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# JURY SERVICE AS POLITICAL PARTICIPATION AKIN TO VOTING

Vikram David Amar†

## INTRODUCTION

The Supreme Court has grappled with the constitutional limits on discrimination in the jury selection process for over one hundred years, beginning with decisions in 1879<sup>1</sup> involving state laws and practices that excluded blacks from sitting on juries altogether. In the last nine years alone, the Court has decided six significant cases concerning alleged racial discrimination in jury composition.<sup>2</sup>

Nor is race the only kind of jury selection discrimination that has been challenged. For example, in cases involving the Sixth Amendment rights of criminal defendants, the Court has held that women cannot be excluded from the jury process, at least at the venire constitution stage.<sup>3</sup> And just last term, in *J.E.B. v. Alabama ex rel. T.B.*,<sup>4</sup> the Court held unconstitutional a State's use of peremptory challenges to exclude men from a civil jury. These cases, and the line-drawing problems they obviously present, indicate a rather desperate need for

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<sup>1</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (finding exclusion of black jurors to be a violation of black defendant's equal protection rights); *Ex parte Virginia*, 100 U.S. 339 (1879) (upholding provision of federal civil rights law prohibiting exclusion of blacks from juries).

<sup>2</sup> See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (prohibiting criminal defendant from exercising peremptory challenges in a race-based manner); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (prohibiting private civil litigants from exercising peremptory challenges in a race-based manner); *Hernandez v. New York*, 500 U.S. 352 (1991) (upholding trial court's finding that prosecutor's explanations for certain peremptory challenges of hispanic jurors were sufficiently race neutral under *Batson* framework); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that white criminal defendant has standing under Equal Protection Clause using *Batson* framework to challenge the prosecutor's strike of racial minorities); *Holland v. Illinois*, 493 U.S. 474 (1990) (concluding that white criminal defendant has standing to challenge under Sixth Amendment prosecution's peremptory removal of black jurors, but rejecting claim on the merits because Sixth Amendment's cross-section requirement has no application to peremptories); *Batson v. Kentucky*, 476 U.S. 79 (1986) (permitting black criminal defendant to challenge prosecutor's use of peremptory challenges to remove minority jurors under Equal Protection Clause and setting up framework for resolving factual question of racial motivation).

<sup>3</sup> See, e.g., *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>4</sup> 114 S. Ct. 1419 (1994).

a constitutional theory to identify the groups whose exclusion from or underrepresentation on juries ought to be troubling. The Sixth Amendment, which was invoked by the Court in the 1970s,<sup>5</sup> is not by itself very useful in this regard because the amendment tells us only about the circumstances under which juries must be provided, not about how juries must be constituted.

One option, which the Court has begun to embrace<sup>6</sup> and which some commentators have supported,<sup>7</sup> is an approach based on the Equal Protection Clause.<sup>8</sup> Under this approach, exclusion of jurors is unconstitutional to the extent that it deprives *would-be jurors* of their equal protection rights. This approach does not, of course, necessarily provide easy answers to the line-drawing problems. On the one hand, equal protection analysis is somewhat flexible and, depending on who is doing the analysis, conceivably broad enough to raise questions about a variety of jury selection criteria.<sup>9</sup> And on the other hand, an equal protection approach might be too narrow to suit some people. For example, wealth and age are two criteria whose use does not trigger any heightened scrutiny under traditional equal protection analysis, and yet use of these criteria may be troubling in the jury context. Indeed, as we shall see, the Court has already (and quite properly) suggested that the use of wealth classifications in jury selection is disturbing.<sup>10</sup>

But the real problem with a traditional Equal Protection Clause approach is not that the results such an approach yields might not placate everyone, but rather that the very application of the Clause to the jury context is fundamentally at odds with the text and history of the reconstruction amendments,<sup>11</sup> of which the Fourteenth Amendment is but one. As I argue below, jury service, like voting and office holding, was conceived of as a political right, as distinguished from a civil right, and political rights were excluded from the coverage of the Fourteenth Amendment. Instead, the Constitution speaks to the exclusion of groups from jury service most directly through the voting amendments, beginning with the Fifteenth and running through the Twenty-Sixth. And the groups protected from discrimination by these

<sup>5</sup> See, e.g., *Duren*, 439 U.S. 357; *Taylor*, 419 U.S. 522.

<sup>6</sup> This is not to say that the Court has accepted this approach to the exclusion of all others. Indeed, the Court has said nothing to suggest that it no longer considers its Sixth Amendment cases good law. Although I think a Sixth Amendment approach may be less than ideal, I do not agree with those who argue that it necessarily lacks coherence. See *infra* note 40 and part III.C.

<sup>7</sup> See, e.g., *infra* note 40.

<sup>8</sup> U.S. CONST. amend. XIV, § 1.

<sup>9</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. at 1437 (Scalia, J., dissenting).

<sup>10</sup> See *infra* notes 222-38 and accompanying text.

<sup>11</sup> U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

voting amendments are not the same groups that are protected under a traditional equal protection approach.

There is reason to hope that the Court will understand the close linkage between jury service and voting as part of a political rights package. For example, in *Powers v. Ohio*,<sup>12</sup> where a criminal defendant alleged that the government's peremptory challenges were race based, Justice Kennedy's opinion for the Court observed that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."<sup>13</sup> Justice Kennedy then translated his populist observations about jury service into constitutional doctrine by tapping into the voting discrimination framework. Borrowing language from an earlier case, Kennedy affirmed that "[w]hether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."<sup>14</sup>

Later in the same term, Justice Kennedy, again writing for the Court, invoked the similarity between jury service and voting, this time to support the proposition that peremptory challenges by private litigants may constitute state action. Relying on "white primary" cases in which states had delegated election administration responsibility to private associations that discriminated against black voters, Justice Kennedy's opinion observed that just as government cannot escape from constitutional constraints by farming out the task of picking voters, neither can it free itself from constitutional norms by giving private parties the power to pick jurors.<sup>15</sup>

This "juror as voter" theme in Justice Kennedy's opinions has surface plausibility. After all, jurors *vote* to decide the winners and losers in cases—that is what they do. Thus, the plain meaning of various constitutional provisions concerning the "right to vote" literally applies to jurors. Beyond this plain meaning, jury service eligibility historically has been tied to voter registration as a general matter.<sup>16</sup>

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<sup>12</sup> 499 U.S. 400 (1991).

<sup>13</sup> *Id.* at 407.

<sup>14</sup> *Id.* at 408 (quoting *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970)). See also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. at 1423 (alluding to, but not explaining the relevance of, the Nineteenth Amendment in the discussion of women's right to serve on juries).

<sup>15</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625-26 (1991).

<sup>16</sup> See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* app. I at 702 (J. P. Mayer & Max Lerner eds. & George Lawrence trans., 1966); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1467, 1469 n.360, 1475 n.399 (1983); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?*, 92 COLUM. L. REV. 725, 746 (1992) (citing instances in which state jury eligibility was tied to voting eligibility); see also 28 U.S.C. § 1863(b)(2) (1988) (directing federal districts to select grand and petit jurors from voter

As I hope to demonstrate, however, the connection runs deeper still. The argument of this Article is that the link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments: the Fifth, Sixth, Seventh, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth. As we shall see, the voting-jury service linkage was recognized by the Framers in the 1780s,<sup>17</sup> by those responsible for drafting the reconstruction amendments and implementing legislation,<sup>18</sup> and still later by authors of twentieth century amendments that protect various groups against discrimination in voting.<sup>19</sup> Moreover, each of the groups the Supreme Court has already determined should be protected against discrimination in jury service is also protected by one of the voting discrimination amendments.<sup>20</sup>

One kind of group the Court has yet to protect against jury service discrimination is that defined by age, especially young adults. I argue that age-defined groups, like other groups protected by the Constitution against discrimination in voting, are essential participants in the jury process as well. Thus, the Fifth, Sixth, and Seventh Amendments (providing for juries) must be harmonized with the spirit of the Twenty-Sixth (dealing with age discrimination), just as they have already in effect been brought into alignment with the Fifteenth (dealing with racial discrimination), Nineteenth (dealing with gender discrimination), and Twenty-Fourth (dealing with class discrimination). In the end, the groups protected from discrimination in jury service should be the same groups protected from discrimination in voting, regardless of how these groups fare under Sixth Amendment or equal protection approaches.

Part I provides background on the doctrinal framework that has evolved to address juror exclusion. This Part includes a discussion of the age-based group cases and the slippery slope problems that have led lower courts to refuse to recognize age as an unconstitutional basis for juror exclusion. Part I concludes by suggesting that an understanding of the relationship between jury service and other rights of political participation answers the slippery slope problems. Part II pursues that suggestion by exploring the link between jury service and other rights of political participation, especially voting, in the found-

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registration lists or lists of actual voters). This is not to say that voting eligibility has always been necessary or sufficient to confer jury service eligibility. *See, e.g.*, BARBARA BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW, CAUSES AND REMEDIES* 68 (1975) (discussing historical examples of jury service in states where jury duty was not based on enfranchisement).

<sup>17</sup> *See infra* part II.A.1.

<sup>18</sup> *See infra* part II.A.2.a.

<sup>19</sup> *See infra* parts II.A.2.b-d.

<sup>20</sup> *See infra* discussion part II.A.3.

ing period, the reconstruction, the later voting discrimination amendments, and Supreme Court case law. Part III then elaborates on the ways in which the central insight of this Article—the location of jury service in the broader context of political participation rights protected by the voting discrimination amendments—may be incorporated into the doctrinal framework employed by the Court. Whether or not we completely abandon the equal protection and Sixth Amendment approaches to the jury exclusion cases, we need to accommodate the norms of the voting discrimination amendments into the jury context.

## I

### THE DOCTRINAL LANDSCAPE

#### A. General Principles

Since *Batson v. Kentucky*<sup>21</sup> was decided nine years ago, much academic attention has been paid to Supreme Court cases involving the constraints the Constitution may place on the exercise of peremptory challenges.<sup>22</sup> The *J.E.B.* case involving the State's use of peremptories to exclude men<sup>23</sup> is certain to generate more commentary. This Article analyzes aspects of the decision below.<sup>24</sup> But even as we focus on these post-*Batson* cases, we must not forget that in some ways they are second-generation jury exclusion cases.<sup>25</sup> The first generation of jury exclusion cases involved discrimination in constituting the venires from which individual jury panels are chosen. These cases concerned challenges to the ways in which the key man system operated<sup>26</sup> or the permissibility of certain broad exemptions of groups from jury ser-

<sup>21</sup> 476 U.S. 79 (1986).

<sup>22</sup> See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989); Underwood, *supra* note 16.

<sup>23</sup> *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

<sup>24</sup> See *infra* notes 41-43, 238 and accompanying text.

<sup>25</sup> Cf. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1119-20 (1989) (distinguishing between these "two major types of jury discrimination cases").

<sup>26</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879); see also *Carter v. Jury Comm'n*, 396 U.S. 320 (1970); *Franklin v. South Carolina* 218 U.S. 161, 168 (1910). Under a key man system, citizens of good reputation in the community (the "key" men) recommend persons to fill the jury venire. Notwithstanding the highly subjective nature of such recommendations, the Supreme Court has declined to hold that the key man system itself is constitutionally impermissible; instead, it has held that when a key man system is administered in an intentionally racially discriminatory way, it runs afoul of the Fourteenth Amendment.

Until 1968, the federal government operated on the key man system. Pursuant to the 1968 Jury Selection and Service Act, federal jury venires are now drawn from federal jury wheels, which in turn are randomly filled with names drawn from a source list consisting primarily of voter registration lists. 28 U.S.C. §§ 1861-1869 (1988).

vice.<sup>27</sup> It is in these cases that the principles underlying the Court's resolution of the second generation of jury exclusion cases were initially formulated.<sup>28</sup>

The first Supreme Court case to consider the jury exclusion issue was *Strauder v. West Virginia*,<sup>29</sup> in which a black criminal defendant successfully argued that the exclusion of all blacks from the jury venire rendered his conviction unconstitutional. Although *Strauder* spoke in terms of the right of the criminal defendant to the equal protection of the laws under the Fourteenth Amendment,<sup>30</sup> the opinion has spawned a number of other theories about jury discrimination as well.<sup>31</sup> These theories coalesce to form the imperative of a "fairly comprised jury," which the Court has invoked in many cases involving exclusion of racial minorities and women from jury venires.

By the mid-1980s it was commonplace for federal courts to speak of the "requirement that a jury be drawn from a cross-section of the community," yet the source of this requirement was unclear. The only certainty has been the Court's unwillingness to let stand any verdict rendered by a "jury" constituted in violation of the cross-section command. As one appellate court trying to cover all its bases put it, the Supreme Court has "grounded" the cross-section requirement in the Equal Protection Clause, the supervisory power of the federal courts, and the Sixth Amendment, which is made applicable to the states through the Fourteenth.<sup>32</sup>

A central question raised by these cases—a question that arises regardless of the constitutional provision(s) under which one is challenging the exclusion of would-be jurors—is which groups cannot constitutionally be excluded? Indeed, to paraphrase one commenta-

As of 1977, the following 16 states utilized a key man system: Alabama, Arkansas, Connecticut, Florida, Georgia, Kentucky, Louisiana, Massachusetts, New Hampshire, North Carolina, Oklahoma, South Carolina, Tennessee, Vermont, Virginia, and West Virginia. JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 86-87 (1977). While most of these states have since revised their jury selection procedures, some states still employ a version of the key man system. See, e.g., GA. CODE ANN. § 15-12-40 (1990).

<sup>27</sup> See, e.g., *Rawlins v. Georgia*, 201 U.S. 638 (1906) (upholding statutory exclusion of persons in certain occupations—including lawyers, preachers, ministers, doctors, engineers, dentists, and railroad firemen—from jury service).

<sup>28</sup> Others have also made this observation. See, e.g., *Underwood*, *supra* note 16, at 742.

<sup>29</sup> 100 U.S. at 303.

<sup>30</sup> *Id.* at 309.

<sup>31</sup> See *Underwood*, *supra* note 16, at 742.

<sup>32</sup> *Barber v. Ponte*, 772 F.2d 982, 984, *vacated en banc*, 772 F.2d 982, 996 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986). Justice Marshall's plurality opinion for the Court in *Peters v. Kiff*, 407 U.S. 493, 501 (1972), suggests his belief that the requirement also stems from the Due Process Clause itself, regardless of the "incorporation" of other rights that clause might effect. See also *Duren v. Missouri*, 439 U.S. 357, 371 n.\* (1979) (Rehnquist, J., dissenting) (discussing the way in which the various doctrinal bases for the jury exclusion cases overlap and meld, and calling majority's approach a "hybrid" between the Sixth Amendment and the Equal Protection Clause).

tor, any workable theory of jury exclusion must, at a minimum, explain which groups count and why.<sup>33</sup> The cases have analyzed this issue in terms of whether a group is "cognizable," and have borne out the centrality, as well as the difficulty, of the cognizability question.

*Taylor v. Louisiana*,<sup>34</sup> where the Court made clear that women were a constitutionally cognizable group for purposes of a criminal defendant's Sixth Amendment claim, is illustrative. Quoting extensively from the its opinion thirty years earlier in *Ballard v. United States*,<sup>35</sup> the Court emphatically rejected the notion that women's participation is not essential to the jury process. However, the Court could articulate its reasoning only in intuitive terms:

The truth is that the 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>36</sup>

Identification of "distinct qualities" and "flavors" of groups opens the courts to the charge that they are making up constitutional law. For example, four terms after *Taylor* Justice Rehnquist's dissent in *Duren v. Missouri* accused the Court in the juror exclusion line of cases of "resort[ing] to . . . mystical incantations,"<sup>37</sup> and expressed misgivings about accepting on faith the Court's "omniscience . . . as to the existence of 'unknowable' qualities of human nature, 'flavor[s]' and 'indefinable something[s].'"<sup>38</sup>

As Justice Rehnquist's sarcastic remarks suggest, the Court in *Taylor* and *Duren* had obvious difficulty in explaining why a jury on which women are underrepresented is not really a "jury" for purposes of a defendant's Sixth Amendment rights. Perhaps this difficulty explains why, in more recent cases, "concern for the jury as an institution ha[s] become the centerpiece of the analysis," and that "the rights of excluded jurors rather than those of litigants are paramount."<sup>39</sup> This shift in focus underlies the Court's increased reliance on the equal

<sup>33</sup> See Underwood, *supra* note 16, at 738.

<sup>34</sup> 419 U.S. 522 (1975).

<sup>35</sup> 329 U.S. 187 (1946).

<sup>36</sup> *Taylor*, 419 U.S. at 531-532 (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)) (emphasis added).

<sup>37</sup> *Duren v. Missouri*, 439 U.S. 357, 371 n.\* (1979) (Rehnquist, J., dissenting).

<sup>38</sup> *Id.* (alterations in original). See also *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (discussing problems with defining "distinctive groups" for purposes of Sixth Amendment).

<sup>39</sup> *Babcock*, *supra* note 22, at 1154 (emphasis added).



protection rights of would-be jurors, a doctrinal move some commentators have welcomed as an intellectual improvement.<sup>40</sup>

This is not to say that the Court has abandoned its Sixth Amendment decisions or their rhetoric; it has not. Indeed, one remarkable feature of the most recent cases is the incorporation of Sixth Amendment rhetoric into equal protection reasoning.<sup>41</sup> In fact, the two analyses are in a great deal of tension: whereas the Sixth Amendment "flavor" approach values a group's input into the jury process because the group has characteristics that make it *different* from other groups in society, the Court's recent Equal Protection Clause cases deny any relevant differences between the excluded and included groups at all. Use of certain jury selection criteria is invalid under the Equal Protection Clause reasoning because the criteria are themselves irrelevant, and their use reflects nothing more than stereotypical thinking.<sup>42</sup>

Notwithstanding any tension with earlier reasoning, the Court seems to be settling on the equal protection approach. According to its adherents, this approach would prohibit race and gender-based jury selection decisions but would not protect against wealth or age discrimination, among others.<sup>43</sup> Close analysis of the treatment of age-based groups provides a helpful backdrop for the historical and doctrinal analyses that follow.

