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I. INTRODUCTION

The Framers understood criminal petit juries to be responsible for making determinations of both fact and law.[1] This "jury review" power provided the people with a "check" against the government's judicial function.[2] Today, juries are limited solely to findings of fact.[3] As Blackstone[4] predicted, this erosion of the jury function did not proceed with grand assault, but with minor deployments.[5] The result is a less powerful citizenry, and an unchecked government.

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[1] AKHIL REED AMAR, AMERICA'S CONSTITUTION 238 (2005) [hereinafter AMAR, CONSTITUTION] ("Alongside their right and power to acquit against the evidence, eighteenth-century jurors also claimed the right and power to consider legal as well as factual issues—to judge both law and fact 'complicately'—when rendering any general verdict.").

[2] *See* AKHIL REED AMAR, THE BILL OF RIGHTS 100 (Yale University Press 1998) [hereinafter AMAR, RIGHTS] ("[T]he Federal Farmer had declared that if judges tried to 'subvert the laws, and change the forms of government,' jurors would '*check* them, by deciding against their opinions and determinations.'" (quoting LETTERS FROM THE FEDERAL FARMER (XV), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981)) (emphasis added)); *see also* Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

[3] AMAR, CONSTITUTION, *supra* note 1, at 238 ("Jurors today no longer retain this right to interpret the law, but at the Founding, America's leading lawyers and statesmen commonly accepted it.").

[4] "There is no better place to begin than with Blackstone." Rothgery v. Gillespie County, 128 S. Ct. 2578, 2596 (2008) (Thomas, J., dissenting).

[5] *See* Jones v. United States, 526 U.S. 227, 246 (1999) (warning of "secret machinations, which may sap and undermine" the jury trial right (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342–44 (1769))).

The modern jury's diminished power is of particular consequence in cases involving the "death-qualification" of jurors. At issue is whether the State may—at the outset of a capital prosecution—remove from a jury all those who appear to be opposed to imposing the maximum punishment allowed by law. Or, placed into a series of questions: What were the qualifications for jury service at the time of the Constitution's adoption? Will the United States Supreme Court support the slow accumulation of additional qualifications without addressing the residual erosion of the Sixth Amendment's guarantee?

This Article considers the "death-qualification" of jurors, including how the process arose, why the Court continues to justify its existence today, and how a proper historical understanding of the Sixth Amendment right to a jury trial requires that this practice be put to rest.[6] This Article will also highlight a second and more-global theme: the Court's Sixth Amendment jurisprudence is in the midst of an originalist revolution. Starting with *Jones v. United States*[7] and continuing through *Apprendi v. New Jersey*,[8] *Ring v. Arizona*,[9] *Blakely v. Washington*,[10] and *Crawford v. Washington*,[11] the Court stands poised to refasten Sixth Amendment jurisprudence to its historical underpinnings.

This "refastening" is no small undertaking. Courts have long undervalued, if not ignored, the original understanding of the Framers as to the nature and scope of the criminal jury. Focusing instead on questions of function and convenience, the pre-*Apprendi* Court systematically eliminated requirements of jury unanimity,[12] jury size,[13] and the role of the jury as final arbiter as to whether a convicted felon will be sentenced to death.[14] The modern Court's willingness to overturn precedent rooted in functional and ahistorical reasoning suggests that the jury may eventually receive the full scope of its authority as envisioned by the Founders. Eliminating the death-qualification process is an important step in this transformation.

At the time of the founding, citizen-jurors who believed the death penalty to be unconstitutional in any particular case or context would

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[6] A subsequent corollary component to the death-qualification process is the defendant's right to exclude jurors who refuse to follow the law. *See* Morgan v. Illinois, 504 U.S. 719 (1992). This Article does not address the continued vitality of *Morgan v. Illinois*.

[7] 526 U.S. 227 (1999).

[8] 530 U.S. 466 (2000).

[9] 536 U.S. 584 (2002).

[10] 542 U.S. 296, 306 (2004).

[11] 541 U.S. 36 (2004).

[12] Apodaca v. Oregon, 406 U.S. 404 (1972).

[13] Williams v. Florida, 399 U.S. 78 (1970).

[14] Spaziano v. Florida, 468 U.S. 447 (1984).

not have been subject to a "for cause" challenge on the basis of partiality, for the accused's right to an "impartial jury" was simply a tool to eliminate relational bias and personal interest from the criminal adjudication process. A citizen's view on the constitutionality of a particular law did not constitute personal interest, but instead marked an important component of society's deliberative process.

Modern "death-qualification" jurisprudence frustrates the Framers' understanding as to the role of the criminal jury.[15] Whereas the jury envisioned by the Framers had the power to rule on the constitutionality of the death penalty—though the force of any ruling applied only to the particular case on which they sat—a prospective juror today cannot even sit on a capital jury unless she promises that she would be able and willing to impose a sentence of death.

The practical effect of "death-qualification" is to expose the capitally accused to increased odds of receiving the death penalty,[16] and to eliminate the voices of citizens who would opt to "check" the government's decision to inflict this penalty.

Worse, perhaps, is that as judges and justices attempt to determine how much opposition to the death penalty warrants a challenge for cause during voir dire, the discretion left to individual judges results in wildly different determinations.[17]

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[15] It is necessary to note that at common-law, jurors were limited to freeholding men. *See* Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, *in* TWELVE GOOD MEN AND TRUE 305, 310 (J.S. Cockburn and Thomas A. Green, eds., 1988) (citing J.C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 214–21 (1983)). The removal of this qualification, along with invidious qualifications of race and gender, secured for the jury more authority rather than less. *See infra* note 68 and accompanying text.

[16] Baze v. Rees, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring). Justice Stevens described death-qualification as guaranteeing juror bias:

> Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction.

Id.

[17] Uttecht v. Brown, 127 S. Ct. 2218, 2238–39 (2007) (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting). The dissenting Justices in *Uttecht* noted the dangers of such deference:

> Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases.... Today the Court ignores these well-established principles, choosing instead to defer blindly to a state court's erroneous characterization of a juror's *voir dire* testimony.

Id.

Though the exclusion of prospective jurors based upon their views on the death penalty was not permitted at common law or at the adoption of the Sixth Amendment to the United States Constitution, it is now a de facto component of capital proceedings. The Supreme Court has authorized the lower courts to wander from the historical basis of the Sixth Amendment. The overarching problem—beginning in *Witherspoon v. Illinois*[18] and continuing throughout the Court's death-qualification jurisprudence—is that the development of an ahistorical standard for determining when views on the death penalty are too much has resulted in the creation of a juror exclusion process that substantially weakens the people's check.[19]

Allowing the exclusion of conscientious objectors from criminal juries began with state efforts to punish bigamy and slavery-abolitionists in the nineteenth century, but appellate courts' review of death-qualification procedures became firmly unhinged from the textual basis of the Constitution in *Witherspoon*. There, the United States Supreme Court, though recognizing that the State's removal of jurors opposed to capital punishment violated the Sixth Amendment, held that mere reversal of the subsequent death sentence was all that was necessary[20]—as if a little violation of the Sixth Amendment was acceptable, or only providing half a remedy for a Sixth Amendment violation was required. The error continued in *Wainwright v. Witt*,[21] where the Court endorsed and attempted to modify the "balancing" test between the defendant's Sixth Amendment right to a jury trial and "the State's legitimate interest in administering constitutional capital sentencing schemes."[22] The Court's death-qualification analysis descended to a constitutional nadir—from an originalist's perspective—in *Lockhart v. McCree*,[23] where the debate turned on whether social science studies established that the removal from the jury of *Witherspoon*-excludables led to a death-prone jury. Ultimately, the *Lockhart* Court subscribed to an

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[18] 391 U.S. 510 (1968).

[19] The intersection between the Court's *Witherspoon* and *Morgan* line of cases has also caused significant confusion in the lower courts. *See, e.g.*, John Holdridge, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts' Contradictory Readings of* Wainwright v. Witt *and* Morgan v. Illinois, 19 MISS. C. L. REV. 283, 283 (1999) (discussing "the conflicting approaches taken by lower courts to the legal standards governing the death/life qualification component of voir dire in capital cases, particularly with respect to whether rulings on challenges for cause of prospective jurors should be based solely on their views of capital punishment in the abstract or also on their views of the appropriateness of a particular sentence under the facts of the case to be tried.").

[20] 391 U.S. 510 (1968).

[21] 469 U.S. 412 (1985).

[22] *Id.* at 423; *see also Uttecht*, 127 S. Ct. at 2223 (noting that Sixth Amendment interests yield to "the State's interest in administering its capital punishment scheme").

[23] 476 U.S. 162 (1986).

ahistoric and textually absurd suggestion that the Sixth Amendment simply prohibited the exclusion of "distinct groups" such as blacks, women, and Hispanics.[24]

In the same way that *Crawford* overturned significant case law to hold that the Sixth Amendment right to confront witnesses required the exclusion of testimonial hearsay evidence regardless of the reliability of that evidence,[25] and *Apprendi* and *Blakely* reversed long-standing precedent to maintain that the Sixth Amendment right to a jury determination of guilt required the jury to make factual findings even if a judge might be more accurate,[26] this Article suggests that the Court should reevaluate—in its historical context—the Sixth Amendment right to a jury trial. Specifically, the Court should reconsider the framework laid out in *Witherspoon v. Illinois*, *Wainwright v. Witt*, and *Lockhart v. McCree* to hold that the Sixth Amendment prohibits the state from excluding prospective jurors based upon their political or moral views.

This Article begins by tracing the roots of death-qualification. In so doing, it will illustrate how historical inaccuracy as to the meaning of the term "impartial" led to the first for-cause exclusion of death penalty objectors. The Article will then illustrate how the Court arrived at the same anti-objector result by altogether shifting away from the original understanding of the proper role of the criminal jury. After reviewing the Court's current death-qualification jurisprudence, the Article will explore the modern Court's willingness to confront and reverse Sixth Amendment precedent where ahistorical or functional considerations subvert the Framers' original understanding of the right to a jury trial. Next, the Article will detail the basis for concluding that the Framers would have found death-qualification abhorrent to their understanding of the jury function in a democracy. It will conclude by showing what is at stake for the capitally accused individual, as well as for society. The time for the death of death-qualification is now.

