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## ***Batson* for Judges, Police Officers & Teachers: Lessons in Democracy From the Jury Box**

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BATSON FOR JUDGES, POLICE OFFICERS & TEACHERS:  
LESSONS IN DEMOCRACY FROM THE JURY BOX

Stacy L. Hawkins\*

*In our representative democracy we guarantee equal participation for all, but we fall short of this promise in so many domains of our civic life. From the schoolhouse, to the jailhouse, to the courthouse, racial minorities are under-represented among key public decision-makers, such as judges, police officers, and teachers. This gap between our aspirations for representative democracy and the reality that our judges, police officers, and teachers are often woefully under-representative of the racially diverse communities they serve leaves many citizens of color wanting for the democratic guarantee of equal participation. This critical failure of our democracy threatens to undermine the legitimacy of these important civic institutions. It deepens mistrust between minority communities and the justice system and exacerbates the failures of a public education system already lacking accountability to minority students.*

*But there is hope for rebuilding the trust, accountability and legitimacy of these civic institutions on behalf of minority citizens. There is one place where we have demonstrated a deeper commitment to our guarantee of democratic equality on behalf of minority citizens and exerted greater effort to that end than perhaps in any other domain of our civic life—the jury box. This paper recounts this important history and explores the political theory underlying the equal protection jurisprudence of jury selection. It then applies these lessons gleaned from the jury context to the constitutional defense of efforts to achieve greater racial diversity within the judiciary, law enforcement, and public education, all of which are as important to the legitimacy of our democracy today as the jury has been throughout American history.*

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“[I]f liberty and equality . . . are [ ] to be found in democracy, they will be best attained when all persons alike share in the government to the utmost.”

– Aristotle<sup>1</sup>

I swear to the Lord,  
I still can't see,  
Why Democracy means,  
Everybody but me.

Langston Hughes<sup>2</sup>

## INTRODUCTION

The stark contrast in voice reflected in the above quotes echoes the contrasting sentiments they embody. On the one hand, we guarantee that all persons are equal and, therefore, ought to have an equal share in the process of democratic self-government. That is the formal expression of our aspirational ideal for democratic equality. On the other hand, the lived experience for many racial minorities is one of exclusion from participation in our democracy.<sup>3</sup> Historically that exclusion was total, but even

1. ARISTOTLE, *POLITICS* 156 (Benjamin Jowett trans., Dover Publications, Inc. 2000) (1885).

2. Langston Hughes, *The Black Man Speaks* in *THE COLLECTED WORKS OF LANGSTON HUGHES: THE POEMS 1941-1950*, at 76 (2011).

3. The term “racial minorities” is used herein interchangeably with “minorities.” Both terms are imprecise in designating the group of non-White persons to whom they refer. The social construction of race renders its use necessarily context-dependent. See IAN HANEY LOPEZ,

today people of color experience far from equal participation in the many institutions that comprise our democracy.<sup>4</sup> Although we continue to fall short in realizing the promise of democratic equality, there is one democratic domain where we have fared better, and more importantly, tried harder, in realizing our aspirations for democratic equality than most others—the jury box.<sup>5</sup>

This paper draws on lessons from the jury context to suggest how we ought to do democracy more broadly. Specifically, the focus here is on applying these jury insights to demands for increasing racial diversity among judges, police officers, and teachers as key democratic decision-makers not wholly unlike jurors in the extent to which they too ought to adequately reflect the communities they serve. Although there is a fairly wide legal literature calling for greater racial diversity among judges in particular, and to some lesser extent among police officers and teachers, this contribution to that literature is unique insofar as it draws an analogy between these contemporary calls for greater racial diversity among judges, police officers, and teachers as key democratic decision-makers, and a long history and tradition of pursuing increased racial diversity among a different set of key democratic decision-makers – jurors.<sup>6</sup> This paper bridges the gap in the existing literature by first recounting the deep history and tradition of guaranteeing democratic equality in jury selection through efforts to ensure racial diversity among jurors,<sup>7</sup> and then applying those jury insights to judges, police officers, and teachers.<sup>8</sup>

The jury literature is extensive.<sup>9</sup> Many scholars have extolled the democratic virtues of increased racial diversity among juries made possible by, among other things, doctrinal developments in the equal protection jurisprudence of jury selection.<sup>10</sup> The jury selection system is by no means perfect,<sup>11</sup> but it has improved dramatically over time to expand the racial diversity of jurors.<sup>12</sup> A likely reason for this exceptional approach in

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WHITE BY LAW (2006). As used herein, these terms are meant to refer to those racial and ethnic minority groups, including Blacks, Hispanics, and Asians, who have or continue to suffer from legal and social discrimination and who remain underrepresented among key public decision-makers in many domains of our democracy. *See id.*; *see also infra* Section III.C. Native Americans are excluded from this reference as used herein because of the complex political relationship between sovereign Native American tribes and the U.S. government. *See* JILL NORGRÉN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 4-5 (2006).

4. *See* LOPEZ, *supra* note 3.

5. *See infra* Section I.D.

6. *See infra* Section I.

7. *See infra* Section I.C.

8. *See infra* Section II.A.

9. *See infra* Section I.A.

10. *See id.*

11. Scholarly critiques of the jury system are as numerous as articles boasting of the jury system. *See infra* note 112.

12. *See infra* Section I.D.

the jury context is that the jury is held up as emblematic of our highest ideals for democratic self-government.<sup>13</sup> Underlying these efforts is an acknowledgment that the failure to ensure racial diversity among jurors betrays our fundamental commitment to democratic equality.<sup>14</sup>

Despite this long history and tradition of valuing racial diversity in jury selection and service, and the concerns for democratic equality informing this tradition, we have largely failed to appreciate parallel concerns for democratic equality that might animate similar calls for greater racial diversity among judges, police officers, and teachers. The jury may be a unique feature of our democracy, but there are many other democratic institutions that serve as equally important sites of civic participation in our democracy. In a democracy “of the people, by the people, and for the people,” these institutions should similarly reflect a commitment to racial diversity as a guarantee of democratic equality.<sup>15</sup> This paper suggests that how we treat jury selection, and in particular, our deliberate efforts to promote racial diversity in jury service, ought to be instructive for how we pursue racial diversity and approach selection for civic participation in these other democratic domains.<sup>16</sup>

This paper is divided into three parts. Part I explains the democratic significance of juries and traces the deep, historic intersection between juries and race in America. Synthesizing political theory, social science research and the equal protection jurisprudence of jury selection, this Part first identifies why the jury is an exemplar of our democratic ambitions for self-government and then reveals why racial diversity in jury selection and service is critical to the realization of those democratic ambitions.

Borrowing from the theory of representative bureaucracy in the public administration literature, Part II extends the democratic lessons of the jury to the judiciary, law enforcement and public education. By demonstrating that each of these other civic domains also has great significance in our democracy and poses equal challenges to our aspirations for democratic equality when public decision-makers in these domains fail to adequately reflect the diversity of the citizens they serve, this Part suggests some basis for analogizing these domains with the jury. Part II offers both theoretical and empirical support for the claim that the lack of racial diversity among judges, police officers, and teachers not only betrays our commitment to democratic equality, but also undermines the legitimacy of our democracy.

Finally, Part III offers some preliminary ideas for how we might address the democratic dilemma posed by the existing lack of racial diversity among judges, police officers, and teachers without violating the constitu-

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13. See *infra* Section I.A.

14. See *infra* Section I.C.

15. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

16. See *infra* Section II.A. and B.

tional proscription on government uses of race. Borrowing lessons from the equal protection jurisprudence of jury selection, this Part suggests that we can similarly engage in deliberate, race-conscious efforts to promote greater diversity among judges, police officers, and teachers in constitutionally permissible ways. The equal protection jurisprudence of jury selection reveals that the democratic legitimacy attained when public decision-makers reflect the diversity of the communities they serve is undoubtedly a compelling government interest. By structuring these race-conscious efforts to mirror those that have been undertaken in the jury context, they can be narrowly tailored in ways that promote meaningful racial diversity within the judiciary, law enforcement, and public education while also ensuring their constitutionality.

## I. JURIES, DEMOCRATIC EQUALITY, AND RACIAL DIVERSITY

### A. *Juries and Democracy*

Juries occupy a special place of significance as a civic institution in our democracy.<sup>17</sup> Virtually every scholarly work on juries recognizes trial by jury as the quintessential and most revered feature of our unique democratic republic.<sup>18</sup> In a system of representative democracy, where few of the governed actually get to govern, juries offer the opportunity for direct democratic participation.<sup>19</sup> Juries, in other words, signify democ-

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17. See JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1-2 (1994) (“Trial by jury is about the best of democracy and about the worst of democracy. . . the jury. . . exposes the full range of democratic vices and virtues. No other institution of government rivals the jury in placing power so directly in the hands of citizens. . . no other institution . . . wagers more on the truth of democracy’s core claim that the people make their own best governors. . . the jury version of democracy stands almost alone today in entrusting the people at large with the power of government.”).

18. *Id.*; see also Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825 (2015); Nancy S. Marder, *Juries Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 660 (2002) (describing the jury’s populist function in our democracy); Vikram Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

19. Representative democracy, in which the people are governed by elected representatives, can be contrasted with direct democracy, in which the people engage in direct self-rule. See DANIELLE ALLEN, *TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE Brown v. Board of Education* 22 (2004) (describing this conflict as “democracies inspire in citizens an aspiration to rule and yet require citizens to constantly live with the fact that they do not.”). See also *Powers v. Ohio*, 499 U.S. at 407 (citing Alexis de Tocqueville’s description of our jury system as “rais[ing] the people itself . . . to the bench of judicial authority [and] invest[ing] the people . . . with the direction of society.”); see also ABRAMSON, *supra* note 17, at 7 (noting that “[i]n a democracy, the legitimacy of the law depends on acceptance by the people. And the jury remains our best tool for ensuring that the law is being applied in a way that wins the people’s consent”); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 34 (2004) (noting the “generally accepted view” that the “representativeness” of the jury “enhances the jury’s political legitimacy as a democratically inclusive institution”).

racy in action.<sup>20</sup>

The most venerable feature of the jury is its ability to promote three critical democratic values—*trust*, *accountability*, and *legitimacy*. Juries foster both the *trust* in government and *accountability* to the people necessary to *legitimize* our representative democracy in the eyes of the citizenry.<sup>21</sup> As the only unelected branch of our federal government, the judicial branch is considered more reliant on the *trust* reposed in it by the people than are the elected branches of government, which are thought to replenish their goodwill with each new election cycle.<sup>22</sup> The judicial branch, therefore, is more dependent on the appearance of *legitimacy* than are the executive or legislative branches.<sup>23</sup>

The jury is the democratic capstone of our judicial system, most prized for its unique ability to legitimize the otherwise politically unaccountable decision-making of judges.<sup>24</sup> Juries satisfy this need for demo-

20. See generally Carroll, *supra* note 18 and Amar, *supra* note 18. See also ABRAMSON, *supra* note 17, at 125 (identifying a “representative deliberation” theory of democracy to describe the jury’s role in our democracy).

21. Powers v. Ohio, 499 U.S. at 411 (“The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. . . . Jury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial or political prejudice . . . or predisposition about the defendant’s culpability.”). Elizabeth Anderson observes that lack of political accountability by government to the people is incompatible with the notion of democratic self-government. ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 89, 92 (2010) (describing democracy as a mode of government by the people “carried out by discussion among equals . . . [whose] point is to . . . realize this promise of universal and equal standing . . . [through] a form of collective self-determination whereby those subject to the laws are also in a relevant sense the authors of the laws.”). Nancy Sherer describes democratic “legitimacy” as “a ‘reservoir’ of goodwill” or “long-term, deep-seated support for an institution . . . rather than short-term snapshots of an institution’s popularity.” Nancy Sherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the US Justice System Possible?*, 105 NW. U. L. REV. 587, 625 (2011). According to political scientist Danielle Allen, democratic disappointment arising from lack of consensus in political decision-making is inevitable in democracy. See ALLEN, *supra* note 19, at 45–47. Thus finding ways of fostering trust and legitimacy are critical to democratic survival. *Id.*

22. See Sherer, *supra* note 21, at 625.

23. *Id.* Sherer refers specifically to the federal judiciary, which is entirely appointed, but her claims are equally applicable to states with judicial appointment systems. See Ciara Torres-Spelliscy, Monique Chase and Emma Greenman, *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE at 6 (2010) (noting that the District of Columbia and 24 other states have appointive, rather than elective, state judicial systems). Even elected state judges may experience some deficit of democratic legitimacy when they fail to reflect the diversity of the communities they serve. See Brenda Wright, *The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections* 19 FLA. ST. U. L. REV. 669 (1991) (referring to a report of the Racial Ethnic Bias Study Commission that concluded, “[t]he state simply cannot expect continued acceptance of a judicial system in which minorities are virtually invisible in positions of decision-making and responsibility.”).

24. For instance, this quest for judicial legitimacy, including efforts to both create and preserve it, defines much of the Supreme Court’s separation of powers doctrine. Alexander Bickel famously coined the phrase “the counter-majoritarian difficulty” to describe the tension

cratic accountability by allowing ordinary citizens “the opportunity to participate in making the justice of the community.”<sup>25</sup> According to jury scholar Jeffery Abramson, it is precisely this function of promoting democratic accountability to all constituent groups in the community that makes racial diversity in particular a salient feature of the jury.<sup>26</sup>

Juries not only generate democratic accountability on behalf of the people, they also foster needed *trust* in the judicial system.<sup>27</sup> This trust is indispensable to the effective functioning of our democracy. Contrary to some popular conceptions of democracy as government by consensus, political philosopher Danielle Allen explains that loss is inevitable in democracy.<sup>28</sup> The real project of democracy, therefore, is not to find consensus. It is instead to first ensure that no group suffers continual losses, and then to find a mechanism for individuals and groups to negotiate the loss of self-interest that is inevitable in democracy.<sup>29</sup> Allen suggests the best mechanism for accomplishing these ends is to engender trust both among citizens and between citizens and government.<sup>30</sup> Trust between citizens guards against the prospect of any group suffering continual losses by fostering “a willingness to sacrifice some of one’s own power for the sake of common agreement,”<sup>31</sup> while trust between citizens and the government allows for acceptance of the temporal losses that are inevitable in democracy.<sup>32</sup> Nowhere is the prospect of loss more inevitable than in the judicial system.<sup>33</sup> When juries are representative of the communities they serve, they help

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between the authority of judicial review by unelected judges and the theory of representative democracy. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

25. *Id.* at 90-92.

26. *Id.* at 125. (“When the cross-sectional ideal is justified in terms of its ability to sell the verdict, the representative jury is brought in line with the general theory of representative government.”) In highlighting the importance of racial diversity in jury service, Abramson argues that “the appearance of justice can[not] be delivered by a jury [ ] process that continually underrepresents minorities.” *Id.* at 131.

27. *See infra* note 34 and accompanying text.

28. ALLEN, *supra* note 19, at 37 (2004). Allen relies on theories of democracy espoused by Thomas Hobbes, Immanuel Kant, Jurgen Habermas, and Plato in describing a presumption of political consensus as characterizing democracy. *See id.* at 63.

29. *Id.* at 68.

30. *Id.* at 93. Allen uses the analogy of friendship to describe the function “trust” plays in stabilizing democracy. She explains that “friendship’s basic act is reciprocity” and that it consists “primarily of believing that others will not exploit one’s vulnerabilities, and that one’s agency is generally secure, even when one cedes some elements of it to others.” *Id.* at 132.

31. William Eskridge also discusses the dangers posed when any group suffers continual political losses in our democracy. William N. Eskridge Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239 (2009). He describes the consequences of this “stakes raising” as destabilizing for our democracy. *Id.*

32. *See* ALLEN, *supra* note 19, at 93.

33. *See* discussion *infra* at 111 (describing how to mitigate loss by fostering trust).



foster the trust necessary to legitimize our judicial system by securing the consent of those governed by it.<sup>34</sup>

### B. *The Theory of Procedural Justice*

The theory of procedural justice explains how representative juries foster trust in the judicial system. The theory posits that public perceptions of the legitimacy of our justice system turn less on the substance of discrete decisions than on the perceived fairness of the procedural processes employed in reaching those decisions.<sup>35</sup> This hypothesis – that fair procedures trump fair outcomes in shaping citizens’ perceptions of institutional legitimacy – coincides with Allen’s thesis that if citizens trust the government, they are more willing to accept the losses that are an inevitable feature of democracy.<sup>36</sup> The theory of procedural justice has been confirmed through a variety of empirical studies.<sup>37</sup>

In one revealing study, participants were shown video footage of police misconduct and told to evaluate the appropriateness of punitive action against the police based on the conduct observed using a scale of 1–3, with 1 being conduct least deserving of punishment and 3 being conduct most deserving of punishment.<sup>38</sup> The researchers found that regardless of the lawfulness of the police conduct, the desire to punish was a full point higher when respondents perceived the conduct as procedurally unfair than when they perceived the conduct as procedurally fair.<sup>39</sup> In fact, the difference barely registered on the scale of 1–3 when looking at the lawfulness of the police conduct.<sup>40</sup> Participants were no more likely to want to punish unlawful conduct than to punish lawful conduct, but they were much more likely to want to punish procedurally unfair conduct than they

34. ABRAMSON, *supra* note 17, at 7 (“the jury remains the best tool for ensuring that the law is being applied in a way that wins the people’s consent.”).

