

LABORATORIES OF EQUAL JUSTICE: WHAT STATE EXPERIENCE PORTENDS FOR EXPANSION OF THE *PENA-RODRIGUEZ* EXCEPTION BEYOND RACE

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In the 2017 case Pena-Rodriguez v. Colorado, the Supreme Court held that the jury no-impeachment rule must yield to a criminal defendant's Sixth Amendment right to an impartial jury when a court is faced with clear evidence that racial animus played a significant role in the jury's decision to convict. Despite the Supreme Court notably cabining its decision to instances of racial bias alone, commentators have questioned whether such a limitation is possible in practice. In reaching its decision, the Supreme Court relied on states' past experiences with similar, long-standing bias exceptions, and while the Court lumped all such exceptions together as "racial" bias exceptions, a deeper categorization discovers that states' exceptions often cover far more than race, either in the initial exception or via subsequent judicial expansion.

This Note explores whether the exception to the juror no-impeachment rule for instances of clear racial bias will, and should, expand to include other types of bias that may threaten a defendant's right to an impartial jury. Using states' past experiences with their own bias exceptions, with a supplemental focus on the Supreme Court's own experience in a related doctrinal field, this Note concludes that the Pena-Rodriguez exception is likely to expand to cover other biases such as those based on gender and religion. After determining that such expansion is normatively and pragmatically sound, this Note proposes that any weakening of the no-impeachment rule caused by such expansion will likely be limited by procedural barriers and, by incorporating or adopting a Fourteenth Amendment Equal Protection Clause framework, the Court can further constrain the impact of such expansion.

INTRODUCTION

When faced with the confrontation between two universal, long-standing judicial principles, courts must often decide what happens when an unstoppable force meets an immovable object. At times, fundamental beliefs inherent in the criminal justice system are placed in tension with one another, with the inevitable result that one thought-to-be irrefutable

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maxim must yield to what the court sees as the more important principle in the case at issue. The recent Supreme Court decision in *Pena-Rodriguez v. Colorado* can be described in such terms.¹

The constitutional guarantee of an impartial jury in all criminal trials has long been considered a necessary component of a fair and functioning justice system.² Throughout the history of American criminal justice, racial prejudice has jeopardized this guarantee and stripped minority defendants of their right to an impartial trial, decided solely on the evidence presented. As Justice Blackmun aptly stated in his oft-quoted opinion in *Rose v. Mitchell*, “Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”³ Partiality in the jury room is as toxic to a criminal trial as any flaw one can imagine.

Yet the unimpeachability of jury deliberations has also come to represent a fundamental aspect of the American criminal justice system. Long embodied in common law doctrines protecting the sanctity of the jury room, the prohibition against jurors testifying about deliberations has been codified in the Federal Rules of Evidence⁴ and similar state

1. 137 S. Ct. 855 (2017). In his majority opinion, Justice Kennedy attempted to dismiss this portrayal as unnecessary, stating that while the case “lies at the intersection” of the Court’s decisions protecting the secrecy of jury deliberations and those seeking to ensure an impartial trial free of racial bias, “the two lines of precedent . . . need not conflict.” *Id.* at 868. However, nearly all to comment on the case have characterized it as a direct conflict between these two doctrinal lines.

2. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”); see also *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (deeming the Sixth Amendment jury trial guarantee “fundamental to the American scheme of justice” and finding the Fourteenth Amendment to require states to provide jury trials in criminal cases).

3. 443 U.S. 545, 555 (1979).

4. Federal Rule of Evidence 606(b) currently reads as follows:

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury’s attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 606(b).

rules.⁵ In general, during any inquiry into the validity of a verdict, a juror may not testify about what occurred during deliberations.⁶ Known colloquially as the jury “no-impeachment rule,” Rule 606(b) and state counterparts have been recognized as serving a number of critical functions,⁷ including: (1) protecting the very existence of the jury system by preventing inquiry into an unmanageable number of cases;⁸ (2) ensuring certainty and finality of verdicts;⁹ (3) guaranteeing the secrecy and privacy needed to encourage jurors to hold open debates during deliberations;¹⁰ and (4) preventing abuse of the system, both by losing parties and by jurors themselves.¹¹

5. See, e.g., Idaho R. Evid. 606(b); Ind. R. Evid. 606(b); Minn. R. Evid. 606(b).

6. The no-impeachment rule explicitly addresses *juror competence* to testify about deliberations, not whether evidence of biased statements can ever be used to challenge a verdict. For example, if a bystander discovered evidence of racial bias during jury deliberations, the rule would not prevent her from impeaching the verdict. See Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 *Baylor L. Rev.* 872, 925 (2009) [hereinafter Miller, *Dismissed with Prejudice*]. However, given that in the vast majority of cases juror testimony is the sole evidence of bias during deliberations, *id.*, this distinction is often moot.

7. See *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915), discussed further *infra* section I.A.1.

8. E.g., Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 *Harv. J. Racial & Ethnic Just.* 165, 175–76 (2011) (“[L]oosening the restriction on inquiry into verdicts could implicate a large number of cases and undermine the entire jury system.”); see also *Kittle v. United States*, 65 A.3d 1144, 1148–49 (D.C. 2013) (citing “maintaining the viability of the jury as a judicial decision-making body” as a reason for which courts have exercised great caution in allowing jurors to impeach verdicts (internal quotation marks omitted) (quoting *Sellars v. United States*, 401 A.2d 974, 981 (D.C. 1979))).

9. E.g., *State v. Gardner*, 371 P.2d 558, 560 (Or. 1962) (“The overriding consideration [for the no-impeachment rule] is the necessity of giving finality to litigation.”); see also Victor Gold, *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*, 9 *St. John’s J. Legal Comment.* 125, 131–32 (1993) (“Restrictions on the competency of jurors to testify also have been justified on the grounds that such restrictions advance the value of finality and stability of verdicts.”); West, *supra* note 8, at 176 (“Congressional committee hearings indicate that finality was among Congress’ primary objectives in adopting the federal rule.”).

10. E.g., *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980) (“The purpose of the [no-impeachment] rule is to promote freedom of jury deliberations”); see also Gold, *supra* note 9, at 135 (noting that several cases justify the no-impeachment rule “on the grounds that the willingness of jurors to speak freely during deliberations would be impaired without protection”); West, *supra* note 8, at 177 (highlighting the concern that “secrecy and privacy are required in order to encourage jurors to engage in open debate during deliberations”).

11. E.g., *United States v. Benally*, 546 F.3d 1230, 1234 (10th Cir. 2008) (noting that the no-impeachment rule “protects jurors from harassment by counsel seeking to nullify a verdict” and “reduces the incentive for jury tampering”); see also Gold, *supra* note 9, at 129–31 (citing the initial purpose of the no-impeachment rule as preventing jurors from themselves perpetrating fraud in addition to preventing losing counsel from harassing jurors after a verdict has been reached); West, *supra* note 8, at 177 (“[T]he rule reflects an interest in preventing abuse of the system.”).

In *Pena-Rodriguez*, the Supreme Court confronted the conflict between these two axiomatic concepts: In the face of the no-impeachment rule, how should a court respond when a juror brings forth evidence of one of the most “odious” forms of partiality—racial bias—in the jury room? After long rejecting invitations to do so, the Court in *Pena-Rodriguez* recognized an explicit, constitutional exception to the ban on jurors impeaching their verdict when confronted with clear evidence of racial bias by one or more jurors during deliberations in a criminal trial.¹²

Cabining the decision to cover instances of exclusively *racial* bias, Justice Kennedy noted that “racial bias implicates unique historical, constitutional, and institutional concerns.”¹³ However, commentators and judges alike have questioned whether this limitation is practically possible.¹⁴ With the door to the jury room now cracked open, perhaps the Court’s attempt to limit its holding to racial bias will prove futile.

Indeed, jurisdictions that had established similar racial-bias exceptions before the Court’s decision have not necessarily limited these exceptions in such a way in practice.¹⁵ While the *Pena-Rodriguez* decision, by virtue of its constitutional grounding, rendered the racial-bias exception applicable nationwide, a variety of jurisdictions—notably many states—had already deemed their respective no-impeachment rules susceptible to such an exception.¹⁶ As Justice Brandeis famously noted, a prominent virtue of the American federal system is the degree to which it allows states to conduct social and policy experiments “without risk to the rest of the country”;¹⁷ in essence, states may serve as “laboratories of

12. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (“[W]here a juror makes a clear statement that indicates . . . she relied on racial stereotypes or animus to convict a criminal defendant, . . . the no-impeachment rule [must] give way . . . to permit the trial court to consider . . . the juror’s statement and any resulting denial of the jury trial guarantee.”).

13. *Id.* at 868.

14. See *id.* at 875 (Alito, J., dissenting); see also *Benally*, 546 F.3d at 1240–41 (“[O]nce it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the ‘most serious’ such violations.”); Jarod S. Gonzalez, *The New Batson: Opening the Door of the Jury Deliberation Room After Peña-Rodriguez v. Colorado*, 62 *St. Louis U. L.J.* 397, 411–12 (2018) (“Courts would likely consider granting *Peña-Rodriguez* protection to gender and other suspect classifications”); Harmann Singh, *Bias in the Jury Room: Where to Draw the Line*, *Harv. C.R.-C.L. L. Rev.: Amicus Blog* (Apr. 9, 2017), <http://harvardcrcl.org/bias-in-the-jury-room-where-to-draw-the-line> [https://perma.cc/EFT8-EZUJ] (detailing the imprecise boundaries between race, ethnicity, and national origin and how the Court’s rationale on racial bias applies equally to other bias such as that based on gender and religion).

15. See *infra* section II.A.

16. See *infra* section I.C. While several federal jurisdictions had also established such exceptions, see *infra* section I.C, state experience is likely more instructive due to the degree to which states operate as independent judicial systems and the greater body of case law available at the state level.

17. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

democracy.”¹⁸ For present purposes, the question is what states’ experiences with their own bias exceptions can teach us about the extent to which the newly minted *Pena-Rodriguez* exception will remain limited to race—and whether it should. Thus, if states have failed to limit their bias exceptions strictly to racial bias, why then would we expect the nationwide exception to follow a different trajectory? And further, to the extent states have gone beyond race, does the reasoning behind such expansion provide any coherent normative or pragmatic rationale for why the nationwide *Pena-Rodriguez* exception should follow suit? Essentially, to what extent have states served as “laboratories of equal justice”?

While state experience is indeed instructive and the primary focus of this Note, such experience need not provide the sole justification for any subsequent expansion beyond race. In fact, the majority’s reasoning in *Pena-Rodriguez* rendered the seemingly narrowly crafted exception susceptible to a slippery-slope progression to other types of bias beyond race.¹⁹ While subsequent jurisprudence appears not to have yet slid down this slope, early signs indicate that courts’ brakes may soon falter.²⁰ Further, outside the context of the no-impeachment rule, the Court’s jurisprudence in other doctrinal areas—most notably the Court’s line of cases following its decision in *Batson v. Kentucky*²¹—may indicate that the natural progression is for limited exceptions to expand to cover far more than initially intended.²² Taken together, the evidence appears to be clear: Courts are likely to—and have good reason to—apply the *Pena-Rodriguez* exception to biases beyond race in jury deliberations.

18. This popularized refrain appears to have been paraphrased from Justice Brandeis’s dissent, as this exact wording does not appear in *New State Ice Co.* Since the decision, many authors, commentators, and judges have relied on this phrase to comment upon Brandeis’s notion of states as laboratories for experimentation. See, e.g., Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, *Am. Enter. Inst.* (Mar. 31, 2001), <https://www.aei.org/wp-content/uploads/2011/10/Laboratories%20of%20Democracy%20Anatomy%20of%20a%20Metaphor.pdf> (on file with the *Columbia Law Review*) (“Conservative and liberal justices have quoted Brandeis’s dictum in some three dozen cases. The metaphor invariably surfaces in any scholarly or public discussion of federalism and is accompanied by emphatic nods of approval. It conveys a pragmatic spirit that naturally appeals to a nation of compulsive tinkerers . . .”).

19. See *infra* notes 236–239 and accompanying text; see also *Pena-Rodriguez*, 137 S. Ct. at 882–84 (Alito, J., dissenting) (critiquing the majority’s conclusion that racial bias is distinct from other forms of bias under either the Sixth Amendment or the Equal Protection Clause); Taurus Myhand, Note, *Will the Jury System Survive the Pena-Rodriguez Exception to Rule 606(b)?: The Court’s Response to Racial Discrimination by a Juror Leaves the Future of the American Jury Trial System in Jeopardy*, 23 *Tex. J. on C.L. & C.R.* 103, 118 (2018) (questioning why lower courts should limit the *Pena-Rodriguez* exception to racial bias alone despite the Supreme Court’s specific application to race).

20. See *infra* notes 234–235 and accompanying text.

21. 476 U.S. 79 (1986).

22. See *infra* section II.B.

Extrapolating from state experience, this Note comprehensively addresses whether the *Pena-Rodriguez* exception for racial bias in jury deliberations will expand beyond race to other forms of bias—and whether such a result should concern us.²³ This Note concludes that the exception will likely expand to include other types of bias that may threaten a defendant’s right to an impartial jury—and that such an expansion beyond race is both normatively and pragmatically sound. This Note also concludes that any weakening of the no-impeachment rule caused by such expansion will likely be limited by procedural barriers and can be further cabined by constraining any expansion to bias based on suspect classifications receiving heightened scrutiny under the Fourteenth Amendment. Part I provides a brief history of the no-impeachment rule, describes certain jurisdictions’ willingness to carve out exceptions to the rule for instances of bias, and concludes by discussing the Court’s decision in *Pena-Rodriguez*. Section II.A looks to the jurisdictions in which a bias exception had already existed before *Pena-Rodriguez* to determine whether these exceptions have expanded beyond race to date. Section II.B examines the related doctrinal area of voir dire peremptory strikes to determine whether the expansion of a race-only *Batson* exception to other types of prejudice can shed light on *Pena-Rodriguez*’s potential evolution. Part III uses the states’ experiences with these exceptions and the Court’s own past experience under *Batson* to demonstrate that *Pena-Rodriguez*’s narrow exception is likely to, and should, expand beyond race. Part III further suggests that, in addition to procedural barriers, incorporation of Fourteenth Amendment principles can ensure the no-impeachment rule continues to serve its purpose as a safeguard of the jury system.

23. A growing contingent within the legal community has noted the possibility of expansion beyond race, yet nearly all have done so in the context of a broader commentary about the case itself or other implications stemming from the Court’s holding. For instance, one author discusses the potential for expansion beyond race in the broader context of comparing *Pena-Rodriguez* to *Batson*. See Gonzalez, *supra* note 14, at 411 (“If . . . equal protection is really the driving force[,] . . . [t]he *Peña-Rodriguez* door is open to *Batson*-type arguments in terms of broadening the characteristics . . . to include sex, national origin, religion, disability, sexual orientation, and age, among other possible characteristics.”). One scholar, however, has utilized a similar frame of analysis in looking to states’ existing exceptions to determine the subsequent development of *Pena-Rodriguez* case law. See Robert I. Corrales, *Is Peña-Rodriguez v. Colorado* Just a Drop in the Bucket or a Catalyst for Improving a Jury System Still Plagued by Racial Bias, and Still Badly in Need of Repairs?, 21 Harv. Latinx L. Rev. 1 (2018) (looking at state cases to draw out potential lessons for the expected progression of the *Pena-Rodriguez* exception, but discussing only those state cases cited by the Supreme Court and not aggregating state experience).

I. THE HISTORY OF THE NO-IMPEACHMENT RULE AND A CRACK IN THE
FACADE: FROM ENGLAND TO *PENA-RODRIGUEZ*

While the fundamental right to an impartial jury has a long and storied history,²⁴ the traditional evidentiary ban on jurors impeaching their own verdicts has also existed for several centuries, dating back to 1785 England and Lord Mansfield's decision in *Vaise v. Delaval*.²⁵ The "Mansfield Rule"—essentially a blanket ban on post-verdict juror testimony—dominated jurisprudence for the next 100 years²⁶ and was transplanted in large part into American common law.²⁷ States began to imprint their own variations on the Mansfield Rule, and while the Supreme Court never firmly established support for any one articulation, it came to acknowledge a general rule preventing jurors from testifying about deliberations.²⁸ Federal standardization emerged in 1975 with the adoption of Federal Rule of Evidence 606(b), establishing a uniform approach for federal courts—in both criminal and civil trials²⁹—and a template for state evidentiary codes.

The no-impeachment rule long remained largely inviolable, especially at the Supreme Court level, with courts repeatedly thwarting attempts to recognize exceptions for certain forms of juror misconduct that allegedly threatened the guarantee of an impartial jury. Besides limited incursions for external influences,³⁰ nearly all attempts to weaken the rule on a national level had failed. However, across state and federal jurisdictions, some courts began to retreat from the unyielding nature of the traditional rule. Finally, the Supreme Court joined these jurisdictions in *Pena-Rodriguez*.

24. See, e.g., James J. Gobert, In Search of the Impartial Jury, 79 J. Crim. L. & Criminology 269, 273–83 (1988) (detailing the history of the impartial jury requirement).

25. (1785) 99 Eng. Rep. 944 (KB).

26. West, *supra* note 8, at 166–67; see also David A. Christman, Note, Federal Rule of Evidence 606(b) and the Problem of "Differential" Jury Error, 67 N.Y.U. L. Rev. 802, 816 (1992) ("In the United States, the Mansfield rule was widely accepted in nearly all quarters until the latter half of the 19th Century." (footnote omitted)).

27. See Miller, Dismissed with Prejudice, *supra* note 6, at 881 ("[Mansfield's Rule] soon prevailed in England, and its authority came to receive in [America] an adherence almost unquestioned' until the latter half of the nineteenth century." (first alteration in original) (footnote omitted) (quoting 5 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trial at Common Law § 2352 (2d ed. 1923))).

28. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

29. As a Federal Rule of Evidence, Rule 606(b) applies to both criminal and civil cases. See Fed. R. Evid. 1101(b). The no-impeachment rule in all forms applies to both criminal and civil cases, and the Supreme Court's jurisprudence on the no-impeachment rule has included a mix of both types of cases. Compare *Tanner v. United States*, 483 U.S. 107, 109–10 (1987) (applying the no-impeachment rule in a criminal case), with *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014) (applying the no-impeachment rule in a civil case).

30. See Fed. R. Evid. 606(b)(2)(A)–(B).

Part I tracks this progression. Section I.A describes the history of the no-impeachment rule, from English common law through the adoption of Federal Rule 606(b). Section I.B discusses the Supreme Court's initial rejection of any constitutional exceptions to the rule. Section I.C examines how states and lower federal courts created their own exceptions to the no-impeachment bar for instances of bias, despite the Supreme Court's reluctance to do so. Section I.D details the Supreme Court's eventual acceptance of a constitutional exception for evidence of racial bias in jury deliberations in *Pena-Rodriguez*.

A. *From Common Law to Codification: The No-Impeachment Rule Through the Years*

1. *British Invasion: From English to American Common Law.* — English common law prior to 1785 “routinely” allowed post-trial juror testimony regarding juror misconduct,³¹ although, as the Supreme Court has noted, “always with great caution.”³² Lord Mansfield based his change of course on the belief that jurors could not be reliable witnesses against themselves and thus should not be allowed to impeach their own verdicts.³³ As a result, in *Vaise v. Delaval*, he refused to admit juror affidavits alleging that the jury had decided the all-important guilt-or-innocence question on the basis of a coin flip.³⁴ Lord Mansfield's holding prohibited jurors from testifying about both their “subjective mental processes” and “objective events that occurred during deliberations.”³⁵ The “Mansfield Rule” was thus born and the foundation for the modern no-impeachment rule laid.

While largely adopted into American common law in full, the Mansfield Rule soon came under attack, with rejections and variations sprouting up in several states.³⁶ *United States v. Reid*³⁷ is largely seen as the

31. See Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 513 & n.25 (1988) [hereinafter Crump, *Jury Misconduct*] (citing two pre-*Vaise* English cases, *Norman v. Beaumont*, (1744) 94 Eng. Rep. 1000 (KB), and *Philips v. Fowler*, (1735) 92 Eng. Rep. 1190 (KB), in which jurors had been permitted to give affidavits as to juror misconduct).

32. *McDonald v. Pless*, 238 U.S. 264, 268 (1915).

