ARTICLE

RESTORING THE DELIBERATIVE IDEAL: THE JURY AS A FRAMEWORK FOR REFORMING CONGRESS

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ABSTRACT

Members of Congress must fulfill two, often competing functions. They are expected to represent their constituents' views and opinions, on the one hand, while simultaneously engaging in thoughtful debate over the national interest. For largely electoral reasons, Congress now skews toward meeting its representative purpose, while the deliberative ideal suffers. Although many efforts to reform Congress implicitly recognize this dichotomy of roles, until reform proposals explicitly address these competing obligations, they cannot succeed in solving the problems facing Congress. Perhaps more importantly, understanding this divide in Congress's functions allows us to look to the only other collective body facing a similar demand to be both representative and deliberative: the jury. This Article explores the historical, political, and functional link between the jury and Congress, and it draws from the rules surrounding the jury broad lessons that ought to guide future efforts at reforming Congress.

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I. INTRODUCTION

Congress remains in the throes of crisis. Public confidence in the people's branch stands at an all-time low.[1] The legislature appears incapable of resolving almost any issue confronting the nation. The most it seems Congress can accomplish is to kick the can down the road in hopes that internal dynamics will shift, eventually allowing the legislature to come up with long-term approaches.

Scholars, commentators, and elected officials observe these problems with increasing frustration and disdain, and they often propose prescriptions for Congress's ailments.[2] The ideas put forward are often concrete, worthwhile, and could reasonably be expected to go some of the way towards improving how Congress operates. But, almost uniformly, these reforms go nowhere.[3]

We cannot blame Congress alone for the present situation. We expect lawmakers to fulfill two, often competing, functions. First, congressmembers must represent their constituents' views in the legislative process. The legislature is to be a "mirror" of the larger society.[4] At the same time, we demand—indeed, the Framers designed our Constitution to reinforce—that Congress will act as a deliberative body, giving careful consideration to the national interest and acting through thoughtful debate.[5] The crux of the current crisis gripping Congress rests on the fact that elected members' representative instincts overwhelm the deliberative pulse that effective lawmaking requires.

Most congressional reform proposals tend to address just one of these two core responsibilities, while only implicitly—if at all—addressing the dichotomy between a legislator's roles.[6] Instead,

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1. *E.g.*, Aaron Blake, *Congress's Approval Rating Hits New Low: 9 Percent*, WASH. POST (Nov. 12, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/11/12/congresss-approval-rating-hits-new-low-9-percent [https://perma.cc/ZK4U-FS8B]; David A. Fahrenthold & Sarah Khan, *Stakes Are Rising, and Public Disdain of Congress is Right Behind*, WASH. POST (July 19, 2011), https://www.washingtonpost.com/politics/stakes-are-rising-and-public-disdain-of-congress-is-right-behind/2011/07/19/gIQAFtDlOI_story.html [https://perma.cc/4JPH-ZFPZ].

2. *See, e.g.*, *Congressional Reform*, CONGRESSMAN REID RIBBLE, http://ribble.house.gov/issue/congress, (last visited Oct. 2, 2016); H.R. 4335, 114th Cong. (2016); H.R. 3480, 112th Cong., (1st Sess. 2011) (discussing H.R. 3480 and its legislative history).

3. Mark Strand, *Here's How to Reform Congress to Make It Actually Work*, TIME (Sept. 30, 2016), http://time.com/4514717/congressional-reform/ [[https://perma.cc/S46A-WESW]]; Sarah A. Binder, *Going Nowhere: A Gridlocked Congress*, BROOKINGS INSTITUTION (Dec. 1, 2000), https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress/ [https://perma.cc/2GUR-34JJ].

4. Jack N. Rakove, *From the Old Congress to the New*, *in* THE AMERICAN CONGRESS 6, 7 (Julian E. Zelizer ed., 2004).

5. *See infra* notes 119–32 and accompanying text.

6. *See, e.g.*, sources cited *supra* note 2.

we must explicitly acknowledge the fact that we expect members of Congress to serve these two, often competing, functions. Doing so will better inform efforts to resolve congressional dysfunction.

Nevertheless, this Article's purpose is not to offer a new proposal for addressing Congress's problems. In recognizing that little chance currently exists to actually enact meaningful changes to how Congress operates, the goal here is to shed new light on the issues facing Congress and to offer an as-of-yet unexplored framework for *future* efforts to resolve congressional dysfunction. And importantly, recognizing the representative and deliberative purposes for Congress opens up an area of comparison from which we can draw valuable lessons: juries.

Juries stand as the people's pulse within the judiciary.[7] In fact, as many have noted, the jury is perhaps the most democratic institution of American government.[8] Moreover, the jury—unlike any other collective institution in American government—faces the same challenge of Congress to satisfy the dual requirements of deliberation and representation.[9] Yet, despite the jury's democratic force, scant attention has been paid to how we might look to the jury to help frame legislative reform. This, then, stands as the Article's primary objective and contribution: to demonstrate how the rules surrounding juries provides a model for thinking about reforming Congress.

First, in Section I, I set about supporting my claim that looking to the jury and its rules to consider ideas for addressing Congress's problems makes sense. I review the historical, theoretical, and functional roles of the jury to develop the strong connection between the jury and our national legislature.

More than any other similarity, though, the most important rests with the fact that both institutions grapple with both the representative and deliberative ideals. Jurors—seekers of truth, but also representing a cross-section of the community—and members of Congress—working in the national interest, while serving local needs—must contend with these responsibilities that are often in tension. I discuss these concepts in detail in Section II.

After laying the foundation for looking to the jury as a source for framing congressional reform, I turn to discussing the relevant rules surrounding the jury. I begin by addressing those

7. *See infra* notes 12–28 and accompanying text.

8. *See* Vikram Davia Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 205, 221, 248–49 (1995) (noting members of the Supreme Court and Tocqueville's descriptions of the jury as a democratic institution).

9. Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 322–24 (2006).

requirements that promote the jury's representative purpose before turning to the rules that courts and legislatures impose that push the deliberative ideal.

Finally, in Section IV, I draw from these juror-centric rules the broad lessons that help create a framework for congressional reform. Even here, I intentionally avoid offering a blueprint for reform, choosing instead to reflect on possible types of reforms that our jury rules suggest might help push Congress toward achieving a better balance between its representative impulses and the need for a more deliberative process. I do offer several general ideas about the shape future reforms might take—and many of these will no doubt prove controversial. But now is less the time to grapple with concrete proposals and instead the time to consider the larger problems facing Congress and what objectives we should seek when weighing reforms.

In other words, the question I am seeking to answer here is not, "What should we think about congressional reform?" but rather, "How should we think about congressional reform?" And the jury, as an institution in American government, provides valuable insights in answering that question.

II. THE JURY'S CONNECTION TO CONGRESS

Looking to the jury as a source of possible congressional reforms may, at the outset, seem peculiar. After all, there exist many important differences between the two, as I will discuss below. Nevertheless, those obvious distinctions mask an underlying commonality that makes for a valuable comparison between the two institutions.

A. Framers' Theoretical View of the Jury

Recent affirmations of the jury's democratic significance focus more on drawing comparisons between voting and serving on a jury than on similarities between the jury and Congress as institutions of government.[10] While the analogy between voting and jury service is apt and powerful, it is different than the link I seek to draw between Congress and the jury. Instead, the jury itself has long been viewed as an institution of self-government, along the lines of other representative bodies.[11] Indeed, from the earliest days of this nation, the Framers recognized the invaluable role that the jury plays in preserving the separation of powers and in protecting citizens from arbitrary governmental

10. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991). *See generally* Amar, *supra* note 8.

11. Amar, *supra* note 10, at 218–21.

action.[12] Moreover, the jury represents the democratic pulse that beats within the judiciary. As Anti-Federalist Maryland Farmer described it, "[t]he trial by jury is—the democratic branch of the judiciary power."[13] Indeed, Jefferson famously went so far as to declare that "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[14]

The reason for this well-accepted view rested precisely on the fact that the jury is seen as performing an important function in the administration of the government, beyond simply protecting individual liberty. Federal Farmer, the leading Anti-Federalist at the time of the Constitution's ratification, wrote that, "[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."[15]

In fact, during the founding era, "[a]nalogies between legislatures and juries abounded."[16] Juries secured "to the people at large, their just and rightful controul in the judicial department."[17] Theorists during the founding era likened the jury to the "lower judicial branch"[18] within the judicial, labeling it "the democratic branch of the judiciary power—more necessary than representatives in the legislature."[19]

Further, it was the absence of sufficient protections for the trial by jury in the Constitution as originally proposed that provided the greatest line of attack against the document's ratification.[20] And, as Akhil Amar has written about extensively, the jury is a central feature of the Bill of Rights, in large part because the Anti-Federalists did not believe that the size of the legislature would allow it to stay truly representative.[21] It was

12. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–85 (1991).

13. *Essays by a Farmer*, *in* 5 THE COMPLETE ANTI-FEDERALIST 5, 38 (Herbert J. Storing & Murray Dry eds., 1981).

14. Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *reprinted in* 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

15. Letter from the Federal Farmer to the Republican XV (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 315 (Herbert J. Storing & Murray Dry eds., 1981) [hereinafter Letter from the Federal Farmer XV].

16. Amar, *supra* note 12, at 1188.

17. Letter from the Federal Farmer XV, *supra* note 15, at 320.

18. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (Yale University Press 1950) (1814).

19. *Essays by a Farmer*, *supra* note 13, at 38.

20. Amar, *supra* note 12, at 1183.

21. *Id.* at 1140.

necessary, therefore, to preserve the role of the jury as a means to secure the important democratic role generally thought to belong to the legislature. The democratic purpose was about more than ensuring that the jury would remain a "traditional bulwark of individual rights," but also maintaining the proper "role of the people in the *administration* of government."[22]

Writing about the jury four decades after the Constitution's ratification, Alexis de Tocqueville noted the role the jury played in American government. He said that, "[The jury] places the real direction of society in the hands of the governed."[23] Indeed, "the jury," he wrote, "is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated. . . . He who punishes the criminal is . . . the real master of society."[24]

The Court and legal scholars have also recognized the important governing responsibilities of the jury. In *Powers v. Ohio*, the Court stated 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."[25] Long before *Powers*, the Court had recognized the role that the jury played in the enforcement and administration of justice,[26] and protected the right as one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[27] This view of the jury as an institution finds support among scholars who focus on the historical importance of the jury, as well as those who address the current role the jury serves in our government.[28]

This historical view of the jury demonstrates that the Framers considered the jury to serve an important representative function, on par with that of the national legislature. Again, this similar understanding helps justify turning to the jury for insights into institutional congressional reform.

B. Legal History of the Jury

In addition to the jury serving a democratic function akin to that of the national legislature, the jury as an institution has also

22. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 19 (1981).

23. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Phillips Bradley rev. ed., Francis Bowen rev. ed., Henry Reeve trans., Alfred A. Knopf 1987) (1835).

24. *Id.*

25. 499 U.S. 400, 407 (1991).

26. Balzac v. Porto Rico, 258 U.S. 298, 310 (1922).

27. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

28. *See, e.g.*, Amar, *supra* note 12, at 1132–33; Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1243–44 (2014).

gone through important legal transformations that mirror those of Congress. As the Court stated long ago, "[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."[29]

The starting point of the shared legal trajectory begins with the recognition that the jury, much like Congress, was expected to be a white male affair.[30] Just as Congress did not seat its first nonwhite member until 1870, juries were almost exclusively white well into the late-nineteenth century.[31] It took the Civil War Amendments to reduce the legal obstacles to African Americans voting and serving in the national legislature, as well as serving on juries.[32] But even as the de jure rules restricting minority voting and representation in Congress disintegrated, de facto rules—both subtle and explicit—served effectively to block minorities from political participation.[33] The same de facto efforts kept African Americans off juries, too.[34]

Moreover, just as it required judicial—and, later, congressional—intervention to secure African Americans' place in voting booths and the halls of Congress, it was not until the Supreme Court turned to the Fourteenth Amendment to enforce more robustly constitutional protections against racial bias in jury selection that African Americans enjoyed a true right to serve on juries. The Court struck down a facially discriminatory jury service statute in 1879, in *Strauder v. West Virginia*, and declared, "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[35] *Strauder* involved a facially discriminatory juror exclusion policy.[36] In 1935, the Court addressed non-facial discrimination, and concluded that a party could rely on "long-continued, unvarying, and wholesale exclusion" of a race to make out a case of unconstitutional

29. Glasser v. United States, 315 U.S. 60, 85 (1942).

30. Akhil Amar, *Opening Remarks*, 55 WM. & MARY L. REV. 729, 734 (2014).

31. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 105–12 (1994).

32. *See* Amar, *supra* note 8, at 227.

33. Alexander Athan Yanos, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1822–23 (1992) ("Congress enacted the Voting Rights Act in 1965 in an attempt finally to enfranchise the majority of African-American citizens. . . . [T]he Act's primary purpose was to eliminate the countless physical barriers t[h]at kept voting a white privilege in the South . . . .").

