REASSESSING JURY SERVICE CITIZENSHIP REQUIREMENTS

INTRODUCTION

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." While the Sixth Amendment clearly establishes the right to trial by jury in criminal proceedings, the amendment is less clear about the makeup of a jury. Over the years, courts have repeatedly addressed the issues of how a jury is composed and who is allowed, or entitled, to sit on a jury.

As a result of this attention, the composition of juries has evolved greatly since the writing of the Constitution. For example, size requirements have changed over the years, as has the use of peremptory challenges. The representativeness of juries also has changed dramatically on account of court holdings that exclusions of particular groups of individuals are unconstitutional. Groups that historically have been excluded from jury service include African Americans, women, and persons of Mexican descent. The Supreme Court has held that these exclusions are unconstitutional under either the Sixth or Fourteenth Amendments.

1 U.S. Const. amend. VI.
2 This Note solely addresses the exclusion of non-citizens from criminal juries without addressing the exclusion of non-citizens from civil juries.
5 See Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that the exclusion of women from jury service is unconstitutional under the Sixth and Fourteenth Amendments); Hernandez
While the diversity of juries has increased in many respects, one group remains regularly prohibited from jury service—non-citizens. Eligibility requirements for both federal jury service and state jury service mandate U.S. citizenship, and constitutional challenges to statutes prohibiting non-citizens from jury service have been unsuccessful. These restrictions affect the roughly 22 million non-citizens living in the United States. Despite these limitations, occasionally a non-citizen will sit on a jury rendering a verdict. In such a situation, a court will not overturn a verdict on the grounds that the jury was not comprised solely of U.S. citizens because a defendant does not have a constitutional right to a jury composed entirely of U.S. citizens. Therefore, jury service by non-citizens, or at least certain non-citizens, is a possibility.

Although this Note does not directly consider whether courts should find non-citizen exclusions from jury service unconstitutional, it does address whether non-citizens should be allowed to serve on juries in light of assumptions made about non-citizens and the jury’s purposes. Discussions of assumptions about certain groups and jury roles appear frequently in cases involving exclusions of groups from jury service, whether the groups consist of non-citizens or other historically excluded persons. These issues are also relevant to the policy decision of whether to allow non-citizens to sit on juries.

Part I of this Note discusses the historical and legal background of jury service by non-citizens. Around the time of this country’s formation, non-citizens were allowed to sit on juries, but today non-citizens are widely prohibited from serving as jurors. Courts have repeatedly denied constitutional challenges, to exclusions of non-citizens from jury service, whether brought under the Sixth

v. Texas, 347 U.S. 475 (1954) (holding that the exclusion of persons of Mexican descent from jury service is unconstitutional under the Fourteenth Amendment); Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that the exclusion of African Americans from jury service is unconstitutional under the Fourteenth Amendment).

9 See U.S. Census Bureau, United States—Selected Characteristics of the Native and Foreign-Born Populations, http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id =01000US&-qr_name=ACS_2006_EST_G00_S0501&-ds_name=ACS_2006_EST_G00_ (last visited Jan. 6, 2009).
11 Id. at 1088–89.
or Fourteenth Amendments. Despite statutory prohibitions of non-citizens from jury service, courts have held that it is not unconstitutional for a non-citizen to sit on a jury rendering a verdict.

Part II discusses the three traditional roles of the jury. For the defendant, the jury provides protection against arbitrary and oppressive government. For the community, the jury instills public confidence in the criminal justice system. For the jurors themselves, service on the jury presents opportunities for democratic self-government and civic education. Part II explores the implications of possible jury service by non-citizens with respect to each role.

Part III summarizes the analysis in Part II and looks for an answer to the larger question of whether non-citizens should serve on juries. While jury service by non-citizens would not diminish the ability of the jury to fulfill any of its roles, those roles also do not uniformly require non-citizens to be eligible for jury service. However, in certain communities, the ability of the jury to represent the common sense of the community—an essential component of the jury's role for the defendant—could be enhanced by the inclusion of legal permanent residents in the jury pool.

I. THE HISTORICAL AND LEGAL BACKGROUND OF NON-CITIZEN JURY SERVICE

Jury service has not always been restricted to citizens. In England in 1353, the privilege of a jury made up of an equal number of citizens and non-citizens, or a jury de medietate linguae, for cases involving a non-citizen party was granted by statute to non-citizen merchants. Another statute in 1354 extended the privilege to all non-citizens. The presence of non-citizens on English juries served the dual functions of "improv[ing] the fact-finding capability of the jury, but also . . . improv[ing] upon its sense of fairness by acting as a check against prejudice." American courts in the late eighteenth and early nineteenth centuries followed England in providing non-citizens on trial a jury de medietate linguae, at least into the first half of the

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15 See, e.g., Owens, 924 A.2d 1072.
17 Id. at 413.
18 Id. at 407.
19 LaRue, supra note 12, at 850.
20 Id.
21 Id. at 852.
nineteenth century. Judges in both state and federal courts granted juries de medietate linguae upon request of non-citizens who had been charged with crimes.

The practice of granting juries de medietate linguae did not persist for very long, as state courts began to find that a non-citizen’s right to a jury de medietate linguae no longer existed. In 1825, the North Carolina Supreme Court in State v. Antonio affirmed the denial of a non-citizen prisoner’s request for a jury de medietate linguae in a two-to-one decision, with all judges writing separately. Judge Hall affirmed the denial after finding that the jury de medietate linguae in England was based on the commercial policy of encouraging non-citizen merchants to trade in England rather than on principles of criminal law. Judge Henderson concurred, stating that since the non-citizens who settle in the United States as colonists intend to stay, their interests are not distinct from those of the other colonists; thus, they do not require non-citizen representation on their jury. In subsequent cases, other state courts also denied requests for juries de medietate linguae, finding that state statutes prohibiting non-citizens from being jurors had abolished any right to such a jury that may have previously existed.

In Kentucky, even though a statute still provided for a jury de medietate linguae, the supreme court affirmed the trial court’s denial of a non-citizen’s request for such a jury because the trial court had discretion in whether to grant one as a privilege. By 1936, the U.S. Supreme Court had also found that any past right to a jury de medietate linguae no longer existed.

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22 Id. at 850.
23 See United States v. Cartacho, 25 F. Cas. 312 (C.C.D. Va. 1823); People v. M’Lean, 2 Johns. 381 (N.Y. Sup. Ct. 1807); Respublica v. Mesca, 1 Dall. 73 (Pa. 1783). See generally Commonwealth v. Acc, 487 N.E.2d 189, 191-93 (Mass. 1986) (discussing cases in which judges granted juries de medietate linguae); LaRue, supra note 12, 850-54 (same).
24 11 N.C. 200 (1825).
25 Id. at 205; see also LaRue, supra note 12, at 858-59.
26 Antonio, 11 N.C. at 207 (Henderson, J., concurring); see also LaRue, supra note 12, 859-60.
27 See People v. Chin Mook Sow, 51 Cal. 597, 599 (1877) ("Juries composed in part of denizens and in part of aliens are not known to our system of laws. The statute determines the qualifications of jurors, and prescribes the mode of drawing and empaneling them: aliens are expressly prohibited from serving in that capacity."); State v. Fuentes, 5 La. Ann. 427, 428 (La. 1850) ("[O]ur statutes... enumerating... that the lawful juror shall be a citizen of the State, have abolished the right to a jury, de mediatate linguae, if it ever existed in Louisiana."); see also LaRue, supra note 12, 862 (pointing out the state courts’ brief treatment of the jury de medietate linguae issue in these subsequent cases).
28 Wendling v. Commonwealth, 137 S.W. 205, 208 (Ky. 1911); see also Richards v. Commonwealth, 38 Va. (11 Leigh) 690, 698 (1841) (finding, based on language of a state statute, that courts have "a discretionary power to direct juries de medietate linguae"); LaRue, supra note 12, 860-61 (discussing the holding in Richards v. Commonwealth).
29 United States v. Wood, 299 U.S. 123, 145 (1936) ("Although aliens are within the protection of the Sixth Amendment, the ancient rule under which an alien might have a trial by
Not only did non-citizens in this country lose their right to, or privilege of, a mixed jury composed of an equal number of non-citizens and citizens, but eventually non-citizens were prohibited from sitting on juries entirely. Some states had statutes restricting jury service to U.S. citizens beginning in the nineteenth century. Today most, if not all, states make citizenship a requirement or qualification for jury service. Most states explicitly limit jury service to citizens in their juror qualification statutes. A few states have juror qualification statutes providing that jurors must have the qualifications of electors, and the elector qualification statutes require citizenship. North Carolina, while requiring state citizenship, does not explicitly require U.S. citizenship in its juror qualification statute, but, under the common law, status as a non-citizen is a disqualification for jury service. Additionally, federal statute forbids persons who are not citizens of the United States from serving on district court juries.

Both non-citizens and citizens have challenged these state and federal statutes under the Fifth, Sixth, and Fourteenth Amendments. However, such challenges have been unsuccessful, and courts have repeatedly upheld the constitutionality of these statutes.

First, courts have held that exclusions of non-citizens from jury service do not deny non-citizens equal protection. Non-citizens are entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, under which the Supreme Court held...
“classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”

This strict scrutiny standard requires a state to show that a classification based on alienage satisfies a “compelling interest.” Under this standard the Court found that state statutes denying welfare benefits to non-citizens violate the Equal Protection Clause, as do statutes requiring U.S. citizenship for registration as a licensed engineer.

