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# Jural Districting: Selecting Impartial Juries Through Community Representation

Kim Forde-Mazrui

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*Court reformers continue to debate over efforts to select juries more diverse than are typically achieved through existing procedures. Controversial proposals advocate race-conscious methods for selecting diverse juries. Such efforts, however well-intentioned, face constitutional difficulties under the Equal Protection Clause, which appears to preclude any use of race in selecting juries. The challenge thus presented by the Court's equal protection jurisprudence is whether jury selection procedures can be designed that effectively enhance the representative character of juries without violating constitutional norms.*

*Professor Forde-Mazrui offers a novel insight for resolving this challenge. Analogizing juries to legislatures, he applies electoral districting principles to jury selection. Striking parallels between legislatures and juries justify comparing the selection of jurors to the election of legislators. Both legislatures and juries are fundamental institutions that best serve their function when their membership is representative of their respective jurisdiction. The electoral process enhances the representative character of legislatures through single-member districting. Although limiting the use of race in drawing electoral districts, the Court has endorsed designing districts around "communities of interest," communities with shared political interests identified geographically by demographic characteristics such as residential proximity, socioeconomic class, occupation, religion, and political affiliation. Curiously, the Court even permits some use of race in drawing districts provided it is only one among many factors.*

*Drawing on electoral districting experience and doctrine, Professor Forde-Mazrui proposes a jury selection procedure he terms "jural districting." An implementing jurisdiction would divide a jury district into twelve sub-districts, designed around "communities of interest," and would require juries to contain jurors from every sub-district. Such a procedure should satisfy constitutional objections and, moreover, would create broadly diverse juries representing a variety of communities, including communities identifiable by race, ethnicity, religion, political affiliation, and socioeconomic status. Jural districting would thereby create juries more broadly representative than juries selected by current procedures or even by proposals relying predominantly on race. By improving the quality of jury decision-making through deliberation and consensus among a cross section of groups, jural districting would thereby restore a substantial measure of legitimacy to the jury system.*



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*Kim Forde-Mazrui\**

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## I. INTRODUCTION

Americans have long been ambivalent toward the criminal jury. In its favor, the right to trial by jury is deemed "fundamental to the American scheme of justice,"<sup>1</sup> and is enshrined in the Constitution's Sixth Amendment.<sup>2</sup> The primary purpose of the jury, according to the Supreme Court, is to guard against arbitrary government power by interposing the judgment of ordinary citizens between the defendant and the potentially arbitrary or overzealous prosecutor or judge.<sup>3</sup> Despite its crucial role, the jury is criticized as being inefficient, incompetent, confused, biased, and discriminatory.<sup>4</sup> A continuing challenge is to design a jury system that minimizes the risk of determinable error while enhancing its legitimacy over potential alternative institutions of criminal justice.

This Article focuses on the criminal jury<sup>5</sup> as a *representative*<sup>6</sup> institution. The persistent failure of juries to adequately represent

1. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

2. 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, which district shall have been previously ascertained by law . . ." U.S. CONST. amend. VI.

3. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

4. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 110-14, 123-24 (1949) (discussing jury confusion with trial court instructions and complexity of issues); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 212 (1989) (concluding that inexplicable acquittals result because juries choose to be merciful rather than just or because they misunderstand the court's instructions); Andrew D. Loipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 261, 279-80 (1996) (observing that juries sometimes misunderstand or misapply the law, experience confusion, reach verdicts tainted by prejudice and passion, or agree to compromise verdicts); Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 777-86 (1998) (identifying mistake, confusion, compromise, and lenity as explanations for inconsistent verdicts within the same proceeding, such as multiple-count inconsistencies and multiple defendant inconsistencies, that seem to defy court instructions); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 489-500 (1997) (discussing common criticisms of juries, including jury confusion, incompetence, prejudice, unpredictability, and cost).

5. This Article focuses on procedures for selecting the criminal petit jury, i.e., the jury of traditionally twelve persons that observes a criminal trial and renders a verdict at its conclusion. This should not imply that concerns addressed by this Article over the extent to which juries can or should include members from diverse backgrounds do not apply to petit juries that sit in civil cases or to grand juries that issue criminal indictments. To the contrary, much and perhaps all of the discussion concerning the role of jury composition applies to these other juries and, indeed, much of the doctrine and scholarly commentary does not distinguish between them. I have limited the scope of my analysis principally to the criminal petit jury simply because of the greater precision, clarity, and completeness of analysis afforded by a more particularized focus. Moreover, among the various kinds of juries on which to focus, questions of fairness about the criminal petit jury raise the gravest concerns given its responsibility for determining guilt or innocence, freedom or incarceration, and life or death.

various groups, particularly racial minorities, within a jurisdiction, and the apparently unjust verdicts that have been rendered by such underrepresentative juries, have brought the legitimacy of the jury under increasing suspicion.<sup>7</sup> This concern is not new. Historically, juries have often failed to fairly represent minority groups residing within a community for a variety of reasons, including the intentional exclusion of group members from jury service.<sup>8</sup> Recent high-profile cases, such as the criminal trials of O.J. Simpson and the police officers who beat Rodney King, have greatly increased public awareness of this problem of underrepresentative juries and precipitated a crisis of confidence in the jury system.<sup>9</sup>

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6. What I mean by jury *representation* or *representativeness* cannot be adequately defined at this point as that concept lies at the heart of this Article's inquiry. However, I do not mean only *racial* representation or, narrower still, representation of racial *minorities*. Because the underrepresentation of racial minorities continues to be the most visible and troublesome way in which juries fail to be representative, much of the literature on jury selection (including this Article) focuses on the underrepresentation of such minorities. In general, however, by *representative* juries, I mean juries that represent a broad range of different groups within a jurisdiction including, but not limited to, racial minorities, racial majorities, and groups defined by traits other than race such as economic class, sex, religion, ethnicity, culture, age, occupation, and political affiliation. Ultimately, I will explore the concept of juries that represent "communities of interest" as that concept is understood in the context of electoral districting. See *infra* Parts III.C. and IV.A.

7. See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 32 (1977) (noting that underrepresentation of minorities on juries contributes to mistrust of the criminal system by minorities); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 *DUKE L.J.* 704, 705-07, 734 (1995) (describing the negative reactions of racial and nonracial groups to verdicts reached by juries that are not representative of their interests).

8. Blacks were excluded from jury service by law in most states prior to the Fourteenth Amendment and the Supreme Court's invalidation of such practices in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (stating that "the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man . . ."). See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 38 (Vintage Books 1977) (1976) (describing exclusion of African-Americans from jury service during the 19th century). Since then and continuing to this day, blacks and other racial minorities are underrepresented on juries due to a variety of race-neutral factors and due to intentional, though covert, use of the peremptory challenge to exclude racial minorities on the basis of race. See *infra* notes 10-16 and accompanying text.

9. Concerned with the erosion of public confidence in the jury system after recent infamous cases, Professor George Fisher observes:

[W]e perhaps need not yet worry that the system is coming face-to-face with a future in which jury verdicts, far from settling the question of the defendant's guilt or innocence in the public mind, become for many an object of scorn.

And yet, there have been several such cases in just the last few years. Many of those who watched the first Rodney King trial, the first Menendez brothers trial, and the O.J. Simpson trial concluded that the jury was wrong. Perhaps they lost some of their former faith in jury verdicts. Perhaps, then, the reformers are right—we really should abolish trial by jury . . . .

Although racially explicit barriers to minority participation in jury service have been pulled down, many factors continue to disproportionately exclude minorities from jury selection and service.<sup>10</sup> Courts commonly generate lists of potential jurors from voter registration records—a database that tends to underrepresent the minority population residing in a jury district.<sup>11</sup> Also, because racial minorities are statistically more mobile than whites, a greater number fail to receive jury summonses mailed to outdated addresses.<sup>12</sup> Even when they are contacted, minority residents are less likely to complete a jury questionnaire or to respond to a jury summons due to apathy or resentment toward a criminal justice system from which many feel alienated.<sup>13</sup> Moreover, members of racial or ethnic minorities are more likely to be disqualified from service for reasons such as lack of English proficiency or having a criminal record. Minority jurors are more likely to be excused from jury service due to financial hardship, transportation difficulties, or child care responsibilities.<sup>14</sup> Finally, prosecutors exercising peremptory challenges for ostensibly race-neutral reasons disproportionately target racial minorities.<sup>15</sup> The net result is “that in many communities across the country, the percentage of minority veniremembers, trial and grand jurors, and grand jury forepersons is significantly lower than the percentage of minority adults living in the communities from which they are drawn.”<sup>16</sup>

Responding to the deepening delegitimization of the jury system, court reformers and scholars have advanced proposals to achieve

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George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 1018-19 (1997); see also Laura A. Giantris, *The Maryland Survey: 1994-1995, The Necessity of Inquiry into Racial Bias in Voir Dire*, 55 MD. L. REV. 615, 615 (1996) (noting growing concern over racially biased juries following the trials of O.J. Simpson and the officers who beat Rodney King); Lisa Kern Griffin, “*The Image We See Is Our Own*”: *Defending the Jury’s Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 333 (1996) (stating that “[s]ensational stories, like the Simpson, King, and Menendez trials, undermine the legitimacy of jury verdicts and call into question the compatibility of the institution with the ideal of the rule of law”).

10. For an overview of race-neutral selection procedures that result in the underrepresentation of racial minorities, see Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 712-19 (1993).

11. See *id.* at 712-13; see also HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 18 (1993).

12. See King, *supra* note 10, at 714; see also FUKURAI ET AL., *supra* note 11, at 21-26; VAN DYKE, *supra* note 7, at 30.

13. See King, *supra* note 10, at 714.

14. See *id.* at 714-18.

15. Although evidence suggests that racial minorities are intentionally excluded on the basis of race by peremptory challenges in disproportionate numbers, *id.* at 718 & n.33, trial judges often find that such challenges were made for race-neutral reasons, see *infra* note 19.

16. King, *supra* note 10, at 719.

greater representation of minority groups on juries.<sup>17</sup> Some reforms alter the race-neutral procedures described above that tend to underselect racial minorities. For example, some courts have turned to additional sources for juror names to supplement voter registration lists, such as driver's license records or tax rolls. Some courts have also taken steps to enforce compliance with jury summonses and to make jury service more convenient or remunerative.<sup>18</sup> Courts also continue, albeit with limited success, to police the racially discriminatory use of the peremptory challenge.<sup>19</sup>

These race-neutral reforms, while important, are necessarily limited in their ability to ensure consistently diverse juries.<sup>20</sup> Seeking more immediate and effective ways to ensure jury diversity, many reformers have proposed selection procedures that would intentionally use race as a selection criteria.<sup>21</sup> These more ambitious race-conscious

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17. See generally Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996) (reviewing a variety of race-neutral and race-conscious measures for increasing diversity on juries).

18. See Munsterman & Munsterman, *The Search for Representativeness*, 11 JUST. SYS. J. 59 (1986), cited in King & Munsterman, *supra* note 17, at 274 n.3; King, *supra* note 10, at 752-56, 771-72.

19. See, e.g., Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1830-31 (1993) (arguing that the types of race-neutral explanations that are permitted to rebut a *Batson* challenge to a peremptory challenge serve to conceal discrimination). Justice Thurgood Marshall warned that the only way to prevent the purposeful use of peremptory challenges to strike jurors on account of race was to eliminate peremptory challenges entirely. See *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring). For proposals to abolish the peremptory challenge, see Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995); Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625 (1994); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); Robert M. O'Connell, Note, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991).

20. For example, the time required to create master source lists of qualified jurors means that some addresses will inevitably be outdated which, due to the greater mobility of racial minorities, results in some minority underrepresentation. Additionally, court administrators understandably resist abandoning reasonable qualification standards, such as English proficiency and clean criminal records, which inadvertently exclude a greater percentage of minorities. Moreover, overcoming minority suspicion and apathy toward the criminal justice system is difficult and slow. See King & Munsterman, *supra* note 17, at 274. And short of abolishing the peremptory challenge altogether, efforts to prevent racially-motivated challenges continue to have limited success, see *supra* note 19.

21. See, e.g., Alschuler, *supra* note 7; Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); King, *supra* note 10; Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80 (1973); Deborah A. Ramirez, *A Brief Historical Overview of the Use of the Mixed Jury*, 31 AM. CRIM. L. REV. 1213 (1994); Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781 (1986); Geoffrey Cockrell, Note, *Batson Reform: A Lottery System of Affirmative*

“affirmative selection” procedures, however, face significant constitutional difficulties. Recent Supreme Court cases interpreting the Equal Protection Clause in the contexts of jury selection and affirmative action programs suggest that most race-conscious jury selection procedures would be subjected to the most rigorous scrutiny.<sup>22</sup> These cases seem to indicate that the Court would hold most race-conscious jury selection procedures unconstitutional. While the Court’s color-blind stance is laudable in many respects, it threatens to undermine good faith efforts to create representative juries.

This Article will address the challenge presented by the Court: whether jury selection procedures can be designed to create representative juries more effectively and consistently than do current procedures while satisfying equal protection concerns. The key insight this Article proposes for resolving this puzzle is to draw on procedures and doctrines of electoral districting, including the concept of “communities of interest,”<sup>23</sup> and to apply them to the selection of jurors.

Part II of this Article examines the importance of the jury as a representative institution and the difficulties inherent in efforts to achieve this ideal. Part II.A considers the principal advantages of representative juries—improved decision making, political legitimacy, and civic education. Part II.B reviews recent reform proposals, focusing on race-conscious “affirmative selection” procedures, designed to select more consistently representative juries, i.e., juries that include members from a broad cross-section of groups within a community. Part II.C then examines constitutional doctrine concerning jury selection and analyzes “affirmative selection” proposals under this doctrine. This Part concludes that, although such procedures find support in some Sixth and Fourteenth Amendment cases, more recent

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*Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 351 (1997); Harold A. McDougall, III, Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970); Donna J. Meyer, Note, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251 (1994). For an explanation of these proposals, see *infra* Part III.B.

22. See *infra* notes 98-99 and accompanying text.

23. “Communities of interest” refers to a concept developed by the Court in the context of electoral districting. See *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). While the Court sometimes employs the term “communities of interest,” *Hunt*, 517 U.S. at 907; *Miller*, 515 U.S. at 919, it refers at other points to “communities defined by actual shared interests” *Miller*, 515 U.S. at 916, and to communities that have “some common thread of relevant interests,” *id.* at 920. There does not appear to be any meaningful difference between these terms. See Stephen J. Malone, Note, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461 (1997). The relevance of the “communities of interest” concept for jury selection is developed in Part III.C, *infra*.

cases, particularly those brought under the Equal Protection Clause, present serious and possibly fatal consequences for such proposals.