34. ABRAMSON, *supra* note 31, at 108–12.

35. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

36. *Id.* at 310.

conduct by the state in jury selection.[37] For the next forty years, the Supreme Court's docket included an average of one juror-selection discrimination case per year, with the Court typically ruling in favor of the criminal defendant challenging the state's jury process.[38] During this period, the Court developed the cross-sectional ideal, referring to the need to make the jury "a body truly representative of the community."[39]

Much like it took women longer than African Americans to secure their right to vote and to first be elected to Congress, sex discrimination prevented women from regularly serving on juries late into the twentieth century. In fact, not until the 1940s did a majority of states even permit women to serve on juries,[40] and even as late as 1975, many states drafted men to serve on juries, but required women to volunteer. [41] Finally, in *Taylor v. Louisiana*, the Court struck down state jury systems that discriminated on the basis of gender.[42]

The lofty anti-discrimination rhetoric of the Court's jury selection jurisprudence has been undermined by the need to grapple with the same thorny questions that arise in the election law context, as well. For example, the Court has consistently rejected arguments that jurors enjoy a constitutional right to a jury that reflects the demographics of their community, just as the Court rejects claims of proportional representation in Congress. [43] Instead, the Court has limited its jury-selection jurisprudence to ensuring that the jury pool—the venire—represents a cross-section of the community, not to ensuring the representatives of each petit jury.[44]

The goal, though, is not to resolve this seeming contradiction in the Court's jury-selection jurisprudence. Instead, the point here is that the very reason why the Court has been faced with these types of questions when dealing with the legal rules surrounding jury selection is because the jury itself is a representative body, functionally similar in many ways to Congress. Voting rights and redistricting cases matter because they determine who will act as citizens' representatives in

37. Norris v. Alabama, 294 U.S. 587, 592, 596–97 (1935).

38. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 54 (1977).

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

40. Martha Craig Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After* Taylor v. Louisiana, 43 TENN. L. REV. 1, 53 (1975).

41. *Id.* at 59–61.

42. 419 U.S. 522. 524–25 (1975).

43. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 75–76 (1980); Virginia v. Rives, 100 U.S. 313, 322 (1879).

44. ABRAMSON, *supra* note 31, at 124–25.

Congress. The Fourteenth Amendment jury selection cases are important for a common reason: they determine who will serve as representatives of the people in the judiciary.[45]

The shared legal history and trajectory lend further support, therefore, to the underlying premise of this Article: the jury as an institution can provide important insights when considering congressional reforms.

C. Functional Role of the Jury in American Government

Congress and the jury also share several functional features that makes the latter ripe for direct comparisons to the former. First, consider the process both institutions rely on to reach outcomes. After a jury's seating, it hears opening statements from proponents of both sides, listens to witnesses—some experts, some lay, some biased, some neutral—hears closing statements and instructions, deliberates internally about the correct outcome, and then reaches a decision, or not.[46] With a few changes to the terms, the preceding sentence also describes the congressional process. When considering a piece of legislation or a nomination, Congress hears from supporters and opponents in opening remarks, considers testimony from witnesses, debates the merits of the proposal under a set of prescribed rules, and then reaches a decision, or not.[47]

These featured elements of the decision-making process are similar largely because of the common task the two bodies perform. Congress's role is to consider a problem placed before it, often by others directly affected by the issue, and to weigh the best course of action, based on the available facts and a policy judgment about the merits of the legislation or nomination. A jury is called together to consider a matter placed before it by others, and to determine the correct outcome based on the facts and the law, and often based on a judgment about the merits of the arguments of the competing sides. Moreover, just as significant differences of opinion exist as to the proper bases for congressional decision-making, the same is true for juries. Congressmembers undoubtedly rely on factors that many, if not most, outsiders may consider illegitimate—campaign contributions, logrolling, electoral ambitions, for example.[48] So, too, do jurors rely on factors, such as morals, stereotypes, wealth,

45. Taylor, 419 U.S. at 528–30.

46. Robert P. Burns, *The Jury as a Political Institution: An Internal Perspective*, 55 WM. & MARY L. REV. 805, 814–17 (2014).

47. H.R. DOC. NO. 110-49, at 13, 25–28 (2007).

48. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 46–61 (1974) (discussing how elections impact legislative decision-making).

and emotions, which are widely discredited as appropriate factors to weigh.[49]

As I will discuss in greater detail later, once Congress and a jury reach an outcome, the law affords the decision considerable deference, particularly with concern to any factual findings.[50] Take, for example, how a court is to assess whether the Commerce Clause[51] validates a congressional action. The court does not seek to ascertain whether a particular activity "substantially affects" interstate commerce. Instead, the court is to defer to legislative findings and only determine whether a rational basis exists for Congress's determination that an activity substantially affects interstate commerce.[52] The same deference comes when Congress relies on the Necessary and Proper Clause[53] for a legislative enactment, requiring only a rational relationship between the means selected by Congress and the enumerated power.[54] Indeed, there are countless ways in which courts defer to congressional findings, largely out of due respect for a coordinate branch.

The same is true for juries, of course, with the proposition being inscribed into constitutional text.[55] As the Supreme Court long ago announced, "[i]f, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the [verdict] . . . can be justified . . . and the judgment cannot be disturbed."[56] The premise of granting considerable deference to juries' decisions has "gone unchanged over the years," and federal and state courts alike all shield a jury's factual findings from meaningful judicial review.[57]

Additionally, this refusal to upset congressional and jury decision extends even to those circumstances presenting procedural flaws in the way in which the two institutions deliberated.[58] Not only is judicial review of jury and

49. *See* ABRAMSON, *supra* note 31, at 4.

50. *See infra* notes 241–69 and accompanying text.

51. U.S. CONST. art. I., § 8, cl. 3.

52. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).

53. U.S. CONST. art. I., § 8, cl. 18.

54. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 605 (2004).

55. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

56. R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 661 (1873).

57. Blake v. Pellegrino, 329 F.3d 43, 47 (1st Cir. 2003).

58. Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 493, 545 (1994) (describing "the Court's persistent refusal to embrace judicial review of the

congressional findings treated similarly, the explanation for the deference reflects a common rationale. Courts do not want to second-guess congressional and jury determinations out of respect due representative institutions and for the need for stability in the law.[59]

D. Political Function the Jury Serves

Finally, it is important to note that both Congress and the jury fulfill political functions that help shape the framework for institutional reform. The notion of the jury as a political institution is not new.[60] Indeed, scholars have paid considerable attention to what it means to say that the jury is a political institution.[61] Some of that work relates back to what I have already discussed above regarding the jury's responsibility to serve as a check against the other branches—to "thwart the excesses of powerful and overly ambitious government officials."[62] Moreover, simply through its existence, the jury performs the important political function of lending legitimacy to the judicial process generally, as well as to specific verdicts. This legitimacy stems in part from the representative nature of the jury, as well as the check the jury plays on the other branches.[63]

Beyond that, the jury serves additional "political" functions. As political theorist Hannah Arendt has described it, in political forums, we engage in the "processes of persuasion, negotiation, and compromise, which are the processes of law and politics."[64] The jury certainly performs these political roles as much as Congress or any other legislative body. Studies of jury behaviors reinforce the perception that the jury stands as a political institution in American government.[65] And, of course, the very act of weighing and balancing various considerations against competing values is a political statement more than simply a legal conclusion. Thus, the jury offers a "political wisdom," that commands deference and respect.[66]

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legislature's deliberative process"); Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 301–02 (2007) (describing judicial deference to jury verdicts).

59. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 222 (2014) (stating that deference provides "stability").

60. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 3 (1966).

61. *Id.* at 4 & n.2.

62. Amar, *supra* note 8, at 218.

63. Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837, 850 (2014).

64. HANNAH ARENDT, ON REVOLUTION 86–87 (Penguin Books 1965) (1963).

65. KALVEN, *supra* note 60, at 236–378.

66. *See* Sheldon Wolin, *Political Theory as a Vocation*, *in* MACHIAVELLI AND THE

One way in which this is most true, and obvious, is by allowing the jury to render a verdict without having to explain and justify its reasoning. As such, the jury can take into consideration more than just the facts and law, and can instead render policy-based judgments. This power dates to well before this nation's founding. In fact, as John Langbein has documented, juries in the Middle Ages often tailored their verdicts to affect their political judgments about the appropriate sentence a defendant should receive.[67] Today, nullification, in which a jury acquits a defendant in disregard of a judge's instructions and contrary to the jury's factual findings, represents perhaps the most written about—and controversial—notion of juries performing a political function.[68]

But focusing on nullification misses the more subtle ways in which juries actively make political judgments—indeed, are delegated this responsibility by Congress and the courts. For example, we task juries with the authority to decide damages, and from § 1983 actions to product liability claims, determining these monetary awards constitutes political decision-making just as much as setting caps to those awards is a political decision.[69] In short, juries often perform a task we think of as largely reserved to lawmakers: weigh and balance a variety of factors and considerations against one another, often choosing between competing values. Thus, despite "aspects of traditional legal formalism [a jury] is finally asked to make what we may fairly call a political judgment about what is most important in the case."[70]

Jury decisions also indirectly affect society much like legislative enactments. Prosecutors, law enforcement, and corporations (in the civil context) alter their behaviors in response to jury decisions.[71] Thus, "juries provide signals or markers by which legal actors form estimates of what other juries will do and on that basis make decisions and formulate policies about claims, offers, settlements, and trials, and even about preclaim investments in safety, disclosure, and so forth."[72]

NATURE OF POLITICAL THOUGHT 23, 44–45 (Martin Fleisher ed., 1972).

67. *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170, 1194 (1996) ("The early jury was self-informing.").

68. *See generally* Teresa L. Conaway et. al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004).

69. *See* William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149, 1153 (2014) (noting that politically sensitive decisions can be delegated to jurors).

70. Robert P. Burns, *The Jury As a Political Institution: An Internal Perspective*, 55 WM. & MARY L. REV. 805, 806 (2014).

71. Carbone & Plaut, *supra* note 63, at 844.

72. Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT:

In other words, in addition to lending a "local voice to laws that have been legislatively enacted,"[73] juries act as regulators, to fill in legislative gaps and shape our legal understandings.[74] Thus, it is fair to say that juries work in conjunction with the other representative institutions to make, effectuate, and legitimize the law.

E. Acknowledging the Differences Between the Jury and Congress

No person can read the above account of the many similarities between juries and Congress without also wondering about the obvious differences, too. The question is whether those differences significantly disrupt the ability to draw upon jury rules to help frame congressional reform. The answer, I believe, is no. The theoretical, historical, and functional similarities are too fundamental to overcome. And so, while it is certainly true that concrete proposals for reforming Congress must take account of the differences between that institution and juries, the rules surrounding juries still provide valuable insights into framing such reform.

Still, three key differences must be acknowledged before moving forward. First, jurors, unlike members of Congress, serve for one trial, are unelected, and have no need for accountability to the constituents they represent. Second, jurors decide facts, while legislators set policy and make law.[75] Finally, juries—at their largest—are generally only twelve people.[76] Congress, obviously, is significantly larger. But does this difference in size limit the lessons one can draw from juries?

The first point seems the most relevant in considering the applicability of jury rules to congressional reform. The accountability that elections bring drives many of the actions by members of Congress.[77] Or, put slightly differently, the desire to be reelected affects legislators' behavior in ways.[78] Jurors,

ASSESSING THE CIVIL JURY SYSTEM 61, 61 (Robert E. Litan ed., 1993).

73. Carbone & Plaut, *supra* note 63, at 843.

74. Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1061–65 (2014).

75. Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962) ("[J]urors decide the facts . . . ."); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 867, 879–80 (1993) (discussing the balance of court interpretation and "the legislature's law-making responsibility").

76. Adam M. Chud & Michael L Berman, *Six-Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743, 747 (2000).

77. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 46–62 (1974) (discussing legislators' focus on reelection).

78. *Id.*

obviously, do not need to worry about reelection. But that does not change the fact that jurors represent their fellow citizens while serving on the jury. Moreover, as I will discuss when I turn to the lessons and possible concrete reforms, studying jury rules helps inform how we accentuate the key features of a decision-making process that we want to promote—and that cuts across multiple bodies, including Congress. Additionally, while any one jury serves for only a single trial and then disbands, the jury as an institution plays a larger role in our system of government. I am not seeking to draw upon the concrete and specific rules that any one court imposed on any single jury, but instead to use the legal system's jury-centered rules to help frame how to promote a balanced representative and deliberative ideal within Congress.

Second, yes, juries are generally asked only to make findings of fact.[79] Congress, as we know, sets law and policy through legislating. But as many scholars have already noted, this well-worn notion of a divide between judicial findings of fact and legislative fact-finding is largely a fiction.[80] Congress makes law by finding facts.[81] And though the outcomes juries and Congress produce are certainly different in type, we can still draw from juries valuable lessons for framing how to reform Congress.

There is much literature on how the size of a decision-making body affects how it operates.[82] It is reasonable, therefore, to question whether the size discrepancy between juries and Congress renders many of the lessons drawn from juries inapplicable. That literature certainly supports the idea that once a group grows beyond a certain number, decision-making becomes more challenging.[83] But nothing in the literature suggests that it is impossible or unwise to draw lessons from a small group that we seek to apply—in some form—to a larger group. In fact, I would argue that it is paramount that we take some of the strategies that work to enable juror deliberations to frame our understanding of how to reform Congress to better serve our deliberative interests.

In the end, each of these differences certainly affects *how* the lessons I draw from jury rules can be applied in the context of

79. Juries, however, used to be tasked with finding not just the facts, but the law, as well. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 36–37 (1986).

80. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172–80 (2001) (describing the "illusory fact-law distinction").

81. *Id.* at 1177–80.

82. *See, e.g.*, Samuel T. Shelton, *Jury Decision Making: Using Group Theory to Improve Deliberation*, 34 POL. & POL'Y 706, 710 (2006).

83. *Id.*

reforming Congress. In other words, it remains critical to account for these differences when creating specific reforms, but we can still use the jury as a lens through which to consider how we want Congress to deliberate.

III. THE SHARED REPRESENTATIVE AND DELIBERATIVE STRUGGLE

The previous section presented the many similarities between the jury and Congress. For my purposes, the single most important shared element—one warranting an entire section devoted to it—is the tension both institutions grapple with between fulfilling representative functions while acting as an independent, deliberative body.