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<sup>40</sup> See, e.g., Underwood, *supra* note 16, at 742. In her thoughtful essay, then-Professor Underwood concludes that the only workable doctrinal basis on which to explain the juror exclusion cases is the Equal Protection Clause's protection of the excluded jurors, and the antidiscrimination principle it embodies. She rejects a Sixth Amendment approach as fundamentally flawed because the Sixth Amendment theory can tell us only that a jury is required in certain cases, and not what groups must be included for a body to be a "jury" in the constitutional sense.

As I argue below, I believe the best approach to resolve the jury exclusion cases is one which focuses on the political participation of the excluded jurors and which directly invokes the voting discrimination amendments. As I demonstrate below, an equal protection approach is difficult if not impossible to square with the text, structure, and history of the Reconstruction Amendments. See *infra* part II. A Sixth Amendment approach, while perhaps not as intellectually neat as a direct voting discrimination approach, can at least overcome Underwood's objection once we explore the link between voting and jury service. This linkage, together with the voting right amendments, could be used to identify the groups whose exclusion renders a body less than a "jury" in the constitutional sense. See *infra* part III.C.

Even if the Equal Protection Clause proves, for *stare decisis* reasons, the appropriate doctrinal lens through which to analyze these cases, the antidiscrimination principle which Underwood describes must be modified to take account of the groups—like young adults and the poor—who are explicitly protected by the Constitution from voting discrimination but who are not beneficiaries of traditional equal protection heightened scrutiny. See *infra* part III.B.

<sup>41</sup> See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1424 (1994).

<sup>42</sup> *Id.* at 1424-25.

<sup>43</sup> See Underwood, *supra* note 16, at 765-66. Cf. *J.E.B.*, 114 S. Ct. at 1425.

## B. The Age Group Issue

There are hundreds of federal and state cases involving exclusion from juries of groups defined by age, particularly cases involving exclusion or underrepresentation of young adults.<sup>44</sup> Some states have enacted statutes that require jurors to be twenty-one, thereby excluding adults between eighteen and twenty-one.<sup>45</sup> At times, the key man system<sup>46</sup> employed by many jurisdictions has been used explicitly to weed out young adults.<sup>47</sup> Moreover, parties exercising peremptory challenges sometimes acknowledge openly their discrimination on the basis of age.<sup>48</sup> And, most commonly, the young are systematically underrepresented due to the infrequent refilling of juror wheels<sup>49</sup> in federal and state courts.<sup>50</sup>

Litigants seeking to challenge these exclusions must, of course, surmount the cognizability hurdle. The closest the Supreme Court has come to ruling on the cognizability of young adult groups was its decision in *Hamling v. United States*,<sup>51</sup> which involved several persons convicted under federal statutes prohibiting the mailing of obscene materials. The defendants in *Hamling*, in addition to challenging the constitutionality of the federal obscenity statutes,<sup>52</sup> objected to the petit jury panel on the ground that there had been an unconstitutional exclusion of all persons under twenty-five years of age from the venire.<sup>53</sup> Specifically, the defendants claimed that the Southern District of California's method of periodically emptying and refilling its master jury wheel from voter registration lists effectively excluded

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<sup>44</sup> For a good collection of cases through the late 1970s, see Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045 (1978) (arguing that social science data supports cognizability of age groups). More recent decisions that collect many other recent cases include *United States v. Garrison*, 849 F.2d 103, 105-06 (4th Cir. 1988); *Barber v. Ponte*, 772 F.2d 982, 1000 (1st Cir. 1985) (en banc), cert. denied, 475 U.S. 1050 (1986); and *People v. Bridget*, 527 N.Y.S.2d 81 (App. Div. 1988).

<sup>45</sup> See, e.g., MISS. CODE ANN. § 13-5-1 (1972); MO. REV. STAT. § 494.425 (1989).

<sup>46</sup> See *supra* note 26.

<sup>47</sup> See, e.g., *United States ex rel. Chestnut v. Criminal Court*, 442 F.2d 611, 613 (2d Cir.), cert. denied, 404 U.S. 856 (1971) (relating to New York County officials' discrimination on the basis of age in the solicitation of grand jurors).

<sup>48</sup> See, e.g., *United States v. Garrison*, 849 F.2d 103, 105-06 (4th Cir.), cert. denied, 488 U.S. 996 (1988) (upholding government's exercise of peremptory challenges on basis of age).

<sup>49</sup> See *supra* note 26 for an explanation of juror wheels. Federal law requires refilling with names of voters only every four years, see 28 U.S.C. § 1863 (b)(4) (1988), so that persons between 18 and 22 become increasingly and predictably excluded as time elapses from the most recent refilling.

<sup>50</sup> See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Smith*, 523 F.2d 771, 780-81 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States v. Ware*, 473 F.2d 530, 537 (9th Cir. 1973); *United States v. Briggs*, 366 F. Supp. 1356, 1362 (N.D. Fla. 1973).

<sup>51</sup> 418 U.S. 87 (1974).

<sup>52</sup> *Id.* at 98-124.

<sup>53</sup> *Id.* at 135-38.

young adults between the ages of eighteen and twenty-four.<sup>54</sup> At the time of trial, slightly less than four years had elapsed since the wheel in the district had been refilled, which meant that the youngest potential jurors for the trial were at least twenty-four years old.<sup>55</sup>

In treating this claim, the Court assumed without deciding that young people are a cognizable group for constitutional purposes.<sup>56</sup> The Court nonetheless rejected the claim, finding that defendants had failed to make out a prima facie case of constitutional violation sufficient to place the burden on the government to justify the effective exclusion by reference to governmental objectives.<sup>57</sup> The then-prevailing constitutional doctrine required a showing of "purposeful discrimination" in the jury exclusion context.<sup>58</sup> Such a showing could presumably be made in jurisdictions that exclude by law adults under a certain age.<sup>59</sup> Had the Court been faced with such a scheme, it would have had to decide whether young adults are cognizable. But in *Hamling*, young adults technically were eligible for service under the federal jury statute linking jury service to voting. Thus, they were not purposefully excluded. The disparate impact that the jury wheel refilling procedure had on young adults did not satisfy the purposeful and intentional exclusion requirement necessary to a prima facie case.<sup>60</sup>

*Hamling* does not tell us much about the constitutionality of juries on which young adults are significantly underrepresented today. First, *Hamling* arose before the Twenty-Sixth Amendment<sup>61</sup> was ratified, and the litigants did not argue that the amendment's prohibition of age discrimination in voting had any bearing on jury service.<sup>62</sup> As I will argue below, the enactment of the Twenty-Sixth Amendment is a cru-

<sup>54</sup> *Id.* at 136.

<sup>55</sup> *Id.* As noted above, 28 U.S.C. § 1863(b) provides for periodic but infrequent refilling of juror wheels from voting lists. The version of § 1863 in effect at the time of *Hamling* was identical in this respect. Because § 1863 ties juror eligibility to voter eligibility, and because before 1970 voters in federal elections had to be at least 21 years old, failure to refill a federal jury wheel for three years would have made all potential jurors at least 24 by the time of refilling.

<sup>56</sup> *Hamling*, 418 U.S. at 137. The court of appeals likewise had assumed without deciding the cognizability of the age-based group. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *supra* note 45 and accompanying text.

<sup>60</sup> *Hamling*, 418 U.S. at 138.

<sup>61</sup> See *infra* note 86, and part IIA.2.d, for a discussion of the text and history of the Twenty-Sixth Amendment.

<sup>62</sup> The Twenty-Sixth Amendment was ratified in July 1971, two months after Mr. Hamling was indicted and his criminal prosecution initiated. *United States v. Hamling*, 481 F.2d 307, 310 (9th Cir. 1973), *aff'd*, 418 U.S. 87 (1974). Although Hamling's trial did not begin until October 1971, there is no suggestion in either of the two *Hamling* appellate opinions that he raised a Twenty-Sixth Amendment argument.

cial part of the argument against the exclusion of age-based groups.<sup>63</sup> Moreover, the *prima facie* requirement of purposeful exclusion on which the *Hamling* Court relied has been watered down, if not abandoned, in the Sixth Amendment criminal context in which *Hamling* arose.<sup>64</sup> The most significant modern Sixth Amendment case from the Court, *Duren*, makes clear that the *prima facie* requirement that a group's exclusion be "systematic" requires no more than that the exclusion be "inherent" in the jury selection process;<sup>65</sup> statistical evidence of disparate impact need not reflect a discriminatory purpose to be constitutionally problematic.<sup>66</sup> As Justice Blackmun's opinion for the Court in *Duren* explains, in contrast to traditional equal protection cases, where discriminatory intent is required,<sup>67</sup> "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement."<sup>68</sup> And there is little doubt that the kind of underrepresentation of which *Hamling* complained would be deemed systematic for purposes of the Sixth Amendment's *prima facie* framework set out in *Duren*.

The Court in *Hamling* did go on to discuss the need, as a practical policy matter, for some "play" in the joints of an operating jury wheel refilling system.<sup>69</sup> However, the amount of play allowed depends upon whether a constitutionally significant interest is threatened. Because the Court in *Hamling* concluded that no protected interest was at stake,<sup>70</sup> its discussion of the policies behind infrequent filling meth-

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<sup>63</sup> See *infra* part II.

<sup>64</sup> The Supreme Court in *Hamling* was far from clear about the provisions of the Constitution under which the defendants challenged the jury makeup. Justice Rehnquist's majority opinion characterized the jury exclusion claim as "constitutional," 418 U.S. at 91, but never went on to flesh out the constitutional theory pressed. Instead, he cited to a variety of Supreme Court and lower court cases involving equal protection and Sixth Amendment challenges. See 418 U.S. at 137-39 nn.21-22.

<sup>65</sup> *Duren v. Missouri*, 439 U.S. 357, 366 (1979).

<sup>66</sup> *Id.* at 368 n.26.

<sup>67</sup> *But see Ortiz, supra* note 25, at 1120-26 (arguing that intent standard has been watered down in equal protection jury cases, such as *Castenada v. Partida*, 430 U.S. 482 (1977), to the point where statistical disparity is enough to require governmental justification). See also *infra* notes 257-59 and accompanying text.

<sup>68</sup> *Duren*, 439 U.S. at 368 n.26. Lower courts have construed *Duren* as overruling the basis on which the defendants' claim was rejected in *Hamling*. See, e.g., *Barber v. Ponte*, 772 F.2d 982, 986 n.5, *vacated en banc*, 772 F.2d 982, 996 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986).

<sup>69</sup> *Hamling*, 418 U.S. at 138-39.

<sup>70</sup> As explained above, this determination was based on an understanding of Sixth Amendment doctrine that no longer prevails, and perhaps on a failure to appreciate the importance of preventing age discrimination in jury service, which in turn can be appreciated only after one sees the connections between jury service and voting, and the protection against age discrimination in voting embodied in the Twenty-Sixth Amendment.

ods cannot be taken as an endorsement of the "justification" that would trump the assertion of a constitutional right. All we are left with, then, is *Hamling's* "assumption" that young adults are cognizable for constitutional purposes.<sup>71</sup>

Lower courts, by contrast, have extensively considered and have almost uniformly rejected the cognizability of age-based groups.<sup>72</sup> Indeed, no federal appellate court currently recognizes age-based groups for jury exclusion purposes, although a few decisions have remanded for trial on the "factual issue" of cognizability.<sup>73</sup> The lower courts have generally ignored a developing body of social science data to support the idea that people of different ages think differently.<sup>74</sup>

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<sup>71</sup> One commentator has obliquely suggested that the legality of exclusion of age-based groups was resolved by the Court in *Carter v. Jury Comm'n*, 396 U.S. 320 (1970). See Underwood, *supra* note 16, at 765 n.175. *Carter* was a class action brought by black citizens of Greene County, Alabama, against officials charged with the administration of the state's jury selection laws. The complaint alleged that plaintiffs were fully qualified to serve but had never been summoned for jury service, and that defendants had effected a discriminatory exclusion of blacks from the grand and petit juries in Greene County. The plaintiffs sought, among other relief, a declaration that the Alabama statutes governing jury selection were unconstitutional on their face. The Supreme Court upheld plaintiffs' claim of racial discrimination, but declined to hold that the statutes were facially unconstitutional. In doing so, the Court noted that not all exclusion of groups from juries is constitutionally problematic: "The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character." 396 U.S. at 332.

This reference in *Carter* to age specifications does not resolve the question of cognizability of young adults for many reasons. First, to say that some statutory age specifications might by permissible is not to say that all are; no one would quarrel with a law that prohibited 13-year olds from serving on juries. Significantly, the Alabama statutes under attack in *Carter* did not exclude any voter from jury eligibility on account of age. *Id.* at 323 n.2. It is true that the Court cited to statutes from other states, some of which excluded at the time persons under 25 years of age from jury service, even though those persons were presumably eligible to vote in elections. But these citations were not essential to the evaluation of Alabama's statute. In any event, and most importantly, *Carter* and the statutes it cites predate the adoption of the Twenty-Sixth Amendment, which, as I argue below, essentially makes age an illegitimate criterion on which to exclude those over 18 from political participation. Finally, it is worth mentioning that the *Hamling* Court did not think *Carter* resolved the constitutionality of age-based exclusion; indeed, the *Hamling* court did not cite to *Carter* at all. Thus, when *Hamling* and *Carter* are read together, the extent to which age groups are constitutionally protected against jury exclusion, and why, are open questions in the Supreme Court.

<sup>72</sup> See, e.g., *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (en banc), cert. denied, 475 U.S. 1050 (1986); *Cox v. Montgomery*, 718 F.2d 1036 (11th Cir. 1983); *Davis v. Greer*, 675 F.2d 141 (7th Cir.), cert. denied, 459 U.S. 975 (1982); *Brown v. Harris*, 666 F.2d. 782 (2d Cir. 1981), cert. denied, 456 U.S. 958 (1982); *United States v. Potter*, 552 F.2d 901, 905 (9th Cir. 1977); *United States v. Test*, 550 F.2d 677 (10th Cir. 1976); *United States v. Olson*, 473 F.2d 686 (8th Cir.), cert. denied, 412 U.S. 905 (1973); see also *Zeigler*, *supra* note 44, at 1068 (observing that the biggest problem for groups complaining of age-based group exclusion has been cognizability).

<sup>73</sup> See *Willis v. Zant*, 770 F.2d 1212, 1217 (11th Cir. 1983); *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 818 (5th Cir. 1980).

<sup>74</sup> See *Zeigler*, *supra* note 44 (collecting social science data and presenting results of author's own studies).

The courts similarly have ignored the disproportionate number of young people processed by the criminal justice system when considering the issue of young adult jury service cognizability.<sup>75</sup>

The refusal to cognize young adult groups results from two perceived slippery slope problems. The first is the general line-drawing problem discussed in the Introduction of this Article: if groups defined by age are cognizable, why are not all other groups cognizable? As one leading case puts it, "if the age classification is adopted, surely blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications will be entitled to similar treatment. These are not the groups that the court has traditionally sought to protect from under-representation on jury venires."<sup>76</sup>

The second slippery slope problem goes to defining the contours of age-based groups. This slope poses no problem for those challenging explicit exclusion on the basis of age; once age is considered an illegitimate criterion on which to base juror eligibility, any purposeful age discrimination would be problematic.<sup>77</sup> But those, like Hamling, who challenge a systematic but perhaps unintentional under-representation of an age group must identify end points for the group. If there are no principled means for identifying these end points, we must "be prepared to let each complainant's attorney select his own age group, based solely upon the age boundaries that suit his purposes by showing the greatest statistical disparity, merely to gain tactical advantage rather than to meet constitutional standards."<sup>78</sup> Any rule defining the boundaries of a protected group would be "by arbitrary fiat superimposed on intuition."<sup>79</sup> Even those judges who have argued in favor of cognizing young adult groups have expressed concern over this second line-drawing problem, calling the "boundaries of age groups . . . somewhat necessarily arbitrary."<sup>80</sup>

These slippery slope problems<sup>81</sup> have plagued courts because the doctrine at present is not informed by a workable theory to identify

<sup>75</sup> Clifford Krauss, *No Crystal Ball Needed on Crime*, N.Y. TIMES, Nov. 8, 1994, at A14 tbl. (indicating that nearly 40% of arrests in American cities are of young people ages 15 to 24).

<sup>76</sup> *Barber*, 772 F. 2d at 999.

<sup>77</sup> Of course, an age floor still needs to be established. As noted above, no one could tenably claim that a 13-year old may not properly be excluded from jury service on account of age. This floor is established by the Twenty-Sixth Amendment's reference to persons over 18 years of age. See *infra* part II.B.

<sup>78</sup> *Barber*, 772 F.2d at 999.

<sup>79</sup> *Id.* at 998.

<sup>80</sup> *Barber v. Ponte*, 772 F.2d 982, 987, *vacated en banc*, 772 F.2d 982, 996 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986).

<sup>81</sup> One response to the slippery slopes would be to ride them to the bottom, eliminating key persons and peremptories, leaving only random selection from recently refilled juror wheels and challenges for cause based upon an individual juror's demonstrated incompetence or bias. Such an approach would necessarily mean that exclusion of would-be

protected groups. But the two slippery slopes disappear when we recognize jury service is analogous to other important rights of political participation, especially voting. This recognition solves the first slippery slope problem in the age cases because the Constitution specifically identifies age as one of the criteria on which the right to vote may not be abridged.<sup>82</sup> The Fifteenth,<sup>83</sup> Nineteenth,<sup>84</sup> Twenty-Fourth,<sup>85</sup> and Twenty-Sixth<sup>86</sup> Amendments identify groups whose political participation is essential to a real democracy and who thus are cognizable for jury exclusion purposes.

The second slippery slope problem also is addressed by the Constitution's provisions on political participation—specifically the age requirements for federal elective office holding<sup>87</sup> and the Twenty-Sixth Amendment's reference to persons at least eighteen years of age. Taken as a whole, the Constitution itself sets up an age line that creates the relevant boundaries: persons over eighteen-years old can vote; persons over twenty-five-years old can vote and run for the House; persons over thirty-years old can vote and run for the House or Senate; and persons over thirty-five can do all that and run for the Presidency or Vice-Presidency.<sup>88</sup> Thus, the Constitution's own age-de-

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jurors based upon occupation, geography, education, intelligence, citizenship, residency, and disability would not be permitted. The Supreme Court has suggested that most, if not all, of these criteria may constitutionally be utilized. See *Carter v. Jury Comm'n*, 396 U.S. 310, 332-33 (1970) (listing legitimate bases for exclusion); *Rawlins v. Georgia*, 201 U.S. 638 (1906) (upholding occupational exclusions). The approach adopted in this article solves the slippery slope problems without necessarily calling into question all of these criteria, and thus might preserve peremptories in a form that still can be useful. See Underwood, *supra* note 16, at 768-74 (suggesting that peremptories are still valuable even if certain criteria on which to base them are constitutionally removed).