33. See *Miller, Dismissed with Prejudice*, supra note 6, at 881; West, supra note 8, at 171.

34. *Vaise v. Delaval*, (1785) 99 Eng. Rep. 944 (KB); see also *Miller, Dismissed with Prejudice*, supra note 6, at 881; West, supra note 8, at 171; Christman, supra note 26, at 815 n.76.

35. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017).

36. See, e.g., Crump, *Jury Misconduct*, supra note 31, at 514–17 (discussing the liberalization of the Mansfield Rule in several states, including Iowa, Kansas, and Massachusetts).

37. 53 U.S. 361 (1851).

initial blow to the Mansfield Rule.³⁸ In this 1851 decision, the Supreme Court did not overrule the traditional rule but recognized that “cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.”³⁹

The Iowa Supreme Court soon followed the fissure opened by *Reid*, introducing its own rule in opposition to the Mansfield Rule. The “Iowa Rule,” as announced in *Wright v. Illinois & Mississippi Telegraph Co.*,⁴⁰ was considered both a “more flexible version of the no-impeachment bar”⁴¹ and an “express[] reject[ion] [of] the Mansfield Rule.”⁴² Instead of adhering to the absolute ban on post-verdict juror testimony, the Iowa court demarcated the boundary of permissible and impermissible juror testimony based on its content. On the permissible side of the divide lay “overt acts”:⁴³ a party or attorney improperly approaching a juror, witnesses discussing the case outside of court and in the presence of jurors, or a game of chance or improper quotient deciding the verdict.⁴⁴ On the impermissible side was “evidence of the ‘mental processes of jurors.’”⁴⁵

In an important and lasting characterization of inadmissible juror testimony, the Iowa court deemed the mental processes of the jury to be those that “essentially inhere in the verdict itself.”⁴⁶ Under the Iowa Rule, jurors were allowed to impeach their own verdicts only under limited circumstances, although more frequently and for a broader array of purposes than under the Mansfield Rule. In the wake of the Iowa Rule, state courts began to establish their own interpretations of the no-impeachment rule, with some adhering closely to the strict limitations of

38. See, e.g., Miller, *Dismissed with Prejudice*, supra note 6, at 881 (characterizing *Reid* as “the first major crack in the dam”).

39. *Reid*, 53 U.S. at 366. This statement was merely dicta. Miller, *Dismissed with Prejudice*, supra note 6, at 881. The Court did not allow the jurors to impeach the verdict based upon the entrance of newspapers into the jury room, finding nothing in the newspaper that might influence the jury’s decision. *Reid*, 53 U.S. at 361–62, 366.

40. 20 Iowa 195 (1866). In *Wright*, four juror affidavits alleged that the jury used an illegal quotient verdict, in which they simply added up what each juror thought to be the appropriate damages award and divided this total amount by twelve. *Id.* at 212–13.

41. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017).

42. West, supra note 8, at 172.

43. *Id.*

44. *Wright*, 20 Iowa at 210.

45. West, supra note 8, at 172 (quoting Jack Pope, *The Mental Operations of Jurors*, 40 Tex. L. Rev. 849, 851 (1962)).

46. *Wright*, 20 Iowa at 210. This included evidence that the juror did not assent to the verdict, she misunderstood the court’s instructions, she was unduly influenced by other jurors, or any other matter “resting alone in the juror’s breast.” *Id.* The Supreme Court later described such evidence as jurors’ own “subjective beliefs, thoughts, or motives during deliberations.” *Pena-Rodriguez*, 137 S. Ct. at 863.

the Mansfield Rule and others following the more lenient approach of the Iowa Rule.⁴⁷

Perhaps in response to the nonuniformity of lower court approaches, the Supreme Court decided to wade into the burgeoning debate on the proper scope of the rule. The Court first confronted this issue in 1892 in *Mattox v. United States*, a capital murder case in which several jurors, post-verdict, alleged that a juror had brought a newspaper containing sensational details of the case into the jury room and that a bailiff had made improper comments to jurors regarding the defendant's past behavior.⁴⁸ The Court, relying on a variation of the Iowa Rule developed in Massachusetts,⁴⁹ established an exception to the general rule, according to which jurors could impeach their verdicts post-trial by providing evidence of "external causes tending to disturb the exercise of deliberate and unbiased judgment."⁵⁰ Thus, the Supreme Court recognized the precursor to the "extraneous prejudicial information" and the "improper outside influences" exceptions codified in Rule 606(b).⁵¹ However, several questions remained in the wake of *Mattox*.⁵²

The Court next endeavored to clarify its position on permissible exceptions to the general no-impeachment rule in *McDonald v. Pless*.⁵³ The *McDonald* Court framed the question as a choice between "redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."⁵⁴ Citing numerous rationales as justification for the no-impeachment rule,⁵⁵ the Court determined that the risk of a private

47. See Miller, *Dismissed with Prejudice*, supra note 6, at 882–83 (discussing the Massachusetts approach, distinguishing what "passed in the jury room" from the private deliberations of the jury, and the Kansas approach, distinguishing "matters resting in the personal consciousness of one juror" from "overt acts").

48. 146 U.S. 140, 150–51 (1892); see also Christman, supra note 26, at 817 (detailing the circumstances giving rise to the attempted verdict impeachment in *Mattox*).

49. See West, supra note 8, at 173; see also *Woodward v. Leavitt*, 107 Mass. 453, 460 (1871) (announcing the Massachusetts variation of the Iowa Rule).

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

51. See Miller, *Dismissed with Prejudice*, supra note 6, at 884 ("*Mattox* stands for the proposition that jurors could impeach their verdicts after trial through testimony concerning 'external causes,' i.e., extraneous prejudicial information . . . and improper outside influences, such as the bailiff's comments.>").

52. See *id.* at 884 (highlighting the uncertainty of the admissibility of overt acts); Christman, supra note 26, at 818 ("The decision . . . did not fully resolve the question of whether testimony to quotient and chance verdicts was admissible.>").

53. 238 U.S. 264 (1915). As in *Wright*, a juror alleged that the jury had reached a quotient verdict. *Id.* at 265. *Hyde v. United States*, 225 U.S. 347 (1912), also dealt with impeachment of a jury verdict but did not advance the Court's jurisprudence in a substantial way. See Miller, *Dismissed with Prejudice*, supra note 6, at 884.

54. *McDonald*, 238 U.S. at 267.

55. See *id.* at 267–68 (noting concerns like the risk that every verdict could be "followed by an inquiry in the hope of discovering something which might invalidate the find-

injury must yield to the overwhelming public policy concerns with allowing a broad intrusion into jury deliberations.⁵⁶ The Court thus stated that outside the “gravest and most important cases” in which excluding a juror’s testimony might “violat[e] the plainest principles of justice,” the general rule is that the losing party cannot “use the testimony of jurors to impeach their verdict.”⁵⁷ Here, in the final case before the passage of Rule 606(b), the Court reinforced a less flexible version of the no-impeachment rule than that implied in *Reid* and *Mattox*,⁵⁸ concluding that doing otherwise might lead to undesirable consequences that could be disastrous for the judicial system.⁵⁹ This approach, known as the “federal rule,” while modified in some jurisdictions, controlled in federal courts until the passage of Federal Rule of Evidence 606(b).⁶⁰

2. *Codification: Rule 606(b) and Similar State Rules.* — Given that the Court’s last case interpreting the no-impeachment rule prior to adoption of the Federal Rules of Evidence recognized very limited exceptions, one might expect Congress’s codification to include a similarly restrictive interpretation. And while that is indeed what transpired, the legislative history surrounding the adoption of Rule 606(b) evinces a more complicated picture, highlighting that Congress could have adopted a rule with more flexible exceptions, akin to the Court’s *Mattox* decision.⁶¹ Rule 606(b)’s initial draft was actually closer to the Iowa Rule than the Mansfield Rule and would have barred testimony regarding only a juror’s mental or emotional state.⁶² Under such a rule, courts likely would have

ing” and that jurors might be harassed by defeated parties, turning private deliberations into “the constant subject of public investigation” and destroying freedom of discussion); see also Christman, *supra* note 26, at 819 (detailing the policy considerations that outweighed any instances of individual injustice).

56. See *McDonald*, 238 U.S. at 268–69.

57. *Id.*

58. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 864 (2017) (commenting that the *Mattox* Court seemed to suggest that it might adopt a “more flexible rule,” but in *McDonald*, “the Court rejected the more lenient Iowa rule”); see also *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014) (“This Court occasionally employed language that might have suggested a preference for the Iowa rule.”).

59. *McDonald*, 238 U.S. at 267–68.

60. See, e.g., *Pena-Rodriguez*, 137 S. Ct. at 876 (Alito, J., dissenting).

61. For a more extensive discussion of Congress’s passage of Rule 606(b), see Crump, *Jury Misconduct*, *supra* note 31, at 520–22; Miller, *Dismissed with Prejudice*, *supra* note 6, at 886–90; Caroline Covington, Note, *Pena-Rodriguez v. Colorado: Elevating a Constitutional Exception Above the Tanner Framework*, 77 Md. L. Rev. 547, 556–58 (2018).

62. See West, *supra* note 8, at 174 (“The initial draft . . . adopted a balance along the lines of the Iowa Rule, stating that ‘a juror may not testify concerning the effect of anything upon . . . any . . . juror’s mind or emotions . . . or concerning his mental processes in connection therewith.’” (quoting Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 289–90 (1969))). The legislative history demonstrates that the House preferred this interpretation. See, e.g., Crump, *Jury Misconduct*, *supra* note 31, at 521.

admitted evidence of “improper jury room conduct,” including outward expressions of bias.⁶³ However, the Senate rejected this lenient version of the rule out of concern for its negative policy consequences.⁶⁴ Instead, Congress adopted a more stringent version—which included only two limited exceptions for evidence of extraneous prejudicial information and outside influence, alongside a broad exclusion of post-verdict juror testimony—under which juror bias was not admissible.⁶⁵ Today, Rule 606(b) reads nearly identically to the initial 1975 version:

- (b) During an Inquiry into the Validity of a Verdict or Indictment
- (1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.
- (2) *Exceptions.* A juror may testify about whether:
- (A) extraneous prejudicial information was improperly brought to the jury’s attention;
- (B) an outside influence was improperly brought to bear on any juror; or
- (C) a mistake was made in entering the verdict on the verdict form.⁶⁶

States were quick to follow federal codification, and today, most states have no-impeachment rules that closely mirror Rule 606(b):

Of the forty-two states with state evidentiary codes modeled on the Federal Rules of Evidence, twenty-five have adopted rules that either are substantially similar to F.R.E. 606(b) or have even stronger bars against juror testimony. Six states have rules that are substantially similar to F.R.E. 606(b) but also specify one

63. West, *supra* note 8, at 174.

64. See Miller, *Dismissed with Prejudice*, *supra* note 6, at 889–90 (citing concerns such as the harassment of jurors and the exploitation of disgruntled ex-jurors).

65. See West, *supra* note 8, at 174–75. One Senator, John McClellan, was particularly persuasive in his attempt to expand the coverage of the no-impeachment rule. See *id.* at 174. In a letter to the Senate Committee Chair, McClellan referred explicitly to “bias” as something understood to be precluded by the evidentiary bar and urged that this understanding be adopted in Rule 606(b). 117 Cong. Rec. 33,645 (1971) (statement of and letter from Sen. McClellan). Senator McClellan prevailed, with a strict no-impeachment rule reflected in Rule 606(b).

66. Fed. R. Evid. 606(b). The Advisory Committee added the exception for a mistake in entering the verdict, 606(b)(2)(C), in a 2006 amendment in response to a divergence between the text of the Rule and case law that had nonetheless established such an exception. See Fed. R. Evid. 606 advisory committee’s note to 2006 Amendment.

other area of misconduct to which jurors may testify. Seven states have no statutory rules analogous to F.R.E. 606(b). Arizona has a rule identical to F.R.E. 606(b), but only applies it to civil actions. Florida, Hawaii, and Nevada are the only states with F.R.E.-based evidentiary codes that have codified rules substantially different from F.R.E. 606(b).⁶⁷

For nearly four decades after the passage of Rule 606(b), most federal courts, including the Supreme Court, seemed to adhere to the Senate's preferred inflexible version of the no-impeachment rule. Despite calls to carve out exceptions to this rigid rule, the Supreme Court continued to treat Rule 606(b) and the broader no-impeachment rule as impervious to bias or misconduct exceptions.

B. *Tanner and Warger: Rule 606(b) Withstands Attack in the Supreme Court*

Pena-Rodriguez was not the first time petitioners had asked the Supreme Court to recognize an exception to the no-impeachment rule, though it was the first time the Court answered that request in the affirmative. Before *Pena-Rodriguez*, the Court had adhered to the restrictive interpretation preferred by the Senate and had rejected two attempts to force the rule to yield to defendants' challenges.

In *Tanner v. United States*, the Court refused to acknowledge an exception to Rule 606(b) when the petitioners produced evidence demonstrating that some jurors were under the influence of drugs and alcohol during the trial.⁶⁸ Justice O'Connor began by rejecting the contention that juror testimony purporting to establish evidence of such improper activity was admissible under Rule 606(b). Instead, relying on the distinction between internal and external influences, the *Tanner* Court found the evidence of jurors' drug and alcohol use to be inadmissible as internal to the deliberations.⁶⁹

The petitioners also raised Sixth Amendment claims.⁷⁰ In rejecting the petitioners' contention that their Sixth Amendment right to a fair trial before an impartial and competent jury required consideration of

67. Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1487–88 (2006) (footnotes omitted). The *Pena-Rodriguez* Court seems to have relied on similar studies, as it indicated that some version of the no-impeachment rule is followed by every state and Washington, D.C., with forty-two jurisdictions following Rule 606(b) and nine jurisdictions still following the Iowa Rule. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017).

68. 483 U.S. 107, 115–17, 125–27 (1987). The allegations of misconduct in this case are particularly disturbing, with one juror describing the jury as “one big party.” *Id.* at 115. Other allegations included that four jurors regularly smoked marijuana during the trial, *id.*, two jurors regularly ingested cocaine, *id.* at 115–16, and multiple jurors fell asleep during the trial, *id.* at 116.

69. See *id.* at 121–26.

70. *Id.* at 126.

the juror testimony, the Court relied on existing safeguards within the jury trial system that would insulate defendants from incompetence or bias during juror deliberations.⁷¹ The Court stressed the combination of: (1) voir dire, as a preliminary method of discerning juror bias or ineptitude; (2) jurors' ability to come forward with allegations of inappropriate behavior *during* trial; (3) attorneys' or trial judges' ability to observe potential misconduct during trial; and (4) even *post*-trial, parties' ability to use evidence other than juror testimony to impeach the verdict.⁷² With these safeguards in place, the Supreme Court chose to defer to the "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry," deeming an overriding Sixth Amendment exception unnecessary and inappropriate.⁷³

In *Warger v. Shauers*, the Court again relied significantly on existing safeguards within the trial process in refusing to acknowledge an exception to Rule 606(b).⁷⁴ In a negligence suit for damages following a motorcycle accident, the Court addressed whether Rule 606(b) precludes a party from using juror testimony to prove that another juror had not been completely honest during voir dire, resulting in alleged bias during deliberations.⁷⁵ The Court relied on the language and legislative history of Rule 606(b), evincing Congress's intent to adopt the federal approach, under which juror testimony was not admissible to prove dishonesty during voir dire.⁷⁶ Noting the *Tanner* safeguards, the Court further held that there were no constitutional issues with precluding such evidence despite the Constitution's guarantee of an impartial jury.⁷⁷ But, importantly, the Court echoed *Reid* in recognizing that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged."⁷⁸ While it took the Court only another three years to find such

71. See *id.* at 127.

72. *Id.* As stated *supra* note 6, Rule 606(b) bans only jurors themselves from testifying about deliberations and is not a blanket preclusion of evidence of juror misconduct or bias during deliberations.

73. *Tanner*, 483 U.S. at 127.

74. 135 S. Ct. 521, 529 (2014) ("Similarly here, a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased.").

75. *Id.* at 524. After the trial, a juror alleged that the jury foreperson, despite attesting during voir dire that she could be impartial, indicated during deliberations that her daughter's involvement with a fatal car accident colored her decisionmaking. *Id.*

76. See *id.* at 525–28.

77. See *id.* at 528–29 ("[A] party's right to an impartial jury remains protected despite Rule 606(b)[] . . . [J]uror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered.").

78. *Id.* at 529 n.3; see also *United States v. Reid*, 53 U.S. 361, 366 (1851) ("[C]ases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.").

a case in *Pena-Rodriguez*, many other jurisdictions had long recognized this reality and had taken affirmative steps to address the situation.

C. *Go Your Own Way: State and Lower Federal Court Recognition of Bias Exceptions to the No-Impeachment Rule Before Pena-Rodriguez*

While the Supreme Court continued to reject challenges to Rule 606(b), some states and lower federal courts opted instead to take a different approach in areas left undecided, notably for instances of racial bias in deliberations. Several states had long recognized the need for their no-impeachment rules to conform to fundamental requirements of fairness in jury trials, and even in the federal system, certain districts and circuits took a more lenient view of Rule 606(b) than the Supreme Court to allow for juror impeachment in rare instances of bias during deliberations.

1. *State Exceptions Predating Pena-Rodriguez*. — State courts have adopted different views of the no-impeachment rule, reflected both in how states have codified the common law rule—if they have at all—and in how courts have reacted to challenges to their respective rules. As the Supreme Court noted, at the time of the *Pena-Rodriguez* decision, at least sixteen states had recognized exceptions to their no-impeachment rules in cases of explicit racial bias in jury deliberations,⁷⁹ in both civil and criminal contexts.⁸⁰ The Court's estimation, though supported by various amici,⁸¹ appears to be too low, as it excludes states in which such exceptions may exist but for certain reasons were not included in the total count.⁸² While some commentators believed there to be “little

79. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017). The Court's characterization is somewhat misleading. The Court indicated that at least sixteen jurisdictions, eleven following the federal rule, had exceptions for circumstances equivalent to those in *Pena-Rodriguez*: “juror testimony that racial bias played a part in deliberations.” *Id.* However, the state exceptions do not all pertain to racial bias. See *infra* section II.A.

80. See *infra* note 144.

81. Amicus Curiae Brief of Center on the Administration of Criminal Law in Support of Petitioner at 22, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606) [hereinafter Center on Criminal Law Amicus Brief]; Brief for Amici Curiae Professors of Law in Support of Petitioner at 14, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606), 2015 WL 8758156 [hereinafter Professors of Law Amicus Brief]. Amici disagree on the exact number of jurisdictions recognizing an exception. The number may depend on the precise definition of an exception and the manner in which it had been recognized—that is, whether recognized by way of judicial decree.

82. One example is Texas. In *Evans v. Galbraith-Foxworth Lumber Co.*, 31 S.W.2d 496, 500 (Tex. Civ. App. 1929), the Texas Court of Civil Appeals found that the verdict should have been set aside by the trial judge after evidence of a juror's racial prejudice was produced. However, because this case was decided before passage of Texas's statutory no-impeachment rule, Texas was not included in the tally. See Center on Criminal Law Amicus Brief, *supra* note 81, app. at 1a n.8.

At least one amicus believed Oklahoma to be a jurisdiction in which a racial-bias exception existed, yet the Court chose not to include Oklahoma in its total count. See *id.*

dissent from the proposition” that Rule 606(b) and similar state rules precluded impeaching verdicts when confronted with evidence of racial bias,⁸³ a state-by-state analysis appears to demonstrate otherwise. The underlying reasoning, scope, and explicitness of such state exceptions has varied, but, indisputably, many states deemed bias exceptions to the no-impeachment rule necessary before the Supreme Court mandated as much nationwide. Thus, states have proven fertile grounds for experimentation: Jurisdictions’ willingness to peel back the veil of secrecy imposed on jury deliberations before the Supreme Court saw fit to do so encouraged the Court that such a move would not destroy the jury trial system and, if anything, would serve to bolster the promise of a fair and impartial criminal justice system.

2. *The Circuit Split Preceding Pena-Rodriguez*. — At the time of the *Pena-Rodriguez* decision, a circuit split had developed on racial-bias exceptions to the no-impeachment bar, with ample scholarship drawing attention to the uneven treatment in lower federal courts.⁸⁴ *Tanner*, which dealt with

app. B, at 7a; see also *Pena-Rodriguez*, 137 S. Ct. at 886 (failing to include Oklahoma on a list of jurisdictions believed to have racial-bias exceptions). Holding an impartial trial to be a constitutional due process requirement, the Oklahoma Supreme Court ruled the plaintiffs were entitled to a new trial when, after the verdict, a juror revealed that he himself harbored racial bias toward African Americans. *Fields v. Saunders*, 278 P.3d 577, 580 (Okla. 2012). In this case, however, the juror himself revealed his own biases—and did so outside the courthouse and unknowingly to an independent attorney—as opposed to another juror bringing forth evidence of his partiality. *Id.* at 580–81. The court pointed out that this was “not a case of a juror impeaching a verdict,” and that of great significance was that the juror himself revealed his bias and did so willingly without probing questions by the parties or the court. *Id.* at 581–82.