However, after determining that classifications based on alienage are subject to strict scrutiny, the Court later retreated and found that under certain circumstances classifications based on alienage are only subject to the lesser rational basis standard of review. The exception became known as the “political function” exception, which “applies to laws that exclude aliens from positions intimately related to the process of democratic self-government.” The “political function” exception first took shape in Sugarman v. Dougall, in which four resident aliens challenged the constitutionality of a state statute restricting competitive civil service positions to citizens. The Court closely scrutinized the classification and held that it was unconstitutional. However, the Court carefully limited its holding by stating that its scrutiny of classifications based on alienage will be less demanding when dealing with “matters resting firmly within a State’s constitutional prerogatives.” The Court’s establishment of this less demanding scrutiny recognized the state’s power to “exclude aliens from participation in its democratic political institutions” and the state’s “constitutional responsibility for the establishment and operation of its own government.” The Court explained that it would apply less demanding scrutiny to voter qualifications and classifications regarding “state elective or important nonelective executive, legislative, and judicial positions,” because individuals “who participate directly in the formulation, execution, or review of

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38 Graham, 403 U.S. at 372 (footnotes omitted).
40 See Graham, 403 U.S. at 376.
44 Id. at 636.
45 Id. at 646.
46 Id. at 648.
47 Id.
broad public policy perform functions that go to the heart of representative government."

The Court has issued many decisions determining what sorts of state classifications based on alienage fall within the "political function" exception to strict scrutiny. The Court held public school teachers come within the "political function" exception because of their role in promoting civic virtues in students. Police officers and probation officers also fall within the "political function" exception due to the discretionary powers they have over citizens. However, the Court found that lawyers do not come within the "political function" exception, despite their access to courts and positions as government leaders, because their profession was private and not "so close to the core of the political process as to make [the lawyer] a formulator of government policy." Notaries public also do not come within the "political function" exception, because their clerical and ministerial duties do not involve policymaking or "broad discretion in the execution of public policy."

As for non-citizens as jurors, the U.S. District Court for the District of Maryland applied strict scrutiny when faced with an equal protection challenge to statutes disqualifying non-citizens from jury service. In Perkins v. Smith, a resident alien challenged federal and state statutes excluding non-citizens from serving on grand and petit juries, claiming that the statutes denied resident aliens equal protection of the laws. Although in its analysis the district court stated that it considered grand and petit jurors to "'perform functions that go to the heart of representative government,'" hence placing jurors within the "political function" exception, the district court analyzed the case through strict scrutiny, looking for a compelling interest in restricting jury service to citizens. The district court found that resident aliens could be excluded from jury service because of the government's compelling interest to restrict "jury service to those who will be loyal to, interested in, and familiar with, the customs of

48 Id. at 647.
50 Cabell v. Chavez-Salido, 454 U.S. 432, 445-46 (1982) ("In carrying out [his] responsibilities, the probation officer necessarily has a great deal of discretion . . . ."); Foley v. Connelle, 435 U.S. 291, 299-300 (1978) ("It would be . . . anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers . . . .").
51 In re Griffiths, 413 U.S. 717, 728-29 (1973).
54 Id. at 137 (quoting Sugarman, 413 U.S. at 647).
55 Id. at 136; see also Commonwealth v. Acen, 487 N.E.2d 189, 195-96 (Mass. 1986) (stating that Perkins applied strict scrutiny analysis).
this country." The district court felt that such allegiance to this county could not be counted upon in resident aliens as a group, and nothing short of the taking of citizenship would be an appropriate test for loyalty. The Supreme Court summarily affirmed the decision without opinion. Because "[a] summary affirmance is merely agreement with a District Court’s judgment, but not necessarily its rationale," it is unclear from the summary affirmance alone whether the Court agreed with the placement of jurors within the "political function" exception. However, just a few years later, the Court suggested in dictum that classifications regarding jury service would be subject to less demanding scrutiny.

Some state courts, in deciding equal protection challenges to prohibitions of non-citizens from jury service, have applied less demanding scrutiny after finding that jurors fall within the "political function" exception because jury service "clearly lies at the heart of Anglo-Saxon democratic self-government." Thus, states only need a reasonable interest to justify the classification, and restricting jury service to those who understand this country’s government and are loyal to this country’s interests is such a reasonable interest. Hence, when a court applies less demanding scrutiny to jury citizenship qualifications after determining that jurors perform a "political function," it can find such qualifications satisfy equal protection requirements. Therefore, whether considered under close judicial scrutiny or the less demanding scrutiny provided to positions...

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57 Id.
60 Foley v. Connelie, 435 U.S. 291, 296 (1978) (finding that police officers fall within the political function exception). The Court stated that when a matter is a constitutional prerogative of a state,

[the State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification. ... Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. Similar considerations support a legislative determination to exclude aliens from jury service.

Id. at 296 (citations omitted) (citing, inter alia, Perkins, 370 F. Supp. 134); see also State v. Garza, 492 N.W.2d 32, 48 (Neb. 1992) ("[T]he U.S. Supreme Court, in Foley v. Connelie, has acknowledged in dictum a state's right to restrict aliens from participating in the jury process."

(citation omitted).
62 Garza, 492 N.W.2d at 48.
63 See, e.g., id.
involving a "political function," exclusions of non-citizens from juries have been held not to violate the Equal Protection Clause.

Sixth Amendment challenges to exclusions of non-citizens from jury service have also been unsuccessful. The Sixth Amendment provides that criminal defendants have the right to a jury trial, and the Supreme Court has interpreted this right to require "a jury drawn from a fair cross section of the community." The purposes behind the fair cross section requirement reflect the roles the jury fulfills, and the requirement's importance is further evident from its inclusion in the declarations of policy under the Jury Selection and Service Act.

To establish a prima facie violation of the Sixth Amendment fair cross section requirement, a defendant must satisfy the three-prong test set forth in Duren v. Missouri. The defendant must show: (1) a group is "distinctive" in the community; (2) the group is underrepresented on the jury in comparison to its numbers in the community; and (3) the underrepresentation is the result of the group's systematic exclusion during jury selection. Defendants have not yet been able to establish that exclusions of non-citizens from juries at both the state and federal levels constitute prima facie violations of the requirement.

As for federal juries, courts have found that "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." If a qualification for jury service is reasonable, no Sixth Amendment violation occurs when the group whom that qualification excludes is not present in the jury venire. In United States v. Gordon-Nikkar, the U.S. Court of Appeals for the Fifth Circuit found that it was

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64 U.S. CONST. amend. VI.
66 See Lockhart v. McCree, 476 U.S. 162, 174-75 (1986) (citing Taylor, 419 U.S. at 530-31) (listing three purposes for the fair cross section requirement). The roles the jury fulfills are discussed in Part II of this Note.
67 28 U.S.C. § 1861 (2006) ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").
69 Id. at 364.
70 United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (quoting United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971)); see also United States v. Morillo, 34 F. Supp. 2d 105, 106-07 (D. Puerto Rico 1999) ("[T]here is no constitutional requirement that juries be drawn from a cross-section of the community without imposition of any qualifications.").
71 Gordon-Nikkar, 518 F.2d at 976.
72 518 F.2d 972 (5th Cir. 1975).
reasonable for non-citizens to be excluded from federal jury service because the exclusion serves the compelling interest of ensuring that jurors are committed to this nation's laws. Additionally, the exclusion is reasonable in light of Congress's plenary authority under the Constitution "to define the extent of resident aliens' rights prior to obtaining citizenship." Hence, courts have found that no violation of the Sixth Amendment fair cross section requirement exists when non-citizens are excluded from federal juries.

In finding that the exclusion of non-citizens from state juries does not violate a defendant's right to a jury drawn from a fair cross section of society, the California Supreme Court proceeded with a different analysis. In Rubio v. Superior Court, the court found that resident aliens do not constitute a cognizable group giving rise to Sixth Amendment concerns. Although resident aliens might constitute a cognizable group due to their shared experiences of political exclusion and exposure to discrimination, these experiences are still represented on juries since naturalized citizens have also suffered these burdens. In finding that non-citizens do not constitute a cognizable group, the court concluded that statutory exclusions of non-citizens from state juries do not violate the Sixth Amendment fair cross section requirement.

Although courts have held that prohibitions of non-citizens from jury service are constitutional, many cases show that actual jury service by non-citizens is not unconstitutional. Despite statutes prohibiting their jury service, non-citizens have occasionally sat on juries. This situation can occur if a non-citizen does not know that citizenship is a requirement for jury service and mistakenly fills out a juror questionnaire or is never asked or challenged about his citizenship. In a recent Maryland case, Owens v. State, Mr. Alade, a non-citizen permanent resident in the United States as a student, served as a juror. When Mr. Alade filled out the juror qualification form, he checked the box that indicated he was qualified to serve as a juror due to an oversight. Soon after the jury returned its verdict

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73 Id. at 976.
74 Id. at 978.
75 593 P.2d 595 (Cal. 1979).
76 Id. at 600.
77 Id. at 599.
78 Id.
79 924 A.2d 1072 (Md. 2007), cert. denied, 128 S. Ct. 1064 (2008).
80 Id. at 1078–79.
81 Id. at 1079. At a hearing held on the matter of Mr. Alade's non-citizenship, the trial court found that Mr. Alade did not deliberately intend to mislead the court as to his citizenship status. Id.
convicting the defendant, Mr. Alade learned that non-citizens cannot serve on juries, and he brought his non-citizenship to the attention of the Jury Commissioner. The defendant’s subsequent motion for a new trial on the basis that he was “deprived of a lawful jury” due to Mr. Alade’s non-citizenship was denied.

The Maryland Court of Appeals affirmed the decision of the trial court and rejected the defendant’s argument that substantive due process protects a right to a citizen jury, pointing to several U.S. Supreme Court cases. In some of the cases, the Court found that, although a defendant can challenge the non-citizenship of a juror prior to trial, challenge cannot be made after a verdict. Another case provides that “States remain free to confine the selection [of jurors] to citizens”—implying that states are not required under the Constitution to restrict jury service to citizens. Therefore, although courts have found that the Constitution does not mandate jury service for non-citizens, they have also held that there is no constitutional right to a jury composed entirely of citizens and that the presence of non-citizens on juries is not unconstitutional.

