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RICHARD M. RE

## Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury

**ABSTRACT.** This Note proposes a new justification for the fair cross section (FCS) requirement governing criminal jury composition. While the Supreme Court has defended the requirement by invoking demographic conceptions of the jury's legitimacy, many scholars have observed that this approach is at odds with contemporary jury law and practice. This Note argues that courts should instead defend the FCS requirement as a means of ensuring that eligible participants are included in the jury franchise. Besides solving an intractable doctrinal puzzle, an enfranchisement-based approach draws attention to ways in which widespread juror selection practices exclude underrepresented groups and thereby undermine the jury's democratic character.

**AUTHOR.** Yale Law School, J.D. expected 2008; Cambridge University, M.Phil. 2005; Harvard College, A.B. 2004. I am grateful to Professors Peter H. Schuck, Dennis Curtis, and Pamela S. Karlan, to Judge Nancy Gertner, and to Christopher M. Re, Gregory Re, and my indefatigable editor Kimberly Gahan for their encouragement, insight, and criticism. Of course, I thank Kristen Eichensehr, for everything.



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## INTRODUCTION

Under current precedent, the Sixth Amendment's Impartiality Clause<sup>1</sup> requires that venires for criminal juries be fairly cross-sectional over time.<sup>2</sup> Following *Duren v. Missouri*, criminal defendants can argue that: (1) a "group alleged to be excluded is a 'distinctive' group"; (2) the group is underrepresented, meaning that its long-term representation in the relevant jurisdiction's venires is not "fair and reasonable in relation to the number of such persons in the community"; and (3) "this underrepresentation is due to systematic exclusion"—that is, exclusion "inherent in the particular jury-selection process utilized."<sup>3</sup> Once these three prongs have been satisfied, a *prima facie* fair cross section (FCS) claim has been established, at which point the government must justify the underrepresentation by citing a "significant state interest," or the defendant is entitled to a new trial.<sup>4</sup>

This well-worked-out schema supplies the hinge on which two opposing conceptions of the criminal jury's legitimacy might swing into law.<sup>5</sup> Demographic conceptions maintain that a jury's legitimacy depends in part on its composition. On this view, jury venires are fairly cross-sectional when they possess particular traits sufficiently—that is, fairly—in proportion to the larger population, such that defendants have a "fair possibility" of being judged by a representative jury.<sup>6</sup> By contrast, an enfranchisement conception emphasizes democratic participation. On this alternative approach, a jury system is fairly cross-sectional when all eligible people have been given adequate—that is, fair—opportunity to participate in jury service, regardless of how demographically representative the resulting venires or juries may be. While demographic approaches are favored by the Supreme Court, enfranchisement conceptions appear only fleetingly in early FCS cases and, more recently, near the margins of lower court opinions.

In this Note, I argue that an enfranchisement conception of jury legitimacy better explains contemporary FCS doctrine and, indeed, central features of contemporary jury practice. Moreover, an enfranchisement conception is

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1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").
  2. See *Duren v. Missouri*, 439 U.S. 357, 364-66 (1979).
  3. *Id.*
  4. *Id.* at 367-68.
  5. Hereinafter my use of "jury" refers to criminal petit juries.
  6. See *Holland v. Illinois*, 493 U.S. 474, 478 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

normatively superior in that it is consistent with values underlying the American criminal jury, whereas demographic conceptions are not. An enfranchisement conception of jury legitimacy should therefore supplant the demographic rationales for FCS doctrine currently enshrined in Supreme Court precedent.

The stakes in this debate are substantial, and not just because FCS doctrine remains a frequently litigated issue in criminal law. Any investigation into the FCS requirement leads quickly to larger debates about the meaning of juror impartiality, the legality of affirmative action in jury selection, and the role of the jury in American democracy. The choice between demographic and enfranchisement conceptions of jury legitimacy is therefore of fundamental constitutional importance.

My argument proceeds in four Parts. Part I describes demographic conceptions of the jury's legitimacy and criticizes them on both legal and normative grounds. Next, drawing on historical sources and voting law, Part II proposes and defends an enfranchisement conception of jury legitimacy that avoids the pitfalls associated with demographic approaches. Part III then argues that this enfranchisement conception best explains and justifies FCS doctrine's metes and bounds. Finally, Part IV discusses the important case *United States v. Green*<sup>7</sup> and recent reforms in the District of Massachusetts in order to bring an enfranchisement approach to bear on issues at the forefront of jury law and policy.

## I. DEMOGRAPHIC CONCEPTIONS OF JURY LEGITIMACY

The Supreme Court has repeatedly suggested that the composition of a given petit jury is relevant to its legitimacy. Most famously, *Ballard v. United States* held that both sexes possess “a flavor, a distinct quality” relevant to jury deliberations.<sup>8</sup> Similarly, in *Peters v. Kiff*, a plurality held that the exclusion of particular groups “deprives the jury of a perspective on human events.”<sup>9</sup> These statements support what I call demographic conceptions of jury legitimacy. When a demographic conception is realized, the individuals making up a given petit jury appropriately reflect the demographic composition of the overall population. On this view, the goal of the FCS requirement (which applies only

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7. 389 F. Supp. 2d 29 (D. Mass. 2005).

8. 329 U.S. 187, 193-94 (1946).

9. 407 U.S. 493, 503-04 (1972); see also *Taylor*, 419 U.S. at 533.

to venires over time) is to provide each criminal defendant with a “fair possibility” of being judged by a demographically representative petit jury.<sup>10</sup>

Of course, given the jury’s small size and the enormous diversity of modern American society, proponents of demographic conceptions must differentiate and prioritize among different characteristics. A jury might run afoul of demographic representativeness by lacking African-Americans, men, Democrats, millionaires, and so on, but only a finite number of these categories can be represented in a twelve-person jury. The need to prioritize among mutually exclusive conceptions of jury diversity gives rise to a variety of demographic conceptions, each one reflecting a particular understanding of fair representation.

In this Part, I criticize demographic conceptions of jury legitimacy as inconsistent with contemporary jury law and practice. Section A discusses the benefits that courts and scholars ascribe to demographic proportionality. Section B then argues that demographic conceptions of jury legitimacy are incompatible with FCS doctrine’s limitations, contemporary criminal jury practice, equal protection jurisprudence, the jury’s function as an impartial decision-making institution, and the Supreme Court’s aversion to essentialist jurisprudence.

#### A. *Demography’s Legitimizing Benefits*

Demographic conceptions are typically defended with reference to three types of benefits, which I call participatory, perceptual, and correlative. Participatory and perceptual benefits are best considered as a pair. The former accrue when jury service influences jurors in a way that ultimately redounds to society’s advantage, while the latter arise when jury service increases public confidence in the legitimacy of verdicts. Participatory benefits have historically been understood to emerge simply from an individual’s inclusion in a jury, regardless of that jury’s demographic makeup.<sup>11</sup> The link between participatory benefits and demographic conceptions of jury legitimacy is comparatively recent, based on studies indicating that women who have

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10. See *supra* note 6 and accompanying text.

11. See AKHIL REED AMAR, *THE BILL OF RIGHTS 93-94* (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*]; ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318 (Arthur Goldhammer trans., Literary Classics 2004) (1835) (“[T]he jury . . . is also the most effective means of teaching the people how to rule.”); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 *CORNELL L. REV.* 203, 218-20 (1995) [hereinafter Amar, *Jury Service*]; see also John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 *J. POL.* 585 (2002).

served on diverse juries tend to have more confidence in the trial process.<sup>12</sup> By contrast, perceptual benefits are traditionally associated with demographic diversity.<sup>13</sup> Critics have long highlighted the apparent illegitimacy of verdicts rendered by homogenous juries, especially in racially charged cases.<sup>14</sup> More recently, empirical studies indicate that the public generally has more confidence in verdicts rendered by diverse juries.<sup>15</sup> Demographic conceptions grounded in either participatory or perceptual benefits are united in instrumentalizing criminal justice. That is, instead of arguing that jury diversity contributes to just or accurate verdicts, perceptual and participatory accounts view jury diversity as a means of promoting other social goals, such as the system's perceived legitimacy.

Correlative benefits, by contrast, directly focus on the jury's fundamental mission of dispensing individualized justice, and so merit special attention. Correlative arguments suggest that "descriptively" representative juries also tend to be "substantively" representative.<sup>16</sup> That is, juries with members who exhibit certain traits in proportion to the larger population (descriptive representation) are believed to be more likely to render decisions that accord with the larger population's unarticulated interests (substantive

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12. See Nancy S. Marder, *Juries, Justice, and Multiculturalism*, 75 S. CAL. L. REV. 659, 692 (2002) ("There were significant effects of diversity by gender and age, but not race, on jurors' satisfaction with the jury deliberations, the jury experience, and the verdict.").
  13. See *Taylor*, 419 U.S. at 530 ("Community participation in the administration of the criminal law . . . [is] critical to public confidence in the fairness of the criminal justice system."); HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* 73-76 (2003).
  14. See, e.g., Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 704 (1995) ("Few statements are more likely to evoke disturbing images of American criminal justice than this one: 'The defendant was tried by an all-white jury.'").
  15. See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 663 (1997) (discussing a randomized survey of residents of Santa Cruz County, California, in which "67.3% of respondents agreed that 'Decisions reached by racially diverse juries are more fair than decisions reached by single race juries'"); Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177 (1994).
  16. This claim draws on a political science vocabulary that has developed in the context of electoral representation. See, e.g., HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628 (1999).

representation).<sup>17</sup> Correlative arguments can be understood as efforts to compensate for the fact that jurors, unlike most community representatives, are neither elected nor appointed. Consequently, jurors are not institutionally tethered to the populace on whose behalf they speak. Because no accountability mechanisms constrain jury decision-making, the argument might go, jurors should at least be chosen according to demographic criteria that increase the likelihood of substantive representation.

Arguments connecting descriptive representation to correlative benefits generally fall into one of two categories: single-viewpoint and multiple-viewpoint accounts. Single-viewpoint accounts assert that a particular idea or perspective must be included in any jury for the resulting verdict to be legitimate. For instance, *Ballard* suggested that a jury lacking women would inevitably also lack an important outlook on human experience that might prove relevant during deliberations.<sup>18</sup> Multiple-viewpoint accounts, by contrast, hold that the espousal of a particular viewpoint is less important than having an array of dissimilar views that enrich the quality of deliberations.<sup>19</sup> The presence of several different outlooks may better catalyze critical reflection, yielding what the Court has sometimes termed “diffused impartiality.”<sup>20</sup> More

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17. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 144 (1996) (“[T]he Sixth Amendment requires community representation on the petit jury not just for its educative or political value, but also because representation contributes crucially to the reliability of criminal verdicts.” (footnote omitted)).
  18. See 329 U.S. 187, 193-94 (1946); see also CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Susan Glaspell, *A Jury of Her Peers*, in TRIAL AND ERROR: AN OXFORD ANTHOLOGY OF LEGAL STORIES 139 (Fred R. Shapiro & Jane Garry eds., 1998); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1893 (2005) (“[T]he Glaspell story leads directly to a legal proposition—that women might be entitled to a ‘jury of their peers’ because men and women might reason differently about moral or legal guilt.”).
  19. See Alschuler, *supra* note 14, at 736 (arguing that minority representation “might promote the expression of diverse viewpoints in the jury room and enhance the quality of jury deliberations”); see also *Ballew v. Georgia*, 435 U.S. 223 (1978) (accepting empirical evidence that five-person juries would generate unduly truncated deliberations and would silence minority perspectives); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) (arguing that empirical evidence supports elevating the unanimity requirement to a constitutional rule).
  20. *E.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 134 (1994) (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); see also *Ballew*, 435 U.S. at 233 (citing jury studies indicating that “prejudices of individuals were frequently counterbalanced”); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003) (discussing mock jury studies indicating that racially diverse juries deliberate more thoroughly and efficaciously).

recently, the Court's invocation of academic diversity in *Grutter v. Bollinger*<sup>21</sup> has given hope to those who would support measures to ensure that juries also contain a critical mass of minority voices.<sup>22</sup> Thus, in single-viewpoint accounts the correlative benefit accrues from the inclusion of a particular view (or views), whereas in multiple-viewpoint accounts the benefit arises from the difference between two (or more) included views. Both approaches rest on judgments regarding the similarities and differences among various jurors' attitudes and outlooks.

### B. Demography's Detractions

Whatever the virtues of promoting jury diversity as a matter of policy, legal arguments founded on demographic conceptions of jury legitimacy encounter at least five pitfalls. Specifically, demographic conceptions are in conflict with the limits of FCS doctrine, the demands of equal protection jurisprudence, established jury practice, the value of jury impartiality, and the law's aversion to essentialist jurisprudence. As a result, those who support a more representative jury should seek an alternative legitimizing theory.<sup>23</sup>

#### 1. Inapplicability to Petit Juries

Demographic conceptions of jury legitimacy undermine the coherence of FCS doctrine by forcing it to confront an apparent mismatch between the

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21. 539 U.S. 306, 325 (2003).

22. See John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297, 300 (2005) (describing "a proposal to apply *Grutter* to the jury selection process"); Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291 (2004).