For over two centuries, scholars and public officials have questioned the proper role of the legislator.[84] While drafting the Constitution, the Framers recognized the dual responsibilities of Congress: to serve as the conduit for the people's views and to reach decisions in the best interest of the whole nation through rigorous discussion and debate.[85] As Justice Kennedy observed, "[o]fficeholders face a dilemma inherent in the democratic process and one that has never been easy to resolve: how to exercise their best judgment while soliciting the continued support and loyalty of constituents whose interests may not always coincide with that judgment."[86]

Additionally, our view of the jury is that of a group of citizens composed of a "cross section of the community."[87] A defendant, it is often said, possesses the right to be tried by a "jury of peers."[88] Thus, the jury serves a clear representative function. At the same time, we expect the jury to also commit to a deliberative process that strives to reach the correct outcome.[89] Indeed, until the 1960s, the legal and political sentiment favored a less egalitarian view of the jury, instead imagining it as a group of "men of recognized intelligence and probity."[90]

Thus, Congress and the jury have been forced to contend with two, often competing, understandings of the role they were

84. *See infra* notes 92–132 and accompanying text.

85. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 167 (Gaillard Hunt and James Brown Scott eds., international ed. 1920).

86. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).

87. The Jury Selection & Service Act, 28 U.S.C. § 1861 (2012).

88. *See, e.g.*, Sara Gordon, *All Together Now: Using Principles of Group Dynamics to Train Better Jurors*, 48 IND. L. REV. 415, 420–21 (2015).

89. *See* ABRAMSON, *supra* note 31, at 8–9.

90. *Id.* at 99; Charles A. Lindquist, *An Analysis of Juror Selection Procedure in the United States District Courts*, 41 TEMP. L.Q. 32, 45 (1967).

designed to fulfill. As I will explain below, the changing view of the jury toward a more representative institution—and the accompanying rules designed to preserve much of the body's deliberative design—offers important insights to congressional reform.

A. Congress's Struggle

As noted above, for over two hundred years, commentators have debated whether legislators should serve as representatives of their constituents' views and interests, or, rather, as members of a deliberative body designed to effectuate the national interest through reasoned judgment.[91] Though not the true origin of this debate, Edmund Burke's famous speech to the electorate of Bristol in 1774 best captured this competing dichotomy and served as the lightning rod for discussions centered on the question of the legislator's proper role. Thus, analyzing Congress's competing functions requires reviewing the Burkean theory and the resulting political and historical commentary.

1. Burkean Theory: Legislator as Delegate or Trustee. Edmund Burke served as an English statesman during the eighteenth century.[92] In 1774, Burke ran for re-election to Parliament, seeking to continue to represent Bristol, the "capital of western England."[93] In a campaign speech to the electorate, Burke said:

> [I]t ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect . . . . It is his duty to sacrifice his repose, his pleasure, his satisfactions, to theirs—and above all . . . to prefer their interests to his own.
>
> But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. . . . Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.
>
> . . . .
>
> . . . Parliament is a *deliberative assembly* of one nation, with one interest, that of the whole—where *not local*

91. *See infra* notes 92–132 and accompanying text.

92. Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 397 (2007).

93. EDMUND BURKE, BURKE'S POLITICS 113 (Ross J. S. Hoffman & Paul Levack eds., 1949).

> *purposes*, not local prejudices, ought to guide, but the *general good*, resulting from the general reason of the whole.[94]

This quote would serve as a sounding board for political theory for the next two hundred plus years.[95] Burke's statement, particularly his view that parliament is a deliberative assembly, ran contrary to many of the theories and practices of the day.[96]

As is evident, Burke's view suggests a dichotomous role for the legislator.[97] The first, the one advocated by Burke, sees the legislator as a delegate—as someone sent to Parliament to exercise individual judgment.[98] The second, in contrast, frames the legislator as a trustee sent to the legislature to act as one's electorate would want, as a "mirror of the constituency."[99]

Burke fundamentally changed the way scholars discussed legislative roles following his speech at Bristol. Burke argued that it was a legislator's obligation to use an "unbiased opinion, . . . mature judgment," and "enlightened conscience" when making decisions as a legislator.[100] Burke went so far as to contend that a legislator should not sacrifice her judgment to satisfy the views or wishes of the electorate.[101] Burke based this conclusion on the premise that "government and legislation are matters of reason and judgment, and not of inclination."[102] In Burke's view, individuals could not make the decisions a legislature faced hundreds of miles away from the debate itself.[103]

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94. *Id.* at 115–16 (emphasis added).

95. *See, e.g.*, Bogus, *supra* note 92, at 406–07, 463–65; Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN. ST. L. REV. 415, 431–32 (2003).

96. BURKE, *supra* note 93, at 114, 116 (indicating "[t]he practice of sending instructions to members of Parliament from popular constituencies . . . had become fairly common. That it almost passed away within a few years appears to have been due mainly to Burke's influence"). *See generally* Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1 (1999) (recognizing the role constituent instructions played in seventeenth century England).

97. JOHN C. WAHLKE ET AL., THE LEGISLATIVE SYSTEM 270 (1962) ("Burke . . . emphasiz[ed] the deliberative function of the legislature, presumably in contrast to its representational function.").

98. BURKE, *supra* note 93, at 115 (arguing "government and legislation are matters of reason and judgment, and not of inclination").

99. Rakove, *supra* note 4, at 7 (speaking on Adams metaphor that the "American assembly should be a miniature of the larger society—that one should be able to look at a representative assembly and see therein a 'mirror' . . . of the larger society").

100. BURKE, *supra* note 93, at 115.

101. *See id.* (stating that a legislator "ought not to sacrifice [his mature judgment] to you, to any man, or to any set of men living").

102. *Id.*

103. *Id.*

Burke's writing and speeches make clear that he believed argument and discourse were necessary components of a legislative body.[104] Debate was essential to reaching the best outcome, a conclusion that would serve the interests of the electorate. Burke recognized the realities of elections required a representative to satisfy the needs of the constituency; however, Burke believed the ultimate decisions made in a legislature benefited from deliberation by legislators.[105]

In fact, Burke's statements to the electorate of Bristol addressed and "explicitly repudiated" a common political practice of the day.[106] During the eighteenth century, democratic radicalism had emerged in Great Britain.[107] This movement suggested that members of parliament should cast "parliamentary votes according to the wishes of the electors who chose him rather than according to his own independent judgment."[108] Burke not only provides an alternative model, but argues that such a view is both ineffective and "a fundamental mistake of the whole order and tenor of our constitution."[109]

In short, Burke advanced the view that legislators must first and foremost fulfill their responsibility to the deliberative ideal—to debate, reason, and vote with the national interest as their guiding principle.

2. American View of the Legislator's Roles. The tension identified by Burke in 1774 was not limited to Parliament. Across the Atlantic, the colonists, particularly the colonial legislatures, "conceived of themselves as possessed of a positive legislative capacity removed from the ancient English idea of Parliament as an agency for wresting concessions from the Crown."[110] This new world legislature believed the problems of government were "soluble by way of rational deliberation and cogent argument in debate."[111] The American Congress developed at a time where a legislative body was designed to take on a greater role in lawmaking. This reorganized body was now "capable of performing independent, policy-making functions."[112]

104. *Id.* at 116 (arguing that "Parliament is a deliberative assembly" where law was formed to serve "the general good").

105. *Id.* at 115 ("Your representative owes you, . . . his judgment; and he betrays . . . you, if he sacrifices it to your opinion.").

106. *Id.* at 114.

107. *Id.*

108. *Id.*

109. *Id.* at 116.

110. HEINZ EULAU, POLITICS, SELF, AND SOCIETY 183 (1986).

111. *Id.*

112. *Id.*

Indeed, many of the debates at the Constitutional Convention revealed the Framers' recognition that legislators must both serve representative and deliberative functions, and they designed a system that sought to reach a balance between these competing ideals. Two issues debated by the delegates illustrate this effort: first, whether congressmembers could be directed by their constituents as to how to vote on specific matters, and, second, the appropriate length of term for members of the two legislative chambers.[113]

Prior to the creation of the Federal Constitution, instructions were commonplace in the colonies.[114] These instructions "ordered the representatives to take specified positions on issues of concern."[115] The constituency, regardless of the legislators view on the subject, "expected their representatives to follow their orders without deviation."[116] The instructions carried de facto binding force, though "[i]n most colonies, no formal legal mechanism compelled the representative to obey his instructions."[117] The legislators followed the instructions out of a belief that going against the constituency's interests would destroy the voter's confidence.[118]

During the debates over the Constitution, George Clymer argued passionately against a constitutional amendment that would have allowed constituents to "instruct" legislators.[119] Clymer reasoned that legislators should not be required to "decide constitutional questions by implication."[120] Underpinning these statements was a fear of undermining the deliberative role of Congress.[121] In fact, the Supreme Court echoed these same sentiments over two hundred years later. The Court recognized that it was the intent of the framers "that binding instructions

113. *See, e.g.*, MADISON, *supra* note 85, at 106–07 (discussing possible term lengths for representatives).

114. Kobach, *supra* note 96, at 27.

115. *Id.* at 28; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 189 (1969).

116. Kobach, *supra* note 96, at 30.

117. *Id.* at 31.

118. *See* Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising a Revenue . . . [Annapolis,] 1765*, *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750–1776, at 598, 608 (Bernard Bailyn & Jane N. Garrett eds., 1965) (discussing the colonies' instructions to its representatives).

119. 1 ANNALS OF CONG. 763 (Joseph Gales ed., 1789) (statement of George Clymer).

120. *Id.*

121. Clymer's fears do not seem to reflect a fear of losing power. Rather, Clymer's statements indicate a similar concern expressed by Burke, that preventing representative from exercising their own independent judgment would deteriorate the role of legislators. *See id.* (discussing how constituent instructions are "destructive of all ideals of an independent and deliberative body" and are contrary to the establishment of an "efficient General Government").

would undermine an essential attribute of Congress by eviscerating the deliberative nature of that National Assembly."[122] The words of Representative Sherman weighed heavily on the Court, specifically his belief that allowing the constituency to "control the debates of the Legislature" would be contrary to the purpose of the legislature. Sherman believed:

> It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and, after he has discovered them, to give them his support. Should his instructions, therefore, coincide with his ideas on any measure, they would be unnecessary; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them.[123]

The logic underpinning this hostile attitude toward constituent instructions, and the general movement for a deliberative legislature, was the view that "people . . . should have as little to do as may be about the Government. They want information and are constantly liable to be misled."[124]

At the same time, the Framers sought a more representative government than what existed under the Crown. In this regard, John Locke greatly influenced the Framers' thinking, even more so than Burke. Indeed, Locke provided one of the earliest comprehensive arguments for the legislature's representative role. Locke contended that "no one can be . . . subjected to the political power of another, without his own consent."[125] Thus, the Lockean begins with the general premise "that government must derive from popular consent."[126] This is easily distinguishable from Burkean theory that "has little to say about how or why people might choose to enter into society."[127]

These views influenced James Madison, who struggled alongside his colleagues to devise a system that promoted both the representative and deliberative ideal. This tension between a legislator's dual functions surfaced again during the debate over

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122. Cook v. Gralike, 531 U.S. 510, 521 (2001); *see* 1 ANNALS OF CONG. 763–64 (Joseph Gales ed., 1789) (remarks of Rep. Sherman) (arguing if legislators were bound by instructions "there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him.").

123. 1 ANNALS OF CONG. 764 (Joseph Gales ed., 1789) (remarks of Rep. Sherman).

124. Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217, 219 (1986) (quoting MADISON, *supra* note 113, at 39).

125. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 49 (J.W. Gough ed., MacMillan Co. rev. ed. 1982) (1689).

126. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 650 (1994).

127. *Id.*

the appropriate term lengths for members of Congress.[128] From the outset, the delegates intended the Senate to be more isolated from the electorate—to protect against the exceeding passions that may overtake the public at any one time.[129] Therefore, in addition to senators being selected by state legislatures, Madison proposed a seven-year term to increase the chamber's stability, as a necessary means to rein in "the popular branch."[130] Debate and deliberation improved, many Framers believed, by removing the elected officials from the controls of their constituents.[131]

At the same time, the delegates to the Convention recognized the importance of securing the people's influence within the legislature. To protect the representative ideal, the Framers agreed upon a two-year term for the directly elected members of the House of Representatives. This chamber would be "a miniature of the larger society—that one should be able to look at a representative assembly and see therein a 'mirror' . . . of the larger society."[132] The frequency of elections and the nature of local campaigns continue to allow for greater constituency influence on legislators.

This tension between serving the deliberative and representative ideals, most dramatically articulated by Burke over two hundred years ago, remains today. Indeed, as noted earlier, I argue that achieving the appropriate balance between these interests should serve as the framework for reforming Congress.

B. The Jury's Struggle

The existing tension between a representative, but still impartially deliberative, jury stems, at least in part, from a transformed notion of the ideal jury. Today, we strive for impartial justice, through jurors with no attachments to the issues or events tried or the parties involved.[133] This version of the jury's role—dispassionate, minds "as white paper, [judging] the issue merely as an abstract proposition upon the evidence produced"[134]—rests on the premise that only an impartial jury can engage in the type of deliberation that allows the jury to serve as an "organ of justice."[135]

128. MADISON, *supra* note 85, at 106.
129. *Id.* at 107.
130. *Id.* at 110.
131. *Id.* at 111.
132. Rakove, s*upra* note 4, at 7.
133. ABRAMSON, *supra* note 31, at 17.
134. Mylock v. Saladine (1784) 96 Eng. Rep. 278, 278 (KB).
135. United States v. Parker, 19 F. Supp. 450, 458 (D.N.J. 1937).

