

## RE-FRAMING THE ‘FAIR CROSS-SECTION’ REQUIREMENT

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### ABSTRACT

*In response to the persistent under-representation of women, African Americans and other minorities on juries, the Supreme Court, in a series of celebrated decisions during the early years of the Burger Court, held that the Sixth Amendment right to a jury trial included the right to have the jury selected from a ‘fair cross-section’ of society. In light of the Equal Protection Clause’s limitations, this ‘fair cross-section’ requirement held much promise as a means of ensuring more representative juries. Yet, less than four decades later, the ‘fair cross-section’ requirement has largely come to a jurisprudential standstill.*

*Scholars have traced the stagnation of the once-promising jurisprudence in part to a doctrinal conflict created by the Court’s construction of the ‘fair cross-section’ requirement and a paradox resulting from the manner in which the Court later limited the ‘fair cross-section’ requirement. This lack of doctrinal clarity has led lower courts to largely conflate the scope of the Sixth Amendment’s ‘fair cross-section’ requirement with that of the Equal Protection Clause, reducing its value in ensuring more representative juries.*

*This Article proposes an alternate construction of the Sixth Amendment’s ‘fair cross-section’ requirement, grounding the jurisprudence in the Sixth Amendment’s vicinage clause. Such textual re-framing would be more faithful to the Framers’ understanding of representativeness. It would also resolve the doctrinal conflict and the jurisprudential paradox now constraining the ‘fair cross-section’ requirement and would revitalize the Sixth Amendment by precluding the categorical exclusions from jury service that are prevalent in many jurisdictions across the country.*

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## INTRODUCTION

The Sixth Amendment was framed in an atmosphere of intense mistrust of a potentially tyrannical government,<sup>1</sup> and each procedural right enshrined in the Sixth Amendment was seen as a critical safeguard of individual liberty. In this regard, perhaps none was more so than the right to a jury trial, interposing lay persons as necessary intermediaries in the state's exercise of its sovereign powers.<sup>2</sup>

While the fundamental right to a jury trial now is commonly understood to include a jury of one's peers, for much of the past two centuries large segments of the society were systematically precluded from serving on juries. Even after the Supreme Court rejected the categorical exclusions of women and African Americans as being contrary to equal protection principles, these segments of society continued to be significantly underrepresented on juries. Indeed, through

<sup>1</sup> See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1140 (1991) (describing the fear of Anti-Federalists that the government would be controlled by the aristocracy and would rule through corruption and force); Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 398 (1999) (“[A]ll criminal procedure rights share a common purpose—limiting the means by which government can investigate, prosecute, and punish crime.”); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 157 (2001) (“Fear of a powerful central government led the drafters to give the new government specific powers, with the idea that all other powers and functions remained with the States.”).

<sup>2</sup> See *Singer v. United States*, 380 U.S. 24, 31 (1965) (“The [jury trial] clause was clearly intended to protect the accused from oppression by the Government . . .” (citation omitted)); see also Amar, *supra* note 1, at 1183 (“Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching.”); *id.* at 1185 (“[T]he criminal petit jury could interpose itself on behalf of ‘the people’s’ rights by refusing to convict when the executive sought to trump up charges against its political critics.”); *id.* at 1186 (“Just as state legislators could protect their constituents against central oppression, so too jurors could obviously ‘interpose’ themselves against central tyranny . . .”).

much of the twentieth century it was not uncommon to have defendants tried before juries that did not have a single woman or minority juror.

In response to the persistent under-representation of women, African Americans and other minorities on juries, the Supreme Court, in a series of celebrated decisions during the early years of the Burger Court, held that the Sixth Amendment right to a jury trial included the right to have the jury selected from a 'fair cross-section' of society.<sup>3</sup> In light of the Equal Protection Clause's limitations, this 'fair cross-section' requirement held much promise as a means of ensuring more representative juries.

Yet, less than four decades later, the 'fair cross-section' requirement has largely come to a jurisprudential standstill. Scholars have traced the stagnation of the once-promising jurisprudence in part to a doctrinal conflict created by the Court's construction of the 'fair cross-section' requirement and a paradox resulting from the Court's later limitation of the 'fair cross-section' requirement. Indeed, this lack of doctrinal clarity has led lower courts to largely conflate the scope of Sixth Amendment's 'fair cross-section' requirement with that of the Equal Protection Clause.<sup>4</sup>

This Article proposes an alternate construction of the 'fair cross-section' requirement, grounding the jurisprudence in the Sixth Amendment's vicinage clause. Such textual re-framing would not only resolve the doctrinal conflict and the jurisprudential paradox now constraining the 'fair cross-section' requirement, but it would also revitalize the Sixth Amendment by precluding other categorical exclusions from jury service that are prevalent in jurisdictions across the country.

In Part I, the Article sets forth a critical analysis of the Court's 'fair cross-section' requirement, tracing the jurisprudence's development and highlighting its limitations. In Part II, this Article discusses the vicinage clause of the Sixth Amendment and its capacity to resolve the doctrinal problems created by the Court's current construction of the 'fair cross-section' requirement. Within the context of this discussion, the Article demonstrates how such a textual re-framing would best reflect the Framers' understanding of representativeness. Finally, in Part III, the Article examines the implications of the textual re-framing of the 'fair cross-section' requirement, including its

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<sup>3</sup> See *infra* Part I.B.

<sup>4</sup> See *infra* Part I.C.

impact on state practices that continue to categorically exclude certain sections of the community from serving on juries.

### I. THE SUPREME COURT'S 'FAIR CROSS-SECTION' JURISPRUDENCE

For much of the past two centuries, large segments of the society were systematically precluded from serving on juries. As discussed in Part I.A., this exclusion continued largely unabated despite the Court's repeated admonitions, beginning in 1880, that race-based exclusions contravened the Fourteenth Amendment's Equal Protection Clause. It was in the context of the limitation of the equal protection jurisprudence that the Court articulated an independent constitutional basis for addressing continuing systemic under-representation of large segments of the community on juries. As discussed in Part I.B., the Court interpreted the Sixth Amendment's right to an impartial jury as requiring that the venire from which the jury is selected represent a 'fair cross-section' of the community.

The Court's 'fair cross-section' jurisprudence, however, has proven problematic. As discussed in Part I.C., the Court's current approach has been paradoxical in terms of its inapplicability to the seated jury, has conflicted with the Court's jurisprudence regarding non-discrimination in the exercise of peremptory strikes, and has entangled the Sixth Amendment with the Fourteenth Amendment's Equal Protection Clause. Given the lack of doctrinal clarity, it is not surprising that the 'fair cross-section' requirement has largely stagnated over the years.

#### A. *The Systematic Exclusion of Minorities from Jury Service*

During the common law, women were barred from juries, a discriminatory practice traced in part back to "Blackstone's pronouncement that women were ineligible for jury service due to *propter defectum sexus*, a 'defect of sex.'"<sup>5</sup> The exclusion of women continued in the various states after the Founding and was expanded to include

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<sup>5</sup> See Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 16 (2000) (discussing the history of women's jury service in America (citing LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* (1998))); Charlan Nemeth, Jeffrey Endicott & Joel Wachtler, *From the '50s to the '70s: Women in Jury Deliberations*, 39 SOCIOLOGY 293, 293-94 (1976) (describing that the "tendency to question the female's intellectual capabilities for jury service dates at least to the 18th century, when Blackstone maintained that women were excluded '*propter defectum sexus*'").

slaves.<sup>6</sup> Nor was the exclusion of African Americans limited to slaves—during the “antebellum period, blacks were excluded from jury service in all southern and most northern states.”<sup>7</sup> Exclusion from jury service was also prevalent in the Midwest and West. African Americans residing in Illinois, Indiana, Iowa, and Oregon in the 1850s, for example, were barred from serving on juries.<sup>8</sup>

While some African Americans apparently were permitted to serve on juries just prior to the Civil War,<sup>9</sup> for the most part the systematic exclusion of African Americans continued through the years immediately following the Civil War. Many southern states continued to bar black jury service by statute during the period between 1865 and 1866<sup>10</sup> and “[m]any northern Republicans in 1866 continued to resist the extension to blacks of . . . equal political rights, such as . . . jury service.”<sup>11</sup>

The ratification of the Fourteenth Amendment in 1868 did not directly change this discriminatory exclusion from jury service, perhaps because it was not seen at the time as applying to jury service.<sup>12</sup> As such, for almost a century after the Founding, the community judgment reflected in a jury’s verdict was one in which the voices of women and African Americans had been silenced.

The years after the Civil War witnessed the first opportunities for women to serve on juries. In a development that drew international attention, women were briefly permitted to serve on juries in the Wyoming Territory beginning in 1870.<sup>13</sup> Women served on juries in

6 See Nemeth, Endicott & Wachtler, *supra* note 5, at 293 (“The States, however, added another category of their own for exclusion—the slaves.”).

7 Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 370 (1998).

8 See Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1889 (1995) (describing hostility towards blacks in the Midwest during the 1850s).

9 See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884–85 (1994) (discussing jury service by two African Americans in Massachusetts in 1860).

10 See Klarman, *supra* note 7, at 370–71 (noting that many states continued to bar black jury service during the antebellum period).

11 *Id.* at 325.

12 See Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 238 (1991) (“It is unclear whether the Reconstruction amendments’ drafters intended to prohibit racial discrimination in jury service, as they plainly did with regard to property ownership and voting . . .”).

13 See Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 263 (1986) (explaining that “women’s admission to jury duty came after a long struggle”); see also Alschuler & Deiss, *supra* note 9, at 898 (“The first jury service by women in America . . . occurred in the Wyoming Territory in 1870.”).

Washington Territory in 1884 and in Utah beginning in 1898.<sup>14</sup> These instances of women serving on juries, however, were the exception rather than the rule, with the systematic exclusion of women from juries continuing across the country for many more decades.<sup>15</sup>

This same period following the Civil War also witnessed increased opportunities for African Americans to serve on juries. Although the first decade of Reconstruction did not see meaningful changes in the discriminatory exclusion of African Americans from jury service,<sup>16</sup> it did witness “extraordinary changes in American racial attitudes and practices. Slavery was abolished. . . . The Reconstruction Act of 1867 and the Fifteenth Amendment enfranchised blacks for the first time in most of the nation. . . . In the South, blacks turned out to vote in extraordinary numbers, returning hundreds of black officeholders.”<sup>17</sup>

With the passage of the 1875 Civil Rights Act<sup>18</sup> prohibiting race-based discrimination in jury service, things began to change.<sup>19</sup> Enfranchised African Americans “used their political power to secure both state and federal statutes forbidding race-based exclusions from jury service.”<sup>20</sup> Moreover, “Republican attitudes toward black jury service changed over the course of Reconstruction.”<sup>21</sup>

As a result, southern blacks served on juries in large numbers well into the 1880s, especially in counties with substantial black populations.<sup>22</sup> And while African Americans continued to be barred from jury service in former slave states where the African American popula-

14 See Abrahamson, *supra* note 13, at 263–64 (explaining that “Washington Territory had women jurors during 1884” and that “in 1898 Utah became the first state to permit women to serve on juries”).

15 In the Wyoming Territory, for example, women were once again barred from jury service in 1871. See *id.* at 263 (“For a short time, from March 1870 to September 1871, the Territory of Wyoming provided that women could serve on juries.”).

16 This is not to say that no African Americans served on juries during the first decade of Reconstruction. On the contrary, African Americans, for example, began to serve on juries in South Carolina in 1867. See Alschuler & Deiss, *supra* note 9, at 886 (stating that “[d]uring Reconstruction, African-Americans in some jurisdictions regularly served on juries”).

17 Klarman, *supra* note 7, at 307. Moreover, “Republican attitudes toward black jury service changed over the course of Reconstruction.” *Id.* at 372.

18 Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (“That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude . . .”).

19 See Klarman, *supra* note 12, at 238 (“[I]t was the 1875 Civil Rights Act . . . that authorized judicial invalidation of racial jury exclusions.”).

20 Klarman, *supra* note 7, at 371.

21 *Id.* at 372.

22 See *id.* at 371 (recognizing that in southern counties with high black populations, many blacks served on juries).

tion was not large enough to produce Republican state control—Maryland, Kentucky, West Virginia—the discriminatory practices ended there, too, after the trilogy of decisions by the Supreme Court in 1880 confirming the validity of the Civil Rights Act of 1875, “as well as the broader constitutional imperative of race neutrality in jury selection.”<sup>23</sup>

The end of Reconstruction and the ensuing disfranchisement of African Americans in the South,<sup>24</sup> however, “facilitated the exclusion of blacks from juries.”<sup>25</sup> “Black jury service, conceived to be a form of political officeholding, was even more anathema to most southern whites than was black voting . . . [and] blacks became noticeably less present on southern juries by the late 1880s and generally disappeared in the 1890s.”<sup>26</sup> This exclusion of African Americans from jury service in the South continued through the first three decades of the twentieth century.<sup>27</sup>

Women, likewise, continued to be largely excluded from jury service through the first three decades of the twentieth century. While women gained the right to serve on juries in several states after the

<sup>23</sup> See *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (citing *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880)); *Ex parte Virginia*, 100 U.S. 339 (1880); *Virginia v. Rives*, 100 U.S. 313, 321 (1880); see also Klarman, *supra* note 7, at 370–71 (discussing how “state law continued to bar black jury service until the Supreme Court intervened in 1880”).

<sup>24</sup> “While a southern black had sat in every U.S. House of Representatives but one between 1869 and 1901, not another would be elected from 1901 until 1972. Blacks sat in significant numbers in southern state legislatures through the 1880s, but none was elected to the Virginia legislature after 1891, the Mississippi legislature after 1895, or the South Carolina legislature after 1902.” Klarman, *supra* note 7, at 374.

<sup>25</sup> *Id.* at 358. “By the late 1880s southern race relations had commenced a long downward spiral. The annual number of black lynchings rose dramatically, peaking early in the 1890s. . . . Blacks largely had disappeared from southern juries by around 1890 . . .” *Id.* at 309.