23. Heather Gerken has suggested a novel defense of current FCS doctrine that avoids many shortcomings associated with traditional demographic approaches. In short, Gerken has argued that FCS violations impinge on a social good—namely, the expected frequency with which minority groups command controlling majorities in petit juries. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005). Yet Gerken's approach does not provide a suitable legal justification for FCS doctrine. In essence, Gerken has suggested that inconsistency in jury outcomes ought to be tolerated (or even celebrated) because such inconsistency will generate certain participatory and perceptual benefits. As Gerken herself has acknowledged, this defense depends on the unattractive premise that impartiality ought to be sacrificed for social policy. See *id.* at 1166 ("[O]ur normative vision of the court, and thus the jury, as an 'impartial' decisionmaker runs directly contrary to the argument . . . that we ought to value the fact that different juries will render different verdicts in similar cases.").



scope of the FCS requirement and its justification. According to current precedent, the Sixth Amendment requires cross-sectionality among venires over time but does not require cross-sectionality in any particular jury.<sup>24</sup> Yet a demographic conception of jury legitimacy would suggest that the cross-sectionality guarantee should extend from the venire to each petit jury. Indeed, if FCS doctrine is truly concerned with a defendant's right to an impartial jury, and if demographic proportionality is the means to achieve impartiality, then it is difficult to imagine why cross-sectionality might be essential to the venires from which petit juries are chosen but irrelevant to the verdict-rendering juries themselves.<sup>25</sup> Even the Sixth Amendment's textual reference to the "jury" as opposed to the venire seems to confirm the intuition that venires are mere means to the end of selecting petit juries.

The Court and other defenders of the status quo FCS doctrine usually respond by invoking necessity: given that perfect cross-sectionality is impossible in any group of twelve jurors, defendants are entitled only to a "fair possibility," and not a guarantee, of a representative jury.<sup>26</sup> Yet if the Court truly viewed a representative jury as the ideal outcome, it could extend the cross-sectionality requirement to individual petit juries in a loosened, practically obtainable form. The Court might hold that FCS claims could be brought based on protracted underrepresentation of distinctive groups in petit juries, and not just venires. Alternatively, the Court could limit the cross-sectionality requirement to those groups whose proportional representation could easily be achieved, such as women. In fact, however, the Court has held that FCS doctrine does not apply to the composition of petit juries

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24. See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").
25. See *Duren v. Missouri*, 439 U.S. 357, 372 n.\* (1979) (Rehnquist, J., dissenting) ("[I]f 'that indefinable something' [associated with female jurors] were truly an essential element of the due process right to trial by an impartial jury, a defendant would be entitled to a jury composed of men and women in perfect proportion to their numbers in the community."); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 369-71 (1999); Gerken, *supra* note 23, at 1115 ("[A]lmost any theory that would explain why we care about a pool that mirrors the population would also favor a jury that does the same.").
26. See *supra* note 6 and accompanying text; see also *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) ("[T]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury . . . ."); RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 119 (2003); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1696-97 (2000).

whatsoever.<sup>27</sup> Recognizing the mismatch between the Court's theory and its holdings, some have argued that the Sixth Amendment's cross-sectionality guarantee should extend to individual petit juries.<sup>28</sup> FCS doctrine's contradictions thus serve as a foothold for supporters of affirmative action in petit jury selection.

## 2. *Incompatibility with Equal Protection Jurisprudence*

A second, related doctrinal puzzle results from the interaction between the FCS requirement and equal protection jurisprudence. *Batson v. Kentucky* and its progeny prohibited peremptory strikes on the basis of race and gender,<sup>29</sup> thereby suggesting that both are illegitimate bases for establishing suitability for jury service. Yet the Court's demographic approach to justifying FCS doctrine appears to rest on the benefits that purportedly accrue from the inclusion of members of various racial groups and both sexes in petit juries.<sup>30</sup> These countervailing doctrines place courts in the strange predicament of insisting under *Batson* that there is no legally acceptable reason for parties—including defendants—to influence juries' racial composition, while simultaneously throwing out convictions on FCS grounds because of racially skewed jury pools.<sup>31</sup> Indeed, the Equal Protection Clause precludes many

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27. See *Holland v. Illinois*, 493 U.S. 474 (1990) (refusing to apply FCS doctrine to petit juries); *Taylor*, 419 U.S. at 538 (holding that the FCS requirement does not guarantee that petit juries be "of any particular composition"). But see *Holland*, 493 U.S. at 498 (Marshall, J., dissenting) ("A 'dispassionate analysis' of our cases . . . thus makes clear that fair-cross-section principles *do* apply to the petit jury."); Muller, *supra* note 17, at 140.
28. See, e.g., Nancy J. King, *Racial Jurymaning: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (discussing jury affirmative action proposals, including guaranteeing a certain number of jurors of the defendant's race).
29. See 476 U.S. 79 (1986); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400, 407 (1991).
30. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2016 (1998) ("On the one hand, particularly in the fair cross-section cases, the Court has suggested that race and sex matter both because they might influence individual jurors' perspectives and because the behavior of a jury as a whole might be affected by its racial and sexual composition. On the other hand, the Court has been equally insistent that stereotypical assumptions about jurors' attitudes are both unjustified and unjustifiable." (footnote omitted)).
31. See Amar, *Jury Service*, *supra* note 11, at 210; Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 965 (1998) ("A defendant is thus placed in a strange position: he is entitled to a jury drawn from a fair cross section specifically because it increases the odds that different groups and perspectives will be represented in the jury pool, which in turn helps ensure that the panel is impartial; when actually seating a jury, however, he may not take those same characteristics into account.").

obvious remedies for FCS violations. For example, one way to rectify a racially unrepresentative jury system would be to modify the selection process to afford members of the underrepresented racial group an increased probability of being selected for petit jury service.<sup>32</sup> Such remedies have in fact been attempted, only to be struck down by circuit courts on equal protection grounds.<sup>33</sup>

The problem would become even more acute if, in accordance with demographic ideals, the FCS requirement were extended to petit juries. Direct remediation of FCS violations through racially preferential selection at the petit jury stage is incompatible with *Batson*; thus, the most effective means of implementing an extended FCS requirement would be prohibited by the Fourteenth Amendment.<sup>34</sup> As the doctrine currently stands, this direct conflict between the Sixth and Fourteenth Amendments is averted by the Court's insistence that the FCS requirement applies only to venires. In other words, the Court's unexplained refusal to extend the FCS requirement to petit juries obscures and forestalls a latent inconsistency between the FCS requirement and equal protection jurisprudence.

### 3. *Intrajurisdictional and Interjurisdictional Diversity*

More broadly, demographic conceptions of jury legitimacy are inconsistent with important features of the law governing contemporary juror selection. American criminal juries exhibit what I call intrajurisdictional and interjurisdictional diversity. Intrajurisdictional diversity refers to the fact that any given jurisdiction experiences a distribution of venire compositions over time as a result of the deliberately randomized process of juror selection. By contrast, interjurisdictional diversity refers to the fact that each jurisdiction contains a demographically distinctive population; thus, a frequent or median jury composition in one locale could be anomalous or nonexistent in another.

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32. See John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 430 (1997) ("Thus, the Court finds itself in a 'catch-22.' To be true to its race-blind approach, the Court must invalidate stratified sampling. But, the Court must uphold the practice if it wants to protect a criminal defendant's . . . Sixth Amendment rights.").

33. See, e.g., *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998) (striking down the Eastern District of Michigan's policy of removing nonblack citizens from master jury wheels so as to achieve proportionate representation of African-Americans); see also Andrew J. Lievens, *Fair Representation on Juries in the Eastern District of Michigan: Analyzing Past Efforts and Recommending Future Action*, 38 U. MICH. J.L. REFORM 941 (2005).

34. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution."); Ellis & Diamond, *supra* note 15, at 1051.

Defendants accused of identical crimes might therefore be tried by juries of every imaginable composition, depending on the venire they happen to draw and the jurisdiction in which they are tried, or both. This fact represents a grave injustice if, consistent with demographic approaches, some jury compositions are legally superior to others. Yet FCS doctrine condones these variations by requiring defendants to demonstrate underrepresentation both over time (thereby permitting intrajurisdictional diversity)<sup>35</sup> and within the jurisdiction in which they are tried (thereby permitting interjurisdictional diversity).<sup>36</sup> Demographic conceptions of jury legitimacy thus imply a wide-ranging criticism of the American criminal justice system.

#### 4. *Impartiality: Selected Versus Acquired Competence*

Demographic conceptions are also in tension with the Sixth Amendment's impartiality guarantee. The jury is unique among governmental institutions in that its legitimacy hinges almost exclusively on impartiality as opposed to accountability. This is why there are virtually no constitutional qualifications for jury service,<sup>37</sup> why juries are paid a set wage regardless of the outcome, why jury deliberations are secret and the reasons for their decisions unrecorded,<sup>38</sup> and why jurors are discharged immediately after rendering their decision without any special prospect of being invited to return. In the absence of accountability mechanisms, the legitimacy of jury verdicts depends on the

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35. See Jury Selection and Service Act (JSSA) of 1968, 28 U.S.C. § 1863 (2000) (requiring random jury selection within federal jurisdictions, albeit limited by geographical constraints); see also *United States v. Ashley*, 54 F.3d 311 (7th Cir. 1995) (rejecting an FCS claim that intrajurisdictional diversity should be remedied by creating new jury districts that would increase the reliability of black representation in local petit juries); Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 109 (2004) (“[T]he values of minority communities are more likely to be subsumed in juries drawn from larger federal districts than they would be in smaller, county-based state court juries.”).
36. See *Engel*, *supra* note 26, at 1702 (“To transfer a trial from the Bronx to Albany distorts the character of the jury as surely as if the county had excluded women or black jurors from sitting on the venire. Such changes run afoul of the spirit, if not the letter, of the cross-section requirement.” (footnote omitted)).
37. See *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984) (“The constitutional standard [is] that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court . . .” (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961))).
38. See *Clark v. United States*, 289 U.S. 1, 13 (1933) (“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 53-54 (1994) (discussing the view that the jury's “black box” character yields “aresponsibility” in order “to protect the independence of the jury”).

jurors' competence—that is, their ability to render accurate verdicts. Yet the jury relies almost exclusively on “acquired” as opposed to “selected” competence: jurors acquire the information necessary to render legitimate verdicts *after* assuming their posts, from the trial evidence, the judge's legal instructions, and their own reasoned deliberations.<sup>39</sup> This focus on acquired competence ensures that jurors are not beholden to the appointing government agent and prevents the government from selecting decision-makers who are predisposed to favor particular positions.

Demographic conceptions suggest a greater role for selected competence by focusing on the benefits generated by including particular group members in petit juries. In so doing, demographic conceptions take a step away from impartiality. At the extreme, a perfect understanding of the relationship between group membership and jury deliberations would permit jury-reforming officials to influence verdicts by changing the input of juror group membership. But the problem obtains even if proponents of demographic conceptions posit only a few social scientific findings, such as that increased jury diversity yields more extensive and, consequently, more accurate jury deliberations. Accepting this rationale would constitute a legal acknowledgement of the government's ability—and duty—to manage jurors as a means of achieving desirable verdicts. This doctrinal move would emphasize the government's role in constructing optimal juries, at the expense of the jury's independent capacity to determine the facts. Thus, demographic conceptions would corrode the law's doctrinal commitment to jury impartiality.

##### 5. *Essentialist Jury Selection*

Finally, by highlighting an essentializing connection between group membership and jury verdicts, demographic conceptions would establish a principle of juror partisanship precisely when neutrality is called for most. This concern is usually expressed in perceptual terms. Programs to increase the representation of certain demographic groups might encourage jurors to think of themselves as representatives of interest-bound constituencies, thereby corroding their commitment to disinterested deliberation.<sup>40</sup> The same policies

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39. Cf. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 325 (2005) (“Twelve private citizens who simply got together on their own to announce the guilt of a fellow citizen would not be a lawful jury, but a lynch mob.”).

40. See JEFFREY ABRAMSON, *WE, THE JURY* 140 (2000) (arguing that jurors selected on account of their race “would be less prepared to enter into the kind of independent and impartial deliberations that historically have differentiated jury behavior from voting behavior”). But see Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative*

might also undermine the public's confidence that the criminal justice system is capable of generating verdicts that reflect individualized justice as opposed to political outcomes dictated by interest-based voting.<sup>41</sup>

These perceptual and partiality concerns signal deeper doctrinal problems. Even if (somehow) neither jurors nor the public knew that jury affirmative action was taking place, demographic conceptions would still legally enshrine associations between group membership and individual attitudes that are, at best, contextual and ever-changing. This essentialism can be found in both single- and multiple-viewpoint accounts. Indeed, multiple-viewpoint accounts are arguably more essentializing, as they rest not only on assumptions regarding individual groups, but also on relative judgments that certain groups hold views that are similar or dissimilar to the views of others. Shifting Court majorities have eschewed similar essentialist premises in the related contexts of jury selection and electoral districting.<sup>42</sup> By taking the opposite tack, demographic conceptions run afoul of the spirit, if not the letter, of these precedents.

## II. AN ENFRANCHISEMENT CONCEPTION OF JURY LEGITIMACY

The enfranchisement conception I propose holds that the jury is legitimate to the extent that it enfranchises eligible participants. Thus, following the democratic values rhetoric in seminal FCS cases, jury service can be likened to

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*Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 173 (suggesting a policy whereby neither the jurors nor “the parties would be unable to discern which jurors were affirmatively selected and which were chosen randomly”).

41. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 243-45 (1997); Eric M. Albritton, *Race-Conscious Grand Juror Selection: The Equal Protection Clause and Strict Scrutiny*, 31 AM. J. CRIM. L. 175, 212 (2003) (“[S]tamping with legitimacy the position that race affects jury verdicts will not increase legitimacy, but rather decrease legitimacy of verdicts.”); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 733 (1992) (“A race-based generalization about the likely views of jurors cannot lawfully be the basis for any legal rule.”); Andrew Kull, *Racial Justice: Trial by Cross-Section*, NEW REPUBLIC, Nov. 30, 1992, at 17, 20 (objecting to the view that “a person can neither represent another’s interests effectively nor judge him fairly unless he is of the same race”).
42. See *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (emphasizing that equal protection jurisprudence “forbids” governmental reliance on “stereotypical assumptions”); *Shaw v. Reno*, 509 U.S. 630, 647-48 (1993) (exhibiting concern about “perpetuating” stereotypical notions about racial groups, particularly stereotypes that racial group members “think alike”); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (“[T]he Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes . . .”).

the electoral franchise.<sup>43</sup> The legitimacy of an election does not depend on whether actual voters descriptively represent the set of eligible voters, but rather on whether the electorate was afforded an adequate opportunity to participate in the electoral process. Similarly, jury legitimacy does not depend on the participation of a descriptively representative sample of the set of eligible jurors, but rather on eligible jurors' fair opportunity to be called for service. On this view, the second *Duren* prong requiring substantial underrepresentation has only diagnostic value, in that the relative absence of an identifiable group signals that disenfranchisement—the real constitutional evil—is taking place. My argument is divided into three sections. Section A argues that jury service constitutes a distinctive form of suffrage and that FCS doctrine helps ensure equal access to that franchise. Section B then argues that criminal defendants have an impartiality interest in a democratic jury, thereby connecting jury enfranchisement to the Sixth Amendment. Finally, Section C demonstrates that an enfranchisement conception of jury legitimacy avoids demographic conceptions' shortcomings.

#### A. Conceptualizing Jury (Dis)Enfranchisement

An enfranchisement conception of jury legitimacy begins by assessing the similarities between voting and jury service. As scholars including Akhil and Vikram Amar have shown, this comparison has an ancient heritage.<sup>44</sup> At the Founding, jurors and voters were conceptualized as complementary legislators, with the latter shaping the criminal law's construction and the former its

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43. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“Community participation in the administration of the criminal law . . . [is] consistent with our democratic heritage . . . .”); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (concluding that “systematic” exclusion constitutes an “injury . . . to the democratic ideal reflected in the processes of our courts”); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223, 225 (1946) (holding that when the “democratic nature of the jury system” is impinged, “it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion”); *Glasser v. United States*, 315 U.S. 60, 85 (1942) (“Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government.”); *Smith v. Texas*, 311 U.S. 128, 130 (1940) (holding that racial juror exclusion “is at war with our basic concepts of a democratic society and a representative government”).
44. See AMAR, *THE BILL OF RIGHTS*, *supra* note 11, at 94–96; Amar, *Jury Service*, *supra* note 11, at 253–54; see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 293 (1997) (“If the rights to [electoral] representation and to trial by jury were left to operate in full force, they would shelter nearly all the other rights and liberties of the people.”).

application and, therefore, its local definition.<sup>45</sup> Today, it remains axiomatic that every criminal defendant has a Sixth Amendment right to be judged by “a jury of his peers.”<sup>46</sup> The Court has emphasized that the jury is a democratic institution, holding in *Powers v. Ohio* 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.”<sup>47</sup> More recently, the Court observed in *Blakely v. Washington* that “[j]ust as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”<sup>48</sup>

These are not empty slogans. Even when jurors do not consciously contemplate nullification, statutory terms like “reasonable,” “substantial,” and “malicious” invite consideration of social norms and public policy. For example, when a jury convicts a defendant for reckless conduct, it is deciding—in a very particular case—what it means to be reckless in its society. And just as those who feel especially concerned about particular social issues—like gun control or drug abuse—may express those preferences in the electoral process, they may also argue more strenuously for the conviction of gun or drug dealers during jury deliberations. The jury thus parallels the electoral system in providing a medium through which individuals and groups participate in democratic governance.<sup>49</sup>

Yet “enfranchisement” has a very different meaning in connection with juries as opposed to elections. Whereas the opportunity to participate in juries is generated by a complex jury selection process, the government fulfills an analogous obligation with regard to voting simply by scheduling and administering accessible elections. This difference stems not from any constitutional principle, but rather from the logistical necessities of the criminal justice system: voluntary jury service would not reliably yield an

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45. See, e.g., AMAR, *THE BILL OF RIGHTS*, *supra* note 11, at 100 (quoting Theophilus Parsons’s proclamation during the Massachusetts ratifying convention, “Let [any man] be considered as a criminal by the general government, yet only his own fellow-citizens can convict him”).

46. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (further describing jury service as “community participation”).

47. 499 U.S. 400, 407 (1991).

48. 542 U.S. 296, 306 (2004) (collecting sources from the ratification era).

49. Jury service arguably offers *greater* opportunities for democratic participation than does voting. First, the unanimity requirement typically observed in criminal cases ensures that each juror’s vote is potentially decisive in the outcome of every case. Second, each juror’s freedom of speech is enhanced within the context of jury deliberations, which afford a guaranteed and open-ended opportunity to persuade all other voting parties. So while individual voters trivially affect decisions of great importance, individual jurors play pivotal roles in deciding isolated cases.



adequate number of jurors at the appropriate times.<sup>50</sup> The two institutions consequently present themselves to prospective participants in very different ways. As any busy American knows, jurors are called to mandatory service at a time of the government's choosing. By contrast, voting in the United States is discretionary, as each voter can choose whether to participate in any number of set elections. Because of these divergent administrative arrangements, voting is more easily conceptualized as a right, whereas jury service is usually thought of as a duty. Still, the Court has recognized that jury service, like all forms of self-government, is best viewed as both a right and a duty.<sup>51</sup>

The jury's greater reliance on state management and its decreased visibility as compared to elections generate a unique governmental obligation in the form of third-party standing. Consider the fundamental democratic principle that each eligible voter should cast an equally weighted vote. This precept's jury analogue requires that the government extend to each eligible citizen an equal opportunity to be called for jury service. Yet there are important practical differences between being called for jury service and casting a ballot. Eligible voters can be disenfranchised when elections are not publicized in advance, when voting stations are inaccessible, and when opaque voting procedures prevent them from expressing their wishes. Jurors, by contrast, can be disenfranchised much more discreetly when the government persistently withholds jury summonses. Whereas electoral disenfranchisement is publicly experienced at a specifiable point in time—that is, at the moment of the election—jury disenfranchisement is a gradually realized and inconspicuous phenomenon. Indeed, even well-meaning officials and the disenfranchised jurors themselves may not be aware that jury disenfranchisement is taking

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50. The JSSA, 28 U.S.C. § 1864(a) (2000), which strives to prevent invidious discrimination by curtailing government discretion, generally forbids volunteer juries in federal courts. *See* *United States v. Kennedy*, 548 F.2d 608, 609 (5th Cir. 1977); *see also* *United States v. Bearden*, 659 F.2d 590, 602 (5th Cir. Unit B Oct. 1981) (stating that the “underlying concern” of the JSSA’s randomness requirement is that jury selection “must not result or have the potential to result in discrimination”). However, state volunteer juries do not necessarily violate either the JSSA or FCS doctrine, and they are legal in some states. *See* *United States v. Ramirez*, 884 F.2d 1524, 1527-30 (1st Cir. 1989); *United States v. Nelson*, 718 F.2d 315, 320 (9th Cir. 1983) (collecting cases); BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, STATE COURT ORGANIZATION 2004, at 218-21 (2004) [hereinafter STATE COURT ORGANIZATION 2004], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scoo4.pdf> (providing a table indicating juror qualifications, as well as the source of juror lists, in every state).
51. *See* *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (suggesting that any measure that resulted in total exclusion from jury service would constitute a “substantial deprivation of [a] basic right[] of citizenship”); *Carter v. Jury Comm’n*, 396 U.S. 320, 330 (1970) (declining to decide “[w]hether jury service be deemed a right, a privilege, or a duty”); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946) (“Jury service is a duty as well as a privilege of citizenship . . .”).

place. This detection problem means that normal accountability mechanisms, like public visibility, are unlikely to be effective in enforcing compliance with FCS principles. Accordingly, there is a special need to provide third-party standing to an interested class of people—criminal defendants—who possess a legal incentive to seek out and draw attention to jury disenfranchisement.<sup>52</sup>

What can a criminal defendant point to as evidence of jury disenfranchisement? Because an eligible juror has no legal interest in hearing any particular case or, indeed, in being called any more regularly than another juror, the unpredictable and infrequent receipt of summonses is still compatible with inclusion in the jury franchise. Moreover, not every instance of individual juror disenfranchisement should rise to the level of constitutional violation. To be sure, equal protection jurisprudence permits prospective jurors to challenge their own race- or gender-based exclusion from grand jury or petit jury service, just as it protects prospective voters from discrimination based on suspect classifications.<sup>53</sup> However, unintentional, nonsystematic electoral disenfranchisement typically does *not* constitute a constitutional violation.<sup>54</sup> This rule acknowledges that some forms of electoral disenfranchisement are de minimis or practically unavoidable and therefore not constitutionally objectionable. An analogous result is especially appropriate in the jury setting given the complex and inevitably imperfect administrative bureaucracy necessary for jury selection. Thus, short-term or isolated cases of juror exclusion do not suffice to demonstrate jury disenfranchisement. Instead, the defendant must show that a significant number, or group, of eligible jurors has been systematically excluded from the jury franchise over time.

### *B. Enfranchisement and Impartiality*

An enfranchisement approach comports with the Sixth Amendment's impartiality guarantee. True, both demographic and enfranchisement conceptions accept that people arrive in jury booths bearing diverse experiences and, therefore, that arbitrary differences among jurors could yield discrepancies

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52. Cf. *Powers*, 499 U.S. at 415 (granting third-party standing to criminal defendants bringing equal protection challenges on behalf of excluded jurors).

53. See *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) (upholding equal protection claims based on racial exclusion from grand juries); *Carter*, 396 U.S. at 329-30 (petit juries).

54. See, e.g., *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) (“We must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that . . . may result in the dilution of an individual’s vote.”).

between the sentences of similar defendants.<sup>55</sup> But whereas demographic conceptions react by qualifying impartiality through juror management, an enfranchisement approach reinforces the traditional legal premise that deliberating jurors can transcend their idiosyncrasies to arrive at a fair understanding of the case.<sup>56</sup> A parallel can be drawn between the black box of the jury and the secret ballot. Just as the juror is asked to step outside her narrow self-interest to pass judgment on a fellow citizen, the voter is invited to contemplate the public weal. Both the juror and the voter are free to deliberate and vote in any way that they choose—responsibly, recklessly, or even maliciously—consistent only with certain minimal institutional requirements. The legitimacy of these impartial institutions thus depends on the public's faith in the civic virtues of deliberating citizens.<sup>57</sup>

Criminal defendants, like the public at large, also possess an intelligible impartiality interest in the enfranchisement of eligible jurors. Imagine, for example, what is often taken as the paradigm case of jury partiality: a black defendant subjected to a racist all-white jury trial in the Jim Crow South. By hypothesis, the defendant's jury is not substantively impartial in the legal sense of being disinterested. This violation is particularly grave because it is sufficient on its own to establish a false or unjust conviction; the jurors are literally prejudiced and will decide the case accordingly. But the all-white jury also falls short of what might be called institutional impartiality in that the government has limited the set of citizens who can participate in petit juries. This institutional violation is far more easily demonstrated because skewed jury selection procedures can be ascertained through witnesses and records, whereas the secrecy of the jury makes it difficult if not impossible for a reviewing court to determine whether the jury was substantively prejudiced. As institutional impartiality is restored, and black jurors are admitted into the jury system,<sup>58</sup> the biased white majority will have difficulty acting on its prejudices.

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55. See JOEL D. LIEBERMAN & BRUCE D. SALES, *SCIENTIFIC JURY SELECTION* 57-78 (2007) (collecting studies on the connection between demographic patterns and juror behavior); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77-99 (1993) (collecting studies indicating that verdicts are influenced by jurors' race, the jury's racial makeup, and the race of both defendants and their lawyers).
56. See KENNEDY, *supra* note 41, at 252; see also *supra* notes 37-39 and accompanying text.
57. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1485-86 (1991) (suggesting a "restructuring [of] the legislative decisionmaking process on the model of jury deliberations" because the mission of jurors "is to review the evidence and decide an outcome that is in the public interest, rather than their self-interest").
58. See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325-26 (1995) ("After courts began to interpret

This interrelationship between substantive and institutional impartiality helps explain why courts and plaintiffs did not distinguish between the two concepts while resisting racism and sexism in the jury during the twentieth century.

Yet we can see that a lack of institutional impartiality would constitute a distinct injury to the defendant and, more generally, to an entire society of potential defendants. Instead of an impartial arbiter composed of one's peers, each defendant would confront a tribunal of the government's own creation.<sup>59</sup> Like the jury's more general emphasis on acquired competence, FCS doctrine helps prevent the government, an interested party, from unduly influencing the fact-finder's identity.<sup>60</sup> In a similar vein, *Holland v. Illinois* held that when the government skews the composition of venires, it effectively influences petit jury compositions without expending any of its valuable peremptory strikes.<sup>61</sup> *Holland* thus viewed FCS doctrine as a safeguard against governmental policy that deliberately or inadvertently "stacks the deck" against the defendant in what would otherwise be a fair adversarial process.<sup>62</sup> If read in the context of the prevailing demographic approach to FCS doctrine, *Holland* raises the question of why the law requires venires to be fairly cross-sectional only over time and not in every case. After all, the FCS requirement does not prevent particular venires from being "stacked" against the defendant.

