the privileges of citizenship.”).

<sup>81</sup> CONG. GLOBE, *supra* note 80, at 845.

<sup>82</sup> *Id.* at 900.

<sup>83</sup> *Id.* at 822.

cases: *Virginia v. Rives* and *Strauder v. West Virginia*.<sup>84</sup> While both cases confronted demands that jury service include Black Americans, only Taylor Strauder properly based his call for an integrated venire on the Constitution. The constitutional grounding was decisive; Strauder alone convinced the Court.<sup>85</sup>

The petitioners in *Rives* barely missed the mark. A Virginia law had established that “[a]ll male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are made liable to serve as jurors.”<sup>86</sup> Notably, the statutory text did not itself limit eligibility according to race. When an all-white jury nonetheless indicted two Black men for murder, the petitioners claimed that the indictment had violated the Fourteenth Amendment by denying them the equal protection under the laws. For, they argued:

[A] strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man. From that fact alone they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race.<sup>87</sup>

But the approach was misguided. While the Fourteenth Amendment protects citizens against discriminatory action by the state, in this instance, community prejudice bore the blame. The exclusion of African Americans was therefore without constitutional consequence.

The underlying facts of the second case, *Strauder*, resemble the underlying facts in *Rives*. Like *Rives*, twelve white jurors had convicted the Black petitioner of murder. Nevertheless, unlike the state law in *Rives*, West Virginia law itself had indirectly excluded African Americans from the jury box by dictating that “[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors.”<sup>88</sup> The law had not been a relic from before the Civil War. Instead, West Virginia had enacted it eight years after the War ended.<sup>89</sup>

Strauder appealed his conviction on the same constitutional grounds as the defendants in *Rives*. The Fourteenth Amendment guaranteed citizens equal protection under the laws. But “he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens.”<sup>90</sup> Without Black ju-

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<sup>84</sup> See *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880).

<sup>85</sup> *Id.*

<sup>86</sup> *Rives*, 100 U.S. at 315.

<sup>87</sup> *Id.*

<sup>88</sup> *Strauder*, 100 U.S. at 305.

<sup>89</sup> See CHRISTOPHER WALDREP, *JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI* 168 (2011).

<sup>90</sup> *Strauder*, 100 U.S. at 304.

rors, “the probabilities of a denial of [rights] to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man.”<sup>91</sup>

The Court agreed that the all-white jury had determined Strauder’s constitutional fate. As “every white man [was] entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not,” only white criminal defendants, and not Black criminal defendants, were tried by “a body of men composed of the peers or equals of the person.”<sup>92</sup> “It is not easy to comprehend,” Justice Strong marveled, “how it can be said . . . [that] the [Black defendant] is equally protected by the law with the [white defendant].”<sup>93</sup>

The instrumental role that the Court assigned to African Americans serving on the jury evidently did not erase the character of service as an individual right belonging to the juror.<sup>94</sup> To the contrary, Strong wrote, the statutory exclusion of African Americans from jury service also “expressly denied [to them] all right to participate in the administration of the law, as jurors.”<sup>95</sup> In fact, that violation itself was “a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”<sup>96</sup> Ultimately, only when “the law in the States [was] the same for the black as for the white” could “all persons, whether colored or white, . . . stand equal before the laws of the States.”<sup>97</sup>

A third holding from the same day quietly revised the provision of the Civil Rights Act of 1875 that had first imparted upon African Americans the right to serve.<sup>98</sup> *Ex parte Virginia* had reached the Supreme Court after Virginia imprisoned a county judge for excluding African Americans from the jury. Before the Court, the judge argued that the justices should invalidate the law that convicted him. Congress, he argued, did not have the authority to “punish a State judge for his official acts.”<sup>99</sup> For while the Fourteenth Amendment governed action by the state, the judge, “in selecting the jury as he did, was performing a judicial act.”<sup>100</sup> The fact that “the state statute

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 308–09.

<sup>93</sup> *Id.* at 309.

<sup>94</sup> See Barbara Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 743 (“The *Strauder* Court treated the injury to jurors . . . not as the central rights violation in the case, but rather as an additional reason for recognizing the defendant’s personal right to equal protection[.]”).

<sup>95</sup> *Strauder*, 100 U.S. at 308.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 307.

<sup>98</sup> *Ex parte Virginia*, 100 U.S. 339, 348 (1880).

<sup>99</sup> *Id.* at 348.

<sup>100</sup> *Id.*

under which [the] Judge . . . acted was not discriminatory” illustrated that the state had held no sway over the judge’s alleged acts.<sup>101</sup>

The Court dismissed the argument. The man who allotted jurors to the bench, an individual by all conventional meaning, became, in the moment of allotment, a State envoy. Justice Strong explained, “[h]e acts in the name [of] and for the State, and is clothed with [her] power, his act is [her act].”<sup>102</sup> Strong referred to this surrogacy when he wrote, “[t]he constitutional provision, therefore, must mean that no agency of the State, *or of the officers or agents by whom its powers are exerted*, shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>103</sup> The jury provision of the Civil Rights Act of 1875, and the charge rising therein, thus remained valid.<sup>104</sup>

Beneath the clearly articulated decision, the Court had made a careful choice. Even though the Act itself made no reference to criminal defendants, the Court nonetheless upheld the judge’s conviction on account of the harms that the criminal defendant suffered from such discriminatory jury procedures.<sup>105</sup> The holding thus recharacterized the juror within the broader constitutional framework surrounding jury trial.<sup>106</sup>

The following year, the Court confirmed that the instrumental value of African American jurors in *Strauder* and *Ex parte Virginia* neither diminished nor contradicted the right-holding status that Reconstruction has granted them. In *Neal v. Delaware*, the Court acknowledged the twofold nature of juror participation: while enabling the rights of Black criminal defendants, Black jurors also served as full and equal right-holders.<sup>107</sup> The Court’s bifurcated account of jurors is noteworthy. While “theorists of rights are generally very uneasy about instrumental justification,”<sup>108</sup> the holding suggests that the law can mandate citizens to exercise certain rights without offending the sovereignty that the right implies.

*Neal* considered a Delaware law stipulating that all qualified voters were “liable to serve as jurors.”<sup>109</sup> As the Delaware Constitution had restricted suffrage to white males, the law operated to restrict jury service to the same selective citizens.<sup>110</sup> But then came the Fifteenth Amendment,

<sup>101</sup> Leonard F. Manning, *State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition*, 27 *FORDHAM L. REV.* 201, 205 (1958).

<sup>102</sup> *Virginia*, 100 U.S. at 347.

<sup>103</sup> *Id.* at 347 (emphasis added).

<sup>104</sup> *Id.* at 349.

<sup>105</sup> Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 *CORNELL L. REV.* 203, 235 (1995) (observing that “the federal indictment in *Ex parte Virginia* had not specified any cases in which the judge on trial had excluded jurors on account of race.”).

<sup>106</sup> *Id.* at 345.

<sup>107</sup> See *Neal v. Delaware*, 103 U.S. 370 (1881).

<sup>108</sup> Jeremy Waldron, *Participation: The Right of Rights*, 98 *PROC. ARISTOTELIAN SOC’Y* 307, 320 (1998).

<sup>109</sup> *Neal*, 103 U.S. at 388 (the law stated, “[a]ll qualified to vote at the general election, being ‘sober and judicious persons,’ shall be liable to serve as jurors.”).

<sup>110</sup> See *id.* at 387–88.



which prohibited denial or abridgement of the right to vote on account of race or previous condition of servitude. The state, however, still had not indicated that it “recognize[d], in the fullest legal sense, the binding force of that amendment and its effect in modifying the State Constitution upon the subject of suffrage.”<sup>111</sup> When New Castle County indicted a Black man for rape, state law and state constitution combined to ensure that every member of the jury that convicted him was white.

The Supreme Court invalidated the Delaware law for two reasons. First, “to compel a colored man to submit to a trial before a jury drawn from a panel from which was excluded, because of their color, every man of his race . . . was a denial of the equal protection of the laws.”<sup>112</sup> Likewise, “a denial to citizens of the African race, because of their color . . . of participating, as jurors, in the administration of justice, [was] a discrimination against the former inconsistent with the [Fourteenth A]mendment.”<sup>113</sup> Second, the Federal Constitution controlled over the state constitution.<sup>114</sup> Therefore, the Fifteenth Amendment superseded the provision of the Delaware Constitution that excluded African Americans from suffrage—and so African Americans, as voters, should have been liable to serve.

Only after securing African American jury service did the Court strike down the Act that had first provided African Americans with the right to serve. In *The Civil Rights Cases* of 1883, the Court acknowledged that the Civil Rights Act’s antidiscrimination provisions, by targeting private conduct, exceeded congressional authority under the Fourteenth Amendment.<sup>115</sup> Justice Joseph Bradley cited to *Ex parte Virginia* to leave standing only the provision of the Act that granted the right to jury service.<sup>116</sup> With this citation, *The Civil Rights Cases* reinforced the reasoning that had prompted *Ex parte Virginia* to uphold the jury provision in the first place. That is, the provision fell within the scope of the Fourteenth Amendment precisely because Black jurors functioned as a guard against discriminatory state action.

In the end, Langston had been right. The United States could not guarantee the equal protection of the laws for African American criminal defendants until the jury represented them as it did white criminal defendants. Such a promise of representational equality gave the Supreme Court little choice but to require African Americans to exercise the right to participate in jury

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<sup>111</sup> *Id.* at 389.

<sup>112</sup> *Id.* at 386.

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 389–90 (“The presumption should be indulged . . . that the State recognizes . . . an amendment of the Federal Constitution . . . , as binding on all of its citizens and every department of its government, and to be enforced . . . without reference to any inconsistent provisions in its own Constitution or statutes.”).

<sup>115</sup> *See* *The Civil Rights Cases*, 109 U.S. 3, 11–12 (1883) (recognizing the Fourteenth Amendment as empowering only congressional action that is “directed to the correction of [State laws’ or State proceedings’] operation and effect”).

<sup>116</sup> *See id.* at 12.

service. Only by demanding their participation could the constitutional commitments of Reconstruction expand beyond the page.

### B. *Women's Jury Service*

When compelling African Americans to participate in jury service, the Supreme Court clarified that states did not violate the Fourteenth Amendment by “confi[n]g the selection [of jurors] to males.”<sup>117</sup> For almost a century, as the judiciary clung to the conviction that service on the jury would cause women to forego their domestic obligations, the dictum held strong.

The first wave of the Women's Movement, however, was determined to prove that the worth of women held beyond the home. Although not serving on the battlefields of the Civil War, women had been instrumental to the military campaigns of the day.<sup>118</sup> In the trenches, they nursed the wounded.<sup>119</sup> At home, they filled the trades that men-turned-militants had deserted.<sup>120</sup> Through these performances, women preserved a bare degree of stability against a feverish and violent climate. The leaders of the Women's Movement hoped that the contributions would accelerate the path to women's suffrage.<sup>121</sup> More generally, they sought to “enlarg[e] public acceptance of a less traditional role for women.”<sup>122</sup>

Their hopes proved fantasy. While the pre-War Constitution had described Americans as “citizens”<sup>123</sup> or “the people,”<sup>124</sup> Reconstruction, renowned for principles of inclusion and equality, injected new prejudice. The Fourteenth Amendment introduced “male” as a descriptor.<sup>125</sup> The limitation appears thrice in a single provision: Political representation is afforded to each state in accordance with the state's number of “male citizens.”<sup>126</sup> When the right to vote is denied, representation “shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.”<sup>127</sup>

The gendered stipulations were not cavalier. In the half-century preceding the War, the Women's Movement had flourished. Efforts to expand upon

<sup>117</sup> *Strauder v. West Virginia*, 100 U.S. at 303, 310 (1880).

<sup>118</sup> See JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 151 (1994).

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> See Jill Elaine Hasday, *Women's Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1720 (2013).

<sup>122</sup> Lind, *supra* note 118, at 151.