Part III turns to the legislative process. The representative character of legislatures and juries justifies exploring whether procedures used to elect legislatures provide useful insights for the selection of jurors. To enhance minority representation in the electoral process, the federal government and many states have resorted to electoral districting with the goal of creating majority-minority districts. As in the jury context, however, the Court has substantially limited the use of race as a factor in electoral districting. Despite such limitations, and contrary to the popular press<sup>24</sup> and some scholarly commentary,<sup>25</sup> the Supreme Court has not banned race-conscious electoral districting altogether. Instead, the Court permits legislatures to consider race and other demographic factors to identify “communities of interest”<sup>26</sup> for inclusion within particular electoral districts. Thus, unlike state action that defines groups primarily in racial terms, which the Court deems impermissible stereotyping, categorizing people by perceived “communities of interest” represents a constitutionally permissible concept of group identity—even where race is used as a factor in identifying such communities. This Part thus concludes that electoral districting, even under recent constitutional limitations, contributes to better representation in the legislative process of minority groups—racial and otherwise.

Part IV applies Part III's lessons concerning the facilitation of representative legislatures through districting to jury selection. Such an application suggests a means for creating representative juries without implicating equal protection concerns. The discussion focuses primarily on a proposal for jury selection, “*jural districting*”, that is closely analogous to electoral districting. In brief, this method divides a jury district into twelve sub-districts, drawn around “communities of interest,” and requires that each petit jury contain one juror from each sub-district. Drawing on electoral districting experience, such a

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24. See, e.g., Linda Greenhouse, *The Supreme Court: Reapportionment; Court Questions Districts Drawn to Aid Minorities*, N.Y. TIMES, June 29, 1993, at A1 (stating that “[a] sharply divided Supreme Court ruled today that designing legislative districts to increase black representation can violate the constitutional rights of white voters.”); Dick Lehr, *Court Casts Doubts over Race-Based Redistricting*, BOSTON GLOBE, June 29, 1993, at Nat'l/Foreign 1 (“The U.S. Supreme Court . . . ruled yesterday that congressional districts designed to give minorities a voting majority may be unconstitutional . . .”).

25. See, e.g., Alschuler, *supra* note 7, at 741-42; King, *supra* note 10, at 719-42; King & Munsterman, *supra* note 17, at 276-77.

26. See *supra* note 23 for cases in which the Supreme Court has used the term “communities of interest” in the context of electoral districting.

selection method would tend to create more consistently diverse juries than do current selection procedures that select jurors on an "at large" basis. Alternative districting approaches that retain the central insight of creating jury diversity through geographical diversity but which minimize some of the practical limitations of requiring every jury to contain one juror from each sub-district are also considered in Part IV.

## II. THE QUEST FOR REPRESENTATIVE JURIES

Court reformers and administrators have sought to design jury selection procedures that enhance the extent to which juries consistently represent a broad cross-section of the surrounding community.<sup>27</sup> The following section describes the principal reasons for desiring representative juries. Part II.B then examines the most ambitious and controversial proposals for creating representative juries. The constitutional implications that such proposals raise are considered in Part II.C.

### A. *The Desirability of Representative Juries*

While there is substantial justification for finding representative juries more desirable than nonrepresentative juries,<sup>28</sup> there is

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27. See, e.g., Alschuler, *supra* note 7, at 707-17 (listing various plans that involve racial quotas); King, *supra* note 10, at 719-29 (describing "jury-mandering techniques" in the context of venue choice, jury district boundaries, source lists, qualified lists and venire, grand juries, trial juries, and foreperson selection); King & Munsterman, *supra* note 17, at 274-76 (describing "stratified selection," a method of restoring the racial or ethnic diversity to source lists, ethnic conscious plans, and a post-qualification balancing plan).

28. See, e.g., *Holland v. Illinois*, 493 U.S. 474, 495 (1990) (Marshall, J., dissenting) (observing that the fair cross-section requirement assures impartiality, guards against exercise of arbitrary power, preserves public confidence in the fairness of the criminal justice system, and promotes civic responsibility); Alschuler, *supra* note 7, at 717 (explaining that the Supreme Court's recognition of the importance of representative juries justifies a departure from the standard used in equal protection cases to determine assertedly discriminatory government action); King, *supra* note 10, at 751 (identifying three purposes served by racially diverse juries: (1) impartial decisionmaking; (2) public respect for and acceptance of criminal proceedings and results thereof; and (3) civic participation in criminal jury service by all groups); King & Munsterman, *supra* note 17, at 274 (arguing that underrepresentation of minorities on juries undermines public trust in jury fairness, deprives minority citizens of civic participation in jury service, and may lead to underinformed jury decisions); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 746-50 (1992) (arguing that nonrepresentative juries impoverish factfinding, contribute to less reliable verdicts, and damage public confidence in the fairness of the justice system); Tanya E. Coke, Note, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 351 (1994) (arguing representative juries enhance jury deliberation and promote public confidence in the fairness of the criminal justice system);

considerable debate over the actual purposes served by representativeness. At least three important purposes have been advanced: representativeness (1) improves the quality of jury decision-making;<sup>29</sup> (2) enhances the jury's political legitimacy as a democratically inclusive institution;<sup>30</sup> and (3) serves to educate jurors from the various represented groups about the nature and importance of civic participation.<sup>31</sup>

With respect to the quality of jury decision-making, juries anchor a trial process designed to determine facts and to reach verdicts in accordance with legal and normative standards. The jury performs this function by viewing the evidence presented and deliberating as a group to reach a consensus verdict. This decision-making function, including both fact-finding and normative judgments, is plausibly enhanced by representative compositions. The jury's fact-finding function may be enhanced by a representative composition in several ways. First, to the extent that individual jurors may be biased to some degree, representation of different groups may minimize the effect of any bias by balancing the biases of some jurors with those of

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*see also infra* notes 46-61 and accompanying text (describing proposals advanced by different reformers designed to create more representative juries).

29. *See* *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (noting that the exclusion of any large segment of the community from jury service robs the deliberative process of perspectives that may have "unsuspected importance in any case that may be presented"); *Alschuler, supra* note 7, at 732 (arguing that inclusion of minority jurors can enhance the fairness and effectiveness of jury decisions even in cases that do not present racially sensitive issues); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 99-100 (1993) (arguing that empirical studies demonstrate that jury discrimination affects jury decisions). *But see* Edward S. Adams & Christian J. Lane, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 710 (1998) (arguing that "[i]t is less than clear whether the racial, ethnic, gender, or other demographics of a jury actually effect a change in verdicts"); Underwood, *supra* note 28, at 731 (arguing that "the Court has clearly rejected the theory that race-based jury selection denies equal protection to black defendants by producing biased juries and unreliable verdicts").

30. *See* *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (stating that "[c]ommunity participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system"); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 504 (1986) (arguing that "[w]hat a jury 'looks like' to the community will affect the community's respect for the verdict."); *Coke, supra* note 28, at 351; *see also* sources cited *supra* note 28 and *infra* notes 36-39 and accompanying text.

31. *See* Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 221 (1995) (citing de Tocqueville's conclusion that juries are the most effective way of establishing popular sovereignty and the most efficient way of teaching the population how to rule itself); *see also* sources cited *supra* note 28 and *infra* notes 40-42 and accompanying text.

others.<sup>32</sup> In this way, the deliberations of a broadly representative jury can be marked by a "diffused impartiality."<sup>33</sup> Representativeness would also aid in the determination of facts by bringing to the jury room a wider range of experiences and perspectives. These experiences would help, in the first instance, in determining the objective facts and circumstances surrounding the alleged crime. Moreover, a diversity of viewpoints would particularly aid in resolving factual questions of a less determinate nature. For example, whether a defendant reasonably feared for his life, whether a suspect was acting suspiciously, or whether police conduct amounted to entrapment, may depend on whose experiences or cultural values are consulted. Diversity on a jury would help to ensure that decisions of this sort reflect a consensus among potentially differing judgments.

The representative character of a jury should also enhance its capacity to reach a community consensus with respect to normative, moral, or otherwise subjective judgments. Thus, for example, whether the heinousness of a murder warrants the death penalty over life imprisonment, whether allegedly obscene material has redeeming value,<sup>34</sup> or whether a defendant, though technically guilty, should be

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32. "No individual is totally objective; all people have their own personal views and experiences. . . . The jury is an attempt to minimize bias in all of us by drawing a group of persons from the community and trusting that the combination of differing perspectives will balance out." VAN DYKE, *supra* note 7, at xiii; see also Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 552 (1975); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 124 (1990); Johnson, *supra* note 21, at 1615-16; Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 848 (1976); Massaro, *supra* note 30, at 511, 533-35; McDougall, *supra* note 21, at 533-35, 547-48.

33. *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (citation omitted); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

34. Whether material is obscene is to be judged in light of local community standards as determined by a jury drawn from that community. In order to fairly determine the "average" community standards of obscenity, a jury should, as much as practicable, represent a cross-section of the community. See *Ripplinger v. Collins*, 868 F.2d 1043, 1053 (9th Cir. 1989) (stating that "the jury should not use sensitive persons as a standard, and emphasized that in determining the 'average person' standard the jury 'must include the sensitive and the insensitive, in other words . . . everyone in the community' " (citation omitted)); *United States v. Sanders*, 592 F.2d 788, 796 (5th Cir. 1979) (stating that jury in obscenity case is "to consider the community as a whole, young and old, educated and uneducated, religious and the irreligious"); *United States v. Linetsky*, 533 F.2d 192, 203 (5th Cir. 1976) (stating that the "application of local community standards by different triers of fact assures a degree of diversity in obscenity determinations"); *United States v. Groner*, 479 F.2d 577, 583 (5th Cir. 1973) (stating that "[f]or the trial of obscenity cases under federal law 'the community' should logically embrace that area from which the jury is drawn and selected"). Indeed, of particular interest to the geographically-based jury selection procedure advanced in this Article, see *infra* Part IV, the Supreme Court has suggested that states may define the community whose standards shall determine what is obscene by manipulating the boundaries of the jury district from which the jury to hear a case shall be drawn. See *Smith v. United States*, 431 U.S. 291, 303 (1977) ("If a State wished to adopt a slightly different approach to obscenity regulation, it might impose a geographic limit on

acquitted in light of either his moral innocence or the condemnable conduct of government officers,<sup>35</sup> are questions which representative juries are particularly well-suited to resolve. In this way, juries can more realistically represent the community's conscience.

The jury may benefit from inclusive selection in yet another way. A more representative jury should carry more political legitimacy. By legitimacy, I mean the extent to which jury verdicts are perceived by both litigants<sup>36</sup> and the public<sup>37</sup> as worthy of acceptance because they are the product of a democratically inclusive process. Even if there is no difference between verdicts from representative and non-representative juries,<sup>38</sup> verdicts from the former may have greater legitimacy.<sup>39</sup> As an instrument of public justice, the jury's le-

the determination of community standards by defining the area from which the jury could be selected in an obscenity case . . .").

35. Whether it is ever appropriate for juries to acquit defendants they believe to be technically or factually guilty, commonly referred to as the practice of jury nullification, is a matter of intense controversy. My point here is limited to the proposition that jury nullification is more likely to be perceived as legitimate when the composition of the jury exercising this power is diverse rather than homogeneous in character.

36. See Massaro, *supra* note 30, at 544 (discussing how the parties' opinion of the jury's impartiality affects the legitimacy of the jury itself).

37. Thus, as the Supreme Court observed in *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), "[c]ommunity participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." See also Massaro, *supra* note 30, at 504 (stating that "[w]hat a jury 'looks like' to the community will affect the community's respect for the verdict").

38. See Massaro, *supra* note 30, at 542, 546-48 (concluding that non-representative juries may nonetheless reach impartial verdicts).

39. As de Tocqueville observed, "[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule." Amar, *supra* note 31, at 221 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* app. I at 254 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., 1966)). Thus, the jury "should be regarded as a free school which is always open and in which each juror learns his rights, . . . and is given practical lessons in the law." *Id.* (quoting DE TOCQUEVILLE, *supra*, at 252-53).

Consider, for example, the extent to which public disillusionment over the acquittal of the police officers prosecuted for beating Rodney King stemmed from the observable absence of any African-Americans on the jury. See Alschuler, *supra* note 7, at 722 (agreeing with Andrew Deiss that "even Americans whose own view of the videotape evidence initially persuaded them of the guilt of the police officers who beat Rodney King probably would have seen the officers' acquittals as just (or at least as acceptable) if these verdicts had been rendered by an all-African-American jury") (citing Andrew G. Deiss, *Negotiating Justice: The Criminal Jury Trial in a Pluralist America* 23, 51 (1995) (unpublished manuscript, on file with Albert W. Alschuler)). Lamenting the absence of African-Americans from that jury, Professor Kenneth Nunn writes:

in a case so clearly implicating racism, why were there no Blacks on the jury? Whether Blacks were excluded 'intentionally,' or whether their underrepresentation was a simple matter of demographics, their absence from the jury casts a shadow over the verdict, a shadow lengthened by the history of discrimination against African-Americans in this country.

Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 66 (1993).

gitimacy depends on the extent to which it speaks for all of us. When the jury fails to represent certain groups, members of those groups may justifiably doubt the extent to which the system represents their interests, respects their judgments, or welcomes their participation. When juries are broadly representative, in contrast, their verdicts can more readily be accepted as representing the consensus of the community.

Finally, representativeness may enhance the educative function of jury service for the jurors themselves. Jury service provides an opportunity for citizens to participate in and exercise the power of self-government.<sup>40</sup> Trial judges have long recognized the educational importance of jury service, taking the opportunity to teach the jurors about the responsibility of civic virtue and self-government.<sup>41</sup> The inclusion of people from all the various groups residing throughout a community in the jury provides the opportunity for every group to participate in the administration of justice.<sup>42</sup> Representativeness serves to educate jurors about the possibility and importance of cooperation among members of different groups in exercising governmental power. Through deliberation with jurors from different groups or classes, jurors on representative panels learn to work together toward the shared goal of determining guilt or innocence in accordance with law and the community's sense of justice.

There is thus a real debate in the literature about the purpose of jury representativeness. Some commentators argue that representativeness increases the accuracy or reliability of verdicts.<sup>43</sup> Other

40. As de Tocqueville observed, "[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule." Amar, *supra* note 31, at 221 (quoting DE TOCQUEVILLE, *supra* note 39, at 254). Thus, the jury "should be regarded as a free school which is always open and in which each juror learns his rights, . . . and is given practical lessons in the law." *Id.* (quoting DE TOCQUEVILLE, *supra* note 39, at 252-53).