35. See Tom R. Tyler & Tracey Meares, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, YALE L. J. FORUM, 525 (Mar. 2014). See also Sherer, *supra* note 21 at 625 (citing scholars demonstrating empirically that “fair court procedures . . . lead to greater legitimacy for the justice system”). Although Sherer herself distinguishes between “procedural fairness” and the kinds of “descriptive representation” reflected in calls for greater racial diversity within the judiciary (whether among judges or on juries), ensuring that jurors represent a fair cross-section of the community, including the racial diversity of the community, can itself be seen as promoting a kind of procedural justice. *Id.*; see also Tom R. Tyler, *Governing Amid Diversity: The Effects of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28:4 L. & SOC’Y REV. 809–832 (1994); ABRAMSON, *supra* note 17, at 131.

36. See *supra* note 30 and accompanying text.

37. See, e.g., Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing & Rightful Policing and Why It Matters*, 54 WM. & MARY L. REV. 1865 (2013).

38. *Id.* Police are first responders in our justice system and their behavior is as salient in legitimizing or delegitimizing our system of justice as is the behavior of judges or juries. *Id.*

39. *Id.*

40. *Id.*

were to punish procedurally fair conduct.<sup>41</sup> In other words, people disapproved of bad processes far more than they disapproved of bad outcomes.

Studies show that fair processes not only increase faith in the legitimacy of judicial decision-making, they also increase citizens' willingness to accept the decisions of courts, to cooperate with them, and to otherwise abide by the rule of law.<sup>42</sup> In a 2002 study of 1,656 respondents who had interactions with the justice system through either police officers or courts, respondents' perceptions of the fairness of the procedures employed by these public decision-makers were more determinative of respondents' willingness to accept the decision than was the favorability of the decision itself.<sup>43</sup>

Tom Tyler and Tracey Meares explain that there are two key measures of procedural justice: (1) the quality of treatment of citizens by public decision-makers, and (2) the quality of the decision-making itself.<sup>44</sup> These two measures can be seen as rough proxies for gauging *trust* and *accountability* respectively. A key determinant of the quality of treatment of citizens is the extent to which citizens *trust* public decision-makers.<sup>45</sup> Trust in this regard is defined as a belief that the decision-maker is sincere and cares about the effects of his or her conduct on citizens rather than acts out of prejudice or disregard for citizens.<sup>46</sup> One way to foster the trust in public decision-makers that promotes a sense of procedural justice, particularly on behalf of minority citizens, is to ensure that decision-makers themselves are racially diverse in ways that reflect the communities they serve.<sup>47</sup>

### C. *The Importance of Racially Diverse Juries*

Race has always figured prominently in our conception and construction of the American jury system, which is often perceived as treating minorities unfairly relative to Whites.<sup>48</sup> For example, one study found that a quarter of White respondents (25%) and more than three-quarters of Black respondents (78%) said they believe the justice system treats Blacks

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41. *Id.*

42. *See e.g.* Meares, *supra* note 37.

43. *Id.*

44. Tyler & Meares, *supra* note 35, at 537-538.

45. *See id.*

46. *See id.*

47. *See* ABRAMSON, *supra* note 17, at 104 (discussing how racial diversity improves the quality of jury deliberation and decision-making).

48. *Id.* Studies have shown that Whites generally trust the justice system; whereas Blacks generally distrust the justice system. Sara Sternberg Greene, *Race, Class & Access to Civil Justice*, 101 IOWA L. REV. 1263, 1277 (2016) ("Blacks are widely believed to view law enforcement and other legal institutions with greater distrust than whites."). Often these negative perceptions of the justice system by Black citizens is based on perceptions of discriminatory experiences with the system. *Id.* at 1278.

unfairly.<sup>49</sup> Similarly, nearly half of White respondents (45%) and more than four-fifths of Black respondents (84%) said they think the justice system favors Whites over Blacks.<sup>50</sup> This explains why, in the aftermath of the now infamous 1992 trial of the White police officers caught on videotape brutally beating Rodney King (a Black motorist), nearly half of all Black respondents (45%) described the acquittal of the White police officers by an all-White jury as “racist.”<sup>51</sup>

According to the theory of procedural justice, if we can foster trust in the decision-maker (here the jury), and thereby improve perceptions of fair treatment in the judicial process, we can also improve perceptions of judicial legitimacy—notwithstanding the outcome in individual cases.<sup>52</sup> One way that we foster trust in the jury and improve perceptions of fair treatment in the judicial process is by improving the racial diversity of juries.<sup>53</sup> Studies show that perceptions of procedural fairness are significantly higher when verdicts are rendered by racially diverse juries than when verdicts are rendered by single-race juries.<sup>54</sup> As one judge observed about juror diversity, “[y]ou want . . . for this thing to not only be fair, but look fair. Th[e] Court depends on people believing that you get a fair shake.”<sup>55</sup>

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49. Nancy King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1184-1185 and 1194-1195 (1994).

50. *Id.*

51. *Id.* This case was widely cited in the literature in support of critiques of all-White juries and calls for racially diverse ones. See e.g. Johnson & Fuentes-Rohwer, *supra* note 19, at 44; Hiroshi Fukurai & Daryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas & Affirmative Juries of the Hennepin Model and the Jury De Mediate Linguae*, 4 VA. J. SOC. POL'Y L. 645, 646 (1997); King, *supra* note 49, at 1184. Reflecting the same concern in the converse, one scholar observed “no rebuke stings more than the concise statement that ‘an all-White jury convicted a Black defendant.’” Johnson & Fuentes-Rowher, *supra* note 19, at 6.

52. See Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REV. 26, 35 (2009). If, however, judicial outcomes were consistently unfavorable to minority litigants, Allen suggests that such continual losses would also erode trust in the legitimacy of the justice system as a democratic institution. See *supra* notes 30-31.

53. See Samuel Sommers, *On Racial and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90:4 J. PERS. & SOC. PSYCH. 597-612 (2016).

54. Sixty-seven percent of all respondents, seventy-five percent of Hispanic respondents, and ninety-two percent of Black respondents agreed that “decisions reached by racially diverse juries are fairer than decisions reached by single race juries.” See Fukurai & Davies, *supra* note 51, at 664.

55. Ashish S. Joshi and Christian T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA J. (2015). Danielle Allen similarly describes this principle in relation to democratic decision-making more broadly when she explains that trust in fellow citizens as public decision-makers “inspires . . . a consent-based regime with the flexibility needed to garner from citizens of diverse backgrounds consent to decisions made in uncertainty.” ALLEN, *supra* note 19, at 156.

Increasing the racial diversity of jurors improves perceptions of the fairness, and consequently the legitimacy, of the judicial system.<sup>56</sup>

In addition to fostering *trust* in the jury as the judicial decision-maker, which is the first key measure of procedural justice, research shows that ensuring racial diversity among jurors also improves the quality of decision-making in jury deliberations.<sup>57</sup> Thomas and Meares identify this as the second key measure of procedural justice.<sup>58</sup> Abramson offers an account of how increased racial diversity among jurors improves jury deliberations.<sup>59</sup>

Abramson describes the task of the jury in discharging its democratic function fully and competently to “represent accurately the diversity of views held in a heterogeneous society such as the United States.”<sup>60</sup> He argues that racially diverse juries, unlike racially homogenous ones, promote three different democratic ideals: (1) *epistemic diversity*: a populist claim about the collective wisdom of the people; (2) *deliberative diversity*: a claim that many minds outsmart the few brightest minds; and (3) *representative diversity*: a claim that diversity of representation matters in a democracy.<sup>61</sup> Representative diversity fosters needed trust in the jury as judicial decision-maker, but it is the epistemic and deliberative features of racially diverse juries that improve the quality of decision-making, which also promote procedural justice.<sup>62</sup>

56. *Id.*

57. *See supra* note 44 and accompanying text (describing the two key measures of procedural justice); *see also* ABRAMSON, *supra* note 17, at 104. Abramson emphasizes that the deliberative theory of the jury is not about pandering to group interests by highlighting or exploiting individual prejudices, but about leveraging epistemic diversity to improve jury deliberations. *Id.*

58. *See* Thomas & Meares, *supra* note 35, at 537.

59. ABRAMSON, *supra* note 17, at 104.

60. *Id.* at 101. Elizabeth Anderson describes this as epistemic diversity. ANDERSON, *supra* note 21, at 151. She too distinguishes between the underlying differences in cultural and social experiences that contribute to the diversity of perspectives that make for improved jury deliberations and mere differences in race and/or ethnicity among jurors. *Id.*

61. Jeffery Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 883 (2015). In explaining the optimal functioning of the jury and the necessity of cross-sectional representation, Abramson offers a deliberative theory of the jury that relies on Aristotle’s assertion that “democracy’s chief virtue [i]s the way it permit[s] ordinary persons drawn from different walks of life to achieve a ‘collective wisdom’ that none could achieve alone.” *Id.* at 104. Abramson argues that the jury is the “last, best refuge of this connection among democracy, deliberation, and the achievement of wisdom by ordinary persons.” *Id.* *See also* ALLEN, *supra* note 19, at 135 (similarly relying on Aristotle’s claims of deliberation and consent to inform democratic engagement among citizens).

62. The representative function of juries is particularly important for racial minorities who have experienced both *de jure* and *de facto* discrimination in so many domains of public life. *See* Marder, *supra* note 18, at 661 (observing that “[s]erving on a jury and voting . . . takes on special meaning for those members of society, such as African-American men and all women, who were long excluded from jury service, first by law and then by practice. . .”).

The accountability hypothesis helps explain how the deliberative and epistemic features of diverse juries improve the quality of jury deliberations.<sup>63</sup> The accountability hypothesis posits that when working groups are composed of diverse members, participants have to justify their ideas to a wider range of people and therefore must display more thought and care in their consideration.<sup>64</sup> Recent jury studies by psychologist Samuel Sommers confirm the accountability hypothesis, finding that racially diverse juries do a better job than racially homogenous ones of keeping racial prejudices in check in particular, and also of deliberating generally.<sup>65</sup> Sommers finds that the more mixed the racial composition of the jury: (1) the less likely White jurors are to express guilty preferences in advance of jury deliberations, and (2) the greater the information exchange among jurors during deliberations.<sup>66</sup> According to Sommers, relative to racially homogenous juries, racially diverse juries:<sup>67</sup>

- deliberated longer (50.67 minutes vs. 38.49 minutes)
- discussed more case facts (30.48 vs. 25.93),
- committed less factual inaccuracies (4.14 vs. 7.28),
- left fewer inaccurate statements uncorrected (1.36 vs. 2.49),
- cited to more pieces of evidence they considered missing (1.87 vs. 1.07),
- raised a greater number of race-related issues (3.79 vs. 2.07),
- made more mentions of racism (1.35 vs. 0.93),
- had fewer objections when racism was mentioned as relevant (22% of the time vs. 100% of the time).

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63. See ANDERSON, *supra* note 21, at 130 (describing the accountability hypothesis).

64. *Id.* Notably, expressing care also reflects the quality of treatment that fosters trust in the decision-maker and satisfies the first measure of procedural justice. See *supra* note 44 and accompanying text.

65. Sommers, *supra* note 53, at 608. Abramson similarly observes that “research indicates that ‘when jurors of different ethnic groups deliberate together, they are better able to overcome their biases.’” ABRAMSON, *supra* note 17, at 104. Elizabeth Anderson provides support for the notion that racial diversity among jurors may contribute to improved deliberation by relying on theories of cognitive psychology, explaining that “[c]ognitive biases tend to kick in when people need to make decisions under time pressure, when they are tired, distracted, cognitively overloaded, or under stress and when a nondiscriminatory rationale for their decision is readily available. They are better able to consciously check their biases when they know they are being observed, are held accountable for their decisions, are reminded of nondiscriminatory norms, are given ample time to deliberate, and make evaluations on the basis of objectively measured criteria rather than subjective impressions.” ANDERSON, *supra* note 21, at 50. This conclusion is also bolstered by the business management literature demonstrating that diverse teams, including those reflecting broad racial diversity, are better problem solvers than heterogeneous teams. See generally SCOTT PAGE, *THE DIFFERENCE* (2007).

66. Sommers, *supra* note 53, at 608.

67. *Id.*

In other words, racially diverse juries displayed more care and less prejudice in their deliberations. This means that not only is the deliberative process itself improved when juries are more racially diverse, but this enhanced deliberation reinforces precisely the qualities that, according to the theory of procedural justice, engender trust in the decision-maker.<sup>68</sup>

Abramson's claim about the jury embodying principles of democratic equality by ensuring that all groups are effectively represented in the deliberative process actually has historic roots dating back to colonial England.<sup>69</sup> The jury "de medietate linguae," which translates to "jury of the half tongue," was first used in twelfth century England in cases involving Jews, but evolved to accommodate cases involving any foreign party.<sup>70</sup> The jury "de medietate linguae" required that half of all jurors represent the minority interest in any litigation involving the adjudication of minority rights.<sup>71</sup> The jury "de medietate linguae" was an acknowledgment that "prejudice existed against the minority group and that an ordinary jury would not necessarily produce a fair result."<sup>72</sup> As with so many other aspects of English common law, this practice was eventually adopted in the early American jury system in cases involving a minority party interest.<sup>73</sup>

By 1968, the Jury Selection & Service Act codified this commitment to democratic equality in jury selection and service, including, specifically, a commitment to racial diversity among jurors, by expressly identifying the purpose of jury selection as "achieving proportionate representation on the jury rolls for all 'distinct' or 'cognizable' groups in the community," defined to include (among other things) proportionate representation of racial minorities.<sup>74</sup> The Jury Selection and Service Act, and the fair cross-section requirement it established, have become the constitutional baseline for the guarantee of equal protection in jury selection and service in both federal and state courts.<sup>75</sup> As a result, numerous federal, state, and local courts have adopted efforts deliberately designed to improve racial diversity in jury selection and service.<sup>76</sup>

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68. See *supra* note 44 and accompanying text; see also Marder, *supra* note 18 (similarly concluding that cultural diversity on juries generates epistemic and deliberative benefits for jury deliberations).

69. ABRAMSON, *supra* note 17, at 106; see also Fukurai & Davies, *supra* note 51, at 654-657.

70. Fukurai & Davies, *supra* note 51, at 654-657.

71. *Id.*

72. *Id.*

73. *Id.*

74. See ABRAMSON, *supra* note 17, at 117. Prior to 1968, federal juries were composed of "men of recognized intelligence and probity" within the community, but this more elitist jury selection system was abandoned for a more democratic system reflective of a "fair cross-section of the community." *Id.* at 99-100.

75. See *id.* at 118.

76. Nancy King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 708 (1993) ("Practically unnoticed, a growing

Hennepin County, MN, for instance, employs a race-conscious selection system for grand juries that requires the composition of the 23-member grand jury to mirror the racial composition of the County as determined by the most recent census.<sup>77</sup> The system provides detailed procedures for calling successive jurors from the jury pool until the required racial composition is reached among grand jurors.<sup>78</sup> There are also a number of State and Local Court Commissions and Task Forces charged with developing procedures for ensuring that jury selection and service appropriately reflect the racial diversity of the communities from which jurors are drawn.<sup>79</sup> The federal judiciary has adopted similar efforts.<sup>80</sup>

In addition to these more formal processes,, individual judges have also taken steps to promote jury diversity. For example, in the Northern District of Illinois, which encompasses Chicago, Judge Milton Shadur adjourned a trial until a multi-racial jury appropriately representative of the community could be summoned.<sup>81</sup> The Third Circuit affirmed similar efforts by Judge Ramseur of the Federal District Court in New Jersey to ensure that the jury reflected a cross-section of the community.<sup>82</sup> These

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number of courts are using race to select jurors . . . to increase the representation of minorities on jury pools to [ ] duplicate or surpass their percentages in local populations.”); *see generally* Albert W. Alschuler, *Racial and Ethnic Quotas and the Jury*, 44 DUKE L. J. 704 (1995) (discussing the jury *de mediate linguae*, the Hennepin County, MN grand jury model, and other courts that employ racial and ethnic quotas in jury selection); *see also* *Jury Selection & Composition*, 10 HARV. L. REV. 1443 (1997); Leslie Ellis & Shari Seidman Diamond, *Race Diversity & Jury Composition: Battering & Bolstering Legitimacy*, 78 CHI-KENT L. REV. 1033, 1050 (2003). For examples of the types of efforts being undertaken by courts, *see, e.g.,* *Federal Diversity & Inclusion Strategic Plan 2016; Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*.