<sup>26</sup> *Id.* at 371.

“Booker T. Washington observed at the end of the nineteenth century, ‘In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts.’ A 1910 study found that African-Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia—and that they never served in Alabama and Georgia.”

Alschuler & Deiss, *supra* note 9, at 894–95.

<sup>27</sup> See Klarman, *supra* note 7, at 371, 407 (“Through the first three decades of the twentieth century, essentially no blacks sat on southern juries.”); see also Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1280 (2000) (“At the end of the nineteenth century, systematic exclusion of African Americans was still commonplace, particularly in the South. Indeed, through the first half of the twentieth century, state courts used systems such as color-coding of tickets placed in the jury selection box in order to separate white jurors from jurors of color.”).

ratification of the Nineteenth Amendment in 1920, the majority of states still barred women from jury service.<sup>28</sup>

This systematic exclusion of African Americans and women continued largely unabated for decades notwithstanding the Supreme Court's recognition, beginning with the trilogy of decisions in 1880,<sup>29</sup> that the Fourteenth Amendment prohibited such exclusions on the grounds of race. This can be traced in no small part to the Court's equal protection jurisprudence itself. While the Supreme Court "heard about ten cases in which southern black defendants sought to overturn their criminal convictions on the ground that members of their race had been systematically excluded from jury service,"<sup>30</sup> in rejecting nearly all these challenges,<sup>31</sup> the Court "impos[ed] stringent standards of proof on defendants alleging race discrimination in jury selection and announc[ed] a broad rule of deference to state court findings on the question of discrimination."<sup>32</sup>

These restrictions permitted

[s]outhern states [to] easily evade[] the *Strauder* right through the fraudulent exercise of administrative discretion in the selection of jurors. By refusing to presume unconstitutional motivation on the part of state administrative officials, to infer discriminatory motive from disparate impact, or to closely scrutinize state court findings of fact, the Court effectively invited nullification of the right.<sup>33</sup>

So while the Court repeatedly reaffirmed that systematic exclusions from jury service on the grounds of race violated the Equal Protection Clause, it "largely nullified *Strauder* by making such discrimination virtually impossible to prove."<sup>34</sup>

The inefficacy of the Court's equal protection jurisprudence was demonstrated by its decision in *Hoyt v. Florida*.<sup>35</sup> The Court was faced with a Florida statute that automatically exempted women from jury service, allowing women to serve on juries only if they called in to the clerk's office and indicated their desire to be placed on the jury list.<sup>36</sup>

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28 See Abrahamson, *supra* note 13, at 264 (explaining that upon ratification of the Nineteenth Amendment, women became eligible to serve on juries in several states but not in most).

29 The trilogy of decisions included *Strauder v. Virginia*, 100 U.S. 303 (1879).

30 Klarman, *supra* note 7, at 304.

31 The Court granted relief "[o]nly on the rare occasions when state officials admitted the deliberate exclusion of blacks from juries or when state courts refused black defendants the opportunity to present evidence of race discrimination in jury selection." *Id.*

32 *Id.*

33 *Id.* at 407.

34 *Id.* at 376.

35 368 U.S. 57 (1961).

36 See *id.* at 58 (discussing a Florida statute which actively required women to register as potential jurors).

In holding that the state's opt-in statute was constitutional, the Court found that it was reasonable for the state to enact different legislation for women because they are "still regarded as the center of home and family life."<sup>37</sup>

### B. *Development of the 'Fair Cross-Section' Requirement*

The Sixth Amendment, proposed by James Madison in 1789 and ratified in 1791,<sup>38</sup> mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."<sup>39</sup> Yet, despite the broad reach of the right to jury trial, for over a century after the Sixth Amendment's ratification the Supreme Court did not issue a single opinion concerning this right.<sup>40</sup>

The dearth of decisions during this period is not surprising. Since most crimes were prosecuted by states to whom the Bill of Rights did not apply at the time,<sup>41</sup> and since there was a significant limitation on a defendant's ability to challenge a federal conviction,<sup>42</sup> there was little occasion for the Court to interpret the Sixth Amendment right to a jury trial. This was true even during the Reconstruction Era despite

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<sup>37</sup> *Id.* at 61–62.

<sup>38</sup> See Penny J. White, "He Said," "She Said," and Issues of Life and Death: *The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 397 n.46 (2007) (describing the history of the Sixth Amendment and the development of its language).

<sup>39</sup> U.S. CONST. amend. VI.

<sup>40</sup> See Jonathan F. Mitchell, Apprendi's *Domain*, 2006 SUP. CT. REV. 297, 342 (2006) ("[T]here was very little case law interpreting the Sixth Amendment in the eighteenth and nineteenth centuries . . .").

<sup>41</sup> See *Barron ex rel. Tiernan v. Mayor of Balt.*, 32 U.S. 243, 250–51 (1833) (holding that the Fifth Amendment only limits the federal government and is not applicable to state governments). There were also significant procedural hurdles preventing state court defendants from using collateral proceedings to appeal to the Supreme Court. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465 (1963) ("[U]ntil 1867 (and with exceptions not relevant here) there was no federal habeas jurisdiction to inquire into detentions pursuant to state law. Further, even after the act of 1867 established such a jurisdiction, the Supreme Court could make no pronouncements in cases of state detention because the Court's appellate jurisdiction under the act of 1867 was removed in 1868 and not reestablished until 1885. Thus during the first century of the Constitution the Court had no occasion to deal with the scope of the habeas jurisdiction for state prisoners." (footnotes omitted)).

<sup>42</sup> See Bator, *supra* note 41, at 473 n.75 ("Until 1889 federal criminal cases were reviewable by the Supreme Court only when there was a division of opinion in the circuit court on a question of law." (citations omitted)).

the enactment of a statute geared at expanding state defendants' access to federal courts.<sup>43</sup>

It was in the post-Reconstruction Era that the Court first dealt with the right to a jury trial. Interestingly, in contrast to the broad mandate of the Sixth Amendment that defendants in "all" criminal prosecutions be provided the right to a jury trial, the Court's first foray in this area involved a restrictive reading of the right. In a series of decisions towards the end of the nineteenth century, the Court circumscribed the scope of the right to a jury trial, finding that the right did not extend to the trial of petty crimes.<sup>44</sup>

The Court's restrictive approach to the scope of the right to a jury trial continued over the next century. For instance, when the Court incorporated the right to a jury trial, it held that the right applied only to trials of non-petty crimes.<sup>45</sup> And while the Court subsequently read the right to a jury trial to include criminal contempt proceedings, it excluded "petty" contempt proceedings<sup>46</sup> and contempt pro-

<sup>43</sup> See *id.* at 478–83 (discussing the early cases involving habeas corpus jurisdiction for state prisoners); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2337–38 (1993) ("[O]ne of the most significant enactments of the Reconstruction era, the Habeas Corpus Act of 1867, extended that jurisdiction to cases in which petitioners charged they were unlawfully detained by state officials . . . . In the wake of Reconstruction, habeas helped shape the relations between the federal government and the states." (footnotes omitted)); *id.* at 2339–40 ("Still, as late as the notorious Leo Frank case, *Frank v. Mangum*, the Court repeated the confused boilerplate that had attached itself to the writ over the preceding century . . . [and] federal habeas was open only if the state court had exceeded its jurisdiction—if it had ceased to act as a court.").

<sup>44</sup> See generally *District of Columbia v. Clawans*, 300 U.S. 617 (1937) (stating that only major offenses are entitled to a jury trial); *Schick v. United States*, 195 U.S. 65 (1904) (noting that there is no constitutional right to a jury for the trial of a petty offense); *Natal v. Louisiana*, 139 U.S. 621 (1891) (holding that petty offenses may be punished without trial by jury); *Callan v. Wilson*, 127 U.S. 540 (1888) (finding that the right to a trial by jury does not extend to all classes of misdemeanors).

<sup>45</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) ("[W]e hold no constitutional doubts about the practices common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial." (footnote omitted)). The Burger and Rehnquist Courts reaffirmed this reading of the right to jury trial. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 545 (1989) (holding that any offense, even one deemed "serious" like a DUI, is still "petty" if the authorized maximum sentence is six months or less); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (holding that no offense can be labeled "petty" if more than a six-month sentence is authorized). While the Supreme Court has not expressly incorporated the vicinage clause, its incorporation is implicit in these cases. Moreover, even if one were to argue that the vicinage clause has heretofore not been incorporated, its central role in the adoption of the Sixth Amendment, see *infra* Section II, would require its incorporation.

<sup>46</sup> See *Bloom v. Illinois*, 391 U.S. 194, 210 (1968) ("[T]he guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses."); see also *Frank v. United States*, 395 U.S. 147, 149–50 (1969) (holding that there is no right to a jury trial for criminal contempt proceedings where the actual sentence imposed was less than six

ceedings where the sentences imposed were subsequently reduced to the equivalent of a single term of six months.<sup>47</sup> The Court also found that the right did not apply to probation revocation hearings<sup>48</sup> or juvenile court proceedings.<sup>49</sup>

The Court's restrictive reading of the scope of the right to a jury trial mirrored its restrictive reading of the size and function of the jury. In particular, despite the long-standing understanding that the right to a jury trial meant the right to a unanimous jury verdict,<sup>50</sup> the Court held that this unanimity requirement was not applicable to state prosecutions.<sup>51</sup> Similarly, the Court held that while a twelve-person jury was required in federal prosecutions, juries in state prosecutions could be composed of fewer than twelve persons.<sup>52</sup>

In contrast to these restrictive decisions concerning the scope, size, and function of juries, the Court has been comparatively more zealous in ensuring the proper composition of juries. The Court not only has mandated race-based questions in some criminal cases and prohibited discrimination in the exercise of peremptory strikes during jury selection, but, as discussed below, the Court has also required that the venire from which the jury is selected represent a 'fair cross-section' of the community.

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months). The Court's extension of the right to jury trial to criminal contempt proceedings, while constituting an expansive reading of the right to a jury trial, undermined civil rights advancements by providing that these cases be tried before juries that would not convict whites instead of allowing convictions by judges. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 137 (1994) (recognizing that southern white juries tended to acquit whites).

47 See *Taylor v. Hayes*, 418 U.S. 488, 495–96 (1974) (“Although petitioner was ultimately found guilty and sentenced separately on eight counts of contempt, the sentences were to run concurrently and were . . . equivalent to a single sentence of six months. The eight contempts . . . thus constituted petty offenses, and trial by jury was not required.”).

48 *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984).

49 *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

50 See *Andres v. United States*, 333 U.S. 740, 748 (1948) (“Unanimity in jury verdicts is required where the Sixth . . . Amendment appl[ies].”).

51 *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972).

52 *Williams v. Florida*, 399 U.S. 78, 86–103 (1970). In a series of subsequent decisions, the Court set forth the Due Process limitations on jury size and unanimity in state prosecutions. In particular, the Court subsequently held that juries in state courts must be comprised of a minimum of six persons. See *Ballew v. Georgia*, 435 U.S. 223 (1978), and that non-unanimous verdicts in state prosecutions would be unconstitutional if they were the product of six-person juries, see *Burch v. Louisiana*, 441 U.S. 130, 134–39 (1979) (holding that a conviction by a non-unanimous six-person jury in a state criminal trial for a non-petty offense violates the right of an accused to trial by jury guaranteed by the Sixth and Fourteenth Amendments). Therefore, while both 9-3 and 5-1 jury verdicts are unconstitutional in federal prosecutions, only the latter are unconstitutional in state prosecutions.

In the 1940s, the Court began to focus on the representativeness of juries.<sup>53</sup> While analyzing the petitioner's challenge in *Smith v. Texas* under the Equal Protection Clause, the Court held that "juries as instruments of public justice . . . [should] be a body truly representative of the community."<sup>54</sup>

Two years after this "true landmark case in the advancement of the fair cross-section requirement,"<sup>55</sup> the Court grounded the notion of representativeness in the Sixth Amendment and used the phrase "cross section" for the first time in *Glasser v. United States*.<sup>56</sup> In *Glasser*, the Court held that jury commissioners responsible for picking the venire could not use their discretion in a way that did not "comport with the concept of the jury as a cross-section of the community."<sup>57</sup> Sowing the seeds for the future entanglement of the Jury Trial Clause, the Court held that a 'fair cross-section' was necessary to ensure an impartial jury.<sup>58</sup> Although finding that the defendant had failed to prove his case, the Court held "that those responsible for compiling federal jury lists could not limit their search to discrete groups."<sup>59</sup>

In the following years, the Court used its supervisory power to strike down two methods for assembling venires. In *Thiel v. Southern Pacific Co.*, the Court reversed a defense verdict in a civil action where the jury commissioner and court clerk excluded daily wage earners from the venire.<sup>60</sup> The *Thiel* Court employed the "cross section" language from *Glasser*, finding that excluding wage earners from the potential jury would "breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."<sup>61</sup>

The Court also employed its supervisory power to overturn a criminal conviction in the case of *Ballard v. United States*, where women

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53 See generally Martha Craig Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 3 (1975) (discussing the history of the Supreme Court's review of jury-selection cases).

54 311 U.S. 128, 130 (1940).

55 Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 335 (2005).

56 315 U.S. 60, 86 (1942).

57 *Id.*

58 See *id.* (explaining that a jury representative of the community is required for the jury system to function properly).

59 Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO L.J. 945, 952-53 (1998) (citing *Glasser*, 315 U.S. at 86).

