THE AMERICAN JURY: CAN NONCITIZENS STILL BE EXCLUDED?

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Though noncitizens can be, and frequently are, judged by juries, they are categorically excluded from serving on them. In this Note, I explore the implications of this exclusion from demographic, functional, and doctrinal perspectives. The demographic portrait of noncitizens and minorities in the United States shows that the citizenship requirement for jury service results in the exclusion of significant numbers of residents in certain regions, and that this exclusion is highly skewed by race and ethnicity. The exclusion and resulting decrease in jury diversity has potentially negative effects on the jury's decisionmaking and its institutional legitimacy, and it excludes many residents who may be integrated into the community for many other purposes. Doctrinally, the exclusion of noncitizens from the jury might be challenged as unconstitutional on several grounds. Although some of the constitutional arguments are unlikely to be persuasive to the courts, I argue that there is room under the current doctrine for claims based on rights of the party before the jury—either under equal protection or the fair cross-section requirement of the Sixth Amendment—to succeed if properly framed.

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INTRODUCTION

In the United States, all jurors must be U.S. citizens.[1] Although this requirement is often overlooked or accepted as inevitable—indeed, a jury is often referred to as a "citizen jury"—it has implications that merit analysis. The citizenship requirement has received little scholarly attention, and then only with limited scope.[2] The Supreme Court has mentioned the requirement in passing, stating in dictum that states may require jurors to be citizens, but in a case that did not present the issue, and at a time before the United States underwent ma-

1. In federal courts, citizenship is required by 28 U.S.C. § 1865(b): "[A]ny person [shall be deemed] qualified to serve on grand and petit juries in the district court unless he—(1) is not a citizen of the United States . . . ." 28 U.S.C. § 1865(b) (2006). Forty states also specifically dictate that jurors must be U.S. citizens. *See, e.g.*, CAL. CIV. PROC. CODE § 203(a) (West 2011). Four states require that jurors be qualified to be electors, and electors are in turn required to be citizens. *See, e.g.*, KAN. CONST. art. V, § 1 (requiring electors to be U.S. citizens); KAN. STAT. ANN. § 43-156 (West 2011) (requiring that jurors "possess the qualifications of an elector"). In five states, the statute requires only state citizenship or requires simply "citizenship" without specifying whether that is U.S. or state citizenship. In these states, other statutes or case law make clear that jurors must be U.S. citizens. *See, e.g.*, MISS. CONST. art. III, § 8 (declaring that all residents of Mississippi who are U.S. citizens are state citizens); MISS. CODE. ANN. § 13-5-1 (2011) (requiring that jurors be state citizens); N.C. GEN. STAT. ANN § 9-3 (requiring that jurors be state citizens); Hinton v. Hinton, 145 S.E. 615, 615 (N.C. 1928) (holding that persons who are not U.S. citizens cannot be jurors); VA. CODE. ANN. § 8.01-337 (2011) (requiring that jurors be citizens, without specifying whether they must be citizens of Virginia or of the United States); Commonwealth v. Towles, 32 Va. (5 Leigh) 743, 743 (1835) (holding that U.S. citizens who reside in Virginia are citizens of Virginia). For one state, I could not find a statute explicitly stating that jurors must be U.S. citizens, but a statute states that the jury list shall be prepared from a list containing only citizens. *See* S.C. CODE ANN. § 14-7-130 (2012).

2. To my knowledge, the piece addressing the issue in the most detail is Mary Lombardi, Note, *Reassessing Jury Service Citizenship Requirements*, 59 CASE W. RES. L. REV. 725 (2009), which focuses on whether, normatively, noncitizens should serve on juries, without explicitly questioning the constitutionality of their exclusion. *Id.* at 736. This Note goes beyond Lombardi's, analyzing in depth the potential constitutional challenges to the exclusion of noncitizens and the role of the correlation between race/ethnicity and noncitizenship in those challenges.

jor demographic changes.[3] In the four decades since that decision, the noncitizen population has increased dramatically, now making up a significant percentage of the total population.[4] Because this increase has been more pronounced in some regions than others,[5] in many communities a large proportion of the population is excluded from jury service. Moreover, because noncitizen status is strongly skewed by race and ethnicity, juries in these communities are likely to be unrepresentative in these respects of the community as a whole. As demographics continue to shift in the United States, the effects of excluding noncitizens may become more pronounced in different jurisdictions at various times.

This Note first explores in Part I the demographic portrait of noncitizens in the United States through an analysis of data from the American Community Survey (ACS).[6] The data show that in many areas, the citizenship requirement results in the exclusion of significant portions of the overall population, and of certain ethnic and racial groups, from the jury pool. Part II discusses the effects of this exclusion on two core functions of the jury: its role as a decisionmaker and its role as a civic institution. Part III discusses possible legal challenges to the citizenship requirement. These challenges may focus on the rights of noncitizens excluded from the jury, or they may focus on the rights of parties before the jury. They may also challenge the exclusion of noncitizens as such, or they may challenge the resulting disproportionate exclusion of certain racial or ethnic groups. Of these challenges, I argue that the most persuasive are claims that the exclusion of noncitizens from state juries violates the equal protection rights of noncitizen parties in cases before those juries, and claims that the disproportionate exclusion of minorities from both state and federal juries violates the Sixth Amendment rights of criminal defendants in some jurisdic-

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3. *See* Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970).

4. *See infra* Appendix.

5. Data on foreign-born residents can five a sense of the areas of growth. *See* JEANNE BATALOVIA, MIGRATION POLICY INST., 2010 AMERICAN COMMUNITY SURVEY AND CENSUS DATA ON THE FOREIGN BORN BY STATE (2011), *available at* http://www.migrationinformation .org/datahub/files/MPIDataHub_ACS_2010-NumberForeignBorn.xlsx.

6. The ACS is carried out by the U.S. Census Bureau. In 2010 it replaced the census long form. Unlike the census, the ACS gathers data continuously and has much more demographic, social, economic, and housing data than the census short form. U.S. CENSUS BUREAU, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT GENERAL DATA USERS NEED TO KNOW 1 (2008). The data are estimates based on data aggregation over one-, three-, and five-year periods. The five-year aggregation periods yield published estimates for communities across the United States and have smaller margins of error, while the one-year periods yield data only for areas with populations over 65,000 and have greater margins of error. *Id.* at 3, 9. This Note uses the five-year estimates in order to have the most comprehensive and statistically reliable data, although this means the data has less currency. (Readers should also keep in mind that the data have margins of error associated with them that are not included in the analyses here.) *See id.* app. at A-2 to -3.

tions. Part IV briefly addresses some considerations in remedying any violations. The appropriate remedy would vary with the type of violation found, but I outline the general form of statutory amendments that might be made in each situation. Finally, I address the practical limitations of any remedies.[7]

I. THE DEMOGRAPHICS OF NONCITIZENSHIP

The United States is often described as a nation of immigrants,[8] and indeed, noncitizens make up a significant proportion of its population. In the period from 2005-2009, noncitizens made up 7.2% of the total U.S. population, and 8.6% of adults.[9] Because the distribution of noncitizens is highly nonuniform across the United States, in some areas, the percentage of noncitizens is far higher. Figure 1 below illustrates the percentage of noncitizens among adult residents by state for the same period. California had the highest percentage of noncitizens—15% of the total population and 18% of adults.[10] Among U.S. counties, approximately 18% had adult noncitizen populations comprising over 5% of the total adult population, and approximately 7% had adult noncitizen populations comprising over 10%.[11] In California, however,

7. In this Note, I focus on the petit jury rather than the grand jury. However, many of the ideas I discuss—particularly the doctrinal analysis—are also relevant to the grand jury, and where relevant I draw from case law developed in the context of grand juries.

8. *See, e.g.*, JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964); Remarks at American University, 2010 DAILY COMP. PRES. DOC. 2 (July 1, 2010) ("[W]e've always defined ourselves as a nation of immigrants, a nation that welcomes those willing to embrace America's precepts.").

9. This data was calculated using data from *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder2.census.gov (last visited June 13, 2012). The ACS data analyzed in this Note can be downloaded by selecting "Geographies," selecting "United States," "All States within United States," and "All Counties within United States," selecting "Add to Your Selection," and selecting "Close"; selecting "Topics," selecting "People," selecting "Origins," selecting "Citizenship," and selecting "Close"; selecting "Topics," selecting "Dataset," selecting "2010 ACS 5-year-estimates," and selecting "Close"; then checking the boxes next to dataset ID's B05003, B05003B, B05003D, B05003H, and B05003I, and selecting "Download." In federal courts and almost all state courts, the age requirement for jurors is eighteen years. *See* 28 U.S.C. § 1865(b) (2006) (federal juries); *see also, e.g.*, CAL. CIV. PROC. CODE § 203(a)(2) (West 2011) (California juries). In a handful of states, the age requirement is slightly higher. *See* ALA. CODE § 12-16-60 (2011) (nineteen); MISS. CODE. ANN. § 13-5-1 (West 2011) (twenty-one); MO. ANN. STAT. § 494.425 (West 2011) (twenty-one); NEB. REV. STAT. § 25-1601 (2011) (nineteen). Children are more likely than adults to be citizens because the Fourteenth Amendment confers citizenship on almost every child born on U.S. soil. U.S. CONST. amend. XIV, § 1.

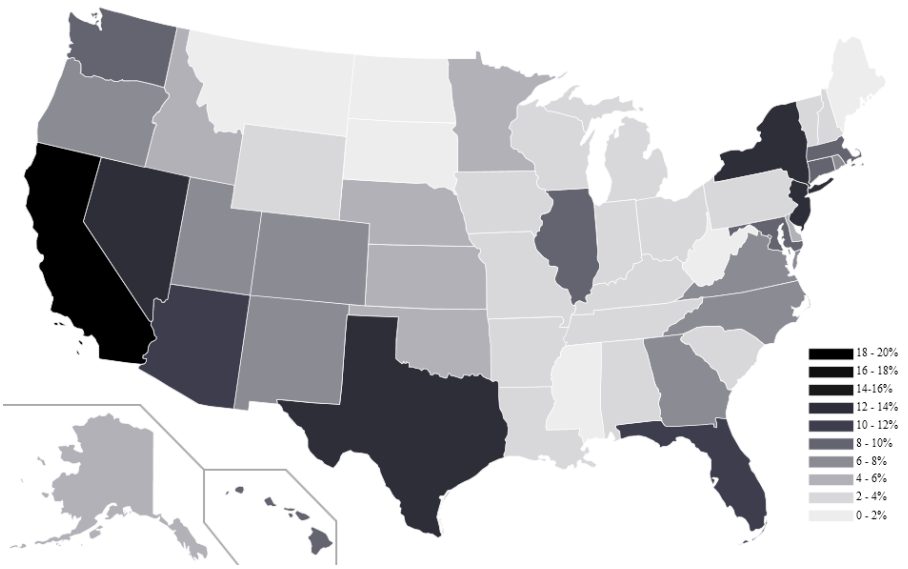
10. These percentages were calculated using data from American FactFinder. *See supra* note 9.

11. These percentages were calculated using data from American FactFinder. *See supra* note 9. Throughout this Note, I use "county" to refer to regions formally designated as "counties" as well as their equivalents. These include parishes in Louisiana, boroughs in Alaska, cities that are governmentally independent of any county organization, and the District of Columbia, which is treated by the U.S. census as the equivalent of both a state and a county, since it has no primary administrative divisions. *See* U.S. DEP'T OF COMMERCE,

approximately 59% of counties had adult noncitizen populations over 10%, 41% had adult noncitizen populations over 15%, and 12% had adult noncitizen populations over 20%.[12] Though states like California may be atypical today, trends suggest that similar demographics may be evident in other parts of the country in the future.[13]

FIGURE 1

Percentage of Noncitizens Among Adult Residents, by State[14]



In regions where noncitizens make up a large proportion of the population, the citizenship requirement does more than significantly decrease the percentage of residents eligible to serve on juries. Because noncitizen status is highly correlated with race and ethnicity, the requirement skews the racial and ethnic composition of jury pools. Amongst the most populous racial and ethnic groups

GEOGRAPHIC AREAS REFERENCE MANUAL 4-2 (1994), *available at* http://www.census.gov/geo/www/garm.html.

12. These percentages were calculated using data from American FactFinder. *See supra* note 9.

13. Fifteen states had over two hundred percent growth in the foreign-born population from 1990-2009: Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Kentucky, Minnesota, Nebraska, Nevada, North Carolina, South Carolina, Tennessee, and Utah. MIGRATION POLICY INST., STATES WITH THE LARGEST AND FASTEST-GROWING IMMIGRANT POPULATIONS (2011), *available at* http://www.migrationinformation.org/DataHub/FB_maps/StateRankingsACS_2009_NFB_Growth_1990.pdf (last visited June 13, 2012).

14. These percentages were calculated using data from American FactFinder. *See supra* note 9.

in the United States,[15] noncitizens comprise significant percentages of the Hispanic[16] and Asian populations, but much smaller percentages of the black and non-Hispanic white populations, as shown below.

TABLE 1[17]

	Hispanic	Asian	Black	Non-Hispanic White
% Noncitizens (total population)	27%	29%	4%	2%
% Noncitizens (adult population)	37%	33%	5%	2%

Thus, the citizenship requirement significantly reduces Hispanic and Asian eligibility for jury duty, while having little effect on the eligibility of blacks and non-Hispanic whites.

To illustrate this effect, consider the federal jury pools in the Central District of California, which has the largest population of any federal judicial district—over eighteen million.[18] The Central District contains three divisions from which juries are drawn: the Western Division, consisting of Los Angeles, San Luis Obispo, Santa Barbara, and Ventura Counties; the Eastern Division, consisting of Riverside and San Bernardino Counties; and the Southern Division, consisting of Orange County.[19] Figure 2 below illustrates the alienage of adult noncitizens by race for each division.

15. *See* KAREN R. HUMES ET AL., OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 6-7 (2011). The other races currently listed as options on the census are American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, or Other. Since 2000, individuals can also identify as more than one race. *Id.* at 2.

16. This Note uses "Hispanic" to refer to persons who identify on the ACS as "Spanish/Hispanic/Latino" or as "of Hispanic, Latino, or Spanish origin." *See* U.S. DEP'T OF COMMERCE, THE AMERICAN COMMUNITY SURVEY (ACS) MAIL QUESTIONNAIRE FROM 2005 TO 2009, at 7 (2010), *available at* http://www.census.gov/acs/www/Downloads/questionnaires/SQuestChanges05to09.pdf.

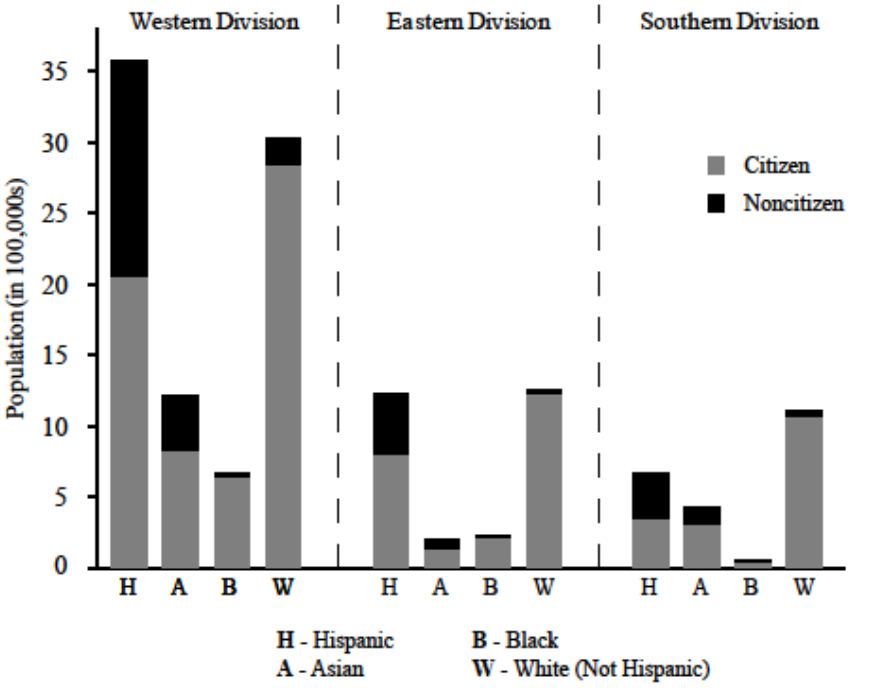
17. These percentages were calculated for the period from 2005-2009 using data from American FactFinder. *See supra* note 9. Data for the categories "Asian," "Black," and "Non-Hispanic White" were based on persons who identified as only one race.