II. IMPLICATIONS OF THE JURY’S ROLES FOR NON-CITIZEN JURY SERVICE

Even though the widespread state and federal exclusions of non-citizens from juries suggest a strong consensus that non-citizens should not serve as jurors, this seeming consensus deserves questioning. Many state and federal courts have faced and rejected Sixth Amendment fair cross section challenges to non-citizen jury service prohibitions, but the Supreme Court has never addressed such a challenge. As for challenges based on equal protection, in Perkins v. Smith the Supreme Court affirmed the denial of such a challenge by a three-judge panel of the U.S. District Court for the District of Maryland, but did so without opinion—a summary affirmance that carries limited precedential weight.
This Note will not address the constitutionality of statutes excluding non-citizens from jury service. Instead this Note addresses whether, in light of the finding that the presence of non-citizens on juries is not unconstitutional, there are policy reasons to allow some non-citizens to serve as jurors. These policy reasons cannot be addressed outside of the greater framework of the meaning of jury service in the United States. Only in light of the jury's role can one consider whether some non-citizens should be included in, rather than excluded from, jury service. This analysis is also appropriate since statements and reflections on the jury's role have been frequently included in cases concerning jury selection procedures.

However, deciphering the jury's role is "not a straightforward task." This statement seems an accurate assessment since the jury's role consists not of one single purpose, but of a collection of many different purposes. Although the Sixth Amendment frames the jury trial in criminal proceedings as a right of the accused, the jury trial is widely recognized as having functions beyond such protection. The jury trial has important roles and benefits for the jurors and community as well as for the criminal defendant. Not only does the jury have several recognized roles, neither these roles, nor the manner in which the jury serves these roles, have remained static throughout this country's history. In addressing whether some non-citizens should serve on juries, one must determine whether the jury trial's current meanings for the defendant, the community, and the jurors are best served by allowing or barring aliens from jury service.

established.'" (quoting Fusari v. Steinberg, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring)).

This Note's discussion of policy concerns may raise some issues that could lead to the questioning of the constitutionality of statutes excluding non-citizens from jury service. However, the constitutionality of these statutes is likely secure because of the government's concern for defining the political community. See Sugarman v. Dougall, 413 U.S. 634, 642, 648 (1973).


U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

Brian C. Kalt, The Exclusion of Felons from Jury Service, 53 AM. U. L. REV. 65, 118 (2003) (stating that jury trials "are beneficial for society, litigants, and the jurors themselves"); see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 (1994) ("Discrimination in jury selection . . . causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.").

See, e.g., Matthew P. Harrington, The Law-Finding Function of the American Jury, 1999 WIS. L. REV. 377, 377 (explaining that although current doctrine posits that judges determine the law and juries apply the law and determine fact, in the eighteenth and nineteenth centuries it was believed that the role of the jury was to find both fact and law).
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A. The Role of the Jury for the Criminal Defendant

The main purpose of the jury trial for the criminal defendant, often recognized in Supreme Court jurisprudence, is to serve as a protection against arbitrary and oppressive government.94 This role as a check on power was clearly exhibited during the late eighteenth century when colonial juries in certain cases resisted the British government's tyrannical laws by refusing to convict defendants who had violated the laws.95 Even after this country achieved independence and formed a democratic, representative government, jury trials were still considered a necessary protection against government power.96 Although the protection the jury provides is no longer directed at a distant monarch, the protection is characterized as a check on prosecutors and judges.97

A determination of whether the current exclusion of non-citizens from juries is compatible with the protective role that juries are supposed to maintain for a criminal defendant requires consideration of the ways in which juries perform this role. Juries historically fulfilled the role of a check against arbitrary governmental power through their law-determining function and representation of the community in which the crime was committed.98

1. The Decline of the Jury's Law-Finding Function and the Current Limitation to Fact-Finding

Juries were historically a strong check on government because they could "decide the law as well as the facts in criminal cases."99 This ability and power arose partly out of necessity. Colonial judges did not have much formal training and often did not instruct the jury about the law.100 Eighteenth-century lawyers recognized the law-finding function of the jury and would often argue the law

96 JONAKAIT, supra note 3, at 24–27.
97 See Duncan, 391 U.S. at 156 (describing the jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); JONAKAIT, supra note 3, at 29–35 (discussing the reasons for the need for juries as a safeguard against judges).
98 ABRAMSON, supra note 95, at 25 ("[J]ury trials gave local residents, in moments of crisis, the last say on what the law was in their community.").
99 Barkow, supra note 90, at 48–49.
100 Harrington, supra note 93, at 379.
directly to the jury. Additionally, in trials presided over by more than one judge, each judge would instruct the jury as to his interpretation of the law. If the judges' instructions conflicted, the jury would necessarily have to choose one of the views in reaching its verdict. The Supreme Court also recognized the ability and power of the jury to decide the law, even if the judges agreed upon and instructed the jury on one applicable law. In Georgia v. Brailsford, Chief Justice John Jay instructed the jury, "[Y]ou have nevertheless a right to take upon yourselves . . . to determine the law as well as the fact in controversy." However, during the nineteenth century judges began to curb juries' law-finding function by instructing jurors that they could apply only the law stated in the charge the judge provided. These limitations were motivated by three factors. First, judges desired stability in the law. Second, judges felt that the increasing diversity of juries meant that juries did not always represent a common set of community beliefs. Lastly, judges saw the increased legal education for judges and lawyers as support for the view that judges, rather than juries, should hold the law-finding function. The Supreme Court considered the law-finding function and nullification power of juries in 1895 in Sparf v. United States and held that the duty of juries was to make findings of fact and then apply to those facts the law the court declared to them. Thus, the Court clearly rejected the idea that juries have a right to make decisions of law or to nullify the law.

Despite this holding, jury nullification can still occur, because even though the Court held that juries do not have the right to nullify the law, juries still have the ability and power to do so. This ability arises because the jury in a criminal trial issues a general verdict, which compounds the jury's finding of law and fact—a verdict of

101 Id. at 378.
102 JONAKAIT, supra note 3, at 246.
103 Id.
104 Id. (citing Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794)).
105 3 U.S. (3 Dall.) 1 (1794).
106 Id. at 4.
107 Harrington, supra note 93, at 380.
108 156 U.S. 51 (1895).
109 Id. at 102. The Court declared:

[In the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law, upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.

Id.
110 Harrington, supra note 93, at 434.
acquittal could possibly be the result of a jury’s nullification of the law.\textsuperscript{111} This nullification is “unassailable” due to the “Constitution’s protection against double jeopardy.”\textsuperscript{112} Despite this fact, some scholars suggest that actual events of jury nullification are most likely rare.\textsuperscript{113} Few individuals in the jury pool know of the jury’s ability to nullify the law, and courts have decided that jurors should not be told about their power of nullification.\textsuperscript{114} Additionally, the convictions imposed by criminal juries in the majority of cases and interviews with both judges and jurors suggest that jury nullification is not widespread.\textsuperscript{115}

This decline of jury nullification, in addition to Sparf’s rejection of the jury’s right to decide matters of law, indicates that a jury’s law-finding function is no longer an important element of the jury’s role as protector against oppressive governmental power. Therefore, instead of a determination of whether jury service by non-citizens is compatible with the historical function of juries to determine the law, the question becomes one of addressing any concerns about non-citizens’ performance of the jury’s job to decide issues of fact and apply the law, as instructed by the judge, to those facts.

One reason often advanced for prohibiting non-citizens from jury service is doubt as to whether non-citizens have the loyalty, interest, and familiarity with the customs and laws of the United States necessary to perform jury service.\textsuperscript{116} This perception raises the question of whether jury service by non-citizens is compatible with the jury’s limitation to engage only in fact-finding without making any findings of law. One could claim that since non-citizens are less likely to have an extensive knowledge of or commitment to the customs and laws of this country, they may be more likely to disregard or misunderstand the law directed by a judge and decide

\begin{footnotesize}
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\item Id.
\item Id. The Fifth Amendment states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.
\item See JONAKAIT, supra note 3, at 258.
\item Id. at 254–55.
\item Id. at 258.
\item See United States v. Gordon-Nikkar, 518 F.2d 972, 976 (5th Cir. 1975) ("[T]here [i]s a compelling interest 'in ensuring that persons who serve as jurors are personally committed to the proper application and enforcement of the laws of the United States' which therefore justifies the exclusion of aliens." (quoting Perkins v. Smith, 370 F. Supp. 134, 142 (D. Md. 1974) (three-judge court) (Winter, J., concurring), summarily aff'd, 426 U.S. 913 (1976))); Perkins, 370 F. Supp. at 138 ("There is no . . . basis for assuming that resident aliens . . . have so assimilated our societal 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."); Commonwealth v. Acen, 487 N.E.2d 189, 196 (Mass. 1986) ("[J]ury service demands loyalty to this country and its laws as well as knowledge of and familiarity with its customs. . . . [I]t is undeniable that some aliens do not possess these requisite attributes . . . ." (citations omitted)).
\end{enumerate}
\end{footnotesize}
verdicts according to their own understanding of what the law is or should be. However, this broad claim based on a broad assumption is weakened by a variety of arguments.