*Holland* makes more sense when read in light of an enfranchisement conception of jury legitimacy. Far from being entitled to a fairly composed venire, a defendant instead deserves an independent, democratic jury. The relevant institutional impartiality violation therefore occurs not when particular types of jurors appear in venires while others do not, but rather when the government exercises control over the jury by excluding eligible participants. As I discuss in Part IV, group underrepresentation in venires over time can signal this sort of illicit governmental meddling.

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constitutional mandates of equal protection and impartial juries to require that women and minorities be included on juries, the demographics of juries changed dramatically at a pace far exceeding the diversification of legislatures, executive branches, or the judiciary.”).

59. Prior to the JSSA, many states employed a “key man” system of jury selection, whereby jury administrators chose leading citizens or “key men” to serve as jurors. As Randolph Jonakait has noted, “Most often the nonrandom selection of the jury pool, not surprisingly, aided the prosecution.” JONAKAIT, *supra* note 26, at 121.

60. See *supra* Subsection I.B.4.

61. 493 U.S. 474, 480-81 (1990).

62. *Id.* at 481; see also *Teague v. Lane*, 489 U.S. 288, 314 (1989) (“Because the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant, the jury venire cannot be composed only of special segments of the population.”).

The connection between enfranchisement and impartiality has two important implications. First, it provides a plausible basis for limiting FCS doctrine to venires as opposed to petit juries over time. There would be little practical difference between these two approaches in the absence of voir dire. In fact, however, peremptory challenges permit the government to strike cognizable groups disproportionately in case after case, thereby disenfranchising jurors and undermining institutional impartiality.<sup>63</sup> Yet peremptories also arguably vindicate the defendant's and the public's interest in the impartiality of each affected petit jury.<sup>64</sup> Linking juror enfranchisement to jury impartiality thus reframes the debate over the desirability of peremptory strikes as a disagreement about how to evaluate, balance, and accommodate these competing impartiality interests.

Second, the connection between enfranchisement and impartiality explains why criminal defendants—and not systematically excluded jurors—have standing to bring FCS claims. Drawing on principles of third-party standing, Section A suggested that criminal defendants are well situated to bring FCS claims because of their highly particularized interest in victory, as compared to the diffuse interests of excluded jurors. This conclusion is strengthened by FCS doctrine's orientation toward impartiality. Whereas exclusionary selection practices implicate jurors' enfranchisement and equality interests, the skewed or "partial" juries that result from those practices directly impinge on defendants' right to an impartial jury. Because only the latter violation sounds in impartiality, only defendants retain a Sixth Amendment claim.

### C. *Avoiding Demography's Detractions*

An enfranchisement approach avoids the problems associated with demographic conceptions. First, an enfranchisement approach explains why FCS doctrine does not extend to individual petit juries, or even to individual venires. Because only a broad assessment of selection procedures over time can demonstrate that individuals have been included in (or excluded from) the jury franchise, no single jury or venire can serve as a useful unit of analysis. Instead, disenfranchisement must result from systematically exclusionary selection

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63. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

64. See Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 342 (1982) (explaining that the goal of peremptory challenges is to produce "a jury from which extremes of bias have been removed").

practices. Thus, by governing venires over time, FCS doctrine focuses squarely on the jury as a participatory institution.

Second, an enfranchisement approach harmonizes the doctrine with contemporary equal protection jurisprudence regarding juries. The *Batson* line of cases has generated a constitutional presumption against race- and gender-based decision-making in jury selection. This premise is reinforced by frequent assertions that juror competence is a characteristic of individuals, not of groups, and that any qualified juror is just as competent as any other.<sup>65</sup> These longstanding claims are rendered consistent when FCS doctrine is understood as a mechanism for democratic inclusion. All jurors, whatever their race or gender, ought to be included in the jury process and should be excluded, if at all, only on the basis of individual characteristics.

Third, viewing jury service as enfranchisement clarifies the appropriateness of permitting interjurisdictional and intrajurisdictional diversity. Because an enfranchisement approach does not depend on the differences between eligible jurors, neither type of diversity poses any fairness problem. Courts can therefore consistently insist on juror enfranchisement while countenancing jury compositions that vary both between and within jurisdictions. Indeed, interjurisdictional diversity is the jury analogue of the principle that electoral voters should be permitted to cast ballots only in jurisdictions where they reside. Just as electoral voters have a special interest in local matters, so too does a “jury of the State and district wherein the crime shall have been committed.”<sup>66</sup> Therefore, neither jury nor electoral votes should be diluted by nonresidents.<sup>67</sup>

Finally, a focus on enfranchisement avoids the remaining disadvantages associated with demographic conceptions. An enfranchisement approach does not challenge the jury’s traditional emphasis on acquired as opposed to selected competence. Nor does it invoke essentialist assumptions regarding group identity. Instead, as Section III.A outlines, an enfranchisement approach relies on group membership only as a proxy for, or a means of measuring, the enfranchisement of individual persons.

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65. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“Jury competence is an individual rather than a group or class matter.”); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (quoting *Thiel*).

66. U.S. CONST. amend. VI.

67. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972) (accepting the legitimacy of bona fide residency requirements for voting); Engel, *supra* note 26, at 1691 (“By stamping the community’s judgment on the verdict, the local jury legitimizes both the convictions and the acquittals of criminal defendants.”).

While avoiding these problems, an enfranchisement approach preserves an important feature of FCS doctrine vis-à-vis its Equal Protection Clause counterpart—namely, that FCS doctrine does not require intentional discrimination to be demonstrated, inferred, or even shown to be possible. This is a tremendous asset. Today, the greatest threats to minority venire representation are not bigotry or prejudice but administrative neglect, bureaucratic strain, and political indifference. As Parts III and IV illustrate, even epochal reforms implemented with the goal of *increasing* minority representation can have substantial exclusionary consequences. By offering a constitutional remedy for such governmental shortcomings, FCS doctrine helps to honor our constitutional order's abiding commitment to democracy in the jury booth.

### III. UNDERSTANDING THE DOCTRINE'S HEARTLAND: THE THREE *DUREN* PRONGS

The preceding Part argued that an enfranchisement approach to FCS doctrine solves several of the salient problems associated with demographic conceptions of jury legitimacy. This Part explores the full explanatory power of an enfranchisement approach by examining how it operates within the three interrelated *Duren* prongs, which require the identification of a distinctive group, a showing that the group is substantially underrepresented, and evidence that the underrepresentation results from systematic exclusion. I argue that the metes and bounds of each prong of the *Duren* test are best explained by an enfranchisement conception of jury legitimacy. Yet even as an enfranchisement approach clarifies poorly understood precedent, it also casts *Duren's* principles in a new and potentially unflattering light. My exploration of the *Duren* prongs thus not only demarcates FCS doctrine's heartland, but also points toward its frontiers.

#### A. *Distinctive Groups: Age and Permanence*

As Vikram Amar has noted, “[A]ny workable theory of jury exclusion must, at a minimum, explain which groups count and why.”<sup>68</sup> The Supreme Court has provided a working answer to this question by entertaining FCS challenges based on the exclusion of women, African-Americans, and Hispanics.<sup>69</sup> Lower courts have supplied a more general answer by requiring FCS claims to be

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68. Amar, *Jury Service*, *supra* note 11, at 209.

69. See *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (collecting cases).

founded on the underrepresentation of groups that have (1) a “definite composition,” (2) a “basic similarity in attitude, idea, or experience,” and (3) a “community of interest . . . such that the group’s interests cannot adequately be represented if the group is excluded from the jury selection process.”<sup>70</sup> Unfortunately, this tripartite distinctiveness test has forced courts to engage in stereotypical and essentialist reasoning. By contrast, an enfranchisement approach focuses on the disenfranchisement of individuals. On such a view, FCS doctrine would protect the right to serve on a jury in much the same way that Fourteenth Amendment “fundamental rights” doctrine prohibits infringements on the electoral right to vote, regardless of whether those infringements impinge on suspect classifications.<sup>71</sup>

Yet an enfranchisement approach is not as irreconcilable with *Duren’s* distinctive group requirement as it initially appears. Though in principle disenfranchisement is not necessarily a group injury, there are evidentiary reasons to organize FCS doctrine around groups as opposed to individuals, and around groups defined by fixed characteristics as opposed to more ephemeral traits. Narrowly drawn age-based groups provide a paradigmatic example.<sup>72</sup> Imagine that a faulty jury selection system caused a particular group to be underrepresented in venires by 10% for one year. Would these facts constitute disenfranchisement? As we will see in more detail in the following Sections, if the group were African-Americans, then the answer would be “yes.” The facts asserted demonstrate that a significant number of eligible jurors had not been afforded a substantially equal opportunity to serve on juries. Yet these same facts would not support a finding of significant disenfranchisement if the excluded group were nineteen-year-olds. As the year progressed, the excluded nineteen-year-olds would increasingly become fully included twenty-year-olds. Consequently, many of those included in the ostensibly formidable 10% figure would in fact be included in the jury franchise during the specified time period. By contrast, protracted underrepresentation of permanent traits, like race or gender, would necessarily indicate the disenfranchisement of individuals, and not just of groups. An enfranchisement approach thus explains courts’

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70. *E.g.*, *United States v. Green*, 435 F.3d 1265, 1271 (10th Cir. 2006) (collecting cases).

71. *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding that limitations on the franchise merit heightened scrutiny even if those limitations do not employ suspect classifications).

72. Broadly drawn age groups could supply evidence of individual disenfranchisement. Whereas the category of twenty-year-olds replaces a large percentage of its overall membership every month, the category of, say, twenty- to thirty-year-olds is relatively stable. *Cf. Barber v. Ponte*, 772 F.2d 982, 987 n.8 (1st Cir.) (indicating that the court “would be far less likely” to remedy discrimination against “age-groups with fairly small age spans”), *vacated en banc*, 772 F.2d 996 (1st Cir. 1985).



approval of FCS claims based on groups, such as African-Americans and women, that are separately protected under equal protection jurisprudence.

An enfranchisement approach conversely provides a compelling explanation for courts' tendency not to accept FCS claims based on transient characteristics, such as being a new community resident, a parent with a young child,<sup>73</sup> or a renter who has recently changed addresses.<sup>74</sup> Most saliently, courts have repeatedly and uniformly denied FCS claims on behalf of age-defined groups,<sup>75</sup> even when those groups have been deliberately excluded without legal authorization.<sup>76</sup> This is a startling pattern, given that age-based groups satisfy the aforementioned three-part test for distinctiveness at least as well as racial groups do.<sup>77</sup> Individuals of similar age live through the same historical events, tend to occupy more comparable social and economic positions, and even share physiological and cognitive traits. Consequently, generational groups may share a common "attitude, idea, or experience" with even greater regularity than do members of particular racial groups.<sup>78</sup> Further, as an objective characteristic, age is far more easily regulated by law than race,<sup>79</sup>

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73. See *Hitchcock v. State*, 413 So. 2d 741, 745 (Fla. 1982).

74. See, e.g., *United States v. Hsia*, 125 F. Supp. 2d 6, 8 (D.D.C. 2000) ("As the Court has noted previously, it is unreasonable to categorize undeliverables as persons who affirmatively opt out of jury service, particularly in such a transitory district as this one.").

75. See *United States v. Maxwell*, 160 F.3d 1071, 1075-76 (6th Cir. 1998) (collecting cases); *Johnson v. McCaughtry*, 92 F.3d 585, 593 (7th Cir. 1996) ("[A]ge-based claims have been frequently made, but have been rejected in every circuit that has considered them."); *Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir. 1988).

76. See *Johnson*, 92 F.3d at 590 (rejecting an FCS claim despite the fact that the juror administrator admitted on the stand that "he excluded all persons under the age of 25" due to his belief, based on personal experience, that "young persons were not mature enough and did not have enough experience to be jurors").

77. See Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1090 (1978) (collecting and presenting original empirical evidence suggesting a connection between age group and jury deliberations).

78. See *id.*; cf. Tanya E. Coke, Note, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 354 (1994) ("[O]ne shared and highly relevant aspect of the lives of many dark-skinned Americans is their experience of discrimination in formal and informal law enforcement settings.").

79. Offering an alternative enfranchisement approach, Vikram Amar has argued that the voting amendments should apply with equal force to jury voting and that the constitutional "age requirements for federal elective office holding" offer constitutionally preferred age-defined groups for FCS purposes. Amar, *Jury Service*, *supra* note 11, at 216. *But see* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 40 (2004) (arguing that the Reconstruction Congress did not intend the Fifteenth Amendment to apply to juries).

especially as ethnic categories proliferate in our increasingly diverse society.<sup>80</sup> Yet courts have found assumptions of age-based similarity to be “stereotypical,” even as they hold that racial groups represent sui generis “communities of interest.”<sup>81</sup> Courts’ unanimous refusal to accept the distinctiveness of age-based groups suggests that they are not exclusively motivated by demographic conceptions of jury legitimacy. Rather, courts applying the first *Duren* prong may be following intuitions best justified by an enfranchisement conception.