60 See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 221, 225 (1946).

61 *Id.* at 224.

were systematically excluded from the jury pool.<sup>62</sup> Equally important to the decision to strike down the challenged system was the language Justice Douglas used in his majority opinion:

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.<sup>63</sup>

*Glasser*, *Thiel*, and *Ballard* established several important principles. First, the Court in *Glasser* found that representative juries were not only essential to promote representative government, but they also were linked with a defendant's Sixth Amendment right.<sup>64</sup> Second, these opinions embraced both the concept of inclusion and nondiscrimination.<sup>65</sup> The concern for inclusion recognizes that "those eligible for jury service are to be found in every stratum of society"<sup>66</sup> and that "competence is an individual rather than a group or class matter."<sup>67</sup> Third, these decisions, at least implicitly, embodied the notion that certain groups may influence the outcome of a trial, and that representativeness, therefore, is necessary to ensure an impartial jury.<sup>68</sup>

These developments laid the groundwork for *Taylor v. Louisiana*, where the Court used the cross-section language of the Sixth Amendment to strike down Louisiana's method for choosing a venire.<sup>69</sup> Less than fifteen years after it had rejected Equal Protection challenges to a similar statute,<sup>70</sup> the Court confronted a Louisiana statute that automatically excluded women from being summoned for

62 *Ballard v. United States*, 329 U.S. 187, 195–96 (1946) (stating that excluding women from jury panels may be highly prejudicial).

63 *Id.* at 193–94.

64 See Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 108 (1996) (recognizing that the Sixth Amendment required representative juries (citing *Glasser v. United States*, 315 U.S. 60, 85 (1942))).

65 See Leipold, *supra* note 59, at 954 (discussing the Court's use of non-discriminatory, inclusive language in *Ballard*, *Glasser*, and *Thiel*).

66 *Id.* (quoting *Thiel*, 328 U.S. at 220).

67 *Id.* (quoting *Thiel*, 328 U.S. at 220).

68 See *id.* at 955 ("Far more than in some later cases, the Court felt free to acknowledge the risks and probability that some group members—by nature of their gender or economic class—would be biased in favor of or prejudiced against certain defendants.").

69 See *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) ("We are also persuaded that the fair cross-section requirement is violated . . . here . . .").

70 See *supra* text accompanying notes 35–37 (discussing *Hoyt v. Florida*, 368 U.S. 57 (1961)).

jury service unless they filed a declaration of their desire to serve; men, on the other hand, did not have to go through a similar procedure.<sup>71</sup> As a result of Louisiana's "opt-in" system, only 10% of the 53% of otherwise eligible women were called to serve at the defendant's trial.<sup>72</sup> Writing for the majority, Justice White phrased the issue as being one about "whether the presence of a 'fair cross-section' of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an *impartial jury* in criminal prosecutions."<sup>73</sup>

Eight members of the Court agreed 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."<sup>74</sup> The Court found that the purposes of the jury were lost by a process that failed to comport with the cross-section requirement: (1) to "guard against the exercise of arbitrary power;" (2) to preserve "public confidence in the fairness of the criminal justice system;"<sup>75</sup> and (3) to uphold that the ideal that "sharing in the administration of justice is a phase of civic responsibility."<sup>76</sup> The Court also relied on the language in *Ballard*, where Justice Douglas had stated that "a flavor, a distinct quality is lost if either sex is excluded."<sup>77</sup>

Four years after *Taylor v. Louisiana*, the Court struck a state "opt-out" system for selection of the jury venire in *Duren v. Missouri*.<sup>78</sup> In contrast to Louisiana's statute that had automatically exempted women unless they opted-in to jury service, the Missouri statute included all women in jury service pools, but allowed any woman who sought to do so, the right to automatically be exempted from jury service. In rejecting this "opt-out" scheme, the Court in *Duren* enunciated the test for establishing a 'fair cross-section' violation. First, the defendant must first make a prima facie case, demonstrating three facts: (1) the alleged exclusion affects a "distinctive group;" (2) the number of members from the group is unreasonable in proportion to the number in the community; and (3) the underrepresentation is the result of "systematic exclusion."<sup>79</sup> Unlike the equal protection test,

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71 See *Taylor*, 419 U.S. at 531.

72 *Id.*

73 *Id.* at 526 (emphasis added).

74 *Id.* at 528.

75 *Id.* at 530.

76 *Id.* at 531 (Frankfurter, J., dissenting) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946)).

77 *Id.* at 532 (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)).

78 439 U.S. 357 (1979).

79 *Id.* at 364.

the defendant need not show that the under-representation was the result of purposeful discrimination. Second, if the defendant successfully makes out a prima facie case, then the state must show that the exclusion serves a "significant state interest."<sup>80</sup>

Thus, after almost two centuries of continuing under-representation of women, African Americans and other minorities on juries, and less than fifteen years after the Court had rejected equal protection challenges to state opt-in statutes, the Burger Court identified a new jurisprudential basis for ensuring that juries did indeed function as voices of the whole community. No longer restricted by the demanding burdens of equal protection analysis, the Court's 'fair cross-section' jurisprudence held much hope for ending the systematic exclusion of women, African Americans, and other minorities from jury service.

### C. *Limitations of the Court's 'Fair Cross-Section' Jurisprudence*

The Court's 'fair cross-section' jurisprudence has since failed to live up to its promise. In part this has been due to the Court's curtailment of the scope of this jurisprudence, the creation of a doctrinal paradox, and the lower courts' conflation of it with the Court's equal protection jurisprudence. As discussed below, these developments have led, not surprisingly, to a largely inefficacious jurisprudence.

Consider first the Court's curtailment of the scope of the 'fair cross-section' requirement. As discussed above, the 'fair cross-section' grew out of the historical failure of the Court to prevent the systematic under-representation of women, African Americans, and other minorities on juries. One might have expected, therefore, that the 'fair cross-section' jurisprudence would apply to under-representation on the seated jury—whether the petit jury or the grand jury. Instead, the Rehnquist Court subsequently held that this 'fair cross-section' requirement is limited to the venire from which the jury is selected; it does not extend to the actual seated jury.<sup>81</sup> The fallacy of this approach is revealed by the fact that it calls into question the textual basis for the 'fair cross-section' jurisprudence: After

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80 *Id.* at 367. After the writing of this article, the United States Supreme Court decided *Berghuis v. Smith*, 130 S.Ct. 1382 (2010), reversing the lower court's decision granting relief to a defendant on a 'fair cross-section' claim. In deeming reasonable the Michigan Supreme Court's determination that the defendant had failed to establish a prima facie violation of the Sixth Amendment 'fair cross-section' requirement, the Supreme Court reaffirmed its approach in *Taylor v. Louisiana* and *Duren v. Missouri*. *See id.* at 387–88.

81 *See Holland v. Illinois*, 493 U.S. 474 (1990).

all, the Sixth Amendment gives defendants the right to an “impartial jury,” not the right to an “impartial jury venire.”

Consider next, the doctrinal paradox that has arisen between the ‘fair cross-section’ jurisprudence and the Court’s jurisprudence regarding discrimination in jury selection. The Court in *Taylor* had grounded the cross-section requirement in the “impartial jury” guarantee of the Sixth Amendment, drawing on the notion that “different groups of jurors can view exactly the same evidence and reach different conclusions, *and* that these different outcomes are correlated to the jurors’ race or gender.”<sup>82</sup> In doing so, the Court cited its earlier opinion in *Ballard* for the proposition that “a flavor, a distinct quality is lost if either sex is excluded.”<sup>83</sup>

The Court’s “flavors” rationale was mocked by Justice Rehnquist in dissent. He characterized the Court’s rationale as “smack[ing] more of mysticism than of law.”<sup>84</sup> He also argued that whatever merit the Court’s rationale had, it was undermined by the Court’s inconsistent application of the rationale by not extending it to the exclusion of groups such as lawyers and doctors, groups that might fairly be characterized as bringing “distinct flavors” to deliberations.

The criticisms levied by Justice Rehnquist in dissent in *Taylor* were accentuated by the Court’s later decision in *Batson v. Kentucky*.<sup>85</sup> In a case involving the use of peremptory challenges during jury selection, the Court affirmed that the Equal Protection Clause prohibits the exercise of such challenges on the basis of race, and eased the showing necessary to establish such claims.<sup>86</sup> As Professor Muller has noted, the Court’s rationale in *Batson* is fundamentally inconsistent with the rationale underlying the ‘fair cross-section’ requirement.<sup>87</sup> After all, if potential jurors cannot be excluded on the basis of race and gender because those characteristics bring distinct “flavors” and perspectives

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82 Leipold, *supra* note 59, at 964.

83 *Taylor*, 419 U.S. at 532 (citation omitted).

84 *Id.* at 542 (Rehnquist, J., dissenting). Justice Rehnquist also argued that the weakness of the Court’s rationale was exposed by its apparent limitation of the ‘fair cross-section’ requirement to jury venires and its apparent inapplicability to groups such as lawyers and doctors. *Id.*

85 *See Batson v. Kentucky*, 476 U.S. 79 (1986). The Court subsequently held that the rationale of its decision in *Batson* extended to peremptory strikes exercised on the basis of gender. *See J.E.B. v. Alabama*, 511 U.S. 127 (1994).

86 *See Batson*, 476 U.S. at 89 (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . .”).

87 *See Eric L. Muller, Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 93–96 (1996) (critiquing *Batson* for presenting a remedy for a violation which, though resulting in equal protection harms, does not affect the reliability of the verdict).

to deliberations, then why should parties to litigation not be able to exclude such distinct perspectives?

Finally consider the conflation of the 'fair cross-section' jurisprudence with equal protection principles. As the *Duren* opinion lays bare, the cross-section test borrowed heavily from the Court's Equal Protection Clause doctrine. Not surprisingly, over time courts have largely conflated the scope of the Cross-Section Clause with the Equal Protection Clause.<sup>88</sup> Specifically, lower courts have treated the "distinct group" requirement of the cross-section requirement as identical to the "suspect class" requirement of the Fourteenth Amendment.<sup>89</sup> While this has made the Sixth Amendment a useful tool in combating some discrimination,<sup>90</sup> conflating "distinctiveness" with "suspect classification" has led lower courts to find that the following groups are not protected by the cross-section requirement: "[Y]oung people,

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88 Leipold, *supra* note 59, at 972 ("In fact, the cross-section and equal protection cases significantly overlap; groups have successfully challenged selection practices under either or both theories.").

89 See Zuklie, *supra* note 64, at 132 ("A . . . major flaw in the discrimination analysis is that it conflates two distinct inquiries: '[D]istinctiveness' under the Sixth Amendment with 'suspectness' under the Due Process Clause of the Fourteenth Amendment." (citation omitted)); see also Leipold, *supra* note 59, at 969 ("[C]ourts routinely limit the application of the cross-section requirement to groups that already receive heightened protection under the Equal Protection Clause."); Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1057-61 (1978) (noting the various ways lower courts have limited the protection of groups under the cross-section doctrine); Zuklie, *supra* note 64, at 103 ("It appears that courts lack a clear understanding of what the distinctiveness test aims to accomplish, and that they have collapsed their analysis of group distinctiveness into a single inquiry—whether members of the group are victims of general societal discrimination.").

90 See Leipold, *supra* note 59, at 967 ("[T]oday no state procedure intentionally and systematically excludes women or religious, racial, or ethnic minorities."). It bears noting that while it appears to be less onerous to prove a violation of the 'fair cross-section' requirement than an equal protection violation because the former does not require a showing of discriminatory intent, Sixth Amendment claims have not been more successful. See John P. Bueker, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 400 (1997) ("In theory, it also makes it easier for a defendant to succeed in challenging a jury selection system on Sixth Amendment grounds. In practice, however, Sixth Amendment challenges are more common, but not more successful." (citations omitted)). In part this is because, while it might be easier to establish a prima facie case that the 'fair cross-section' right has been violated, it is easier for the state to rebut a Sixth Amendment violation than it is for it to rebut an equal protection claim. To defeat a prima facie equal protection claim, the government must show that a "compelling" interest is advanced, but to defeat a prima facie 'fair cross-section' claim, the government need only show that "significant state interest[s] are manifestly and primarily advanced." Leipold, *supra* note 59, at 974 (quoting *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979)). For this reason, winning on a 'fair cross-section' claim is not necessarily easier than winning on an Equal Protection claim. *Id.* at 974 ("The point is simply that prevailing on a fair cross-section challenge is not obviously or substantially easier than proving an equal protection claim." (citation omitted)).

old people, poor people, deaf people, less educated people, college students, resident aliens, blue-collar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis.”<sup>91</sup> These groups were found to be not distinct because they do not have unique “flavors”—that is, their life experiences are not so unique as to make them prone to interpret evidence in a manner that is different from how other “distinct” groups might view that evidence. As a result, because ‘fair cross-section’ jurisprudence “adds little to the equal protection commands already in place, the Sixth Amendment innovation has withered, while the *Batson* line continues to grow and thrive.”<sup>92</sup>

The circumscribed scope of the ‘fair cross-section’ requirement, the doctrinal conflict with the *Batson* line of cases and the conflation with Equal Protection jurisprudence have led to a largely inefficacious jurisprudence.<sup>93</sup> Over the three decades since *Taylor v. Louisiana*, defendants have had little success in federal courts raising Sixth Amendment claims that the juries in their cases were selected from venires that did not reflect a ‘fair cross-section’ of the community.<sup>94</sup> The same has been true for claims raised in state courts across the country.<sup>95</sup> The limited efficacy of the ‘fair cross-section’ jurisprudence can be traced to its entanglement with the equal protection principles in that the “cognizable groups” element of the Sixth Amendment analysis has been largely equated by federal courts to the suspect and quasi-suspect classifications in equal protection analysis, rendering the ‘fair cross-section’ of limited utility in challenging underrepresentation of other classes in society.<sup>96</sup> State courts, too, have similarly conflated the “cognizable groups” element of the Sixth Amendment analysis and the suspect and quasi-suspect classifications in equal protection analysis.<sup>97</sup> Finally, reflecting the failure of the ‘fair cross-section’ jurisprudence to meaningfully depart from the

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91 Leipold, *supra* note 59, at 968–69 (citations omitted); *see also Sixth Amendment at Trial*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 516, 525 n.1648 (2007) (noting that convicted felons, persons charged with felonies, and persons with last names beginning with letters W through Z are not cognizable groups).