First, case law involving situations in which non-citizens have served as jurors suggests courts are not greatly concerned that non-citizen jurors would purposefully ignore the law as instructed by a judge or that a lack of knowledge of the law would result in such a disregard. Findings of law by a jury potentially can take two different forms: the jury can ignore the law directed by a judge either to acquit a guilty defendant or to convict a defendant whom the jury believes is innocent of the alleged crime. The first form is referred to as jury nullification. While juries have the ability, if not the right, to nullify the law in order to acquit, some scholars "stress that the jury does not have the power to ignore the law in order to convict" in reality because a judge can set aside guilty verdicts (but not acquittals). A conviction in disregard of the law compromises the role of the jury in preventing oppression, because an appeal requires additional expenses in time and money for the defendant, while "few appeals are successful." For these reasons, even though a guilty verdict is appealable, the harms resulting from law-finding that takes the form of convictions in disregard of the law are potentially worse than harms from law-finding resulting in acquittals in disregard of the law.

If this is the case, and if the assumed lack of knowledge and loyalty of non-citizens truly affects the likelihood that non-citizens will apply the law instructed by the judge, one would expect courts to frequently reverse verdicts of conviction when a non-citizen sits on the jury rendering the verdict. However, again and again courts faced with defendants' post-conviction objections to the non-citizenship of a juror find that the presence of a non-citizen juror on the jury is not grounds for reversal of the verdict. In one such case, the defendant specifically argued that a non-citizen is less likely to be familiar with local laws and customs. However, after addressing many considerations, including whether the non-citizen juror applied the

117 See cases cited supra note 84.
118 JONAKAIT, supra note 3, at 245.
119 Id. at 263.
120 Id. at 265.
121 See In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (describing "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").
law as directed by the trial court, the appellate court affirmed the conviction, finding that none of the defendant’s constitutional rights were violated. Therefore, although lack of familiarity with, knowledge of, or loyalty to this country’s law and customs is advanced as a reason to deny non-citizens the opportunity to serve on juries, courts have not used this reason to reverse verdicts of conviction when non-citizens have served as jurors.

Second, the specific assumption that non-citizens lack the necessary knowledge of the law to perform as jurors should not alone support non-citizens’ exclusion from jury service, especially considering the typical knowledge of citizens who serve as jurors. The law’s numerous complexities foster much doubt as to ordinary citizens’ capacity to know and understand the law. These complexities represent one of the initial reasons for assigning the judge the law-finding function while limiting the jury to questions of fact. Jurors are not required to seek out or know the law to apply in a particular case; instead, jurors receive their knowledge of the applicable law from the judge’s instructions. Even when presented with the applicable law through the jury instructions, jurors will often not understand that law. Thus, an assumption that non-citizens lack knowledge of the laws of the United States should not alone support prohibitions of non-citizens from jury service; citizens also lack comprehensive knowledge of this country’s laws, and jury instructions often contribute to confusion about the law rather than clarify any minimal understanding.

Third, the assumption that non-citizens lack knowledge of and loyalty to the laws and customs of the United States may not accurately represent non-citizens as a class and certainly cannot be said to accurately represent every individual non-citizen. As various scholars note, “United States citizenship is a weak correlate of actual allegiance, or loyalty.” In Perkins, the U.S. District Court for the District of Maryland recognized that “many, if not most, aliens do intend to become citizens, and . . . their loyalty could probably be

124 Id. at 267.
125 ABRAMSON, supra note 95, at 9.
126 Id.
127 JONAKAIT, supra note 3, at 198.
128 Id.
129 Of course, unclear jury instructions that do not remedy jurors’ initial lack of knowledge about applicable law represent a problem of the jury system requiring attention. For a discussion about the jury instruction process and possible reforms, see JONAKAIT, supra note 3, at 198–217.
counted upon."

Indeed, the Supreme Court has stated that "jury competence is an individual rather than a group or class matter." However, the district court in *Perkins* rejected the possibility that any sort of screening, prior to the taking of citizenship itself, could show the allegiance of a non-citizen to the laws of the United States. Possibilities exist, however, for determining the knowledge of and commitment to the laws by individual non-citizens.

Residency status of non-citizens could act as a vehicle for determining their knowledge of customs and commitment to the laws. Non-citizens who are legal permanent residents could be given the opportunity to serve on juries. As of September 2004, an estimated 11.6 million legal permanent residents were living in the United States, and 8.0 million of these legal permanent residents were estimated to be eligible for naturalization. As a legal permanent resident, a non-citizen is allowed to live and work in the United States permanently. Legal permanent residents must pay local, state, and federal taxes, are able to "serve in the military and are eligible for the draft," and are subject to federal, state, and local laws. A legal permanent resident’s ability to serve in the military is particularly relevant to the question of whether this class of non-citizens should be able to serve as jurors. If legal permanent residents are deemed loyal enough to fight for the United States, they should be considered sufficiently committed to the laws of this country to serve as jurors and apply the law as instructed by the judge.

Even if doubts remain about the loyalty to this country’s laws of legal permanent residents as a group, there are still other methods available to determine if certain subgroups of legal permanent residents possess the requisite loyalty to the laws necessary to

136 The obligations of legal permanent residents to the United States have also been cited as reasons for extending the vote to non-citizens. See Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. PA. L. REV. 1391, 1441–42 (1993) (arguing that resident aliens should be able to vote at local level); Evia, supra note 135, at 151–53 (arguing that legal permanent residents should be able to vote at national and local levels).
perform the juror’s task. For instance, legal permanent residents who have applied for U.S. citizenship could be included as jurors. In fiscal year 2007, legal permanent residents filed 1.4 million applications for U.S. citizenship.138 By filing for citizenship, these legal permanent residents indicated their desire and commitment to live in this country. Also, to file for citizenship these legal permanent residents must have resided in the United States for at least five years since the date they were lawfully admitted for permanent residence.139 This length of time allows development of the commitment to and knowledge of the laws necessary for service as a juror who accepts and applies the law the judge provides.

Alternatively, courts could determine individual legal permanent residents’ commitment to the laws. Such determinations could take the form of oaths and questioning similar to those that are already used in jury service. For example, judges could question potential jurors about whether they will apply the law as instructed, and, if a potential juror indicates that he might not apply the law as instructed because of his personal conscience, the judge could excuse that person.140 Other possibilities include oaths that a juror will uphold the Constitution and laws.141 Thus, multiple ways exist to ascertain if non-citizens possess the knowledge of and loyalty to the laws of this country necessary to perform the jury’s function of finding facts and applying the law as instructed by the judge to those facts.142

2. A Jury Drawn From the Community to Represent the Common Sense of the Community

The second characteristic of juries that contributes to the jury’s role of protecting the criminal defendant against oppressive government is the jury’s composition of members of the community in which the crime was committed. What it means to be a jury drawn from the community has evolved over time. Before the colonies achieved independence from the British government, the power of the jury to protect criminal defendants from the British government’s tyrannical laws depended on juries being drawn from the local

141 See, e.g., N.J. STAT. ANN. § 2B:20-18 (West 2009).
142 In Part III, this Note attempts to answer the question of whether non-citizens should sit on juries. In doing so, it finds that in certain locations, legal permanent residents should be eligible to serve as jurors. See infra Part III.
population of the colonies. During the framing of the Constitution, the argument for maintaining the local nature of the jury centered on the importance of a jury’s representation of a community’s common sense. When the Bill of Rights was drafted, the Sixth Amendment maintained the local nature of the jury with the requirement of a “jury of the State and district wherein the crime shall have been committed” for all criminal prosecutions.

In the last century, while the commitment to juries drawn from the community in which the crime was committed has remained strong, the focus in cases involving jury selection has shifted to how the jury is drawn from the community. In Taylor v. Louisiana, the Supreme Court emphasized its oft-repeated finding that “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.” The Court discussed how the common sense of the community acts as a guard against the exercise of arbitrary power by the government, and this protection mechanism cannot be realized fully “if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the [jury] pool.” A representative jury is necessary to maintain “a diffused impartiality.” Therefore, in order for the jury, by embodying the common sense of the community, to fulfill its role of protecting the criminal defendant against arbitrary and oppressive government, the jury must not only be drawn from the community in which the crime was committed, but also be widely representative of that community.

In order for a jury to most fully represent the common sense of the community, one would expect that members of most or all groups should be eligible for jury service. However, a limit for this wide inclusion might be justified if the presence of members of a certain group on a jury actually decreases the ability of the jury to represent the common sense of the community. For non-citizens to constitute such a group, their presence on a jury must cause the jury to no longer

143 ABRAMSON, supra note 95, at 25.
144 Id. at 28.
145 U.S. CONST. amend. VI.
146 But see generally JONAKAIT, supra note 3, at 112–13 (discussing venue changes).
148 Id. at 528.
149 Id. at 530; see also Batson v. Kentucky, 476 U.S. 79, 87 n.8 (1986) (“By compromising the representative quality of the jury, discriminatory selection procedures make ‘juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.’” (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting))).
150 Taylor, 419 U.S. at 530 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
represent the common sense of the community, thereby no longer being capable of fulfilling its role of protecting the defendant from oppression and partiality.

To represent the common interest of the community, members of a jury must have knowledge of the customs and values of the community. In Perkins, the U.S. District Court for the District of Maryland emphasized the importance of a juror having knowledge of the "customs of the locality" and stated that no assumption that resident aliens have this knowledge could be made. Even so, legal permanent residents could be eligible for jury service without harm to the jury's characteristic of representing the community's common sense. Most legal permanent residents must be residents of the United States for five years prior to being eligible for naturalization. Therefore, the estimated 8.0 million legal permanent residents who are eligible to naturalize have lived in this country for at least five years. Even accounting for interstate and interdistrict migration, which also occurs among citizens, a strong probability exists that many legal permanent residents have lived in a particular community for many years. These legal permanent residents could have a closer connection to their community and more opportunity to gain knowledge of the community's interests and customs than even a citizen who is a new resident of the community. Since the citizen who is a newcomer to town may be called for jury service while the legal permanent resident who has developed ties to the community over many years may not be called, citizenship classifications seem an arbitrary measure of an individual's knowledge of a community, and hence his or her ability to sit on a jury representing the common sense of that community.