<sup>123</sup> U.S. CONST.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at amend. XIV, § 2.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

the allotment of suffrage were robust, and success loomed.<sup>128</sup> Nonetheless, the drafters of the Amendment recognized that the implications of ambiguous language would be too controversial for an Amendment already built on controversy. The condition of the grant—the refusal to recognize the value in women—was therefore deliberate.<sup>129</sup>

Reconstruction's deconstruction of the gender-neutral Constitution progressed with ratification of the Fifteenth Amendment in 1870. The Amendment proclaimed, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."<sup>130</sup> The text continued the work of the prior Amendment by neglecting to prohibit states from excluding citizens on the basis of gender. Rushing to offset the restrictive language, advocates of the Women's Movement proposed a Sixteenth Amendment in 1871 that would enfranchise women. But, once more, the imminent loss of political support took its toll,<sup>131</sup> and the proposal did not get far.<sup>132</sup>

Reconstruction may have neglected them, but women served on the jury long before African Americans. Seventeenth and eighteenth-century colonial courts invoked the English custom of a "jury of matrons."<sup>133</sup> Under this practice, courts assembled all-female juries to decide the truth or falsity of claims of pregnancy by women convicted of capital offenses.<sup>134</sup> For convicts whose pregnancy the jury affirmed, the court would grant a stay of execution.<sup>135</sup> Otherwise, the execution would proceed.<sup>136</sup> While recognizing a utility in female jurors for the jury's fact-finding function, the practice all but disappeared by the end of the eighteenth century.<sup>137</sup>

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<sup>128</sup> See Hasday, *supra* note 121, at 1721 ("The drafters of the Fourteenth Amendment realized that if they did not use sex-specific language in the Fourteenth Amendment's second section, then women would immediately contend that they had been enfranchised and that women might even win such arguments.").

<sup>129</sup> See Lind, *supra* note 118, at 162 ("Those few Republicans sympathetic to voting rights for females found giving women the vote too politically risky to tolerate—it might cost the allegiance of enough white men to offset the expected benefit of new African American voters in the South, loyal to the Republican cause.").

<sup>130</sup> U.S. CONST. amend. XV.

<sup>131</sup> See Lind, *supra* note 118, at 149 ("Suffragists discovered that their needs and goals would be sacrificed to political expediency.").

<sup>132</sup> See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948 (2002).

<sup>133</sup> See HOLLY J. MCCAMMON, *THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT* 38 (2012).

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* at 37–38. For example, after Virginia sentenced a pregnant Margaret Hatch to death in 1633 for murdering her child, a jury of matrons determined that Hatch was feigning her pregnancy. See *id.* at 38–39; JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* 82 (2006). Accordingly, on June 24, 1633, the state executed Hatch without delay. MCCAMMON, *supra* note 133, at 38–39.

<sup>136</sup> See *id.* at 38.

<sup>137</sup> See *id.*

Women next appeared on the jury in states that reasoned that jury service should accompany grants to women of the right to vote.<sup>138</sup> Chief Justice John H. Howe of the Wyoming Supreme Court created the first “mixed jury” after Wyoming granted women the right to vote in 1870.<sup>139</sup> Under his direction, eleven women and twenty-six men presided as jurors over each trial.<sup>140</sup> Howe was not alone in his reading of the right to vote. Washington, Colorado, Idaho, and Utah also ordered female jury service in the aftermath of suffrage.<sup>141</sup>

The suffrage-based progress did not last. Howe’s successor revoked the practice of mixed juries as soon as Howe left the court.<sup>142</sup> Wyoming would not allow women back on the jury for another eighty years.<sup>143</sup> Washington, too, banished women from the jury after a change in court composition.<sup>144</sup> In Idaho, a 1924 decision by the state Supreme Court did the same.<sup>145</sup> Although Utah maintained laws allowing them to serve, women still rarely appeared on juries.<sup>146</sup>

Despite these setbacks, the Movement continued to press the argument that jury service should accompany the right to vote. In 1922, the Women Lawyers’ Journal called for the state to include women in jury service because “[t]he granting of equal citizenship rights to women is the logical fulfillment of the suffrage amendment, which granted equal voting rights.”<sup>147</sup>

In 1927, Burnita Shelton Matthews, who would later be the first woman to sit on the U.S. District Court for the District of Columbia,<sup>148</sup> also observed that, “[s]ince the adoption of woman suffrage, women . . . [were] demanding the why and wherefore of their exclusion from jury service.”<sup>149</sup> In 1947, Matilda Fenberg of the Illinois Bar characterized jury service as “a function

<sup>138</sup> See, e.g., *Parus v. Dist. Ct. of Fourth Jud. Dist. of Nev. in and for Elko Cty.*, 174 P. 706, 709 (1918) (“When the people of Nevada approved and ratified the constitutional amendment making women qualified electors of the state, it is to be presumed that such ratification carried with it a declaration that the right of electorship thus conferred carried with it all of the rights, duties, privileges, and immunities belonging to electors; and one of the rights, one of the duties, and one of the privileges belonging to this class was declared by the organic law to be grand-jury service.”).

<sup>139</sup> McCAMMON, *supra* note 133, at 39.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 40.

<sup>142</sup> See *id.*

<sup>143</sup> See Debora A. Person, *Wyoming Pre-Statehood Legal Materials: An Annotated Bibliography—Part II*, 7 WYO. L. REV. 333, 386 (2007).

<sup>144</sup> McCAMMON, *supra* note 133, at 40.

<sup>145</sup> *Id.*

<sup>146</sup> See *id.*

<sup>147</sup> Jean Nelson Penfield, 12 WOMEN L.J., 1, 5 (1922).

<sup>148</sup> Justice Ruth Bader Ginsburg, *Remarks of Ruth Bader Ginsburg, March 11, 2004*, CUNY School of Law, 7 N.Y. CITY L. REV. 221, 222 (2004).

<sup>149</sup> See Burnita Shelton Matthews, *The Woman Juror*, 15 WOMEN L.J. 15, 20 (1927).

of government” that would offer women “first hand knowledge of methods by which laws are administered and enforced.”<sup>150</sup>

Most protested female jury service by arguing that women belonged in the “domestic sphere,” rather than in the courtroom.<sup>151</sup> Should women serve as jurors, who would care for their children? Who would manage the home? And because women had been constrained to domestic quarters, they “lacked the worldly experience necessary to make informed decisions as jurors.”<sup>152</sup> In response, the Women’s Movement, foregoing equality for another fight, “reframe[d] their legal arguments in terms commensurate with the courts’ goals—difference rather than rights.”<sup>153</sup> Under this supplementary strategy, supporters contended that women improved the jury’s fact-finding function by providing uniquely female insights. The journalist and advocate Alice Stone Blackwell drew out the new approach through metaphor. When women add their voices to the voices of men, she wrote, they do more than “double[ ] the volume of sound.”<sup>154</sup> They “add the soprano and alto to the tenor and bass.”<sup>155</sup> Together, the genders “form a new harmony that [is] richer than the sound men [can] produce singing alone.”<sup>156</sup>

By 1937, the Women’s Movement had taken the cry for female jury service to the floor of Congress. Addressing the Subcommittee of the House Committee on the Judiciary, a single-minded Thomas Musgrave, representing the Maryland Federation of Republican Women, described the injury that child defendants suffered when jury deliberations excluded the female perspective. For these young defendants, the need for female perspectives on the jury was pressing. Musgrave explained:

The reason that [women] are in favor of jury service is because . . . we had to witness a poor little girl on trial, and each one of us

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<sup>150</sup> Matilda Fenberg, *Jury Service for Women*, 33 *WOMEN LAW. J.* 45, 48 (1947).

<sup>151</sup> Joanna L. Grossman, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 *STAN. L. REV.* 1115, 1146 (1994); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994) (“[S]upporters of the exclusion of women from juries tended to couch their objections in terms of the ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere.”).

Notably, anti-suffragists invoked a similar argument—“that women were supposed to be virtuous caregivers and that giving women the right to vote would detract from household responsibilities like caring for children, managing the household and ‘looking pretty.’” Alisha Haridasani Gupta, *The Suffragists Fought to Redefine Femininity. The Debate Isn’t Over.*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/womens-suffrage-femininity.html>, archived at <https://perma.cc/LMS5-MZQP>.

<sup>152</sup> Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 *WM. & MARY J. WOMEN & L.* 1, 2–3 (2005).

<sup>153</sup> Grossman, *supra* note 151, at 1144–45.

<sup>154</sup> Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 *STAN. L. REV.* 915, 960 (1998) (quoting ALICE STONE BLACKWELL, *OBJECTIONS ANSWERED* 2 (1911), reprinted in *WOMAN SUFFRAGE: ARGUMENTS AND RESULTS, 1910–1911* (Kraus Reprint Co. 1971)).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

thought that it might have been our own daughter; and on the jury were 10 white men and 2 colored men, and she looked the most pathetic thing I ever saw, and each woman said at our club later, ‘Suppose that it had been our daughter that was at the bar,’ with 2 colored men and 10 white men.<sup>157</sup>

George Morey of the Maryland Land Federation of Women’s Clubs drew out a similar sentiment. She railed, “although our men want to protect us, if they cannot protect both us and the children, they had better let us go in the jury room and protect ourselves and the children.”<sup>158</sup> Matthews added, “more and more women are coming to feel, when they have children, that the protection of their children depends on what goes on in the outside world as well as in the home.”<sup>159</sup> Aurelle Burnside, president of the Arkansas Council of Women Lawyers, made sure that Congress understood the prompting by stating, “I should like to see mandatory service, of course, in my State, rather than optional.”<sup>160</sup>

Before the Supreme Court, the Women’s Movement did not develop this argument on difference from the Equal Protection Clause of the Fourteenth Amendment. Instead, litigants demanded that women participate in jury service for the sake of the Sixth Amendment right of the criminal defendant to an impartial jury, which entailed that the jury be selected from a “fair cross-section of the community.”<sup>161</sup> The reasoning behind the variance in legal approach could be straightforward: “[i]t was not until 1971 that the Court held, for the first time in American history, that the Equal Protection Clause protects women, too.”<sup>162</sup> But the decision was also undeniably strategic. That is, the argument on difference had developed precisely because calls to include women in jury service in the name of gender equality had failed. It was thus already evident that the equality of the Equal Protection Clause would not be a source of success.

Remarkably, these differing constitutional claims do little to distinguish the principles that convinced the Supreme Court to subject women and African Americans to mandatory jury service. The Court subjected both long-excluded groups to jury service upon determining that the jury system could only satisfy its representative function upon their participation.

In 1942, the representation-based logic of the women’s movement began to take shape. When a district court convicted Daniel Glasser, assistant

<sup>157</sup> HOUSE COMM. ON THE JUD., SUBCOMM. NO. 1, 75TH CONG., WOMEN JURORS IN FEDERAL COURTS: HEARINGS BEFORE THE UNITED STATES HOUSE COMMITTEE ON THE JUDICIARY 23 (1937).

<sup>158</sup> *Id.* at 16.

<sup>159</sup> *Id.* at 8.

<sup>160</sup> *Id.* at 17.

<sup>161</sup> Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 78 (2003) (“In 1968, Congress mandated a ‘fair cross-section’ requirement in its new federal jury selection law for both criminal and civil cases.”).

<sup>162</sup> Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL’Y 235, 263 (2020).

U.S. attorney in the Northern District of Illinois, on charges of conspiracy, Glasser appealed his conviction. He argued, in part, that the district court's systematic exclusion of women from the jury violated state law.<sup>163</sup> In fact, women had composed half of the jury that convicted Glasser. Still, each had been "taken from a list furnished . . . by the Illinois League of Women Voters, and prepared exclusively from its membership."<sup>164</sup> Members on the list had participated in "jury classes whose lecturers presented the views of the prosecution."<sup>165</sup>

Justice Frank Murphy appreciated the prejudiced danger in Glasser's jury. He noted that "the proper functioning of the jury system . . . requires that the jury be a 'body truly representative of the community.'"<sup>166</sup> For a "jury selected from the membership of such an organization is . . . not only the organ of a special class, but, in addition, it is also openly partisan."<sup>167</sup> In short, by preventing veniremen from adequately representing the community, jury selection could not carry out its constitutional function of enabling a fair trial. Justice Murphy further elevated the constitutional hazard of Glasser's jury by warning that "[t]he guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power."<sup>168</sup>

But the holding had its limits. For one, the Court would not have had any reason for its holding had Illinois law not already permitted women to serve. For another, the Court found that the lower court had acted improperly by selecting jurors based on group affiliation. The fact that all group members just so happened to be women was irrelevant to the Court's reasoning.