<sup>82</sup> See *infra* note 86.

<sup>83</sup> The text of the Fifteenth Amendment provides, in relevant part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

<sup>84</sup> The text of the Nineteenth Amendment provides, in relevant part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex." U.S. CONST. amend. XIX.

<sup>85</sup> The text of the Twenty-Fourth Amendment provides, in relevant part, that "[t]he right of the citizens of the United States to vote in any primary or other election for President or Vice President, for Electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV, § 1.

<sup>86</sup> The text of the Twenty-Sixth Amendment provides, in relevant part, that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age." U.S. CONST. amend. XXVI, § 1.

<sup>87</sup> See U.S. CONST. art. I, § 2 (House members must be at least 25 years old.); U.S. CONST. art. I, § 3 (Senators must be at least 30 years old.); U.S. CONST. art. II, § 1 (President must be at least 35 years old.).

<sup>88</sup> The Constitution requires that those running for the Vice-Presidency be eligible to serve as President. U.S. CONST. amend. XII.

fined groups include eighteen to twenty-five year olds, twenty-five to thirty year olds, thirty to thirty-five year olds, and persons over thirty-five. Accordingly, if any of these age groups is excluded<sup>89</sup> from jury service, then the Constitution is offended.

Of course, solutions to slippery slope problems need to be principled. The lines this Article proposes—unlike those that could be drawn under an Equal Protection Clause never designed to apply to political rights such as jury service—are rooted in the text, structure, and history of the Constitution and case law interpreting it. With respect to the first slippery slope, the connection between jury service and voting goes back to the time of the framing, and continues to be visible through the reconstruction and subsequent amendments involving voting protection, as well as the Supreme Court decisions protecting groups from jury exclusion. As to the second slippery slope, the constitutional age categories reflect constitutionally presumed differences in attitudes and life perspectives, which in turn can affect the “flavor” of a group’s political participation.

## II

### JURY SERVICE AS A RIGHT OF POLITICAL PARTICIPATION

#### A. The Voting Connection as a Means of Determining Which Groups Count

The response to the first slippery slope problem—if age-based groups, who else?—proceeds in three steps. First, the Framers recognized the connection between jury service and other forms of political participation, especially voting. Second, this connection between jury service and voting as two components in a package of political rights runs through the reconstruction and voting discrimination amendments, from the Fifteenth, which proved to be the textual and intellectual template for the others, through the Twenty-Sixth, which prohibits age discrimination. And third, an appreciation of this connection implicitly informs the line one can draw through the Supreme Court case law identifying the groups that have been held to be cognizable.

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<sup>89</sup> I use “excluded” here to refer only to systematic but not necessarily purposeful underrepresentation that is not justified by an important governmental interest. *See supra* notes 65-68 and accompanying text. As noted above, the second slippery slope problem to which the constitutional age lines are responsive does not arise if age is explicitly the criterion by which a would-be juror is excluded.



### 1. *The Founding*

Constitutional history provides strong support for the Supreme Court's recognition, in *Powers*<sup>90</sup> and *Edmonson*,<sup>91</sup> of the link between jury service and other rights of political participation.<sup>92</sup> Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government. Indeed, one of the sharpest attacks anti-federalists could make on the new Constitution was that it did not go far enough in the protection of the institution of juries.<sup>93</sup> The federalists took this charge seriously and ultimately responded by, among other things, enacting the Fifth, Sixth, and Seventh Amendments.<sup>94</sup>

The Framers expected the jury to act as a mediating body to insulate individuals from government overreaching. Coming from a pool of ordinary citizens and owing no financial allegiance to the government, juries had the power to thwart the excesses of powerful and overly ambitious government officials.<sup>95</sup> Nowhere was this more true than in criminal cases, where the grand jury could terminate any prosecution it deemed "unfounded or malicious," and the petit jury could interpose itself on behalf of the defendant if the executive sought to trump up charges against a political critic.<sup>96</sup>

But the jury's function in the federal constitutional scheme was not limited to the protection of individual litigants. Rather, the jury was an essential democratic institution because it was a means by which citizens could engage in self-government. As the anti-federalist historian Herbert Storing has eloquently stated, "[t]he question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government."<sup>97</sup> And in the words

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<sup>90</sup> *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>91</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

<sup>92</sup> Other commentators have observed this link but have not explored it. See, e.g., Underwood, *supra* note 16, at 765 n.171. My brother has unearthed much framing-period evidence on the political nature of juries. See Akhil R. Amar, *Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

<sup>93</sup> See HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981) (discussing the politics of the Constitution's opponents).

<sup>94</sup> See, e.g., Amar, *supra* note 92, at 1182-90; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 668-69 (1973); Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148 n.26 (1991).

<sup>95</sup> Amar, *supra* note 92, at 1183.

<sup>96</sup> *Id.* at 1185.

<sup>97</sup> STORING, *supra* note 93, at 19. See also *Letters of Centinel (II)*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 143, 149 (Herbert V. Storing ed., 1981) (anti-federalist essayist argu-

of the Federal Farmer on whose writings Storing draws, “[i]t is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence . . . for changing the nature of the government.”<sup>98</sup>

The Federal Farmer grounded the importance of juries on their application of law to fact, which necessarily involves shaping the law itself:

It is [also] true, the freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties. The body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined.<sup>99</sup>

We find corroboration of this public law function in the discussion of criminal cases, in which juries have traditionally been thought of primarily as important guarantors of individual rights. The grand jury, in particular, was intended to operate as an organ for democratic self-government. In the words of James Wilson:

The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.<sup>100</sup>

Once we see the important way in which juries provide avenues for political participation, the connections people of the time drew between jury service and other means of political participation, in par-

ing that jury trials preserve “in the hands of the people, that share which they ought to have in the administration of justice”); Amar, *supra* note 92, at 1187 n.250.

<sup>98</sup> Letter from the Federal Farmer (XV), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 97, at 315, 315.

<sup>99</sup> *Id.* at 320; see also *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) (“Trial by a jury of laymen rather than by the sovereign’s judges was important to the founders because juries represent the layman’s common sense, the ‘passional elements in our nature,’ and thus keep the administration of law in accord with the wishes and feelings of the community.”) (citing OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 237 (1920)).

<sup>100</sup> 2 THE WORKS OF JAMES WILSON 537 (Robert G. McCloskey ed., 1967). The administration of law and the protection of individual rights converge on the question of petit jury constitutional review (*i.e.*, a jury’s ability and duty to review the constitutionality of a law it is being asked to apply). Advocates of such a review believed juries are no different than judges in this regard, so that juries must follow their own vision of the Constitution. For a discussion of this issue, see Amar, *supra* note 92, at 1191-95.

ticular voting, make more sense. Alexis de Tocqueville, whom the Court has quoted extensively in recent jury exclusion cases,<sup>101</sup> keenly understood these linkages. Commenting on the overall jury system, he wrote:

[The jury] puts the real control of affairs into the hands of the ruled, . . . rather than into those of the rulers.

. . . .

. . . The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail.

. . . .

. . . [T]he jury is above all a political institution . . . [and] should be made to harmonize with the other laws establishing that sovereignty. . . . [F]or society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters.<sup>102</sup>

Tocqueville later added, albeit with some qualification, that "[i]n America all citizens who are electors have the right to be jurors."<sup>103</sup>

The Framers likened the role of the people in making up juries to the role of voters selecting legislative bodies; references to legislative bodies abounded during the debates over the Constitution's jury provisions. Observed the Federal Farmer:

It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department.

. . . .

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community.<sup>104</sup>

Another anti-federalist essayist went even further, indicating that as between electoral voting and jury service, a democracy free from corrupt antimajoritarian government depended more on the latter:

The trial by jury is . . . more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than

<sup>101</sup> See, e.g., *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991).

<sup>102</sup> TOCQUEVILLE, *supra* note 16, at 250-51.

<sup>103</sup> *Id.* app. I at 702 (observing general rule and sole exception of New York).

<sup>104</sup> *Letters From the Federal Farmer (IV)*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 97, at 245, 249-50; see also TOCQUEVILLE, *supra* note 16, at 251 ("The jury is the part of the nation responsible for the execution of the laws, as the legislative assemblies are the part with the duty of making them . . .").

direct and open legislative attacks; in the one case the treason is never discovered until liberty, and with it the power of defence is lost; the other is an open summons to arms, and then if the people will not defend their rights, they do not deserve to enjoy them.<sup>105</sup>

Finally, the relationship between jury service and other modes of political participation crops up in discussions of the educational quality of juries. As one commentator has succinctly put it, "[t]hrough the jury, Citizens would learn self-government by doing self-government."<sup>106</sup> This learning, of course, would carry over to other political activity. As Tocqueville explained:

Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.

. . . .

. . . [T]hey make all men feel that they have duties toward society and that they take a share in its government. By making men pay more attention to things other than their own affairs, they combat that individual selfishness which is like rust in society.

. . . [The jury] should be regarded as a free school which is always open and in which each juror learns his rights, . . . and is given practical lessons in the law . . . . I think that the main reason for the . . . political good sense of the Americans is their long experience with juries in civil cases.<sup>107</sup>

Making clear his distinction between actual self-government through juries and the development of self-governance skills from jury service that were transferable to other modes of democratic government, such as voting and office holding, Tocqueville concluded that "[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule."<sup>108</sup> In light of these virtues of the jury system, Tocqueville was not at all surprised to find, as a general and theoretical matter, that "[e]very American citizen can vote or be voted for and may be a juror."<sup>109</sup>

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<sup>105</sup> *Essays by a Farmer (IV)*, reprinted in 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 97, at 36, 38 (emphasis omitted). Thomas Jefferson echoed this point when he declared in 1789 that "it is necessary to introduce the people into every department of government . . . [but w]ere I called upon to decide whether the people had best be omitted from the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." Letter from Thomas Jefferson to Abbé Arnoux (July 19, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 282, 283 (Julian P. Boyd ed., 1959).

<sup>106</sup> Amar, *supra* note 92, at 1187.

<sup>107</sup> TOCQUEVILLE, *supra* note 16, at 252-53.

<sup>108</sup> *Id.* at 254.

<sup>109</sup> *Id.* at 251.

## 2. Voting Discrimination Amendments

### a. The Fifteenth Amendment

Analysis of the Fifteenth Amendment begins, for present purposes, by asking why the Fifteenth Amendment was necessary. In other words, why was not discrimination on the basis of race in voting already proscribed by the Fourteenth Amendment?<sup>110</sup> One simple response is that given by the second Justice Harlan in *Oregon v. Mitchell*:<sup>111</sup> that the enactment of the Fifteenth Amendment is itself "evidence that [those responsible for the Fourteenth Amendment] did not understand it to accomplish such a result."<sup>112</sup> Most modern

<sup>110</sup> One might also argue that racially motivated denial of voting amounts to a badge of servitude and thus violates the Thirteenth Amendment. This argument would be difficult to maintain, however, in light of the fact that free blacks in Northern States did not have the right to vote as a matter of course until the Fifteenth Amendment was enacted. *But cf.* Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990).

<sup>111</sup> 400 U.S. 112 (1970).

<sup>112</sup> *Id.* at 166 (Harlan, J., concurring in part and dissenting in part); *see also* *Minor v. Happersett*, 88 U.S. 162, 175 (1874) (observing that perceived need for Fifteenth Amendment undermines claim that voting is a privilege or immunity protected by the Fourteenth). Justice Harlan's position in *Mitchell*, that the Fourteenth Amendment did not confer upon Congress the power to prescribe voting qualifications, did not rest upon the enactment of the Fifteenth Amendment alone. Justice Harlan also pointed to Section Two of the Fourteenth Amendment itself, which gives Congress the power to decrease a State's representation in Congress if it denies the suffrage to any male citizens twenty-one years or older on grounds other than commission of a crime. Justice Harlan believed enactment of this provision left States free to prescribe voting qualifications, subject to the potential consequences. *Mitchell*, 400 U.S. at 152, 168-69 (Harlan, J., concurring in part and dissenting in part). One response to this suggestion would be that Section Two merely provides an extraordinary remedy for something that Section One—which contains the Privileges and Immunities, Due Process, and Equal Protection Clauses—already prohibits states from doing and which Congress can also punish through more conventional means under its Section Five enforcement powers. But if Section One prohibits States from setting certain voter qualifications, why does Section Two not merely refer back to Section One violations instead of fleshing out the circumstances under which Congress can reduce a State's representation? Moreover, and in any event, argued Harlan, the historical evidence concerning the meaning of the clauses in Section One foreclosed any argument that this Section affected States' authority to regulate the franchise. *Id.* at 152-200.

Justice Brennan, writing as well for Justices Marshall and White in *Mitchell*, took issue with Justice Harlan's historical survey. 400 U.S. at 250-78 (Brennan, J., concurring in part and dissenting in part). As at least one commentator has pointed out, *see* John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1440 n.225 (1992), all of the (limited) historical evidence Justice Brennan adduces that relates anything in the Fourteenth Amendment to suffrage concerns only the Privileges and Immunities Clause. The relevance of that clause to voting is addressed *infra* at notes 114-29 and accompanying text. In light of the well-settled meaning of privileges and immunities of citizenship and the disavowal by Section One's drafters that anything in that section affected voting, Brennan clearly seems to have the weaker of the historical debate. In any event, the argument Justice Brennan makes—on the Privileges and Immunities Clause—was itself rejected by the Court in *Minor v. Happersett*, 88 U.S. 162 (1874), which is explored below. Instead, the Court has apparently embraced the notion that the Equal Protection Clause applies to voting, a proposition for which Brennan cites no historical support and which is difficult to square with the broad text of that clause. *See infra* notes 130-33 and accompanying text.

cases and commentators, however, appear to suggest that the Fourteenth Amendment does address voting discrimination, even though this reading renders the Fifteenth Amendment essentially superfluous.<sup>113</sup>

Within the Fourteenth Amendment, the two likeliest candidates to proscribe voting discrimination are the Privileges and Immunities and Equal Protection Clauses.<sup>114</sup> But there are major problems with both. The Privileges and Immunities Clause does not prohibit race discrimination in the franchise because voting was not among the “privileges or immunities [of citizenship]” as that phrase was used in Article IV of the Constitution or elsewhere in legal discourse. For example, a citizen of Massachusetts visiting South Carolina would be entitled to many “civil” privileges and immunities, such as the right to own property, but would not be entitled to vote in South Carolina elections or exercise any other “political” rights. Thus, a key distinction drawn by the drafters of the Civil Rights Act of 1866<sup>115</sup> and the closely related Fourteenth Amendment<sup>116</sup> was that between civil and political rights; only the former were intended to be safeguarded.<sup>117</sup>

<sup>113</sup> See, e.g., *Mitchell*, 400 U.S. at 251-52 (Brennan, J. concurring in part and dissenting in part); Ortiz, *supra* note 25.

<sup>114</sup> Section One of the Fourteenth Amendment provides, in relevant part, that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>115</sup> Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

<sup>116</sup> The Civil Rights Act of 1866, which survived President Johnson’s veto, is one of the important intellectual forerunners of the Fourteenth Amendment and thus provides relevant historical information for those who seek to understand the concerns and ambitions of the amendment’s framers. For a discussion of the important relationship between the two, see Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1244-46 (1992); see also *Mitchell*, 400 U.S. at 162-63 (Harlan, J., concurring in part and dissenting in part) (observing that one of the primary goals of Fourteenth Amendment was to “constitutionalize the Act” and that the “privileges and immunities” in Section One of Fourteenth Amendment “include those set out in the . . . Act”).

<sup>117</sup> Harrison, *supra* note 112, at 1417. Section One of the 1866 Act listed as civil rights the following private law rights: (1) to make and enforce contracts; (2) to sue, and be sued; (3) to give evidence; (4) to inherit, purchase, sell, lease, hold and convey real and personal property; and (5) to enjoy equal protection of the laws. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. To say, as does Harrison, that the Privileges and Immunities Clause essentially constitutionalized this list is not to deny that it also “incorporated” against the states other “privileges and immunities” of citizenship found within the Bill of Rights and the rest of the Constitution. See Amar, *supra* note 116. As noted above, the jury was a central political institution in the Fifth, Sixth, and Seventh Amendments. Thus, one could argue that incorporation of the jury trial amendments means that certain kinds of discrimination in juries is problematic. But the Bill of Rights jury amendments, without more, do not tell us anything about who has a right to participate on juries—that is, which groups must be included for a body to be a “jury.” Thus, we still need an answer for the question, which groups count and why? The answer proposed by this Article invokes the voting discrimination amendments because of the link between voting and jury service as part of a package of political participation rights recognized in the voting discrimination amendments.

Senator Stephen Douglas explained the civil-political distinction when he remarked on the floor of Congress in 1850 that free blacks in Illinois were "protected in the enjoyment of all their civil rights," but were "not permitted to serve on juries, or in the militia, or to vote at elections; or to exercise any other political rights."<sup>118</sup> Douglas's distinction resurfaced many times during the debate on the 1866 Act. Representative Russell Thayer, for instance, invoked the distinction in order to allay fears that statutory language prohibiting discrimination in "civil rights and immunities" might apply to voting. Representative Thayer assured his colleagues:

The words themselves are 'civil rights and immunities,' not political privileges; and nobody can successfully contend that a bill guaranteeing simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.<sup>119</sup>

Representative Wilson of Iowa made a similar observation. In discussing the proposed Act's "civil rights and immunities" language, Wilson promised colleagues that the legislation would not affect the quintessential political rights of voting and jury service:

What do these terms [of the Act] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of

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<sup>118</sup> CONG. GLOBE, 31st Cong., 1st Sess. 1664 (1850). Antebellum cases corroborate this usage. See, e.g., *Campbell v. Morris*, 3 H. & McH. 535, 559 (Md. 1797); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827) (asserting that voting is not a privilege or immunity of citizenship); but cf. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., riding circuit). Professor Harrison has characterized Justice Washington's dicta in *Coryell* that voting is a "privilege" of citizenship as a minority view. Harrison, *supra* note 112, at 1417. I would add that it is also an ambiguous view. After enumerating various private law protections as a list of privileges, Washington concluded with the phrase, "to which may be added, the elective franchise, as regulated and established by . . . the State in which it is to be exercised." *Coryell*, 6 F. Cas. at 552 (emphasis added). In any event, the suggestion that voting is a privilege or immunity of citizenship protected by the Fourteenth Amendment was rejected by the Supreme Court as a whole in *Minor v. Happersett*, 88 U.S. 162 (1874), discussed *infra* at notes 124-29 and accompanying text.