II. THE EVOLUTION OF DEATH-QUALIFICATION IN THREE ACTS

Capital jury selection in eighteenth century England was a relatively straightforward task. The twelve veniremen present when the trial was called were sworn unless challenged by the Crown or the defense.

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[24] *Id.* at 175.

[25] Crawford v. Washington, 541 U.S. 36 (2004).

[26] Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004).

At common law, there were four challenges for cause: 1. If a Lord was empaneled, he could be challenged *propter honoris respectum* (on account of respect for nobility); 2. If a person previously convicted of a felony or misdemeanor was empaneled, he could be challenged *propter delictum* (on account of crime); 3. If an alien or slave was empaneled, he could be challenged *propter defectum* (on account of defect); and 4. If a venireman was related to either party, was the defendant's master or servant, or had previously served as a juror or arbitrator in the same cause, then he could be challenged *propter affectum* (on account of favor or bias).[27] In addition to these for-cause challenges, capital defendants had thirty-five peremptory challenges at their disposal.[28] By statute, the Crown was not permitted to exercise any peremptory challenges.[29] There was no allowance for asking questions from which to determine whether a venireman could apply a death sentence. Thus, jurors who survived all four narrow for-cause challenges, and the defendant's peremptory ones, were sworn.

Neither at common law, nor in Blackstone's England, did the death-qualification of jurors exist. Indeed, at common law, the state and the defense were both limited by the same four for-cause challenges that Blackstone described.[30] For-cause challenges based on a juror's conscientious objection to a particular law or punishment seeped into the American criminal trial scheme beginning in the late

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[27] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *353.

[28] These peremptory challenges "in favorem vitae" were given to display "that tenderness and humanity to prisoners, for which our English laws are justly famous," under the belief that a prisoner put to defend his life have a "good opinion of his jury," and in case the "reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." *Id.*

[29] *Id.* Blackstone makes clear that the provision of peremptory strikes to the state—as opposed to the defense—is governed by statute:

> This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn.

Id.

[30] *See, e.g.*, WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 214 (2d. ed. 1920), *available as an electronic abridgement at* http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USATJWeb.nsf/ (follow "Winthrop's" hyperlink) ("At the common law, the causes for challenge to jurors were divided into four classes; those *propter honoris respectum*, (on account of a respect for nobility;) *propter delictum*, (on account of crime;) *propter defectum*, (on account of defect, that is to say personal or legal incapacity;) and *propter affectum*, (on account of favor or bias.)").

eighteenth century, as the nation struggled with religious freedom and slavery.

In the decades after the adoption of the United States Constitution, concern over governmental overstepping led to opposition to the death penalty among certain demographics. A particularly deep divide arose between Quakers and other Christians.[31] Justice Joseph Story handled the most famous case arising out of tensions over the refusal of Quakers to impose a death sentence. A federal district court judge sua sponte removed Quaker jurors from jury service at a capital trial based upon their conscientious opposition to the death penalty. On appeal, Justice Story affirmed the removal of the Quakers.[32] Disregarding the role of jurors as finders of both law and fact, Story concluded that objector jurors, such as the Quakers, would not apply the facts of the case to the law, and thus could not perform their proper tasks as jurors.[33] "Story cited no precedent."[34]

Slavery, or more specifically challenges to the slavery regime, marks the first context where challenges to jurors with "conscientious scruples" against a particular law appeared in cases. In one 1788 Connecticut case, *Pettis v. Warren*,[35] involving "a black slave's suit for freedom," the state challenged a juror on grounds that she believed that "'"no negro, by the laws of this state, could be holden a slave."'" [36] The Connecticut Supreme Court affirmed the trial court's

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[31] *See* United States v. Cornell, 25 F. Cas. 650, 655 (C.C.D.R.I. 1820) (No. 14,868). As Justice Story, serving as Circuit Justice, noted:

> It is well known, that the Quakers entertain peculiar opinions on the subject of capital punishment. They believe men may be rightfully punished with death for the causes set down in the divine law, but for none others; and in point of conscience they will not give a verdict for a conviction where the punishment is death, unless the case be directly within the terms of the divine law.

Id.

[32] *See* John Quigley, *Exclusion of Death-Scrupled Jurors and International Due Process*, 2 OHIO ST. J. CRIM. L. 261, 270 (2004) Discussing the evolution of death-qualification in colonial America, Professor Quigley quoted Justice Story's reasoning in *Cornell*:

> '[T]o compel a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense. To insist on a juror's sitting in a case when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice.'

Id. (quoting *Cornell*, 25 F. Cas. at 655) (alteration in original).

[33] *Id.*

[34] *Id.*

[35] 1 Kirby 426 (Conn. 1788).

[36] William E. Nelson, *The Eighteenth-Century Background of John Marshall's*

denial of the challenge on the grounds that jurors were *supposed* to make legal determinations.[37] Future courts would take the opposite, ahistorical view.

A. Act I: Commonwealth v. Lesher

The origins of death-qualifications, as will be discussed later, appear to trace back to one case—*Commonwealth v. Lesher*.[38]

Across the pond from Blackstone's England, and early into the next century, a Pennsylvania jury was hearing the Lesher capital trial. Prior to the start of jury selection in his capital trial, Mr. Lesher was about as fortunate as a person facing trial for his life could be. He lived in Pennsylvania during the early 1800s, a time when Quakerism both flourished and was tolerated. Practicing Quakers both largely opposed the death penalty and lived in the state in sufficient numbers to give one hope that a Quaker would serve on his jury. Further bolstering Lesher's apparent good fortune was the state legislature's recent ban of the prosecution's use of preemptory challenges.[39] The State appeared to have no way to prevent a would-be Quaker juror from serving on Lesher's jury.

As it turns out, Lesher was not quite so lucky. He did get one prospective juror who opposed the application of the death penalty in all circumstances, but he happened to get the one death-penalty- opposed juror who would decide to unilaterally inform the judge of his inability to sentence Lesher—or anyone else for that matter—to death. The State issued a for-cause challenge, and the trial judge granted the challenge and excused the objector from the jury. Lesher was tried, convicted, and sentenced to death. This case led to

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Constitutional Jurisprudence, 76 MICH. L. REV. 893, 917 (1978) (quoting *Pettis*, 1 Kirby at 427).

[37] *Id.* Professor Nelson's discussion of *Pettis* noted:

> [T]he Connecticut Supreme Court held that "[a]n opinion formed and declared upon a general principle of law, does not disqualify a juror to sit in a cause in which that principle applies." Indeed, the court observed that the jurors in every case could "all be challenged on one side or the other, if having an opinion of the law in the case is ground of challenge," since, as John Adams had once noted, "[t]he general Rules of Law and common Regulations of Society . . . [were] well enough known to ordinary Jurors." Jurors, the Connecticut court believed, were "supposed to have opinions of what the law is,' since they sat as 'judges of law as well as fact."

Id. (quoting *Pettis*, 1 Kirby at 427; 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965))).

[38] 17 Serg. & Rawle 155 (Pa. 1828).

[39] *See id.* at 158 ("In Pennsylvania peremptory challenges, in cases of felony, were never expressly taken from the commonwealth, until by the act of assembly of 1814.").

the first published affirmation of a state's for-cause exclusion of a juror based on his conscientious objection to the death penalty.

He appealed his conviction to the Pennsylvania Supreme Court on the basis that the trial court was not entitled to remove prospective jurors with conscientious objections to the death penalty. The Pennsylvania Supreme Court affirmed his conviction. Under the auspices of employing the traditional *propter affectum* challenge, the Pennsylvania Supreme Court found that a juror who refused to consider imposing the penalty of death could not be impartial between the State and the Defendant.[40]

The *Lesher* court performed no textual or historical analysis on the meaning or correct interpretation of the concept of partiality, or on the proper scope of the role of a criminal jury. It offered no justification for extending the understanding of partiality as relational bias to partiality as bias against the laws of the State. As explained later, neither textual nor historical considerations warranted this extension of the historical understanding of partiality as a challenge based on relational considerations. Thus, the court seemingly created a judicial exception to the right to an impartial jury, so that the Quaker State might still freely secure a death sentence.

Unconvinced by this analysis, Chief Justice Gibson of the Pennsylvania Supreme Court wrote a biting dissent in *Lesher*, observing that the majority opinion amounted to judicial activism that infringed upon the right to an impartial jury.[41] Yet within twenty

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[40] *Id.* at 156. Specifically, the court reasoned:

> The prejudice itself need not be made out; the probability of it is enough. One related, though by marriage only, as remotely as the ninth degree, to the defendant or the prosecutor, may be challenged off the jury for that cause. Any one, who, in any possible way, no matter how honestly, has been warped by any preconceived opinion which may affect his verdict, or has made up his mind what verdict he is to give, and declared it, is excluded. Nothing in the law can well be more extensive than this right of challenge *propter affectum.*

Id.

[41] *Id.* at 163–64. Chief Justice Gibson stated:

> [F]eeling, as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even the hair of any privilege of a prisoner on trial for his life.
>
> That Chief Justice argued very ill, who, in a capital case, admitted a jury not freeholders, saying—"Why may not we give precedents to succeeding times, as well as those who have gone before us, have made precedents to us?" Such an occurrence in the trial of Algernon Sydney, is spoken of in terms of indignation. Were the judges to set the law to rights as often as it should differ from their ideal standard of excellence, it is a hundred to one that their corrections would not hit the taste of those who came after them; and we should have nothing but corrections, while there would be no guide in the decision of causes but the discretion of fallible judges in the court of the last resort, and no rule by which the citizen might beforehand square his

years of *Lesher*, the practice of securing death-qualified juries had spread to Louisiana, New York, and Virginia.