18. U.S. Attorney's Office, Cent. Dist. of Cal., *Our District*, DEP'T JUST., http://www.justice.gov/usao/cac/district.html (last visited June 13, 2012).

19. *In re* Plan of the U.S. Dist. Court, Cent. Dist. of Cal. for the Random Selection of Grand and Petit Jurors, Gen. Order No. 07-10, at 1 (C.D. Cal. June 30, 2011).

FIGURE 2

Number of Adult Citizens and Noncitizens for Persons Identifying as Hispanic, Asian, Black, and Non-Hispanic White in the Central District of California, by Division[20]



The percentages of adult Hispanics who were noncitizens were 41%, 33%, and 45%, in the Western, Eastern, and Southern Divisions, respectively. The percentages for Asians were 29%, 28%, and 24%. In contrast, the percentages for blacks were 4%, 3%, and 6%; and for non-Hispanic whites 5%, 2%, and 3%.[21]

In sum, noncitizens make up a significant percentage of the U.S. population, with particularly high concentrations in some areas. Because noncitizen status is correlated with race and ethnicity, the citizenship requirement for jury service results in underrepresentation in jury pools of certain racial and ethnic groups, particularly Hispanics and Asians, compared to their representation in the general population.

20. These numbers were calculated using data from American FactFinder. *See supra* note 9.

21. These percentages were calculated using data from American FactFinder. *See supra* note 9.

II. THE EFFECT OF THE CITIZENSHIP REQUIREMENT ON JURY TRIALS

The jury plays multiple roles: it is both an arbiter of justice, making findings of fact and determining the outcomes for litigants and defendants, as well as a civic institution, allowing members of society to participate in their community's governance.[22] From both perspectives, the exclusion of noncitizens from juries raises a host of concerns. These concerns stem not only from the exclusion of noncitizens per se, but also from the resulting underrepresentation of racial and ethnic minorities. This Part briefly addresses the functional concerns related to exclusion—such as juror bias, poor quality of jury deliberations, and institutional legitimacy—leaving the doctrinal concerns to Part III.

A. *Jury as Decisionmaker*

The exclusion of noncitizens from the jury raises concerns related to the quality of the jury's deliberation and decisionmaking. The exact nature of the concerns, however, differs depending on who is before the jury. Below, I briefly outline the concerns that apply, first, to all parties in jury trials, regardless of their race, ethnicity, or citizenship status. I then outline the additional concerns for parties in jury trials who are noncitizens, and finally, concerns for parties who are minorities.

1. *Nonminority citizen parties*

Though it might seem at first that exclusion of noncitizens is largely irrelevant to nonminority citizen parties, evidence suggests it may impact any party in a jury trial. Studies have found that changes in jury composition affect outcomes, even when the defendant is white. One mock jury study,[23] for instance, found that the more white jurors there were on the jury, the more likely the jury was to reach a guilty verdict, even when the defendant was white (although the effect was stronger when the defendant was Latino).[24] Another similar study found that white jurors were more likely than black jurors to find the defendant

22. *See generally* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1052-86 (1995) (discussing the jury's roles).

23. Researchers most commonly conduct jury decisionmaking research on mock juries because researchers are rarely allowed to observe real jury deliberations, and other approaches, like postdeliberation interviews with real jurors, are thought to be less reliable. *See* David DeMatteo & Natalie Anumba, *The Validity of Jury Decision-Making Research*, *in* JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 1, 6-8 (Joel D. Lieberman & Daniel A. Krauss eds., 2009).

24. *See* Dolores A. Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249, 1256 (1993).

guilty, even when the defendant was white (but more so when the defendant was black).[25]

Researchers believe that the effects of diversity are not simply due to the individual perspectives of minority jurors—research suggests that the presence of minority jurors positively impacts the collective process of jury decisionmaking, leading to better information exchange.[26] One study found that racially heterogeneous juries deliberated longer than racially homogeneous juries,[27] discussed more case facts, and made fewer inaccurate statements of case facts.[28] The effect was not simply attributable to the contributions of black jurors—most of the effect was due to increased performance of white jurors when on heterogeneous juries.[29] The exclusion of noncitizens from juries, and resulting exclusion of minorities, is therefore likely to lead to less careful or less thorough deliberations. Of course, it is debatable to what extent this necessarily precludes a jury from reaching the "correct" outcome. But because research does indicate that in close cases, racial composition of juries can affect ultimate outcomes,[30] less jury diversity should be a concern for any defendant or litigant.

2. *Noncitizen parties*

The citizenship requirement raises further concerns for noncitizen parties in jury trials. Noncitizens are far from infrequent in the criminal justice system: amongst those convicted of federal crimes, for example, the percentage of offenders who are noncitizens has risen steadily over the past two decades, increasing from approximately 23% in 1991[31] to 41% in 2008.[32] A major factor

25. *See* Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 179 (2007) (discussing J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW & PSYCHOL. REV. 103, 109 (1979)).

26. *See id.* at 180.

27. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 604 (2006). In this study, "homogeneous" juries had six white members, and "heterogeneous" juries had four white members and two black members. *Id.* at 601-02.

28. *Id.* at 605. This study had only black defendants, however, so it is possible the effect does not generalize to situations when the defendant is white. But the study's author has suggested that the study's conclusions regarding improved information processing should be generalizable. *See* Sommers, *supra* note 25, at 182.

29. Sommers, *supra* note 27, at 605.

30. *See* Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 165-66.

31. LOUIS REEDT & JESSICA WIDICO-STROOP, U.S. SENTENCING COMM'N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 2 (2008), *available at* http://www.ussc.gov/Research/Research_Projects/Overviews_of_Federal_Criminal_Cases/20090127_Changing_Face_Fed_Sent.pdf.

in this increase is the current emphasis on immigration law enforcement, including a significant increase in immigration-related prosecutions.[33] But even outside of immigration crimes, noncitizens made up 20% of federal offenders.[34]

It may raise general doubts that a group so highly represented amongst criminal defendants is categorically excluded from the juries deciding their cases. But there may also be more concrete negative effects. In areas with high numbers of noncitizen prosecutions and anti-immigrant sentiment, jury bias based on alienage (or perceived alienage) should be a real concern. Some researchers have suggested that diversity affects jury outcomes because of a "prejudice suppression effect"—minority jurors' presence inhibits majority jurors from expressing prejudice toward minority defendants.[35] Further, the presence of minorities may not simply suppress prejudice but also actually reduce it, by causing jurors to be more respectful of different racial perspectives and to confront their racial prejudices.[36] Thus, the exclusion of noncitizens from the jury may increase jurors' anti-immigrant prejudice and their propensity to express it.

3. *Minority parties*

Finally, for minorities who are parties in jury trials, whether citizen or noncitizen, there are additional concerns. A number of studies suggest that less diversity on juries leads to worse outcomes for minority parties. Several studies have found that individual white jurors or juries with greater percentages of whites lead to more punitive outcomes for black defendants.[37] While the ma-

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32. GLENN R. SCHMITT, U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2008, at 2 (2009), *available at* http://www.ussc.gov/Research/Research_Projects/Overviews_of_Federal_Criminal_Cases/20091230_Data_Overview.pdf. These statistics are based on all offenders, including those who were not tried before a jury because they plead guilty or had a bench trial. I was unable to find data on defendants who were tried before a jury.

33. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281-82 (2010). But the percentage of Hispanics tried before a jury is likely lower than the percentage of Hispanic offenders, because at least half of immigration crimes are federal "petty offenses" and are thus tried before a magistrate judge without a jury. *See id.* at 1288, 1326 n.267. Also, the percentages of both Hispanics and noncitizens are likely much lower among offenders convicted in state courts, since immigration prosecutions are federal, not state, with narrow exceptions.

34. SCHMITT, *supra* note 32, at 10 n.14.

35. *See* Ramirez, *supra* note 30, at 163-64; *see also, e.g.*, Valerie P. Hans & Neil Vidmar, *Jury Selection*, *in* THE PSYCHOLOGY OF THE COURTROOM 39, 42 (Norbert L. Kerr & Robert M. Bray eds., 1982).

36. *See* Ramirez, *supra* note 30, at 164.

37. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 82-84 (1993); *see also, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83

jority of studies on the role of race in decisionmaking look only at blacks and whites,[38] a few studies have considered Hispanic jurors and defendants and have found that jury composition affected trial outcomes. For instance, one study of mock juries with either white or Hispanic majorities found that the white-majority juries were significantly more likely to convict the defendant than Hispanic-majority juries, with the effect being much more pronounced when the defendant was Hispanic as opposed to white.[39] The potentially negative effects on Hispanic defendants should be of particular concern: Hispanics not only have high rates of noncitizenship,[40] but in certain contexts they are also before juries in disproportionately high numbers. In the federal criminal justice system, they make up a larger proportion of federal offenders than any other ethnic or racial group, accounting for 42.2% of offenders in 2008.[41]

Although jury diversity, broadly speaking, appears to have a positive effect on jury performance, there is an argument that diversity should not be achieved by the inclusion of noncitizens because noncitizens will not be good jurors. Some courts have expressed concern that noncitizens may have less knowledge of the U.S. legal system and society, or less commitment to the proper implementation of the judicial system.[42] While these concerns may be justified in

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CORNELL L. REV. 1638, 1722 n.159 (1998) (reporting preliminary findings from a study on the racial composition of Philadelphia juries in capital cases suggesting that increased proportions of black jurors led to less punitive treatment of black defendants, relative to white defendants); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193-95 (2001) (examining data from 340 trials involving capital punishment in fourteen different states and finding that increased numbers of black jurors were strongly associated with reduced death sentencing in cases involving a black defendant and a white victim, and, to a lesser extent, in cases involving a black defendant and a black victim). But not all studies have found such effects. *See* King, *supra*, at 82 n.65.

38. *See* Sommers, *supra* note 25, at 172, 176.

39. *See, e.g.*, Perez et al., *supra* note 24; *see also* Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISP. J. BEHAV. SCI. 275, 282 (1983) (finding that in predeliberation assessments, white jurors were more likely to attribute guilt to Hispanic defendants than Hispanic jurors, but finding no significant difference after deliberation). But see Howard C. Daudistel & Harmon M. Hosch, *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL. 317, 329, 331 (1999), which examines data from 317 noncapital felony cases in El Paso, Texas, and finds jury racial composition uncorrelated with sentence lengths for Hispanic defendants, although the sentence length of white defendants was correlated to the jury composition. Of note, however, is that whites form the minority in El Paso.

40. *See supra* Table 1 and accompanying text.

41. SCHMITT, *supra* note 32, at 2. Drug and immigration crimes made up 84.6% of all convictions of Hispanic offenders. *Id.* See note 33 above for caveats regarding immigration crimes.

42. *See, e.g.*, Perkins v. Smith, 370 F. Supp. 134, 136-38 (D. Md. 1974) ("[N]ative-born citizens would be conversant with the social and political institutions of our society, the customs of the locality, the nuances of local tradition and language. . . . There is no corresponding basis for assuming that resident aliens, who owe allegiance not to any state or to the federal government, but are subjects of a foreign power, have so assimilated our societal

some cases, it seems doubtful that they can support categorical exclusion of noncitizens.[43]

Being a noncitizen does not necessarily correlate with having little exposure to the law and customs of the United States. Noncitizens are often long-term residents: ACS five-year estimates for 2005-2009 show that 31% of noncitizens in the United States entered in the 1990s; 14% entered in the 1980s; and 8% entered in the 1970s or earlier.[44] Amongst legal permanent residents (LPRs) in 2010, 22% gained LPR status in the 1990s; 9% gained LPR status in the 1980s; and 13% gained LPR status in the 1970s or earlier.[45] This is not to deny that many noncitizens are recent immigrants—slightly less than half of all noncitizens arrived in 2000 or later.[46] But categorical critiques of noncitizens as unfamiliar with U.S. social and legal norms have limited persuasiveness as applied to the significant number of noncitizens who have been present in the country for extended periods of time.

Even assuming that noncitizens lack knowledge of the U.S. legal system, this may not distinguish them from some citizens, and, in any case, jurors are not expected to fully understand the legal system—they are provided the relevant law through jury instructions.[47] With respect to concerns that noncitizens are less committed to the proper implementation of the judicial system, there seems to be little basis for that conclusion with respect to legally present noncitizens. One commentator has concluded that most courts "are not greatly

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and political mores that an equal reliance could be placed on their performing as well as citizens the duties of jurors in our judicial system."), *aff'd mem.*, 426 U.S. 913 (1976).

43. *See* Lombardi, *supra* note 2, at 740-43 (arguing that such concerns about noncitizens generally are unfounded, and to the extent that they do apply to individual noncitizens, that those concerns should be addressed on a more individualized basis rather than through categorical assumptions about the unfitness of noncitizens).

44. These percentages were calculated using data from American FactFinder. *See supra* note 9. This data can be downloaded by selecting "Geographies," selecting "United States," selecting "Add," and selecting "Close"; selecting "Topics," selecting "People," selecting "Origins," selecting "Year of Entry," and selecting "Close"; selecting "Topics," selecting "Dataset," selecting "2010 ACS 5-year-estimates," and selecting "Close"; then checking the box next to dataset ID B05005, and selecting "Download."

45. NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2010, at 3 tbl.3 (2011), *available at* www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2010.pdf. I could not find data on year of entry for LPRs. For some LPRs, the date of initial entry is the same as the date of obtaining LPR status; others were living in the United States previous to becoming an LPR. *See id.* at 2. In 2010, slightly over half of new LPRs had already been living in the United States when they acquired their LPR status. RANDALL MONGER & JAMES YANKAY, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., U.S. LEGAL PERMANENT RESIDENTS: 2010, at 1 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf.

46. This percentage was calculated using data from AmericanFactFinder. *See supra* note 9.

47. Lombardi, *supra* note 2, at 741.

concerned" by the threat of noncitizen jurors purposefully ignoring the law,[48] and others have questioned the assumption that noncitizens are less committed to the United States than citizens.[49]

B. *Jury as Civic Institution*

Beyond its role as a decisionmaker, the jury is also an important civic institution. Arguably, those denied the ability to serve on juries are injured because they cannot participate in a process that serves to articulate public values.[50] Jury service is one of the few ways that individuals can directly participate in their communities' governance.[51] Indeed, the only other way most individuals can directly participate in government—voting[52]—is also unavailable to noncitizens.[53] Scholars have also argued that exclusion from jury service denies individuals a form of education about our government.[54] Furthermore, excluding large portions of the community may undermine the legitimacy of the jury as an institution, leading to less community acceptance of jury decisions and more negative views of the justice system.[55] When a group making up more than forty percent of federal offenders[56] is disproportionately excluded from the juries deciding those cases, the jury's institutional legitimacy may be significantly harmed. Exclusion of noncitizens may also perpetuate bias against

48. *Id.* at 740.

49. *See* Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 295 (1994) (arguing that citizenship is not necessarily correlated to loyalty to the United States); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1129-33 (1977) (arguing that there is not a sufficient difference in commitment to justify distinguishing between resident aliens and citizens with respect to the right to vote).

