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Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate

Scott W. Howe*

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In the last decade, commentary about jury selection has focused on equal protection requirements rather than on the Sixth Amendment's impartiality mandate. This trend has followed developments in the Supreme Court. After a shift beginning in the 1940s away from reliance on equal protection principles toward a focus on the impartiality mandate, the Court returned to equal protection as the basis for major new restrictions with its 1986 decision in *Batson v. Kentucky*. The organizing themes of impartiality doctrine were less than clear when *Batson* was decided. The Court's sudden return to equal protection as the source of signifi-

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1 As for jury impartiality, the Sixth Amendment provides: "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 . . . ." U.S. CONST. amend. VI. The Supreme Court also has held that the Fourteenth Amendment incorporates the Sixth Amendment right to an impartial jury against the states. See, e.g., Taylor v. Louisiana, 419 U.S. 522, 526-28 (1975) (invalidating Louisiana laws that excluded women from jury service who had not filed a written request to serve). The Court also has concluded that the Due Process Clause requires that a jury, when provided, be impartial, even when the right to jury is inapplicable. See Morgan v. Illinois, 504 U.S. 719 (1992) (holding that failure to allow capital defendant to ask potential jurors if they would automatically vote for a death sentence if they found him guilty violated due process, although capital defendant not entitled to jury trial on sentencing question).

The Equal Protection Clause in the Fourteenth Amendment limits the states, while equal protection principles apply against the federal government through the Due Process Clause in the Fifth Amendment. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (prohibiting racial discrimination in the District of Columbia school system).


2 See infra notes 195-97 and accompanying text.


4 For examples of commentary published near the time of the Court's *Batson* decision that underscore the ambiguous function of the impartiality mandate, see Toni M. Massaro, *Preemptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 503 (1986) (arguing that the Court had erroneously looked to mandate of equal protection rather than impartiality mandate to control racially motivated exercise of peremptory strikes by prosecutors against African-Americans); James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555, 1555 (1985) (noting that the Court has "struggled" both "to define" the impartiality standard and "to resolve earlier contradictory pronouncements regarding due process and equal protection challenges").
cant new limitations raised additional questions about the function of impartiality regulation, even as it diverted attention from the Court's impartiality decisions.5

The modest volume of commentary focusing on impartiality doctrine has also come in fractured form, with little analysis of the impartiality decisions as a structural whole. Normative commentary about the impartiality mandate typically has focused on a single problem, such as discrimination against African-Americans in jury selection or ambiguity in the standard for "death qualification" of jurors in capital cases.6 While this commentary often proposes an account of impartiality to address the relevant concern, the aim is not to elucidate the overarching principles by which to understand impartiality decisions as a unified body of law. Similarly, descriptive commentary about impartiality requirements typically has not focused on impartiality as a unitary concept but rather on its relevance along with other doctrines at segmented stages of the jury selection process.7 Descriptive commentary also has typically assumed a deferential approach to the Supreme Court's assertions about the doctrine. Yet, some of the Justices' comments about the impartiality doctrine are not sensible in light of the Court's holdings.8

This Article provides a theory for integrating the decisions of the Supreme Court interpreting the impartiality mandate. It identifies the organizing themes by which to view the impartiality decisions both as a coherent body of law and as a jurisprudence that corresponds with other constitutional doctrine regulating jury selection. In sum, the Article demonstrates how the Court's impa-

5 See infra text accompanying notes 238-66.


8 For examples of troublesome assertions by the Court, see infra text accompanying notes 145-47, 261-66. For examples of inconsistent decisions, see infra note 168.
Efforts to comprehend the Court’s impartiality decisions are complicated by four often interrelated problems. First, ambiguity surrounds the notion of individual impartiality. Does a conclusion that an individual juror is impartial signify that the juror is neutral and that she is free of extreme biases, or something else? The Court’s opinions leave the concept of individual impartiality murky.

The second problem concerns whether a constitutionally impartial jury means something more than a group of impartial jurors, and, if so, what more the notion of jury impartiality implies. The Court repeatedly has held that a jury of impartial jurors can be challenged on representativeness grounds based on the exclusion of certain potential jurors, such as African-Americans or women. At the same time, the Court has sometimes rejected impartiality claims based on exclusion by declaring that an impartial jury demands no more than that each person who serves qualifies as impartial. The Court’s opinions affirming that impartial ju-

9 Underlying the Court’s “fair cross-section” decisions is the notion that the exclusion of certain potential jurors in the venire can render the resulting jury biased even though all of its individual members are impartial. See, e.g., Duren v. Missouri, 439 U.S. 357, 363-64 (1979) (holding that system allowing women to opt out of service by written request rendered resulting jury violative of the Sixth and Fourteenth Amendments); Glaston v. United States, 315 U.S. 60, 85-86 (1942) (holding that exclusion of all women not members of the Illinois League of Women Voters renders any jury selected partial). This idea also underlies the Court’s holdings in capital cases that the exclusion of certain jurors from the venire can render the resulting jury biased on the sentencing question although all jurors may be impartial in an individual sense. See, e.g., Adams v. Texas, 448 U.S. 38, 41-49 (1980) (citing Witherspoon, the Court found unconstitutional the Texas practice of excluding jurors in capital cases who could not take oath attesting that the mandatory penalty of death or imprisonment for life would not “affect [their] deliberations on any issue of fact”); Witherspoon v. Illinois, 391 U.S. 510, 521-23 (1968) (exclusion of potential jurors with “conscientious scruples” against death penalty rendered resulting jury “woefully short of that impartiality to which petitioner was entitled” under the Constitution).

10 In rejecting a claim by a capital defendant that excluding potential jurors based on their views about the death penalty rendered the jury partial on the guilt-or-innocence question, the Court stated: McCree’s “impartiality” argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by “balancing” the various predispositions of the individual jurors. Thus, according to McCree, when the State “tips the scales” by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial jury consists of nothing more than “jurors who will consci-
rors may comprise a biased jury also fail to provide a clear articulation of the rationale and boundaries for a group impartiality rule.\textsuperscript{11}

The third problem concerns whether due process requires a jury to be impartial even when the Sixth Amendment right to an impartial jury in nonpetty criminal trials does not apply. The Court has stated\textsuperscript{12} and implied in its decisions\textsuperscript{13} that due process requires a jury, whenever it is provided, to stand impartial in every sense in which the Sixth Amendment mandates impartiality. However, the Court has never explained this conclusion. Individual judges or even a panel of judges need only stand impartial in an individual sense to satisfy due process; states need not select judges through a process that promotes representativeness.\textsuperscript{14} It is not clear why claims about juror exclusion—claims about representativeness—should matter when the defendant has no constitutional right to a decision by a jury over a decision by one or more judges.

The final problem in understanding impartiality doctrine concerns the relation of that doctrine to equal protection regulation. Over a century ago, the Court held that equal protection proscribes the exclusion on racial grounds of African-Americans

\textsuperscript{entiously apply the law and find the facts.” Wainwright v. Witt, 469 U.S. 412 \{\textsuperscript{18}\} (1985) (emphasis added); see also Smith v. Phillips, 455 U.S. 209 \{\textsuperscript{19}\} (1982) (“Due Process means a jury capable and willing to decide the case solely on the evidence before it”); Irvin v. Dowd 366 U.S. 717, 722 (1961) (“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”).


\textsuperscript{11} See infra notes 147, 151.

\textsuperscript{12} See Morgan v. Illinois, 504 U.S. 719, 726 (1992) (“Due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”).

\textsuperscript{13} See, e.g., Witherspoon, 391 U.S. at 510 (improper exclusion of potential jurors rendering jury impartial on sentencing question and requiring reversal of sentence although defendant had no right to jury trial on sentencing); accord Gray v. Mississippi 481 U.S. 648 (1987); Adams v. Texas, 448 U.S. 38 (1980); Davis v. Georgia, 429 U.S. 122 (1976).

\textsuperscript{14} See Massaro, supra note 4, at 537 (noting that "white, male, middle class, middle-aged judges regularly decide cases involving people of every color, gender, age, and background" and that society does not expect the Supreme Court to condemn the practice as unconstitutional); John Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 246 (1987) (noting that, as regards judges, the Supreme Court has only read the Constitution to forbid them to hear cases "when they have a personal stake in the result, become personally embroiled with a party, or were involved in the litigated incidents").
from eligibility for jury service. In subsequent decades, the Court reiterated that prohibition and extended it to other groups before developing an impartiality doctrine that largely engulfed the equal protection holdings. The Court's recent return in Batson to equal protection has focused on the elimination of potential jurors through peremptory challenges. Traditionally, litigants could exercise their allotted peremptory strikes without explanation, even when they apparently acted on racial grounds. In Batson, the Court first held that an African-American defendant could challenge a prosecutor's use of peremptories to dismiss African-Americans and has now extended that doctrine in several ways. The Court not only decided Batson on equal protection grounds, but also rejected a claim that the impartiality mandate incorporates the Batson principle to promote representativeness.

Two disputes have arisen about the impartiality doctrine based on the Court's equal protection decisions. First, some of the Justices have suggested that the Court, under equal protection, has outlawed racial and gender stereotyping in jury selection, while relying on such stereotyping to support, under the representativeness notion of impartiality, rules that regulate even unintentional exclusions of potential jurors. Second, some have contended that the Court's conclusion that race or gender-based peremptories are insufficiently justified to satisfy equal protection conflicts with its

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15 Establishing an intent to discriminate has often proved an unsurmountable burden to success with equal protection challenges. See, e.g., Swain v. Alabama, 380 U.S. 202, 205-09 (1965). However, no such problem arises where a statute explicitly bars blacks from jury service. This was the situation presented in Strauder v. West Virginia, 100 U.S. 303 (1879), where the Supreme Court first sustained an equal protection challenge to jury selection procedures.

16 For discussion of these early equal protection decisions, see infra note 194.

17 For discussion of the emergence of the representativeness notion of impartiality, see infra notes 195-97 and accompanying text.

18 See, e.g., Stephen A. Saltzburg & Mary Ellen Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337, 340 (1982) ("[B]oth prosecutors and defense counsel have come to rely on the peremptory to remove jurors they suspect of prejudice. By definition, the peremptory challenge does not require an explanation.").

19 For discussion of Batson and subsequent decisions of the Court extending the Batson principle, see infra notes 200-08 and accompanying text.


21 See infra text accompanying notes 214-16.
These four general problems provide the organizational structure for the Article and the analytical outlines for understanding the Court's impartiality jurisprudence. Parts I, II and III deal respectively with the questions: 1) What is an "impartial" juror?; 2) Why does an impartial jury mean more than a collection of impartial jurors?; and 3) Why does due process require a jury to stand impartial in the same way as the Sixth Amendment even when the Sixth Amendment does not apply? These problems focus on the internal structure of impartiality regulation. Part IV of the Article addresses whether impartiality doctrine conflicts with equal protection regulation in jury selection.

The Article concludes that the Court's decisions interpreting the impartiality mandate reflect a coherent structure of organizing principles that coincide with the Court's equal protection doctrine. The principal theme underlying the Court's decisions is that impartiality signifies an impartiality spectrum. The web of principles that explain the Court's doctrine stems from this basic proposition. It is important to understand that what the Court has said about impartiality does not always correspond with these organizing principles or even with the basic proposition that impartiality signifies an impartiality array. The Court continually is pulled in opposite directions by the problems associated with either admitting or denying that impartial jurors will differ in their assessments of a case. That tension is visible in the Court's sometimes polarized rhetoric about impartiality. Nonetheless, the Court's actual decisions reveal a mediating approach by which it has addressed some of the more blatant concerns arising from the reality that juror background matters, without concluding that a jury is always biased unless it embodies a balance of juror demographics.

I. THE IMPARTIALITY OF INDIVIDUAL JURORS

The question at the heart of impartiality doctrine concerns what it means for an individual juror to stand impartial. Litigants have presented numerous claims before the United States Su-

22 See infra text accompanying notes 241-49.
23 See, e.g., infra text accompanying notes 227-31.
24 See, e.g., supra note 10.
Supreme Court alleging the bias of individual jurors, in part because inclusion of even one biased juror will infringe the impartiality mandate and require reversal of a conviction. However, the Supreme Court has rarely reversed convictions based on juror bias. The Court’s rulings give state courts and federal trial judges substantial discretion in passing on questions of individual impartiality. Recognizing that most potential jurors are not neutral, but rather hold perspectives that will influence their verdicts explains much about the Court’s approach to individual impartiality.

The individual impartiality question arises near the end of jury selection. That process begins with the creation of a master “wheel” or “list” of possible jurors, which is typically compiled based on voter registration records. In relatively active courts, jury officials select a “pool” of potential petit jurors from the list for service during a particular period. When a trial is ready to commence, the jury officials compile a smaller “venire” of potential jurors from the pool and direct the group to the courtroom. After excusals based on health or hardship, the trial

25 This point is not seriously disputed: “[O]nly a few Court decisions have concluded that the trial court erred in not excluding a particular venire person for cause; such a finding has always required reversal of conviction.” WHITEBREAD & SLOBOGIN, supra note 7, at 687.

26 The Court’s decisions reflect a distinction between when exclusion is constitutionally permitted and when it is required. See infra text accompanying notes 55-57.


28 This approach has been used in the federal system since 1968, when Congress passed the Jury Selection and Service Act. “The purpose of the [Act] is to codify and implement the Sixth Amendment’s fair cross-section requirement.” Criminal Procedure Project, supra note 7, at 1382. The Act mandates that the wheel of potential jurors be prepared based on either voter registration lists or lists of actual voters. Those lists must be supplemented with other sources, such as drivers license records, where necessary to secure a wheel that represents a cross-section of the community. See 28 U.S.C. §§ 1861-1869 (1988). In most federal districts, however, courts have held that a wheel prepared only on voter registration lists satisfies Sixth Amendment requirements. See Cynthia A. Williams, Note, Jury Source Representativeness and the Use of Voter Registration Lists, 65 N.Y.U. L. Rev. 590, 592 (1990).

Many state courts have adopted similar systems, but some continue to employ a “key man” system, under which commissioners appointed by the court prepare a jury wheel of persons who the commissioners believe are honest and upstanding citizens. See Whitebread & Slobogin, supra note 7, at 670; Van Dyke, supra note 27, at 934 (noting that state courts have adopted similar systems).

29 Typically, the selection of the venire is random, though in states following the “key man” system, creation of the venire often is also decidedly nonrandom, which has led to constitutional challenges. See Whitebread & Slobogin, supra note 7, at 671. On the nature and disposition of the constitutional claims, see infra note 142 and accompa-
judge supervises a voir dire proceeding during which potential jurors are briefly educated about the nature of the trial and questioned, among other things, about their reactions. As jurors answer questions, the trial judge rules on motions to exclude for "cause," which concern legal qualifications to serve. The parties may also exercise a specified number of peremptory challenges to exclude members of the venire not excluded by the trial judge. However, questions of individual impartiality, strictly defined, arise when the judge determines whether to exclude jurors for cause.

The Supreme Court frequently has stated that an impartial juror is one who will base a verdict on the evidence and the instructions of the trial court. The Justices recently have articulated this standard with regularity, particularly in capital cases: "[T]he proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or
substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

This standard is ambiguous because it often is uncertain what following the law means. First, as Professor Neuborne has noted, an individual's construction of reality builds on that individual's experiential background. Many interpretations of the evidence in a particular case could arise that would lead to a variety of conclusions about the "facts." None of these different interpretations are necessarily "erroneous." Also, apart from doubts that right answers generally exist for legal issues, many problems submitted to jurors in criminal cases openly call for value judgments that do not lend themselves to objectively correct answers. When has a defendant acted "negligently"? When has a defendant "caused" the death of another? When does a capital defendant "warrant" the death penalty? For these kinds of questions, a judge probably can only suggest that some views come closer to representing community values than others.

38 See, e.g., Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518, 562 (1986) (suggesting that a federal district judge as well as a Supreme Court Justice never truly experiences rule application from earlier decisions as something that must occur). See generally ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1-4 (1986) (contending that the critical legal studies movement has undermined the formalist and objectivist notions of modern legal thought).
39 See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 127-29 (1968) (noting that questions of negligence play a large role in criminal cases and involve application of a juror's sense about community values rather than a factual question about the internal state of mind of the criminal defendant).
40 See, e.g., Meir Dan-Cohen, Causation, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 166 (Sanford H. Kadish ed. 1983) ("[T]he statement that A caused B's death may, in ordinary speech, be as much a conclusory statement, based on the prior tacit judgment that A deserves to be punished for B's death, as it is an independent statement of fact which leads to that conclusion."); cf. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 361 (1978) ("The requirement of causation in homicide cases is problematic because, given modern notions of liability based on the culpability of acts, it is particularly difficult to explain why the occurrence of death matters.").
41 See, e.g., Scott W. Howe, Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb, 79 IOWA L. REV. 989 (1995) (discussing the value judgment involved in the decision of the capital sentencer whether to impose the death penalty).
42 This conclusion is demonstrated most clearly by the Court's decisions before 1972 regarding when a potential juror was too biased against the death penalty to decide a capital case. Before 1972, capital sentencing decisions were unregulated by legal standards. See Furman v. Georgia, 408 U.S. 238 (1972). Because the decisions were not regulated, a sentencing decision based on any sincere view would not violate the juror's oath.
Although the Justices have not articulated a precise measure of juror impartiality, it is difficult to fashion a test that reflects more accurately the Court's constitutional holdings. A brief, self-explanatory standard appears impossible to provide. Perhaps the best that one can say is that persons who establish themselves in advance as likely to be strongly influenced by information gained extrajudicially regarding important factual issues, as likely to decide the case primarily on offensive, personal considerations or as likely to fail to consider relevant, in-court arguments, warrant a finding of bias.

The measure of juror bias revealed by the Court's decisions rarely requires exclusion of many potential jurors. A bias may...
arise from a variety of sources but only requires exclusion if it appears likely to influence a potential juror’s decision to a powerful degree. A predisposition about the proper outcome of the case based on knowledge about it could be a source of debilitating bias. A more personal bias warranting exclusion could likewise exist if, for example, a potential juror had a financial interest in the outcome of the case or were closely related to the defendant. More general biases against, for example, the race of a party, one of the potential punishments to be imposed or the criminalization of the act the defendant allegedly committed could warrant exclusion. However, unless the juror admits to a

I mean the “prerogative to disregard uncontradicted evidence and the legal instructions of the judge in order to acquit a defendant.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 441 n.79 (1991). Professor Dressler notes:

Historically, juries have used their nullification power to acquit defendants charged with controversial offenses, such as the Fugitive Slave Act, which made it an offense to assist slaves to escape. But, the jury can use its nullification power for any reason, including as an act of compassion towards a factually guilty defendant.

Id. Hence, acceptance of jury nullification reflects recognition of the existence of personal perspectives influencing jurors in deciding cases. It also means that jurors who render a verdict that one would call irrational in light of the evidence and the law may nonetheless act properly.