The Supreme Court has been critical of similar arbitrary restrictions in the past. In Dunn v. Blumstein, the Court found that a one-year residency requirement for voter eligibility could not be justified on the basis of a government desire for an electorate knowledgeable about community issues. The Court found the durational residency requirement too crude a measure of knowledge since some new residents may be more informed about community issues than long-time residents. This finding supports a theory that

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152 RYTINA, supra note 134, at 2.
153 See id. at 2-3.
155 Id. at 356-57.
156 Id. at 357-58.
general bans of non-citizens from jury service should be reconsidered because of their arbitrary nature. Since most legal permanent residents have likely lived in the same community for many years, they have an opportunity to become acquainted with local customs and values on par with that of citizens. Their presence on juries will maintain the jury’s representation of the common interest of the community, while potentially enhancing community representation on the jury. Therefore, the presence of at least certain groups of non-citizens on juries is compatible with the role of the jury as a guard against government oppression and partiality.

B. The Role of the Jury for the Community

The jury plays an important role for the community as a whole by instilling public confidence in the criminal justice system. The Supreme Court described a purpose of the jury system as “to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.” The manner of jury selection will greatly impact whether community members believe a jury verdict is fair and whether community members are confident in the entire judicial process. Jury selection procedures do not need to result in actual bias for community members to lose confidence in the jury system; an appearance of bias or an increase in the risk of actual bias is sufficient to create a loss of confidence.

Exclusions of certain groups during the jury selection process can diminish public confidence in the institution of the jury and the criminal justice system as a whole for two different reasons. First, loss of confidence in the judicial system is inevitable if the exclusion involves discrimination that violates equal protection of the law and contributes to “the perpetuation of invidious group stereotypes.”

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157 In contrast to the invalidity of a one-year residency requirement for voting, the validity of a one-year residency requirement for jury service has been upheld. See, e.g., United States v. Ross, 468 F.2d 1213 (9th Cir. 1972) (finding that 28 U.S.C. § 1865(b)(1), which requires a one-year residency in the district for federal jurors, is constitutional). However, in jurisdictions in which there are durational residency requirements, an additional restriction on non-citizens is not needed because non-citizens will already have the same opportunity to learn the customs of the community as citizens do.

158 Legal permanent residents, rather than all non-citizens, constitute the group that Part III of this Note proffers should be allowed to serve on juries, at least in some locations. See infra Part III.


161 Id. at 502–03.

Second, exclusion of a group from jury service can create a loss of confidence in the judicial system if the exclusion systematically produces a jury that is less representative of the community.\textsuperscript{163} If the exclusion of non-citizens from jury service decreases public confidence in the jury system for either of these reasons, non-citizens should be allowed to serve on juries. In determining whether there is a decrease in public confidence, one must look not only at the effects of non-citizen exclusions on non-citizens themselves, but also at the effects on other groups.

1. Equal Protection as a Concern for Community Confidence in the Jury System

The exclusion of non-citizens from jury service could create a loss of public confidence in the judicial system if the exclusion is deemed to be invidious discrimination. Relevant to this determination are equal protection decisions concerning exclusions of other groups from jury service and various equal protection cases involving non-citizens. "[N]o court has ever held that . . . jury service is a fundamental right entitled to strict or even heightened scrutiny."\textsuperscript{164} Therefore, whether exclusion of a certain group is likely to be considered invidious discrimination by the state will depend in part on whether that group is viewed within the equal protection framework under heightened scrutiny. Classifications based on race and national origin are inherently suspect and deserve close judicial scrutiny.\textsuperscript{165} The Supreme Court has found that jury service exclusions based on both of these classifications violate the Equal Protection Clause.\textsuperscript{166} The Court has also held that classifications based on alienage are inherently suspect and deserve close judicial scrutiny, because "[a]liens as a class are a prime example of a 'discrete and insular' minority."\textsuperscript{167} This view of non-citizens as a class makes it

\textsuperscript{163} See Lockhart v. McCree, 476 U.S. 162, 174–75 (1986) (stating that one of the purposes of the fair cross section requirement is to maintain "public confidence in the fairness of the criminal justice system" (quoting Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975))).

\textsuperscript{164} Kalt, supra note 92, at 88 (citing United States v. Onant, 116 F. Supp. 2d 1015, 1020 (E.D. Wis. 2000)).


\textsuperscript{166} See Hernandez v. Texas, 347 U.S. 475, 482 (1954) ("[Petitioner's] only claim is the right to be indicted and tried by . . . juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution."); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (finding that a statute prohibiting African Americans from serving as jurors "amounts to a denial of the equal protection of the laws").

\textsuperscript{167} Graham, 403 U.S. at 372 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938)).
highly likely that exclusion of this group from jury service conflicts with the jury's role of instilling public confidence in the judicial system. However, unlike exclusions from jury service that courts have rejected for other groups subject to strict scrutiny, exclusions of non-citizens from jury service have been upheld.\(^{168}\)

To uphold jury service citizenship restrictions, without producing a loss of confidence in the jury system, courts must find that something about citizenship classifications is different from other classifications subject to strict scrutiny. Precedents concerning exclusions of non-citizens from jury service identify two possible differences. The first arises from the state interest that the courts find justifies an alienage classification for jury service—a state interest in ensuring that jurors are both committed to the enforcement of this country's laws and familiar with this country's customs.\(^{169}\) This state interest rests on an assumption that non-citizens as a class are less likely to be loyal to this country's laws or familiar with this country's customs.\(^{170}\)

The assumption about the loyalty (or lack thereof) of non-citizens is not sufficiently strong to be a distinction that would justify the difference in treatment between non-citizens and other groups subject to strict scrutiny. As previously discussed, many factors suggest that most legal permanent residents are just as committed to this country and its laws as the average citizen.\(^{171}\)

The assumption that non-citizens are less likely to be familiar with the customs, values, and institutions of this country may be a more meritorious distinction to justify upholding exclusions of non-citizens from jury service even while other exclusions are subject to close judicial scrutiny and struck down. Both native-born and naturalized citizens have the opportunity to learn about the customs of this country. Native-born citizens, and naturalized citizens who are schooled in the United States, receive this knowledge in "classes in civics, United States and [state] history, and principles of American government" provided in public and private schools.\(^{172}\) Naturalized citizens have demonstrated knowledge of the customs of this country, because "a knowledge and understanding of the fundamentals of the

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\(^{171}\) See supra Part II.A.1; see also Legomsky, supra note 130, at 295-96 (discussing allegiance as a purpose of citizenship and describing reasons why resident aliens cannot be assumed to be disloyal).

history, and of the principles and form of government, of the United States" is a requirement for naturalization. In contrast, non-citizens who have not attended school in the United States have likely not had the opportunity to learn about American government in school and, until naturalization examinations, have no way of demonstrating the requisite knowledge about U.S. customs, laws, and institutions.

However, as Judge Winter, concurring in Perkins, stated, resident aliens could serve on juries if their eligibility was conditioned upon "their successful completion of examinations comparable to those administered by the Bureau of Immigration and Naturalization." Since alienage is a classification requiring close judicial scrutiny, administrative inconvenience of such examinations is an insufficient reason to maintain an exclusion from jury service of all resident aliens. Thus, the likelihood that non-citizens are less familiar with the customs and institutions of this country is insufficient alone to justify the continued exclusion of non-citizens from jury service. Public confidence in the jury system would suffer if non-citizen exclusions were based only on this likelihood or the assumption that non-citizens are less likely to be committed to this country’s laws.

In contrast, the second potential difference between the alienage classification and other classifications requiring strict scrutiny analysis could justify the exclusion of non-citizens from jury service. This difference arises because of the relevance of citizenship to political participation. As discussed earlier, the Supreme Court has held that there are "political function" exceptions to the requirement that alienage classifications face close scrutiny. The basis for this exception is the finding that states have the power to define their "political community" and to "exclude aliens from participation in [their] democratic political institutions." In the determination of a political community, citizenship also holds significance at the national level. This significance is partly shown in the Constitution, which provides that citizenship is a requirement for the office of

175 Id. Even so, Judge Winter concurred with the majority in upholding the statute excluding resident aliens from jury service because of the state’s interest in restricting jury service to those committed to applying the laws of the United States and the lack of an objective test of commitment for non-citizens. Id. at 141–42.
176 See Bernal v. Fainter, 467 U.S. 216, 220 (1984) (describing the political function exception); see also supra Part I (same).
178 Id. at 648 (citing Pope v. Williams, 193 U.S. 621, 632–34 (1904)).
President \(^{179}\) and for positions in the Senate \(^{180}\) and the House of Representatives. \(^{181}\) Additionally, the Constitution provides for the protection of certain "privileges or immunities of citizens of the United States." \(^{182}\) The importance of citizenship is also evident in Congress’s power "to establish an uniform Rule of Naturalization." \(^{183}\) Congress has the "power to define the extent of resident aliens’ rights prior to obtaining citizenship." \(^{184}\) Therefore, at both the state and federal level, support exists for the relevance of citizenship to political participation. \(^{185}\) The importance placed on a political community presents a reasonable distinction for excluding non-citizens from jury service while other groups subject to strict scrutiny are not excluded. \(^{186}\) Thus, exclusions of non-citizens from jury service can be justified and likely will not be viewed as invidious discrimination resulting in a decrease in public confidence in the judicial system.