Of course, many potential indicia of group membership—such as political affiliation, place of residence, or income—lie somewhere between permanent traits like gender and ephemeral characteristics like age. How are courts to determine which, if any, of these categories merits FCS protection? Under the demographic approach, courts must adjudicate these claims by entangling themselves in the politics of difference. Do Catholics, the deaf, and residents of the inner city each possess a distinctive outlook, or are their perspectives sufficiently similar to those of other groups, like Muslims, the hearing, and inhabitants of rural areas?<sup>82</sup> Are all members of admittedly distinctive groups, like African-Americans, fungible for FCS purposes, or are some black communities distinctive in ways that others are not?<sup>83</sup> These are not questions that courts can competently answer or that parties can competently argue. Far from being amenable to objective proof, the distinctiveness inquiry raises

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80. See KENNEDY, *supra* note 41, at 244; see also PETER H. SCHUCK, *DIVERSITY IN AMERICA* 145 (2003) (noting that the 2000 census recognized 126 distinct group combinations and that legal and other factors will “encourage many other eager groups (Arab-Americans, for example) to demand their own specific listing in the census form”); Jennifer Lee & Frank D. Bean, *America’s Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 221 (2004) (“Currently, 1 in 40 persons identifies himself or herself as multiracial, and this figure could soar to 1 in 5 by the year 2050.”).

81. See *Wells v. State*, 848 N.E.2d 1133, 1142 (Ind. Ct. App. 2006) (“Any conclusion that college students are somehow ‘different’ from other members of the community would have to rely on stereotypical assumptions about them; i.e., that college students as a whole think differently, on average, from other members of society as a whole and on average. We decline to engage in such unsupported speculation.”). Apparently, less “stereotypical” assumptions underlie the *Wells* court’s acceptance of women, African-Americans, and Hispanics as distinctive groups. *Cf. id.*

82. See, e.g., *State v. Spivey*, 700 S.W.2d 812, 814 (Mo. 1985) (finding that the deaf do not constitute a distinctive group under *Duren* because “[t]he misfortune of deafness . . . exists in all segments of the community” and because “[w]e doubt that deaf persons have a community of attitudes or ideas”). *But see* CAROL PADDEN & TOM HUMPHRIES, *INSIDE DEAF CULTURE* (2005).

83. See *Preston v. Mandeville*, 479 F.2d 127 (5th Cir. 1973) (rejecting an effort to remedy black underrepresentation by adding eligible black jurors from only one locale to the exclusion of all other black population groups within the jurisdiction).

profound and inherently contestable issues of group identity.<sup>84</sup> Further, any court that does seriously take up this daunting enterprise risks engaging in stereotypical and essentialist reasoning. Perhaps because of these problems, the distinctiveness test has become more of a mantra than a source of judicial reasoning.

An enfranchisement approach offers a more objective and judicially manageable alternative. Instead of being concerned with the substantive differences and similarities between and among identity groups, an enfranchisement-based FCS doctrine would be concerned primarily with whether a group's membership was sufficiently fixed and well defined for underrepresentation of that group to serve as a meaningful proxy for individual disenfranchisement.<sup>85</sup> In addition to race and gender, other plainly cognizable groups might include people with brown eyes or those with Social Security numbers ending with "2." Furthermore, groups defined by mutable or less objective traits, like area of residence<sup>86</sup> or income class,<sup>87</sup> may supply evidence

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84. The distinctiveness test can be contrasted with the comparatively objective *Gingles* factors, examined in racial vote dilution claims, which focus on a given racial group's geographic compactness, tendency to engage in racial bloc voting, and susceptibility to oppositional racial bloc voting. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).
85. This approach is consistent with the famous passage from *Peters v. Kiff*: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is *unknown* and perhaps unknowable." 407 U.S. 493, 503 (1972) (plurality opinion) (Marshall, J.) (emphasis added).
86. Overall residential mobility patterns suggest that residency is usually insufficiently fixed for FCS purposes. See U.S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES: 2000 (INTERNET RELEASE) 3-1 (2002), <http://www.census.gov/population/pop-profile/2000/profile2000.pdf> (indicating that approximately 16% of the U.S. population aged one and older changed addresses between March 1999 and March 2000, and that mobility rates tend to decline with age). Courts consistently reject FCS claims based on geographically defined groups. See, e.g., *United States v. Canfield*, 879 F.2d 446, 447 (8th Cir. 1989).
87. See *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946) (finding an FCS violation resulting from the intentional exclusion of day laborers); Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 122-24 (1996) (arguing and collecting data suggesting that poverty constitutes a status permanent enough for FCS purposes). While the long-term or chronically poor may constitute relatively fixed categories, on average about 40% of poor Americans exit poverty each year. See Robert G. Valletta, *The Ins and Outs of Poverty in Advanced Economies: Poverty Dynamics in Canada, Germany, Great Britain, and the United States* 34 tbl.2, 35 tbl.3, 36 tbl.4 (Fed. Bank of S.F., Working Paper No. 2004-18, 2004), available at <http://www.frbsf.org/publications/economics/papers/2004/wp04-18bk.pdf>; see also Ann Huff Stevens, *Climbing out of Poverty, Falling Back in: Measuring the Persistence of Poverty over Multiple Spells*, 34 J. HUM. RESOURCES 557, 567 & tbl.1 (1999) (providing poverty exit and reentry rates by duration of the initial poverty spell). Poverty alone is therefore not a useful FCS metric.

of disenfranchisement in some contexts. Lower courts have plausibly concluded that Jews, the Amish, Puerto Ricans, homosexuals, and Native Americans are distinctive groups with cognizable FCS claims.<sup>88</sup> While these cases did not emphasize the objectivity or fixity of group membership, defendants could have adduced such evidence. Further, if FCS claimants produced reliable evidence showing that these or other quasi-permanent groups were usefully but still not perfectly fixed or objectively ascertainable, courts could require an elevated showing of substantial underrepresentation.<sup>89</sup> For example, defendants might be able to demonstrate that, on average, 15% of a given jurisdiction's population both enters and exits a particular income class (or age group or residential area) per year, but that that subpopulation, properly defined, is otherwise fixed and objective. In that case, a court might require FCS claimants to show that the income group is underrepresented by 25%—that is, 15% in addition to the 10% threshold usually imposed in race- and gender-based claims. In this way, a permanence approach to *Duren's* first prong could bring FCS doctrine to bear on forms of group exclusion that are rendered inaccessible under current precedent.

In sum, an enfranchisement approach supports current doctrine regarding the first *Duren* prong, but with important qualifications. Both the difficulty of adducing reliable evidence regarding the fixity of quasi-permanent groups and the ready availability of data bearing on ethnicity and gender support courts' presumption that the latter groups constitute the heart of FCS claims. Nonetheless, courts should be mindful that other permanent or even quasi-permanent traits may sometimes provide reliable evidence of juror disenfranchisement.

#### *B. Substantial Underrepresentation: Measurement and Inference*

The substantial underrepresentation requirement has elicited more scholarly and judicial commentary than either of the other *Duren* prongs. Because the Supreme Court has not prescribed a specific metric for group representation, lower courts have had the freedom and the burden of deciding

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88. See *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (finding Jews to be a distinctive group); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 341 (Ct. App. 2000) (finding homosexuals to be distinctive under California's constitution); *State v. Villafane*, 325 A.2d 251, 256 (Conn. 1973) (Puerto Ricans); *State v. Fulton*, 566 N.E.2d 1195, 1201 (Ohio 1991) (Amish); *State v. Plenty Horse*, 184 N.W.2d 654, 656 (S.D. 1971) (Native Americans).

89. Cf. *infra* Section III.B (discussing *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995), which required a lesser showing of substantial underrepresentation in light of egregious evidence of systematic exclusion).

the matter for themselves.<sup>90</sup> Though several tests have been proposed and even employed by courts, the two most commonly employed methods are, unsurprisingly, also the two simplest. The first method, known as the “absolute disparity test” (ADT), subtracts the distinctive group’s absolute percentile representation in venires<sup>91</sup> from its absolute percentile representation in the overall population. By contrast, the second approach, called the “comparative disparity test” (CDT), divides this absolute disparity figure by the underrepresented group’s share of the overall population. Substantial underrepresentation is found when the output of either test exceeds a certain fraction.

While ADT indicates the portion of the overall population that has been excluded, CDT measures “the decreased likelihood that members of an underrepresented group will be called for jury service.”<sup>92</sup> In practical terms, the main difference between the two tests is that FCS claims based on small population groups are disadvantaged under ADT and advantaged under CDT. For example, under the 10% threshold commonly applied under ADT, a population group comprising 8% of the overall population could not serve as the basis of an FCS claim, even if that group were entirely unrepresented. By contrast, a group that made up 8% of the overall population but only 4% of venires would yield an impressive CDT output of 50%. CDT thus captures the common intuition that underrepresentation is more objectionable when a large fraction of a given group is excluded.

CDT would plainly be preferable if, as some commentators have suggested, courts thought of distinctive groups not as a set of individual impartial jurors, but rather as interest groups insisting on full representation, somewhat like political parties in a parliamentary legislature.<sup>93</sup> Naturally, any such group

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90. In *Duren*, the Court did not endorse any particular test or establish the relevant threshold at which substantial underrepresentation takes place. See 439 U.S. 357, 365-66 (1979). The common 10% “absolute disparity test” threshold is adapted from the equal protection case *Swain v. Alabama*, 380 U.S. 202 (1965). See, e.g., *United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980).

91. Instead of collecting data on a long series of venires, courts often examine the group’s representation in “qualified juror wheels”—that is, the list of eligible and responsive potential jurors who make up venires over a period of time. See, e.g., *United States v. Gault*, 141 F.3d 1399, 1402 (10th Cir. 1998).

92. *United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998) (emphasis omitted).

93. See, e.g., *Forde-Mazrui*, *supra* note 25, at 388-91 (suggesting that juries should represent distinct “communities of interest” defined in racial and geographic terms); *Gerken*, *supra* note 23, at 1139 (describing jury selection alternatives as a “choice” faced by minority groups). Such comparisons would have more force if there were a jury dilution statute parallel to section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2000).

would have grounds to complain if it were denied a proportionate number of seats, even if those seats only made up only a small percentage of the overall membership. However, a defendant would not share this complaint. Because it is unlikely that even a single member of a small group would ultimately be empanelled in any given jury of twelve, a small group's total exclusion would not appreciably impact the defendant's "fair possibility" of a representative jury or warrant the extraordinary remedy of reversal.<sup>94</sup> CDT is therefore unsupported even by the demography-based approach embodied in current precedent.<sup>95</sup>

ADT is in fact the leading test; no jurisdiction has accepted CDT as the general test for substantial underrepresentation.<sup>96</sup> Even when courts consider CDT, they usually do so in conjunction with ADT or some other side-constraint to ensure that successful FCS claims are not based on the exclusion of very small portions of the overall population.<sup>97</sup> This trend is readily explainable under an enfranchisement approach. FCS doctrine ensures that no significant portion of the total jury franchise is excluded over time. This objective renders CDT's assessment of *group* underrepresentation useful only insofar as it illuminates overall jurisdictional patterns—a function that small distinctive groups are inherently less able to fulfill. Relying on ADT thus allows courts to resist FCS claims predicated on unhelpfully small groups (that is, groups defined by relatively uncommon traits) and encourages defendants to seek out evidence that sheds more light on how the jury selection system affects the jury franchise as a whole.

In the exceptional cases that rely on CDT and other statistical methods, courts have noted the purported unfairness of ignoring FCS claims based on

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94. Recognizing this problem, one commentator fashioned a "disparity of risk" test that "precisely reflects the change in the defendant's ex ante chances of drawing a representative jury." Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1915 (1994). No court has adopted this relatively complex test.
95. Courts sometimes express this point by invoking "the substantial impact test," which multiplies the ADT output by the number of jurors in a given venire, grand jury, or petit jury. By expressing the ADT output in more practical terms, the substantial impact test deflates FCS claims based on diminutive population groups. *See, e.g., State v. Gibbs*, 758 A.2d 327, 337-38 (Conn. 2000).
96. For especially thorough discussions favoring the use of ADT, see *United States v. Weaver*, 267 F.3d 231, 241-42 (3d Cir. 2001); *United States v. Royal*, 174 F.3d 1, 6-8 (1st Cir. 1999); and *Thomas v. Borg*, 159 F.3d 1147, 1150 (9th Cir. 1998).
97. *See, e.g., United States v. Gault*, 141 F.3d 1399, 1403 (10th Cir. 1998).

small groups.<sup>98</sup> However, these holdings are better justified by the fact that the groups in question have been affected by particularly faulty jury selection procedures under the systematic exclusion prong. In perhaps the most extraordinary such cases, *United States v. Osorio*<sup>99</sup> and *United States v. Jackman*,<sup>100</sup> a computer glitch prevented jury summonses from being sent to eligible jurors living in Hartford and New Britain. Evidence adduced at trial showed that the affected areas were disproportionately inhabited by African-Americans and Hispanics, but minority underrepresentation on jury venires was minimal—and far below the 10% ADT threshold that the Second Circuit normally requires.<sup>101</sup> Yet the courts applied CDT to find substantial underrepresentation. Arguing that the nature of the exclusion was not a “benign” governmental failure, the courts effectively loosened *Duren*’s substantial underrepresentation requirement in the face of a particularly outrageous case of systematic exclusion.<sup>102</sup>

Although this outcome is puzzling under a demographic conception of jury legitimacy, it is readily understandable under an enfranchisement approach. Connecticut venires may have remained racially representative despite the computer glitch, but an identifiable number of eligible citizens had been deprived of the opportunity to participate in juries for well over a year. This outcome was especially objectionable both because the affected regions were almost absolutely excluded (underrepresentation approaching 100%) and because the government’s negligently designed and implemented selection

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98. See, e.g., *Azania v. State*, 778 N.E.2d 1253, 1258–59 (Ind. 2002) (using CDT to find a statutory violation when a jury selection program effectively excluded two cities); *People v. Hubbard*, 552 N.W.2d 493, 503–04 (Mich. Ct. App. 1996) (lowering the substantial underrepresentation threshold because a jury selection error effectively excluded the city of Kalamazoo and so was not “benign”).