41. See Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1186-87 (1991) (discussing historical role of "jurors as pupils").

42. Stressing the civic value of jury service (and, interestingly, noting a parallel between jury service and voting rights), the Court in *Powers v. Ohio* observed:

The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system . . . . It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law." Indeed with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

*Powers v. Ohio*, 499 U.S. 400, 406-07 (1991) (citation omitted); see also *Holland v. Illinois*, 493 U.S. 474, 496-97 (1990) (observing that right of black persons to serve on juries affirms their right to participate in the criminal justice system); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (asserting that peremptorily challenging black jurors on account of their race denies to them "the same right and opportunity to participate in the administration of justice enjoyed by the white population" (quoting *Swain v. Alabama*, 380 U.S. 202, 224 (1965))).

43. See *supra* note 29.

commentators argue that juries are essentially political institutions whose legitimacy depends on their representative character.<sup>44</sup> Still other commentators look to representative juries as an opportunity for all groups to participate and cooperate in the process of popular government.<sup>45</sup> It is not necessary, for present purposes, to determine which of these interests is the most important or most effectively served by representative juries. The point is that any or all of these purposes may be served by juries that represent a wide variety of groups residing within a jurisdiction. The more representative a jury is the more its verdicts can be trusted by the parties and public at large as accurate, consistent with community values, and as produced by an inclusive process with democratic legitimacy.

### *B. Overview of Affirmative Selection Procedures*

The reality, however, is that jury selection procedures have resulted in juries that underrepresent distinct groups, especially racial minorities, with serious consequences.<sup>46</sup> Responding to the deepening delegitimization of the jury system, court reformers and scholars have advanced various proposals to achieve greater and more consistent representation of minority groups on juries. This Subpart reviews those proposals commonly referred to as "affirmative selection" procedures. Such proposals would permit or require race-conscious methods for selecting juries, thereby ensuring representativeness, at least with respect to race.<sup>47</sup> At the same time, the intentional use of race under such procedures presents challenging and possibly insurmountable practical and constitutional difficulties.

Several court administrators and judges are considering race-conscious measures to increase minority representation at all stages of jury selection.<sup>48</sup> These affirmative selection reforms fall into three general categories: racial quotas, litigant choice, and geographically-targeted selection.

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44. See *supra* note 30.

45. See *supra* note 31.

46. See *supra* notes 7-16 and accompanying text.

47. See *infra* notes 48-61 and accompanying text.

48. As Professor King observes, "[t]he race of potential jurors is now considered by judges choosing trial venues, by jury commissioners selecting names for jury source lists, by jury clerks selecting names of qualified jurors, and by judges choosing grand jurors and grand jury forepersons." Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1178-79 (1994).

The first of these general approaches would directly ensure racial representativeness on juries through the use of racial quotas.<sup>49</sup> For instance, according to Professor Alschuler:

In Arizona, a bar committee has proposed dividing jury lists into subsets by race and drawing jurors from each subset. Some Arizona judges currently strike trial juries that, in their view, do not include adequate numbers of minority jurors. In DeKalb County, Georgia, jury commissioners divide jury lists into thirty-six demographic groups (for example, black females aged 35 to 44); they then use a computer to ensure the proportional representation of every group on every venire.<sup>50</sup>

Still other quota proposals would require that half or at least three members of the jury share the defendant's racial or ethnic identity.<sup>51</sup> A proposal that has been considered in Hennepin County, Minnesota, would require that at least two jurors on every grand jury be a member of a racial minority.<sup>52</sup>

A second general approach to creating diversity on juries would rely on litigant choice.<sup>53</sup> Three specific examples will be described. The first would allow litigants to choose a certain number of venire-persons, already screened for cause, for inclusion in a "mini-venire" to which the court would include additional jurors selected randomly from the larger venire.<sup>54</sup> The litigants would then use peremptory challenges until the number of jurors is reduced to the appropriate number for trial. A second proposal involving litigant choice would permit the parties to list twelve jurors of preference.<sup>55</sup> The court would impanel any juror common to both lists, followed by alternating between the lists until the sufficient number were seated.<sup>56</sup> The third example of a procedure involving litigant choice would permit the parties a small number of "peremptory inclusions," which the parties could use to include particular venirepersons on the petit jury

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49. See, e.g., Alschuler, *supra* note 7, at 707-11; Johnson, *supra* note 21, at 1698-99; Potash, *supra* note 21, at 82-95.

50. Alschuler, *supra* note 7, at 711 (footnotes omitted).

51. See Johnson, *supra* note 21, at 1698-99 (noting that studies show that without at least three minority jurors, group pressure is too overwhelming).

52. See Alschuler, *supra* note 7, at 707-11.

53. See, e.g., Altman, *supra* note 21, at 802-12 (proposing a system of affirmative selection that allows the parties to seat rather than exclude particular jurors). See generally Meyer, *supra* note 21.

54. See Ramirez, *supra* note 21. Professor Ramirez calls her solution the "affirmative peremptory choice." *Id.* at 1223. The term "mini-venire" is used by Professor King in describing Ramirez's proposal. King, *supra* note 48, at 1200.

55. See Altman, *supra* note 21, at 806.

56. See *id.*

without challenge by the opposing party except for cause.<sup>57</sup> In this way, although not ensuring diversity in every case, it would allow litigants to create diversity through their inclusive choices in cases where the litigants deemed such diversity desirable.

In addition to the use of racial quotas and litigant choice to create diversity on juries, a third general approach would rely on geography to increase racial diversity on juries. Under this approach, areas populated predominantly by members of minority groups could be sent additional jury summonses to increase the number of minorities that appear for jury service.<sup>58</sup> Alternatively, the district from which jurors are drawn could be either expanded to include areas where minorities commonly reside or circumscribed to reduce the area populated by majority groups. Another geography-based proposal, discussed in greater detail below,<sup>59</sup> would sub-divide a jury district into twelve sub-districts and draw each juror for a petit jury from a different sub-district.<sup>60</sup> Thus, by identifying racial or ethnic residential patterns, geographically-based selection procedures such as these and others<sup>61</sup> offer a practical means for increasing jury representativeness.

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57. See Meyer, *supra* note 21, at 280-81.

58. Federal district courts in both Michigan and Connecticut, for example, have sent additional jury questionnaires to parts of the district where greater numbers of minority persons lived in order to increase the representation of those groups in the jury pool. See King, *supra* note 10, at 723 (discussing the use of this process by the United States District Court in the Eastern District of Michigan); King & Munsterman, *supra* note 17, at 275 (discussing current procedure in the District of Connecticut).

59. See *infra* Part IV.

60. Such a proposal was made by Lindsay Jones, an attorney formerly with the Minnesota Attorney General's office, now working for the Minnesota Urban League. His proposal would divide Minneapolis, Minnesota into twelve "jury seat districts" and require each petit jury to contain one juror from each jury seat district. The purpose of the proposal was to increase the representation of traditionally underrepresented minority groups. Mr. Jones assumed his proposal would have to satisfy strict scrutiny under the Equal Protection Clause. Although he argued it could be satisfied, he acknowledged the difficulty such a standard presents. See Lindsay R.M. Jones, *Democratizing the Jury Selection Process: A Multi-Pool Stratification Model* (1993) (unpublished manuscript, on file with author); see also King, *supra* note 48, at 1198-1200 (describing Jones' proposal and concluding that it would probably not survive constitutional scrutiny). What I hope to do in this Article is to analyze such a proposal, and other districting methods, under electoral districting doctrine. Viewed through this lens, the constitutional difficulties are far less formidable.

61. For a description of several selection procedures, implemented or proposed, that take advantage of racial or ethnic residential patterns, see King & Munsterman, *supra* note 17, at 274-76.

### C. Constitutional Implications of Affirmative Selection Procedures

Race-conscious selection procedures designed to create representative juries implicate two constitutional provisions: the Sixth Amendment and the Equal Protection Clause. Some of the cases decided under these provisions provide support for affirmative selection procedures, while others provide a more ambiguous, even contradictory, message about the permissibility of representativeness-by-design.<sup>62</sup> These ambiguities reflect the Supreme Court's ambivalence concerning the effect of representativeness on the quality of jury decision-making. In discussing these points, this Subpart begins with the Sixth Amendment and the "fair cross-section" requirement. It then focuses on the implications of race-conscious jury selection under the Equal Protection Clause of the Fourteenth Amendment.<sup>63</sup>

The development of the fair cross-section standard under the Sixth Amendment seems chiefly premised on the view that diverse composition enhances the quality and accuracy of jury deliberation. In *Smith v. Texas*,<sup>64</sup> the Supreme Court explicitly endorsed the concept of the jury as "a body truly representative of the community."<sup>65</sup> To this end, the Court subsequently declared, it "is an essential component of the Sixth Amendment right to a jury trial" that the petit jury be drawn "from a representative cross section of the community."<sup>66</sup> In cases applying this fair cross-section requirement, the Court invalidated jury selection procedures that systematically excluded certain "cognizable groups" from the venire, such as racial and ethnic minorities,<sup>67</sup> women,<sup>68</sup> and members of particular socioeconomic classes.<sup>69</sup>

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62. See *infra* notes 63-92 and accompanying text.

63. Although the issue of jury composition first arose in a case involving the Equal Protection Clause, see *Strauder v. West Virginia*, 100 U.S. 303 (1880), I shall discuss the Sixth Amendment first because its relevance for the jury selection process is limited to the initial selection of the venire, and because the most recent constitutional developments in jury selection have occurred under the Equal Protection Clause.

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

65. *Id.* at 130.

66. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

67. See *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (discussing the systematic exclusion of persons of Mexican descent from jury service).

68. See *Duren v. Missouri*, 439 U.S. 357 (1979) (holding that state statutes which automatically exempt women from jury service unless the women request to serve and result in jury venires of below 15 percent female on average violate the fair cross-section requirement of the Constitution); *Taylor*, 419 U.S. at 522 (holding that systematic exclusion of females from jury service resulting in unrepresentative jury pools violates the Sixth and Fourteenth Amendments).

69. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224-25 (1946) (invalidating systematic exclusion of wage earners).

The principal cases that laid the foundation for the fair cross-section doctrine reveal a Court concerned with the effect that underrepresentativeness might have on jury deliberations and verdicts. The Court did not explicitly refer to a "cross-section" requirement until the 1940s.<sup>70</sup> Even then, it based the requirement on the Court's supervisory power over the Federal courts. In *Ballard v. United States*<sup>71</sup> the Court struggled to explain why excluding women jeopardized the jury's function:

The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class . . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.<sup>72</sup>

In 1972, a plurality of the Court in *Peters v. Kiff*,<sup>73</sup> relied on due process grounds to invalidate the exclusion of blacks from grand and petit jury pools, observing:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. 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 exclu-

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70. *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (invalidating systematic exclusion of women); *Thiel*, 328 U.S. at 220 (invalidating systematic exclusion of wage earners as inconsistent with the concept of a civil or criminal jury, which "necessarily contemplates" an impartial group "drawn from a cross-section of the community."). The Court first used the phrase "cross section" in dicta four years before *Thiel* and *Ballard* in *Glasser v. United States*, 315 U.S. 60, 86 (1942) (disapproving jury selection practice but denying claim for lack of proof). Earlier cases, although not explicitly discussing a "fair cross-section" standard, had discussed the importance of jury representativeness in the context of equal protection. See, e.g., *Smith v. Texas*, 311 U.S. 128, 130 (1940) (invalidating, under the Equal Protection Clause, a state practice of excluding blacks from juries, and observing that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community"). For a fuller discussion of the development of the fair cross-section requirement, see Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 949-60 (1998).

71. *Ballard*, 329 U.S. at 196 (relying on supervisory power over federal courts to prohibit exclusion of women from the venire).

72. *Id.* at 193-94 (citations omitted), quoted with approval in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 133-34 (1994).

73. *Peters v. Kiff*, 407 U.S. 493 (1972) (Marshall, J., joined by Douglas and Stewart, JJ.). Three justices concurred in the judgment on statutory grounds. See *id.* (Whito, J., concurring in judgment, joined by Brennan and Powell, JJ.).

sion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.<sup>74</sup>

By 1975, a majority of the Court, in *Taylor v. Louisiana*,<sup>75</sup> held that the fair cross-section requirement is constitutionally mandated by the Sixth Amendment's guarantee of an impartial jury in criminal trials.<sup>76</sup> In so holding, the Court relied on the reasoning of *Ballard* concerning the contribution of representativeness to the deliberations of the jury.<sup>77</sup>

In contrast, the Court has elsewhere resisted the claim that racial composition affects the quality or impartiality of jury decisions. Thus, the Court has consistently denied that the Sixth Amendment guarantees the right to a representative petit jury in any given case, provided no groups are intentionally or systematically excluded from the venire from which the petit jury is drawn.<sup>78</sup> Indeed, the Sixth Amendment does not even prohibit the intentional exclusion of cognizable groups from the petit jury by use of the peremptory challenge, even if such challenges leave those groups underrepresented on, or completely absent from, the petit jury.<sup>79</sup> Certainly a plausible reading of the Court's refusal even to inquire into the representativeness of a given petit jury, absent allegations of systematic exclusion at the venire stage, bespeaks a belief that representativeness does not seri-

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74. *Id.* at 503-04 (Marshall, J.).

75. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

76. *Id.* at 528. 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, which district shall have been previously ascertained by law. . . ." U.S. CONST. amend. VI. The Court further held in *Taylor* that the fair cross-section requirement was incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Taylor*, 419 U.S. at 526-28.

77. See *Taylor*, 419 U.S. at 531-32 (stating that "[t]he truth is the two sexes are not fungible; . . . the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." (quoting *Ballard*, 329 U.S. at 193-94)).

78. See *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879)); see also *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (stating that a criminal defendant is not entitled to jurors of his or her ethnic group, but is entitled to be tried by juries from which members of ethnic groups are not systematically excluded); *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950) (stating that the Constitution does not require a proportional representation of races on a jury, but only a fair jury, selected without regard to race); *Akins v. Texas*, 325 U.S. 398, 403 (1945) (holding that the mere fact that there was only one grand jury member of the defendant's race is not proof, in and of itself, of discrimination); *Martin v. Texas*, 200 U.S. 316, 321 (1906) (holding that the allegation of discrimination by the criminal defendant was not established simply by proving that no one of his race was on the grand or petit juries); *Neal v. Delaware*, 103 U.S. 370, 394 (1881) (stating that the Constitution does not require an ethnically mixed jury, simply one selected without discrimination).