2. Jury Representativeness as a Concern for Community Confidence in the Jury System

Alternatively, the prohibition of non-citizens from jury service could create a loss of confidence in the judicial system if it is an impermissible systematic exclusion that decreases the representative quality of the jury. As early as 1946, the Supreme Court emphasized that a jury had to be drawn from a jury pool broadly representative of the community. \(^{187}\) However, the jury does not have to be drawn from a segment of the community that includes every possible group. The representative quality of a jury is not so much about the groups themselves, but about the attitudes and viewpoints of the groups. \(^{188}\)

\(^{179}\) U.S. CONST. art. II, § 1, cl. 5.  
\(^{180}\) U.S. CONST. art. I, § 2, cl. 2.  
\(^{181}\) U.S. CONST. art. I, § 3, cl. 3.  
\(^{182}\) U.S. CONST. amend. XIV, § 1.  
\(^{183}\) U.S. CONST. art. I, § 8, cl. 4; see also United States v. Gordon-Nikkar, 518 F.2d 972, 977–78 (5th Cir. 1975) (citing to this Constitutional provision as a source of Congress’s authority to limit jury service to citizens).  
\(^{184}\) Gordon-Nikkar, 518 F.2d at 978.  
\(^{185}\) See infra Part II.C.1, for a discussion of whether this accepted connection between citizenship and democratic political participation is appropriate for the role of the jury to the juror himself.  
\(^{186}\) For this reason, although this Note focuses on policy concerns and does not tackle the constitutionality question directly, the constitutionality of exclusions of non-citizens from jury service is likely secure.  
\(^{187}\) Kalt, supra note 92, at 77–80. However, the Court later stated that "'[t]he Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)."' Id. at 80 (quoting Holland v. Illinois, 493 U.S. 474, 480 (1990)) (alteration in original).  
\(^{188}\) Rubio v. Superior Court, 593 P.2d 595, 598 (Cal. 1979).
The representation of the community may occur in this way, because, as the Supreme Court stated, ""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."" The Court’s established test for a fair cross section violation reflects this conception of a jury’s representation of the community through attitudes and viewpoints rather than group memberships—the exclusion of a group creates a fair cross section violation only if the group is "‘distinctive’ group in the community." Even if a prima facie case of a fair cross section violation is found, a state may justify the fair cross section violation, and thus the decreased representativeness, with a significant state interest.

If non-citizens comprise a distinctive group in the community, public confidence in the jury system could be harmed by the exclusion of non-citizens from jury service. The Supreme Court has not stated what qualities make a group distinct, but "‘a common court of appeals definition has emerged’: the group must be defined by some factor; the group must possess "‘a common thread or basic similarity in attitude, ideas, or experience’"; and the members of the group must share interests that "‘cannot be adequately represented if the group is excluded from the jury selection process.’" Non-citizens definitely meet the first requirement, since they are defined by their non-citizenship status. The California Supreme Court addressed the other two factors in Rubio v. Superior Court. The majority found that non-citizens had the shared experiences of exclusion from this country’s political processes and of discrimination. However, the majority found that non-citizens were adequately represented by naturalized citizens, who had similar experiences as non-citizens before naturalization. Justice Tobriner thought otherwise, arguing in his dissent that naturalized citizens and non-citizens have different outlooks due to the passage of time, so

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189 Id. (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)). However, there are criticisms of the adequate representation factor. See, e.g., id. at 604–06 (Tobriner, J., dissenting); Kalt, supra note 92, at 84.
190 Id., at 367–68.
191 Id., at 82 (citing Lockhart v. McCree, 476 U.S. 162, 174 (1986)).
192 Id. at 92, at 84.
194 Id. at 367–68.
195 Id. at 82 (quoting Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983)).
196 593 P.2d 595 (Cal. 1979).
197 Id. at 598.
198 Id. at 599–600.
adequate representation of non-citizens by naturalized citizens is unlikely.\footnote{Id. at 606 (Tobriner, J., dissenting).}

If, as Justice Tobriner argued, the representation of non-citizens by naturalized citizens is inadequate, thus revealing that non-citizens constitute a distinctive group, then the exclusion of non-citizens from jury service would make a prima facie case of a fair cross section violation.\footnote{The exclusion of non-citizens satisfies the other prongs of the Duren test, underrepresentation of the group and systematic exclusion of the group. See Duren v. Missouri, 439 U.S. 357, 364 (1979).} However, the government, at either a state or federal level, could justify this limitation on the representative quality of the jury with a significant state interest. As stated above, states have the power to “exclude aliens from participation in [their] democratic political institutions,”\footnote{Sugarman v. Dougall, 413 U.S. 634, 648 (1973) (citing Pope v. Williams, 193 U.S. 621, 632–34 (1904)).} and Congress has the power “to define the extent of resident aliens’ rights prior to obtaining citizenship.”\footnote{United States v. Gordon-Nikkar, 518 F.2d 972, 978 (5th Cir. 1975).} Thus, even when the representative quality of the jury is concerned, exclusions of non-citizens probably will be deemed to not affect public confidence in the fairness of the criminal justice system. Non-citizens might not comprise a distinct group whose viewpoint will not be represented if the group is not available in the jury pool; but, even if the absence of non-citizens does subtract a certain viewpoint from the jury pool, the absence can be justified to the public.

3. Implications for the Presence of Other Groups on the Jury as Concerns for Community Confidence in the Jury System

In the previous discussion of the reasons for how exclusions of non-citizens from jury service could possibly decrease public confidence in the criminal justice system, only the presence or absence of non-citizens on the jury was considered. However, exclusions of groups from jury service could potentially decrease public confidence in the jury system through the effects that the exclusion might have on other groups eligible to serve on juries. This effect has been observed and considered in exclusions of felons from jury service.\footnote{See Kalt, supra note 92, at 113–14.} Felon exclusions from jury service contribute to racial disparity on juries by disqualifying a greater percentage of African American adults than the percentage of the entire adult population
that is disqualified due to felon exclusions.\textsuperscript{203} Despite the disparate racial impact of felon exclusions from jury service, felon exclusions have been upheld against both fair cross section challenges\textsuperscript{204} and equal protection challenges.\textsuperscript{205}

Citizenship requirements for jury service have also been viewed as a cause of racial disparity on juries. The underrepresentation of Hispanics on juries in some communities is attributed to the citizenship requirement as well as many other factors, including the English language requirement.\textsuperscript{206} For example, in one case involving a fair cross section challenge based on Hispanic underrepresentation, the court found that a 14.5 percent absolute disparity existed between the percentage of over-eighteen Hispanics in the population of the county and the percentage of Hispanics on the master trial jury list.\textsuperscript{207} Despite the disparity, the court rejected the challenge.\textsuperscript{208} The court recognized that citizenship requirements were a cause of the absolute disparity,\textsuperscript{209} but when the percentage of Hispanics on the master trial jury list was compared to the percentage of “jury-eligible” (i.e., U.S. citizen) Hispanics in the county, any remaining underrepresentation was insufficient for a Sixth Amendment fair cross section violation.\textsuperscript{210} Additionally, the court found that the county’s jury selection method did not systematically exclude jury-eligible Hispanics.\textsuperscript{211}

Although citizenship requirements for jury service may be one cause of Hispanic underrepresentation on juries in certain communities, this effect likely should not interfere with public confidence in the jury system. Racial disparities on juries should most likely produce a decline of public confidence in the jury system if they are the result of intentional discrimination against the group

\textsuperscript{203} Id. at 114.
\textsuperscript{204} Id. at 75 n.34.
\textsuperscript{205} Id. at 88.
\textsuperscript{207} Smith v. State, 571 S.E.2d 740, 745 (Ga. 2002).
\textsuperscript{208} Id. at 749.
\textsuperscript{209} See id. at 746; see also Johnson, supra note 206, at 187 (“According to the 2000 U.S. Census, almost thirty percent of Hispanics in the United States are not U.S. citizens, and thus are ineligible for jury service.”).
\textsuperscript{210} Smith, 571 S.E.2d at 747. Federal appellate courts have also stated that to determine whether a group is underrepresented, a court should compare the percentage of the group in the jury pool to the percentage of the group in the general jury-eligible population. See United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998); United States v. Rioux, 97 F.3d 648, 657 (2d Cir. 1996); United States v. Grisham, 63 F.3d 1074, 1078-79 (11th Cir. 1995).
\textsuperscript{211} Smith, 571 S.E.2d at 747-49.
(because the racially disparate impact of a law does not necessarily indicate a discriminatory purpose\textsuperscript{215}) or systematic exclusion of the underrepresented group. Neither is present when considering the effect of citizenship requirements on Hispanic underrepresentation on juries. Such a requirement is not racially discriminatory on its face, and the long history of statutes restricting jury service to citizens\textsuperscript{213} clearly shows that the exclusion of Hispanics is not a purpose of the citizenship requirement.\textsuperscript{214} Also, courts have held that underrepresentation of Hispanics on juries does not result from systematic exclusion if the only cause is a citizenship requirement, without any affirmative effort to impede members of that group from serving as jurors.\textsuperscript{215} Because Hispanic underrepresentation is attributable to longstanding jury citizenship requirements that are some of many accepted citizenship requirements related to political participation,\textsuperscript{216} this effect should not create a decrease in public confidence in the jury system overall that would recommend non-citizen participation on juries.\textsuperscript{217} The exclusion of non-citizens from jury service probably does not conflict with the jury’s role of creating public confidence in the criminal justice system, either through the absence of non-citizens from juries or through effects that non-citizen exclusions may have on the presence of eligible groups for jury service.\textsuperscript{218}

\textsuperscript{212} See Washington v. Davis, 426 U.S. 229 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."); Kalt, supra note 92, at 89–90 (stating that it would be difficult to challenge, on disparate racial impact grounds, felon exclusions from jury service because it would be difficult to show discriminatory intent).

\textsuperscript{213} See supra Part I.

\textsuperscript{214} Cf. Kalt, supra note 92, at 91 (stating that because “felon exclusion was practiced at common law,” attributing “racial animus to the historical practice of felon exclusion is difficult”).

\textsuperscript{215} Smith, 571 S.E.2d at 747.

\textsuperscript{216} See supra text accompanying notes 176–85.