99. 801 F. Supp. 966 (D. Conn. 1992).

100. 46 F.3d 1240 (2d Cir. 1995).

101. See *id.* at 1248 (Walker, J., dissenting) (“[T]he Sixth Amendment should not be invoked to correct jury selection errors that have only a *de minimis* effect on a criminal defendant’s right to a representative jury venire . . .”).

102. See *id.* at 1247 (majority opinion) (“The facts in this case reveal circumstances far less benign than . . . even those in *Osorio*, where the apparently inadvertent exclusion of Hartford and New Britain residents had not previously been discovered.”); *Osorio*, 801 F. Supp. at 979 (“[T]he exclusion of Hartford and New Britain from the Qualified Wheel, an occurrence not the result of random chance, is not ‘benign’ . . .”); see also *People v. Smith*, 615 N.W.2d 1, 11 (Mich. 2000) (Cavanagh, J., concurring) (“If a jury selection process appears *ex ante* likely to systematically exclude a distinctive group, that is, the system contains ‘non-benign’ factors, a court may essentially give a defendant the benefit of the doubt on underrepresentation, even if the system *ex post* proves to work no systematic exclusion.”).

process was directly responsible (systematic exclusion).<sup>103</sup> On this understanding, there was no need for evidence showing that the affected regions were of any particular demographic composition. The plaintiff's claim would not be that African-Americans or Hispanics were underrepresented in venirees—they were not—but rather that the inhabitants of the affected regions had been disenfranchised due to an egregious governmental blunder.

This leaves the question of how to define the appropriate population baseline for showing substantial underrepresentation: by the total population, or only those eligible for jury service?<sup>104</sup> To be sure, juror qualifications can be viewed as either justifiable or unnecessary limitations on individual rights under both demographic and enfranchisement approaches. Yet the eligible juror baseline is in tension with jury demography because using eligible jurors as the baseline necessarily overlooks—and thereby blesses—juror qualifications' tendency to disproportionately exclude distinctive groups.<sup>105</sup> Under an enfranchisement approach, by contrast, an eligible juror baseline should be preferred. The total population may usually be a convenient proxy for the jury-eligible population, but these two categories are not the same and in some contexts may be quite different. And, indeed, courts have acted on this possibility. At least when the relevant data is readily available,<sup>106</sup> many courts prefer to measure substantial underrepresentation by comparing the distinctive group's representation in venirees with its representation among eligible jurors—that is, among members of the jury franchise.<sup>107</sup>

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103. See *Osorio*, 801 F. Supp. at 978 (highlighting “the total exclusion from the Qualified Wheel of the two largest cities in the Division”).

104. Permissible qualifications for jury service largely overlap with those for voting and include citizenship, age, residency, and lack of prior felony conviction; however, reflecting again the unique logistical necessities of jury service as opposed to electoral voting, jury qualifications include English language competence. See, e.g., JSSA, 28 U.S.C. § 1865(b)(2)-(3) (2000); STATE COURT ORGANIZATION 2004, *supra* note 50, at 218-21; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, at 263-72 tbls.39 & 40 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco9806.pdf> (providing disability disqualifications by state). Courts have upheld such qualifications despite their exclusionary effects on distinctive groups. See, e.g., *United States v. Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995).

105. See, e.g., Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (noting “glaring racial disparities” resulting from felon exclusion rules).

106. See *People v. Harris*, 679 P.2d 433, 442 (Cal. 1984) (declining to require an eligible juror baseline when the required data is “almost impossible to obtain” (quoting David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 785-86 n.63 (1977))).

107. See *United States v. Torres-Hernandez*, 447 F.3d 699, 701 (9th Cir. 2006) (using the jurisdiction's “percentage of jury-eligible Hispanics” as the FCS baseline); *United States v.*



### C. Systematic Exclusion: Voting and Voluntarism

The history of FCS doctrine's little-understood third prong, the requirement of "systematic" exclusion, is rich and provocative. The seminal *Ballard* opinion used the term "systematic" as part of a larger phrase, referring to the "systematic and intentional exclusion of women."<sup>108</sup> This close association between systematicity and intentionality continued as late as the careful discussion of unconstitutional jury discrimination in *Washington v. Davis*.<sup>109</sup> But by the time FCS matured into its own doctrine in *Duren*, "systematic exclusion" had become a freestanding constitutional criterion. Indeed, *Duren* specifically held that FCS claims only required "the cause of the underrepresentation [to be] systematic—that is, inherent in the particular jury-selection process utilized."<sup>110</sup> This deliberate shift away from intentionality constitutes the main practical distinction between FCS and equal protection jurisprudence.<sup>111</sup> *Taylor v. Louisiana*<sup>112</sup> and *Duren* explained that FCS doctrine's lack of an intentionality requirement reflected the Court's desire to stamp out demographic underrepresentation, whatever the cause. Consistent with this goal, *Taylor* overruled a policy requiring women to opt in to jury service,<sup>113</sup> while *Duren* found an FCS violation based on a policy that granted women the ability to opt out of jury service simply by not appearing in court.<sup>114</sup> These

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Williams, 264 F.3d 561 (5th Cir. 2001); *People v. Anderson*, 22 P.3d 347, 361 (Cal. 2001); see also *United States v. Rioux*, 97 F.3d 648, 657 (2d Cir. 1996) (emulating voting rights cases in holding "that the appropriate measure in this case is the eighteen and older subset of the population, regardless of other qualifications for jury service").

108. 329 U.S. 187, 195 (1946); see also *Hernandez v. Texas*, 347 U.S. 475 (1954) (prohibiting systematic exclusion under equal protection jurisprudence).
109. 426 U.S. 229, 241 (1976) ("It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.'" (quoting *Akins v. Texas*, 325 U.S. 398, 404 (1945))).
110. 439 U.S. 357, 366 (1979).
111. See *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (establishing a three-part test for prima facie equal protection violations, including (1) identification of a "distinct class . . . singled out for different treatment under the laws, as written or applied," (2) "underrepresentation" of that group "over a significant period of time," and (3) "a selection procedure that is susceptible of abuse or is not racially neutral"). One important difference between *Duren* and *Castaneda* is that the latter requires at least an inference of discriminatory intent.
112. 419 U.S. 522 (1975).
113. *Id.* at 534.
114. 439 U.S. at 370.

foundational cases thus suggested that an FCS claim need not demonstrate that eligible jurors had been excluded or impeded from participation.<sup>115</sup>

Yet the systemic exclusion requirement has come to be understood as a process-based test of *how* the underrepresentation came about,<sup>116</sup> such that the sine qua non of any FCS violation is a showing of an improperly exclusionary government practice.<sup>117</sup> Weather and natural disasters,<sup>118</sup> demographic changes in local communities,<sup>119</sup> and voluntary decisions by eligible jurors<sup>120</sup> do not entail government exclusion and thus do not give rise to FCS violations, even if unquestionably distinctive groups are substantially underrepresented. By contrast, a jurisdiction's failure to send out jury questionnaires or summonses is paradigmatic systematic exclusion, as indicated by *Osorio*, *Jackman*, and other cases involving faulty jury selection programs. Given this doctrinal emphasis on exclusion, *Taylor* and *Duren* seem in retrospect to have depended on

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115. See Leipold, *supra* note 31, at 971 (“[T]he government’s obligation to do more than remove barriers seemed to be the message of *Duren v. Missouri*.”).
116. On a demographic approach, it is unclear why the process by which a jury is selected would ever be constitutionally important. See Underwood, *supra* note 41, at 730 (“[I]f an all-white jury selected through a discriminatory process is a biased decisionmaker, then the identical all-white jury selected through a nondiscriminatory process must likewise be a biased decisionmaker.”).
117. See Leipold, *supra* note 31, at 970 (“Courts now seem to view their duty as little more than removing barriers to jury service: voting lists are an acceptable source of jurors, regardless of any underrepresentation that results, as long as there are no barriers to voter registration.”); see also *Taylor*, 419 U.S. at 538 (“Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn *must not systematically exclude* distinctive groups in the community *and thereby* fail to be reasonably representative thereof.” (emphasis added) (citations omitted)).
118. See *United States v. Little Bear*, 583 F.2d 411, 414-15 (8th Cir. 1978) (rejecting an FCS claim based on the exclusion of rural jurors due to bad weather); *United States v. Jones*, No. 2:05-cr-00231-LMA-ALC, 2006 U.S. Dist. LEXIS 4110, at \*10-11 (E.D. La. Feb. 3, 2006) (finding no possibility of an FCS violation in the wake of Hurricane Katrina because any underrepresentation would be due to “external” factors); *State v. McDonald*, 387 So. 2d 1116, 1123 (La. 1980) (finding no FCS violation when flooding prevented eligible rural jurors from arriving for jury service).
119. See *United States v. Rioux*, 97 F.3d 648, 658 (2d Cir. 1996) (“The inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces, such as demographic changes.”).
120. See, e.g., *United States v. Gometz*, 730 F.2d 475, 480 (7th Cir. 1984) (en banc) (holding that the JSSA does not require jury administrators to follow up with jury non-responses); Zuklie, *supra* note 87, at 146 (“[T]he doctrine prohibits systematic underrepresentation rather than voluntary self-exclusion . . .”). *Gometz* also discussed the enfranchisement goals of the JSSA. See 730 F.2d at 480 (“Congress wanted to make it possible for all qualified persons to serve on juries, which is different from forcing all qualified persons to be available for jury service.”).

Missouri's facially unequal treatment of men and women in violation of equal protection principles, and not on the importance of including special viewpoints.<sup>121</sup> The Court itself has tacitly endorsed this revisionist interpretation by incorporating *Taylor* and *Duren* into its equal protection jurisprudence, and even by discussing them as though they were equal protection cases.<sup>122</sup>

The importance of juror exclusion is also manifest in the continuing practice of permitting jury exemptions even after *Taylor* and *Duren*. Current jury practice renders jury service voluntary through hardship, occupational, and other exemptions.<sup>123</sup> While the legislative trend among states has been toward eliminating jury service exemptions, they are certainly constitutional.<sup>124</sup> Even when courts entertain the possibility that traditional jury exemptions might satisfy the *Duren* prongs, those prima facie FCS claims are easily defeated on the ground that the exemptions serve "compelling state interests." In the FCS context, this is a low bar indeed. Exemptions from jury service are available not just for law enforcement officers, family caretakers, and the infirm, but also for doctors, lawyers, dentists, and students.<sup>125</sup> Consequently, these groups can avoid jury duty even if their decisions often undermine defendants' purported right to a demographically representative jury.<sup>126</sup> Under an enfranchisement approach, jury exemptions would be more defensible,

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121. See *Duren v. Missouri*, 439 U.S. 357, 371 n.\* (1979) (Rehnquist, J., dissenting) ("[T]he majority is in truth concerned with the equal protection rights of women to participate in the judicial process . . .").
122. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) ("*Taylor* relied on Sixth Amendment principles, but the opinion's approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications."); see also *id.* at 152 (Kennedy, J., concurring) (citing both *Taylor* and *Duren*—and only those cases—for the proposition that "[t]here is no doubt under our precedents . . . that the Equal Protection Clause prohibits sex discrimination in the selection of jurors").
123. Courts have interpreted the JSSA to permit such exemptions as long as they are founded on "objective criteria," so as to preclude the possibility of covert discrimination. *E.g.*, *United States v. Candelaria-Silva*, 166 F.3d 19, 33 (1st Cir. 1999); *United States v. Bearden*, 659 F.2d 590, 607 (5th Cir. Unit B Oct. 1981).
124. See *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) ("The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." (citing *Rawlins v. Georgia*, 201 U.S. 638 (1906))).
125. See STATE COURT ORGANIZATION 2004, *supra* note 50, at 223-26.
126. See Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 263-66 (1994) (noting that hardship and occupational exemptions sometimes result in underrepresentation of the elderly, the poor, the less educated, daily wage earners, residents of rural areas, and minorities, particularly black and Hispanic women).

reflecting a (contestable) governmental judgment that the administrative benefits of mandatory service can be outweighed by personal and social costs.

We have already seen that egregious instances of systematic exclusion can justify adopting a more permissive test for substantial underrepresentation.<sup>127</sup> Yet enfranchisement is a double-edged sword, and courts more often invoke the enfranchisement-based systematic exclusion requirement to reject than to sustain FCS challenges. Indeed, the connection between enfranchisement and *Duren*'s systematic exclusion prong is perhaps most visible in courts' refusal to sustain FCS claims based on the use of voter registration records to populate lists of eligible jurors.<sup>128</sup> These records plainly underrepresent cognizable groups, including African-Americans.<sup>129</sup> Nonetheless, the Jury Selection and Service Act (JSSA) of 1968 requires federal jury administrators to populate their eligible jury lists with (at least) those names present on voter registration rolls, thereby establishing a default practice emulated by most states.<sup>130</sup> This reformist measure was designed to ensure not only that jurors were chosen from a wide sample of the population, but also that the same antidiscrimination protections that benefited black voters would also benefit black jurors. Because the JSSA and FCS doctrine became law at roughly the same historical moment, courts routinely assume that the procedures

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127. See *supra* Section III.B (discussing *Osorio* and *Jackman*).

