BATSON'S INCOMPLETE LEGACY: GENDER DISCRIMINATION AND THE PEREMPTORY CHALLENGE

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I. INTRODUCTION

In the seminal case *Batson v. Kentucky*,[1] the Supreme Court of the United States held that in criminal prosecutions, the state's exercise of peremptory challenges to exclude African-Americans from the jury panel violated the Equal Protection Clause of the Fourteenth Amendment.[2] Shortly thereafter, in a series of decisions rendered on the heels of *Batson*, the Court extended the logic of *Batson* to proscribe the racially motivated peremptory challenge in almost every context the peremptory might arise.[3] In so doing, the Court established the legal framework for eliminating racial discrimination in the jury selection process.

The Court has done little, however, to prevent the use of peremptory challenges based on gender.[4] With the granting of certiorari in *J.E.B. v. T.B.*[5] in May 1993, the Court has finally decided to resolve this issue. Utilizing federal and state case law, this comment will argue that the time has arrived for the Court to hold that gender-motivated peremptory challenges, like racially motivated peremptory challenges, violate the Equal Protection

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[1] 476 U.S. 79 (1986).

[2] *Id.* at 98-99. The Fourteenth Amendment provides, in pertinent part: "[no state shall] deny to any person within its jurisdiction equal protection of the law." U.S. CONST. amend. XIV, § 1.

[3] Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding that defendant may raise a *Batson* claim where the prosecutor peremptorily strikes a venireperson not of the same race as the defendant); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that racially-motivated peremptory strikes may not be employed by attorneys in civil cases); and Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that counsel for the defense may not exercise racially-motivated peremptory challenges, even if the attorney is not a public defender).

[4] *See infra* note 29.

[5] 606 So.2d 156 (Ala. 1992), *cert. granted*, 61 U.S.L.W. 3771 (U.S. May 18, 1993) (No. 92-1239).

Clause of the Fourteenth Amendment. Part II of this essay will provide a brief overview of the jury selection process. Part III will illustrate the Fourteenth Amendment theory underlying the proscription of racially motivated peremptory challenges. Part IV will examine the Fourteenth Amendment, gender, and women in the jury selection process. Finally, Part V will argue that the Fourteenth Amendment logic used to eliminate racially motivated peremptories should now be extended to eliminate gender-based peremptories.

II. OVERVIEW OF JURY SELECTION PROCEDURES AND PRACTICES

The Federal Jury Selection and Service Act of 1968 governs jury selection in the federal court system [hereinafter the Act].[6] Pursuant to the Act, each federal district must create a jury commission or appoint a clerk to manage the jury selection procedures.[7] Jury selection begins when the jury commission or clerk must select names from registered voter lists to form the "master jury wheel."[8] From this "master wheel," the jury commission or clerk will remove unqualified persons, thus creating the "qualified jury wheel."[9] The commissioner or clerk will then select the venire[10] from the qualified jury list as the necessity for

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[6] WAYNE LAFAVE, CRIMINAL PROCEDURE 833 (3d ed. 1985). State procedures generally mirror those practiced on the federal level. *Id.* at 834.

[7] *Id.* at 833.

[8] *Id.* Many states use a much larger pool from which to draw their "master jury lists." *Id.* at 834-35. For example, in addition to the use of voter registration lists, states will often utilize local census, tax rolls, city directories, drivers' license lists, and phone books. *Id.*

[9] *Id.* at 834. Persons may not be disqualified, excused, excluded, or exempted from the "master jury wheel" unless the person: demonstrates jury service would impose an undue hardship or burden; is unable to be impartial; would disrupt the litigation; is dismissed pursuant to a challenge for cause or a peremptory challenge; would threaten the secrecy of the proceedings; or would otherwise affect the integrity of the proceedings. *Id.*

Generally, valid excuses to jury service are "poor health, advanced age, [the] need to care for small children, or the distance [the prospective juror] live[s] from the courthouse." *Id.* at 835. In economically depressed states, economic hardship is also a valid excuse. *Id.* Finally, some groups (such as certain public employees, teachers, doctors, and clergy) are also commonly exempt from jury service. *Id.*

[10] Venire is defined as: "[t]he group of citizens from whom a jury is chosen in a given case . . . ." BLACK'S LAW DICTIONARY 1556 (6th ed. 1991).

jurors arises.[11] Once such a need arises, attorneys will choose jurors from the venire.[12] At this juncture, commonly referred to as *voir dire*,[13] attorneys for both sides may remove (or "challenge") jurors from the petit jury.[14]

There are two types of challenges which may be exercised during *voir dire*.[15] First, an attorney may "challenge a venireperson for cause," which is accomplished by demonstrating to the judge that the venireperson is sufficiently biased against the attorney's client.[16] Attorneys may exercise an unlimited number of challenges for cause.[17] The second type of challenge that may be exercised is the peremptory challenge.[18] Traditionally, the "essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without

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[11] LAFAVE, *supra* note 6, at 834.

[12] *Id.*

[13] *Voir dire* literally means "to speak the truth." *Id.* at 840.

[14] *Id.* at 840. *Voir dire* in the federal court system is conducted by the trial judge. *Id.* at 834. In the federal system, attorneys for the litigants in a particular case submit selection questions to the judge, who ultimately poses the questions to venirepersons in the presence of the attorneys. *Id.* For a concise summary of jury selection procedures in American jurisdictions, see JOHN M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977 & Supp. 1987).

[15] LAFAVE, *supra* note 6, at 840.

[16] *Id.* An attorney may establish cause where a venireperson: lacks the legal qualifications to serve as a juror; has served on a jury in a related matter; has or will serve as a witness in a trial regarding a similar matter; or is somehow related to one of the parties. *Id.* at 844. An attorney can also show cause if it can be established that the venireperson cannot be impartial or has already decided the case in his or her mind. *Id.*

[17] *Id.*; Jonathan H. Hurwitz, *The Right to A Jury Trial and the Role of Peremptory Challenges*, ANNUAL SURVEY OF AMERICAN LAW 31, 32 (1984) (citing e.g. CAL. PENAL CODE §§ 1071-76 (West 1970 & Supp. 1984)).

[18] Every jurisdiction in the United States authorizes the use of peremptory challenges. Barbara Underwood, *Race in Jury Selection*, 92 COLUM. L. REV. 723, 726 n.3 (1992) (setting forth the jury selection method in federal and state courts).

being subject to the court's control."[19] This arbitrary reason for discharging venirepersons from jury service is rooted in the Anglo-American legal system, and dates back to 1305.[20] Peremptory challenges became established procedure in England and were adopted in the American colonies soon after the English settled in America.[21] The practice of peremptory challenges has since fallen into disuse in England.[22] Nonetheless, the peremptory challenge system is still used in the United States, and is widely perceived by trial attorneys to be an important means for formulating an impartial jury.[23]

There are four principle justifications given to support the continued use of peremptory challenges in the United States. First, in instances where attorneys lack sufficient proof to satisfy the more exacting standard required to employ a challenge for cause, peremptories allow parties to

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[19] LAFAVE, *supra* note 6, at 847 (citing Swain v. Alabama, 380 U.S. 202 (1965)); Hurwitz, *supra* note 17, at 32 (stating peremptory challenges "may be made for any reason, but are available only in limited number"). Two types of peremptory challenge systems exist in the United States. In the most common peremptory system, termed the "sequential system," venirepersons are dismissed after an attorney removes that venireperson from the petit jury. Salvatore Picariello, Note, 23 SETON HALL L. REV. 1160, 1162 (1993); *see also* Brent J. Gurney, Comment, *The Case For Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 228 (1986) (arguing that peremptory challenges should be abolished). The "struck system" is the other method. Picariello, *supra*, at 1162. This process features a jury pool that is limited to the number of jurors required for a petit jury and the number of venirepersons permitted to be peremptorily challenged. *Id.* The litigants then exercise their peremptories until the requisite number of jurors has been reached. *Id.*

[20] *See Swain*, 380 U.S. at 217-21. Peremptory challenges first arose under the Ordinance of Inquests, 33 EDW. 1, STAT. 4 (1305), where both the King and the defendant could exercise peremptories for all felony trials at common law where capital sentences could be imposed. *Id.* at 213 (citations omitted).

[21] *Id.* at 213-14. As of 1790, Congress had not yet indicated how many peremptory challenges a defendant was entitled to in the federal court system. *Id.* at 214. Commenting on this lack of a Congressional determination, Justice Washington opined: "[t]he right of [peremptory] challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five jurors. If, therefore, the act of Congress has substituted no other rule . . . the common law rule must be pursued." *Id.* at 214 n.13 (citing United States v. Johns, 4 Dall. 412, 414 (Cir. Ct. Pa. 1806)).

[22] *Id.* at 218.

[23] *Id.* at 218-19.

remove venirepersons that the attorneys believe may be biased.[24] Second, peremptories convey to the litigant a perception that the legal system adjudicating his or her rights is fair because the litigant helps select the jury.[25] Third, peremptories held expedite the jury selection process because they enable attorneys to select jurors with less inquiry.[26] Finally, peremptories permit attorneys to ask probing and vigorous questions without fearing a venireperson's hostile response during the trial.[27] Therefore, by utilizing challenges for cause and peremptory challenges, an attorney can eliminate venirepersons that are clearly biased against his or her client, as well as those that the attorney believes might favor one party over the other.[28]

Throughout the development of Anglo-American legal tradition, the nature of peremptory challenges engendered an informal catalog of stereotypes regarding race, ethnicity, gender, and economic status[29]

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[24] Hurwitz, *supra* note 17, at 35 (citing *Swain*, 380 U.S. at 220).