46 See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961) (overturning murder conviction based on conclusion that jurors who had heard inflammatory information about the defendant through the media should have been viewed as biased despite their assertions of impartiality); cf. Marshall v. United States, 360 U.S. 310 (1959) (holding, under the supervisory power over federal courts, that potential jurors who had learned of the defendant’s prior criminal record through news sources were too biased to serve when the federal district judge had excluded the defendant’s record from the evidence).

47 Cf. Connally v. Georgia, 429 U.S. 245 (1977) (agreement under which justice of the peace was paid $5 for each search warrant that he issued and nothing for warrant applications that he denied rendered the decision maker biased).

48 See, e.g., Turner v. Murray, 476 U.S. 28 (1986) (holding that failure of trial judge to voir dire about potential racial prejudice against black defendant convicted of murdering white victim warranted reversal of death sentence); Ham v. South Carolina, 409 U.S. 524 (1973) (holding that trial judge was obliged to inquire of potential jurors specifically regarding their possible racial prejudices where black, civil-rights worker in small town defended against drug charge on grounds that he had been framed).

49 See, e.g., Wainwright v. Witt, 469 U.S. 412, 423 (1985) (delineating for purposes of capital cases when states may exclude potential jurors because they are too biased against the death penalty); cf. Morgan v. Illinois, 112 S. Ct. 2222, 2229 (1992) (setting forth a standard for determining when potential jurors in capital cases are too biased in favor of capital sanction to serve).

50 See, e.g., Reynolds v. United States, 98 U.S. 145, 157 (1878) (concluding that potential jurors living in polygamy were too biased to serve in trial of defendant on charges of bigamy).

51 The notion that potential jurors could be excluded for nonspecific bias was controversial at the time of the founding. In the United Kingdom, potential jurors are still
bias, exclusion usually is not constitutionally required. Only rarely has the Court held that a trial judge should have inferred a debilitating bias from other circumstances, such as the juror's exposure to publicity about the case, and even those holdings seem limited by more recent decisions. Further, to require exclusion under the Constitution, a relevant bias apparently must be so extreme that it would not give way to consideration of evidence and testimony warranting a contrary decision.

The bias standard is effectively loosened more by the Court's decision to allow lower courts great discretion on how thoroughly to inquire into the prejudices of potential jurors. First, voir dire questions typically may be directed to potential jurors as a group rather than individually. Employing this procedure will limit re-
responses that suggest an inability to be fair. The judge rather than the lawyers may also conduct the questioning, giving the judge control over both initial inquiries and the follow-up questions to any juror responses. The judge can therefore follow any suggestion of prejudice with an abstract inquiry, like: “Can you nonetheless fairly evaluate the evidence and follow the court’s instructions?” Further, the trial court usually need not pose more than a small number of basic questions framed in general terms. One requirement arises regarding capital sentencing trials, where the trial judge must allow a question about whether jurors would automatically vote for the death penalty upon a finding

Regulation of voir dire by the Federal Courts of Appeal under the supervisory powers notion has, indeed, been modestly more exacting than regulation under the Constitution.

Generally speaking, individual voir dire has been required in three situations in the Federal courts, although trial judges have significant discretion as to how to frame the questions. These three situations are: 1) where a case has racial overtones; 2) where the case involves matters concerning which the local community is known to harbor strong feelings, that may stop short of a need for a change of venue but may nonetheless affect the trial—such as child abuse or narcotics distribution; and, 3) where testimony from law enforcement agents is likely to be overvalued.

Babcock, supra note 32, at 547-48 (footnotes omitted).

[A]nother method of restricting the information-gathering function of voir dire is to address all questions to the jury panel at once, rather than as individuals. Such a procedure makes it difficult for people who are not accustomed to speaking in front of others to respond to the questions, and it also makes it easier for jurors who have an answer to some question to fail to respond. Experienced litigators know, and empirical studies have substantiated, that it is part of the psychology of the venire for some people to decide that they want to be on the jury. To that end, such people will evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and possibly being struck. Such behavior is obviously more difficult when the questions are addressed to each juror individually.

57 See generally id. at 548-49.

58 See id. at 548-49.

59 For example, in Ham v. South Carolina, 409 U.S. 524 (1973), involving a bearded civil rights worker who defended against a drug charge by alleging that the police had framed him, the Supreme Court upheld the refusal of the trial court to voir dire potential jurors on their possible prejudices against those with facial hair. Although the Court conceded “that prejudice against people with beards might not have been harbored by one or more of the potential jurors,” the Court noted that it was unable to constitutionally “distinguish possible prejudice against beards from a host of other possible similar prejudices . . . .” Id. at 527-28.
that the defendant was guilty of capital murder. The Court has constitutionally mandated few other specific inquiries. The trial judge need not even inquire into racial prejudices, except in interracial capital cases or where race presents a substantial issue beyond the inter-racial nature of the crime. This deferential approach by the Supreme Court to regulating voir dire means that defendants often cannot demonstrate that potential jurors have powerful biases that would influence their decisions.

61 See Turner v. Murray, 476 U.S. 28 (1986) (reversing death sentence based on failure of trial court to voir dire about potential racial prejudice against black defendant found guilty of murdering white victim).
62 In Ham, where a black civil rights worker in a small town defended against a drug charge on grounds that he had been framed, the Supreme Court concluded that the trial judge had violated due process by failing to inquire of potential jurors specifically regarding their possible racial prejudices. Ham, 409 U.S. at 526–27. The Court emphasized that the trial judge was not required to put the questions in any particular form, noting that either of the two questions proposed by defendant would have been sufficient. Id. at 527. Ham had proposed the following questions:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?"
"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?

Id. at 526 n.2.

In Ristaino v. Ross, 424 U.S. 589 (1976), the Court clarified that Ham did not announce a rule of broad applicability. In Ross, the Court rejected the notion that a constitutional obligation arose to inquire specifically about racial prejudice merely because the victim of an armed assault and robbery was white and the defendants were black. Id. at 597–98. The Court noted, however, that it could impose more exacting standards on federal trial judges through its supervisory powers over the federal courts. See id. at 597 n.9.

In Rosales-Lopes v. United States, 451 U.S. 182 (1981), a plurality of four Justices also stated that inquiry into potential racial prejudices is required in federal trials "when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." Id. at 192. The Court then concluded, however, that such an inquiry was unnecessary where a defendant of Mexican descent was charged with aiding members of his own ethnicity in entering the United States illegally. Id. at 193–95.

A majority of the Court endorsed a more limited rule for constitutional purposes in Mu'Min v. Virginia, 500 U.S. 415 (1991): "[T]he possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice . . . ." Id. at 425.

63 Another principle operates to reduce the number of individual impartiality claims, but by overexcluding rather than underexcluding biased jurors. States may employ statutes reflecting categorical approaches to partiality:

Hopt v. Utah, 120 U.S. 490, 493 (1887), detailed typical reasons for excuse for cause: "Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution
The test of when a potential juror qualifies as impartial is effectively loosened even further through procedural rules restraining federal review of claims by defendants regarding the inclusion of biased jurors. Most importantly, the Court has defined the individual-bias inquiry as purely a factual question, rather than a mixed question of law and fact. This means that a trial judge's conclusion, either that a potential juror is biased or is impartial, will be spared close examination on federal review. As long as the record from voir dire suggests a potential juror with both a prejudice and some willingness to set it aside, a federal reviewing court generally will uphold either sort of finding by the trial

was instituted, or to the defendant; ... Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages ... Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.” [ABA Project on Minimum Standards for Criminal Justice—Standards Relating to Trial by Juror 69 (Approved Draft 1968)] ... lists the traditional grounds similar to those above and adds: “Some statutes also list additional grounds, such as: that he has served as a juror within the preceding year ...; that he is or has been engaged in carrying on a business in violation of the law, where the defendant is indicted for a like offense; that he has been indicted within 12 months for a felony or an offense of the same character as that with which the defendant is charged; that he is a party to a suit pending in that court at that term ... .” Babcock, supra note 32, at 549 n.16. These statutes eliminate a significant number of difficult impartiality questions.

65 Id. at 428-29. In Wainwright, the Court discusses how when issues from state criminal trials are raised in federal habeas corpus, “a federal reviewing court is required to accord any findings of the state courts on ‘factual issues’ a ‘presumption of correctness’ under 28 U.S.C. § 2254(d).” Id. at 426. Unless the applicant can establish that he did not receive a fair hearing, as set forth in 28 U.S.C. § 2254(d)(2), or that the record does not fairly support the finding, as set forth in 28 U.S.C. § 2254(d)(8), the applicant cannot overcome the presumption except with convincing evidence that the finding was wrong. See 28 U.S.C. § 2254(d) (1988). In practice, this standard accords great deference to trial court findings of juror impartiality based on the view that the trial judge is bestowed with the opportunity to assess the potential juror's demeanor and credibility. See Wainwright, 469 U.S. at 428.

Similar deference is shown to factual findings by state courts when the Supreme Court reviews criminal convictions on direct appeal. See generally ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 159-60 (7th ed. 1993) and authorities cited therein.

Factual findings by federal trial courts are likewise immune from review by federal appellate courts, absent unusual circumstances, except upon a finding of manifest error. See, e.g., Reynolds v. United States, 98 U.S. 145, 156 (1878).
court. The reviewing court will only inquire whether some basis existed in the record for the finding.

What is the conception of juror impartiality that underlies the Court's doctrine? The Court sometimes speaks as if juror impartiality equates with juror indifference. However, the Court's implementation of the impartiality mandate accords more with a view that most people included in a venire for any trial will carry prejudices that would influence their decisions, a view that the Court has sometimes openly acknowledged. This perspective helps explain the inability to delineate the substantive standard of individual impartiality with much precision. The inquiry necessarily in-

66 For example, in the context of a federal habeas appeal, the Court emphasized in Darden v. Wainwright, 477 U.S. 168 (1986), that the reviewing court must view the voir dire as a whole in trying to support the trial court's ruling. As the court stated, "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. at 178 (citing Wainwright, 469 U.S. at 412).

67 Apart from cases involving pre-trial publicity, the Court has only once concluded that a juror's bias should have been inferred automatically, despite statements from the juror indicating an ability to remain impartial. In Leonard v. United States, 378 U.S. 544 (1964), the Court concluded that potential jurors who had been present when the trial court announced the guilty verdict in an earlier trial of the defendant should have been automatically disqualified for bias at the defendant's second trial on similar charges. Id. at 545. The Court has rejected such claims of implied bias by criminal defendants in several other circumstances, requiring that the defendant establish "actual bias." See, e.g., Dennis v. United States, 339 U.S. 162 (1950) (federal employees, although dischargeable if unloyal to the government, were not necessarily biased in the trial of the defendant on charges of failing to appear before House Un-American Activities Committee).

As regards potential bias based on pre-trial publicity, decisions from the Warren Court that seemed to require a conclusive presumption of bias where publicity was extensive have been limited by more recent decisions calling for a showing of actual bias to require exclusion. See supra note 53. See generally WHITEBREAD & SLOBOGIN, supra note 7 at 702-05. For a discussion from various perspectives of the effects of pre-trial publicity on jury selection, see Symposium Issue on the Selection and Function of the Modern Jury, 40 AM. U. L. REV. 541 (1991).

68 See, e.g., United States v. Wood, 299 U.S. 123, 145-46 (1936) (describing impartiality as a "mental attitude of appropriate indifference").

69 The observation that all potential jurors harbor relevant prejudices in every case is not novel. See, e.g., Babcock, supra note 32, at 551 ("All people have biases and opinions that will inevitably influence their decisions and perceptions, including those on jury duty."); Minow & Cate, supra note 54, at 656 (declaring it an "obvious fact that every juror brings opinions, biases, and prejudices to the jury box"); see also Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201, 1208 (1992) (noting that the categories of sex and race "implicate us all" and that "[i]f being implicated means bias, then everyone is biased").

70 See, e.g., Taylor v. Louisiana, 419 U.S. 522, 533 (1975) (noting that impartial jurors include those with "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." (quoting Peters v. Kiff, 407 U.S. 493 (1972))

volves determining not merely whether a potential juror holds relevant biases toward one of the litigant’s positions, but determining the strength of those biases. More importantly, this view of potential jurors as typically harboring prejudices helps explain why the qualifications for impartiality are forgiving: Efforts to enforce a highly exacting standard of juror impartiality would require exclusion of almost most potential jurors in many cases.

Indeed, the most important idea to extract from the Court’s decisions on individual bias is that constitutional impartiality does not connote bland neutrality. An imprimatur of impartiality indicates only that a potential juror has not manifested certain powerful and inappropriate perspectives regarding a particular trial. The Court does not often emphasize this notion of impartiality. Declaring that impartial jurors vary raises problems that can be deflected by promoting the concept of impartiality as neutrality. Nonetheless, the Court’s approach to individual impartiality reflects the reality that even potential jurors deemed constitutionally impartial harbor many relevant biases. These numerous and sometimes countervailing influences will cause some impartial jurors to favor one litigant in varying degrees, some to favor another litigant in varying degrees, and some to favor none of the litigants. This point is the core around which the rest of impartiality doctrine unfolds.

II. GROUP IMPARTIALITY

A conception of individual impartiality as a range of permissible prejudice suggests why a jury made up of impartial jurors could nonetheless sometimes be thought to harbor collective bias. The group could be selected by methods that tend to exclude persons at one end of the impartiality range much more so than persons at the other end of the spectrum. Attention to this problem implies a concern about group impartiality—the representativeness of the jury. It suggests the need for restrictions on the methods by which impartial potential jurors are excluded from the jury. What restrictions should the Court impose? This Part explains the problems involved with pursuing group impartiality and the course that the Court has followed.

A. Problems With Pursuing Group Impartiality

Both conceptual and practical problems arise with efforts to require group impartiality on juries. First, the Sixth Amendment
call in nonpetty, criminal cases for an "impartial jury" does not clarify how to define group impartiality.\textsuperscript{71} The aspiration could be that a jury would replicate, in a very rough sense, the distribution of persons favorable to each party contained among the large number of persons in the local community who would qualify as impartial.\textsuperscript{72} Alternatively, the aspiration could be that a jury would display a particular balance between jurors that tend to favor one litigant and jurors that tend to favor the opposing litigant even though that balance might not correspond to the distribution of persons within the community who would qualify as impartial.\textsuperscript{73} Of course, the choice between these goals could lead to substantially different jury selection systems.\textsuperscript{74} In addition to

\textsuperscript{71} In this regard, see Lawrence M. Solan, The Language of Judges 185 (1993) (noting that "the relationship between words and events in the world is largely underdetermined by our knowledge of the words.").

\textsuperscript{72} The Sixth Amendment calls for an impartial jury "of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. The Supreme Court has not addressed how this "vicinage" requirement applies to criminal trials in state courts, and courts in general have had few opportunities to address it. See Lafave & Israel, supra note 7, at 967-68. The prevailing view appears to be that "district" in the Amendment refers, even when applied to state trials, to the federal judicial district, so that a criminal defendant is entitled to a jury of persons residing in that district. See Note, Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King, 106 Harv. L. Rev. 705, 713-14 (1993).

As to whether the impartiality mandate requires that a jury be drawn from a list of potential jurors from throughout the entire federal district or allows jurors to be drawn from a smaller geographic sphere, see infra note 138.

\textsuperscript{73} Some might suggest another view of the ideal behind a representativeness mandate: Certain discrete segments of the population defined other than through information indicating their tendency to favor one or the other parties—such as Mexican-Americans or African-Americans or women—should not be excluded disproportionately from service. However, this view cannot represent the ideal embodied in the representativeness concept because its rationale does not involve any connection to the tendency of members of such groups to represent a mix of perspectives different from that represented by the larger population in the district. Further, this view could not justify prohibiting the exclusion of impartial potential jurors solely because they lie at one end of the impartiality range. But see Adams v. Texas, 448 U.S. 38 (1980) (proscribing exclusion of potential jurors in capital case who are impartial but who nonetheless express qualms about the death penalty); Witherspoon v. Illinois, 391 U.S. 510 (1968) (same).

\textsuperscript{74} Scholars have not agreed on the aim. Many favor the first goal. See, e.g., Laurie L. Levenson, Change of Venue and the Role of the Criminal Jury, 66 S. Cal. L. Rev. 1533, 1546 (1993) (arguing that jurors today are expected to represent "community standards" rather than to serve as "peers" of the defendant); Van Dyke, supra note 27, at 933 (arguing that "[a] jury that includes a representative cross section of the community fulfills the needs of impartiality . . . ."). Likewise, many commentators have favored the second aspiration, and they have grounded that argument on the impartial jury mandate. See, e.g., M. Shanara Gilbert, An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Cases, 67 Tul. L. Rev. 1855, 1941 (1993) (arguing that solution
the basic uncertainty over ideals, two more practical problems arise with efforts to pursue group impartiality. These problems, to which we now turn, make it difficult to pursue any aspiration of group impartiality.

1. The Infringement of State Interests

States have legitimate reasons not to pursue jury selection systems that would promote group impartiality in any extreme way. State interests augur against seeking maximum group impartiality regardless of how we define the aspiration for group impartiality. This section outlines the selection systems suggested by each of the potential aspirations just identified and explains why states would not want to implement them.

a. Representing the Community of Impartial Potential Jurors

It is expensive and unjust to vigorously pursue the notion of a jury that represents the local community. Seemingly, the best way to pursue this aspiration would be to select each jury randomly, apart from excluding partials, from among an expansive and representative list of adults in the community.\(^7^5\) No major problems
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should arise in creating a master list that fairly represents the larger population. To compose such a list, officials need only rely on voter registration data supplemented by other sources, such as driver licensing records, telephone directories and data from public welfare agencies. However, the effort thereafter to pursue a random selection process, except for excluding partials, would become costly and unfair.

First, states have a significant interest in excluding biased jurors efficiently. For this reason, states might want to construct categorical definitions of individual partiality rather than to probe at length into the actual partiality of each potential juror. For example, states might want to disqualify all potential jurors bearing a familial or legal relationship to any of the parties or other

all impartial jurors in the community. The complexity of views in the larger population would be forfeited to some extent by the typical limitation of juries to no more than twelve members. Furthermore, random selection of impartial jurors from even an all-encompassing master list would produce some juries that would by chance depart substantially from this representativeness goal. Cf. Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 205 & n.49 (1977) (discussing chance departures from norms as grounds for excluding evidence of a party's involvement in prior accidents as evidence of proneness to accidents).

For a discussion of the overall process of jury selection, see supra text accompanying notes 27-34.

Use of voter registration lists is convenient, but those lists do not mirror American society. Certain groups—for example, young persons, persons without college degrees and minorities—register to vote at lower rates than the rest of the population. See generally Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 88-93 (1977).

This is the approach mandated by statute for the composition of juries in the federal courts. See 28 U.S.C. §§ 1861-1869 (1988); supra note 28. Federal courts have typically held, however, that a master jury list produced only with voter registration lists meets the representativeness concept of the impartiality mandate. See generally Williams, supra note 28. The result of the practice, moreover, has been that jury venires often depart substantially in their racial and ethnic composition from that of the community for which the list is compiled. See Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. Rev. 707, 712-13 (1993). To remedy this problem of underrepresentation of racial minorities on the lists, some jurisdictions have used affirmative-action techniques, such as transfusing names of minorities not on the voter rolls or eliminating a calculated number of names of white, registered voters. See id. at 721-23. The Supreme Court has not yet passed on the propriety of this practice. See infra text accompanying notes 233-36.