An amicus also pointed to Oregon’s statute, Or. Rev. Stat. § 40.335 (2017), claiming the legislature meant “to allow a juror to testify about a fellow juror who ‘manifested extreme racial prejudice towards one of the parties.’” Center on Criminal Law Amicus Brief, *supra* note 81, app. B, at 7a n.10 (quoting legislative history). Oregon case law prior to the enactment of its codified no-impeachment rule seems to support this proposition. In *State v. Gardner*, the Supreme Court of Oregon stated that “there is no absolute rule in this state prohibiting the use of a juror’s affidavit to impeach a verdict” and instead held that “a verdict is impeachable if justice demands that it be set aside.” 371 P.2d 558, 559–61 (Or. 1962). Thus, while no Oregon case created an exception to the no-impeachment rule for instances of racial bias, when “the evidence clearly establishes that the misconduct constitutes a serious violation of the juror’s duty and deprives complainant of a fair trial,” evidence of a juror’s misconduct may be used to impeach the verdict. *Id.* at 561.

83. Gold, *supra* note 9, at 128; see also 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6074, at 505 (2d ed. 2007) (“Most authorities agree . . . that the rule precludes a juror from testifying that . . . racial or ethnic prejudice played a role in deliberations.”).

84. See, e.g., Covington, *supra* note 61, at 560–62; Jacob J. Key, Note, *Walking the Fine Line of Admissibility: Should Statements of Racial Bias Fall Under an Exception to Federal Rule of Evidence 606(b)?*, 39 *Am. J. Trial Advoc.* 131, 137–39 (2015); see also Ashok Chandran, Note, *Color in the “Black Box”: Addressing Racism in Juror Deliberations*, 5 *Colum. J. Race & L.* 28, 40–43 (2014); Andrew C. Helman, Comment, *Racism, Juries, and Justice: Addressing Post-Verdict Juror Testimony of Racial Prejudice During Deliberations*,

allegations of unqualified jurors, importantly left open the question as to whether evidence of *bias* in jury deliberations must be admitted, notwithstanding Rule 606(b).⁸⁵ The split between the circuits that had addressed the issue was largely even, with three circuits either explicitly recognizing or suggesting an amenability to an exception for instances of racial bias, and three circuits either explicitly declining to recognize such an exception or suggesting its impropriety.⁸⁶

As in the various states recognizing racial-bias exceptions, the lower federal courts acknowledging or expressing an amenability to exceptions used different legal justifications and announced such exceptions with varying levels of explicitness. In dicta in *United States v. Henley*, the Ninth Circuit deemed racial prejudice to be a mental bias unrelated to any issue a juror may be asked to determine and thus found racial bias “generally not subject to Rule 606(b)’s prohibitions against juror testimony.”⁸⁷ While *Henley* ultimately did not adjudicate this issue in the specific context of juror deliberations, the Ninth Circuit gave Rule 606(b) a much narrower scope than any other federal court to date.⁸⁸

62 Me. L. Rev. 327, 334–38 (2010). Key’s Note provides a particularly thorough depiction of the then-split.

85. Amanda R. Wolin, What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b), 60 UCLA L. Rev. 262, 275 (2012). But see Miller, Dismissed with Prejudice, *supra* note 6, at 896 (alleging that most courts had “extrapolated *Tanner’s* conclusion” from the issue of a competent jury to the issue of an impartial jury).

86. See *Pena-Rodriguez*, 137 S. Ct. at 865. Given *Pena-Rodriguez*, the cases in which courts rejected racial-bias exceptions are less relevant today. However, such cases, especially *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), help demonstrate the arguments against such an exception and may provide some insight into how certain circuits’ jurisprudence will develop post-*Pena-Rodriguez*.

In *Benally*, the Tenth Circuit reasoned that the *Tanner* safeguards were sufficient to protect defendants’ constitutional interests and expressed concerns similar to those in Justice Alito’s dissent in *Pena-Rodriguez*, see discussion *infra* section I.D, regarding the inability to limit a constitutional exception to racial bias alone. See *Benally*, 546 F.3d at 1240–41. See generally Brandon C. Pond, Note, Juror Testimony of Racial Bias in Jury Deliberations: *United States v. Benally* and the Obstacle of Federal Rule of Evidence 606(b), 2010 BYU L. Rev. 237 (concluding that the Tenth Circuit misapplied Rule 606(b)). The Third Circuit similarly declined the opportunity to create an exception for racial bias. See *Williams v. Price*, 343 F.3d 223, 229–39 (3d Cir. 2003); see also *United States v. Shalhout*, 507 F. App’x 201, 205–07 (3d Cir. 2012). Finally, while not addressing the constitutional aspect, the Fifth Circuit in *Martinez v. Food City, Inc.* deemed evidence of racial bias to be excluded by Rule 606(b). 658 F.2d 369, 373–74 (5th Cir. Unit A Oct. 1981).

87. 238 F.3d 1111, 1119–21 (9th Cir. 2001). The Ninth Circuit relied on prior Supreme Court case law, including *Rushen v. Spain*, in which the Court held that “[a] juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide.” 464 U.S. 114, 121 n.5 (1983) (*per curiam*). The *Henley* court ultimately determined that the allegations of racial bias were admissible to prove whether a juror’s responses during voir dire were truthful. *Henley*, 238 F.3d at 1121.

88. *Henley*, 238 F.3d at 1120. At least one district court understood the Supreme Court’s decision in *Warger v. Shauers*, 135 S. Ct. 521 (2014), to “seriously undermine[]”, if

Other circuits—and districts⁸⁹—relied explicitly on constitutional principles when discussing racial-bias exceptions. The Seventh Circuit, while failing to create an explicit exception and rejecting the attempt to impeach the verdict in the case at hand, recognized that constitutional principles might require an exception to the no-impeachment bar.⁹⁰ In so doing, the court stated that the no-impeachment rule “cannot be applied in such an unfair manner as to deny *due process*” and that “further review may be necessary . . . to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent.”⁹¹

The First Circuit was the only circuit to explicitly create a constitutional exception to the no-impeachment rule for evidence of racial bias, holding in *United States v. Villar* that a defendant’s constitutional rights to due process and an impartial jury require an exception to Rule 606(b) for cases in which racial or ethnic bias tainted jury deliberations.⁹² While acknowledging the policy concerns associated with impeaching verdicts, the court held that “there are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment.”⁹³ A precursor to *Pena-Rodriguez*, *Villar* held the *Tanner* safeguards inadequate to protect against racial bias in deliberations, with the *Villar* court

not totally abrogate[.]” *Henley*. *Ali v. Grounds*, No. 14-0898 BAS (WVG), 2015 WL 13079247, at *23 (S.D. Cal. Mar. 16, 2015).

89. Even within circuits in which the Court of Appeals had not yet weighed in, some district courts took the initiative to create an exception, relying on defendants’ constitutional rights to require that juror-supplied evidence of racial bias in deliberations be admitted. See, e.g., *Tobias v. Smith*, 468 F. Supp. 1287, 1291 (W.D.N.Y. 1979) (requiring a hearing be held to determine whether a juror made racially prejudiced statements during deliberations, for if the deliberations were tainted by racial prejudice, “the petitioner’s [S]ixth [A]mendment right to a trial by an impartial jury would have been denied”).

90. See *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158–60 (7th Cir. 1987). While the court said an exception may be appropriate in some circumstances, it emphasized that Rule 606(b) otherwise barred impeaching a verdict with juror testimony of racial bias, and district courts subsequently used *Shillcutt* to reject impeachment attempts based on racial bias. See *Nielsen v. Basit*, No. 83 C 1683, 1994 WL 30980, at *9 (N.D. Ill. Feb. 1, 1994).

91. *Shillcutt*, 827 F.2d at 1159 (emphasis added). The court added that its ultimate role is to determine “whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial.” *Id.*

92. 586 F.3d 76, 87–88 (1st Cir. 2009). In *Villar*, a prosecution of a Hispanic man for bank robbery, a juror came forth post-conviction alleging that another juror stated, “*I guess we’re profiling but they cause all the trouble.*” *Id.* at 81 (internal quotation marks omitted) (quoting Brief of Appellee at 8, *Villar*, 586 F.3d 76 (No. 08-1154), 2009 WL 6927441).

93. *Id.* at 88.

acknowledging the existence of “a constitutional outer limit” to Rule 606(b).⁹⁴

D. *Pena-Rodriguez: Constitutional Concerns Trump the No-Impeachment Bar*

For years, both within the judicial system and in scholarly circles, many in the legal community urged the Supreme Court to recognize an exception to Rule 606(b) for certain forms of juror misconduct, including racial bias.⁹⁵ These calls became more pronounced after *Tanner* and *Warger*, especially in light of the varying approaches taken by lower courts.⁹⁶ After years of explicitly declaring that Rule 606(b) and the no-impeachment bar need not yield to constitutional considerations, finally, the Court answered the call in *Pena-Rodriguez*.

In 2007, a man sexually assaulted two teenage sisters at a Colorado horse-racing facility. The girls identified Miguel Angel Peña-Rodriguez as the assailant, and the State tried Peña-Rodriguez on several charges.⁹⁷ Before trial, each member of the jury venire was asked several times if he or she could be fair and impartial in this case, to which none of the empaneled jurors expressed any reservations.⁹⁸

After the jury convicted Peña-Rodriguez of unlawful sexual contact and harassment, two jurors voluntarily relayed to defense counsel that a different juror (H.C.) had expressed anti-Hispanic bias toward Peña-Rodriguez and the defense’s alibi witness.⁹⁹ According to the jurors’ affidavits, H.C. stated that “Mexican men had a bravado that caused them to believe they could do whatever they wanted with women,” and, “I think he did it because he’s Mexican and Mexican men take whatever

94. See *id.* at 87–88; see also West, *supra* note 8, at 183 (“The court characterized its holding as providing a ‘constitutional outer limit’ to the application of the Rule 606(b) evidentiary bar.” (quoting *Villar*, 586 F.3d at 88)).

95. See, e.g., Gold, *supra* note 9, at 126 (suggesting that testimony concerning alleged racial bias during jury deliberations must not be excluded by Rule 606(b)); Kevin Zhao, Comment, The Choice Between Right and Easy: *Pena-Rodriguez v. Colorado* and the Necessity of a Racial Bias Exception to Rule 606(B), 12 *Duke J. Const. L. & Pub. Pol’y Sidebar* 33, 46 (2016), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1143&context=djclpp_sidebar (on file with the *Columbia Law Review*) (“[T]he Supreme Court should adopt a racial bias exception to Rule 606(b) to eliminate race-based decision making at trial.”); cf. West, *supra* note 8, at 204 (arguing that Rule 606(b) should be amended to allow evidence of juror statements to prove whether a juror made misrepresentations during voir dire regarding potential biases and that predeliberation trial mechanisms should be expanded to allow inevitable juror biases to be more reliably discovered and addressed).

96. See, e.g., Zhao, *supra* note 95, at 37 (discussing that the Supreme Court avoided foreclosing the possibility of constitutional exceptions to Rule 606(b) following *Warger*).

97. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017).

98. *Id.* Potential jurors were asked some variation of this question on a written questionnaire, by the court, and by defense counsel. *Id.*

99. *Id.* at 861–62.

they want.”¹⁰⁰ H.C. also questioned the defense’s alibi witness because he was “an illegal.”¹⁰¹ The trial court acknowledged H.C.’s bias but denied Peña-Rodriguez’s motion for a new trial, holding that the Colorado counterpart to Federal Rule 606(b)¹⁰² prohibited jurors from testifying as to statements made during deliberations when inquiring into the validity of a verdict.¹⁰³ A divided panel of the Colorado Court of Appeals affirmed, and the Colorado Supreme Court affirmed by one vote, largely in reliance on *Tanner* and *Warger*.¹⁰⁴

The Supreme Court of the United States agreed to hear the case. In announcing the majority opinion, Justice Kennedy provided an extensive history of the no-impeachment rule, recognized the existence of racial-bias exceptions in several jurisdictions, and ultimately explained that the Court had to determine whether “the Constitution requires an exception to the no-impeachment rule when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.”¹⁰⁵ Highlighting the distinct and particularly damaging role racial discrimination has played in America, Justice Kennedy reaffirmed the compelling need to confront racial animus in the justice system.¹⁰⁶ The Court’s characterization of the prejudice at issue in the trial as *racial*, rather than ethnic, was particularly important; Kennedy focused heavily on the Court’s

100. *Id.* (internal quotation marks omitted) (quoting appellate record).

101. *Id.* at 862 (internal quotation marks omitted) (quoting appellate record).

102. Colorado Rule of Evidence 606(b) is nearly identical in wording—and is identical in substance—to Federal Rule 606(b). Colorado Rule of Evidence 606(b) reads as follows:

(b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors’ attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Colo. R. Evid. 606(b).

103. *Pena-Rodriguez*, 137 S. Ct. at 862.

104. See *Pena-Rodriguez v. People*, 350 P.3d 287, 290–93 (Colo. 2015); *People v. Pena-Rodriguez*, 412 P.3d 461, 465 (Colo. App. 2012).

105. See *Pena-Rodriguez*, 137 S. Ct. at 863–67.

106. *Id.* at 867–68. Much of the oral argument also centered on the extent to which race was different from other bases of juror bias or misconduct such that instances of racial bias warranted an exception to the no-impeachment rule. See Carrie Leonetti, *Smoking Guns: The Supreme Court’s Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 Marq. L. Rev. 205, 225 (2017) (quoting the Justices’ race-focused questions during oral argument).

important role in “purg[ing] racial prejudice from the administration of justice” after the enactment of the Civil War Amendments to prevent discriminatory practices against African Americans in the jury system.¹⁰⁷ Thus, the designation of the bias as racial allowed the Court to situate its opinion within its past efforts to combat racial discrimination against African Americans, despite the fact that the defendant was Hispanic.¹⁰⁸

Despite building up to a seemingly inevitable confrontation between the two lines of precedent, Kennedy asserted that these doctrinal strands need not conflict. Instead, Kennedy argued that racial bias is significantly different from the other types of improper conduct the Court had confronted in its cases on the no-impeachment rule, as such bias risks “systemic injury to the administration of justice,” “implicates unique historical, constitutional, and institutional concerns,” and may not be adequately safeguarded against by the existing structural components relied on by *Tanner* and *Warger*.¹⁰⁹ The Court ultimately held that:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.¹¹⁰

The Court made notable attempts to cabin its holding to egregious cases in which a “clear statement” demonstrates “overt racial bias” and “cast[s] serious doubt on the fairness and impartiality” of the deliberations and verdict.¹¹¹ In attempting to prevent badgering of jurors post-verdict, Kennedy emphasized that the jurors in this case came forward voluntarily, implying that this is the preferred method of

107. *Pena-Rodriguez*, 137 S. Ct. at 867–68 (emphasis added).

108. Kennedy explicitly noted that the bias at issue was based on Peña-Rodriguez’s Hispanic identity and that while the Court has previously referred to this as ethnicity, here, the Court would treat this as race. *Id.* at 863. The need for this characterization becomes obvious once the Court grounds its holding in the long-standing and deep-seated nature of racial discrimination in America. For a further discussion of race versus ethnicity, see *infra* notes 246–248 and accompanying text.

109. See *Pena-Rodriguez*, 137 S. Ct. at 868–69. While grounding its holding in terms of the defendant’s individual right to a fair and impartial jury, the Court also noted that allowing an exception for racial bias is necessary to ensure the legal system conforms to the promise of “equal treatment under the law that is so central to a functioning democracy,” *id.* at 868, a statement that seems akin to an Equal Protection Clause holding. For the argument that the Court employed faulty reasoning in reaching the correct outcome and should have instead grounded its decision in the inadequacy of the *Tanner* safeguards for instances of racial bias, see Covington, *supra* note 61, at 575–79.

110. *Pena-Rodriguez*, 137 S. Ct. at 869.

111. *Id.* Further, “not every offhand comment indicating racial bias or hostility” suffices to set aside the no-impeachment rule, and racial bias must have been a “significant motivating factor” to convict. *Id.*

disclosure of racially biased statements during deliberations.¹¹² The Court provided limited procedural guidance to lower courts, leaving much to the “substantial discretion of the trial court in light of all the circumstances.”¹¹³ However, the Court relied in large part on the jurisdictions that had already recognized a racial-bias exception to the no-impeachment rule, both in reaching its holding and in guiding subsequent development.¹¹⁴

Justices Thomas and Alito dissented.¹¹⁵ Alito’s dissent, joined by the Chief Justice and Justice Thomas, warned that there are unlikely to be any “principled grounds for preventing the expansion of [the Court’s] holding.”¹¹⁶ Alito challenged the majority’s conclusion on both of its purported grounds—that the *Tanner* safeguards are ineffective in combating racial bias and that Sixth Amendment interests are heightened in the face of racial bias¹¹⁷—but ultimately concluded that “[t]he real thrust of the majority opinion” is that racial bias is simply more violative of the Constitution than other forms of juror bias or misconduct.¹¹⁸

Alito identified the primary issue with the majority’s supposedly limited holding: “What the Sixth Amendment protects is the right to an ‘impartial jury.’ Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided . . . depends on the nature of a jury’s partiality or bias.”¹¹⁹ After providing a lengthy hypothetical in which he attempted to highlight the irrationality of drawing a distinction between racial bias and other types of bias—using an intentionally absurd bias based on sports-team preferences to illustrate his point—Alito succinctly summarized his concerns, stating: “If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.”¹²⁰ Alito also noted that while the majority phrased its holding in Sixth Amendment terms, recharacterizing it as an equal protection case would similarly raise

112. See *id.* at 870.

113. See *id.* at 869–70 (“[T]he Court need not address[] what procedures a trial court must follow when confronted with a motion for a new trial . . . [or] the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.”).

114. See *id.* at 870.

115. Thomas, writing for himself, contended that the majority misconstrued the original understanding of the Sixth and Fourteenth Amendments. See *id.* at 871–74 (Thomas, J., dissenting).

116. *Id.* at 875 (Alito, J., dissenting).

117. *Id.* at 879.

118. *Id.* at 882.

119. *Id.*

120. *Id.* at 883.

issues of expansion, since equal protection doctrine does not discriminate between suspect classifications.¹²¹

In essence, Alito argued that while racial bias is a disfavored and dangerous form of partiality threatening to the justice system, so too are gender bias and religious bias, and so on. Invoking the same fears of systemic harm to the jury system that guided the *McDonald* Court,¹²² Alito concluded that, while well-intentioned, the Court's decision threatens the very existence of the jury trial system.¹²³ While perhaps hyperbolic at points, Justice Alito's dissent raised valid questions and concerns: Without a sound doctrinal underpinning through which the Court can limit the exception to race alone, just how expansive might this exception become—and how much of the no-impeachment rule will remain?

II. EXPANSION BEYOND RACE: STATE JURISPRUDENCE AND OTHER DOCTRINAL AREAS

Pena-Rodriguez, groundbreaking as it may have been, was a relatively barebones decision that avoided meaningful engagement with the many procedural and doctrinal issues created by subjecting the no-impeachment rule to a constitutional racial-bias exception in criminal cases. In the short time since the decision, lower courts have already begun to grapple with some of these major open questions, including: the threshold showing sufficient to warrant an inquiry into claims of racial bias;¹²⁴ the showing necessary for granting a new trial;¹²⁵ whether *Pena-Rodriguez's*

121. *Id.* For further discussion of the characterization of *Pena-Rodriguez* as an equal protection case, see *infra* notes 213–221 and accompanying text; *infra* sections II.B, III.C.

122. See *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915) (predicting that jury impeachment would spell the end of thoughtful jury deliberation, turning jurors' private discussions into public spectacles subject to fraud and abuse).

123. *Pena-Rodriguez*, 137 S. Ct. at 885. For a scholarly continuation of Justice Alito's call to arms, see generally Myhand, *supra* note 19.