77. *See* Fukurai & Davies, *supra* note 51, at 658. Based on then available census data reflecting a nine percent total minority population in Hennepin County, at least two members of every 23-member grand jury empaneled had to be racial and ethnic minorities. *Id.*

78. *Id.*

79. *See, e.g.,* *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*; *see also* Wright, *supra* note 23 (detailing the report of the Florida Supreme Court Racial and Ethnic Bias Study Commission to improve jury diversity).

80. Goal 5.2.c of the 2015 *Strategic Plan for the Federal Judicial Center*, which is the administrative arm of the federal court system, is to “improve the extent to which juries are representative of the communities in which they serve.” *Id.*

81. *See* Joshi and Kline, *supra* note 55; *see also* Annie Sweeney % Cynthia Dizikes, *The Balancing Act of Jury Selection*, CHICAGO TRIBUNE, Mar. 27, 2013 (describing the same incident and efforts more generally to improve racial diversity among jurors).

82. In defending his actions, Judge Ramseur explained that he was “trying to get a cross-section . . . [by] deliberately trying to get an even mix of people from background and races, and things like that.” *Ramseur v. Beyer*, 983 F.2d 1217, 1229 and 1236 (3rd Cir. 1992), *cert. denied* 113 S. Ct. 2433 (1993) (finding race-conscious selection of grand jurors may be “objectionable” or “ill-conceived” but not unconstitutional where motivated neither by a desire to purposefully discriminate, nor to limit service by African American jurors, but instead by desire to achieve cross-section on jury). *Compare* *Cassell v. Texas*, 339 U.S. 282 (1950) (finding equal protection violation where jury commissioner purposefully limited the number of African

race-conscious efforts by judges, jury commissioners, and others affirm the importance of ensuring diversity in jury selection and service as a function of our constitutional commitment to democratic equality.<sup>83</sup>

#### D. *The Equal Protection Jurisprudence of Jury Selection*

The Equal Protection Clause is the provision of our Constitution that guarantees all citizens equal treatment under the law.<sup>84</sup> It has been the constitutional provision most responsible for redressing racial discrimination throughout our nation's history.<sup>85</sup> For nearly a century after the Equal Protection Clause was ratified, however, it did little to protect people of color (particularly the newly emancipated slaves) from racial discrimination as intended, with one notable exception—the jury box.<sup>86</sup> Because of their unique ability to help legitimize our democracy by fostering trust and accountability on behalf of the judicial branch, juries have received special consideration in our constitutional equal protection jurisprudence.<sup>87</sup> Cases adjudicating equal protection challenges in jury selection and service have acknowledged the intersecting principles of representative democracy and equal protection embodied by the jury.<sup>88</sup> Indeed the very first *successful* challenge under the newly ratified Equal Protection Clause was a challenge to racial exclusion in jury selection.<sup>89</sup>

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American jurors to one to achieve proportionate representation of the community.). *But cf.* Commonwealth v. Doss, 510 S.W.3d 830 (Ky. 2016) (finding judge who discharged jury in criminal trial of Black defendant because no Blacks were seated on the petit jury violated the Equal Protection Clause).

83. See discussion *supra* Section I.C.

84. U.S. CONST. art. XIV, § 1.

85. Cases include *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967).

86. During this period, Justice Oliver Wendell Holmes famously called the Equal Protection Clause the constitutional provision of “last resort.” *Buck v. Bell*, 274 U.S. 200, 208 (1927).

87. See Alschuler, *supra* note 76, at 717 (“The Supreme Court has recognized that the importance of representative juries justifies a departure from the standards employed in equal protection litigation . . . It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”) (*internal citations omitted*); see also Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 N.Y.U. ANN. SURV. AM. L. 185, 185-186 (2013) (arguing generally that the Supreme Court cases on race in jury service diverge substantially from the rest of the Court’s Equal Protection jurisprudence, describing it as “emphatically the most protected area of Equal Protection jurisprudence.”).

88. See *infra* note 106 and accompanying text.

89. *Strauder v. West Virginia*, 100 U.S. 303 (1880). The first challenge decided by the Supreme Court under the Equal Protection Clause was *The Slaughterhouse Cases*, 83 U.S. 36 (1873), but that challenge by a group of butchers to a state-sponsored monopoly in the slaughtering industry in the city of New Orleans was unsuccessful.



In *Strauder v. West Virginia*, a Black criminal defendant challenged a West Virginia statute excluding Black persons from jury service.<sup>90</sup> The Supreme Court declared that the statutory exclusion from jury service on the basis of race evinced precisely the kind of racial prejudice the newly ratified Equal Protection Clause was designed to redress.<sup>91</sup> More troubling than the overt racial exclusion, the Court observed, was the fact that it occurred in the jury context, which by its very design is intended to secure the individual liberty emblematic of our representative democracy through its composition of “the peers or equals of the person whose rights it is selected or summoned to determine.”<sup>92</sup> The Court expressly held that “compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race,” is undoubtedly a violation of the Equal Protection Clause.<sup>93</sup>

After *Strauder*, jury cases became unique in the Court’s equal protection jurisprudence.<sup>94</sup> During a time when the “separate but equal” doctrine prevailed to authorize racial segregation in almost every domain of public life, the jury was a notable exception.<sup>95</sup> The Court continued to enforce the guarantee of equal protection in jury service in ways that diverged from the Court’s more general equal protection jurisprudence, thereby signaling the unique importance of racial equality in jury service.<sup>96</sup> Unlike the jury “de medietate linguae,” the Court did not mandate that Blacks be seated on juries involving Black defendants as a matter of equal protection law,<sup>97</sup> but in *Norris v. Alabama*, the Court extended the protection from “total statutory exclusion” as recognized in *Strauder*, to “systematic and arbitrary exclusion” in the selection of persons called for jury service.<sup>98</sup> Further, rather than requiring direct evidence of discriminatory intent, the Court accepted “statistical disparities between Blacks eligible to serve and those actually called” as proof of unlawful discrimination under

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90. *Strauder*, 100 U.S. at 304.

91. *Id.* at 308.

92. *Id.* at 309.

93. *Id.*

94. See Heyman, *supra* note 87.

95. See *id.*

96. For a discussion of the cases addressing the issue of racial diversity in jury service from *Strauder v. Virginia*, 100 U.S. 303 (1880) to *Powers v. Ohio*, 499 U.S. 400 (1991), see ABRAMSON, *supra* note 17, at 105-139.

97. *Virginia v. Rives*, 100 U.S. 313 (1880). For a fuller discussion of *Rives*, see ABRAMSON, *supra* note 17, at 105-107.

98. *Norris v. Alabama*, 294 U.S. 587, 588 (1935). This case involved an appeal by the famous Scottsboro Boys, who were five Black defendants accused a raping a white woman and then convicted by an all-White jury. See ABRAMSON, *supra* note 17, at 111 (discussing the *Norris* case and describing the trial of the Scottsboro boys, along with the trial of the men accused of lynching Emmitt Till, as the most infamous cases of the jury effectuating a grave miscarriage of justice and, as sociologist Gunnar Myrdal described, embodying a form of “extreme democracy” that favors only the interests of the majority).

the equal protection clause.<sup>99</sup> This particular line of jury discrimination cases culminated in *Smith v. Texas*,<sup>100</sup> in which the Court first acknowledged the “need to make the jury a ‘body truly representative of the community.’ ”<sup>101</sup> This acknowledgement expressed a requirement for racial diversity among jurors in principle, but the selection of jurors for trial continued to reflect racialized exclusion in practice.<sup>102</sup>

Then, in *Batson v. Kentucky*, the Court went beyond scrutinizing rules designed to include Blacks on juries in principle to address the pernicious and discriminatory effects of more covert practices intended to exclude Blacks from jury service in practice.<sup>103</sup> In *Batson*, a Black criminal defendant challenged the prosecutor’s use of peremptory strikes to remove all of the Black prospective jurors from the jury venire, resulting in the defendant’s conviction by an all-White petit jury.<sup>104</sup> *Batson* argued these race-based peremptory strikes violated the Equal Protection Clause.<sup>105</sup> Addressing the ways in which both principles of equal protection and representative democracy were implicated in the case, the *Batson* Court observed:

The very idea of a jury is a body . . . 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 . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.<sup>106</sup>

The Court specifically referenced judicial reliance on the public trust reposed in the court for its *legitimacy*, and the way in which the racial exclusion of jurors undermined that public trust. Echoing the theory of procedural justice and its emphasis on fair process, the Court reasoned:

Selection procedures that purposefully exclude Black persons from juries undermine public confidence in the fairness of our system of justice . . . Discrimination within the judicial system is most pernicious because it is ‘a stimulant to that race

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99. See Heyman, *supra* note 87, at 237, 239. This can be contrasted with the ruling in *Plessy v. Ferguson* in which the Court announced the “separate but equal” doctrine, finding that state-sponsored segregation was not a violation of the Equal Protection Clause. 163 U.S. 537 (1896).

100. *Smith v. Texas*, 311 U.S. 128 (1940).

101. See ABRAMSON, *supra* note 17, at 115.

102. See *id.*

103. *Batson v. Kentucky*, 476 U.S. 79 (1986).

104. *Id.* at 83.

105. *Id.*

106. *Id.* at 86-88.

prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.<sup>107</sup>

In finding for the Black defendant and prohibiting a prosecutor's use of peremptory strikes to remove jurors from the jury venire on the basis of their race, the *Batson* Court explained how its decision legitimized the justice system and even the rule of law itself:

By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.<sup>108</sup>

The Supreme Court in *Batson* declared the covert efforts to exclude Blacks from jury service through the use of peremptory strikes just as incompatible with the equal protection guarantee of racial non-discrimination in jury selection as the overt exclusion in *Strauder*.<sup>109</sup> Moreover, the Court in *Batson* ruled that the prosecution could no longer rely on the presumption of non-discrimination that had prevailed in these cases, but instead required the prosecution to "articulate a neutral explanation related to the particular case to be tried" for peremptorily striking each potential juror.<sup>110</sup> The Court specifically cautioned trial judges to be aware of and sensitive to the potential for peremptory strikes to mask discriminatory treatment when evaluating whether purposeful discrimination had occurred.<sup>111</sup>

This line of cases, with *Batson* at its center, provided unparalleled substantive and procedural protections against racial discrimination in the

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107. *Id.*

108. *Id.* at 99; *see also* Georgia v. McCollum, 505 U.S. 42, 57 (1992) (refusing to allow even a criminal defendant to engage in race-based exclusion of jurors because of concerns for democratic legitimacy).

109. Applying the "systematic exclusion" standard first announced in *Norris*, the Court went further still in finding that such "systematic exclusion" on the basis of race need not be demonstrated through a pattern of conduct spanning multiple cases, but can be demonstrated by proof of conduct raising an inference of discrimination solely in the pattern of striking jurors in the defendant's own case. *Batson*, 476 U.S. 79. This standard has been continually affirmed in subsequent cases. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (finding proof of "systematic exclusion" of Mexicans from jury service); Alexander v. Louisiana, 405 U.S. 625 (1972) (finding systematic exclusion of Blacks from jury service).

110. The standard providing for a presumption of non-discrimination on the part of the prosecution arose in *Swain v. Alabama*, 380 U.S. 202 (1965).

111. *Batson*, 476 U.S. at 99.

jury context.<sup>112</sup> For this reason, the decision in *Batson* is considered a cornerstone of the Supreme Court's equal protection jurisprudence surrounding jury selection.<sup>113</sup> The treatment of *Batson* in the scholarly literature is extensive and cannot be fully summarized here, but there is general consensus about the import of *Batson* for both equal protection doctrine and democratic theory.<sup>114</sup> This acknowledgment was made more explicit

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112. Despite its notable impact, *Batson* has not proven to be a panacea. Both scholars and practitioners alike have questioned the efficacy of *Batson*, and the constitutional standards it established, for ensuring that juries adequately reflect the racial diversity of the communities they serve. See, e.g., Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859 (2015) (critiquing the Court's focus on procedural fairness in jury selection rather than on the constitutional rights of criminal defendants); Jeannine Bell and Mona Lynch, *Cross-Sectional Challenges: Gender, Race and Six-Person Juries*, 46 SETON HALL L. REV. 419 (2016) (identifying ongoing challenges to achieving cross-sectional juries, particularly among six-person juries); Ellis & Diamond, *supra* note 76, at 1058 (acknowledging ongoing challenges to jury diversity "despite *Batson* and its progeny").

113. The scholarly literature on *Batson* fills volumes in no small part because of its impact in shifting the doctrinal terrain of constitutional law in ways that have moved us materially closer to realizing the guarantee of racial equality in one particular domain of public life - jury service. For instance, there have been numerous symposia dedicating whole volumes to discussion and analysis of *Batson v. Kentucky* and/or its implications for juries. See, e.g., *Symposium: Batson at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy*, IOWA L. REV. (2012); *The Civil Jury as a Political Institution Symposium*, WM. & MARY L. REV. (2014); *Jury and Lay Participation: American Perspective and Global Trend*, CHIC.-KENT L. REV. (2015); *Symposium: The Jury at a Crossroad: The American Experience, II. The Jury and Race*, CHIC.-KENT L. REV. (2003); AM. CRIM. L. REV. (1994).

114. See, e.g., Carroll, *The Jury As Democracy*, *supra* note 18 (arguing for alternate conceptions of jury selection based on satisfying both its democratic and representative functions); Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837 (2014) (arguing for the importance of the civil jury as a form of democratic participation and the necessity of racial diversity to achieve the goal of legitimacy); Melynda J. Price, *Policing the Borders of Democracy: The Continuing Role of Batson in Protecting the Citizenship Rights of the Excluded*, 97 IOWA L. REV. 1635, 1637, 1643 (2012) (describing the jury box as "critical and negotiated democratic space" and further noting "discussions of the role of the jury in representative democracy provided many political trees in the forest of legal issues regarding . . . the prevention of racial discrimination [in jury selection]."); Marder, *supra* note 18 (observing that the jury performs many "populist" functions, among them fostering legitimacy in government among citizens, a function which is best served when the jury is representative of the citizenry); *Jury Selection and Composition*, 110 HARV. L. REV. 1443 (1997) (identifying the jury as a forum for democratic participation, as much as the administration of law/justice, and arguing for greater racial diversity in jury service to further these dual roles); Amar, *supra* note 18 (arguing that because of the political nature of jury service, the right of racial minorities to equal participation is best protected as a voting right rather than under the equal protection clause); Phoebe Had-don, *Does Grutter Offer Courts An Opportunity to Consider Race in Jury Selection and Decisions Related to Promoting Fairness in the Deliberation Process?*, 13 TEMP. POL. & CIV. RTS. L. REV. 547 (2004) (arguing for reconception of the jury to better accomplish the goal of the jury as an embodiment of principles of both democracy and equality); King, *supra* note 49 (arguing for the defensibility of affirmative action in jury selection under equal protection doctrine based on the compelling interest in furthering democratic legitimacy on behalf of the judiciary). See also Al-schuler, *supra* note 76 (also arguing for affirmative race-consciousness in jury selection based both on principles of equal protection and democratic participation).

in *Powers v. Ohio*, where the Court went further still in emphasizing the point that racial equality in jury service is about protecting the right of democratic participation by jurors themselves and preserving the *legitimacy* of the judicial process.<sup>115</sup> Relying on the holding of *Batson*, the Court in *Powers* held that it is not only a violation of the defendant's equal protection rights to exclude jurors on the basis of their race, but a violation of the excluded juror's constitutional rights not to be removed from the jury on the basis of her race.<sup>116</sup> Reiterating the importance of jury diversity to judicial legitimacy, the Court expressly reasoned that denying individuals participation in jury service on the basis of race "casts doubt on the integrity of the judicial process" itself.<sup>117</sup>

Even today, the Supreme Court is still scrutinizing claims of racial discrimination in jury selection and service with great concern for considerations of procedural justice.<sup>118</sup> The Court's emphasis in these cases, not just on equal protection but also on preserving public respect for both the judicial system and the rule of law, can be understood as expressing concern for fostering the trust and ensuring the accountability to the citizenry that are necessary to preserve the legitimacy of the judicial system.<sup>119</sup>

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115. *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people . . . for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

116. *Id.* Despite the fact that the defendant in *Powers* was White and the excluded jurors were Black, the Court reasoned that the defendant had standing to litigate this third-party claim on behalf of the excluded juror(s). *Id.* at 413 ("Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom . . . This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror.").

117. *Id.* at 412 (observing that racial discrimination in jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law" and even "casts doubt" over the entire proceeding). Acknowledging the racialized dimension of the concern for judicial trust and legitimacy, the Court observed that this "cynicism may be aggravated if race is implicated in the trial, either in a direct way . . . or some more subtle manner . . ." *Id.*

118. In 2016, the Court overturned the criminal conviction of a Black defendant where the prosecution exercised its peremptory strikes to exclude all of the qualified Black venirepersons from the jury, leaving the defendant to be convicted by an all-White jury. *Foster v. Chatman*, 578 U.S. \_\_\_, 136 S. Ct. 1737 (2016). Last term, in *Pena-Rodriguez v. Colorado*, the Court again overturned a defendant's jury verdict, this time because a juror admitted making racially biased statements during jury deliberations. 580 U.S. \_\_\_, 137 S. Ct. 855 (2017). In both cases the Court emphasized the importance of ensuring that jury trials are not tainted by racial discrimination, which the Court said "implicates unique historical, constitutional, and institutional concerns" and denies the guarantee of equality central to the effective functioning of our democracy. *Id.* at 21 (slip op.).