128. See, e.g., *United States v. Ireland*, 62 F.3d 227, 231 (8th Cir. 1995) (“[T]he mere fact that one identifiable group of individuals votes in a lower proportion than the rest of the population does not make a jury selection system illegal or unconstitutional.” (internal quotation marks omitted)); *United States v. Young*, 822 F.2d 1234, 1239 (2d Cir. 1987) (“The use of voter registration lists as the sole source of the names of potential jurors is not constitutionally invalid, absent a showing of discrimination in the compiling of such voter registration lists.” (quoting *United States v. Gordon*, 493 F. Supp. 814, 820–21 (N.D.N.Y. 1980), *aff'd*, 655 F.2d 478 (2d Cir. 1981))).

129. See *Fukurai & Butler*, *supra* note 126, at 245–47 (amassing statistical evidence showing that traditional source lists, including registered voter lists, disproportionately exclude African-Americans and Hispanics). Alternate source lists present their own exclusionary problems. See Ted C. Newman, *Fair Cross-Sections and Good Intentions: Representation in Federal Juries*, 18 JUST. SYS. J. 211 (1996) (arguing that supplementing lists of registered voters with lists of drivers in the Northern District of Illinois would exacerbate the underrepresentation of African-Americans).

130. 28 U.S.C. § 1863 (2000); see also STATE COURT ORGANIZATION 2004, *supra* note 50. Fewer than one-third of the states still employ “key man”-like selection systems that empower jury administrators to qualify potential jurors on an ad hoc basis, pursuant to statutory criteria. See JONAKAIT, *supra* note 26, at 121–22; see also *supra* note 59. Because juror qualifications are compatible with enfranchisement principles, see *supra* note 104, these systems, while exclusionary, are not inherently disenfranchising, see *Singleton v. Lockhart*, 871 F.2d 1395, 1398 (8th Cir. 1989) (noting that nonrandom jury selection systems are “disfavored” under FCS analysis, while upholding such a system).

established in the JSSA are per se compliant with FCS doctrine. Yet the JSSA did not provide that voter registration lists are always sufficient to ensure fair cross-sectionality. On the contrary, it specified that supplemental lists might be required to ensure fair cross-sectionality.<sup>131</sup> Courts' hostility to FCS claims based on underinclusive voter registration lists therefore cannot be explained by reference to the JSSA alone.

When pressed, courts defend voter registration lists' exclusionary consequences by arguing that they are not "exclusionary" at all, but rather are traceable to individual choices.<sup>132</sup> Consistent with this view, the searching opinion in *United States v. Cecil*<sup>133</sup> favorably cited legislative history indicating that any exclusion resulting from the JSSA's focus on voter registration lists would not be unfair because no economic or social characteristic would prevent a person from placing his name on the voter registration list.<sup>134</sup> Thus, courts expounding FCS doctrine generally follow the JSSA in effectively holding that as long as the electoral franchise is fairly accessible, the same is true of the jury franchise.<sup>135</sup>

Even accepting *Cecil's* voluntariness paradigm, however, the "decision" not to participate in the jury franchise might not constitute a choice in any normatively meaningful sense. It could, for example, be an inadvertent consequence of the need to focus on more urgent priorities, such as having to make ends meet. If this enfranchisement-based critique is accepted, then the government may be obliged to facilitate the inclusion of unregistered but eligible participants in the electoral and jury franchises. Congress recognized such a duty in the electoral context in the National Voter Registration Act of 1993 (the "motor voter" law).<sup>136</sup> While this measure has the indirect effect of

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131. See 28 U.S.C. § 1863(b)(2). As of 1997, "seventeen districts in nine circuits [used] multiple source lists when selecting potential jurors." Bueker, *supra* note 32, at 391 (arguing that supplementation is costly and relatively ineffective).

132. At least some legislators supported the JSSA on the ground that voter registration lists would have salutary exclusionary consequences, as unregistered voters were presumed to lack the civic virtues appropriate for jury service. See ABRAMSON, *supra* note 40, at 129.

133. 836 F.2d 1431, 1445-49 (4th Cir. 1988) (en banc).

134. See H.R. REP. NO. 90-1076, at 6 (1968), reprinted in 1968 U.S.C.C.A.N. 1792, 1795; see also *United States v. Gometz*, 730 F.2d 475, 482 (7th Cir. 1984) (en banc) ("Some voluntarism is . . . implicit in the use of voter lists, since there is no legal duty in this country to vote . . .").

135. See *Cecil*, 836 F.2d at 1448 ("[P]ractically every Circuit . . . , as well as the legislative intent expressed in the Jury Selection Act itself, . . . categorically establish[ed] that there is no violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class by reason of failure to register, when that right is fully open.").

136. 42 U.S.C. § 1973gg(a)(2) (2000) (recognizing that "it is the duty of the Federal, State, and local governments to promote the exercise" of the right to vote).

promoting jury enfranchisement, additional reforms could be instituted specifically within the jury selection process. Examples of enfranchisement-promoting jury reforms include increasing jurors' hourly compensation, reducing peremptory strikes, supplementing and updating eligible juror lists, and initiating public programs that encourage or facilitate voter registration and jury participation. In contrast to jury affirmative action programs, which manage citizens on the basis of essentialist assumptions, these and other enfranchisement-promoting reforms empower individuals by inviting them to participate in democratic self-government.<sup>137</sup>

#### IV. EXPLORING THE DOCTRINE'S FRONTIERS: *UNITED STATES V. GREEN*

*United States v. Green*<sup>138</sup> is perhaps the most important recent FCS case. Confronted with problems of juror exclusion and minority underrepresentation common throughout the United States,<sup>139</sup> Judge Nancy Gertner fashioned both a new test for FCS violations and a novel remedy for minority underrepresentation. Neither of these experiments was successful, as *Green*'s adapted FCS standard could not be satisfied in practice, and its remedial order was vacated by writ of mandamus.<sup>140</sup> Yet in March 2007, by a vote of the district's judges, the revised jury selection plan that Gertner envisioned came into effect in the District of Massachusetts.<sup>141</sup> *Green* is therefore poised to

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137. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323 (1999) (discussing the Eastern District of Michigan's switch from jury affirmative action to an enfranchisement-promoting jury registration campaign); Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L. REV. 49 (1997).

138. 389 F. Supp. 2d 29 (D. Mass. 2005).

139. See generally Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses, and What Courts Can Do About It*, 82 JUDICATURE 156, 157 (1999) (summarizing data indicating that 12% of state jury summonses and 8% of federal summonses are returned as undeliverable); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 800 (1994).

140. See *In re United States*, 426 F.3d 1 (1st Cir. 2005) (abrogating *Green* on the grounds that individual district judges do not have the authority to determine district jury selection procedures).

141. See U.S. Dist. Court for the Dist. of Mass., Plan for Random Selection of Jurors, <http://www.mad.uscourts.gov/New/RevisedJuryPlan.pdf> (last visited Apr. 18, 2007); see also Revisions to the Jury Plan of the United States District Court for the District of Massachusetts: Notes of the Jury Plan Committee, <http://www.mad.uscourts.gov/New/NotesofJuryPlanCommittee.pdf> (last visited Apr. 18, 2007).

become a key point of comparison for future efforts at jury reform.<sup>142</sup> Yet *Green* is an unstable compromise between demographic and enfranchisement conceptions of jury legitimacy that is best resolved in the latter's favor. *Green* thus shows how an enfranchisement approach can illuminate issues at the forefront of FCS litigation. Section A argues that Gertner's frustration with traditional tests of substantial underrepresentation is best explained and justified on enfranchisement grounds. Section B argues that *Green's* novel remedy for group underrepresentation is most defensible when reconceptualized as an effort to rectify what I term "partial disenfranchisement."

### A. Finding Jury Disenfranchisement

*Green* involved an FCS challenge to the District of Massachusetts's jury selection system. The defendant's main allegation was that varying standards in jury administration across counties resulted in a crazy quilt of inaccurate and outdated eligible juror lists, thereby skewing black representation in venires. For example, Dorchester, where African-Americans constituted 83% of the population, was underrepresented by 22% on the district's list of eligible jurors.<sup>143</sup> In Suffolk County, which contained many of the district's African-American residents, 15% of jury summonses were returned as undeliverable, possibly because their intended recipients had changed addresses.<sup>144</sup> Allegedly because of these and other juror selection failures, only 3% of those included in the district's federal venires were African-American, although African-Americans made up about 7% of the relevant jury pool.<sup>145</sup>

Because African-Americans are plainly a distinctive group for FCS purposes, the first step in assessing the plaintiffs' FCS claim was to determine whether they had shown substantial underrepresentation as required by the second *Duren* prong. Addressing this issue, Judge Gertner criticized the First Circuit's reliance on ADT as a means of finding substantial underrepresentation. Though the First Circuit had not set a definitive

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142. The Hennepin County, Minnesota, proposal for race-based targeted mailings is a focal point in academic literature, even though Minnesota courts specifically refused to implement it on the ground that it would violate equal protection doctrine. See *Hennepin County v. Perry*, 561 N.W.2d 889, 896-97 (Minn. 1997). Likewise, the much-discussed system implemented in the Eastern District of Michigan was struck down on equal protection grounds in *United States v. Ovale*, 136 F.3d 1092 (6th Cir. 1998); see *supra* note 33. By contrast, the remedy propounded in *Green* is now employed in the District of Massachusetts and, because it is race-blind, is almost certainly constitutional.

143. *Green*, 389 F. Supp. 2d at 59.

144. *Id.* at 61.

145. *Id.* at 37.

threshold for underrepresentation, Gertner noted that it had favorably cited precedent embracing the 10% threshold while deeming figures of around 3% to be unsubstantial.<sup>146</sup> This posed a problem for the plaintiffs in *Green*, as a 10% absolute disparity threshold would mean that African-Americans could not be substantially underrepresented in the Eastern Division of the District of Massachusetts, the population of which was only 7% black.<sup>147</sup>

Gertner believed that FCS claims should not be foreclosed in this way. But instead of drawing on demography-based reasons to argue in favor of a different substantial underrepresentation metric such as CDT, Gertner instead focused on the district's alleged systematic exclusion. Specifically, Gertner proposed a "hybrid approach" under which evidence of official misfeasance would lower the substantial underrepresentation bar.<sup>148</sup> But why should this be? If FCS doctrine is truly about preventing the exclusion of distinctive viewpoints, then the *manner* in which the state excludes particular viewpoints should be irrelevant to the exclusion's unconstitutionality. The expanded role that Gertner envisioned for the systematic exclusion prong seems to consider governmental misconduct in the jury selection system as a freestanding constitutional concern. In this respect, *Green* followed *Osorio* and *Jackman* in relying on enfranchisement-based intuitions to justify an explicitly demography-based application of FCS doctrine.

Unfortunately, *Green* was ultimately debilitated by its attempt to appeal to both enfranchisement and demographic intuitions. According to Jeffrey Abramson, the court-appointed jury expert, the hybrid approach required the plaintiffs to demonstrate that the government's misfeasance brought about underrepresentation of at least 3%.<sup>149</sup> Thus, in addition to requiring a showing of governmental responsibility under the systematic exclusion prong, the hybrid approach required measurement of the identified exclusionary mechanisms' racial impact. This rule placed a burden on aggrieved parties far beyond that imposed by normal application of the *Duren* prongs. In *Green*, all the tools of social science were insufficient to disaggregate the many factors that bore on black underrepresentation in the district.<sup>150</sup> The plaintiffs' burden

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146. See *id.* at 50-51; see also *United States v. Royal*, 174 F.3d 1 (1st Cir. 1999); *United States v. Pion*, 25 F.3d 18 (1st Cir. 1994); *United States v. Hafen*, 726 F.2d 21 (1st Cir. 1984).

147. See *Green*, 389 F. Supp. 2d at 52.

148. *Id.* at 51 ("If defendants can identify a mechanism by which a cognizable class is excluded . . . and if they can show that such misfeasance contributes to African-American underrepresentation in the jury pool, such a showing should suffice even if the absolute disparity is 'only' 2 or 3%.").

149. *Id.*

150. See *id.* at 62.



was thus rendered practically insurmountable, and *Green* found no FCS violation, despite abundant evidence of “clear procedural defects” that “disproportionately affect a cognizable group.”<sup>151</sup>

Gertner accepted this conclusion grudgingly, noting that such evidence should be enough to satisfy the hybrid approach: “[I]f the goal [of FCS doctrine] is a fully representative jury, it should be enough that official misfeasance played a part in diminishing African-American representation, even if we cannot quantify that role . . . .”<sup>152</sup> This statement underscores the dual-loyalties problem entailed in any hybrid approach to FCS doctrine. On the one hand, Gertner insisted that the goal of FCS doctrine is demographic proportionality. Therefore, she was bound to require some showing of actual underrepresentation. On the other hand, Gertner also believed that a finding of governmental culpability could compensate for a weak showing of group underrepresentation. Gertner’s approach was especially remarkable in that she would have found governmental misfeasance whenever state policies skewed the racial composition of jury venires to any extent. But this criterion for government wrongdoing is too uncompromising given the prior assumption that FCS doctrine is meant to promote demographic representativeness. In *Green*, for example, government policies at most resulted in absolute black underrepresentation of about 3%, and the plaintiffs could not establish what portion of that already slight figure was attributable to the government conduct in question. As Section III.B argued, such a small deviation from the cross-sectionality ideal would only minimally impact the defendant’s “fair possibility” of a representative jury.