B. Act II: John Brown

While questions concerning the impact of death-qualification on racism did not begin to be formulated until 150 years later, issues of race and opposition to slavery existed at the outset. The court minutes from the 1859 Virginia trial of abolitionist John Brown reflect one of the earliest recorded instances of a trial judge performing the "death-qualification" of a jury pool. In the century between the trials of Pettis and Brown, the central questions surrounding slavery had become more pressing, slavery supporters were put on the defensive, and pro-slavery states had to fight vigorously to stave off the abolitionist movement. In this tumultuous context, John Brown and other "evil and traitorous persons" were indicted by a grand jury upon charges of making rebellion against the Commonwealth.[42] John Brown's alleged purpose was to "maliciously and feloniously advise

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> actions. "The discretion of a judge," said one of the greatest constitutional lawyers that ever graced the English bench, "is the law of tyrants: it is always unknown: it is different in different men: it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice—in the worst, it is every vice, folly and passion to which human nature can be liable."
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> ... Every system of jurisprudence will necessarily be defective; and if we interfere to remedy every insignificant defect, experience will assuredly convince the profession, if not ourselves, that our reason is no better than the reason of those who went before us.

Id. (citations omitted).

[42] *The Trial of John Brown*, *in* THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN KNOWN AS "OLD BROWN OF OSSAWATOMIE" WITH A FULL ACCOUNT OF THE ATTEMPTED INSURRECTION AT HARPER'S FERRY 55–59 (Mnemosyne Publishing Co. 1969) (1859). The minutes of the indictment read, in pertinent part:

> [N]ot having the fear of God before their eyes, but being moved and seduced by the false and malignant counsel of other evil and traitorous persons and the instigations of the devil, did, severally, on the sixteenth, seventeenth, and eighteenth days of the month of October, in the year of our Lord eighteen hundred and fifty-nine, and on divers other days before and after that time, within the Commonwealth of Virginia, and the County of Jefferson aforesaid, and within the jurisdiction of this Court, with other confederates to the Jurors unknown, feloniously and traitorously make rebellion and levy war against the said Commonwealth of Virginia, and to effect, carry out, and fulfill their said wicked and treasonable ends and purposes did, then and there, as a band of organized soldiers, attack, seize, and hold a certain part and place within the county and State aforesaid, and within the jurisdiction aforesaid, known and called by the name of Harper's Ferry, and then and there did forcibly capture, make prisoners of, and detain divers good and loyal citizens of said Commonwealth ....

Id.

said slaves . . . to rebel and make insurrection against their masters and owners, and against the Government, the Constitution and laws of the Commonwealth of Virginia . . . ."[43]

The following question was put to the jurors by the judge presiding over John Brown's trial[44]: "Have you any conscientious scruples against convicting a party of an offence [sic] to which the law assigns the punishment of death, merely because that is the penalty assigned?"[45] John Brown's inevitable death sentence could not be jeopardized by the "conscientious scruples" of any would-be abolitionist juror in an already politically-charged trial.

C. Act III: The Kennedys

In 1845, in *State v. Kennedy*,[46] the Louisiana Supreme Court seized on the *Lesher* case,[47] addressing the issue of "death-qualification" in a case where two jurors were removed due to their "conscientious scruples" against the death penalty.[48] The court transformed the "rule of the common law" that "the juror must stand indifferent as he stands unsworn," into a requirement of willingness to follow and impose the law. The court claimed "an English judge would not hesitate, in a capital case, to reject [such] jurors" on the grounds that they "did not stand indifferent."[49] The court went on to

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[43] *Id.* at 60.

[44] *Id.* at 63. The court minutes describe the jury selection process:

> The jailer was ordered to bring Brown into court. He found him in bed, from which he declared himself unable to rise. He was accordingly brought into court on a cot, which was set down within the bar. The prisoner laid most of the time with his eyes closed, and the counterpane drawn up close to his chin. The jury were then called and sworn. The jurors were questioned as to having formed or expressed any opinion that would prevent their deciding the case impartially on the merits of the testimony. The Court excluded those who were present at Harper's Ferry during the insurrection and saw the prisoners perpetrating the act for which they are about to be tried. They were all from distant parts of the country, mostly farmers—some of them owning a few slaves, and others none. The examination was continued until 24 were decided by the Court and counsel to be competent jurors. Out of these 24, the counsel for the prisoner had a right to strike off eight, and then twelve are drawn by ballot out of the remaining sixteen.

Id.

[45] *Id.* at 63.

[46] State v. Kennedy, 8 Rob. 590 (La. 1845).

[47] The Louisiana court provided the cite to the Pennsylvania decision, without its name. *See id.* at 595 (citing 17 Serg. & Rawle 155).

[48] *See id.* at 594–95 ("Two persons being called as jurors, and sworn upon their *voir dire*, were asked by the attorney general, 'whether they had any conscientious and religious scruples against finding a verdict of guilty, in any case involving the life of the accused?' The question was answered affirmatively, and the jurors set aside for cause.").

[49] *Id.* (citing 1 CHITTY COMMON LAW 544; MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, JURIES G. 5) ("'The rule of the common law is, that the juror must stand indifferent as

review a New York case where "[a] similar question arose" and in which Mr. Chief Justice Savage found that "'such a person is unfit; he has prejudged the question; he has made up his verdict without hearing the evidence, and ought to be excluded upon common law principles.'"[50] Finding the principles established by Judge Savage to be "good ones" for the state of Louisiana to follow, the court followed New York and Pennsylvania, holding that citizens who possessed conscientious objections to the death penalty could not serve as jurors in capital trials.[51]

The error of conflating relational bias with the need for "indifference" appears in *Kennedy* as it did in *Lesher*. The *Kennedy* court acknowledged that there had never been a case where a juror was excused for these reasons under the common law, but prophesized that an English judge would not hesitate to exclude such jurors on partiality grounds.

As discussed below, however, the common law rule that a juror must stand indifferent was meant to protect the accused and the state from bias based on affiliation with the particular actors trying the case or stemming from personal involvement in the cause at issue. Far from being a prohibited "bias," the jury's beliefs on the appropriateness of the law or its punishment served an important function both in the English system and in ours at common law.

Nearly a century and a half later, in 2003, Patrick Kennedy was tried by a Louisiana jury on the charge of capital rape of a child.

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he stands unsworn.' He cannot be said to stand indifferent between the State and the accused, upon a trial for a capital crime, when, from his religious belief and conscientious scruples he cannot convict, and is therefore previously determined to acquit. *No adjudicated case upon this point is found in the common law reports*, probably because opinions opposed to capital punishments do not prevail in England. But an English judge would not hesitate, in a capital case, to reject jurors professing such opinions, upon the common law principle, that they did not stand indifferent, that they were not above all exception, and those by whom the truth of the matter in controversy could be best ascertained." (quoting EDWARD COKE, COMMENTARY UPON LITTLETON 155, a; citing 1 CHITTY COMMON LAW 544; MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, JURIES G. 5) (emphasis added)).

[50] *Id.* at 595 (quoting People v. Damon, 13 Wend. 351, 355 (N.Y. Sup. Ct. 1835). The court noted:

> A similar question arose in New York, growing out of a statute relating to persons who belonged to religious denominations opposed to the infliction of capital punishment. Mr. Chief Justice Savage, speaking of a juror who entertained the same opinion, but was not a member of a religious denomination, said, . . . "It would be a solemn mockery to go through the forms of a trial with such a jury, or even with one such juror. The prisoner is sure to be acquitted independent of the question of guilt or innocence. It would be a misnomer to call such a proceeding a trial."

Id. (quoting *Damon*, 13 Wend. at 355).

[51] *Id.*

During voir dire, the state successfully challenged for cause forty-four jurors due to their conscientious objection to the death penalty.[52] Seventeen of the challenged jurors would consider the death penalty for the crime of murder, but refused to do so for child rape.[53] The State's direct questioning of prospective jurors on questions of conscience, as well as the trial court's wholesale exclusion of venireman who would refuse to impose the ultimate punishment, reflect the widespread—and United States Supreme Court validated—practice of death-qualification.

What forces moved the courts from Blackstone's description of the English voir dire process—where no mechanism to determine whether a juror had a conscientious objection to a particular crime or punishment even existed—to Patrick Kennedy's case, where the state excluded seventeen potential jurors who supported capital punishment for cases involving a homicide offense, but opposed the death penalty for a person convicted of child rape?[54]

From Judge Joseph Story to the trial of John Brown to *State v. Kennedy*, we see the same failure to appreciate that the Framers understood a verdict influenced by the jurors' conscientious scruples to be a salutary and critical function of the American jury. The Framers generation—brewed in awareness of the King's efforts to limit the power of juries, and the use of libel prosecutions to persecute political opponents and unpopular minorities—believed that an essential component of the freedom protected by a jury was its power to determine both the facts and the validity of the law. John Adams, writing in 1771, said:

> "Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice

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[52] Brief of Petitioner at 13, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343) (dismissing the jurors because "'they would not consider capital punishment either generally or for an offense of aggravated rape'").

[53] Brief of Respondent at 42 n.40, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

[54] One of the significant lacunae in the Court's Eighth Amendment jurisprudence is that a measure of the constitutionality of the death penalty—either for a specific class of offenders or for a specific class of offenses—depends upon the regularity that juries impose a death sentence for the specific offense. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("[W]e have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries '"maintain a link between contemporary community values and the penal system"' that this Court cannot claim for itself." (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976))). Measuring the community's sentiment concerning a specific punishment by gathering a venire, removing from the venire all people opposed to a punishment, and then taking the temperature of the remaining citizens concerning the propriety of that punishment, would be like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on.