When *Ballard v. United States* came before the Court four years later, gender nonetheless took center stage. Like the Illinois law in *Glasser*, California law already required women to appear in jury panels. The Southern District of California, ignoring the ordinance, had nonetheless excluded them "intentionally and systematically."<sup>169</sup>

Justice William Douglas did not have trouble employing the holding from *Glasser*. By omitting women from jury panels, the Southern District of California had inhibited the jury from properly representing the community.<sup>170</sup> The lower court had thus "not accord[ed] to the defendant the type of jury to which the law entitles him," because "the exclusion of women from jury panels may at times be highly prejudicial to the defendants."<sup>171</sup> Douglas embellished the argument by explaining:

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<sup>163</sup> See *Glasser v. United States*, 315 U.S. 60, 65 (1942).

<sup>164</sup> *Id.* at 83–84.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 86.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 69.

<sup>169</sup> *Ballard v. United States*, 329 U.S. 187, 189–90 (1946).

<sup>170</sup> In a footnote, Douglas went so far as to concede that "it is now generally agreed that women are qualified to serve on federal juries wherever the states have declared them qualified as jurors of the highest court of law in their respective states." *Id.* at 204 n.1.

<sup>171</sup> *Id.* at 195.

[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.<sup>172</sup>

Such an injury also extended beyond the defendant.<sup>173</sup> Douglas added, “[t]he systematic and intentional exclusion of women, like the exclusion of a racial group, . . . deprive[d] the jury system of the broad base it was designed by Congress to have in our democratic society.”<sup>174</sup>

Notwithstanding Douglas’s pronouncement of utilitarian equality, the Court was not so welcoming when reappraising women’s jury service ten years after *Ballard*. The story behind the case in question—*Hoyt v. Florida*—is pure drama. In 1957, Gwendolyn Hoyt, having already assaulted her husband some years earlier after catching him with another woman, beat him to death with a baseball bat.<sup>175</sup> Hoyt situated her claim in the spirit of her crime. In the throes of infidelity, rejection, and heartbreak, she had murdered her husband.<sup>176</sup> Female jurors, she insisted, would be more sympathetic.<sup>177</sup>

But an all-male jury had tried Hoyt, and she blamed state law. For, while subjecting all eligible men to jury duty, Florida did not include women in the mandate. Instead, the law allowed women to choose whether to register for service. In practice, few women had taken Florida up on the offer. The near-absence of women in Hoyt’s jury pool had thus occasioned the all-male jury that convicted her.<sup>178</sup>

*Hoyt* reached the Supreme Court in November 1961, after the County Court in Florida had convicted Hoyt and the highest court of the State had affirmed.<sup>179</sup> Hoyt appealed and argued that her trial before an all-male jury had “violated rights assured by the Fourteenth Amendment.”<sup>180</sup>

Dorothy Kenyon, board member of the American Civil Liberties Union, submitted an amicus brief in Hoyt’s defense. Kenyon argued that the Fourteenth Amendment should apply to “fully emancipated” women as the Court had applied it to African Americans.<sup>181</sup> She asked:

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<sup>172</sup> *Id.* at 193–94.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 195 (internal citations omitted).

<sup>175</sup> See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND OBLIGATIONS OF CITIZENSHIP 124 (1st ed. 1998).

<sup>176</sup> See *Hoyt v. Florida*, 368 U.S. 57, 59 (1961).

<sup>177</sup> See *id.*

<sup>178</sup> See *id.* at 58.

<sup>179</sup> See *id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Brief of the Florida Civil Liberties Union and the American Civil Liberties Union, Amici Curiae at 26–27, *Hoyt v. Florida*, 368 U.S. 57 (1961) (No. 31).



It has long been the law that the express exclusion of Negroes from juries or jury lists, on the sole ground of race or color[—] whether by statute or administrative act[—] was an unreasonable classification and therefore a denial to Negro defendants of the equal protection of the laws. Is the same thing true in the case of women?<sup>182</sup>

Kenyon continued the parallel to *Strauder* by observing that the state prevented women from exercising an “important right” by allowing them to opt out of jury service.<sup>183</sup> To her, suggesting that women were “still not qualified or capable of performing this simple act of good citizenship on the same terms as men [was] a genuine humiliation and degradation of [their] spirit.”<sup>184</sup>

Alas, Hoyt and Kenyon should have looked more closely at the Reconstruction case law upon which they relied. In *Rives*, the Court had rejected the Black petitioners’ equal protection challenge to the all-white jury that convicted them because the composition of the petitioners’ jury could not “be imputed to the state,”<sup>185</sup> and so “[a] mixed jury in a particular case [was] not essential to the equal protection of the laws.”<sup>186</sup> That is, in the absence of state action, the Equal Protection Clause could not supply a viable constitutional claim. The same requirement of state action would eventually condemn Hoyt’s defense as well. As the Court recognized, Florida did not prohibit women from serving on the jury.<sup>187</sup> Instead, Hoyt’s all-male jury had resulted from the simple fact that most women had neglected to register.

In holding against Hoyt, the Court only reaffirmed that prejudice would overpower any argument based on equality. The State exempted women from one civic duty, jury service, in maintenance of another, domestic order. Justice Harlan wrote, “Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.”<sup>188</sup> As Harlan reminded Hoyt, the view was not so rare. Seventeen states retained laws that, mirroring Florida, provided women with some form of absolute exemption from jury service.<sup>189</sup> The Florida legislature had only recently rejected a bill

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<sup>182</sup> *Id.* at 6–7.

<sup>183</sup> *Id.* at 26–27.

<sup>184</sup> *Id.* (emphasis added).

<sup>185</sup> *Virginia v. Rives*, 100 U.S. 313, 334 (1879) (Field, J., concurring).

<sup>186</sup> *Id.* at 323 (1879). *Strauder* likewise recognized that the Constitution did “not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant.” *Hoyt*, 368 U.S. at 59.

<sup>187</sup> See Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 938 (2011) (“The inefficacy of the Court’s equal protection jurisprudence was demonstrated by its decision in *Hoyt v. Florida*.”).

<sup>188</sup> *Id.* at 61–62.

<sup>189</sup> See *id.* at 62.

that would have made jury service compulsory for women after state representatives balked at the idea of disturbing domestic responsibilities.<sup>190</sup>

When the argument on difference resurfaced fourteen years later, a valid constitutional claim steered the Supreme Court towards a different conclusion. *Taylor v. Louisiana* considered a Louisiana law almost identical to the Florida law of *Hoyt*. That is, jury lists excluded women unless they submitted a written declaration selecting to participate.<sup>191</sup> Under the system, despite composing 53% of eligible jurors in the district, women composed just 10% of citizens on the district's jury lists.<sup>192</sup> In fact, the 175-member venire of the jury had not contained a single woman.<sup>193</sup> An all-male grand jury had thus indicted Billy J. Taylor on charges of aggravated kidnapping. On appeal, Taylor argued that the Louisiana law violated his Sixth Amendment right to trial before an impartial jury.

Taylor's Sixth Amendment claim was successful, and Justice White held that the Louisiana jury-selection system "operate[d] to exclude from jury service an identifiable class of citizens"<sup>194</sup> and "thereby fail[ed] to be reasonably representative."<sup>195</sup> Not only did "women bring to juries their own perspectives and values that influence both jury deliberation and result,"<sup>196</sup> but "[c]ommunity participation in the administration of the criminal law, moreover, is . . . consistent with our democratic heritage [and] also critical to public confidence in the fairness of the criminal justice system."<sup>197</sup>

But *Taylor* could only do so much. The holding invalidated laws providing that women would be subject to jury service only if they volunteered. In the aftermath of *Taylor*, five States still maintained laws that, while including women on jury lists, nonetheless allowed them to exempt themselves without reason.<sup>198</sup> The *Taylor* decision did inspire three of the five to abolish the option of self-exemption. Missouri and Tennessee, however, did not join the others.<sup>199</sup>

The Court took a brief four years to recognize the incoherence between the holdout states and the *Taylor* methodology. An all-male jury oversaw the charges by Jackson Country, Missouri against Billy Duren for murder and

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<sup>190</sup> See Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 298 n.5 (1986) ("In the 1959 Florida legislative session, a bill was introduced recommending compulsory jury service for women. Even prior to introduction of the bill, debate had raged throughout the state over the ability of women to perform as jurors and over the perceived interference of jury duty with women's duties to home and family. The compulsory jury service bill did not pass.").

<sup>191</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 523 (1975).

<sup>192</sup> See *id.* at 524.

<sup>193</sup> See *id.*

<sup>194</sup> *Id.* at 525.

<sup>195</sup> *Id.* at 538.

<sup>196</sup> *Id.* at 532 n.13.

<sup>197</sup> *Id.* at 530.

<sup>198</sup> See *Duren v. Missouri*, 439 U.S. 357, 359 (1979).

<sup>199</sup> See *id.*; Abrahamson, *supra* note 190, at 269 ("As late as 1957 four states—Alabama, Mississippi, South Carolina, and West Virginia—prohibited women from serving on juries. In 1966 the last of the states—Alabama—permitted women to serve on juries.").

robbery.<sup>200</sup> While fifty-three citizens had composed Duren's final venire, the venire included only five women.<sup>201</sup> As the County customarily treated the failure of women to return a summons as automatic exemption, the distribution of Duren's venire was not irregular.<sup>202</sup> The Court in *Duren v. Missouri* explained, "14.5% (741 of 5,119) of the persons on the postsummons weekly venires during the period in which petitioner's jury was chosen were female."<sup>203</sup> The defendant therefore argued that state law had violated his constitutional rights, as a jury misrepresenting the community could not be impartial.<sup>204</sup>

The systematic exclusion of women from the venire at last pushed the Court to agree that the Sixth Amendment right of the criminal defendant would yet remain tenuous so long as women could exempt themselves from service.<sup>205</sup> For "a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicate[d] that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized."<sup>206</sup> Accordingly, *Taylor's* holding "with respect to the system there challenged under which women could 'opt in' for jury service [was] equally applicable to Missouri's 'opt out' exemption."<sup>207</sup> Finally, the Court, doing away with the legal latitude, barred all eligible female citizens from failing to participate in the jury selection process.<sup>208</sup>

Justice Rehnquist dissented to criticize the Court's "crablike movement from the equal protection analysis of its early jury composition cases to the . . . 'fair-cross-section' rationale."<sup>209</sup> The amorphous approach, he argued, demonstrated that the majority was "concerned with the equal protection

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<sup>200</sup> See *Duren*, 439 U.S. at 360.

<sup>201</sup> See *id.* at 357.

<sup>202</sup> See Justice Ruth Bader Ginsburg, *A Conversation with Associate Justice Ruth Bader Ginsburg*, 84 U. COLO. L. REV. 909, 916–17 (2013).

<sup>203</sup> *Duren*, 439 U.S. at 362.

<sup>204</sup> See *id.* at 360.

<sup>205</sup> See *id.* at 370 ("[A]ny category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement—such as women—runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement.").

<sup>206</sup> *Id.* at 366.

<sup>207</sup> *Id.* at 369.

<sup>208</sup> In summarizing the reasoning, the Court articulated three requirements for prima facie fair cross-section claims. Defendants 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." *Id.* at 364.

<sup>209</sup> *Id.* at 371 n.27. Rehnquist argued that if "men and women are essentially fungible for purposes of jury duty, the question arises how underrepresentation of either sex on the jury or the venire infringes on a defendant's right to have his fate decided by an impartial tribunal." *Id.* (Rehnquist, J., dissenting).

rights of women to participate in the judicial process rather than with the Sixth Amendment right of a criminal defendant.”<sup>210</sup>

Rehnquist’s objection confronted a tension that seemed to have confounded both Congress and the Court ever since the Civil Rights Act of 1875 first introduced African American jury service into law. For a century, the case law had struggled to distinguish the discrete rights at stake in the jury selection process.<sup>211</sup> Not long after *Duren*, the Court would finally clarify that the separate rights of litigants and jurors amounted to a single structural safeguard. That is, the Constitution bestowed upon them the same “right to nondiscriminatory jury selection procedures.”<sup>212</sup>

Ultimately, the dignitary interests of civic participation were not enough for the Court to subject women to jury service. It was only when the fair cross-section requirement recast female jurors as enabling the guarantees of the Sixth Amendment that the Court reached a different conclusion. That is, for the venire to represent the community, which included women, women had to participate in jury service. Despite the differing constitutional claim, the Women’s Movement relied on representation-based reasoning akin to the representation-based reasoning that had enabled African Americans to serve on the jury during Reconstruction.<sup>213</sup>

### C. *The Historical Equivalence Between Jury Service and the Electoral Process*

The history behind African Americans and women on the jury reinforces an institutional symmetry between jury service and voting that has existed since before Reconstruction. That is, “[j]ust as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”<sup>214</sup>

<sup>210</sup> *Id.* (Rehnquist, J., dissenting).