While a variety of state courts have adopted similar systems, some still follow a "key man" approach. See Van Dyke, supra note 27, at 934. Under this system, commissioners appointed by the court compose a list of potential jurors who are believed to be honest and upstanding citizens. This approach tends not to produce a list that mirrors the larger population if only because the commissioners are not very familiar with many members of the community. See Whitebread & Slobogin, supra note 7, at 670 and authorities cited therein.
trial participants. Likewise, states might want to disqualify any potential juror who witnessed the events giving rise to the litigation. States might also want to exclude any potential juror with a direct financial interest in the litigation. They also might want to dismiss automatically any potential juror who has formed an opinion about the case. Some potential jurors falling into these categories might qualify as impartial after a searching inquiry. Nonetheless, a state could conclude that the categorical rules would generally define those likely to have undue biases and, in any event, serve the appearance of fairness and avoid the need for protracted inquiry into the actual biases of those who fall within the categorical definitions.\(^7\)

States could also deem it worthwhile to allow parties to exercise peremptory challenges to disqualify potential jurors without providing explanations. The justifications for allowing peremptory strikes approximate those that support certain categorical definitions of partiality. Peremptory challenges are reasonably thought to assist in eliminating unduly biased jurors who fail to reveal their biases with sufficient clarity to warrant excusal for cause.\(^8\) Parties also may sense factors hinting at bias that cannot feasibly be exposed through questioning\(^8\) or that trial judges do not perceive as sufficiently probative to justify exclusion.\(^8\) Also, peremptory challenges allow lawyers to question more vigorously during voir dire (where courts allow lawyer questioning) to ferret out unduly biased potential jurors. The lawyers will know that those who appear alienated by questions may be stricken peremptorily although insufficient grounds exist to warrant an excusal for cause.\(^8\) Further, the use of peremptory strikes can efficiently allow the exclusion of questionable jurors based on hunches. Thus, the peremptory strikes reduce the need to delve too deeply into biases

\(^7\) States commonly employ some categorical definitions of disqualifying bias. See supra note 63.

\(^8\) See, e.g., Babcock, supra note 32, at 554.

\(^8\) See Babcock, supra note 32, at 553-54 (noting that some stereotypes suggestive of bias in certain cases would nonetheless be socially divisive when openly expressed); William T. Pizzi, Batson v. Kentucky: Curing The Disease But Killing The Patient, 1987 Sup. Ct. Rev. 127 (noting that some inquiries can risk insulting not only the person questioned but other potential jurors).

\(^8\) See, e.g., Saltzburg & Powers, supra note 18, at 354 ("The peremptory challenge permits both sides to strike at hidden, subtle, or subconscious biases that may be just as threatening as overt prejudice to the concept of an indifferent, and therefore impartial, jury.").

\(^8\) See Babcock, supra note 32, at 555.
during voir dire. Finally, peremptory challenges allow the parties to help choose the members of the jury; thus, these challenges serve at least the appearance of fairness if not actual impartiality.

States also hold a legitimate interest in requiring jurors to be *competent*—to have certain qualifications relevant to their ability to understand the evidence and the court's instructions and to maintain the integrity of the deliberative process. On this basis, states might want to exclude persons lacking the ability to read and comprehend English, persons who have not reached the age of majority, and persons suffering serious mental illness. States also could conclude that noncitizens lack sufficient interest in communal affairs to serve. The same conclusion might even be true of citizens if they have lived in the jurisdiction for a short period. On a similar but slightly different rationale, states might want to disqualify those with serious criminal histories. Whatever the actual ability of some jurors in these categories to render a rational verdict, a concern for both appearance and efficiency may support such categorical exclusions.84

States also have interests in excluding persons for whom jury service would present a major hardship to themselves or others.85 A potential juror whose service would cause personal hardship might be thought unlikely to view the issues with adequate attention. Thus, states might want to dismiss or defer service for those with distracting medical afflictions or those who need to attend important functions, such as funerals or weddings. Certainly states might also want to exempt those who have recently served as jurors.86 Potential jurors whose service would impose hardship on another might also be thought unduly distracted. States might want to dismiss, for example, someone charged with the care of a dependent person for whom no alternative caretaker is easily secured. States could also view some potential jurors as rendering greater public benefits in their normal occupations than in service.

84 The various measures of competency listed in the text correlate with the measures of juror competency presently used. See, e.g., supra note 34.
85 The American Bar Association has recommended strict standards requiring an individualized finding of hardship to either the potential juror or to others caused by the potential juror's service. See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 61-62 (1983) [hereinafter ABA STANDARDS].
86 Given the low remuneration provided to jurors and the lengthy service required in some jurisdictions, a state could even view as an exempting hardship the fact that one would lose substantial income if forced to serve as a juror. For discussions regarding the low pay and long service often associated with jury duty, see King, supra note 78, at 717 n.27, and Van Dyke, supra note 27, at 935.
as jurors. Hence, exclusion could be thought appropriate for professionals fulfilling important public functions, such as medical personnel, certain government officials, and members of the armed services.

Thus, states' interests argue strongly against a system involving purely random selection of impartial jurors. The very process of resolving which jurors to dismiss for bias calls for approaches that overexclude impartial potential jurors. Likewise, the need to ensure juror competency, the desire to avoid imposing undue hardship on potential jurors, and the general public call for further

87 The ABA Standards propose that potential jurors be excused in these kinds of circumstances:

[A]n excuse may be granted . . . when an individual requests to be released from jury service and demonstrates that he or she served as a member of a venire within the past 24 months, or that jury service would cause genuine personal hardship either to the individual requesting the excuse or to members of the public whom that individual serves. The prior-service provision is intended to provide courts with the necessary flexibility to accommodate the exceptional cases in which a person is unable to serve for the limited term specified . . . because of severe, chronic physical illness or incapacity, or essential military or other public duties.

ABA STANDARDS, supra note 85, at 62. Because the ABA standards limit the term of service and provide for significant compensation, they do not include an excuse for economic hardship, but they do allow for removal for cause in the unusual case involving a long trial, which would create economic hardship for some. See id. The ABA standards also provide for deferral of service for certain cases of temporary hardship which do not meet the above criteria. See id. at 62-63.

88 See id. at 61 (At present, "[m]any states exempt individuals who fall into certain occupational categories or, upon request, automatically excuse other classes of individuals, such as the elderly or mothers caring for young children.").

89 One could question whether the categorical exclusions discussed in this section would significantly distort the mix of perspectives represented among the jury as compared with those perspectives represented in the larger population. It is not obvious that potential jurors excluded on competency or hardship grounds represent a certain spectrum of perspectives so that the jury would suffer by dismissal of those persons. But see King, supra note 78, at 714 (noting that, in actuality, use of qualification and excuse procedures results in disproportionately large numbers of dismissals of minority jurors). It appears more probable that categorical definitions of partiality and the allowance of peremptory challenges carry some distorting effects. These types of exclusions might primarily disqualify those who fall toward either end of the impartiality range rather than those in the center. In effect, the exclusions might sometimes misrepresent the distribution of impartial potential jurors in the larger population. See, e.g., LaRue, supra note 74, at 873 ("As long as counsel can play a role [by using peremptory challenges], they will be rational and try to change the skew away from a representative cross-section to a non-representative cross-section, favorable to one side."). Nonetheless, a basic question remains: Assuming the ideal of impartiality is a representative jury as compared with the larger population of impartial jurors, when do other concerns justifiably outweigh the concern for such representativeness?
exclusions among impartial potential jurors. It is unclear how these exclusions would affect the representative nature of a particular jury. Nonetheless, these kinds of exclusions obviously depart from the purely random selection approach that seems most likely to promote representativeness in most cases.

b. Promoting Empathy for Particular Litigants

The difficulties for states in attempting to construct juries that include a prescribed number of jurors particularly empathetic to each litigant would be as great as with the effort to construct juries roughly representative of the larger population. The problems would center on identifying where impartial potential jurors would fall on the spectrum between those particularly empathetic to one party and those particularly empathetic to the opponent. Reaching sound conclusions about these issues appears impossible. In any event, efforts to achieve such representations would cost huge sums and implicate questions of fairness. States have an understandable interest in avoiding these problems.

States would have to choose a method for selecting jurors from among those deemed impartial and otherwise qualified. The choice of a selection system would not itself present a major problem. For example, states could simply allow each litigant to choose, from among those potential jurors who were otherwise qualified, a certain number who the opponent could not disqualify with peremptory challenges. The litigants could choose these jurors from among the entire venire. The venire itself could be constructed through random selection from the jury list. This approach would tend to ensure a jury with at least some members who each litigant deemed particularly attuned to their position. At the least, allowing each litigant to decide which potential jurors were particularly favorable would help ensure the appearance that

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90 For more on the effect of peremptory challenge systems, see infra note 257 and accompanying text.
91 It is unclear whether the appropriate geographical reference for judging representativeness challenges is the federal judicial district or a more local area. However, under either view, states could justify drawing jurors from smaller geographic spheres. See infra note 137.
92 This assumes that the jury list would be constructed in a way that would tend fairly to represent the local community. Often jury lists are not so constructed. See supra notes 77-78.
each litigant could receive empathetic consideration from some jurors.

Serious efforts to select empathetic jurors under this approach, however, would devour large chunks of judicial resources. The process typically would demand extensive individual questioning of each potential juror by the lawyers. Otherwise, litigants could not rationally assess the location of jurors along the impartiality range. The amount of in-court questioning could be reduced through the use of juror questionnaires, though the extent of in-court questioning required would still appear substantial. Further, the venire seemingly would have to include many potential jurors. Without a large venire, a litigant could justifiably contend that the venire did not include a sufficient number of persons who were empathetic to the litigant's situation. This argument becomes all the more forceful when one recalls that states would retain the same interests in excluding even impartial potential jurors based on incompetency, hardship, categorical definitions of impartiality and, to a limited extent, peremptory challenges. Further, all members of the venire would need to be questioned before the process of making protected selections could occur. Otherwise, the litigants could not rationally decide who would be most favorable to them. As a result, this approach to jury selection typically would consume days, even weeks—perhaps even more time than the trial.

The benefits of this approach are doubtful as well. First, the intensive questioning required to ferret out a potential juror's positions might tend to prejudice some potential jurors against a questioning litigant. This problem would likely cause reticence on the part of many counsel to explore too deeply potential jurors' prejudices. Although this factor would provide an incentive

93 One commentator has noted that this problem helps justify a system of peremptory challenges combined with challenges for cause:

Another important function of the peremptory challenge is as a shield for the exercise of the challenge for cause. Questioning in order to investigate the appropriateness of a cause challenge may have so alienated a potential juror that, although the lawyer has not established any basis for removal, the process itself has made it necessary to strike the jury peremptorily. Without the insurance of the peremptory challenge, a party would be far less able to search for cause to eliminate jurors.

Babcock, supra note 32, at 554-55. See also Saltzburg & Powers, supra note 18, at 369 ("Aside from infringing on the privacy of prospective jurors, [intensive inquiry] is likely to become hostile and to justify the use of a peremptory challenge.").
to reduce the length of questioning, it would also reduce the flow of helpful information to the litigants.94

Second, even with lengthy questioning, it is doubtful that a typical litigant could determine with much accuracy which potential jurors would empathize with the litigant's position. It is well known that some potential jurors aim to mask their perspectives.95 Also, potential jurors often will not have a conscious awareness of their prejudices although they are seeking to be honest about them.96 Hence, it would remain difficult, even after fairly extensive examination, to expose the many biases that could significantly influence potential jurors if confronted with the evidence in the trial.

Third, additional liabilities would grow out of this inability to accurately assess the perspectives of potential jurors. Litigants would likely rely on stereotypes to reach their inclusionary decisions. Of course, the Supreme Court already has concluded that reliance on certain kinds of stereotypes in exercising peremptory strikes violates the Equal Protection Clause.97 Reliance on such stereotypes to include certain jurors might also infringe equal protection.98 This problem would not altogether foreclose the use of an approach that provided for protected selections. In fact, states could attempt to ensure that litigants would rely on nonoffending grounds for their inclusions.99 This litigation, however, would re-

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94 Alternatively, the problem might result in the protected seating by a litigant of some jurors who had become offended by the opposing litigant utilizing the very process designed to ensure empathetic consideration toward that litigant.

95 See Babcock, supra note 32, at 554.

96 See id.

97 See infra notes 203-07 and accompanying text.

98 This concern would remain even if stereotypes were employed to include non-whites or women or religious minorities rather than whites. The Court has rejected the notion that equal protection analysis differs for racial classifications that burden whites and those that burden historically disadvantaged groups. See Shaw v. Reno, 113 S. Ct. 2816 (1993) (declining to dismiss equal protection challenge by white voters to congressional redistricting plan that created districts with majority of African-American voters); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (discrimination against whites through state sponsored, set-aside programs for minority contractors subject to strict scrutiny because “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification”); University of California Regents v. Bakke, 438 U.S. 265 (1978) (discrimination against “innocent” whites in medical school admissions context subject to strict scrutiny standard).

For an incisive discussion of equal protection problems posed by race-conscious jury selection procedures, see King, supra note 78, at 729-60.

99 The Supreme Court has approved this sort of approach to regulating the exercise of peremptories in lieu of banning peremptory challenges altogether. See infra note 201.
quire further judicial expenditures at the trial and appellate levels, which would only compound the heavy drain on resources that this system already would foster. Further, the difficulty of resolving when litigants had employed improper stereotyping and dissension over the propriety of stereotyping in this context would create a controversy about the system's basic fairness.¹⁰⁰

Finally, this system would significantly increase the risks, or at least the risks perceived by litigants, that some persons on the jury would hold an inappropriate bias. Excluding these potential jurors is one significant reason for providing the parties with peremptory strikes.¹⁰¹ The protected inclusion system, however, would appear to thwart the function of peremptory strikes at the margin where their value is greatest. The potential jurors that one litigant would most favor for inclusion would often include those the opponent would wish to excuse. It also stands to reason that the potential jurors who actually held an inappropriate bias, or at least those so perceived by one or both of the litigants, would appear among the group protected from exclusion. This problem raises further doubts that the benefits of a protected inclusion approach to jury selection would outweigh state interests in avoiding it.¹⁰²

¹⁰⁰ Although declining to adopt methods suggested by academics for selecting jurors from a venire to ensure the inclusion of certain percentages of racial minority group members on petit juries, some jurisdictions have pursued methods to ensure at least proportional representation of such persons on jury lists and jury venires. See King, supra note 78, at 728.

¹⁰¹ See infra notes 257-58 and accompanying text.

¹⁰² One could suggest other methods to promote the empathetic juror ideal. For example, one could pursue modified random-selection systems and eliminate peremptory challenges to prevent the exclusion of potential jurors most favorable to each litigant. However, while this approach requires less to pursue the goal of empaneling empathetic jurors, it still raises several of the major problems posed by a protected inclusion system.

Another alternative, suggested by Professor Deborah Ramirez, would allow each party to select from a normal venire, after voir dire and excusals for cause, a certain number of potential jurors to be included with some random selections on a mini venire, from which jurors would then be selected according to existing procedures. See Ramirez, supra note 74, at 1223-24. These affirmative selections would be unknown to either the opposing party or to the potential jurors. This approach is an ingenious method to fulfill its proposed purpose and provide greater opportunity to obtain minority jurors. Additionally, this approach is more likely than many other approaches of its kind to survive equal protection challenges. See infra notes 233-37 and accompanying text. As an effort to promote the possibility of some truly empathetic jurors for all parties or even for criminal defendants generally, however, the system would still seem to require very large initial venires and very extensive questioning of potential jurors.
2. The Difficulty of Defining Prejudicial Exclusions

Efforts by the Court to implement a group impartiality mandate also raise troublesome questions over whether exclusions that depart from any mandate should be classified as prejudicial or benign. The Sixth Amendment indicates that its protection is for the criminal defendant, not for potential jurors or the public generally. Yet, how should the Court determine whether unjustifiable exclusions of potential jurors present a real possibility of harm to the defendant?

When potential jurors are excluded precisely because of their ideology regarding trial issues, a potential for group bias could exist. This situation would arise, for example, where a state excluded all potential jurors in a death sentencing trial who had qualms about the death penalty. This practice would tend to leave only jurors who favored capital punishment or, at least, those who would feel comfortable imposing it. The same situation would occur if, for example, a state provided the prosecution with an unlimited number of peremptory strikes while providing the criminal defendant with none or only a few, and the prosecutors excluded a large number of people. One would reasonably view those excluded as coming too heavily from one side of the impartiality array.

In many situations, however, the actual likelihood of prejudice would not be so obvious although the possibility might seem quite real. Assume, for example, that a state allowed all women to opt out of service on juries in criminal cases. Assume further that twenty percent of all eligible women elected not to serve. A criminal defendant might easily persuade a court that this procedure lacked a legitimate justification. She would have difficulty, however, establishing even a reasonable probability that she was prejudiced. We might suspect that women would tend to view some cases differently than would men. That would not, however,

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103 See supra note 1 (quoting U.S. CONST. amend. VI).
104 Exclusions through peremptories could be viewed as either ideological or non-ideological since the reasons for them typically are not given, and they may be based on a variety of factors. Either way, it is reasonable to view the peremptory strikes, where they are exercised in more than a small number, as focused on a group of persons that bears relevance for impartiality purposes.
105 States have attempted to follow these kinds of procedures for groups such as women. See infra text accompanying notes 143-44.
amount to a reasonable probability of prejudice. If wealthy, the defendant might fund a survey that perhaps could show that women in the community were more likely than men to empathize with defendants like her. This study might suffice to establish the necessary prejudice. However, to demand such a showing as a general rule would effectively shield many suspicious practices from challenge. For most criminal defendants, the requirement would pose an overwhelming financial obstacle to attacking pernicious selection procedures.¹⁰⁶

Requiring a showing that members of an excluded group would tend to favor the particular defendant as part of establishing an impartiality claim would also entangle courts in a troubling task. This approach would ultimately involve courts in the unseemly business of attributing specific attitudinal outlooks to potential jurors by reason of factors like race, gender and ethnicity. Apart from the problems of assessing the accuracy of the evidence offered in support of the particular generalization proposed in a case, the very act of openly stereotyping potential jurors by reason of such demographic characteristics denies their individuality in a way that contributes to the public perception that such stereotyping is acceptable.¹⁰⁷

At the same time, problems also arise if the Court simply denotes certain nonideological categories of potential jurors as shielded in all cases under impartiality doctrine against procedures tending not to fairly represent them. Again, the impartiality protection is for the criminal defendant, not for potential jurors. Hence even affirmative exclusions would not implicate the protection unless they somehow affected the verdict. Further, where potential jurors have voluntarily exempted themselves, the nonserving persons have no grievance. Hence, these voluntary self-

¹⁰⁶ For many nonindigent defendants, the financial requirement in similar situations would generally prohibit serious pursuit of impartiality claims. In cases of indigent persons, questions would arise about whether the public should bear the expense involved with obtaining this kind of evidence.