[25] LAFAVE, *supra* note 6, at 847; *Swain*, 380 U.S. at 219-21.

[26] Hurwitz, *supra* note 17, at 34-35 (citing Swain v. Alabama, 380 U.S. 202, 220 (1965)). Peremptories expedite the selection process because removal of venirepersons are founded upon "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," rather than time consuming examination. *Swain*, 380 U.S at 220 (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)).

[27] LAFAVE, *supra* note 6, at 847; *see also Swain*, 380 U.S. at 219-21.

[28] STEPHEN A. SALTZBERG, AMERICAN CRIMINAL PROCEDURE 954 (1980); *Swain*, 380 U.S. at 220; *see also* Jean M. Shanley, Comment, *The Discriminatory Use of Peremptory Challenges After* Holland, 22 SETON HALL L. REV. 58, 60 n.8 (1991) (stating the peremptory has been a "valued tool" for prosecutors and defense attorneys because both may remove from the petit jury venirepersons who emit possible prejudice during *voir dire*).

In *Swain*, the Court commented that "the peremptory challenge 'permits rejection for a real or imagined partiality that is less easily designated or demonstrable' than that supporting a challenge for cause, and is exercised not only on the basis of impressions or guesses, but 'frequently . . . on grounds normally thought irrelevant to legal proceedings or official action' such as race, nationality, or occupation." Hurwitz, *supra* note 17, at 35 (quoting *Swain*, 380 U.S. at 220).

[29] Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection*, 17 OHIO N.U. L. REV. 229 (1991) (observing that jury selection guidelines fashioned by practitioners were "replete with [their] racist, sexist, ethnic, age, and other forms of bias."); Eugene I. Pavalon, *Jury Selection Theories*, TRIAL, June 1987, at 29-31. Pavalon commented that "Clarence Darrow, who considered jury selection 'of the utmost importance,' stressed the key elements in a prospective juror . . . are "humanness first, and then according to nationality, politics, and religion."

which, until *Batson*, attorneys could freely employ when selecting juries.[30] Many attorneys concur that these stereotypes, steeped in the

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Continuing, Darrow stated:

> An Irishman . . . is emotional, kindly, and sympathetic. If a Presbyterian enters the jury box . . . let him go. He is as cold as the grave. Beware of the Lutherans, especially the Scandinavians; they are almost sure to convict. I have never experimented with Christian Scientists; they are much too serious for me . . . . Only the gloomy and dyspeptic can be trusted to convict . . . . So, by all means, choose a man who laughs. Never take a wealthy man on the jury. Then, too, there are women. These are now in the jury box . . . . I formed a fixed opinion that they were absolutely dependable, but I did not want them.

Id. (citations omitted).

As the foregoing quote indicates, attorneys held misguided and unsubstantiated stereotypes regarding the capacity of women to serve as jurors. Melvin Belli commented that: "a male juror is more sound than a woman juror . . . . If counsel is depending upon a clearly applicable rule of law and if [the attorney] wants to avoid a verdict of 'intuition' and 'sympathy,' . . . generally [the attorney] would want a male juror." MELVIN M. BELLI, SR., 3 MODERN TRIALS § 51.67, at 446 (2d ed. 1982). Belli's contemporaries generally concurred with this logic; one attorney noted that women made "unpredictable" jurors because women were influenced by the experiences of their husbands. Fulero & Penrod, *supra*, at 230.

The New Jersey Law Journal recently examined the jury duty selection practices of attorneys arguing current cases. 133 N.J.L.J. 658 (March 1, 1993). Attorney Philip H. Corboy, explaining why he preferred women on the petit jury in a products liability case against a lawnmower company, stated:

> I want [women] in any product design defect case (unless they're engineers, accountants, or manufacturers' representatives, etc.). Most women understand the human factors approach. They know products cause damage for no reason at all. They are consumers of all types of household items, from kitchen gadgets to power saws and yes, lawnmowers. They know no one wears goggles to mow the lawn . . . .

Id. at 676.

In remarking he did not want an authoritarian on the jury, Mr. Corboy noted that he was not looking for "Mr. Right," who would be aggressive, jockey for foreman, and influence the jury into thinking the plaintiff was at fault. *Id.* at 674. Continuing, Mr. Corboy wrote that he did not want uptight or regimented persons on the petit jury and referred to an uptight person as "Ms. Stern," who would be "intolerant of mistakes," and "suspicious that [the plaintiff] was even injured." *Id.* While Mr. Corboy probably intended no harm, it is interesting he assigned knowledge of homemaking and "uptight" behavior to women and authoritarianism and aggressive behavior to men. *See id.*

[30] Pavalon, *supra* note 29, at 29-30. Pavalon traces the development of stereotypes to the effort of attorneys to quicken *voir dire*. *Id.*

trappings of tradition, continue to exist.[31] Despite the continued use of race, gender, ethnic, or economic oriented stereotypes, however, a myriad of relatively recent studies have conclusively demonstrated these stereotypes are simply untrue.[32]

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[31] Paul D. Teiger, *Seven Deadly Sins: What not to do in Voir Dire*, THE CONNECTICUT LAW TRIBUNE, July 1, 1991, at 22. The justification Mr. Teiger proffers for the dogged claim to these stereotypes is that lawyers "hate to give up cherished notions" that peremptories help constitute the most favorable jury for their clients. *Id.* ("Despite convincing scientific evidence to the contrary, most attorneys continue to believe that demographic variables, such as age, sex, ethnic background, race, occupation, and income level will enable them to predict jurors' behavior.").

[32] Case Comment, *Beyond* Batson: *Eliminating Gender Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1920-21, 1939 (1992); Pavalon, *supra* note 29 at 31. For example, contrary to popular stereotypes, persons of Southern European descent are more likely to convict criminal defendants than are persons of Northern European descent. *See* Thomas Sannito & Edward Burke Arnolds, *Jury Study Results: The Factors at Work*, TRIAL DIPL. J., Spring 1982, at 9-10 ("Other demographic factors that had virtually no relationship with how jurors felt before deliberating or how they voted were *age, educational level, income, religious preference, religious attendance, and political orientation.*") *Id.* at 10 (emphasis in original).

Moreover, also contrary to popular belief, minorities and women are not prone to acquit defendants. *Id.* In fact, studies have demonstrated that African-American jurors show "'no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.'" Underwood, *supra* note 18, at 732 (quoting United States v. Newman, 549 F.2d 240, 250 n.8 (2d Cir. 1977) (Anderson, Smith, Timbers, JJ.)). Additionally, studies demonstrate that women jurors are more likely than men to vote for conviction, especially where women jurors have had some form of higher education. Sannito & Arnolds, *supra*, at 10.

Research irrefutably demonstrates that race, gender, or ethnicity are only one small element in predicting how a juror will vote. *Id.* at 8. While jurors are most likely to vote from a combination of judgement, prejudices, and intuition, *see* Hurwitz, *supra* note 17, at 35, many factors influence those prejudices, and one alone is not indicative of how a juror will vote. Sannito & Arnolds, *supra*, at 10. The most reliable way to predict a potential juror's voting habits is to consider a host of psychological elements which, with practice, may be obtained during *voir dire*. Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J., 575, 588-89 (1985). Professor Covington's well known research set forth the following general concepts:

> Psychological research indicates a conviction prone juror believes:
> (a) society is too permissive toward sex,
> (b) misfortunes are the result of laziness,
> (c) alcoholics are moral degenerates,
> (d) jurors often acquit out of pure sympathy,
> (e) courts protect criminals too much,
> (f) the death penalty should be used in some circumstances. (citations omitted).

As the foregoing footnotes suggest, *voir dire* stereotypes have permitted attorneys to permanently remove African-Americans, women, ethnic minorities, and the economically dispossessed from jury service. Originally, these stereotypes were commonly expressed, overt beliefs that some types of persons, such as African-Americans and women, are not the social and intellectual equals of white men, and therefore, should not

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Similar studies reveal that an acquittal is more likely to be received from a juror who:
(a) is married to a liberal or a less-educated spouse,
(b) would rather read than watch T.V.,
(c) has several children,
(d) has older siblings,
(e) has returned a "not guilty" verdict before,
(f) does not believe criminals are too protected by the courts,
(g) does not agree that jurors are too sympathetic toward criminals,
(h) does not like the victim,
(i) has had prior difficulties with the law,
(j) does not believe the prosecutor is competent and well prepared. (citations omitted).

Id. at 589 (citing Sannito & Arnolds, *supra*, at 6, 10, 11). In her article, Professor Covington explains that attorneys who employ mock trials, community surveys, and mirror juries as a means of determining the effect of demographic factors on jurors' votes will meet with more success. *Id.* at 596.

Recalling the recent jury selection study conducted by the New Jersey Law Journal, *see supra* note 29, attorney David M. Zornow stated that attorneys must "understand the essential theory of the case that will be tried." *Id.* at 662. Mr. Zornow continued, "[o]nly by mapping out the linchpin themes can the trial lawyer begin to hone in on the type of juror likely to end up in his [or her] corner." *Id.* Accordingly, Mr. Zornow, representing a large power utility suing a nuclear power plant for knowingly selling defective power-generating equipment, sought to empanel venirepersons who are emotional and have a technical background. *Id.* An attorney can better discover these traits through open-ended questions, hypothetical questions, and knowledge of community demographics than through traditional stereotypes. *Id.* at 663-64. Dan K. Webb, representing the nuclear power company, stated that attorneys must give detailed individualized consideration to each venireperson so as to expose any bias against a client. *Id.* at 668.