<sup>211</sup> See Amar & Brownstein, *supra* note 154 at 994 (“A careful examination of the judicial decisions on exclusionary jury selection procedures over time demonstrates that the Court’s inability to develop a coherent doctrinal picture has an obvious cause: The Court has failed to reconcile the tension between the *individual* and *group* dimensions of political rights.”).

<sup>212</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994); *Holland v. Illinois*, 493 U.S. 474, 483 (1990) (recognizing that the Sixth “Amendment’s central purpose . . . is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored.”).

<sup>213</sup> See *United States v. Rioux*, 930 F. Supp. 1558, 1575–76 (D. Conn. 1995) (“The inquiry of a Sixth Amendment claim is the systematic exclusion of distinctive groups in the community. In other words, the inquiry is how the system of jury selection affects representation of distinct groups.”).

<sup>214</sup> *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004); *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.”); Amar, *supra* note 62, at 1183 (“Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching.”).

From the start, the Framers conceived of the jury system as a vehicle for self-governance.<sup>215</sup> In particular, the Anti-Federalists argued, “[i]f the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations.”<sup>216</sup> To them, jury service provided an indispensable method for public control over government that surpassed even the right to political representation in value.<sup>217</sup> It is thus not surprising that “references to legislative bodies abounded during the debates over the Constitution’s jury provisions.”<sup>218</sup>

Before long, the Reconstruction Congress also placed juror and voter side by side. In 1869, congressmen debating the Fifteenth Amendment suggested that suffrage could entail political rights beyond the right to vote,<sup>219</sup> such as the right to serve on the jury.<sup>220</sup> The Civil Rights Act of 1875 soon after solidified the place of jury service in the Fifteenth Amendment. The provision of the Act that guaranteed equal treatment for African Americans in jury selection read, “Be it enacted . . . that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude.”<sup>221</sup> In this text, scholars have noticed something crucial: “The jury service provision of the Act . . . does not track the language of the Fourteenth Amendment or its predecessor, but rather tracks the language of the Fifteenth Amendment . . . perfectly.”<sup>222</sup>

The *Strauder* Court continued the work of Congress.<sup>223</sup> Professor Akhil Amar reads the case “as implicating not merely a Fourteenth Amendment right to be tried by a fair jury, but also a Fifteenth Amendment right of

<sup>215</sup> Matthew Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 167 (“By the time of the Revolution, . . . the jury had become a symbol of the colonists’ drive for self-government.”).

<sup>216</sup> FEDERAL FARMER NO. 15 (1788).

<sup>217</sup> FEDERAL FARMER NO. 4 (1787) (The Federal Farmer credited “[t]he trial by jury . . . and the collection of the people by their representatives in the legislature . . . [as] procur[ing] for [the people] . . . their true proportion of influence.”).

<sup>218</sup> Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 220 (1995).

<sup>219</sup> See GRETCHEN RITTER, CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN AMERICAN CONSTITUTIONAL ORDER 45 (1st ed. 2006).

<sup>220</sup> See Amar, *supra* note 220, at 204; Kalt, *supra* note 161, at 109; Gretchen Ritter, *Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 483 (2002).

<sup>221</sup> Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37.

<sup>222</sup> Amar, *supra* note 218, at 238.

<sup>223</sup> *But see* Cristina M. Rodriguez, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys’ Network in Nineteenth-Century America*, 108 YALE L.J. 1805, 1808 (1999) (“Even a brief consideration of the Court’s opinion in *Strauder* reveals that the Court rendered the decision in the highly particularized context of the Reconstruction Amendments. The attempt to generalize jury service as a direct function of voting beyond the emancipation context is therefore not well-supported by *Strauder*.”).

blacks to serve on juries.”<sup>224</sup> The words of Justice Strong bolster Amar’s argument by grouping the Thirteenth, Fourteenth, and Fifteenth Amendments together as “a series of constitutional provisions having a common purpose.”<sup>225</sup> When Delaware law later classified voters as eligible for jury service, the Court responded: “[a]s [Black Americans] ha[d] the right to vote, they [were] liable to serve as jurors.”<sup>226</sup>

Even after a century, the juror-voter parallel held strong. When establishing the fair cross-section doctrine, *Glasser* observed, “[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government.”<sup>227</sup> On these grounds, “the jury [must] be a body truly representative of the community.”<sup>228</sup> Justice Earl Warren would invoke nearly identical language decades later to describe voting as “the essence of a democratic society” and warn that “any restrictions on the right strike at the heart of representative government.”<sup>229</sup>

Congress similarly endorsed the analogy. The Civil Rights Act of 1957 primarily established the Commission on Civil Rights to investigate interference with the right to vote.<sup>230</sup> But the statutory text also provided that “[a]ny citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror.”<sup>231</sup> *Taylor* itself would cite the voter-oriented statute when recounting the history of jury service.<sup>232</sup>

The jury-voter parallel undoubtedly influenced Congress and the Court when calling Black Americans and women to the jury. Such institutional equivalence seems irreconcilable with the disparate treatment of the two rights under the law.

### III. A REPRESENTATION-BASED PRINCIPLE OF MANDATORY RIGHTS

Despite the robust case law on jury service, mandatory voting has only once come before the courts. In 1890, Kansas City subjected all men of voting age to a tax of \$2.50 that the city waived for men who voted.<sup>233</sup> Before the Supreme Court of Missouri, the city did not deny the mandatory character of the ordinance. On the contrary, it argued that “the important

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<sup>224</sup> Akhil Reed Amar, *The Constitution Versus the Court: Some Thoughts on Hills on Amar*, 94 NW. U. L. REV. 205, 214 (1999) (“The Fifteenth Amendment . . . protects the rights of blacks to vote on juries, just as it protects their rights to vote for and in legislatures.”).

<sup>225</sup> *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

<sup>226</sup> *Neal v. Delaware*, 103 U.S. 370, 383–384 (1880).

<sup>227</sup> *Glasser v. United States*, 315 U.S. 60, 85 (1942).

<sup>228</sup> *Id.* (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

<sup>229</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>230</sup> See 52 U.S.C. § 10101 (1957).

<sup>231</sup> *Id.*

<sup>232</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975).

<sup>233</sup> *Kansas City v. Whipple*, 38 S.W. 295, 295 (1896).

character of the high trust committed to the voter, and the necessity of its discharge to the public welfare” made the mandate indispensable.<sup>234</sup>

The court rejected the structural outlook of the city, and countered that the people of the United States have “a single sovereign power—the power of the ballot.”<sup>235</sup> Only by exercising this power “does the citizen find his prerogative of sovereignty in the normal operations of a representative republican government.”<sup>236</sup> However, Chief Justice Theodore Brace clarified, citizens “must be as free . . . not to exercise it, as to exercise it on any particular occasion; otherwise the right is not sovereign.”<sup>237</sup> This reasoning inspired him to ask: “How can a citizen be said to enjoy *the free* exercise of the right of suffrage who is constrained to such exercise, whether he will or not, by a penalty?”<sup>238</sup>

The jury exclusion cases, however, suggest that Kansas City had the holding right. This Part identifies a principle of mandatory rights in the jury cases that validates the Kansas City ordinance. This constitutional principle, which builds off the structural rights theory, requires that the law mandate the structural right to engage in the representative process when a structural guarantee depends upon the representative body that the process produces. Ultimately, the principle that motivated mandatory jury service likewise indicates that the United States should mandate all citizens to vote.

#### A. *Deriving a Representation-Based Principle of Mandatory Rights from the Jury Exclusion Cases*

Scholars have accounted for jury service without fully acknowledging the legal groundwork that motivated the mandate. That is, the existing scholarship generally categorizes jury service as “an amalgam of a right, a duty, and a badge of community membership” that reflects “a definitional part of the identity of an American citizen.”<sup>239</sup> But the nebulous language of the

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<sup>234</sup> *Id.* at 296.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 297.

<sup>238</sup> *Id.* (emphasis in original).

<sup>239</sup> Kalt, *supra* note 162 at 123–24 (arguing that awarding “third-party standing to litigants to defend the rights of excluded jurors, . . . does nothing to protect jurors that neither party wants to defend, such as members of groups of whom both parties are wary or jurors whose views the parties are unwilling to stereotype.”); Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1119 (2014) (concluding that, “[a]fter the Civil Rights Movement, the right to serve on a jury became a badge of citizenship, not because it was necessary to find facts in a particular case, but because equal participation represented full citizenship.”); Underwood, *supra* note 94, at 728 (arguing that the jury discrimination cases are “better understood as chiefly vindicating the equal protection right of the excluded jurors, a right in which the defendant has a strong strategic interest but no personal constitutional claim.”). *But see* Amar, *supra* note 62 (“[I]t is anachronistic to see jury trial as an issue of individual right rather than (also, and, more fundamentally) a question of government structure.”).

citizenship theory generally overlooks the representation-based reasoning that characterizes the case law.

In fact, the jury exclusion cases demonstrate a unique constitutional principle that accounts for mandatory democratic rights. Under this principle, rights to engage in a representative process should be mandatory when constitutional commitments depend upon the representative body that the democratic process produces. This representation-based principle, which supplements current commentaries on mandatory rights, promotes the needs of the body politic over the preferences of any individual right-holder.<sup>240</sup>

Proponents of the structural rights theory, which developed in opposition to the rights-structure dichotomy of constitutional law, come closest to articulating a principle of mandatory rights that justifies mandatory rights like jury service.

The rights-structure dichotomy divides the provisions of the Constitution across two categories.<sup>241</sup> The structural provisions, which appear in the first three Articles of the Constitution,<sup>242</sup> grant authority to the government.<sup>243</sup> The rights provisions, meanwhile, grant rights that citizens can exercise against the government.<sup>244</sup> James Madison seems to bear the blame for the staunch distinction. In Federalist No. 48, Madison warned against relying on “a mere demarcation on parchment of the constitutional limits of the several departments [to] guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>245</sup> To Madison, structural constraints like the separation of powers far surpassed such “parchment barriers” in preventing government actors from “transcend[ing] their legal limits.”<sup>246</sup>

Scholars have largely come to reject that the two constitutional categories are so discrete.<sup>247</sup> In particular, the structural rights theory envisions a

<sup>240</sup> This Article construes the term “right” to refer to an entitlement. From this perspective, the prerogative to exercise a right belongs only to the right-holder. Mandatory rights, meanwhile, compose rights that the law compels the right-holder to perform.

<sup>241</sup> See F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 176 (2019) (“The Constitution contains two general types of provisions. The first confers rights; the second establishes government structures and assigns powers to those structures.”); see also Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1850 (2019) (“[T]he study of democratic parts of American institutions [is] that of ‘structure’ and the study of the undemocratic parts that of ‘rights.’”); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012) (“A conventional divide in constitutional law separates structure from rights.”).

<sup>242</sup> See Levinson, *supra* note 241, at 1293–94.

<sup>243</sup> See J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1688 (2004).

<sup>244</sup> See *id.*; Jessica Gallinaro, *Over There, Over There: The Extraterritorial Application of Domestic Establishment Clause Jurisprudence in Former Warzones*, 17 RUTGERS J. L. & RELIGION 1, 24 (2015) (“Generally, individual rights are constitutional rights the government owes to each individual within its jurisdiction.”).

<sup>245</sup> THE FEDERALIST NO. 48 (James Madison).