¹⁰⁷ The Justices have displayed what has been characterized as “schizophrenic views” about the ability in post-conviction review of jury composition challenges to assess when juror discrimination affects jury decisions. See Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 MICH. L. REV. 63, 69 (1993). Professor King notes that the Court has frequently justified exempting timely claims of jury discrimination from harmless error analysis on grounds that courts cannot measure the effect of discrimination on verdicts. However, the Court has also demanded that courts “perform that very task” by expanding “cause and prejudice” and “actual innocence” review for “all constitutional error, including jury discrimination.” Id. at 64-65.
excusals would seem only to affect the verdict on a theory that the nonserving jurors might have or at least appear to have favored the defendant. Yet, one could question whether any category of persons defined in nonideological terms represents such a distinctive mix of perspectives that its low representation would affect the verdict in most cases. Also, if the Court were to recognize some nonideological groups as relevant in this way, on what basis should it separate the cognizable from the noncognizable categories?

B. The Court’s Group-Impartiality Mandate

We turn now to examine what the Supreme Court actually has mandated in the way of group impartiality on juries. The Court has not required approaches to jury selection that would pursue any theory of group impartiality in an extreme way. Nonetheless, the Court’s rulings in this area have generally adhered to a coherent structure of principles that protect against unjustifiable manipulations producing obvious concerns about group bias. This section outlines the theory and standard suggested by the Court’s holdings for resolving group bias claims and discusses the application of the suggested approach in a variety of particularized contexts.

1. A General Standard Revealed By The Court’s Decisions

The representativeness concept that the Court has constructed recognizes an idealized model of jury selection to promote group impartiality but also allows states to depart from that model. The Court has viewed the baseline approach as a selection system that employs a highly encompassing master list reflective of the community’s population, from which a jury is composed through random selection except for the exclusion of biased persons. A two-part standard then explains when deviations from this baseline model will not infringe the representativeness mandate. First, the Court’s doctrine accepts that states will have valid reasons to depart in many ways from the baseline model. As long as a State can offer a “legitimate” interest in following a particular departure, no

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108 A state that followed this approach would not violate the group impartiality mandate regardless of whether some of the jury venires or juries that resulted turned out not to represent the community. Jurors biased in an individual sense must be excluded in order to meet the basic requirement of the impartiality mandate. See supra text accompanying notes 25-70.
violation of the impartiality mandate arises.109 Second, while acknowledging the infeasibility of investigating the precise perspectives of each potential juror, the Court's representativeness doctrine accepts the need, before a violation will be found, for some basis to believe that a selection procedure could prejudice the complaining litigant. The Court has, however, recognized certain categories of cases in which ideological skewing of the jury is conclusively presumed.110

It is an abstraction to view the baseline approach as employing a master list mirroring the population followed by random selection of impartial jurors. In fact, no jurisdiction follows this model. Nonetheless, several of the Court's holdings look to this approach as the starting point from which to judge selection procedures for impartiality purposes.111 This baseline model could serve, though imperfectly, both aspirations of representativeness outlined earlier.112 One might conclude that this model would produce the largest number of juries mirroring the views of the larger population of impartial jurors. On an assumption that the larger population would often contain a roughly proportional distribution of perspectives favorable to each party and that no alternate solution exists when the assumption falters, this model

110 The Court has explained how courts should address allegations of nonrepresentativeness in the construction of the venire, which the Court has called its "fair-cross-section" doctrine:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion in the jury-selection process . . . .

Duren v. Missouri, 439 U.S. 357, 365 (1979). Once the defendant makes out the prima facie case, the state can attempt to make the required showing of justification to rebut it. See id. at 368-69.
111 See, e.g., Holland, 493 U.S. at 487 (declaring that "petit juries must be drawn from a source fairly representative of the community" (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975))).
112 See supra text accompanying notes 73-74.

Reasonable persons could disagree about whether this baseline model serves both aspirations equally. To the extent that one perceives the assumption underlying the contention regarding the second aspiration as wildly inaccurate and perceives other approaches to ensuring empathetic jurors as worth the problems created, one could conclude that the baseline model favors the former ideal rather than the latter.
could also appropriately pursue jury balance according to the
alternative aspiration of promoting the possibility for some jurors
empathetic to each litigant. In any event, because the Court has
allowed such substantial departures even from this baseline model,
uncertainty prevails about which of these aspirations lies behind
the doctrine.

It is defensible to allow states to depart from this baseline
approach upon demonstrated justifications. Recall the language of
the relevant mandate, the Sixth Amendment, which calls only for
an "impartial jury." It does not clarify how to go about implement-
ing the notion of impartiality. Hence, accommodation of govern-
mental interests in avoiding a system of purely random selection
among impartials obviously would not violate any clear command
in the Amendment. In these circumstances, evaluating departures
by considering the implicated governmental interests represents a
standard approach to constitutional adjudication.

The Court also has stated that a legitimate justification for a
selection procedure means something more than a mere rational
purpose. The scrutiny is not highly exacting. For example,
states may justify a selection procedure merely on grounds that it may help in securing jurors who are individually impartial or competent\textsuperscript{115} or that particular circumstances render the baseline approach unusually expensive.\textsuperscript{115} Nonetheless, the Court has retained for the courts more authority than that available under mere rational basis testing to examine the governmental interests to decide whether they justify the departure. Application of such a standard enables the Court to protect against procedures that appear, whether intentionally or inadvertently, to unjustifiably distort the representativeness of the jury.\textsuperscript{117}

As for the difficulty of defining when violations of the mandate will invalidate a verdict,\textsuperscript{118} the Court has recognized two ways to establish distortion in the relevant ideological composition of the jury.\textsuperscript{119} An unjustifiable selection procedure will infringe the group impartiality mandate if it is reasonably thought to skew the relevant ideological balance of the jury as compared with that of the larger population.\textsuperscript{120} However, where a departure from the

\textsuperscript{115} See, e.g., Holland, 493 U.S. at 484 (allowing use of peremptory challenges to exclude all potential, African-American jurors because the state’s “legitimate interest is the assurance of impartiality that the system of peremptory challenges has traditionally provided.”).

\textsuperscript{116} See, e.g., Lockhart, 476 U.S. at 182 (upholding Arkansas’ practice of dismissing before guilty phase of capital trial prospective jurors whose opposition to capital punishment would render them unable to act impartially at the sentencing phase).

\textsuperscript{117} For more on the Court’s view, see infra text accompanying notes 149-60.

\textsuperscript{118} See supra text accompanying notes 103-07.

\textsuperscript{119} For examples of the application of this standard, see infra text accompanying notes 137-67.

\textsuperscript{120} The Court’s opinions reflect confusion on this point. In Lockhart v. McCree, 476 U.S. 162 (1986), the Court contended through dicta that a group defined by its members’ qualms about the death penalty is not “distinctive” and, therefore, its exclusion would not violate the “fair cross-section” requirement. \textit{Id.} at 174. This is how the Court has referred to representativeness requirements at the pre-venire stages. See infra note 148. However, the Court had already twice found the exclusion of such a group of venire members to render the resulting jury slanted on the death sentencing issue and therefore to violate the representativeness concept of impartiality. See Adams v. Texas, 448 U.S. 38, 40 (1980); Witherspoon v. Illinois, 391 U.S. 510, 522-23 (1968). The confusion may be partially explained by the Court’s confusion in concluding that a fundamental distinction exists between the “fair cross-section” requirement and the representativeness concept of the impartiality mandate. See, e.g., \textit{Lockhart}, 476 U.S. at 173-84 (analyzing the two doctrines separately as if they came from different sources and served different aspirations). Elsewhere, I contend that no such valid distinction exists. See infra text accompanying notes 145-47. In any event, any suggestion in \textit{Lockhart} that, for a death sentencing trial, exclusion at the pre-venire stage of all prospective jurors with scruples against the death penalty would not violate the representativeness concept of impartiality must be wrong given that the same exclusion after formation of the venire would violate that concept.
baseline model is unjustified, the Court has recognized categorical situations where it will assume the defendant suffers prejudice. These situations arise when groups to whom the Court attributes a mix of outlooks distinct from that in the larger population are disproportionally unrepresented because of the departure from the baseline model.

This approach means that some nonideological categories will serve as *proxies* for ideology. For example, the Court has concluded that selection procedures resulting in the systematic exclusion from jury venires of women, African-Americans and Mexican-Americans may violate the representativeness concept of impartiality. Underrepresentation of these groups can violate impartiality even without a demonstration that their members come disproportionately from any particular part of the impartiality spectrum in a particular case. These are the only nonideological categories that the Court has recognized as proxies for ideology under the group impartiality concept, although the Court has not addressed many others.

A potential for confusion arises from the Court’s recognition of only these few nonideological groups as proxies for ideology. The Court’s decisions could be understood to indicate that the group impartiality concept, like equal protection regulation, exists for the protection of the excluded venire persons rather than for the protection of affected litigants. Of course, these groups historically were excluded from juries and are protected from such practices today by the Equal Protection Clause.

The problem with this view of the impartiality mandate, however, reveals itself in the Court’s decisions proscribing even procedures that allow potential jurors of certain groups to exempt themselves

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121 See *Lockhart*, 476 U.S. at 175 (noting that each of these groups are proxies for purposes of the representativeness concept of jury impartiality).

122 These are the only groups whose exclusion at the pre-venire stage the Court has addressed. See *Holland v. Illinois*, 493 U.S. 474, 485 (1990) (noting that these are all the groups the Court has considered in the pre-venire context).

123 See infra text accompanying notes 193-94.

124 Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 877 (1994) ("The jury of 1791 seems democratic . . . only in the context of the times. Every state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists.") (citation omitted).

125 See infra notes 194, 196 and accompanying text.
voluntarily from service.\footnote{See authorities cited supra note 145.} In those cases, the impartiality mandate proscribes the action although the nonserving, potential jurors have no grievance.

The Court's recognition of only a few nonideologically defined groups as relevant also could be thought to indicate—I contend erroneously—that ideology is not the touchstone for group impartiality doctrine. Perhaps one might conclude that procedures producing disproportionally low participation by women, African-Americans, and Mexican-Americans are proscribed simply because they create an appearance of improper exclusion toward those groups. This result could encourage disrespect for governing rules by others, including those who actually serve as jurors.\footnote{Cf. Brand, supra note 1, at 524 ("[I]n order to function as the conscience of a community, a jury must first see itself as part of that community." (quoting Timothy P. O'Neill, Wrong Place, Wrong Jury, N.Y. TIMES, May 9, 1992, at 23)).} Again, however, this concern, while sometimes warranted, cannot explain the boundaries of the group impartiality concept. If prospective jurors have the option of declining to serve, their failure to serve does not create an appearance that they have been treated unfairly. From a perspective other than that of the nonserving jurors, the only apparent explanation for the doctrine is that certain groups defined in nonideological ways yield a different mix of perspectives than that reflected in the rest of the population.\footnote{Cf. Babcock, supra note 32, at 553 ("Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases."); King, supra note 78, at 75-99 (reviewing sociological literature regarding how juror race affects jury decision making and concluding that the studies reveal that juror race affects the verdict in particular kinds of criminal cases, but does not substantially affect it in certain other kinds of criminal cases); Pizzi, supra note 81, at 129-30 (discussing "in-group-out-group bias" revealed in sociological studies).}

Thus, when the particular group, defined nonideologically, appears to represent a mix of ideologies that is significantly distinct from that represented in the rest of the population, the category will serve as a proxy for ideology under the impartiality mandate.\footnote{See, e.g., Taylor v. Louisiana, 419 U.S. 522, 531-32 (1975) (invalidating Louisiana law by which women were required to file special, written request to serve); see also Duren v. Missouri, 439 U.S. 357 (1979) (invalidating Missouri law under which women could opt out of service merely by requesting exemption on questionnaire sent to prospective jurors).}

On whether this proxy-for-ideology explanation for the Court's representativeness doctrine builds on or engenders pernicious stereotypes of certain groups, see \textit{infra} text accompanying notes 210-37.
Avoiding appearances that promote disrespect for governing rules is an important explanation for this doctrine, but the appearances tied to juror ideology actually drive the doctrine. When a nonideological group whose members seem to have a distinct mix of perspectives goes systematically underrepresented, one may perceive the resulting jury as unfairly constructed and ultimately not a proper voice for the community.\textsuperscript{130} This perception of impropriety could arise despite one's knowledge that members of the underrepresented group voluntarily opted out of service. Further, the perception of unfairness in the selection process could encourage disrespect for governing procedures by other participants in the trial, including those actually serving on the jury. This result could inure to the defendant's disadvantage.\textsuperscript{131}

Although the theory for recognizing nonideological groups as distinctive appears widely applicable, the Court's wariness in recognizing nonideological categories as proxies for ideology is understandable.\textsuperscript{132} We do not view demographic groups, such as members of the Democratic party or retired postal workers, as ideologically distinctive in ways that matter in most cases.\textsuperscript{133} We may not

\textsuperscript{130} See, e.g., King, supra note 78, at 763-65, and authorities cited therein (surveying studies bearing on relationship between racial representation on juries and the appearance of fairness); Robert J. MacCoun & Tom R. Tyler, The Basis of Citizens' Perceptions of the Criminal Jury, 12 LAW & HUM. BEHAV. 333, 347 (1988) (noting that perceptions as to fairness of jury depends greatly on level to which jury diversity coalesces with diversity of the community); Daniel W. Shuman & Jean A. Hamilton, Jury Service - It May Change Your Mind; Perceptions of Fairness of Jurors and Nonjurors, 46 SMU L. REV. 449, 456 (1992) (noting variety of studies finding that "race influences perceptions of fairness in the judicial system").

\textsuperscript{131} The defendant's objection tends to imply that she perceived the selection process as potentially influencing the verdict.

Where the defendant does not object at trial, moreover, she is most unlikely to realize success in later challenging any conviction based on the improper composition of the jury, because the defendant must show both a good reason for the failure to object and prejudice resulting from the selection procedure. See Amadeo v. Zant, 486 U.S. 214 (1988) (unanimous decision) (finding no basis to upset District Court's conclusion that cause and prejudice was established where record revealed that prosecutorial scheme to limit inclusion of African-Americans on jury lists to just above that sufficient to establish prima facie case of discrimination on statistical grounds did not come to light until after the trial).

\textsuperscript{132} The groups that would qualify, however, should extend beyond those that the Court so far has recognized. See infra note 196.

\textsuperscript{133} The theory remains tenable, although we will not know the views of the prospective jurors dismissed in a case in which a litigant challenges a selection procedure based on its disproportionally low representation of members of a proxy group. If members of such a group are systematically excluded, as is required to establish a violation, it is probable that the views of the nonserving, prospective jurors will largely mirror those of the
even be able to describe how members of the categories of persons the Court has already recognized as distinctive would tend to deviate from the rest of the population in their disposition of many typical cases. Yet, as we have seen, serious problems arise with efforts to define relevant categories based on attitudinal generalizations of demographic groups as they apply to the facts of individual cases. At the same time, the resulting broad applicability of a conclusion that a particular group is cognizable as a proxy under impartiality doctrine suggests why the Court will not likely find many categories of persons to qualify.

2. Applications of the Standard

The standard for identifying violations outlined in the preceding section best explains the details of the group impartiality doctrine. The operative two-part standard for analyzing claims that a selection procedure has resulted in group partiality first asks whether the departure from a random-selection approach lacks a substantial justification. Second, it inquires whether the procedure produces an appearance of relevant, ideological distortion in the proxy group. See infra text accompanying note 162.

134 Cf. Neuborne, supra note 37, at 445 (noting that the Court's recent conclusion that even white defendants have standing under equal protection theory to challenge racially based exclusions of African-Americans underscores the Court's view that juror race affects verdicts in complex and subtle ways).

135 See supra text accompanying notes 105-07.

136 The desire for caution also raises pressures for the Court to articulate the standards defining proxy groups in ambiguous terms. Ambiguity in the standard allows the Court flexibility to acknowledge the existence of a few categories as proxies for ideology while rejecting the vast majority of other categories. Underscoring this point, two noted scholars have described the Court's standard as follows:

There appear to be three requirements a "group" must meet before it comes within the ambit of the Sixth Amendment fair cross-section requirement established in Taylor and Duren. First, the group must be "large." Second, it must be identifiable. Third, its inclusion in the venire must significantly advance the systemic and community objectives associated with the jury trial right. As summarized by the Court in Lockhart v. McCree, [476 U.S. 162 (1986)], these objectives are "(1) 'guard[ing] against the exercise of arbitrary power' and ensuring that the 'commonsense judgment of the community will act as a 'hedge against the overzealous or mistaken prosecutor;' (2) preserving 'public confidence in the fairness of the criminal justice system;' and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'" If the group, in Taylor's words, imparts a "flavor, a distinct quality" to the jury deliberation process, then it presumably meets these latter three objectives. On the other hand, the group need not "act or tend to act as a class" in the jury room for it to be "distinctive."

WHITEBREAD & SLOBOGIN, supra note 7, at 678.
makeup of the jury.\textsuperscript{137} The Court has not always articulated in these unifying terms its approach to the various group-bias claims it has addressed.\textsuperscript{138} Nonetheless, the Court's disposition of these claims can all find explanation in the application of this basic, two-part standard.

First, this standard suggests that use of a discretionary "key man" system to compose a jury venire, an approach some states still follow,\textsuperscript{139} would not always violate the impartiality mandate. Under this kind of system, a small group of judges or commissioners, called "key men," have discretion to call together a venire of potential jurors. Frequently, these selectors tap potential jurors known to them as upstanding citizens rather than randomly choosing them from an expansive list.\textsuperscript{140} The Court might well view any proffered rationale as insufficient to justify an extreme departure of this sort from an approach relying on random selection and an expansive master list. Nonetheless, such a method would not automatically violate the impartiality mandate. The complaining litigant would still need to establish that the system substantially skewed the ideological composition of the venire from that which would be expected under the baseline approach. This showing could be accomplished with evidence of a substantial disparity between the representation in the community and on the

\textsuperscript{137} It is unclear whether the proper area for judging representativeness claims is the entire federal judicial district, referred to in the Sixth Amendment's vicinage mandate, or a more local geographic area, such as a county. See \textit{supra} note 72. However, even if the larger federal district provided the baseline measure, states would not be required to pick jurors from throughout the federal district. States would surely favor rules providing for juries to be drawn from smaller geographic areas. This approach would reduce the group of potential jurors available for any particular trial and sometimes affect the diversity of the group available. However, states might conclude that this system would generally lessen the burden on potential jurors from travelling long distances because the trial typically would occur in the community in which the juror resided. In terms of community representation, states could also see advantages by having juries chosen, in most cases, from the particular locale where the alleged crime occurred.