This was not always the dominant view of the jury's role. At common law, participants of a trial expected jurors to be acquainted with the parties and the facts of the case.[136] The jury was to be drawn from the community in part so that the community's views and understanding of the circumstances could be brought to bear on the trial.[137] Indeed, one of the primary lines of attack by Anti-Federalists during the ratification debate centered on the need for a constitutional commitment to localized juries.[138] The purpose behind pushing for a vicinage requirement for federal trials was more than a desire to ensure representativeness in the administration of justice—though that certainly served as a chief motivation.[139] The other primary consideration rested on the belief that "[w]hen jurors can be acquainted with the characters of the parties and the witnesses . . . they not only hear the words, but they see and mark the features of the countenance; they can judge of weight due to such testimony."[140] In short, juries were to be biased—in that they knew the people, events, and local interests involved at the trial. In other words, they were to represent the community's knowledge and views in the judiciary. Before dismissing this notion as out of place with a proper view of justice, bear in mind that the Anti-Federalists prevailed in their push for greater jury-centric guarantees in the Bill of Rights.[141]

Nevertheless, the idea that local, partial juries served to ensure justice lost hold in short order, replaced by our current view that juries must be impartial. The jury, now, is a neutral institution, listening to witnesses and determining the facts through careful, unbiased deliberation.

Herein lies the paradox. We aspire to a jury capable of impartially dispensing justice through a deliberative process aimed at finding the truth.[142] Indeed, if any governing principle were universally accepted, this is it. But we also seek to fulfill another ideal—one of a representative jury. On its face, this representative principle hardly appears controversial. In fact, it is a worthwhile goal and supported by the historical and constitutional objective to ensure that the people enjoy a strong voice in the judiciary. Moreover, after more than a century of racial, gender, and economic bias kept the jury from fulfilling its

136. ABRAMSON, *supra* note 31, at 27.
137. *Id.*
138. *See supra* notes 21–22 and accompanying text.
139. ABRAMSON, *supra* note 31, at 27–29.
140. *Id.* at 28.
141. U.S. CONST. amends. V–VII.
142. ABRAMSON, *supra* note 31, at 8, 10.

representative functions, the Supreme Court and Congress both sought to place greater emphasis on the cross sectional ideal.[143]

Again, this makes perfect sense in isolation. But the difficulty lies in reconciling the need for a representative jury with the importance of impartiality in jury decision-making. After all, the very notion of representativeness—especially group-oriented representativeness—rests on the presumption that different groups approach questions differently, based on their shared contexts or experiences.[144] In other words, unless the desire for a cross-sectional ideal is driven exclusively by its legitimizing effect, representativeness presumes group-oriented biases that stand on its head the concept of an impartial jury dispassionately seeking the truth.[145]

In fact, the Court's cross-sectional case law suggests as much. Take *Ballard v. United States*, in which the federal court intentionally excluded women from the grand jury because the courthouse lacked accommodations for female jurors.[146] The Supreme Court held such conduct violated the constitutional requirement "to make the jury a 'cross-section of the community' and truly representative of it."[147] The explanation the Court provided demonstrates just how the representative and deliberative ideals conflict in this context. The Court said:

> 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. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[148]

Perhaps even more directly, the Court in *Taylor v. Louisiana* explained its holding invalidating gender-based exclusions by quoting Congress's effort to make the jury more representative: "As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are

143. *Id.* at 99–100.
144. *Id.* at 3–4.
145. *Id.*
146. 329 U.S. 187, 189–90, 204–05 (1946).
147. *Id.* at 191.
148. *Id.* at 193–94.

supposed to represent." [149] In other words, the Court, itself, recognizes that the cross-sectional requirement serves the purpose of ensuring that various groups' attitudes and beliefs are represented. That is difficult to comport with the deliberative ideal's notion of an impartial, truth-seeking jury.

Thus, much like the delegate-trustee dichotomy apparent in our view of Congress's role, we have developed versions of the jury that are equally incompatible at times. We have not resolved this inherent tension, and, in fact, we likely never will, largely because we want and expect the jury to serve both of these functions, even as we recognize their competing ideals. Instead, we have shaped the rules surrounding the jury—from selection to discharge—to emphasize these values at different points in the process. And this is precisely the benefit that looking to the jury can offer when considering congressional reforms.

IV. JURY-CENTERED RULES FOSTERING THE REPRESENTATIVE AND DELIBERATIVE IDEALS

The previous two sections laid the foundation for looking to the institutional jury as a source for congressional reform. Congress and the jury share many features, key democratic underpinnings, and a legal trajectory that sought to make each more representative. Most importantly, both institutions must serve representative and deliberative functions that are often in conflict. Furthermore, courts and legislatures have already created a variety of rules that address this dichotomy within the jury system, by promoting the representative tradition of juries in certain contexts and the deliberative ideal in others. Reviewing these approaches provides important insights into the kinds of rules we may want to develop in any effort to reform Congress.

A. Promoting the Representative Purpose Through Jury Selection Rules

The jury's representative nature could hardly be realized if the selection process prevented particular groups from serving as jurors. For that rather self-evident reason, in the context of jury selection, courts and Congress have fashioned rules that promote the representative role of juries.

Gone are the days of "key man" systems in which a court would appoint a very select number of well-respected community members to nominate other individuals to populate the list of potential

149. 419 U.S. 522, 529 & n.7 (1975) (quoting H.R. REP. NO. 90-1076, *as reprinted in* 1968 U.S.C.C.A.N. 1792, 1797).

jurors.[150] Instead, the congressional reform of 1968 and subsequent state efforts replaced this approach with systems designed to randomly select a fair cross-section of the community.[151] This reform embodied in statute what the Court was beginning to recognize as required by the Sixth and Fourteenth Amendments. The underlying rationale for the reforms rests on the desire to ensure a fair trial by entitling the defendant to a jury derived from a process that did not exclude any cognizable group.

> [O]ur democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.[152]

But even as courts and commentators push the representative purpose of juries through rules designed to ensure group inclusion, there are limits beyond which courts will not go. As a starting point, the Supreme Court has made clear that the right involved is one related to the venire.[153] That is, a party enjoys the right to a jury pulled from a representative pool of potential jurors.[154] A defendant is *not* entitled to a jury composed, in whole or in part, of her race or gender.[155] Those familiar with the Supreme Court's voting rights cases will undoubtedly appreciate the similarity in the Court's approach.[156] But the larger point here is that the Court has created a set of rules to push the representative nature of the jury in the juror selection process, even if the Court stops short of demanding each jury be representative. It has accomplished this by demanding a juror selection method that assumes the qualifications of every of-age citizen and draws upon residents randomly.[157] It values representation, partly, for the quality of the deliberative outcome, but more for the political interests it serves.[158] And, ultimately, this makes sense. If the representative versus deliberative ideals are ever most in direct conflict, it must be when juries are being selected. To focus at this stage on the need for a deliberative jury, and to turn away from the

150. ABRAMSON, *supra* note 31, at 99.

151. *Id.*

152. Glasser v. United States, 315 U.S. 60, 86 (1942).

153. ABRAMSON, *supra* note 31, at 126.

154. *Id.*

155. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986); Akins v. Texas, 325 U.S. 398, 403 (1945).

156. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 61–65 (1980).

157. Castaneda v. Partida, 430 U.S. 482, 496 & n.17, 497 n.18 (1977).

158. ABRAMSON, *supra* note 31, at 100–01.

representative pulse, would render the latter ideal meaningless, for when else is it possible to impose rules that work to ensure the inclusion of all groups?

The lesson, therefore, is both clear, yet undefined. When faced with competing considerations over representativeness and impartial deliberation, courts and legislatures have chosen to develop rules that ensure the representative potential of each jury at the selection stage. Moreover, courts have not limited the application of this principle to the well-known, cognizable groups protected by heightened scrutiny under the Fourteenth Amendment. The importance of representativeness extends beyond those traditional statuses, though just how far remains unknown.

B. Promoting the Deliberative Ideal

Once the jury is seated and the cross-sectional ideal is met, the focus turns to promoting the deliberative goals of the institution. Many rules relate to ensuring that the jury undertakes its responsibilities without regard to anything beyond the facts of the case and the law as presented to it by the judge. Indeed, the rules of evidence themselves are designed in significant part to promote deliberation by the jury. In addition, rules exist that require the jury to engage in a particular type of deliberative process, even if it means undermining the jury's representative function. It is these rules—many of which seek to isolate the jury from outside influences that might negatively affect that deliberative goal—that highlight how much emphasis we place on that objective over the representative goals that dominate juror selection.

1. Rules of Evidence. Evidentiary rules represent a desire on the part of courts and policymakers to ensure that jurors use information in a particular way.[159] Indeed, underlying many of the rules of evidence rests a distrust of the jury's ability to put aside inflamed passions and reach an outcome based on reasoned deliberation. For example, Federal Rule 403[160] stands as "a model of optimal jury behavior."[161] We want juries to use admitted evidence "as proof of only the factual propositions the judge admits them to prove [and] ascribe the proper probative

159. EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 5.01 (7th ed. 2008); Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 164–67 (2008).

160. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

161. IMWINKELRIED, *supra* note 159, § 5.01.

weight to each item of evidence."[162] As the policy discussions behind Rule 403 demonstrate, the legal system harbors significant doubts about the jury's ability to achieve this standard. Similarly, Rule 404's[163] character evidence limits rest on concerns that a jury will give too much weight to such evidence.[164] Both Rule 403 and Rule 404 exclude otherwise admissible (and therefore relevant) evidence because of fears over how such evidence might affect a jury's decision-making.

Other exclusionary rules, such as Rules 407,[165] 408,[166] 409,[167]410,[168] 411,[169] and 412,[170]are all crafted, in part, based on

162. *Id.*

163. "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." FED. R. EVID. 404(a)(1).

164. Michelson v. United States, 335 U.S. 469, 475–76 (1948) (noting that such evidence "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

165. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

FED. R. EVID. 407.

166. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

FED. R. EVID. 408(a).

167. "Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury."FED. R. EVID. 409.

168. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

FED. R. EVID. 410(a).

169. "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." FED. R. EVID. 411.

170. "The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in

concerns over how juries might use certain types of information.

Thus, it is fair to describe rules of evidence as a jury-centric mechanism to promote the kind of deliberation the legal systems believes is appropriate in the context of criminal and civil trials. The rules' primary purpose is to "ensure that the jury would render a verdict largely free of emotion and passion—a verdict based only on a reasoned analysis of the facts properly before it."[171] Policymakers seek to strike a balance with the rules between inclusiveness—a hallmark feature of evidentiary rules—and promoting fairness and the "right" outcome.[172]

Moreover, the rules of evidence represent a clear nod to the competing functions of juries rooted in our legal system. As discussed in depth above, the jury stands within the American trial system as the people's representatives within the judiciary. At the same time, we expect the jury to serve its deliberative purpose and drafters designed the rules of evidence toward that end—largely because of distrust over the jury's ability to engage in the type of deliberative process we desire without such rules in place.

2. Sequestration. Courts have recognized the need to prevent outside influences from affecting jury functions. As Justice Holmes opined, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[173] Thus, for centuries, judges have often taken the step of sequestering a jury to promote the jury's deliberative features. Though sequestration can take many different forms, four key elements exist: (1) isolating the jury from family, friends, and co-workers; (2) preventing juror access to media reports; and (3) law enforcement's supervising jurors.[174]

Sequestering juries enjoys a long history in both American and English law. Under traditional English procedure, a court would keep a jury isolated and under lock and key until the conclusion of the case.[175] The colonies continued the practice

other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition." FED. R. EVID. 412.

171. Teter, *supra* note 159, at 172 (citing Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 503–06 (1983) and John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1250–51 (2006)).

172. The right outcome does not necessarily mean the factually accurate outcome. It means an outcome that flows from the type of deliberation we want juries to engage in.

173. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

174. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 66 n.4 (1996).

175. *Id.* at 70–71.

initially, though since most trials lasted only a day, it imposed no real hardship on jurors.[176] The basis for sequestering juries originally "stemmed primarily from an interest in ensuring jury cohesion and enhancing the likelihood of agreement between jurors."[177] In other words, the goal focused on concerns for the deliberative process—seeking to promote a well-functioning, responsible jury that could reach an agreed upon outcome.

In its most mild form, the practice continues to this day.[178] After empaneling a jury, a court seeks to ensure that the jurors speak to no one about the case—even other jurors, until deliberation formally begins—and that they avoid any contact relating to the case. In exceptional circumstances, when there exists a serious concern about the jury's exposure to prejudicial information during the trial, courts may impose more severe sequestration rules on a jury, including requiring the jury to live isolated from society during the trial.[179] As the use of sequestration has softened, so too, has the rationale. Today, courts sequester juries—in both the softer and more severe forms—to prevent undue influences on the jury from media attention, family, friends, and other contacts external to the evidence presented. Specifically, courts sequester juries out of concerns that "exposure to publicity trammels the defendant's right to an impartial jury" and to ensure "that the jury only considers relevant evidence."[180] In addition, isolating the jury

> helps to ensure a fair trial insofar as it prevents exposure to prejudicial publicity, ensures that jurors are not pressured by the views of others with whom they may come in contact if allowed to mingle generally in society, and protects jurors from threats that might be made against them from ruthless parties attempting to influence the verdict.[181]

For these reasons, the American Bar Association has called for sequestration when necessary to "ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court."[182] All of these considerations, too, go to the desire to promote the jury's deliberative mission.