In another interview, Andrew T. Berry, representing the defendant in a products liability case, hired jury consultants, conducted mock trials, and utilized psychologists to help learn more about each venireperson. *Id.* at 674. Such techniques, when combined with open ended questions, help find ideal jurors in a products liability case: people who are "people persons" and quick thinkers. *Id.* at 676. Finally, concurring with her peers, Ms. Judith P. Vladeck, the plaintiff's attorney in a sexual discrimination case, demonstrated how a consideration of gender, economic status, education, union membership, and evidence of deference toward authorities are all factors attorneys should consider in choosing a jury to try a gender discrimination case. *Id.* at 682-83.

serve on juries, particularly in cases with white male defendants.[33] The second form of discrimination arose through stereotypes that attorneys concocted to address the relationship between the "personal and demographic characteristics of the biases or attitudes."[34] Tragically, the stereotypes upon which these overt and invidious forms of discrimination have been based are still employed.[35]

Consequently, African-Americans[36] and women are more noticeably absent from petit juries, irrespective of whether the discrimination was overt or subconscious.[37] Recognizing the plight of African-Americans, the Supreme Court has used the Fourteenth Amendment to place substantial limitations on the exercise of racially motivated peremptory challenges.[38] The Court has not yet employed the Fourteenth Amendment to eradicate the use of gender motivated peremptories,

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[33] *See infra* notes 57-59 (discussing jury venire selection cases throughout the late nineteenth and mid-twentieth centuries that reveal this blatant form of discrimination).

[34] Pavalon, *supra* note 29, at 31.

[35] Marcia Coyle, *Not the Last Word on Juries*, NAT. L.J., June 17, 1991, at 28 (commenting that gender discrimination is prevalent in the courtroom, even though the Court has viewed racial discrimination in jury selection as being more egregious); Michael Hoenig, *Peremptory Challenges*, N.Y.L.J., May 24, 1990, at 13 (observing attorneys often fall into the trap of exercising peremptories based on gender or race rather than more relevant traits, such as actual prejudice or psychologic foundation); Pavalon, *supra* note 29, at 29-31 (stating some attorneys still consider jury selection a guessing game where stereotypes rather than strategy and research reign); Hurwitz, *supra* note 17, at 35 (citing Swain v. Alabama, 380 U.S. 202, 220 (1965); Sannito & Arnolds, *supra* note 32, at 6 (admonishing attorneys to utilize the host of empirical research with regard to jury selection rather than employing unfounded and untrue racial, gender, age, and ethnic stereotypes).

[36] *See* Batson v. Kentucky, 476 U.S. 76, 99 (1986); *id.* at 101 (White, J., concurring); *Id.* at 102-103 (Marshall, J., concurring); *Beyond* Batson, *supra* note 32, at 1929; Coyle, *supra* note 35, at 28; *see also* Shanley, *supra* note 28, at 59-60.

[37] *Beyond* Batson, *supra* note 32, at 1929; Coyle, *supra* note 35, at 28; *see also* Shanley, *supra* note 28, at 59-60.

[38] *Batson*, 476 U.S. 79 (1986) (holding that prosecution may not peremptorily strike a venireperson because of race); Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding that defendant may raise a *Batson* claim where the prosecutor peremptorily strikes a venireperson not of the same race as the defendant); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that racially-motivated peremptory strikes may not be employed by attorneys in civil cases); and Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that counsel for the defense may not exercise racially-motivated peremptory challenges, even if the attorney is not a public defender).

however, despite the fact that several circuit courts and state supreme courts have already done so.[39]

The history of gender in jury selection is more ill-defined than that of race primarily because unlike race, the Court has not construed the Fourteenth Amendment to treat gender as a suspect classification subject to the Court's highest scrutiny.[40] Thus, despite the fact that American women of all races have rarely been given the same legal, social, or economic status as men,[41] the Court has given issue of gender-motivated

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[39] The Ninth Circuit has extended the Fourteenth Amendment to proscribe gender-based peremptory challenges. *See* United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), *aff'd en banc,* 960 F.2d 1433 (1992). State supreme courts have also acted to proscribe gender-motivated peremptory challenges. *See* People v. Wheeler, 583 P.2d 748 (Cal. 1978); State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Levinson, 795 P.2d 845 (Haw. 1990); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); State v. Crespin, 612 P.2d 716 (N.M. App. 1980); New York v. Izzari, 560 N.Y.S.2d 279 (1990). Several federal circuits have declined to extend the Fourteenth Amendment to proscribe gender-motivated peremptory challenges. *See, e.g.*, United States v. Broussard, 987 F.2d 215 (5th Cir. 1993); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

[40] *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 595-96 (1989). Generally, the Court has created a "three tiered" system to analyze issues of equal protection. *Id.* at 595. The first tier is known as the "rational basis" tier, which is the lowest standard of review, and applies to issues arising from state efforts to regulate economic rights, housing, education, taxes, living arrangements, and employment conditions. *Id.* at 596.

The second tier, termed "strict scrutiny," is the most exacting standard of equal protection review. *Id.* at 595. "Strict scrutiny" is invoked whenever government attempts to regulate suspect classes, such as race, alienage, and national origin, or fundamental rights, such as freedom of speech, free exercise, or the right to privacy. *Id.* at 596.

Finally, the third tier, often called "middle tier" review, "applies to rights and classes that the Court has deemed less sensitive than those triggering strict scrutiny, but more sensitive than those subject to the rational basis test." *Id.* at 595. The Court invokes this level of review in issues involving gender, illegitimacy, and children of illegal aliens. *Id.* at 596.

[41] *See Beyond* Batson, *supra* note 32, at 1921. At least prior to Brown v. Bd. of Educ. of Topeka, 354 U.S. 1 (1954), the law drew a sharp distinction between African-Americans and women. *Id.* From 1865 until 1954, African-Americans were kept legally separated from whites under the doctrine of "Separate but Equal," *see* Plessy v. Fergeson, 163 U.S. 537, 550-51 (1896), which was based on the rights of the white majority to disassociate itself from African-Americans. *Plessy*, 163 U.S. at 551. The Separate but Equal doctrine, of course, spread across gender lines. Despite the egregious wrongs this doctrine visited upon African-Americans, at the very minimum, states were prohibited from passing laws which on their face denied opportunities to African-Americans afforded to white persons. *Id.* at 550 (citations omitted).

jury selection far less concern than that which has accompanied the justified concerns of African-Americans. Although the Court has imposed some guidelines respecting gender representation on juries, these determinations are grounded in the defendant's Sixth Amendment right to trial by a cross section of the community[42] rather than a woman's Fourteenth Amendment right to be included on a jury.[43]

This comment will first set forth the grounds upon which the Court moved to ban race-based peremptory challenges. Next, this essay will examine the manner in which the Court has addressed the history of

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Conversely, the Court permitted the national and state governments to prevent women of all races from participating in civic functions traditionally thought of as within the exclusive sphere of male activity. For example, states could legally prevent women from voting until 1920, when the Nineteenth Amendment was ratified. U.S. CONST. amend. XIX, § 1 ("The right of citizens to vote shall not be denied or abridged on account of sex."). The Court also permitted state legislatures to enact paternalistic laws prohibiting women from participating in social activities and other realms where women were not traditionally present. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872). In *Bradwell*, the Court upheld a statute which forbade women from practicing law on the grounds that the Privileges and Immunities Clause of the Fourteenth Amendment did not guarantee the right to practice law to all people. *Id.* at 138-39. Justice Bradley, in a concurring opinion was more blunt: "[it is] the law of the Creator" that "[the] timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring); *see also* Muller v. Oregon, 208 U.S. 412 (1908) (upholding a daily working hours statute for women — after previously rejecting one imposed on bakers only three years prior in Lochner v. New York, 198 U.S 45 (1905)). In Goesaert v. Cleary, 335 U.S. 464 (1948), the Court upheld a state statute that prohibited women from becoming bartenders, reasoning the legislature could properly conclude tending bar would "would create moral and social problems for women." *Id.* at 466.

For a light-hearted but accurate description of the law's treatment of women, see C. DICKENS, THE ADVENTURES OF OLIVER TWIST, c. LI. In this classic tale, Mr. Bumble was chastised by a court for attempting to disclaim his responsibility for the acts of his wife. *Id.* The court retorted, "[y]ou were present on the occasion of [your wife's] destruction of these trinkets, and indeed, the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction." *Id.*

[42] The Sixth Amendment, in pertinent part, reads: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[43] Ballard v. United States, 329 U.S. 187 (1946) (exercising Court's supervisory power over the federal judiciary to require that women be included in the selection of the federal court venire so as to ensure the jury represents a "fair cross-section" of society); Taylor v. Louisiana, 419 U.S. 522 (1974) (holding the decision reached in *Ballard* was a Constitutional requirement); Duren v. Missouri, 439 U.S. 357 (1979) (establishing a three-pronged analysis to determine whether the jury is representative of a "fair cross-section" of the community from which it was drawn).

gender under the Sixth and Fourteenth Amendments. This comment will then set forth the legal and social basis for concluding that the Fourteenth Amendment prohibits gender-motivated peremptory challenges.

III. PREVENTING RACIAL DISCRIMINATION IN JURY SELECTION

Preventing racial discrimination in the jury selection process dates back to 1879, when the Supreme Court confronted a trio of cases, *Strauder v. West Virginia*,[44] *Virginia v. Rives*,[45] and *Ex Parte Virginia*.[46] Although the first case in this trio, *Strauder*, is probably the most famous today, these three cases collectively set the basic foundations upon which lie all subsequent Fourteenth Amendment challenges to discriminatory jury selection procedures.[47]

In *Strauder*, the West Virginia Supreme Court upheld the conviction of an African-American man, who was tried and convicted by an all-white jury.[48] A West Virginia statute extant at the time expressly excluded

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[44] 100 U.S. 303 (1879).