When a court changes the venue more complex questions arise, such as whether the judge must consider factors like race and ethnicity when choosing the new venue. See, e.g., Gilbert, \textit{supra} note 74, at 1934-42; Levenson, \textit{supra} note 74, at 1559-68.

\textsuperscript{138} For an example, see \textit{supra} note 10.

\textsuperscript{139} See \textit{Whitebread & Sloboegin}, \textit{supra} note 7, at 670; see also \textit{Sarah S. Beale & William C. Bryson, Grand Jury Law & Practice} \textsection{} 4:06 (1986 & Supp. 1994) (discussing "key man" systems in the selection of grand juries).

\textsuperscript{140} See \textit{Whitebread & Sloboegin}, \textit{supra} note 7, at 670.
venire\textsuperscript{141} of a group recognized as distinctive under impartiality doctrine.\textsuperscript{142}

Systematic exclusions in the formation of the venire of women, African-Americans or Mexican-Americans, by reason of gender, race or ethnicity, would clearly violate the impartiality standard. Even systems that allowed members of groups defined by these kinds of factors to exempt themselves voluntarily would render a resulting jury biased. For example, in \textit{Taylor v. Louisiana},\textsuperscript{143} the Court struck down a Louisiana law that required women to file a written request before they would be summoned for service. A few years later, in \textit{Duren v. Missouri},\textsuperscript{144} the Court also struck down a Missouri law that allowed women to opt out of service by filing a written request. The Court found these approaches insufficiently justified given the disproportionately low representation of women on jury venires that they produced.

The Court has distinguished impartiality claims focusing on exclusions at stages before the composition of the venire from claims focusing on exclusions after that point. The Court has characterized its doctrine regulating exclusions at the pre-venire stages as the "fair cross-section" requirement.\textsuperscript{145} It has described rules restricting exclusions at the post-venire stage simply as violations of the broader impartiality mandate.\textsuperscript{146} Of course, all of these decisions further a single concept—group impartiality—and no sharp difference exists in the policy justifying regulation at the pre-venire and post-venire phases. This conclusion does not mean, however, that post-venire exclusions will generally violate the im-

\textsuperscript{141} The Court has not clarified the level of disparity that must exist to establish a violation. \textit{See}, e.g., \textit{Duren v. Missouri}, 439 U.S. 357, 364 (1979) (noting that defendant must establish that representation of relevant group in jury venires is not "fair and reasonable" compared to proportion of such persons in the community). The lower court's generally indicate that an absolute disparity must exceed ten percent. \textit{See} \textit{WHITEBREAD} & \textit{SLOBOGIN}, \textit{supra} note 7, at 681. A prima facie case of discriminatory exclusion under equal protection requires this same kind of showing. \textit{See} \textit{id}. The Court's decisions also indicate that the community measure focuses on all members of the adult population rather than simply those deemed qualified according to the jurisdiction's standards. \textit{Cf.} \textit{Duren}, 439 U.S. at 365 n.23 ("[T]he fair cross-section requirement involves a comparison of the make-up of jury venires or other sources from which jurors are drawn with the make-up of the \textit{community}, not of voter registration lists.").

\textsuperscript{142} Although often finding juries invalid when selected under "key man" systems, the Court has usually based its decisions on a finding of discrimination in violation of equal protection. \textit{See} \textit{Castenada v. Partida}, 430 U.S. 482, 509 (1977) (collecting cases).

\textsuperscript{143} 419 U.S. 522 (1975).

\textsuperscript{144} 439 U.S. 357 (1979).

\textsuperscript{145} \textit{See}, e.g., \textit{Duren}, 439 U.S. at 360; \textit{Taylor}, 419 U.S. at 526.

\textsuperscript{146} \textit{See}, e.g., \textit{Gray v. Mississippi}, 481 U.S. 648, 657 (1987).
partiality mandate, for post-venire exclusions generally will not infringe the two-part standard.\footnote{See infra text accompanying notes 152-67. The Court’s terminology in this area poses a potential to confuse. A particular danger arises from the Court’s repeated declarations that the fair cross-section requirement does not apply after formation of the venire. See, e.g., Buchanan v. Kentucky, 483 U.S. 402, 416 (1987); Lockhart v. McCree, 476 U.S. 162, 173 (1986). The purpose of these declarations may be only to clarify that a jury itself need not actually be representative of the larger community of impartial jurors to pass muster under the impartiality mandate. In particular, the Court seems to have sought to underscore that the representativeness mandate does not prohibit the use of peremptory challenges to strike members of a venire, though the provision of peremptory challenges may diminish the representativeness of the resulting jury. These statements are befuddling because they imply that the venire must closely mirror the larger community and that the impartiality mandate does not regulate exclusions from the venire. First, however, even a venire need not actually represent a cross-section of the community to pass muster under the impartiality mandate. Second, while differences exist between regulation at the pre-venire and post-venire stages, the Court has recognized that the representativeness concept of impartiality regulates the exclusion of jurors even after selection of the venire. The Court could also hold the practice of employing peremptory challenges permissible on more narrow grounds than that the representativeness concept does not apply after the creation of the venire. See infra text accompanying notes 152-53.} As affirmative support for the view that the group-bias concept regulates exclusions after formation of a venire, one need only consider the consequences of concluding otherwise. If the representativeness concept were inapplicable after a venire were formed, a state could, solely to secure slanted juries, provide the prosecution in a criminal case with unlimited peremptory challenges while providing the defense with none or only a few.\footnote{This has been the practice in England, where until recently, the prosecution had an unlimited number of peremptory challenges while the defense was accorded only three. See Hughes, supra note 51, at 593-94. It appears, however, that except in unusual cases, the prosecution used such challenges sparingly. See id. at 593 n.403. Recent legislation eliminated peremptory strikes for the defense and sharply curtailed their use by the prosecution. See Judith Heinz, Comment, Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England and Canada, 16 Loy. L.A. Int’l & Comp. L.J. 201, 217 (1993).} Alternatively, the state could authorize the prosecution to choose which members of the venire to seat in the jury box and which of the remaining venire members should take the place of anyone in the box excluded for cause or through peremptory challenges. These approaches would likely result in a jury comprised of members who, although impartial, would appear favorable to the prosecution. If the group-bias concept applies at the pre-venire stages, as the Court has held it does, these sorts of selection procedures also must be invalid. In terms of the two-prong standard, the dis-
parate allocation of control over selection would lack a good justification, and the prosecutor's choices would create an appearance of ideological distortion in the composition of the jury.

Indeed, the Court has concluded that exclusions may violate the group impartiality requirement even though they occur after formation of the venire. In both Witherspoon v. Illinois\(^\text{149}\) and Adams v. Texas,\(^\text{150}\) the Justices confronted situations in which state statutes required the exclusion in capital cases of venire members who had qualms about the death penalty. Application of the statutes in both cases resulted in the systematic exclusion of potential jurors who, although favorable to the defense on the capital sentencing issue, were not properly excluded for cause. In both cases, the two prongs of the standard for identifying violations of the representativeness mandate were satisfied. There was no legitimate reason for the excusals, and the resulting jury appeared skewed in the state's favor on the sentencing issue. For these reasons, the Court held that the improper exclusions violated the notion of group impartiality.

While these decisions involved capital punishment trials, the same standards should apply to determine the propriety of post-venire exclusions as they bear on questions of guilt or innocence.\(^\text{151}\) The two-part standard, however, reveals why states need not abolish their peremptory-challenge systems.\(^\text{152}\) Allowing liti-

\(149\) 391 U.S. 510 (1968).
\(150\) 448 U.S. 38 (1980).
\(151\) As noted earlier, in Lockhart v. McCree, 476 U.S. 162 (1985), the Court rejected a claim that the exclusion of potential jurors biased against the death penalty violated a capital defendant's right to a representative jury on the question of guilt or innocence. See supra note 120. As one basis for the result, the Court declared that the notion of representativeness reflected in Witherspoon and Adams should be limited to "the special context of capital sentencing." Lockhart, 476 U.S. at 182. The Court reiterated this notion in Buchanan v. Kentucky, 483 U.S. 402, 421 (1987), a case presenting a similar issue the following year. However, as Justice Marshall noted, there is nothing sufficiently divergent between a guilt-or-innocence decision and a decision on capital sentencing to justify treating the two contexts differently. See Lockhart, 476 U.S. at 196-98 (Marshall, J., dissenting) (noting that the capital sentencing issue is not substantially more discretionary than many guilt-or-innocence issues); cf. Ballew v. Georgia, 435 U.S. 223, 239 (1978) (holding that five member criminal juries violate Sixth Amendment because small size "prevents juries from truly representing their community"). Moreover, the McCree and Buchanan decisions find justification on other grounds. See supra text accompanying notes 155-59.
\(152\) Peremptory challenge systems have a long tradition:

The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, see 4 W. Blackstone, Commentaries 346-348 (1769), was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, see Act of Apr. 30, 1790, ch. 9,
gants to strike potential jurors without articulating reasons typically lessens the representativeness of the resulting jury. Each litigant aims to strike potential jurors believed to favor the opposing litigant. This practice seemingly produces a jury with members clustered toward the center of the impartiality range, which would conflict with the aspiration of jury representativeness, however defined. Nonetheless, systems of peremptory challenges survive under the first prong of the standard: States have a substantial and legitimate interest in allowing peremptory challenges. As previously noted, peremptory challenges on the whole help ensure the appearance of impartiality and probably the actual impartiality of those selected to serve.\textsuperscript{153} This is particularly important given the difficulty of excluding all unduly biased jurors through challenges for cause.

For similar reasons, states under the group impartiality mandate may dismiss potential jurors under categorical definitions of individual bias. Some jurors included in these categorical definitions would actually fall within the impartial range upon close examination. As stated earlier, however, efficiency argues for avoiding these inquiries by simply defining certain categories of persons as biased.\textsuperscript{154} Of course, the Supreme Court retains the authority to determine whether categorical definitions sweep too broadly within the range of impartial jurors to find justification on efficiency grounds. However, typical categorical measures of individual bias, such as familial relationship to a participant or a financial interest in the outcome, surely are permissible.

On the same kind of narrow rationale, a judge in a bifurcated trial may dismiss, after formation of the venire, potential jurors

\textsuperscript{153} See supra text accompanying notes 80-83.

The Justices have emphasized the benefits of securing a jury of impartial members as one of the purposes of peremptory challenge systems:

Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides," . . . thereby "assuring the selection of a qualified and unbiased jury."


\textsuperscript{154} See supra text accompanying notes 78-79.
who are biased regarding one phase of a trial although they would qualify as impartial in another. The Justices addressed this kind of exclusion in *Lockhart v. McCree.* In *Lockhart,* a capital case, an Arkansas trial judge excluded potential jurors who were unduly biased against the state on the sentencing question although they were qualified to decide the guilt-or-innocence issue. The defendant was convicted of murder, but the same jury spared him from the death penalty at the sentencing trial. In attacking his conviction in federal habeas proceedings, the defendant argued that exclusion of the jurors who were biased on the sentencing question violated his right to an impartial jury regarding the guilt-or-innocence trial. He argued that the state could have avoided the problem simply by empaneling separate juries for the guilt-or-innocence and sentencing questions. He supported his argument with sociological evidence indicating that the category of jurors excluded would likely have favored him on the guilt-or-innocence issue more than the remainder of the population of impartial jurors. Nonetheless, the Supreme Court rejected his claim, noting that removal of the jurors "serve[d] the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case." The Court found the state's interest in efficiency to justify the exclusions although they appeared likely to have skewed the representativeness of the jury regarding guilt or innocence.

Application of the two-prong standard also can explain why states may dismiss potential jurors on incompetency or hardship rationales. States have substantial and legitimate interests in ensuring that those who serve as jurors appear qualified to render a rational verdict and that their service would not pose major inconvenience to others. For this reason, exclusion of jurors who do not appear to possess those qualifications will not satisfy the first prong of the standard for identifying group bias violations. Furthermore, these grounds for exclusion are nonideological.

156 The *Witherspoon* Court adverted to this possibility. See *Witherspoon v. Illinois,* 391 U.S. 510, 520 & n.18 (1968).
158 Id. at 180.
159 For a case extending the *McCree* analysis to a joint trial of co-defendants where the petitioner was not subject to the death penalty, see *Buchanan v. Kentucky,* 483 U.S. 402 (1987).
160 The Court made clear the propriety of exemptions for hardship in *Taylor v. Louisiana,* 419 U.S. 522, 534 (1975).
Hence, employing them also would not violate the second prong of the standard unless doing so disproportionately excluded members of some distinctive category recognized as a proxy for ideology.\textsuperscript{161}

One apparent difference in the way the group bias standard applies to early and late stages of the process centers on the extent of an exclusion of potential jurors needed to establish a violation. Generally, in composing a venire, a systematic exclusion of potential jurors must occur to infringe the impartiality requirement.\textsuperscript{162} By contrast, after a venire has been selected, even the erroneous exclusion of a single potential juror can infringe the mandate.\textsuperscript{163} However, this difference might only grow out of the disparity at the pre-venire and post-venire stages between the kinds of exclusions that litigants typically challenge. During the stages preceding the formation of the venire, litigants generally attack the disproportionately low representation of groups defined in non-ideological terms, like African-Americans or women. Potential jurors typically are not excluded for their ideologies at these early stages.\textsuperscript{164} By contrast, after formation of a venire, potential jurors frequently are excluded precisely on relevant ideological grounds—because they are identified as likely to favor one party too readily. Where persons are excluded on nonideological grounds, the excluded persons must not only come from a group that qualifies as a proxy for ideology, but must be systematically excluded. Otherwise, no appearance of ideological distortion aris-

\textsuperscript{161} But see King, supra note 78, at 713-14 (noting that some common qualification procedures, such as requiring that persons return jury questionnaires, that they have proficiency in English, and that they have not been charged with a felony, exclude minorities to a greater degree than whites).


However, in Ross v. Oklahoma, 487 U.S. 81 (1988), the Court deviated from the notion that even a single error by the trial court when exercised on ideological grounds will create a biased jury. In Ross, a capital defendant used one of his allotted peremptories to excuse a juror the trial judge should have dismissed for cause because the juror stated he would vote to impose death automatically upon conviction. The Supreme Court declined to reverse, although the defendant had used all of his peremptories and, thus, was effectively denied a peremptory by the trial court's improper action.

\textsuperscript{164} Generally, no evaluation of the ideologies of prospective jurors occurs until they are included in a venire for possible service in a particular trial. At that point, the lawyers for each of the litigants begin evaluating previously completed juror questionnaires, and voir dire questioning commences.
es. Where ideological grounds bearing on the trial improperly exclude even a relatively small number of potential jurors, the potential for ideological distortion of the jury is more obvious. It might still make sense to require systematic exclusion at the early stages even for relevant ideological exclusions given that the group of potential jurors is much greater than at the final stage of selecting a jury from a venire. The Court should at least consider defining systematic exclusion differently, however, depending on whether the exclusions rest on alleged bias or on nonideological grounds.

How the Court should treat erroneous dismissals of potential jurors at the final stage of selecting a jury from a venire remains an important question. A significant distinction again centers on whether the trial judge based the exclusionary ruling on an assessment of the juror's ideology or on some other rationale. Surely, an erroneous exclusion on nonideological grounds, such as incompetency or undue hardship, does not infringe the representativeness notion of impartiality. Isolated, erroneous exclusions of this sort create no appearance of ideological distortion in the jury and, thus, do not satisfy the second prong of the standard even though they violate the first. What if the erroneous ruling, however, was based on the member's alleged partiality toward the appellant? If the ruling was cognizably wrong, it lacked a good justification and, therefore, violated the first prong of the standard. One could also say the exclusion satisfied the second prong because the judge excluded a juror who appeared to empathize with the appellant. Indeed, the Supreme Court has held that even a single erroneous exclusion on ideological grounds over a litigant's objection produces a group bias violative of the litigant's right to an impartial jury. Yet, these holdings come from capital sentencing trials. For isolated errors, unlike more systematic exclusions, the Court could plausibly conclude that the difference between a guilt-or-innocence decision and a capital sentencing decision is sufficient to warrant divergent approaches.

165 The previously noted factors limit the number of cases in which federal courts will identify group bias claims of this sort. Again, these factors tend to limit the frequency with which federal courts rule that a trial court's conclusion regarding an individual bias question was erroneous. See supra text accompanying notes 55-67.


167 In these two contexts, the Court could perhaps justify the different treatment of a trial judge's isolated, erroneous dismissal based on alleged partiality. I have elsewhere argued that the distinction between regular criminal trials and capital sentencing trials is insufficient to warrant a different result in regular criminal trials where potential jurors
In the end, the Court’s representativeness holdings reflect an effort to forestall the potential for group bias on juries without ignoring the states’ interests in the selection process. One might disagree in some respects with the balance that the Court has struck. Nonetheless, the conclusion remains that the Court’s holdings in this area reveal a principled and plausible approach to promoting group impartiality on juries.

III. JURY IMPARTIALITY OUTSIDE OF THE SIXTH AMENDMENT

The remaining question about the internal structure of the jury impartiality mandate concerns whether due process requires jury impartiality to the same extent as the Sixth Amendment. This issue is significant because the “impartial jury” requirement in the Sixth Amendment does not apply in many circumstances. For example, in federal court, the Constitution requires a jury in some civil trials, but imposes no explicit command that the juries stand “impartial.” In several other contexts, the Constitution imposes no mandate even that a jury serve as the decision maker, although juries often are so employed. For example, the Court has held that a single judge or a panel of judges may serve as the trier in a capital sentencing hearing, but many states use juries. The Constitution also does not require states to use juries in civil cases, although states often use civil juries. In contexts like these, who are members of a cognizable group are systematically excluded. See supra note 120. The isolated-exclusion case, however, presents a tougher question, but not because the regular criminal trial presents issues that are necessarily less discretionary than those presented at the capital sentencing trial. The more plausible basis for distinction is simply that the Court has sometimes imposed more stringent standards at the capital sentencing hearing, viewing “heightened reliability” as warranted when death may be the appropriate punishment. See, e.g., Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977).

One might conclude, for example, that the Court should demand a greater justification by states than it sometimes has required for departures from random-selection approaches. See supra text accompanying notes 114-17. Alternatively, one might conclude that the Court should abandon the notion that demographic groups can serve as proxies for ideology. See supra text accompanying notes 118-21. One might also advocate a “protected-inclusion” system of jury selection or even for the abandonment of peremptory strikes. See supra text accompanying notes 92-94, 102.

The Seventh Amendment provides: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.


The Seventh Amendment requirement regarding juries in civil cases, like the Fifth
does due process demand that any jury provided meet the same impartiality standards that apply under the Sixth Amendment?\footnote{172} The answer, according to the Court, is that due process mandates jury impartiality to the same extent as the Sixth Amendment.\footnote{173}
Although the Court has never provided a rationale, this Part examines reasoning that could support that conclusion.