50. *See* Marder, *supra* note 22, at 1052.

51. *Id.* at 1084.

52. *Id.*; *see also* Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

53. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 138 (2000) (discussing the elimination of noncitizen voting).

54. *See* Marder, *supra* note 22, at 1083.

55. *See* Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury* De Medietate Linguae, 4 VA. J. SOC. POL'Y & L. 645, 660-61, 663 (1997) (finding that in response to a telephone survey, 67.3% of respondents agreed with the statement that "[d]ecisions reached by racially diverse juries are more fair than decisions reached by single race juries"); Lombardi, *supra* note 2, at 750-52; Marder, *supra* note 22, at 1066, 1074, 1084-85; Sommers, *supra* note 27, at 608; *cf.* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is also critical to public confidence in the fairness of the criminal justice system.").

56. SCHMITT, *supra* note 32, at 2.

them by acting as government-sanctioned discrimination, casting a stigma and perpetuating stereotypes about noncitizens' lack of integration into society.[57]

Of course, whether these effects matter is tied up with much broader normative questions about what role noncitizens should play in the political community and in the American community more broadly, and what rights and privileges noncitizens should have relative to citizens. For some observers, many of the consequences of excluding noncitizens from juries may be untroubling. But because the decisions of juries affect others—often citizens—even those who are unconcerned about the effects of exclusion on noncitizens may have reason to be concerned about effects on citizens and on the jury's continued institutional legitimacy.

III. LEGAL CHALLENGES TO THE CITIZENSHIP REQUIREMENT

The potential consequences of jury exclusion have not been entirely ignored—there have been cases in which the exclusion of noncitizens from juries has been challenged, but none of the challenges have been successful. This Part explores the various approaches by which the citizenship requirement might be challenged. Just as the policy implications of exclusion can be viewed from the perspectives of both the jury as decisionmaker and the jury as civic institution, so too can the doctrinal implications. That is, we might focus on the legal rights of the party with a case before the jury, or we might focus on the legal rights of the potential juror. Furthermore, the harms of exclusion may be a function of the exclusion of noncitizens as such, or they may be a function of the resulting racial and ethnic exclusion. The following Subparts first address whether the citizenship requirement is constitutionally compelled, and then consider each of the different permutations of legal challenges to the citizenship requirement based on whose rights, and which rights, are at stake.

A. *The Citizenship Requirement Is Not Constitutionally Compelled*

The historical inclusion of noncitizens on juries both in the United States and more generally in the Anglo-American legal tradition, as well as case law touching on the issue, suggest that there is no constitutional requirement that jurors be citizens. The Anglo-American legal tradition has a long history of including noncitizens on juries. An early English common law right to a jury *de medietate linguae*, or "mixed jury"—a jury composed of half aliens—was codified in England in 1354 for civil and criminal trials involving aliens.[58] When

57. *Cf.* Marder, *supra* note 22, at 1084 (discussing how exclusion through peremptory challenges "undercuts notions of equality that are fundamental to a democracy" by "relying on stereotypes that perpetuate differences about who can serve and who cannot—who can fulfill the obligations of a citizen and who cannot").

58. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury* De Medietate Linguae*: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 785 (1994).

English settlers came to North America, they brought this tradition with them, and several colonies continued to provide foreigners the right to a mixed jury.[59] With independence, the new Constitution and Bill of Rights included several references to juries,[60] but none of these references indicated whether juries needed to be composed of citizens. The contemporary records are also unclear about whether the right to trial by jury was meant to include a right for foreigners to a mixed jury.[61] But whether or not the Constitution and Bill of Rights meant to continue the mixed jury, in practice it continued to be used after ratification. Some state laws provided for mixed juries, and many courts accepted them in the period between ratification and the early twentieth century in holding that noncitizens had a right to mixed jury[62] or that it was within the court's discretion to grant one.[63]

The Supreme Court's only mention of the mixed jury also supports the conclusion that the citizenship requirement is not constitutionally compelled.[64] In 1936, in *United States v. Wood*, after use of the mixed jury had faded, the Court referred to the mixed jury in a list of traditional jury requirements not constitutionally compelled by the Sixth Amendment,[65] along with the historical exclusion of women from the jury[66] and the number of peremptory challenges

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59. *Id.* at 790-91.

60. U.S. CONST. art. III, § 2 ("The Trial of all Crimes . . . shall be by Jury . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); *id.* amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . . .").

61. *See* Ramirez, *supra* note 58, at 792.

62. Respublica v. Mesca, 1 U.S. (1 Dall.) 73, 75 (Pa. 1783) (granting foreign defendants' request for a mixed jury in a Pennsylvania criminal case). *But see* State v. Antonio, 11 N.C. (4 Hawks) 200, 206 (1825) (holding that aliens in North Carolina did not have a right to a mixed jury).

63. *See, e.g.*, Wendling v. Commonwealth, 137 S.W. 205, 206-08 (Ky. 1911) (holding that the Kentucky statute allowing for a mixed jury did not compel that one be granted, but rather gave the court discretion to grant one if deemed proper); Richards v. Commonwealth, 38 Va. (11 Leigh) 690, 693 (1841) (holding that a Virginia statute allowing for a mixed jury did not compel that one be granted, but rather gave the court discretion to grant one if deemed proper); *see also* Brown v. Commonwealth, 38 Va. (11 Leigh) 711, 712 (1841) (following *Richards*); United States v. Cartacho, 25 F. Cas. 312, 312-13 (C.C.D. Va. 1823) (No. 14,738) (granting a motion for a jury made up half of noncitizens, stating that the mixed jury was "a privilege, sometimes accorded to alien criminals by our courts, with whom it is discretionary, but in regard to which there is no act of congress, although the state laws have a provision to that effect").

64. *See* Ramirez, *supra* note 58, at 793.

65. United States v. Wood, 299 U.S. 123, 132-33, 145 (1936) (describing the list of jury requirements as "illustrations of the familiar principle which, while safeguarding the essence of the constitutional requirements, permits readjustments of procedure consistent with their spirit and purpose," and stating that "the ancient rule under which an alien might have a trial by jury *de medietate linguae* . . . no longer obtains").

66. *Id.* at 145 ("The Sixth Amendment does not preclude legislation making women qualified to serve as jurors in criminal prosecutions, although that was not permitted at common law.").

allowed the defendant.[67] In stating that the Constitution did not require a mixed jury, the Court implied that it also did not prohibit one. This implicit assumption was supported several decades later in *Carter v. Jury Commission*, in which the Court stated in dicta that "States remain free to confine the selection [of jurors] to citizens"—suggesting again that they were not required to do so.[68]

This conclusion is also supported by a handful of cases in which a noncitizen was inadvertently seated on a jury, and the defendant sought to challenge the verdict based on the noncitizen's presence.[69] In each of these cases, the court held that the verdict need not be set aside on this ground,[70] and in one 2007 case, the Court of Appeals of Maryland explicitly held that the citizenship requirement was not constitutionally compelled.[71]

B. *Challenges to the Citizenship Requirement as Excluding on the Basis of Citizenship*

If the citizenship requirement is not constitutionally compelled, is it true, as the Supreme Court's dicta in *Carter* indicated, that states can exclude noncitizens from juries? And can the federal government exclude noncitizens from juries? In the time since the Court in *Carter* provided the citizenship requirement as an example of a "long-accepted" qualification for jury service,[72] much has changed with respect to both the relevant doctrinal landscape and the demographic characteristics that may give rise to constitutional challenges. In approaching these questions, there are four general forms of legal challenges to

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67. *Id.* ("Congress has reduced the number of peremptory challenges of the accused. . . . 'There is nothing in the Constitution . . . which requires the Congress to grant peremptory challenges to defendants in criminal cases. . . .'") (quoting Stilson v. United States, 250 U.S. 583, 586 (1919)).

68. Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970). Another much earlier case made a similar statement. *See In re* Jugiro, 140 U.S. 291, 297 (1891) ("[S]o far as the Constitution of the United States is concerned, service upon grand and petit juries in the courts of the several States may be restricted to citizens of the United States."). That the citizenship requirement for jurors is not constitutionally compelled is consistent with another area in which civic participation is limited to citizens—voting. There, too, the restriction to citizens is not constitutionally compelled, and historically, many states allowed noncitizens to vote. *See* KEYSSAR, *supra* note 53, at 32-33.

69. *See* Lombardi, *supra* note 2, at 734-35; *see also, e.g.*, Kohl v. Lehlback, 160 U.S. 293, 300 (1895); Hollingsworth v. Duane, 4 U.S. (4 Dall.) 353, 12 F. Cas. 370 (C.C. Pa. 1801) (No. 6618); Owens v. State, 924 A.2d 1072, 1077 (Md. Ct. App. 2007). In *Missouri v. Murray*, the juror at issue did in fact turn out to be a U.S. citizen, but the court said that, in any case, the appellant could not object to the juror because of a state statute saying that "no exception to a juror on account of his citizenship [or other qualifications] shall be allowed after the jury is sworn." 292 S.W. 434, 437 (Mo. 1926).

70. *Kohl*, 160 U.S. at 300; *Hollingsworth*, 4 U.S. at 354, 12 F. Cas. at 371; *Owens*, 924 A.3d at 1094.

71. *Owens*, 924 A.3d at 1089.

72. *Carter*, 396 U.S. at 332.

the citizenship requirement to consider. The first two are based on the exclusion of noncitizens as such: exclusion on the basis of citizenship as violating the rights of (1) potential jurors and (2) parties before the jury. The second two are based on the citizenship requirement's disproportionate exclusion of minority groups: exclusion of racial or ethnic groups as violating the rights of (3) potential jurors and (4) parties before the jury. An analysis of these four approaches suggests that the first and third approaches, which focus on the rights of potential jurors, are likely to fail. Indeed, cases taking the first approach have failed, and to my knowledge no cases have even attempted the third approach, presumably because it is so unlikely to succeed. Although cases reflecting the second and fourth approaches have also failed, there may be room for successful challenges to the exclusion of noncitizens as violating the rights of parties before the jury, if properly framed, as discussed below.

1. *Rights of potential jurors*

A challenge to the exclusion of noncitizens as violating the rights of potential jurors might allege that those noncitizens are denied equal protection under the Fourteenth Amendment. This type of challenge has been repeatedly invoked in litigation involving race-based jury discrimination.[73] The Supreme Court first addressed this form of challenge to the exclusion of black jurors in its 1970 decision in *Carter v. Jury Commission*.[74] There, the Court stated that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[75] After two decades with some references to but without explicit reliance on jurors' equal protection rights,[76] in 1991, the Court clearly established the merit

73. Barbara Underwood argues that excluded jurors' right to equal protection is the best basis for the legal doctrine prohibiting race-based discrimination in jury selection. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726-27 (1992). Richard Re similarly argues that the juror-enfranchisement approach is the best justification for current fair cross-section jurisprudence. *See* Richard M. Re, Note, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568 (2007).

74. *Carter*, 396 U.S. at 329; *see* Underwood, *supra* note 73, at 743.

75. *Carter*, 396 U.S. at 329; *see* Underwood, *supra* note 73, at 743. Though the Court first directly addressed a challenge based on jurors' rights in *Carter*, the idea had been around since the Court's early foray into racial discrimination in jury selection in *Strauder v. West Virginia*. *See* Underwood, *supra* note 73, at 743. In *Strauder*, the Court stated:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. 303, 308 (1880).

76. Underwood, *supra* note 73, at 743-44.

of this type of challenge in *Powers v. Ohio*[77] and *Edmonson v. Leesville Concrete Co.*[78]

An equal protection challenge to the exclusion of noncitizens, however, would be unlikely to succeed.[79] The Supreme Court has held that the Equal Protection Clause applies to noncitizens,[80] and that as a general rule strict scrutiny applies to facial discrimination on the basis of alienage.[81] But with regard to state statutes requiring citizenship for jury eligibility, it is well established under *Sugarman v. Dougall* that state laws that exclude noncitizens from political participation and policymaking public employment do not violate equal protection because they promote significant state interests in self-governance.[82] For instance, the Supreme Court has upheld state citizenship requirements for probation officers,[83] public school teachers,[84] and state troopers.[85] Because jury participation is often thought of as a civic duty and a form of democratic

77. 499 U.S. 400, 406-08 (1991) (addressing a criminal jury).

78. 500 U.S. 614, 618-19 (1991) (addressing a civil jury).

79. Parties in jury trials (citizens or noncitizens) or excluded noncitizens could bring such a challenge. In the context of race-based discrimination challenges, both parties and potential jurors have been found to have standing for such a claim. *See id.* at 629 (holding that there was standing for the litigant in a civil trial); *Powers*, 499 U.S. at 415 (holding that there was standing for the defendant in a criminal trial); *Carter*, 396 U.S. at 329; *see also* Underwood, *supra* note 73, at 756 (discussing how both litigants and excluded jurors can raise challenges to race-based jury selection).

80. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Graham v. Richardson, 403 U.S. 365, 371 (1971) (citing *Yick Wo*, 118 U.S. at 369; Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948)) ("It has long been settled, and it is not disputed here, that the term 'person' in [the Fourteenth Amendment] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside."). This claim could presumably only be based on the rights of a lawful noncitizen—in this context, unauthorized migrants most likely do not have equal protection rights, or at least not rights that would lead to real judicial scrutiny. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1731-32 (2010) (discussing how the Supreme Court's statement in *Plyler v. Doe*, 457 U.S. 202 (1982), that equal protection applies to unauthorized migrants, has been confined to the context of K-12 public education).

81. *Graham*, 403 U.S. at 376.

82. *See* Sugarman v. Dougall, 413 U.S. 634, 647-48 (1973) (holding that states can deny noncitizens certain rights related to democratic political institutions).

83. Cabell v. Chavez-Salido, 454 U.S. 432, 433, 436 (1982).

84. Ambach v. Norwick, 441 U.S. 68, 81 (1979).

85. Foley v. Connelie, 435 U.S. 291, 300 (1978).

governance,[86] jury service would almost certainly fall under this type of state interest, and the Supreme Court has indicated as much.[87]

My research reveals only one case in which the citizenship requirement has been clearly challenged as a violation of potential jurors' equal protection, but its reasoning supports the analysis above. In *Perkins v. Smith*, a noncitizen resident of Maryland challenged the federal and state citizenship requirements for jury service.[88] A three-judge panel of the U.S. District Court for the District of Maryland, in a decision later affirmed without opinion by the Supreme Court, rejected his equal protection challenge because it found that Maryland had an interest in limiting jury eligibility to those who were citizens.[89] The court explained, quoting *Sugarman*, that jurors hold "important nonelective . . . judicial positions" and "perform functions that go to the heart of representative government."[90] The court said that while "states logically can anticipate that native-born citizens would be conversant with the social and political institutions of our society, the customs of the locality, and the nuances of local tradition and language," there was "no corresponding basis for assuming that resident aliens, who owe allegiance not to any state or to the federal government, but are subjects of a foreign power, have so assimilated our societal and political mores that an equal reliance could be placed on their performing as well as citizens."[91] Thus, the court in *Perkins* held that the juror citizenship requirement was "the prime example" in which a state interest justified alienage-based discrimination.[92]

Challenges to federal statutes, too, will likely fail. Despite the general application of strict scrutiny to alienage classifications, the Supreme Court has held that Congress may adopt federal classifications disadvantaging noncitizens that might violate equal protection if the same classifications were adopted by states.[93] Thus, for federal statutes, facial discrimination against noncitizens

86. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991) ("[Jury service] 'affords ordinary citizens a valuable opportunity to participate in a process of government . . . .' Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." (quoting Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting))).

87. *See* Foley, 435 U.S. at 296 ("Similar considerations [to those allowing a state to exclude noncitizens from voting and running for elective office] support a legislative determination to exclude aliens from jury service.").

88. Perkins v. Smith, 370 F. Supp. 134, 134 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976).

89. *Id.* at 137-38.