*Green* would have proceeded quite differently had it embraced a thoroughgoing commitment to enfranchisement values. True, under an enfranchisement approach, courts would still have to ask whether government policies in fact excluded substantial numbers of eligible participants from the jury franchise. But this question would take a different form. In *Green*, the record indicated that many of the district’s municipalities maintained eligible juror lists that either overstated or understated the number of jury-eligible individuals in given locales.<sup>153</sup> According to Abramson, however, the “defendants’ data [fell] short of proving that African-American residents [were] being undercounted *more than the other residents*” of the district.<sup>154</sup> In other words, the defendants were able to show significant and systematic jury

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151. *Id.* at 63.

152. *Id.* at 56–57.

153. *Id.* at 59–61.

154. *Id.* at 60 (emphasis added).

exclusion but were unable to show that the resulting burdens fell disproportionately on African-Americans. Under an enfranchisement approach, this additional conclusion would be unnecessary to establish a prima facie FCS violation.

Instead, an enfranchisement approach would require the defendants to show that a significant number of identifiable eligible jurors were chronically excluded from the jury franchise on account of governmental policy. Assuming that “significant” disenfranchisement should be found under conditions analogous to those under which courts currently find “substantial” underrepresentation—that is, when at least 10% of eligible jurors in a given jurisdiction are disenfranchised—it may seem that the plaintiffs in *Green* could easily have demonstrated unconstitutional disenfranchisement. Some counties, like Dorchester, were underrepresented on the district’s master jury wheel by as much as 22%;<sup>155</sup> over 12% of all jury summonses in the district were returned as undeliverable, including over 15% of all summonses directed toward residents of Boston;<sup>156</sup> and over 12% of deliverable summonses received no response.<sup>157</sup> Because all of these exclusionary forces operated in tandem, the total number of people excluded by the district’s jury selection system at any one time was surely well over 10% of the total population.

Troubling though these figures may be, however, they do not necessarily support a finding of disenfranchisement. The group adversely affected by the district’s jury selection procedures is not defined by a permanent or even quasi-permanent characteristic. Consequently, even if large numbers of eligible jurors are left off juror lists and summonses are sent to undeliverable (e.g., out-of-date) addresses, a policy of regularly updating jury records might over time afford all eligible jurors a roughly equal chance of being called to service. Further, the high numbers of unreturned summonses might be due to nonexclusionary forces, including willful noncompliance. This is not to say that the plaintiffs’ case was implausible. On the contrary, the plaintiffs might have been able to show, for example, that people of high residential mobility (like renters) or inhabitants of particular regions constituted quasi-permanent groups that were repeatedly excluded despite the repopulation of eligible juror lists.

Besides determining the number of people who have been excluded from jury service, an assessment of juror disenfranchisement might require asking

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<sup>155</sup> *Id.* at 59.

<sup>156</sup> Report on Defendant’s Challenge to the Racial Composition of Jury Pools in the Eastern Division of the United States District Court for the District of Massachusetts at 39, *Green*, 389 F. Supp. 2d 29 (No. 02-10301) [hereinafter Abramson Report].

<sup>157</sup> *Id.* at 42.

whether the government is taking appropriate steps to include eligible citizens. Unlike the District of Connecticut in *Osorio* or *Jackman*, the District of Massachusetts in *Green* appeared to comply with all relevant statutory mandates. Additionally, some causes of underrepresentation, like residential mobility, are inescapable features of jury administration. Indeed, the JSSA arguably addressed this problem when it required that master jury wheels be updated at least every four years. This rule may reflect a legislative judgment, affirmed by courts, that regular four-year refilling strikes a constitutionally fair balance between administrative costs and individual enfranchisement.<sup>158</sup> Of course, there are presumably some circumstances in which a jury selection system's records would be so out of date or otherwise erroneous as to frustrate individuals' constitutionally entitled expectation of jury service.<sup>159</sup> For example, if the record in *Green* had indicated that a cognizable group tended to be excluded every time the master jury wheel was refilled or that residential mobility was much higher in parts of the district than in the country generally, then normal updates might have failed to ensure fair cross-sectionality. Unfortunately, these issues go unexplored in a jurisprudence devoted to jury demography, not enfranchisement.

### B. Remedying Partial Disenfranchisement

Unable to demonstrate that the government was responsible for a sufficient portion of the underrepresentation at issue, Gertner found no FCS violation under her hybrid approach. She did, however, find a violation of the JSSA, which she construed as imposing an affirmative duty on courts to maximize the racial representativeness of venires through source list supplementation.<sup>160</sup>

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158. See *Hamling v. United States*, 418 U.S. 87, 138 (1974) (“[S]ome play in the joints of the jury-selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that ‘an impartial jury [is] drawn from a cross-section of the community,’ at the same time take into account practical problems in judicial administration. . . . Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice.” (citation omitted) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946))); *United States v. Rodriguez*, 588 F.2d 1003, 1008-09 (5th Cir. 1979); *People v. Bartlett*, 393 N.Y.S.2d 866, 870 (1977). *But see Amar, Jury Service*, *supra* note 11, at 256 (maintaining that “[t]he infrequent (every four years) refilling of jury wheels ought to be equally suspect” as “hold[ing] brief voting registration periods only once every four years in the name of administrative convenience”).

159. See *United States v. Dixon*, No. Crim.A. 05-209, 2006 WL 278258, at \*4 (E.D. La. Feb. 3, 2006) (“[A] sufficiently outdated master wheel would violate the constitutional fair cross-section requirement because it no longer represents the current community.”).

160. See *Green*, 389 F. Supp. 2d at 70-71 (citing 28 U.S.C. § 1863(b)(2) (2000)).

This remedy was overturned on mandamus but has since become the policy of the District of Massachusetts. Gertner's proposal was essentially that for every undeliverable jury summons, an additional summons should be sent to the same zip code containing the original undeliverable address. Meanwhile, the undeliverable addresses would be purged from the district's list of eligible jurors. This policy of "second-round mailings" would increase representation from within zip codes that contained disproportionately high numbers of undeliverable addresses as compared to the overall district. To the extent that those zip codes contained disproportionately black residents, the second mailing would also tend to increase the district's overall percentage of summoned black jurors. This approach would have the crucial benefit of being formally race-neutral—and therefore compliant with equal protection jurisprudence—because second mailings would also be sent in response to undeliverable addresses in predominantly white zip codes.<sup>161</sup> Further, the implementation of second mailings would not substantially alter the random jury selection procedures outlined in the JSSA. *Green* thus outlined a means of improving jury representativeness that did not run afoul of either equal protection jurisprudence or congressional intent.

However, the *Green* remedy does not address the root causes of juror exclusion in the district. Introducing second-round mailings does not add viable addresses to incomplete eligible juror lists or encourage recalcitrant eligible jurors to participate. These important sources of juror exclusion and, allegedly, of racial imbalance will continue to warp venire compositions despite the *Green* remedy. Consequently, the additional mailings will at best only partially offset the alleged racial impact of errors in juror lists. Recognizing this, Gertner considered whether her order should combat juror exclusion directly, such as by requiring home visits to ascertain whether a lack of response resulted from inaccurate address lists or noncompliance. But Gertner rejected this remedial option because, in her view, "[t]he issue is not the citizen's choice to be included in the jury selection system; it is the defendant's right to a fair cross-sectional jury pool."<sup>162</sup> Under an enfranchisement approach, of course, the question of whether citizens are "included in the jury selection system" is integral to a determination of fair cross-sectionality.

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161. By contrast, some commentators have suggested the use of weighted mailings, whereby regions containing disproportionate numbers of minorities would receive extra jury summonses so as to increase the likelihood of a racially representative venire. See Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996). A similar type of system was deemed unconstitutional in *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

162. *Green*, 389 F. Supp. 2d at 76.

Gertner's remark thus stands as a remarkably clear repudiation of an enfranchisement conception of jury legitimacy in favor of a demographic one.

Yet Gertner struck a dramatically different note in a separately drafted addendum to the order, issued after the parties and the public had received the decision. Responding to the government's objections to the disseminated draft order, Gertner argued that the *Green* remedy provides that "each person . . . would have more of an equal chance of receiving a summons."<sup>163</sup> She further argued that the JSSA "refers to a fair cross-section 'of the *persons* residing in the community in the district or division wherein the court convenes'" and that the remedy "maximizes the chances that 'persons' will have an equal opportunity for access to this jury."<sup>164</sup> By focusing on eligible jurors' "opportunity" and "access," and not on the jury's demography, these passages imply that juror inclusion is a legitimate value in itself. They further suggest that Gertner believed the *Green* remedy was not simply a convenient means of increasing black representation in juries, but rather a principled defense of an individually held right. But how can second-round mailings targeting particular zip codes equalize *individuals'* access to jury service?

The answer to this question requires distinguishing between two types of juror disenfranchisement. One could imagine a jury selection system that absolutely excluded one subset of the population from jury service, much like the way the computer error in *Osorio* and *Jackman* excluded residents of Hartford and New Britain. If this were the situation in the district, then the *Green* remedy would do little to enfranchise excluded jurors: individuals chronically left off eligible juror lists would stand no greater chance of being called by second mailings than by first ones. But there are also situations in which a particular group is not absolutely but only comparatively excluded from jury service. We could imagine, for example, that people who live in part of a particular jurisdiction might receive jury summonses significantly less frequently than do those in the rest of the area. This would constitute partial jury disenfranchisement in that a particular subpopulation would be afforded less of an opportunity to participate in juries. Most FCS claims cite partial disenfranchisement, with the substantial underrepresentation prong determining whether the alleged exclusion rises to the level of a constitutional violation. As we saw in the preceding Section, the facts in *Green* may not have satisfied that standard.

But just because a jury selection system meets constitutional strictures does not mean that it fully achieves enfranchisement values. The record in

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<sup>163</sup> *Id.* at 78.

<sup>164</sup> *Id.* at 79 n.80 (quoting 28 U.S.C. § 1863(b)(3)).

*Green* strongly indicated that the district's jury selection system produced some degree of partial disenfranchisement. Abramson expressed the point in his report: "[A]ll individuals have the 'opportunity' to be counted as residents of their respective cities and towns[;] it is just that cities and towns understandably fail to include everyone on their lists. It may be John Doe here or this year or Ruth Doe there or next year."<sup>165</sup> At the same time, Abramson also noted repeatedly that "[t]he statistics do establish that the problem of undeliverable summonses is greater than average when those summonses are mailed to zip codes with high numbers of low income and African American residents."<sup>166</sup> So while every JSSA-required four-year refilling of the master jury wheel may be more or less accurate, some zip codes disproportionately contain people who have changed addresses within that four-year window. Therefore, inhabitants of certain zip codes tend to face diminished prospects of being called for jury service, even if they are not repeatedly overlooked when eligible juror lists are updated. Second-round mailings counteract this disparity by sending more summonses to these zip codes.

Viewed from this perspective, *Green's* zip-code-targeted "second-round mailing" remedy is more than a convenient way of increasing black representation in federal criminal venues. Indeed, the remedy also promotes equal access to the jury franchise. In effect, second-round mailings strive to compensate people whose addresses are temporarily undeliverable by offering them an increased likelihood of being called for jury service in those years when their current addresses are included on updated eligible juror lists. This compensatory scheme highlights the differences between the jury and electoral franchises. Because no eligible juror has a legal interest in participating in any particular case, an eligible juror can be equally enfranchised whether she is actually called for jury service today, next year, or the year after. Thus, to the extent that *Green's* novel remedy over time equalizes the likelihood that district residents will be called for jury service, it also promotes the constitutional value of jury enfranchisement.

## CONCLUSION

This Note's overarching goal has been to offer a justification of the FCS requirement that is consonant with the legal values animating the American criminal justice system. A commitment to juror enfranchisement, and not jury demography, better comports with the metes and bounds of FCS doctrine,

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<sup>165</sup> Abramson Report, *supra* note 156, at 54.

<sup>166</sup> *Id.* at 4.

important features of jury law and practice, equal protection jurisprudence, and principles of impartiality and anti-essentialism. Therefore, an enfranchisement approach to FCS doctrine best explains how the Sixth Amendment's invocation of jury impartiality relates to *Duren's* cross-sectionality guarantee. At the same time, current jury selection law and practice often fall short of what enfranchisement values might command or commend. Courts in particular should be mindful of FCS doctrine's potential applicability in cases involving quasi-permanent groups defined by traits like income or residential location.

An enfranchisement conception of jury legitimacy also has implications beyond the four corners of FCS doctrine. FCS doctrine is best viewed as but one manifestation of our society's abiding commitment to democracy in the jury booth. Accordingly, nonconstitutional remedies, such as increased juror compensation and the District of Massachusetts's second-round mailings, should be praised for promoting enfranchisement ideals. Thus, while clarifying past decisions and latent judicial intuitions, an enfranchisement approach also invites a fresh perspective for the future.