119. As the Court reasoned in *Powers*, "[t]he purpose of the jury system is to impress upon the [ ] defendant and the community as a whole that a verdict . . . is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means. . . [that] excludes jurors . . . on account of race." 499 U.S. at 413.

The Supreme Court's opinions in *Batson* and its progeny, as well as the scholarly literature analyzing *Batson*, identify two key reasons why this case, and the goal of racial diversity in jury service that it promotes, are considered so significant in our constitutional equal protection canon. The first is the unique role that juries occupy in our system of representative democracy, serving as a means to foster both trust and accountability on behalf of the judiciary as the least democratic branch of government.<sup>120</sup> The second is the overriding importance of racial diversity to the effective democratic functioning of the jury itself.<sup>121</sup> If we wager so much on juries precisely because they epitomize our ideals for democratic equality, then how we think about and treat juries ought to inform how we manage other aspects of our judicial system, as well as civic institutions more broadly.

## II. ENSURING DEMOCRATIC EQUALITY IN THE JUDICIARY, LAW ENFORCEMENT, AND PUBLIC EDUCATION

If the jury is considered an exemplar of our representative democracy, it follows that how we conceive of and administer the jury system should inform our approach to other key sites of civic participation in our representative democracy.<sup>122</sup> In other words, *Batson* is grounded in a doctrine of racial equality and principles of participatory democracy that transcend the jury context.<sup>123</sup> The most obvious extension of *Batson* is to the bench, where judges perform a civic function equivalent to juries in our judicial system.<sup>124</sup> But there is no reason to limit application of the democratizing principles embodied in *Batson* to the judiciary.

There are other equally significant domains of our representative democracy where the key insights of procedural justice theory ought to similarly apply and where key public decision-makers ought to equally reflect the racial diversity of the communities they serve.<sup>125</sup> The two additional domains suggested here are law enforcement and public education. These domains are suggested not because they are the only other domains of our civic life that lend themselves to application of these doctrinal and democratic principles, but because, for several reasons, they have unique significance for the enhanced democratic legitimacy that will accrue if public

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120. See *supra* Section I.A.

121. See *supra* Section I.C.

122. See *supra* note 35 and accompanying (discussing the theory of procedural justice).

123. See *supra* note 114 and accompanying text.

124. Judges today perform many judicial functions that were once within the purview of the jury. See ABRAMSON, *supra* note 17, at 75-77. There is already a fair amount of consensus around the claim for greater judicial diversity. See, e.g., Johnson & Fuentes-Rohwer, *supra* note 19, at 45 (citing sources ranging from Chief Justice William Rehnquist to the American Bar Association, "broad agreement exists that there is a *pressing* need for a diverse judiciary.").

125. See *supra* note 35 and accompanying text (discussing the theory of procedural justice).

decision-makers in these domains better reflect the diversity of the communities they serve.<sup>126</sup>

First, these are domains where we are presently experiencing a crisis of democratic legitimacy, particularly on behalf of minority citizens, as acutely reflected in the “school to prison pipeline” phenomenon.<sup>127</sup> Second, and perhaps because of these dire circumstances, these domains have been the subject of extensive research and study and so lend themselves to greater empirical analysis of the effects of increased diversity on these domains.<sup>128</sup> Finally, each is a domain where scholars have already made calls for increased racial diversity, and so there is precedent for the race-conscious approach advocated for here.<sup>129</sup> However, the focus here on these three domains should not suggest any limitation on future attempts to expand the scope of the democratic equality principles embodied in *Batson* even further.<sup>130</sup>

Political philosopher Elizabeth Anderson has similarly called for extension of the principle of democratic equality from the jury to democracy more broadly.<sup>131</sup> She suggests that, much like racially homogenous juries, our present system of democracy, with its long history of racial exclusion and segregation, lacks the requisite *accountability* to racial minorities needed to foster democratic legitimacy.<sup>132</sup> This history has resulted in public decision-makers who are overwhelmingly White and who lack effective ac-

126. See *infra* notes 127-129 and accompanying text.

127. See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313 (2016).

128. See *infra* Section II.B.

129. See *infra* notes 146 and 148. It might seem that given these considerations, prosecutors would be a likely target of consideration here. See, e.g., *Justice For All*, www.wholeads.us/justice (citing the abysmal statistics on the demographic diversity of elected state prosecutors across the country). However, the justice system is already well-represented in this analysis by the inclusion of both police (front-line enforcers) and judges (with final enforcement authority), and so prosecutors seem an unnecessary target. Additionally, given the focus specifically on the “school to prison pipeline,” it seems appropriate to forego treatment of prosecutors in this analysis in favor of teachers. Finally, there simply has not been as much research on and scholarship produced about the effects of increased racial diversity among prosecutors to permit their inclusion here.

130. Abramson, for instance, connects the debate over racial equality in jury service to other democratic domains such as “schools, police forces and elected and appointed offices.” ABRAMSON, *supra* note 17, at 102. See also *id.* at 127 (“these issues . . . are ones that Americans fiercely debate elsewhere, in school assignments, affirmative action programs, and . . . minority voting districts.”). Allen defines our democracy as “[a] host of publicly binding decisions . . . [that] arise from public institutions like schools, churches, media outlets, and businesses.” ALLEN, *supra* note 19, at 168-169.

131. See ANDERSON, *supra* note 21, at 102.

132. *Id.*

countability to minority citizens.<sup>133</sup> Such a lack of political accountability is inherently incompatible with the idea of representative democracy that informs our commitment to democratic equality.<sup>134</sup> According to Anderson, if we are to enforce our aspirational norms of democratic equality, as well as ensure trust and foster accountability in our democratic institutions, we must seek greater racial diversity among public decision-makers across all relevant domains of our civic life.<sup>135</sup> If we understand our aspirations for democracy as a form of “collective self-determination whereby those subject to the laws are also in a relevant sense the authors of the law,” then the imperative of racial diversity within the key sites of our democracy and in particular among key public decision-makers is made evident.<sup>136</sup> Although Anderson cautions that the pursuit of representative democracy should not devolve into identity politics, she does advocate for greater racial diversity among our civic leaders.<sup>137</sup>

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133. *Id.* (“[E]lites—those with official decision-making power over others—are overwhelmingly composed of a closed social group . . . th[at] effectively escape[s] accountability for the impact of their decisions on [minority racial] groups.”).

134. Anderson expressly describes our democracy as a government in which the political rights inhering in all citizens include the right to participate fully and equally in government through the following acts: “to vote, assemble for political purposes, hold political office and *serve on juries*.” ANDERSON, *supra* note 21, at 90.

135. Anderson concludes that “democratic equality requires not just that [political] offices be realistically open on fair terms to all groups . . . , but that they actually be filled by members of all the relevant groups, such that offices are fully integrated, with members of different groups working together on terms of equality.” *Id.* at 110. *See also id.* at 109 (“[political] offices [must] be occupied by members of different groups . . . [and] competent elites must be composed of people from all walks of life, including all significantly segregated groups.”). This sentiment seems to mirror Justice O’Connor’s recognition in *Grutter* that in order for our democracy to be legitimate in the eyes of minority citizens, the path to civic leadership must be “visibly open to talented and qualified individuals from every race and ethnicity. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Anderson argues that “under conditions of racial segregation, elites composed overwhelmingly of Whites cannot be trusted to formulate policies concerning Blacks or any other racially isolated group . . . that are equally responsive to their interests.” ANDERSON, *supra* note 21, at 110. Anderson explains this lack of accountability on behalf of majority civic leaders to minority citizens by observing, for instance, that “[w]hen the target of policy is implicitly or explicitly coded Black, the policy response is harsh and punitive; when the target is coded White . . . the policy response is sympathetic.” *Id.* at 62.

136. ANDERSON, *supra* note 21, at 92. This process of “collective self-determination” is consistent with Allen’s claim that democracy requires reciprocity where, in the process of governing, individual citizens trust that “one’s agency is generally secure, even when one cedes some elements of it to others.” ALLEN, *supra* note 19, at 132.

137. Anderson warns that “racial identity politics” fosters continued segregation that promotes neither justice nor democracy and urges investment in a collective rather than narrow racial identity. ANDERSON, *supra* note 21, at 110. I am not convinced that racial identity politics are as troublesome as Anderson suggests to our democratic aspirations. *See generally* Osamudia James, *Valuing Identity*, 102 MINN. L. REV. 127 (2017). I do, however, concede her point, which echoes Allen’s, that the effective functioning of our democracy requires that we cultivate trust among citizens and between citizens and government and that any threat to this mutual trust



Anderson emphasizes the importance of racial diversity among elected officials, but the public decision-making that implicates the need for fostering democratic trust and accountability is not confined to electoral politics.<sup>138</sup> Public deliberations occur across a broad range of civic institutions and by a host of different public decision-makers, which Allen describes as “the parochialness of law and representation” in our democracy.<sup>139</sup> Accordingly, participation in each public domain of our civic life, as well as all decision-making by public servants, ought to equally reflect this commitment to fostering democratic trust and accountability.<sup>140</sup> In broadly conceiving of the opportunities for our representative democracy to live up to its commitment to democratic equality, most notably embodied in our constitutional jury jurisprudence as signified by *Batson*, I turn now to these other domains of our political life as models for *Batson*’s ready application.

#### A. *Judging, Policing, and Teaching as Key Sites of Civic Participation*

Legal scholars have in part acknowledged application of the democratic equality principles embodied in *Batson* to judges.<sup>141</sup> Sylvia Lazos Vargas, for instance, makes the case for racial diversity among judges by drawing on John Hart Ely’s famous representation reinforcement theory.<sup>142</sup> Vargas explains how equal protection law operates to both guarantee equal participation and reinforce notions of democratic representation on behalf of racial minorities.<sup>143</sup> Like Allen, Vargas argues that the trust generated on behalf of minority citizens when judges reflect the racial di-

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poses a threat to the legitimacy and long-term stability of our democracy. ALLEN, *supra* note 19, at 37.

138. ANDERSON, *supra* note 21, at 109.

139. Allen argues for broadly construing the sites and moments of political participation by arguing: “The bills of federal and state legislatures are not the only laws that structure life. A host of publicly binding decisions . . . arise from public institutions like schools, churches, media outlets, and businesses to set the terms of our cohabitation. Political representation occurs not merely when Congress-folk gather. . . . Our participation in assorted institutions . . . shapes our political world . . . [reflects an] understanding of the parochialness of law and representation.” ALLEN, *supra* note 19, at 168-169.

140. Although Allen does not expressly identify courts and/or juries in particular as relevant sites of civic participation, she does imply their relevance in this regard. *Id.* at 78. (citing Thomas Hobbes for the principle that, “[i]n a democracy. . . the court is the people.”).

141. Sylvia R. Lazos Vargas, *Does A Diverse Judiciary Attain A Rule Of Law That Is Inclusive?: What Grutter v. Bollinger Has To Say About Diversity On The Bench*, 10 MICH. J. RACE & L. 101 (2004-2005).

142. *Id.* at 139. This theory defends Chief Justice Earl Warren’s activist equal protection jurisprudence during the Civil Rights Era. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

143. Vargas, *supra* note 141, at 139.

iversity of the citizenry legitimizes and stabilizes our democracy by diffusing racial tensions.<sup>144</sup>

Acknowledgments of the democratic equality benefits of greater racial diversity among police officers and teachers also exist in the social science literature.<sup>145</sup> Relying on studies demonstrating the material benefits that accrue to communities of color from greater racial diversity among law enforcement (and conversely the harms that can occur when an all-White force polices minority communities), scholars have called for increased racial diversity among police officers.<sup>146</sup> Law enforcement itself has long defended efforts to increase racial diversity within their own ranks on the ground that such racial diversity is vital to their ability to engender trust with minority communities and ultimately to legitimize law enforcement in the eyes of minority citizens.<sup>147</sup> Similar calls for increased racial diversity among teachers can be found both in the educational literature<sup>148</sup> and among school districts themselves.<sup>149</sup>

Although scholars have sometimes defended calls for greater racial diversity among judges, police officers, and teachers on the basis of increased perceptions of institutional legitimacy, they have not generally grounded their observations or arguments in the equal protection principles expressed in *Batson* and its progeny.<sup>150</sup> Thus, the literature has not

144. *Id.* at 141-142. (“[i]nclusive judging provides a reason for minority citizens to continue to trust key governmental institutions and believe they are neutral rather than political . . . Trust that institutions can function capably and inclusively is part of what makes it possible for democratic societies to diffuse racial identity-based conflicts and keep them at tolerable levels.”).

145. *See infra* notes 146 and 148.

146. *See, e.g.,* Alison Hall, Erika Hall & Jamie Perry, *Black & Blue: Exploring Racial and Ethnic Bias and Law Enforcement in the Killings of Unarmed Black Male Civilians*, 71:3 AM. PSYCH. 175-186, 182 (2016) (suggesting that among the factors contributing to police killings of Black men, “racial imbalances between communities and their police forces may be especially problematic.”).

147. Numerous police departments have argued, and courts have accepted, that racial diversity among law enforcement is necessary for effective policing, particularly in minority communities. *See, e.g.,* *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (upholding race-conscious police hiring). *See also* *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996); *Hayes v. North State Law Enforcement Officers Ass’n*, 10 F.3d 207 (4th Cir. 1993).

148. *See, e.g.,* Dan Goldhaber, Roddy Theobald & Christopher Tien, *White Paper: The Theoretical & Empirical Arguments for Diversifying the Teacher Workforce: A Review of the Evidence* at 2, THE CENTER FOR EDUCATION DATA & RESEARCH WP 2015-9 (2015) (citing the extensive scholarly literature promoting greater racial diversity among teachers).

149. School districts have similarly argued, with less success than police departments, that racial diversity among teachers is necessary to effectively serve minority students. *See* *Wygant v. Jackson Bd. of Education*, 476 U.S. 276 (1986) (rejecting race-conscious teacher lay-off plan designed to achieve racial diversity among teachers); *Piscataway School Bd. v. Taxman*, 91 F.3d 1547 (3rd Cir. 1996).

150. Some legal scholars have grounded recent calls for judicial diversity in the doctrine of diversity espoused in *Grutter v. Bollinger* rather than in the democratic equality principles of *Batson*. *See, e.g.,* Vargas, *supra* note 141, at 117 (relying on *Grutter* to support the call for a

fully explored the underlying theories of democratic equality and procedural justice that inform the need for greater racial diversity in the judicial, law enforcement or educational domains. Filling this gap in the extant literature, this section will offer greater doctrinal and theoretical grounding for these claims by demonstrating how the call for greater racial diversity among judges, police officers, and teachers is consistent with the democratic equality principles of *Batson* and how realizing this aim in each of these domains will help legitimize these democratic institutions by increasing perceptions of procedural fairness.<sup>151</sup>

### B. *Representative Bureaucracy as a Theory of Procedural Justice*

The theory of procedural justice, with its focus on perceptions of the justice system as a whole, can explain why increased racial diversity will improve perceptions of legitimacy on behalf of judges, in addition to juries.<sup>152</sup> It even has some application to police officers, who serve as front-line decision-makers in our justice system.<sup>153</sup> But it does not explain the importance of racial diversity in the domain of public education generally, or among teachers specifically. A related concept, representative bureaucracy, bridges the gap between the theory of procedural justice and the domain of public education as a key site of civic participation, and between judicial actors and teachers as key public decision-makers in our democracy.<sup>154</sup> Additionally, the theory of representative bureaucracy reinforces the importance of racial diversity among judges and police officers as key public decision-makers in the judicial and law enforcement domains.

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“critical mass of minority judges on each bench.”). One notable exception is the work of Kevin R. Johnson and Luis Fuentes-Rohwer. See Johnson & Fuentes-Rohwer, *supra* note 19. Johnson and Fuentes-Rohwer rely on both *Gutter* and the “jury selection literature,” including in particular *Batson*, to inform their proscriptive claims for selecting judicial nominees with an eye toward racial diversity. *Id.* at 10 (noting that “many of the arguments for diversity among jury pools apply with equal force to the judiciary.”).

151. See also Torres-Spellisc, Chase & Greenman, *supra* note 23 (taking for granted the importance of judicial diversity and instead conducting empirical research of representative state judicial nominating processes to determine best practices for increasing judicial diversity).

152. Diversity among judges is more important today than in the past as judges have expanded their decision-making power to include many issues that were previously decided by the jury. See Abramson, *supra* note 61, at 866, 898 (offering theoretical model for democracy legitimizing features of jury that have equal application to judges). *Id.* at 870-71.

153. For a discussion of the application of the theory of procedural justice to police officers, see *supra* notes 38-43 and accompanying text (discussing police studies in the procedural justice literature).