124. See *United States v. Baker*, No. 16-2895, 2018 WL 3747345, at *8 (2d Cir. Aug. 8, 2018) (“*Peña-Rodriguez* does not address the separate question of what showing must be made before counsel is permitted to interview jurors post-verdict to inquire into potential misconduct.”); *Commonwealth v. Young*, No. 1305 MDA 2017, 2018 WL 2947919, at *6 (Pa. Super. Ct. June 13, 2018) (“We think that the trial court's requirement that, at least, a *prima facie* showing of improper animus must be made before convening a hearing on the matter is reasonable.”); Brief of the Appellant at 30–32, *United States v. Birchette*, No. 17-4450 (4th Cir. filed Nov. 13, 2017), 2017 WL 5997873 [hereinafter Brief of Appellant Birchette] (“The Supreme Court's dicta, prior Fourth Circuit precedent, and logic all dictate that ‘good cause’ to investigate claims of racial bias during deliberations be governed by a standard lower than that necessary to actually impeach a verdict.”).

125. See *Berardi v. Paramo*, 705 F. App'x 517, 519 (9th Cir. 2017) (holding that the trial court's examination of six of twelve jurors provided an adequate opportunity for the defendant to prove bias); *Patton v. First Light Prop. Mgmt., Inc.*, No. 14-cv-1489-AJB-WVG, 2017 WL 5495104, at *6–7 (S.D. Cal. Nov. 15, 2017), appeal docketed, No. 17-56861 (9th Cir. Dec. 13, 2017) (raising, *sua sponte*, the issue of racial bias in deliberations but finding

holding should extend to civil cases;¹²⁶ the appropriate standard of review for appeals of claims brought under *Pena-Rodriguez*;¹²⁷ and whether *Pena-Rodriguez* serves as authority for anything beyond the importance of striking racial prejudice from the criminal justice system.¹²⁸ Organizations responsible for drafting and amending evidentiary codes with codified no-impeachment rules—including the federal Advisory Committee on Rules of Evidence—are also struggling to codify *Pena-Rodriguez*'s holding in a way that accurately reflects the current exception while acknowledging that judicial application of the holding may modify its scope.¹²⁹ While no

that the bias in the case did not rise to the level present in *Pena-Rodriguez* to warrant admission).

126. See Brief of Appellee Tyson Foods, Inc. at 29–31, *Benson v. Tyson Foods, Inc.*, 889 F.3d 233 (5th Cir. 2018) (No. 17-40161), 2017 WL 6421754 (“The *Pena-Rodriguez* case—involving a criminal conviction—is clearly different than the present matter.”); see also *First Light Prop. Mgmt.*, 2017 WL 5495104, at *6–7 & n.5 (commenting in a footnote that the court was aware that *Pena-Rodriguez* was a criminal case but still addressing the issue “to further clarify” that the juror’s affidavit was inadmissible). Because the Court grounded the *Pena-Rodriguez* exception in the Sixth Amendment, which applies only to criminal cases, any subsequent expansion to civil cases strengthens the argument that *Pena-Rodriguez* is not a pure Sixth Amendment case and that the exception thus rests at least in part on other doctrinal grounds. For more on this argument, see *infra* note 217 and accompanying text; see also Gonzalez, *supra* note 14, at 404–11 (discussing the potential paths for expansion to civil cases based on the Court’s prior experience with *Batson*).

127. See Brief of Appellant Birchette, *supra* note 124, at 24 (“Although the Supreme Court did not state what the standard of review is for claims under . . . *Pena-Rodriguez v. Colorado*, its holding was grounded in the Sixth Amendment right to a jury trial. This Court generally reviews preserved Sixth Amendment claims *de novo*.” (citations omitted)).

128. In an effort either to avoid application of the newly created exception or to distinguish racial bias from other types of bias, several parties and courts have relied on *Pena-Rodriguez* exclusively for the heightened importance bestowed on eradicating racial bias from the justice system. See, e.g., *Austin v. Davis*, 876 F.3d 757, 790–91 (5th Cir. 2017) (emphasizing the “sound basis” for treating racial bias as different from other forms of bias and refusing to apply the exception to the statements at issue (quoting *Pena-Rodriguez*, 137 S. Ct. at 869)); Brief of NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondents State of Hawaii, et al. at 22, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1586443 (“This Court’s recent decisions . . . make clear that this Court will no longer tolerate the race-as-dangerous stereotyping that was used to justify the lynching of African Americans, the exclusion of Chinese immigrants, or the internment of thousands of Japanese Americans during World War II.”); Reply Brief for Petitioners at 15, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5644420 (relying on the special status given to race in *Pena-Rodriguez* to argue against a hypothetical involving discrimination against interracial couples).

129. See Advisory Comm. on Rules of Evidence, Fall 2017 Meeting Materials 27–28 (Oct. 26–27, 2017) [hereinafter Adv. Comm. Fall 2017], http://www.uscourts.gov/sites/default/files/a3_0.pdf [<https://perma.cc/8E5A-FY9M>]; Advisory Comm. on Rules of Evidence, Spring 2017 Meeting Materials 276–83 (Apr. 21, 2017) [hereinafter Adv. Comm. Spring 2017], http://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [<https://perma.cc/5UJ7-LU2W>]; Advisory Comm. on Rules of Evidence, Spring 2018 Meeting Materials 17–18 (Apr. 26–27, 2018)

changes have yet been made to the Federal Rules of Evidence, some states have already amended their respective rules to reflect the *Pena-Rodriguez* holding and, in so doing, have likely impacted subsequent case law in those jurisdictions.¹³⁰

As important as the procedural questions are,¹³¹ for present purposes, they are relevant only to the extent that their resolution may impact the potential progression of the exception beyond race.¹³² In the months following *Pena-Rodriguez*, the legal community immediately began to question whether the holding would remain limited to race.¹³³ In fact, Justice Alito paved the way for such questions in his dissent.¹³⁴

[hereinafter Adv. Comm. Spring 2018], http://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf [<https://perma.cc/GNM8-M9SM>]; see also 32 Robert H. Dierker, Missouri Practice Series: Missouri Criminal Law § 57:12 n.3 (3d ed. 2017).

130. Virginia added a new exception to its statutory no-impeachment rule stating that a court may receive as evidence a juror's testimony and affidavit regarding whether "a juror made one or more statements exhibiting overt racial/national origin bias—tending to show that a racial/national origin stereotype or animus was a significant motivating factor in the juror's vote and casting serious doubt on the fairness and impartiality of the jury's deliberations or the verdict." Va. R. Evid. 2:606(b)(ii)(d). For further discussion of Virginia's amended no-impeachment rule and the inclusion of both racial and national origin bias in the codified exception, see *infra* text accompanying note 230.

Colorado, the state from which *Pena-Rodriguez* originated, did not amend the codified no-impeachment rule itself; however, it did include new annotations to the rule, essentially quoting from *Pena-Rodriguez*, to state that the rule must give way to clear statements of racial bias. Colo. R. Evid. 606 committee's comment on recent annotations.

131. A few scholars have examined some of these issues in varying degrees of detail. See, e.g., Gonzalez, *supra* note 14, at 412–16 (2018) (noting three anticipated changes to trial procedures in the wake of *Pena-Rodriguez*); Lauren Crump, Comment, Removing Race from the Jury Deliberation Room: The Shortcomings of *Peña-Rodriguez v. Colorado* and How to Address Them, 52 U. Rich. L. Rev. 475, 488–92 (2018) [hereinafter Crump, Removing Race] (arguing that *Pena-Rodriguez* did not go far enough in protecting the right to a fair trial and suggesting additional procedural mechanisms, including a "unified system for inquiring about racial bias in jury proceedings prior to the issuing of a verdict").

132. See *infra* section III.B.

133. See, e.g., Singh, *supra* note 14 ("[T]he courts may struggle to restrict the exception to racial bias alone . . ."); Robert Weisberg, On Juries and Racism and the *Peña-Rodriguez v. Colorado* Decision, Stanford Law Sch.: Legal Aggregate (Mar. 8, 2017), <http://law.stanford.edu/2017/03/08/on-juries-and-racism-and-the-pena-rodriguez-v-colorado-decision> [<https://perma.cc/HBS2-AYCF>] ("Racial prejudice is surely partiality, but there are lots of other types of partiality, which do not receive this level of constitutional scrutiny."); see also *supra* note 23.

134. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 883 (2017) (Alito, J., dissenting). Alito warned that if the Sixth Amendment required admission of juror testimony to prove one type of partiality, then evidence of all other types should be treated the same way, for the Sixth Amendment does not "recognize[] some sort of hierarchy of partiality or bias." *Id.* Even if courts choose to interpret *Pena-Rodriguez* as more of an equal protection holding, Alito noted the Fourteenth Amendment does not discriminate among suspect classes. *Id.* at 883–84.

The concerns that led the Supreme Court to reject all prior attempts to carve out exceptions to the no-impeachment bar are now all the more pertinent, for litigants have already attempted to broaden the narrow exception from race to other protected categories like sexual orientation¹³⁵—and if Justice Alito is to be believed, carve-outs for frivolous biases like sports-team fandom are not far behind.¹³⁶ The Supreme Court itself had the opportunity to weigh in on such attempted expansion involving alleged sexual-orientation bias in a death penalty case but did not grant the petition for certiorari.¹³⁷ Elsewhere, litigants challenging verdicts on grounds of impermissible, *nonracial* juror bias have begun relying on *Pena-Rodriguez* as the legal justification.¹³⁸ In fact, one defendant-appellant went so far as to argue that *Pena-Rodriguez* explicitly did *not* limit the exception to racial bias, instead arguing that *Pena-Rodriguez* stands for the proposition that impeachment should be allowed “if the constitutional rights violation is egregious enough.”¹³⁹ While these litigants have not had any meaningful success to date,¹⁴⁰

135. Petition for a Writ of Certiorari at 11, *Rhines v. South Dakota*, 138 S. Ct. 2660 (2018) (No. 17-8791).

136. *Pena-Rodriguez*, 137 S. Ct. at 883 (Alito, J., dissenting) (detailing Alito’s intentionally exaggerated sports-team-bias hypothetical).

137. *Rhines*, 138 S. Ct. 2660. On its face, *Rhines* seemed like an appropriate vehicle for the Court to expand its *Pena-Rodriguez* holding to cover sexual-orientation bias. In *Rhines*, several jurors issued sworn declarations alleging that jury deliberations were tainted by antigay bias, with jurors alleged to have made statements such as *Rhines* “shouldn’t be able to spend his life with men in prison,” and “if he’s gay we’d be sending him where he wants to go.” Mark Joseph Stern, *A Jury Likely Sentenced a Man to Death Because He’s Gay. The Supreme Court Just Let Its Verdict Stand.*, *Slate* (June 18, 2018), <https://slate.com/news-and-politics/2018/06/rhines-v-south-dakota-supreme-court-refuses-to-hear-allegations-about-anti-gay-jury.html> [<https://perma.cc/CGG9-NSDU>]. The optimistic view of the Court’s decision to deny certiorari is that “after issuing a major decision that unsettles precedent, the justices prefer to sit back and watch it percolate in the lower courts before revisiting and revising it.” *Id.*

138. See, e.g., *United States v. Antico*, No. 9:17-cr-80102-ROSENBERG, 2018 WL 659415, at *4 (S.D. Fla. Feb. 1, 2018) (“Allegations of bias against police officers do not meet the narrow exception to the no impeachment rule that the Supreme Court declared for allegations of racial bias.”).

139. Reply Brief of Defendant-Appellant Joshua D. Ewing at 6–8, *United States v. Ewing*, No. 17-5496 (6th Cir. filed Apr. 3, 2018), 2018 WL 1763783.

140. See, e.g., *Vincent v. McDaniel*, No. 3:10-cv-00181-HDM-VPC, 2017 WL 4127772, at *15 (D. Nev. Sept. 18, 2017) (stating that *Pena-Rodriguez* created a very limited exception but otherwise reaffirmed the “broad applicability” of the no-impeachment rule and its policy considerations). Many cases in which litigants have unsuccessfully attempted to advance a broader reading of *Pena-Rodriguez* have involved types of misconduct that courts had already deemed plainly inadmissible under the no-impeachment rule. See, e.g., *United States v. Foster*, 878 F.3d 1297, 1310 (11th Cir. 2018) (refusing to apply *Pena-Rodriguez* to a case in which a juror claimed to have been pressured by other jurors); *Austin v. Davis*, 876 F.3d 757, 789–90 (5th Cir. 2017) (refusing to expand *Pena-Rodriguez* to cover allegations that jurors had lied during voir dire); *Montes v. Macomber*, No. 15-cv-2377-H-BGS, 2017 WL 1354779, at *8 & n.3 (S.D. Cal. Apr. 10, 2017) (refusing to apply *Pena-Rodriguez* to allegations that, in reaching their verdict, jurors considered a defendant’s refusal to

there is no reason to believe that the attempts will subside any time soon.

Prior to determining whether expansion *should* occur, two sources are likely to provide especially helpful guidance in determining whether and to what extent the racial-bias exception recognized by *Pena-Rodriguez* could expand beyond race. Most importantly, in reaching its decision, the Court explicitly relied on states that had already recognized bias exceptions prior to *Pena-Rodriguez*,¹⁴¹ analyzing what actually transpired in those states after the initial exception—and before the *Pena-Rodriguez* decision—can help shed light on potential doctrinal development. Yet one need not rely entirely on other jurisdictions' respective experiences, as this is not the first time the Court has drawn an initially race-limited exception to a practice or rule. In the related field of peremptory strikes during voir dire, the Court in *Batson v. Kentucky* created an exception to the general rule permitting such strikes for any reason by prohibiting strikes made on the basis of race.¹⁴² With these sources in mind, section II.A examines in greater detail states' specific exceptions to their respective no-impeachment rules, assessing the extent of any development beyond the initial exception recognized in each state before *Pena-Rodriguez*. To supplement the lessons from states' jurisprudence, section II.B looks to the Court's experience in the *Batson* line of cases to discern how the doctrinal development of *Pena-Rodriguez* might unfold.

A. *Why Stop There?: Beyond Race in the States*

1. *The Nature of the State Exception.* — The Supreme Court oversimplified state jurisprudence when it claimed that at least sixteen jurisdictions had recognized exceptions to the no-impeachment bar similar to that recognized in *Pena-Rodriguez*.¹⁴³ Courts have based exceptions on different legal grounds, leading to varied doctrinal development.¹⁴⁴ Distinguishing

testify). Others have alleged more novel forms of bias or misconduct, such as bias against police officers, *Antico*, 2018 WL 659415, at *3–4, or misconduct in the form of “rushed deliberations on a Friday afternoon when one juror claimed to have a flight and did not want to return on Monday,” *Zamora-Smith v. Davies*, No. CV 14–6032–GW (AGR), 2017 WL 3671859, at *3 (C.D. Cal. Aug. 23, 2017).

141. *Pena-Rodriguez*, 137 S. Ct. at 865, 870 (stating that “the Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule” and claiming that “[t]he experience of these jurisdictions . . . will inform the proper exercise of trial judge discretion in these and related matters”).

142. 476 U.S. 79, 89 (1986).

143. The Court did note that “variations make classification imprecise,” but this seems to be more of a reference to the number of jurisdictions that follow the Federal Rule as opposed to the Iowa Rule. *Pena-Rodriguez*, 137 S. Ct. at 865.

144. One such distinction is that some states recognized bias exceptions in civil cases while others did so in the criminal context. Such a distinction is relevant in that the Supreme Court grounded its holding in *Pena-Rodriguez* in the Sixth Amendment, which applies only to criminal cases. Thus, the precedential value of any jurisdiction in which the

jurisdictions that relied on constitutional grounds—primarily the Sixth Amendment, but also in some cases due process or equal protection—from those that attempted to fit racial bias within existing, codified exceptions is particularly relevant, given that the *Pena-Rodriguez* Court saw fit to announce the new rule as an explicit constitutional exception.¹⁴⁵

Several jurisdictions have construed their state counterparts to Rule 606(b) to be sufficiently malleable to include racial bias within statutory exceptions, avoiding the need to resort to constitutional principles in creating a bias exception. Some states have deemed evidence of racial bias to fall within the “extraneous evidence” exception to Rule 606(b) and similarly structured state statutes,¹⁴⁶ while others have categorized bias as falling within the “outside influence” exception.¹⁴⁷ In jurisdictions

exception was drawn in civil cases may be diminished. In states in which courts announced the initial exception in a civil case, however, many courts appear to have subsequently applied the exception to criminal cases as well. See, e.g., *State v. West*, 425 S.W.3d 151, 155 (Mo. Ct. App. 2014) (rejecting an attempt to impeach the verdict but deeming the exception relevant to criminal cases).

145. One amicus brief relied on a similar distinction, separating those jurisdictions with exceptions based on Sixth Amendment grounds from those with exceptions based on state statute or common law. Center on Criminal Law Amicus Brief, *supra* note 81, apps. A–B, at 2a–8a. Exceptions in certain jurisdictions appear to defy simple classification, especially in cases in which a court may have announced its amenability to a racial-bias exception but opted not to create such an exception in the specific case before it. See, e.g., *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980) (“The purpose of [the no-impeachment rule] is to promote freedom of jury deliberations, but the rule should not be interpreted as completely foreclosing inquiry into jury deliberations even in cases in which there is strong evidence that racial prejudice infected the jury’s verdict.”). In other instances, the court simply does not make explicit whether the exception is grounded in constitutional principles or statutory exceptions to the no-impeachment rule. See, e.g., *State v. Levitt*, 176 A.2d 465, 467–69 (N.J. 1961) (holding that “improper influences” that “discolored” the jury’s verdict were permissible grounds for a new trial but failing to explicitly identify whether impeachment was grounded in statutory or constitutional concerns).

146. See *State v. Bowles*, 530 N.W.2d 521, 536 (Minn. 1995) (“Race-based pressure constitutes ‘extraneous prejudicial information’ about which a juror may testify.”); *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (encouraging trial courts to consider allegations of racial bias, among other biases, as “extraneous prejudicial remarks”). Deeming the Wisconsin court’s decision as relying on a statutory exception is contrary to the Center on the Administration of Criminal Law’s classification in its amicus brief. However, this conclusion is supported by the Wisconsin Supreme Court’s decision in *State v. Shillcut* two years later, in which the court, while noting that *After Hour Welding* did not explicitly address whether a reference to religion constituted “‘extraneous prejudicial information’ under the statute,” spent the majority of its opinion discussing cases involving statutory claims and explicitly declined to create a constitutional exception. 350 N.W.2d 686, 690–94 (Wis. 1984).

147. See *People v. Rukaj*, 506 N.Y.S.2d 677, 679–80 (App. Div. 1986) (“The scourge of racial prejudice, toward any group, which impugns a jury’s ability to impartially assess the evidence, constitutes a corrupt outside influence which cannot be sustained.”); see also Christopher B. Mueller, *Jurors’ Impeachment of Verdicts and Indictments in Federal Courts Under Rule 606(b)*, 57 Neb. L. Rev. 920, 942 (1978) (arguing that it is plausible to consider racial bias an “outside influence,” evidence of which should be admitted).

with no-impeachment rules differing from the Federal Rule, states have at times deemed impermissible bias to fall within exceptions specific to their state rules, considering such statements to be “overt acts” or to not “inhere in the verdict.”¹⁴⁸

However, the vast majority of states that have recognized bias exceptions to the no-impeachment bar have done so through calls to overarching constitutional ideals of fair, impartial trials under the Sixth Amendment, or similar state constitutional protections, and the principles of due process and equal protection. In Delaware, for instance, the state’s highest court determined that excluding a juror’s testimony of racial bias during deliberations “would nullify the enforcement of [the defendant’s] basic right to a trial by an impartial jury of twelve who will decide the case free of improper racial implications.”¹⁴⁹ Relying more overtly on due process and equal protection considerations, states like Georgia have held that “the rule of juror incompetency ‘cannot be applied in such an unfair manner as to deny due process.’”¹⁵⁰ These and other states have thus found that courts must consider evidence of racial bias in jury deliberations—even though such bias is technically excluded by Rule 606(b) and similar state evidentiary rules—in order to satisfy fundamental constitutional guarantees.¹⁵¹

148. See *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356–58 (Fla. 1995) (deeming racial statements by jurors to be “overt acts” permitting trial court inquiry); *City of Seattle v. Jackson*, 425 P.2d 385, 389 (Wash. 1967) (determining that evidence of racial bias or prejudice does not “inhere in the verdict” (quoting *Allison v. Dep’t of Labor & Indus.*, 401 P.2d 982, 984 (Wash. 1965))).

149. *Fisher v. State*, 690 A.2d 917, 919–21 (Del. 1996).