<sup>119</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866) (remarks of Rep. Thayer); see also *id.* at 476, 599, 606, 1151, 1159, 1757, 1836, 3035 (remarks of Sen. Lyman Trumbull, Reps. Russell Thayer and William Windom, and Sen. John Henderson) (Civil Rights Bill does not encompass political rights). In the end, the Act as finally adopted did not include a general ban on discrimination in civil rights or immunities, in "an abundance of caution" for those who feared "it might be held by courts that the right of suffrage was included." *Id.* at 1366-67 (remarks of Rep. Wilson).

government. Nor do they mean that all citizens shall sit on juries. . . . These are not civil rights or immunities.<sup>120</sup>

Representative Lawrence, addressing the same question, echoed Wilson's sentiments, again discussing voting and jury service, along with office holding, as a *grouping* of political rights unaffected by the legislation. In Lawrence's words, the Act speaks only to civil privileges and "does not affect any political right, as that of suffrage, the right to sit on juries, hold office, etc."<sup>121</sup>

This important distinction drawn repeatedly during consideration of the Act carried over to, and informed interpretation of, the Privileges and Immunities Clause of the Fourteenth Amendment, which was intended to preserve the political-civil line.<sup>122</sup> As Professor Harrison has put it, however "close [the] connection between [the Fourteenth Amendment's] privileges and immunities [of citizenship language] and [the concept of] civil rights[,] neither was thought to extend to political rights, such as voting or serving on juries."<sup>123</sup>

This interpretation of the Privileges and Immunities Clause was confirmed after passage of the Fourteenth Amendment in *Minor v. Happersett*.<sup>124</sup> In *Minor*, the Court considered the claim that "a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the State in which she resides, [and thus] has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or Constitution abridge."<sup>125</sup> The Court readily agreed with the first part of the argument—that women may be citizens of the United States so as to be entitled to the protection of the Privileges and Immunities Clause.<sup>126</sup> But the unanimous Court went on to reject the plaintiff's claim, holding that the Privileges and Immunities Clause did not add to the privileges and immunities that existed before it was enacted. Because suffrage was not coextensive with citizenship at the time the Fourteenth Amendment was adopted,<sup>127</sup> the Court reasoned, voting was not among the privileges and immunities guaranteed by the Amend-

<sup>120</sup> *Id.* at 1117 (remarks of Rep. Wilson).

<sup>121</sup> *Id.* at 1832 (remarks of Rep. Lawrence).

<sup>122</sup> See, e.g., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. 7, 12, 15 (1866) (distinguishing between "civil" and "political" rights, and linking Section One of proposed Fourteenth Amendment with "civil rights and privileges"); see also *supra* notes 116-17, *infra* notes 130-31 and accompanying text.

<sup>123</sup> Harrison, *supra* note 112, at 1417.

<sup>124</sup> 88 U.S. 162 (1874).

<sup>125</sup> *Id.* at 165.

<sup>126</sup> *Id.* at 168-69.

<sup>127</sup> *Id.* at 171-78; see also H.R. REP. No. 22, 41st Cong., 3d Sess. 1-3 (1871) (report by Congressman John Bingham concluding that Fourteenth Amendment had not added to the privileges and immunities of Article IV and that the Fourteenth Amendment's guarantees thus did not include voting).



ment. Thus, a provision in a State Constitution that confined the right to vote to "male citizens of the United States"<sup>128</sup> did not run afoul of the privileges and immunities clause; "in such a state women [simply had] . . . no right to vote."<sup>129</sup>

The Equal Protection Clause also was not understood at the time of its enactment as requiring race neutrality in voting. Fourteenth Amendment co-author Representative John Bingham, in language that addresses both the equal protection and privileges and immunities arguments examined here, said that "[t]he [proposed] amendment [as a whole] does not give, as the second section shows, the power to Congress of regulating suffrage in the several States."<sup>130</sup> Senator Jacob Howard was even more to the point. When he introduced the Fourteenth Amendment in the Senate, he reassured his fellow legislators that "the first section [which includes the Equal Protection Clause as well as the Privileges and Immunities and Due Process Clauses] of the proposed amendment does not give to either of these classes [blacks or whites] the right of voting."<sup>131</sup>

The broad phrasing of the Equal Protection Clause confirms this understanding. Unlike the Privilege and Immunities Clause but like the Due Process Clause, the Equal Protection Clause applies to all *persons*, not just citizens. The drafters of Section One clearly wanted the Fourteenth Amendment to afford some protection to non-citizens, including aliens, and needed a separate provision because of the Privileges and Immunities Clause's limited application to citizens. As Representative Bingham remarked on the floor of the House:

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens [of the United States]? Is it not [also] essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in the Union . . . ?<sup>132</sup>

Senator Howard's explanation to the Senate was to the same effect: the Equal Protection and Due Process Clauses "disable[d] a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due pro-

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<sup>128</sup> *Minor*, 88 U.S. at 163 (syllabus).

<sup>129</sup> *Id.*; see also *Ex parte Virginia*, 100 U.S. 339, 366 (1879) (Field, J., dissenting) (jury service not protected by Privileges and Immunities Clause).

<sup>130</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (remarks of Rep. Bingham); see also *supra* note 112 (discussing impact of Section Two on voting question).

<sup>131</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (remarks of Sen. Howard). See also REPORT OF THE JOINT COMMITTEE, *supra* note 122; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 163 (1956) (quoting 1866 campaign speech of Senator Thaddeus Stevens conceding that Section One of Fourteenth Amendment "does not touch . . . political rights").

<sup>132</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (remarks of Rep. Bingham).

cess of law, or from denying to him the equal protection of the laws of the State."<sup>133</sup>

If the drafters intended the Equal Protection Clause to apply to aliens, then freedom from voting discrimination could not have been thought to be a denial of equal protection. For it is clear that the Constitution did not prohibit states from denying to aliens the right to vote and exercise other political participatory rights on the basis of their alienage. Thus, like the Privileges and Immunities Clause, the Equal Protection Clause could not have been meant to apply to voting and other rights of political participation.

Once we see the void in the protection of political rights—such as voting, jury service, and office holding—left by enactment of the Fourteenth Amendment, we can examine the Fifteenth Amendment's path to passage more meaningfully. One early distillation of what later became the Fifteenth Amendment made clear its intent to fill that void, by providing that "all provisions in the Constitution or laws of any State whereby any distinction is made in *political* or civil rights or privileges on account of race . . . or color shall be inoperative and void."<sup>134</sup> The draft went on to give "Congress [the] power to make all laws necessary and proper to secure to all citizens of the United States in every State the same *political rights and privileges*."<sup>135</sup> Consistent with their focus on political participation, proponents of the Fifteenth Amendment also advocated at times a broad package of rights of political participation that could not be abridged on a variety of grounds. For example, Senator Henry Wilson, commenting on circulating drafts that protected voting and office holding from racial discrimination only, wanted to go further and prohibit discrimination "in the elective franchise or the right to hold office on account of race, color, nativity, property, education, or creed."<sup>136</sup>

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<sup>133</sup> *Id.* at 2766; *see also id.* at 505, 1115, 2560, 2768-69, 2890 (remarks of Sen. Johnson, Rep. Wilson, Sens. Stewart, Wade and Cowan) (drawing person-citizen distinction); Amar, *supra* note 116, at 1193, 1224-1228 & n.145.

<sup>134</sup> CONG. GLOBE, 40th Cong., 3d Sess. 1032 (1869) (Sen. Fessenden) (emphasis added).

<sup>135</sup> *Id.* (emphasis added). Fessenden was quoting, in the midst of the Fifteenth Amendment debate, a proposed amendment he had drafted and submitted to the Senate three years earlier—while the Fourteenth Amendment was being debated—concerning, to use Fessenden's words in 1869, the "proposition now under consideration," *id.* As one commentator put it, "the Fessenden plan . . . involved the idea which finally took definite shape [not in the Fourteenth but] in the Fifteenth Amendment." JOHN M. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 12 (1909). The Fessenden plan's goals were echoed by abolitionist Wendell Phillips in his call for an amendment "forbidding *disenfranchisement, or proscription from official trust, on account of race or color, in any State or Territory of the Union.*" *Id.* at 20 (citing *Anti Slavery Standard*, Nov. 7, 1868) (emphasis added).

<sup>136</sup> *See* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 59 (1965); ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 56 (1978) (quoting CONG. GLOBE, 40th Cong., 3d Sess. 1300 (1869)). In the

The question of whether office holding, in particular, ought to be included in the text of the amendment is worthy of discussion. Each house of the 40th Congress passed a proposed amendment that would have expressly prohibited not only racially discriminatory voter qualifications but discriminatory qualifications for office as well.<sup>137</sup> A Conference Committee, consisting of Senators Stewart, Conkling, and Edmunds, and Representatives Boutwell, Bingham, and Logan, struck out the office-holding provision.<sup>138</sup> With Inauguration Day and its ushering in of a new Congress—and one that was not nearly so radically Republican—only a week away, both Houses accepted the Conference report version and passed it on to the states.<sup>139</sup>

Although the Conference Committee did not explain its deletion of the office-holding provision, a plausible explanation is not hard to construct. To begin with, many persons thought that the right to be free from discrimination in voting implied the right to be free from discrimination in office holding. Congressman Butler of Massachusetts articulated most forcefully the argument that the political right to vote presumptively carries with it the similarly political right to serve in office:

I had supposed if there was anything which was inherent as a principle in the American system and theory of government, of equality of all men before the law, and the right of all men to a share in the Government, it was this: that the right to elect to office carries with it the inalienable and indissoluble and indefeasible right to be elected to office.<sup>140</sup>

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end, the drafters' special concern with race is reflected in the limited language sent to the States. The special concern for race is also reflected in other early drafts of the amendment. There, devices such as poll taxes and literacy tests, which had been used in the South to dilute the effect of race-neutral voting provisions Southern states were required to build into their constitutions as conditions for readmittance to the union, were proscribed. *See id.* at 57. These efforts were not successful until passage of the Twenty-Fourth amendment and the Supreme Court's decision in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), discussed *infra* part II.A.3.

<sup>137</sup> *See Oregon v. Mitchell*, 400 U.S. 112, 166 (1970) (Harlan, J. concurring in part and dissenting in part).

<sup>138</sup> *See, e.g., Gillette, supra* note 136, at 70-71.

<sup>139</sup> There was widespread belief that if the version of the Fifteenth Amendment reported from the joint conference committee were not approved, the amendment process itself might have died. *See CONG. GLOBE*, 40th Cong., 3d Sess 1627 (1869) (remarks of Sens. Wilson, Morton); *see also Grimes, supra* note 136, at 58; *Mathews, supra* note 135, at 34. This belief was in large part driven by the fact that the new 41st Congress, while still Republican enough to enact progressive legislation, would not easily provide the two-thirds majority in each chamber required under Article V's constitutional amendment process.

<sup>140</sup> *CONG. GLOBE*, 40th Cong., 3d Sess. 1426 (1869) (remarks of Rep. Butler).

Importantly, at least half of the Conference Committee which ultimately recommended the deletion of the office-holding provision expressed agreement with this sentiment.<sup>141</sup>

Even if the right to vote free from racial discrimination logically subsumed other rights of political participation, including the right to run for and hold office free from the same discrimination, one must still ask why the drafters would not make the office-holding protection explicit. In other words, what would be the harm of including office-holding language in the amendment, from the perspective of those who thought such language unnecessary?<sup>142</sup> The answer may be that inclusion of an office-holding provision would have implied that voting by itself does not subsume office holding. This in turn would have

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<sup>141</sup> See *id.* at 1425-26 (Rep. Boutwell) (observing that holding office is a "legal consequence[ ] and right[ ]" of the House version of the Amendment although it speaks expressly only to voting); GILLETTE, *supra* note 136, at 71 (noting that Senators Stewart and Conkling "agreed [to leave out a reference to office holding from the Conference Committee version of the proposed amendment] because they felt the right to vote included the right to hold office"); WILLIAM M. STEWART, REMINISCENCES OF SENATOR WILLIAM M. STEWART OF NEVADA 236 (1908) (observing that as Senator he "was willing to strike out [the office-holding language] . . . because I thought the right to vote carried with it the right to hold office" and that "Mr. Conkling agreed with me"). Senator Stewart's position on this issue appears to have evolved somewhat by the time he served on the Conference Committee on February 24, 1869; in earlier floor statements he expressed his desire for explicit office-holding language in the amendment. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 1292 (statement on Feb. 17, 1869). It is noteworthy that most of these earlier floor statements predate Congressman Butler's forceful plea of February 20, 1869, quoted above, and Butler's accompanying observations about the political implications of an explicit reference to office holding in the amendment, see discussion *infra* notes 142-56 and accompanying text. But see CONG. GLOBE, 40th Cong., 3d Sess. 1629 (Feb. 26, 1869) (exchange between Sens. Stewart and Sawyer) (In this exchange, Senator Sawyer anticipated and rejected Senator Stewart's argument that voting includes office holding. Senator Stewart responded not by reasserting his belief that voting *does* presumptively include office holding, but rather by observing that he had wanted to insert the right to hold office into the amendment. Stewart added that in any event the omission of office-holding language would have little practical effect because, whether or not voting legally subsumed office holding, black voters would have the political clout to demand the right to hold office.)

Others legislators expressed, although sometimes with less rhetorical flair than Congressman Butler, similar beliefs that the right to hold office was logically subsumed within the constitutional right to vote. See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 1625 (1869) (remarks of Sen. Howard); see also *Oregon v. Mitchell*, 400 U.S. 112, 168 n.19 (1970) (Harlan, J., concurring in part and dissenting in part) (observing that "the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amendment in both Houses of Congress"); *infra* note 178 (discussing cases in which the Court has accepted this "idea").

Not everyone in Congress agreed, of course, that voting subsumed office holding, even after Butler's eloquent statement. See CONG. GLOBE, 40th Cong., 3d Sess., app. at 92 (1869) (remarks of Rep. Miller); CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869) (remarks of Sen. Sawyer); *id.* at 1627 (remarks of Sen. Wilson); *id.* at 1632 (remarks of Sen. Hendricks); CONG. GLOBE, 41st Cong., 2d Sess. 2676 (1870) (remarks of Sen. Edmunds).

<sup>142</sup> Cf. CONG. GLOBE, 40th Cong., 3d Sess. 1629 (1869) (Sen. Sawyer posing the question: "If [the office-holding provision of the proposed amendment] means nothing why vote it down?").

had implications for a reconstruction controversy that was still unresolved at the time the Fifteenth Amendment was drafted.

The federal act by which Georgia had been offered readmission to the Union after the Civil War required by its terms a promise from Georgia that freedom from racial discrimination in *suffrage* always remain part of its fundamental law, the State Constitution.<sup>143</sup> In July of 1868 Georgia amended its constitution and submitted it to Congress for approval.<sup>144</sup> This new Georgia constitution, approved by Congress, complied with Congress' suffrage condition but was silent as to black office holding. Georgia was tentatively readmitted in the summer of 1868.<sup>145</sup> Then, in the fall of 1868, Georgia expelled all its newly elected black state legislators. As a result of this expulsion, Georgia's reconstruction was reopened. In early 1869, at the same time it was drafting the Fifteenth Amendment, Congress was in the process of deciding how to respond to Georgia's actions and did not, in choosing language for the Fifteenth Amendment, want to suggest that Georgia's conduct might not have violated Congress' reconstruction directives. Again, Congressman Butler's words are enlightening:

I am myself almost persuaded not to vote for the amendment [the current form of which contained an office-holding provision]. As it comes to us from the Senate it provides that no man, on account of race, color, or previous condition of servitude, shall be deprived of the right to hold office. . . . [I]f we adopt this provision without a word of protest, the effect will be by intentment to legalize that which has been done in Georgia in voting the colored men out of office. If it takes a [specific] constitutional provision to prevent a man from being deprived of holding office because of race or color [when that man is already protected by a federally approved state constitutional provision with respect to voting], then the men of the Legislature of Georgia did right. . . . I [therefore] wish to vote for an effectual provision that will leave beyond doubt the right to vote, and stop there, because there came with it the right to be voted for beyond all question.<sup>146</sup>

In other words, Representative Butler suggested, if Congress were to object to Georgia's expulsion of black office holders on the ground

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<sup>143</sup> Act of June 25, 1868, ch. 70, 15 Stat. 73 (1868). Although the Act did not refer to race as such but rather required that Georgia's constitution shall never "be so amended or changed as to deprive any citizen or class of citizens of the United States the right to vote in said State, who are entitled to vote by the constitution [of Georgia] herein recognized, except as punishment for . . . crimes," its goal—recognized at the time of the Act's adoption and since—was the protection of black voters. See, e.g., CONG. GLOBE, 41st Cong., 2d Sess., app. at 275 (1870) (remarks of Sen. Morton); JOHN H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 130 (1961).

<sup>144</sup> See CONG. GLOBE, 41st Cong., 2d Sess. 1702 (1870) (remarks of Rep. Butler).

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

<sup>146</sup> CONG. GLOBE, 40th Cong., 3d Sess. 1426 (1869) (remarks of Rep. Butler).

that such expulsion violated Congress' understanding of the Georgia constitution it had approved, then the voting provisions of Georgia's constitution must have included office holding as well. And if this were the rule of state constitutional construction, ought not it to inform the drafting of *federal* constitutional amendments?