> of the people." "The British empire has been much alarmed, of late years, with doctrines concerning juries, their powers and duties, which have been said, in printed papers and pamphlets, to have been delivered from the highest tribunals of justice. . . ." "[T]he jury have the power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment and conscience?" " . . . [I]s a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, No. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." "The English law obliges no man to decide a cause upon oath against his own judgment."[55]

III. THE EROSION OF THE SIXTH AMENDMENT JURY TRIAL GUARANTEE AT THE UNITED STATES SUPREME COURT

A. Erosion of the Jury's Right to Determine Law

The United States Supreme Court's broadest erosion of the jury trial guarantee occurred in *Sparf v. United States*,[56] where a majority of the Court limited the jury's right to determine the law. In upholding the capital convictions of two defendants charged with murder, the Court observed that the lower court had not erred in refusing to instruct the jury on the lesser offense of manslaughter.[57] The premise of the majority's opinion was that the judge, and not the jury, had the right to issue all findings with respect to the law.[58]

While it was the first United States Supreme Court case to devalue the role of the jury, *Sparf* arose in a series of prosecutions concerning the slave trade and individuals engaged in the effort to abolish slavery. The *Sparf* Court identified *United States v. Battiste*[59] (where

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[55] Sparf v. United States, 156 U.S. 51, 143–44 (1895) (Gray & Shiras, JJ., dissenting) (quoting 2 THE WORKS OF JOHN ADAMS 253–55).

[56] 156 U.S. 51 (1895).

[57] *Id.* at 106 ("[T]he court below did not err in saying to the jury that they could not consistently with the law arising from the evidence find the defendants guilty of manslaughter or of any offence less than the one charged, that if the defendants were not guilty of the offence charged, the duty of the jury was to return a verdict of not guilty.").

[58] *Id.*

[59] 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

the Court held that juries are not judges of law in a "capital or other criminal" case) as the historical pedigree for its rule, without observing the actual facts at issue in that case.[60]

Battiste was not truly an opinion issued on a verdict, but rather the instructions given by Judge Story to the jury in that case. The details of the *Battiste* case confirm rather than dispel the notion that the right to a jury trial includes the right to reject an unfounded law: in *Battiste*, the jury acquitted the defendant of the capital offense of slave-trafficking.[61] Judge Story informed the jury that its role was to adjudicate the facts, but went on to observe that convicting the defendant of the capital charge would "confound all moral distinctions in regard to crimes."[62] Thus, it would be mistaken to suggest that the jury in *Battiste* was "confined" to making an assessment solely of the facts, given the instructions Judge Story actually gave them.

Sparf was ultimately revisited by the United States Supreme Court some eighty years later in *Beck v. Alabama*.[63] The *Beck* Court confirmed the mere utilitarian or functional view of the jury trial right that had emerged after *Sparf* and flourished in the 1970s and 1980s. While the exact issue of whether the Constitution required a trial court to instruct the jury on a lesser included verdict was revisited in *Beck*, the Court chose to consider the issue in light of the Eighth Amendment to the United States Constitution and the defendant's right to due process of law guaranteed by the Fourteenth Amendment.[64] No consideration was made of the defendant's Sixth Amendment right to a jury trial determination.

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[60] *See Sparf*, 156 U.S. at 73 ("The question before us received full consideration by Mr. Justice Story in *United States v. Battiste*, ... That was an indictment for a capital offence, and the question was directly presented whether in criminal cases, especially in capital cases, the jury were the judges of the law as well as of the facts. He said: 'My opinion is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case[,] tried upon the general issue.'" (quoting *Battiste*, 24 F. Cas. at 1043)).

[61] *See Battiste*, 24 F. Cas. at 1045.

[62] Judge Story continued: "[Capital punishment under this case's circumstances] would punish an act involving not the slightest moral turpitude, in the same manner, as it would punish the hardened atrocity, inhumanity, and horrible iniquities attending the slave trade on the coast of Africa." *Id.*

[63] 447 U.S. 625, 633 (1980) (citing SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 301–302 (1736) (posthumous); 2 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 623 (6th ed. 1787); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 250 (5th Am. ed., Banks, Gould & Co. 1847); 1 THOMAS STARKIE, TREATISE ON CRIMINAL PLEADING 351–52 (2d ed. 1822))).

[64] *Beck v. Alabama*, 447 U.S. 625, 633-638 (1980)("[W]hen the evidence establishes that the defendant is guilty of a serious, violent offense but leaves some doubt as to an element justifying conviction of a capital offense, the failure to give the jury such a 'third option'

Thereafter, in the early 1970s, the United States Supreme Court opined that its assessment of the Sixth Amendment depended upon the functions that the jury served in contemporary society.[65] After approving, in *Williams v. Florida*,[66] of the deterioration of a defendant's Fifth Amendment right against self-incrimination by upholding Florida's notice of alibi rule, the Court descended to the nadir of its concern for original intent, first with disbandment of the unanimity requirement (*Apodaca v. Oregon*[67]), then the jury determination requirement (*Walton v. Arizona*[68]), and the "beyond a reasonable doubt" standard (*McMillan v. Pennsylvania*[69]). At the same time, the Court authorized the admission of hearsay evidence based upon the Court's then-current assessment of reliability.[70]

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inevitably enhances the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake.")

[65] Justice Black, in dissent in *Williams v. Florida*, observed the emergence of this trend:

> There is a hint in the State's brief in this case—as well as, I fear, in the Court's opinion—of the ever-recurring suggestion that the test of constitutionality is the test of "fairness," "decency," or in short the Court's own views of what is "best." Occasionally this test emerges in disguise as an intellectually satisfying "distinction" or "analogy" designed to cover up a decision based on the wisdom of a proposed procedure rather than its conformity with the commands of the Constitution. Such a course, in my view, is involved in this case. This decision is one more step away from the written Constitution and a radical departure from the system of criminal justice that has prevailed in this country.

399 U.S. 78, 115 (1970) (Black, J., dissenting); *see also id.* at 124–25 (Harlan, J., dissenting) ("It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances. . . . The right to a trial by jury, however, has no enduring meaning apart from historical form."); *see also* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) ("After considering the history of the 12-man requirement and the functions it performs in contemporary society, we concluded [in *Williams v. Florida*] that it was not of constitutional stature. We reach the same conclusion today with regard to the requirement of unanimity.").

[66] 399 U.S. 78, 115 (1970).

[67] 406 U.S. 404 (1972).

[68] 497 U.S. 639 (1990) (authorizing judges to make determination of existence of element that is aggravating factor in capital proceedings), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[69] 477 U.S. 79, 92 (1986) ("Nor is there merit to the claim that a heightened burden of proof is required because visible possession is a fact 'concerning the crime committed' rather than the background or character of the defendant. Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, without suggesting that those facts must be proved beyond a reasonable doubt." (citations omitted)).

[70] *See, e.g.*, Roberts v. Ohio, 448 U.S. 56, 66 (1980) (dispensing with the Sixth Amendment's cross-examination requirement based upon current judicial determination that statements bore "particularized guarantees of trustworthiness"), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

A Court watcher in the early to mid-1990s would have had a solid backdrop for predicting the mode of analysis, if not the result, of a Sixth Amendment jury trial case. The smart money was on the social scientist and not the historian. The landscape shifted in the latter part of the decade—in more of an earthquake than steady erosion—when the Court vigorously regained historical perspective.

B. Bigamy as the Source of Law-qualification

The first instance in which the United States Supreme Court permitted the removal of jurors based upon their conscientious scruples occurred in a non-capital bigamy case, *Reynolds v. United States*.[71] George Reynolds was charged with bigamy, and tried by a jury in the third judicial district of the Utah Territory. During voir dire, the prosecution successfully challenged for cause two veniremen, Homer Brown and John W. Snell, on the basis that both men were themselves bigamists.[72]

Without addressing the morality or legality of bigamy, it is interesting to note that historical research of cases at common law reveals that juries routinely rejected the legality of imposing punishment for charges on similar offenses such as adultery and fornication. "[T]here is some evidence that juries were reluctant to follow government policy slavishly and that they were constrained by local precedent, hallowed procedure, and a concept of community at odds with that of their superiors. In the cases of fornication, for example, magistrates relied on confessions by suspects as a means of evading trial by jury and the risk of acquittal."[73]

The *Reynolds* Court identified the Sixth Amendment right to an "impartial jury," quoting Lord Coke to establish that impartiality requires a juror to "'be indifferent as he stands unsworn'" and "'so

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[71] 98 U.S. 145 (1878).

[72] *Id.* at 147–48. Part of Homer Brown's questioning included:

> Q. "Are you living in polygamy?" A. "I would rather not answer that." The court instructed the witness that he must answer the question, unless it would criminate him. By the district attorney: "You understand the conditions upon which you refuse?" A. "Yes, sir." — Q. "Have you such an opinion that you could not find a verdict for the commission of that crime?" A. "I have no opinion on it in this particular case. I think, under the evidence and the law, I could render a verdict accordingly."

Id. at 147. Part of John W. Snell's questioning included: "Q. 'Are you living in polygamy?' A. 'I decline to answer that question.' — Q. 'On what ground?' A. 'It might criminate myself; but I am only a fornicator.'" *Id.* at 148.

[73] Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649–1670*, *in* TWELVE GOOD MEN AND TRUE 182, 192 (J.S. Cockburn & Thomas A. Green eds., 1988).

called because, if it be found true, it standeth sufficient of itself, without leaving any thing to the conscience or discretion of the triers.'"[74] Highlighting that the excluded jurors were themselves living in bigamy, the *Reynolds* Court found that "[i]t needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice . . . ."[75]

C. Witherspoon *and Its Roots*

Witherspoon v. Illinois[76] was the first United States Supreme Court case in modern times to deal with the issue of death-qualification.[77] In a case where forty-seven veniremen were excluded by the trial judge for having a conscientious objection to the death penalty, the Court granted certiorari to determine the narrow question of whether a trial court may exclude all jurors who oppose capital punishment and would have conscientious scruples against inflicting it.[78]

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[74] *Reynolds*, 98 U.S. at 154–55 (quoting EDWARD COKE, COMMENTARY UPON LITTLETON 155, b & 156, b).