176. *Id.* at 71.
177. *Id.* at 70.
178. *Id.* at 70–77.
179. *Id.* at 66.
180. *Id.* at 78.
181. *Id.* at 77.
182. ABA STANDARDS FOR CRIMINAL JUSTICE: CONTROL OVER AND RELATIONS WITH THE JURY 15-4.1(a) (3d ed. 1996).

Courts take the step of imposing the more severe form of sequestration on jurors "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."[183] This consideration is amplified by the fact that media and news are becoming increasingly accessible. Courts, therefore, "must give great weight to [their] perception of this atmosphere in order to assure a fair and impartial trial to the defendant."[184]

While the rules for when sequestration is necessary vary by jurisdiction, they can be broken down into three distinct categories. The first gives the trial court full discretion to determine if conditions present a need for sequestration.[185] The second approach requires sequestration for certain types of cases, typically capital cases.[186] And, finally, some jurisdictions grant the trial court discretion unless both parties move to sequester the jury.[187]

It is certainly rare for courts to engage in the most severe form of sequestration because of its exacting toll on jurors and the financial costs. Nevertheless, there are instances of courts engaging in the practice in exceptional circumstances and cases in which courts have reversed a defendant's conviction because of the trial court's failure to sequester the jury.[188] For example, in *Coppedge v. United States*, the D.C. Circuit reversed and remanded for a new trial because jurors had been exposed to newspaper accounts quoting material from the trial that the jury had not heard.[189] Similarly, in *Sheppard v. Maxwell*,[190] the well-known case that served as a basis for the television show and movie *The Fugitive*, the Supreme Court reversed Sheppard's conviction because the trial judge "did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community" and "warned trial judges to begin taking affirmative action to mitigate the effects of prejudicial publicity . . . ."[191]

183. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

184. Abby Propis Simms, Comment, *Sequestration: A Possible Solution to the Free Press—Fair Trial Dilemma*, 23 AM. U. L. REV. 923, 944 (1974); *see also Sheppard*, 384 U.S. at 362 ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.").

185. *See* Strauss, *supra* note 174, at 72–74.

186. *Id.* at 72, 74–76.

187. *Id.* at 72, 76.

188. *Id.* at 66, 81–82; *see, e.g.*, Raines v. State, 65 So. 2d 558, 559–60 (Fla. 1953).

189. Coppedge v. United States, 272 F.2d 504, 505–06, 508–09 (D.C. Cir. 1959).

190. *Sheppard*, 384 U.S. at 333.

191. Scott A. Hagen, Comment, KUTV v. Wilkinson*: Another Episode in the Fair Trial/Free Press Saga*, 1985 UTAH L. REV. 739, 741–42 (quoting *Sheppard*, 384 U.S. at 363); *July 04, 1954: A Sensationalized Murder Trial Inspires The Fugitive*, HISTORY

More recently, jurors in the Casey Anthony trial and George Zimmerman trial were sequestered for several weeks, with closely monitored access to the Internet or cell phones.[192] And the sequestration order in the O.J. Simpson trial lasted for over eight months.[193]

As these rules and cases show, sequestration serves the interests of deliberative decision-making by the jury. The point is to establish rules that will enhance the jury's ability to focus on the legitimate considerations in reaching an outcome.

3. Gag Orders. Courts also restrict trial participants through gag orders that prevent disclosing information to the public.[194] It is important to divide these orders into two types: participant orders—those applying to witnesses, attorneys, and parties in a case—and gag orders directed at the press.[195] This distinction stands as the most relevant factor when considering a gag order's constitutionality and therefore deserves special attention.

The Supreme Court has held that gag orders constitute a form of prior restraint.[196] Time and time again, the Court has affirmed, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[197] In *Nebraska Press Ass'n v. Stuart*, the Court set out a three-part procedure for reviewing gag orders directed at the press.[198] Under this procedure, a court must determine: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[199] Thus, the underlying rationale for even allowing media gag orders rested

(2009), http://www.history.com/this-day-in-history/a-sensationalized-murder-trial-inspires-the-fugitive [https://perma.cc/5WT3-29QU].

192. Amy Pavuk, *George Zimmerman Trial: Jury Will Be Sequestered, Judge Rules*, ORLANDO SENTINEL (June 13, 2013), http://articles.orlandosentinel.com/2013-06-13/news/os-george-zimmerman-trial-jury-sequestered-20130613_1_jurors-george-zimmerman-zimmerman-second-degree-murder-case [https://perma.cc/FAY4-KE97]; *$33,000 Spent on Sequestered Zimmerman Trial Jurors*, CBS NEWS (July 17, 2013, 11:49 PM), http://www.cbsnews.com/news/33000-spent-on-sequestered-zimmerman-trial-jurors/ [https://perma.cc/QL6G-ELFA].

193. Strauss, *supra* note 174, at 65–66.

194. *Gag Order*, BLACK'S LAW DICTIONARY (8th ed. 1999).

195. *See* United States v. Brown, 218 F.3d 415, 418, 426–27 (5th Cir. 2000).

196. Gannett Co. v. DePasquale, 443 U.S. 368, 399 (1979).

197. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

198. 427 U.S. 539, 562 (1976).

199. *Id.* at 562.

with the threat that publicity can pose to a trial's fairness.[200] The Supreme Court in *Stuart* also made it clear that, in addition to the procedures laid out in the case, gag orders would still need to comport with the specificity requirements of the First Amendment. [201] Thus, gag orders targeting the press are subjected to an incredibly high standard of review and their availability is quite limited.[202]

Gag orders directed at participants, however, pose less of a constitutional concern and, therefore, are more common.[203] In *Gentile v. State Bar of Nevada*, the Supreme Court held that a less stringent standard could be used for a participant gag order.[204] This conclusion rested on the role attorneys and other court participants play in the judicial system.[205] The Court stated that a "'substantial likelihood of material prejudice' standard constitute[d] a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."[206] The Court's decision did not address whether the "substantial likelihood of material prejudice" standard represented the lowest threshold for a gag order to pass constitutional muster and many courts have struggled with that question.[207]A majority of lower courts have concluded that *Gentile* did not establish the floor and have therefore imposed even less stringent requirements.[208] In many instances, courts have found gag orders focused at attorneys, parties, witnesses, and court officers to survive based on a showing of a "reasonable likelihood" of prejudice to a fair trial.[209]

Like with sequestration, gag orders' underlying premise rests on the concern that we want to ensure that juries focus only on particular issues when deliberating. We want to guard against inflammatory appeals to emotion, outside influences and pressures, and the jury relying on extrinsic sources to decide matters. In short, gag orders help promote the type of

200. *Id.* at 553.

201. *Id.* at 568.

202. *See id.* at 556–61.

203. C. Thomas Dienes, *Gagging Trial Participants*, COMM. LAW., Spring 2001, at 3, 3.

204. 501 U.S. 1030, 1074–75 (1991).

205. *Id.* at 1074.

206. *Id.* at 1075.

207. C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107, 1143–44 (2001).

208. United States v. Brown, 218 F.3d 415, 427 (5th Cir. 2000). *But see* United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987) ("The order in the instant case is clearly overbroad and fails to meet the clear and present danger standard in the context of a restraint on a defendant in a criminal trial.").

209. *See, e.g.*, *Brown*, 218 F.3d at 427.

deliberative process we believe paramount to a jury fulfilling its constitutional duties.

4. Unanimity Requirements. A critical aspect of the jury's deliberative process is the degree to which courts require unanimity. The unanimity requirement dates to at least Fourteenth Century England, and in 1930, the Court held that the constitutional right to trial by jury included the common law requirement of unanimity.[210] Though the Court, in 1972, held that the Sixth and Fourteenth Amendments do not require unanimity in state criminal or civil trials,[211] unanimity remains the standard in the federal court system and most states still impose unanimity requirements in criminal matters.[212] In civil cases, however, states have slowly eroded the unanimity standard. Now, only eighteen states require unanimity in civil cases.[213] Other states require unanimity in certain matters, depending on the seriousness of the issue, but not for others.[214]

Courts, practitioners, and scholars have debated the merits of requiring unanimity in jury verdicts. While some of the debate centers on history and precedent, much of the disagreement focuses on competing beliefs about how the vote-requirement standards will affect jury deliberations.[215] Justice Douglas, dissenting to the Court's holding that states could allow for non-unanimous verdicts in criminal trials, stated:

> The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required [by the State] even though the dissident jurors might, if given the chance, be able to convince the majority. Such persuasion does in fact occasionally occur in States where the unanimous requirement applies: "In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance." . . . This collective effort to piece together the

210. Patton v. United States, 281 U.S. 276, 288 (1930).

211. Johnson v. Louisiana, 406 U.S. 356, 363 (1972); Apodaca v. Oregon, 406 U.S. 404, 411–12 (1972). Though unanimity is required with six-person juries. *See* Burch v. Louisiana, 441 U.S 130, 134 (1979).

212. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006).

213. *Id.* at 203–04.

214. *Id.* at 203; *see, e.g.*, Tex. R. Civ. P. 292 ("A verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages.").

215. Diamond, Rose & Murphy, *supra* note 212, at 204.

> puzzle of historical truth, however, is cut short as soon as the requisite majority is reached . . . . Indeed, if a necessary majority is immediately obtained, then no deliberation at all is required in these States. . . . To be sure, in jurisdictions other than these two States, initial majorities normally prevail in the end, but about a tenth of the time the rough-and-tumble of the jury room operates to reverse completely their preliminary perception of guilt or innocence. The Court now extracts from the jury room this automatic check against hasty fact-finding by relieving jurors of the duty to hear out fully the dissenters.[216]

Unanimity's proponents offer two general arguments: first, unanimity leads to a more desirable deliberative process and, second, produces better results.[217] With regards to process, a unanimity requirement is said to protect the interests of minority viewpoints.[218] "[T]houghtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity."[219] Practitioners, including district attorneys, believe that the unanimity requirement also forces jurors to think through the evidence in a more focused, deliberate way.[220] "When jurors know they must all agree, they tend to carefully examine all of the evidence and discuss it among themselves prior to taking the first vote."[221] In contrast, "vote-driven juries . . . are more likely to divide into groups and focus more on attracting people to their side than working together to a generally accepted conclusion."[222]

Those opposed to requiring jury unanimity are more concerned with achieving outcomes and believe that unanimity stands in the way. For example, lawmakers in California proposed changes to the unanimity requirement to address a sense of a growing number of hung juries.[223] Speaking to the National District Attorney's Association, California Governor Peter Wilson stated that, "It has become apparent that to put 12

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216. Johnson v. Louisiana, 406 U.S. 356, 388–89 (1972) (Douglas, J., dissenting) (internal citations omitted) (quoting Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY 490 (1966)).

217. Chenyu Wang, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 394 (2012).

218. *Id.* at 395–96.

219. Diamond, Rose & Murphy, *supra* note 212, at 230.

220. Mark Curriden, *Jury Reform*, 81 ABA J. 72, 76 (1995).

221. *Id.* (quoting Beth Bonora, president of the National Jury Project).

222. *Id.*

223. *Id.*

strangers behind closed doors, to expect that one of them will not act unreasonably, is itself no longer a reasonable assumption."[224] At the time, fourteen percent of all jury trials in California ended without jurors being able to agree on a verdict.[225]

At least some studies confirm what both sides suspect. Indeed, the most comprehensive study of jury behavior found six key differences when juries operated under unanimity requirements versus majority-rule standards.

> First, majority-rule juries render a verdict more quickly. Second, majority-rule juries tend to adopt a verdict-driven deliberation style, in which jurors vote early and conduct discussions in an adversarial manner, rather than an evidence-driven style, in which jurors first discuss the evidence as one group and vote later. Third, majority-rule juries generally vote sooner than unanimity-rule juries. Fourth, majority-rule jurors are more likely to remain holdouts at the conclusion of deliberations. Fifth, members of small groups are less likely to speak on a majority-rule jury. Finally, large factions attract members more quickly on a majority-rule jury.[226]

Thus, as both sides anticipate, non-unanimity rules generally make verdicts more likely, easier to reach, and faster—but at the expense of taking all views into account through a more thoughtful and inclusive process. The real debate, then, is not over what the consequence of more relaxed jury rules will be, as much as it is over which approach is normatively better. Of course, the point here is not to join that debate, but to instead draw from the discussion several important ideas. First, voting rules affect deliberation—not just the outcome, but the actual process and form that deliberation takes. Second, in the jury context, we can and do impose different vote requirements depending on the type of case and the issue being decided. Generally, but not uniformly, the more important the stakes, the more the need for a higher vote percentage or even unanimity. Finally, demanding a strong consensus not only stands as a basic element of a constitutional right to due process, but also serves a legitimizing effect that helps the jury as an institution remain in the public's high regard. At the same time, one of the chief criticisms of the jury system comes from those frustrated with indecision and hung juries. [227] A strong push to alter the

224. *Id.* (quoting California Governor Pete Wilson).

225. *Id.*

226. Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 671–72 (1997) (internal citations omitted).

227. Curriden, *supra* note 220, at 76.

unanimity requirements came with an indecision rate of fourteen percent.[228] As I will discuss immediately below, we want and expect juries to reach decisions and we will alter the vote requirements to help achieve outcomes.

5. The Allen Charge's Push for a Verdict. A deliberative process with no outcome may be acceptable in many circumstances,[229] but a trial is not one of them. After the long and painstaking process of selecting jurors, the costly and time-consuming effort to secure witnesses and present evidence, the idea that a jury could fail to reach a decision hardly sits well. Therefore, courts have long developed rules to push a jury toward an outcome.[230] The initial effort comes through instructions given to the jury by the court before deliberations begin. These instructions state the law that the jury is expected to apply, explain what bases the jury may rely on for its judgment, and establish the ground rules for conducting its deliberation.[231] By restricting the evidence that be considered and telling the jury how to apply the law to the facts, these instructions serve to push the jury toward an agreed-upon conclusion. After all, if each jury must base her vote on an accepted and closed universe of evidence, there is greater likelihood that the twelve assembled members of the jury can agree.