In this regard, Representative Butler echoed the reasoning of a Senate Judiciary Committee report on the Georgia matter that Senator Stewart had authored a month earlier.<sup>147</sup> In explaining its recommendation not to seat senators from Georgia, that report observed that Georgia's new constitution was understood by the Congress that approved it as protecting black office holding:

Your committee are of [the] opinion that under the constitution of Georgia there is no distinction in the right to hold office on account of race or color, and they are quite confident that such was the opinion of Congress at the time it approved that constitution.<sup>148</sup>

While Congress was deciding how to respond to the situation in Georgia, the Georgia Supreme Court ruled that Georgia's constitution protected the rights of blacks to hold office, notwithstanding the absence of explicit office-holding language.<sup>149</sup> But rather than wait for the Georgia courts to execute their own judgments, Congress reimposed military rule on Georgia.<sup>150</sup> Among the conditions Georgia would be required to meet before (its second) readmission was its ratification of the proposed Fifteenth Amendment.<sup>151</sup>

147 S. REP. NO. 192, 40th Cong., 3d Sess. 4 (1869).

148 *Id.* Senator Trumbull later questioned whether all of the reasoning of the committee report enjoyed majority committee support. See CONG. GLOBE, 41st Cong., 2d Sess. 1925 (1870) (remarks of Sen. Trumbull). But Trumbull's quarrel with the report had to do not with the report's conclusion that Georgia's expulsion of black office holders was contrary to Congress' understanding of Georgia's newly approved constitution, but rather the report's independent conclusion that some other Georgia senators were ineligible for public service under the fourteenth amendment because they had been rebels. *Id.* at 1925-26. Indeed, there appears to be general agreement that Georgia's expulsion of black office holders was one of the reasons the whole of Congress reimposed military rule and additional conditions for readmission. See *id.* at 1926; GRIMES, *supra* note 136, at 55.

149 *White v. Clements*, 39 Ga. 232 (1869).

150 See CONG. GLOBE, 41st Cong., 2d Sess. 1703 (1870) (remarks of Rep. Butler).

151 Another provision of the Reorganization Act declared:

The expulsion of any person or persons elected . . . from participation in the proceedings of [the] senate or house of representatives upon the ground of race, color, or previous condition of servitude, would be illegal and revolutionary, and is hereby prohibited.

CONG. GLOBE, 41st Cong., 2d Sess. 1703 (1870) (remarks of Rep. Butler).

Enactment of this section by the 41st (less Republican) Congress apparently suggests congressional acceptance of the position that even though constitutional protection of voting subsumes protection of office holding (and thus provides a federal basis for reimposing military rule upon Georgia), see *supra* notes 147-48, *infra* notes 152-55 and accompanying text, there is little harm done by explicitly reminding Georgia in a federal statute that it may not do again what it already did. See CONG. GLOBE, 41st Cong., 2d Sess. 2717-18 (1870) (remarks of Sen. Pool taking this position); see also *infra* note 156 (discuss-

The justification relied on most often by Republicans in Congress for imposing new rule and conditions upon Georgia was that suggested by the Senate Judiciary Committee—Georgia's failure to abide by *Congress'* understanding of the Georgia constitution it approved. Indeed, as many Congressmen pointed out, Georgia could not legitimately be punished by federal authorities for doing no more than violating its own state constitution; Congress had to premise its actions on a federal breach.<sup>152</sup> Responding to arguments that Georgia had committed no federal breach, and the related suggestion that Georgia was not given adequate notice of what Congress expected of her,<sup>153</sup> Senator Howard thundered:

[I]f an excuse were wanting for the imposition of this further condition in the admission of Georgia, I feel for one that it is found in the conduct of the dominant party in Georgia. They have not kept their faith with the reconstruction acts. The reconstruction acts authorize every male person twenty-one years of age, without distinction of color, to vote at the polls and to vote for members of the Legislature, and to be voted for as members of the Legislature. The right to be elected to the Legislature was as plainly provided for in the reconstruction acts as was the right to vote. It was plainly written on the face of the statute, so plainly that he who runs might read, and that even he who stumbles might not mistake it. But notwithstanding the clearness of that provision in those acts, when the Legislature of Georgia assembled, there being a majority . . . to expel from the legislative bodies of that State, . . . a large portion of the members elected; not because they were not twenty-one years old, not because they were not citizens of the United States, not because they had been guilty of any crime or offense . . . , but because they were colored . . . .

Sir, there was no excuse or apology for this high-handed, revolutionary, and oppressive measure. It was setting at direct defiance the commands . . . of Congress. It was not keeping faith with the United States. It was directly breaking faith with us.<sup>154</sup>

In a similar vein are the words of Representative Coburn:

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ing difference between statutory and constitutional office holding language). This position also explains why the 41st Congress, in admitting Virginia, Mississippi, and Texas, required each state, to promise not to discriminate "on account of . . . race, color, or previous condition of servitude, [in] the right to hold office under the constitution and laws of said State," in addition to its promise to ratify the Fifteenth Amendment. Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (Virginia); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (Mississippi); Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (Texas). It is noteworthy that these readmission provisions dealing with office holding track the language of the Fifteenth Amendment perfectly.

<sup>152</sup> See, e.g., CONG. GLOBE, 41st Cong., 2d Sess., app. at 295 (1870) (remarks of Sen. Fowler); CONG. GLOBE, 41st Cong., 1st Sess. 249 (1869) (remarks of Rep. Beck).

<sup>153</sup> See, e.g., CONG. GLOBE, 41st Cong., 1st Sess. 171 (1869) (remarks of Sen. Bayard).

<sup>154</sup> *Id.* at 174 (remarks of Sen. Howard).

But it is urged that Georgia having complied with the reconstruction acts, and having been admitted to representation in Congress, cannot now be dealt with in the manner proposed. Now, the acts of reconstruction were not intended as a vain and empty ceremony, but were provided for the restoration of peace and security in the region to which they applied; they were made in good faith, and it was expected and understood that they should be complied with in good faith. By them the freedmen were enfranchised and suffrage and the right to hold office clearly conferred; yet, notwithstanding this, the Legislature of Georgia deprived them of the right to hold office, and expelled them from that body. . . . They have broken faith as soon as admitted to the representation here . . . .<sup>155</sup>

Given that Congress, in punishing Georgia, construed the Georgia constitutional voting provisions to include office holding, it is not at all surprising that, in drafting its own constitutional language, Congress may not have wanted to suggest a need for explicit office-holding language.<sup>156</sup>

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<sup>155</sup> *Id.* at 261 (remarks of Rep. Coburn). *See also* CONG. GLOBE, 41st Cong., 2d Sess. 2717 (1870) (remarks of Sen. Pool) ("Whether or not under the guarantee clause [of the federal constitution] it was proper for Congress to [punish Georgia for her expulsion of black officeholders], Congress assumed that Georgia could not be admitted under its reconstruction policy—which policy it based on the high ground of necessity for the peace and safety of this Union—unless colored men could have the right to hold office in the State."); *id.* at 1951 (remarks of Sen. Stewart) (Georgia's actions made clear its "defiance of the authority of the [federal] government."); *id.* at 1703 (remarks of Rep. Butler) (By expelling black office holders Georgia "had already done . . . the very things we declared would be invalid."); *id.* at 2677 (remarks of Sen. Williams) ("The judiciary committee of the Senate and [the entire] Congress have decided that the expulsion of the colored men from their seats was illegal and revolutionary."). *But see* CONG. GLOBE, 41st Cong., 2d Sess., app. at 288 (1870) (remarks of Sen. Trumbull) ("[S]o far as the reconstruction acts go, it was perfectly competent for the people of Georgia to exclude colored men from office.").

<sup>156</sup> As noted earlier, the 41st Congress did not feel the need to remove office-holding language from its reconstruction statutes. *See, e.g., supra* note 151. This distinction between constitutional and statutory language is not surprising, given the prevailing attitude that constitutions, unlike statutes, were not intended to be prolix. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This distinction might also explain why Congress, in providing for political rights of blacks in the District of Columbia, proceeded in two statutes, the first providing for voting and the second providing for office holding and jury service. Even here, however, it is not clear that office holding and jury service would not have necessarily and logically followed from enactment of the voting statute alone. Senator Pomeroy suggested that the second proposed statute was designed to remedy a "defect" in the first to the extent that the first bill purported to create a voting class ineligible for office holding. *See* CONG. GLOBE, 40th Cong., 2d Sess. 39 (1867) (remarks of Sen. Pomeroy). As Pomeroy noted, "there is no state in the union where a man has a right to be an elector, where he has a right to vote, where he cannot be voted for." *Id.* One year earlier, Congressman Miller purported to identify an exception to this general rule in the State of New York. Miller suggested, albeit cryptically, that New York's constitution permits blacks to vote, but not to hold office or serve on juries. CONG. GLOBE 39th Cong., 1st Sess. 305 (1866) (remarks of Rep. Miller). If Miller's observation rested on New York's constitution, he was mistaken. Although the state constitution required blacks but not whites to own a great deal of property in order to vote, nothing in it prevented blacks who qualified to vote from holding any office. *See* NEW YORK CONST. OF 1846, reprinted in 5 FRANCIS N. THORPE,



In the end, the belief that as a matter of constitutional interpretation the right to vote presumptively subsumes the right to hold office, the political ramifications of phrasing the Fifteenth Amendment so as to contradict that belief, and the time pressure of a Congress about to change over all contributed to Congress' deletion of the office-holding provision of the Fifteenth Amendment.

Nor were the states during the ratification period oblivious to the textual acrobatics being performed in Washington. In Georgia, for example, Governor Bullock in introducing the amendment for a ratification vote to the legislature observed that,

[w]ere there any doubt . . . as to the sufficiency of this Amendment to confer equal political privileges without regard to race or color, or were it urged that the right to vote did not necessarily include the right to hold office, it would certainly be dissipated and answered by the arguments advanced in the debates in Congress on the passage of the joint resolution proposing the Amendment, as well as by the expressed opinions of the soundest lawyers of the Nation. . . . If we ratify this Amendment, to be consistent we must at once voluntarily yield to colored citizens the right to have their voices heard in your halls.<sup>157</sup>

And across the continent in California, the Democratic Party platform likewise argued that the Fifteenth Amendment should be defeated because it would "give the Negro and Chinaman the right to vote and hold office."<sup>158</sup>

We have observed that voting was but part of a political rights package that also included office holding, which many supporters

AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 2653 (1909). The statutes of New York did not appear to impose any racial barriers on office holding either. 1 N.Y. REV. STAT. tit. vi at 116 (1829); see also Paul Finkleman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 417 (1986) (suggesting that blacks could hold office under the laws of New York). The statutes of New York did impose a property requirement on *all* jurors, and in this way, as Tocqueville observed, New York was the sole exception to the general rule that those who could vote could serve on juries. TOCQUEVILLE, *supra* note 16, at 728 app. I. But this juror property requirement applied by its terms to whites and blacks alike. I am unaware of any other New York statutes that forbade black office holding or any case law upholding any such statutes against New York constitutional challenge. Compare *White v. Clements*, 39 Ga. 232, 265-66 (1869) (holding that the legislature is not free to provide requirements for office when constitution could have but did not). Of course, even where blacks were permitted by law to hold office and to serve on juries, such service was rare. See LEON F. LITWACK, *NORTH OF SLAVERY* (1961); Finkleman, *supra*, at 477.

<sup>157</sup> See MATHEWS, *supra* note 135, at 66 (quoting the GEORGIA HOUSE JOURNAL 577 (1869) (remarks of Gov. Bullock)). Although some have questioned whether Bullock truly believed that Georgia should ratify the Fifteenth Amendment, see GILLETTE, *supra* note 136, at 101, those who ultimately voted for ratification might well have relied on Bullock's interpretation of the Amendment.

<sup>158</sup> MATHEWS, *supra* note 135, at 72 (quoting EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 479 (1871)).

conceived as being subsumed within voting. How then does a third element of the package—jury service—fit into the analytic scheme? The language of the Fifteenth Amendment technically should apply to jury service because *juries* vote. Furthermore, we have noted that American tradition, from the founding through Tocqueville's era, explicitly links voting and jury service.

A complete answer to the question posed, however, requires that we examine the first jury exclusion cases decided by the Supreme Court. *Strauder*,<sup>159</sup> in which the Court relied on the Equal Protection Clause to overturn a black defendant's conviction by a jury from which blacks had been explicitly excluded, has received much academic attention.<sup>160</sup> But the issues raised in one of *Strauder's* companion cases, *Ex parte Virginia*,<sup>161</sup> are perhaps more illuminating.

*Ex parte Virginia* involved the federal criminal prosecution of a Virginia state court judge, who had responsibility to select grand and petit jurors in his county, for violating a law making it a crime to disqualify any man from state or federal jury service because of his race. The law was part of the 1875 Civil Rights Act,<sup>162</sup> most of whose provisions—those proscribing racial discrimination in public accommodations—were struck down by the Supreme Court in the *Civil Rights Cases*.<sup>163</sup> The jury service provision at issue in *Ex parte Virginia*, however, was upheld by the Court over defendant's argument that Congress lacked the authority to prohibit racial discrimination in jury selection, at least in the state courts.

In rejecting the defendant's contentions, the Court focused on the rights of black criminal defendants in state courts, even though the provision at issue in *Ex parte Virginia* imposed criminal liability whether or not the discriminatory jury selection process was part of a prosecution of a black defendant. In fact, 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. Instead, the indictment alleged only that the judge had in practice violated the federal statute. In essence, then, as applied by the federal prosecutors and as it came to the Court, the federal statute seemed to be concerned not with the interests of the litigants in particular cases, but rather with the rights of would-be jurors. Nonetheless, the Court in *Ex parte Virginia* piggybacked on the *Strauder* analysis, and held that Congress enjoyed au-

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<sup>159</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1879).

<sup>160</sup> See, e.g., Schmidt, *supra* note 16 (analyzing *Strauder* and discussing other scholarship).

<sup>161</sup> 100 U.S. 339 (1879).

<sup>162</sup> Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, *codified at* 18 U.S.C. § 243 (1988).

<sup>163</sup> *Civil Rights Cases*, 109 U.S. 3 (1883) (striking down antidiscrimination provisions including a prohibition against discrimination in public accommodations and places of recreation).

thority to enact the criminal provision at issue in order to protect the equal protection rights of black defendants:

[T]he Fourteenth Amendment secures . . . to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. . . . [I]mmunity from any such discrimination [in the right to an impartial jury trial] is one of the equal rights of all persons, and . . . any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the amendment. . . . [S]uch an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the general government and guaranteed by it. . . . [T]his protection and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.<sup>164</sup>

As Justice Field's powerful dissent pointed out, the Equal Protection Clause's broad application to all "persons" undermined the majority's reasoning: "[T]he universality of the protection secured [by the Clause] necessarily renders [the majority's] position untenable."<sup>165</sup> Harkening back to the desire of the Equal Protection Clause's drafters that aliens be included within the Clause's language, Field observed:

All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, . . . are to be equally protected. Yet no one will contend that equal protection to . . . aliens can . . . be secured [only by] allowing persons of the class to which they belong to act as jurors in cases affecting their interests.<sup>166</sup>

If the majority were correct, then, alien criminal defendants—persons protected against discrimination by the equal protection clause—would be entitled to have aliens serve on the juries in their cases. But this simply could not be so.<sup>167</sup> The majority never responded to Field's argument, nor did the drafters of the statute respond to similar arguments raised by those Congressmen who

<sup>164</sup> *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

<sup>165</sup> *Id.* at 367 (1880) (Field, J., dissenting).

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

<sup>167</sup> Indeed, the Court has stated that citizenship requirements for juror service do not run afoul of equal protection. *See Carter v. Jury Comm'n*, 396 U.S. 320, 332 (1970). This is not to suggest that aliens have never been allowed on juries. The early Nineteenth century device of jury *de medietate linguae* allowed aliens to serve on juries in some cases. The common law practice was never thought to be constitutionally required. *See Ex parte Virginia*, 100 U.S. at 369 (Field, J., dissenting); cf. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. Rev. 777 (1994).

opposed the law's passage on the ground that it could not be based on Congress' power to implement the Equal Protection Clause.<sup>168</sup>

The majority also failed to address the related but more general critique of its Equal Protection Clause analysis—that the Fourteenth Amendment does not extend to any political rights, of which jury service is just one. And the emphasis in *Ex parte Virginia* (as well as *Strauder*) on the equal protection rights of the defendants, as opposed to those of the excluded jurors—which are stressed in recent cases—does nothing to blunt the attack.<sup>169</sup> For if the *Ex parte Virginia* equal protection logic is valid, it would also support an argument that a black man in 1869 (after the Fourteenth Amendment but before the Fifteenth Amendment) could not, consistent with equal protection, be required to subject himself to laws resulting from an electoral process in which members of his race could not vote. Of course, that would mean, as a practical matter, that blacks would not be bound by any laws.

Nor would it make sense to distinguish between the political rights of voting and jury service for these purposes. If the Equal Protection Clause does not prohibit excluding blacks from voting for leaders and laws under which blacks must live, it is hard to see why the clause should prohibit excluding blacks from bodies—like juries—that administer those laws. If the argument here is that no equal protection violation exists when blacks are governed by the general laws that apply to whites, the same argument would likewise apply to juries; blacks get the same (all white) juries as everyone else, just as women get the same (all male) juries as others.<sup>170</sup> To approach the issue another way, if whites could be trusted to represent the interests of

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<sup>168</sup> When Senator Thurman pointed out that the Equal Protection Clause could not support the jury provision of the 1875 Act because women, children, and aliens were persons protected by the Clause and yet could be properly excluded from serving on juries, Senator Morton accused Thurman of hiding "behind women, . . . children . . . [and] aliens." 3 CONG. REC. 1795 (1875). Senator Thurman acknowledged that the accusations were rhetorically amusing, but argued in response:

I submit to the Senator whether he has answered my reply at all.

. . . What was . . . [the Senator's] answer to . . . [my] question? Why, that [I] . . . get[] behind the women. That is the logical answer of the able Senator from Indiana! That is the logical answer of the leader of the republican party on this floor! That is a specimen of his ability to reason and reason logically!