[75] *Id.* at 157. Again, the term "partiality" is used to refer to bias as to the juror's approbation of a particular law or its punishment generally, and not simply to relational bias against the defendant or the individual representative of the government. Oddly, the *Reynolds* Court does not attempt to analogize an admitted bigamist to a person previously tried for a crime that he is now asked to adjudge—a challenge *propter delictum*—but instead selectively chooses a definition of partiality that ignores the historical understanding of the term "impartial jury" as would have been recognized by the Framers. Over a century later, when the Court addressed its first "death-qualification" case, the same mistaken definition of "partiality" prevailed.

[76] 391 U.S. 510 (1968).

[77] The *Witherspoon* Court set the scene in the trial court, where over half of the potential jury pool was excluded on the basis of conscientious objection to the death penalty:

> [T]he tone was set when the trial judge said early in the *voir dire*, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its infliction "in a proper case" and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

Id. at 514–15 (footnote omitted).

[78] *See, e.g., id.* The *Witherspoon* majority then carefully described the limited issue before the Court:

> The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never

The *Witherspoon* Court ruled that the removal of jurors based upon the State's challenge for cause did not violate the defendant's Sixth Amendment rights insofar as the jury's guilt determination, but did violate his Sixth Amendment rights insofar as the jury's imposition of the death penalty. The Court emphasized that a "sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[79] Accordingly, the Court reversed Witherspoon's death sentence, but affirmed his conviction.

While the decision in *Witherspoon* might have threaded the needle sufficiently well to satisfy a lawmaker's sensibility, it provided very little in historic constitutional basis. Indeed, given the Court's refusal to reverse the conviction of a defendant who shot and killed a police officer in order to secure his escape,[80] it fairly seems to embody jurists undertaking a dubious response to a difficult problem.[81]

Importantly, the *Witherspoon* Court did not correct the mistaken interpretation of the term "impartial" in the Pennsylvania Supreme Court's century-old *Lesher* opinion. Instead, the Court stated that the jurors who opposed the death penalty could serve impartially if they agreed to apply the law to the facts of the case, but would be partial if they refused to impose the penalty under all circumstances. In other

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> vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it.

Id. at 513–14 (footnote omitted).

[79] *Id.* at 522.

[80] *See id.* at 533 (Black, Harlan, and White, JJ., dissenting).

[81] Moreover, if Justice Scalia's method of textual exegesis called for better historians, the method of constitutional adjudication in *Witherspoon* appeared to call merely for better sociologists:

> The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

Id. at 517–18 (footnote omitted).

words, the *Witherspoon* Court refused to validate jurors as finders of both law and fact.

The *Witherspoon* Court predicated its holding—that the exclusion of death penalty objectors from a criminal jury may not require reversal of the conviction and is permissible in some instances—on *Logan v. United States*,[82] decided approximately ninety years prior to *Witherspoon*. While the majority opinion in *Witherspoon* spends a scant few sentences addressing the issue of whether the Sixth Amendment violation requires a new trial, Justice Douglas's dissent makes it clear how the Court is relying upon *Logan*:

> The Court in *Logan v. United States*, held that prospective jurors who had conscientious scruples concerning infliction of the death penalty were rightly challenged by the prosecution for cause, stating that such jurors would be prevented "from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence. . . ."
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> . . . [W]here a State leaves the fixing of the penalty to the jury, or provides for a lesser penalty on recommendation of mercy by the jury, or gives the jury power to find guilt in a lesser degree, the law leaves the jury great leeway. Those with scruples against capital punishment can try the case "according to the law and the evidence," because the law does not contain the inexorable command of "an eye for an eye." Rather "the law" leaves the degree of punishment to the jury. *Logan v. United States* in the setting of the present case does not state what I believe is the proper rule. Whether in other circumstances it states a defensible rule is a question we need not reach. Where the jury has the discretion to impose the death penalty or not to impose it, the *Logan* rule is, in my opinion, an improper one. For, it results in weeding out those members of the community most likely to recommend mercy and to leave in those most likely not to recommend mercy.[83]

Justice Douglas went on to explain that challenges for cause were supposed to be "highly individualized not resulting in depriving the

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[82] 144 U.S. 263 (1892), *abrogated by* Witherspoon v. Illinois, 391 U.S. 510 (1968).

[83] *Witherspoon*, 391 U.S. at 528–29 (Douglas, J., dissenting) (citation and footnotes omitted).

trial of an entire class or of various shades of community opinion or of the 'subtle interplay of influence' of one juror on another."[84]

Tracing *Witherspoon* through *Logan* back to its origins returns us to the outset of this section, and two decisions: the Supreme Court's decision in *Reynolds v. United States*, dealing with polygamy, and the decision of Mr. Justice Baldwin in *United States v. Wilson*.[85] The *Reynolds* bigamy opinion bases itself on the *Lesher* opinion discussed in detail above. However, the decision in *Reynolds* is oddly applied to capital punishment, because in *Reynolds* the prospective jurors had actually practiced polygamy: if the defendant's claim of religion as a defense to the charge was unavailing, the jurors themselves would be guilty of felony-polygamous behavior. *Wilson*, on the other hand, specifically relies on the *Lesher* case—given by the same state supreme court two years earlier—as the basis for its ruling that a juror's conscientious scruples to applying the death penalty justified a for cause challenge.[86] An effort to trace the genesis of the *Wilson* and *Lesher* decisions has significance as it reveals that the jurists in those cases were leaving aside the textual basis of the Sixth Amendment, as well as the historical meaning of the term "impartial," in a manner that was forewarned by past originalists and is disapproved of by the current ones.

Witherspoon's progeny—*Logan*, *Reynolds*, *Wilson*, and *Lesher*—ignore the Framers' understanding of the role of the jury as finder of law and fact, as well as the historical definition of partiality, and instead continue to expand the circumstances under which a person opposed to the death penalty can be excused for cause. The Court's latest decision, in *Uttecht v. Brown*,[87] summarizes the four main principles for which *Witherspoon* and its progeny stand:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.

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[84] *Id.* at 530 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)).

[85] 28 F. Cas. 699 (C.C.E.D. Pa. 1830) (No. 16,730).

[86] *Id.* at 701. Specifically, Justice Baldwin, as Circuit Justice, reasoned:

> If the juror should act according to his declaration, his conscientious scruples, it would prevent him from deciding according to the evidence and his solemn Affirmedation: we should hold it a good cause of challenge if the question remained unsettled, but it has been so held in the circuit court of the First circuit, . . . and the supreme court of the state, ... The challenge is allowed.

Id. (internal citations omitted) (citing United States v. Cornell, 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868) (opinion of Mr. Justice Story, as Circuit Justice); Commonwealth v. Lesher, 17 Serg. & Rawle 163).

[87] 127 S. Ct. 2218 (2007).

> Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.[88]

This "balancing test" between the accused's right to an impartial jury and the state's interest in obtaining capital convictions, which emerged from *Wainwright v. Witt*,[89] is a means in search of a historically acceptable basis. Thus, *Wainwright* also was wrongly decided because—though it noted the ongoing confusion amongst the lower courts—it endorsed an intuitive and baseless "balancing test" in which deference to the subjective determinations of trial courts rather than fidelity to the Sixth Amendment controlled.[90]

To the extent the Court in *Witherspoon* proceeded down a politically savvy but historically unacceptable path, *Lockhart v. McCree* completed the processional because, faced with argument on the applicability of the social sciences to the Sixth Amendment, the Court decided to limit the role of the social sciences to analyzing the removal of "distinct groups."[91]

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[88] *Id.* at 2224 (citations omitted) (citing *Witherspoon*, 391 U.S. at 521; Wainwright v. Witt, 469 U.S. 412, 416, 424–34 (1985)).

[89] *Wainwright*, 469 U.S. at 416, 424–34.

[90] *See id.* at 416 (discussing the Court's holding in *Witherspoon* and recognizing "the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme"); *see also id.* at 420 ("States retain[] a 'legitimate interest in obtaining jurors who [can] follow their instructions and obey their oaths.'" (quoting Adams v. Texas, 448 U.S. 38 (1980))).

[91] *Lockhart* first examined the evolving field of social science to assess whether the exclusion of jurors opposed to the death penalty created death prone juries and ultimately concluded that it did not:

> Mr. McCree introduced into evidence some 15 social science studies in support of his constitutional claims, but only 6 of the studies even purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of 'Witherspoon-excludables.' Eight of the remaining nine studies dealt solely with generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system, and were thus, at best, only marginally relevant to the constitutionality of McCree's conviction. The 15th and final study dealt with the effects on prospective jurors of *voir dire* questioning about their attitudes toward the

What becomes clear, in reading *Lockhart,* is that the death qualification cases preceding it—*Witherspoon*, *Wainwright*, and *Adams*—paved a pathway where the historical underpinnings of the Sixth Amendment were irrelevant. Indeed, the Court did not decide the claims based upon the definition of an impartial jury, but on the claim that excluding opponents of the death penalty reduced the accuracy of the decision and violated the fair cross-section requirement imposed by the Sixth Amendment.[92]

Lockhart also misses the mark. Death-qualification does not offend the Constitution by removing a cross-section of the community from the jury, but by ensuring the partiality of the jury: the "fair cross-section" component of the Sixth Amendment is a relatively recent invention,[93] whereas the prohibition on partiality was the harbinger of constitutional origin. This triumph of function over historical understanding—evident most clearly in *Lockhart*, though present throughout the Court's death-qualification decisions—must be viewed in the context of a series of Sixth Amendment cases in

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> death penalty, an issue McCree raised in his brief to this Court but that counsel for McCree admitted at oral argument would not, standing alone, give rise to a constitutional violation.