90. *Id.* at 137 (alterations in original) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

91. *Id.* at 138.

92. *Id.*

93. Mathews v. Diaz, 426 U.S. 67, 78-80 (1976) (holding that Congress could use its "broad power over immigration and naturalization" to restrict noncitizens' eligibility for Medicare, even if such a law "would be unacceptable if applied to citizens").

must only meet a "narrow standard of review."[94] Lower courts have interpreted this to effectively dictate rational basis review in cases involving federal statutes that classify by citizenship status.[95] Under the rational basis standard, federal statutes limiting noncitizen jury participation would surely be permissible. A congressional purpose of ensuring knowledge of and commitment to U.S. laws and customs for persons acting in positions of self-governance would be a sufficient justification for the exclusion, if it is sufficient for similar exclusion by states.[96] Thus, federal statutes excluding noncitizens from juries, like state statutes, are likely to survive equal protection challenges based on the rights of potential jurors.

2. *Rights of parties in jury trials*

Rather than focusing on the rights of potential jurors, however, a challenge to the citizenship requirement might focus instead on harm to a civil litigant or a criminal defendant. Like the harm to potential jurors, this harm might be framed as a violation of the party's equal protection rights. Or, for a criminal defendant, it might alternatively be framed as a violation of the party's Sixth Amendment rights. The following Subpart analyzes both types of challenges, concluding that while equal protection claims by jurors have failed in the past, a successful equal protection challenge to a state law is not foreclosed. Fair cross-section challenges, on the other hand, would likely fail.

a. *Equal protection*

A party's right to equal protection is commonly cited as the basis for bans on jury discrimination, and it was central to the development of jurisprudence on race-based exclusion from jury pools.[97] The Supreme Court's first treatment of racial discrimination in jury selection, in *Strauder v. West Virginia*, took this approach. The Court held that "the statute of West Virginia, discriminating in the selection of jurors . . . against negroes because of their color, amounts to a

94. *Id.* at 82.

95. *See, e.g.*, City of Chi. v. Shalala, 189 F.3d 598, 604 (7th Cir. 1999).

96. A Fourteenth Amendment challenge based on the denial of a fundamental right would also be likely to fail. Though jury service has been described as a "prized privilege[]" having "undoubted importance," United States v. Conant, 116 F. Supp. 2d 1015, 1021 (E.D. Wis. 2000) (internal quotation marks omitted), no court has found that it is a fundamental right, *id.* at 1022 ("Neither these cases, nor any others the court is aware of, suggest that a fundamental right has been impinged in the process."). *See also, e.g.*, Eckstein v. Kirby, 452 F. Supp. 1235, 1241 (E.D. Ark. 1978); Adams v. Superior Court, 524 P.2d 375, 379 (Cal. 1974).

97. Underwood, *supra* note 73, at 728. But Underwood argues this view does not adequately explain the current doctrine on jury discrimination. *See id.* at 728-36.

denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence."[98]

Under *Strauder*, a law facially excluding jurors based on race is a violation of the equal protection rights of a defendant who belongs to that racial group.[99] But is it also true that a noncitizen defendant or litigant is denied the equal protection of the laws when noncitizens are excluded from the jury?[100] When a federal law excludes noncitizens from the jury, the answer is likely to be no. As discussed above, Congress's broad power over immigration and naturalization means that discrimination based on alienage is subject only to rational basis review. That standard would most likely be easily met based on the same rationale as in challenges based on jurors' rights—the congressional purpose of ensuring knowledge of and commitment to U.S. laws and customs for persons acting in positions of self-governance.[101] I say "most likely," however, because here the reasoning is slightly more attenuated: Congress is discriminating against a potential *juror* based on alienage, leading to a possible violation of the *party's* rights. But because both the potential juror and the party are noncitizens, the reasoning likely remains persuasive.

When a state law excludes noncitizens, the Supreme Court's jurisprudence does not make clear whether the self-governance exception of *Sugarman*[102] would apply when parties'—as opposed to jurors'—rights are at issue. *Sugarman* and its progeny address the state's ability to restrict noncitizens from public office and related positions. It seems a natural extension of this doctrine to apply it to jurors as participants in civic decisionmaking. But the *Sugarman* exception may not go as far as to limit the rights of parties in jury trials. An equal protection challenge to the exclusion of noncitizens from juries differs

98. Strauder v. West Virginia, 100 U.S. 303, 310 (1880).

99. *See also* Powers v. Ohio, 499 U.S. 400, 404 (1991) ("For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct.").

100. The Supreme Court has made clear that this equal protection right extends to civil litigants in addition to criminal defendants. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994). There is little chance that a *citizen* party could successfully claim that excluding noncitizens violated his or her equal protection rights. The Supreme Court has avoided holding that a defendant of one race was denied equal protection by the exclusion of jurors of another race, preferring, in cases where this issue was raised, to avoid it by deciding the case instead on the excluded juror's equal protection rights. *See* Underwood, *supra* note 73, at 734-36 (stating that "the Court has strained mightily" to avoid this type of claim). There is also a question as to whether an unauthorized immigrant who is a party to a jury trial has equal protection rights in this context. An unauthorized immigrant who is a civil litigant likely would not. *See supra* note 80. An unauthorized immigrant criminal defendant, however, may have a good case that equal protection should apply. The Supreme Court has indicated that persons unlawfully present may have greater constitutional rights when physical confinement is at stake than they would otherwise. *See* Zadvydas v. Davis, 533 U.S. 678, 690-96 (2001); Wong Wing v. United States, 163 U.S. 228, 237 (1896).

101. *See supra* notes 93-96 and accompanying text.

102. *See supra* notes 82-85 and accompanying text.

from the exception's application to jurors in two respects. First, the noncitizen being excluded from the public decisionmaking body is not the one whose rights are at issue. Second, what is being denied to the excluded noncitizen—in a denial that is arguably valid under *Sugarman*—is not the same as the right claimed by the noncitizen party. That is, the noncitizen potential juror is being denied the ability to serve on the jury; the noncitizen party whose rights are at issue is being denied the right to a fair trial. These differences may mean that the *Sugarman* exception does not apply when a party's rights are at issue.

To be sure, some of the reasoning behind the *Sugarman* exception still applies when parties' rights are at issue. Regardless of whose rights are in question, noncitizens are still being excluded from an institution "bound up with the operation of the State as a governmental entity."[103] Indeed, the few cases that have addressed equal protection claims by noncitizen parties based on the exclusion of noncitizens from juries have followed the reasoning of *Sugarman* and concluded that there was no equal protection violation because the self-governance exception applied.[104]

However, the reasoning in these decisions is not entirely persuasive because it applies the self-governance exception without making the distinction between the equal protection of *jurors* and the equal protection of the *parties before the jury*. Indeed, several of these cases cite to *Perkins* for support,[105] even though that case was unquestionably about the equal protection of a potential juror.[106] Moreover, there is reason to doubt these cases' conclusions because the Supreme Court has explained that the *Sugarman* exception "represents the choice, and right, of the people to be governed by their citizen peers."[107] This statement suggests that perhaps the exception is not appropriately extended when those being governed are not "*citizen* peers" at all. Thus,

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103. Ambach v. Norwick, 441 U.S. 68, 73-74 (1979).

104. *See* Rubio v. Superior Court, 593 P.2d 595, 601-02 (Cal. 1979); State v. Thigpen, 397 A.2d 912, 913 (Conn. Super. Ct. 1978); Commonwealth v. Acen, 487 N.E.2d 189, 195-96 (Mass. 1986); *see also* United States v. Avalos, 541 F.2d 1100, 1118 (5th Cir. 1976) (relying on *Perkins*).

105. *See, e.g.*, *Avalos*, 541 F.2d at 1118 ("[Defendants] contend that the exclusion of resident aliens from the grand jury and trial venires denied them equal protection . . . . In *Perkins v. Smith*, the Court affirmed [that] laws excluding resident aliens from . . . jury service do not violate . . . equal protection." (citation omitted)); *Rubio*, 593 P.2d at 601-02 (stating, regarding the "defendant's contention that he was denied equal protection because of the exclusion of resident aliens from jury service," that "jury service has now been recognized as one of the basic decision-making functions of government," and citing to *Perkins* in its discussion).

106. In *Perkins v. Smith*, a noncitizen resident of Maryland challenged the state and federal statutes excluding him from jury service. 370 F. Supp. 134, 134 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976). In that case, it was quite clear that his rights as a potential juror, not the rights of a litigant or defendant, were at stake. *Id.* In fact, he originally attempted to bring the suit as a class action representing all noncitizens otherwise qualified for jury service. *Id.*; *see also supra* notes 88-92 and accompanying text.

107. Foley v. Connelie, 435 U.S. 291, 296 (1978).

while equal protection challenges to the citizenship requirement have failed in the past, the possibility for a successful challenge emphasizing the party's—in contrast to the juror's—equal protection is not foreclosed.

b. *Fair cross-section*

Another possible challenge to the exclusion of noncitizens from jury service is as a violation of a party's right to a jury drawn from a fair cross-section of the community.[108] Since the 1940s, the Supreme Court has explicitly recognized that "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."[109] This requirement was codified for federal courts in 1968 by the Federal Jury Selection and Service Act,[110] and seven years later, the Supreme Court held in *Taylor v. Louisiana* that the fair cross-section requirement was constitutionally compelled for criminal juries by the Sixth Amendment,[111] which guarantees the right in criminal prosecutions to a trial "by an impartial jury."[112] *Taylor* made clear, however,

108. Only a defendant (or litigant, if the constitutional fair cross-section applies to civil juries, *see infra* note 112) would have standing to bring such a constitutional claim; excluded potential jurors do not have standing. *See* Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 342 (2005) (citing U.S. CONST. amend. VI; United States v. King, 36 F. Supp. 2d 705, 710 n.3 (E.D. Va. 1999)). However, a defendant does not need to be a member of the excluded group to have standing. *See* Holland v. Illinois, 493 U.S. 474, 477 (1990) ("[O]ur cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs."); Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (holding that a man had standing to challenge the exclusion of women from the jury). Further, even a defendant who is an unauthorized immigrant should be able to bring this claim, because it is based on his Sixth Amendment rights as a criminal defendant. *See* Wong Wing v. United States, 163 U.S. 228, 238 ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments].").

109. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946); *see also* Glasser v. United States, 315 U.S. 60, 83-87 (1942). But the Court's opinion in *Strauder*, over six decades earlier, had at least implicitly recognized this idea. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

110. Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-1869 (2006)). The Act requires that each district court have a plan "designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes." 28 U.S.C. § 1863.

111. 419 U.S. at 526 ("[P]resence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions."). The Court had previously held in *Duncan v. Louisiana* that the Sixth Amendment's provision for jury trial was binding on the states under the Fourteenth Amendment. 391 U.S. 145, 149 (1968).

112. U.S. CONST. amend. VI. Because the constitutional requirement is grounded in the Sixth Amendment, challenges taking this approach would be open to criminal defendants but most likely not civil litigants (though they could bring a statutory claim). Some courts have

that the fair cross-section requirement means only that the jury must be drawn from a representative source; it does not mean that defendants have a right to a petit jury of any particular composition.[113]

In the 1979 case of *Duren v. Missouri*, the Supreme Court articulated a two-step test for a violation of the Sixth Amendment's fair cross-section requirement.[114] First, a prima facie violation of the fair cross-section requirement is established by showing that there is a "distinctive" group that is underrepresented relative to the community, "due to systematic exclusion . . . in the jury-selection process."[115] A prima facie violation can be rebutted by a showing that a significant government interest is "manifestly and primarily advanced by those aspects of the jury-selection process" and that "attainment of a fair cross section [is] incompatible" with that interest.[116]

It is doubtful that excluding noncitizens from juries as such violates the test set out in *Duren*. First, it is unlikely that their exclusion would establish a prima facie case. Even if noncitizens were found to be underrepresented due to systematic exclusion,[117] it is unlikely they would be found to be a "distinctive" group. The majority of federal courts of appeals have adopted the standard that a group is distinctive if it has (1) a "defin[ing] and limit[ing] . . . factor (i.e., . . . a definite composition such as by race or sex)," (2) a "common thread or basic similarity in attitude, ideas, or experience," and (3) a "community of interest . . . such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process."[118] The group consisting of noncitizens is characterized by several factors that courts, in applying this definition, generally weigh against distinctiveness. For one, there is significant diversity amongst noncitizens. Moreover, citizenship is a legal definition, not an immutable characteristic—most noncitizens can eventually naturalize. Courts are generally resistant to allowing fair cross-section claims based on nonpermanent characteristics.[119]

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held and commentators have argued, however, that the requirement applies to civil juries as well. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 75 & n.36 (2003) (listing examples of courts and scholars favoring this position, and pointing out that the fair cross-section doctrine originated with a civil case, *Thiel*, 328 U.S. 217).

113. *Taylor*, 419 U.S. at 538.

114. 439 U.S. 357, 364, 367-68 (1979).

115. *Id.* at 364.

116. *Id.* at 367-68.

117. Whether noncitizens are actually "underrepresented" under *Duren* is actually more complicated than it appears. *See* discussion *infra* Part III.C.2.b.

118. Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983); *accord* United States v. Green, 435 F.3d 1265, 1271 (10th Cir. 2006); United States v. Raszkiewicz, 169 F.3d 459, 463 (7th Cir. 1999); United States v. Fletcher, 965 F.2d 781, 782 (9th Cir. 1992); United States v. Canfield, 879 F.2d 446, 447 (8th Cir. 1989); United States v. Di Pasquale, 864 F.2d 271, 277 (3d Cir. 1988); Ford v. Seabold, 841 F.2d 677, 681-82 (6th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 995 (1st Cir. 1985).

119. Re, *supra* note 73, at 1592. For instance, courts have consistently held that age-based groups are not distinctive. *Id.*; *see* Johnson v. McCaughtry, 92 F.3d 585, 593 (7th Cir.

The few courts that have addressed this issue have held that noncitizens are not a distinctive group for purposes of the fair cross-section requirement. For instance, in *United States v. Armsbury* in 1976, an Oregon federal district court concluded that it would not recognize as cognizable "[g]roups based solely on language, residency, or citizenship."[120] In *Rubio v. Superior Court* in 1979, the California Supreme Court similarly held that noncitizens were not cognizable because their viewpoint could be represented by naturalized citizens.[121] Since these cases, some courts have recognized distinctive groups based on traits other than race or sex, holding that groups such as Hispanics,[122] Native Americans of the Shoshone and Arapaho tribes,[123] Jews,[124] and the Amish[125] were distinctive.[126] But given the generally restrictive view currently taken by most courts,[127] noncitizens are unlikely to qualify. On the other hand, many courts treat as the same groups receiving heightened protection under equal protection and groups that are cognizable under the fair cross-section doctrine.[128] Under such an approach, perhaps noncitizens should be a distinctive group, since strict scrutiny applies to alienage classifications.[129]

1996) (citing many cases rejecting age-based groups as "distinctive" under *Duren*, including cases from the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

120. 408 F. Supp. 1130, 1134-35 (D. Or. 1976).

121. 593 P.2d 595, 598-99 (Cal. 1979) (using a different test for cognizability requiring that "no other members of the community are capable of adequately representing the perspective of the group assertedly excluded"); *see also* United States v. Musto, 540 F. Supp. 346, 357 (D.N.J. 1982) (holding that aliens are not a cognizable group under the fair cross-section requirement because nonvoting citizens are not a cognizable group).

122. *See, e.g.*, United States v. Nelson, 137 F.3d 1094, 1101 (9th Cir. 1998) (reaffirming that Hispanics are a distinctive group under *Duren*).

123. *See* United States v. Tranakos, 690 F. Supp. 971, 976-77 (D. Wyo. 1988) (finding these tribes to be a cognizable group in a challenge to a grand jury selection plan).