*Id.*

<sup>169</sup> Other commentators also have pointed out the flaws of *Ex parte Virginia's* reliance on the equal protection rights of the litigants. See, e.g., Underwood, *supra* note 16, at 729-36. The current Court's decision to invoke the equal protection rights of the excluded jurors may signify a recognition of the weakness of *Ex parte Virginia* in this regard. Of course, the Court's new approach is in similar tension with the history and text of the Equal Protection Clause, which clearly was not designed to give excluded jurors a political right of access.

<sup>170</sup> See Underwood, *supra* note 16, at 746-48.

blacks at the polls and in the legislature, why could not whites be similarly trusted in the jury boxes? The only adequate response to this question is to deny its premise—that the Equal Protection Clause does not speak to voting. As the preceding discussion should make clear, such a denial would be historically difficult at best.

Similar problems plague a Due Process Clause justification for the results in *Strauder* and *Ex parte Virginia*. One might defend the result in *Strauder* by arguing that an all-white jury deprives a black criminal defendant of his due process right to a fair and impartial jury because black and white jurors might behave differently. If accepted, this argument requires an explanation for why a randomly selected jury which happens to be all white does not similarly deprive a black criminal defendant of his right to a fair jury. Moreover, this due process approach does not provide a basis for attacking black juror exclusion when the criminal defendants are whites, as might very well have been true in *Ex parte Virginia*. As the recent Rodney King criminal and civil cases illustrate, this due process approach would create an unfortunate dilemma when black jurors are excluded in cases where the defendant is white but the victim is black.<sup>171</sup>

Fortunately there is a better way to analyze, and a coherent way to uphold, the provision involved in *Ex parte Virginia*. This way begins with the statutory language. The first three sections of the Civil Rights Act of 1875<sup>172</sup>—which were held unenforceable in the *Civil Rights Cases*—parallel the language in the Civil Rights Act of 1866,<sup>173</sup> which, as we have seen, is linked tightly with the Fourteenth Amendment. By contrast, the jury service provision of the Act at issue in *Ex parte Virginia* does not track the language of the Fourteenth Amendment or its predecessor, but rather tracks the language of the *Fifteenth* Amendment, and tracks it perfectly. The jury service section upheld in *Ex parte Virginia* provides:

[N]o citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any State, *on account of race, color, or previous condition of servitude*, and any officer or other person charged with any duty in the selection or summoning of ju-

<sup>171</sup> See generally REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3-17 (1991) ("The Christopher Commission Report") (describing the Rodney King incident and its aftermath).

<sup>172</sup> Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, codified at 18 U.S.C. § 243 (1988).

<sup>173</sup> Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted as amended pursuant to ratification of the Fourteenth Amendment as Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. § 141 (1988))).

rors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall . . . be deemed guilty of a misdemeanor . . . .<sup>174</sup>

This *in haec verba* formulation is itself strong evidence of the linkage between voting and jury service as part of a political rights package in the Fifteenth Amendment perceived by the drafters of the Act.

The legislative history of the Act provides support for this connection. Supporters of the Act were aware and made note of the logical linkages between the political rights of jury service and voting.<sup>175</sup> Moreover, and perhaps more important, the parallel language of the Fifteenth Amendment and the Act was not lost on those who unsuccessfully argued against the law on the grounds that Congress lacked the power to enact it. Senator Carpenter, in particular, felt compelled to address the Fifteenth Amendment as a possible basis for the law, and rejected it because office holding was not explicitly included in the Fifteenth Amendment, and jury service was office holding of sorts.<sup>176</sup>

Of course, one response to Senator Carpenter's argument, which we have seen earlier, is that the Fifteenth Amendment might very well have included the right to be free from racial discrimination in office holding, so that even if jury service is office holding, the Fifteenth Amendment provided a basis for the Act. As a presumptive matter, absent a clear statement to the contrary in the same document creating the nondiscrimination right, a constitutional declaration of freedom from certain kinds of discrimination in voting subsumes the freedom from similar discrimination in office holding. This theory was accepted by many who drafted and ratified the Fifteenth Amendment<sup>177</sup> and has been accepted by the modern Supreme Court.<sup>178</sup>

<sup>174</sup> 18 Stat. 335, *codified at* 18 U.S.C. § 243 (emphasis added). Compare the text of U.S. CONST. amend. XV, § 1 "The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude" (emphasis added).

<sup>175</sup> See 3 CONG. REC. 1795 (1875) (remarks of Sen. Morton) (discussing right of voting and jury service together as political rights).

<sup>176</sup> *Id.* at 1863; see also *id.* at 1796 (similar remarks of Sen. Merrimon); CONG. GLOBE, 40th Cong., 3d Sess. 1291 (1869) (Sen. Wilson linking jury service and office holding in discussing the Fifteenth amendment); *Ex parte* Virginia, 100 U.S. 339, 370 (1879) (Field, J., dissenting) ("[I]f [Congress] can make the exclusion of persons from jury service on account of race or color a criminal offense, it can make their exclusion from office on that account also criminal.").

<sup>177</sup> See *supra* notes 140-58 and accompanying text.

<sup>178</sup> See, e.g., *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970) (decided the same day as *Carter v. Jury Comm'n*, 396 U.S. 320 (1970), discussed *supra* note 71, and concluding that "[t]he State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees"). The Court went on to cite the voting discrimination cases for support. *Id.* See also *Lubin v. Panish*, 415 U.S. 709, 721-22 (1974) (Douglas, J., concurring) ("[T]he right to vote would be empty if the State could arbitrarily deny the right to stand for election."); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (observing that "rights of voters and the rights of candi-

A second response to Senator Carpenter would be that, while jury service is an important political right, jurors are populist actors and thus differ from traditional governmental office holders. In this respect, jury service is akin to voting, another populist function. As Senator Edmunds put it, perhaps overstating the point:

If a juryman is an officer of a State and holds a political office in the constitutional sense, there would be a great deal of force [to Senator Carpenter's argument] . . . . It is enough to say on that question merely that in all the history of juries from the beginning of the jury trial a thousand years ago down to this day it has been reserved to this present time to discover that a juryman is an officer under the laws and constitution of any country. A juryman is a man; he is called by the name of a man and not the name of an official . . . .<sup>179</sup>

Because jury service is closer to voting than to office holding, historically and structurally, Senator Carpenter's argument that the Fifteenth Amendment purposefully excluded office holding, even if true, would not necessarily carry the day.

The discussion thus far has established that jury service was linked to the Fifteenth Amendment in the minds of at least many of its drafters and those who enacted implementing legislation. This linkage is reflected in the grouping of voting and jury service together as part of a political rights package that was left out of the Fourteenth Amendment's scope but intended to be addressed by the Fifteenth. The linkage is reinforced by the language and legislative history of the 1875 Civil Rights Act. And the linkage is not undermined by the hurried decision of the Fifteenth Amendment's drafters not to include an explicit office-holding provision, but rather to represent political rights more generally by referring to the "right to vote." For many, at least, although the point was never made as bluntly as I am making it now, the right to vote presumptively subsumed the right to hold office, which in turn included the right to sit on juries. Even more di-

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dates do not lend themselves to neat separation"); *Oregon v. Mitchell*, 400 U.S. 112, 167 n.19 (1970) (Harlan, J., concurring in part and dissenting in part) (right to be free from racial discrimination in voting subsumes right to be free from similar discrimination in office holding).

It is noteworthy that *Turner* predates congressional approval of the Twenty-Sixth Amendment, the most recent of the voting rights amendments. Whether or not reading a constitutional voting protection to include office holding is a sound first principle of constitutional construction, it is one that the framers of the Twenty-Sixth Amendment knew, or can be presumed to have known, the Court would employ. Because the framers of the Twenty-Sixth Amendment wanted its meaning to track those of the Fifteenth and Nineteenth Amendments, their understanding of the language they used sheds interpretive light on all three amendments. See Amar, *supra* note 92, at 1201-03; Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL'Y 39, 40-41 (1994).

<sup>179</sup> 3 CONG. REC. 1866 (1875) (remarks of Sen. Edmunds). Edmunds, it should be noted, was one who thought that an explicit office holding provision was necessary to make the Fifteenth Amendment complete. See GILLETTE, *supra* note 119, at 70-71.

rectly, ordinary voters in America had always been jurors, as Tocqueville remarked upon, and so the general right to vote quite naturally included the right to serve, and vote, on juries.

In any event, the Fifteenth Amendment is assuredly a *more plausible* constitutional basis on which to prohibit racial discrimination in jury service than is the Fourteenth Amendment, whose text and history make clear that political rights—including jury service—were not covered.<sup>180</sup> To the extent that the text, structure, and history of the reconstruction amendments speak to racial discrimination on juries, they do so through the Fifteenth Amendment. Given this, the Court was remiss in failing to explicitly invoke the amendment to support its results in *Ex parte Virginia* and *Strauder*.<sup>181</sup>

#### b. *The Nineteenth Amendment*

Unlike the linkage between jury service and the Fifteenth Amendment, the historical connection between the women's suffrage movement and jury service has been explored in both historical and legal literature. Rather than recount the evidence that supports this connection, I shall briefly cover the main issues and leave the reader to examine the sources cited herein.

There is much support for the proposition that the struggle for women's suffrage was, from the outset, "also about the right to serve on juries [and that] . . . [t]he two causes were the twin indicia of full citizenship" for those who favored the elimination of gender discrimination at the polls.<sup>182</sup> Professor Rhode has documented the persistent and unsuccessful efforts by early feminists to gain jury service for women.<sup>183</sup> Moreover, the linkage between voting and jury service was well understood by those who opposed women's suffrage; indeed, many opponents thought that jury service would flow inexorably from the vote.<sup>184</sup> In California, for example, a leading opponent of the women's vote movement tried to defeat the legislative suffrage effort by

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<sup>180</sup> Cf. Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019, 1043 (1992) (suggesting that Fourteenth Amendment, interpreted in light of the Fifteenth Amendment, justifies the result in *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

<sup>181</sup> In *Powers v. Ohio*, 499 U.S. 400, 408 (1991), the Court came close to recognizing explicitly the connection between jury service and the Fifteenth Amendment. Justice Kennedy's opinion for the Court cited the statute that had been at issue in *Ex parte Virginia* one paragraph after likening discrimination in jury service to racial discrimination in voting. Unfortunately, the Court did not emphasize the parallelism in the language of the Act and the Fifteenth Amendment. Cf. *Franklin v. South Carolina*, 218 U.S. 161, 168 (1910) (upholding key man discretionary scheme because it did not necessarily lead to discrimination "on account of race, color or previous condition").

<sup>182</sup> Babcock, *supra* note 22, at 1165.

<sup>183</sup> DEBORAH RHODE, JUSTICE AND GENDER 48-50 (1989).

<sup>184</sup> Babcock, *supra* note 22, at 1166-74.



pointing out the harm that would flow to women from having to hear evidence in court and being sequestered with male jurors.<sup>185</sup> Other opponents to suffrage, also assuming it went hand in hand with jury service, objected to the possibility that women might vote only for handsome men, in both elections and on juries.<sup>186</sup>

Despite widespread recognition of the link between these two aspects of public service, women's access to juries did not follow the adoption of the Nineteenth Amendment as a matter of course. Activists took three distinct litigation tacts, with varying success. Some argued from plain meaning: jurors vote. Some argued that because state law made jury service dependent on voting eligibility, the Nineteenth Amendment effectively amended state laws. And some argued that if women were qualified for the franchise, they were a fortiori qualified for jury service—that it was nonsensical, constitutionally irrational if you will, to allow women to vote but not serve on juries. While some state courts embraced one or more of these notions, most rejected them.<sup>187</sup> Notably, the United States Supreme Court did not rule on the issue, perhaps in part because the jury trial requirements of the Bill of Rights were not understood at that time to apply against the states.<sup>188</sup> Moreover, the reasoning of these state cases—that exclusion of women does not meaningfully affect the decisionmaking process of juries—was promptly repudiated by the Court in *Ballard v. United States*.<sup>189</sup>

### c. *Twenty-Fourth Amendment*

As noted earlier, the first and unsuccessful efforts to eliminate poll taxes, in all elections, were made in the initial drafting of the Fifteenth Amendment.<sup>190</sup> Ordinary legislation which, like the ultimately enacted Twenty-Fourth Amendment, would have outlawed the poll tax in federal elections was passed in the House in the 77th, 78th, 79th, 80th, and 81st Congresses from the years 1942 to 1950.<sup>191</sup> The

<sup>185</sup> *Id.* at 1167.

<sup>186</sup> *Id.* at 1168.

<sup>187</sup> See, e.g., *McDaniels v. State*, 158 P.2d 151 (Ariz. 1945); *Powers v. State*, 157 S.E. 195 (Ga. 1931); *State v. Emery*, 31 S.E.2d 858 (N.C. 1944); *State v. James*, 114 A. 553 (N.J. 1921); *In re Grilli*, 179 N.Y.S. 795 (Sup. Ct. 1920); *Glover v. Cobb*, 123 S.W. 2d 794 (Tex. 1938); see generally Note, *Jurors—Effect of the 19th Amendment on Qualifications of Jurors*, 21 ILL. L. REV. 292 (1926).

<sup>188</sup> The Sixth Amendment was held to apply to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The grand jury provisions of the Fifth Amendment, however, do not apply to the States. *Hurtado v. California*, 110 U.S. 516 (1884). The Court has never ruled directly on whether the Seventh Amendment's civil jury provisions apply to the States.

<sup>189</sup> 329 U.S. 187 (1946). For a discussion of *Ballard*, see *supra* notes 35-36, *infra* notes 216-21 and accompanying text.

<sup>190</sup> See *supra* note 136 and accompanying text.

<sup>191</sup> See 108 CONG. REC. 17,656 (1962) (statement of Rep. Celler).

Senate did not pass any of these bills, but passed its own anti-poll-tax bill—which the House never passed—in the 86th Congress in 1958.<sup>192</sup>

From 1870 through 1962, when the Twenty-Fourth Amendment was considered and passed by the 88th Congress, the link between poll taxes and racial discrimination was recognized.<sup>193</sup> To the extent that the Twenty-Fourth Amendment is concerned with race discrimination, little need be said here in addition to the earlier discussion of the Civil War amendments. Unlike the Fifteenth, however, the Twenty-Fourth Amendment is not phrased in terms of “race, color or condition of previous servitude,” but rather applies to all poll taxes and other taxes in federal elections.<sup>194</sup> Nor was this phrasing just an imprecise way of dealing with the race issue. Many of the Amendment’s backers expressed concern over the political participation of a group that overlapped with, but was distinct from, the black community: the poor. One supporter responded to the idea that poll taxes were de minimis by saying:

[A] dollar and a half or two dollars is a lot of money to [a] man who only makes two or three hundred a year. Any charge for voting unjustly discriminates against people of limited means. And whatever the amount of money, a citizen of the United States should not have to pay for his constitutional right to vote.<sup>195</sup>

Concern about the political involvement of the poor is relevant to the present discussion because of the way in which supporters of the Amendment spoke out on the invidious discrimination against the poor with respect to political participation. This form of class discrim-

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

<sup>193</sup> One supporter of the amendment in 1962 put it this way:

Recent studies of the U.S. Commission on Civil Rights revealed on the whole that the imposition of the poll tax has not been administered in a discriminatory manner, but the power to do so is resident therein. Past history is replete with discrimination. Present history still records some unjust brakes on the right to vote. For too long a time have the rights of minorities been trammled and trampled upon; 100 years have elapsed since the Emancipation Proclamation. That is a long time. Emancipation has still not been fully achieved. Certainly there should be no longer any procrastination in consigning the poll tax to limbo.

*Id.* at 17,656 (remarks of Rep. Celler).

This sentiment was echoed repeatedly throughout the Congressional consideration period. See *id.* at 17,664, 17,665, 17,667, 17,669 (statements of Reps. Ryan, Stratton, Gallagher, and Halpern) (noting effect of poll taxes on blacks); *id.* at 4585 (remarks of Sen. Yarborough) (same). Indeed, many argued during the debate on the Amendment that because poll taxes were in fact racially discriminatory, Congress could and perhaps should outlaw them with simple legislation under the enforcement powers of the Fourteenth and Fifteenth Amendments. See, e.g., *id.* at 17,669 (remarks of Rep. Halpern).

<sup>194</sup> The broad sweep of the text was not lost on the drafters. See, e.g., *id.* at 17,655 (remarks of Rep. Dingell) (noting breadth of amendment’s application).

<sup>195</sup> *Id.* at 17,667 (remarks of Rep. Gallagher). See also *id.* at 17,662 (remarks of Rep. Joelson and Sen. Yarborough).

ination was called "undemocratic"<sup>196</sup> and even "un-American."<sup>197</sup> Representative Fascell captured this sentiment when he spoke broadly of the need for the political processes to be open to input from the poor:

The payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. . . .

. . . .

We have come a long way in the constitutional history of this great Nation. . . . Certainly, we do not intend to permit money—however insignificant the amount—to remain as a criteria for the freeman to exercise this privilege of participation in his government.<sup>198</sup>

This democratic theme of the Twenty-Fourth Amendment was highlighted two years later in the Supreme Court's opinion in *Harper v. Virginia Board of Elections*,<sup>199</sup> in which the Court extended the anti-poll-tax norm of the Twenty-Fourth Amendment to state elections via the Equal Protection Clause. This theme also harkens back to *Thiel v. Southern Pacific Co.*,<sup>200</sup> a case involving the exclusion of poor persons from juries. The structural similarity between *Harper's* extension of the Twenty-Fourth Amendment norm in the name of democracy on the one hand, and *Thiel's* discussion of the democratic nature of juries on the other, will be taken up below.<sup>201</sup>

#### d. *Twenty-Sixth Amendment*

The Twenty-Sixth Amendment<sup>202</sup> was passed and ratified in 1971. The amendment process gained momentum after the Court in *Oregon v. Mitchell*<sup>203</sup> held, by a 5-4 vote, that a federal statute which prohibited age discrimination in voting against persons over eighteen years of age in elections for state and federal offices could not constitutionally be applied to elections for state offices. Much of the discussion leading up to the passage in Congress of the Twenty-Sixth Amendment concerned the involvement of young persons in the Vietnam War.<sup>204</sup> This discussion is very relevant to the jury service question as well: just as it might be thought unfair for young adults to fight and die in a war

<sup>196</sup> See, e.g., *id.* at 17,657 (Rep. Fascell, quoting Sen. Holland); *id.* at 17,662, 17,663, 17,666 (remarks of Reps. Joelson, Moorehead, and Boland).