154. J. Donald Kingsley first coined the term “representative bureaucracy” in 1944 in relation to British Parliamentary government, but it emerged in the American public administration and then political science literature in the late 1960s and early 1970s as a recognition that bureaucratic agencies make more public policy decisions than do legislatures. M.E. SHARPE, REPRESENTATIVE BUREAUCRACY: CLASSIC READINGS & CONTINUING CONTROVERSIES (Julie Dolan & David H. Rosenbloom eds., 2003).

The premise of “representative bureaucracy” theory is that racial congruence between bureaucrats and the citizens they serve influences how minority citizens benefit from public decision-making by the bureaucrat.<sup>155</sup> In other words, representative bureaucracy posits that minority citizens will experience greater civic benefit from bureaucrats who share their racial background.<sup>156</sup> The underlying reasons are much like the accountability hypothesis in the jury context and involve an accrual of the deliberative and representative benefits of diversity.<sup>157</sup> Representative bureaucracy theorizes that differences in social identity translate into different social experiences.<sup>158</sup> These experiences, in turn, contribute to differences in political attitudes, which are strongly correlated with political behaviors.<sup>159</sup> Just as the accountability hypothesis in the jury context predicts that racial diversity among jurors improves deliberations, particularly in cases where minority interests are involved, representative bureaucracy theorizes that racial congruence between bureaucrats and citizens improves policy outputs on behalf of minority citizens, particularly on issues of high racial salience.<sup>160</sup>

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155. *Id.* There are some differences among theorists in describing the benefits of representative democracy, which loosely correlate with Abramson’s epistemic, deliberative, and representative theories of jury diversity. See Abramson, *supra* note 61, at 866. Donald Kingsley, who coined the term in 1944, believes that government bureaucracies must reflect the larger populace to ensure they reflect the wisdom and insight of the diverse views of the public. *Id.* at 4. Max Weber, on the other hand, doubts that individual representatives can overcome institutional bureaucratic cultures. *Id.* Frederick Mosher straddles these two views by acknowledging the importance of representative bureaucracy for enhancing public decision-making, but expresses suspicion that identity congruence between bureaucrats and citizens will necessarily translate into beneficial public policy for citizens because of their shared identity. *Id.* at 5. Samuel Krislov responds to Mosher’s concern by suggesting that the descriptive (or passive) representation that arises from identity congruence between bureaucrats and citizens is itself beneficial because it legitimizes government by promoting the ideal of equality. *Id.* at 6. Despite these conflicting theoretical perspectives, each of these theorists acknowledges the importance of representative bureaucracy, regardless of their disagreement over its precise consequences for citizens. Moreover, the empirical data demonstrates that representative bureaucracy can inure to the benefit of minority citizens. See *infra* note 159.

156. *Id.*

157. *Id.* at 52 (describing benefits as “enhancing administrative responsiveness . . . redressing [ ] underrepresentation . . . [and] legitimizing government.”).

158. *Id.* at 85; see also Hong-Hai Lim, *Representative Bureaucracy: Rethinking Substantive Effects & Active Representation*, PUB. ADMIN. REV. (Mar./Apr. 2006).

159. SHARPE, *supra* note 154, at 85. This theory and each of these linkages have been confirmed by at least some empirical research relating to race, whereas some other demographic characteristics, such as gender, wealth or education are only weakly correlated with bureaucratic decision-making. *Id.* at 89-90. Given the distinct social construction of racial identity, it is unsurprising that racial identity has strong correlations with social experiences and, consequently, political attitudes. See generally LOPEZ, *supra* note 3, discussing the social construction of racial identity.

160. This is particularly true where bureaucrats exercise substantial discretion. Sharpe, *supra* note 154, 122 and 126. See also Nick A. Theobald & Donald P. Haider-Markel, *Race, Bureaucracy & Symbolic Representation: Interactions Between and Police*, 19 J. PUB. ADMIN. RESEARCH & THE-

Several examples in the relevant domains of policing and teaching illustrate the point. Studies have found that Black and Latino police officers treat Black and Latino motorists less punitively than White police officers by, for instance, issuing fewer citations.<sup>161</sup> Similarly, a study showed that Black teachers treat Black students more favorably by assigning them to gifted classes three times more often than do White teachers.<sup>162</sup> Another study of teachers found less punitive treatment of Black students, as measured by formal discipline, based on student/teacher racial congruence.<sup>163</sup> If we consider police officers and teachers as bureaucrats and their actions as policy outputs, these findings suggest that positive benefits do accrue to minority citizens from having bureaucrats who share their racial identity.

Representative bureaucracy theory is even reinforced in the judicial domain. Judicial behavioralism is the branch of political science that applies empirical methods to determine the relationship, if any, between the personal attributes of judges and their rulings.<sup>164</sup> This is like studying the policy outputs of judges as bureaucrats. Judicial behavioralism offers findings and conclusions regarding the racially congruent effects of judicial decision-making that are consistent with the findings of representative bureaucracy for police officers and teachers, namely that racial congruence between judges and litigants matters for how judges decide individual cases.<sup>165</sup>

In one study, researchers found that plaintiffs in racial harassment cases had higher success rates when their cases were decided by African

ORY 409-426 (2008) (“[R]esearch suggests that the presence of African American and Hispanic elected officials increases the likelihood that African American and Hispanic interests are represented in policy processes,” and suggesting the same phenomenon operates with even greater force among unelected public officials).

161. *Id.* Additionally, research suggests that, consistent with procedural justice theory, minority citizens perceive police as more legitimate when there is racial congruence between citizens and police. *Id.*; see also Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, Vol. 2, No. 1 AERA OPEN, 1-25 at 2 (Jan. – Mar. 2016).

162. See Grissom & Redding, *supra* note 161, at 1-4. This race congruent effect in the educational context has not similarly been found to exist for White, Hispanic or Asian students. *Id.* at 10. This may be due, in part, to the higher salience of Black identity than Hispanic or Asian identity. See generally LOPEZ, *supra* note 3.

163. See also SHARPE, *supra* note 154, at 128-129 (finding in a study of Florida Public Schools that teacher/student racial congruence is associated with fewer assignments to remedial classes, more assignments to gifted classes and less disciplinary action for Black students).

164. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 Wash. U. L. Rev. 1117 (2009); see also Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics in Minority Diversity of the Federal Bench*, 83 Ind. L. J. 1423, 1471 (2008).

165. These studies have found that racial congruence between judges and litigants matters in cases of high racial salience. See Chew & Kelley, *supra* note 164, at 1134 (describing the significance of judges’ race in cases alleging racial discrimination).

American judges (45.8%), than when their cases were decided by either White judges (20.6%) or Hispanic judges (19%).<sup>166</sup> Notably, critics often claim that it is not this descriptive representation (or racial congruence) that matters among key public decision-makers, but that instead, it is substantive representation (or interest congruence) that matters most.<sup>167</sup> These critics argue that it matters less whether public decision-makers look like you than whether they share your political commitments.<sup>168</sup> But this study of judicial decisions in racial harassment cases found that the statistical disparity in outcomes by race held even after controlling for judges' political affiliation.<sup>169</sup> African American judges who were both Democrat (47%) and Republican (43%) ruled in favor of Black plaintiffs significantly more often than either White Democrats (27.1%) or White Republicans (16.6%).<sup>170</sup>

Another study similarly found that African American judges were more than twice as likely to rule in favor of Voting Rights Act plaintiffs than their White counterparts.<sup>171</sup> Moreover, consistent with the account-

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166. *Id.* The study was based on a random sampling of racial harassment cases across six federal circuits for the period 1981 – 2003. *Id.* at 1138. The success rate before a Black judge (45.8 percent) was twice the overall rate of success rate of (22 percent). *Id.* at 1141.

167. *See, e.g.,* Royce Brooks, *Electing One of Our Own: The Importance of Black Representation for Black Communities in the Context of Local Government*, 3 AM. U. MODERN AM. 33, 37–38 (2007) (responding to this critique by expressing a preference for descriptive representation over substantive representation in local elections where the need for effective interest representation is most acute).

168. *Id.*

169. Chew & Kelley, *supra* note 164, at 1149.

170. *Id.* This means that although Black Republicans were slightly less likely to rule in favor of race discrimination plaintiffs than were Black Democrats and White Republicans were also significantly less likely to do so than White Democrats, Black Republicans and Black Democrats were 2–3 times more likely to rule in favor of race discrimination plaintiffs than were their White counterparts. *Id.* Providing further confirmation of the importance of identity congruence between judges and litigants, another study found that judges' gender was not significantly correlated with judicial decisions in racial discrimination cases, but judges' gender was correlated with outcomes in sex discrimination cases. *See* Pat K. Chew, *Judges, Gender & Employment Discrimination Cases: Emerging Evidence Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359, 366 (2011). Interestingly, the judges' race was correlated with different rulings in both race and sex discrimination cases, with African American judges ruling in favor of sex discrimination plaintiffs twice as often as their White counterparts and ruling in favor of race discrimination plaintiffs more than twice as often as their White counterparts. *Id.* at 370.

171. Voting Rights Act plaintiffs are more often than not African American. *See* Adam Cox & Thomas Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008). Additional studies confirm the significance of racial congruence between judges and litigants by evaluating racial disparities in criminal sentencing. *See* David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012). Although generally judges impose harsher sentences on Black criminal defendants than on White criminal defendants, one study found a statistically significant reduction in the magnitude of the racial disparity among African American judges, suggesting that minority defendants are treated less harshly by African American judges than by judges of other races. *Id.*

ability hypothesis on the deliberative diversity benefits of racially heterogeneous decision-makers from the jury context, this study also found that on appeal, White judges were significantly more likely to find a violation of the Voting Rights Act when they sat on a panel with an African-American judge than when they sat on an all-White judicial panel.<sup>172</sup> These empirical findings confirm the importance of racial diversity among judges for the same reasons that representative bureaucracy theory promotes racial diversity among police officers and teachers—it increases democratic accountability on behalf of minority citizens, which in turn promotes democratic legitimacy.<sup>173</sup>

Despite clear evidence of the benefits that accrue for minority citizens from increased racial diversity among judges, police officers and teachers, Nancy Sherer suggests that opposition to these efforts will persist unless proponents are able to convince Whites that they too benefit from this increased diversity.<sup>174</sup> This acknowledgment that minorities will not achieve equality in the absence of the convergence of their interests with the interest of Whites is not new.<sup>175</sup> Responding to this concern for “interest convergence,” following is an analysis of the broader implications of this failure to achieve greater racial diversity among judges, police officers, and teachers.

### C. *The Consequences of Failing to Achieve Democratic Equality*

The reasons we should strive to improve the racial diversity of our judges, police officers, and teachers are not limited to the idea that principles of democratic equality demand it as a theoretical or doctrinal matter,

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172. Cox & Miles, *supra* note 171, at 45.

173. Not surprisingly, given these findings and the widespread calls for greater racial diversity among judges, attempts to diversify the federal bench extend as far back as the Carter Administration in the 1970s. See Sherer, *supra* note 21, at 601 (marking the start of efforts to diversify the federal judiciary with President Carter, observing, “[w]hen President Jimmy Carter took office in 1977, there were but eight women (1.4% of all federal court judges at that time), twenty African-Americans (3.5%), and five Hispanics (0.9%) on the federal bench (including both active and senior status judges). Believing that such imbalance jeopardized the integrity of the entire justice system, President Carter became the first president to implement a far-reaching appointment strategy with diversity as its cornerstone,” and citing President Clinton as the “first to make descriptive representation the cornerstone of his judicial selection strategy . . . promising to make . . . appointed positions ‘look like America.’”

174. Sherer, *supra* note 21, at 631.

175. Derrick Bell first espoused the interest convergence theory in a 1980 Harvard Law Review article addressing the successes and failures of *Brown v. Board of Education*. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Bell suggested generally that the guarantee of equality for Blacks and other minority groups will remain unrealized unless and until these claims can be aligned with the interests of Whites, and he specifically observed that the momentary success of efforts to racially integrate public schools, epitomized by *Brown*, was achieved only because of the concurrent international pressures to disavow racism and promote democratic equality in the aftermath of World War II. *Id.* at 524.

or because it will benefit minority citizens specifically. Allen observes that democracy is marked by the inevitability of loss, but she cautions that when any group suffers continual losses the stability of democracy is threatened.<sup>176</sup> Examples from each of these domains demonstrate the devastating practical consequences for our democracy and the real losses that accrue for all citizens when public decision-makers fail to reflect the diversity of the communities they serve and, consequently, are incapable of ensuring accountability, engendering trust, or promoting legitimacy on behalf of these democratic institutions.

The examples below are merely illustrative of the types of harms, both to our democracy and to our citizenry, that arise from our failure to ensure that judges, police officers and teachers reflect the racial diversity of the communities they serve. Using the “school to prison pipeline” phenomenon to frame this problem,<sup>177</sup> the following demonstrates how public decision-makers, *i.e.*, teachers, police officers and judges, at each successive point in this pipeline lack accountability to minority citizens and contribute to negative outcomes that have the potential to erode trust in these institutions, undermine their legitimacy and ultimately, as Allen suggests, may threaten the long-term stability of our democracy.

### 1. When Teachers Lack Accountability Minority Students Suffer

We have long recognized that public education provides the foundation for good citizenship and the best opportunity for children to flourish as engaged citizens and as productive individuals.<sup>178</sup> Despite this recognition, public schools have failed to educate all citizens equally. There has been a stubborn racial achievement gap in American education dating back decades.<sup>179</sup> Black and Hispanic students are underrepresented among

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176. See ALLEN, *supra* note 19, at 108-111. See also Eskridge, *supra* note 31 (similarly explaining the “stakes-raising” threat posed to democracy when minority groups suffer continual political losses).

177. For a general discussion of the racialized nature of this problem, see Nance, *supra* note 127.

178. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments . . . It is the very foundation of good citizenship. . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”). See also FREDERICK C. MOSHER, *DEMOCRACY AND THE PUBLIC SERVICE*, 27-28 (2nd Ed. 1982) (describing public education as the most significant institution by which any society can transmit its “ethos, frames of reference and knowledge,” and perhaps more importantly by which access is granted to “different strata and specializations of position within . . . the public service”).

179. See Goldhaber, Theobald & Tien, *supra* note 148, at 2.



high academic achievers.<sup>180</sup> At the same time, they are overrepresented in remedial education classes and among school disciplinary cases.<sup>181</sup> The reasons for this achievement gap are complex and some are unknown, but recent research reveals that academic achievement for Black students in particular is positively correlated with teacher/student racial congruence.<sup>182</sup> This research suggests that we could narrow the existing racial achievement gap, increase the number of Black students in gifted classes, reduce the number in remedial education classes, and lower the rate of discipline for Black students simply by increasing the number of Black teachers and improving the rate of student/teacher racial congruence.<sup>183</sup>

Existing racial disparities between public school students and their teachers suggest there is significant room for improvement.<sup>184</sup> Half (50%) of all public school students are racial minorities, the vast majority of whom are Black and Hispanic, but less than one-fifth (18%) of public school teachers are racial minorities.<sup>185</sup> These racial disparities are expected to get worse as the population of public school students gets more diverse over time.<sup>186</sup> Although there are various reasons why public school teachers are less racially diverse than their students, one of the reasons is that minority teachers are hired at lower rates than their White peers.<sup>187</sup> This is a troubling trend that public schools ought to try more deliberately to redress if we are to ensure that all children have an equal opportunity to become productive citizens.<sup>188</sup>

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180. See Status & Trends in the Education of Racial and Ethnic Groups 2016 at iv and 38, NCES, <https://nces.ed.gov/pubs2016/2016007.pdf>. (summarizing achievement gap and disparities in discipline, as well as disparities in special education).

181. *Id.*

182. See Goldhaber, Theobald & Tien, *supra* note 148, at 3. See also Hannah Putnam et al., *High Hopes and Harsh Realities: The Real Challenges to Building a Diverse Workforce*, BROWN CENTER ON EDUCATION POLICY (Aug. 2016).

183. See SHARPE, *supra* note 154, at 128.

184. See *infra* note 185 and accompanying text.

185. See Putnam et al. *supra* note 182, at 4.

186. The share of minority students will grow from fifty percent to two-thirds by the year 2060. *Id.* This growth in the diversity of students is expected to far exceed the growth in the diversity of teachers, which is only expected to increase from eighteen percent to approximately thirty percent. *Id.* at 5.

187. *Id.* at 7. Some of the other reasons include lower levels of college degree attainment among Blacks and Hispanics in particular and lower levels of interest in teaching as a career among minorities generally. *Id.* at 6.