[45] 100 U.S. 131 (1879).

[46] 100 U.S. 339 (1879).

[47] The less-famed cases in the *Strauder* trio delineated the scope of *Strauder*. In *Rives*, two male African-American defendants were convicted of murder by all white juries. *Rives*, 100 U.S. at 314. Unlike the circumstances in *Strauder*, however, there was no law in Virginia that proscribed African-Americans appointment to the jury venire. *Id.* at 314-15. The defendants sought to have their convictions reversed, arguing that the petit juries which tried and convicted the defendants were all white, despite the fact that African-Americans were not prohibited from the venire. *Id.* at 315. The Court affirmed the right of African-Americans to be called for jury service, but refused to hold that African-American defendants were entitled to a petit jury composed in whole or in part of their own race. *Id.* at 322-23; *see also* Akins v. Texas, 325 U.S. 398, 403 (1945) (explaining that it would be impossible to require petit juries to be composed of persons with similar racial or ethic backgrounds to the defendant because of the diverse social composition of the United States).

In *Ex Parte* Virginia, 100 U.S. 339 (1879), the Court affirmed the indictment of a Pittsylvania County Judge for intentionally keeping African-Americans off the jury venire in violation of federal law. *Id.* at 345. Synthesizing *Strauder* and *Rives*, the Court posited that, although a defendant does not have the right to a petit jury composed in whole or in part of the defendant's race, the defendant is entitled to a jury selected pursuant to fair procedures. *Id.*

[48] *Strauder*, 100 U.S. at 304.

non-white persons from serving on a jury.[49] Justice Strong, writing for the majority, reversed the West Virginia Supreme Court's decision.[50] The Justice pronounced that the Equal Protection Clause of the Fourteenth Amendment was promulgated to ensure that African-Americans could enjoy all of the same civil rights and protections afforded to white persons and that any state law which violated this principle was necessarily void.[51] The Court then invalidated the West Virginia statute and issued two reasons to justify this conclusion.[52]

First, the Court reasoned that the very fact that African-Americans were excluded from service on the venire is an assertion by the state that African-Americans were inferior and second class citizens.[53] Continuing, the Court stated that *de jure* discrimination against African-Americans provided a stimulant to prejudice which is an impediment to ensuring that African-Americans receive equal protection of the laws.[54]

Second, Justice Strong opined that unlike white defendants, African-American defendants in West Virginia faced the disadvantage of not being judged by their peers.[55] The Court supported this conclusion by acknowledging that prejudice among whites against African-Americans made it unlikely that African-American defendants would receive a fair trial if confronted with an all white jury.[56]

Despite the conspicuous holding in *Strauder*, however, the Court was continuously confronted with cases where states, being unable to enact *de*

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[49] The West Virginia law provided in pertinent part: "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ." W. VA. CODE § 102 (1873), *reprinted in Strauder*, 100 U.S. at 305.

[50] Strauder v. West Virginia, 100 U.S. 303, 303-05 (1879).

[51] *Id.* at 306-07.

[52] *Id.*

[53] *Id.* at 308.

[54] *Id.*

[55] *Id.* at 308-09. The Court stated: "[the] jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, [and] persons having the same legal status in society as that which he holds." *Id.* at 308.

[56] *Id.* at 309. Justice Strong offered no statistics to support this point. *See id.* Rather, the Justice most likely relied on first hand knowledge of the pervasive institutionalized discrimination against African-Americans. *See id.*

jure discriminatory jury selection procedures, turned to invidious forms of *de facto* discrimination. For example, in light of *Strauder*, *Rives*, and *Ex Parte Virginia*, many states employed subjective standards such as intelligence, experience, or moral integrity when considering the qualifications of prospective African-American jurors.[57] Many state jury commissioners twisted these vague statutes and successfully employed them to keep African-Americans off the jury venire. In response to such practices, one year after *Strauder* was decided, the Court in *Neal v. Delaware* prohibited this conduct as violative of the Fourteenth Amendment.[58] Noting the pervasiveness of the states' discriminatory practices despite the Court's holding in *Neal*, however, the Court again addressed and outlawed the practice in 1934.[59]

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[57] *See, e.g.*, ALA. CODE § 8603 (1923) ("The jury commission shall place on the jury roll and in the jury box the names of all male citizens . . . who are generally reputed to be honest and intelligent men, are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is . . . an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror . . . ."), *reprinted in* Norris v. Alabama, 294 U.S. 587, 590-91 (1934).

[58] 103 U.S. 370 (1880). Writing for the majority, Justice Harlan held that African-Americans could not be excluded from the venire based on the assumption that as a class, all African-Americans were somehow unfit to serve as impartial jurors. *Id.* at 397. In *Neal*, a male African-American defendant was tried and convicted of rape by an all white jury. *Id.* at 375-76. The defendant's jury was selected pursuant to a statute which provided: "all [men twenty-one years of age] qualified to vote at the general election, being 'sober and judicious persons,' shall be liable to serve as jurors . . . ." *Id.* at 388 (citation omitted). The Court conceded that the statute did not expressly proscribe African-American males from serving as jurors. *Id.* Justice Harlan observed, however, that an African-American male had never been called to serve as a juror in the county where the defendant was tried. *Id.* at 395. The Justice decided this information was enough to conclude that the Delaware Supreme Court was incorrect in holding that this fact did not prove *per se* exclusion of African-Americans from juries. *Id.* at 397. The Justice opined it was a "violent presumption" to assume all African-Americans in the state lacked the intelligence or moral integrity to serve as qualified jurors. *Id.* at 397. Significantly, the Court observed that excluding African-Americans from the venire rolls not only harmed the equal protection rights of the defendant, but also harmed the right of African-Americans who were unable to have equal involvement in the judicial system. *Id.* at 386.

[59] Norris v. Alabama, 294 U.S. 587 (1934). In *Norris*, decided over fifty years subsequent to *Neal*, the Court held *prima facie* evidence that a defendant was denied equal protection is established whenever African-Americans are deemed somehow unfit for jury service. *Id.* at 598. *Norris* is probably best known as the infamous "Scottsboro Boys" case, *see* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 369-98 (Rev. ed. 1979), where nine African-American youths were tried in Morgan County, Alabama by an all-white jury for committing a rape. *Norris*, 294 U.S. at 588. Morgan County had never appointed an African-American juror in any criminal case. *Id.* The defendants were

These early cases forced states to open the jury venire to African-Americans, and only a handful of venire discrimination cases were brought under the Fourteenth Amendment between 1934 and 1968.[60] The results of *Strauder* and its jury venire progeny, however, did not augment the numbers of African-Americans on petit juries,[61] because attorneys employed the peremptory challenge against racial and ethnic minorities.[62]

The first case heard by the Court involving the discriminatory use of peremptory challenges was *Swain v. Alabama*.[63] The defendant, an African-American male, challenged his conviction by an all white jury on the grounds that the state peremptorily struck six out of eight African-Americans

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convicted despite the fact that the prosecution's evidence was entirely circumstantial, the defendants were not positively identified, two witnesses perjured themselves during examination, and the key witness retracted her statement and rendered an entirely different account of the alleged rape. *See* CARTER, *supra* at 369-98. The Morgan County jury commissioner justified the chronic and systematic lack of African-American jurors in criminal cases with the logic that he knew of no African-Americans in the community who possessed the intelligence or moral integrity requisite of a fit juror. *Norris*, 294 U.S. at 598-99. The Court reversed the defendants' convictions and invalidated the Alabama jury selection statute, *see supra* note 59, under which the trial jury was chosen. *Id.* at 599.

[60] For example, the Court also employed *Strauder* and its progeny to protect the venire rights of naturalized citizens. Texas v. Hernandez, 347 U.S. 475 (1954). In *Hernandez*, the defendant, an American citizen of Mexican decent, appealed a life sentence imposed on him by a jury chosen from a venire which contained no American citizens of Mexican decent. *Id.* at 476. Subsequent to finding that American citizens of Mexican decent were systematically and intentionally excluded from the jury venire, the Court reversed the defendant's conviction. *Id.* at 481-82.

Writing for the Court, Chief Justice Warren reasoned the Fourteenth Amendment expressly forbade state sponsored discrimination against persons of a minority national origin as well as racial minorities. *Id.* at 482. Thus, the Chief Justice concluded, the holdings in *Strauder* and its progeny must be extended to instances where persons of a particular national origin were intentionally and systematically excluded from the jury venire. *Id.*

[61] Although there are few hard statistics to support this claim, the United States Commission on Civil Rights conducted a study of discrimination in jury selection. Swain v. Alabama, 380 U.S. 202 (1965) (citing THE UNITED STATES COMMISSION ON CIVIL RIGHTS, JUSTICE 103 (1961)). The Commission concluded: "The practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th Amendment." *Id.*

[62] *Id.*

[63] 380 U.S. 202 (1965).

from the petit jury.[64] In so doing, the defendant demonstrated that since 1950, no African-Americans had been chosen to serve on a petit jury in a criminal case in the county in which he was tried, even though the venires included an average of six to seven African-Americans.[65] After deciding that both the grand jury and the petit jury venires had been fairly composed pursuant to *Strauder* and its progeny, the Court addressed whether the State had violated the Fourteenth Amendment in using its peremptory challenges to strike all African-American venirepersons.[66] The majority, per Justice White,[67] held that in the attendant case, the state's use of peremptory challenges to strike the African-American venirepersons did not violate the Fourteenth Amendment.[68]

In so holding, the Court first reasoned that the peremptory challenge had "very old credentials" and had always been recognized as an important method to secure an impartial jury.[69] Justice White asserted that peremptory challenges helped attorneys compose an impartial jury, noting that opposing counsel could more aggressively question a prospective juror without fearing that person's placement on the jury.[70] Second, the Justice maintained that attorneys should be permitted to remove a limited number of venirepersons whom the attorneys may have reason to believe would be hostile to the litigants.[71] Finally, the Justice noted that attorneys may often have to strike jurors based upon broad generalizations (such as race, gender,

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[64] *Id.* at 203. The remaining two out of eight African-American venirepersons were exempt from duty on the petit jury. *Id.* at 205. In *Swain*, the defendant also challenged the racial composition of the grand jury but, the Court refused to quash his indictment. *Id.* at 208-09.