92 Leipold, *supra* note 59, at 993.

93 *See id.* at 950 (“[I]t lacks a solid intellectual foundation.”); *id.* at 960 (“Unfortunately, the articulated rationale for the [cross-section] doctrine leaves much to be desired.”).

94 *See* Sanjay K. Chhablani, *The Failed Legacy of the Fair Cross Section Requirement* (on file with author) (surveying federal cases where relief for ‘fair cross-section’ claims have been denied).

95 *See id.* (demonstrating the lack of success of ‘fair cross-section’ claims in state court).

96 *See id.*

97 *See id.*

onerous showings necessary to establish equal protection violations, defendants have rarely prevailed in even those cases where federal courts have recognized claims based on non-suspect classifications.<sup>98</sup> Likewise, defendants have rarely prevailed in state courts even where those courts have recognized claims based on non-suspect classifications.<sup>99</sup>

## II. THE SIXTH AMENDMENT'S VICINAGE CLAUSE

The right to a jury trial is a unique constitutional right, proscribed by both the unamended Constitution and the Bill of Rights. Article III, Section 2 provides that “the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said crimes shall have been committed.”<sup>100</sup> The Sixth Amendment, on the other hand, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury *of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law.*”<sup>101</sup> The critical difference between the two is the latter’s concern about vicinage.

The importance of having the jury be drawn from the geographic area in which the crime was committed can be traced back several centuries to the time when jury trials were first held. In those days, jurors were asked not just to ascertain facts as presented by the sovereign, but to bring their own personal knowledge of the crime and the defendant.<sup>102</sup> This personal knowledge would have been lacking in jurors who did not reside in the geographic locale in which the crime was committed and so the right to a jury trial came to be inexorably linked to the right to have the jurors drawn from the vicinage of the crime.<sup>103</sup>

Although drawing jurors from the vicinity of the crime was a longstanding aspect of the jury in England, it was not a uniform practice in the American colonies. For example, while early New Jersey colonial law did in fact require that the jury be composed of “twelve

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98 *See id.*

99 *See id.*

100 U.S. CONST. art. III, § 2.

101 U.S. CONST. amend. VI. (emphasis added).

102 *See* Drew Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 813 (1976) [hereinafter Kershen, *Vicinage I*] (noting that jurors were “expected to resolve the disputed questions of fact upon the basis of their own knowledge of the crime”).

103 *See id.* (“[I]t is obvious that these jurors would then have to be chosen from the vicinity of the crime.”).

honest men of the neighborhood,” Virginia originally required that jurors be chosen from the area surrounding Jamestown, where the colonial court was located.<sup>104</sup> By the time that the Sixth Amendment was debated in 1789, the diversity of state practices was even more evident. While some states, such as Georgia, had a constitutional mandate that juries be drawn from the vicinage,<sup>105</sup> other states, including Connecticut and New York, had no specific vicinage protections.<sup>106</sup>

The unamended Constitution did not include a vicinage provision, providing in Article III, Section 2 only that the venue of the trial be in the state in which the crime occurred.<sup>107</sup> This venue provision elicited minimal debate during the framing of Article III and was meant to address Great Britain’s perceived abuses of the right to a jury trial, such as transporting colonial defendants to England to stand trial.<sup>108</sup> While Article III’s venue provision did not specifically address the location from where the jury would be drawn, it did indirectly guarantee that a defendant would be tried by a jury drawn from that state. As such, the vicinage envisioned in this provision was broader than the traditional understanding that developed from English common law, with the jury being drawn from a larger geographical area. Commentators have observed that the broad language of the Article III provision was a result of the fact that this was the most precise language that could be agreed upon at the time.<sup>109</sup> The states retained diverse practices with regard to vicinage, and it was unlikely that a more precise provision dealing specifically with vicinage could be passed.

The language in Article III played a significant role in leading to the drafting of what eventually became the Sixth Amendment. Since Anti-Federalists feared that Article III did not preserve the common

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104 *See id.* (comparing the jury-selection practices of New Jersey and Virginia). It was not until 1734 that Virginia adopted a vicinage requirement mandating that jurors be drawn from the area of the crime. *Id.*

105 *See* GA. CONST. art. XXXIX (1777) (“All matters of breach of the peace, felony, murder, and treason against the State to be tried in the county where the same was committed.”).

106 Kershen, *Vicinage I*, *supra* note 102, at 814.

107 *See* Drew Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 38 (1977) [hereinafter Kershen, *Vicinage II*] (“[T]he constitutional draftsmen used the place of the commission of the crime as the appropriate test to determine . . . venue under Article III . . .”).

108 *See id.*, at 808 (“Little debate was engendered by this venue proposal at the Constitutional Convention as the delegates undoubtedly recalled the venue grievance listed in the Declaration of Independence.” (citation omitted)).

109 *See* Kershen, *Vicinage I*, *supra* note 102, at 816 (concluding that the various delegates could not agree on more explicit language for the Article III jury provision).

law practice of trial by a jury of the vicinage,<sup>110</sup> they sought a specific vicinage right in the Constitution as a limit on the power of the federal government.

On June 8, 1789, James Madison proposed a number of amendments to the Constitution, including one that would eventually become the Sixth Amendment.<sup>111</sup> Madison's proposed language with regard to vicinage stated that "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage."<sup>112</sup> Additionally, Madison's proposal included language allowing for a jury trial away from the district where the crime was committed in the case of a general insurrection, indicating that he did not view his proposal to be an absolute right to a jury of the vicinage.<sup>113</sup> Madison intended his proposals to replace Article III's venue provision directly rather than be included as a separate amendment to the Constitution.<sup>114</sup> When the Committee of Eleven reported on Madison's proposals on July 28, it largely approved Madison's proposals, including the proposed vicinage provision.<sup>115</sup>

The House debated the proposals in August of 1789, during which time Congressman Burke proposed that the word "vicinage" be replaced with the phrase "district or county in which the offence [sic] has been committed."<sup>116</sup> Burke's primary concern was that "vicinage" was a vague concept. However, the proposed amendment failed and the word "vicinage" remained in the draft approved for transmission to the Senate.<sup>117</sup>

The debate in the Senate on the vicinage proposal is especially significant. At the time the Senate began debate on the measure in September 1789, the body was dominated by Federalists, and it is possible that the Federalist dominance of the Senate in the First

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110 See Seth Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 977 (2002) (arguing that the Anti-Federalists' fears ultimately resulted in the jury trial provisions of the Sixth Amendment).

111 See Kershen, *Vicinage I*, *supra* note 102, at 818 (detailing Madison's proposed amendments to the Constitution concerning rights at criminal trial).

112 *Id.*

113 See *id.* ("[I]n all crimes . . . in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offense.").

114 See *id.* at 818–19 (describing Madison's intentions for how his proposals would be incorporated into the Constitution).

115 See *id.* at 820 ("[T]he Committee of Eleven presented its report to the House with [Madison's] two . . . proposals placed in a single proposition . . .").

116 *Id.* at 821.

117 *Id.*

Congress affected the outcome of the body's debate on vicinage.<sup>118</sup> The Senate initially stripped Madison's vicinage language from what would become the Sixth Amendment,<sup>119</sup> and later considered a motion to restore a vicinage proposal to the Bill of Rights.<sup>120</sup> The proposed language read in pertinent part that "[t]he trial of all crimes . . . shall be by an impartial jury of the vicinage."<sup>121</sup> The motion failed by a vote of 8–8 largely along factional lines,<sup>122</sup> and the Senate returned a version of the Sixth Amendment completely devoid of any vicinage provision.<sup>123</sup>

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118 In September of 1789, the Federalists held a 18–8 majority over the Anti-Federalists. See *Party Division in the Senate, 1789–Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Mar. 27, 2011). The Federalist/Anti-Federalist had become a split between the Pro-Administration and Anti-Administration factions. At this time, Rhode Island and North Carolina had not yet ratified the Constitution and therefore had no representation in the Senate. These states would not send representatives to the Senate until June 12, 1790 and November 26, 1789, respectively. See *Senators of the United States, 1789–2011*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf> (last visited Mar. 27, 2011).

119 See Kershen, *Vicinage I*, *supra* note 102, at 822 (“Several changes were made . . . by the Senate, among which was the complete elimination of any reference to right to trial by a jury of the vicinage.”).

120 See S. JOURNAL, 1st Cong., 1st Sess. 77 (1789) (considering a motion to restore the vicinage language).

121 *Id.*

122 See *id.* (listing how each senator voted on the motion). Five of the six Anti-Federalist senators present on September 9 voted for this motion. They were joined by three members generally aligned with the Federalist faction: Senators Dalton of Massachusetts, Schuyler of New York, and Paterson of New Jersey. The individual practices and concerns in those three states may have influenced how these Federalist senators voted on the motion. Senator Dalton's home state of Massachusetts included a strong endorsement of vicinage in its state constitution, stating that “[i]n criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.” MASS. CONST. pt. I, art. XIII (1780). Senator Schuyler's home state of New York did not have a specific constitutional provision on vicinage, but vicinage was a great enough concern that New York ratified the main body of the Constitution with the understanding that a vicinage provision would eventually be included in the Bill of Rights. See Kershen, *Vicinage I*, *supra* note 102, at 817 (explaining that New York ratified the Constitution “only after setting forth a declaration which indicated the ratifying convention's understanding of certain constitutional provisions”). New Jersey also did not have specific vicinage support in its constitution, but had a long history of supporting strict vicinage. Its original Fundamental Laws stated “[t]hat no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, estate, property or any ways hurt in his or their privileges, freedoms or franchises . . . without a due trial, and judgment passed by twelve good and lawful men of his neighborhood.” THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY, ch. XVII (1677). .

123 See Kershen, *Vicinage I*, *supra* note 102, at 822 (“Several changes were made . . . by the Senate, among which was the complete elimination of any reference to right to trial by a jury of the vicinage.”).

There are a number of reasons underlying the Senate's rejection of vicinage language in the Sixth Amendment. James Madison outlined the Senate's concern with the proposed vicinage clause in a letter dated two weeks after the body rejected restoring such language:

They are equally inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or strict a term, too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word Juries, 'with the accustomed requisites,' leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. The truth is that in most of the States the practice is different, and hence the irreconcilable difference of ideas on the subject. In some States, jurors are drawn from the whole body of the community indiscriminately; in others, from large districts comprehending a number of Counties; and in a few only from a single County. The Senate supposed also that the provision for vicinage in the Judiciary bill, will sufficiently quiet fears which called for an amendment on this point.<sup>124</sup>

The role that the diversity of existing state practices played in the vicinage language's defeat in the Senate appears twofold. First, Senators may have been accustomed or partial to the vicinage practices in their home states.<sup>125</sup> Madison highlighted the difficulties of uniting these factions in a letter dated September 14, 1789:

In many of the States juries even in criminal cases, are taken from the State at large; in others from districts of considerable extent; in very few

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<sup>124</sup> *Id.* at 822–23 (quoting JAMES MADISON, THE WRITING OF JAMES MADISON 1787–1790 424 (Gaillard Hunt ed.1904)) (internal quotation marks omitted).

<sup>125</sup> While the Senate record concerning the debate over the Sixth Amendment is sparse, some information can be gleaned from looking at the Senate composition and individual state vicinage practices as of 1789. There appears to be a correlation between the political factions that individual senators belonged to and the strictness of state vicinage practice. Those states that had relatively strict vicinage practices had at least one Anti-Federalist senator. For example, Virginia, whose constitution provided “[t]hat in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage,” VA. CONST. § 8 (1776), was represented by Richard Henry Lee and William Grayson. *See Senators of the United States, 1789–2011*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf> (last visited Mar. 27, 2011). On the other hand, states that either had no constitutional vicinage protection or had very broad vicinage requirements tended to be represented by Federalists. For example, Connecticut, which featured no specific vicinage protection, sent Oliver Ellsworth and William Samuel Johnson, two prominent Federalists, to the Senate. *See id.* While Pennsylvania had a vicinage provision in its constitution, which stated “[t]hat in all prosecutions for criminal offences, a man hath the right to . . . a speedy public trial, by an impartial jury of the country.” PA. CONST. Declaration of Rights, § IX (1776), the word “country” was later interpreted to “embrace more territory than the neighborhood, the visne, or the vicinage.” *State v. Brown*, 154 A. 579, 581 (Vt. 1931). With such a relatively broad vicinage provision, it should not be surprising that Pennsylvania was represented by two senators generally aligned with the Federalist faction, William Maclay and Robert Morris. *See id.*

from the county alone. Hence a . . . like to the restraint with respect to *vicinage*, which has produced a negative on the clause. . . . Several others have had a similar fate. The difficulty of uniting the minds of men accustomed to think and act differently can only be conceived by those who have witnessed it.<sup>126</sup>

In addition to creating political obstacles to a vicinage provision, the diversity of state practices in place as of 1789 may have led some senators to question the appropriateness of including such a provision in the Constitution.<sup>127</sup> The Senate apparently endorsed the point of view prevalent at the Constitutional Convention that “the Constitution should reflect only fundamental principles upon which general agreement existed in the states.”<sup>128</sup> Based on this conception of what should be included in the Constitution, many Senators felt that the diversity of practices in the states rendered vicinage less than fundamental. Some who voted against the Vicinage Clause in the Senate apparently did so because states could not agree on the definition of vicinage or how it should be practiced.<sup>129</sup> Without consensus among the states, vicinage was not seen as a fundamental principle appropriate for inclusion in the Bill of Rights.

The Senate’s belief that the term “vicinage” was too vague was because the proposed amendment did not delineate a specific geographic area from which to draw the jury.<sup>130</sup> “Vicinage could mean several things, including ‘vicinity,’ ‘neighborhood,’ ‘community,’ ‘district,’ ‘state,’ or ‘county.’”<sup>131</sup> Given the diversity of approaches in the states, it is likely the Senate feared inconsistent application of an amendment that included the word “vicinage.”<sup>132</sup> Senators also feared that if the word “vicinage” demanded a precise meaning, the general understanding was that it would mean an area no larger than

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126 Kershen, *Vicinage I*, *supra* note 102, at 823 n.76 (quoting JAMES MADISON, *THE WRITING OF JAMES MADISON 1787–1790* 420 (Gaillard Hunt ed.1904)) (internal quotation marks omitted).