150. *Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990) (quoting *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987)) (stating further that the “goals [of the no-impeachment rule] are not absolute”).

151. See *Kittle v. United States*, 65 A.3d 1144, 1154–56 (D.C. 2013) (“[T]he protections built into the trial process identified by *Tanner* do not adequately protect a defendant’s constitutional right to a trial and jury free from racial or ethnic bias.”); *State v. Jackson*, 912 P.2d 71, 80–81 (Haw. 1996) (holding that if there is a prima facie showing of racial prejudice, the verdict will be set aside unless it can be shown that the juror’s comments could not have affected the verdict); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991) (holding that while juror bias is not an “extraneous matter” that would be admissible under the no-impeachment rule, constitutional considerations require that the trial judge conduct a hearing as to jurors’ alleged ethnic bias); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc) (“Such statements evincing ethnic or religious bias or prejudice deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law.”); *State v. Hidanovic*, 747 N.W.2d 463, 472–74 (N.D. 2008) (“We agree . . . that racial and ethnic bias . . . may deprive a criminal defendant of a right to a fair trial by an impartial jury.”); *State v. Brown*, 62 A.3d 1099, 1110 (R.I. 2013) (holding that “a juror’s racial bias is not ‘extraneous prejudicial information’ or an ‘outside influence’ within the embrace of Rule 606(b),” but that this “does not preclude the admission of such testimony where necessary to protect a defendant’s right to a fair trial by an impartial jury”); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (finding that “allegations of racial prejudice involve principles of fundamental fairness” and implicate due process).

To the extent that the Court relied on the states in reaching its decision, such reliance may have been at least partially misplaced for jurisdictions whose bias exceptions were not grounded in constitutional principles.¹⁵² Further, even for states with constitutional racial-bias exceptions, most state courts' holdings appear to have been limited to instances of racial bias solely because that happened to be the type of bias in the case at issue. In only one jurisdiction did the court's reasoning resemble the Supreme Court's in *Pena-Rodriguez*, identifying racial bias as a "familiar and recurring evil"¹⁵³ that is so conceptually distinct from other forms of bias or misconduct as to warrant a constitutional exception.¹⁵⁴ For nearly all other jurisdictions, the danger of racial bias was its effect on the specific trial and the harm imposed on the specific defendant, not the impact on the criminal justice system as a whole. Legal reasoning, however, is not the only important basis for distinguishing the state exceptions.

2. *The Scope of and Expansion Beyond the Initial State Exception.* — In examining the extent of expansion beyond race in states that had already recognized bias exceptions to the no-impeachment rule, one must first examine the scope of the initial exceptions recognized. By lumping all state exceptions into a single metric—"racial"-bias exceptions—the Court ignored the varying scope of juror bias covered by the state exceptions.¹⁵⁵ Many state courts did indeed couch such exceptions explicitly in terms of "racial bias" or "racial prejudice."¹⁵⁶ However, despite the Court's morphing of ethnicity into race in *Pena-Rodriguez*,¹⁵⁷ several courts recognized an exception that, by its terms, refers to either ethnic bias

152. While the Court relied on states primarily to demonstrate the workability of bias exceptions rather than to borrow the states' legal reasoning, the distinction between rules-based exceptions and constitutional exceptions is relevant in that the scope of the state exception and any subsequent expansion is likely to be influenced by the legal source of the exception.

153. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

154. See *State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998) ("[W]e conclude that an allegation of racial bias on the part of a juror differs so fundamentally from other types of juror misconduct . . .").

155. Appellees also appear to have been incorrect in stating in oral argument that the state bias exceptions "only deal with racial bias." See Transcript of Oral Argument at 34–35, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606), 2016 WL 5920142. One other scholar has since noted that both the Supreme Court and appellee's counsel appear to have been mistaken in concluding that state exceptions were limited in scope to racial bias. See Corrales, *supra* note 23, at 12 (indicating that "a review of the cases cited for support by petitioner" demonstrates that states did not all limit the scope of their exceptions to racial bias alone).

156. See *Fisher v. State*, 690 A.2d 917, 919–21 (Del. 1996); *Spencer v. State*, 398 S.E.2d 179, 184–85 (Ga. 1990); *Jackson*, 912 P.2d at 80–81; *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980); *People v. Rukaj*, 506 N.Y.S.2d 677, 679–80 (1986); *Brown*, 62 A.3d at 1110; *Hunter*, 463 S.E.2d at 316; *City of Seattle v. Jackson*, 425 P.2d 385, 389 (Wash. 1967).

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

alone or to racial *and* ethnic bias.¹⁵⁸ Such a distinction may be important in cases in which the bias alleged is not against a Hispanic individual, as race and ethnicity are doctrinally less easily interchanged in other contexts.¹⁵⁹

Moreover, at least four jurisdictions created exceptions in matters of first impression for other types of bias—either in addition to racial bias or, in some instances, instead of racial bias.¹⁶⁰ Both Missouri and New Jersey announced their initial exceptions in cases involving anti-Semitic bias; in Missouri, the court couched its exception in terms of “ethnic or religious bias or prejudice,”¹⁶¹ whereas in New Jersey, the court spoke only in terms of religious bias.¹⁶² In these and other such cases, courts found no basis to ground the exceptions in any history of racial discrimination and instead relied solely on the need to combat the effect of bias on the jury trial guarantee.

While litigation beyond the “benchmark case”¹⁶³ in each jurisdiction

158. See *Kittle v. United States*, 65 A.3d 1144, 1154–56 (D.C. 2013) (“[W]e conclude that the protections built into the trial process identified by *Tanner* do not adequately protect a defendant’s constitutional right to a trial and jury free from racial or ethnic bias.”); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991) (couching its holding in terms of “ethnic bias,” although discussing ethnic and racial bias somewhat interchangeably throughout); *State v. Hidanovic*, 747 N.W.2d 463, 474 (N.D. 2008) (holding that “racial and ethnic bias cannot be condoned in any form and may deprive a criminal defendant of a right to a fair trial by an impartial jury”). In addition, *State v. Santiago* discusses the bias at issue interchangeably as racial or ethnic, despite ultimately couching its holding in terms of racial bias and expounding on the special importance of racial bias in the criminal justice system. 715 A.2d at 18–22. Writing separately, Chief Justice Callahan commented in a footnote, “Although race and ethnicity are not equivalent terms, I will use the terms ‘ethnic’ and ‘racial’ interchangeably, as does the majority, because I believe the majority’s decision applies equally to both forms of bias.” *Id.* at 23 n.1 (Callahan, C.J., concurring in part and dissenting in part).

159. For example, bias against an Irish person can be described as ethnic bias but would not be classified as racial bias.

160. See *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357–58 (Fla. 1995) (holding that appeals to racial bias in deliberations constitute overt acts of misconduct, but noting that “[t]he issue of racial, ethnic, *and religious* bias in the courts is not simply a matter of ‘political correctness’ to be brushed aside” (emphasis added)); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc) (stating its holding in terms of ethnic or religious bias or prejudice); *State v. Levitt*, 176 A.2d 465, 467–68 (N.J. 1961) (couching its holding in terms of religious prejudice in deliberations); *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (stating that judges should be especially sensitive to “any form of prejudice based on race, *religion, gender, or national origin*” (emphasis added)); see also *Evans v. Galbraith-Foxworth Lumber Co.*, 31 S.W.2d 496, 499–500 (Tex. Civ. App. 1929) (referring exclusively to racial bias but dealing with anti-Semitic expressions, which can be classified as racial, ethnic, or religious bias).

161. See *Fleshner*, 304 S.W.3d at 89–90.

162. See *Levitt*, 176 A.2d at 468–69.

163. The term “benchmark case” is used to refer to the first case in a specific jurisdiction in which a court announced a bias exception to the no-impeachment rule or expressed its willingness to do so in the appropriate case. For an extended discussion of

has been limited,¹⁶⁴ in several jurisdictions, litigants have attempted to broaden the initial exception.¹⁶⁵ On one end of the spectrum, there are a few jurisdictions in which no cases have cited the benchmark case for any proposition related to jury deliberations or the no-impeachment rule.¹⁶⁶ Elsewhere, jurisdictions recognizing bias exceptions based explicitly on race have not expanded the initial exception to cover other types of bias beyond race.¹⁶⁷ And while other jurisdictions appear to have cabined the exception to the form or forms of bias recognized in the benchmark case, these jurisdictions' initial exceptions seemingly covered a broad enough array of bias in the first instance that expansion may not be necessary. For example, Wisconsin phrased its initial exception in terms of bias based on race, religion, gender, or national origin, covering four of the most prominent suspect classifications.¹⁶⁸

In several jurisdictions, however, states have either explicitly expanded their initial exception to other types of juror bias or have at least expressed a willingness to do so. In three jurisdictions, courts have reasoned that the initial exception is sufficiently broad to encompass—or is based on constitutional principles that do encompass—the other type of juror bias at issue.¹⁶⁹ The benchmark Florida case, *Powell v. Allstate Insurance Co.*, dealt explicitly with racial bias, yet the opinion seemed to imply that racial, ethnic, or religious bias would fall under an exception.¹⁷⁰ Initially, however, Florida courts refused to expand beyond race, with one

many of the benchmark cases cited by the *Pena-Rodriguez* Court and what these cases indicate for post-*Pena-Rodriguez* doctrine, see Correales, *supra* note 23, at 12–17, 22–33.

164. See *infra* section III.B.

165. In reaching this conclusion, I examined all the cases within a jurisdiction that cited to the benchmark case identified by the Supreme Court in the Appendix to the *Pena-Rodriguez* decision, a methodology similar to that followed by the Center on Administration of Criminal Law in compiling its amicus brief. See Center on Criminal Law Amicus Brief, *supra* note 81, at 22–25, *app.* at 1a.

166. These jurisdictions are North Dakota, Rhode Island, and Washington, D.C. Unsurprisingly, each of these jurisdictions' benchmark cases was decided in the recent past, all within the past ten years. See *Kittle v. United States*, 65 A. 3d 1144 (D.C. 2013); *State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008); *State v. Brown*, 62 A.3d 1099 (R.I. 2013).

167. These jurisdictions are Connecticut, Delaware, Georgia, Hawaii, Minnesota, and New York. The First Circuit also appears to fall within this category, having cabined the holding in its benchmark case to racial or ethnic bias, with subsequent cases relying on *Villar* only for those two types of bias. See, e.g., *United States v. Fuentes*, No. 2:12-CR-50-DBH, 2013 WL 4483062, at *5–6 (D. Me. Aug. 19, 2013). Additionally, the district courts mentioned *supra* note 89 seem not to have expanded any exception beyond race.

168. *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982).

169. These jurisdictions are: (1) Florida, see *Devoney v. State*, 717 So. 2d 501, 504 (Fla. 1998); (2) Missouri, see *Ledure v. BNSF Ry. Co.*, 351 S.W.3d 13, 23 (Mo. Ct. App. 2011); and (3) New Jersey, see *State v. Athorn*, 216 A.2d 369, 371 (N.J. 1966); *State v. LaFera*, 199 A.2d 630, 637 (N.J. 1964).

170. See 652 So. 2d 354, 357–58 (Fla. 1995) (“The issue of racial, ethnic, and religious bias in the courts is not simply a matter of ‘political correctness’ to be brushed aside by a thick-skinned judiciary.”).

court stating that “*Powell* carefully limited its holding to overt acts of racial prejudice during jury deliberations,” cautioning that the holding not be read as a “wholesale retreat from the traditional rule.”¹⁷¹ However, the Florida Supreme Court shortly thereafter stated that *Powell* “appears to have established that a juror who spreads sentiments of racial, ethnic, religious, or gender bias, fatally infects the deliberation process in a unique and especially opprobrious way.”¹⁷² Similarly, the Missouri Court of Appeals interpreted the Missouri Supreme Court’s holding in *Fleshner v. Pepose Vision Institute, P.C.*—which recognized an exception for ethnic and religious bias¹⁷³—to extend to “statements that reflected a juror was biased based on gender or other constitutionally impermissible ground.”¹⁷⁴ And in New Jersey, the expansion seemed to occur in the opposite direction, as the original exception to the no-impeachment rule covered religious prejudice¹⁷⁵ but was expanded to allow jurors to impeach the verdict based on evidence of “bigotry,”¹⁷⁶ interpreted to cover both religious and racial bias.¹⁷⁷

Finally, in at least three jurisdictions, while courts refused to expand the exception in the cases before them, they did so largely due to weak evidence rather than an aversion to expansion and thus did not foreclose the possibility of expansion in appropriate cases.¹⁷⁸ In both Massachusetts

171. *Travent, Ltd. v. Schecter*, 678 So. 2d 1345, 1348 (Fla. Dist. Ct. App. 1998).

172. *Devoney*, 717 So. 2d at 504 (emphasis added) (quoting *State v. Devoney*, 675 So. 2d 155, 158 (Fla. Dist. Ct. App. 1996)). While the Florida Supreme Court’s statement here added a gloss on its original exception announced in *Powell*, this statement was dicta, as the Court used *Powell* to distinguish the case in front of it and reject the impeachment attempt. *Id.*

173. 304 S.W.3d 81, 85 (Mo. 2010) (“This Court finds that if a juror makes statements evincing ethnic or religious bias or prejudice during jury deliberations, the parties are deprived of their right to a fair and impartial jury and equal protection of the law.”).

174. *Ledure*, 351 S.W.3d at 23 (emphasis added). Here, as in *Devoney*, the court rejected the present impeachment attempt but, in what likely qualifies as dicta, broadened the circumstances to which the exception applies. *Id.*

175. *State v. Levitt*, 176 A.2d 465, 467–68 (N.J. 1961).

176. *State v. LaFera*, 199 A.2d 630, 637 (N.J. 1964). The bias at issue in this case was anti-Italian bias, and, while not the dispositive issue in the case, the New Jersey Supreme Court felt compelled to expand on its holding in *Levitt*. *Id.*

177. *State v. Athorn*, 216 A.2d 369, 371 (N.J. 1966).

178. These jurisdictions are: (1) Massachusetts, see *Commonwealth v. Delp*, 672 N.E.2d 114, 116–17 (Mass. App. Ct. 1996); (2) South Carolina, see *State v. Franklin*, 534 S.E.2d 716, 719–20 (S.C. Ct. App. 2000); and (3) Washington, see *Frye v. Jack*, No. 39644-7-I, 1998 WL 283055, at *4 (Wash. Ct. App. June 1, 1998). The Ninth Circuit may also be properly categorized as such a jurisdiction. While *Henley* did not actually create an exception for racial bias, see *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001), subsequent cases relied on *Henley* to cover racial, ethnic, or religious bias, see *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013) (implying that all three types of bias are impermissible and that evidence of these biases would be admissible to prove a juror lied during voir dire).

and Washington, lower courts seemed to imply that an exception to the no-impeachment rule may be appropriate in cases of sexual-orientation bias. In Massachusetts, the initial exception covered only ethnic bias,¹⁷⁹ although later cases took this to include both racial and ethnic bias.¹⁸⁰ In *Commonwealth v. Delp*, while the Massachusetts Appeals Court ultimately did not allow a juror alleging “homosexual bias” to impeach the verdict, the court grounded its ruling in the view that the trial judge could reasonably have deemed the juror to be having second thoughts rather than harboring true bias.¹⁸¹ The court’s discussion strongly implied that, were the evidence of “homosexual bias” credible, such evidence *would* have been admissible to impeach the verdict.¹⁸² So too in Washington, where the Washington Court of Appeals rejected a defendant’s attempt to impeach the verdict based on statements regarding sexual orientation but seemed to hold that the statements would have been admissible had they demonstrated actual sexual-orientation bias.¹⁸³

In the jurisdictions whose exceptions cover more than just racial bias—either from the outset or due to subsequent expansion—there is no reason to believe that *Pena-Rodriguez* will cause a shrinking in such coverage. Yet even in jurisdictions for which *Pena-Rodriguez* represents the first constitutional exception to the no-impeachment rule, the experience of jurisdictions with more expansive coverage indicates that unless courts continue to share Justice Kennedy’s belief in the unique stature of racial discrimination, the exception to the no-impeachment bar may ultimately envelop bias beyond that based on race.

The South Carolina Supreme Court initially based its exception on principles of fundamental fairness, holding that so long as a juror “claims prejudice played a role in determining guilt or innocence of a defendant, investigation into the matter is necessary.” *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995). In so holding, the court positioned the exception as ripe for expansion, as all types of misconduct or bias could be deemed prejudice having an impact on the guilt determination. The South Carolina Supreme Court seemed to agree with this assessment, subsequently requiring a trial court to inquire into claims of “premature jury deliberations” that allegedly impacted fundamental fairness. *State v. Aldret*, 509 S.E.2d 811, 813 (S.C. 1999). Later, however, in *State v. Franklin*, the South Carolina Court of Appeals rejected an attempt to apply the *Hunter* exception to allegations of gender bias, but only because the court found the comments did not actually reflect gender bias, thus leaving open the possibility that gender bias would be an appropriate basis for an exception to the no-impeachment rule. 534 S.E.2d at 719–20.

179. *Commonwealth v. Laguer*, 571 N.E.2d 371, 376–77 (Mass. 1991).

180. See, e.g., *Commonwealth v. McCowen*, 939 N.E.2d 735, 764 (Mass. 2010).

181. See *Delp*, 672 N.E.2d at 116–17.

182. See *id.* (discussing the admissibility of juror comments during deliberations demonstrating bias and noting that the judge properly allowed questioning as to remarks made by other jurors).

183. See *Frye*, 1998 WL 283055, at *4 (deeming a comment about a female defendant’s “girlie friend” to be derogatory and suggestive of prejudice but deciding that this statement alone did not support an inference that the juror was unable to evaluate the evidence fairly).

B. *Batson and Progeny: A Case Study for Pena-Rodriguez's Progression?*

While state experience is instructive in examining the actual progression of exceptions to the no-impeachment rule, curious observers need look no further than the Supreme Court's own jurisprudence in a related doctrinal realm to determine how progression of the limited racial-bias exception might—and perhaps should—transpire. The Court is no stranger to adopting exceptions to general rules to combat racial discrimination and ensure the guarantees of the Sixth Amendment, even when the doctrinal underpinnings have no mechanism for distinguishing between different types of prejudice.¹⁸⁴ Of particular relevance for this Note is the creation of the *Batson* challenge to racially discriminatory peremptory strikes during voir dire.¹⁸⁵ Tracking the progression of this initially race-limited constitutional principle to other forms of discrimination may provide important clues for the likely path of the *Pena-Rodriguez* exception.

1. *Batson Challenges: From Race to Gender and Beyond.* — The peremptory challenge, in which a party may remove a juror during voir dire without cause, has long been held necessary and useful to ensure the Sixth Amendment jury trial guarantee—much like the no-impeachment rule. By allowing parties to strike certain jurors for whom cause cannot be shown but who the party reasonably believes will nonetheless be biased, peremptory strikes serve as a vital means of protecting the right to an impartial jury.¹⁸⁶ Much like the no-impeachment rule, however, this long-

184. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race”); *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973) (requiring a trial judge to inquire about racial prejudice during voir dire).

185. Thank you to Professors Daniel Richman and Robert Weisberg for recommending this frame of analysis, suggested by the Supreme Court itself in citing to *Batson* in the *Pena-Rodriguez* majority opinion. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). In the time between the drafting and publication of this Note, other scholars have seen fit to adopt a similar frame of reference through which to view the *Pena-Rodriguez* decision. See *supra* note 23. Courts have also compared the two cases, noting that both *Batson* and *Pena-Rodriguez* are “intended to protect the integrity of the jury system by preventing verdicts based in any way on race.” *McKnight v. Bobby*, No. 2:09-cv-059, 2018 WL 2327668, at *5 (S.D. Ohio May 22, 2018). Thus, this Note does not claim to be the first to suggest this comparison. Instead, this Note relies on the comparison to advance the narrow argument regarding the exception's expansion beyond race and to distinguish the procedures attending each case and the way in which those procedures have impacted or will impact subsequent case law.

186. See, e.g., *Batson*, 476 U.S. at 120–22 (Burger, C.J., dissenting) (stressing the traditional role of peremptory challenges in the jury trial system, their long-standing and unchallenged use, and their vital role in eliminating extremes of partiality and strengthening the jury system).

standing norm¹⁸⁷ was held subservient to constitutional principles of equality under the law.