The effort to push the jury's deliberative process to an outright conclusion does not end there, however. For well over a century, courts have sought to push otherwise deadlocked juries toward a verdict. The most commonly employed mechanism is through a mid-deliberation exhortation known as the Allen charge.[232] In *Allen v. United States*, the Court upheld the constitutionality of supplemental jury instructions that seek to encourage potentially hung juries to reconsider their views in light of the other jury members' opinions.[233] The Court reasoned that while a verdict should represent each individual juror's views, the very nature of the American legal system was built on the notion that unanimity is formed from a "comparison of views, and by arguments among the jurors themselves."[234] A typical present-day Allen charge reminds the jury that:

228. *Id.*

229. As any regular attendee of faculty meetings can attest.

230. Lowenfield v. Phelps, 484 U.S. 231, 236–37 (1988).

231. United States v. McCracken, 488 F.2d 406, 414 (5th Cir. 1974).

232. Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 696 (2000); Karen Pelletier O'Sullivan, Note, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167, 169–70 (1985).

233. 164 U.S. 492, 501–02 (1896).

234. *Id.* at 501.

> This is an important case. The trial has required time, effort, and money from both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be resolved at some time. A second trial will also be costly to both sides. . . .
>
> . . . .
>
> As stated in the instructions given at the time the case was first submitted to you for decision, you should not surrender your honest beliefs as to the weight or effect of evidence solely because of the opinion of other jurors or for the mere purpose of returning a unanimous verdict.
>
> It is your duty as jurors, however, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. In the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous.
>
> . . . .
>
> If the greater majority of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest and equally conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth.
>
> If on the other hand, a majority or even a lesser number of you are for acquittal, other jurors ought to seriously ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight and sufficiency of evidence which fails to convince the minds of several of their fellow jurors beyond a reasonable doubt.
>
> . . . .
>
> You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you in the light of the Court's instructions on the law.[235]

235. 1A KEVIN O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY

The Allen charge, then, recognizes that many times individuals must be strongly encouraged to relinquish their own accepted view of the facts, at least long enough to listen to and consider contrary opinions.[236] The Allen charge, however, is not directed to each juror equally. Instead, as critics of the instruction note, it is designed to encourage jurors in the minority to weigh the views of the majority, without expecting the majority to consider the minority opinion.[237] Thus, they consider these charges to be "inherently coercive."[238]

While the critique is a fair one and worthy of debate on the merits, the point here is that courts consider it valuable and legitimate to apply some pressure to the jury to reach an outcome.[239]

6. Shielding Jury Deliberations from Judicial Review. Once a jury reaches a verdict, its conclusion commands incredible respect and deference from courts.[240] This stems from multiple interests, particularly a desire for finality, but also from the deeply rooted concern for effectuating the jury's democratic purpose and to ensure the legitimacy of the judicial process. Moreover, inquiring into jury decisions touches on numerous and serious legal issues, including the Seventh Amendment's protection against reexamining fact, freedom of speech, and jurors' privacy interests.[241] For this reason, the Supreme Court has said that any court considering invading the black box of jury deliberations in hopes of knowing what occurred must proceed with "great caution."[242]

As strong as this deference is, however, there are instances in which a court is willing to scrutinize the jury's deliberations to ensure that they did not run afoul of a defendant's due process rights. The Supreme Court has established a clear rule for what type of information or evidence may be used to set aside a jury decision.[243] Information relating to matters not extrinsic to a verdict, or as the Justice Brewer said, "matter[s] resting in the

PRACTICE AND INSTRUCTIONS § 20:08 (6th ed. 2008).

236. *Id.*

237. Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 523 n.278 (1977); O'Sullivan, *supra* note 232, at 171.

238. Paul Marcus, *The* Allen *Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 MO. L. REV. 613, 620 n.48 (1978).

239. *See id.* at 615 (noting the effectiveness and initial popularity of the Allen charge).

240. *See* Gary J. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U. L.Q. 39, 50–51.

241. U.S. CONST. amend. VII.

242. United States v. Reid, 53 U.S. (1 How.) 361, 366 (1851).

243. *See generally* Mattox v. United States, 146 U.S. 140, 148–49 (1892).

personal consciousness of one juror," should not be used to set aside a jury decision.[244] In contrast, the Supreme Court and other lower courts, have occasionally allowed information related to extrinsic matters, "such as juror misconduct, improper nondisclosure by a juror during voir dire examination, [or] improper considerations by the jury" to be used to overturn a jury decision.[245]

A set of public policies underpins the distinction of what type of information can be used to overturn or inquire into a jury decision and what information cannot be used.[246] Justice Brewer, addressing some of these public policies, argued that investigating into matters relating to the jury's decision process would give the "thought of one the power to disturb the expressed conclusions of twelve" and "induce tampering with individual jurors subsequent to the verdict."[247]

Other courts have weighed in on these policy considerations and argued, "[j]urors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation."[248] This concern for the privacy of the jury room, and the deliberations that take place therein, is likely the primary policy consideration supporting the general rule against allowing jury testimony to impeach jury decisions. The Supreme Court has even stated that if evidence of private jury deliberation becomes subject to subsequent judicial review and public scrutiny, the result will be "the destruction of all frankness and freedom of discussion and conference."[249]

The Supreme Court's decision in *Mattox* created the first exception to the common law rule that juror testimony could not be used, in any situation, to impeach a jury decision.[250] *Mattox* created a narrow exception that allowed such testimony if it related to an "extraneous influence." [251] Over time, the Supreme Court has addressed exactly what constitutes an "extraneous influence."

In *Parker v. Gladden*, the Court allowed a juror to provide testimony, in order to overturn a jury decision, that a bailiff had made statements to a juror regarding the guilt of the

244. *Id.* at 148.

245. 50A CORPUS JURIS SECUNDUM § 534 (2008) (internal citations omitted).

246. James W. Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 ST. JOHN'S L. REV. 389, 395–403 (1991) (examining the various policies that underpin the extrinsic matter exception).

247. *Mattox*, 146 U.S. at 148.

248. United States v. Infelise, 813 F. Supp. 599, 605 (N.D. Ill. 1993) (quoting United States v. Dotson, 817 F.2d 1127, 1130 (5th Cir. 1987)).

249. Stein v. New York, 346 U.S. 156, 178 (1953).

250. *See* Tanner v. United States, 483 U.S. 107, 117 (1987).

251. *Mattox*, 146 U.S. at 149.

defendant.[252] In *Parker*, a bailiff made several statements to a juror asserting that the defendant was guilty and that the Supreme Court would certainly affirm the defendant's guilt if the case were appealed.[253] The Supreme Court concluded that the bailiff's statements were an "outside influence" on the jury.[254]

In *Remmer v. United States*, the Supreme Court allowed a juror's testimony to overturn a jury decision based on evidence that a party had bribed members of the jury.[255] The Supreme Court, using their previous holding in *Mattox*, held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." [256] In *Remmer*, the Court also provided a procedure for courts to apply when deciding whether or not to allow juror testimony to overturn a jury decision.[257] The Court concluded that trial courts should evaluate the circumstances, from the information available to them, and determine if there is prejudice to the defendant and provide "a hearing with all interested parties permitted to participate."[258]

The Supreme Court's decision in *Remmer* established a procedure for evaluating juror evidence of matters extrinsic to a verdict. For extrinsic juror evidence, the trial court must provide a hearing and allow the defendant an opportunity to "prove actual bias."[259] Lower courts have used this procedure and the Supreme Court's relevant jurisprudence and attempted to draw boundaries around what constitutes an extrinsic matter. The Supreme Court has carefully examined any expansion of the extrinsic matter exception and continually reaffirmed a strong presumption in favor of excluding jury testimony that would impeach a verdict.[260] This strong presumption is based on the aforementioned policy decisions and the Court's genuine belief that "the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct."[261]

In *Tanner v. United States*, the Supreme Court held that jury testimony of other jurors' conduct during deliberations did

252. 385 U.S. 363, 364–65 (1966).
253. *Id.* at 363–64.
254. *Id.* at 364.
255. 347 U.S. 227, 228–30 (1954).
256. *Id.* at 229.
257. *Id.* at 229–30.
258. *Id.*
259. Smith v. Phillips, 455 U.S. 209, 215 (1982).
260. Tanner v. United States, 483 U.S. 107, 119–20 (1987).
261. *Id.* at 120–21.

not fit into the extrinsic matter exception.[262] In *Tanner*, there was evidence from certain members of the jury that a juror was intoxicated during deliberations and slept through much of the deliberations.[263] Despite the strength of this evidence, the Court noted the harm that would flow from investigating the circumstances that occur inside the jury deliberation room.[264]

Lower courts have used the holding in *Tanner* to conclude that a juror's subjective feelings of coercion from another juror were not an extrinsic matter.[265] In fact, lower courts have used *Tanner*'s holding to conclude, "allegations of the physical or mental incompetence of a juror" are "'internal' [not] 'external' matters."[266] This conclusion not only applies to addictions and mental ineptitudes, but also to racial bias. The Tenth Circuit recently held that juror testimony of another juror's racial bias did not fit within the extrinsic matters exception.[267] In support of this conclusion, the Tenth Circuit cited to cases that concluded "the possible subjective prejudices or improper motives of individual jurors" did not fit within the extrinsic matters exception.[268]

In the more than one hundred years since the Supreme Court decided *Mattox*, the Supreme Court's jurisprudence on using juror testimony to impeach a jury verdict has remained remarkably constant. With few exceptions, the Court has closely protected the sanctity of jury deliberations and shielded jurors from post-verdict scrutiny.[269] The extrinsic matters doctrine is the exception to this general rule. This doctrine provides courts with a means to review a jury decision based on some form of outside influence.[270] The scope of this exception appears to be very narrow and, for the most part, only involves situations that arise outside of the jury deliberation room.

Thus, a court will pierce the veil that keeps jury deliberations shrouded in secrecy in the face of substantial evidence of the jury's deviation from the required procedure. In these instances, the defendant's interest in a fair trial and the public's concern for a legitimate judicial outcome overcome the

262. *Id.* at 127.

263. *Id.* at 113.

264. *Id.* at 120–22 ("However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep.").

265. Anderson v. Miller, 346 F.3d 315, 328–29 (2d Cir. 2003).

266. *Id.*

267. United States v. Benally, 546 F.3d 1230, 1237–38 (10th Cir. 2008).

268. *Id.* at 1238 (citing Martinez v. Food City, Inc., 658 F.2d 369, 373 (5th Cir. 1981)).

269. *Tanner*, 483 U.S. at 118–19.

270. *See, e.g.*, 50A CORPUS JURIS SECUNDUM § 534 (2008).

desire to promote finality and to respect the decision of the people's representatives within the judiciary.

Each of these areas of jury-centered rules demonstrate how courts have sought to balance the often competing interests of a representative jury and a verdict based on a thoughtful and unbiased deliberation. Once the jury is seated, courts reorient their focus to ensuring that the jury meets our deliberative objectives. Moreover, it is important to at least note the countervailing constitutional principles that these well-established rules run up against. Even the more relaxed isolating rules that demand jurors not speak about the case to anyone pose potential First Amendment problems. Obviously, the severe sequestration [rules] push the constitutional concerns even further by limiting not just speech, but the most basic liberty interests of where one can go, sleep, and travel. Still, courts believe that promoting the deliberative purposes of the jury override these other interests.

V. LESSONS TO FRAME FUTURE CONGRESSIONAL REFORMS

The rules courts and legislatures have created to surround the jury provide valuable insights into how to consider reforms to Congress that allow it to achieve the proper balance between its representative and deliberative functions. In this section, I want to draw out the broad lessons from jury-centric rules and discuss how each lesson might influence how we think about reforming Congress. But first, I must offer a caveat. My purpose here is not to offer a complete, concrete proposal for reforming Congress. Indeed, as I stated at the outset, because of the current political climate and the impracticality of meaningful changes, I believe now is the time to reflect on possible future reforms, not the time to actually seek to reform Congress. Thus, I am offering broad outlines of lessons and ideas and then, admittedly, am only partially shading in the picture of reform.

A. Focus on Representation in the Selection Process

Perhaps the most important lesson from reviewing jury rules is that courts and legislators seek to promote the representative function of the jury during the juror selection stage. During the remainder of the jury's service, the rules turn toward promoting the deliberative ideal. This, of course, makes sense—maybe even axiomatic. But that does not weaken its significance, as even this general observation serves to disrupt many commonly held views about the best approach for congressional reform. Commentators often decry the lack of representativeness in Congress, but seek

to address those concerns by altering the internal rules of Congress.[271] Congressional critics also engage in the reverse effort—seeking to improve congressional deliberations by altering electioneering processes.[272] There is appeal to both of these approaches, to be sure. Despite my effort to treat the two core functions of Congress as separate, there remains a link between representativeness and deliberation. Therefore, wrestling with one can still affect the other. But the most direct and effective mechanism to promote greater representativeness is by focusing on the selection process.

More than that, the jury selection rules also teach us that courts may be willing to take a much more expansive approach to efforts to create a more representative legislature than we may realize.[273] The key, however, is to approach the issue in a manner similar to the efforts to promote a representative jury.