188. See Putnam et al., *supra* note 182. This is not to suggest that closing the racial gap between teachers and students would be easy. Data suggest that simply hiring minority teachers at the same rate White teachers are hired would not significantly close the racial gap between students and teachers. *Id.* at 11. However, there is no reason to believe that minority teachers could not be hired at higher rates than White teachers given the existing (and growing) disparities between minority students and teachers. *Id.* (this diversity hiring strategy would have to increase minority hiring substantially above the rate at which White teachers are currently hired

## 2. When Communities Mistrust Police Lives Are Lost

Even more troubling perhaps than this lack of academic accountability to minority students are the fatal consequences that have resulted from the erosion of trust between law enforcement and minority communities. Recent news reports have chronicled the strained relations and growing mistrust between law enforcement and minority communities across the country.<sup>189</sup> The issue has garnered so much national attention that both the Democratic and Republican candidates addressed it as a primary pillar of their campaigns during the 2016 presidential election.<sup>190</sup> Although there is much disagreement from all sides of the debate on the solutions to this problem, there is one point of consensus—trust between minority communities and the police is dangerously low, and the consequence has been deadly.<sup>191</sup>

According to recent data, Black citizens are more than twice as likely to be shot by police than either White or Hispanic citizens, and are six times more likely to be shot by police than Asian citizens.<sup>192</sup> Blacks represent less than thirteen percent of the U.S. population, but roughly one quarter of unarmed persons killed by police.<sup>193</sup> Even when the consequence of policing in minority communities is not deadly, it is often devastating. The Department of Justice, for instance, has concluded that some local law enforcement agencies have engaged in patterns of discriminatory policing in minority communities that have resulted in unlawful arrests and

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because a nominal increase would not significantly impact the existing or projected racial disparity). Despite the admitted difficulty of the task, it should not foreclose the effort.

189. See, e.g., Timothy Williams, *Official Apologizes for Police Role in Mistrust by Minorities*, N.Y. TIMES, Oct. 17, 2016 (acknowledging the increasingly strained relations between police and Black communities).

190. Democratic presidential nominee Hilary Clinton was sympathetic to calls for police to rebuild trust with minority communities. See Candace Smith, *How the Presidential Candidates Differ on Police Brutality*, ABC NEWS (July 8, 2016), [abcnews.go.com/politics/presidential-candidates-differ-police-brutality/story?id=40440463](http://abcnews.go.com/politics/presidential-candidates-differ-police-brutality/story?id=40440463). Presidential nominee Donald Trump seemed to dismiss these concerns with calls for more emphasis on “law and order.” *Id.*

191. The president of the International Association of Chiefs of Police, Terrence M. Cunningham, has acknowledged this “deepening mistrust of law enforcement within predominantly Black and Hispanic communities.” See Williams, *supra* note 189. See also Michele L. Jawando & Billy Corriher, *More Money, More Problems*, CTR FOR AM. PROGRESS 5 (2015) (highlighting the growing distrust between minority communities and law enforcement specifically, and the justice system more generally).

192. See *The Counted*, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>. Native Americans are the only racial group more likely to be shot by police than Blacks. *Id.*

193. 242 of the 1001 people killed by police between January 1, 2016 and December 9, 2016 were Black, and 38 of the 139 unarmed people killed by police during the same period were Black. *Id.* According to the 2010 Census, Blacks comprise 12.8 percent of the U.S. population. See [www.census.gov](http://www.census.gov).

the use of non-lethal, excessive force.<sup>194</sup> Responding to these concerns, the Department of Justice has acknowledged that rebuilding trust must be at the heart of any efforts to repair relations between minority communities and law enforcement.<sup>195</sup>

And it is not just Black deaths at the hands of police officers that have deepened the mistrust between law enforcement and minority communities. It is also the police response to Black deaths at the hands of other citizens. From the killing of unarmed teenager Trayvon Martin in 2012 by White neighborhood watchman George Zimmerman, to the more recent killing of professional football player Joe McKnight by a White motorist during a “road rage” incident, minority communities have expressed mounting frustration with police officers for the perceived reluctance of law enforcement to arrest and/or seek prosecution of White perpetrators when the victim is Black.<sup>196</sup> This frustration is in stark contrast with what is often perceived as over-policing by law enforcement in minority communities when they are instead the perpetrators of crime, sometimes with fatal consequences.<sup>197</sup>

The deaths of unarmed Blacks in particular at the hands of police have spurred protest movements across the country by citizens beleaguered with the state of police/minority relations.<sup>198</sup> And the death toll is adding up on both sides. During a recent protest of police shootings in Dallas, Texas, five police officers were fatally shot.<sup>199</sup> This growing mistrust between law enforcement and minority communities is not simply a matter of democratic legitimacy; it is a matter of life and death.

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194. *Investigation of the Baltimore City Police Department*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION (Aug. 10, 2016).

195. See Greene, *supra* note 48, at 1269 (describing Attorney General Eric Holder's 2014 National Initiative for Building Community Trust & Justice).

196. According to news reports, Joe McKnight was unarmed when he approached the vehicle of Ronald Gasser, the White man who fatally shot McKnight over a traffic incident. See Daniel Victor, *Joe McKnight Shooting: Man Is Charged Days Later in Fatal 'Road Rage'*, N.Y. TIMES, Dec. 6, 2016. Local Black citizens criticized the Jefferson Parish Sheriff for being “slow-footed” in handling the McKnight investigation “because of the race of the two men.” *Id.* Local NAACP leaders and others were particularly critical of the sheriff's decision to release Mr. Gasser rather than charge him for the murder initially, saying “they believed he would not have been freed if he were Black and that justice would be less swift because Mr. McKnight was Black.” *Id.*

197. See *The Counted*, *supra* note 192.

198. The most widely known movement is the Black Lives Matter Movement formed after the 2012 death of Trayvon Martin. The number of Black police shooting victims is being chronicled by *The Counted*, but some of the more high-profile cases that have garnered national media attention since the 2012 death of Trayvon Martin include: Michael Brown (2014, MI), Eric Garner (2014, NY), Tamir Rice (2014, OH), Akai Gurley (2014, NY), Laquan McDonald (2015, IL), Freddie Gray (2015, MD), Walter Scott (2015, SC), Alton Sterling (2016, LA), Rekia Boyd (2016, IL), Terrence Crutcher (2016, OK), Philando Castille (2017, MN), and Jordan Edwards (2017, TX).

199. See Manny Fernandez, Richard Perez-Pena & Jonah Engel Bromwich, *Five Dallas Officers Were Killed As Payback, Police Chief Says*, N.Y. TIMES, July 8, 2016.

Given the low numbers of minority police officers currently, at least some calls for police reform emphasize the importance of improving the racial diversity of law enforcement in communities of color.<sup>200</sup> According to one recent report surveying 269 local jurisdictions, racial minorities are underrepresented among law enforcement by an average of twenty-four percentage points relative to census population estimates of the racial composition of the communities served.<sup>201</sup> In thirty-five of the eighty-five jurisdictions in which racial minorities are in the majority, the racial disparity between citizens and the police was more than fifty percent.<sup>202</sup> If the theories of procedural justice and representative bureaucracy are correct, increasing the racial diversity of police officers in these communities will not only improve trust between law enforcement and these communities, it will also increase accountability to minority citizens.<sup>203</sup> Rebuilding trust and fostering greater accountability to minority communities may be the best safeguard against the continued threats to the democratic legitimacy of law enforcement posed by ongoing police shootings and the resulting minority protests.

### 3. When Judges Lack Legitimacy the Judicial System is Undermined

Finally, at the last stage of this pipeline, we must ensure the legitimacy of the rule of law by ensuring that judicial decision-making is procedurally fair, starting with increasing the racial diversity of judges.<sup>204</sup> First, increased racial diversity among judges may help ameliorate some of the lingering concerns with the administration of *Batson* challenges in the jury context based on empirical evidence of minority judges' greater willingness to credit claims of racial discrimination.<sup>205</sup> Second, and perhaps more important, when the bench lacks sufficient diversity, judges themselves can decide cases in ways that compromise the appearance of procedural fairness and undermine the legitimacy of the justice system.

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200. See *supra* note 146-147;. See also David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the new Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006) (observing the benefits of increased diversity among law enforcement due to affirmative action efforts of the 1970s and '80s and calling for continued efforts to improve the diversity of law enforcement).

201. *Diversity on the Force: Where Police Don't Mirror the Community*, GOVERNING (Sept. 2015).

202. *Id.*

203. See Sklansky, *supra* note 200, at 1230 (citing evidence that Black police officers respond differently to claims of racial profiling and excessive force).

204. See Barbara Graham, *Toward An Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 183 (2004) (detailing diversity of federal bench); Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, AM. CONST. SOCIETY FOR L. & POL'Y (2016) (citing statistics on the lack of gender and racial/ethnic diversity among state court judges).

205. See Chew & Mears, *supra* note 164 (describing a study of judges' decision-making patterns in cases alleging racial discrimination).

Aaron Persky is a White judge of the Superior Court in Santa Clara County, CA. A recent case over which Judge Persky presided demonstrates the threat to judicial legitimacy posed by judges whose decision-making is perceived as procedurally unfair. Judge Persky garnered national attention in June 2016, when he presided over a case in which Brock Turner, a White Stanford alum and an accomplished student athlete, had been convicted of three counts of felony sexual assault of a fellow Stanford student.<sup>206</sup> Under California law, Turner's conviction carried a minimum penalty of two years on each count of sexual assault.<sup>207</sup> Despite the prosecutor's recommendation for a longer sentence, Judge Persky sentenced Turner to a mere six months in the county jail.<sup>208</sup>

Judge Persky elicited immediate objections from those who questioned the Judge's lenient sentencing of Turner in view of his crimes.<sup>209</sup> But things grew worse still for Judge Persky when it soon came to light that there was another rape case over which Judge Persky presided where the defendant, Raul Ramirez, a thirty-two year old immigrant from El Salvador, was also charged with sexually assaulting his female roommate in a case that news reports described as having striking similarities to the case involving Brock Turner.<sup>210</sup> Suspicions regarding the propriety of Judge Persky's sentencing in the Turner case only grew after news reports highlighted substantial differences in Judge Persky's treatment of Ramirez, despite factual similarities in the two cases.<sup>211</sup> Perhaps most notable was Persky's alleged agreement with the prosecutor that Ramirez should receive a state prison sentence of three years even though Ramirez had no criminal history. In stark contrast, Persky had observed on the record in the Turner case that "[a] prison sentence would have a severe impact on him" and, therefore, his lack of criminal history justified a light sentence.<sup>212</sup>

Speculation arose that Judge Persky's sentencing of Turner and Ramirez was based more on race than on the merits of the cases.<sup>213</sup> Not

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206. Judge Persky himself is a Stanford graduate and former athlete. Sam Levin, *Stanford Trial Judge Oversees Much Harsher Sentence in Similar Assault Case*, THE GUARDIAN, Jun. 27, 2016.

207. *Id.*

208. Turner also received three years' probation. *Id.*

209. See Mary Elizabeth Williams, *Brock Turner Judge's Credibility Gone: Prosecutors Have Persky Removed from a Similar Sexual Assault Case*, SALON, Jun. 15, 2016. Persky was subjected to both a recall campaign and legislative calls for judicial investigation. *Id.* The removal petition garnered 1.4 million supporters. *Id.*

210. Levin, *supra* note 206.

211. As reported by the media, Ramirez's bail was set at \$200,000, while Turner's had been set at \$150,000. *Id.* Ramirez was sentenced to three years in prison under a plea deal overseen by Persky, while Persky gave Turner only six months jail time following his jury conviction. *Id.*

212. *Id.*

213. When these differences were made public, Michele Landis Dauber, the Stanford professor leading the recall campaign, said, "this just shows that our concern about Judge Persky's

surprisingly, the citizens of Santa Clara County perceived Judge Persky's sentencing in the Brock Turner case as procedurally unfair.<sup>214</sup> As a result public trust in the judicial system was undermined.<sup>215</sup> There was a public campaign to have Judge Persky recalled, and citizens refused to serve on juries in Judge Persky's courtroom.<sup>216</sup> At least one prosecutor filed a motion to recuse Judge Persky from another sexual assault case, expressing a lack of confidence in his ability to render an impartial judgment in that case.<sup>217</sup>

Santa Clara County is not the only place where citizens lack confidence in courts where largely White judges preside over what appears to be a system of racialized justice.<sup>218</sup> When judges lack legitimacy, the judicial system is incapable of performing its primary function of meting out justice in a manner that wins the people's consent.<sup>219</sup> This failure has the potential to erode the trust in the judiciary that is critical to the effective functioning of our justice system.<sup>220</sup>

### III. LESSONS FROM *BATSON*: DIVERSIFYING THE JUDICIARY, LAW ENFORCEMENT, AND PUBLIC SCHOOLS

According to the theories of procedural justice and representative bureaucracy, achieving racial diversity among judges, police officers, and teachers is necessary to ensure the democratic legitimacy of the judiciary,

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ability to be unbiased is justified. We continue to think that he abused his discretion in giving an unduly lenient sentence to Turner." *Id.*

214. See Williams, *supra* note 209. A judicial review board concluded that Judge Persky's sentencing of Brock Turner was not inappropriate as a matter of law, but Judge Persky is still the target of a recall campaign. *Judge Persky Cleared in Misconduct for Sentence in Brock Turner Sex Assault Case*, ASSOCIATED PRESS (Dec. 19, 2016) <https://www.nbcnews.com/news/us-news/judge-cleared-misconduct-sentence-brock-turner-sex-assault-case-n697941>. This is consistent with procedural justice theory, which says that it is the perceived fairness of the process, not the substantive outcome, that influences perceptions of judicial legitimacy. See *supra* note 35 and accompanying text.

215. Levin, *supra* note 206.

216. More than a dozen jurors have since refused to serve in Persky's courtroom, citing his decision in the Turner case. See Thomas Fuller, *Opposition to Judge in Stanford Sexual Assault Case Grows, In & Out of Court*, N.Y. TIMES, June 15, 2016.

217. *Id.*

218. The criminal justice system of Cook County, Illinois, which includes Chicago, was the subject of an ethnography that described it as a system "where mostly white professionals are charged with vetting, sorting, and judging the morality of a racialized population" in a way that "reproduce[s] racism and racial stigma at numerous contact points." NICOLE GONZALEZ VAN CLEVE, *CRUOK COUNTY* 185 (2016).

219. See ABRAMSON, *supra* note 17, at 104,125 (discussing the importance of jury diversity to the legitimacy of the judicial system). See also Jawando & Corriher, *supra* note 191, at 5 ("[W]hen judges do not look like the defendant litigants in court, . . . communities of color will have a more difficult time . . . trusting their decisions.").

220. See ALLEN, *supra* note 19, at xix (asserting that the failure to "incorporate reasonable interests" of political minorities destabilizes democratic institutions).

law enforcement, and public schools as institutions of government.<sup>221</sup> Achieving greater racial diversity among the key public decision-makers in each of these domains will also avoid the kinds of losses currently experienced by minority citizens as described above that may inflame racial tensions and that Danielle Allen suggests may threaten the long-term stability of our democracy.<sup>222</sup> To forestall this possibility, we ought to consciously pursue racial diversity in each of these domains in the same way and for the same reasons we engage in race-conscious jury selection.<sup>223</sup> The race-conscious efforts undertaken by jury commissioners and judges to ensure diversity in jury selection as a means of promoting trust and accountability to minority citizens and ensuring the democratic legitimacy of the judicial system offer vital insights and critical lessons for how we ought to similarly pursue racial diversity in each of these other important democratic domains.

Equal protection doctrine requires that all government uses of race satisfy the highest standard of judicial review, known as strict scrutiny.<sup>224</sup> Strict scrutiny demands that any use of race be: (1) justified by a compelling government interest, and (2) narrowly tailored to meet the asserted interest.<sup>225</sup> Relying on the principles of democratic equality embodied in *Batson*, as well as the social science research on procedural justice and representative bureaucracy, this strict scrutiny standard can be satisfied to support similar race-conscious efforts to achieve greater racial diversity among judges, police officers, and teachers.<sup>226</sup>

#### A. Racial Diversity as a Compelling Interest

Theories of procedural justice and representative bureaucracy demonstrate that racial diversity promotes the trust and accountability necessary to legitimize democratic institutions generally and specifically to le-

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221. See *supra* Sections I.B. and II.B.

222. See *supra* Section II.C. Some of the Black Lives Matter protests have already been described as “riots,” and each new acquittal of a White police officer in a case involving the death of a Black shooting victims runs the risk of inciting the kinds of riots that ensued in the wake of the acquittal in the Rodney King beating trial. See Johnson & Fuentes-Rowher, *supra* note 19, at 44 (referring to the riots following the King verdict and observing “[i]n certain instances, the questionable legitimacy of the decision-maker contributes to the potential for civil unrest.”).

223. See Alschuler, *supra* note 76 and accompanying text.

224. See *Korematsu v. U.S.*, 323 U.S. 214 (1944) (adopting strict scrutiny standard for race/national origin classifications); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989) (holding benign uses of race are subject to strict scrutiny to the same extent as invidious uses of race).

