seemed more likely than not that the framers of the Sixth Amendment had not intended to preserve the requirement within the term "jury." Therefore, the Justices undertook a functional analysis of the jury and could not discern that the requirement of unanimity materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen. The Justices also determined that the unanimity requirement is not implicated in the constitutional requirement of proof beyond a reasonable doubt, and is not necessary to preserve the feature of the requisite cross-section representation on the jury.[67] Four dissenting Justices thought that omitting the unanimity requirement would undermine the reasonable doubt standard, would permit a majority of jurors simply to ignore those interpreting the facts differently, and would permit oppression of dissenting minorities.[68] Justice Powell, on the other hand, thought that unanimity was mandated in federal trials by history and precedent and that it should not be departed from; however, because it was the Due Process Clause of the Fourteenth Amendment that imposed the basic jury-trial requirement on the states, he did not believe that it was necessary to impose all the attributes of a federal jury on the states. He therefore concurred in permitting less-than-unanimous verdicts in state courts.[69]

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,[70] has been held to be a standard mandated by the Sixth Amendment.[71] The Court further held that the Fifth Amendment's Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.[72] Thus, a district court presiding over a case of providing false statements to a

---

[67] Apodaca v. Oregon, 406 U.S. 404 (1972) (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Blackmun indicated a doubt that any closer division than nine-to-three in jury decisions would be permissible. Id. at 365.

[68] 406 U.S. at 414, and Johnson v. Louisiana, 406 U.S. 356, 380, 395, 397, 399 (1972) (Justices Douglas, Brennan, Stewart, and Marshall).

[69] 406 U.S. at 366. Burch v. Louisiana, 441 U.S. 130 (1979), however, held that conviction by a non-unanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation of requiring unanimity in six-member juries required nullification of the state policy. *See also* Brown v. Louisiana, 447 U.S. 323 (1980) (holding *Burch* retroactive).

[70] *See In re* Winship, 397 U.S. 358, 364 (1970).

[71] Sullivan v. Louisiana, 508 U.S. 275 (1993).

[72] United States v. Gaudin, 515 U.S. 506 (1995).