What does this mean, precisely? As the discussion earlier shows, courts remain unsympathetic to claims that a petit jury must represent a fair cross-section of the community. Courts do not recognize a right to a jury that is proportional to the local population—that reflects the diversity of the community.[274] The existing right currently stands as one for a representative venire from which to draw the jury.[275]

At the same time, promoting representativeness on venires extends beyond the easily cognizable groups that we typically discuss when thinking about voting rights. The courts have imposed meaningful Fourteenth Amendment scrutiny to only a handful of classifications. Government actions based on race,[276] gender,[277] national origin,[278] alienage,[279] and religion,[280] all receive some form of heightened review. But for nearly every other classification—from age[281] to wealth[282]—the plaintiff bears the burden of showing that the government has no conceivable rational basis for the classification.[283] However, in the context of

271. *See, e.g.*, *supra* note 2.
272. *See infra* notes 314–16 and accompanying text.
273. *See infra* notes 287–88 and accompanying text.
274. *See supra* note 155 and accompanying text.
275. *Id.*
276. Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2418–19 (2013).
277. United States v. Virginia, 518 U.S. 515, 523–24 (1996).
278. Clark v. Jeter, 486 U.S. 456, 461, 465 (1988).
279. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).
280. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 525, 546–47 (1993).
281. Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312–13 (1976).
282. Dandridge v. Williams, 397 U.S. 471, 485 (1970).
283. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 706–07 (5th ed. 2015).

drawing together a representative jury pool, the judiciary recognizes that "excluding identifiable segments" [284] of the community—beyond those suspect classifications receiving heightened scrutiny under the Fourteenth Amendment—violates the Constitution. The Court requires only that the excluded group be "distinctive" in the community.[285] Moreover, the Court has stated that, "[c]ommunities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place."[286] Thus, courts have invalidated actions by court clerks that removed daily wage earners[287] or that grouped potential jurors by last name.[288]

The effort to promote jury representativeness helps frame congressional reforms in ways perhaps not immediately obvious. To the extent that scholars and jurists place jury service within the foundations of democratic self-government, they do so by equating being on a jury with voting. One of the key insights that comes from looking to juries as a source for refocusing congressional reform is that jurors operate more like members of Congress than as voters. Jurors stand as the decision-makers in trials. They are the people's representatives within the judiciary. Similarly, just as courts do not—and likely never will—require true representativeness on a jury, courts do not—and likely never will—require true representativeness within Congress. [289] Instead, to promote Congress's representative function, reforms should focus on ensuring that legislative members are drawn from a fair cross-section of the community.

At first blush, this idea may seem unnecessary or impossible. But it's not. In fact, it could dramatically revamp efforts to make Congress more representative. Consider, for example, how we draw congressional districts. As things currently stand, state legislators generally draw lines and engage in partisan gerrymandering that distorts the representative nature of these districts. [290] With only the Fourteenth Amendment's Equal Protection Clause limiting the States, the

284. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

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

286. *Taylor*, 419 U.S. at 537.

287. Thiel v. S. Pac. Co., 328 U.S. 217, 222–23 (1946).

288. HANS & VIDMAR, *supra* note 79, at 56–57.

289. *See supra* note 156 and accompanying text.

290. Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 785 (2005); Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST (Mar. 1, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/?utm_term=.03273a97b2ff [https://perma.cc/YF8Y-BNFA].

Court has invalidated only those redistricting efforts that classify on the basis of race[291] or that deviate from the one person, one vote standard.[292] Efforts, for example, to limit the ability for lawmakers to engage in partisan gerrymandering have been rebuffed, largely because of concerns that there exist no judicially enforceable standards to apply.[293]

But what if we considered the redistricting question in a light more similar to how we think of filling the venire? If each member of Congress must be elected from a district the lines for which were drawn to ensure that no "distinctive" group was excluded, partisan gerrymandering now becomes an expressly unconstitutional act. And just as courts rely on the Sixth Amendment, rather than the Fourteenth Amendment, to enforce the cross-sectional requirement, other constitutional provisions and history lend themselves to a cross-sectional standard in congressional line drawing, such as Article I, section 2,[294] which the Court relied on to secure the one person, one vote principle in federal elections.[295]

One could go further. If all eligible citizens must be afforded the same opportunity to be part of a jury pool to ensure representativeness, perhaps it is not outlandish to wonder whether all citizens should have equal opportunity for legislative service, as well. As it stands, one need only look at the average wealth or education level of members of Congress to see that there is likely not equal opportunity based on those traits. I am not advocating a legal response when thinking about these reforms, but they are proper considerations for legislative reforms. In other words, the goal here is to inform possible congressional electoral reform, which will come mainly from legislatures, not courts. The point is to consider how we might want to frame our understanding of what ought to be changed and how. If we recognize the need for venires to be drawn from a cross-section of the community to ensure the jury's representative ideal, surely it makes sense to seek the same cross-sectional pull for our national representatives. How do we seek to make Congress more representative? Can we tackle the institutional obstacles that prevent a cross-section of the community from serving in our legislature? Further, I am not

291. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 657–58 (1993).

292. Reynolds v. Sims, 377 U.S. 533, 581 (1964).

293. Vieth v. Jubelirer, 541 U.S. 267, 286–87 (2004).

294. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.

295. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

suggesting that this should occur through judicial fiat, but rather that these insights might guide congressional reform efforts.

B. Insulating From Outside Pressures Pushes Deliberation and Promotes Legitimacy

Many of the rules surrounding the jury are designed to promote conscientious deliberation by seeking to protect jurors from outside influences. The Rules of Evidence, for example, limit the types of information that jurors may hear, out of concerns that they will be swayed by passion rather than reason.[296] Sequestration and gag rules exist to isolate the jury, to shield them from others' influence.[297] Thus, we recognize that deliberation can be aided by restricting outsiders' access to those making decisions. We worry, rightfully so, of the possibility for certain types of evidence or individuals to corrupt the jury deliberation process. We want the jury to base its decision on particular types of evidence and on specific considerations.[298] And we therefore limit what they can hear, what they can discuss, what factors they can weigh, and who they can speak to about the case.[299] In addition, sequestration, in particular, disrupts the representative purpose, at least in some measure, by restricting the ability of the community to influence jurors. It isolates the juror from her "constituents" at the key point when the jury is hearing and considering evidence and weighing a decision.

Of course, adjudicating is a different process than lawmaking, as discussed earlier,[300] but that does not alter the fact that we use evidentiary rules, sequestration, and gag orders to promote the jury's core deliberative function. Moreover, differences between adjudicating and legislating aside, the key lesson from these jury-centered rules is that we should, and do, carefully consider the ideal form of decision-making and then create rules to promote that ideal. In other words, "we want the jury to: use admitted items of evidence as proof of only the factual propositions the judge admits them to prove, ascribe the proper probative weight to each item of evidence, and concentrate on the historical issues in dispute in the case."[301] And we have designed a system that aims to achieve that.

We have taken considerable care to think about how we want jurors to behave and the type of deliberations in which we

296. FED. R. EVID. 606.
297. *See supra* notes 173–209 and accompanying text.
298. *See supra* notes 159–72 and accompanying text.
299. *See supra* notes 159–209 and accompanying text.
300. *See supra* notes 77–83 and accompanying text.
301. IMWINKELRIED, *supra* note 161, at 205–06.

expect them to engage. As these juror-centric rules show, it is appropriate to place a higher value on the deliberative ideal during the decision-making process than on the representative function.

Translating this lesson to congressional reform requires asking how we want members of Congress to deliberate. What information do we want them to rely on? What types of interactions may corrupt the deliberative process? And what rules make sense to promote these objectives? My goal is not to answer these questions. Instead, the point is to suggest that if it is appropriate to weigh these issues in the context of trials—and it is—it makes as much sense, if not more, to consider them with regards to the legislative process. To an extent, we already do. For example, Congress criminalized bribery[302] and has imposed (very) modest limits on lobbyists and criminalized bribery.[303] Certainly, though, we can go further than that in promoting the type of congressional deliberations that serve the national interest. Again, these will not be identical to those we impose on the jury system for a number of reasons. But it is a start to recognize that we do impose these deliberation-enhancing rules on the jury and that encouraging the deliberative ideal within Congress serves an equally important purpose.

C. Design the Process to Promote Outcomes

Courts have created a jury trial process that favors outcomes over indecision. Narrowing the scope of evidence juries may consider, instructing jurors regarding how they are to conduct deliberations, pushing the deadlocked juries through Allen charges, according jury decisions incredible deference, and rarely inquiring into the adequacy of a particular jury's discussions all work towards ensuring that the deliberative process produces results. Why? We want, and need, outcomes. Trials are expensive.[304] Jurors must take time out of their normal lives to serve. The parties want to be able to move forward. In short, it is important not to interpret the "ideal" in "deliberative ideal" to mean that a well-reasoned debate is all that it takes for the process to satisfy society's needs and expectations. A jury system

302. 18 U.S.C. § 201.

303. David D. Kirkpatrick, *Congress Finds Ways to Avoid Lobbyist Limits*, N.Y. TIMES, Feb. 11, 2007, at A1.

304. *See, e.g.*, Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 FORDHAM L. REV. 1069, 1078 n.68 (1995) ("A jury trial, even one of summary nature, however, requires at minimum the time-consuming process of assembling a panel and (one would hope) thorough preparation for argument by counsel, no matter how brief the actual proceeding.") (quoting In re NLO Inc., 5 F.3d 154, 158 (6th Cir. 1993)).

that resulted only in a really solid, thoughtful conversation among jurors would be quickly replaced with a process that yielded outcomes. Again, that provides the rationale for many of the rules designed to push for verdicts.

Today's Congress is the least productive in memory, enacting fewer laws than past Congresses.[305] Moreover, Congress has struggled mightily to even produce those limited results. The inaction extends beyond just important legislation. Record numbers of judicial and executive branch nominations await action, and those that do get confirmed take longer than in the past to receive a vote.[306]

We would not settle for such inaction with our jury system. The harms caused by congressional inaction are, at the very least, equally severe as those that would come from a legal system that consistently resulted in hung juries.[307] Moreover, we need juries to reach verdicts to maintain the system's legitimacy.[308] A look at congressional approval numbers and the concerns expressed by citizens about our legislature shows that Congress's legitimacy suffers, too, as it fails to produce meaningful results.[309] Our jury system teaches us that Congress cannot fulfill its deliberative function without actually taking meaningful action and that we should develop rules that promote that end. What might those be? We may want to consider the appropriate role for judicial involvement in policing some forms of congressional inaction or how the judiciary might play a more active role in resolving inter-branch disputes. More palatable would be simply adopting additional congressional reforms that promote outcomes: voting rules that ratchet down the super-majoritarian requirement on a piece of legislation the longer it is debated or that subject less significant bills or nominations to a lower threshold for enactment or confirmation. The point is that it is appropriate to consider mechanisms that push Congress toward outcomes, just as we do with juries. The consequences of inaction are too costly.

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305. Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103–04 (describing the current legislative paralysis in Congress).

306. *Id.* at 1105–06 (describing gridlock over judicial and executive branch nominees).

307. *Id.* at 1135–55 (explaining the threats to separation of powers posed by congressional gridlock).

308. *See supra* notes 62–63 and accompanying text.

309. *See* Lydia Saad, *Gridlock is Top Reason Americans Are Critical of Congress*, GALLUP (June 12, 2013), http://www.gallup.com/poll/163031/gridlock-top-reason-americans-critical-congress.aspx (noting that inaction is one of the primarily reasons behind Congress's 78% disapproval rating).

D. Otherwise Dominant Constitutional Values Overcome to Accommodate the Interests in Ensuring a Deliberative Process

Many congressional reform proposals encounter fierce opposition in the form of constitutional arguments.[310] Put simply, the Court and legislators have often halted efforts to remake Congress, particularly within the electoral process, by concluding that such measures violate the Constitution or cannot be judicially reviewed. One of the major lessons from reviewing the rules surrounding juries is that important constitutional values may sometimes correctly be deemphasized to promote the deliberative ideal.

The First Amendment stands not only as a bulwark against government oppressing freedom of speech, but also, at times, as an impediment to legislative reform. Most famously, in *Citizens United v. FEC*,[311] the Court struck down on First Amendment grounds the Bipartisan Campaign Reform Act's (BCRA) [312] restrictions on campaign expenditures. In addition, the Court relied on the First Amendment to invalidate state legislative attempts to create meaningful public funding schemes for state elections[313] and to open up the two-party nominating process.[314]

Of course, talking to other citizens about important civic matters and enjoying access to the news media stand as two of the most concrete features of our First Amendment protections. Nevertheless, in the context of jury rules, courts may restrict those core principles—rights central to our political freedoms—because of the importance of preserving the process, legitimacy, and integrity of jury deliberations.[315] None of the briefs presented to the Court in *Citizens United* analogized the BCRA and the concerns giving rise to the law to the free speech limits courts may place on litigants and jurors.[316] I do not mean to suggest that advancing such an argument would have altered the outcome in *Citizens United*, but it could have helped to frame the

310. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (holding that congressional reforms on term limits are invalidated on congressional grounds); *see also* Citizens United v. FEC, 558 U.S. 310, 319–20 (2010) (invalidating legislative reforms on First Amendment grounds).

311. 558 U.S. at 319.

312. 2 U.S.C. § 441b.

313. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011).

314. California Democratic Party v. Jones, 530 U.S. 567, 571, 586 (2000).

315. *See supra* notes 194–209 and accompanying text.