79. See *Holland v. Illinois*, 493 U.S. 474, 478, 487 (1990).

ously affect verdicts.<sup>80</sup> Similarly, the Court denied a habeas claim that the Sixth Amendment imposed a fair cross-section requirement on the petit jury on the ground that such a “new rule,” even if valid, should not be applied retroactively “[b]ecause the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction.”<sup>81</sup> Thus, while the Court’s decisions interpreting a fair cross-section requirement as part of the Sixth Amendment’s guarantee of an impartial jury suggests that representativeness is critical to the jury’s function, the Court’s subsequent limitation of the fair cross-section requirement to the venire stage suggests instead that representativeness is *not* crucial to the jury’s function.

Court decisions applying the Equal Protection Clause to jury selection also reveal a Court of two minds with respect to the effect of representativeness on jury verdicts. At the venire stage of jury selection, the Equal Protection Clause prohibits the exclusion of protected classes although, unlike the Sixth Amendment, it invalidates only those procedures that *intentionally* exclude such groups.<sup>82</sup> In *Strauder v. West Virginia*, the first case to apply equal protection to jury selection procedures, the Court invalidated the exclusion of black jurors in part on the ground that “[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”<sup>83</sup> Moreover, in contrast to the fair cross-section requirement, the Equal Protection Clause extends to the post-venire selection of the petit jury, prohibiting the use of peremptory chal-

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80. *But see infra* notes 93-96 and accompanying text (discussing possible explanation for not imposing fair cross-section requirement on petit jury that is consistent with the view that representativeness may affect jury impartiality).

81. *Teague v. Lane*, 489 U.S. 288, 315 (1989); *see also* *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975) (holding that the fair cross-section requirement recognized in *Taylor* was not to be given retroactive effect because it “[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment”).

82. *See* *Washington v. Davis*, 426 U.S. 229, 239-42 (1976) (holding that Equal Protection Clause violation requires proof of discriminatory intent).

83. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

lenges to strike jurors based on race,<sup>84</sup> ethnicity,<sup>85</sup> or gender.<sup>86</sup> In this respect at least, equal protection limitations provide stronger protection than the Sixth Amendment against litigant efforts to exclude cognizable groups from the jury.

However, in more recent cases applying the Equal Protection Clause to peremptory challenges, the Court seems to have repudiated the claim that representativeness has any significant effect on jury outcomes. Rejecting the claim that race is probative of juror bias or competence,<sup>87</sup> the Court characterizes attempts to justify peremptory challenges based on race as employing "the very stereotype the law condemns."<sup>88</sup> In order to reconcile its denial that discriminatory jury selection creates a significant risk of bias with its unwavering stance since *Batson* that racially motivated peremptory challenges are unconstitutional, the Court has shifted its focus to the rights of the excluded juror.<sup>89</sup> In so doing, the Court seems to have repudiated its

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84. See *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (prohibiting race-based peremptory challenges by criminal defendant); *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (prohibiting such challenges against black jurors by prosecution where defendant was white); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (prohibiting race-based peremptory challenges by prosecution against black jurors in case where defendant was also black); cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (prohibiting race-based peremptory challenges in civil cases). As in *Strauder*, the *Batson* Court seemed concerned with the effect that excluding black jurors might have on the functioning of the jury. In explaining the dangers of purposeful discrimination in the selection of the venire, the Court stated that "[t]hose on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" *Batson*, 476 U.S. at 86-87 (quoting *Strauder*, 100 U.S. at 309)).

85. See *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (stating that it would violate the Equal Protection Clause for a prosecutor to use peremptory challenges to exclude Latino jurors because of their ethnicity).

86. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31, 141-42 (1994) (holding that discrimination in jury selection on the basis of gender violates the Equal Protection Clause).

87. See *Powers v. Ohio*, 499 U.S. 400, 410 (1991); see also *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (limiting retroactive effect of rule announced in *Batson* because rule did not have "a fundamental impact on the integrity of factfinding").

88. *Powers*, 499 U.S. at 410 (rejecting use of race to determine "the objectivity or qualifications of a juror" because "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns").

89. Although the Court acknowledged the rights of the excluded jurors as early as *Strauder*, by *Powers*, the Court relied exclusively on the jurors' rights, viewing the defendant's objection to racially motivated peremptory challenges as a question of third-party standing to raise the rights of the excluded jurors. *Id.* at 410-416; see also *J.E.B.*, 511 U.S. at 129-31 (holding that litigant has standing to raise equal protection rights of jurors peremptorily challenged on the basis of sex); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (holding that prosecution has standing to raise the rights of jurors against race-based peremptory challenges by defendants); cf. *Edmonson*, 500 U.S. at 628-30 (granting private litigant in civil trial third-party standing to raise rights of black jurors subject to discriminatory peremptory challenges).

apparent holding in *Strauder* that racially discriminatory jury selection violates the defendant's rights by creating biased juries.<sup>90</sup>

The Court thus has created a paradox in its application of fair cross-section and equal protection principles to jury selection. The Court has, under both doctrines, forbidden the exclusion of certain groups from jury service because such exclusion would deprive the jury of valuable perspectives. More recently, the Court has rejected the claim that discrimination in the selection of the petit jury deprives the defendant of an impartial jury or of equal protection.<sup>91</sup> Indeed, any affirmative attempt to create racial or ethnic representation by the use of peremptory challenges is forbidden.<sup>92</sup>

Affirmative selection procedures analyzed under these doctrines raise difficult questions. Proponents of affirmative selection procedures recognize the support provided by the Sixth Amendment's fair cross-section requirement.<sup>93</sup> Less noticed, however, are the potential difficulties presented by the fair cross-section standard. The wide net required by this standard seems premised on the view that juries should include as many experiences and viewpoints as practicable.

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90. See *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880); see also Alschuler, *supra* note 4, at 188-91 (interpreting *Strauder* as based on assumption that racial composition may bias the jury).

91. For an interesting discussion of the paradoxical position taken by the Court with respect to the effect of diversity on jury verdicts, see Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96-99 (1996).

92. The use of the peremptory challenge to affirmatively create diversity may seem counterintuitive given that its direct effect is exclusionary, not inclusionary. The peremptory challenge could serve a litigant's interest in creating diversity on a jury, however, by striking jurors who share a similar background with those jurors already seated, thereby increasing the chance that a juror from a different background will be seated. For example, a black defendant might use peremptory challenges to strike prospective white jurors in order to enhance the possibility that black jurors will be seated. See *McCullum*, 505 U.S. at 69 (O'Connor, J., dissenting) (quoting brief for NAACP Legal Defense & Education Fund, Inc. which stated that "[t]he only possible chance the [minority] defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race." Amicus Curiae Brief of NAACP Legal Defense and Education Fund, at 9-10, *Georgia v. McCollum*, 505 U.S. 42, 69 (1992) (footnotes omitted)). Because the Court has now banned all peremptory challenges based on race, however, such challenges can no longer be used to secure minority representation on juries. Cf. *McCullum*, 505 U.S. at 61-62 (Thomas, J., concurring) (criticizing application of Equal Protection Clause to criminal defendants' peremptory challenges because black defendants will lose a means for securing black jurors); *id.* at 68-69 (O'Connor, J., dissenting) (same).

93. See, e.g., Alschuler, *supra* note 7, at 717 (concluding that the fair cross-section requirement looks more to effect); Johnson, *supra* note 21, at 1655-56; King, *supra* note 10, at 747; Altman, *supra* note 21, at 783 (discussing Sixth Amendment jurisprudence); Cockrell, *supra* note 21, at 378 (noting that a process that produces more diverse juries is "more in line with the Sixth Amendment's right to a fair cross-section than other methods"); Meyer, *supra* note 21, at 255 (arguing that a criminal defendant needs a mechanism which achieves a representative jury panel in order to protect the Sixth Amendment guarantee of a fair trial and an impartial jury).

The failure to require representativeness on the petit jury is not necessarily inconsistent with this account. Countervailing considerations may outweigh the imposition of a representational requirement on the petit jury. These considerations include the potentially restrictive effect of a representational requirement on the free exercise of peremptory challenges,<sup>94</sup> the practical impossibility of fulfilling a representational requirement on every petit jury,<sup>95</sup> and the risk that in specifying which groups to include in a representational requirement some significant groups may inadvertently be excluded.<sup>96</sup> As to the last point, the concern is that any attempt to define a representative petit jury based on any particular demographic characteristic, such as race,

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94. One reason for not extending the fair cross-section requirement to the petit jury is that it could impair the litigants' discretion in the exercise of peremptory challenges, a practice which the Court has endorsed as contributing to jury impartiality. See *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (stating that "[p]eremptory challenges . . . are a means of 'eliminat[ing] extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'" (quoting *Batsou v. Kentucky*, 476 U.S. 79, 91 (1986)). This explanation is consistent with the proposition that representativeness affects impartiality. Indeed, in refusing to extend the Sixth Amendment to the petit jury, the *Holland* Court explicitly acknowledged that a venire representing a fair cross-section is a means of assuring an impartial jury. See *id.* at 480. The purpose of the fair cross-section requirement, the Court explained, is to equalize the ability of both sides to use their peremptory challenges to exclude jurors that may be ill disposed to their side. If the State could skew the representative character of the pool or venire, it could "stack the deck" and "would have, in effect, unlimited peremptory challenges to compose the pool in its favor." *Id.* at 481. Under this view, impartiality begins with a representative venire and then, "once a fair land is dealt," each side may "use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side." *Id.*

95. A second explanation for the Court's refusal to impose the fair cross-section requirement on the petit jury is the practical impossibility of including every cognizable group on each petit jury. Thus, in *Batson*, after observing that "we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,'" *Batson*, 476 U.S. at 85 n.6 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)), the Court concluded, "[i]ndeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society." *Id.*; accord *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 n.19 (1994) (noting that requiring "that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community" would frequently be impossible); *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) (stating "[t]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury") (citing *Batson*, 476 U.S. at 85 n.6); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (stating that the complete representation on every jury of all the economic, social, religious, racial, political, and geographical groups of the community would frequently be impossible); cf. *Batson*, 476 U.S. at 85 (denying that a defendant, under the Equal Protection Clause, has a right to a "petit jury composed in whole or in part of persons of his own race" because "[t]he number of our races and nationalities stands in the way of evolution of such a conception") (quoting, respectively, *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880), and *Akins v. Texas*, 325 U.S. 398, 403 (1945)).

96. Thus, in *Holland v. Illinois*, 493 U.S. 474, 512 (1990), the Court stated that a requirement of representativeness on the basis of race would "distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level, or economic class."

may pose an intolerable risk that racial groups not included in the quota or groups defined by characteristics other than race will consistently be excluded or underrepresented.

Applied to affirmative selection procedures, especially racial quotas, the fair cross-section requirement would arguably be undermined to the extent that any such procedure caused the underrepresentation of other cognizable groups. A racial quota, for example, may result in the exclusion of groups not included in the quota. If, for instance, a quota called for a certain number of Caucasians, Asian-Americans, African-Americans, Native Americans and Latinos, it may result in the underrepresentation of, for example, Arabs or Indians (of South Asia) to the extent such groups fell outside the defined categories. Or such a quota may cause the underrepresentation of people defined by other demographic characteristics, such as religion or economic class. If, for example, the vast majority of upper class people are white, the reservation of a limited number of seats for white jurors may result in the underrepresentation of upper class persons since white-juror slots could be filled by non-upper class whites.<sup>97</sup> I recognize that the effect of a quota on unintended groups is not easily predicted and that quotas might be defined in such a broad and inclusive manner that members of any relevant group would be selected for jury service, at least in the long term, as frequently as under current procedures. To the extent such procedures would tend to underrepresent certain groups, however, they may implicate the Sixth Amendment.

More obvious than the Sixth Amendment as a limitation on affirmative selection procedures is the Equal Protection Clause. The difficulties presented by equal protection doctrine have been elaborated elsewhere,<sup>98</sup> so I will only briefly sketch them here. As described above, the Supreme Court has invalidated race-conscious jury selection procedures when used to exclude jurors both at the venire stage, where jurors are drawn from the community, and during selection of the petit jury. Although these cases involved the *exclusion* of jurors, the Court's approach to affirmative action suggests that it would be equally unsympathetic to the use of race in order to *include* minority jurors. At the very least, as most scholars

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97. Procedures that rely on litigant choice to create representative juries would not seem to face the same Sixth Amendment concerns as racial quotas. If the fair cross-section requirement does not apply to exclusionary peremptory challenges, it is difficult to see why it would apply to peremptory inclusions. The Equal Protection Clause, however, would seem to be implicated by litigant inclusions based on race.

98. See King, *supra* note 10, at 745-60.

acknowledge, the Court would likely subject most race-conscious selection procedures to strict scrutiny which, in practical terms, would operate to invalidate them.<sup>99</sup>

### III. RECONCILING THE PARADOX?: LESSONS FROM THE ELECTORAL PROCESS

The Sixth Amendment and Equal Protection Clause thus place serious obstacles in the way of race-conscious efforts to create consistently representative juries. The principal issue I wish to explore is whether principles and procedures employed for selecting members of *legislative* bodies might shed some light on how representative juries can be selected consistent with constitutional limitations. Legislatures, as much as juries, are multi-membered deliberative institutions that best serve their function when their membership is broadly representative of groups within the governed jurisdiction. An examination of electoral procedures that enhance the representative character of legislative bodies, therefore, may provide some insights for the selection of representative juries.

This Part examines the legislature, comparing its nature as a representative process with that of the jury, and explores the development of electoral districting procedures designed to enhance the legislature's representative character. It then examines recent constitutional limitations placed on districting plans designed to increase minority participation. Part IV will then return to the topic of jury selection to explore whether electoral districting principles can be employed to select representative juries.

#### A. Legislatures and Representation

An examination of the function and nature of legislatures and the electoral process reveals many of the same virtues as a jury system in a broadly representative process. That is, as the following discussion explains, representativeness in the legislative process plausibly improves the quality of legislative policies, enhances the legitimacy of those policies, and serves to educate and inspire members of

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99. See Alschuler, *supra* note 7, at 716 n.58 (1995) (noting that many scholars evaluating Hennepin County grand jury quota believe it invalid or at least subject to strict scrutiny); King, *supra* note 10, at 745-60 (arguing that in only a very narrow class of cases would race-conscious jury selection satisfy strict scrutiny).

represented groups about the political process and the possibility of inter-group cooperation.

First, as with juries, participation in the legislative process by a broad range of groups enhances the likelihood that substantive decisions will properly take account of minority interests, racial and otherwise.<sup>100</sup> As Professor John Hart Ely's influential process theory of constitutional law holds, the protection of liberty and equality resides in a political process that, by its nature, takes account of minority interests.<sup>101</sup> The role of the judiciary is to police that process to ensure that minority groups have meaningful access to the process both formally and functionally. When effective representation is achieved, the legislature is the proper institution for defining substantive rights and policies. Representativeness thus enhances the reliability of the legislative process to devise fair and desirable substantive policies.