In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause prevents the prosecution from exercising a peremptory challenge solely on account of the juror's race or the belief that black jurors as a group will be unable to impartially consider the case against a black defendant.¹⁸⁸ As in *Pena-Rodriguez*, the Court stressed both the need to strike racial prejudice from the administration of justice¹⁸⁹—drawing on its past efforts to combat racial discrimination¹⁹⁰—and the fundamental nature of the jury trial guarantee, under which defendants have a right to be tried upon the evidence alone without any consideration of race.¹⁹¹ Providing far more procedural guidance than in *Pena-Rodriguez*, the Court dictated that a defendant must first make a prima facie showing of purposeful discrimination by the prosecution, after which the burden shifts to the government to provide a race-neutral justification for striking the particular juror.¹⁹² The trial court must then determine whether, in light of all the circumstances, the defendant has made a proper showing of purposeful discrimination.¹⁹³

Litigants quickly jumped on the opportunity to expand the scope of *Batson* to cover far more than racial discrimination. Initially, expansion pertained more to the party raising the challenge and the context in which the challenge was raised than to the nature of the underlying discrimination alleged.¹⁹⁴ However, only eight years after *Batson*, the Court in *J.E.B. v. Alabama* extended its reasoning to cover allegations of *gender*

187. The Supreme Court has held that the peremptory challenge, while used in all American jurisdictions, does not have a constitutional basis. See *Rivera v. Illinois*, 556 U.S. 148, 157 (2009).

188. *Batson*, 476 U.S. at 89. The initial holding applied to strikes only by the prosecution, but the Court quickly applied its decision to strikes exercised by the defense. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

189. See *Gonzalez*, supra note 14, at 405 (“According to both decisions, the resulting systemic and public harm is what makes race discrimination so pernicious and worthy of differential treatment from otherwise categorically broad rules . . . that do not generally receive other exceptions.”).

190. See *Batson*, 476 U.S. at 84–88. The *Batson* Court drew significantly on *Strauder v. West Virginia*, 100 U.S. 303 (1880), credited by the Court as laying “the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.” *Batson*, 476 U.S. at 85.

191. See *Batson*, 476 U.S. at 86–87 (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.”).

192. *Id.* at 96–98.

193. *Id.* at 98.

194. The Court has expanded *Batson*’s application to: peremptory strikes made by defendants, see *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); civil cases, see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); and challenges by defendants of a different race than the struck juror, see *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

bias in peremptory challenges.¹⁹⁵ Citing the extensive history of sex discrimination and pernicious gender stereotypes, the Court rejected the argument that “gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender.”¹⁹⁶ While the Supreme Court has—for the time being—limited the expansion of *Batson* challenges to allegations of only racial, ethnic,¹⁹⁷ and gender discrimination, lower federal courts and state courts have seized on the Court’s reasoning in *Batson* and *J.E.B.* to allow *Batson* challenges in the context of other suspect classifications under equal protection doctrine, including sexual orientation,¹⁹⁸ religion,¹⁹⁹ and skin color.²⁰⁰ As summarized succinctly by the Second Circuit, the maxim that a defendant has a right to be tried by jurors selected pursuant to nondiscriminatory criteria is not limited to discrimination on the basis of race, with litigants and jurors alike possessing a “general equal protection right to ‘jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.’”²⁰¹

195. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). Other scholars have also commented upon the potential value *J.E.B.* provides as a precedent for expansion to gender of the *Pena-Rodriguez* exception. See, e.g., Gonzalez, *supra* note 14, at 411; Myhand, *supra* note 19, at 118–19.

196. *J.E.B.*, 511 U.S. at 136–41.

197. The original *Batson* holding applied only to race, and there is no case in which the Supreme Court has explicitly held that *Batson* extends to ethnicity. In *Hernandez v. New York*, the Court rejected the petitioner’s claim that peremptory challenges exercised against two jurors because they were native Spanish speakers was a cover for discrimination based on ethnicity, therefore avoiding the need to address whether *Batson* applied to ethnic discrimination. 500 U.S. 352, 369–70 (1991). However, in dicta in *United States v. Martinez-Salazar*, the Court stated that *Batson* challenges cover only those instances in which discrimination was based on “the juror’s gender, *ethnic origin*, or race.” 528 U.S. 304, 315 (2000) (emphasis added).

198. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481, 486 (9th Cir. 2014) (deeming *United States v. Windsor*, 133 S. Ct. 2675 (2013), to require heightened scrutiny for classifications based on sexual orientation and thus holding that *Batson* applies to peremptory challenges made on the basis of sexual orientation). For the argument that the Supreme Court should affirm the Ninth Circuit’s holding as the law of the land, see, e.g., Kristal Petrovich, Note, Extending *Batson* to Sexual Orientation: A Look at *SmithKline Beecham Corp. v. Abbott Labs.*, 2015 U. Ill. L. Rev. 1681.

199. See *United States v. Brown*, 352 F.3d 654, 668–69 (2d Cir. 2003) (deeming the principles underlying *Batson* and *J.E.B.* to apply equally to religious affiliation); see also *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (“It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc.”). Several state courts have also reached this conclusion, including in Arizona, see *State v. Purcell*, 18 P.3d 113, 119–20 (Ariz. Ct. App. 2001), and Connecticut, see *State v. Hodge*, 726 A.2d 531, 552–54 (Conn. 1999).

200. See *People v. Bridgeforth*, 69 N.E.3d 611, 613 (N.Y. 2016) (“[U]nder this State’s Constitution and Civil Rights Law, color is a classification upon which a *Batson* challenge may be lodged.”).

201. *Brown*, 352 F.3d at 668 (quoting *J.E.B.*, 511 U.S. at 128).

Much as courts and commentators claimed that a constitutional bias exception would do irreparable damage to the traditional no-impeachment rule, in the wake of *Batson* and *J.E.B.*, many in the legal community believed that the Supreme Court had dealt the fatal blow to a vital aspect of the jury trial system.²⁰² Despite these concerns, peremptory challenges have remained a vital aspect of jury trial practice, with all jurisdictions continuing to allow peremptory challenges and prosecutors and defense counsel continuing to employ such strikes on a regular basis.²⁰³ While procedural issues inherent in the structure of the *Batson* challenge have prevented *Batson*'s spread beyond race from eliminating or crippling the peremptory challenge, they have also served to significantly limit the effectiveness of the *Batson* regime—and, thus, a party's ability to effectuate the very right created by the *Batson* Court.²⁰⁴ The Supreme Court's interpretation of the second and third stages of the *Batson* framework has rendered it particularly difficult for a party to bring a successful *Batson* challenge, as trial courts readily accept any seemingly genuine, race-neutral justification during voir dire.²⁰⁵ Thus, *Batson*'s procedural

202. One such individual was Justice Scalia, who, in dissent in *J.E.B.*, claimed that the Court's decision "imperial[ed] a practice that has been considered an essential part of fair jury trial since the dawn of the common law." *J.E.B.*, 511 U.S. at 163 (Scalia, J., dissenting). For scholarly accounts making such claims, see generally, e.g., Karen M. Bray, Comment, Reaching the Final Chapter in the Story of Peremptory Challenges, 40 UCLA L. Rev. 517 (1992); Brian E. Leach, Comment, Extending *Batson v. Kentucky* to Gender and Beyond: The Death Knell for the Peremptory Challenge?, 19 S. Ill. U. L.J. 381, 403 (1995); Stacy L. Wichterman, Note, *J.E.B. v. Alabama ex rel. T.B.*: Gender-Based Peremptory Challenges on Trial, 16 N. Ill. U. L. Rev. 209, 237 (1995).

203. See Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809, 827 (1997) ("[E]very state recognizes some form of peremptory challenges for both sides in criminal and civil cases."); Julia C. Maddera, Note, *Batson* in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression, 116 Colum. L. Rev. 195, 234 & n.275 (2016) ("[A]ttorneys overwhelmingly support the exercise of peremptory challenges." (citing Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, 74 Fordham L. Rev. 1683, 1685–86 (2006); Caren Myers Morrison, Negotiating Peremptory Challenges, 104 J. Crim. L. & Criminology 1, 5 (2014))).

204. For a discussion of how the procedural "safeguards" associated with the *Batson* regime have prevented *Batson* from having a consequential impact on the makeup of juries and of how the procedural aspects of the *Pena-Rodriguez* regime are less likely to diminish the right to an impartial jury, see *infra* notes 271–273 and accompanying text.

205. See *Purkett v. Elem*, 514 U.S. 765, 767–70 (1995) (per curiam) (determining that the second step of the *Batson* inquiry "does not demand an explanation that is persuasive, or even plausible," and further holding that a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection"); *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (holding that there is no per se violation of the Equal Protection Clause when a prosecutor's criterion for exercising peremptory strikes has a disproportionate impact on an identifiable group).

development has served as a limiting principle, even as the challenge itself has been extended to cover a wider array of discrimination.²⁰⁶

2. *Reasons to Believe Pena-Rodriguez Will Follow a Similar Course.* — Despite what appears to be a direct analogy between *Batson* and *Pena-Rodriguez*, differences between the cases may distinguish their respective doctrinal progressions. The primary distinction is the constitutional source of the Court's holdings: In *Batson*, the Court explicitly relied on the Equal Protection Clause of the Fourteenth Amendment, whereas in *Pena-Rodriguez*, the Court, at least nominally, relied on the Sixth Amendment.²⁰⁷ The Court's jurisprudence is different under each constitutional provision: The Fourteenth Amendment is a traditional source for combatting discrimination against minority groups, while the Sixth Amendment has less of an explicit history as such a tool.²⁰⁸ Further, as an equal protection case, *Batson* and its progeny may have a built-in limiting principle, as only a small subset of classifications receive heightened scrutiny under the Equal Protection Clause.²⁰⁹ On the other hand, if grounded in the Sixth Amendment, *Pena-Rodriguez* may not have a similar limiting principle inherent in its legal underpinning, as there is no categorization of classes under the Sixth Amendment.²¹⁰ Neither the Sixth Amendment itself nor Sixth Amendment jurisprudence distinguishes between types of bias: Anything that threatens a defendant's right to an impartial trial theoretically offends the Sixth Amendment.

While the differences between *Batson* and *Pena-Rodriguez* are important, there are significant reasons to believe that the similarities are more compelling. In both cases, the Court decided that constitutional principles required an exception to long-standing and universally supported norms. The Court grounded both decisions in the need to combat a long and pervasive history of racial discrimination in the criminal justice system and the especially pernicious effect discrimination has had

206. See *infra* section III.B for more on how procedural issues are likely to similarly limit any expansion of the *Pena-Rodriguez* exception.

207. Compare *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (“[T]he Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”), with *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (“Accordingly, the component of the jury selection process at issue here, the State’s privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.”).

208. See Weisberg, *supra* note 133 (“When we think of race under the Constitution, we think of the Equal Protection clause as the obvious vehicle for rooting out prejudice and discrimination.”).

209. See, e.g., Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 9 (5th ed. 2015).

210. *Pena-Rodriguez*, 137 S. Ct. at 883 (Alito, J., dissenting) (“Nor has the Court found any decision of this Court suggesting that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias.”).

on black defendants.²¹¹ And in both instances, the Court's holding, whether explicitly under the Sixth Amendment or the Equal Protection Clause, could apply with equal force to forms of discrimination or bias other than that based on race.²¹²

Even the primary distinction between the cases may be simply formalistic, for as commentators have noted—building on an observation in Justice Alito's dissent—*Pena-Rodriguez* may be an “Equal Protection holding under the mask of the Sixth Amendment.”²¹³ To the extent that courts—including the Supreme Court—are willing to adopt this view and recharacterize *Pena-Rodriguez* as an equal protection case, either explicitly or implicitly, *Batson* and its progeny are even more telling for *Pena-Rodriguez*'s expansion beyond race.²¹⁴ Lower courts appear to have already begun such a fusing or recharacterization in early cases applying *Pena-Rodriguez*. Several federal courts have cited *Pena-Rodriguez* for Fourteenth Amendment propositions,²¹⁵ while others have noted that *Pena-Rodriguez*

211. *Id.* at 867 (majority opinion) (“The duty to confront racial animus in the justice system is not the legislature’s alone. Time and again, this Court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.”); *Batson*, 476 U.S. at 87–88 (“Discrimination within the judicial system is most pernicious because it is ‘a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.’” (alteration in original) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879))); see also *Gonzalez*, *supra* note 14, at 405–06 (comparing specific language in each case to highlight the shared focus on ridding the justice system of racial discrimination).

212. For an extended discussion of the similarities between the two cases, see *Gonzalez*, *supra* note 14, at 404–06.

213. Weisberg, *supra* note 133. Professor Weisberg argues that the Equal Protection Clause is often “an ill fit in the legal context” given the need to establish proof of intentional government discrimination. Thus, in certain contexts, the Supreme Court chooses to address racial prejudice under some other doctrine—in this case, the Sixth Amendment. See *id.* During oral argument in *Pena-Rodriguez*, Justice Kagan expressed a similar sentiment, claiming that “it seems artificial not to think about the Sixth Amendment issue as informed by the principles of the Equal Protection Clause.” Transcript of Oral Argument, *supra* note 155, at 30; see also *Gonzalez*, *supra* note 14, at 405, 407–08 (“The heart of both the *Peña-Rodriguez* and *Batson* decisions is really an equal protection concern, although *Peña-Rodriguez* is framed in the context of the Sixth Amendment and *Batson* is framed more in the context of equal protection under the Fourteenth Amendment than the Sixth Amendment.”).

214. See, e.g., *Gonzalez*, *supra* note 14, at 411 (“If this is correct and equal protection is really the driving force underlying the *Peña-Rodriguez* decision, then *Batson* returns yet again as a model for the development of *Peña-Rodriguez* law in both criminal and civil cases.”).

215. See, e.g., *Young v. Davis*, 860 F.3d 318, 333–34 (5th Cir. 2017) (highlighting *Pena-Rodriguez*'s emphasis on “our long struggle against racial prejudice,” stating that “[p]rohibition of racial discrimination lies at the core of the *Fourteenth Amendment*,” and noting that the role of the Fourteenth Amendment has been salient in the “erratic but relentless march toward a color-blind justice” (emphasis added)); *Stout v. Jefferson Cty. Bd. of Educ.*, 250 F. Supp. 3d 1092, 1179 (N.D. Ala. 2017) (stating that racial discrimination is intolerable under the Fourteenth Amendment and that “[i]t must become the heritage of our Nation to rise above racial classifications” (alteration in original) (internal quotation

is best classified as part of a line of Equal Protection Clause cases “entirely in the service of eliminating racial bias in determining culpability.”²¹⁶ Further, courts’ potential readiness to extend *Pena-Rodriguez* to civil cases only confirms that courts may not be willing to view *Pena-Rodriguez* as a pure Sixth Amendment holding, as the Sixth Amendment by its terms applies only in criminal cases.²¹⁷ At the very least, these subsequent cases demonstrate that *Pena-Rodriguez* should not be considered a straightforward Sixth Amendment case.

Even if *Pena-Rodriguez* does retain its formal characterization as a Sixth Amendment holding, both *Pena-Rodriguez* and *Batson* hew closely to the border of the Fourteenth and Sixth Amendments, with *Pena-Rodriguez* perhaps even fusing the two sources into one broad constitutional narrative.²¹⁸ The Court’s express language in *Pena-Rodriguez* and *J.E.B.* tracks quite closely, despite the nominal difference in constitutional bases.²¹⁹

marks omitted) (quoting *Pena-Rodriguez*, 137 S. Ct. at 867), aff’d in part, rev’d in part, 882 F.3d 988 (11th Cir. 2018).

216. *McKnight v. Bobby*, No. 2:09-cv-059, 2018 WL 2327668, at *5 (S.D. Ohio May 22, 2018); see also *McGail v. Noble*, No. 3:17-cv-251, 2018 WL 950184, at *13 (S.D. Ohio Feb. 20, 2018) (“*Pena-Rodriguez* [sic] is not directly in point because it was grounded on the need to purge the administration of justice of racial prejudice.”); *State v. Odom*, No. 117,263, 2018 WL 1883902, at *4 (Kan. Ct. App. Apr. 20, 2018) (“Though the Court held that the Sixth Amendment right to due process provided the constitutional basis for an exception to the no-impeachment rule, its analysis focused primarily [on] the judiciary’s need to purge systemically all vestiges of racism from the administration of justice.”).

217. See *Patton v. First Light Prop. Mgmt., Inc.*, No. 14-cv-1489-AJB-WVG, 2017 WL 5495104, at *6–7 & n.5 (S.D. Cal. Nov. 15, 2017). In *Patton*, the court, on its own initiative, concluded that the alleged Native American bias was not equivalent to the bias shown in *Pena-Rodriguez* and that there was no evidence that jurors relied on racial stereotypes in arriving at a verdict. See *id.* In a footnote, the court acknowledged that *Pena-Rodriguez* was a criminal case but stated that it addressed the issue “to further clarify” that the affidavit was inadmissible as evidence. *Id.* at *7 n.5. One scholar argues that the extension to civil cases may be even easier in the *Pena-Rodriguez* context than in the *Batson* context, as the *Batson* context involved the “complicated question of whether peremptory challenges by private litigants concern state action,” whereas “[t]he actor in the alleged jury racial bias is the jury and not a private litigant.” Gonzalez, *supra* note 14, at 408–09. Gonzalez ultimately concludes that the difficult decision was whether to “open the door at all,” and now that it has been cracked open, “[i]t is only a matter of time for the exception to become entrenched in civil cases.” *Id.* at 409; see also Myhand, *supra* note 19, at 119.

218. See Leading Case, *Peña-Rodriguez v. Colorado*, 131 Harv. L. Rev. 273, 278 (2017) (accusing Kennedy of “merg[ing] principles from the Equal Protection Clause and the Sixth Amendment to conclude that the unique harms associated with racial bias required a unique exception to the no-impeachment rule”). Under a pure Sixth Amendment approach, the exception would be aimed at ensuring a fair trial for any individual defendant by ensuring an impartial jury. An Equal Protection Clause theory would be more concerned with preventing discrimination against any individual or class of individuals. The Court’s opinion certainly seems to fuse aspects of each theory. See *id.* at 279–80.

219. Compare *Pena-Rodriguez*, 137 S. Ct. at 867 (“It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to equal dignity of all persons.”), with *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (“It is necessary only to acknowledge that ‘our Nation has had a long and unfortunate his-

Beyond linguistics, prior to *Batson*, litigants brought challenges to racially discriminatory peremptory strikes under the fair cross-section requirement of the Sixth Amendment, fearing that the Equal Protection Clause was too difficult to satisfy.²²⁰ And the *Pena-Rodriguez* Court, in supporting its latest effort to eradicate racial prejudice from the criminal justice system, cited to a string of cases upon which it builds, nearly all of which are based entirely or at least partially on the Fourteenth Amendment.²²¹

In arguing that *Batson* should not be extended to classifications beyond race, scholars relied on the long history of discrimination against African Americans, distinctions between racial and other classifications, and the harm such extension would cause to a critical feature of jury trials.²²² This reasoning mirrors Justice Kennedy's in *Pena-Rodriguez*, and it is likely to be seized upon by lower courts seeking to cabin the *Pena-Rodriguez* exception to race.²²³ In both the Supreme Court and lower courts across the nation, however, this reasoning has been rejected, with courts extending *Batson*'s reasoning about the long and evil history of racial discrimination to discrimination on the basis of other classifications.²²⁴ Thus, perhaps the most reasonable expectation is that *Pena-Rodriguez* will

tory of sex discrimination,' a history which warrants the heightened scrutiny we afford all gender-based classifications today." (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973))).

220. Ronald Jay Allen et al., *Comprehensive Criminal Procedure* 1341 (4th ed. 2016); see also, e.g., *Booker v. Jabe*, 775 F.2d 762, 763 (6th Cir. 1985); *McCray v. Abrams*, 750 F.2d 1113, 1124–31 (2d Cir. 1984). The fair cross-section requirement mandates that the jury be "truly representative of the community," *Smith v. Texas*, 311 U.S. 128, 130 (1940), as a fair cross-section is necessary to ensure an impartial jury, see *Glasser v. United States*, 315 U.S. 60, 85–86 (1942). In *Taylor v. Louisiana*, the Supreme Court stated that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. 522, 528 (1975). For further discussion of the fair cross-section requirement and how the progression and modern application of this doctrine may bear on *Pena-Rodriguez*, see *infra* notes 281–282 and accompanying text.