124. *See* United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989).

125. *See* State v. Fulton, 566 N.E.2d 1195, 1201 (Ohio 1991) (holding that the Amish are a distinctive group).

126. Groups defined by sexual orientation have also been found to constitute a distinctive group under the California Constitution. *See* People v. Garcia, 92 Cal. Rptr. 2d 339, 347-48 (Ct. App. 2000).

127. Courts have rejected as distinctive groups "young people, old people, poor people, deaf people, less educated people, college students, resident aliens, blue-collar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis." Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 968-69 (1998) (footnotes omitted).

128. *See* Sanjay K. Chhablani, *Re-Framing the "Fair Cross-Section" Requirement*, 13 U. PA. J. CONST. L. 931, 947 (2011).

129. Graham v. Richardson, 403 U.S. 365, 376 (1971). Richard Re has argued that some "quasi-permanent traits" might properly be the basis for a distinctive group if the group's membership was sufficiently fixed and well defined to serve as a meaningful proxy for individual exclusion. Re, *supra* note 73, at 1595. Given the difficulty and long delay of the naturalization process, noncitizens might well qualify under such a test.

In any case, even if a prima facie violation could be established, a court would almost surely find a government interest sufficient to rebut it. The "significant state interest" sufficient to defeat a prima facie case under *Duren* is similar to the significant interest based on self-governance that can defeat an equal protection challenge to a state law that excludes noncitizens from certain types of public employment.[130] Indeed, several cases—when they reject fair cross-section challenges to the exclusion of noncitizens—cite equal protection cases that rely on the self-governance exception to support the existence of a significant government interest to defeat a prima facie violation.[131] Moreover, in response to challenges to analogous exclusions, courts have found a significant government interest sufficient to uphold the exclusions. Courts have upheld the requirement that jurors must speak English, despite the widespread exclusion caused by that requirement in Puerto Rico,[132] based on the "overwhelming national interest served by the use of English in a United States court."[133] Courts have also upheld the exclusion of felons from juries based on the "significant governmental interest in having jurors who can be relied upon to perform their duties conscientiously, and in accordance with the law."[134] Given the findings of sufficient government interests to rebut a prima facie case in these contexts, as well as the accepted government interest in restricting self-governance positions to citizens under equal protection doctrine, any prima facie violation of the fair cross-section requirement due to exclusion of noncitizens is likely to be rebutted.

C. *Challenges to the Citizenship Requirement as a Proxy for Racial or Ethnic Exclusion*

Challenges to the citizenship requirement as discriminating against or excluding noncitizens as such are perhaps the most obvious type of challenge. But another form of challenge can be based on noncitizenship's strong correlation with race and ethnicity and the resulting effect of exclusion of minorities—

130. *See supra* notes 82-86.

131. *See, e.g.*, United States v. Toner, 728 F.2d 115, 129 (2d Cir. 1984); Commonwealth v. Acen, 487 N.E.2d 189, 195-96 (Mass. 1986).

132. *See* Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497, 498, 522-24 (2011).

133. United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir. 1990); *see also* United States v. Dubón-Otero, 292 F.3d 1, 17 (1st Cir. 2002) (citing *Aponte-Suarez*, 905 F.2d at 492); United States v. Flores-Rivera, 56 F.3d 319, 326 (1st Cir. 1995) (same); United States v. Benmuhar, 658 F.2d 14, 19-20 (1st Cir. 1981) (reasoning that the government's interest in the language requirement was "significant" based on the need for federal district courts to provide a nationally uniform forum for resident and nonresident litigants, the ability of the Attorney General to appear and other judges to sit without language considerations, and translation "distortions").

134. United States v. Greene, 995 F.2d 793, 798 (8th Cir. 1993).

generally Hispanics and Asians—at higher rates than other racial and ethnic groups.[135] Like challenges to the exclusion of noncitizens as such, challenges focusing on racial and ethnic exclusion could be approached in two ways: potential jurors may have an equal protection claim, or parties before the jury may have equal protection or fair cross-section claims. Though the analytical framework is similar to challenges to the citizenship requirement based on excluding noncitizens as such, the outcomes may be different.

1. *Rights of potential jurors*

A challenge focusing on the rights of potential jurors would characterize the citizenship requirement as a proxy for discrimination based on race or ethnicity, and thus as violating equal protection. From this perspective, any equal protection claim is likely to fail. The reason begins with the absence of any racial or ethnic classification on the face of the statutes requiring citizenship. As such, a successful equal protection claim would ultimately require finding that the citizenship requirement had a purpose to discriminate against certain racial or ethnic groups.[136]

The first federal statute to dictate specific juror qualifications, including the citizenship requirement, was passed by Congress in 1957.[137] Some state requirements were enacted much earlier. In California, for example, the citizenship requirement can be traced back to 1851, within one year of achieving

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135. *See supra* Part I.

136. *See* Washington v. Davis, 426 U.S. 229, 239, 242 (1976) (holding that there must be proof of a discriminatory purpose—not just proof of discriminatory impact—for a law or official act to be subject to strict scrutiny). In *Castaneda v. Partida*, the Supreme Court articulated a test for a prima facie equal protection violation in jury selection: a (1) suspect class is (2) underrepresented over a significant period of time, and (3) there is a selection procedure "susceptible of abuse" or not racially neutral. 430 U.S. 482, 494-95 (1977). It can be rebutted by evidence "to dispel the inference of intentional discrimination." *Id.* at 497-98. *Castaneda* addressed grand jury selection, but it has been widely applied to challenges to petit jury selection as well. *See, e.g.*, United States v. Orange, 447 F.3d 792, 796-97 (10th Cir. 2006). Because this test is largely aimed at ferreting out discrimination in, for instance, highly subjective selection procedures, the bulk of the inquiry in a challenge to the citizenship requirement would presumably simply focus on whether the statute had discriminatory purpose. *Cf.* United States v. Ovalle, 136 F.3d 1092, 1105 (6th Cir. 1998).

137. Civil Rights Act of 1957, Pub. L. No. 85-315, § 152, 71 Stat. 634, 638 (1957) (codified as amended at 28 U.S.C. § 1865 (2006)); *see also* Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 249, 251 (1973). Prior to 1957, federal juror qualifications were determined based on the state requirements where the court sat. Imlay, *supra*, at 249. In 1941, the Judicial Conference appointed a committee to survey the jury systems throughout federal courts. John C. Knox, *Selection of Federal Jurors*, 31 J. AM. JUDICATURE SOC'Y 9, 11 (1947). In the resulting report, the committee members suggested that a uniform set of federal requirements ought to be enacted. JOHN C. KNOX ET AL., REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON SELECTION OF JURORS 6 (1942). The committee's proposed statute included the citizenship requirement. *Id.* at 44.

statehood.[138] Other states enacted specific juror citizenship requirements more recently, but effectively limited jurors to citizens quite early. For instance, in Delaware, the jury selection statute adopted in 1848 specified that jurors would be selected from those qualified to vote, who were in turn limited under the constitution of Delaware, adopted in 1831, to white male citizens.[139]

Much has changed since the adoption of these statutes. The demographic profile of the United States has changed significantly, with dramatic increases in the noncitizen and Hispanic populations in particular.[140] At the same time, the character of discrimination with respect to jurors, and more generally, has changed dramatically from outright de jure discrimination to more subtle forms. These factors, combined with the complicated history of the adoption of citizenship requirements and the plausibility of race-neutral reasons for limiting jurors to citizens, means that even if any specific statute had been enacted or ratified with discriminatory intent, it would be nearly impossible to prove it. The impracticability of this type of intent-based claim against the citizenship requirement is consistent with my research finding no cases in which this argument was advanced.

2. *Rights of parties in jury trials*

a. *Equal protection*

In Part III.B, I suggested that equal protection challenges to the exclusion of noncitizens as such might be more successful if framed as protecting the rights of parties in jury trials, rather than as protecting the rights of potential jurors. But when the exclusion of noncitizens is challenged as a proxy for racial and ethnic exclusion, it is no help to reframe the challenge this way. Regardless of whose rights are at stake, a successful equal protection claim would still run into the same obstacle—proving there was a discriminatory purpose.

b. *Fair cross-section*

Unlike an equal protection claim, however, a fair cross-section challenge would not have the limitation of requiring discriminatory purpose—the fair cross-section requirement focuses on effects, not motive.[141] If a defendant

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138. *See* 1851 Cal. Stat. 290 ("A person shall not be competent to act as a Juror, unless he be . . . A Citizen of the United States."). The Judicial Conference committee report in 1942 reported that twenty states (as well as the District of Columbia) had juror qualification statutes requiring citizenship. *See* KNOX ET AL., *supra* note 137, at 34.

139. Neal v. Delaware, 103 U.S. 370, 387-88 (1881).

140. See the Appendix for graphs showing the change in the noncitizen, Hispanic, and Asian populations over time.

141. *See* Alston v. Manson, 791 F.2d 255, 258-59 (2d Cir. 1986) ("The sixth amendment . . . forbids any substantial underrepresentation of minorities regardless of whether the

challenged the exclusion of noncitizens from the jury as violating the fair cross-section requirement by disproportionately excluding minority groups, the claim would be analyzed under the same *Duren* test as discussed above.[142] The first requirement for a prima facie case would almost surely be met: that the group is "distinctive." Both race[143] and Hispanic ethnicity[144] have been held to be bases for distinctive groups. The requirement for a prima facie case that the underrepresentation be systematic would also be met. In *Duren*, the Supreme Court clarified that this element requires the underrepresentation to be caused by something "inherent in the particular jury-selection process utilized."[145] Here, because the exclusion is statutory, it is clearly inherent and therefore systematic.

The final element of the prima facie case is underrepresentation. The most commonly used measures of underrepresentation are absolute disparity and comparative disparity.[146] Absolute disparity measures the difference between the distinctive group's representation in the community and in the jury pool; it is calculated by subtracting the group's percentage in the jury pool from its percentage in the community.[147] Comparative disparity instead measures the decreased likelihood that a member of the group will be called for jury service due to the underrepresentation; it is calculated by dividing the absolute disparity by the group's percentage in the overall population.[148] The Supreme Court

State's motive is discriminatory. The fourteenth amendment, however, imposes the additional requirement of discriminatory purpose."); Re, *supra* note 73, at 1590.

142. *See supra* notes 114-16 and accompanying text.

143. Most of the circuits have adopted a test that uses racial groups as an example of a distinctive group. *See supra* note 118 and accompanying text.

144. *See* United States v. Rodriguez-Lara, 421 F.3d 932, 941 (9th Cir. 2005) ("Rodriguez's claim clearly satisfies the first prong of *Duren*. Hispanics have long been recognized as a 'distinctive' group in the community."); *cf.* Stephen E. Reil, Comment, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under* Duren v. Missouri, 2007 BYU L. REV. 201, 210-12 (discussing a few instances of courts questioning whether Hispanics were a distinctive group under *Duren*, but concluding that "Hispanics are generally considered a distinct group" and would "likely" be found distinctive in Utah). *But see* United States v. Duran de Amesquita, 582 F. Supp. 1326, 1328 (S.D. Fla. 1984) (holding that the defendant did not establish that "persons with 'hispanic' surnames" were a cognizable group).

145. Duren v. Missouri, 439 U.S. 357, 366 (1979).

146. Paula Hannaford-Agor & Nicole L. Waters, *Safe Harbors from Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool*, 8 J. EMPIRICAL LEGAL STUD. 762, 765 (2011). There are also statistical metrics that measure the probability that the observed underrepresentation of the group is due to chance, but these have not been widely adopted by courts. *Id.* at 765 n.5.

147. *See* United States v. Rioux, 97 F.3d 648, 655 (2d Cir. 1996) ("The absolute disparity method measures the difference between the group's representation in the general population and the group's representation in the qualified wheel.").

148. *Id.*

has declined to endorse any particular metric for underrepresentation,[149] but absolute disparity is used most frequently and is more often the preferred measure.[150] While most courts do not specify an exact numerical threshold at which an absolute disparity qualifies as underrepresentation, courts generally suggest that a disparity under 10% is insufficient.[151]

If the actual disparities based on ACS data for 2005-2009 are calculated for all U.S. counties, the exclusion of noncitizens results in a 10% or greater disparity in Hispanic representation in 72 counties (or county equivalents) in the United States when looking at the adult population. When considering all ages, it results in 10% or greater disparity in 25 counties.[152] The counties with 10% or greater disparities are shown in Figure 3 below.

149. *See* Berghuis v. Smith, 130 S. Ct. 1382, 1393 (2010) ("[N]either *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools. . . . Each test is imperfect.").

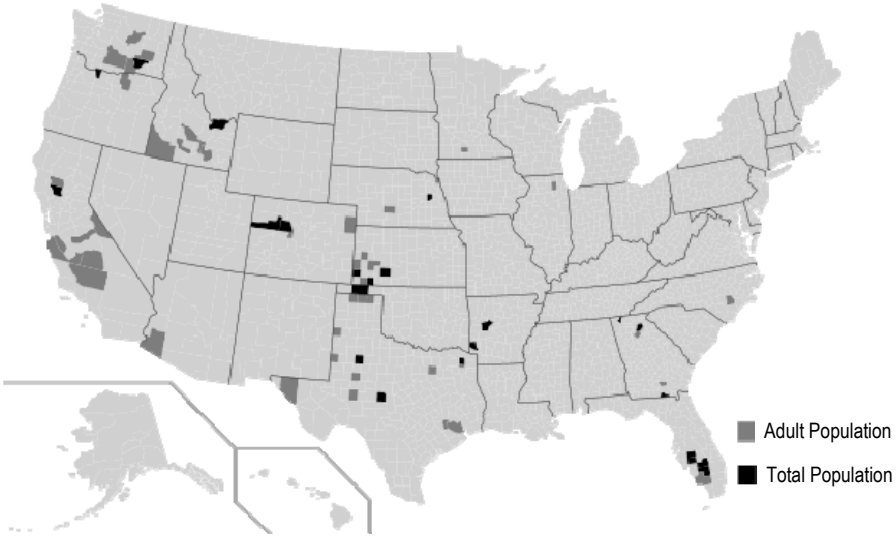
150. *See* United States v. Weaver, 267 F.3d 231, 242 (3d Cir. 2001); United States v. Rioux, 930 F. Supp. 1558, 1570 (D. Conn. 1995), *aff'd*, 97 F.3d 648 (2d Cir. 1996); *see also, e.g.*, United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998) ("In this circuit, 'absolute disparity . . . is the starting place for all other modes of comparison.'" (omission in original) (quoting United States v. Yazzie, 660 F.2d 422, 427 (10th Cir. 1981))).

151. *Shinault*, 147 F.3d at 1273 (citing *Rioux*, 930 F. Supp. at 1570); Hannaford-Agor & Waters, *supra* note 146, at 766. *But cf.* Ramseur v. Beyer, 983 F.2d 1215, 1232 (3d Cir. 1992) (finding a 14.1% absolute disparity to be "of borderline significance"). Some courts have explicitly imposed a 10% threshold. *See* United States v. Carmichael, 560 F.3d 1270, 1280 (11th Cir. 2009) (citing United States v. Grisham, 63 F.3d 1074, 1078-79 (11th Cir. 1995)).

152. The disparities were calculated using data from American FactFinder. *See supra* note 9. Because citizenship is conferred on almost all children born in the United States, *see* U.S. CONST. amend. XIV, § 1, a greater number of counties meet the threshold when only adults are considered. Approximately 63% of Hispanic adults are citizens, while 92% of Hispanic children are citizens. *See American FactFinder*, *supra* note 9. Because ACS data is broken down only at age eighteen, I have calculated the disparities for adults based on those who are eighteen or older, even though a handful of states actually have slightly higher age requirements for jury service, *see supra* note 9.