127 *See id.*, at 824 n.77 (establishing that because procedures concerning a jury of the vicinage differed between the states, such a provision was rejected by the Senate).

128 *Id.*

129 *See id.*

130 *See id.* at 823 (explaining the Senate’s concerns pertaining to the vagueness of the term “vicinage”).

131 *Id.*

132 *See id.* at 823–24 (“It would appear that the Senate thought the term ‘vicinage,’ used by the House, ‘too vague’ because it did not definitely refer to any particular geographical territory recognized as a political or governmental unit.”).

a county.<sup>133</sup> This was too strict of a requirement for a Federalist-controlled Senate.<sup>134</sup>

After defeat in the Senate, Madison's vicinage proposal was returned to the House of Representatives, which was unwilling to accept an amendment without a vicinage clause.<sup>135</sup> On September 24, 1789, the House adopted language that read:

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, which district shall have been previously ascertained by law . . . .<sup>136</sup>

This language addressed the Senate's reservations in a number of ways. First, the House version did not contain the word "vicinage," assuaging Senate fears about the potential ambiguity. Rather, the concept of vicinage was tied to a "district," which was a geographic area with definite boundaries that could be defined by the Judiciary Act.<sup>137</sup> The district could be of any size that Congress decided on in passing that Act. On September 25, the Senate adopted the House proposal on vicinage.<sup>138</sup>

The definition of "district" was left to the parameters of the Judiciary Act of 1789, which was debated in Congress at the same time that the Sixth Amendment debates occurred.<sup>139</sup> Section 29 of the Judiciary Act essentially contained three possible definitions of the vicinage for federal courts. First, Section 29 mandated that jurors for capital cases should be drawn from the county where the crime was committed, unless doing so would cause "great inconvenience."<sup>140</sup> Second, the Act gave judges broad latitude with regard to vicinage for noncapital cases, stating that a federal judge could draw jurors "from such parts of the district from time to time as the court shall direct, so

133 *See id.* at 826 ("At the same time, the Senate had also objected that if the term 'vicinage' were definite, then it did not refer to a specific geographic area larger than a county.").

134 *See id.* ("[A] county . . . in the opinion of the Senate was too small an area.").

135 *Id.* at 825.

136 *Id.* (internal quotation marks omitted).

137 *See id.* at 826 (describing how the House met the Senate's objections to the term "vicinage").

138 *See S. JOURNAL*, 1st Cong., 1st sess. 88 (1789) (passing "an act to regulate processes in the courts"). There is no detailed record in the Senate Journal of the debate concerning the adoption of the vicinage clause. Additionally, the Senate Journal lacks information on how individual senators voted on the measure.

139 *See Kershen, Vicinage I, supra* note 102, at 844–45 (detailing the creation of a judicial system, as under the Judiciary Act of 1789).

140 Judiciary Act of 1789, ch. 20, § 29, Stat. 73, 88 (codified as amended in scattered essections of 28 U.S.C.) ("[I]n cases punishable with death, the trial shall be had in the county where the offense was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.").

as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen [sic] the citizens of any part of the district with such services.”<sup>141</sup> Although jurors had to be drawn from the district, the judge had discretion to determine what location within the district jurors would be drawn from.<sup>142</sup> Third, the Act allowed a hybrid of the first two vicinage situations for capital cases in which “great inconvenience” would occur if jurors were only drawn from the county of the crime. In such a situation, the Judiciary Act mandated that twelve jurors be chosen from the county of the crime, and the court had discretion to choose the vicinage of the rest of the jurors to round out the jury pool.<sup>143</sup>

The vicinage clause, thus, played a central role in the adoption of the Sixth Amendment. Defendants in all criminal prosecutions were guaranteed not only a trial located in the state in which the crime allegedly occurred, but also a trial conducted before a jury drawn from the “district” in which the crime was allegedly committed.

### III. RE-FRAMING THE ‘FAIR CROSS-SECTION’ REQUIREMENT

The Sixth Amendment’s vicinage clause provides a compelling alternate textual basis for the ‘fair cross-section’ requirement. Such re-framing of the ‘fair cross-section’ requirement would obviate the doctrinal paradox created by the Court’s current restriction of the ‘fair cross-section’ requirement to jury venires, and resolve the doctrinal conflict between the current construction of the ‘fair cross-section’ requirement and the Court’s equal protection jurisprudence. Moreover, such re-framing would be a more textually consistent reading of the Sixth Amendment and would be more faithful to the Framers’ idea of representativeness embodied in the amendment.

#### A. *Grounding the ‘Fair Cross-Section’ Requirement in the Vicinage Clause*

The Sixth Amendment’s vicinage clause provides a textual basis for the ‘fair cross-section’ requirement. A jury venire in which women, African Americans, or other identifiable groups are substantially under-represented would result in a jury that is not drawn from the

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141 *Id.*

142 *Id.* (“[J]urors . . . shall be returned . . . from such parts of the district from time to time as the court shall direct . . .”).

143 *See id.* (describing the jury-selection procedure for instances where a “defect of jurors shall happen”).

“district.”<sup>144</sup> Rather, such a jury would be drawn from a smaller, and unconstitutionally restrictive, *subset* of the district. Only a jury venire that represents a ‘fair cross-section’ of the community would lead to a jury drawn from the entire pool of potential jurors in the district.

Such interpretation of the vicinage clause would not happen on a blank slate. In *Ruthenberg v. United States*, the Court considered a case where defendants were convicted in the Northern District of Ohio for failing to register with the selective draft.<sup>145</sup> In rejecting the defendants’ argument that their Sixth Amendment rights had been violated because the jury had been drawn from only a portion of the Northern District of Ohio, the Court relied on the text of the Judiciary Act of 1789, which it called a contemporary interpretation of the Sixth Amendment.<sup>146</sup> Section 29 of the Judiciary Act specifically allowed for judges to use their discretion in selecting jurors from a portion of the district.<sup>147</sup>

A decade later, in *Lewis v. United States*, the Court dealt with a case where the defendants were charged with violations of federal banking laws that had allegedly occurred in Tulsa, Oklahoma.<sup>148</sup> While Tulsa had been moved to the Northern District of Oklahoma by the time of trial, the trial was held, and the jurors were drawn from, the Eastern District of Oklahoma, which had been where Tulsa was located at the time of the crimes.<sup>149</sup> Rejecting the defendants’ argument that the jury was not drawn from the district where the crime was committed because Tulsa was no longer within the Eastern District, the Court stated that “as this district had been ascertained by § 101 of the Judicial code before the offenses had been committed, there was no violation of the provision of the Sixth Amendment.”<sup>150</sup> The Court also rejected the defendants’ argument that their vicinage rights were

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144 As noted in the subsequent discussion of *Duren v. Missouri*, this ‘fair cross-section’ requirement has properly been limited to those situations where the under-representation is the result of “systematic exclusion.” Just as it is possible for a string of coin tosses to result in a disproportionate number of heads or tails, so too it is entirely possible that any given venire will not fairly represent all demographic groups. The Sixth Amendment is, therefore, correctly directed at those situations where the under-representation can be traced to some systemic cause.

145 245 U.S. 480, 481 (1918).

146 *Id.* at 482.

147 Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (codified as amended in scattered sections of 28 U.S.C.).

148 *Lewis v. United States*, 279 U.S. 63, 66–67 (1929) (holding that the transfer of territory to a district outside of defendants’ arrest and their subsequent conviction in the changed district did not violate their constitutional rights).

149 *Id.* at 67–69.

150 *Id.* at 71–72.

violated because the jury had not been drawn from the entire district, citing *Ruthenberg* for the proposition that “the Sixth Amendment does not require that the accused be tried by jurors drawn from the entire district.”<sup>151</sup>

While these two cases from the early twentieth century pose a hurdle to the textual re-framing of the ‘fair cross-section’ requirement in the vicinage clause, that hurdle is not insurmountable. While the Judiciary Act of 1789 does include the provision cited by the Court, Section 29 of the Judiciary Act used two definitions of the geographic location for drawing jurors.<sup>152</sup> The first was for capital crimes where the jury had to be drawn from the county where the crime was committed.<sup>153</sup> The area was defined as the district as a whole where the crime was committed for non-capital crimes.<sup>154</sup> These definitions show that “no separation between the community from which the jurors were summoned and the community in which the crime was committed was allowed by the Judiciary Act of 1789.”<sup>155</sup>

In addition, these cases stand for no more than the proposition that juries may be selected from some “geographical” subset of the district. They do not thereby necessarily authorize that juries may be selected from a ‘population’ subset of the district. In other words, no matter the physical boundaries for drawing the venire, the vicinage clause can still be interpreted as requiring that the resulting venire fairly represent the community of the entire district.

Moreover, the continued viability of these cases is questionable since they pre-date the Court’s ‘fair cross-section’ jurisprudence.<sup>156</sup> These cases are also fundamentally unsound insofar as they permit

151 *Id.*

152 *See* Kershen, *Vicinage II*, *supra* note 107, at 114 n.501 (describing two types of geographical areas from which jurors could be drawn).

153 *See id.* (“[U]nder Section 29 of the Judiciary Act of 1789, the geographical area from within which jurors must be summoned for capital crimes was set as the county in which the crime was committed.”).

154 *See id.* (“[T]he geographical area from within which the jurors must be summoned for noncapital crimes was set as the judicial district as a whole in which the crime was committed.”).

155 *Id.* *But see* Note, *Does the Sixth Amendment Require a Jury of the Vicinage for State Criminal Trials? A Functional Approach*, 5 RUTGERS L.J. 514, 516 (1974) (arguing that selecting jurors from a portion of a judicial district is permissible and that a contrary position may undermine the representativeness and impartiality of juries).

156 *See* Kershen, *Vicinage II*, *supra* note 107, at 104–06 (examining whether a jury selection process which excludes a substantial number of eligible citizens is permissible); *id.* at 107 (“[A]fter the Act and the *Taylor* decision it is urged that automatic exclusion of citizens on a geographical basis is a systematic and intentional exclusion . . . .”); *id.* at 107–08 n.493 (recognizing that the jury panel should “reflect the population of the community as a whole”).

courts to summon jurors from a portion of the judicial district that does not include the locale of the crime.<sup>157</sup> Such a construction of the vicinage clause is incompatible with the very concept of vicinage, which requires “that the geographical boundaries of the community where the crime was committed be identical to the geographical boundaries of the community within which the petit juror must reside.”<sup>158</sup> Indeed, such a construction of the vicinage clause is not consonant with the Anti-Federalist position that the jury should serve a democratizing function: If the place of the crime is excluded from the area from which the jury is drawn, it would be impossible for jurors to view a crime in light of the community’s values.<sup>159</sup> The practice endorsed by the Court in these two decisions, in addition, has been criticized on policy grounds.<sup>160</sup>

*B. A Sounder Construction of the ‘Fair Cross-Section’ Requirement*

The proposed textual re-framing of the ‘fair cross-section’ requirement would solve the doctrinal paradox in the Court’s current ‘fair cross-section’ jurisprudence. As noted above, while the Court derives the ‘fair cross-section’ requirement from the notion of an “impartial jury,” a concept tied to the seated jury, the Court has limited the applicability of the ‘fair cross-section’ requirement to jury venires. If it is the impartiality of the seated jury that compels the inclusion of women, African Americans, and other minorities in the jury pool, then there is little doctrinal justification for not extending the ‘fair cross-section’ requirement to the seated jury. On the other hand, if the ‘fair cross-section’ requirement is derived from the vicinage clause, a clause that applies only to jury venires, there is a textual basis for limiting the scope of the ‘fair cross-section’ requirement and excluding seated juries.

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157 See *id.* at 112 (“Is it a permissible jury selection process if it delimits the geographical boundaries of the community wherein the crime was committed differently from the geographical boundaries of the community from within which the petit jurors will be summoned?”).

158 *Id.* at 114 (citation omitted).

159 See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 28 (1994) (recognizing that, as local citizens, “the jury was our best assurance that law and justice accurately reflected the morals, values, and common sense of the people”).

160 See John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 *TEMP. L. REV.* 673, 710–11 (1999) (arguing that such practice “obviously can greatly alter the demographic composition of the jury pool and therefore can affect plea bargaining or the outcome of the trial”); *id.* (noting that the Anti-Federalists were adamant that defendants be tried within the county where the crime was committed, and observing that the vicinage provisions may entail different boundaries for a prosecution of a crime in federal court than for the prosecution of that crime in state court).

Moreover, tethering the ‘fair cross-section’ jurisprudence to the “district” clause would resolve the doctrinal conflict between the current ‘fair cross-section’ jurisprudence and the *Batson* line of cases. The exclusion of women or African Americans from the jury pool, for instance, would be prohibited not because their absence makes the resulting jury “partial,” but because their systemic exclusion renders the jury pool to be one that is not drawn from the “district.” There is no supposition being made under the “district” analysis that women or African Americans have distinct “flavors.” Since there is no constitutional reliance on any differing perspectives women, African Americans, or other minorities bring to the deliberations, the Court may more properly limit parties from exercising peremptory strikes to exclude these classes of individuals.

In addition, the proposed re-framing of the ‘fair cross-section’ requirement would lead to a more textually consistent reading of the Sixth Amendment. While the “impartial jury” language from which the Court currently derives the ‘fair cross-section’ requirement properly speaks to the seated jury, the vicinage clause speaks directly to the venire from which the jury is selected.<sup>161</sup> As such, the Court’s decision to restrict the ‘fair cross-section’ requirement to the jury venire as opposed to the seated jury poses no doctrinal conflict.