Temporarily putting aside cases where the Constitution mandates a jury but does not explicitly require impartiality, one might suppose that the full notion of jury impartiality should not apply when no right to a jury itself arises. Judges, serving either individually or in panels, need only be impartial in an individual sense to satisfy due process; they need not meet the representativeness concept outlined in Part II. Given those conclusions, the mere provision of a jury, when not constitutionally required, perhaps should not carry with it a demanding impartiality mandate. Arguably, jurors serving in a role satisfied by a judge should not have to stand more impartial than would one or more judges. If due process does not require the seemingly lesser right (a jury), it is not obvious why it demands the seemingly greater right (a jury that is impartial in the Sixth Amendment sense) when a jury is provided.

The rationale for requiring a jury to always meet the demanding impartiality mandate, however, builds on our expectations of juries vis-a-vis our expectations of judges. Arguably, the very conception of a fair jury has come to include the notions embodied in the impartiality mandate. That is to say, a strong consensus now prevails that jurors should be individually impartial. Further, there is a prevailing view that juries should be selected through procedures that will not unjustifiably exclude either persons favorable to

174 See, e.g., Leubsdorf, supra note 14, at 246 (noting that, as regards judges, the Supreme Court has only read the Constitution to forbid them to hear cases "when they have a personal stake in the result, become personally embroiled with a party, or were involved in the litigated incidents.") (footnotes omitted); id. at 271 ("cases are tried by one judge, not a panel that could include members of various groups; judges are lawyers, and hence middle or upper class people with many common experiences").

175 This view would parallel the positivist position concerning procedural due process claims related to nonconstitutional rights. "According to positivists, federal courts properly may apply constitutional scrutiny to procedural rules only when federal law also governs the underlying substantive issue." Donald A. Dripps, The Constitutional Status of the Reasonable Doubt Rule, 75 CAL. L. REV. 1665, 1678 (1987). Under this positivist perspective, for example, only "[w]here the Constitution requires the state to provide a particular defense" would procedural due process, as articulated in In re Winship, 397 U.S. 358 (1970), also require the government to "disprove the defense beyond a reasonable doubt." Id. Whether this positivist account provides the best normative account of procedural due process, however, is disputed. Compare Ronald J. Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 HARV. L. REV. 323, 342-48 (1980) (arguing the positivist thesis) with Dripps, supra, at 1679 (arguing that the positivist view does not adequately explain basic decisions such as Winship).
one litigant or persons from groups deemed to reflect a distinct and relevant mix of perspectives. The same cannot be said where a judge renders the decision. We do not expect judges to be representative of the community.

Professor Toni Massaro has noted the differing societal expectations regarding juries and judges and the import of that difference for jury impartiality doctrine.\(^{176}\) She has noted that judges are typically white, male, middle-class, at least middle-aged, and that they regularly judge cases involving people who do not share any of these characteristics.\(^{177}\) The typical judge may not be the most neutral arbiter in such cases.\(^{178}\) Nonetheless, she contends, the Supreme Court will not find a violation of due process in these cases largely because "[s]ociety accepts this disparity of power or at least is content to correct it through the long-term solution of opening the opportunity to become judges to all groups."\(^{179}\) The same societal acceptance does not extend to juries, however, because the "symbolism and function of a jury of laypeople are different from the symbolism and function of a professional judge."\(^{180}\) We expect the jury to include a variety of perspectives and certainly do not view as appropriate state sanctioned procedures that unjustifiably exclude from participation members of groups representing distinctive segments of the community.\(^{181}\)

As is now apparent, the rationale for always requiring juries to meet the impartiality standard focuses on defeated expectations. This notion is key to explaining why a decision by an unrepresentative jury is more problematic than a decision by a judge. Judges are not representative of the community. Therefore, in some sense one could view the decision of a biased jury as equivalent to the decision of a judge. Yet, a decision by a biased jury infringes more substantially on our expectations than a decision by a judge. We

\(^{176}\) See Massaro, \textit{supra} note 4, at 537-38.
\(^{177}\) See \textit{id.} at 537.
\(^{178}\) See \textit{id.}
\(^{179}\) \textit{Id.}
\(^{180}\) \textit{Id.} at 538.
\(^{181}\) Professor Massaro has elucidated this point in the context of the exclusion of African-American jurors in the trial of an African-American defendant:

A judge wears a robe and has training and status that separate him or her from the parties. Only one judge decides the case in a bench trial; a jury trial involves at least six fact finders and hence implies that its purpose is to include more perspectives—black and white—in the verdict.

\textit{Id.}
expect juries to meet a demanding impartiality standard. We lack this expectation when it comes to judges.

This defeated-expectations rationale also assumes a potentially real harm to defendants from the failure to pursue impartiality even when the Constitution does not mandate a jury. Without a specification of potential harm to the defendant, the rationale for enforcing the mandate in those circumstances would not appear. However, when a procedure systematically deselects a group whose members would seem to have a distinct mix of perspectives, the community may perceive the resulting jury as unfairly assembled and ultimately not a proper community voice. Regardless of whether members of the underrepresented group would generally favor the defendant, the perception of unfairness in the jury selection process could encourage disrespect for the process and prejudice the objecting litigant. Of course, this idea correlates with the theory behind representativeness under the Sixth Amendment, which builds in part on the same notion of defeated expectations.

Given its recent declarations, the Court is not likely to distinguish between jury impartiality claims brought under the Sixth Amendment and those brought under the residual force of due process. Indeed, some of the Court’s more expansive decisions about the meaning of jury impartiality, particularly about jury representativeness, have arisen in contexts where the Sixth Amendment does not apply. Hence, the Court should clarify the rationale for concluding that due process requires impartiality to the same extent as the Sixth Amendment. The defeated-expectations rationale provides the best basis for an explanation.

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182 As indicated earlier, the potential for harm to the criminal defendant, rather than to potential jurors who are excluded, is the driving force behind impartiality doctrine. See supra text accompanying notes 103, 126.

183 For a discussion regarding how the deleterious effects of apparent distortions in the representative nature of a jury explains the representativeness concept within impartiality doctrine, see supra text accompanying notes 127-31.

184 See Morgan v. Illinois, 504 U.S. 719, 726 (1992); supra note 12 for a quote from Morgan.

185 See supra text accompanying notes 169-72.

186 See discussion supra note 173.

187 The conclusion that due process requires jury impartiality to the same extent as the Sixth Amendment warrants qualification. In the grand jury context, the Court may not impose stringent standards of individual impartiality and may not impose the representativeness concept of impartiality. This view would build on the proposition that the grand jury serves a very different function than the petit jury. For further discussion of these matters, see 1 BEALE & BRYSON, supra note 139, §§ 4:09, 4:12, 4:21 (Supp.
IV. IMPARTIALITY AND EQUAL PROTECTION

Questions remain about impartiality regulation in relation to the Court's equal protection doctrine. Some have argued that the Court's decisions about how equal protection limits jury selection collide in certain respects with the Court's decisions interpreting the impartiality mandate. This Part examines those alleged conflicts and demonstrates that the Court's equal protection and impartiality doctrines coincide.

A. A Summary of the Relation

It is worth reviewing at the outset how equal protection, as compared with the impartiality mandate, limits jury selection. The two doctrines differ in significant respects, but they also frequently converge. This extensive overlap creates a potential for confusion about the purposes and boundaries of each form of regulation.

Equal protection restrictions and the impartiality mandate serve very different functions. First, equal protection regulation aims primarily to protect potential jurors, while the impartiality mandate aims only to protect litigants. Thus, an excluded potential juror would have standing to raise an equal protection claim, but not a claim based on the impartiality mandate. Second, equal protection, in the jury context, aims to protect members of certain groups, such as African-Americans, Mexican-Americans and women, against purposeful discrimination based on their group membership. Hence, an equal protection claim based on exclusion of a potential juror arises only where evidence exists

1993. Although the representativeness notion applies to federal grand juries by statute, it is unclear that the Constitution independently mandates it. See id. § 4:12.
188 See infra text accompanying notes 210-16, 238-49.
189 See, e.g., WHITEBREAD & SLOBOGIN, supra note 7, at 672-73 (noting that recent Supreme Court decisions reveal that the right at stake in an equal protection case is that of the excluded potential juror rather than that of the litigant); Barbara A. Babcock, A Place in the Palladium: Women's Rights and Jury Service, 61 U. CINN. L. REV. 1139, 1142 (1993) ("The goal of protecting those summoned to serve, once a background feature, has now moved to the center of the analysis.").
190 See, e.g., WHITEBREAD & SLOBOGIN, supra note 7, at 410-11. The authors noted the criteria for third-party standing:

The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute . . . ; the litigant must have a close relation to the third party . . . ; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Id.
of an intent to discriminate on such grounds. The impartiality mandate, by contrast, strives to protect litigants against jury verdicts that reflect bias either by individual jurors or by unjustified selection procedures that appear to skew the ideological balance of the jury as a whole. A litigant may establish a violation based on an exclusionary practice without evidence of an intent to discriminate.

Equal protection theory applies throughout the selection process, though it is less important than the impartiality doctrine in regulating the early stages. In 1880, in *Strauder v. West Virginia*, the Court first sustained an equal protection challenge to a state statute that explicitly barred African-Americans from jury service. In subsequent decades, the Court reiterated that prohibition and extended it to bar discriminatory exclusions of other groups.

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191 Regarding the history of the Court's efforts to define what evidence can establish a finding of intent to discriminate in the jury selection process, see infra note 194.

192 This distinction is not as significant as might first appear. The Court has allowed litigants to make out a prima facie case of discrimination for equal protection purposes with statistical evidence of a significant disparity between the proportion of the venire and of the local community made up of the relevant group. Lower courts typically have required proof of the same level of disparity as required in the equal protection context to make out a prima facie case under the proxy-for-ideology decisions within impartiality doctrine. It is at the rebuttal stage that differences would arise in the sorts of response that states might offer to justify the disparity. As for the level of disparity that must be established to make out a prima facie case under the two theories, see supra note 141.

One commentator has noted that courts have applied a variety of measures to assess underrepresentation on jury wheels and that there is a tendency to use different measures for equal protection claims than for Sixth Amendment claims. See Peter A. Detre, Note, A Proposal for Measuring Underrepresentation in the Composition of Jury Wheels, 103 Yale L.J. 1913, 1918-26 (1994). The Supreme Court has not clarified how to measure underrepresentation in these contexts. See id. at 1918-19. On many occasions, the lower courts arguably employ flawed tests. See id. at 1920-37.

193 100 U.S. 303 (1880)

194 The year after *Strauder*, in *Neal v. Delaware*, 103 U.S. 370, 396-97 (1881), the Court accepted the proposition that the absence for ten years of a single African-American on the jury rolls of a county with a fifteen percent African-American population constituted prima facie evidence of intentional discrimination. Though the question remained whether intentional discrimination had occurred, the burden shifted to the state to provide a non-discriminatory explanation for the disparity. Federal courts evaded for five decades enforcement of the *Strauder* and *Neal* holdings. The Supreme Court evaded their enforcement in part through subsequent conclusions that federal habeas corpus statutes only authorized federal courts reviewing state court convictions to inquire whether state courts possessed proper jurisdiction. See, e.g., Andrews v. Swartz, 156 U.S. 272, 276 (1895) ("[e]ven if it be assumed that the state court improperly denied to the accused . . . the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged . . .")
Beginning in the 1940s, the Court developed an impartiality doctrine that reduced the importance of these equal protection holdings. The impartiality decisions revealed that disproportionally low representation of "distinctive" groups—a category that includes groups protected under equal protection—could establish a violation of the representativeness concept of impartiality without proof of an intent to discriminate.

In the 1960s, the Court adopted a more sensitive approach. In Whitus v. Georgia, 385 U.S. 545 (1967), the Court found a prima facie case of discrimination based on evidence of a substantial disparity between the number of eligible African-American men in the county and the number included on jury venires. The Court also concluded that testimony of jury commissioners that race had not played a factor was insufficient to overcome the presumption. Also, in Castaneda v. Partida, 430 U.S. 482 (1977), the Court extended the analysis to a group other than African-Americans. The Court held that evidence that a Texas practice of relying on "key" men in the community to identify potential jurors had produced a forty percent disparity between persons with Spanish surnames in the county (79 percent) and persons with Spanish surnames called for jury service (39 percent) established a prima facie case of discrimination.

In 1942, in Glasser v. United States, 315 U.S. 60 (1942), the Court first interpreted the impartiality mandate in the Sixth Amendment to proscribe selection procedures "which do not comport with the concept of the jury as a cross-section of the community." Id. at 86.

The impartiality holdings also took on greater importance because the Court had concluded, until recently, that criminal defendants could only challenge a selection procedure on equal protection grounds if they were a member of a cognizable group that correlated with the group identification of the potential jurors who were excluded. See, e.g., Holland v. Illinois, 493 U.S. 474, 476-77 (1990) (citing Batson v. Kentucky, 476 U.S. 79 (1986)). In 1991, in Powers v. Ohio, 499 U.S. 400 (1991), the Court first employed a theory of third-party standing to conclude that any criminal defendant may challenge on equal protection grounds the exclusion from jury service of members of protected groups. Id. at 410-16.


See, e.g., Duren v. Missouri, 439 U.S. 357 (1979) (declaring invalid an "opt-out" statute for women); Taylor v. Louisiana, 419 U.S. 522 (1975) (declaring invalid an "opt-in" statute for women); see also WHITEBREAD & SLOBOGIN, supra note 7, at 681 ("The facts of Taylor and Duren—both illustrate that the Sixth Amendment does not require proof of purposeful exclusion.").
The equal protection theory, however, has more practical significance than the impartiality theory at the post-venire stages of jury selection. Although the Court has sometimes suggested that the representativeness concept of impartiality is inapplicable after the selection of a venire, that assertion is illogical. Both the Equal Protection Clause and the representativeness concept of impartiality have some applicability after formation of a venire. Nonetheless, the equal protection doctrine is of greater significance than the impartiality doctrine because of the Court's differing treatments of peremptory strikes under the two doctrines. Traditionally, litigants were not required to give reasons for their allotted peremptory challenges even when they seemingly were exercised on racial grounds. In *Batson v. Kentucky*, the Court for the first time concluded that the equal protection theory enabled an African-American defendant to challenge a prosecutor's use of peremptories to dismiss African-Americans from the venire on racial grounds. The Court subsequently concluded

As explained earlier, however, this distinction was not as significant as might first appear. See *supra* note 192.

198 For a discussion of why it is implausible to conclude that the representativeness concept of impartiality has no applicability simply because a venire has been formed, see *supra* text accompanying notes 145-51.

199 See, e.g., Saltzburg & Powers, *supra* note 18, at 340 (noting that as of the early 1980s, a peremptory challenge did not require an explanation).

Until 1986, the Court had not imposed any serious restrictions on the use of peremptory challenges. It had never addressed whether the impartiality mandate posed restrictions. Moreover, the Warren Court had largely, though not entirely, immunized peremptory challenges from attack on equal protection grounds even when, a prosecutor exercised them on purely racial grounds. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court rejected an equal protection claim where a prosecutor had used peremptories to strike all six African-Americans on the venire. The Court clearly approved the practice of using race as a predictor of probable bias in a particular case. *Id.* at 220-21. The Court indicated, however, that a defendant could make out an equal protection claim by showing that the prosecution systematically and almost totally excluded African-Americans for a substantial period. *Id.* at 227. Such evidence would tend to show an effort to keep all African-Americans off of all juries, which was unacceptable. *Id.* at 223-24.


201 Under *Batson*, the defendant could establish a prima facie case of purposeful discrimination merely upon "evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 96. Upon establishment of a prima facie case, the burden would shift to the prosecution "to come forward with a neutral explanation for challenging black jurors" though not necessarily one "justifying exercise of a challenge for cause." *Id.* at 97. Although a limitation later abandoned, see *infra* note 203 and accompanying text, the Court also stated that the defendant could only pursue such a claim if he were "a member of a cognizable racial group . . . and . . . the prosecutor . . . exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96.
that the impartiality mandate does not restrict the bases on which parties may exercise peremptory strikes.\footnote{202}

Decisions by the Court after \textit{Batson} have compounded the relative importance in limiting peremptory strikes of the equal protection doctrine compared to the impartiality doctrine. Any criminal defendant now may pursue the equal protection claim even if not of the same race as the excluded potential juror.\footnote{205} A party in a civil suit now may pursue the claim.\footnote{204} The prosecutor in a criminal case now may challenge the peremptories exercised by the defendant.\footnote{205} The equal protection claim now will also lie where peremptories are exercised based on gender.\footnote{206} It is unclear how much further the Court will extend equal protection regulation of peremptory strikes,\footnote{207} but the extensive and rapid

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It remains unclear what constitutes a “neutral” explanation for the exercise of peremptories. The Supreme Court has addressed this question in only one case after \textit{Batson}. In Hernandez v. New York, 500 U.S. 352 (1991), the Court upheld as race neutral a prosecutor’s explanation that he had struck Latino jurors who appeared hesitant when stating that they would not consider their own translations of testimony given in Spanish rather than the translations of the court interpreter. The significance of the decision was further muddied by the presence of a variety of factors suggesting that the prosecutor had no desire to exclude Latinos based on their race, such as that a variety of the victims and prosecution witnesses were Latinos. For incisive analysis of \textit{Hernandez}, see Deborah Ramirez, \textit{Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service}, 1993 Wis. L. Rev. 761.

For the view that the only plausible approach to eliminating racially discriminatory peremptories by the prosecution is to eliminate peremptories for the prosecution while providing an expanded for-cause system of dismissals, see Oglettle, supra note 1, at 1113-51.

\footnote{202} See Holland v. Illinois, 493 U.S. 474, 487 (1990) (holding that Sixth Amendment right to an impartial jury does not prevent prosecution’s exercise of peremptory challenges to strike all black potential jurors).


\footnote{207} The Court has not addressed whether the \textit{Batson} analysis would extend to challenges against peremptories based on the religion of the venire member. But see Davis v. Minnesota, 114 S. Ct. 2120 (1994) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (declining to review holding of state court that \textit{Batson} did not limit exercise of peremptories based on religion of venire member).

It also remains unresolved whether \textit{Batson} covers the use of peremptories to exclude white males, although the Court in other contexts has indicated that the Equal Protection Clause proscribes discrimination against whites in the distribution of burdens and benefits. See, e.g., Shaw v. Reno, 113 S. Ct. 2816 (1993) (refusing to dismiss challenge to congressional redistricting plan that produced two districts with a majority of African-American voters); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to a state sponsored set-aside program purportedly designed to offset the effects of purposeful discrimination against African-Americans); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (applying strict scrutiny to discrimination against “in-
changes that already have occurred carry significant implications for peremptory challenge systems.\textsuperscript{208}

B. Coordinating Equal Protection and Impartiality Doctrines

Questions have arisen about whether the Court's impartiality holdings conflict with the Court's equal protection doctrine. These contentions from both the Court and academic commentators have focused on two separate aspects of the impartiality holdings.\textsuperscript{209} This section confronts these two purported tensions and concludes that the Court's equal protection and impartiality doctrines do not collide.