221. See *Pena-Rodriguez*, 137 S. Ct. at 867–68. The Fourteenth Amendment cases cited are: *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Turner v. Murray*, 476 U.S. 28 (1986); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1880). In casting *Pena-Rodriguez* as part of this long line of cases seeking to eliminate racial discrimination in the jury system, Kennedy "refused to limit *Peña-Rodriguez* to the status of a Sixth Amendment case," instead opting to "transcend[] particular textual provisions" as part of his broad constitutional mission. *Leading Case*, *supra* note 218, at 279–81.

222. See, e.g., *Leach*, *supra* note 202, at 403.

223. Some commentators have already latched on to this line of thought. See, e.g., 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.9(g) (4th ed. 2017) ("[The Court's] reasoning should provide a basis for future decisions to reject similar exceptions that would allow introduction of other types of juror statements.>").

224. See *supra* notes 194–201 and accompanying text.

proceed in a similar manner to *Batson*, expanding beyond race, slowly at the national level, but more expansively within lower courts, with its practical implications limited by procedural safeguards.

III. GO WEST, YOUNG MAN: EXPANSION IS COMING

In each of its meetings since the Court's decision in *Pena-Rodriguez*, the Advisory Committee on Rules of Evidence has considered the case's implications and what steps to take to conform Federal Rule 606(b) to the new racial-bias exception to the no-impeachment rule.²²⁵ Although the constitutional nature of the *Pena-Rodriguez* exception means any change to Rule 606(b) is merely functional,²²⁶ and Rule 606(b) has no application to the states, the Committee's wrangling with the codification of *Pena-Rodriguez* demonstrates some of the pressing issues that similar state organizations—and courts—are facing in the wake of *Pena-Rodriguez*. After considering three explicit amendments to Rule 606(b), the Committee has thus far chosen only to monitor future cases, fearing that any amendment could “suggest expected expansion and potentially contribute to it.”²²⁷ While the Committee's hesitance to codify any explicit exception to Rule 606(b) is understandable given the likelihood of required subsequent amendments, in the meantime, courts must determine how to apply the *Pena-Rodriguez* exception in new contexts. Part III offers a prediction and provides some guidance for how these cases should play out in the wake of *Pena-Rodriguez*.

Drawing upon the analysis in Part II, Part III argues that the experiences of other jurisdictions with existing bias exceptions, supplemented by the Supreme Court's own experience under *Batson*, suggest that the narrow exception recognized in *Pena-Rodriguez* is highly unlikely to remain cabined to instances of racial bias. Section III.A summarizes the strongest evidence favoring expansion and argues that, if and when it addresses the issue, the Supreme Court should approve such expansion. Section III.B argues that procedural issues will serve as a limiting principle on *Pena-Rodriguez*'s progression. Section III.C provides a doctrinal solution to further ensure that bias exceptions remain exceptions and do not ultimately swallow the rule.

225. Adv. Comm. Fall 2017, *supra* note 129, at 2; Adv. Comm. Spring 2017, *supra* note 129, at 2; Adv. Comm. Spring 2018, *supra* note 129, at 2.

226. See Adv. Comm. Spring 2017, *supra* note 129, at 277 (claiming that “[n]o amendment is needed to remove the Rule 606(b) bar on testimony about racist statements during deliberation” as the Sixth Amendment already did so, but “the Evidence Rules Committee has always sought to avoid a situation in which a Rule could be applied in violation of the Constitution”).

227. Adv. Comm. Fall 2017, *supra* note 129, at 28. While the Advisory Committee has not amended Federal Rule of Evidence 606(b) as of the publication of this Note, the Committee continues to consider the wisdom of an amendment to Rule 606(b) and likely will do so again at its Fall 2018 meeting.

A. *All Engines Go: Why Expansion Is Likely—and Acceptable*

1. *The Seeming Inevitability of Expansion.* — Despite the Supreme Court's forceful argument that racial discrimination is unique, this view is unlikely to prevent the *Pena-Rodriguez* exception from expanding beyond race in states and lower federal courts. The Advisory Committee seemed to acknowledge as much in rejecting a proposal to amend Rule 606(b) by codifying the specific holding of *Pena-Rodriguez*, which would have limited the codified exception to racial bias.²²⁸ Within jurisdictions that had already recognized bias exceptions broader than that recognized by the Supreme Court, *Pena-Rodriguez* is unlikely to abrogate those decisions and cause courts to revert to a narrower interpretation of their own exceptions, especially given the varying legal justifications upon which such exceptions have been based.²²⁹ Having relied on these jurisdictions' experiences in justifying its nationwide exception, the Supreme Court may have in fact bolstered these courts' belief that the no-impeachment rule must yield to constitutional principles of fundamental fairness, equal protection, and impartial juries. To the extent that these states rely on *Pena-Rodriguez* in allowing jurors to impeach the verdict upon evidence of bias beyond race, this may implicitly expand the scope of the Court's holding by intimating that *Pena-Rodriguez* itself permits impeachment for nonracial bias. As bodies of case law citing to *Pena-Rodriguez* build, whether intentionally or not, the case may come to stand for a proposition much broader than that intended by the Supreme Court.

A similar progression beyond race is also likely in jurisdictions in which the *Pena-Rodriguez* decision represents the initial exception to the no-impeachment rule. Interestingly, in Virginia, a state in which no such exception existed before *Pena-Rodriguez*, the legislature itself expanded beyond race in codifying the *Pena-Rodriguez* exception, allowing impeachment in cases of racial or national-origin bias.²³⁰ Few jurisdictions relied on the special history of racial bias in America as the primary justification for creating an exception to the no-impeachment bar before *Pena-Rodriguez*,²³¹ and even those that did felt comfortable applying the principles from the initial racial-bias exception to cover other forms of prejudice.²³² While no federal court has yet relied on *Pena-Rodriguez* to allow impeachment in a case involving nonracial juror bias,²³³ in discussing

228. See Adv. Comm. Spring 2017, *supra* note 129, at 280 (“[T]here is a possibility that not very far down the road [the Committee] will have to revisit the rule when the Court extends its exception to other kinds of problematic juror statements, or to civil cases.”); see also Adv. Comm. Spring 2018, *supra* note 129, at 235–36.

229. See *supra* section II.A.

230. Va. R. Evid. 2:606.

231. But see *State v. Santiago*, 715 A.2d 1, 19–20 (Conn. 1998) (alleging that racial bias differs fundamentally from other forms of juror misconduct).

232. See *supra* notes 169–177 and accompanying text.

233. See *supra* note 140 and accompanying text.

Pena-Rodriguez, lower federal courts have spoken more freely. The Eastern District of California stated that *Pena-Rodriguez* was inapplicable in a case because there was “no evidence of racial, religious, or other prejudice,”²³⁴ and the Third Circuit cited *Pena-Rodriguez* for the proposition that “the administration of justice includes ensuring a defendant is tried by an impartial jury free from racial or ethnic bias.”²³⁵ With lower federal courts suggesting a willingness to find *Pena-Rodriguez* applicable in situations beyond that first contemplated by the Supreme Court, the question appears to be when, not if, one such court explicitly allows impeachment under *Pena-Rodriguez* in a case involving nonracial bias.

Whether the exception is grounded in the Sixth Amendment or the Equal Protection Clause, courts will not have a strong doctrinal underpinning for limiting the exception to instances of racial bias.²³⁶ And if courts are willing to recharacterize *Pena-Rodriguez* as an equal protection holding, then a *Batson*-like progression is an even more direct analogue for the post-*Pena-Rodriguez* exception.²³⁷ Just as courts, including the Supreme Court, have concluded that *Batson*'s reasoning applies with equal force to other forms of discrimination, courts can be expected to similarly extend the reasoning relied on in *Pena-Rodriguez*.²³⁸ Even if lower courts are willing to accede to the view that racial bias deserves special treatment because of its entrenched nature in American criminal justice, other impermissible biases have also long plagued the judicial system.²³⁹

2. *Keep Calm and Expand On: Why Expansion Is Preferred.* — As the racial-bias exception expands beyond race in some jurisdictions, others

234. *Peters v. Arnold*, No. 2:15-cv-00586-JKS, 2017 WL 6209908, at *16 n.8 [sic] (E.D. Cal. Dec. 7, 2017) (emphasis added).

235. *United States v. Angel-Huerta*, 718 F. App'x 105, 110 (3d Cir. 2017) (emphasis added).

236. See, e.g., Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 *Syracuse L. Rev.* 1, 19 (2010) (“There . . . is no clear basis for distinguishing juror testimony about racial bias from testimony about . . . other forms of juror misconduct that Rule 606(b) was designed to exclude . . . [T]he Sixth Amendment and Due Process Clauses . . . contain no language . . . treating racial comments differently than other comments indicating partiality or unfairness.”).

237. See *supra* notes 213–221 and accompanying text for the argument that *Pena-Rodriguez* is an equal protection holding masked in Sixth Amendment language.

238. See, e.g., Singh, *supra* note 14. Singh highlights that Kennedy's primary justifications for deciding that racial bias required an exception to the no-impeachment rule apply with near-equal force to other forms of bias, including those based on religion and gender. *Id.* While the Court noted that the *Tanner* safeguards are insufficient to protect against racial bias in deliberations, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868–69 (2017), these insufficiencies also apply to other forms of bias. Courts are just as likely to struggle with rooting out racial bias in voir dire as they are with gender or religious bias, and while it is certainly difficult to visually observe racial bias, it is no easier to observe sexual-orientation bias. See Singh, *supra* note 14.

239. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (noting America's long history of sex discrimination, “a history which warrants the heightened scrutiny we afford all gender-based classifications today”).

are likely to hew closely to the Court's admonition that race is special²⁴⁰ and refuse to expand beyond race, leading to a likely split across jurisdictions.²⁴¹ If such a situation arises, the Supreme Court should affirm the expansion of the exception to bias beyond race. From a normative perspective, prioritizing race over other classifications is inconsistent with the overarching promise of the criminal justice system that every defendant is entitled to a fair trial, free from bias or prejudice, regardless of his or her demographic characteristics.²⁴² To offer relief to a defendant discriminated against on the basis of race but deny such relief when the discrimination is based on gender cannot meaningfully advance the Sixth Amendment's mission.²⁴³

Pragmatically, expansion beyond race would avoid a number of muddled distinctions and place the exception on firmer doctrinal ground. Applying *Pena-Rodriguez* to other forms of bias avoids any issues that may arise in arguing that the rationales underlying the decision do not apply equally to other forms of discrimination.²⁴⁴ Expansion beyond race also avoids reliance on the rationale that racial bias is of a different kind than other forms of bias, an argument that may require "flexibility in

240. See supra note 140.

241. As noted supra notes 137–140, federal courts have not yet explicitly held *Pena-Rodriguez* applicable to instances involving nonracial bias. The Advisory Committee, in tracking the cases following *Pena-Rodriguez*, has also noted that courts have thus far "adhered to the line drawn by the Court in *Pena-Rodriguez*." Adv. Comm. Fall 2017, supra note 129, at 132 (citing several federal cases in which the court rejected defendants' attempts to impeach the verdict in reliance on *Pena-Rodriguez*); see also Adv. Comm. Spring 2018, supra note 129, at 237–40 (providing an updated list of such cases). However, the Supreme Court's denial of certiorari in *Rhines* notwithstanding, see supra note 137 and accompanying text, no federal case has yet involved bias against an identifiable class of individuals.

242. Cf. Fraser Holmes, Note, *Becoming Penelopes: Rethinking the Federal No-Impeachment Rule After Peña-Rodriguez*, 96 Tex. L. Rev. 1053, 1076–78 (2018). Holmes argues that the federal no-impeachment rule should be split into two separate rules, one for criminal cases and one for civil cases, with the criminal rule made more flexible by disallowing evidence only of jurors' mental and decisionmaking processes. *Id.* at 1076. As Holmes notes, while doing so would lead to the admission of more evidence, "rather than *threatening* the jury system's legitimacy, a more permissive rule might actually *strengthen* the jury system's legitimacy, particularly among communities of color." *Id.*

243. Cf. Covington, supra note 61, at 568–75 ("[T]he Court's exception to Rule 606(b) strikes the proper balance between preserving [the] policy objectives [of Rule 606(b)] and upholding a defendant's Sixth Amendment rights in the face of juror misconduct."); Leah S.P. Rabin, Note, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of Tanner and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. Pa. J. Const. L. 537, 555 (2011) ("[A]llowing verdicts to stand without inquiry after legitimate allegations of juror racism have been presented is an affront to the very foundation of our judicial system.").

244. See Singh, supra note 14 ("Lower courts may find it difficult to distinguish and articulate how the *Tanner* procedures *do not* protect against racial prejudice but *do* protect against other biases.").

constitutional reasoning.”²⁴⁵ While there is minimal dissent from the proposition that racism is a particularly pernicious evil in America, there is little in modern jurisprudence—especially under the Sixth Amendment—to support the position that racial animus should receive greater legal scrutiny than similarly offensive and dangerous forms of bias.

Refusing to expand beyond race would also involve difficult distinctions between racial, ethnic, national-origin, and religious bias, entangling the Court in linguistic and sociological acrobatics that may appear disingenuous at best and dishonest at worst. State court experience with bias exceptions and the Supreme Court’s own experience in other contexts have demonstrated that the distinction between race and other forms of bias or prejudice is complex and can often be too thin to ascertain a meaningful difference.²⁴⁶ In *Pena-Rodriguez* itself, the Court was able to ground the exception in the history of the Civil War Amendments and post-Civil War jurisprudence only by classifying the bias as racial, while it could have just as appropriately been deemed ethnic or national-origin bias given the juror’s specific statements about the defendant’s Mexican heritage.²⁴⁷ While prejudice against Hispanics has a long pedigree, such prejudice is presumably not what Kennedy and the majority had in mind when expounding the especially pernicious role racial bias has played in American history.²⁴⁸

245. Weisberg, *supra* note 133 (“[I]f the Court ultimately wants to draw the line at race, it will be saying that because racial prejudice is the defining tragedy of American history, it demands special recognition”); see also Covington, *supra* note 61, at 576 (citing Alito’s dissent and arguing that “the holding suggests that the Sixth Amendment prioritizes racially or ethnically biased juror misconduct above all other types of bias that could equally taint jury deliberations”).

246. See *supra* note 158 and accompanying text; see also, e.g., Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 *Fordham L. Rev.* 21, 69–70 (2013) (arguing that the Court uses race as a legal term of art, which may conflate race with ethnicity); Valerie P. Hans & Ramiro Martinez, Jr., *Intersections of Race, Ethnicity, and the Law*, 18 *Law & Hum. Behav.* 211, 211 (1994) (“Studying race, ethnicity, and the law is challenging for many reasons, not the least of which is the prime difficulty of defining what we mean by race.”); Singh, *supra* note 14 (noting Alito’s questioning at oral argument of whether race and ethnicity are interchangeable outside the context of Hispanics). Some litigants have taken the Court’s conflation of race and ethnicity in *Pena-Rodriguez* to stand for the proposition that “[p]rejudice against an ethnicity is, after all, the constitutional equivalent of racial prejudice.” Motion for a New Trial at 8, *Zone 4 Energy Ltd. v. JPMorgan Chase Bank, N.A.*, No. 2015CA021879 (Fla. Cir. Ct. Dec. 22, 2017), 2017 WL 7518957.

247. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017). Both Kennedy and Alito largely dismiss the conflation of ethnicity and race in *Pena-Rodriguez* by deferring to the parties’ choice of the term “racial,” even though the use of racial was integral to the majority’s opinion. See *id.* at 863; *id.* at 875 n.1 (Alito, J., dissenting).

248. Relying on entrenched discrimination against African Americans to distinguish racial bias against Hispanics from other forms of bias may bring the Court into contention with its holding in a recent voting rights case, in which it chastised a state for treating all members of a particular race as a homogenous group despite socioeconomic differences between different populations within the race. See *League of United Latin Am. Citizens v.*

B. *The Impact of Practical and Procedural Barriers to Claims Brought Under Pena-Rodriguez*

Even if expansion beyond race is foreseeable and welcome, there are a number of procedural barriers that will likely prevent the exception from swallowing the no-impeachment rule.²⁴⁹ In many states, parties are barred from actively seeking out jurors after a verdict, rendering it difficult for a defendant to gain access to the information necessary to litigate a claim under *Pena-Rodriguez*.²⁵⁰ While there is no federal rule barring post-verdict juror contact, a large number of district courts have adopted local rules imposing limitations on attorney post-verdict contact with jurors.²⁵¹ To the extent a district is not subject to such a rule, the relevant circuit court may have imposed a similar limitation by judicial decree.²⁵² Rules curtailing post-verdict contact with jurors not only ensure the sanctity of the no-impeachment rule but also serve some of the central policy goals animating the staunch defense of the no-impeachment rule: By protecting jurors from potential harassment after a verdict has been rendered, these rules ensure jurors can feel comfortable engaging

Perry, 548 U.S. 399, 433–35 (2006). Historically, discrimination against Hispanics does not mirror discrimination against African Americans, and relying on one group's history to justify an exception for the other group does not seem to comport with the Court's belief that members of the same race, let alone different races, should not be homogenized because of a shared characteristic or history of unequal treatment.

249. As stated *supra* note 131, others have focused more critically on the procedural questions in the wake of *Pena-Rodriguez*. Again, the focus here is on the potential interplay between these procedural issues and the progression of the exception to other forms of bias.

250. See *Pena-Rodriguez*, 137 S. Ct. at 869 (noting that state rules of professional ethics and local court rules often limit counsel's post-trial contact with jurors); see also Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 Calif. L. Rev. 135, 148–54 (2018) [hereinafter *Miller, State Limits*] (tracking state restrictions on juror interviews and noting that while some are codified in state statutes, most arise from local court rules or individual judges' court orders).

251. See, e.g., D. Vt. L.R. 83.5 ("Parties, attorneys, their agents and representatives shall not contact jurors before, during, or after a trial without first obtaining the written permission of the trial judge."); see also Benjamin M. Lawsky, Note, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 Colum. L. Rev. 1950, 1955–56 (1994) (noting that as of 1994, at least fifty-one federal districts had local court rules regulating communication with jurors, with most specifically prohibiting attorneys from contacting jurors without prior court approval).

252. See, e.g., *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985) ("[H]enceforth this Circuit prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate."); see also Lawsky, *supra* note 251, at 1956–57 (citing Fifth Circuit and Eleventh Circuit precedent imposing some form of limitation on attorney contact with jurors post-verdict).

in full and open debates during deliberations.²⁵³ When defense counsel circumvents state or local court rules in contacting jurors post-verdict, courts can and will reject defendants' attempts to impeach the verdict in reliance on tarnished juror testimony.²⁵⁴ Thus, in most instances, defendants will not be permitted to contact jurors unless a juror voluntarily comes forward with allegations of bias, as in *Pena-Rodriguez*, or defendant's counsel receives permission from the court.²⁵⁵ This will effectively prevent defendants from engaging in "fishing expeditions" seeking out instances of bias based on pure conjecture or chance.²⁵⁶

Further, while the Supreme Court left much up to the discretion of lower courts, the Court's limited guidance on the threshold showing of bias required to warrant impeachment,²⁵⁷ and lower courts' subsequent interpretation of this standard, demonstrates that the standard has been

253. See *supra* notes 8–11 and accompanying text. For the argument that the *Pena-Rodriguez* Court itself should have adopted a rule, modeled on existing state rules, that forbids attorneys from having post-verdict contact with jurors unless the juror has expressed a desire to communicate with the attorney, see Crump, Removing Race, *supra* note 131, at 488–90. But see Miller, State Limits, *supra* note 250, at 154–73 (arguing that restrictions on postconviction investigation "prevent criminal defendants from discovering constitutional error and raising potentially meritorious claims" in habeas proceedings and fail to accomplish their stated objectives, including prevention of juror harassment, free juror deliberations, and finality of verdicts).

254. See, e.g., *United States v. Robinson*, 872 F.3d 760, 770 (6th Cir. 2017) (upholding the district court's denial of the defendant's attempt to impeach the verdict in part because of defense counsel's "violation of both a local court rule and a specific admonishment from the bench not to contact jurors").

255. See *Pena-Rodriguez*, 137 S. Ct. at 869–70 (discussing the impact of "state rules of professional ethics and local court rules" in limiting post-verdict contact with jurors). But see Gonzalez, *supra* note 14, at 415–16 (arguing that after *Pena-Rodriguez*, "any limitations that prevent attorneys from initiating such a post-trial question to jurors in criminal cases are going to have to be evaluated and perhaps modified in light of the *Peña-Rodriguez* decision," with "stringent rules" likely forced to give way). Gonzalez's assessment, however, does not comport with Kennedy's confirmation that trial courts be given vast discretion, presumably with regards to when allegations of racial bias in deliberations warrant breaching any local rules prohibiting post-verdict juror contact. See *Pena-Rodriguez*, 137 S. Ct. at 869.