<sup>246</sup> *Id.*

<sup>247</sup> See Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1054 (2017) (“It is a theoretical mistake to cast rights and structure as conceptual opposites where rights serve functions



subset of individual rights whose exercise enables collective structural objectives.<sup>248</sup> Rights within this subset enable citizens to apportion authority across governments, courts, and other institutions according to the “broader institutional framework” of the Constitution.<sup>249</sup> The state can also infringe upon them when necessary to maintain democratic order.<sup>250</sup> Such rights can therefore “be understood as . . . individual right[s] within a dichotomous scheme.”<sup>251</sup> For example, the jury trial amounts to a structural right because participating in jury service enables citizens to maintain democratic control over the judiciary.<sup>252</sup>

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similar to structure.”); *see also* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 363–64 (1993) (“To think of rights as conceptually independent constraints on government power is generally mistaken.”); Hessick & Fisher, *supra* note 241, at 177 (“Although it is commonly accepted that some provisions confer rights and others impose structures, the language of the Constitution does not always create a clear demarcation between structure and rights.”); Levinson, *supra* note 241, at 1293 (“[S]eparating structure from rights misses the point that the original design of the Constitution relied primarily on structural arrangements to protect rights.”).

<sup>248</sup> *See* Clay Calvert, Stephanie McNeff, Austin Vining & Sebastian Zarate, *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 133–34 (2018) (“[A] structural rights perspective views the values of laws not in terms of the individual benefits they may yield, but rather in terms of the freedom from government control they produce.”); Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1124 (2005) (“[T]he central insight of structuralism . . . is that one cannot make sense of individual rights unless one comes to terms with the institutional and electoral structures that provide content to those rights.”); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 733 (1998) (“[B]y serving the interests of the right-claimant, [these constitutional rights] serve collective interests in the realization of various common goods.”); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1814 (1999) (“In this structural conception of constitutional rights, rights are less protections for intrinsic interests of individuals than linguistic tools the law invokes in the pragmatic task of bringing certain issues before the courts for judicial resolution.”).

<sup>249</sup> Yasmin Dawood, *Democracy and the Right to Vote: Rethinking Democratic Rights Under the Charter*, 51 OSGOODE HALL L.J. 251, 262–263 (2013); *see* Gallinaro, *supra* note 244, at 24 (“Structural rights . . . strike at the heart of the Constitution’s foundational purpose to manage the government’s authority.”); Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 4 (2009) (“Structural rights include constitutional provisions that structure the government’s interaction with its citizens and . . . and ensure over the long term the preservation of popular consent to the exercise of political power.”); Hessick & Fisher, *supra* note 241, at 177, 179 (“Most provisions in the Constitution are structural: provisions that assign powers to various government institutions and dictate the procedures that those institutions must follow to exercise that power.”)(“[T]he motivation behind these structural rights is to disperse power and check other branches of the government.”).

<sup>250</sup> *See* Pildes, *Why Rights Are Not Trumps*, *supra* note 248, at 734 (“Government can infringe on rights for reasons consistent with the norms that characterize the common goods that those rights are meant to realize, but when government infringes rights for reasons inconsistent with these common goods, it violates individual rights.”); Amar, *supra* note 255, at 1205 (arguing that the “substantive ‘rights’ [in the Bill of Rights] were intimately intertwined with structural considerations” and “rooted in the sovereignty of We the People of the United States.”).

<sup>251</sup> Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1682 (2001).

<sup>252</sup> *See* Hessick & Fisher, *supra* note 241, at 176 (“The three structural rights in the Bill of Rights are the Fifth Amendment right to a grand jury, the Sixth Amendment right to a criminal jury, and the Seventh Amendment right to a civil jury.”); *see also* United States v. Fuentes,

The jury exclusion cases also capture a distinct phenomenon that follows from the structural rights theory. The Supreme Court subjected certain groups of citizens to jury service upon finding that the state systematically excluded them from participating in the jury selection process.<sup>253</sup> It was thus the Court's concern with "the process of selecting venires, not the outcome of that process in a particular case," that ultimately governed the resolution.<sup>254</sup>

The constitutional harm of discriminatory jury selection also extends beyond the defendant.<sup>255</sup> By infringing upon the rights of prospective jurors whom the state excluded from participating in jury service,<sup>256</sup> "[t]he systematic and intentional exclusion of women, like the exclusion of a racial group, deprives the jury system of the broad base it was designed by Congress to have in our democratic society."<sup>257</sup> For while the Framers had envisaged the jury as safeguarding against oppression and arbitrary power in the judicial branch, "[t]his prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."<sup>258</sup>

Nonetheless, the Fourteenth Amendment limited the Court when restoring the democratic function of the jury system. In particular, the Equal Protection Clause prohibited the state from excluding any citizens from participating in the jury selection process "for reasons completely unrelated

2013 U.S. Dist. LEXIS 115459, at \*27–28 (D. Me. Aug. 15, 2013) ("The . . . right to twelve impartial jurors under the Sixth Amendment is a structural right."); *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (recognizing "the right of jury trial [as] . . . a fundamental reservation of power in our constitutional structure.").

<sup>253</sup> See *Duren v. Missouri*, 439 U.S. 357, 366 (1979); *Patton v. Mississippi*, 332 U.S. 463, 466 (1947) ("[T]he indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race."); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (When "no members of this class among the over six thousand jurors called in the past 25 years[,] [t]he result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."); see also *Alexander v. Louisiana*, 405 U.S. 625, 643 (1972) ("[N]either man nor woman can be expected to volunteer for jury service.").

<sup>254</sup> *United States v. Jackman*, 46 F.3d 1240, 1248 (2d Cir. 1995); *Holland v. Illinois*, 493 U.S. 474, 512 (1990) (holding that "[t]he fair-cross-section requirement mandates the use of a neutral selection mechanism to generate a jury representative of the community," but "does not dictate that any particular group or race have representation on a jury.").

<sup>255</sup> See *Peters v. Kiff*, 407 U.S. 493, 498 (1972) ("[T]he arbitrary exclusion of any . . . well-defined class of citizens[] offends a number of related constitutional values.").

<sup>256</sup> See *Carter v. Jury Comm'n*, 396 U.S. 320, 329 (1970) ("People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."); Ferguson, *supra* note 239, at 1129 ("Voluntary systems of participation, opt-in systems, and a general gendered prejudice made enacting the promise of universal jury service a disappointing reality for much of the twentieth century.").

<sup>257</sup> *Ballard v. United States*, 329 U.S. 187, 195 (1946).

<sup>258</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.").

to the ability of members of the [excluded] group to serve as jurors.”<sup>259</sup> The Sixth Amendment also required a venire “not arbitrarily skewed for or against any particular group or characteristic.”<sup>260</sup> Only by concluding that “the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race” could the Court reconcile the competing commitments.<sup>261</sup> The jury system thus “postulates a conscious duty of participation in the machinery of justice,”<sup>262</sup> and the need for universal participation in jury service ensues from “the role of the jury in our system.”<sup>263</sup>

This reasoning compounds with the structural rights theory to produce the groundwork for a principle of mandatory democratic rights that hinges on representation: for democratic objectives entailing representative bodies, our fundamental constitutional structure entails that the state mandate all citizens to exercise the structural right to participate in the representative process.<sup>264</sup>

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<sup>259</sup> *Lockhart v. McCree*, 476 U.S. 162, 175 (1986); *see also* *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991) (“[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.”).

<sup>260</sup> *Holland v. Illinois*, 493 U.S. 474, 515 (1990) (Marshall, J., dissenting); *see also* *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004).

<sup>261</sup> *Johnson v. California*, 545 U.S. 162, 171–72 (2005); *see also* *Alexander v. Louisiana*, 405 U.S. 625, 628–29 (1972) (“[A] defendant . . . is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice.”) (internal citation omitted).

<sup>262</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922); *see also* *Amar & Brownstein*, *supra* note 154, at 991 (“[T]he dignitary and instrumental consequences of the abridgement of political rights are intimately connected to the hybrid—individual and group—nature of these interests. Thus, to achieve political equality and avoid each type of harm, the Court must recognize both the individual and group dimensions of the right to serve on a jury.”).

<sup>263</sup> *Teague v. Lane*, 489 U.S. 288, 314 (1989); *see also* *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (“[T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community.”); *see also* *Amar*, *supra* note 62, at 1189 (“[T]he mandatory rotation principle [of jury service] drew its strength from structural concerns about attenuated representation rather than elaborate ideas about minority rights.”).

<sup>264</sup> Of course, ambiguous terms will render any principle impotent. And, according to Hanna Pitkin, representation is susceptible to four distinct meanings. Descriptive representation indicates only a likeness between the representative and the represented: “The representative does not act for others; he ‘stands for’ them, by virtue of a correspondence or connection between them, a resemblance or reflection.” HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 61 (1967). Substantive representatives “act[ ] in the interests of the represented in a manner responsive to them.” *Id.* at 209. Symbolic representations “represent something, to make it present by their presence, although it is not really present in fact.” *Id.* at 93. The flag of the United States, which “stands for the nation,” offers a clear example. *Id.* at 99. Lastly, formalistic representation occurs through the “institutional structures and practices [that] achieve th[e] ideal” of representation and so is “empty of substantive content.” *Id.* at 55. Which species of representation governs the principle on mandatory rights that this Article suggests? As the principle governs only the process that achieves representation, the representation in the representation-based principle is undoubtedly formalistic. This finding is significant. It indicates that the principle is not limited by the category of representation that the process in question yields.

The representation-based principle that undergirds the jury exclusion cases indicates that the state should similarly mandate citizens to vote.<sup>265</sup> Like jury service, voting “involves individual citizens in the group act of self-governance.”<sup>266</sup> And, “in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws.”<sup>267</sup>

### B. *The Supreme Court’s Misguided Approach to Voting Claims*

Although constitutional history has embraced voting and jury service as analogous democratic institutions, decades of election law decisions have still refused to conceive of voting as anything other than an individual exercise.<sup>268</sup>

The Supreme Court has primarily entrenched voting as an individual right by separating the constitutional “harms that underlie a racial gerrymandering claim,” which are “personal,”<sup>269</sup> from “the citizen’s abstract interest in policies adopted by the [redistricted] legislature,” which “is a nonjusticiable ‘general interest common to all members of the public.’”<sup>270</sup> By thus bifurcating the harm, the Court has labeled the right to an undiluted vote as

<sup>265</sup> See Nicholas Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 295 (2014) (“What is at stake [in election law cases] is irreducibly *structural*: the relationships between candidates, groups, and parties; the allocation of power between different political actors; and the operation of the electoral system as a whole.”); Richard W. Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 553 (2013) (“Voting is . . . ‘structural’ in that it is of such foundational importance to the function of democratic governance.”); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (“[S]tatutes distributing the franchise . . . ‘constitute the foundation of our representative society.’”) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969)); *Shaw v. Reno*, 509 U.S. 630, 682 (1993) (“In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter’s representation.”).

<sup>266</sup> *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting).

<sup>267</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003).

<sup>268</sup> See Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 Nw. U.L. REV. 655, 713 (2017) (observing that “the Supreme Court has not heeded calls to ‘unify constitutional oversight’ of election-related controversies by focusing on . . . structural values.”) (quoting Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 39–40 (2004)); see also Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1295 (2011) (“Most of the time, courts stubbornly refuse *either* to recast the structural problem of fraudulent votes as a violation of individual voters’ rights *or* to recast the individual right to vote as an instrument for achieving structural values such as overall participation or representativeness.”); James A. Gardner, *The Dignity of Voters—A Dissent*, 64 U. Miami L. Rev. 435, 439 (2010) (“[T]he Supreme Court has for more than forty years favored the rights approach over the structural approach in cases dealing with the regulation of electoral democracy.”).

<sup>269</sup> *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015).