Finally, such textual re-casting of the ‘fair cross-section’ requirement leads to a jurisprudence that is more faithful to the Framers’ understanding of “representativeness” that is embodied in the Sixth Amendment. At the time of the Founding, the Federalists and Anti-Federalists fundamentally disagreed on their notions of representativeness. The difference in the theories of representation is illustrated by the differing philosophical grounding of the Federalists and the Anti-Federalists. Anti-Federalists preferred a classical founda-

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<sup>161</sup> The emphasis on the “district” instead of the “State and district” is due to the fact that this narrowing of the source of the jury pool to the “district” where the crime was committed is one of the features that distinguishes the Sixth Amendment right to a jury trial from the right to a jury trial in Article III of the Constitution. U.S. CONST. art. III, § 2 (“The Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .”). The latter only requires that the jury be drawn from the State where the crime occurred. In other words, the salient feature of the Sixth Amendment right to a jury trial is that the jury be drawn not only from the State where the crime occurred, but also more importantly from the district where it occurred. See Amar, *supra* note 1, at 1197 (“[W]hy did the first Congress add the jury clause of the Sixth Amendment? The historical answer is unequivocal: To guarantee a right to a trial *within the district* of the crime. Article III had not specified jury trial of ‘the vicinage,’ as per the prevailing common law, and many Anti-Federalists wanted an explicit guarantee that juries would be organized around local rather than statewide communities.” (citation omitted)).

tion for their view of representation, viewing representation as an ancient theory that was “as old as the history of mankind.”<sup>162</sup> For the Anti-Federalists, representation required “mirror representation,” or the reflection of all classes, interests, and groups in society.<sup>163</sup> Such representation could only be achieved through local governance or, at the very least, very small and numerous legislative districts.<sup>164</sup> In contrast, the Federalists preferred more contemporary theories, arguing that representation had developed in “modern Europe” with thinkers such as Locke.<sup>165</sup> The Federalists rejected the mirror representation model, instead arguing that the best form of representation is that which accounts for the nation’s aggregate private interests.<sup>166</sup> Modern commentators have argued that Federalist theories of representation can be summarized by a single principle: “Objective interests, objectively arrived at.”<sup>167</sup>

The perceived importance of objectivity in government served as the foundation for the Federalist preference for large republics and

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162 Wilson Carey McWilliams, *The Anti-Federalists, Representations, and Party*, 84 NW. U. L. REV. 12, 12 (1989). In his concurring opinion in *Berghuis v. Smith*, Justice Thomas argued that, since juries at the founding were not representative of the community insofar as their composition was largely limited to white men who were property owners, the Sixth Amendment’s right to jury fails to provide a basis for the ‘fair cross-section’ requirement. *See* 130 S.Ct. 1382, 1396 (2010). Rather, he argued, the ‘fair cross-section’ right was derived from an “amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.” *Id.* (citing *Duren v. Missouri*, 439 U.S. at 372 (Rehnquist, J., dissenting)). This argument does not preclude grounding the ‘fair cross-section’ requirement in the vicinage clause. Whatever the set of eligible jurors, the Anti-Federalist theory of mirror representation reflected in the Sixth Amendment would require that that groups be fairly represented. So, at a time that only white men were eligible to be jurors, the ‘fair cross-section’ requirement would have required that the jury venire fairly reflect that subset of the population. When the set of eligible jurors was broadened to include African American men, then the ‘fair cross-section’ requirement would have required that the venire fairly reflect the subset of the population that consists of white and African American men. Finally, when the set of eligible jurors was expanded to include women, then the ‘fair cross-section’ requirement would have required that the jury venire fairly reflect the composition of the entire community in terms of racial and gender groups.

163 Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 138 (2007).

164 *See id.* (describing the Anti-Federalists’ concerns about representation in a “large and extended nation”).

165 *See* McWilliams, *supra* note 162, at 12–13 (“The framers of the Constitution of the United States were informed by the teaching, now familiar to most Americans, that human beings are by nature free, independent, and engrossed in private aims, especially the desire for self-preservation.” (citation omitted)).

166 *See id.* at 14 (“The Federalists were emphatic, however, in holding that there exists an objective, collective interest which, favoring out subjectivities, forms the true standard for representative rule.” (citation omitted)).

167 *Id.* at 15.

small legislatures.<sup>168</sup> In the view of the Federalists, such large governments provide a more accurate reflection of the nation's aggregate private interests and therefore better preserve private liberty.<sup>169</sup> Federalists preferred small legislatures as a means of "refining" public opinion and minimizing the effects of small factions.<sup>170</sup> James Madison's first two Federalist Papers, *The Federalist No. 10* and *The Federalist No. 14*, help illustrate the interaction between the Federalist concept of representation and the size of the legislature relative to the size of the nation.<sup>171</sup> According to Madison, direct democracy was impossible in any large nation, and citizens were thus forced to rely on a small body of citizens to represent their interests.<sup>172</sup> In Madison's view, a small group of representatives could "refine" opinion and "produce more virtuous, wise, and stable decisions."<sup>173</sup> Madison argued that a larger legislature would dilute the effectiveness of representation by impeding deliberation.<sup>174</sup> By keeping the legislature small, the Federalists hoped to promote the objective interests they favored by minimizing the efficacy of small groups or factions.

In broad terms, the Federalist theory of representation was partially aimed at preventing a "tyranny of the minority." In *The Federalist No. 10*, Madison recognized that a large republic and very large legislative districts would contain increased numbers of the small, local factions that the Federalists feared.<sup>175</sup> However, in Madison's opinion, a large republic would protect against tyranny from either majority or minority factions by ensuring that any majority positions would be "incoherent," thus guaranteeing that the legislature would agree on only a small number of measures.<sup>176</sup> Thus, ideal representation would come not from self-restraint of citizens but from the gridlock created by a diversity of representation.<sup>177</sup>

The Anti-Federalist theory of representation demanded mirror representation, a concept that was wholly incompatible with the Federalist call for small legislatures and large electoral districts. Brutus,

168 See *id.* (explaining the Federalist defense of a large republic).

169 See *id.*

170 See Amar, *supra* note 1, at 1139 (stating the benefits of having a "small, select group of representatives").

171 See *id.*

172 See *id.* (citing THE FEDERALIST No. 14, at 100 (J. Madison) (C. Rossiter ed. 1961)).

173 See *id.* (quoting THE FEDERALIST No. 19, at 82 (J. Madison) (C. Rossiter ed. 1961)).

174 See *id.*

175 See McWilliams, *supra* note 162, at 17 ("Madison contended that a large republic may embrace so great a variety of interests and factions that any majority will be incoherent, and unable to agree on more than a limited number of goals and measures.").

176 See *id.*

177 See *id.*

one of the most influential and important Anti-Federalist writers, offered a summary of the Anti-Federalist view of ideal representation: “In this assembly, the farmer, merchant, mechanic [sic], and other various orders of people, ought to be represented according to their respective weight and numbers . . . .”<sup>178</sup> On this view, Anti-Federalists argued that true representation could only come when the legislature reflected all of the groups in society in their respective proportions. Absent such reflective representation, in the words of Brutus, “the representation is nominal—a mere burlesque.”<sup>179</sup> Brutus further argued that mirror representation in the new government was the best means of promoting the public’s happiness, which should be the underlying goal of any representative system:

Society instituted government to promote the happiness of the whole, and this is the great end always in view in the delegation of powers. It must then have been intended, that those who are placed instead of the people, should possess their sentiments and feelings, and be governed by their interests, or, in other words, should bear the strongest resemblance of those in whose room they are substituted.<sup>180</sup>

The Federal Farmer, another highly influential Anti-Federalist writer, argued that a government lacking true representation would interfere with the ability of the public to achieve the happiness that government was created to protect:

A virtuous and happy people by laws uncongenial to their characters, may easily be gradually changed into servile and depraved creatures. Where the people, or their representatives, make the laws, it is probable they will generally be fitted to the national character and circumstances, unless the representation be partial, and the imperfect substitute for the people.<sup>181</sup>

With these broad representative theories in mind, the Anti-Federalists countered the Federalist position on legislative size by arguing that the proposed Congress took the idea of refining opinion too far.<sup>182</sup> The Anti-Federalists feared that the small legislature would restrict the ability to participate in the body to the elite, men with “reputations over wide geographic areas.”<sup>183</sup> Such broad geographic appeal ran counter to the Anti-Federalist preference for localism, which was a tool to ensure that representation mirrored the diverse composition

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178 HERBERT STORING, *THE ANTI-FEDERALIST*, 125 (1985).

179 *Id.* at 126.

180 *Id.* at 125.

181 *Id.* at 75.

182 See Amar, *supra* note 1, at 1139–40 (“Probably the deepest Anti-Federalist objection to the Constitution was that the document took the skimming principle too far: Congress was too small, too ‘refined.’”).

183 *Id.* at 1139.

of the country by including members of small groups or factions. An Anti-Federalist pamphlet from Pennsylvania specifically pointed to the proposed size of the U.S. Senate as a hindrance to achieving ideal representation. At the time, the size of the Senate was pegged at twenty-five or twenty-six members, leading the pamphlet's author to state that "the sense and views of 3 or 4 millions of people . . . cannot be collected in so small a body."<sup>184</sup>

In contrast to the small legislature that the Federalists favored, the Anti-Federalists' view of representation demanded a much larger body with very small electoral districts. The Federal Farmer argued that the Federalist view of representation would unfairly silence the voices of many groups in society, stating that "a fair and equal representation is that in which the interests, feelings, opinions and views of the people are collected, in such a manner as they would be were the people all assembled."<sup>185</sup> In the Federal Farmer's view, the Federalist-proposed representative size was "unsubstantial and ought to be increased" so as to achieve the goal that the legislature act as though the people were present.<sup>186</sup> More specifically, Anti-Federalists feared that a small legislative body would have a disproportionate impact on the poor or "middling classes."<sup>187</sup> Melancton Smith, a prominent New York City Anti-Federalist, argued that the legislature could include members of the "natural aristocracy," but not in numbers that exceeded their proportion in society:

The number of representatives should be so large, as that while it embraces men of the first class, it should admit those of the middling class of life. I am convinced that this Government is so constituted, that the representatives will generally be composed of the first class in the community, which I shall distinguish by the name of the natural aristocracy of the country.<sup>188</sup>

Aside from the size of the proposed Congress, Federalists also weighed in their conceptions of how representatives should behave when they were elected. In keeping with the Federalist emphasis on objectivity, Alexander Hamilton argued that representatives should minimize their own ambitions in favor of "the principle or love of glory."<sup>189</sup> In Hamilton's view, the Federalist's view of formal represen-

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184 STORING, *supra* note 178, at 214.

185 *Id.* at 74.

186 *Id.*

187 *Id.* at 340–41.

188 *Id.* at 340.

189 McWilliams, *supra* note 162, at 18 (quoting Letter from Alexander Hamilton to James Baynard (Jan. 16, 1801), *reprinted in* 10 THE WORKS OF ALEXANDER HAMILTON 417 (H. Lodge ed. 1903)).

tation was the most effective way of protecting that individual virtue by pitting interests against each other and thus diluting the effectiveness of any potentially dominant faction.<sup>190</sup> In the Federalist view, the ideal representative “reflects the interests of his constituents, but not their subjective feelings and parochial opinions.”<sup>191</sup> There was a noticeable interplay between the Federalist concept of the ideal representative and the size of the legislature. The Federalist-preferred size of the legislature assisted in assuring membership of such ideal representatives by shielding members from local “passion and discord,” which would distract from the goal of representing the new nation’s objective, aggregate interests.<sup>192</sup> Furthermore, James Madison wrote that “unworthy candidates” would be less likely to find electoral success in large districts.<sup>193</sup> Large districts would protect the Federalists’ precious objectiveness by ensuring that local factions, or in Madison’s words, “little demagogues,” would be unable to resort to “the vicious arts, by which elections are too often carried,” such as intrigue and intimidation.<sup>194</sup>

Anti-Federalists were more vague in their conception of how individual legislators should behave. Such relative silence may be a product of their mirror representation theory. However, Hanna Pitkin’s seminal work *The Concept of Representation* helps clarify the interaction between mirror representation and the behavior of individual representatives. In terms of modern political theory, Anti-Federalists, with their preference for mirror representation, could be defined as “proportionalists” who argue that accurate reflection of the population in the representative body is critical to achieving true representation.<sup>195</sup> Proportionalists believe that the composition of the legislature will determine the actions that it will take as a whole.<sup>196</sup> Thus, the actions of representatives are secondary to who the representatives are; proportionalists focus their theory on the individual members of the legislature without specifically considering any duties those representatives may owe to their constituents. The Anti-Federalist silence on the preferred actions of individual legislators can be seen as a product of their “zeal for accurate reflection in the

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190 *See id.* (“[Hamilton] was content to rest the Constitution on formal representation and the complex balances which pit interest against interest.”).

191 *Id.* at 16.

192 *Id.*

193 *Id.* at 17 (quoting THE FEDERALIST No. 10, at 63 (J. Madison) (J. Cooke ed. 1961)).

194 *Id.* (quoting THE FEDERALIST No. 10, at 63 (J. Madison) (J. Cooke ed. 1961)).

195 *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 61–62 (1967) (discussing the different metaphors used to describe the “proportionalist” approach).

196 *Id.* at 63.

composition of the legislature.”<sup>197</sup> The composition of Congress was more significant to Anti-Federalists than what the members of that body would do once elected.