1. Racial, Ethnic And Gender Stereotyping: Prohibited By Equal Protection But Promulgated Under Impartiality?

It is possible to see tension at a general level between the equal protection doctrine and the representativeness concept of impartiality. The argument that such a conflict exists starts with the notion that equal protection forbids the use of certain stereotypes at all stages of jury selection. Under equal protection theory, for example, potential jurors may not be excluded simply because they are African-American, Mexican-American or women.\textsuperscript{210} When it appears that potential jurors have been excluded on such a basis, equal protection responds by providing a remedy for that improper action. At the same time, several of the representativeness decisions promulgated under the impartiality mandate—the proxy-for-ideology cases\textsuperscript{211}—build on the view that members of these groups respond differently to cases than other

\textsuperscript{208} The notion that \textit{Batson} and its progeny have destroyed the value of peremptory challenge systems, however, goes too far. \textit{See generally} Underwood, \textit{supra} note 1, at 760-63.

\textsuperscript{209} Others have raised a related kind of question. \textit{See}, \textit{e.g.}, Kamisar, \textit{supra} note 172, at 1329 (“Could the Supreme Court in \textit{Batson} have instead ruled in the petitioner's favor by relying upon the Sixth Amendment[] ... Assuming the Court could have done so, would such an approach have been preferable?”).

\textsuperscript{210} For competing arguments on this question, compare Massaro, \textit{supra} note 4, at 503 (arguing, in a pre-\textit{Batson} article, that “the relevant constitutional text is not the equal protection clause, but the Sixth Amendment, which provides the right to an impartial jury”) with Underwood, \textit{supra} note 1, at 736-50 (arguing that impartiality concepts are inferior to equal protection concepts as a basis for restricting peremptory challenges). \textit{See also} Pizzi, \textit{supra} note 81, at 117-22 (discussing advantages and disadvantages of reliance on each of the constitutional bases).

\textsuperscript{211} \textit{See supra} text accompanying note 191.

\textsuperscript{211} \textit{See supra} notes 143-44 and accompanying text.
persons and, for that very reason, selection procedures that result in their disproportionately low representation can violate the impartiality mandate. Further, these impartiality decisions do not remedy improper discrimination; it is the effect of juror race, ethnicity and gender on the verdict, rather than any discriminatory act toward the nonserving, potential jurors, that drives this doctrine. Hence, the Court outlaws stereotypical decision-making under equal protection theory while it relies on group differences to promulgate doctrine under the impartiality mandate.

Recently, several Supreme Court Justices implied that the relationship between the Court’s equal protection and impartiality doctrines presented a conflict. In *J.E.B. v. Alabama ex rel. T.B.* the Court concluded that a gender-based use of peremptory strikes violated equal protection. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented and asserted, in part, that the majority’s reasoning conflicted with the Court’s earlier decisions interpreting the representativeness concept of impartiality:

The Court also spends time establishing that the use of sex as a proxy for particular views or sympathies is unwise and perhaps irrational. The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror’s sex has some statistically significant predictive value as to how the juror will behave . . . . This assertion seems to place the Court in opposition to its earlier Sixth Amendment “fair cross-section” cases . . . . But times and trends do change, and unisex is unquestionably in fashion.

In the context of the case, these comments suggest that the Court, in its representativeness decisions, attributed to individual jurors predictable gender-based views that correlated with the stereotypes used by lawyers exercising gender-based peremptories. Justice Scalia subsequently argued that the Court should allow gender-based peremptories on grounds that gender can be, or at least can appear to be, sufficiently related to a juror’s view of a case to

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212 Not all of the representativeness cases build on this notion. Some of them deal with groups defined in ideological terms directly relevant to the case at hand rather than to groups defined by demographic features such as race and gender. *See supra* notes 155-59 and accompanying text.

213 *See supra* note 120 and accompanying text.


215 *Id.* at 1436 (Scalia, J., dissenting) (citing Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975)).
be of significant value. Yet, for one who disagrees on that point, the purported conflict implies that the Court erred in promulgating portions of its representativeness doctrine.

The two lines of decisions, however, are reconcilable. It is true that equal protection prohibits the exclusion of potential jurors based on stereotypes, for example, about race, ethnicity and gender. It is also true that some of the proxy-for-ideology decisions within the impartiality doctrine reflect notions of differences between groups defined by these factors. Nonetheless, the proxy-for-ideology decisions do not build on the same kind of attributions to individuals by reason of race, ethnicity or gender as those at issue in J.E.B. Under the proxy-for-ideology decisions, certain demographic groups—African-Americans, Mexican-Americans and women—are viewed as proxies for ideology, and their unjustifiably low representation is cognizable, but not because of a view that

216 Justice Scalia first noted that he found gender-based peremptories rational. He noted, "Personally, I am less inclined to demand statistics, and more inclined to credit the perceptions of experienced litigators who have had money on the line." Id. He also contended, however, that such peremptory strikes could be justified even if based on false stereotypes:

Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function . . . . In point of fact, that may well be its greater value.

Id. at 1438 n.3. Finally, he noted that the majority actually was declaring the stereotyping violative of equal protection without regard to the predictive value of the stereotype. Id. at 1436.

217 The majority in J.E.B. ultimately concluded that even if gender stereotypes sometimes have statistically predictive value, under equal protection, they are improper bases for excluding potential jurors. Consistent with its previous declarations regarding the use of peremptories based on stereotypes of African-Americans, the majority stated: "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" J.E.B., 114 S. Ct. at 1426 (citing Powers v. Ohio, 499 U.S. 400, 410 (1991)). The majority elaborated on this point:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.

Id. at 1427 n.11.

This basis for the equal protection prohibition is necessary to distinguish the Court's particular conclusion that the same race-based or gender-based use of peremptories do not violate the impartiality mandate. See infra text accompanying notes 252-60.
they will tend to align with a particular ideology.\textsuperscript{218} The Court has not attempted to define how members of such groups differ from the rest of the population in their outlooks and has never suggested that they coalesce around a particular perspective.\textsuperscript{219} The Court has frankly asserted that it is impossible to know how the participation of these proxy groups on juries might affect the results in any category of cases.\textsuperscript{220} The Court has only asserted that certain groups appear to reflect a mix of perspectives that diverge from the mix of perspectives reflected by the rest of the population so that these groups should not be systematically excluded in any trial.\textsuperscript{221} The Court has not offered or implied the same sort of judgment about an individual based on group membership that occurs where, for example, a litigant exercises a purely gender-based peremptory.\textsuperscript{222}

This distinction does not eliminate the potential for the argument that the two lines of decisions operate at cross purposes. Equal protection in the jury context severely regulates any decision to exclude or include individuals by reason of their race, ethnicity

\begin{itemize}
\item \textsuperscript{218} See supra text accompanying notes 118-22.
\item \textsuperscript{219} See, e.g., Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975) (plurality opinion of Marshall, J.) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (quoting Peters v. Kiff, 407 U.S. 493, 503-04 (1972))).
\item \textsuperscript{220} See id. ("[T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases." (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972))).
\item \textsuperscript{221} See supra text accompanying notes 143-44.
\item \textsuperscript{222} In explaining why equal protection could not guarantee a defendant the chance to select sympathetic jurors, Professor Underwood has argued that a race-based generalization could not be the basis for any inclusionary or exclusionary rule:

Surely a Court that prohibits litigants from relying on a race-based generalization to challenge jurors should not rely on that same generalization itself. A race-based generalization about the likely views of jurors cannot lawfully be the basis for any legal rule. It cannot support the theory that some (or all!) groups of jurors must be excluded from a jury on grounds of bias. Neither can it support the theory that some groups of jurors must be included on a jury in order to protect the defendant's right to a fair trial. No rights whatsoever can be grounded in a race-based generalization about the likely views of jurors. As a result, the theory that the defendant is denied equal protection by being denied the chance to select sympathetic jurors must fail.

Underwood, supra note 1, at 733. These comments do not indicate Professor Underwood's views about the Court's impartiality decisions, however, because it is not certain that she would view those decisions as "grounded in a [group-]based generalization about the likely views of jurors." Id.
or gender. Regardless of motivation, the use of these kinds of factors to distribute benefits or burdens\textsuperscript{223} may denigrate individuals and compound social divisions. This result is what equal protection seeks to limit, as opposed to merely limiting the promulgation of stereotypes.\textsuperscript{224} Further, the Court's proxy-for-ideology decisions can reasonably be understood to mean that a juror's race, ethnicity and gender matter.\textsuperscript{225} One can see this message alone as engendering the kind of social divisions that equal protection seeks to limit.\textsuperscript{225}

\textsuperscript{223} Jury service can be seen as both a benefit and a burden, and equal protection analysis should not depend on efforts to characterize it as only one or the other. For the view that jury service is a burden, see Andrew Kull, \textit{The Slow Death of Colorblind Justice: A Racial Quota System for Juries Denies Our Common Citizenship}, ATL. CONST., Nov. 29, 1992, at H1. For the view that it is a benefit, see King, \textit{supra}, note 78, at 736 n.115. For the Court's view that it would not matter whether jury duty is defined as a benefit or a burden or both, see Shaw v. Reno, 113 S. Ct. 2816 (1993), where the Justices refused to dismiss an equal protection challenge to a congressional redistricting plan that produced two districts with mostly African-American voters. One of the arguments offered by proponents of the plan for not employing strict scrutiny was that the plan did not impose anything that could be conceived of as a burden or denial of a benefit on white voters—that it caused them no "harm." "Racial classifications," the Court stated, "receive close scrutiny even when they may be said to burden or benefit the races equally." \textit{Id.} at 2829.

\textsuperscript{224} See, \textit{e.g.}, Shaw, 113 S. Ct. at 2827 ("When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.").

\textsuperscript{225} Professor Andrew Kull, for example, criticizes the proxy-for-ideology decisions on grounds that they were destined to cause officials to pursue highly race conscious methods for inclusion of minorities and that these more blatant methods promote racial stigmatization and balkanization.

\begin{quote}
Grant, for the sake of argument, that raw racial nerves these days will perceive unfairness in any decision rendered by an all-white jury. This is a reason to try to avoid seating many such juries. \textit{But it is still not a reason to admit, at a constitutional level, that a juror's race can be of any consequence.}
\end{quote}

That standard—that racial distinctions are irrelevant in the jury box—confounds the assumption of every newspaper story and TV newscast about jury composition in high-profile trials. The news media are surely not wrong in suggesting that race matters, but \textit{neither is the Constitution in insisting it must not.} See Kull, \textit{supra} note 223, at H1 (emphasis added).

\textsuperscript{226} One can make the same kind of argument about the Court's decisions indicating that criminal defendants have standing to raise equal protection claims challenging the exclusion of potential jurors on racial grounds. \textit{See, \textit{e.g.}, supra} notes 203-06 and accompanying text. The notion that defendants have standing builds on the view that exclusions can affect case outcomes. \textit{Cf.} Neuborne, \textit{supra} note 37, at 445 (noting that the conclusion in \textit{Powers}, that white defendants have standing to challenge exclusions of African-Americans, reveals a view that the influence goes beyond mere prevention of racial dis-
The reality of the jury-selection context, however, is such that the Court faces a choice of evils. To do nothing beyond barring purposeful discrimination is to breed mistrust, even cynicism, by participants in and observers of the judicial process. Even if one believes that a juror's race, ethnicity and gender should bear no relation to jury verdicts, one cannot easily deny that those factors sometimes influence outcomes or that the general perception that their influence is profound. On the other hand, to pursue with fervor the notion that juror race, ethnicity and gender matter is to breed a notion of differences that undermines our effort to achieve a society in which these factors are irrelevant. A constitutional holding, for example, that a white defendant cannot be judged by a jury with more than nine racial minorities or that an African-American defendant must have at least three African-American jurors would pose this potential. The more important point, however, is that to do anything about the problem, just as to do nothing about it, is to act in nonneutral fashion.

The Court's proxy-for-ideology decisions within impartiality doctrine, although not neutral, represent a well-considered effort at limiting the evils associated with either admitting or denying that juror race, ethnicity and gender matter. The mandate that the Court has promulgated calls only for modified random selection from a jury list that approximates in limited ways the diversity of the community. This approach can help promote juries with racial, ethnic and gender diversity, though it does not ensure them. These proxy-for-ideology decisions are not neutral; the enforcement norm focuses, in part, on the racial, ethnic and gender diversity of venires produced by departures from the baseline ap-

crimination by jurors).

227 See supra notes 128 & 130.

History indicates that when the courts only proscribe discrimination the result is the implementation of selection systems that tend to exclude certain categories of jurors. See supra text accompanying notes 143-44. For example, proscribing only discrimination will result in all-white or nearly all-white juries regularly judging African-American defendants, or in largely male juries regularly passing judgment on women bringing sexual harassment suits against men. This disproportionally low representation of certain groups on juries has deleterious consequences wholly apart from the race or gender of the litigants. See Neuborne, supra note 37, at 445 (explaining how juror race may affect verdicts wholly apart from a juror's tendency to empathize more easily with litigants of the same race).


229 See supra text accompanying notes 108-36.
proach. Yet, it is hard to conceive of any serious effort to promote jury diversity that could tread more lightly on equal protection interests. The baseline approach itself is neutral. To the extent that the enforcement norm is not, one can easily view it as manifestly and primarily advancing a compelling public interest that cannot reasonably be advanced in a less intrusive manner.

The more difficult questions concern the extent to which states may employ race-specific efforts to secure diverse venires and juries. In some jurisdictions, officials are contemplating and sometimes implementing openly race-conscious strategies to produce venires and juries with minority representation equal to or even surpassing their proportion in the community. The Supreme Court's recent turn toward color-blind analysis under the Equal Protection Clause raises grave doubts that these approaches will pass Constitutional muster. These problems do not undermine the view, however, that the representativeness concept of impartiality coincides rather than conflicts with equal protection doctrine.

230 See supra notes 109-22 and accompanying text.
231 See, e.g., King, supra note 78, at 753; Kull, supra note 223, at H1.
232 This conclusion would mean that the enforcement norm would satisfy even strict scrutiny under equal protection analysis. See, e.g., Shaw v. Reno, 113 S. Ct. 2816, 2831 (1993) (analyzing whether redistricting plan was "narrowly tailored" and "reasonably necessary" to advance a "compelling interest" of the state).
233 These approaches would implicate equal protection concerns as well as concerns about jury impartiality itself. If the use of procedures that systematically underrepresent certain groups can infringe the impartiality notion, it would seem that affirmative actions resulting in disproportionally high representation of the groups would also implicate impartiality. Nonetheless, given that these approaches are consciously focused on racial representation, the impartiality mandate would not seem to regulate them more closely than the Equal Protection Clause.
234 See, e.g., Kull, supra note 223, at H1 (describing "quota" system used in Georgia to produce racially diverse jury venires).
235 See, e.g., Shaw, 113 S. Ct. at 2816 (refusing to dismiss challenge to congressional redistricting plan producing two districts with African-American voter majorities); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to a state-sponsored set-aside program purportedly designed to offset effects of purposeful discrimination); see also Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992) (in rejecting white defendant's use of peremptory challenges to excuse African-Americans by reason of race implying that the same result would adhere to use of peremptory challenges to strike whites by reason of race).
236 These questions are beyond the scope of this Article and have been addressed elsewhere. See generally King, supra note 78.
237 These highly race-conscious efforts bear on the propriety of the Court's decisions only if those decisions are viewed as inevitably resulting in the promulgation and judicial approval of such efforts. However, for an argument on the propriety of caution in accepting such "thin edge of the wedge" contentions, see Frederick Schauer, Slippery Slopes,
2. Peremptory Strikes: Contradictory Approaches Under Equal Protection and Impartiality?

One may also see tension between equal protection and impartiality doctrines in the specific ways that they respond to race and gender-based peremptory strikes. While the more general alleged conflict concerned whether impartiality doctrine reflects pernicious stereotypes by proscribing even some unintentionally exclusionary practices, this second alleged conflict concerns intentionally discriminatory exclusions that the impartiality doctrine does not even limit. Beginning with Batson, the Court has relied on equal protection to prohibit race or gender-based peremptories. However, the Court held, in Holland v. Illinois, that the impartiality mandate does not impose any similar restriction on the use of peremptory strikes. Race or gender-based peremptories obviously bear on the representativeness of the jury. Why then if the practice lacks a justification to overcome an equal protection attack doesn’t it also lack a justification to overcome an impartiality challenge?

Several Justices and commentators have argued that peremptories should be limited under the representativeness concept of impartiality to the same extent as they are limited under equal protection. For example, Justice Marshall, joined by Justices Brennan and Blackmun, presented this argument in a dissenting opinion in Holland. In their view, the Sixth Amendment serves in part, like equal protection, to shield the excluded venire member from discriminatory treatment. Likewise, the Sixth Amendment protects the intentionally excluded, venire member to the same extent as equal protection so that if discriminato-

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238 See supra text accompanying notes 200-08.
240 See id. at 484 (holding that the Sixth Amendment right to an impartial jury does not prevent the prosecution’s exercise of peremptory challenges to a potential juror because he or she is African-American).
241 For commentary favoring the view that the Sixth Amendment, like equal protection, should proscribe peremptories exercised on racial and gender grounds, see Brown, supra note 6, at 128-32.
242 Holland, 493 U.S. at 491-504 (Marshall, J., dissenting).
243 Id. at 496-98 (noting that ensuring disadvantaged groups the opportunity to serve on juries was acknowledged in the Court’s previous opinions as one of the justifications for the representativeness concept of impartiality).
ry peremptories violate equal protection, they must also violate the Sixth Amendment. This argument tied the discriminatory exclusion functions of equal protection and the Sixth Amendment mandate so closely together that it was unnecessary to explore whether race-based peremptories served any legitimate aims of the party who employed them. Since the Court already had prohibited race-based peremptories under equal protection, it automatically followed that the Sixth Amendment also prohibited them.

Justice Stevens offered a slightly different dissent in *Holland*. Unlike Justice Marshall, he did not contend that the Sixth Amendment aims, like equal protection, to shield excluded venire persons from discriminatory treatment. Nonetheless, he argued that if the justifications for racially based peremptories

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244 *Id.* at 497 (citing *Batson* for the proposition that the purported goal under the impartiality mandate "of ensuring that no distinctive group be excluded from full participation in our criminal justice system is impaired when the prosecutor implies, through the use of racially motivated peremptory challenges, that he does not trust Afro-Americans to be fair enough or intelligent enough to serve on the case he is trying.").

245 These Justices concluded that representativeness is inherent in the idea of a jury and, thus, comes from the Sixth Amendment requirement of a "jury," rather than the requirement that a jury be "impartial." *Id.* at 494-95. Hence, representativeness is not simply a means for ensuring group impartiality. *Id.* at 495-96. These Justices contend that this point supports the notion that the representativeness concept aims to protect not simply the litigants in the case but also potential jurors and the larger community. *Id.* at 496.