Second, the political legitimacy of legislatures is also enhanced by representativeness.<sup>102</sup> Legislatures are integral to the functioning of our government as a democracy. The acceptability of legislatures, like juries, depends in part on the extent to which their membership represents the diverse constituencies within their jurisdictions. As Professor Lani Guinier puts it, "[j]ust as the flag stands for the nation, the presence of racial group members symbolizes inclusion of a

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100. See John Ferejohn & Barry Weingast, Symposium, *Positive Political Theory and Public Law: Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 569 (1992) (arguing that representative character of legislature enables it to more accurately discern the common good); Pamela S. Karlan, *Our Separatism? Voting Rights As an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 99 (1995) (arguing that "legislative bodies are like juries: just as ensuring a fair cross-section on juries contributes to the search for truth because it increases the likelihood that wisdom acquired from diverse experiences will be available during the deliberative process, so too ensuring diversity on governing bodies will increase the likelihood that wisdom acquired from both diverse experiences and interaction with diverse constituencies will be available for legislative decision making") (citation omitted).

101. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77-87 (1980) (discussing the importance of pluralist political process to proper functioning of representative system).

102. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 644 (1993) (arguing that "increase[d] minority representation in the political sphere . . . supports systemic legitimacy by permitting the construction of political bodies more broadly representative of American society (contrast cultural readings of an all-white board of directors of a major corporation versus an all-white state legislature)"); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1174 (1993) (arguing that "[a] homogeneous legislature in a heterogeneous society is simply not legitimate"); Karlan, *supra* note 100, at 99 (arguing that "integration [in the legislative process] enhances the legitimacy of that deliberative process by allaying fears that the distinctive perspective of minority groups has been ignored"); Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 982 (1995) (arguing that legitimacy of laws derives from representative composition of legislature enacting them).

previously excluded group.<sup>103</sup> This legislative legitimacy gained through representativeness is distinct from the effect of representativeness on the content of legislation. As with juries, political legitimacy and the effect on outcomes will often be related. The public may find laws enacted by a representative legislature more acceptable because it understands (or assumes) that the content of the legislation reflects a real consensus among various interests. Moreover, representativeness may give legitimacy to legislation even where the legislation was not or does not appear to have been affected by the representative character of the enacting body.<sup>104</sup> Consider, for example, a city's decision to adopt or abandon an affirmative action program. Such a policy may be more acceptable to those adversely affected if the city council included members who represented their interests, even if the outcome were no different from that which an underrepresentative council would have reached.<sup>105</sup>

Third, the representative character of the legislative process serves an educative function. The inclusion of a variety of groups in the legislature and in the electoral process provides an opportunity for members of those groups to engage in and learn the nature of political participation. Moreover, an inclusive process enables members of different groups to work together in devising legislative policy and crafting legislation in pursuance thereof. Such experience may help to heal the rift between groups, particularly evident along racial lines, in both the legislative process and other aspects of civil and political life.<sup>106</sup>

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103. Guinier, *supra* note 102, at 1147.

104. See Schwarcz, *supra* note 102, at 982 (observing that "a legislature does not always consider the perspectives of all parties potentially affected by its laws; the legitimacy of its laws derives instead from the representative composition of its members").

105. Consider also President Clinton's 1992 campaign promise to make his cabinet "look like America." See Judy Keen, *Clinton to Be Held to Vow of Diversity*, USA TODAY, Nov. 13, 1992, at A1. He seemed to view the inclusion of minority persons and women as legitimizing the cabinet independent of whether those appointed would pursue different policies from other comparably qualified white males.

106. Several scholars have endorsed the theory that interaction between members of different racial groups on a constructive and equal basis can reduce prejudice and improve race relations. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1071 (1991) (suggesting the positive effect of interracial contact on white racial views); Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classroom: In Pursuit of Common Goals*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 438, 441 (1979) (describing how structured interracial work groups in schools increase self-esteem, morale, and interpersonal interaction); Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 SMALL GROUP RES. 224, 226 (1994) (discussing how common identity facilitates interpersonal interaction); cf. Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help From Ordinary Citizens)*, 80 MARQ. L. REV. 1, 58 (1996) (noting that "[t]he jury process itself may

Thus, similar to jury selection, the electoral process is legitimately concerned with creating decision-making bodies that represent various groups in the jurisdiction over which they exercise power. As with juries, the representative character of the legislative process plausibly serves a number of desirable purposes. The more representative a legislature is, the more it can be relied upon to produce substantive legislation that fairly takes account of the interests of various groups residing within society. The inclusive character of the legislative process also enhances the legitimacy of the laws it enacts as a product of a democratic system. Finally, a representative legislature enables members of the represented groups to participate in self-government and to learn to work with members of other groups to find common ground. While reasonable disagreement may arise over which function is most effectively served by representativeness or which function is most important, it is sufficient to observe that, for any or all of the foregoing reasons, devising a representative electoral process is a legitimate goal. As the following Subpart describes, however, such a goal has not often been achieved.

### *B. Underrepresentation and At-Large Districting*

The history of the legislative process, like that of the jury, is largely a story about the exclusion of minority participation. Prior to ratification of the Fourteenth Amendment, and the *Strauder* decision, many states denied blacks the right to vote or serve on juries. Voting laws that discriminated on their face, once invalidated, were replaced by only slightly less obvious devices, such as literacy tests, grandfather clauses, and poll taxes, that prevented large numbers of racial minorities from exercising the right to vote.<sup>107</sup> The Supreme Court invalidated a number of these practices until Congress responded with the Voting Rights Act, which invalidated the remaining overt barriers to minority voting.<sup>108</sup>

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educate the jurors about citizens of different races, classes, sexual orientation, and physical abilities”).

107. See Aleinikoff & Issacharoff, *supra* note 102, at 629; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093-101 (1991).

108. As Professor Lani Guinier observes:

The 1965 Voting Rights Act was a landmark piece of legislation. The Act responded directly to the most urgent claims of activists challenging direct impediments to registration and voting. In drafting the Act, Congress was concerned with eradicating discrimination “comprehensively and finally” from every election in which voters were eligible to cast ballots.

Meaningful electoral participation for minority groups remained elusive, however, due to the tendency of at-large electoral systems to stifle minority efforts to seek representation in the legislative process.<sup>109</sup> As Professors Aleinikoff and Issacharoff explain:

These [at-large] electoral systems permit all members of a community or electoral jurisdiction to vote separately on each candidate for office, thereby allowing a voting majority to control every seat in an election. For example, if a community is sixty percent white and forty percent black, and if the two racial groups have consistently different voting preferences, the result of an at-large election for a city council in which black and white candidates vie for each of five council positions would be that the white candidate would likely prevail in each contest, with about sixty percent of the vote. In such cases, the perceived harm is the capacity of a majority community to capture a disproportionate share of representation through its ability to vote serially for each candidate for local office.<sup>110</sup>

Legislatures elected under at-large schemes routinely included few or no representatives of minority groups. Instead, in jurisdictions employing at-large systems, elected officials tended to come from the most socioeconomically and racially privileged groups, and often lived in geographically-identifiable privileged neighborhoods. As candidates favored by minority groups were continually defeated at the polls and those officials that were elected ignored minority concerns, many members of minority groups became increasingly apathetic and cynical, leading to lower minority turnout in subsequent elections.<sup>111</sup>

The tendency of at-large electoral systems to dilute minority influence in the electoral process and thereby impair their ability to achieve representation in the legislature led the courts, in interpreting the Voting Rights Act, to require the creation of single-member

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Guinier, *supra* note 107, at 1092; *see also* Shaw v. Reno, 509 U.S. 630, 640 (1993) (stating that "[t]he [Voting Rights] Act proved immediately successful in ensuring racial minorities access to the voting booth; by the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%.").

109. Studies of at-large election schemes and single-member districts have demonstrated that minority groups tend to receive less representation under at-large systems. *See* Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85, 121 (1979); Chandler Davidson, *The Voting Rights Act: Protecting the Rights of Racial and Language Minorities in the Electoral Process*, 13 CHICANO L. REV. 1, 9 (1993); Richard A. Walawender, Note, *At-large Elections and Vote Dilution: An Empirical Study*, 19 U. MICH. J.L. REFORM 1221, 1233 (1986).

110. Aleinikoff & Issacharoff, *supra* note 102, at 589-90.

111. For example, in Bessemer, Alabama, where an at-large election kept the near black majority from electing a black official to the city council, a civil rights leader noted, "[b]lack majority have lost hope for representation. Apathy has set in. The feeling of hopelessness is well ingrained." Howard Ball, *The Perpetuation of Racial Vote Dilution: An Examination of Some Constraints on the Effective Administration of the 1965 Voting Rights Act, As Amended in 1982*, 28 HOW. L.J. 433, 462 (1985) (citation omitted).

electoral districts.<sup>112</sup> Single-member districting facilitates the representation of minority groups by limiting the constituency for each seat in the legislature to circumscribed areas in which such groups, though a minority in the jurisdiction as a whole, comprise a majority of the district and, therefore, can elect a candidate of their choice.<sup>113</sup> In many cities, particularly larger ones, different groups defined by various demographic characteristics, such as class, political affiliation, occupation, religion, ethnicity, and race, occupy different identifiable areas.<sup>114</sup> Indeed, historically-determined "hyper-segregation"<sup>115</sup> has left whole areas of some cities almost exclusively one race, while other neighborhoods may be occupied predominantly by members of particular ethnic or cultural groups by choice. Thus, by building on residential patterns, single-member districting facilitates the representation of minority groups, racial and otherwise, in the legislative process. These race-conscious efforts to maximize minority representation

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112. See Guinier, *supra* note 107, at 1094-1100 (discussing how courts interpreted 1982 amendments to Voting Rights Act as authorizing courts to require single-member districts as a remedy to vote dilution).

113. See Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 469 (1988) (explaining that "courts or districting authorities often create a series of single member districts, one or more of which includes a minority population so large that it is virtually assured of electing representatives of its choice"); Guinier, *supra* note 102, at 1100 (discussing judicial remedy of subdividing jurisdiction into small single-member districts in which a majority is black, thereby enabling blacks to control the election of the district's representative).

114. See *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971) (observing that "[t]here are also union-oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas."); see also *infra* notes 141-42 and accompanying text.

115. The term "hypersegregation" was coined by Douglas S. Massey and Nancy A. Denton and refers to the extreme levels of racial segregation that exist in various large U.S. metropolitan areas. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74-77 (1993). Nancy Denton explains the phenomenon as follows:

By hypersegregation we mean that no matter how one conceptualizes segregation, African-Americans score very high: they are *unevenly distributed* across neighborhoods; they are highly *isolated* within very racially homogenous neighborhoods; their neighborhoods are *clustered* to form contiguous ghettos, *centralized* near central business districts and away from suburban schools and jobs, and *concentrated* in terms of population density and spatial area compared to white neighborhoods. Together, these five concepts (evenness, isolation, clustering, centralization, and concentration) comprise five distinct dimensions of segregation.

Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 798 (1996); see also Paul A. Jargowsky, *Metropolitan Restructuring and Urban Policy*, STAN. L. & POL'Y REV., Summer 1997, at 47, 48 (observing that "[i]n the three decades since the passage of landmark civil rights and fair housing legislation, racial segregation between blacks and whites in U.S. metropolitan areas has remained extremely high.") (citations omitted).

through districting, however, raise constitutional questions of their own.

*C. Districting for Minority Representation Meets Equal Protection:  
The "Communities of Interest" Synthesis*

As in the jury context, equal protection concerns over the use of race have jeopardized race-conscious efforts to increase minority participation in the electoral process. In *Shaw v. Reno*<sup>116</sup> and *Miller v. Johnson*,<sup>117</sup> the Supreme Court recognized a new cause of action under the Equal Protection Clause against electoral districting schemes. The Court held that districting plans that rely predominantly on race must satisfy the requirements of strict scrutiny.<sup>118</sup> The novelty in the ruling was the invocation of strict scrutiny, with its usual fatal consequences, even though no racial group had had its voting strength diluted by the districting plan. The plans at issue were race-consciously designed to create majority-minority districts whose percentage among the total number of districts approached the percentage of minority persons among the total population of the state.<sup>119</sup> The challengers, who happened to be white,<sup>120</sup> were harmed, the Court held, by being subject to a districting plan that was predominantly motivated by racial considerations. As a consequence, majority-minority districts created for the purpose of enhancing minority participation in the electoral process became vulnerable, and many such districts have been successfully challenged in court.<sup>121</sup>

In lieu of districting primarily on behalf of racial groups, the Court endorsed the creation of districts around "communities of interest."<sup>122</sup> What the Court means by communities of interest is not entirely clear. The Court seems to have in mind a geographically-identifiable community the majority of which share political interests. In identifying such communities, the Court permits the consideration of

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116. *Shaw v. Reno*, 509 U.S. 630 (1993).

117. *Miller v. Johnson*, 515 U.S. 900 (1995).

118. See *id.* at 916 (holding that strict scrutiny is triggered when race has been predominant factor in drawing district lines); *Shaw*, 509 U.S. at 643 (holding that strict scrutiny is triggered when district's design is unexplainable on grounds other than race).

119. See *Miller*, 515 U.S. at 900, 905; *Shaw*, 509 U.S. at 633-34.

120. The harm recognized by the Court did not turn on the race of the plaintiffs, so in that sense, their race was irrelevant. Given their opposition to districts in which blacks comprised a majority, however, their race would seem to have obvious explanatory force.

121. See, e.g., *Bush v. Vera*, 517 U.S. 952, 976-81 (1996) (invalidating Texas legislative districts); *Shaw v. Hunt*, 517 U.S. 899, 904-18 (1996) (invalidating North Carolina congressional districting plan); *Miller*, 515 U.S. at 920-27 (invalidating Georgia congressional districting plan).