I believe the comparison based on the adult population is more meaningful because it isolates the effect of the citizenship requirement. On that theory, of course, it would be more accurate to calculate the disparities after taking other qualifications into account, particularly the English-language requirement. Unfortunately, I could not find the data to do this calculation, but presumably it would decrease the number of counties meeting the threshold, with the extent of the reduction depending on how many adult Hispanic citizens do not speak English.

FIGURE 3
Counties with 10% or Greater Absolute
Disparities in Hispanic Representation[153]



It is worth noting the somewhat counterintuitive fact that it is not the counties with the highest Hispanic populations that have the greatest absolute disparities. This is because if Hispanics make up the vast majority of the total population, they will generally also make up the vast majority of the citizens, even if not all Hispanics are citizens. As Hispanics grow from a small segment of a community to a larger one, the demographic change will initially lead to larger absolute disparities, but at a certain point, the absolute disparity will begin to decrease.[154] Thus, if the Hispanic population continues to increase in

153. The disparities were calculated using data from American FactFinder. *See supra* note 9. All of the counties with a 10% disparity based on the total population had a disparity of at least 10% based on the adult population. It should be noted that this analysis does not fully represent situations in which an actual claim would be successful, since counties often do not correspond to the geographic regions from which the jury is drawn. Whereas county juries are generally drawn from the whole county, *see, e.g.*, L.A. SUPER. CT. LOC. R. 2.19(a), *available at* http://www.lacba.org/Files/Main%20Folder/CourtNotices/files/LASC_Local_Rules_Effective_July_1_2011.pdf, federal juries are often drawn from multiple counties, *see, e.g.*, *supra* notes 18-19.

154. This idea is illustrated below in Figure 4. The lines represent the disparity (absolute or comparative) as Hispanics vary from 0% to 100% of the total population in a given jurisdiction. The curves' shapes depend on the percentage of Hispanics in the community who are citizens (which is held constant for each graph here). The graph on the left shows the disparities when 50% of Hispanics are citizens. The graph on the right shows the dispari-

communities throughout the United States, constitutionally cognizable levels of underrepresentation may ripple through jurisdictions, surfacing in various locations as demographic changes occur.

Although absolute disparity is the most common measure of underrepresentation, it has been criticized as a poor metric in areas where the group is a relatively small proportion of the population.[155] Absolute disparity can never be greater than a group's percentage in the community; thus, if a group makes up less than 10% of the population, it would be impossible to establish a cognizable disparity under a 10% rule.[156] It can therefore be useful to also look at comparative disparity.[157] But not all courts accept comparative disparity as a metric of underrepresentation,[158] and the appropriate threshold is unclear. However, some courts have suggested a disparity of 50% as a rough threshold.[159] Based on ACS data from 2005-2009, 180 counties (or county equivalents) would exceed a 50% threshold when considering the total population, and 685 counties would exceed it when considering only the adult population.[160] These counties are shown in Figure 5, below.

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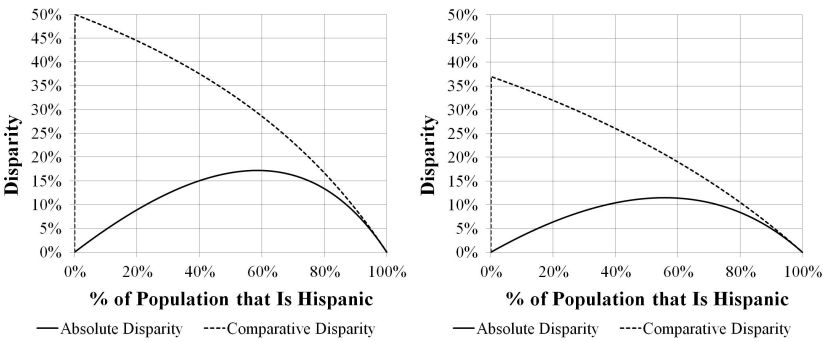
ties when 63% of Hispanics are citizens (the current statistic for adult Hispanics). *See supra* note 152.

FIGURE 4



155. *See, e.g.*, United States v. Rogers, 73 F.3d 774, 776-77 (8th Cir. 1996).

156. Hannaford-Agor & Waters, *supra* note 146, at 780-81.

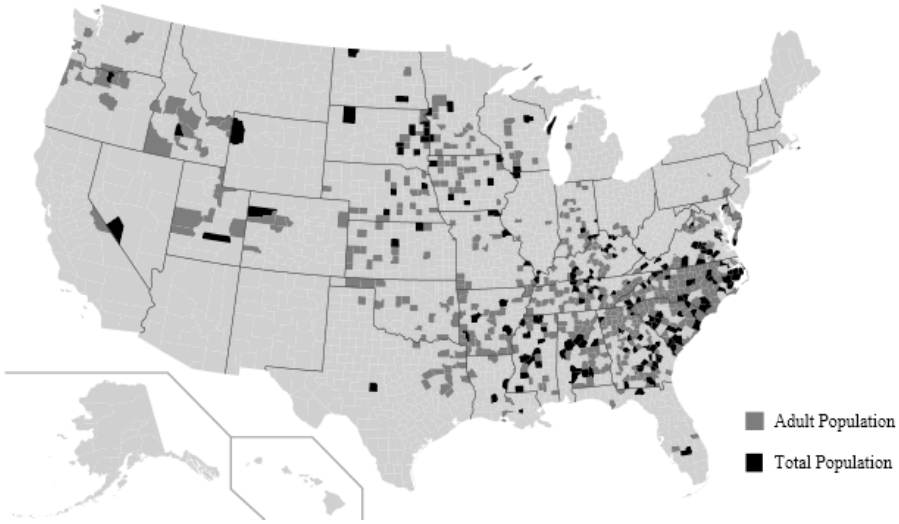
157. *Rogers*, 73 F.3d at 777; Hannaford-Agor & Waters, *supra* note 146, at 766.

158. *See, e.g.*, United States v. Royal, 174 F.3d 1, 7 (1st Cir. 1999) ("For fifteen years, this Circuit has rejected comparative disparity analysis and applied absolute disparity analysis in cases similar to the case at hand . . . .").

159. *See* State v. Lopez, 692 P.2d 370, 377 (Idaho Ct. App. 1984); Hannaford-Agor & Waters, *supra* note 146, at 766; *cf.* Evans v. State, 926 P.2d 265, 275 (Nev. 1996).

160. The disparities were calculated using data from American FactFinder. *See supra* note 9. It is important to note that that comparative disparity is criticized for overstating the severity of underrepresentation when populations are very small. *See* Hannaford-Agor & Waters, *supra* note 146, at 766-67. Thus, even a court accepting comparative disparity as a valid metric for measuring underrepresentation under *Duren* might not consider it meaningful when Hispanics make up too small of a proportion of the population. Excluding counties with very low Hispanic populations would decrease the number meeting a 50% threshold. If,

FIGURE 5
Counties with 50% or Greater Comparative Disparities in Hispanic Representation[161]



In contrast to the numerous counties with populations in which cognizable disparities might be shown for Hispanics, fewer counties would meet either test for underrepresentation with respect to Asians, even though the rate of noncitizenship among Asians is high. Only one county in the United States would meet the 10% threshold for absolute disparity.[162] Using the comparative test, 627 counties have a disparity of 50% or greater when considering the adult population, and 483 counties have such a disparity when considering the total population. However, in the vast majority of these counties, the overall Asian population is extremely low; when looking only at counties with overall or adult Asian populations exceeding 2%, only 48 counties have 50% or greater

for instance, only counties with Hispanic populations exceeding 2% of the total population were considered, the exclusion of noncitizens would result in a disparity of 50% or greater in 491 counties in the United States considering only the adult population, and in 124 counties considering all ages. These disparities were calculated using data from American FactFinder. *See supra* note 9.

161. The disparities were calculated using data from American FactFinder. *See supra* note 9. All but two counties meeting the 50% threshold considering total population also met the threshold considering only adult population.

162. The disparities were calculated using data from American FactFinder. *See supra* note 9. The 10% threshold is met in the Aleutians East Borough in Alaska when considering either adult or total population.

disparities for the adult population, and only 30 counties have such disparities for the total population.[163]

Although in some jurisdictions the exclusion of noncitizens leads to disparities between the jury-eligible population and the overall (or overall adult) population at levels that may generally be constitutionally cognizable, the underrepresentation prong of *Duren* is not necessarily met. This is because several courts considering fair cross-section challenges to the exclusion of noncitizens have held that the appropriate comparison is to the *jury-eligible* population, not the population in the general community. If this is correct, the disparity caused by statutorily excluding noncitizens is zero.

In the 1975 Fifth Circuit case of *United States v. Gordon-Nikkar*, for instance, the defendant challenged the exclusion of noncitizens from the jury as a violation of his Sixth Amendment rights.[164] The court stated:

> [Despite] a fundamental right to trial by a jury which is a truly representative cross-section of the community[,] . . . "it has never been thought that federal juries must be drawn from a cross-section of the *total* population without the imposition of any qualifications." . . . The "truly representative cross-section" requirement encompasses only individuals qualified to serve as jurors.[165]

The Nebraska Supreme Court similarly held that in such a circumstance "the cross-section requirement is not invoked."[166] Other courts addressing fair cross-section claims, while not expressly stating that the fair cross-section requirement categorically encompasses only qualified jurors, have stated that eligible juror populations are the appropriate comparison or have simply used population data for eligible jurors in their analyses.[167]

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163. The disparities were calculated using data from American FactFinder. *See supra* note 9.

164. United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975).

165. *Id.* at 975-76 (quoting United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971)); *cf.* United States v. Brumitt, 665 F.2d 521, 529 (5th Cir. 1981) (citing *Gordon-Nikkar*, 518 F.2d at 976; *McVean*, 436 F.2d at 1122) (stating, in response to a statutory fair cross-section claim regarding a grand jury, that "the disparity . . . must be based not on *total* population but . . . on those . . . *eligible* to serve as jurors"); State v. Young, 853 P.2d 327, 341 (Utah 1993) (stating, in response to a fair cross-section challenge based on the removal of those under eighteen, those on active military duty, and nonresidents, that "[w]e fail to see how removing the names of [these] persons . . . can prejudice the defendant, since the Act disqualifies these persons from jury service").

166. State v. Garza, 492 N.W.2d 32, 48 (Neb. 1992).

167. *See, e.g.*, United States v. Torres-Hernandez, 447 F.3d 699, 701 (9th Cir. 2006) (holding that "to determine whether Hispanics are underrepresented to an unconstitutional degree in venires, a district court must rely on that evidence which most accurately reflects the judicial district's actual percentage of jury-eligible Hispanics" and "may not take into account Hispanics who are ineligible for jury service"); Ramseur v. Beyer, 983 F.3d 1215, 1231 (3d Cir. 1992) ("Absolute disparity . . . is defined as the difference between the percentage of a certain population group eligible for jury duty and the percentage of the group who actually appear in the venire."); Al-Amin v. State, 597 S.E.2d 332, 342 (Ga. 2004) (rejecting a defendant's fair cross-section claim that excluding noncitizens led to Hispanics' underrepresentation on the ground that "[a] potential juror must be a citizen of the United

Despite these holdings, both courts and scholars have assumed that statutory eligibility restrictions can lead to fair cross-section violations in other contexts. For example, faced with fair cross-section challenges to the statutory exclusion of felons or persons charged with felonies, both the Seventh and Eighth Circuits have analyzed the exclusions under the *Duren* test to determine whether there was a violation.[168] The supreme courts of Oregon and California have also analyzed this same type of challenge under *Duren*.[169] The courts all rejected the claims, either concluding that any prima facie case was rebutted by a significant governmental interest[170] or that felons were not a distinctive group.[171] There would be no reason to carry out these analyses at all if a statutory exclusion could not lead to a fair cross-section violation. Indeed, none of these courts even raised the possibility that the fair cross-section requirement was limited to the jury-eligible population. Scholars arguing that felon-exclusion statutes lead to fair cross-section violations have also assumed that statutory exclusions can lead to fair cross-section violations.[172] Like the courts,

States in order to serve" and that "[t]herefore, eligible population statistics, not gross population figures, must be considered" (citation omitted)). Other courts have suggested comparison to the age-eligible population. *See, e.g.*, United States v. Rioux, 97 F.3d 648, 657 (2d Cir. 1996) (stating that using the eligible population "certainly has intellectual merit," but the statistics were not available in the record and "[f]ocusing on the eighteen and over population is a fair and sensible methodology when considering the constitutionality of jury selection").

In the context of what is required to make out a prima facie case, however, one Ninth Circuit panel has concluded that "[t]he weight of Supreme Court and circuit authority teaches that, for purposes of the prima facie case, the proportion of the distinctive group in the jury pool is to be compared with the proportion of the group in the whole community." United States v. Rodriguez-Lara, 421 F.3d 932, 941 (9th Cir. 2005). This opinion rejected previous Ninth Circuit holdings that the comparison for a prima facie case should be made to the jury-eligible population. *See id.* at 942-43; *see also* Sanders v. Woodford, 373 F.3d 1054, 1069-70 (9th Cir. 2004), *rev'd on other grounds sub nom.* Brown v. Sanders, 546 U.S. 212 (2006); United States v. Artero, 121 F.3d 1256, 1261-62 (9th Cir. 1997). The Ninth Circuit later stated that it need not resolve this intracircuit conflict as to the proper evidentiary burden. United States v. Torres-Hernandez, 447 F.3d 699, 704 (9th Cir. 2006).

168. *See* United States v. Barry, 71 F.3d 1269, 1273-74 (7th Cir. 1995); United States v. Greene, 995 F.2d 793, 796-98 (8th Cir. 1993).

169. *See* State v. Compton, 39 P.3d 833, 841-42 (Or. 2002); Rubio v. Superior Court, 593 P.2d 595, 597-99 (Cal. 1979).

170. *See Barry*, 71 F.3d at 1274; *Greene*, 995 F.2d at 798.

171. *See Compton*, 39 P.3d at 842; *Rubio*, 593 P.2d at 599; *see also* Carle v. United States, 705 A.2d 682, 686 (D.C. 1998) (holding that the exclusion of ex-felons did not violate the fair cross-section requirement because felons were not a distinctive group under *Duren* and because the exclusion was justified by a significant state interest).

172. *See* Kalt, *supra* note 112, at 75-88 (discussing whether felon-exclusion statutes violate the fair cross-section doctrine and focusing on the "distinctiveness prong, because there is no question that felon exclusion causes systematic underrepresentation of felons on juries"); Paula Z. Segal, Note, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. CITY L. REV. 313, 347 (2010) ("I propose that, under *Duren*, felon jury exclusion is a prima facie violation of the fair-cross-section requirement." (footnote omitted)).

these scholars do not even raise the possibility that the requirement might operate only on jury-eligible populations.

Similarly, courts and scholars have assumed that statutory eligibility restrictions could lead to fair cross-section violations in the context of exclusion of non-English speakers from juries. In a series of cases challenging the statutory English-language requirement, the First Circuit held that a prima facie case of a fair cross-section violation was or would be rebutted by the national interest in excluding non-English-speakers from jury service.[173] Though the court did not find fair cross-section violations in these instances,[174] the key lesson for defining underrepresentation is the court's assumption that statutory requirements could be a basis for a violation. Jasmine Gonzales Rose, in discussing the English-language requirement and these cases, acknowledged that some courts adhered to the more restrictive view of the fair cross-section requirement, which would preclude challenges to the English-language requirement.[175] But she quickly rejected that view as flawed reasoning, and found it therefore did not preclude her main argument that the language requirement's application in Puerto Rico led to a fair cross-section violation.[176]

Under the restrictive view reflected in cases like *Gordon-Nikkar*, a fair cross-section challenge to the citizenship requirement is entirely foreclosed because exclusion due to statutory eligibility requirements can never be the basis for a fair cross-section violation. That is, the fair cross-section requirement can be easily circumvented by adding statutory exclusion criteria. Gonzales Rose observed that this view "risks being circular," and it means that individuals "can be constitutionally excluded simply because they are statutorily excluded."[177] To be sure, the approach does not render the fair cross-section requirement entirely meaningless—it still protects against underrepresentation that is the result of other jury selection procedures. But it is a doctrine with a limited scope.[178]

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173. *See* United States v. Flores-Rivera, 56 F.3d 319, 326 (1st Cir. 1995) (citing United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir. 1990)); *Aponte-Suarez*, 905 F.2d at 492 (applying the *Duren* analysis and stating that "[e]ven if the accounts are accurate, resulting in a smaller pool of eligible jurors and a 'systematic exclusion' in the jury selection process, the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language"); United States v. Benmuhar, 658 F.2d 14, 19-20 (1st Cir. 1981) (assuming a prima facie case and holding that it was rebutted by a significant government interest); Gonzales Rose, *supra* note 132, at 525 n.200 ("[T]he First Circuit . . . has assumed that non-English speakers constitute a cognizable group.").