256. See, e.g., *United States v. Reyes*, No. 2:16-cr-00069, 2018 WL 705302, at *3 (D. Vt. Feb. 1, 2018) (distinguishing between instances in which jurors disclose racial bias from those in which defendants seek out such bias and noting that in cases in which no juror has disclosed any racial animus and no evidence of taint exists, the court "should not promote intrusion into the jury's deliberations"); see also Chandran, *supra* note 84, at 50 (claiming that, as of 2014, "[i]n every case that has addressed the issue so far, petitioners have only raised their claims once a member of the jury actively reached out and alerted them of racist comments or behaviors that took place"); Holmes, *supra* note 242, at 1077 (suggesting amendments to Rule 606(b) in the wake of *Pena-Rodriguez*, including that "defendants may only challenge the validity of the verdict using evidence obtained through a juror's independent disclosure or evidence obtained from juror interviews conducted immediately after rendition of the verdict" (footnote omitted)).

257. See *Pena-Rodriguez*, 137 S. Ct. at 869 ("[T]here must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict.").

set quite high. Thus far, lower courts have taken seriously the Court's mandate that there be "statements exhibiting overt racial bias"; when statements of alleged racial bias do not rise to a level similar to that in *Pena-Rodriguez*, courts have rejected efforts to impeach the verdict, claiming that the statements qualify as mere "offhand comment[s]" or do not "cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdicts."²⁵⁸ Even for parties that do receive a hearing, courts have required defendants to show that the bias in question actually played a role in causing the juror to convict²⁵⁹—in essence creating a prejudice requirement akin to the Supreme Court's standards in other areas of criminal law.²⁶⁰ So far, courts have rejected impeachment efforts in cases in which jurors allegedly made statements reflecting racial bias against individual jurors, rather than a defendant or witness, even when the court finds that the statements were overtly racist.²⁶¹ Thus, the procedures relied on by courts applying *Pena-*

258. *Id.* For a sampling of such cases, see, e.g., *United States v. Baker*, No. 16-2895, 2018 WL 3747345, at *8 (2d Cir. Aug. 8, 2018) (holding that a juror's allegation that "he knew the defendant was guilty the first time he saw him" does not alone "constitute clear, strong, and incontrovertible evidence that this juror was animated by racial bias or hostility"); *Berardi v. Paramo*, 705 F. App'x 517, 518–19 (9th Cir. 2017) (examining the alleged juror statements and concluding that, in comparison to those in *Pena-Rodriguez*, they do not reveal racial bias); *Commonwealth v. Young*, No. 1305 MDA 2017, 2018 WL 2947919, at *6 (Pa. Super. Ct. June 13, 2018) (affirming the imposition of a requirement that defendants make a prima facie showing of improper animus before receiving a hearing on alleged juror bias); see also Virginia Weeks, Note, Fairness in the Exceptions: Trusting Juries on Matters of Race, 23 *Mich. J. Race & L.* 189, 200 (2018) ("[C]ourts have limited the application of the *Peña-Rodriguez* rule by drawing a distinction between comments related to race and comments showing racial bias.").

259. See, e.g., *Zora v. Winn*, No. 17-1132, 2017 WL 7511334, at *5 (6th Cir. Sept. 5, 2017) (rejecting impeachment efforts when a juror who submitted an affidavit alleging bias did not even participate in deliberations on guilt and thus could not be relied upon to cast serious doubt on the fairness or impartiality of the jury's deliberations and final verdict).

260. See *Pena-Rodriguez*, 137 S. Ct. at 869 ("To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."). The Court has required prejudice showings in many other areas, including for claims of grand jury errors, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988), and claims of ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This notion of a prejudice requirement appears to comport with how some scholars envision the *Pena-Rodriguez* procedures playing out in trial courts. See, e.g., Gonzalez, *supra* note 14, at 414 ("It seems preferable for trial courts to evaluate whether any expression of racial bias . . . meaningfully affected the jury's verdict because there could be cases where . . . other jurors expressly rejected a fellow juror's racially biased comments and . . . race discrimination ended up playing no role in the jury's verdict.").

261. See, e.g., *United States v. Robinson*, 872 F.3d 760, 770–72 (6th Cir. 2017), petition for cert. filed, No. 17-7970 (U.S. Mar. 6, 2018) (refusing to impeach after a white jury foreperson claimed the "colored women" were the only jurors who could not see that the black defendants were guilty and accused these jurors of protecting their "black brothers"); *Williams v. Price*, No. 2:98cv1320, 2017 WL 6729978, at *9 (W.D. Pa. Dec. 29, 2017) (requiring the racial slur "ni**er lover," as "reprehensible and abhorrent" as it is, to

Rodriguez can ensure that the no-impeachment rule remains a vital part of the jury system despite expansion to biases beyond race.²⁶² To the extent that existing procedural safeguards are insufficient or state and lower federal courts fail to enact sufficiently heightened standards in the practical execution of the *Pena-Rodriguez* exception,²⁶³ there are a number of additional procedural requirements that state or federal institutions can install to protect both jurors and the existence of the no-impeachment rule.²⁶⁴

The limited number of cases attempting to rely on bias exceptions in jurisdictions that recognized such exceptions before *Pena-Rodriguez* further indicates that practical barriers are likely to limit any damaging effects on the no-impeachment rule and the jury trial system as a whole. Despite the prevalence of concerns that an exception to the no-impeachment bar for instances of juror bias would lead to a dismantling of the jury system or a “barrage of postverdict scrutiny of juror conduct,”²⁶⁵ convicted defendants have raised very few post-verdict claims of juror impartiality in an attempt to impeach the verdict.²⁶⁶ Even in jurisdictions with long-standing, broad

be directed *at the defendant* in order to qualify under *Pena-Rodriguez* as a “significant motivating factor in the juror’s vote to convict” (quoting *Pena-Rodriguez*, 137 S. Ct. at 869)); see also *Richardson v. Kornegay*, No. 5:16-HC-2115-FL, 2017 WL 1133289, at *10 (E.D.N.C. Mar. 24, 2017) (refusing to apply *Pena-Rodriguez* because the questioned juror statements pertained to another juror’s potential racial biases, rather than expressing any racial bias against the defendant himself), appeal docketed, No. 18-6488 (4th Cir. May 3, 2018).

262. But see *Crump, Removing Race*, supra note 131, at 488 (arguing that the *Pena-Rodriguez* Court “should have created a unified system for inquiring about racial bias in jury proceedings” to fully effectuate the promise of the Sixth Amendment); *Myhand*, supra note 19, at 117–18 (arguing that the Court’s new standard “will require constant litigation to glean what is meant by the Court’s decision,” and that “the discretion held by a trial judge can be a much more dangerous tool”).

263. For one scholar’s more detailed forecasting of how these procedures may play out in practice, see *Gonzalez*, supra note 14, at 413–15 (listing, among other things, potential factors for trial courts to consider in deciding whether to grant a motion for a new trial).

264. See, e.g., *id.* at 412–13 (suggesting modifying model jury instructions); *Covington*, supra note 61, at 569–71 (arguing that courts can “implement a hearing process to merely confirm the veracity of allegations, thereby preserving the sanctity of jury deliberations and preventing any increased disruption to verdicts in compliance with legislative intent”); *Singh*, supra note 14 (highlighting procedural enhancements courts could adopt to mitigate any added incentive for juror harassment, including time restrictions, limits on soliciting testimony, and required good cause showings); cf. *Crump, Removing Race*, supra note 131, at 488–92 (suggesting that the *Pena-Rodriguez* Court should have instituted a requirement that juries articulate their reasoning for issuing a guilty verdict, which would allow trial judges to review the jury’s reasoning “for the limited purpose of evaluating if improper racial bias affected the decision”).

265. *Tanner v. United States*, 483 U.S. 107, 120–21 (1987).

266. See Center on Criminal Law Amicus Brief, supra note 81, app. at 1a (finding forty-two cases that “established the principle that courts may consider racial bias in jury deliberations”); Professors of Law Amicus Brief, supra note 81, at 14 (claiming that in jurisdictions recognizing or hospitable to an exception, “decades of appellate case law

exceptions, few litigants have attempted to impeach the verdict by using juror testimony to prove instances of juror bias.²⁶⁷ In a promising sign for the vitality of the jury trial system and the no-impeachment rule, exceptions appear to remain infrequently relied upon, regardless of their initial scope or subsequent expansion.

Thus, just as the procedural accompaniments to *Batson*—notably the willingness of trial courts to accept almost any race-neutral explanation²⁶⁸—have served to limit *Batson*'s weakening of the peremptory challenge, *Pena-Rodriguez*'s procedural mechanisms—especially the difficulty in making a threshold showing of racial bias²⁶⁹—are likely to limit the *Pena-Rodriguez* exception's infringement on the no-impeachment rule. However, whereas procedural issues have rendered *Batson* much less effective outside of the capital context,²⁷⁰ the procedural issues with *Pena-Rodriguez* are unlikely to similarly render it a nullity. As discussed *supra* section II.B.1, critics of the *Batson* regime allege that, along with ensuring the continued vibrancy of the peremptory challenge, structural issues in the *Batson* regime have ensured that discrimination also remains vibrant in the selection of petit juries.²⁷¹ Whereas in the *Batson* context prosecutors are capable of creating post hoc, pretextual justifications for impermissible peremptory strikes, clear statements of racial bias are just that: clear.²⁷² To the extent a defendant is able to access evidence of a juror's

reflect only thirty claims by defendants who sought to introduce juror testimony concerning racial or ethnic bias in deliberations"); see also Transcript of Oral Argument, *supra* note 155, at 32–34 (detailing appellees' strained responses to questions regarding any evidence of an influx of cases in jurisdictions with existing racial-bias exceptions).

267. See *supra* notes 166–169 and accompanying text. For a summary of this Note's analysis, see *supra* note 165; see also, e.g., Center on Criminal Law Amicus Brief, *supra* note 81, at 24–25 (showing that, for example, while Washington first created a racial-bias exception in 1967, only three total cases have since addressed inquiries into racial or ethnic bias in jury deliberations).

268. See *supra* note 205 and accompanying text.

269. See *supra* notes 257–262 and accompanying text.

270. While most litigants bringing *Batson* challenges before the Supreme Court have continued to struggle, litigants in capital cases have fared more favorably, perhaps because of the heightened stakes in such cases. See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016).

271. See, e.g., Editorial, Will the Supreme Court *Really* End Racist Jury Selection?, L.A. Times (Nov. 3, 2015), <http://www.latimes.com/opinion/editorials/la-ed-1103-peremptory-challenge-20151103-story.html> [<https://perma.cc/UF57-JLLR>] (noting that the requirement that the prosecution offer a race-neutral explanation for the peremptory challenge is "an extremely low bar"); Nathan Koppel, Three-Strikes and You're Out? Critics Seek Juror-Dismissal Cap, Wall St. J. (Mar. 5, 2009), <http://www.wsj.com/articles/SB123621836517136247> (on file with the *Columbia Law Review*) (claiming that, despite *Batson*, attorneys and academics say that potential jurors are struck based on race, ethnicity, and gender all the time).

272. One scholar suggests that the actual *Batson* procedural framework could be transplanted nearly in full into the *Pena-Rodriguez* context. See Gonzalez, *supra* note 14, at 414–15. This seems unlikely for several reasons, not least of which is this notion that the only way in which a defendant is likely to receive a hearing is if there is a *clear* statement of

overt expression of racial bias—such as those in *Pena-Rodriguez* itself—these statements will likely be too damning for any alternative explanation to suffice.²⁷³ Further, whereas the context in which the *Batson* strike arises—voir dire—involves repeat players familiar with the law, jurors are often one-time players without the foresight or knowledge to effectively disguise their bias. Thus, while there are certainly hurdles for a defendant to overcome in the *Pena-Rodriguez* context, there is no equivalent, easily accessed escape hatch to avoid effectuation of the *Pena-Rodriguez* right; as a result, expansion beyond race will be cabined, yet not in such a way as to ultimately negate the existence of the exception.

C. *The Usual Suspects: Incorporating or Adopting Equal Protection Doctrine*

To avoid relying solely on expected procedural developments, courts should adopt a doctrinal solution to constrain expansion of the bias exception, thereby ensuring that the no-impeachment rule remains a safeguard for the jury trial system. The *Pena-Rodriguez* Court clearly stated that the no-impeachment rule continues to serve vital interests,²⁷⁴ and while an argument can be made for abandoning the no-impeachment rule entirely to fully effectuate the Sixth Amendment's promise,²⁷⁵ such a proposal does not seem to have any widespread support.²⁷⁶ As a result,

racial bias. Thus, the potential for a second step in which the opposing side rebuts the inference of racial bias seems unnecessary, if not unhelpful. As argued in this section, both the procedures themselves and the environment in which these procedures operate are likely to be different in the *Batson* and *Pena-Rodriguez* contexts.

273. To counter this point, one scholar has argued that “courts have generally refused to take on ‘subtler’ forms of racial discrimination,” and the only reason the Court felt compelled to act in *Pena-Rodriguez* is due to the “explicit, intentional appeal[] to racial bias—as close to a smoking gun as one is ever likely to see in a contested racial-equality challenge in the twenty-first century.” Leonetti, *supra* note 106, at 227–28. Thus, one might contend that the Court’s requirement of overt expressions of racial bias that played a clear role in the decision to convict—and lower courts’ strict interpretation of this requirement—could function in a similar manner to the race-neutral justifications provided in the *Batson* context by weakening the force of the right recognized in *Pena-Rodriguez*.

274. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017) (“[T]he no-impeachment rule has substantial merit.”).

275. Such an argument would be analogous to Justice Marshall’s concurrence in *Batson*, in which he argued that the only way to truly rid voir dire of racial discrimination is to eliminate the peremptory challenge entirely. See *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). Given that the Sixth Amendment does not distinguish between types of bias, and any bias that jeopardizes a defendant’s right to an impartial jury technically violates the Sixth Amendment, the argument goes that a juror should always be able to impeach the verdict when any form of bias played a role in the decision to convict. Procedural protections beyond the no-impeachment rule already exist to prevent juror harassment, and the fact that jurors can already come forward with allegations of bias before reaching a verdict may undermine the objective of promoting open discussions during deliberations. Singh, *supra* note 14.

276. See *Pena-Rodriguez*, 137 S. Ct. at 865 (noting that every state follows the no-impeachment rule); see also Adv. Comm. Spring 2017, *supra* note 129, at 280–81

while organizations like the Advisory Committee can choose to simply observe the progression of *Pena-Rodriguez* case law before enacting any new amendments to the no-impeachment rule, courts must make certain decisions about the proper scope of any subsequent expansion of the exception.²⁷⁷

While procedural limitations are likely to serve as a sufficient limiting factor, courts should nonetheless doctrinally limit expansion of the racial-bias exception. Only when the juror bias at issue would require heightened scrutiny under the Equal Protection Clause should the no-impeachment rule yield to the guarantee of an impartial jury.²⁷⁸ To the extent that *Pena-Rodriguez* is really an equal protection holding masked by the Sixth Amendment or a fusion of the two constitutional sources,²⁷⁹ such a limiting principle is a natural fit under the Court's jurisprudence. Using constitutionally suspect classifications as the outer limit for expansion of the *Pena-Rodriguez* exception provides a judicially manageable limiting principle and ensures that bias of only the most serious kind will be admissible to impeach a jury verdict.

Even if the exception retains its grounding in the Sixth Amendment, other suspect classifications under the Fourteenth Amendment share many of the same attributes that led the Court to require the no-impeachment rule to give way to evidence of racial bias; thus, other suspect classifications also likely require different treatment than the forms of juror misconduct in cases like *Tanner* and *Warger*.²⁸⁰ Further, the Court does not need to recharacterize its holding as an equal protection case or

(claiming that Rule 606(b) strikes the balance between the right to a fair trial and the public interest in protecting the jury process in favor of the latter, and that such a balance was largely affirmed by the Supreme Court in *Pena-Rodriguez*).

277. In rejecting its second proposal to amend Rule 606(b), which would broaden the *Pena-Rodriguez* exception to permit juror testimony about "the full range of conduct and statements that may implicate a defendant's constitutional rights," the Advisory Committee noted that this proposal would "require significant policy determinations and would be difficult to draft with precision." Adv. Comm. Fall 2017, *supra* note 129, at 132.

278. While this Note does not necessarily advocate the explicit recharacterization of *Pena-Rodriguez* as an equal protection holding, it is important to note that expansion in reliance on the Equal Protection Clause may necessitate that courts permit post-verdict impeachment for potential violations of other constitutional protections. For example, if there is a credible allegation that a juror voted to convict because of a defendant's choice not to testify, *Griffin v. California*, 380 U.S. 609 (1965), may dictate that such a statement violates the defendant's Fifth Amendment right, and thus impeachment may be warranted. With thanks to Professor Daniel Capra for this articulation, there is no basis for protecting one constitutional right more than another. While this Note would perhaps be in favor of such a further loosening of the no-impeachment rule, it restricts its focus to the expansion to other forms of bias but invites others to comment upon such issues.

279. See *supra* notes 213–221 and accompanying text.

280. See *supra* note 238 and accompanying text. Bias based on any suspect classification can be hard to detect at voir dire, and many minority groups have faced long histories of prejudice in America; if allowed to run rampant, prejudice based on any suspect classification can threaten the fair and impartial functioning of the criminal justice system.

outwardly rely on an equal protection framework in order to rely on this built-in limitation under the Fourteenth Amendment—it can do so implicitly, as the Court has done in other contexts. Although the Court has come to address claims of jury nonrepresentativeness primarily under the Sixth Amendment fair cross-section requirement, the Court had previously addressed such claims under the Equal Protection Clause, and still does so in some cases.²⁸¹ While the modern analysis is thus grounded in the Sixth Amendment and need not map onto the Fourteenth Amendment’s definition of “cognizable groups,” in practice, the Court has adhered to the relevant classifications under the Equal Protection Clause.²⁸² If the driving force behind *Pena-Rodriguez* is the elimination of discrimination in criminal trials, then the exception to the no-impeachment rule may be based on the Sixth Amendment as a matter of constitutional necessity,²⁸³ but a focus on Fourteenth Amendment classes is both logical and administrable.

CONCLUSION

The Advisory Committee’s third and final proposal was to include a generic exception to allow testimony whenever “required by the constitution.”²⁸⁴ Although deemed the superior of the three proposals due to its ability to adapt to any future expansion by the Court, the Committee ultimately rejected the proposal, fearing it may be interpreted to advocate for such expansion.²⁸⁵ Given the evidence of likely expansion available to date, this constitutional exception is perhaps the Advisory Committee’s best bet. Whether suggested by the Committee or not, expansion appears likely. Despite the Court’s reliance on the unique nature of racial discrimination in America, few jurisdictions believe this to be a sound limiting principle, nor has this principle withstood pressure in other doctrinal areas. Both state experience with bias exceptions to the no-impeachment rule and the Court’s own experience with *Batson* and related cases suggest expansion is coming. Significant pragmatic and normative

281. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

282. See, e.g., Sanjay K. Chhablani, Re-Framing the ‘Fair Cross-Section’ Requirement, 13 U. Pa. J. Const. L. 931, 947–49 (2011) (alleging that lower courts have treated the “distinct group” requirement of the Sixth Amendment as identical to the “suspect class” requirement of the Fourteenth Amendment); Mitchell S. Zuklie, Comment, Rethinking the Fair Cross-Section Requirement, 84 Calif. L. Rev. 101, 132–33 (1996) (arguing that the “distinctive group” analysis for fair cross-section purposes has conflated Sixth Amendment and Fourteenth Amendment inquiries and that certain groups that are *not* suspect classes under the Equal Protection Clause may be distinctive under the Sixth Amendment).

283. See Weisberg, *supra* note 133.

284. Adv. Comm. Fall 2017, *supra* note 129, at 28; see also Adv. Comm. Spring 2018, *supra* note 129, at 236.

285. See Adv. Comm. Fall 2017, *supra* note 129, at 28; Adv. Comm. Spring 2018, *supra* note 129, at 236.

reasons support such expansion. In conjunction with the development of procedural limitations, adopting Fourteenth Amendment principles will allow the *Pena-Rodriguez* exception to grow to encompass bias based on other suspect classifications under the Equal Protection Clause without destroying the no-impeachment rule.