The differing theories of representation the Federalists and Anti-Federalists employed also dictated their respective views on jury issues. The Anti-Federalist concern over giving the “middling classes” a voice in government helped shape that group’s view of who would most benefit from jury service. The leading Anti-Federalist Maryland Farmer wrote that jury service would uplift the lower classes and “secure to the people at large, their just and rightful controul [sic] in the government.”<sup>198</sup> Anti-Federalists viewed the jury as playing an integral role in achieving mirror or proportional representation by reflecting “the morals, values, and common sense of the people asked to obey the law.”<sup>199</sup> One Anti-Federalist writer went so far as to distribute a pamphlet that claimed representation on juries was even more important than representation in the legislature.<sup>200</sup> The importance of the Anti-Federalist representative theory with regard to juries is well understood today. Modern commentators have noted that “we are using the Anti-Federalist model when we say that a jury should be ‘representative’ of the community.”<sup>201</sup>

With the emphasis Anti-Federalists placed on jury service as a part of their overarching representative theory, vicinage played an important role in their arguments concerning juries. They believed that the jury could serve as a democratic institution as long as it was practiced locally, on a “scale small enough to ‘secure to the people at large, their just and rightful controul [sic] in the judicial department.’”<sup>202</sup> The concept of vicinage played a particularly important role in the Anti-Federalist view of the jury, with the Federal Farmer calling a trial by a jury of the vicinage one of the two essential rights.<sup>203</sup> For many Anti-Federalists, vicinage “equated . . . with the jury right,” with Richard Henry Lee equating vicinage with the jury

197 *Id.* at 64.

198 Amar, *supra* note 1, at 1187 (citations omitted).

199 ABRAMSON, *supra* note 159, at 28.

200 Christopher Waldrep, *Black Access to Law in Reconstruction: The Case of Warren County, Mississippi*, 70 CHI-KENT L. REV. 583, 588 (1994).

201 Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 4 (1989).

202 ABRAMSON, *supra* note 159, at 29 (quoting STORING, *supra* note 178, at 320).

203 See STORING, *supra* note 178, at 39 (“The essential parts of a free and good government are a full and equal representation of the people in the legislature, and the jury trial of the vicinage in the administration of justice . . .”).

right itself.<sup>204</sup> Anti-Federalists believed that true representation could be achieved through the jury, but only if local juries were mandated.<sup>205</sup> Any attempt to exclude vicinage from federal jury procedure was seen as a “plan to subvert popular government.”<sup>206</sup> The importance Anti-Federalists placed on vicinage as part of their representative goals is illustrated by the parallels some drew between representation in the legislature and on the jury:

It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department . . . . The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other.<sup>207</sup>

Anti-Federalists believed that juries served democracy not just through its fact-finding function, but also “by getting the people right.”<sup>208</sup> According to these writers, the local jury accurately reflected the morals and values of the community and provided an opportunity for “common people . . . [to] have a part and share of influence in the judicial . . . department.”<sup>209</sup> For the Anti-Federalists, the smaller the area from which jurors were drawn, the more likely it was that it would achieve the ideal of mirror representation. Along with the Anti-Federalist preference for localism and representation of various community groups, the Anti-Federalists would have preferred a vicinage provision mandating the drawing of juries from the neighborhood of the crime.<sup>210</sup>

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204 Daniel D. Blinks, “*This Germ of Rottedness*”: *Federal Trials in the New Republic, 1789–1807*, 36 CREIGHTON L. REV. 135, 153 (2003).

205 See ABRAMSON, *supra* note 159, at 29 (“The Anti-Federalists constantly pointed out that the proposed republic was too large and the numbers of representatives too small to provide genuine dialogue between most citizens and their representatives. . . . By contrast, trial by jury could remain an oasis of genuine democracy, if practiced on a scale small enough . . . .” (citations omitted)).

206 Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 398 (1999).

207 Amar, *supra* note 1, at 1188 (citations omitted).

208 ABRAMSON, *supra* note 159, at 28.

209 STORING, *supra* note 178, at 249.

210 See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1853 (2002) (noting that Anti-Federalists pushed for a vicinage requirement for criminal defendants).

In furthering their arguments in favor of vicinage, several Anti-Federalists focused on the inconveniences created by denying the vicinage right. Many Anti-Federalists distributed pamphlets outlining the inconveniences that defendants would suffer, including measuring the miles that they would have to travel to reach the place of trial, if vicinage was not included in the Constitution.<sup>211</sup> The Federal Farmer was among these writers, noting that defendants would have to travel “150 or 200 miles” for trial without the vicinage right.<sup>212</sup> Patrick Henry also weighed in on the importance of the vicinage right, stating that the federal government could “shop” a state for a favorable jury.<sup>213</sup> According to Henry, it would have been preferable that “trial by jury were struck out altogether” than adopt a system of jury trial absent the vicinage right.<sup>214</sup>

In addition to arguments concerning the democratizing function of local juries and the inconveniences caused by non-local juries, Anti-Federalists also focused on the jury’s fact-finding mission.<sup>215</sup> According to many leading Anti-Federalists, including Patrick Henry and James Winthrop, local juries had an advantage in fact finding because local jurors were more likely “acquainted with [the defendants’] characters, their good or bad conduct in life, to judge of the unfortunate man who may be thus exposed by the rigors of government.”<sup>216</sup> Winthrop, whose influential Anti-Federalist essays were written under the pseudonym Agrippa, wrote that jurors from afar would be unable to judge whether the defendant was “habitually a good or bad man.”<sup>217</sup>

Just as the Anti-Federalist theory of mirror representation led to their favorable view of vicinage, the Federalist demand for objectivity served as the basis of that group’s general opposition to vicinage. The Federalists feared that vicinage would interfere with the ability to represent objective interests by giving too large a voice to local, minority passions or prejudices.<sup>218</sup> Essentially, Federalists were con-

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211 See ABRAMSON, *supra* note 159, at 23 (noting that Anti-Federalist pamphlets “measured out the miles, the distances, the inconveniences, and the disadvantages that an accused would suffer when the federal government had free choice of both venue and jury anywhere within a state”).

212 STORING, *supra* note 178, at 40.

213 ABRAMSON, *supra* note 159, at 22–23.

214 *Id.* at 23 (citation omitted).

215 See *id.* at 27 (“One argument centered on the fact-finding mission of juries, a mission that local jurors with personal knowledge of the case could accomplish more accurately.”).

216 *Id.* (citations omitted).

217 *Id.*

218 See *id.* at 28 (stating that jurors from the community would have “knowledge of the witnesses and their reputations”).

cerned that local juries created through a vicinage right would be unable to render impartial verdicts. Governor Johnston of North Carolina, a Federalist, wrote in response to the Anti-Federalists that:

We may expect less partiality when the trial is by strangers; and were I to be tried for my property or life, I would rather be tried by disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent.<sup>219</sup>

The decision to include a vicinage provision in the Sixth Amendment, therefore, reflected an incorporation of the Anti-Federalist theory of mirror representation. Grounding the 'fair cross-section' requirement in the vicinage clause would be faithful to this notion of representativeness.

### C. A More Robust 'Fair Cross-Section' Requirement

As noted earlier, re-framing the 'fair cross-section' requirement by changing the textual tether from the "impartial jury" provision to the vicinage provision would allow for disentangling the 'fair cross-section' jurisprudence from equal protection jurisprudence. Since the vicinage requirement does not involve an analysis of whether the excluded group of potential jurors has a unique "flavor" that might impact the jury's "impartiality," the exclusion of any demographically distinct group would contravene the Sixth Amendment, not just the exclusion of distinct groups that may share unique perspectives. This disentanglement of the 'fair cross-section' requirement from the Equal Protection Clause would dramatically increase the scope of the 'fair cross-section' requirement.

As of the end of 2008, a majority of states allow automatic exemptions from jury service to statutorily defined groups. Many of these exemptions are offered to those who are above a certain age,<sup>220</sup> have

<sup>219</sup> *Id.* at 26 (citations omitted).

<sup>220</sup> Thirty-five states allow for some automatic exemptions from jury service. Non-occupational exemptions include automatic exemptions for potential jurors over a certain age. Twenty-one states allow for an age exemption, which exempts ages ranging from sixty-five to eighty years old. *See* ARIZ. REV. STAT. ANN. § 21-202 (1956); CONN. GEN. STAT. § 51-217 (2005); FLA. STAT. § 40.013 (2010), *available at* [http://leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0000-0099/0040/Sections/0040.013.html](http://leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0040/Sections/0040.013.html); GA. CODE ANN. § 15-12-1 (2008); HAW. REV. STAT. § 612-6 (2007); MD. CODE ANN., CTS. & JUD. PROC. § 8-306 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 600.1307a (West 1996); MISS. CODE ANN. § 13-5-25 (1999); NEB. REV. STAT. § 25-1601 (2008); NEV. REV. STAT. § 6.020 (2007); N.H. REV. STAT. ANN. § 500-A:9 (LexisNexis 1955); N.J. STAT. ANN. § 2B:20-10 (West 2010); N.C. GEN. STAT. § 9-6.1 (2009); OHIO REV. CODE ANN. § 2313.16 (LexisNexis 2005); OKLA. STAT. tit. 38, § 28 (2009); OR. REV. STAT. § 10.050 (2007); TENN. CODE ANN. § 22-1-103 (1994); TEX. GOV'T

recently served on a petit or grand jury,<sup>221</sup> or have specific familial obligations that are presumed to place a substantial burden on the potential juror.<sup>222</sup> Additionally, nearly twenty states retain some form of automatic exemption for members of certain occupations.<sup>223</sup> The

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CODE ANN. § 62.106 (West 2005); W. VA. CODE ANN. § 52-1-8 (LexisNexis 2008); WYO. STAT. ANN. § 1-11-104 (2009).

221 Twelve states allow exemptions for those who have served on a jury within a specific time period. These states include Arkansas, Colorado, Connecticut, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, Oklahoma, Texas, and West Virginia. *See* ARK. CODE ANN. § 16-31-103 (1987); COLO. REV. STAT. § 13-71-105 (2008); CONN. GEN. STAT. § 51-217 (2005); KAN. STAT. ANN. § 43-158 (2009); MASS. ANN. LAWS ch. 234A, § 4 (2000); MINN. GEN. R. PRAC. 808, *available at* <http://www.mncourts.gov/rules/general/GRtitleIX.htm#g808ix>; MO. REV. STAT. § 494.425 (2004), N.J. STAT. ANN. § 2B:20-10 (West 2010); N.M. STAT. § 38-5-2 (2010); OKLA. STAT. ANN. tit. 38, § 28 (West 2009); TEX. GOV'T CODE ANN. § 62.106 (West 2005); W. VA. CODE ANN. § 52-1-8 (LexisNexis 2008).

222 Familial exemptions include exemptions for nursing mothers. States with such exemptions are Illinois, Iowa, Kansas, Mississippi, Nebraska, Oklahoma, and Oregon. *See* 705 ILL. COMP. STAT. ANN. 305/10.3 (West 2007); IOWA CODE § 607A.5 (2009); KAN. STAT. ANN. § 43-158 (2009); MISS. CODE ANN. § 13-5-23 (West 1999); NEB. REV. STAT. § 25-1601 (2008); OKLA. STAT. ANN. tit. 38 § 28 (West 2009); OR. REV. STAT. § 10.050 (2007). Additionally, a number of states allow exemptions for potential jurors who are caregivers for disabled family members. *See* COLO. REV. STAT. § 13-71-105 (2008); FLA. STAT. § 40.013 (2010), *available at* [http://leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0000-0099/0040/Sections/0040.013.html](http://leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0040/Sections/0040.013.html); GA. CODE ANN. §§ 15-12-1 to -2 (2008); IOWA CODE § 607A.5 (2009); MASS. ANN. LAWS ch. 234A § 4 (LexisNexis 2000); TEX. GOV'T CODE ANN. § 62.106 (West 2005).

223 States that allow for occupation-based exemptions include Arizona, Connecticut, Florida, Georgia, Hawaii, Maine, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia, and Wyoming. *See* ARIZ. REV. STAT. ANN. § 21-201 (2002) (exempting peace officers); CONN. GEN. STAT. § 51-217 (West 2005) (exempting state constitutional officers, state judges, and members of the General Assembly); FLA. STAT. § 40.013 (2010), *available at* [http://leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0000-0099/0040/Sections/0040.013.html](http://leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0040/Sections/0040.013.html) (exempting the governor, lieutenant governor, cabinet members, court clerks, federal or state law enforcement officers, attorneys, and physicians); GA. CODE ANN. 15-12-1 (2008) (exempting post-secondary students during the time school is in session, teachers engaged in home-school programs while those programs are in session, and members of the Georgia legislature while the legislature is in session); HAW. REV. STAT. § 612-6 (2007) (exempting elected officials while the legislature is in session; county, state, or federal judges; members of the armed forces deployed out-of-state; active members of police or fire departments; active members of an emergency medical services agency; and actively practicing physicians or dentists); 14 ME. REV. STAT. ANN. § 1211 (2005) (exempting the governor, judges, physicians, dentists, veterinarians, sheriffs, attorneys); MD. CODE ANN., CTS. & JUD. PROC. § 8-306 (LexisNexis 2006) (exempting members of Congress, active duty members of the armed forces, and members of organized militias); MINN. GEN. R. PRAC. 808, *available at* <http://www.mncourts.gov/rules/general/GRtitleIX.htm#g808ix> (exempting judges); MO ST 494.425 (2004) (exempting judges and healthcare workers); NEB. REV. STAT. § 25-1601 (2008) (exempting judges, clerks of state courts, sheriffs, and jailers); NEV. REV. STAT. ANN. § 6.020 (LexisNexis 2008) (exempting legislators and police officers); N.J. STAT. ANN. § 2B:20-10 (West 2010) (exempting those who "provide highly specialized technical health care services for which replacement cannot be reasonably obtained,"

most common exempted professionals are elected officials, attorneys, members of the state and federal judiciary branches, police officers, and medical professionals. These occupational exemptions were originally justified with three broad arguments. First, some occupations were deemed too important to society to allow members of those professions to interrupt their duties for long periods of time. Second, states viewed certain professional expertise as a hindrance in weighing evidence presented at trial. Third, states were concerned that the ethical or moral responsibilities of some occupations conflicted with the duties of jury service.<sup>224</sup>

The Supreme Court has not directly addressed the Sixth Amendment implications of modern occupational exemptions to jury service. However, the Court did state as early as 1906 that the practice in Georgia of excluding doctors, dentists, lawyers, and ministers from jury service did not create constitutional concerns.<sup>225</sup> It is unclear whether that holding remains good law in light of the Court's more recent Sixth Amendment jurisprudence. However, the Court did state in dicta in *Taylor* that states are free to grant exemptions to "those engaged in particular occupations the uninterrupted perfor-

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health care workers directly involved in the care of a handicapped person for whom a replacement cannot be obtained, instructional staff of grammar and high schools, and volunteer members of fire departments of first aid or rescue squads); OHIO REV. CODE ANN. § 2313.16 (West 2008) (exempting cloistered members of religious organizations); OKLA. STAT. ANN. tit. 38, § 28 (West 2009) (exempting judges of the state supreme court, court of criminal appeals, court of civil appeals, or district court; sheriffs or sheriff deputies; licensed attorneys; legislators; and jailors); 42 PA. CONS. STAT. § 4503 (2002) (exempting members of the armed forces); R.I. GEN. LAWS § 9-9-3 (2010) (exempting legislators, other elected officials, the jury commissioner and his assistants, judges, court clerks, attorneys, police officers, probation and parole officers, fire fighters, and members of the armed forces); TENN. CODE ANN. § 22-1-103 (1994) (exempting federal or state elected officials, practicing attorneys, teachers, members of fire companies or law enforcement agencies, pharmacists, nurses, members of the armed forces or national guard, and those who operate their businesses as sole proprietors); VA. CODE ANN. § 8.01-341 (1998) (exempting the President and Vice President of the United States, Governor, Lieutenant Governor, Attorney General of Virginia, members of Congress, members of the General Assembly, practicing attorneys, judges, law enforcement officers, superintendents and officers of state and regional jails); W. VA. CODE ANN. § 52-1-8 (LexisNexis 2008) (exempting state or federal office holders); WYO. STAT. ANN. § 1-11-103 (2009) (exempting elected public officials, salaried members of an organized fire department, and active members of a police department).