[65] *Id.* at 205.

[66] *Id.* at 208-10.

[67] Justice Harlan concurred with the majority, emphasizing agreement with the majority because the Court did not determine whether the defendant had demonstrated a violation of the Fourteenth Amendment. *Id.* at 228 (Harlan, J., concurring). Justice Black concurred in the result without issuing an opinion. *Id.* (Black, J., concurring). Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, dissented. *Id.* (Goldberg, J., dissenting).

[68] *Id.* at 221.

[69] *Id.* at 212. See *supra* part I, for a detailed account regarding the history, philosophy, and development of the jury selection system in the United States.

[70] *Id.* at 219-20.

[71] *Id.* at 220.

party affiliation) and a superficial knowledge of how each venireperson might act once in the jury box.[72]

The majority acknowledged, however, that a state would violate the Equal Protection Clause if the prosecutor purposefully or deliberately employed peremptory challenges to deny African-Americans an equal opportunity to serve on petit juries.[73] Thus, Justice White opined that the Fourteenth Amendment prohibited the use of peremptory challenges where the prosecutor continually struck African-Americans, irrespective of the circumstances in each case or the venirepersons' responses to *voir dire*.[74] The Court, however, conditioned this conclusion, stating that the discriminatory use of the peremptory challenge by state attorneys could be proven only if the defendant could conclusively demonstrate that the state attorney systematically employed the peremptory challenge over a protracted period of time against African-American venirepersons.[75]

In a vigorous dissent, Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, argued that Justice White's opinion severely impaired the ability of *Strauder* and its progeny to enforce equal protection rights.[76] The dissent maintained that the defendant had satisfied the *prima facie* case of discrimination established in *Norris*[77] because the defendant had demonstrated that no African-American had ever served on a jury in the county the conviction occurred.[78] After noting that the peremptory

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[72] *Id.* at 221.

[73] *Id.* at 203-04.

[74] *Id.* at 222-23.

[75] *Id.* at 221. Justice White did not specify the length of the time period over which the defendant would have to show the prosecutor systematically used peremptory challenges against African-Americans. However, the defendant in *Swain* obviously fell short of the standard, even though the defendant proved that from 1950 to 1965, no African-American had served on a petit jury in a criminal case in the county where the defendant was tried. *See supra* notes 64-65 and accompanying text.

[76] *Id.* at 231 (Goldberg, J., dissenting).

[77] *Id.* at 232-33 (Goldberg, J., dissenting). *See supra* note 59.

[78] *Id.* at 232 (Goldberg, J., dissenting). The dissent illustrated that attorneys for the State of Alabama, prosecutors as well as defense attorneys, typically agreed before trial how many African-Americans could be on the jury venire and in the petit jury. *Id.* at 234-35 (Goldberg, J., dissenting). The dissent also noted that the Alabama Supreme Court acknowledged that the method of jury selection in Talladega County was "'not exhaustive enough to insure the inclusion of all qualified persons.'" *Id.* at 237 (Goldberg, J., dissenting) (quoting Swain v.

was not Constitutionally mandated but merely a convenient procedural device,[79] Justice Goldberg chastised the majority's decision to superimpose the peremptory challenge system over the fundamental rights of African-American citizens.[80]

Despite *Swain*, state attorneys continued to use peremptory challenges to exclude African-Americans and other groups protected by the Fourteenth Amendment from petit juries.[81] Trial courts applied the standard established in *Swain* to determine whether prosecutors employed peremptory

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Alabama, 156 So.2d 368, 374 (Ala. 1963)). The dissent concluded that the State had failed to rebut the defendant's showing. *Id.* at 239 (Goldberg, J., dissenting).

[79] *Id.* at 243-44 (Goldberg, J., dissenting). As noted in part I of this comment, the Court has long recognized that the "right to peremptorily challenge is not a fundamental right, constitutionally guaranteed, even as applied to the defendant, much less to the State." *Id.* at 243 (Goldberg, J., dissenting) (citing Stiltson v. United States, 250 U.S. 583, 586 (1919)).

[80] *Id.* at 244 (Goldberg, J., dissenting). In a famous passage, Justice Goldberg maintained:

> Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.

Id.

[81] Some state supreme courts, however, realized *Swain* did not go far enough to protect the equal protection rights of African-Americans and prevent their exclusion from petit juries. The first state to so hold was California in People v. Wheeler, 583 P.2d 748 (Cal. 1978). In *Wheeler*, the California Supreme Court held that the exercise of peremptory challenges on the basis of race, ethnic background, religion, gender, or similar grounds violated Article I, § 16 of the California Constitution, which stated: "[t]rial by jury is an inviolate right and shall be secured to all." *Id.* at 754, 761-62.

Following the lead of the California Supreme Court, the Massachusetts Supreme Judicial Court held in Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979), that use of peremptory challenges in a manner which discriminates against race, gender, ethnicity, or creed violated Article 12 of the Massachusetts Constitution. *Id.* The high courts in Florida, Hawaii, New Mexico, and New York subsequently adopted the logic of the California Supreme Court's decision in *Wheeler*. *See* State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Levinson, 795 P.2d 845 (Haw. 1990); State v. Crespin, 612 P.2d 716 (N.M. App. 1980); People v. Izzari, 560 N.Y.S.2d 279 (1990).

Additionally, in states where the state supreme court adopted standards more forgiving than those pronounced in *Swain*, federal courts adopted such standards. *See* Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *judgment vacated in light of* Batson, 478 U.S. 1001 (1978).

challenges against African-Americans in a discriminatory manner.[82] This standard, however, proved to be a crippling burden of proof for defendants to carry.[83] Defendants could not prove sustained discriminatory use of the peremptory challenges because the work required to satisfy the *Swain* analysis was too burdensome.[84] This task was especially daunting because very few jurisdictions kept written records regarding the many facets of jury selection in civil and criminal cases.[85]

In the years following *Swain*, the United States Supreme Court declined

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[82] Batson v. Kentucky, 476 U.S. 79, 92 n.16 (1986) (citing United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982); United States v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971); Thigpen v. State, 270 So.2d 666, 673 (Ala. 1972); Jackson v. State, 432 S.W.2d 876, 878 (Ark. 1968); Johnson v. State, 262 A.2d 792, 796-97 (Md. 1970); State v. Johnson, 311 A.2d 389 (N.J. Super. 1973) (per curiam); State v. Shaw, 200 S.E.2d 585 (N.C. 1973)). *See* Swain v. Alabama, 380 U.S. 202, 221 (1965).

[83] In fact, between 1966 and 1986, only two defendants could meet the rigorous *prima facie* standard set forth in *Swain*. State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162 (La. 1979); *see* LAFAVE, *supra* note 6, at 848-49 (stating "[a]lthough courts are inclined to say that the defendant's burden of showing such systematic exclusion by the prosecutor [pursuant to *Swain's* requirements] is not insurmountable, experience has clearly indicated the virtual impossibility of doing so. A great many cases are to be found holding the defendant did not meet this burden, but there are almost none ruling that the defendant had established such systematic exclusion by the prosecutor's use of . . . peremptory challenges.").

[84] *Batson*, 476 U.S. at 92 n.17 (1986). For example, defendants were required to research many cases over extended periods of time and ascertain the race of defendants in prior cases, the racial composition of the jury venires and the petit juries in those cases, and the use of peremptory challenges against African-Americans. *Id.* *See* United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975) (noting since 1974, 81% of African-American venirepersons were peremptorily struck in all criminal cases in which defendants were African-Americans), *cert. denied*, 425 U.S. 961 (1976); United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974) (observing that among 53 criminal cases occurring within two years and involving African-American defendants, Government prosecutors peremptorily challenged 68.9% of African-Americans on the venire); McKinney v. Walker, 394 F. Supp. 1015, 1017-18 (S.C. 1974) (commenting that while African-Americans constituted 12.4% of the population qualified for jury duty, during 1970-1971, they constituted only 7.3% of the jurors sitting in judgement of white defendants in criminal cases and only 2.6% of the jurors sitting in judgement of African-American defendants), *aff'd*, 529 F.2d 516 (4th Cir. 1975).

See also Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); VAN DYKE, *supra* note 14, at 155; *see also Batson*, 476 U.S. at 103 n.2. (Marshall, J., concurring) (citing Harris v. Texas, 467 U.S. 1261 (1984) (Marshall, J., dissenting from denial of certiorari); Williams v. Illinois, 466 U.S. 981 (1984) (Marshall, J., dissenting from denial of certiorari)).