316. I reviewed the briefs filed in the case, which are available on SCOTUSblog. *See Citizens United v. Federal Election Commission*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/ [https://perma.cc/9X89-G6AW] (last visited Feb. 1, 2017).

debate in such a way as to highlight the important, deliberation-enhancing rationale of such reforms. Perhaps more importantly, the rationale underlying *Citizens United* has always stood on shaky ground, given the slim majority on the Court that supported it. Reframing the argument even slightly might provide the justification to reconsider the decision following a change on the Court.

But the First Amendment also stands as an impediment to other potential reforms that more directly affect the deliberative, rather than representative, process. In other words, during critical legislative moments, perhaps outside influences—in the form of lobbying, fundraising, polling—could be restricted to promote better deliberation by Congress.

In addition to the limiting effect of current First Amendment jurisprudence, the Court's use of the political question doctrine to restrict judicial inquiry into congressional processes stands as an obstacle to reform. The Court's political question doctrine jurisprudence certainly offers a mixed bag approach, without any real consistency or coherence. The Court famously laid out the six "prominent" elements of a political question in *Baker v. Carr*,[317] in 1962. Of those, the Court has relied on three of them to limit its jurisdiction over cases that might be implicated in congressional reform proposals.[318] As discussed earlier, in *Vieth*, the Court held that the partisan gerrymandering question entailed a "lack of judicially discoverable and manageable standards for resolving it."[319] In addition, the Court has been concerned about policing congressional rules and practices out of a belief that judicial intervention might be invading an area with "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or might require the court do undertake an independent resolution of an issue that would express a "lack of respect due coordinate branches of government."[320] Based on these considerations, the Court has dismissed challenges to a statute that the challengers believed did not accurately reflect the language of the bills voted on in the House and Senate and also to statute enacted in accordance with

317. 369 U.S. 186, 217 (1962).

318. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004); United States v. Munoz-Flores, 495 U.S. 385, 390–92 (1990); Powell v. McCormack, 395 U.S. 486, 518–22 (1969) (determining that the critical issue in this case was whether there was a "textually demonstrable constitutional commitment" to the House to determine the qualification of its members).

319. 541 U.S. at 277–78 (quoting Baker v. Carr, 319 U.S. at 217).

320. *See Powell*, 395 U.S. at 518–22 (addressing the "demonstrable constitutional commitment" issue); *Munoz-Flores*, 495 U.S. at 390–92 (addressing the "lack of respect due" question); *see also supra* note 330 and accompanying text.

rules that permitted the House to determine itself what constituted a quorum.[321]

The Court's approach to these cases, however, offers no internal consistency. For example, in *Powell v. McCormack*, the Court heard and resolved Representative Adam Clayton Powell's case challenging the House of Representative's refusal to seat him, even though Article I, Section 5 granted to that chamber the power to determine its members' qualifications.[322] Similarly, in *United States v. Munoz-Flores*, the Court held that it had jurisdiction to hear a challenge to a statute that plaintiffs alleged violated the Origination Clause that requires revenue bills to originate in the House.[323] And, of course, the Court has decided a number of cases that involve inter-branch disputes, mostly recently *NLRB v. Noel Canning*[324] about President Obama's recess appointments, but also including matters involving the legislative veto, [325] the independent counsel law, [326] and the line-item veto.[327]

Thus, while the political question doctrine largely reflects a concern over the appropriate separation of powers, the Court has been willing to overlook those concerns when presented with concrete reasons to do so.[328] The rules and case law surrounding juries, gag orders, and sequestration bolster the arguments for dispensing with the separation of powers concerns and perhaps engaging the judiciary more directly in resolving disputes over congressional self-governance and inter-branch conflicts.

E. Vote Requirement Rules Inform the Deliberative Approach and Can Be Adjusted Depending on the Decision Being Made

Requiring jury unanimity serves important interests, including promoting a particular form of deliberation and helping legitimize verdicts. [329] As critics and supporters of unanimity agree, requiring all the jurors to agree on an outcome

321. *See, e.g.*, United States v. Ballin, 144 U.S. 1, 4–5 (1892) (upholding a Congressional reform whereby the House changed its rules to determine that a quorum is satisfied by a majority).

322. *Powell*, 395 U.S. at 489.

323. *Munoz-Flores*, 495 U.S. at 396.

324. 134 S. Ct. 2550, 2556 (2014).

325. *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986).

326. *See* Morrison v. Olson, 487 U.S. 654, 678–79 (1988).

327. *See* Clinton v. City of New York, 524 U.S. 417, 448–49 (1998).

328. *See Munoz-Flores*, 495 U.S. at 393 ("In many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanism to help it do so. Nevertheless, the Court adjudicates those separation-of-power claims.").

329. *See supra* notes 62–63 and accompanying text.

encourages those holding minority views to speak up and demands that those in the majority listen to and respect those alternative opinions.[330] And, perhaps because of that, jurors spend more time looking through the evidence and take longer to reach a verdict.[331] Moreover, as the discussion above illustrates, we change the voting rules for juries based, in part, on the importance of the issue involved and the liberties at stake.[332]

In some respects, we have already brought these lessons into congressional voting. The House of Representatives operates under a majority-rule voting system that, as a result, limits the degree to which those in the minority have their voices heard.[333] The Senate, with its strong preference towards supermajority voting rules—and often unanimous consent—allows the minority to ensure their voice is heard.[334] This standard means that the Senate often engages in more thoughtful and time-consuming deliberation than the House of Representatives. There is a reason, after all, that the Senate used to be referred to as the world's greatest deliberative body.[335] At the same time, the Senate often changes the vote requirement depending on the issue being debated,[336] much like we do with juries.

Many proposals seeking to reform the internal dynamics of Congress focus on voting. For example, in 2003, Speaker Dennis Hastert implemented a "majority of the majority" rule under which he would not bring any legislation to the floor of the House of Representatives unless a majority of Republicans supported the bill.[337] Since then, members have offered efforts both to

330. *See supra* notes 215–26 and accompanying text.

331. *See supra* note 226 and accompanying text.

332. *See supra* note 214 and accompanying text.

333. *The Legislative Process: How are Laws Made?*, U.S. HOUSE REPRESENTATIVES, http://www.house.gov/content/learn/legislative_process/ [https://perma.cc/9CS2-KQ3Q] (last visited Feb. 1, 2017).

334. *Senate Legislative Process*, U.S. SENATE, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm [https://perma.cc/L35U-LWDC] (last visited Feb. 1, 2017).

335. Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule is Unconstitutional and What to do About It*, 55 B.C. L. REV. 39, 81 (2014).

336. *See generally Rules of the Senate*, U.S. SENATE COMMITTEE ON RULES & ADMIN., http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome [https://perma.cc/95HQ-27AA] (last visited Feb. 1, 2017); *Yay or Nay? Voting in the Senate*, U.S. SENATE (Oct. 15, 2016, 4:17 PM) http://www.senate.gov/general/Features/votes.htm [https://perma.cc/47YU-HGE8] (noting that a simple majority is typically required for a measure to pass, but that "[i]n a few instances, the Constitution requires a two-thirds vote of the Senate").

337. Holly Fechner, *Managing Political Polarization in Congress: A Case Study on the Use of the Hastert Rule*, 2014 UTAH L. REV. 757, 764–65.

enforce and to revise the Hastert rule.[338] Of course the voting proposals in the House do not come close to the wrangling that has occurred in the past decade over the Senate's voting standards. Many senators and commentators have championed reforming the filibuster rules and in 2013, Senate Democrats adopted changes that altered the requirements for obtaining cloture with regards to judicial and executive nominations.[339] A similar push to address the filibuster with regards to legislation has stalled, but remains a possibility. In fact, most of the Senate rules regarding voting have arisen as reforms in one way or another. The cloture rule itself is a reform dating to 1917 and has been altered several times in the hundred years since—all changes designed to help ensure that the world's greatest deliberative body reaches outcomes.[340] Other reforms, including having a two-track system that allows one bill to be "filibustered" while the Senate takes up other legislation, [341] and the reconciliation rules that allow certain types of bills to pass with a simple majority vote,[342] also seek to push the Senate to reach decisions.

The lesson, then, is that the inclination to use voting rules to account for the type of deliberation we want Congress to engage in finds support in our jury system. We need to carefully weigh whether the current rules, as devised, promote the style of debate and consideration we hope for from our national legislature. Moreover, perhaps we should consider further altering congressional voting rules to accommodate the different interests at stake. For example, why must a district court nominee require the same vote threshold as a Supreme Court appointment? Should minor tax reform legislation need the same supermajority as budgetary overhauls? I am not seeking to answer these questions, but only to raise them as examples to weigh when thinking about what kind of consensus we need in order to meet our deliberative objectives.

338. *Id.* at 764–70.

339. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 21, 2013, at A1.

340. Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional*, 94 MARQ. L. REV. 547, 566–68 (2010).

341. *Id.* at 567–68.

342. 2 U.S.C. § 644. *See* C. STEPHEN REDHEAD & JANET KINZER, CONG. RESEARCH SERV., R43289, LEGISLATIVE ACTIONS TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT 1, 8 (2016) https://www.fas.org/sgp/crs/misc/R43289.pdf [https://perma.cc/H4H7-86PT] ("Reconciliation bills are considered by the full House and Senate under expedited procedures. In the Senate, a reconciliation bill can pass with only a simple majority, rather than the 60 votes that are often needed for controversial legislation (because reconciliation bills are not subject to filibuster).").

F. Non-Transparency Can Be Valuable, so Long as Other Conditions Are Satisfied

No one can reasonably doubt the importance of transparency in government.[343] The First Amendment protections for the press, open records law, and public legislative hearings all demonstrate our commitment to keeping government transparent. But just as we have public trials, the rules surrounding the jury also tell us that shielding decision-making from some public view can be important to promoting the deliberative ideal. Our current vision of transparency promotes the representative interest of accountability, but, too often perhaps, does so at the expense of thoughtful and meaningful deliberation. Elected officials play to the audience—whether it be voters, constituents, lobbyists, or donors.[344] Moreover, given the current polarization in American politics, gerrymandering, and party nomination rules, elected officials can face serious electoral consequences for demonstrating a willingness to compromise.[345]

Indeed, the Framers themselves recognized non-transparency's value when they crafted the Constitution. The rules governing the constitutional convention required delegates to maintain the secrecy of the discussions.[346] Indeed, no records of the convention debates were available until James Madison's notes were published in 1840.[347] Could the Framers have reached the compromises they did had they operated knowing that what they said would reach the public? In fact, the Framers wrote the option for congressional non-transparency into the Constitution, by allowing Congress to exclude certain proceedings from the legislative record and only requiring that votes be included in the record by a vote of one-fifth of the chamber.[348]

Finally, we recognize the value of non-transparency today in a variety of other relevant contexts. Executive privilege, for example, rests in large part on the importance of non-disclosure

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343. Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 458–60 (2012) (discussing the concept of a "right to know").

344. MAYHEW, *supra* note 77, at 49–61.

345. *See, e.g.*, Amy Gumann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 PERSP. ON POL. 4, 1125–28 (2010); Aaron Blake, *Republicans Are Cool With Compromise—Just Not With President Obama*, WASH. POST (Nov. 20, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/11/20/republicans-are-cool-with-compromise-just-not-with-president-obama/?utm_term=.ab0569615dd6 [https://perma.cc/84Q4-JC9V].

346. *See generally* JOHN P. KAMINSKI, SECRECY AND THE CONSTITUTIONAL CONVENTION 7 (2005).

347. *Id.* at 24.

348. U.S. CONST. art. I., § 5, cl. 3.

of public information.[349] Additionally, quite recently, Congress itself imposed non-transparency rules on the "Super Committee" that it established to address the budgetary crisis in 2011.[350]

The rules that keep jury deliberations secret, though, reveal an important part of non-transparency that cannot be lost. Allowing jury deliberations to remain secret and shielding them from later judicial review works because of all the other rules that promote the representative ideal and thoughtful decision-making. That is to say, we can trust jurors to engage in the type of deliberations we want because we have ensured they are drawn from a cross-section of the community, that they only consider particular types of evidence, that they will not be unduly influenced by outside interests, and must meet certain voting standards to reach an outcome. If we did not have these rules in place, the value of transparency might not be worth the lost protection that comes from being able to see into the jury room.

If we are thinking about serious and meaningful reforms to Congress, one issue to consider must be the degree to which transparency affects the deliberative process. Perhaps there is some room for looking to how we insulate and isolate juries for ideas for giving Congress its own breathing room to deliberate without undue outside influences, whether well-meaning or nefarious.

VI. CONCLUSION

The underlying premise of this Article is admittedly pessimistic. Congress remains deeply dysfunctional and there exists little reason to believe that any solutions are forthcoming. But that, I believe, also offers us the time we need to consider how we want to frame future reforms, and the jury—as a democratic institution of American government—offers powerful lessons for thinking about reforming Congress.

The main lesson drawn from how we deal with juries is that it is important to recognize the competing ideals we expect Congress to serve. We have implemented rules in the jury context to promote the representative and deliberative functions at separate times. We emphasize the representative goals during the selection process and then switch gears and push deliberation once the jury is seated. Currently, Congress's interests are skewed too much toward the representative function, without

349. Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1386–87 (1974); Jeffrey P. Carlin, Note, Walker v. Cheney: *Politics, Posturing, and Executive Privilege*, 76 S. CAL. L. REV. 235, 240–41 (2002).

350. Rosalind S. Helderman, *Debt Committee Secrecy Worries GOP Freshmen*, WASH. POST, Nov. 2, 2011, at A6.

due regard to ensuring thoughtful legislative deliberation. Our reforms should seek to correct this imbalance. But more than that, we ought to consider the ways in which we have secured the type of jury deliberations we desire. Translating those rules to Congress might not fit directly, but they do provide a valuable framework for guiding congressional reform—when the moment arrives.