122. See *supra* note 23 for cases in which the Supreme Court has used the term "communities of interest" in the context of electoral districting.

various demographic characteristics, including “traditional districting principles such as compactness, contiguity, and respect for political subdivisions,” and other indicia of shared interest such as political affiliation, socioeconomic status, religion, or occupation.<sup>123</sup>

Race is also a factor that district line-drawers may consider in identifying communities of interest.<sup>124</sup> Contrary to many media reports<sup>125</sup> and some scholarly commentary,<sup>126</sup> the Court has not foreclosed completely the use of race in electoral districting. Instead, race may be used as one of several demographic factors to identify communities of interest for inclusion within particular districts to facilitate the representation of such communities in the electoral process. If race is only one factor, and not predominant over others, race-conscious districting plans do not even trigger strict scrutiny.<sup>127</sup>

The Court’s “communities of interest” approach raises two questions with respect to the use of race in drawing electoral district lines: Why did the Court limit the extent to which race may be relied upon, and why does the Court still permit some consideration of race? With respect to its limitation on the use of race, the Court seemed concerned about the message conveyed by race-conscious districting. Likening the appearance of districts drawn with obvious reliance on race to “political apartheid,”<sup>128</sup> the Court condemned such districts as reflecting impermissible stereotyping.<sup>129</sup> Given that the invalidated district caused no vote dilution, the nature of the constitutional injury was unclear. According to Professors Pildes and Niemi, the Court was concerned with “expressive harms”<sup>130</sup> from state actions that reflect a

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123. *Shaw*, 509 U.S. at 646.

124. *See Miller*, 515 U.S. at 920 (explaining that state may “recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests,” but where, as here, state relies on race as the predominant, overriding factor over other districting principles, strict scrutiny must be satisfied).

125. *See supra* note 24.

126. *See supra* note 25.

127. *See Miller*, 515 U.S. at 916.

128. *Shaw*, 509 U.S. at 647.

129. According to the Court, “where the State assumes from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls,’ it engages in racial stereotyping at odds with equal protection mandates.” *Miller*, 515 U.S. at 920 (quoting *Shaw*, 509 U.S. at 647).

130. “An expressive harm,” Pildes and Niemi write, “is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.” Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

form of value reductionism, i.e., an overemphasis of one value (here race) over other equally important values (other indicia of shared interest), in a context in which the Constitution "require[s] policymakers to accommodate and sustain the tension between conflicting values, rather than to permit one important value to subordinate all others."<sup>131</sup> Alternatively, Professors Aleinikoff and Issacharoff suggest, the Court's concern over racially-motivated districts stems from a rejection of race "essentialism," i.e., the assumption that voters share the same interests simply on the basis of race.<sup>132</sup> "To fashion public programs on the belief that all African Americans or Latinos or women have identical preferences and outlooks is to make a factual and moral error; it is to deny a basic, individualistic premise of the American creed."<sup>133</sup>

In addition to the invidious message conveyed by racially gerrymandered districts, the Court was troubled by what it perceived as the potential effects of such districts on racial politics. First, by perpetuating the stereotype that members of the same racial group, regardless of other differences, share political interests, racial gerrymandering may balkanize people along racial lines and exacerbate patterns of racial bloc voting.<sup>134</sup> Second, the Court stated that racial gerrymandering may encourage elected officials to view their primary obligation as representing one racial group to the exclusion of other constituents.<sup>135</sup>

That these concerns would prompt the Court to limit the use of race is unsurprising. An intriguing question, however, is why, in view of these concerns, the Court did not forbid completely the use of race in drawing district lines. Indeed, in criticizing the racially gerrymandered districts it invalidated in *Shaw* and *Miller*, the Court condemned the use of race in the strongest terms and cited an array of precedents in which *any* use of race was held to be inherently suspect.<sup>136</sup> The Court has been remarkably unclear why the use of race as one of many factors is permissible in electoral districting without triggering strict scrutiny.<sup>137</sup> Recounting the nature and purpose of districting, however, suggests some plausible explanations.

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131. *Id.* at 506.

132. Aleinikoff & Issacharoff, *supra* note 102, at 615.

133. *Id.* (citation omitted).

134. *See Shaw*, 509 U.S. at 648.

135. *See id.*

136. *See id.* at 642-44; *see also* *Miller v. Johnson*, 515 U.S. 900, 904-05 (1995).

137. What is particularly confusing about the Court's reasoning in *Miller* is that, while the Court begins by explaining that the Equal Protection Clause's ban on race-based decision-making applies to districting just as it does in other contexts, *Miller*, 515 U.S. at 911-13, the

I submit that one important justification for treating race-conscious electoral districting differently from most other race-conscious state action rests on the distinction between the use of race to ensure minority access to governing institutions and its use by such institutions in defining substantive choices. Generally, the democratic process is to be relied upon to define the content of legislative policies. However, the intentional use of race in fashioning such policies increases the risk that the interests of racial minorities will be undervalued or demigrated. Only if the use of race can be justified as necessary to achieve a compelling interest will that risk be tolerated. By contrast, the use of race to ensure minority representation in the governing process itself may enhance the reliability of the process to give equal concern to minority interests over procedures that avoid racial considerations. At-large electoral systems, for example, may preclude effective representation of minority groups even when such systems are created for race-neutral reasons. Similarly, single-member districting that ignores racial demographics may dilute minority representation by inadvertently “packing” such groups into particular districts or distributing them throughout several districts and thereby preventing them from forming a majority in any district. Of course, not every use of race in districting is legitimate. Excessive reliance on race may carry certain risks, as discussed above.<sup>138</sup> Obviously, the use of race to exclude minority participation from the electoral process is impermissible. The use of race as one of several factors to enhance minority participation, however, may serve the ends of representative democracy and equal protection at least as, and possibly more, effectively than electoral districting without regard to race.

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Court then proceeds to hold that strict scrutiny is triggered when race has been the predominant, overriding factor in a district's design, *id.* at 916. In other contexts, however, strict scrutiny is triggered when race is a motivating factor even if it is not the predominant factor. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977), cited in *Miller*, 515 U.S. at 905. Professors Karlan and Levinson note the Court's continuing failure to clarify the test for when strict scrutiny applies to a racially-motivated districting plan:

This Term's attempt at a further gloss on when strict scrutiny is required, *Bush v. Vera*, fizzled miserably, producing no majority opinion, two somewhat contradictory opinions each written by Justice O'Connor, and a deeply divided Court on which four Justices called for the overruling of the entire line of wrongful districting cases. All that seems clear is that Justice O'Connor is the pivotal voter and that district appearance—a factor seemingly irreducible to any easy to articulate or to apply set of rules—is the key to her approach.

Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1215 (1996).

138. See *supra* text accompanying notes 128-35.

Some scholars have advanced an alternative justification for permitting the use of race in electoral districting while prohibiting its use in other contexts, namely, that districting is inherently concerned with the identification of *groups* rather than individuals.<sup>139</sup> The representation of groups requires a choice of characteristics in order to identify or define which groups to aggregate into districts. Given the prevalence in this society of racial discrimination, racial bloc voting, residential segregation, and the myriad of associations self-defined by race, it is realistic, not stereotypical, to assume that race is a characteristic with respect to which many people either identify and form communities or at least have interests or experiences in common as a result of a shared racial identity. Use of race in electoral districting, particularly when combined with other indicia of shared interest, would be useful for identifying such communities. In addition to racial communities, however, districting would also aggregate non-racial communities of interest defined wholly by demographic factors other than race that reside within a jurisdiction. To preclude the use of race while permitting the use of other criteria in identifying communities of interest would enable such other communities to seek representation in the legislature while denying that opportunity to racial minorities.<sup>140</sup> The use of race in electoral districting is thus necessary for racial minorities—as groups—to have access to the legislative process equal to that of nonminority groups.

The next question is what effect the Court's "communities of interest" approach to electoral districting will have on the representative character of legislatures. The Court's approach limits the extent to which the electoral process will predictably produce *racially* diverse legislatures, at least on the federal and state level. Notwithstanding the persistence of racially segregated communities, the large size of congressional districts and, to a lesser degree, state legislative districts, makes the possibility of creating majority-minority districts dif-

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139. See Aleinikoff & Issacharoff, *supra* note 102, at 600-01 (arguing that fairness of electoral system cannot be evaluated without reference to group rights); Karlan & Levinson, *supra* note 137, at 1204-08 (noting that the purpose of apportionment is to classify voters into groups to elect "representatives").

140. As Karlan and Levinson observe:

In apportionments . . . the alternative to race-conscious districting is not to treat individuals as individuals, but rather to use some other demographic characteristics as an aggregating tool. . . . [A] command that forbids using race, but permits use of these other characteristics has the perverse consequence of discriminating against the intended beneficiaries of the Fourteenth and Fifteenth Amendments. If only race is excluded from the political calculus of redistricting, then only black and Hispanic voices will be excluded from the process of governance.

Karlan & Levinson, *supra* note 137, at 1208 (footnotes omitted).

ficult without substantial reliance on race. The limitation on race-conscious districting would, however, likely have less impact on local elections for city or county councils, where relatively small districts or wards enable the creation of districts around compact communities of a distinctive character. Still, the inability to focus on race above all else surely limits the extent to which districting would achieve racial diversity.

Although *racial* representation is less easily achieved under the Court's approach, districting around geographically-identifiable communities of interest may nonetheless advance the cause of legislative representativeness. Communities of interest may be at least as good a proxy as race alone in identifying groups with distinct perspectives and experiences. For example, a black resident of a middle-class neighborhood may be more likely to share experiences and interests in common with another black person from the same neighborhood than with a black person from the inner city. Indeed, the black resident of the middle-class neighborhood may well have more interests in common with a *white* neighbor with respect to, for example, community policing, public schools, or welfare, than with the black inner-city resident. Thus, although defining political groups by race alone may be adequate to capture a substantial amount of shared interests, using race in combination with other indicia of community, including residential proximity, may more effectively capture a more homogeneous community.

Moreover, to the extent that communities of interest exist whose identities are defined by traits other than race, such as religion, class, age, occupation or political affiliation, districting can enable these communities to seek representation in the legislature as well. For example, districts may be drawn around a Hasidic Jewish community,<sup>141</sup> a retirement village, a Catholic enclave, or around other communities occupied by "union oriented workers, the university community, [or] religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas."<sup>142</sup> By encompassing such communities within the same district and leaving other communities for other districts, the membership of the legislature would tend to represent many of the various communities residing throughout a jurisdiction.

My point here is not to praise the recent restraints imposed upon electoral districting under *Shaw* and *Miller*, although I have

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141. See, e.g., *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977).

142. *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971).

suggested some potential justifications. The passionate debate that has ensued since these decisions suggests a great deal of complexity in the issue. My point is that despite the limitations placed upon race-conscious districting designed to enhance minority representation, districting, with an eye toward communities of interest, remains a viable strategy for increasing the representative character of the legislative process. Whether such a strategy is worth pursuing in the context of jury selection is the question addressed in the next Part.

#### IV. JURAL DISTRICTING: APPLYING ELECTORAL DISTRICTING PRINCIPLES TO THE SELECTION OF JURIES

Like legislators prior to electoral districting, jurors are selected on an at-large basis under current selection procedures. That is, jurors are generally drawn randomly from any location within a jury district without regard to whether other jurors selected for the same trial are drawn from the same area. By simple chance, the jury panel selected for any particular trial may contain several jurors from particular areas within the district and none from other areas. In this way, the at-large nature of current selection procedures inevitably leads to the selection of juries that alternatively overrepresent and underrepresent the communities within the district. The smaller a community within the district is, the more likely an at-large selection process will, through chance, fail to select a member of that community to serve on the petit jury of any particular case.

At-large selection procedures also reinforce other factors that lead to the under-selection of minority persons (such as underrepresentative source lists and lower response rates), by over-selecting residents of non-minority communities to fill jury seats that would otherwise be filled by members of minority communities if the selection process were more inclusive.<sup>143</sup> The effect of districting in the electoral process to ensure better representation of geographically-identifiable communities suggests its potential use to remedy the underrepresentation effects of at-large selection procedures in the jury selection process.

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143. For an explanation of the relationship between at-large selection procedures and other race-neutral factors that contribute to the underrepresentation of minority groups on juries, see *infra* notes 147-48 and accompanying text.

The following discussion begins with a “strict” model of *jural districting* that closely parallels electoral districting.<sup>144</sup> In this way, the potential advantages and pitfalls of applying districting principles to jury selection can be highlighted. Some modifications that retain many of the advantages offered by districting while minimizing some of its potential limitations are considered later.<sup>145</sup>

#### A. *Jural Districting and Its Implications for Jury Representativeness*

Under a strict model of jural districting, a jury district would be divided into twelve<sup>146</sup> sub-districts of approximately equal population. Each petit jury would be required to contain one juror from each sub-district. Sub-districts would be drawn with a view toward including communities of interest within particular sub-districts. Demographic information used to identify such communities would, as in the electoral context, include governmental unit boundaries as well as other demographic factors such as race, religion, occupation, class, and other information that electoral district line-drawers use to identify communities of interest.

Compared to current at-large selection methods, jural districting would tend to create juries more representative of the surrounding vicinage by ensuring that each jury contains residents of different sub-districts encompassing different communities of interest. As electoral districting experience informs us, residents of different communities of interest tend to differ more from each other than would residents of the same community. Because persons of similar demographics tend to concentrate in certain areas, geographical diversity would tend to yield demographic diversity. Under current at-large jury selection, a jury may contain several jurors from the same community,

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144. The “strict” model of jural districting is described at the outset of Part IV.A. By “strict,” I mean a model of selecting a jury through a districting system that closely tracks electoral districting principles. Most importantly, a strict model would require that each and every jury contain one juror from each sub-district within a jury district just as a legislature elected through a districting scheme would contain a legislator elected to represent each district. Another important feature of a strict model of jural districting is the use of the same demographic data that electoral districters use including the use of race as one of many factors. A jurisdiction may wish to relax or modify some of the features of a strict model of jural districting, which is explored *infra* Part IV.B.

145. See *infra* Part IV.B.

146. The number twelve is only relevant for courts with twelve-member criminal juries, as was conventional at common law and continues to be in the federal system. States requiring fewer jurors, such as eight or ten, would, under a strict jural districting model, sub-divide the district into eight or ten sub-districts respectively and require every petit jury in a criminal case to contain a juror from each sub-district.

where residents tend to share common backgrounds and experiences, while containing no jurors from other communities where residents have different backgrounds. Under jural districting, each juror on every jury would come from a different sub-district and community, creating a greater likelihood that a jury would encompass a range of different experiences and perspectives.

Perhaps even more significant than counteracting the under-representative effect that random at-large selection inevitably has on particular jury panels, jural districting would also counteract those other features of jury selection that tend to underselect minority groups, such as underinclusive source lists, qualification standards, and the financial hardship of jury service.<sup>147</sup> These features of jury selection currently result in the overall underrepresentation of minority groups in jury service. Under jural districting, in contrast, if a disproportionately low percentage of residents from certain minority communities are selected for jury service, such communities would still be represented proportionally on juries because jural districting would require that someone from the sub-district circumscribing that community serve on each jury. The result would be that residents of "low turnout" minority communities who do serve on juries would do so more frequently than would residents from communities where a high percentage of residents serve. Jural districting would thus help to ensure the proportional representation of different communities throughout a jury district even if a lower percentage of residents of some communities perform jury service.