<sup>224</sup> See Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL'Y REV. 239, 246 (2007) ("Clergy argued that jury service would violate their professional ethics, forcing them to make the type of judgments about other human beings that were incompatible with their religious responsibilities.")

<sup>225</sup> See *Rawlins v. Georgia*, 201 U.S. 638, 639-40 (1906) (finding that the exclusion of certain professions from jury service was not a violation of the Fourteenth Amendment).

mance of which is critical to the community's welfare."<sup>226</sup> Such exemptions are apparently not problematic under the Court's current 'fair cross-section' formulation.

Despite the Supreme Court's apparent endorsement of occupational exemptions, the trend among states is to abolish such exemptions or limit the number of professions exempted from jury service. The trend toward abolishing occupational-based exemptions began with Chief Judge Judith Kaye's efforts to reform the New York system in the mid-1990s. By 1994, New York had over two dozen occupational exemptions, and the efforts eliminating those exemptions were largely premised on two rationales. First, automatic occupational exemptions exacerbated a juror shortage that led to non-exempt jurors being called very regularly to serve long periods of time. As Judge Kaye pointed out, qualified jurors were called every two years to serve almost two weeks at a time.<sup>227</sup> The second argument was based on the idea of fundamental fairness. New York reforms were aimed at spreading the burden of jury service among more groups of citizens and sending a message that "no group is more privileged, or less important, when it comes to jury service, and no one gets excused automatically from this fundamental right, and obligation, of citizenship."<sup>228</sup>

The success of eliminating automatic occupational exemptions in New York has influenced other states to follow suit. The two primary rationales behind the New York reforms have proven especially influential as other states have either limited the number of occupational exemptions or wholly abolished them. One significant model for jury reform in the states has been the Jury Patriotism Act ("JPA"), a model act drafted by the American Legislative Exchange Council ("ALEC") which recommends the complete abolition of occupational exemptions.<sup>229</sup> The JPA is premised mostly on the two rationales underlying the New York reforms. ALEC is concerned that exemptions have caused artificial juror shortages that lead to delays and other in-

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<sup>226</sup> *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (citing *Rawlins*, 201 U.S. at 638). In *Berghuis v. Smith*, the Court observed that the categorical exemptions referred to in *Taylor* were offered as examples of the type of evidence the State might produce to rebut a prima facie showing by the defendant of under-representativeness. See 130 S.Ct. 1382, 1395 (2010).

<sup>227</sup> See Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, N.Y. ST. B.A.J., Oct. 2006, at 10, 11 ("By the early 1990s in New York, we were calling the same people every two years like clockwork . . .").

<sup>228</sup> *Id.* at 12.

<sup>229</sup> Victor E. Schwartz, Mark A. Behrens, & Cary Silverman, *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, ST. FACTOR, Apr. 2003.

efficiencies in the juror system.<sup>230</sup> Additionally, the JPA endorses the broad fundamental fairness rationale used in New York.<sup>231</sup> ALEC supports the ABA position that “‘broad categorical exemptions not only reduce the inclusiveness and representativeness of a jury panel, but also place a disproportionate burden on those who are not exempt,’ most notably blue-collar workers, the retired, and the unemployed.”<sup>232</sup> However, there is a strong counterargument to the fundamental fairness rationale adopted in New York and other states. Some professions, such as police officers and some attorneys, already play a role in the criminal justice system, and exempting them would not necessarily allow those professionals to shirk their participatory duties.<sup>233</sup> Nevertheless, states have found this two-prong rationale particularly persuasive as several states have adopted versions of the model act that have either eliminated or reduced occupational exemptions. Alabama, Arizona, Colorado, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Utah, Maryland, Texas, and Vermont have adopted portions of the JPA in reforming their jury systems.<sup>234</sup> Most recently, Tennessee wholly eliminated occupational exemptions to jury service.<sup>235</sup>

Although the states do not appear to have specifically contemplated the Sixth Amendment implications of automatic occupational exemptions, some commentators contend that such exemptions are inconsistent with the Supreme Court’s ‘fair cross-section’ requirement. These commentators argue that exempting members of certain professions is contrary to the Supreme Court’s acknowledgement that the community is made up of distinctive groups with unique viewpoints that should be represented in the jury venire. While admitting that there may be strong arguments for occupational exemp-

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230 See Kristin Armshaw, *Why Every State Should Have a Jury Patriotism Act: Bad Excuses and Broad Exemptions Are Hurting Our Jury Pools*, FINDLAW (July 14, 2004), [http://writ.news.findlaw.com/commentary/20040714\\_armshaw.html](http://writ.news.findlaw.com/commentary/20040714_armshaw.html) (“The result of no-shows and the overuse of hardship excuses has often been dire[.]. . . [and the]lack of jurors caused trials to be delayed or rescheduled.”).

231 See *id.* (arguing that under the JPA “[b]oth justice and fairness will be advanced”).

232 Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, But Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173, 202 (2006) (quoting AM. BAR ASSN., STANDARDS RELATED TO JUROR USE & MANAGEMENT 51 (1993)).

233 See Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL’Y & L. 445, 470 n.106 (1994) (“Police officers, for example, are almost always peremptorily struck by criminal defendants, and one might argue that they already play a public service role in the criminal justice system.”).

234 See Behrens & Crouse, *supra* note 232, at 203 (listing the states which have adopted legislation based on the JPA).

235 TENN. CODE ANN. § 22-1-103 (2009).

tions, some argue that “every exemption of an occupation makes a pool a less accurate cross-section of the community; police officers are a segment of every community, as are physicians, attorneys, and other occupations frequently excused from service.”<sup>236</sup> However, it appears unlikely that the Court would endorse this viewpoint given its statement in *Taylor* that the exclusion of certain occupations was unlikely to “pose substantial threats that the remaining pool of jurors would not be representative of the community.”<sup>237</sup> Additionally, some articles point to empirical data that suggests occupation is a poor indicator of juror viewpoint, and therefore occupational exemptions may not actually threaten the ability of states to achieve a ‘fair cross-section’ for venires. In arguing for a reformulation of the test for finding a “distinctive group” for Sixth Amendment purposes, Mitchell Zuklie points to a 1970s study that indicated that income was a much stronger predictor of juror attitude than was occupation.<sup>238</sup> With such studies in mind, it is possible that occupational exemptions do not impair the impartiality of jury venires and therefore are not necessarily in conflict with the ‘fair cross-section’ requirement.

Additionally, some commentators argue that occupational exemptions cause educational deficits in venires that impair the ability of juries to weigh evidence in complex matters adequately. As Professor Vikram David Amar points out, the public is often frustrated by inconsistent or “stupid” results from jury trials.<sup>239</sup> He argues that automatic occupational exemptions artificially limit the educational levels of potential jurors and that ending such exemptions would produce more consistent results:

The idea of the jury is rooted in equality; just as all defendants are treated equally before the law, all jurors have equal claims, as well as obligations, to play a part in the administration of justice. Limiting exemptions would expand the size of the jury pool, enforce the universality of required service, and raise the education level of juries.<sup>240</sup>

The most common exemptions are for highly educated professions, most notably attorneys, physicians, and members of legislative bodies. As Hillel Levin and John Emerson point out, the changing nature of trials calls for more educated jurors at the time that approx-

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<sup>236</sup> Brown, *supra* note 233, at 470.

<sup>237</sup> *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975).

<sup>238</sup> Zuklie, *supra* note 64, at 140.

<sup>239</sup> See Vikram David Amar, *More on What's Wrong with the Modern Jury: How Juror Selection Can Be Improved*, FINDLAW (Feb. 20, 2004), <http://writ.news.findlaw.com/amar/20040220.html> (finding that Americans are dissatisfied by the performance of modern juries and their decisions “seem out of step with American values and common sense”).

<sup>240</sup> *Id.*

imately one-third of states exempt the most educated from jury service. "As trials become more complex, it would be perverse if relatively educated members of pools—who may be the very best kinds of jurors—were systematically excluded from jury service."<sup>241</sup> However, it should be noted that Levin and Emerson's empirical study did not find that juries in Connecticut were substantially less educated than was the state's population, despite Connecticut's relatively long list of occupational exemptions. Additionally, it appears that New York case law has interpreted the reforms there to have been at least partially influenced by a desire to increase the educational levels of jury venirees. "In passing, we note also that the policy goals of recent jury reform measures that eliminated exemptions . . . . This reform plainly contemplates that a class of professional individuals should contribute their 'wisdom and life experiences to the deliberative process.'"<sup>242</sup>

Although the trend in the states has clearly been to limit or wholly eliminate occupational exemptions, there are a number of arguments in support of maintaining such exemptions. Arguments in favor tend to fall in one of three broad categories. First, there are some occupations that are unlikely to survive voir dire, and it is therefore inefficient to summon members of those professions. For example, police officers are unlikely to be selected to sit on a petit jury, although many states have eliminated automatic exemptions for such professionals.<sup>243</sup> Second, some argue that there are professionals whose absence from work may cause public inconvenience. The most notable example is physicians with very inflexible professional schedules. Physicians are especially concerned that being summoned for jury service will create a substantial hardship for their patients.<sup>244</sup> Finally, there is an argument that not exempting certain professions may cause substantial personal hardship for those summoned. The Vera Institute of Justice study points specifically to the increasing numbers of jurors in New York who identify themselves as either self-employed

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241 Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 327 (2006) (citations omitted).

242 *People v. Maragh*, 729 N.E.2d 701, 705 (N.Y. 2000) (quoting Judith Kaye, *A Judge's Perspective on Jury Reform from the Other Side of the Jury Box*, 36 JUDGES' J. 18, 21 (1997)).

243 See *Who Is Eligible*, AM. JUDICATURE SOC'Y, [http://www.ajs.org/jc/juries/jc\\_whoserves\\_eligible.asp](http://www.ajs.org/jc/juries/jc_whoserves_eligible.asp) (last visited Mar. 27, 2011) (stating that most states have trended toward eliminating exemptions to attain a broader representation for purposes of the 'fair cross-section' requirement).

244 JULIA VITULLO-MARTIN, BRIAN MAXEY & CHRIS CESARINI, FIVE YEARS OF JURY REFORM: WHAT JURORS ARE SAYING 12 (Vera Inst. of Just. ed., Aug. 2000) (finding that nearly half of doctors say that if they have to serve on juries, their patients will suffer).

or sole-proprietors of their business.<sup>245</sup> Not exempting such potential jurors may place a unique weight on those individuals. However, it should be noted that as of December 2008, only one state, Tennessee, specially included an automatic exemption for the self-employed. As part of its jury reform efforts, Tennessee eliminated that automatic exemption as of January 1, 2009.

So, while “young people, old people, poor people, deaf people, less educated people, college students, resident aliens, blue-collar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis,”<sup>246</sup> convicted felons, persons charged with felonies, and persons whose last name begins with letters W through Z may not have unique “flavors,” systematic exclusions of these groups from jury service would violate the Sixth Amendment because the resulting venire would be composed not of “the district,” but of an unconstitutionally restrictive subset of “the district.”

#### CONCLUSION

The Sixth Amendment’s promise of a representative jury continues to be unfulfilled. Much as the Court failed in preventing the widespread and persistent under-representation of women, African Americans, and other minorities on juries for almost two centuries after the Founding, so too the Court’s celebrated ‘fair cross-section’ jurisprudence has proved largely inefficacious. A doctrine that once held much potential to serve as the means of ensuring representative juries has largely come to a jurisprudential standstill due in large part to the doctrinal conflicts created by the manner in which the Court chose to frame the ‘fair cross-section’ requirement.

If, instead of deriving the ‘fair cross-section’ requirement from the Sixth Amendment’s impartial jury clause, it were derived instead from the vicinage clause, the result would be a doctrine more faithful to the understanding of representativeness reflected in the adoption of the Sixth Amendment. Such a textual reframing, moreover, would resolve the doctrinal conflict and jurisprudential paradox now constraining the ‘fair cross-section’ requirement and would revitalize the Sixth Amendment by precluding the categorical exclusions from jury service that are now prevalent in many jurisdictions.

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<sup>245</sup> *Id.* at 10–11.

<sup>246</sup> Leipold, *supra* note 59, at 968–69 (citations omitted).