Lockhart v. McCree, 476 U.S. 162, 168–70 (1986) (footnotes omitted). At the time of the adoption of the Sixth Amendment, women, blacks, and Hispanics were decidedly excludable from jury service, as permissible qualifications at common-law were that the jurors be " males . . . freeholders . . . persons within certain ages . . . or . . . persons having educational qualifications." Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (recognizing that states could require certain qualifying factors, but could not discriminate based on race or color). The Fourteenth Amendment clearly modified the common-law exclusion of blacks, and arguably modified the qualification concerning women. *See, e.g.*, Commonwealth v. Maxwell, 114 A. 825 (Pa. 1921) (noting that adaptation to modern circumstances and ideas of self-government supported the admission of women on juries).

[92] *Lockhart*, 476 U.S. at 173 ("[W]e do not believe that the fair-cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.").

[93] In *Taylor v. Louisiana*, the Court noted that "[t]he unmistakable import of this Court's opinions, at least since 1940, and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. 522, 528 (1975) (citing Smith v. Texas, 311 U.S. 128 (1940)). *Smith v. Texas* cites no historical basis for this determination , however:

> It 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 racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles.

311 U.S. at 130 (footnote omitted).

which the Court consistently applied the same function-first approach to restrict the historical breadth of the right to a jury trial.

IV. THE REEMERGENCE OF CONSTITUTIONAL FIDELITY

In the late 1990s, the Court refocused upon the historical origins of the Constitution. While Justice Scalia was only one of an emerging group of advocates for strict fidelity to the original meaning of the Constitution, his view perhaps carried more practical significance, if not philosophic weight.[94]

While Justice Scalia's views were out of favor in the early 1980s, a sea change in textual exegesis occurred with the dissent in *Almendarez-Torres v. United States*[95] and the subsequent majority opinions in *Jones* and *Apprendi*. Over the past seven years the United States Supreme Court has not hesitated to reexamine jurisprudence when evidence has emerged indicating that the foundation of the jurisprudence lacked basis in the text of the Constitution.[96]

Indeed, in *Jones*, the Court recognized that the critical historical aspect of Sixth Amendment juries is that they do not merely do the state's bidding but provide a necessary check on the executive's power.[97] Justice Souter noted that efforts to diminish the jury's power

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[94] Justice Scalia described the venture of Originalism moderately in a 1988 speech at the University of Cincinnati's William Howard Taft Constitutional Law Lecture:

> Let me turn next to originalism, which is also not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly. Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning. They have meaning enough, as the scholarly critics themselves must surely believe when they choose to express their views in text rather than music. But what *is* true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. *It is, in short, a task sometimes better suited to the historian than the lawyer.*

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (last emphasis added).

[95] 523 U.S. 224 (1998).

[96] *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004) (abrogating Ohio v. Roberts, 448 U.S. 56 (1980), based upon historic and textual interpretations of the Sixth Amendment right to confrontation); Ring v. Arizona, 536 U.S. 583, 609 (2002) (overruling Walton v. Arizona, 497 U.S. 639 (1990), based upon historic and textual interpretations of the Sixth Amendment right to a jury trial).

[97] Jones v. United States, 526 U.S. 227, 245 (1999). The Court explained:

existed prior to the adoption of the Constitution, but that the Declaration of Independence and the adoption of the Constitution were clear efforts to reject these measures.[98]

Justice Souter further observed that a major concern of scholars at the time of the Constitution's adoption was the diminishment of the jury proceedings, quoting Blackstone that "[t]he use of nonjury proceedings had 'of late been so far extended,' . . . 'as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury.'"[99] Justice Souter, joined by Justices Stevens, Scalia, Thomas, and Ginsburg, observed that Blackstone had forewarned not only of grand efforts to dispense with jury trials but also of the introduction of "convenient" forms of Sixth Amendment alternatives.[100]

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part.

Id. (quoting 4 BLACKSTONE, *supra* note 5, at 238–39).

[98] *Id.* at 245–46. Specifically, Justice Souter noted:

> [C]ountervailing measures to diminish the juries' power were naturally forthcoming, with ensuing responses both in the mother country and in the Colonies that validate, though they do not answer, the question that the Government's position here would raise. One such move on the Government's side was a parliamentary practice of barring the right to jury trial when defining new, statutory offenses. This practice extended to violations of the Stamp Act and recurred in statutes regulating imperial trade and was one of the occasions for the protest in the Declaration of Independence against deprivation of the benefit of jury trial. But even before the Declaration, a less revolutionary voice than the Continental Congress had protested against the legislative practice, in words widely read in America.

Id. (citations omitted) (citing, *inter alia*, 4 BLACKSTONE, *supra* note 5, at 277–79; PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 118 (1997); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 925–30 (1926)).

[99] *Id.* at 246 (quoting 4 BLACKSTONE, *supra* note 5, at 278).

[100] *Id.* Justice Souter explained how Blackstone's "less revolutionary voice than the Continental Congress" had advocated change:

> Identifying trial by jury as "the grand bulwark" of English liberties, Blackstone contended that other liberties would remain secure only "so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must

Specifically, and of great relevance to the issue at hand, one of the ways the states had attempted to reign in the relevance of juries was through efforts to limit the opportunity for juror nullification.[101] In *Jones*, Justice Souter made clear that the need to guard against this history was embedded in the original intent of the drafters of the Constitution.[102] The historical assessment of the need for fidelity to the Sixth Amendment conducted in *Jones* has been endorsed in *Apprendi v. New Jersey*,[103] *Ring v. Arizona*,[104] and now *Blakely v. Washington*.[105]

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pay for their liberty in more substantial matters."

Id. (quoting 4 BLACKSTONE, *supra* note 5, at 342–44).

[101] *Id.* at 246–47. As an example, the *Jones* Court related:

> A second response to the juries' power to control outcomes occurred in attempts to confine jury determinations in libel cases to findings of fact, leaving it to the judges to apply the law and, thus, to limit the opportunities for juror nullification. Ultimately, of course, the attempt failed, the juries' victory being embodied in Fox's Libel Act in Britain and exemplified in John Peter Zenger's acquittal in the Colonies. It is significant here not merely that the denouement of the restrictive efforts left the juries in control, but that the focus of those efforts was principally the juries' control over the ultimate verdict, *applying law to fact* (or 'finding' the law), and not the factfinding role itself.

Id. (citations omitted) (emphasis added) (citing THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 318–55 (1985); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 300–02 (1996)).

[102] *See id.* 245–48 & n.7 (1998) (citing, *inter alia*, State v. Bennet, 5 S.C.L. 515 (1815); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 22, 52–54 (1983); JULIUS GOEBELL & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 673–74 (1944); Thomas A. Green, *The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900, at 41, 48–49 (Antonio Padoa Schioppa ed., 1987)). Justice Souter stated:

> That this history had to be in the minds of the Framers is beyond cavil. According to one authority, the leading account of Zenger's trial was, with one possible exception "the most widely known source of libertarian thought in England and America during the eighteenth century." It is just as much beyond question that Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion. One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need "to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY."

Id. at 247–48 (citations omitted) (citing LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 133 (1963); A [New Hampshire] Farmer, No. 3, June 6, 1788, *quoted in* THE COMPLETE BILL OF RIGHTS 477 (Neil H. Cogan ed., 1997)).

[103] 530 U.S. 466 (2000).

[104] 536 U.S. 584 (2002).

[105] 542 U.S. 296 (2004).

The Court in *Jones* specifically identified concern over limiting juries to the role of fact-determiners, which, in effect, prevents juries from expressing the will of the community by nullifying an egregious law. Removing from a jury all citizens who would not do the State's bidding constitutes a similar erosion of the jury trial right. It is akin to the "attempts to confine jury determinations in libel cases to findings of fact, leaving it to the judges to apply the law and, thus, to limit the opportunities for juror nullification."[106] That the Sixth Amendment might interfere with the government's effort to impose a death sentence is inconvenient,[107] but the historical basis for the Amendment was to interpose citizens between the State and the accused for just that purpose.

What the Sixth Amendment guarantees, from a historical and textual basis, has much less to do with race, gender, or fair cross-sections than with the role of the jury as a "check" on governmental overreaching. The Framers believed the jury to be finders of both fact and law.[108] The enormity of this responsibility and influence clashes with the Court's modern vision of the jury function. Yet, the Framers' support for a strong and independent jury could not have been clearer.[109]

The Framers viewed the jury as a bicameral branch of the judiciary.[110] Juries enabled the people to review the actions of the executive in enforcing the law, the judiciary in applying the law, and the legislature in establishing it. Juries were not more powerful than

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[106] *Jones*, 526 U.S. at 246 (citing GREEN, *supra* note 101, at 318–55 (1985); RAKOVE, *supra* note 101, at 300–02 (1996)).

[107] Indeed, the Sixth Amendment has never offered prettiness. If scientists were to prove that conservatives made better jurors, or that only intelligent people should be allowed to make determinations of life and death, the Sixth Amendment would mean nothing if it acceded to these concerns.

[108] As, apparently, did the early Court. *See, e.g.*, Georgia v. Brailsford, 3 U.S. 1, 4 (1794) ("It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But *it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy*." (emphasis added)).

[109] Federalist 83 captures the degree of consensus among the Framers on the importance of a trial by jury:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

THE FEDERALIST NO. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[110] *See* AMAR, RIGHTS, *supra* note 2, at 100 ("[J]uries can be seen as part of the judicial department—the lower (and if anything, presumptively more legitimate, because more popular) house.").

judges, prosecutors, or the legislature, but they had authority to veto or abridge the acts of the respective branches of government.

The Framers' belief in the jury as the people's "check" stems, in part, from the English tradition. Indeed, Blackstone warned that the threat of intrusion on the bulwark of the jury by "courts of conscience" was what caused founders of English laws to enshrine the role of the jury as a check on the executive function.[111] Then-Judge Story, in his *Commentaries on the Constitution of the United States*, observed the same rationale apparent in how the Framers envisioned jury system.[112]

Alexander Hamilton's views on the great protection of the jury trial right were informed by his appearance as of counsel in the libel

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[111] 4 BLACKSTONE, *supra* note 27, at *349–50. Blackstone stated:

> [T]he founders of the English law have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

Id.; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 659 (1833) (describing an information as a mode of accusation), *quoted in* Priestly v. State, 171 P. 137, 138–39 (Ariz. 1918) (quoting State v. Holt, 90 N.C. 749 (1884)).