The difficulty with this view is two-fold. First, even if the representativeness concept emanated from the word "jury" rather than from the notion of "impartiality," it would remain a non sequitur to claim from this point that a representativeness concept aims to serve purposes other than guaranteeing the litigant a fair jury. Second, these dissenting Justices' assertion as to the source of the representativeness requirement was not compelling. The Court had indeed sometimes analyzed what it called the "fair cross-section" requirement as a separate claim from group "impartiality." *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 174-88 (1986). Nonetheless, in a variety of earlier decisions, the Court also had implied that the representativeness concept was embodied in the notion of impartiality. *See, e.g.*, Adams v. Texas, 448 U.S. 38, 50-51 (1980) (asserting that the requirement that venire persons in a capital case not be excluded based on qualms about the capital sanction served the notion of ensuring an "impartial jury"); Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (asserting that the "fair cross-section requirement" was derived from the notion of how an "impartial jury" is assembled). Because the source of the representativeness mandate was uncertain, it was entirely appropriate for the *Holland* majority to clarify its view on this point: "The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring . . . an impartial [jury] . . ." *Holland*, 493 U.S. at 480. Justice Stevens in his dissent did not disagree with the majority's contention. *Id.* at 504-18 (Stevens, J., dissenting). *See also* Underwood, *supra* note 1, at 738-39 (noting that the former claim is "no more than a construct" and that it "derives most of its power from an idea that has more to do with antidiscrimination norms than with fair trial rights").

246 *Holland*, 493 U.S. at 504-20 (Stevens, J., dissenting).
were insufficient to overcome an equal protection claim, they were also insufficient to overcome a challenge under the impartiality mandate. He acknowledged the majority’s contention that peremptories based even on racial grounds serve the interest of obtaining an impartial jury. However, he found this argument unpersuasive because it rested “on the assumption that a black juror may be presumed to be partial simply because he is black—an assumption that is impermissible since Batson.” Justice Stevens seemingly concluded that Batson had stamped race-based peremptories as irrational, which would, of course, mean they would lack a sufficient justification to overcome either an equal protection or an impartiality challenge.

These arguments about why peremptory strikes should be limited in the same way under the Sixth Amendment as under equal protection miss the mark entirely. First, contrary to Justice Marshall’s contention, the Sixth Amendment language does not reveal a purpose to protect potential jurors. Indeed, the Court has now clarified that the Sixth Amendment aims only to ensure a fair jury for the criminally accused. Hence, the question of

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247 Id. at 517 (“The operation of a facially neutral peremptory challenge procedure in a discriminatory manner is no less a violation of the defendant’s Sixth Amendment right to a jury chosen from a fair cross section of the community than it is a violation of the juror’s right to equal protection.”).
248 Id. at 519.
249 Id.
250 The relevant language from the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .” U.S. CONST. amend. IV.

The argument that protection accrues to the potential juror does not appear much stronger if one turns to the Due Process Clause of the Fourteenth Amendment: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend XIV.

251 While earlier opinions of the Court had stated that the Sixth Amendment aimed to protect not only the criminally accused but the potential jurors and the general public, the Holland majority made no mention of those purposes, as Justice Marshall complained. Holland, 493 U.S. at 493 (Marshall, J., dissenting). The majority explicitly rejected the notion that those purposes should play a role in interpreting the mandate:

To be sure, as Justice Marshall says, the Sixth Amendment sometimes operates “as a weapon to combat racial discrimination” . . . — just as statutes against murder sometimes operate that way. But it is no more reasonable to portray this as a civil rights case than it is to characterize a proposal for increased murder penalties as an anti-discrimination law. Since only the Sixth Amendment claim, and not the equal protection claim, is at issue, the question before us is not whether the defendant has been unlawfully discriminated against because he was white, or whether the excluded jurors have been unlawfully discriminated against because they were black, but whether the defendant has been denied the right to “trial . . . by an impartial jury.” The earnestness of this
how the Sixth Amendment regulates peremptory challenges is not automatically answered by *Batson* and its progeny.

Justice Stevens's argument that the Court has stamped race- or gender-based peremptories irrational, and, for that reason, of no legitimate service also fails. Of course, if the Court had restricted peremptories under equal protection on that view, the Court should similarly have restricted peremptories under the representativeness concept of impartiality. If race- or gender-based peremptories serve no rational function, they cannot overcome the quest for representativeness on juries any more than they can overcome the quest for equal treatment of potential jurors. That view is not, however, the basis for the Court's equal protection regulations. The Court has recently clarified that race or gender-based peremptories are prohibited, even though they may be rational, because of the harms that they produce. The principal harm of concern in the equal protection context is the denigration of excluded jurors. As a result, the Court has concluded that classifications based on race or gender must be supported by an "exceedingly persuasive justification." While race and gender-based peremptories serve some valid functions, the Court has concluded that they do not meet this high standard.

The impartial jury mandate does not impose the same standard for race- or gender-based peremptories because it is not aimed at shielding potential jurors. The stakes change when the substantial harm to potential jurors is not the focus. The possibility for some harm to the complaining litigant from race- or gender-based peremptories remains. For this reason a "legitimate

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252 See, e.g., J.E.B. v. Alabama ex rel T.B., 114 S. Ct. 1419, 1428 (1994) ("Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their inferiority.'" (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880))).

253 Id. at 1428 n.12 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

254 See, e.g., id. at 1427 n.11 ("Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection."); cf. Powers v. Ohio, 499 U.S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns.").

255 If the perception exists that peremptories are grounded solely on race or gender, some potential exists for prejudice to the litigant, though it may also be offset by a rec-
interest" in allowing these peremptory strikes must still exist. Yet, while race or gender-based peremptories cannot meet the high standard of justification required under equal protection theory, they can be thought to meet the lesser standard applicable under impartiality doctrine.\textsuperscript{256} Litigants exercise peremptories on racial or gender stereotypes out of a sincere belief, borne out by their interests at stake, that the stereotypes have predictive capacity in identifying unfavorable venire members\textsuperscript{257} in a particular trial.\textsuperscript{258} Also, whatever the predictive power of the stereotypes, allowing peremptories based on those stereotypes surely furthers the perceptions of each party that they have eliminated those most likely to hold a bias against them.\textsuperscript{259} Peremptory strikes based

\textsuperscript{256} See supra notes 114-17 and accompanying text for discussion of this standard.

\textsuperscript{257} It is plausible to believe that peremptories help to eliminate some potential jurors who actually would qualify as biased in constitutional terms. This is not to say, however, that the litigant exercising the challenges need view the function of the peremptory strikes in this way. Such a litigant may view the strikes simply as more likely to exclude those on the side of the impartiality range favorable to the opposing litigant rather than as eliminating partial jurors who have masked their partiality sufficiently to avoid dismissal on that basis. See, e.g., Pizzi, supra note 81, at 126 ("While there may be some jurors struck whom one of the lawyers believes should have been struck for cause, most of the jurors struck through peremptory challenges will be struck because one of the lawyers believes that he can obtain a juror who will be easier to persuade of the merits of his side of the case."). Given the probability that peremptory strikes serve to eliminate at least some unqualified potential jurors, however, such strikes are appropriately seen as promoting individual impartiality among jurors. See supra text accompanying notes 80-83.

\textsuperscript{258} Professor Babcock has noted that this is a central purpose of allowing peremptory strikes. Babcock, supra note 32, at 553. Professor Babcock has more recently noted that race-based peremptories may nonetheless engender deleterious consequences. See id. at 1147; cf. J.E.B., 514 S. Ct. at 1436 (Scalia, J., dissenting) (arguing that race and gender-based peremptories are sufficiently justified even to withstand an equal protection challenge: "Personally, I am less inclined to demand statistics, and more inclined to credit the perceptions of experienced litigators who have had money on the line.").

\textsuperscript{259} In Swain v. Alabama, the Court emphasized this point:

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Swain v. Alabama, 380 U.S. 209, 219 (1965) (quoting In re Murchison, 349 U.S. 133, 136 (1955)). See also Babcock, supra note 32, at 552 ("The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem so to those whose fortunes are at issue."); Richard D. Friedman, An Asymmetrical Approach to the Problem of Peremptories, 28 CRIM. L. BULL. 507, 511 (1992) ("But, even if peremptories are of only occasional importance in contributing to fairness itself, they are of consistent, although not as dramatic, importance in contributing to the perception of fairness.").
even on race or gender stereotypes have value.\footnote{260} Hence, the conclusion of the \textit{Holland} majority that the impartiality mandate imposes no limits on the bases for peremptory strikes does not contradict the Court’s decisions to restrict them under equal protection.

Although the conclusion of the \textit{Holland} majority coincides with impartiality and equal protection theory, the majority opinion remains troubling. The majority did not clarify that differing justificatory standards arise under the equal protection and impartiality doctrines. Moreover, the majority justified its conclusion, in part, on the grounds that the “fair cross-section” requirement within the impartiality doctrine does not limit the exclusion of jurors after the formation of the venire.\footnote{261} The Court had espoused this view in several earlier opinions, emphasizing that we cannot expect that juries include a fair cross-section of the larger community.\footnote{262} However, this is an inappropriate answer to the Sixth Amendment claim presented by the petitioner in \textit{Holland}. We also cannot expect, and the Court does not demand, that jury venires approach a “cross-section” of the larger community. Yet the Court has imposed some restrictions on the exclusion of potential jurors in the formation of venires.\footnote{253} More importantly, the Court on several occasions has proscribed the exclusion of jurors after formation of a venire on the grounds that their exclusion distorted the “impartiality” of the jury as a body.\footnote{264} Hence, rather than focus on the restricted applicability of an extraconstitutional term—“fair cross-section”—the majority should have acknowledged that a notion of

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\begin{footnote}{260} Some commentators have argued that the value of peremptories is significant enough that the Court’s view of how equal protection regulates race-based peremptories in \textit{Swain} was correct. \textit{See}, e.g., Saltzburg \& Powers, supra note 18 at 338 (declaring that “\textit{pre-Batson} decisions of state courts prohibiting race as grounds for peremptorily challenging jurors are misconceived, that they miss the basic point of peremptory challenges, \ldots and that in the long run they may do more harm to the litigation process than does the \textit{Swain} rule.“).
\end{footnote}

\begin{footnote}{261} \textit{See Holland v. Illinois}, 493 U.S. 474, 478 (1990) (“While statements in our prior cases have alluded to such a “fair possibility” [of a representative jury] requirement, satisfying it has not been held to require anything beyond the inclusion of all cognizable groups in the venire \ldots”); \textit{id.} at 485 (noting that, in \textit{Teague v. Lane}, 489 U.S. 288 (1989), the Court had rejected a habeas corpus claim on grounds that to apply the “fair cross-section” requirement to the petit jury stage would create a “new rule”).
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\begin{footnote}{262} \textit{See supra} note 147.
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\begin{footnote}{263} \textit{See supra} notes 143-44 and accompanying text.
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\begin{footnote}{264} \textit{See supra} note 163 and accompanying text.
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group impartiality exists that restricts the exclusion of potential jurors either before or after venire formation.\textsuperscript{265} The majority could then have clarified, by reference to the differing justificatory standards under equal protection and the representativeness concept of impartiality, that the representativeness concept need not be understood to restrict the bases for exercising peremptories.\textsuperscript{266}

V. CONCLUSION

Three basic questions provide a lens through which to explore the theoretical structure of the Court's impartiality jurisprudence. First, one must ask what the Court means in a constitutional sense when it speaks of an individual juror as "impartial." Does it mean a juror who is free of biases that will bear on her verdict, or something else? Second, one must ask whether an impartial jury means more than a collection of impartial jurors and, if so, what the notion of jury impartiality further implies. Can the exclusion of certain potential jurors render a resulting jury biased, even if everyone on the jury is impartial? Finally, one must ask to what extent due process requires a jury to stand impartial as explicitly commanded by the Sixth Amendment even when the Sixth Amendment does not apply.

The proposition that impartial, potential jurors are not fungible is key to understanding the internal structure of the Supreme Court's impartiality jurisprudence. The denotation of individual impartiality indicates only that a potential juror probably falls

\textsuperscript{265} See supra text accompanying notes 145-47.

\textsuperscript{266} The holding in \textit{Holland} has little practical significance in failing to proscribe race or gender-based peremptories. Equal protection regulates race- or gender-based peremptories, and it is of no concern to trial litigants whether the same regulations arise under the impartiality mandate. Indeed, in his dissent, Justice Marshall argued that there was no reason to worry about any purported lost benefits associated with race or gender-based peremptories since they already had been eliminated by the equal protection decisions. See \textit{Holland v. Illinois}, 493 U.S. 474, 503 (Marshall, J., dissenting) ("Whatever damage my interpretation of the Sixth Amendment would do to the peremptory challenge system has already been done under the Fourteenth Amendment."). Holland's lawyer had raised both contentions in the Illinois Supreme Court. However, he had not reiterated the equal protection claim in the Supreme Court, perhaps out of an erroneous belief that a white defendant would not have standing under equal protection theory to challenge the exclusion of African-American venire persons. \textit{Id.} at 507 (Stevens, J., dissenting). After \textit{Holland}, a lawyer should simply contest the opponent's race- or gender-based peremptories (and others as well) on equal protection grounds.

To the extent that the impartiality mandate would apply to groups not cognizable under the \textit{Batson} principle, the \textit{Holland} decision would have practical significance. It is unlikely that the Court will extend the impartiality mandate, however, to include a wide variety of groups. See supra text accompanying notes 132-36.
within a range of perspectives not deemed absolutely disqualifying for the particular trial. This point, in turn, explains why an impartial jury as a whole means more than a collection of impartial jurors: The exclusion of certain groups from among those who qualify as impartial could produce disproportional representation at one end of the impartiality spectrum even if all who serve qualify individually as impartial. Because of problems involved with efforts to ferret out all of a potential juror's prejudices in detail, impartial potential jurors generally are treated as if they were fungible so that exclusion of one or more of them is irrelevant under impartiality doctrine. Nonetheless, where exclusionary procedures pose obvious risks of distorting the ideological mix of the jury and are deemed unjustified, the "representativeness" or "group impartiality" concept prevails. Furthermore, due process mandates both an individual and a group notion of impartiality, similar to the Sixth Amendment. This mandate results from concern over the appearance of distortion in the composition of the jury and the possible deleterious consequences for litigants.

This analytical approach also explains the relevance under the impartiality doctrine of certain demographic characteristics of potential jurors, such as gender and race. The Court's doctrine restricting procedures that tend toward disproportionately low representation of certain demographic groups is justified because the groups are thought to represent a mix of perspectives that differs from that reflected in the overall population. Furthermore, their low representation may be viewed as unfair to the litigant by the participants in the proceedings and those who learn of them. Therefore, as with the exclusion of groups defined in more relevant ideological terms, the unjustified systematic exclusion of members of those groups is proscribed by the representativeness concept of impartiality.

This view of the representativeness mandate also provides a basis for assessing whether impartiality doctrine conflicts with equal protection regulation of jury composition. Under one theory, the Court's denouncement on equal protection grounds of reliance on racial, ethnic or gender stereotypes to eliminate poten-

267 See supra text accompanying notes 25-70.
268 See supra text accompanying notes 71-168.
269 See supra text accompanying notes 108-22.
270 See supra text accompanying notes 169-87.
271 See supra text accompanying notes 121-36.
tial jurors collides with the Court’s decisions under the group impartiality concept of impartiality to remedy even unintentional exclusions of members of groups defined in racial, ethnic or gender terms. However, the Court’s group impartiality decisions assume only that the mix of perspectives among certain groups are distinct from the mix of perspectives in the larger population. In its impartiality opinions, the Court has steadfastly avoided suggesting how those mixes of perspectives differ. Hence, the group impartiality cases do not build on the kind of stereotyping of individuals proscribed by the equal protection decisions.272

The second alleged conflict between equal protection and impartiality regulation focuses on race- or gender-based peremptory strikes. Some commentators have contended that the Court has acted inconsistently by proscribing these types of peremptories under equal protection but not under the group impartiality concept. However, peremptory strikes based on race or gender are not without value. Because of the different interests it seeks to protect, impartiality doctrine also imposes a less demanding standard for justifying the use of race or gender stereotypes than equal protection doctrine. The apparent tension between the absence of a claim under the impartiality mandate and the existence of a claim under equal protection can be reconciled through these different justificatory standards.273

The Court’s jury impartiality decisions have conformed274 to a structural theory through which we can view them as a coherent body of law.275 The Court’s statements about impartiality do not always correspond with the view of jury impartiality revealed by its decisions.276 Yet, the Court is confronted with a dilemma in the

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272 For discussion of this alleged conflict and why it is illusory, see supra text accompanying notes 210-37.
273 See supra text accompanying notes 238-66.
274 There are, however, some inconsistencies in the Court’s decisions. For an example of inconsistent decisions, see supra note 163.
275 This conclusion does not imply that the Court’s regulation of jury selection embodies indisputable assumptions. It remains important to study the Court’s approach to regulating jury selection especially as it builds on debatable perspectives about the function of relevant constitutional mandates. See, e.g., Underwood, supra note 1, at 745 (arguing that only potential jurors suffer a “direct and palpable” injury from race-based jury selection so that the problem should be addressed through the equal protection rights of potential jurors rather than through any theory concerning the rights of litigants).
276 For example, the Court has recently denied even that an impartial jury means something more than a jury constituted by impartial jurors. See Lockhart v. McCree, 476 U.S. 162, 178 (1986) (“We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial jury consists of
jury selection context that constantly pulls it in opposite directions. On the one hand, conceding that impartial jurors represent an impartiality array opens the door to a host of problematic issues whose resolution may carry socially divisive consequences regarding how to provide balance among disparate perspectives on juries. On the other hand, to contend that impartiality conveys bland neutrality is to ignore the reality that juror background affects jury verdicts. Hence, it is no small measure of the Court's work in this area that its impartiality decisions, if not all of its statements about impartiality doctrine, reveal a logical and conceptual unity and that they correlate with the Court's other efforts to regulate jury selection under the Constitution.

nothing more than 'jurors who will conscientiously apply the law and find the facts.' (quoting Wainwright v. Witt, 469 U.S. 412, 423 (1985)); see also Buchanan v. Kentucky, 483 U.S. 402, 418 (1987) (quoting same language from Witt). This assertion is quite untrue. See supra notes 143-44 and accompanying text.

The Court also has created confusion by suggesting that a fundamental distinction exists between pre-venire and post-venire exclusions and that the notion of representativeness embodied in the impartiality mandate does not apply once the venire is formed. See supra text accompanying notes 145-47. These notions neither make sense nor follow the Court's decisions. See supra notes 120 & 147 and accompanying text.

The Court also has suggested that systematic and unjustified exclusions of venire members on ideological grounds would not violate the impartiality mandate if they occurred in a regular criminal trial, even though the Court previously had held that exclusions violated the representativeness concept when they occurred in a capital sentencing trial. See supra note 120. This assertion also is unjustified. See supra notes 120 & 167.

277 As Professor Amsterdam has noted in a different context, it is "far more difficult for the Court than for its critics to produce 'a single coherent analytical framework' for decisions that the Court must make." Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 350 (1974) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971)) (footnote omitted).