[85] *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

numerous opportunities to re-examine the discriminatory use of peremptory challenges.[86] One year after the Court last declined to revisit *Swain*, the Court granted certiorari in *Batson v. Kentucky*.[87] In *Batson*, an African-American defendant challenged his burglary conviction, asserting that the conviction was obtained in violation of the Sixth and Fourteenth Amendments.[88] The Court, per Justice Powell, reversed the decision of the Kentucky Supreme Court and remanded the case for further proceedings.[89]

Justice Powell first reviewed the precedent which firmly established that jury venires could not be chosen through discriminatory procedures.[90] Upon this review, the majority re-affirmed the well-established principle that discriminatory procedures used to exclude African-Americans from jury service violated the Equal Protection Clause of the Fourteenth Amendment.[91] The Justice noted that discrimination in selecting the jury venire harmed the defendant in this case because such discrimination

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[86] *See, e.g., Harris*, 467 U.S. at 1261 (Marshall, J., dissenting from denial of certiorari); *Williams*, 466 U.S. at 981 (Marshall, J., dissenting from denial of certiorari).

[87] 471 U.S. 1052 (1985).

[88] Batson v. Kentucky, 476 U.S. 76, 84 (1986). The defendant argued that the trial judge, who had conducted *voir dire*, permitted the prosecutor to use the State's peremptory challenges to strike all four African-Americans on the petit jury venire. *Id.* at 83. The defendant maintained the prosecutor's use of peremptories was discriminatory and in violation of the Fourteenth Amendment, and that the prosecutor abridged the defendant's right to a fair jury that reflected a fair cross-section of the community. *Id.* On review of the defendant's case, the Kentucky Supreme Court declined to adopt the rulings of the California Supreme Court in *Wheeler* and the Massachusetts Supreme Judicial Court in *Soares*, and affirmed the defendant's conviction. *Id.* at 84.

[89] *Id.* at 84. Justice Marshall authored a concurring opinion. *Id.* at 102 (Marshall, J., concurring). Although agreeing with the majority's holding, the Justice declared that the only action which would end discrimination against African-Americans and other minority races in the jury selection process was to eliminate peremptory challenges altogether. *Id.* at 102-03 (Marshall, J., concurring).

Justice Stevens, joined by Justice Brennan, also wrote a concurring opinion. *Id.* at 108 (Stevens, J., concurring); Justice O'Connor also concurred separately. *Id.* at 111 (O'Connor, J., concurring). Chief Justice Burger, joined by Justice Rehnquist, dissented, arguing the majority's opinion represented an abrupt and dangerous break from precedent that would unnecessarily undermine the integrity of the peremptory challenge system. *Id.* at 112 (Burger, C.J., dissenting).

[90] *Id.* at 85-88. The Justice recounted the decisions in *Strauder*, *Neal*, *Norris*, *Hernandez*, and *Swain*, and reviewed the circumstances that surround selecting a petit jury. *Id.* at 84 n.3.

[91] *Id.*

deprived the defendant of the right to be tried by peers and equals.[92] The majority further observed that the Court had held that discrimination in the jury venire violated the excluded juror's equal protection rights because race was not indicia of a venireperson's competence to serve as an impartial juror.[93] Finally, Justice Powell stated that the harm from discriminatory jury selection procedures also extended to the community, because discrimination within the court system undermines the public's confidence in the fairness of the judicial system.[94]

Next, the majority pronounced that the justifications for proscribing discriminatory procedures in the selection of jury venires necessitated the prohibition against discriminatory practices in the selection of petit juries as well.[95] The Court reasoned that it was both inconsistent and unfair to use the Equal Protection Clause to ban racial discrimination in one phase of jury selection but then permit such discrimination to later enter the jury selection process.[96] Therefore, the Justice Powell determined the State's privilege to use peremptory challenges was subject to the commands of the Equal Protection Clause.[97]

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[92] *Id.* at 86 (citing *Strauder*, 380 U.S. at 308).

[93] *Id.* at 87 (citing Thiel v. Southern Pacific Co., 328 U.S. 217, 223-27 (1946)); Neal v. Delaware, 103 U.S. 370, 386 (1880). In fact, some commentators have asserted that the venireperson who is struck on racial grounds is the most harmed. *See, e.g.*, Underwood, *supra* note 18, at 727. The Court implied this logic in Powers v. Ohio, 111 S. Ct. 1364 (1991). *See id.*

[94] *Id.* (citing Ballard v. United States, 329 U.S 187, 195 (1946)); *see infra* notes 135-146 and accompanying text. Some commentators dispute the importance of the detrimental effect on the community as "flawed public policy," contending that it derived from dicta in *Batson*. *See* Michael A. Cressler, Comment, 28 IDAHO L. REV. 349, 388 (1992). The commentator's understanding is faulty, however, as the Court has consistently employed this element as a justification for eradicating racial discrimination in the courtroom since *Strauder*. Strauder v. West Virginia, 100 U.S. 303, 308-09 (1880); *Ballard*, 329 U.S. at 195.

[95] Batson v. Kentucky, 476 U.S. 76, 88 (1986).

[96] *Id.*

[97] *Id.* The Court acknowledged that the prosecutor is entitled to use the peremptory challenge "for any reason at all, as long as that reason is related to his view concerning the outcome" of the instant case and not on the assumption that African-Americans are unable to be impartial jurors where the defendant is also African-American. *Id.* at 89 (quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976), *mandamus granted sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir. 1977)).

Next, Justice Powell acknowledged that *Swain* addressed the discriminatory use of peremptory challenges, and had established that African-Americans could prove a *prima facie*

The Court later employed these three justifications to narrow even further the contexts in which racially-motivated peremptory challenges could be exercised.[98] In *Powers v. Ohio*, the Court considered whether a defendant may challenge the state's use of peremptory challenges where the excluded venirepersons are not of the same race as the defendant.[99]

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case of discriminatory use of peremptories by showing that the prosecutor repeatedly struck African-American venirepersons from petit juries in succeeding cases regardless of their circumstances. *Id.* at 90-91 (citing Swain v. Alabama, 380 U.S. 202, 224 (1965)). The Court then noted this standard was considerably different than the *prima facie* standards required to prove a case of discriminatory selection of the jury venire. *Id.* at 94-95. Supporting this observation, the Court stated a defendant may make out a *prima facie* case of discriminatory selection of the jury venire by relying on the facts and circumstances of the defendant's case. *Id.* at 95. Interestingly, the Court also noted that *Swain's* analysis was inconsistent with the *prima facie* requirements to prove a violation of Title VII. *Id.* at 96 n.19.

With the aforementioned discrepancy in mind, the Court replaced the *Swain* analysis with a three pronged test. *Id.* at 96. In setting forth this analysis, the Court first stated the defendant must show that he or she is a member of a cognizable racial group, *id.* (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)), and that the prosecutor peremptorily challenged to remove persons of the defendant's race from the venire. *Id.* Second, the majority expounded that if the defendant satisfies the first prong, the challenger then has the burden to demonstrate that the venireperson was challenged for a legitimate, non-discriminatory reason. *Id.* at 97. The court added that in so doing, the defendant is entitled to rely on the presumption that peremptory challenges are jury selection procedures which permit "those to discriminate who are of a mind to discriminate." *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). Third, Justice Powell established that if the challenger establishes a non-discriminatory justification for dismissing the venireperson, the defendant may present any relevant circumstances that rebut the challenger's demonstration. *Id.* at 99. Finally, the Court concluded by overruling *Swain* to the extent that it was inconsistent with *Batson*. *Id.* at 100.

Justice White, the author of the majority opinion in *Swain*, concurred with the Court's decision in *Batson*. *Id.* (White, J., concurring). The Justice admonished attorneys that prosecutors should have been warned by *Swain* to stop using peremptory challenges in a discriminatory manner. *Id.* at 101 (White, J., concurring). The Justice noted, however, that prosecutors ignored *Swain's* warning and continued to peremptorily challenge African-Americans venirepersons from petit juries in a manner which excluded African-Americans from jury boxes. *Id.* Thus, the Justice agreed with the majority that the analysis pronounced by Justice Powell was required. *Id.* at 102 (White, J., concurring).

[98] Powers v. Ohio, 111 S. Ct. 1364 (1991).

[99] *Id.* at 1366. In *Powers*, a white defendant was convicted on multiple counts of murder, aggravated manslaughter. *Id.* During *voir dire*, the prosector exercised peremptory challenges against six African-American venirepersons; defendant's counsel raised *Batson* objections each instance an African-American venireperson was peremptorily challenged. *Id.* The trial judge overruled the objections. *Id.* The defendant was sentenced to 53 years to life imprisonment. *Id.*

Confining itself to this issue, the Court, per Justice Kennedy, held that the decision in *Batson* was not limited to situations where the defendant and the excluded jurors were of the same race.[100] Justice Kennedy acknowledged that *Batson* was only concerned with the harm caused to defendants of the same race as the excluded venireperson.[101] The Justice added, however, that neither *Batson* nor any prior case law limited discussion of discriminatory use of peremptory challenges to any one race or to the harm the discrimination causes to the defendant, as opposed to a venireperson.[102]

Less than one year after the *Powers* decision, in *Edmonson v. Leesville*

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[100] *Id.* at 1367-68.

[101] *Id.* at 1368.

[102] *Id.* The Court considered whether defendants, as a class, had third-party standing to bring a Fourteenth Amendment action on behalf of excluded jurors as a class. *Id.* at 1370. In so doing, the Court employed the three-pronged third party standing analysis enunciated in Singleton v. Wulff, 428 U.S. 106 (1976). *Id.* (citation omitted). The Court noted that, under the requirements of this analysis, a court must determine first, that a defendant suffers an "injury in fact" sufficient to give the defendant a sufficient interest in the outcome of his or her trial, *id.* at 1370 (citing *Singleton*, 428 U.S. at 112); second, that a defendant has a close relation to the excluded juror, *id.* at 1370 (citation omitted); and finally, that the third party is hindered in a way that prevents the third party from asserting his or own rights. *Id.* at 1370-71. The Justice asserted that the other ills *Batson* was designed to cure — protecting excluded venirepersons and maintaining public confidence in the fairness of the trial by jury — require the Court to prohibit any racially motivated peremptory challenge, regardless of any nexus between the defendant and the excluded juror. *Id.* at 1368-70.