[112] Judge Story stated:

> The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. . . . The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner, than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall. But to give it real efficiency, it must be preserved in its purity and dignity; and not, with a view to slight inconveniences, or imaginary burthens, be put into the hands of those, who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile, to wield its potent armour.

3 STORY, *supra* note 111, at 653–54 (footnote omitted).

case of Harry Croswell, who—the prosecution argued—had libeled Thomas Jefferson by claiming that Jefferson had paid James Thompson Callender for calling George Washington "a traitor, a robber, and a perjurer" and for calling John Adams, "a hoary-headed incendiary."[113] Hamilton defended Croswell by arguing that juries have the power to determine the law, and that jurors have the duty to follow their convictions.[114]

John Adams, writing in 1771, similarly observed that juries served the central purpose of being the "voice of the people."[115] Adams noted that one of the objections informing those who sought independence from England was that some juries were being instructed to render verdicts which "would render juries a mere ostentation and pageantry, and the Court absolute judges of law and fact."[116]

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[113] People v. Croswell, 3 Johns. Cas. 337, 340 (N.Y. Sup. Ct. 1804).

[114] *Id.* at 345–46. Hamilton argued:

> All the cases agree that the jury have the power to decide the law as well as the fact; and if the law gives them the power, it gives them the right also. Power and right are convertible terms, when the law authorizes the doing of an act which shall be final, and for the doing of which the agent is not responsible.
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> . . . .
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> It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions.* It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent.

Id. (emphasis added).

[115] 2 THE WORKS OF JOHN ADAMS 253 (Charles Francis Adams ed., 1850) ("Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, *without the concurrence of the voice of the people.*" (emphasis added)).

[116] *Id.* Adams went on to ponder: "*is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience?*" *Id.* at 254 (emphasis added). In answering his own rhetorical question, Adams proclaimed:

> The great principles of the constitution are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse's milk and first air.
>
> Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, no. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to

Early jurists further confirmed the view of the jury as finder of both fact and law: "the history of English criminal jurisprudence furnishes abundant evidence . . . that the power of juries to determine the law as well as the facts in criminal trials was essential to the protection of innocence and the preservation of liberty."[117] This power to determine the law authorized and required jurors to vote on their conscience. Indeed, jurors themselves ruled on the constitutionality of the law in question.

A. "An Impartial Jury"

Judicial reliance on the guarantee of "an impartial jury" to justify the exclusion of jurors who would not impose the death penalty finds no basis in historical understanding. The English understood "impartial" to encompass merely relational bias, as Blackstone made clear in his explanation of challenges for bias or partiality.[118] While later judicial and scholarly opinions suggested that a juror's general views on the death penalty could constitute "partiality," it is clear that Lord Coke, and the founding fathers, considered the qualification of "impartiality" to be limited to actual bias.[119]

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the direction of the court. . . .

The English law obliges no man to decide a cause upon oath against his own judgment . . . .

Id. at 254–55 (emphasis added).

[117] State v. Croteau, 23 Vt. 14, 21 (1849), *overruled by* State v. Burpee, 25 A. 964 (Vt. 1892).

[118] *See* 4 BLACKSTONE, *supra* note 27, at *363. Blackstone stated:

> Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be over-ruled, for jurors must be *omni exceptione majores*. Challenges *to the favour*, are where the party hath no principal challenge; but objects only some probably circumstances of suspicion, as acquaintance and the like . . . .

Id. (footnotes omitted).

[119] *See* Commonwealth v. Lesher, 17 Serg. & Rawle 155, 162 (Pa. 1828) (Gibson, J., dissenting) ("It is impossible not to see that Lord Coke intended to use the words malice and favor in their natural sense, and not to signify a constructive partiality which should be consistent with absolute indifference to the parties personally; and thus explained, the freedom of mind of which he speaks, is plainly nothing else than exemption from the dominion of the passions. All the examples he has put are instances of favor or malice as regards the person."

None of the state[120] or federal[121] legislative enactments at the time of the adoption of the Constitution, or the state constitutions, suggested that the Sixth Amendment guarantee of an impartial jury required or allowed the exclusion of jurors who opposed capital punishment. Indeed, never in the history of the right to a jury trial, had the law ever countenanced listing as a qualification for jury service belief in the punishment to be imposed;[122] such a requirement would have been considered tyranny. Jurors were required to take an oath of service, and the courts had faith in the jury to carry out their oath.[123]

(discussing 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 155, a, 157, a, & 157, b)).

[120] *See, e.g.*, Shaw v. Clements, 5 Va. (1 Call) 429, 442 (1798) ("[O]ur juries consist of twelve, called out at the instant from the bye-standers, and no other qualification prescribed, than their being freeholders.").

[121] The Judiciary Act of 1789 provided:

> That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services.

Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (footnote omitted).

[122] In the Athenian Constitution, the only qualifications were age and lack of debt: "All persons above thirty years of age are qualified to serve as jurors, provided they are not debtors to the state and have not lost their civil rights." ARISTOTLE, ARISTOTLE ON THE ATHENIAN CONSTITUTION 115 (Frederic George Kenyon trans., G. Bell and Sons, Ltd. 1914).

[123] The seriousness of the oath was apparent in the case of *Bushell*, in which a juror, accused of acquitting a defendant whom the law had directed the jury to convict, was fined and imprisoned:

> This appears from *Bushell*'s case, reported in Sir *Thomas Jones*, 18. and stated, in *Wood's* case, 3 *Wilson*, 175. by the chief justice, in delivering the opinion of the court. *Bushell*'s case was shortly this: A person was indicted at the *Old Bailey*, in London, for holding an unlawful conventicle. The jury acquitted him, contrary to the direction of the court on the law. For this some of the jurors, and *Bushell* among the rest, were fined and imprisoned by the court at the *Old Bailey*. *Bushell* then moved the court of common pleas for a writ of *habeas corpus*, which, after solemn argument and consideration, was granted by three judges against one. *Bushell* was brought up, and the case of his commitment appearing insufficient, he was discharged. This took place before the *habeas corpus* act was passed, and is a conclusive authority in favour of the doctrine for which we contend. *Wood's case*, 3 *Wilson*, 175. and 3 *Bac. Ab.* 3. are clear to the same point."

Ex parte Bollman, 8 U.S. (4 Cranch) 75, 81 (1807).

The jury's ability to render a verdict as it saw fit, and not as directed by the court—either through instruction or machination—was the critical component of the Sixth Amendment guarantee.[124] The Court, in *Stettinius v. United States*, made clear that jurors were free to *not* apply a law that they found unjust.[125] Allowing jurors to vote

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[124] *See* Stettinius v. United States, 22 F. Cas. 1322, 1332 (C.C.D.D.C. 1839) (No. 13,387) (describing the role of juries in criminal cases). In *Stettinius*, the Court observed:

> The only control exercised by the courts over juries is, to keep them together until they find such a verdict as will enable the court to render a judgment in the cause. . . . *Before the jury can apply to facts to the law which it is their peculiar province to do, they must know what the law is. They may ask the opinion of the court, but they are not bound to do so. They have the power to take upon themselves the responsibility of judging for themselves as to the meaning of the law;* or they may, if they will, but not of right, find *a verdict against law; and such a verdict against law, if in favor of the defendant, will be as conclusive and effectual as if it were according to law.*

Id. at 1332 (emphasis added). The *Stettinius* Court further observed:

> In the trial of the impeachment of Judge Chase, Mr. Randolph, one of the managers of the prosecution, in speaking of this right of juries to decide the law, calls it "their undeniable right of deciding upon the law as well as the fact necessarily involved in a general verdict." He said, also, "There is, in my mind, a material difference between a naked definition of law, the application of which is left to the jury, and the application, by the court, of such definition to the particular case upon which the jury are called upon to find a general verdict. Surely, there is a wide and evident distinction between an abstract opinion upon a point of law, and an opinion applied to the facts admitted by the party accused, or proven against him." Speaking of the prior decisions of the same points of law in some former cases by other judges, Mr. Randolph said, "They exercised the acknowledged privilege of the bench in giving an opinion to the jury on the question of law after it had been fully argued by counsel on both sides." Again, he said, "I do not deny the right of the court to explain their sense of the law to the jury, after counsel have been heard, but I do deny that the jury are bound by such exposition." Mr. Early, another of the managers of that impeachment, said, "It is no part of my intention to deny the right of judges to expound the law in charging juries; but it may be safely affirmed, that such right is the most delicate they possess, and the exercise of which is to be guarded by the utmost caution and humanity." Mr. Edward Tilghman, who was examined as a witness in the trial of that impeachment, testified, that in Pennsylvania, the judges, "in their charge to the jury, state the law and the evidence, and apply the law to the evidence. The court generally hear the counsel at large on the law; and they are permitted to address the jury on the law and the fact; after which the counsel for the state concludes. The court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury." In Croswell's Case, the counsel for the defendant admitted it "to be the duty of the court to direct the jury as to the law; and it is advisable for the jury, in most cases, to receive the law from the court, and in all cases they ought to pay respectful attention to the opinion of the court; but it is also their duty to exercise their judgments upon the law as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions."

Id. at 1327–28 (citation omitted).

[125] *Id.* at 1333 ("And we say, also, in the language of Mr. Justice Baldwin, of the supreme court of the United States, in the case of U.S. v. Wilson [Case No. 16730]: 'Their judgment is final, not because they settle the law, but because they either think it not applicable, *or do not choose to apply it to the case.*'" (emphasis added)). The *Stettinius* Court also observed:

their conscience was a critical component of the jury trial guarantee of the Sixth Amendment—instead of functioning like a French bureaucracy, the English jury trial protected defendants who by law might be guilty but by human justice deserved mercy. In this sense, the pre-requisite of "indifference" or "impartiality" did not require "indifference to the law" but was a highly technical term concerning relationships with the party—the fact that one was employed by the prosecutor (even if only in his band or in his jail) created a relationship of partiality which rendered the juror not indifferent; whereas a view on the propriety of the law did not render the juror partial.