<sup>197</sup> See e.g., *id.* at 17,662 (remarks of Rep. Joelson).

<sup>198</sup> *Id.* at 17,657 (remarks of Rep. Fascell).

<sup>199</sup> 383 U.S. 663 (1966).

<sup>200</sup> 328 U.S. 217 (1946).

<sup>201</sup> See *infra* part II.A.3.

<sup>202</sup> See *supra* note 86 for the text of the Amendment.

<sup>203</sup> 400 U.S. 112 (1970) (5-4 decision).

<sup>204</sup> See, e.g., S. REP. NO. 92, 92d Cong., 1st Sess. 6 (1971).

without being able to voice their opposition to it in federal and state elections, so too it might be unfair to prosecute them for evading the draft or protesting the war without allowing their peers to be on juries in those cases. This discussion of fairness is just one of the features of the Twenty-Sixth Amendment ratification process relevant to the present inquiry.

To begin with, note the language of the Amendment. It does not say merely that states shall reduce their voting age to eighteen. Rather, it provides that the right of persons eighteen or older to vote cannot be abridged on account of age: textually, then, age cannot be used as a criterion for withholding the core political right of voting. In this sense, the Amendment self-consciously tracks the language of the Fifteenth and Nineteenth Amendments, with the same intended consequences.<sup>205</sup>

Moreover, in describing the intended effects of the Amendment, its supporters spoke broadly of its impact upon political participation generally. President Nixon's attorney general spoke for his boss by saying:

America's 10 million young people between the ages of 18 and 21 are better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplifies the highest qualities of mature citizenship.<sup>206</sup>

Representative Poff was even more direct about the way in which the amendment was meant to facilitate the fullest possible political participation. Addressing the House and quoting the committee report, he described the Amendment as conferring "a plenary right on citizens 18 years of age or older to participate in the political process, free from discrimination on account of age."<sup>207</sup> Representative Poff

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<sup>205</sup> See 117 CONG. REC. 7539 (1971) (remarks of Rep. Pepper) ("What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th amendment. Therefore, it seems to me that this proposed amendment is perfectly in consonance with those precedents."); *id.* at 7534 (remarks of Rep. Poff) ("What does the proposed constitutional amendment accomplish? . . . [I]t guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting.")

<sup>206</sup> S. REP. NO. 92, 92d Cong., 1st Sess. 4 (1971). See also *id.* (quoting Senator Kennedy's testimony that "the time has come . . . to bring American youth into the mainstream of our political process. To me, this is the most important single principle we can pursue as a nation if we are to succeed in bringing our youth into full and lasting participation in our institutions of democratic government."); 117 CONG. REC. 7546 (1971) (remarks of Rep. Ford) (proposed amendment "affords today's youth a great opportunity to . . . make its voice heard at all levels of Government").

<sup>207</sup> 117 CONG. REC. 7535 (1971) (remarks of Rep. Poff).

went on to explain in an address to his fellow House members that "[t]he 'right to vote' is a constitutional phrase of art whose scope embraces the entire process by which people make their political choices."<sup>208</sup> Thus, noted Poff, unlike the congressional statute that was at issue in *Mitchell*, the Amendment was not limited to particular kinds of voting, but rather applied to nominating activities, and even to voting by which voters make law, as in the case of an initiative.<sup>209</sup> Indeed, the only limitations he saw on the "plenary right" were those which were already built into the Constitution and which the Twenty-Sixth Amendment did not purport to amend—the age limitations for elective office.<sup>210</sup> In Poff's mind, the right to be free from age discrimination in voting—that is, in "choosing"—did not call into question the validity of age requirements for elective office "candidates—those who seek to be a choice."<sup>211</sup> (And here we see how the presumptive linkage between voting and office holding could be broken by clear constitutional text to the contrary.) But with that single, textually-clear exception, the freedom from age discrimination in the right to vote was representative of<sup>212</sup> and subsumed all political voting activities.

Finally, the reasons offered for inclusion of younger persons in the voting process parallel the Supreme Court's Sixth Amendment juror exclusion jurisprudence, which requires that a group bring something distinctive to the deliberative process to be found cognizable. The Senate report on the Twenty-Sixth Amendment observed:

[T]hese younger voters should be given the right to full participation in our political system because they will contribute a great deal to our society. . . . [T]he student unrest of recent years . . . reflects the interest and concern of today's youth over the important issues of our day. The deep commitment of those 18 to 21 years old is often the idealism which Senator Barry Goldwater has said "is exactly what we need more of in the country."<sup>213</sup>

If young people are mature and distinct enough to contribute something special—that is, to add a flavor—to the electoral process, it is hard to see why they would not do the same on juries.

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* See also *id.* at 7540 (remarks of Rep. Wiggins) (proposed amendment does not prevent states "if they wish, [from] follow[ing] the Federal pattern and impos[ing] more restrictive age standards for holding elective office").

<sup>212</sup> Cf. S. REP. No. 92, 92d Cong., 1st Sess. 4 (1971) (statement of San Francisco State University President S.I. Hayakawa that voting has a "symbolic" meaning).

<sup>213</sup> *Id.* at 6; see also 117 CONG. REC. 7539, 7543 (1971) (remarks of Reps. Carney and Matsunaga).

3. *Case Law*

When looking at the Supreme Court case law, we see that the Court has already held cognizable the same groups that enjoy specific constitutional protection against voting discrimination, except for age-defined groups. Blacks and other racial groups have been protected against jury exclusion essentially since *Strauder*.<sup>214</sup>

Each of the sexes has also received judicial protection. The Court's decision in *J.E.B.*<sup>215</sup> last term, holding that Georgia's gender-based peremptories violated the equal protection rights of excluded men jurors, was the latest in a long line of jury cases involving gender. Justice Blackmun's majority opinion rested clearly on equal protection grounds, but it drew its strength from earlier cases that had invalidated the exclusion or underrepresentation of women on other legal theories. The first case protecting women against jury exclusion was *Ballard v. United States*,<sup>216</sup> in which male criminal defendants objected to the lack of women in the jury pool. Acting under its supervisory powers over lower federal courts, the Court reversed the men's convictions because the exclusion of women deprived "the jury system of the broad base it was designed to have in our democratic society."<sup>217</sup> That exclusion of women from juries was constitutionally dubious, and not just bad policy, was made clear by the Court in *Taylor v. Louisiana*.<sup>218</sup>

In concluding that the fair cross-section requirement of the Sixth Amendment was violated by the automatic exemption from jury service of all women—but not men—who asked for it, a procedure which had the effect of underrepresenting women,<sup>219</sup> the *Taylor* Court bor-

<sup>214</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1879).

<sup>215</sup> *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

<sup>216</sup> 329 U.S. 187 (1946).

<sup>217</sup> *Ballard*, 329 U.S. at 195. See also *Babcock*, *supra* note 22, at 1155 (discussing democracy theme in *Ballard*).

<sup>218</sup> 419 U.S. 522 (1975).

<sup>219</sup> The statute at issue in *Taylor* provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to serve. Men were eligible for jury service whether they had declared a desire to serve or not. 419 U.S. at 523. This scheme thus placed a burden upon women simply on account of their gender. But the "opt-in" character of the scheme proved to be of little constitutional importance, as the Court made clear four terms later in *Duren v. Missouri*, 439 U.S. 357 (1979). *Duren* held invalid a scheme in which women but not men could, upon demand, "opt out" of jury service.

The *Duren* Court was correct in concluding that Missouri's system raised the same problems as did Louisiana's in *Taylor*. Even though Missouri's statute did not require women to take any affirmative action if they wanted to serve on juries, it singled out women for different treatment than men. The Missouri scheme, in effect, required women to forgo a benefit—the value of their time—in order to exercise a right of political participation. Men, on the other hand, did not have to make any such choice because they had no "opt out" alternative. It is as if Missouri had offered women a bribe—in the form of free time—not to participate in a governmental process. Needless to say, an explicit monetary bribe to women not to participate, for example not to vote, would be constitutionally im-

rowed heavily from *Ballard*. Indeed, the Court suggested that the *Ballard* decision itself was founded on constitutional principle, and that the only reason *Ballard* did not rely explicitly on the Constitution is that the fair cross-section requirement as a constitutional imperative was not yet understood.<sup>220</sup>

*Taylor* is not the only explicitly constitutional case to wrap itself in the *Ballard* language. As professor Babcock has pointed out, *Ballard* is one of the two major cases the Court cited in *Batson*<sup>221</sup> to support the blending of the defendant's rights with those of the excluded juror. The other case on which *Batson* relied in this regard was *Thiel*,<sup>222</sup> decided the term before *Ballard*, and involving exclusion of another group that is protected against voting discrimination—persons of low socioeconomic status.

*Thiel* was a federal civil case<sup>223</sup> brought by a man who threw himself out of a moving train. In his negligence suit against the railroad, the plaintiff challenged the composition of the jury, which he contended was made up mostly of "business executives or those having the employer's viewpoint"<sup>224</sup> because of a jury selection procedure that discriminated against those of the poorer classes.<sup>225</sup> The undisputed evidence showed that the clerk of the court and the jury commissioner deliberately excluded from the jury lists all persons who worked for a daily wage, because for those persons jury service tended to be more of a financial hardship.<sup>226</sup>

On these facts, the Court reversed the judgment against Mr. Thiel. In language that has been characterized as "ring[ing] with af-

permissible. *But cf.* *Breedlove v. Suttles*, 302 U.S. 277 (1937) (unanimous Court entirely missing this point in upholding tax from which women could escape by declining to register to vote).

The Missouri scheme ultimately harmed women by devaluing their input in the law-shaping process and perpetuating gender stereotypes. The Court also found that the Missouri law deprived criminal defendants of the chance to have women on their juries because the scheme resulted in the systematic underrepresentation of women.

<sup>220</sup> *Taylor*, 419 U.S. at 531. The Court in *Taylor* stated the "very matter" presented for review, that is, the "judgment that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair cross-section requirement cannot be satisfied," was "debated in *Ballard*." The Court went on to describe the result of that debate: "Positing the fair cross-section rule—there said to be a statutory one—the Court [in *Ballard*] concluded that the systematic exclusion of women was unacceptable." *Id.* From there the *Taylor* Court went on to quote *Ballard's* now-famous "flavor" language. See *supra* text accompanying note 36.

<sup>221</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>222</sup> *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946).

<sup>223</sup> *Thiel* was filed initially in state court and removed to federal court on diversity grounds. 328 U.S. at 219.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 221-22.

firmations of the jury's fundamental role in a democratic society"<sup>227</sup> the Court proclaimed:

Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

. . . .

. . . Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid \$3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month. . . . [T]he pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of the jury panels may have to discriminate against persons of low economic and social status. . . . That we refuse to do.<sup>228</sup>

In other words, people who may feel hardship from jury duty—who are the same people who would feel hardship from the imposition of a poll tax—ought not to be left out of this important democratic process. Indeed, the Court suggested, their involvement is so important that they might even have to suffer a little hardship.<sup>229</sup>

*Thiel*, like *Ballard*, was by its terms a supervisory power case.<sup>230</sup> Yet, like *Ballard*, it seems to have constitutional foundations. It is cited prominently, albeit generically, in *Batson* and other post-*Batson* consti-

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<sup>227</sup> Babcock, *supra* note 22, at 1155.

<sup>228</sup> *Thiel*, 328 U.S. at 220, 223-24 (footnote omitted).

<sup>229</sup> See *id.* at 224. In effect, the *Thiel* Court was unwilling to uphold a de facto "opt out at will" scheme for the poor. This inclination foreshadowed its approach in *Duren*, which involved an opt-out scheme for women jurors. In both cases the Court recognized at least implicitly that the class to whom the "option" is given ultimately is injured by its exercise of the option and must be protected by the Court. See *Thiel*, 328 U.S. at 224 ("[We do not want to] breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."); see also *supra* note 219, discussing *Duren*.

<sup>230</sup> Indeed, a year after *Thiel* was decided, a litigant challenging the jury selection procedure in a state court tried to rely upon the principles in *Thiel*, only to be reminded that *Thiel* was inapposite because, among other reasons, it was at that time limited to the federal court supervisory power context. See *Fay v. New York*, 332 U.S. 261, 287 (1947).



tutional cases.<sup>231</sup> Moreover, lower courts have afforded it explicit constitutional stature.<sup>232</sup>

Most important, the logic of *Thiel* suggests a constitutional rule. To see this, consider the 1966 case of *Harper v. Virginia Board of Elections*,<sup>233</sup> in which the Court invalidated a state election poll tax, in spite of the fact that the Twenty-Fourth Amendment—ratified just two years earlier—by its terms did not apply to poll taxes in state elections. (And here the Twenty-Fourth Amendment differs from its right to vote cousins—the Fifteenth and Nineteenth—which apply to state and federal governments alike.) In striking down Virginia's law on equal protection grounds, the Court used language that, like *Thiel's*, is "ring[ing] with affirmation of the [voter's] fundamental role in a democratic society":

[T]he political franchise of voting [is] a fundamental political right, because [it is] preservative of all rights. . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.<sup>234</sup>

Tracking the logic and language of *Thiel*, the *Harper* Court went on:

Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. . . .

. . . .

. . . Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process. . . . To introduce wealth or payment of a . . . fee is to introduce a *capricious or irrelevant* factor.<sup>235</sup>

To say something is irrelevant is, of course, to beg the question—relevant to what? Every law, after all, is perfectly relevant to at least one purpose—that defined by the scope of the law itself.<sup>236</sup> But the

<sup>231</sup> See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). It is interesting to note that *Thiel* was not cited favorably by the majority of the Court in a constitutional case until after the enactment of the Twenty-Fourth Amendment.

<sup>232</sup> See, e.g., *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 817 (5th Cir. 1980) (citing earlier Fifth Circuit case as having "established that the principle of *Thiel* has constitutional foundations in the due process and equal protection clauses of the fourteenth amendment"), *cert. denied*, 450 U.S. 964 (1981).

<sup>233</sup> 383 U.S. 663 (1966).

<sup>234</sup> *Harper*, 383 U.S. at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), and *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)) (internal quotation marks omitted) (citations omitted).

<sup>235</sup> *Harper*, 383 U.S. at 666, 668 (emphasis added) (footnote omitted).

<sup>236</sup> See Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L. J. 123, 128 (1972).

Equal Protection Clause (if it applies) requires, at a minimum, that a law be relevant to a *legitimate* purpose. The question in *Harper*, then, was really whether an objective of limiting political participation of poor persons because, say, they may lack sufficient stake in the system, is constitutionally *legitimate*. What makes such an objective illegitimate is the Twenty-Fourth Amendment, or at least the norm it embodies.<sup>237</sup> In the end, then, although the opinion in *Harper* is built on the Equal Protection Clause, the essence of the Twenty-Fourth Amendment is doing the work.

Whatever the concept of irrelevance entails, the Court held in *Thiel* and *Harper* that wealth is irrelevant to both jury service and voting. If that irrelevance makes wealth distinctions in voting rights unconstitutional, it should do the same with respect to jury service. Indeed, given *Harper*, can anyone imagine a different result if the facts of *Thiel* arose today in a state criminal case (in which the right to a jury would attach)?<sup>238</sup> Or, for that matter, that a "jury tax" would be upheld?

It is of course possible that *Harper* was incorrectly decided. After all, it should be clear from the earlier discussion that *Harper's* reliance on the Fourteenth Amendment in the voting context is historically questionable. But if the result in *Harper* is wrong, it is so only because the Twenty-Fourth Amendment, unlike the Fifteenth and Nineteenth, does not apply to state governments. Accordingly, if *Harper's* extension of the Twenty-Fourth Amendment's norm to state governments were reconsidered, then *Thiel's* rule might also remain limited to federal courts. In any event, the protection from discrimination afforded the poor would—and should—be the same for voting and jury service.

Thus, groups defined by race, gender, and economic class are protected by voting discrimination amendments and insulated from discrimination in jury service. Age-defined groups have secured protection from voting discrimination but have not yet been considered

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<sup>237</sup> See Amar, *supra* note 116, at 1205 (discussing declaratory theory of constitutional law).

<sup>238</sup> But see *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. at 1429 ("Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review," of which wealth would be one.). It seems doubtful that Justice Blackmun intended to suggest in *J.E.B.* that the result in *Thiel* is not constitutionally required. Indeed, in other parts of the *J.E.B.* opinion, Justice Blackmun quoted extensively and approvingly from *Thiel*. See *id.* at 1430 n.19 (reiterating *Thiel's* proclamation that jury service is an "individual" matter and that economic or social classes cannot be excluded). Of course, the Court could try to draw a line—for constitutional purposes—between venire constitution and peremptory challenges. But since both involve state action, any such line would be completely artificial. *J.E.B.'s* contradictory treatment of *Thiel*—like the tension between the equal protection and Sixth Amendment rhetoric within *J.E.B.*, see *supra* notes 41-42, and accompanying text—points up the intellectual sloppiness of the *J.E.B.* opinion and its doctrinal basis.

by the Supreme Court in a jury selection case. When confronted with such a case, the Court should continue to bat one thousand.

### B. Defining Age Groups by Reference to Other Political Participation Provisions in the Constitution

The answer to the second slippery slope, that of defining age-based groups, begins where the answer to the first left off historically, with the Twenty-Sixth Amendment. As noted above, the text speaks broadly against abridgments on "account of age." Thus, if age is an explicit criterion for selection, no definition is necessary. But where systematic underrepresentation is not explicitly age based,<sup>239</sup> the several age points already found in the Constitution's text help solve the definitional problem thus presented. The Twenty-Sixth Amendment refers to persons over eighteen years old; eighteen is thus the lowest end point. The other age provisions in the Constitution—twenty-five for House members, thirty for Senators, and thirty-five for the President—reflect a constitutional judgment that people in these age groups may make different choices with respect to the administration of government.