\textsuperscript{217} It is still possible that the underrepresentation of Hispanics on juries decreases Hispanic confidence in the jury system, see Johnson, supra note 206, at 196, but whether removing jury service citizenship requirements is the right cure for the underrepresentation is another matter.

\textsuperscript{218} A separate question is whether the presence of non-citizens on juries would actually decrease public confidence in the jury system. The presence of non-citizens on juries should only decrease public confidence if non-citizens are unable to perform the jury’s function, as identified in Part II.A.1, of finding facts and applying the law instructed by the judge to those facts. Knowledge of and loyalty to this country’s laws and customs have been considered necessary for a juror’s performance of this function. See discussion supra Part II.A.1. Although assumptions that non-citizens lack this requisite knowledge and loyalty exist, these assumptions are weak, and legal permanent residents are just as capable as citizens of fulfilling the juror’s function. See id. Therefore, the presence of legal permanent residents on juries should not decrease public confidence in the criminal justice system.
Two main purposes of jury service for the jurors themselves are frequently discussed. First, jury service provides jurors an opportunity for democratic participation in government. Second, jury service supplies jurors with civic education.

1. The Jury as an Opportunity for Democratic Participation in Government

As described by the Supreme Court, the "opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."

A comparison of jury service and enfranchisement as institutions of political participation is often made. In making this comparison, the Court stated that "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." One scholar has even described jury service as "the pinnacle of democratic participation." This opportunity for democratic participation is not only described as a right to sit on a jury and administer justice, but also as a duty.

The role of jury service as a right and duty to participate in the administration of justice has been identified by the Supreme Court as one reason for the representative character of the jury, or the fair cross section requirement. Yet, however great the jury's representative character has expanded over the years through courts holding that distinctive groups previously prohibited from jury service should not be systematically excluded, the representative character of the jury has not become great enough to include non-citizens. This
exclusion fits with the current conception of jury service as democratic participation, which, as shown by the Supreme Court’s statements cited above, is viewed as a right or duty of citizens.

Similarly, non-citizens are excluded from voting, the other main opportunity for political and democratic participation. Legal scholars have argued for separating the perceived connection between citizenship and voter enfranchisement and thereby allowing some non-citizens to vote. It is useful to consider two of the main arguments for enfranchisement in determining whether a similar proposition should be made for the dismantling of the perceived connection between citizenship and democratic participation through jury service, and thus for the inclusion of some non-citizens on juries.

One of the arguments provided for the extension of the vote to legal permanent residents is the membership of legal permanent residents in the communities in which they live. The participation of legal permanent residents in their communities causes legal permanent residents to have an interest in political decisions just as citizens have. This interest arises because legal permanent residents are subject to the same “social and political responsibilities” as citizens; “[i]mmigrants are subject to all laws, pay taxes at all levels, work in and own businesses, send their children to schools, serve in the military and can be drafted, and participate in all aspects of daily social life.” Long-standing democratic principles provide that individuals should not be governed or taxed without the opportunity for representation.

Because democratic participation in the form of jury service is different from democratic participation in the form of voting, the interest in a community that non-citizens gain from their residence and obligations therein may not suggest a need for the opportunity to perform jury service as much as it suggests a need for representation through the vote. Unlike the vote, through which an individual has the opportunity to have input in the formation of the law either directly through referenda or indirectly by electing the lawmakers, jury service does not provide individuals in a community the same level of representation. As discussed earlier, the jury’s function is not to have

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226 Raskin, supra note 137, at 1394.
227 See generally Gerald L. Neuman, “We Are the People”: Alien Suffrage in German and American Perspective, 13 MICH. J. INT’L. L. 259 (1992); Raskin, supra note 137; Rosberg, supra note 130.
228 Evia, supra note 135, at 170.
229 Id.; see also JEFFERYS & MONGER, supra note 135, at 1 (explaining that legal permanent residents may “live and work permanently anywhere in the United States, own property, and attend public schools”).
230 Raskin, supra note 137, at 1443–45.
a voice in the formation of the law but to apply the laws that already exist in the community. This role—an opportunity to participate in the administration of justice through the application of law—is not as effective at influencing matters directly affecting an individual's interest in the community as is voting. The difference between democratic participation through voting and democratic participation through jury service is reflected in distinctions between voting and jury service as rights of citizens. Voting has been described as "a more robust right." The U.S. Constitution repeatedly discusses the right to vote but does not provide a right to serve on a jury. Additionally, while individuals have the right to vote (or not vote) when they choose, individuals only have a right to a fair opportunity at jury service; whether an individual is chosen for jury service is a matter of chance. These differences in quality of right are indications that the proposal for extending the right to vote to certain non-citizens on account of their interest in the community cannot necessarily be applied to jury service.

Another argument for the extension of the franchise to some non-citizens is the historical disconnect between citizenship and voting, which suggests the right to vote is not solely for citizens. An extensive history of alien suffrage exists in many states. The last state to eliminate non-citizen voting did so in 1926. Not only have non-citizens been voting through much of this country's history, but the disconnect between voting and citizenship status is made stronger by limitations placed on citizens' voting. Currently, there are age and residency qualifications to vote, and some states disenfranchise felons. Additionally, the Supreme Court has stated that "citizenship and suffrage are independent legal categories which do not necessarily imply one another." Unlike the extensive history of non-citizen voting, the history of jury service by non-citizens is not as strong. Although in the early part of the nineteenth century non-citizens did sit on juries de medietate linguae convened for trials of non-citizens, the jury de

231 See supra Part II.A.1.
232 Kalt, supra note 92, at 120.
233 Id. (citing U.S. CONST. amend. VI, VII, XV, XIX, XXIV, XXVI).
234 Id. at 119–20.
235 See generally Neuman, supra note 227, at 292–300; Raskin, supra note 137, at 1397–417.
236 Raskin, supra note 137, at 1416.
238 Kalt, supra note 92, at 120.
239 Raskin, supra note 137, at 1417 (citing Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874)).
medietate linguae was a right of the non-citizen on trial rather than the non-citizens serving.\textsuperscript{240} Even the service of non-citizens on juries \textit{de medietate linguae} declined rapidly as courts began to reject requests by non-citizens for these types of juries.\textsuperscript{241} The connection between citizenship and jury service has historically been stronger than the connection between citizenship and voting.

The main arguments for revision of the view that democratic participation in the form of voting is solely a right for citizens cannot be similarly extended to democratic participation in the form of jury service. This finding, in combination with the principle expounded by the Supreme Court that states have the power to define their political community by “exclud[ing] aliens from participation in [their] democratic political institutions,”\textsuperscript{242} indicates that the exclusion of non-citizens from jury service does not conflict with the role of the jury as an opportunity for democratic participation by the juror.

2. \textit{The Educational Purpose of Jury Service for Jurors}

The second major purpose of jury service particular to the jurors themselves is civic education. In the 1830s, Alexis de Tocqueville stated:

I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.\textsuperscript{243}

Not only is jury service an opportunity for individuals to learn about the law first-hand,\textsuperscript{244} but it also teaches a range of other values. De Tocqueville described some of these lessons, such as “teach[ing] men equity in practice,” teaching individuals “not to shirk responsibility for [their] own acts,” and making “men feel that they have duties toward society.”\textsuperscript{245} When de Tocqueville was discussing the values of jury service, he seemed to do so with respect to citizens.\textsuperscript{246} However,
the lessons that jury service provides are beneficial to all individuals, citizen and non-citizen alike.

This educative experience is not only beneficial for the juror but also for the larger community. First, an individual’s involvement in other civic and political behaviors may increase subsequent to his jury service participation. One study found that registered voters who participated in criminal juries that deliberated and reached verdicts were more likely to vote in subsequent elections more often than jurors who did not deliberate or reach a verdict.247 The study also showed that “a conclusive deliberative experience raises future voting rates above those expected based on prior voting history.”248 Later research suggests that the effect of jury service is not limited to an increase in voting rates. Jurors who consider their jury experience rewarding are more likely to demonstrate other increased civic and political behaviors after their jury experience.249 Second, surveys and polls indicate that individuals have a favorable impression of juries after serving as jurors and “have increased confidence in the legitimacy of the trial system.”250 The benefits that individuals receive through serving as jurors, much like the lessons mentioned by de Tocqueville, are generally discussed specifically with regard to citizens.251 However, perhaps these benefits could extend equally to non-citizens if they were able to receive the civic education provided by jury service.

The first benefit that accrues from the education jurors receive—an increase in civic participation—may be partially unavailable to non-citizens who serve on juries. The decrease in this benefit arises simply because non-citizen voting rates cannot increase after non-citizen jury service, since, for the most part, U.S. citizenship is a requirement for voting.252 However, since voting is not the only civic participation that increases after an individual performs jury service, non-citizens should be able to partake in the educational civic

in Marder, supra note 4, at 1053.
248 Id. at 593.
250 JONAKAIT, supra note 3, at 83.
251 See Gastil & Weiser, supra note 249, at 619 (“[T]he Court views jury service as a means of affording every citizen the chance . . . to see the inner workings of the justice system . . . ”).
252 Raskin, supra note 137, at 1394. Whether the franchise should be extended to non-citizens is beyond the scope of this Note, except for the discussion in Part II.C.1 of the relevance of arguments for non-citizen voting to non-citizen jury service.
experience of jury service. Since "people who have joined us on our land are generally here to stay," they should be encouraged to integrate into the community, which includes involvement in civic activities. This is particularly true of the millions of legal permanent residents who have lived in the country for many years and who are eligible for naturalization. If these legal permanent residents are eligible for jury service, they can benefit from the civic education attributable to jury service, which can lead to increased civic participation and thus further integration into the community.