Justice Scalia, joined by Chief Justice Rehnquist, dissented. *Id.* at 1374 (Scalia, J., dissenting). The dissent first argued that challenges to the jury selection procedures and the composition of the jury itself have always been upheld because people of the defendant's race were not present on the jury venire or on the petit jury. *Id.* at 1374-75 (Scalia, J., dissenting) (citations omitted). The dissent also challenged the majority's conclusion with regard to a defendant's third party standing to raise an equal protection challenge to the jury selection procedures excluding a venireperson. *Id.* at 1377 (Scalia, J., dissenting). Justice Scalia maintained that where the prosecution exercised peremptory challenges to exclude venirepersons of a particular race, the jury produced is not an unfair jury — there is only a perception of unfairness. *Id.* at 1377-78.

The Justice then commented that these "perceptions" are not real — not "injuries in fact" — as required by the third party standing analysis. *Id.* at 1379; (Scalia, J., dissenting). Justice Scalia concluded that the majority was using the jail-house key to free not the innocent, but the "unquestionably guilty," merely because the defendants were tried by a jury which did not contain a juror of their race. *Id.* at 1379-80 (Scalia, J., dissenting). For concurring analyses, see Bradley F. Kirk, Note, 19 PEPP. L. REV. 691, 706-12 (1992); Cressler, *supra* note 94.

Concrete Co.,[103] the Court further extended the Fourteenth Amendment's umbrella to include peremptory challenges exercised against a protected class in civil litigation.[104] Writing for the majority, Justice Kennedy first observed that the prevention of discrimination in the jury selection process was never expressly limited to criminal cases.[105] Next, the Justice opined that attorneys selecting a jury are "state actors" because *voir dire* is an act of government or an act where the government's role is sufficient to imbue jury selection with governmental authority.[106] In so holding, the Court determined that attorneys choosing juries in civil cases are bound by the Fourteenth Amendment.[107]

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[103] 111 S. Ct. 2077 (1991). For a detailed analysis of *Edmonson*, see J. Patrick McCabe, Note, SETON HALL CONST. L.J. 861 (1992).

[104] *Edmonson*, 111 S. Ct. at 2080. Noting that the circuit courts have rendered inconsistent verdicts regarding whether *Batson* claims can be made in the context of a civil trial, the Court granted certiorari. *Id.* at 2081. *See* Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281 (7th Cir. 1990) (holding private litigant may not use peremptory challenges in a discriminatory manner proscribed by *Batson*); Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (holding a private litigant is not bound by *Batson* and may use peremptory challenges without accountability for excluding racial groups); Flud v. Dykes, 863 F.2d 822 (11th Cir. 1989) (holding same as in *Dunham*); *cf.* Dias v. Sky Chefs, Inc., 919 F.2d 137 (9th Cir. 1990) (holding corporations may not raise *Batson* claim in a civil trial); United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), *reh'g en banc*, 930 F.2d 695 (1991) (holding the government may raise a *Batson* objection in criminal cases); Reynolds v. Little Rock, 893 F.2d 1004 (8th Cir. 1990) (holding government may not use peremptory challenges in violation of *Batson* when involved in civil litigation).

[105] *Edmonson*, 111 S. Ct. at 2082.

[106] *Id.* at 2082-83. In so holding, the majority reasoned first that the defendant's claimed constitutional deprivation resulted from the exercise of peremptory challenges which have their sole source in state authority. *Id.* at 2082-83 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-41 (1982)). Second, Justice Kennedy maintained that attorneys representing clients in civil litigation can, in all fairness, be described as state actors because: (a) peremptories could not exist without substantial state assistance, *id.* at 2084; (b) attorneys representing civil litigants exercise a traditional government function in selecting the quintessential government body, the jury, *id.* at 2084-85; and (c) permitting racially-motivated jury selection in any legal proceeding, on government property, in government courts, and under sanction of law would compromise the integrity of the judicial system. *Id.* at 2087-88 (citations omitted).

[107] *Id.* at 2087. Once Justice Kennedy determined that the Fourteenth Amendment was applicable to civil litigation, the Justice then wrote that, as in criminal cases, civil litigants have standing to raise *Batson* claims on behalf of excluded jurors. *Id.* at 2087-88. The Justice next opined that in civil cases, the Court must consider the *prima facie* elements of proving a violation of the Fourteenth Amendment previously enunciated in *Batson*. *Id.* at 2088. In conclusion, Justice Kennedy maintained that the justifications for eliminating racial

The most recent case in which the Court has addressed the Fourteenth Amendment peremptory issue was in *McCollum*.[108] In *McCollum*, the Court further expanded the Equal Protection Clause's control over the exercise of peremptory challenges.[109] Using the state actor test initially

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discrimination in civil litigation as set forth in *Batson* (preserving the integrity of the judicial system, preventing dignitary harm to African-American litigants and venirepersons) were as great as in criminal cases. *Id.* at 2088-89.

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 2089 (O'Connor, J., dissenting). Justice O'Connor maintained that just because the government established the framework for civil litigation did not mean the government is responsible for all the acts perpetrated by private parties within that framework. *Id.* Supporting this tenet, the Justice argued that peremptory challenges in both civil and criminal trials were inherently a private action, and the government's involvement in private litigation was too *de minimis* to be considered sufficient to satisfy the *Lugar* analysis. *Id.* at 2090 (O'Connor, J., dissenting). Continuing, the dissent argued that civil litigants did not perform a traditional government function when they exercised peremptory challenges because the peremptory challenge itself, a practice of ancient tradition, was much older than our nation's present system of government. *Id.* at 2092. Finally, Justice O'Connor criticized the majority's assumption that the government and private litigants worked toward the same end of an impartial jury because the very nature or the American judicial system was adversarial. *Id.* at 2093-95 (O'Connor, J., dissenting). Justice O'Connor concluded that although racism is a "a terrible thing," government can only combat racism where the Fifth and Fourteenth Amendment Due Process Clauses allow the government to intervene in private affairs. *Id.* at 2095. For a more thorough analysis of Justice O'Connor's position, see generally, Kirk, *supra* note 102, at 712-28.

Justice Scalia wrote a separate dissent, criticizing the majority for failing to consider the consequences of its decision. *Id.* at 2095 (Scalia, J., dissenting). The Justice noted that one consequence of the Court's holding was that already overburdened federal and state courts would now have to ensure that race is not among other valid reasons (gender, sex, age, political views, economic status) for peremptorily striking jurors in civil litigation. *Id.* at 2095-96 (Scalia, J., dissenting). Perhaps more profound, however, was Justice Scalia's argument that under the Court's expansive logic regarding "government functions," defendants' attorneys could be restricted in their use of peremptories. *Id.* at 2095. This issue was next decided by the Court in its next peremptory challenge-related case, Georgia v. McCollum, 112 S. Ct. 2348 (1992).

[108] 112 S. Ct. 2348 (1992).

[109] *Id.* The defendants, six white males, were accused of assaulting and beating African-Americans. *Id.* at 2351. Local leaders of the African-American community publicized the alleged attack by distributing leaflets which urged African-Americans not to patronize the businesses of the alleged assailants. *Id.* During *voir dire*, the State moved to enjoin the defendant's attempt to peremptorily challenge African-American venirepersons from the jury. *Id.*

The Georgia Supreme Court affirmed the trial court's decision to quash the motion. *Id.* at 2352. The court held that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." *Id.*

pronounced in *Lugar* and later employed in *Edmonson*, the majority reversed the state supreme court's ruling and held that because defendants' counsel are state actors when exercising peremptory challenges, they may not exercise peremptory challenges in a racially discriminatory manner.[110]

First, the majority, per Justice Blackmun, reiterated the well known principle that racial discrimination within the Court system harms the defendant, the excluded venireperson, and the community at large.[111] Next, the Court employed the logic of *Powers* to determine the State had

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(citation omitted). For a thoughtful discussion of *McCollum*, see Picariello, *supra* note 19.

[110] *Id.* at 2356. The Court first recounted that *Strauder* and *Batson* flatly rejected any acceptability of racial discrimination in the jury selection process in criminal cases. *Id.* at 2352-53. The Court then observed that the principles set forth in those two seminal cases were extended to proscribe racial discrimination in jury selection where the defendant was a different race than the excluded venirepersons (*Powers*) as well as in a civil trial (*Edmonson*). *Id.* at 2353.

The Court in *McCollum* applied the "state actor test" utilized in *Edmonson*, and determined that defense attorneys are also "state actors" for purposes of the Fourteenth Amendment. *Id.* at 2354-57. Justice Blackmun then concluded that as in *Edmonson*, the three-pronged "state actor" analysis permitted the Court to hold that counsel for civil litigants are "state actors" and therefore, cannot violate the Fourteenth Amendment through the exercise of racially-motivated peremptory challenges. *Id.* at 2357. In so concluding, Justice Blackmun opined that attorneys could not exist without substantial government, Edmonson v. Leesville Concrete Co. 111 S. Ct. 2077, 2082 (1991) (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 162, 172 (1972)), and defense attorneys in all fairness can be considered state actors when they select juries, because juries are the quintessential governing body, as they have the power to adjudicate rights of litigants before the court. *Id.* at 2354-55 (citing *Moose Lodge No. 107*, 407 U.S. at 172). Finally, the Justice proffered that the injury caused by excluding venirepersons on the account of their race in a civil trial is severe because the government would be permitting such discrimination in a government courthouse. *Id.* at 2356. Relying upon *Powers*, the majority stated that racial discrimination in the courtroom undermines the fairness of the proceedings conducted under the authority of the law. *Id.* at 2087 (citations omitted).