<sup>270</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (quoting *Ex parte Lévi*, 302 U.S. 633, 634 (1937) (per curiam)).

belonging not to “the minority as a group” but rather “to its individual members.”<sup>271</sup>

Yet by extracting the individual act of voting from its democratic context, the Court has all but abandoned “the ultimate point of the electoral enterprise.”<sup>272</sup> For “the functional point of voting is to aggregate individuals’ preferences and to allocate political power.”<sup>273</sup> It is this “aggregative right, to elect, [that] distinguishes self-governance, in which groups participate through their representatives in the formation of policy.”<sup>274</sup> It is also precisely because “all the seeds of [a representative’s] fortune are sown in the district he represents” that our constitutional structure secures democratic responsiveness between the people and their government.<sup>275</sup> But “[a] legislator cannot represent his constituents properly . . . when a voting district is nothing more than an artificial unit divorced from . . . the various communities . . . in the State.”<sup>276</sup> The constitutional harm of malapportionment thus emerges “only when . . . individual votes are combined.”<sup>277</sup>

Nevertheless, the Court has confined voting to a conventional individual right through the Equal Protection Clause. In 1962, Charles Baker, a resident of Shelby County, Tennessee, claimed that the state of Tennessee

<sup>271</sup> *Shaw v. Hunt*, 517 U.S. 899, 917 (1996); see also *Ala. Legis. Black Caucus*, 575 U.S. at 263 (explaining that, while gerrymanders “directly threaten a voter who lives in the district attacked . . . they do not so keenly threaten a voter who lives elsewhere in the State.”).

<sup>272</sup> Gardner, *supra* note 268, at 461.

<sup>273</sup> Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1711 (1999); see also *Davis v. Bandemer*, 478 U.S. 109, 151 (1986) (O’Connor, J., dissenting) (“As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority’s group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process.”).

<sup>274</sup> Pamela S. Karlan, *Regulating the Electoral Process: The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1719 (1993); see also Gerken, *supra* note 251 at 1740 (noting that “the theory of representative democracy is built around the concept of vote aggregation.”).

<sup>275</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 575; see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (“[D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.”).

<sup>276</sup> *Karcher v. Daggett*, 462 U.S. 725, 787 (1983) (Powell, J., dissenting); see also Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 574 (2004) (“The perverse consequence of the incumbent gerrymander is that it skews the distribution politically by driving the center out of elected office at the legislative level.”); Howard M. Shapiro, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 197 (1984) (“A racial gerrymander . . . is more likely to reduce, rather than deny, electoral opportunity. Racial gerrymandering is consequently more difficult to detect.”).

<sup>277</sup> *Davis*, 478 U.S. at 167 (Powell, J., dissenting); see also *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 283 (2015) (Scalia, J., dissenting) (“Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate’s confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law.”). For example, “unfairly drawn congressional districts shifted, on average, . . . 59 seats in the . . . House of Representatives during the 2012, 2014, and 2016 elections.” Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CENTER FOR AMERICAN PROGRESS (Oct. 1, 2019), <https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/>, archived at <https://perma.cc/LVQ8-ARUU>.

committed “systematic discrimination against [him], by way of ‘a debasement of [his] vote[.]’” because the state had not reapportioned its legislative districts for over sixty years.<sup>278</sup> Such discrimination, he argued, not only violated the Equal Protection Clause but also resulted in “the distortion of representative government.”<sup>279</sup> In *Baker v. Carr*, the Court agreed that Baker had standing to challenge Tennessee’s out-of-date districts because he “allege[d] facts showing disadvantage to [himself] as [an] individual[.]”<sup>280</sup> The Court has since extrapolated that a plaintiff who does not live in a gerrymandered district “assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.”<sup>281</sup>

The vote dilution claim emerging from *Baker* places a heavy burden on challenges to discriminatory districting. Not only does the requirement of district-specific harm prevent voters from “su[ing] to invalidate [a] whole State’s legislative districting map,”<sup>282</sup> but the Court’s equal protection analysis also subjects plaintiffs to the high evidentiary standard of “discriminatory purpose or intent.”<sup>283</sup> The same purpose or intent standard has also enabled the Court to dismiss altogether challenges to partisan gerrymanders as nonjusticiable “political questions beyond the reach of the federal courts.”<sup>284</sup>

Last term, the Court more openly overstepped its authority by subjecting statutory claims under the Voting Rights Act to the same individual rights framework that it has applied to constitutional claims regarding the right to vote. In *Brnovich v. Democratic National Committee*, the Court held

<sup>278</sup> *Baker v. Carr*, 369 U.S. 186, 298 (1962).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 206.

<sup>281</sup> *United States v. Hays*, 515 U.S. 737, 745 (1995); *see also Ala. Legis. Black Caucus*, 575 U.S. at 263 (While gerrymanders “directly threaten a voter who lives in the district attacked[,] . . . they do not so keenly threaten a voter who lives elsewhere in the State.”).

<sup>282</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018); *see also Bush v. Vera*, 517 U.S. 952, 957–58 (1996) (holding that individuals who live within a state, but outside an illegally gerrymandered district, lack standing to challenge the gerrymander).

<sup>283</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2332 (2021); *see also Ala. Legis. Black Caucus*, 575 U.S. at 272 (explaining that plaintiffs must show that “‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district’”) (quoting *Miller v. Johnson*, 515 U.S. 900, 901 (1995)); *Miller*, 515 U.S. at 916 (“To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”); *cf. Mobile v. Bolden*, 446 U.S. 55, 134–35 (1980) (warning that “a standard based solely upon the motives of official decisionmakers creates significant problems of proof for plaintiffs and . . . creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion.”) (Marshall J., dissenting) (internal citations omitted).

<sup>284</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019); *see also Brnovich*, 141 S. Ct. at 2502 (“Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. “[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny.”) (quoting *Shaw v. Reno*, 509 U.S. 630, 650 (1993)).

that “facially neutral voting practices violate § 2 [of the Voting Rights Act] only if motivated by a discriminatory purpose.”<sup>285</sup> But the Majority failed to mention that, over forty years ago, Congress unequivocally rejected just such an interpretation: when the Court in *Mobile v. Bolden* had made the same decision in 1980, Congress quickly responded by amending the Act to include an alternative results test.<sup>286</sup> *Brnovich* thus subjected the statutory claims to a standard of proof—and a framework—that Congress had already rejected.<sup>287</sup>

The jury exclusion cases ultimately lay bare the impropriety of the individual rights approach to claims concerning the electoral process. Indeed, for decades, the Court has allowed both civil and criminal fair cross-section claims to proceed “whether or not the systematically excluded groups are groups to which [the movant] belongs.”<sup>288</sup>

The structural character of the jury system underlies the broad-based standing doctrine. That is, the Court held that fair cross-section violations harm defendants from all groups because all defendants have the same right to non-discriminatory jury selection procedures.<sup>289</sup> More broadly, the Court found that “[t]he verdict [will] not be accepted or understood . . . if the jury is chosen by unlawful means at the outset,”<sup>290</sup> and “[t]o bar petitioner’s claim because his race differs from that of the excluded jurors would [also] be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.”<sup>291</sup> The same democratic impetus has expanded the

<sup>285</sup> *Brnovich*, 141 S. Ct. at 2332.

<sup>286</sup> See *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (“The ultimate question remains whether a discriminatory intent has been proved in a given case.”).

<sup>287</sup> See *Brnovich*, 141 S. Ct. at 2332. But see *id.* at 2357 (Kagan, J., dissenting) (“Congress enacted the current § 2 to reverse that outcome—to make clear that ‘results’ alone could lead to liability.”).

<sup>288</sup> *Holland v. Illinois*, 493 U.S. 474, 477 (1993); see also *Alexander v. Louisiana*, 405 U.S. 625, 635 n.2 (1972) (Douglas, J., concurring) (“The fact that [the defendant] is a male challenging the exclusion of females from the jury rolls is not of significance, for his claim rests, not on equal protection principles, but on the right of any defendant to an impartial jury, no matter what his sex or race.”); *Duren v. Missouri*, 439 U.S. 357, 359 n.1 (1979) (“A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class.”); *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (finding that a male defendant has standing to challenge statute that results in exclusion of large portion of women from the jury pool as fair-cross-section violation).

<sup>289</sup> See *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (“[T]he exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community.”); see also *Powers v. Ohio*, 499 U.S. 400, 413 (“[A] criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.”).

<sup>290</sup> *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (“The integrity of these decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions.”); see also *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979) (“Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.”).

<sup>291</sup> *Powers*, 499 U.S. at 415.

doctrine to civil trials as well as criminal trials.<sup>292</sup> As the Court has explained, the civil jury still “occur[s] within the courtroom itself,” and “[f]ew places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.”<sup>293</sup>

The jury exclusion cases thus demonstrate an alternative constitutional framework in which the Court has located claims that bear on the jury selection process. This framework, which pursues the democratic integrity of the jury system over the vindication of individual rights, more properly accounts for the functional role of the jury system as a mechanism for self-government over the judiciary, as well as the structural harms that follow when the state systematically excludes certain groups from participating in the democratic process. From this perspective, the Court has appreciated that “unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.”<sup>294</sup> The objective concern of the fair cross-section claim also indicates that “systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross section.”<sup>295</sup> In other words, unlike vote dilution claims, fair cross-section claims do not depend on whether state officials acted with discriminatory intent.

Given the institutional symmetry between jury service and voting as instruments of self-government, the Court should locate claims bearing on the right to vote in the same alternate constitutional framework as the jury cases. By likewise prioritizing democratic integrity over individual harm, the representation-based principle of mandatory rights fits squarely within this structural framework.

### C. *Locating the Right to Vote in the Representation-Based Principle*

The Supreme Court has located the jury exclusion cases in a constitutional framework that accounts for the role of the jury in maintaining control

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<sup>292</sup> See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991); *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.”); Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. CITY L. REV. 313, 333 (2010) (“The fair-cross-section requirement applies to civil juries through the Supreme Court’s application of Sixth Amendment principles in the civil context, its supervisory authority, and the Due Process Clause of the Fourteenth Amendment.”).

<sup>293</sup> *Edmonson*, 500 U.S. at 628.

<sup>294</sup> *Peters*, 407 U.S. at 502; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (“Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.”).

<sup>295</sup> *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979); *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (“Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the ‘result bespeaks discrimination.’”); Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503, 1530 (2012) (“Unlike an equal protection claim . . . a fair cross-section challenge [does] not . . . require [ ] discriminatory purpose.”).



over the judiciary.<sup>296</sup> That is, the Court has resolved claims bearing on the jury by pursuing the functional integrity of the jury system over the vindication of individual rights. In framing the jury around the collective enterprise of sovereignty rather than individual entitlements, this structural approach properly registers that the primary “freedom actually secured by the Constitution is the freedom of self-government.”<sup>297</sup>

As this Article has argued, claims concerning the right to vote and the electoral process properly belong in the same structural framework in which the Court has located the jury trial. This framework demands that the Court resolve claims bearing on the right to vote by pursuing the functional integrity of the electoral process over the vindication of individual rights.

Once recast in democratic context, the harms of vote dilution expand far more broadly than the Court has been willing to recognize. For not only does a single malapportioned district warp the composition of the entire state legislature, but the systematic exclusion of certain citizens from the democratic process also casts doubt on the legitimacy of our election outcomes. All citizens thus suffer from the harm that low voter turnout imparts on the democratic process.<sup>298</sup> Notably, evidence of such turnout rates does not entail proof of discriminatory state motive.

Under this same framework, the representation-based principle of mandatory rights provides the constitutional groundwork for properly mitigating low or inconsistent voter turnout. As the long-standing underrepresentation of distinctive groups among active voters demonstrates “that the cause of the underrepresentation [is] systematic—that is, inherent” in the system itself,<sup>299</sup> only by requiring all citizens to vote can the Court reconcile the structural demand for a representative body with the individual rights of citizens against exclusion from the democratic process.

More precisely, the Fourteenth, Fifteenth, and Nineteenth Amendments all preclude the state from “exclu[ding] . . . otherwise qualified citizens from the franchise,”<sup>300</sup> and the “[d]iscrimination against any group or class

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<sup>296</sup> See *supra* Part III.B.

<sup>297</sup> *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 341 (2014) (Sotomayor, J., dissenting); *Edmonson*, 500 U.S. at 619 (“One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.”); *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“A fundamental principle of our representative democracy is . . . ‘that the people should choose whom they please to govern them.’”); *United States v. Int’l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 570 (1957) (referring to “the integrity of our electoral process, and . . . the responsibility of the individual citizen for the successful functioning of that process” as “issues not less than basic to a democratic society.”).

<sup>298</sup> See Part III.B; Gerken, *supra* note 251, at 1687 (“The injury of vote dilution . . . is unindividuated; all group members are injured equally by dilution, and all benefit equally from a remedy.”).