174. *See supra* notes 132-33 and accompanying text.

175. Gonzales Rose, *supra* note 132, at 525.

176. *Id.* at 498, 525.

177. *Id.* at 525; *see also* Re, *supra* note 73, at 1599 ("[U]sing eligible jurors as the baseline necessarily overlooks—and thereby blesses—juror qualifications' tendency to disproportionately exclude distinctive groups.").

178. The Supreme Court has clearly excluded from the fair cross-section doctrine's purview the composition of the actual petit jury as shaped through peremptory challenges.

In contrast, a fair cross-section doctrine that applies more broadly, as has been assumed in the felon-exclusion and language-requirement contexts, guarantees, with some limitations, a jury that is representative of the jurisdiction's population as a whole. Of course, this approach does not mean that everyone and anyone must be included in the jury pool. This is because under the *Duren* framework, an exclusion that leads to a prima facie violation is nevertheless permissible if a government interest can rebut the prima facie case.

Which of these approaches to the fair cross-section is correct? There are some statements in Supreme Court cases that support *Gordon-Nikkar*'s more restrictive view. In an early articulation of the idea of the fair cross-section in *Thiel v. Southern Pacific Co.*—before the constitutional articulation of the requirement in *Taylor*—the Court stated that a fair cross-section "mean[t] that prospective jurors *shall be selected by court officials* without systematic and intentional exclusion of any of these groups,"[179] suggesting that the idea applied to how the jury pool was selected from the eligible population, not the eligibility requirements themselves. The Court also said that "those *eligible for jury service* are to be found in every stratum of society."[180] While this language is somewhat ambiguous, it could suggest that the idea of a fair cross-section applies only to those already eligible for the jury.

In addition, more recent Supreme Court decisions have referred to comparisons to eligible jurors. In *Berghuis v. Smith* in 2010, the Court referred to the trial court's analysis of underrepresentation compared to the "overall jury-eligible population"[181] without critiquing or questioning that approach. However, the weight of the Court's statements in *Berghuis* is unclear because the opinion did not rest on the underrepresentation prong of *Duren*, and the Court said that it was not endorsing any particular metric for underrepresentation.[182] Similarly, in *Taylor* the Court compared the percentage of women in the jury wheel to the percentage of female "citizens eligible for jury service," without any discussion of the issue.[183] Yet only four years later, in *Duren*, the Court

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See Holland v. Illinois, 493 U.S. 474, 478 (1990) (holding that the fair cross-section did not apply to the use of peremptory challenges to strike all black jurors from the jury). Thus, the more restrictive view reflected in *Gordon-Nikkar* excludes the early stages of the jury selection process from the doctrine's scope, in addition to the late stages already excluded by prior case law.

179. 328 U.S. 217, 220 (1946) (emphasis added).

180. *Id.* (emphasis added).

181. Berghuis v. Smith, 130 S. Ct. 1382, 1390 (2010). The Sixth Circuit also compared the jury pool with the jury-eligible population, Smith v. Berghuis, 543 F.3d 326, 337 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1382 (2010), but the Supreme Court did not specifically refer to this element of the Sixth Circuit's analysis. *Berghuis*, 130 S. Ct. at 1390-92.

182. *Berghuis*, 130 S. Ct. at 1393-95. In stating that it was not endorsing any metric, the Court was referring to whether courts should use absolute disparity, comparative disparity, standard deviation, or some other similar measure—the Court did not consider the issue of what to use as the baseline population. *Id.*

183. Taylor v. Louisiana, 419 U.S. 522, 524 (1975).

compared the women in the jury venires with the "census measurement of the actual percentage of women in the community."[184] The *Duren* Court seemed to recognize the difference in approach, but did not directly resolve it.[185]

The use of eligible population data, however, does not necessarily imply that a court follows the more restrictive view of the fair cross-section requirement as applying only to the eligible population. Establishing a prima facie case under *Duren* requires identifying a particular practice that leads to underrepresentation. Thus, using eligible population figures may simply be a way of isolating the effects of the particular challenged practice. Some courts explicitly articulate such reasoning. In *United States v. Shinault*, when a defendant challenged the drawing of juror lists from lists of actual voters as systematically excluding Asians, blacks, and Hispanics, the Tenth Circuit expressed a preference for data on the jury-eligible population. It reasoned that "[o]therwise, it will be difficult to ascertain when a disparity is attributable to the district's use of actual voter lists or to the general eligibility criteria."[186] This could reconcile a broader view of the fair cross-section requirement with the use of eligible juror statistics in cases like *Berghuis*.[187]

Much of the Supreme Court's language regarding the fair cross-section doctrine supports the view that it should broadly ensure representativeness, and therefore, that it should not be limited to the eligible population. The Court has consistently described the fair cross-section requirement as ensuring that the jury is representative of the "community."[188] In *Duren*, the Court described the

184. Duren v. Missouri, 439 U.S. 357, 364-65 (1979).

185. *Id.* The Court did say, however, in response to criticisms that census data were not representative of the voter registration lists from which jurors were drawn, that "[i]n any event, the fair-cross-section requirement involves a comparison . . . with the makeup of the *community*, not of voter registration lists." *Id.* at 365 n.23. A dissenting opinion from the Court has directly addressed the question of the correct baseline in the analogous context of establishing a prima facie equal protection violation. In *Castaneda v. Partida*, addressing the claim that Mexican-Americans were underrepresented on the county's grand juries, the majority held that the disparity between individuals summoned and the Mexican-American census figures established a prima facie case. 430 U.S. 482, 490, 495-96 (1977). In a footnote, the majority recognized the state's argument that noncitizens should be excluded, but concluded that even if they were excluded, the effect would be negligible. *Id.* at 486 n.6. In dissent, Chief Justice Burger criticized the majority, arguing that the "prima facie case of discrimination simply w[ould] not 'wash'" because "*eligible* population statistics, not gross population figures, provide the relevant starting point." *Id.* at 504 (Burger, C.J., dissenting).

186. United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998).

187. In *Berghuis*, the defendant had challenged in the lower courts the "siphoning" procedure by which prospective jurors were assigned first to local district courts and then to countywide courts. He argued this led to underrepresentation at the countywide courts. *Berghuis*, 130 S. Ct. at 1388. Because he challenged this particular procedure, the use of jury-eligible population statistics can be explained as a way to isolate the effects of the challenged practices. Thus, the method is not inconsistent with a broad view of the fair cross-section requirement as applying to the population more generally.

188. *See, e.g.*, *id.* at 1387 ("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the

second prong of the prima facie case as requiring the defendant to "demonstrate the percentage of *the community* made up of the group alleged to be underrepresented, for this is the conceptual benchmark for the Sixth Amendment fair-cross-section requirement."[189] In *Taylor v. Louisiana*, the Court stated that the jury must be drawn from a pool that is "broadly"[190] and "truly"[191] representative of the community, and that the purpose of trial by jury is not met "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[192] The Court stated that "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."[193] These statements are consistent with the view that the fair cross-section is aimed toward achieving the goal of a representative jury, rather than simply regulating the selection of those who are statutorily eligible.[194]

Several specific statements by the Supreme Court also implicitly support the broader view of the fair cross-section requirement. In *Taylor*, the Court stated that "[t]he fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community."[195] This statement

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community."); *Duren*, 439 U.S. at 359 (stating that criminal defendants have a "right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community"); *Taylor*, 419 U.S. at 536 (referring to the "Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community").

189. *Duren*, 439 U.S. at 364 (emphasis added).

190. *Taylor*, 419 U.S. at 530-31 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

191. *Id.* at 531.

192. *Id.* at 530.

193. *Id.*

194. The fair cross-section's purposes also largely seem to support applying the fair cross-section requirement more broadly. The purposes are often described as:

> (1) "[G]uard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility."

Lockhart v. McCree, 476 U.S. 162, 174-75 (1986) (second alteration in original) (quoting *Taylor*, 419 U.S. at 530-31). But this may not dictate its application. Its purposes also seem to support application to the petit jury, yet the fair cross-section requirement does not apply there. *See* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1115-16 (2005); *see also* Holland v. Illinois, 493 U.S. 474, 478 (1990) (holding that the fair cross-section did not apply to the use of peremptory challenges to strike all black jurors from the jury); *id.* at 496-97 (Marshall, J., dissenting) (arguing that all three purposes applied in this context). Along these lines, Richard Re argues that restricting the fair cross-section to eligible jurors is in tension with the conventional demographic conception of the requirement. Re, *supra* note 73, at 159.

195. *Taylor*, 419 U.S. at 537-38.

suggests that the fair cross-section requirement prohibits state-prescribed juror qualifications that make the jury pool or panels *unrepresentative* of the community. This is inconsistent with the narrow view of the fair cross-section doctrine, under which a statutory eligibility requirement rendering the jury pool unrepresentative of the community would be permissible. Similarly, the Court stated that its conclusion—that "[i]f the fair-cross-section rule is to govern the selection of juries . . . women cannot be systematically excluded"—was "consistent with the current judgment of the country" as evidenced by then-recent statutes qualifying women for jury service in all jurisdictions.[196] If statutory eligibility were a prerequisite for women to fall within fair cross-section analysis, the new statutes qualifying women would not simply be "consistent with" the inclusion of women, but would be a necessary precondition.[197]

Duren also implicitly supports the broader view. There, the Court stated that a finding of a prima facie case "is not the end of the inquiry"[198]:

> "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions . . . ." However, we cautioned that "[t]he right to a proper jury cannot be overcome on merely rational grounds." Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.[199]

This statement suggests that states are permitted to adopt eligibility requirements that could give rise to a prima facie case of a violation, as long as there is a significant state interest. The assumption that underlies the statement seems to be, then, that a statutory eligibility requirement could result in a prima facie case.

More fundamentally, the narrower view of the fair cross-section collapses much of the fair cross-section doctrine into equal protection. In *Gordon-Nikkar*, the Fifth Circuit said that there was no fair cross-section violation as long as "resident aliens may properly be excluded."[200] To determine whether they could be properly excluded, the court applied equal protection analysis. Concluding that the requirement was not an equal protection violation because of

196. *Id.* at 533.

197. Similarly, the Court referred to the First Judiciary Act's incorporation of state statutes excluding women from juries as making it "apparent that the first Congress did not perceive the Sixth Amendment as requiring women on criminal jury panels." *Id.* at 536. If statutory eligibility were a prerequisite to fall within fair cross-section analysis, women's statutory exclusion would not indicate anything about whether Congress thought the Sixth Amendment required women on the jury, since they would fall outside the doctrine's scope. Also, the Court repeatedly referred to the "exclusion" of women, when the system actually did not exclude women but instead required them to opt in. This imprecision suggests that the Court was not envisioning the restrictive view of the fair cross-section requirement, since presumably an opt-in system would fall within fair cross-section's purview but a true statutory exclusion would not.

198. Duren v. Missouri, 439 U.S. 357, 367 (1979).

199. *Id.* at 367-68 (quoting *Taylor*, 419 U.S. at 534, 538).

200. United States v. Gordon-Nikkar, 518 F.2d 972, 976 (5th Cir. 1975).

the *Sugarman* self-governance exception, the court reasoned that there was therefore no fair cross-section violation.[201] But it is questionable whether the doctrines should be collapsed in this way. Fair cross-section and equal protection are different doctrines, and they promote different values.[202] A fair cross-section violation, unlike an equal protection violation, does not require a finding of discriminatory motive behind a facially neutral policy.[203] And when a jury selection policy adopts a facial classification, the fair cross-section requirement does not have differing levels of scrutiny once a group is cognizable.[204] Thus, in certain fair cross-section challenges, as the Supreme Court said in *Taylor*, "[t]here must be weightier reasons" to justify the exclusion than under equal protection.[205] For these reasons, courts and commentators have referenced how the fair cross-section requirement is more stringent than equal protection and in theory allows the jury venire to be more easily challenged.[206] Thus, while collapsing equal protection and fair cross-section analysis for statutory juror qualifications does not produce any direct doctrinal contradictions, it is generally inconsistent with the idea that the doctrines have distinct purposes and scopes.

If a court takes the broader approach to the fair cross-section requirement and finds a prima facie case under *Duren* based on the exclusion of minorities, it is unlikely to be rebutted by a significant government interest. To rebut a

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201. *Id.* at 976-78. See Part III.B.2.a above for a critique of this approach under equal protection doctrine. A few other courts have taken the same approach, such as the Supreme Court of Nebraska in *Garza*. *See* State v. Garza, 492 N.E.2d 32, 48 (Neb. 1992).

202. *See* Gonzales Rose, *supra* note 132, at 526 ("Whereas the Equal Protection Clause prohibits discrimination, the fair-cross-section requirement of the Sixth Amendment defines the type of jury to which criminal defendants are entitled: a jury drawn from a *representative* pool." (quoting Robin E. Schulberg, *Katrina Juries, Fair Cross-Section Claims, and the Legacy of* Griggs v. Duke Power Co., 53 LOY. L. REV. 1, 3, 24 (2007))).

203. *See Duren*, 439 U.S. at 368 n.26 ("[Underrepresentation in equal protection claims] not only indicated discriminatory effect but also was one form of evidence of another essential element of the constitutional violation—discriminatory purpose. . . . In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section."); *see also supra* note 141.

204. *See* Gonzales Rose, *supra* note 132, at 526.

205. Taylor v. Louisiana, 419 U.S. 522, 533 n.14, 533-35 (1975) (distinguishing an earlier case also addressing an opt-in system for female jurors, where the exemption was challenged under equal protection but upheld because it had a rational basis).

206. *See, e.g.*, Alston v. Manson, 791 F.2d 255, 258 (2d Cir. 1986) ("[T]he sixth amendment . . . is generally thought to set forth a more stringent standard than the equal protection clause."); John P. Bucker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 400 (1997) ("Not requiring a defendant to prove purposeful discrimination makes the Sixth Amendment test a less stringent standard. In theory, it also makes it easier for a defendant to succeed in challenging a jury selection system on Sixth Amendment grounds." (footnote omitted)). Yet scholars have criticized lower courts for conflating the two doctrines in numerous ways. *See, e.g.*, Schulberg, *supra* note 202, at 14-19.

prima facie case, there must be "adequate justification"[207] in the form of a significant government interest. The exclusion must be "appropriately tailored"[208] to and "manifestly and primarily advance[]"[209] the interest. The government would likely make the same arguments as in the challenge to the exclusion of noncitizens as such—that exclusion promotes significant interests in self-governance.[210] But while the exclusion of noncitizens may be logically linked to self-governance, it is hard to imagine a persuasive argument that this is adequate justification for racial or ethnic exclusion.