Nothing within the English law, or the American common law, suggested that jurors could be excused because following the law required them to "'decide a cause upon oath against his own judgment.'"[126] To the contrary, the guarantee that a felony verdict would reflect the conscience of the people marked a fundamental factor motivating the right to a jury trial.

B. The Jury as Finder of Law: Death-qualification and the Eighth Amendment

At the adoption of the Constitution, there may have been some debate concerning whether juries were entitled to rule on the propriety of a law, or merely on its constitutionality, but it was clear that the latter was within the province of the jury—and that the jury could invalidate or reduce a sentence based upon the view that the application of the sentence was too harsh, too cruel, or too unusual.[127]

> Lord Mansfield, in delivering the opinion of the court of king's bench, in the Case of Dean of St. Asaph, said: "Whether the fact alleged, supposing it to be true, be a legal excuse, is a question of law; whether the allegation be true, is a question of fact; and according to this distinction, the judge ought to direct, and the jury ought to follow the direction; though, by means of a general verdict, they are entrusted with a power of blending law and fact, and *following the prejudices of their affections or passions.*" And [further] he says: "The fundamental definition of trial by jury, depends upon a universal maxim that is without exception: 'Ad quaestionem juris non respondent juratores; ad quaestionem facti, non respondent judices.' . . . "It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong; which is a matter entirely between God and their own consciences."

Id. at 1333–34 (emphasis added) (citation omitted).

[126] Sparf v. United States, 156 U.S. 51, 144 (1895) (Gray & Shiras, JJ., dissenting) (quoting 2 THE WORKS OF JOHN ADAMS 253–55).

[127] *See* AMAR, RIGHTS, *supra* note 2, at 98 (distinguishing between "jury nullification" and "jury review," the latter being "the narrower question of whether a jury can refuse to follow a law if and only if it deems that law unconstitutional").

The modern Court confirms the Framers' intent as it relates to the power of criminal juries to give a voice to the people on questions of constitutionality.[128]

If criminal juries do indeed have the right to determine the constitutionality of the laws, then the relationship between death-qualification and the Eighth Amendment's Cruel and Unusual Punishment Clause is of particular importance. The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*"[129] The modern Court's Eighth Amendment jurisprudence turns upon the "evolving standards of decency that mark the progress of a maturing society."[130] The Court's recent Eighth Amendment cases—especially in the area of capital punishment—have emphasized the need to evaluate these "evolving standards" by reference to "objective indicators."[131] Measuring the frequency with which capital juries actually impose a sentence of death in a particular circumstance, as compared to the rate with which those same juries sentence the capitally accused to life, constitutes a valuable "on the ground" indicator of whether a particular punishment has become cruel and unusual.[132]

Death-qualification eliminates from juries those citizens who would find a death sentence to be cruel and unusual either generally or in a particular context.[133] As a result, when appellate courts review the frequency with which juries impose a death sentence for a certain class of capital crimes, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the

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[128] *See* Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

[129] U.S. CONST. amend. VIII (emphasis added).

[130] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[131] *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 603 (1977).

[132] *See* Atkins v. Virginia, 536 U.S. 304, 316 (2002) (noting the infrequent imposition of death sentences upon the mentally retarded, even in states that frequently impose the death penalty generally, as evidence of a "truly unusual" punishment).

[133] *See* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting). As stated by Justice Scalia:

> The reason for insistence on legislative primacy is obvious and fundamental: "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries "maintain a link between contemporary community values and the penal system . . . ."

Id. (citation and internal quotation marks omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 175–76, 181 (1976)).

idea of executing certain classes of offenders.[134] Death-qualification thus restricts the ability of the people to "check" the power of the judiciary by finding—albeit on a micro-scale—that the punishment of death is cruel and unusual in a particular case for a particular crime.

Even if the reviewing courts could easily replace the force of the "frequency of imposition indicator" with state legislature head-counting, the limiting effect of death-qualification on the Eighth Amendment would still be substantial. The Constitution anticipates that in every Eighth Amendment case the Court's "'own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"[135] The Court's "judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[136] Questions of retribution, culpability, and deterrence are among the important factors on which the Court bears its independent judgment.[137]

If courts are to respect the Framers' intentions with regard to the people serving as a "check" to the judiciary, then surely the people themselves have a co-extensive right to bring to bear their own independent judgment in individual cases where the constitutionality of the ultimate punishment is—and must always be—in question. Returning to Patrick Kennedy's case, discussed above, when seventeen prospective jurors announce their opposition to a death sentence for a non-homicide offense, the independent judgment of the people has been exercised in a very realistic way. However, as long as the death-qualification of jurors remains the law of the land, the people's judgment, as well as the Framers' vision of a powerful jury serving as a check on the judicial branch, will be discarded.

C. Exploring the Eroding Effect of Death-qualification on the Sixth Amendment Right to a Jury Trial: Two Possible Extensions

This Article leaves open two questions relating to the death-qualification of jurors that should be addressed by further scholarship: 1. Should questioning of jurors regarding their beliefs

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[134] *See* Baze v. Rees, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., dissenting) ("The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive."); Uttecht v. Brown, 127 S. Ct. 2218, 2238–39 (2007) (Stevens, J., dissenting) ("Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases.").

[135] *Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597).

[136] *Id.* at 313 (citation omitted) (quoting *Coker*, 433 U.S. at 597).

[137] *See generally id.*

about capital punishment be eliminated?; and 2. What is the relationship between death-qualification and the systemic exclusion of minority jurors?

As previously emphasized, neither the English tradition nor the understanding of the Framers provided for the questioning of jurors regarding their belief in capital punishment. This lack of questioning has practical importance beyond the existence of death-qualification. Today, by statute, the states and the federal government have given the prosecution the right to exercise peremptory challenges. The practical effect of these challenges will be to allow prosecutors to exclude some jurors who would not impose the death penalty even if for-cause challenges on these grounds were no longer permitted. Future scholarship should address whether the topic of juror attitudes towards capital punishment should be excluded from voir dire, and, if so, whether such categorical exclusion would be accomplished via statute or under some existing constitutional basis for the rule.

Future scholarship should also address what, if any, importance wholesale exclusion of jurors based upon their religious views and of minority jurors due to their attitudes regarding imposition of the death penalty has on the constitutionality of the death-qualification practice. As Chief Justice Rehnquist wrote in *Lockhart*, the Sixth Amendment prohibits the exclusion of "distinct groups" such as blacks, women, and Hispanics.[138]

African-Americans as a class may be disproportionately excluded from jury service by virtue of the group's disproportionate view of the inappropriateness of capital punishment.[139] Moreover, researchers categorize jurors in capital cases as "'demographically unique'" in that they tend to be both white and male.[140] This disproportionate exclusion of blacks appears to have a significant impact on the outcome of capital cases.[141]

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[138] *Lockhart v. McCree*, 476 U.S. 162 (1986). *But see* Davis v. Minnesota, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting from the denial of certiorari) ("It is at least not obvious, given the reasoning in *J. E. B.*, why peremptory strikes based on religious affiliation would survive equal protection analysis.").

[139] *See generally* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1276–77 (2000) (noting a correlation between race and experience that can lead to the systematic exclusion of jurors of color, as litigants perceive that these jurors would not be receptive to their arguments).

[140] *See* Adam Liptak, *Court Ruling Expected to Spur Convictions in Capital Cases*, N.Y. TIMES, June 9, 2007, at A1 (quoting Brooke Butler, professor at the University of South Florida).

[141] *See id.* (reporting that in one study published in the University of Pennsylvania Journal of Constitutional Law where over 1500 capital jurors were interviewed, researchers found that "[t]he presence of a single black male juror . . . reduc[ed] the likelihood of a death sentence to 43 percent from 72 percent")

V. CONCLUSION: THE DEATH OF DEATH-QUALIFICATION

In looking to remedy problems of arbitrariness and the invidious presence of racism in the imposition of the death penalty, scholars and jurists have considered eliminating the use of peremptory strikes.[142] However, re-fixing the Sixth Amendment to its historical pedigree wherein jurors were only challengeable for cause if they had a personal interest in the outcome, not based upon their views of the legitimacy of the law, would provide a more historically-accurate solution.

When—as Justice Gibson described it—"judicial activism" intervened to assign additional qualifications to jurors, the activism destroyed an essential component of the jury trial guarantee and resulted in more problems along the way. The fact that a great number of legislatures codified this act of judicial activism, and approved of the infraction upon the historic right to an impartial jury, does not rectify its constitutional trespass. Any substantive qualification added to jury service undermines the impartiality of the jury. Indeed, there is no basis for a "balancing" test between the State's interest to secure a death sentence and the Sixth Amendment's impartial jury trial guarantee: the Sixth Amendment was interposed between the State and citizen precisely in order to make it more difficult for the government to secure a death sentence.[143]

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[142] *See* Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) ("[A] jury system without peremptories is no longer unthinkable. Members of the legal profession have begun serious consideration of that possibility.") (citing, *inter alia*, Alen v. State, 596 So. 2d 1083, 1088–89 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); 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, 199–211 (1989); Ahkil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182–83 (1995); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 502–03 (1995))).

[143] Dissenting and concurring in *Witherspoon v. Illinois*, Justice Douglas quoted Professor Oberer:

> "[T]he gulf between the community and the death-qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding. The due-process implications of this flux seem obvious. Yesterday's practice becomes less and less relevant to today's problem."

The removal of jurors based upon their view of the death penalty deprives a defendant of what the Constitution guarantees: a jury trial wherein jurors have the ability to determine whether a sentence of death is repugnant, if not to the jury as citizens, then to the Constitution of the United States.

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391 U.S. 510, 529 n.10 (1968) (Douglas, J., concurring and dissenting) (quoting Walter E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545, 556–57 (1961)).