<sup>299</sup> *Duren v. Missouri*, 439 U.S. 357, 366 (1979); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (“Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners.”).

<sup>300</sup> *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970); U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the

of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity.”<sup>301</sup> Such exclusion “‘not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.’”<sup>302</sup> Nonetheless, by increasing voter turnout and thereby producing a more representative legislature,<sup>303</sup> mandatory voting will secure the ability of the people to self-govern while also restoring the integrity of the electoral process, enriching legislative discourse, and precluding the dignitary harms that citizens suffer when the state excludes them from voting.

The prospect of universal turnout under mandatory voting will also incentivize politicians to distribute political responsiveness more equitably among citizens beyond election day.<sup>304</sup> For while meaningful political representation requires that “representatives can and will remain responsive to the needs and desires of those whom they represent,”<sup>305</sup> the Supreme Court has

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United States or by any State on account of race, color, or previous condition of servitude.”); U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”); *Rice v. Cayetano*, 528 U.S. 495, 523 (2000) (“Race cannot qualify some and disqualify others from full participation in our democracy.”); *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Marshall, J., concurring) (“[T]he right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process.”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”); *United States v. Reese*, 92 U.S. 214, 218 (1875) (“The Fifteenth Amendment guarantees ‘exemption from discrimination in the exercise of the elective franchise.’”); Underwood, *supra* note 94, at 746 (“[W]hile the Constitution does not directly protect a right to vote or to serve on juries, the antidiscrimination rule of the Equal Protection Clause applies with special force to the criteria used to determine eligibility for these fundamental incidents of citizenship.”).

<sup>301</sup> *MacDougall v. Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting).

<sup>302</sup> *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

<sup>303</sup> Hasen, *supra* note 14, at 2170–71 (“[T]he democracies with compulsory voting laws have among the highest turnouts among the industrialized democracies: Australia, 86%; Belgium, 88%; Greece, 78.6%; and Italy, 94%. This compares to an average turnout of 54% for the United States for the same period.”); Arend Lijphart, *Unequal Participation, Democracy’s Unresolved Dilemma*, 9 AM. POL. SCI. REV. 1, 10 (1997) (“Compulsory voting is the only institutional mechanism, however, that can assure high turnout virtually by itself.”).

<sup>304</sup> See *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting) (“One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent.”); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.”).

<sup>305</sup> Andrew Daniller & Hannah Gilberstadt, *Key Findings About Voter Engagement in the 2020 Election*, PEW RESEARCH CENTER (Dec. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/12/14/key-findings-about-voter-engagement-in-the-2020-election>, archived at <https://perma.cc/DQ9C-2ACG> (Surveys from the 2020 presidential election have confirmed that “[v]oters who were more highly engaged in the campaign . . . were contacted much more often by campaigns than less engaged voters.”); *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (describing “a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns”); *Rogers v. Lodge*, 458 U.S. 613, 640 n.21 (1982) (“[I]n a representative democracy, meaningful participation by minority groups in the electoral process is

itself admitted that politicians pay less heed to groups with “less opportunity to participate in the political processes.”<sup>306</sup> Surveys from the 2020 election have confirmed that “[w]hite eligible voters (87%) were somewhat more likely to say they were contacted than Black (82%), Hispanic (75%) or English-speaking Asian (74%) eligible voters.”<sup>307</sup> The same “pattern largely held true even when statistically controlling for other factors such as gender, age, education and party affiliation.”<sup>308</sup> Nonetheless, when all citizens vote, representatives cannot afford to disregard whole subsets of the electorate whom they depend upon for support. Universal voting will thus revitalize the Framers’ conception of the need for reelection as “the more effective way to keep representatives responsive to the people.”<sup>309</sup>

The constitutional framework that the Court has adopted for democratic safeguards against arbitrary power entails that the state mandate all citizens to vote. Only mandatory voting can correct the misrepresentative legislature and thereby enable the electoral process to satisfy its structural function of enabling self-governance.

#### IV. DEFENDING MANDATORY VOTING

Mandatory voting has faced three primary doctrinal challenges. Critics argue that mandatory voting violates the First Amendment, infringes upon the right not to vote, and flouts a dichotomy in law between rights and obligations. Even cohering to the individual rights framework of the Supreme Court, mandatory voting survives all three objections.

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essential to ensure that representative bodies are equally responsive to the entire electorate.”); *United States Tr. Co.*, 431 U.S. at 45 (Brennan, J., dissenting); *Reynolds*, 377 U.S. at 565 (“Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.”).

<sup>306</sup> *Davis v. Bandemer*, 478 U.S. 109, 131 (1986); *Rogers*, 458 U.S. at 640 n.21 (“[I]n a representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are equally responsive to the entire electorate.”); Ross, *supra* note 5, at 1153 (“[A] key rational choice assumption, corroborated by an empirical survey of members of Congress, is that the desire to be re-elected is a key motivation for representatives.”). The political theorist, Roberto Gargarella, aptly describes the tendency of politicians to disregard low turnout groups as “a motivational problem.” Roberto Gargarella, *Full Representation, Deliberation, and Impartiality*, in *DELIBERATIVE DEMOCRACY* 262 (Jon Elster ed., 1998).

<sup>307</sup> Jens Manuel Krogstad & Luis Noe-Bustamante, *Most U.S. Citizens Report a Campaign Contacted Them in 2020, but Latinos and Asians Less Likely to Say So*, PEW RESEARCH CENTER (Jan. 29, 2021) at <https://www.pewresearch.org/fact-tank/2021/01/29/most-u-s-citizens-report-a-campaign-contacted-them-in-2020-but-latinos-and-asians-less-likely-to-say-so>, archived at <https://perma.cc/E45E-2MQG>.

<sup>308</sup> *Id.*

<sup>309</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 814 (1995).

### 1. *First Amendment Concerns*

Critics categorize mandatory voting as compulsory speech that violates the First Amendment.<sup>310</sup> Even responding to this critique requires two concessions. First, that voting constitutes expressive speech protected by the First Amendment. On the contrary, the Supreme Court has recognized “the purpose of casting, counting, and recording votes [as] to elect public officials, not to serve as a general forum for political expression.”<sup>311</sup> Second, that the “mere act of showing up to the polls may be construed as a political expression that ought to remain voluntary under the First Amendment.”<sup>312</sup> The Court has yet to address this inquiry.

Supreme Court doctrine vindicates mandatory voting from the First Amendment charge. *Wooley v. Maynard* laid out the comprehensive inquiry for the constitutionality of compelled speech. In this instance, a New Hampshire law had required all state license plates to show the state motto, “Live Free or Die.” Individuals who covered the motto from sight were liable for a misdemeanor.<sup>313</sup> George Maynard, the plaintiff, maintained that the motto offended his beliefs as a practitioner of the Jehovah’s Witnesses denomination. Since “[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable,”<sup>314</sup> Maynard claimed that the law infringed upon his rights under the First Amendment. In defense, New Hampshire justified the law as “facilitat[ing] the identification of passenger vehicles” and “promot[ing] appreciation of history, individualism, and state pride.”<sup>315</sup>

On two counts, the Court disagreed with New Hampshire. First, the law forced individuals to “use their private property as a ‘mobile billboard’ for the State’s ideological message[s]” of history, individualism, and state pride.<sup>316</sup> Such an ordinance thus violated the First Amendment prohibition on laws obliging citizens to express viewpoints other than their own.<sup>317</sup> Second, the state’s interests in the law were not sufficiently compelling. New Hampshire could already identify state license plates because “New Hampshire passenger license plates normally consist of a specific configuration of let-

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<sup>310</sup> Only lower courts have directly addressed whether voting amounts to speech under the First Amendment. *See, e.g.,* *Coleman v. City of Mesa*, 265 P.3d 422, 429 (Ariz. Ct. App. 2011), *vacated*, 284 P.3d 863 (Ariz. 2012) (“Constitutionally protected speech encompasses both ‘pure speech,’ which comprises inherently expressive activities . . . or symbolic conduct, such as voting.”).

<sup>311</sup> *Burdick v. Takushi*, 504 U.S. 428, 445 (1992) (“[T]he function of the election process is ‘to winnow out and finally reject all but the chosen candidates,’ not to provide a means of giving vent to ‘short-range political goals, pique, or personal quarrel[s].’”).

<sup>312</sup> Shane Singh, *Compulsory Voting in the United States*, in *CHANGING HOW AMERICA VOTES* 23 (Todd Donovan ed., 2017).

<sup>313</sup> *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

<sup>314</sup> *Id.* at 715.

<sup>315</sup> *Id.* at 716.

<sup>316</sup> *Id.* at 715.

<sup>317</sup> *See id.*

ters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the state motto.”<sup>318</sup>

The reasoning in *Wooley* fashions a two-step inquiry for determining the constitutionality of compelled speech. The inquiry begins by asking whether a law “implicat[es] First Amendment protections.”<sup>319</sup> As the Court explained, a law implicates First Amendment protections when requiring citizens “to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>320</sup> The inquiry next determines whether “the State’s countervailing interest [is] sufficiently compelling to justify” the law.<sup>321</sup> For this step, the law must amount to the “less drastic means for achieving the same basic purpose.”<sup>322</sup>

The *Wooley* inquiry defeats the First Amendment challenge to mandatory voting. First, mandatory voting does not implicate First Amendment protections because the state need not restrict an individual’s choice of candidate.<sup>323</sup> A “none of the above” option on ballots would also allow citizens to abstain. Second, as outlined in Part III(C), mandatory voting would secure a legislature that represents the people. In a representative democracy, no interest could be more compelling.<sup>324</sup> The two uncertain concessions concerning the expressive capacity of voting are not enough to preserve the First Amendment challenge. Even if the Supreme Court recognizes both voting and abstaining from voting as protected speech, mandatory voting does not violate the First Amendment.<sup>325</sup>

## 2. *The Right Not to Vote*

Critics have also contended that mandatory voting infringes upon the right not to vote—which the right to vote entails.<sup>326</sup> Arguably, the ability to

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<sup>318</sup> *Id.* at 716.

<sup>319</sup> *Id.* at 715.

<sup>320</sup> *Id.* at 721 (Rehnquist, J., dissenting) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

<sup>321</sup> *Id.* at 716.

<sup>322</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>323</sup> See Note, *The Case for Compulsory Voting in the United States*, *supra* note 9, at 602.

<sup>324</sup> See *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (protecting integrity of electoral process amounts to a compelling interest); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) (“Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.”); Sean Matsler, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953, 975–76 (2003) (“[A]lthough less drastic alternatives to compulsory voting might be available, there is no less restrictive alternative that can guarantee ninety percent turnout.”).

<sup>325</sup> Incidentally, mandatory jury service does not appear ever to have faced any serious challenges on First Amendment grounds.

<sup>326</sup> See Note, *The Case for Compulsory Voting in the United States*, *supra* note 9, at 598 (“One of the chief objections to any compulsory voting law is that it violates a purported right not to vote.”); Jeffrey A. Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1031 (1995) (“Because the right not to vote is simply the inverse of the right to vote, it should be equally free from restrictions.”); Boston Herald Editorial Staff, *Time to Change Low Voter Turnout*, BOSTON HERALD (Nov. 7, 2019, 12:32 AM),

abstain preserves the right not to vote by allowing citizens to refrain from choosing between candidates. But the presumption that the right to vote entails the right not to vote is also mistaken.

In 1965, *Singer v. United States* laid out the conditions for recognizing the corollary right to waive a constitutional right. While waivers of rights differ from negative rights, rights “not to,” the doctrine is still instructive “in that both waivers and rights not to relate to the question of a given constitutional right’s variability in being exercised.”<sup>327</sup> The *Singer* defendant had petitioned the Supreme Court to recognize his Sixth Amendment right to trial by jury as incorporating the right to waive trial by jury. In rejecting the claim, Chief Justice Earl Warren noted that “no evidence [exists] that the common law recognized that defendants had the right to choose between court and jury trial [and] [t]here is no indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one.”<sup>328</sup> And so, “[i]n light of the Constitution’s emphasis on jury trial,” the Court could not “understand how the petitioner c[ould] submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process.”<sup>329</sup> Thus, “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”<sup>330</sup>

*Singer* weighs heavily against the existence of any corollary right not to vote. No historical basis seems to exist suggesting that the drafters of the Constitution valued the ability to refrain from voting equally with exercise of the right to vote. Courts also “indulge every reasonable presumption against waiver of fundamental constitutional rights.”<sup>331</sup> For fundamental rights, “an implied right must arise independently from the design and history of the constitutional text.”<sup>332</sup> This heightened standard for fundamental rights like the right to vote is strong evidence against the existence of a right not to vote.<sup>333</sup>

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<https://www.bostonherald.com/2019/11/07/time-to-change-low-voter-turnouts>, archived at <https://perma.cc/652L-AWSS> (“Some nations have compulsory voting laws. That’s intrusive—freedom to vote also means freedom not to vote, so that has to be respected as a choice.”).