Turning once again to the electoral context, this effect of jural districting in compensating for the low selection rates of certain minority communities is analogous to the effect of electoral districting in compensating for low voter turnout in minority communities.<sup>148</sup> As discussed previously, a minority community suffers in an at-large electoral system because the voters of that community can be out-

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147. For a description of selection procedures that, though race-neutral, contribute to the underrepresentation of minority groups on juries, see *supra* notes 10-16 and accompanying text.

148. A minority community with low voter turnout can, through districting, still control the election of a candidate when a single-member district is designed so that the minority community is a substantial majority of the district's population. See Adam J. Chill, *The Fourteenth and Fifteenth Amendments with Respect to the Voting Franchise: A Constitutional Quandary*, 25 COLUM. J.L. & SOC. PROBS. 645, 678 & n.178 (1992) (explaining that safe minority-majority districts can be created even for minority communities with particularly low voter turnout if the minority community is made to represent a super-majority (75 percent) of the population of the district); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 902 & n.119 (1995) (explaining that in order to compensate for low minority voter turnout, "safe" majority-minority districts have been designed so that the minority community comprises 65 percent of the population).

voted by voters from other communities. A minority community with low voter turnout will be outnumbered by an even larger margin. When, through electoral districting, a minority community is made a substantial majority within a given district, then that community can control the election of a representative from that district even when voter turnout is relatively low. This consequence is largely praised as compensating for lower voter turnout in minority communities that may reflect apathy or distrust on the part of these communities whose interests have been underrepresented in the past and would, absent districting, continue to be underrepresented in the present. Similarly, jural districting would help to compensate for the lower response and qualification rates of traditionally underrepresented minority communities. The message of desired inclusion sent by jural districting, moreover, may help to reverse the sense of alienation from the criminal justice system felt in such communities. True, some residents of underrepresented communities might value enhanced political power over more frequent jury service, but the point remains that jural districting would tend to create juries that are more representative than juries selected under current at-large methods. The jury system would benefit from the enhanced decision-making and legitimacy that derives from such representation.

Consider also the potentially beneficial effect of jural districting on the peremptory challenge. The contribution of the peremptory challenge to the underrepresentation of minority groups is well documented and even more well known among court reformers concerned with jury representativeness.<sup>149</sup> Jural districting could minimize the use of the peremptory challenge to exclude members of racial and ethnic groups from jury service. First, one may reasonably anticipate that a jurisdiction adopting jural districting would also limit the number of peremptory challenges. A jurisdiction willing to administer jural districting, with its attendant costs,<sup>150</sup> is probably one in which current selection procedures underrepresent certain minority groups, such as racial minorities, to an intolerable degree. These same concerns over underrepresentative juries would probably motivate such a jurisdiction to seriously consider reducing or eliminating the peremptory challenge. Second, even if peremptory challenges were retained, by requiring a juror from every sub-district, jural districting could help to deter abuses and the underrepresentative effect of the peremptory challenge. A litigant with a limited number of such

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149. See *supra* note 19 and accompanying text; see also King, *supra* note 10, at 718 & n.33.

150. For a discussion of potential costs of jural districting, see *infra* Part IV.B.

challenges may hesitate to employ them based on overbroad or invidious racial group stereotypes when the struck juror will likely be replaced by a juror from the same community. Thus, although jural districting is compatible with existing peremptory challenge practice, it creates a lower likelihood that the practice will be used to undermine the representative character of the jury.

Jural districting also compares favorably with the use of racial quotas. True, jural districting would tend to be less effective in creating *racially* representative juries than would racial quotas. However, to the extent that racial segregation persists in many cities, districting would still achieve some racial diversity. Moreover, the kind of racial diversity created through districting may be more meaningful than diversity created by the use of racial quotas. As discussed in the context of electoral districting, the difference between persons of different races selected from different communities of interest would tend to be greater than the difference between persons of different races selected on the basis of race alone. Indeed, jurors who share the *same* racial identity but reside in different communities may differ as much and possibly more from one another than jurors whose only known difference is race and who live in the same community. In sum, while the use of race as a proxy for juror difference is rational given the significant correlation between race and certain experiences in this country, it is probably a less effective proxy than community of interest. Jurors who may differ racially but who have several demographic traits in common such as place of residence and economic class may have as much or more in common in terms of experiences and perspectives that bear on juror performance than would jurors of the same race who differ along these demographic lines.

Moreover, as discussed earlier, the use of racial quotas raises very serious constitutional difficulties. The use of race in identifying communities of interest for jury selection would not, however, seem to implicate the same concerns. Given the Court's acquiescence to the use of race in drawing district lines around communities of interest in the electoral process,<sup>151</sup> the same use of race in drawing district lines for the purpose of jury selection should be equally tolerable. In both the legislative and jury contexts, the state has a legitimate interest in devising procedures that facilitate the representation of diverse groups residing throughout the respective jurisdictions. Such repre-

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151. See *supra* notes 124-27 and accompanying text; see also *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (explaining that strict scrutiny is triggered when race is used as an overriding and predominant factor as opposed to one factor among many).

sentativeness may positively affect the substantive decisions reached by the respective bodies, enhance their political legitimacy as democratic institutions, and provide a valuable educative function through the participation of members of the various groups included in the process. Districting around communities of interest, though not required in either context, represents a viable means for facilitating the representation of cognizable communities in the respective institutions. There seems to be no meaningful difference between the use of race in identifying communities of interest for drawing electoral district lines and the use of race in identifying communities of interest for drawing jural district lines. In the electoral context, members of communities of interest defined in part by race are assumed to share the types of experiences, perspectives, and values that influence one's evaluation of political issues. In the jury context, members of the same communities are assumed to share the types of experiences, perspectives, and values that influence one's evaluation of evidentiary issues. It is difficult to see why this assumption about the jury context would represent an invidious or illegitimate stereotype when the assumption underlying electoral districting does not. Therefore, the Court should permit the limited use of race in jural districting without triggering strict scrutiny as it does in electoral districting.

In addition to its implications for racial diversity, jural districting would also likely achieve greater representation of communities defined by traits other than race as compared with both current selection methods and racial quotas. Although discussions of jury representativeness have tended to focus on the underrepresentation of racial minorities (and racial majorities in the O.J. Simpson criminal trial) commentators have also expressed concern over selection methods, such as the peremptory challenge, that compose juries that underrepresent people defined by demographic traits in addition to race, such as occupation, education, religion, or class.<sup>152</sup> To the extent that

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152. See Joseph T. Clark, *The "Community Standard" in the Trial of Obscenity Cases—A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13, 22-23 (1993) (lamenting that "statistics suggest that juries are rarely composed of representatives of all groups of the community," and that juries tend to underrepresent young persons, minorities, women, the highly educated, as well as "members of the police and fire departments, public officials, members of the armed services, physicians, lawyers, dentists, and the elderly"); Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 88 (1994) (raising concern that source lists based on voter registration records "tend[ ] to underrepresent minorities, the poor, the young, the elderly and the less educated and tend[ ] to overrepresent Caucasians, the middle-aged and those who are better educated"); Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77, 92-93 (1994) (questioning value of peremptory challenge given its use to exclude young persons, the poor, and racial minorities from juries); *Developments in the Law: The Civil Jury*,

people who share such demographic traits are concentrated in particular communities, jural districting would tend to enhance the representation of these groups as well. In this way, jural districting would help to ensure that juries generally represent a broad cross-section of the community. Such broad diversity, including but not limited to racial or ethnic diversity, should enhance the quality and legitimacy of the jury system over both current at-large procedures and proposals that rely predominantly on race.<sup>153</sup>

Finally, with its focus on residential communities, jural districting would tend to enhance the jury's collective knowledge with respect to the character of different neighborhoods. Issues, such as the reasonableness of the defendant's or the police's conduct, can be better understood when the jury has some sense of the character of the neighborhood in which the crime was allegedly committed or the suspect apprehended.<sup>154</sup> In some relatively quiet and safe neighborhoods, for example, a loud exchange on a street corner, carrying a weapon, or fleeing from approaching police, may reasonably be viewed as behavior warranting police inquiry. By contrast, in neighborhoods characterized by loud bars, loitering gangs, and frequent violent altercations, carrying a weapon may reflect common sense self-protection, and running from the police may represent a rational attempt to avoid unjustified harassment.<sup>155</sup> Consider a case involving allegations

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*The Jury's Capacity to Decide Complex Civil Cases*, 110 HARV. L. REV. 1489, 1492 n.16 (1997) (noting concern that juries in long complex civil trials were more likely to include jurors who are unmarried, unemployed, or retired, and less likely to be college-educated than juries in shorter trials).

153. For a discussion of the benefits of broadly representative juries, see *supra* Part II.A.

154. Several scholars have noted the significance of a neighborhood's character in explaining and assessing investigatory practices by police. See, e.g., Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 222 n.42 (1983) (noting some limited judicial concern that "police attribute *too much* weight to a high crime neighborhood setting, sometimes detaining a suspect for mere residence in a ghetto."); *id.* ("If an honest citizen resides in a neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances high that he might be mistaken for one. . . . Thus, behavior which seems 'reasonable' to the police because of the character of the neighborhood is seen by the honest citizen in it as irresponsible and unreasonable. About *him*, more errors will necessarily be made under a 'reasonableness' standard." (quoting J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 218 (2d ed. 1975))); Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car: Tempered Zeal by H. Richard Uviller*, 70 B.U. L. REV. 543, 561-62 (1990) (arguing that "the criminal character of a neighborhood will always be a factor in assessing police conduct").

155. See Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 747 n.110 (1992) (criticizing Justice Scalia's assumption, in *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991), that flight from police indicates guilt, because black youths in many communities might reasonably avoid the police for other reasons). See generally Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991) (describing how police often subject blacks to unsupported searches and seizures).

of excessive and/or racially-motivated police conduct. Jurors assessing such allegations will inevitably draw on their own experience with the police in their own neighborhoods. The inclusion of a variety of neighborhood experiences on a jury should contribute to its overall knowledge of what may have happened and ultimately of what did happen.

In sum, to the extent that different communities of interest reside throughout the entire area from which a jury is drawn, jural districting would tend to result in juries more consistently representative of the area in contrast to current at-large methods that permit the selection of jurors from the same community and none from others. Given the reality that members of particular racial or ethnic minority groups often reside within geographically-identifiable communities, jural districting would tend to enhance the racial or ethnic diversity of juries when sub-districts are drawn to encompass these communities of interest. In addition to racial diversity, the diversity achieved through jural districting would bring a broader range of backgrounds and experiences to the jury room, including people from communities defined largely by class, age, occupation, religion, or political affiliation. Representativeness in this broader sense—a sense which the Court seems prepared to endorse—should enhance the legitimacy of the criminal jury over both current selection procedures and methods that would rely predominantly on race.

### *B. Potential Concerns and Modifications*

#### 1. Would Jurors Unduly Perceive Themselves As “Representatives” of Their Communities?

Even if the kind of diversity that jural districting would achieve is desirable, there may be harmful effects on juror self-perceptions when such diversity is achieved *intentionally*. Such a procedure may encourage jurors to think of themselves as advocates for their communities, potentially compromising the impartiality of jury deliberations. The analogy to legislative districting may be particularly troublesome along these lines.

Legislators are expected to be advocates for the desires of their constituents. Jurors, by contrast, are expected to be impartial, reaching conclusions based solely on the evidence before them—albeit viewed through the lenses of their personal experiences and values. They are not, nor should they be, properly concerned with the wishes

of their communities with respect to the cases before them. To the extent districting might encourage jurors to act as advocates for their communities, the ideal of impartial group deliberations may be replaced by a type of interest-group politics. In fact, similar concerns have been raised with respect to racial quotas, in the sense that jurors selected through such schemes may perceive themselves as the "\_\_\_\_-race" juror and believe they should decide the case based on that role.<sup>156</sup>

The risk of juror partisanship is a real concern and one that cannot easily be measured or predicted. There may be reasons, however, to doubt its significance. First, the selection procedure might be administered so as to minimize the likelihood that jurors would be aware that they were selected from a particular sub-district or community. It may be feasible to devise selection procedures to avoid identifying jurors publicly as members of particular sub-districts, although the court and the litigants would presumably have that information. As individual jurors were seated, selection would continue to include only those jurors in the venire from sub-districts not represented by seated jurors. It must be acknowledged, however, that such concealment could only go so far. New selection procedures would presumably be a matter of public record, available to the media or interest groups that could disseminate the information to the public. In addition, jurors may inadvertently learn of their sub-district status during the course of selection or trial proceedings.

Assuming many jurors will know of the districting procedure, it is still questionable whether their "identity" as a sub-district representative is likely to exert significant pressure on their self-perceptions. This is not to suggest that community residence has no correlation to juror experience and perspectives; jural districting is premised on such differences. Rather, the point is that residential community membership is generally not *perceived* as an identity with particular divisiveness in our society. People routinely associate and cooperate with people from other communities without significant cultural or social friction. People also generally choose their residential community and can, through a change of residence, relocate to a different community if they choose. The transiency and lack of divisiveness as-

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156. See Andrew G. Deiss, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 326 (1996) (stating that "[p]erhaps the most common criticism of the use of racial quotas in jury selection is that it will transform the jury from a 'deliberative' body focused on ferreting out the facts of crime into a body in which jurors 'represent' their racial constituency, a body in which jurors might 'just as well mail in their verdict' ") (footnotes omitted).

sociated with community residence lies in contrast to the divisive significance of race in America. This racial divisiveness, as previously discussed, underlies the Court's preference for community-of-interest districting over "racial gerrymandering," and raises concerns over jury selection procedures based on racial quotas.

Two examples may illustrate the point. First, consider the current controversy over affirmative action in college admissions. Many colleges, including those under attack for using racial preferences, currently have and continue to seek geographic diversity in their student population by giving preference to underrepresented counties or states.<sup>157</sup> Yet these preferences are not viewed with the same hostility as racial preferences, even when they serve as comparable proxies for diversity of experience. Second, and returning to the jury context, consider how court watchers and the public are much more likely to comment on the racial composition of the jury than the residential communities in which individual jurors live.<sup>158</sup>

Thus, while some risk undoubtedly exists that jurors selected through jural districting will perceive their role, at least initially, as related to their community identity, the relatively mild non-divisive significance of residential identity, at least as compared to racial identity, will minimize the risk that a juror will decide that, because his community of residence played a role in his selection, he has an obligation to dig in and fight for a verdict that he imagines his community would prefer notwithstanding that the juror personally would consider alternative views of the case.