The second benefit that accrues from the education jury service provides for jurors, confidence in and a favorable impression of the jury as an institution, is important for any individual. All individuals, both citizens and non-citizens, can benefit from seeing how administration of justice occurs through the jury. Both citizens and non-citizens live in a community in which they learn of jury verdicts through the news, and both are subject to the criminal justice system, of which the jury is a part. Therefore, both citizens and non-citizens have an interest in the opportunity to see how the jury works to achieve a fair outcome so that they can have confidence in the administration of justice in their community. Since the same benefits of an educational civic experience can occur if non-citizens have the opportunity to receive that education, non-citizen jury service is compatible with the educational role of the jury for the juror.

III. SHOULD NON-CITIZENS BE ELIGIBLE FOR JURY SERVICE IN LIGHT OF THE JURY’S ROLES?

The above analysis of the jury’s roles for the accused, the community as a whole, and the jurors themselves does not provide a clear answer to the question of whether non-citizens should be eligible for jury service. However, a consideration of non-citizen jury service with respect to these roles does shed light on the issues surrounding the question.

Just as jury service by non-citizens is not unconstitutional, the roles that a jury fulfills will not be harmed if non-citizens serve as jurors. If non-citizens serve on juries, juries will still serve the role of protecting the accused from arbitrary and oppressive government. Despite assumptions that non-citizens lack the knowledge of and loyalty to this country’s laws and customs necessary for jury service, non-citizens, or at least certain groups of non-citizens, will be able to perform the juror’s functions of finding facts and applying the law as

253 Id. at 1466.
254 See discussion supra Part II.A.
instructed by the judge to those facts. Additionally, the presence of non-citizens on a jury will not decrease the jury's representation of the common sense of the community, because citizenship is an arbitrary and inaccurate measure of an individual's knowledge of community customs. Likewise, jury service by non-citizens will not conflict with the jury's role for the community of providing public confidence in the criminal justice system. Since non-citizens, or at least certain groups of non-citizens, can capably perform jurors' tasks despite assumptions to the contrary, public confidence in the criminal justice system should not decrease as a result of certain non-citizen jury service. Finally, the presence of non-citizens on juries will not reduce the jury's role for jurors themselves; jurors will still have the opportunity to participate in democratic self-government and to receive a civic education.

Although the jury's roles will not be compromised by non-citizen jury service, these roles do not forcefully support the inclusion of non-citizens on juries. Despite the absence of non-citizens, juries can still fulfill most of their roles. The present exclusion of non-citizens from jury service likely does not affect the jury's role for the community by diminishing public confidence in the criminal justice system considering the widely recognized relevance of citizenship to political participation as seen in provisions of the Constitution and courts' recognition of a state's interest in defining its political community. Likewise, the jury's role as a democratic opportunity for the jurors themselves does not unduly suffer due to the absence of non-citizens from juries. While jury service provides individual jurors an opportunity for democratic participation, similar to the right to vote, the many arguments for allowing non-citizens to vote do not successfully support the extension of jury service to non-citizens. Only the second role of the jury for jurors themselves, the provision of a civic education, will be enhanced if non-citizens are eligible for jury service—all individuals benefit from a civic education, and society as a whole reaps the benefits of a civically-educated populace. However, even though the jury's educative role could be enhanced by the inclusion of non-citizens in the jury pool, the absence of non-citizens does not prevent the jury from fulfilling this

255 See discussion supra Part II.A.1.  
256 See discussion supra Part II.A.2.  
257 See discussion supra note 218.  
258 See discussion supra Part II.C.  
259 See discussion supra Part II.B.  
260 See discussion supra Part II.C.1.  
261 See discussion supra Part II.C.2.
role. The benefits of the educative jury experience will still accrue to those individuals randomly selected to serve as jurors.

However, the jury’s role of protecting the accused from oppressive and arbitrary government might be served better by including some non-citizens in the jury pool. One of the ways in which the jury protects the defendant is by representing the common sense of the community, and this representation would be most accurate if members of most, or even all, groups are allowed to serve as jurors. In some jurisdictions, the inclusion of non-citizens in the jury pool will greatly increase the ability of the jury to represent the common sense of the community more completely.

As stated by the Supreme Court, “[c]ommunities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.” Additionally, states have broad discretion to set qualifications for jurors as long as the jury pool is representative of the community. In some locations, the inclusion of some non-citizens in the jury pool would significantly help maintain the representativeness of the jury.

The foreign-born and non-citizen populations in the United States are not distributed equally geographically. According to the 2000 U.S. Census, 11.1 percent of the U.S. population is composed of individuals who are foreign-born, meaning that they are either non-citizens or naturalized citizens. Of this foreign-born population, 40.3 percent are naturalized U.S. citizens. Therefore, about 6.6 percent of the total U.S. population consists of non-citizens. “More than one-half of the foreign-born population live[s] in three states: California, New York, and Texas.” In California, 26.2 percent of the total population is foreign-born. Of the foreign-born population in California, 39.2 percent is composed of naturalized citizens. Therefore, about 15.9 percent of the population in California is composed of non-citizens, a much larger percentage than the overall percentage of non-citizens in the United States. This uneven distribution of foreign-born and non-citizens is also

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262 See discussion supra Part II.A.2.
264 Id. at 538.
266 Id. at 2.
267 Id. at 4.
268 Id. at 3.
269 Id.
apparent on a county-by-county basis. In 2000, 22 percent of the total foreign-born population in the United States was concentrated in only four counties holding 6.8 percent of the total U.S. population. Data of this sort suggest that in certain jurisdictions juries might not adequately represent the common sense of the community if all non-citizens are excluded from the jury pool.

But not all non-citizens should be qualified to serve on juries regardless of immigration status. Legal permanent residency should be a qualification for non-citizens to serve on juries. Legal permanent resident status provides non-citizens the possibility to live and work in the United States permanently, allowing them to remain in a community and be more than just “current” residents. As discussed earlier, legal permanent residents are integrated into communities in a variety of ways. Legal permanent residents’ integration into a community allows them to understand and contribute to the common sense of the community. Including legal permanent residents in the jury pool will increase the ability of the jury to fully represent the common sense of the community, thereby improving the jury’s role of protecting the accused in a criminal trial.

Despite the benefits to jury representativeness that including legal permanent residents in the jury pool will provide, any proposal to make legal permanent residents eligible for jury service still faces the obstacles of a state’s interest in defining its “political community” and power to exclude all non-citizens from political participation. But a state may choose whether to exercise this interest and power. States, particularly those with higher percentages of legal permanent residents, should consider expanding their conception of their political community to allow legal permanent residents to serve as jurors. Such a change in the view of the political community would not be unprecedented. For example, many efforts have been made at both state and municipal levels to allow non-citizens to vote in local elections. Some of these efforts have been successful. In Maryland, six municipalities allow residents, whether citizen or non-citizen,

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270 Id. at 9.
271 JEFFERYS & MONGER, supra note 135, at 1; Evia, supra note 135, at 151.
272 See supra text accompanying notes 135–37, 152–53.
273 More selective groups of non-citizens discussed briefly earlier in this Note, see supra text accompanying notes 138–42—such as legal permanent residents who have lived in the United States for a certain period of time, legal permanent residents who have applied for naturalization, or legal permanent residents selected on an individual basis—would likely present significant administrative hurdles.
to vote in local elections.\textsuperscript{276} In Chicago, any parents, regardless of citizenship status, with children in public schools may vote in school site council elections.\textsuperscript{277} Thus, municipalities have reconsidered and redefined conceptions of their political community to allow non-citizens to vote.

Many of the arguments for expansion of the franchise to non-citizens focus on non-citizens’ participation in communities as a reason to give non-citizens the opportunity for democratic political participation.\textsuperscript{278} As discussed previously, these arguments based on inherent rights to democratic participation do not extend smoothly to non-citizen jury service.\textsuperscript{279} However, reasoning based on the opportunity for democratic political participation is not the only basis on which states should reconsider whether to expand their political community to include legal permanent residents in the jury pool. The need to ensure a jury adequately represents the community’s common sense should counsel states, especially those with larger populations of legal permanent residents, to reevaluate their views of who to include in the jury pool and, at a minimum, to consider making those legal permanent residents eligible for jury service.

CONCLUSION

Citizenship requirements for jury service have not attracted much attention, certainly not nearly as much attention as citizenship requirements for voting or for civil service positions at the state or federal level.\textsuperscript{280} But citizenship requirements for jury service deserve attention. The jury is not a static institution: selection procedures and qualification requirements for jury service have evolved over the years. The state of citizenship requirements should be reevaluated as part of the continuing evolution of the jury.

Although the current established consensus excludes all non-citizens from jury service, the finding by courts that non-citizen jury


\textsuperscript{278} See Raskin, supra note 137, at 1443–45 (discussing the concerns of taxation and governance without representation); see also Rachel L. Swarns, Immigrants Raise Call for Right to Be Voters, N.Y. TIMES, Aug. 9, 2004, at A13 (quoting advocates of non-citizen voting who raise the call of "[n]o taxation without representation!").

\textsuperscript{279} See discussion supra Part II.C.1.

service is not unconstitutional allows consideration of whether policy reasons exist for including at least some groups of non-citizens in the jury pool. A look at the traditional roles of the jury for the defendant, the community as a whole, and the jurors provides insight to this question. The presence of non-citizens on juries would not conflict with any of these roles. At the same time, most of these roles do not suffer from the absence of non-citizens from the jury pool. However, the jury’s representation of the common sense of the community, a feature that helps the jury fulfill its role for the defendant, may be more adequate and complete if legal permanent residents are able to serve as jurors. Such representation of legal permanent residents on juries is probably most critical in states with the largest populations of legal permanent residents. Therefore, non-citizens should not be summarily excluded from jury service without consideration of whether, in some communities, the presence of some groups of non-citizens would enhance the operation of the jury as a representative protective body for the criminal defendant.

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