AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Juries and Lawyers

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Pena-Rodriguez v. Colorado, __ U.S. __ (2017)

Miguel Pena-Rodriguez was conviction in a jury trial of harassment and unlawful sexual conduct. After the trial, two jurors asked to speak with defense council in private. Those jurors alleged that during deliberations another juror had made such statements as "I think he did it because he's Mexican and Mexican men take whatever they want," and "Nine times out of ten, Mexican men were guilty of being aggressive toward woman and young girls." Pena-Rodriguez claimed that this evidence demonstrated that he was deprived of his right to an impartial jury guaranteed by the Sixth and Fourteenth Amendments. The trial court nevertheless refused defense council's motion for a new trial on the ground that jury verdicts could not be impeached under state rules of evidence. The Supreme Court of Colorado affirmed. Pena-Rodriquez appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote reversed the Supreme Court of Colorado. Justice Anthony Kennedy's majority opinion declared that the constitutional interest in preventing racial discrimination in the administration of the criminal law requiring making an exception to the longstanding rule that criminal convictions cannot be impeached by juror testimony about the reasons for a juror verdict. Justice Clarence Thomas's dissent claimed that the majority rule was inconsistent with the original intentions of the Sixth Amendment because no exception for racial bias existed at common law. Justice Samuel Alito's concurrence insists that the constitutional interest in the no-impeachment rule outweighs the constitutional interest in preventing racial bias in particular cases. The justices dispute whether other adequate safeguards exist to preventing racial bias in jury decisions. Why does Justice Kennedy think existing safeguards inadequate? Why does Justice Alito disagree? Who is correct? What is the role of the Fourteenth Amendment in each opinion? Might the Fourteenth Amendment be interpreted as creating an exemption to the no-impeachment rule? Justice Alito's opinion begins by assuming that the law clearly recognizes that a trial conviction could not be reserved after a key witness revealed to a minister, a lawyer, or a spouse that he or she had committed perjury at trial to convict a person of color. Would the majority reach that conclusion? Should the majority reach that conclusion?

Justice KENNEDY delivered the opinion of the Court.

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At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise v. Delaval* (K.B. 1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the "Iowa rule." Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule. Under this version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.

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The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted the Federal Rules of Evidence, including Rule 606(b). Congress . . . rejected the Iowa rule. Instead it endorsed a broad no-impeachment rule, with only limited exceptions.

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This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule. . . . At least 16 jurisdictions, 11 of which follow the Federal Rule, have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations. According to the parties and *amici,* only one State other than Colorado has addressed this issue and declined to recognize an exception for racial bias.

The federal courts, for their part, are governed by Federal Rule 606(b), but their interpretations deserve further comment. Various Courts of Appeals have had occasion to consider a racial bias exception and have reached different conclusions. Three have held or suggested there is a constitutional exception for evidence of racial bias. One Court of Appeals has declined to find an exception, reasoning that other safeguards inherent in the trial process suffice to protect defendants' constitutional interests. Another has suggested as much, holding in the habeas context that an exception for racial bias was not clearly established but indicating in dicta that no such exception exists. And one Court of Appeals has held that evidence of racial bias is excluded by Rule 606(b), without addressing whether the Constitution may at times demand an exception.

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In . . . *Tanner v. United States* (1987), the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial. Central to the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry." The *Tanner* Court [was concerned] that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople."

The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony. At the outset of the trial process, *voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered. Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict. Balancing these interests and safeguards against the defendant's Sixth Amendment interest in that case, the Court affirmed the exclusion of affidavits pertaining to the jury's inebriated state. *Ibid.*

The second case to consider the general issue presented here was *Warger v. Shauers* (2014). . . . As in *Tanner,* the Court put substantial reliance on existing safeguards for a fair trial. The Court stated: "Even if jurors lie in *voir dire* in a way that conceals bias, juror 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."

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It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

"[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans. To take one example, just in the years 1865 and 1866, all-white juries in Texas decided a total of 500 prosecutions of white defendants charged with killing African–Americans. All 500 were acquitted. . . .

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. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*.

The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." . . . Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State."

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Racial bias of the kind alleged in this case differs in critical ways from . . . the drug and alcohol abuse in *Tanner,* or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. " . . .

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror

reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire.* Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it."

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

For the reasons explained above, the Court now holds that where 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.

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. . . [T]he Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.

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The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

Justice THOMAS, dissenting.

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The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. . . . The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." Although partiality was a ground for setting aside a jury verdict, *ibid.*, the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. . . .

At the time of the founding, the States took mixed approaches to this issue. Many States followed Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. Some States, however, permitted juror affidavits about juror misconduct. By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. The vast majority of States adopted the no-impeachment rule as a matter of common law.

. . . Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes.

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Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples. Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.

The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.

When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

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The Court justifies its decision on the ground that the nature of the confidential communication at issue in this particular case—a clear expression of what the Court terms racial bias—is uniquely harmful to our criminal justice system. And the Court is surely correct that even a tincture of racial bias can inflict great damage on that system, which is dependent on the public's trust. But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail. The Court provides no good reason why the result in this case should not be the same.

Rules barring the admission of juror testimony to impeach a verdict (so-called "no-impeachment rules") have a long history. Indeed, they pre-date the ratification of the Constitution. They are typically traced back to *Vaise v. Delaval* (K.B. 1785), in which Lord Mansfield declined to consider an affidavit from

two jurors who claimed that the jury had reached its verdict by lot. Lord Mansfield's approach "soon took root in the United States," and "[b]y the beginning of [the 20th] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." . . .

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Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger*.