Finally, some courts, including the Fifth Circuit in *Gordon-Nikkar*, have suggested that Congress's power over immigration and naturalization immunizes the federal citizenship requirement from fair cross-section challenges. The Fifth Circuit held that Congress can exclude aliens from jury service under its power to "define the extent of resident aliens' rights prior to obtaining citizenship."[211] The court reasoned that because Congress could exclude aliens from jury service, the defendant's Sixth Amendment rights therefore could not be violated by their exclusion.[212] However, I believe this reasoning is flawed in a way that resembles the flaws in cases addressing a party's equal protection rights, addressed above.[213] The reasoning applies to congressional power over the rights of a noncitizen who is excluded from service as a juror. It does not apply to the rights at issue—the rights of the party before the jury—who is not necessarily a noncitizen, and indeed is quite likely to be a citizen.[214]

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207. *Duren*, 439 U.S. at 368 n.26.

208. *Id.* at 370 ("[A] State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would, we think, survive a fair-cross-section challenge.").

209. *Id.* at 367-68.

210. *See supra* notes 82-86, 102-06 and accompanying text.

211. *See, e.g.*, United States v. Gordon-Nikkar, 518 F.2d 972, 977-78 (5th Cir. 1975).

212. *Id.* at 978 ("Since Congress may validly exclude aliens from jury service, appellant was deprived of no Sixth Amendment right by the failure to have resident aliens included in the grand or petit jury venires.").

213. *See supra* Part III.B.2.a.

214. It is true that the Supreme Court has rejected challenges to federal laws discriminating against noncitizens in which those challenges were based on claims of infringement of citizens' rights. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 788-91, 799-800 (1977) (rejecting a challenge to the statutory definition of the parent-child relationship for admission purposes, brought by citizen fathers seeking to bring their children born out of wedlock to the United States, claiming the statute violated constitutional rights of both the fathers and children); Kleindienst v. Mandel, 408 U.S. 753, 756-60, 769-70 (1972) (rejecting a challenge brought by U.S. citizens seeking to bring a Belgian speaker to the United States and claiming their First and Fifth Amendment rights were violated by his exclusion). But those cases were about immigration—the Court clearly relied heavily on congressional power over the admission of aliens. *See, e.g.*, *Fiallo*, 487 U.S. at 792 ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); *Mandel*, 408 U.S. at 766 (same). There may be an argument that if

Ultimately, then, although past attempts have been unsuccessful, the fair cross-section requirement may suggest an avenue for successful challenges of the citizenship requirement in certain jurisdictions. The success of these challenges, however, depends on a court adopting the broad view of the fair cross-section requirement.

IV. REMEDYING A VIOLATION

If the citizenship requirement was or could be successfully challenged through one of the approaches outlined above, there are a few considerations regarding remedying the violation that are worth noting. First, the appropriate remedy would depend on which type of violation was found. If a state citizenship requirement violates the equal protection rights of a party before the jury, the remedy would be to eliminate the state citizenship requirement for jury service. In contrast, if the federal or a state citizenship requirement results in a fair cross-section violation by causing minority underrepresentation, a broader range of remedies might be possible.

To correct a fair cross-section violation due to minority underrepresentation, the statutory citizenship requirement may not necessarily need to be eliminated, if the underrepresentation can be corrected in some other way. Commentators on minority underrepresentation on juries have discussed a number of race- or ethnicity-conscious methods to increase minority individuals' chances to be selected for jury duty.[215] Theoretically, using a carefully devised oversampling method, groups underrepresented due to the citizenship requirement could be supplemented without including noncitizens on the jury.

A limitation of an oversampling method, however, is that it would be susceptible to equal protection challenges.[216] For example, the Eastern District of Michigan instituted a jury selection plan that dictated removing one in five non-African-American individuals from the jury wheel to correct for un-

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the defendant bringing the fair cross-section claim was herself a noncitizen, the federal government might have a stronger basis for arguing that the exclusion of noncitizens was allowed under Congress's power.

215. *See, e.g.*, Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999); Fukurai & Davies, *supra* note 55; Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996). Some scholars and judicial districts have considered other types of approaches, such as quotas, to increase minority representation by changing the makeup of the petit jury rather than the jury pool, but these approaches—while addressing the functional concerns associated with underrepresentation—would not actually directly correct the underlying fair cross-section violation. *See, e.g.*, Hennepin Cnty. v. Perry, 561 N.W.2d 889, 896 & n.6, 897 (Minn. 1997) (rejecting a proposal to guarantee at least two minorities on every grand jury as "rais[ing] serious constitutional questions").

216. *See* King, *supra* note 215, at 730-60; King & Munsterman, *supra* note 215, at 276-77; Re, *supra* note 73, at 1578 & nn.32-33.

derrepresentation of African-Americans in the jury pool.[217] The Sixth Circuit struck down the plan as violating equal protection.[218] What methods of oversampling would comport with equal protection, if any, depends on the doctrinal boundaries regarding affirmative action policies, a thorough discussion of which is beyond the scope of this Note. It suffices to say here that it may indeed be possible to devise an oversampling plan that would not violate equal protection. For instance, one commentator has pointed to a plan instituted in the District of Massachusetts as one that would survive equal protection analysis.[219] The district has instituted a facially neutral supplementation plan under which each time a summons is returned as undeliverable, a replacement summons is sent to another individual residing in the same zip code.[220] The effect of this replacement summons method is to increase African-American representation, because undeliverable rates are higher in the areas with larger African-American populations.[221] Assuming the plan is indeed constitutionally permissible, it may thus be possible for jurisdictions to remedy fair cross-section violations while still excluding noncitizens by following a similar model.

Even if a fair cross-section violation were remedied by removing the citizenship requirement rather than by oversampling, the requirement would not have to be removed across the board. The inclusion of noncitizens could be narrowly targeted to the specific jurisdictions (and even subdivisions of jurisdictions) in which the disparity was sufficient to establish a violation. Although the citizenship requirements are dictated by a nationwide statute in federal court and by statewide statutes in state courts, those statutes could remain in place while being amended to permit noncitizen jurors in any jury selection divisions in which application of the citizenship requirement would result in a fair cross-section violation. Such statutory language would allow the inclusion of noncitizens on juries to reflect the dynamic character of the constitutional violation, since fair cross-section violations would occur only in certain jurisdictions and only at certain times, when there is a particular confluence of demographic characteristics. Because of this dynamic character, a legislative

217. United States v. Ovalle, 136 F.3d 1092, 1095 (6th Cir. 1998).

218. *Id.* at 1107, 1109. The court's primary problem with the plan seemed to be that it was not narrowly tailored to creating a fair cross-section; it seemed to leave open the possibility that a facially race-based system might be permissible if constructed properly. *See id.* at 1106.

219. *See* Re, *supra* note 73, at 1611. Re suggests that whether the method is facially race-based or race neutral is the determinative factor. *See id.* ("[The Massachusetts plan] would have the crucial benefit of being formally race-neutral—and therefore compliant with equal protection jurisprudence . . . .").

220. U.S. DIST. COURT FOR THE DIST. OF MASS., PLAN FOR RANDOM SELECTION OF JURORS 4 (2009), *available at* http://www.mad.uscourts.gov/resources/pdf/RevisedJuryPlan.pdf. The District of Kansas has a similar plan. *See* R. PRAC. D. KAN. 38.1(g)(2), *available at* http://www.ksd.uscourts.gov/local-rules-pdf.

221. United States v. Green, 389 F. Supp. 2d 29, 61 (D. Mass. 2005).

remedy seems preferable to court-mandated change. The nature of the problem may not be susceptible to a judicial solution—by the time a case works its way through the system, the demographic composition of the relevant jurisdiction may have changed, and a violation may no longer be possible. A particular defendant or litigant may be granted individual relief, but ultimately it would be most effective if legislators took action proactively.

Whatever approach might be taken to remedy a fair cross-section violation due to the exclusion of noncitizens, there would be limitations to the remedy's practical impact on minority representation. The citizenship requirement is only one of many reasons that minorities are underrepresented in jury pools. Underrepresentation results from other statutory exclusion criteria, such as not being proficient in English,[222] not having lived in the jurisdiction for a sufficient period of time,[223] or being a convicted felon.[224] Even statutorily qualified minority jurors are less likely to be on the lists from which potential jurors' names are taken—usually voter registration lists, lists maintained by departments of motor vehicles, or both.[225] They are also less likely to respond to juror-qualification screening questionnaires that are used in some jurisdictions to compile qualified juror lists,[226] and minorities have been found to respond to jury summons at lower rates.[227] In addition, even if a violation were remedied by removing the citizenship requirement, the impact would almost surely be limited to legally present noncitizens. There would be practical issues of identification that would prevent unauthorized noncitizens, who are estimated to make up nearly half of all noncitizens,[228] from being called for jury duty. Fur-

222. Federal jurors must be able "to read, write, and understand English with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form" and must be able to speak English. 28 U.S.C. § 1865(b)(2)-(3) (2006).

223. In federal courts, jurors must have lived in the jurisdiction for one year. 28 U.S.C. § 1865(b)(1).

224. In federal courts, individuals who have a felony charge pending against them or have been convicted in state or federal court of a crime punishable by imprisonment for more than a year are disqualified from jury service for life. 28 U.S.C. § 1865(b)(5). State statutes often have similar restrictions. *See, e.g.*, ALA. CODE § 12-16-60 (2011) (requiring a period of residency, English-language abilities, and no loss of voting rights due to conviction of an offense involving moral turpitude).

225. *See* King, *supra* note 215, at 713 & n.15; Ronald Randall et al., *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71, 72, 80 (2008). Clearly, for noncitizens to be included, voter registration lists could not be the only source list.

226. King, *supra* note 215, at 714.

227. Walters et al., *supra* note 108, at 329-30.

228. Compare data from AmericanFactfinder, *see supra* note 9, with MICHAEL HOEFER ET AL., DEP'T HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010 2, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf, which estimates the number of unauthorized immigrants at 10.8 million in January 2010. There is significant variation amongst the states in the percentage of noncitizens who are unauthorized. *See id.* at 4 tbl.4.

thermore, even if they could be called, it is unlikely that unauthorized noncitizens would be willing to appear at a courthouse.

CONCLUSION

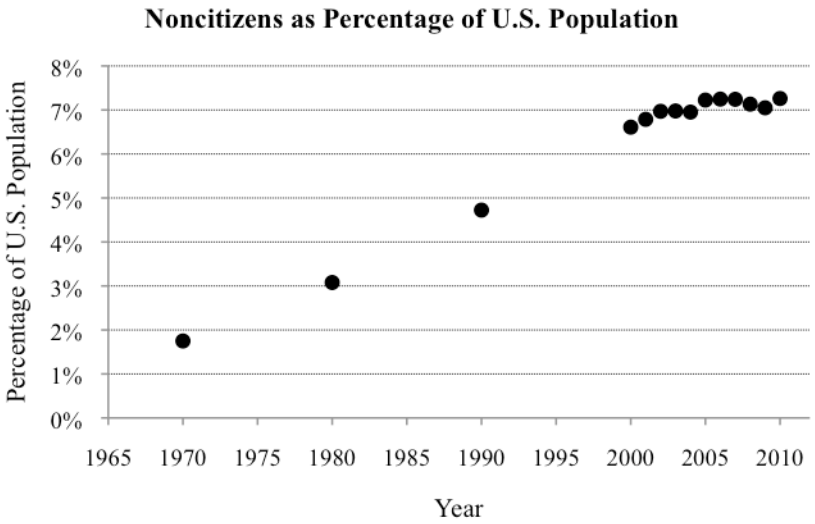
The citizenship requirement for jurors in federal and state courts should be reexamined. In the past, the requirement may have made little difference. But the noncitizen population has grown dramatically since the middle of the twentieth century, and because noncitizenship is correlated with race and ethnicity, in some jurisdictions the citizenship requirement means that racial and ethnic minorities are significantly underrepresented in the pool of eligible jurors.

Normatively, the exclusion seems problematic in two related but analytically distinct ways. First, it denies many persons who are essentially integrated into their communities the right to participate in an important element of community governance. This may perpetuate the view of noncitizens as outsiders, and diminish the jury's legitimacy. Second, the exclusion decreases jury diversity, which may negatively affect the quality of jury deliberation, and which denies many litigants and defendants a jury that is representative of their communities. The lack of a representative jury raises particular concerns because noncitizens, and minorities with high rates of noncitizenship, frequently appear before juries.

This Note has discussed several different approaches to challenging the juror citizenship requirement. Though a variety of past challenges have failed, I have suggested that there are two approaches with some potential to succeed if courts take a favorable approach to areas of unclear case law. The first is an equal protection claim based on the rights of the party before the jury, challenging a facial alienage classification in a state statute. The second is a fair cross-section claim based on the underrepresentation of minorities as a result of the citizenship requirement's disparate impact. While at present the latter claim has potential only in some jurisdictions—and even then only if courts take a broad view of the fair cross-section requirement—such claims may have potential to succeed in many more jurisdictions in the future as demographics continue to shift. Because the jurisdictions where the citizenship requirement may be constitutionally problematic under the fair cross-section doctrine will change over time, the best solution may be proactive legislation that can track the problem as demographic changes occur.

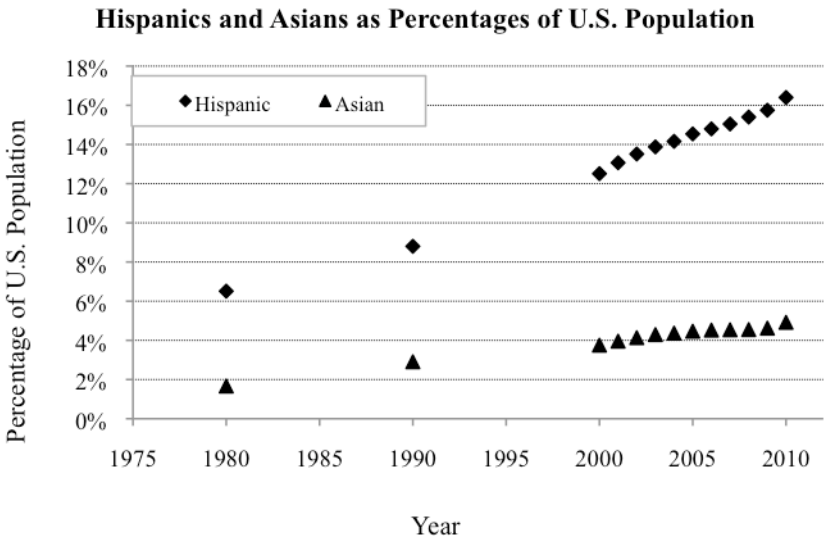
APPENDIX

FIGURE A-1



Data Source: U.S. Census Bureau Data provided by *Integrated Public Use Microdata Series*, IPUMSUSA, http://usa.ipums.org/usa (last visited June 13, 2012). For all data but 1970, click "Analyze Data Online," then click "United States, 1850-2010," then specify row as "year" and column as "citizen," and then click "Run the Table." For 1970 data, follow the same procedure using the "1970 1% (form 1)" hyperlink on the main page. For more information on the comparability of citizenship measures from year to year, see *Citizen*, IPUMSUSA, http://usa.ipums.org/usa-action/variables/CITIZEN#comparability_tab (last visited June 13, 2012).

FIGURE A-2



Microdata Series, IPUMSUSA, http://usa.ipums.org/usa (last visited June 13, 2012). For the Hispanic population, click "Analyze Data Online," then click "United States, 1850-2010," then specify row as "year" and column as "hispan," and then click "Run the Table." For the Asian population, follow the same procedure but designate the column variable as "race". For more detail on how the Hispanic population was measured and caveats in interpreting the data, see *Hispan*, IPUMSUSA, http://usa.ipums.org/usa-action/variables/HISPAN#comparability_tab (last visited June 13, 2012). The measure of the Asian population includes Pacific Islanders. For more information on the measurement of racial groups generally, see *Race*, IPUMSUSA, http://usa.ipums.org/usa-action/variables/RACE#comparability_tab (last visited June 13, 2012).