The history of the framing period bears out the relevance of these age points. Indeed, that some age lines would be drawn for various federal elective office was taken for granted and did not occupy much time or energy at the federal or ratifying conventions. The Framers readily recognized that age affects one's political perspective and participation.<sup>240</sup> In this vein, Joseph Story explained the decision to set the House age minimum at twenty-five rather than twenty-one:

Would the mere attainment of twenty-one years of age be a more proper qualification? All just reasoning would be against it. The characters and passions of young men can scarcely be understood at the moment of their majority. They are then new to the rights of self-government; warm in their passions; ardent in their expectations; and . . . are strongly tempted to discard the lessons of caution, which ripener years inculcate.<sup>241</sup>

To the same effect was Story's observation that a twenty-five-year old's outlook differed from that of a thirty-year old for the purposes of determining an appropriate age for the Senate.<sup>242</sup> For the particular

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<sup>239</sup> On whether underrepresentation is itself actionable, see *infra* part III.

<sup>240</sup> See, e.g., JOSEPH P. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 232 (1833).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 265-66 ("The age of Senators was fixed in the constitution at first by a vote of seven states against four; and finally, by an unanimous vote. Perhaps no one, in our day, is disposed to question the propriety of this limitation . . . . If counsels are to be wise, the ardour, and impetuosity, and confidence of our youth must be chastised by the sober lessons of experience; and if knowledge, and solid judgment, and tried integrity, are to be

skills of the presidency, an even higher age was considered necessary.<sup>243</sup>

Each age group defined by the Constitution is thus different with regard to political participation. Each adds a flavor, to use the Court's rhetoric, to the political process. Nor is the selection of these numbers arbitrary in the way that the Court's "flavor" approach in the Sixth Amendment context might be thought arbitrary. The age groupings are not arbitrary for present purposes<sup>244</sup> because they were chosen by the Constitution, even though the numbers on the constitutional age line may have had an arbitrary quality when chosen.

### C. Locating Jury Service in the Context of Rights of Political Participation—The Special Case of Age

The Constitution's built-in age distinctions regarding elective office make clear that while voting, jury service and office holding are related political rights, age distinctions in each are not *always* treated by the Constitution the same way. But this observation in no way undercuts my claim that the Twenty-Sixth Amendment prohibits age discrimination in jury service against any person eighteen years of age, even if jury service is considered office holding. As noted earlier, the Court has accepted the view of many Fifteenth Amendment framers that, as a general constitutional presumption, the right to be free from discrimination in voting implies a right to be free from similar discrimination in office holding.<sup>245</sup> As Representative Poff understood during the course of the debate on the Twenty-Sixth Amendment, this general constitutional principle may be trumped by specific constitutional provisions relating to elective office.<sup>246</sup> But since the Constitution does not proscribe age qualifications for jurors, the general principle would apply to the "office" of a jury.

And it is no accident that the Constitution provides age requirements for federal elective offices but not for juries. The elective office

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deemed indispensable qualifications for senatorial service, it would be rashness to affirm, that thirty years is too long a period for a due maturity and probation.").

<sup>243</sup> See STORV, *supra* note 240, at 540 ("Considering the nature of the duties, the extent of the information, and the solid wisdom and experience required in the executive department, no one can reasonably doubt the propriety of some qualification of age. That which has been selected, is the middle age of life, by which period . . . opportunities have been afforded for . . . [relevant] experience.").

<sup>244</sup> One might object that these numbers are obsolete because people's life expectancies and maturation patterns have changed since the framing. Whether or not this is true, the objection should fail. Could anyone plausibly suggest that a President needs to be older than 35 to be constitutionally qualified today? Most important, whether or not the Constitution's numbers are dated, we have not yet changed them.

<sup>245</sup> See *supra* notes 140-58, 178 and accompanying text.

<sup>246</sup> See *supra* notes 210-11 and accompanying text.

exception<sup>247</sup> to the "plenary" right to be free from age discrimination in political participation makes sense when we remember, as Senator Edmunds observed over a hundred years ago,<sup>248</sup> that political elective offices are fundamentally different than juries, which were intended to be filled by a much broader class of the electorate. Indeed, juries were to be populated by persons—rotating and common—who would not normally have an opportunity to be elective office holders.<sup>249</sup> Treating jurors differently than elected officials also makes sense in light of the temporary nature of jurors' service. Like early militiamen, jurors are ordinary citizens, not permanent government officials on the government payroll.<sup>250</sup>

Nor does the fact that jurors "make" law mean that they ought to be considered comparable to elective office holders. After all, citizens voting in initiatives are office holders of sorts in that they "make" law. As Professor Eule has put it, "[w]hen the electorate enacts laws it acts not as a sovereign people but as a governmental body" subject to requirements placed on all state actors.<sup>251</sup> And yet, initiative voters are clearly protected by the Twenty-Sixth Amendment.<sup>252</sup> These initiative voters retain Twenty-Sixth Amendment protection not because they are not office holders in some broad sense, but because of the populist character of their office. The same is true of jurors.

In the end, the Court appears to have recognized all of this, and the essentially populist nature of juries has led the Court in *Powers*<sup>253</sup> and *Edmonson*<sup>254</sup> to compare the voting that takes place in a jury room to that which takes place in an election booth, rather than that which occurs on the floor of Congress. And so we come back yet again to the easiest textual and historical argument: jurors vote and voters have traditionally been jurors.

### III

#### APPLICATIONS

The focus of this piece has been the link between jury service and the right to be free from discrimination in voting. But how do these

<sup>247</sup> Whether the exception extends to state elective offices, as suggested by some of the legislative history of the Twenty-Sixth Amendment, *see supra* note 211, is a question I leave for another day.

<sup>248</sup> *See supra* text accompanying note 179.

<sup>249</sup> *See Amar, supra* note 92, at 1187.

<sup>250</sup> *See, e.g.,* TOCQUEVILLE, *supra* note 16, at 250 ("By a 'jury' I mean a certain number of citizens . . . temporarily invested with the right to judge.").

<sup>251</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L. J.* 1503, 1537-38 (1990).

<sup>252</sup> Nor would initiative voters lose Twenty-Sixth Amendment protection if the State paid them nominal compensation comparable to that given to jurors in order to increase the initiative turnout.

<sup>253</sup> *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>254</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

insights play out doctrinally? There are a number of possibilities, which are not mutually exclusive.

#### A. Direct Causes of Action Under the Voting Rights Amendments

The first, most logically coherent, and historically consistent doctrinal means for incorporating the link between jury service and voting would be direct causes of action under the voting rights amendments themselves. Just as the Fifteenth Amendment provided a basis for prohibiting racial discrimination in juries in *Ex parte Virginia*, the Nineteenth, Twenty-Fourth, and Twenty-Sixth should prohibit the consideration of sex,<sup>255</sup> wealth, or age in jury selections. Young adults should be able to sue to vindicate their right not to be discriminated against on the basis of age with respect to jury service, which is part of their “plenary” right of political participation. This right would attach in both state and federal juries or jury-like political bodies, and thus would apply to state grand and civil petit jury composition. Peremptory challenges and systematically discriminatory venire establishment devices would be covered.<sup>256</sup> To the extent that the historically permissible practice of peremptory challenges is thus limited, the limitations are imposed by intervening constitutional developments extending to more persons the meaning of full political citizenship.

This direct voting discrimination amendment approach raises at least two additional issues. The first is the kind of showing of intent a person allegedly excluded on the basis of age would have to make. Causes of action under other voting rights amendments, for example the Fifteenth, have embodied an “intentional discrimination” requirement akin to that imposed on complainants under the equal protec-

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<sup>255</sup> Although I have explored the common ground between jury service and voting primarily through the age-group cases and the Twenty-Sixth Amendment, my conclusions apply with equal force to cases involving the Nineteenth Amendment. Because the terms of the Nineteenth Amendment prohibit discrimination on account of “sex,” men’s voices may not be excluded from the jury box any more than women’s. The Court explicitly recognized in *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), that the Nineteenth Amendment “applies to men and women alike.” Thus, whether or not the Nineteenth Amendment allows for some gender-based jury selection in order to insure that both male and female perspectives are present, *see infra* note 259 and accompanying text, the near-total exclusion of one gender cannot be tolerated. In this way, *J.E.B.* was a much easier case than the Court made it out to be. Unfortunately, the Court alluded to the Nineteenth Amendment only in passing, and does not yet appear to appreciate fully the Amendment’s relevance in the jury context.

<sup>256</sup> The Court has concluded that government participation in enforcing peremptories constitutes state action. *See Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

tion clause.<sup>257</sup> But, as Professor Ortiz has pointed out, in the voting rights context the intent requirement of the Fourteenth and Fifteenth Amendments has been watered down such that the Court has been much more willing to accept a disparate impact theory than in other areas of equal protection law.<sup>258</sup>

What Professor Ortiz observes may be no accident. If political rights are protected by different provisions of the Constitution than are civil rights, one must ask whether the concept of equality embodied in the political rights provisions might be different as well. In other words, the Supreme Court may have hit on something in the earlier jury cases when its focus on flavors, voices and perspectives led it to care about actual inclusion of different groups in the political jury process. And whether or not actual inclusion is *constitutionally required* in the political rights realm, *legislative* attempts to accomplish racial or gender balance in political processes—"affirmative action" in the political rights context, if you will—might be a constitutionally different matter than affirmative action in the civil rights context.<sup>259</sup>

In any event, the appropriate question to ask with respect to any *de facto* or systematic exclusion of young jurors is whether such systematic exclusion would be tolerated with respect to voting; *intent should be treated similarly for voting and jury exclusion*. For this reason, we must ask ourselves whether the Government could, consistent with the Twenty-Sixth Amendment, hold brief voting registration periods only once every four years in the name of administrative convenience. The answer is clearly no. The infrequent (every four years) refilling of jury wheels ought to be equally suspect.<sup>260</sup>

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<sup>257</sup> See *Rogers v. Lodge*, 458 U.S. 613 (1982) (Fifteenth Amendment claim requires same showing of intent as does equal protection claim). Satisfaction of even the most stringent intent requirement would not be difficult for those challenging statutes that explicitly exclude 18 to 21 year olds from jury service, or in those cases where age is acknowledged to be a criterion by the person or institution excluding the would-be juror. For examples of both of these, see *supra* part I.

<sup>258</sup> See Ortiz, *supra* note 25, at 1126-1131. Professor Ortiz argues powerfully that the Court's decisions in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Rogers v. Lodge*, 458 U.S. 613 (1982), indicate that in voting context, the intent requirement is satisfied by a "showing of disparate impact plus a showing that the jurisdiction [involved] has engaged in other types of discrimination in the past. . . . In voting cases, the intent requirement does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the [voting system at issue]." Ortiz, *supra* note 25, at 1127-28.

<sup>259</sup> This possibility is the subject of a forthcoming joint piece on which I am currently at work with my colleague Alan Brownstein.

<sup>260</sup> This is not to say that the government would not be able to justify the refilling scheme on administrative cost grounds. The Court in *Hamling* was certainly correct in stating that there needs to be *some* play in the jury wheel refilling system. But we should be skeptical of such justifications, just as we are skeptical of grandfather clause requirements for voting and other rights, because such requirements may mask an intent to perpetuate the exclusion of certain groups. Cf. *Whitus v. Georgia*, 385 U.S. 545 (1967) (invalidating renewed use of jury selection procedure that had at one time been racially motivated).

Another relevant issue is whether litigants would have third-party standing to raise the claims of persons excluded on the basis of age. The Court has identified three "criteria" that must be satisfied before litigants can raise the rights of others: the litigant must have suffered an injury in fact; the litigant must have a close relation to the third-party; and there must exist some hindrance to the third party's ability to protect his or her own interests.<sup>261</sup> The Court has found these criteria to be satisfied where a litigant in a criminal or civil case raises equal protection claims on behalf of jurors excluded by peremptories.<sup>262</sup> The same should be true when jurors are excluded not by peremptories but rather by systematic exclusions inherent in the venire establishment process,<sup>263</sup> and when the illegality of the exclusion stems not from equal protection concerns but from the specific political participation rights provided for in the Constitution.

### B. Equal Protection

An alternative would be to incorporate the argument of this Article into the equal protection doctrine of juror exclusion. As suggested above, this (and any other Fourteenth Amendment) doctrinal basis is difficult to maintain if textual analysis and historical context are to be given much weight. Of course, these interpretive tools are not always dispositive, and there might be strong *stare decisis* reasons not to eliminate the Equal Protection Clause's application to all political rights. But the Equal Protection Clause's extension to include political access of *would-be jurors* is of recent vintage, and the kind of expectations that might have built up around such an extension are hard to imagine.<sup>264</sup>

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<sup>261</sup> See *Powers v. Ohio*, 499 U.S. 400, 412-14 (1991).

<sup>262</sup> See *id.* (involving criminal defendant); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (involving civil litigants).

<sup>263</sup> The only criterion that could be affected by the means of juror exclusion is the excluded juror's ability to litigate her rights. As the Court in *Powers* pointed out, *would-be jurors* would have difficulty obtaining injunctive or declaratory relief with respect to the threat of illegal peremptories under modern ripeness doctrine. *Powers*, 499 U.S. at 414-15 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-110 (1983)). But jurors excluded by laws governing the venire establishment would lack adequate incentive to sue, see *Powers*, 499 U.S. at 415, and are thus unlikely to vindicate their rights, see *id.*, such that third-party standing is appropriate.

<sup>264</sup> Results reached under equal protection might be justified under other legal theories. For example, the one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), might obtain under a sophisticated reading of the Republican Guarantee Clause. U.S. CONST. art. IV, § 4. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980). That the Republican Guarantee Clause might guard against certain kinds of voting discrimination (e.g., geographical) that are not protected by a voting discrimination amendment does not necessarily have implications for jury service. The Republican Guarantee Clause might be read to ensure broad-based participation only when people are voting on their state constitution—their own form of government—and not necessarily when people are choosing ordinary laws or ordinary lawmakers. See Akhil Reed Amar, *The Central Meaning of Republi-*



In any event, to the extent that the Court might persist in using equal protection in this context, equal protection law at the very least ought to take account of the norms of the voting discrimination amendments. This means, for example, that all jury exclusion on "account of sex" is constitutionally illegitimate, regardless of how equal protection law treats "discrimination" against men outside the political context. It means also that traditional equal protection rationality review, which the Court has applied to laws that draw wealth and age lines, would have to take account of the Twenty-Fourth and Twenty-Sixth Amendments' elimination of wealth and age as "legitimate" bases on which to distinguish persons with respect to the exercise of political participation rights.<sup>265</sup>

The Equal Protection Clause applies in both state and federal courts, and to all stages of the jury selection process, including peremptories. The intent and standing analyses of equal protection claims of excluded would-be jurors should be identical to that discussed above in the context of the Fifteenth and Twenty-Sixth Amendments.

### C. The Concept of a "Jury" Itself in the Constitution

A final place to incorporate the insight this Article has tried to develop is in the concept of a "jury" itself, as that term is used in the Bill of Rights. A body in which groups have been excluded on the basis of race, sex, wealth, or age is not a constitutional jury at all, the argument would run.

As noted above, the Court has already held that persons raising Sixth Amendment claims need not demonstrate that the underrepresentation of the cognizable group be purposeful, but only that the exclusion be inherent in the process. Thus, the intent requirement here may be easier to satisfy than in the context of a Twenty-Sixth Amendment or equal protection claim.<sup>266</sup> The claim under this

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*can Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994). Jury service is akin to ordinary day-to-day voting—the running of the very government set up by the state Constitution.

<sup>265</sup> The analysis offered here would not, of course, call into question age distinctions drawn outside the context of political participation, for example, in the liquor consumption context.

<sup>266</sup> *But see supra* notes 257-58 and accompanying text (discussing argument that equal protection and Fifteenth Amendment intent requirements can sometimes be satisfied by little more than a disparate impact showing). It is also worth reiterating here that a person raising a Sixth Amendment claim does not automatically prevail upon a showing of systematic exclusion. Such a showing merely requires the State to demonstrate a strong justification. So, for example, an exemption from jury service for all college students who could not afford to miss class *might*, if it were narrowly tailored, be legitimate notwithstanding the underrepresentation of young adults that would result. *Cf. Duren v. Missouri*, 439 U.S. 357, 370 (1979) (suggesting that a narrowly tailored domestic caregiver exclusion from

“definition of a jury” approach would belong to the litigants in the “juryless” proceedings, and could be raised only by them.<sup>267</sup>

This approach is limited by the fact that the right to be tried by a “jury” within the meaning of the Sixth Amendment has been held not to have any implications for peremptories.<sup>268</sup> Moreover, the fact that the grand jury provisions of the Fifth Amendment and the whole of the Seventh Amendment have not been applied against the States may create some complications. One could argue that because states need not provide grand juries or civil petit juries under the Constitution at all, they can provide bodies that do not measure up to the Constitution’s inclusive definition of a jury. But this argument is far from an obvious winner. After all, states might not have to permit initiative process voting, and yet if they do they cannot leave out blacks, women, poor persons, or eighteen year olds.<sup>269</sup>

#### CONCLUSION

Rights of political participation are logically and historically distinct from, and in some ways more basic than, individual freedoms from government intrusion. The criteria by which a person or group may be excluded legitimately from partaking in the “[second] most significant opportunity to participate in the democratic process”<sup>270</sup> are thus of obvious importance to our constitutional democracy. Yet we lack a coherent theory about which groups count and why. We need to do better, and the constitutional text, structure, history, and judicial interpretations provide more help to us than we currently recognize.

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jury service might be valid notwithstanding the underrepresentation of women on juries that might result).

<sup>267</sup> In such cases, there would be no need for third party standing, inasmuch as the possessors of the right have adequate incentives to raise it. In federal criminal cases, however, Article III may require a constitutionally adequate jury, regardless of the desire of the criminal defendant to waive the Sixth Amendment right. *See Amar, supra* note 92, at 1196-99.

<sup>268</sup> *Holland v. Illinois*, 493 U.S. 474 (1990). *See also Hernandez v. New York*, 500 U.S. 352 (1991) (insisting that defendant challenging peremptories prove intentional exclusion of minority jurors).

<sup>269</sup> *Cf. Rose v. Mitchell*, 443 U.S. 545, 565 (1979) (suggesting that use of race in selection of state grand jury foreperson would be actionable); *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (“[I]f a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury.”).

<sup>270</sup> *Powers v. Ohio*, 499 U.S. 400, 407 (1991).