Even assuming some effect on juror self-perception from jural districting, the role expected of them as jurors and the effect of the deliberative process would likely negate any impression that they should represent their communities. A legislator advocates for the interests of her district not just because she lives there, but because

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157. See Bruce Goldner, *Illiberal Education: The Politics of Race and Sex on Campus*, 90 MICH. L. REV. 1291, 1303 (1992) (reviewing Dinesh D'Souza) (stating that "universities routinely lower standards for applicants from less represented states to achieve geographic diversity"); Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After Richmond v. J.A. Croson Co. and Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. MARSHALL L. REV. 317, 330 n.65 (1992) (stating that "[u]nder the Harvard University affirmative action plan, race, ethnicity and economic diversity could be considered as a factor in admissions, together with geographic diversity and 'life spent on a farm' in order to create a diverse student body").

158. See *Georgia v. McCollum*, 505 U.S. 42, 61 & n.1 (1992) (Thomas, J., concurring) (noting how much public believes the racial makeup of a jury matters and citing evidence on how frequently the media emphasizes the number of blacks and whites on criminal juries); Muller, *supra* note 91, at 106 (noting how media commonly focus on race and gender composition of juries).

she knows it is her job to represent her district and she knows that keeping her job depends on it. In contrast, a juror performs a very different role, and one which evidence shows most jurors take quite seriously.<sup>159</sup> She is expected to listen to and follow the court's instructions, which include setting aside pre-conceived views about the case, and to evaluate the evidence accordingly. Her performance in a case is not evaluated, if at all, by how well she represented her community's interests; nor does her employment as a juror in future cases, assuming she wants it, depend on the court's or her community's perception of how well she represented her community.<sup>160</sup>

Finally, any self-perceived role as community representative that might remain after sitting through a trial and listening to the court's instructions may dissipate during the deliberative process in the jury room. We should remember that even jurors selected through current at-large schemes will often approach a case from different perspectives from one another. We cannot realistically expect that any jury selection method will create objective or impartial jurors in an absolute sense, or that they will "come into the jury box and leave behind all that their human experience has taught them."<sup>161</sup> Indeed, a principal reason for seeking representative juries is that we recognize that jurors, particularly jurors from different cognizable groups, may have had markedly different life experiences and will, at least initially, draw different inferences and conclusions about the same factual and legal issues in a case. Notwithstanding the inevitable differences in backgrounds and viewpoints among jurors, we expect them, through deliberation, to learn from each other, including the weaknesses of pre-conceived biases or assumptions, and eventually to reach a consensus about the proper verdict to be rendered. The unanimity required of most criminal jury verdicts further encourages the jurors to put aside prejudice and narrow group interests in order to reach a verdict satisfactory to all.<sup>162</sup> Jural districting accepts the

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159. See Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67, 68 (1998) (explaining that "jurors generally take their roles seriously, and try to apply the law as best they can"); Steven Helle, *Publicity Does Not Equal Prejudice*, 85 ILL. B.J. 16, 21 n.23 (1997) (explaining that "jurors take their responsibility seriously; they check prejudices at the door").

160. As Professor King observes, "juror 'representatives' are not motivated by the same incentives as legislators. They are not beholden to 'constituents' for their livelihood or status, or even for their opportunity to serve on the jury. Their individual preferences and votes may not even become known." King, *supra* note 48, at 1199-1200.

161. *Beck v. Alabama*, 447 U.S. 625, 642 (1980), quoted in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).

162. Some court reformers advocate eliminating the traditional unanimity verdict rule in favor of a majority or super-majority rule. See, e.g., Akhil Reed Amar, *Reinventing Juries: Ten*

reality that jurors bring different assumptions to the jury room and seeks to ensure that, through deliberation among a diverse group, fair and legitimate verdicts are reached. The assumption on the part of any jurors that they should "represent" their sub-districts or communities should, as with other inappropriate preconceptions, be abandoned through the deliberative process. Thus, to the extent that jural districting might invite a type of sub-district or community bias with any lingering effect after trial, such bias, after deliberating awhile, should have largely dissipated.

Ultimately, the effect of jural districting on juror self-perceptions cannot be predicted *ex ante* and the risk of community advocacy cannot be dismissed. The preceding discussion noted several points that suggest this risk may not be great. It should also be noted that this risk must be compared to those of existing practice rather than to the ideal of a bias-free jury system. That is, would jural districting make things worse than they currently are? Presently, jurors may perceive themselves as representing a certain perspective, such as class or race—the current system does not preclude this potential.

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*Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1190 (1995); see also Andrew Blum, *A Hostile Environment for Unanimous Juries?*, NAT'L L.J., Sept. 11, 1995, at A1; Jason L. Riley, *Rule of Law: Should a Jury Verdict Be Unanimous?*, WALL ST. J., Nov. 22, 1995, at A11. Their proposals stem primarily from a concern over hung juries, which are likely to result more frequently under a unanimity rule. See, e.g., Amar, *supra*. Unanimity rule proponents, on the other hand, cite fairness and legitimacy concerns over verdicts, particularly convictions, when some jurors dissent. See, e.g., Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1263-64 (1996); Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (1997); Christopher E. Smith, *supra* note 152; Douglas G. Smith, *supra* note 4, at 449. In addition, the unanimity rule has been found to contribute to fuller, more meaningful deliberations. See REID HASTIE ET AL., *INSIDE THE JURY* 229-30 (1983); Arenella, *supra*; Charlan Nemeth, *Interactions Between Jurors As a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCHOL. 38 (1977); Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 145 (1996).

Analogizing once again to the legislative context may also provide some insights. Legislatures generally enact legislation on a majority-rule basis. As Professor Guinier observes, the majority rule that governs legislatures may undermine minority representation because legislators in a majority can simply ignore the interests of minority legislators. Thus, while the Voting Rights Act has helped to combat gerrymandering designed to prevent minority groups from electing candidates to the legislature, the majority rule within the legislature enables majority legislators to achieve a type of "deliberative gerrymander" by excluding minority legislators, once elected, from meaningful participation in the law-making process. See Guinier, *supra* note 107, at 1126 & n.242. Applying Guinier's reasoning to the jury, a majority verdict rule would enable jurors in a sufficient majority to ignore the views of minority jurors during deliberation, and thereby largely negate the value sought by including minority persons on the jury in the first place. Thus, preserving the unanimity rule may help to ensure that jurors sincerely deliberate with an open mind instead of engaging in partisan factionalism. In any event, while I favor preserving the unanimity rule for all the reasons mentioned, that debate is ultimately outside the scope of this Article in that jural districting is compatible with whatever verdict rule a jurisdiction wishes to adopt.

This may be particularly acute when a juror is alone in representing her group—consider the lone black juror in a racially charged case.<sup>163</sup> Litigants can already play the “community card” without jural districting as they will often have information about where jurors live. The sad fact is that the jury room may already be a place of partisan advocacy and compromise. Jural districting at least takes account of this risk, and seeks, through roughly proportional inclusion of competing community values, to reach a compromise that most comports with the judgment of the community as a whole. A candid discussion about the role of jury compositions and the reality of current juror practice is certainly warranted, and a debate over jural districting provides a useful occasion.

## 2. Practical Concerns and Modifications to the Strict Model of Jural Districting

Several practical concerns may arise over jural districting under the strict model thus far described, the most significant of which this section will address. First, it could add significant cost to the jury selection process to require that each juror on every petit jury come from a different sub-district. Depending on the rate of response to jury summonses from particular sub-districts, which jurors are excused for cause or hardship, and which jurors are challenged peremptorily, a strict one-juror-per-sub-district requirement could greatly increase the number of jurors that would need to be summoned.

Second, if jural sub-districts were relatively large as compared with the size of actual distinct communities, jural districting would fail to achieve consistent representation of particular communities to the extent that residents of other communities within a sub-district could represent that sub-district. If, for instance, particular communities were less frequently drawn from, then large sub-districts would allow for more frequently-selected communities to overrepresent the sub-district.

A third concern raised by importing electoral districting procedures into the context of jury selection is the political struggles that might arise over drawing jural district lines. As voting rights experts are well aware, the process of drawing electoral district lines is hardly

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163. See Colbert, *supra* note 32, at 126 (recounting horrific experience of woman who was the only black person on a jury that acquitted a white police officer who fatally shot a ten year-old black child); Victor Gold, *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENT. 125, 128 (1993) (referring to case in which “eleven white jurors racially intimidated a lone black juror”).

ministerial. The complex and competing interests that are inevitably affected by the location of district lines are often intensely fought over in what the Supreme Court has aptly called the "political thicket" of the districting process.<sup>164</sup> Add to this the increasingly frequent litigation over electoral districting plans as the Court attempts to subject such plans to justiciable standards, and it becomes apparent why jural districting may create pains worse than those it is intended to cure.

Finally, some jurisdictions, while interested in jural districting, may not want to take account of race in drawing district lines. The jurisdictions may decline to include race out of a sense of caution against equal protection challenges or because the use of race may be too politically divisive.

A variety of modifications could be made to jural districting to address these concerns while retaining the central insight of jural districting—the creation of jury diversity through geographic diversity. Before considering such modifications, however, a strong word of caution is in order. Some modifications to the strict model of jural districting could cause a loss in effectiveness that outweighs the cost-saving benefits that such modifications might afford. Indeed, a high monetary cost of jural districting may actually indicate a strong need for a more representative jury system which jural districting would help to achieve. A city that would have significant difficulty in recruiting jurors from particular sub-districts is probably a city in which, at present, communities residing in those sub-districts are severely underrepresented in the jury system. Similarly, particularly divisive disputes over either district-line drawing or the conscious use of race may reflect a city with intense inter-community tensions for which a more representative criminal trial process may be particularly salutary. Furthermore, any relaxation of a strict one-juror-per-sub-district rule could undermine the inhibiting effect such a rule might have on the use of racially-motivated peremptory challenges, a practice that persists despite costly efforts to abolish it. Thus, the modifications described below should be considered in light of the potential loss of the benefits that a strict model of jural districting would offer.

Cost reductions could be accomplished through various modifications to the strict model of jural districting. Jury districts could be divided into fewer sub-districts. For example, two jurors could be

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164. *Karcher v. Daggett*, 462 U.S. 725, 751 (1983) (Stevens, J., concurring); *Rogers v. Lodge*, 458 U.S. 613, 633 (1982); *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

drawn from each of six sub-districts. In addition, summoning jurors from each sub-district could be limited to the creation of the venire, rather than the jury panel, thereby creating a more diverse venire than at-large summoning processes create. Limiting districting to the venire stage might also reduce the risk that jurors would perceive their role on the petit jury as one of representing their sub-district since, by not guaranteeing that any sub-district will be represented on any given jury, the procedure itself would deny that representing any specific sub-district is necessary for a fair trial. Moreover, limiting districting to the venire would make any reference to a juror's sub-district unnecessary during the selection of a jury for trial, thereby minimizing the risk that jurors would be made aware or reminded of the fact that they were selected from a particular sub-district. Moreover, by focusing on the venire only, a greater number of sub-districts, with fewer residents, could be designed, thereby enhancing the ability to district around small, discrete communities.<sup>165</sup> To avoid line-drawing burdens and disputes, pre-existing districts, such as precincts or wards, could be used. If the number of jurors desired would exceed the number of existing districts, the remaining jurors could be selected "at-large."

In the event that court administrators considering jural districting were concerned that the use of race would not be tolerated by the courts or the public, the procedure could be modified accordingly. Instead, communities of interest could be identified by demographic characteristics other than race, such as political subdivision, class, religion, occupation, etc. The representation of these communities would still enhance the diversity of experiences brought to the jury room. Moreover, to the extent that race strongly correlates with neighborhoods defined by other traits, such as economic class, districting without regard to race would incidentally promote better racial representation. Consider also that in areas where race would likely not strongly correlate with other indicia of community, so that color-blind districting would not enhance racial representativeness, race might not, in such areas, serve as a particularly useful proxy for a difference in experience or perspectives anyhow.<sup>166</sup>

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165. See FUKURAI ET AL., *supra* note 11, at 165-90 (examining cluster-sampling method by which venirepersons are selected from different census tracts).

166. The question whether color-blind districting would impair the state's ability to identify communities of actual shared interest raises the question whether race has any independent significance in determining juror (or voter) perceptions or whether race, in the end, is nothing more than a proxy for other factors that in turn affect juror viewpoints. That is, if a community of interest must share more than race in common, such as compactness, contiguity, political subdivision, economic class, occupation, religion and/or political affiliation, the question arises

As previously cautioned, any modifications to the strict jural districting model would diminish its effectiveness in creating consistently representative juries. At the same time, any amount of districting would tend to enhance representativeness over current at-large schemes. The trade-off is between effectiveness and cost. The exact contours of any districting plan would depend on the particular concerns and resources of the implementing jurisdiction.

## V. CONCLUSION

Both the function and the legitimacy of legislatures and juries depend on the extent to which each institution represents a diversity of groups within their respective jurisdictions. Equal protection concerns, however, limit the extent to which the membership of either body can be manipulated to represent minority groups, particularly racial or ethnic minorities. In cases examining the electoral process, the Supreme Court has developed a concept of group identity that satisfies equal protection concerns. Although repudiating the assumption that race serves as a proxy for political interests above other demographic characteristics, the Court is prepared to posit the existence of "communities of interest," groups defined by residential location in combination with other demographic factors—including race—that suggest a commonality of interest. Electoral districting, designed to include communities of interest within particular districts, enhances the representative character of legislatures as compared with at-large electoral schemes.

Applying districting principles to the selection of juries should likewise enhance the extent to which juries consistently represent various groups within the community. In areas where residential segregation persists, jural districting would achieve a certain degree of racial representation. Moving beyond the linear conception of diversity as limited to racial composition, jural districting could also facilitate the creation of juries that better represent a broad range of groups residing in the surrounding area. By enhancing the representative character of the jury, jural districting offers to improve the quality of the jury's decision-making function and to enhance its legitimacy in the eyes of the litigants and the public. By drawing on electoral districting doctrine, moreover, jural districting would avoid

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whether race contributes anything to the actual character of the community, or even to the evidence of the community's existence.

many of the constitutional difficulties facing other race-conscious affirmative selection proposals.

The jury can represent the democratic ideals of an increasingly inclusive society, or be an arbitrary and discriminatory tool of a tyrannical majority. The difference depends on whom the jury represents. When the public believes that juries frequently represent only particular groups, it justifiably doubts the legitimacy of the jury and its decisions. Through jural districting, of one form or another, the representativeness and legitimacy of the jury can be restored in some degree.