225. See *Croson*, 488 U.S. at 506.

226. Although she uses *Grutter v. Bollinger* instead of *Batson v. Kentucky* to ground her claim, and she addresses jury diversity rather than the diversity of the judiciary, Phoebe Haddon has similarly argued that democratic equality principles can justify race-conscious jury selection under the strict scrutiny standard. See Haddon, *supra* note 114.

gitimize the individual decision-making of judges, police officers, and teachers as public bureaucrats vis-à-vis minority citizens.<sup>227</sup> Achieving the democratic legitimacy that accrues from this racial diversity is undoubtedly a compelling government interest.<sup>228</sup> The previously highlighted research demonstrates that minorities have lower levels of trust in the judicial system overall and that White judges are less accountable to minority litigants.<sup>229</sup> Law enforcement and public schools also suffer from a crisis of legitimacy among minority citizens who view these institutions as both untrustworthy and/or insufficiently accountable to their interests, particularly the interests of Black and Hispanic citizens.<sup>230</sup> Thus the need to ensure democratic legitimacy in these domains by fostering trust and promoting accountability on behalf of minority citizens is as pressing as it is in the judicial domain.<sup>231</sup>

Nevertheless, the claim that racial diversity can be a constitutionally compelling interest often generates a variety of objections. First, the diversity interest is often criticized in the scholarly literature for its presumptive failure to align with the social justice goals underlying equal protection doctrine.<sup>232</sup> According to this critique, the focus on pragmatic ends, such as educational or commercial benefits, makes the diversity interest incompatible with equal protection doctrine.<sup>233</sup> Anderson herself expresses this concern, noting that despite the ways in which the diversity interest might be otherwise superior to the more traditional remedial interest associated

227. See *supra* Section II.B.

228. The Supreme Court said as much in *Grutter v. Bollinger* when it recognized student body diversity as a sufficiently compelling interest based on the benefits that accrue in the form of, among other things, enhanced democratic legitimacy through “effective participation by members of all racial and ethnic groups in the civic life of our Nation.” 539 U.S. 306, 325, 332 (2003).

229. See *supra* notes 49-51 and accompanying text (discussing research on minorities’ views that the judiciary is racially biased) and notes 166-170 and accompanying text (observing that Black judges find in favor of Black litigants more often than White or Hispanic judges).

230. The lack of trust between minority communities and the police is well-documented. See, e.g., Richard Delgado, Book Review: *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1194, 1200 (2008) (discussing various studies of minority/police relations and finding “a continuing racial divide in which White respondents exhibit a much more favorable attitude toward the police than do Blacks or Latinos,” noting in particular that “[m]inorities perceive that police represent and defend White group interests, while Whites see the police as fair or, worst, guilty of “rational discrimination.””). Similarly, the lack of accountability to minority student interests in public education is evident in the intractable racial achievement gap.

231. During the Clinton Administration, the Justice Department argued that pursuing racial diversity in public employment could satisfy the constitutional strict scrutiny standard because such diversity improves public decision-making and “promote[s] community trust and confidence” in government.” SHARPE, *supra* note 154 at 31. These reasons echo the justifications for pursuing racial diversity in the jury context. See BICKEL, *supra* note 26.

232. See ANDERSON, *supra* note 21, at 141.

233. *Id.*



with equal protection doctrine,<sup>234</sup> it suffers from the flaw of being “divorced from the aims of social justice.”<sup>235</sup> This critique, however, ignores the fact that social justice is itself one of the instrumental aims pursued by the diversity interest.<sup>236</sup>

In the words of Justice O’Connor, writing for the majority in *Grutter v. Bollinger*,<sup>237</sup> where the Court first recognized the diversity interest as constitutionally compelling, one of the instrumental ends sought by the diversity interest is to ensure “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation” and thereby to realize “the dream of one Nation, indivisible.”<sup>238</sup> Thus, social justice is not divorced from the instrumental goal of diversity; it is one of several instrumental goals of the diversity interest.<sup>239</sup> This instrumental diversity interest has already been recognized as constitutionally compelling and, therefore, capable of justifying affirmative, race-conscious efforts to ensure meaningful participation by racial minorities in the various civic institutions that comprise our democracy.<sup>240</sup>

The second objection that often surfaces both in the literature and in the jurisprudence on affirmative, race-conscious efforts in pursuit of diversity is that if the interest is in “epistemic diversity,” then race-conscious selection is not necessary to achieve this goal.<sup>241</sup> Rather, we ought to utilize race-neutral methods to select directly for this epistemic diversity

234. Among some of the ways Anderson argues the diversity interest is superior to the compensatory/remedial interest are that it (1) expands the contexts in which affirmative, race-conscious efforts are permissible, (2) explains why even persons not otherwise disadvantaged might nevertheless benefit under a diversity model, and (3) offers a non-stigmatizing account of the reasons for employing race-conscious efforts that might otherwise foment resentment and division. *Id.*

235. *Id.* at 142.

236. Anderson acknowledges this in identifying one of several aims of the diversity interest as “advanc[ing] democracy.” *Id.* at 136. Notably, this pragmatic diversity end seems indistinguishable from Anderson’s description of one of the ends of the preferred integrative model of diversity as “advanc[ing] a democratic culture, by providing opportunities for citizens from all walks of life . . . to advance democratic government by creating an integrated and thereby more competent and accountable elite, better disposed and able to honor the rights and serve the interests of all members of society, regardless of their group identities.” *Id.* at 148.

237. 539 U.S. 306 (2003). *Grutter* notably, is the case that Anderson identifies with the integrative model, reinforcing its alignment with the diversity interest. See ANDERSON, *supra* note 21, at 136.

238. *Grutter*, 539 U.S. at 332.

239. For a fuller discussion of this social justice diversity interest espoused in *Grutter*, see Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MER-CER L. REV. 577, 609–613 (2015).

240. *Grutter*, 539 U.S. at 332.

241. For an articulation of this objection, see, e.g., *Fisher v. Univ. of Texas*, 579 U.S. \_\_\_, 136 S. Ct. 2198, 2232 (2016) (Alito, J. dissenting). See also Dawinder S. Sidhu, *Racial Mirroring*, 17 U. PA. J. CONST. L. 1335, 1388–1389 (2015).

without relying on race as a proxy for it.<sup>242</sup> This objection is misplaced for several reasons. First, this argument misapprehends the dual interests served by ensuring effective minority participation in our democracy. Recall that Allen and Anderson identify both trust and accountability as the critical values fostered by effective minority participation in our democracy.<sup>243</sup> As the theory of procedural justice demonstrates, racial diversity engenders trust when minority citizens see themselves represented in the institutions of government, regardless of whether or how the presence of those minority representatives influence substantive outcomes in the democratic decision-making process.<sup>244</sup> Thus race-conscious selection is necessary for achieving the descriptive representation that fosters trust in public decision-makers.<sup>245</sup>

Accountability, on the other hand, does depend on the assumption of some epistemic diversity that allows minority representatives to increase responsiveness to minority interests in democratic deliberations.<sup>246</sup> However, there is an erroneous assumption underlying this critique of race-conscious efforts in pursuit of epistemic diversity.<sup>247</sup> Anderson explains that the diversity interest does not rely on race as a proxy for presumed cultural difference, as this objection assumes, but as a proxy for “personal knowledge.”<sup>248</sup> Guaranteeing meaningful civic participation by racial minorities ensures that democracy realizes the epistemic benefits of its diverse citizens who are “asymmetrically affected by various social problems and policy responses to those problems.”<sup>249</sup> In other words, minority citizens necessarily have different “personal knowledge” about social problems than non-minority citizens.<sup>250</sup> Consequently, race is not only necessary to

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242. *Id.*

243. See ANDERSON, *supra* note 21.

244. This is known as “descriptive representation” and is treated extensively in the literature on minority voting and electoral representation. See Hawkins, *Diversity, Democracy & Pluralism*, *supra* note 238, at 643. Elizabeth Anderson addresses the issue as well. See ANDERSON, *supra* note 21, at 133. Even Justice O’Connor recognized this interest in fostering legitimacy through descriptive minority representation when she observed in *Grutter* that the path to civic leadership must be “visibly open to talented and qualified individuals from every race and ethnicity.” *Grutter*, 539 U.S. 306, 332.

245. See, e.g., *supra* note 54 (discussing research on citizens’ perceptions that racially diverse juries are fairer than all White juries).

246. This is true in both the jury and representative bureaucracy contexts. See *supra* notes 61 and 157.

247. ANDERSON, *supra* note 21, at 151–52. (“Epistemic diversity follows from the ways racial segregation and stigmatization shape individuals’ experiences.”). Anderson offers evidence of the value of this epistemic diversity in the contexts of policing and education. See *id.*, 131–132.

248. Justice Alito’s dissent in *Fisher v. Univ. of Texas* demonstrates this flawed reasoning. *Fisher v. Texas*, 579 U.S. \_\_\_\_, 136 S. Ct. 2198, 2221 (Alito, J., dissenting).

249. ANDERSON, *supra* note 21, at 131.

250. *Id.* See also SHARPE, *supra* note 158, and accompanying text (explaining the linkage between differences in social identities and social experiences).

the descriptive representation that increases democratic trust, it is also the best proxy for achieving the desired epistemic diversity necessary for democratic accountability to minority citizens.<sup>251</sup>

The final objection to affirmative race-conscious efforts in pursuit of the diversity interest is that these efforts cause more harm than they are worth by inflaming racial tensions and fueling racial discord.<sup>252</sup> This, according to critics, produces feelings of resentment against minorities on behalf of those non-minorities who may be displaced by these race-conscious efforts.<sup>253</sup> Allen helps us understand why the attention to ensuring minority participation in the various civic institutions comprising our democracy, and the race-conscious means used to achieve this end, ought not arouse resentment on behalf of those non-minorities who may be displaced.<sup>254</sup> She explains that between 1954 and 1964, during the apex of the Court's equal protection jurisprudence and the height of the Civil Rights Movement, "the United States was reconstituted . . . with a promise of equality for all persons regardless of race, ethnicity or color."<sup>255</sup> This began a process of redistribution of political power away from total control by the racial majority in an attempt to realize the guarantee of equality under law through shared political power for minority citizens.<sup>256</sup> Allen is

251. ANDERSON, *supra* note 21, at 168.

252. See Sherer, *supra* note 21, at 617-22; see also King, *supra* note 51 (similarly suggesting that race-conscious selection of juries breeds racial resentment).

253. Nancy Sherer catalogues the opposition arguments to efforts to increase judicial diversity, which include among others claims that race-conscious selection reduces the quality of judges and results in reverse discrimination against White males. Sherer, *supra* note 21, at 617-622. She concluded the first concern was more speculative than actual; *id.* at 620, and on the matter of "reverse discrimination," she found the debate has reached an impasse that can be resolved only if proponents are able to identify "tangible benefits" that flow to White males from supporting judicial diversity. *Id.* at 628-30. Importantly, among the tangible benefits Sherer suggests might flow from increased judicial diversity is "raising citizens' levels of legitimacy towards legal authorities." This in turn, Sherer argues, might produce additional tangible benefit by "mak[ing] people more likely to obey the law . . . [and] fostering a more stable, law-abiding society. . ." *Id.* at 631-632.

254. Claims alleging that non-minorities are harmed by affirmative, race-conscious efforts to include racial and ethnic minorities are referred to as "reverse discrimination" claims. See *e.g.* Sherer, *supra* note 21, at 620-624 (discussing perspective that appointment of judges to the bench on the basis of diversity constitutes reverse discrimination).

255. See ALLEN, *supra* note 19, at 1.

256. Allen describes this as "the long, slow end of its durable minority group . . . [and] also disband[ing of] the durable majority." *Id.* at 163. Allen describes our "reconstitution" as the remaking of our constitutional commitments and identifies several such "reconstitutions" throughout American history, among them each of the major historic events that reshaped our democratic structure and constitutional content, including for instance the Civil War itself, constitutional amendments granting universal suffrage, and the 1950s Civil Rights Movement. Allen explains the 1950s reconstitution as the product of our collective rejection of the past patterns and practices of a "citizenship of [racial] dominance." *Id.* at 5. She describes the Civil Rights Movement that emerged during this time, and in particular the iconic images and events that signified our collective moral, political and social struggle over desegregation, most particularly

very clear to acknowledge that this reconstitution remains incomplete, but also to remind us that the loss occasioned by the majority's displacement as a part of the redistribution of power is the inevitable consequence of democracy.<sup>257</sup> The key to democracy, as Allen explains, is not in avoiding loss but ensuring that there are no permanent losers.<sup>258</sup>

It is, therefore, not this temporal loss by majority citizens that betrays the commitment to democratic equality, but rather our long-standing historic practice of relegating racial minorities to perpetual losers in our democracy generally and in our judicial, law enforcement, and public education systems specifically that betrays the commitment to democratic equality.<sup>259</sup> Affirmative, race-conscious efforts to ensure meaningful participation by racial minorities in the "civic life of our nation" generally, and in each of these key public domains specifically, are an attempt to engender the trust that Allen tells us is necessary to ensure that minority citizens do not feel like permanent losers.<sup>260</sup> At the same time, they allow for the epistemic diversity that Anderson says makes democratic institutions more accountable to the interests of minority citizens so they are less likely to actually suffer continual political losses in the future.<sup>261</sup> As demonstrated by the foregoing analysis, the analogies to the jury context and the compelling interest in fostering democratic legitimacy through increased diversity are significant, and it is at least arguable that this shared interest justifies comparable race-conscious efforts in these other domains.

B. *Narrowly Tailoring Efforts to Increase Racial Diversity Among Judges, Police Offices, and Teachers*

In addition to ensuring that race-conscious diversity efforts are justified by a compelling government interest, strict scrutiny requires that such efforts be narrowly tailored to meet the asserted interest in diversity.<sup>262</sup> Here too efforts to ensure racial diversity in jury selection and service are

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in public schools, as a moment of transformation that challenged us to come up with "new conceptions of democratic life" that would offer greater political protection for minority citizens *Id.*; see also ALLEN, *supra* note 19, at 163.

257. *Id.* at 19 (observing "since the 1950's and 1960's we have met the challenge to develop new forms of citizenship with only limited success.").

258. To guard against the potential destabilizing force of this loss, Allen recommends that citizens engender the trust among themselves that allows for principles of reciprocity to mitigate the pain of this temporal loss with the knowledge that there are no permanent winners or losers in a democracy marked by true equality of citizenship. See ALLEN, *supra* note 19, at 68.

259. See discussion *supra* Section II.C.

260. Responding specifically to this objection, Anderson argues that because "[m]any advocates of colorblindness . . . acknowledge that the[se] race-conscious ends of affirmative action are justified, and they object only to the use of race-conscious means. . . then how could it be wrong to achieve this aim by the most relevant and narrowly tailored means available, which is race-conscious selection." ANDERSON, *supra* note 21, at 168.

261. *Id.* at 130.

262. See *supra* note 224.

instructive.<sup>263</sup> Theories of procedural justice and representative bureaucracy demonstrate that the compelling interest in promoting democratic legitimacy through increased racial diversity applies with equal force in the domains of judging, policing, and teaching as it does in the jury domain. So strict scrutiny analysis should embrace as narrowly tailored in the judging, policing, and teaching domains the same types of efforts undertaken in pursuit of this common interest in the jury domain. This is not to ignore the constitutional mandate that “context matters” when assessing strict scrutiny.<sup>264</sup> There are important differences in context between juries and the other domains addressed here.<sup>265</sup> Nevertheless, the analogies to the jury context are significant insofar as the compelling interest in fostering democratic legitimacy through increased diversity in each of these other domains, and it is at least arguable that this shared interest justifies comparable race-conscious efforts.

### 1. Race-Conscious Selection

Taking *Batson* as the centerpiece of the Supreme Court’s equal protection jurisprudence of jury selection, *Batson* reflects a constitutional commitment to democratic equality in jury service that seeks to legitimize our judicial system by ensuring that racial minorities are adequately represented on juries, particularly when minority interests are being adjudicated.<sup>266</sup> One key insight from *Batson* is the recognition that we should not accord racial disparities in jury selection a presumption of non-discrimination.<sup>267</sup> Instead we should interrogate such racial disparities for any evidence of discriminatory treatment.<sup>268</sup> The same willingness to interrogate disparities in jury selection should be applied to the selection of judges, police officers, and teachers.<sup>269</sup>

*Batson* also revealed that a necessary precondition for increasing racial diversity among jurors is generating sufficient racial diversity among jury

263. See *supra* note 76 and accompanying text.

264. See *Grutter v. Bollinger*, 539 U.S. 306, 327.

265. For instance, jury selection is less defined by considerations of merit than is the selection of judges, police officers and teachers. See *supra* note 74 and accompanying text (describing shift in jury selection from considerations of “probity and intelligence” to ensuring that jurors reflect a “fair cross-section” of the community). Opportunities for service in these other domains are also less plentiful than opportunities for jury service, which are much more widely available. See ABRAMSON, *supra* note 17, at 99-100. For the reasons explained herein, these differences should not foreclose race-conscious efforts as a strategy for increasing racial diversity among judges, police officers, and teachers. *Id.* at 151-52.

266. See *supra* note 120 and accompanying text.

267. *Batson v. Kentucky*, 476 U.S. at 99.

268. *Id.* (acknowledging that peremptory strikes have the potential to mask discriminatory treatment and therefore ought not be subject to a presumption of non-discrimination).