<sup>327</sup> Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (stating that “a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”); Nathaniel Ament-Stone, “*The State Is Not Omnipresent in the Home*”: Mandatory Firearm Ownership Laws and the Constitution, 48 Sw. L. Rev. 105, 116–17 (2019) (“Bearing in mind that waivers of constitutional rights and the existence of constitutional ‘rights not to’ are not synonymous, the literature on waivers is nevertheless instructive.”).

<sup>328</sup> *Singer v. United States*, 380 U.S. 24, 26 (1965).

<sup>329</sup> *Id.* at 36.

<sup>330</sup> *Id.* at 34–35.

<sup>331</sup> *Johnson*, 304 U.S. at 464 (internal quotation marks omitted).

<sup>332</sup> *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

<sup>333</sup> See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.”); *Burson v. Freeman*, 504 U.S. 191, 214 (Kennedy, J., concurring) (“Voting is one of the most fundamental and cherished liberties in our democratic system of government.”); *Storer v. Brown*, 415 U.S. 724, 756 (1974) (“[T]he right to vote is ‘a fundamental political right, . . . preservative of all rights.’”) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886));

### 3. *The Rights-Obligations Dichotomy*

A third doctrinal objection contends that mandatory voting would defy some fundamental divide between rights and obligations in the law.<sup>334</sup> The long-standing commitment of the United States to individual autonomy undoubtedly motivates this objection.<sup>335</sup> For the Supreme Court, “whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.”<sup>336</sup>

But the paradox of being both optional and mandatory has not always stopped rights and legal obligations from stepping into the same territory. For example, courts have named the right to education a fundamental right under certain state constitutions.<sup>337</sup> Still, truancy laws across the country mandate school attendance.<sup>338</sup> One writer concisely summarizes this collection of rights as rights that “serve[ ] as the basis for [their] own compulsoriness, on paternalistic grounds.”<sup>339</sup>

Paternalism is also not the sole source of compulsory rights that persist. The United States has affirmed and reaffirmed that citizens have a right to participate in jury service. At the same time, the law compels citizens to exercise the right when the State so summons. The law does not maintain this mandate for the sake of jurors themselves. Rather, the Supreme Court has mandated the right for the sake of securing the constitutional rights of the criminal defendant, and, more generally, in the name of popular sovereignty.<sup>340</sup>

With this objection, critics misconstrue the relationship between rights and obligations. The law does not so stringently proscribe rights and obliga-

Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (“[T]he right to vote is . . . fundamental.”).

<sup>334</sup> See Neuborne, *supra* note 8, at 1588 (“[W]e cannot prevent skewing the voting rolls in the direction of the wealthy because the idea of a legal duty (as opposed to a formal right) to vote is a constitutional nonstarter as a violation of political autonomy.”); James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, 87 U. CHI. L. REV. ONLINE 24, 28 (2020) (“American tolerance for low voter turnout appears to be rooted in a highly individualistic and rights-based conception of political participation. In the American tradition, decisions concerning whether, when, and in what manner to participate in politics are generally thought to be matters of individual choice.”).

<sup>335</sup> See Eugene Kontorovich, *What Is Standing Good for?*, 93 VA. L. REV. 1663, 1703 (2007) (“[C]onstitutional law disfavors the creation of affirmative duties running from the government to citizens.”); Gerken, *supra* note 251 at 1720 (noting that such “notions of group entitlement . . . would seem wholly inconsistent with the fundamental respect that liberalism accords to individual autonomy.”).

<sup>336</sup> *Faretta*, 422 U.S. at 833–34.

<sup>337</sup> See, e.g., *District of Wilkinsburg v. Wilkinsburg Educ. Ass’n*, 667 A.2d 5, 9 (Pa. 1995); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976).

<sup>338</sup> See Susanna M. Kim, *Section 1983 Liability in the Public Schools After Deshaney: The “Special Relationship” Between School and Student*, 41 UCLA L. REV. 1101, 1126 (1994).

<sup>339</sup> Howard Klepper, *Mandatory Rights and Compulsory Education*, 15 L. & PHIL. 149 (1996); see also John Deigh, *On Rights and Responsibilities*, 7 L. & PHIL. 147, 173 (1988) (“[A] mandatory right is a right whose possessor lacks the freedom to forego its exercise.”).

<sup>340</sup> See *supra* Part III.A.

tions from overlap. For example, mandatory jury service endures because the constitutional demands of the jury system depend upon universal participation in the jury process. The objection could not proscribe the United States from mandating the right to vote.

#### 4. Information Concerns

Critics take a more pragmatic swing at mandatory voting by arguing that the proposal will result in a flood of uniformed voters, whose votes will lead to arbitrary election results.<sup>341</sup> In such circumstances, the spurious ballots would undermine the rationale for better representation that calls for mandating citizens to vote in the first place.<sup>342</sup>

But universal turnout will motivate campaigns to diversify programs of mobilization into new neighborhoods.<sup>343</sup> Mandatory voting will also inspire a heightened degree of “political knowledge” across the electorate.<sup>344</sup> Voter mobilization through ground-level organizing relays information to prospective voters regarding candidates, policies, and the voting process.<sup>345</sup> Yet the resources necessary to mobilize voters motivate cost-effective campaigns to restrict voter mobilization to historically high turnout groups.<sup>346</sup> Community members in groups with documented records of nonparticipation are not so

<sup>341</sup> See MARTIN P. WATTENBERG, *WHERE HAVE ALL THE VOTERS GONE?* 165 (2002) (“People with limited political knowledge might deal with a compulsory situation by making dozens of decisions the same way they choose lottery numbers.”); Matsler, *supra* note 324, at 977; *The Case for Compulsory Voting in the United States*, *supra* note 9, at 607–08 (In sum, these critics then urge “only those who somehow demonstrate a certain minimum degree of awareness and understanding of political issues should be allowed to vote.”); Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court’s Electoral Speech Cases*, 54 CASE W. RES. 225, 228–29 (2003) (“[T]hroughout this nation’s voting rights history . . . restrictions on the right to vote have often been justified by a concept that many Americans have accepted unquestioningly: the electorate should consist only of those people who are deemed sufficiently informed to exercise the franchise in an intelligent and independent manner.”).

<sup>342</sup> See, e.g., Nina Jaffe-Geffner, *The Pros and Cons of Requiring Citizens to Vote*, FAIR VOTE (Oct. 23, 2015), [http://www.fairvote.org/the\\_pros\\_and\\_cons\\_of\\_requiring\\_citizens\\_to\\_vote](http://www.fairvote.org/the_pros_and_cons_of_requiring_citizens_to_vote), archived at <https://perma.cc/TP6S-PYYD>.

<sup>343</sup> See Carmichael, *supra* note 15, at 316–17; *The Case for Compulsory Voting in the United States*, *supra* note 9, at 597; Ross, *supra* note 5, at 1127 (“Campaigns . . . receive critical information about the needs of those who are being mobilized. To the extent that parties and campaigns choose not to mobilize the poor, they are failing to receive the critical feedback from poor voters about their needs”).

<sup>344</sup> Birch, *supra* note 15, at 61.

<sup>345</sup> See Ross, *supra* note 5, at 1167 (“Mobilization . . . subsidizes the costs of participation by providing voters with information about the candidates, issues, and logistics surrounding the election.”); Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U.L. REV. 633, 674 (2019) (“Campaigns offer another free source of information that can be tailored to the potential voter.”); Matt Childers & Mike Binder, *Law & Politics in the Age of Direct Democracy: The Differential Effects of Initiatives and Referenda on Voter Turnout in the United States, 1890–2008*, 19 CHAP. L. REV. 35, 46 (2016) (“[C]ampaigns mobilize voters by reducing the costs of learning about the measures and by lowering peoples’ [sic] costs of getting to the polls.”).

<sup>346</sup> See Ross, *supra* note 5, at 1126–27.



lucky.<sup>347</sup> Studies have already found lower levels of political knowledge in citizens whom voter mobilization does not traditionally target.<sup>348</sup> Low turnout groups can thus begin to access the low-cost lessons in political literacy that mobilization offers.

The available resources also already suffice to notify non-voters about competing candidates. Specifically, “voter cues” compose the numerous casual signals that convey political information.<sup>349</sup> For example, a candidate’s political party and endorsements equip slapdash voters to cast informed ballots without devoting significant time or focus.<sup>350</sup> “[T]rusted experts and political elites” also tend to educate and advise the political novice.<sup>351</sup> A congressional committee report has already agreed that illiterate voters can “still participate intelligently” because of “media besides the printed word—such as radio, television, oral communication and foreign language newspapers.”<sup>352</sup> In other words, new voters will be well-equipped to join the ranks of informed citizens under a system of mandatory voting.

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Ultimately, mandatory voting withstands its customary legal and functional critiques. By compelling citizens to participate in the electoral process, the United States would not violate the First Amendment. Nor could a system of mandatory voting violate a nonexistent right not to vote or overstep any illusory divide between rights and legal obligations. Lastly, new voters will not subvert the system’s representative ends by casting baseless ballots that trigger arbitrary outcomes. The critics make little headway in overriding the constitutional necessity and fundamental appeal of mandatory voting and a legislature that represents the people in accordance with the basic Constitutional premise of the United States.

## V. CONCLUSION

In recognizing the primacy of self-governance, the structural framework of the jury exclusion cases more accurately secures the priorities of

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<sup>347</sup> See *id.* at 1171 (“Campaigns do not typically seek to mobilize infrequent voters with uncertain partisan or candidate orientations because of their lack of voting history.”).

<sup>348</sup> See Childers & Binder, *supra* note 345, at 47 (“Research on congressional and presidential elections shows that turnout and political awareness tend to be higher in areas where campaigns allocate more resources compared to areas where they allocate less.”).

<sup>349</sup> See Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1023–24 (2003) (describing voter cues as “shortcuts to help them vote competently with limited, relatively easy-to-obtain information”).

<sup>350</sup> See *id.* at 1026–27.

<sup>351</sup> Martin Gilens & Naomi Murakawa, *Elite Cues and Political Decision Making*, in POLITICAL DECISION MAKING, DELIBERATION AND PARTICIPATION 15 (Michael X. Delli Carpini, Leonie Huddy & Robert Y. Shapiro eds., 2002).

<sup>352</sup> *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 n.19 (S.D.N.Y. 1970), *aff’d*, 400 U.S. 806 (1970).

representative democracy.<sup>353</sup> Under this framework, which pursues the functional integrity of the representative process over the vindication of individual rights, the need for the representative bodies that enable democratic self-governance requires that the state mandate exercise of the right to participate in the representative process. It was such a constitutional demand for representation that prompted the Court to subject African Americans and women to jury service. Indeed, the Fourteenth Amendment “authoriz[es] Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens.”<sup>354</sup>

From this principle of representation-based mandatory rights that this Article has derived from the jury exclusion cases and located in the structural rights framework, a clean and cohesive legal basis emerges to establish mandatory voting in the United States. Since the Constitution bestows popular sovereignty on the people and popular sovereignty entails a representative legislature, the representation-based principle of the jury exclusion cases calls for the law to mandate the right to vote.

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<sup>353</sup> See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 837 (2015) (Roberts, C.J., dissenting) (“[T]he ratification of the Constitution was the ultimate act of popular sovereignty.”); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 821 (1995) (“[T]he Framers . . . conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly . . . by the people.”).

<sup>354</sup> *United States v. Guest*, 383 U.S. 745, 784 (1966) (Brennan J., concurring in part and dissenting in part).