The *Tanner* petitioners were convicted of committing mail fraud and conspiring to defraud the United States. After the trial, two jurors came forward with disturbing stories of juror misconduct. One claimed that several jurors "consumed alcohol during lunch breaks . . . causing them to sleep through the afternoons." The second added that jurors also smoked marijuana and ingested cocaine during the trial. This Court held that evidence of this bacchanalia could properly be excluded under Rule 606(b).

The Court noted that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict." While there is "little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court observed, it is "not at all clear . . . that the jury system could survive such efforts to perfect it." Allowing such post-verdict inquiries would "seriously disrupt the finality of the process." It would also undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople."

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The Court identified four mechanisms that protect defendants' Sixth Amendment rights. First, jurors can be "examined during *voir dire*." Second, "during the trial the jury is observable by the court, by counsel, and by court personnel." Third, "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." And fourth, "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." These "other sources of protection of petitioners' right to a competent jury" convinced the Court that the juror testimony was properly excluded.

Warger involved a negligence suit arising from a motorcycle crash. During *voir dire,* the individual who eventually became the jury's foreperson said that she could decide the case fairly and impartially. After the jury returned a verdict in favor of the defendant, one of the jurors came forward with evidence that called into question the truthfulness of the foreperson's responses during *voir dire*. According to this juror, the foreperson revealed during the deliberations that her daughter had once caused a deadly car crash, and the foreperson expressed the belief that a lawsuit would have ruined her daughter's life. . . . The Court explained that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by" two of the other *Tanner* safeguards: pre-verdict reports by the jurors and non-juror evidence.

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Tanner and *Warger* rested on two basic propositions. First, no-impeachment rules advance crucial interests. Second, the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations. The first of these propositions applies regardless of the nature of the juror misconduct, and the Court does not argue otherwise. Instead, it contends that, in cases involving racially biased jurors, the *Tanner* safeguards are less effective and the defendant's Sixth Amendment interests are more profound. Neither argument is persuasive.

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First, the Court contends that the effectiveness of *voir dire* is questionable in cases involving racial bias because pointed questioning about racial attitudes may highlight racial issues and thereby

exacerbate prejudice. It is far from clear, however, that careful *voir dire* cannot surmount this problem. Lawyers may use questionnaires or individual questioning of prospective jurors in order to elicit frank answers that a juror might be reluctant to voice in the presence of other prospective jurors. Moreover, practice guides are replete with advice on conducting effective *voir dire* on the subject of race. They outline a variety of subtle and nuanced approaches that avoid pointed questions. And of course, if an attorney is concerned that a juror is concealing bias, a peremptory strike may be used.

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[T]he critical point for present purposes is that the effectiveness of *voir dire* is a debatable empirical proposition. Its assessment should be addressed in the process of developing federal and state evidence rules. Federal and state rulemakers can try a variety of approaches, and they can make changes in response to the insights provided by experience and research. The approach taken by today's majority—imposing a federal constitutional rule on the entire country—prevents experimentation and makes change exceedingly hard.

The majority also argues—even more cursorily—that "racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." This is so, we are told, because it is difficult to "call [another juror] a bigot."

Since the Court's decision mandates the admission of the testimony of one juror about a statement made by another juror during deliberations, what the Court must mean in making this argument is that jurors are less willing to report biased comments by fellow jurors prior to the beginning of deliberations (while they are still sitting with the biased juror) than they are after the verdict is announced and the jurors have gone home. But this is also a questionable empirical assessment, and the Court's seat-of-the-pants judgment is no better than that of those with the responsibility of drafting and adopting federal and state evidence rules. There is no question that jurors *do* report biased comments made by fellow jurors prior to the beginning of deliberations. And the Court marshals no evidence that such pre-deliberation reporting is rarer than the post-verdict variety.

Even if there is something to the distinction that the Court makes between pre- and post-verdict reporting, it is debatable whether the difference is significant enough to merit different treatment. This is especially so because post-verdict reporting is both more disruptive and may be the result of extraneous influences. A juror who is initially in the minority but is ultimately persuaded by other jurors may have second thoughts after the verdict is announced and may be angry with others on the panel who pressed for unanimity. In addition, if a verdict is unpopular with a particular juror's family, friends, employer, co-workers, or neighbors, the juror may regret his or her vote and may feel pressured to rectify what the jury has done.

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The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based. 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 by the Amendment depends on the nature of a jury's partiality or bias. . . .

It is undoubtedly true that "racial bias implicates unique historical, constitutional, and institutional concerns." But it is hard to see what that has to do with the scope of an *individual criminal defendant's* Sixth Amendment right to be judged impartially. . . . Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first

prisoner: "You are entitled to introduce the jurors' testimony, because racial bias is damaging to our society." To the second, the Court would say: "Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue."

This disparate treatment is unsupportable under the Sixth Amendment. 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.

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin or religion—would merit equal treatment. So, I think, would bias based on sex, or the exercise of the First Amendment right to freedom of expression or association. Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

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Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent.

First, as the Court explained in *Tanner*, "postverdict scrutiny of juror conduct" will inhibit "full and frank discussion in the jury room." . . . Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. . . . Where post-verdict approaches are permitted or occur, there is almost certain to be an increase in harassment, arm-twisting, and outright coercion. The majority's approach will also undermine the finality of verdicts. "Public policy requires a finality to litigation." And accusations of juror bias—which may be "raised for the first time days, weeks, or months after the verdict"—can "seriously disrupt the finality of the process."

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The Court's only response is that some jurisdictions already make an exception for racial bias, and the Court detects no signs of "a loss of juror willingness to engage in searching and candid deliberations." One wonders what sort of outward signs the Court would expect to see if jurors in these jurisdictions do not speak as freely in the jury room as their counterparts in jurisdictions with strict no-impeachment rules. Gathering and assessing evidence regarding the quality of jury deliberations in different jurisdictions would be a daunting enterprise, and the Court offers no indication that anybody has undertaken that task.

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