269. This is particularly true where selection methods include the exercise of subjective discretion like peremptory challenges, which the Court found particularly troublesome in *Batson*. *Id.*

pools.<sup>270</sup> Jury commissioners and judges across the country have adopted an array of race-conscious methods for selecting citizens for jury duty generally and jury service specifically to address this problem.<sup>271</sup> These practices range from jury commissioners thoughtfully selecting juror source lists with an eye towards increasing the number of racial minorities called for jury service, to judges carefully managing jury selection to ensure racial diversity among those seated on the petit jury.<sup>272</sup> In some cases these efforts go so far as adopting formal rules mandating racial proportionality between seated jurors in individual cases and the local population census.<sup>273</sup> These efforts can be traced in part to enactment of the 1968 Jury Selection and Service Act, which abandoned the former system of elite juror selection that prized only “men of recognized probity and intelligence” in favor of a selection system that values jurors who reflect a fair cross-section of the community.<sup>274</sup> The Jury Selection and Service Act expressly recognizes racial diversity as indispensable to the guarantee of democratic equality in jury selection and service.<sup>275</sup>

The Civil Service Reform Act of 1978 is analogous to the Jury Selection and Service Act of 1968. The express goal of the Civil Service Reform Act is not “merely ending discrimination” in federal employment but “taking proactive steps to increase the representation of . . . people of color in the civil service” until the government “looks like America.”<sup>276</sup>

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270. See Fukurai & Davies, *supra* note 51, at 649-652 (cataloguing a number of practical impediments to greater racial diversity among jury pools, including lack of diversity among juror source lists, such as voter registration lists, relative to the population; high rates of transience among minority residents that cause jury summonses to be returned undeliverable; and higher rates of excusal for economic hardship).

271. See *supra* note 79 and accompanying text.

272. See *supra* notes 79-82.

273. See *supra* note 77 and accompanying text (discussing the Hennepin County, MN grand jury model). Similar proportional models are used in other jurisdictions. See Alschuler, *supra* note 76, at 711-712 (describing the jury selection process in DeKalb County, Georgia, where “jury commissioners divide jury lists into thirty-six demographic groups . . . then use a computer to ensure the proportional representation of every group on every venire” and other “[s]imilar color-conscious jury selection methods in use in other jurisdictions to . . . ensure racial proportionality in the initial pool from which petit and grand juries are drawn.”).

274. For instance, the “key man” system of relying on personal referrals of potential jurors in the federal system was replaced with a lottery system where names of potential jurors are drawn from voter registration lists or actual voter rolls. Additionally, the Act instructed that if existing juror source lists failed to produce a level of racial diversity among prospective jurors adequate to meet the “fair cross-section” requirement, then supplemental source lists should be added as needed, such as driver’s license records or even public utility records, to achieve the required level of racial diversity among those prospective jurors summonsed for jury duty. See ABRAMSON, *supra* note 17, at 117.

275. *Id.*

276. SHARPE, *supra* note 154, at 35. Rejecting an exclusive value for “neutral competence,” the Civil Service Reform Act acknowledges racial diversity as a key criterion of selection for public service under principles of representative bureaucracy. *Id.* at 140.

Its purpose is to diversify the federal civil service in the same way that the Jury Selection and Service Act has promoted increased racial diversity among jurors.<sup>277</sup> And just as the race-conscious methods identified above have replaced more elitist selection methods as the primary source of juror selection, attention to principles of representative bureaucracy have supplemented the merit selection system to broaden the scope of hiring for the federal civil service.<sup>278</sup> If the Jury Selection and Service Act is the constitutional baseline for both federal and state jury selection, so too the Civil Service Reform Act ought to be viewed as the constitutional baseline for both federal and state civil service selection for judges, police officers, and teachers.<sup>279</sup>

Race-conscious selection processes that are targeted and deliberate in their attention to improving racial diversity among judges, police officers, and teachers ought to be constitutionally permissible if they are pursued in the same way such efforts have been pursued in the jury context.<sup>280</sup> These efforts ought to include targeted outreach and recruitment of diverse applicants as well as race-conscious selection strategies designed to improve the diversity yield among judicial appointments, as well as law enforcement and teacher hires.<sup>281</sup> Some of these efforts are already being pursued at the federal, state and local levels to increase racial diversity among judges.<sup>282</sup> Similar efforts ought to be adopted in the recruitment and hiring of police

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277. See SHARPE, *supra* note 154, at xi; see also *id.* at 36-37 (describing the purpose of the Civil Service Reform Act as making the federal workforce “reflective of the nation’s diversity” and as going beyond mere non-discrimination to ensure “full representation.”). Just like the “key man” jury system, with its emphasis on “men of recognized intelligence and probity,” dominated federal jury selection prior to the Jury Selection and Service Act of 1968, principles of “merit selection,” with an exclusive emphasis on “neutral competence,” dictated civil service employment prior to adoption of the Civil Service Reform Act of 1978. *Id.* at 140.

278. *Id.*

279. See *supra* note 75 and accompanying text.

280. Although some political scientists have called for racial quotas to satisfy the dictates of representative bureaucracy, it is clear that such measures are politically and legally untenable in the United States. See SHARPE, *supra* note 154, at 27 (calling for racial quotas to satisfy the need for representative bureaucracy); but see *Mallory v. Harkness*, 895 F. Supp. 1556 (1995) (finding racial quotas on judicial nominating commission unconstitutional); compare *Talbert v. City of Richmond*, 648 F.2d 925 (1981) (declining to find constitutional violation in promotion of Black police officer over White officer where achieving racial diversity was a legitimate interest and where procedures employed not generate racially disparate impact for White officers or demonstrate discrimination in selection procedure).

281. These are comparable to the targeted outreach to minority prospective jurors in the jury context. See *supra* note 79-82.

282. In a study of state judicial appointments, Leo Romero found that twelve states require that the judicial nomination commission include members who are racially diverse in an effort to increase the selection of racially diverse judges. Leo M. Romero, *Enhancing Diversity in An Appointive System of Selecting Judges*, 34 *FORDHAM URB. L. J.* 485 (2007). Many states include some language in their appointment process requiring the consideration of racial diversity in judicial appointments. *Id.* Not surprisingly, Romero found those states with the most explicit consideration of racial diversity in the judicial appointment process were also the states with the most

officers and public school teachers.<sup>283</sup> Such race-conscious efforts are a critical tool for achieving and maintaining diversity among these key public decision-makers, thereby fostering the trust and accountability necessary to legitimize the judiciary, law enforcement, and public education as key democratic institutions.<sup>284</sup>

At the very least, diversity must be expressly identified as a goal in the selection of judges, police officers, and teachers.<sup>285</sup> Data show, for instance, that state judicial appointment systems that include diversity as an express goal have more diverse benches than those without an express commitment to diversity.<sup>286</sup> But to have maximum effect, just as jury commissioners have undertaken race-conscious efforts to ensure jury pools are as diverse as possible, so too should race-conscious efforts in the selection of judges, police officers, and teachers be focused on expanding the diversity of the applicant pool.<sup>287</sup> These targeted recruitment efforts are likely to both enhance the diversity of the candidates who are ultimately selected for these positions, as well as reduce liability under prevailing equal protection law by focusing race-conscious efforts on recruitment rather than selection.<sup>288</sup>

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racially and ethnically diverse benches. *Id.*; see also Spellisey, Chase & Greenman, *supra* note 23 (describing state court efforts to increase judicial diversity).

283. Notably, some efforts to improve racial diversity in the law enforcement and public education contexts have been struck down. See, e.g., *Lomack v. City of Newark*, 463 F.3d 303 (3rd Cir. 2006) (finding fire department involuntary transfer policy to promote diversity violate equal protection); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down school district attempt to achieve racial balance among school teachers as unconstitutional). But others have been upheld, see *supra* note 147.

284. For a discussion of the current racial disparities in the representation of judges, police officers, and teachers, see *supra* Section II.C.; see also Sklansky, *supra* note 200, 1236-1238 (noting the decline in diversity of police forces after affirmative action effort abandoned after the 1970s and '80s.).

285. See *Romero*, *supra* note 282, at 486 (“To achieve diversity in an appointive system, the people involved . . . must be directed to consider diversity at the different stages of the process.”). *Romero* suggests this goal can be established by law, as it is in the Civil Service Reform Act, or by formal rule, or informal practice. *Id.*

286. *Id.* at 498 (describing the success of New Mexico’s race-conscious judicial appointment efforts); see also Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial and Gender Diversity and State Courts*, Vol. 48, No. 3 THE JUDGES’ J. at 5 (2009) (concluding that states with express commitments to judicial diversity “attract more diverse applicants and select more diverse [judicial] nominees.”).

287. See *supra* note 76 and accompanying text (describing race-conscious efforts to expand the diversity of jury pools).

288. See Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Test: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 FORDHAM L. REV. 2457, 2479-80 (2015) (describing both the success and legal defensibility under Title VII of targeted or expanded recruitment of diverse applicants); compare use of racial quotas in selection, *Mallory v. Harkness*, 895 F. Supp. 1556 (1995). Such targeted outreach efforts in the judicial appointment system can include posting job notices with minority professional organiza-



## 2. Measuring Diversity by the Fair-Cross Section Standard

Continuing the jury analogy, efforts to increase racial diversity among judges, police officers, and teachers should focus on achieving a “fair cross-section” of diversity within each of these domains.<sup>289</sup> Notably, the fair cross-section jury requirement is a guarantee only that the jury venire, from which the petit jury in any individual case is ultimately drawn, is representative of the community.<sup>290</sup> It is not a guarantee that every petit jury serving in any individual case will be representative of a fair cross-section of the community.<sup>291</sup> So too the requirement for a fair-cross section of judges, police officers, and teachers should ensure that the overall demographic composition of these professions at the local level appropriately reflects the racial diversity of the communities they will be called upon to serve.<sup>292</sup>

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tions and including statements in those postings encouraging applications by diverse candidates. Romero, *supra* note 282, at 494.

289. See *supra* note 75 and accompanying text (describing the fair cross-section in the jury context). Some scholars have instead argued that efforts to increase racial diversity among judges should strive for achieving a “critical mass” of diversity akin to the standard adopted for minority student admissions in *Grutter*. See Vargas, *supra* note 141, at 109 and 152 (Relying on and extending the reasoning in *Grutter* to argue quest for judicial diversity “must be understood to go beyond token appointments . . . to achieve a critical mass of minority judges on each bench.”) Although Vargas grounds this claim for a critical mass of minority judges in the need for judicial accountability by leveraging the epistemic or discursive diversity of minority judges so that they can “tell experiential narratives as to why race matters in specific [ ] contexts,” there is an equally strong basis for grounding it in the need for fostering judicial legitimacy. *Id.* Phoebe Haddon has argued this point in reverse by suggesting that *Grutter* should allow the fair cross-section requirement to justify race-conscious selection of petit jurors. See Haddon, *supra* note 114, at 553-554 (2004) (“*Grutter* creates the possibility for litigants to encourage courts to carry over the interest in a fair cross section at the venire stage to the composition of the jury because participants with a variety of backgrounds have the potential to move beyond their own isolated views in deliberation.”); Adam Lamparello & Cynthia Swann *The New Affirmative Action After Fisher v. University of Texas: Defining Educational Diversity through the Sixth Amendment’s Cross-Section Requirement* (unpublished) at 15, [http://production.sw.works.bepress.com/adam\\_lamparello/48/](http://production.sw.works.bepress.com/adam_lamparello/48/) (“The cross-section requirement facilitates such a holistic view of diversity because, by not mandating that juries mirror the racial and ethnic demographics of a community, the Court implicitly recognizes that a true cross-section of the community is reflected by characteristics beyond race and ethnicity. . . it avoids the quantitative approach to diversity that *Grutter*’s ‘critical mass’ standard creates.”).

290. The fair cross-section requirement is borrowed from the Sixth Amendment jury trial guarantee, rather than the equal protection clause’s guarantee of racial equality, but the principles work together to achieve the object of ensuring racial diversity in jury service. See ABRAMSON, *supra* note 17, at 118; see also Heyman, *supra* note 87, at 228 (“jury pool cases . . . were initially decided on 14th Amendment grounds, but have more recently migrated into the 6th Amendment.”)

291. *Id.*

292. This could also be compared to calls for a “critical mass” of racial and ethnic minority students on college and university campuses in the educational context. See *Grutter v. Bollinger*, 539 U.S. 306, 229 (identifying a “critical mass” of underrepresented minority students as the proper measure of diversity necessary to attain the educational benefits of student diversity).

For instance, the diversity of judges sitting in a particular district or circuit in the federal judiciary, or serving a particular county or other judicial subdivision in the state should be reflective of the diversity of that district, circuit, county or judicial subdivision.<sup>293</sup> Similarly, police officers and teachers ought to reflect the racial and ethnic composition of the local communities they serve.<sup>294</sup> This is particularly important where the impairments to trust and accountability suffered by these communities are not equally distributed across racial groups. For instance, in the context of policing and public education, the data show that there is much greater distrust between Black communities and law enforcement than for instance Asian communities and law enforcement.<sup>295</sup> Similarly, our public schools are failing Black and Hispanic students at a far higher rate than it currently fails Asian American or white students.<sup>296</sup> For these reasons, it is important to incorporate the lesson of representative bureaucracy theory into the selection and hiring of judges, police officers, and teachers by realizing that racial congruence between citizens and these key public decision-makers is necessary for generating the accountability and trust needed to legitimize the judicial system, law enforcement, and public education as key sites of civic participation in the eyes of our increasingly diverse citizenry.<sup>297</sup>

But, consistent with the fair cross-section standard, this requirement would not guarantee that all judges assigned to individual cases, police officers assigned to neighborhood beats, or teachers in every school are proportionally representative of the litigants, residents, or students in each of these discrete contexts. Inevitably, however, as we have seen with efforts to increase racial diversity in jury service, efforts to ensure that judges, police officers, and teachers represent a fair cross-section of the communities they serve in the aggregate will likely translate into improvements in the racial and ethnic diversity of judges presiding in individual cases involving minority litigants, police officers patrolling minority neighborhoods, and teachers serving minority students.<sup>298</sup> These increases in the

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293. As Sherrilyn Ifill has observed “. . . at some fundamental level we all understand the importance of judicial diversity” pointing specifically to the way our “tradition of appointing judges that more or less reflect the geographic make-up of the circuit” is an acknowledgement of this diversity principle. See Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 46-47 (2009).

294. Current data suggest we are far from that goal. See Putnam *supra* note 182, at 2 (data on teachers); see also *supra* note 201 (data on police officers).

295. See *supra* note 191 and accompanying text.

296. See *supra* note 180 and accompanying text.

297. See *supra* note 155 and accompanying text.

298. This is not to suggest that these jury diversity efforts have been universally successful or that they are without criticism. Obstacles continue to exist in achieving adequate racial diversity among jury pools that continue to result in the disproportionate exclusion of racial minorities from jury service. See Fukurai & Davies, *supra* note 51, at 650-653 (cataloguing the various reasons why juries remain unrepresentative including: (1) continued reliance on voter registration

racial diversity of judges, police officers, and teachers will promote greater democratic legitimacy by fostering trust and ensuring accountability on behalf of minority citizens.<sup>299</sup>

### CONCLUSION

The jury is rightly revered in America for reflecting our highest aspirations for representative democracy, and in particular for striving to realize the guarantee of democratic equality on behalf of minority citizens. Procedural justice theory helps explain why issues of race, and in particular attention to guaranteeing racial diversity, has always figured so prominently in our constitutional jury jurisprudence. Racially diverse juries foster the trust and accountability necessary to legitimize our judicial system in the eyes of a diverse citizenry. But these principles ought not be confined to the jury context. The jury is merely instructive for how we ought to do democracy more broadly. Representative bureaucracy theory helps extend the claim for racial diversity as a guarantee of democratic equality from the jury to other equally important sites of civic participation in our democracy. The research on representative bureaucracy demonstrates that racial diversity among judges, police officers, and teachers is equally critical to fostering trust and promoting accountability to minority citizens in the judicial, law enforcement, and public education domains.

Borrowing from the Supreme Court's jury jurisprudence, as embodied in *Batson* and its progeny, we can identify principles and strategies for achieving racial diversity that can be applied in these other domains. By adopting race-conscious efforts designed to achieve a fair cross-section of racial diversity among judges, police officers, and teachers, we can ensure "[e]ffective participation by members of all racial groups in the civic life of our Nation," and prevent the kinds of harms that political philosopher Denise Allen cautions would threaten the stability of our democracy and subvert our aspirations for government of the people, by the people, and for the people.<sup>300</sup>

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lists, (2) infrequent updating of jury lists; (3) the jury questionnaire; (4) subjective disqualifications during voir dire; (5) economic hardship excusals among minority hourly wage workers; and (6) ongoing discrimination in the exercise of peremptory challenges.). The point is that deliberate race-conscious efforts are occurring in the jury context that are justified by principles of democratic equality, and these efforts are yielding improvements in jury diversity.

299. See *supra* note 131.

300. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).