Chief Justice Rehnquist and Justice Thomas wrote separate concurring opinions, stating that the decision rendered by the majority was the only possible conclusion, as the decision rested squarely on *Edmonson*. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring). Both concurring opinions, however, agreed that *Edmonson* was incorrectly decided. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* at 2359-61 (Thomas, J. concurring) (setting forth grounds for dissatisfaction regarding the Court's general determination to increase government regulation over peremptory challenges).

Justice O'Connor and Justice Scalia dissented in separate opinions. *Id.* at 2361 (O'Connor, J., dissenting); *id.* at 2364 (Scalia, J., dissenting). Echoing the dissent in *Edmonson*, the Justices disagreed with the proposition that defense attorneys could be considered state actors because of the adversarial nature of the Anglo-American legal system. *Id.* at 2361-62 (O'Connor, J., dissenting); *id.* at 2364 (Scalia, J., dissenting).

[111] *Id.* at 2353-54 (citations omitted).

sufficient third party standing to raise a *Batson* claim on behalf of an excluded juror.[112]

Thus, since *Strauder* was decided in 1879, the Court has employed the Fourteenth Amendment to remove racial discrimination from the established processes of selecting a venire and exercising peremptory challenges.[113] The effort to prevent gender-motivated discrimination in jury selection, however, pales against the Court's significant effort to prevent racially-motivated jury selection procedures.

IV. THE HISTORY OF GENDER AND JURY SELECTION

The Court's position on the treatment of women jurors is less defined and developed than that of African-American jurors.[114] As previously

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[112] *Id.* at 2357. The third party standing analysis, applied by the Court in *Powers*, *see supra* note 102, determined: (1) the State suffers an "injury in fact" where a venireperson is struck from the petit jury because the State has an interest in ensuring that the integrity of the judicial system is not undermined by the pall of racial discrimination, *id.* at 2357 (citing *Powers*, 111 S. Ct. at 1371; *Edmonson*, 111 S. Ct. at 2088); (2) the State has a close enough relationship to the excluded juror to warrant third party standing because the State is representative of all citizens and is the "logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial[,]" *id.*; and (3) the barriers which confront excluded jurors are sufficiently daunting to merit third party standing to the objecting party. *Id.* (citing *Powers*, 111 S. Ct. at 1373; *Edmonson*, 111 S. Ct. at 2087).

[113] This statement should not be understood as conveying the message that the Court has removed racial discrimination from the jury selection process. Many commentators assert the peremptory challenge itself still affords ample opportunity for counsel to remove African-Americans from petit juries. *See, e.g.*, *Beyond* Batson, *supra* note 32, at 1935 n.118; Underwood *supra* note 18, at 724-27. As previously mentioned, one notable proponent of this view was the late Justice Marshall, who in a concurring opinion to Justice Powell's majority in *Batson*, maintained the most effective way of removing racial discrimination from the courtroom is to eliminate the peremptory challenge. Batson v. Kentucky, 476 U.S. 76, 102-03 (1986) (Marshall, J., concurring).

[114] As previously mentioned, by 1945, the Court had decided Strauder v. West Virginia 100 U.S. 303 (1879), Virginia v. Rives, 100 U.S. 131 (1879), Ex Parte Virginia, 100 U.S. 339 (1879), Neal v. Delaware 103 U.S. 370 (1880), and Norris v. Alabama, 294 U.S. 587 (1935) on Fourteenth Amendment grounds. The Court did not address the rights of women jurors, however, until Ballard v. United States, 329 U.S. 187 (1946), and did not decide another gender-related jury issue until Hoyt v. Florida, 368 U.S. 57 (1961). See *infra* notes 135-144 and accompanying text for a detailed discussion of *Ballard*; see also *infra* notes 145-46 and accompanying text for a discussion of *Hoyt*. The Court later decided Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979), on entirely different grounds. See *infra* notes 147-153 and accompanying text for a detailed discussion of *Taylor*; see also *infra* notes 154-159 and accompanying text for a detailed discussion of *Duren*. Finally, although the Court's decisions in Swain v. Alabama, 380 U.S. 202 (1965),

mentioned, the Court does not consider gender to be a suspect class upon which the Fourteenth Amendment confers the strictest scrutiny.[115] Rather, the Court considers gender to be an issue examined under the "middle tier" of constitutional review.[116]

The Court first considered confining gender-related equal protection issues to "middle tier" review in *Craig v. Boren*.[117] In *Craig*, the petitioner, an owner of a liquor store, challenged an Oklahoma statute which permitted the sale of 3.2% beer to females at the age of 18 but deferred the sale to males until they turned 21.[118] Writing for a plurality, Justice Brennan[119]

Batson v. Kentucky, 476 U.S. 79 (1986), Powers v. Ohio 111 S. Ct. 1364 (1991), Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), and Georgia v. McCollum, 112 S. Ct. 2348 (1992), addressed racially-motivated peremptory challenges, the Court has yet to address the constitutionality of gender-motivated peremptories.

[115] *See supra* note 40 and accompanying text. The Court's first attempt at resolving gender-based equal protection issues arose in Reed v. Reed, 404 U.S. 71 (1971). In *Reed*, the Court, per Chief Justice Burger, unanimously ruled to invalidate an Idaho statue which provided that males should be preferred as estate administrators to women. *Id.* at 74. The Court held that such arbitrary preferences, formulated without any connection to a rational state objective, cannot stand in the face of the Equal Protection Clause. *Id.* In so holding, the Court stated: "[t]o give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." *Id.* at 75-76. *Reed* has generally been interpreted to have used a "rational basis" standard, the lowest type of scrutiny administered by the Court. CRUMP ET AL., *supra* note 40, at 724.

In Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion), however, the Court, per Justice Brennan, employed a strict scrutiny standard to invalidate a federal statute which provided that female dependents of military personnel were entitled to widow benefits but did not extend the same benefits to husbands of female military personnel. *Id.* at 678-79 (plurality opinion). Justifying this decision, the Justice opined that: (a) women, like African-Americans, are often unwilling subjects of governmental and societal discrimination; (b) gender, like race and national origin, is an "immutable characteristic" determined solely by the accident of birth, and therefore, should be given the same constitutional standard of scrutiny; and (c) Congress, in passing Title VII, the Equal Pay Act of 1963, and submitting the Equal Rights Amendment for ratification to the steps, has determined that the Court should scrutinize gender issues with the most exacting standards. *Id.* at 685-88 (plurality opinion). As subsequent case law established, however, the Court later abandoned this determination. *See infra* notes 121-132 and accompanying text.

[116] *See supra* note 40.

[117] 429 U.S. 190 (1976) (plurality opinion).

[118] *Id.* at 191-92 (plurality opinion). Oklahoma supported this statute with scientific data that the majority of automobile accidents in Oklahoma involving persons between 18 and 21 years of age were caused by men or intoxicated men. *Id.*

determined that the relationship between males and Oklahoma's interest in traffic safety was too tenuous to be "substantially related" to any state interest.[120]

Significantly, Justice Stevens, in a concurring opinion,[121] articulated that a "two-tiered" equal protection analysis (the highest tier being "strict scrutiny" and the lower tier being "rational basis") was insufficient for gender-related issues.[122] Consequently, the Justice proffered that a "middle tier" be created for equal protection issues, such as those involving gender, which fall between the highest and lowest standards of review.[123] Justifying this position, Justice Stevens contended gender could properly be analyzed under a "middle tier" approach because although gender is an immutable characteristic,[124] distinctions between men and women may constitutionally be drawn when those distinctions are related to the physiological differences between the sexes.[125]

In *Califano v. Goldfarb*,[126] decided less than one year after *Craig*, the

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[119] Justices Powell and Stevens joined separately in all but the last part of the opinion, where Justice Powell, *id.* at 210 (Powell, J., concurring), and Justice Stevens, *id.* at 211 (Stevens, J., concurring), expressed reservations with the lack of a clearly defined level of scrutiny applied by Justice Brennan. *Id.* at 210-11 (Powell, J., concurring); *id.* at 211-12 (Stevens, J., concurring). Justices Blackmun and Stewart also filed separate concurring opinions. *Id.* at 214 (Blackmun, J., concurring); *id.* at 214 (Stewart, J., concurring). Chief Justice Burger and Justice Rehnquist filed separate dissenting opinions. *Id.* at 215 (Burger, C.J., dissenting); *id.* at 217 (Rehnquist, J., dissenting).

[120] *Id.* at 204 (plurality opinion). Unlike the decision rendered in *Frontiero*, the Court avoided describing gender as a "suspect class" entitled to the most exacting scrutiny of review under equal protection issues. *See generally id.*; *see also* CRUMP ET AL., *supra* note 40, at 725-27.

[121] Craig v. Boren, 429 U.S. 190, 211 (1976) (plurality opinion) (Stevens, J., concurring).

[122] *Id.* at 212 (Stevens, J., concurring).

[123] *Id.* at 212-13 (Stevens, J., concurring).

[124] *See supra* note 40.

[125] *Craig*, 429 U.S. at 212-13 (Stevens, J., concurring) (citations omitted). Dissenting from the plurality opinion, Justice Rehnquist strenuously objected to treating gender as a suspect classification or establishing a "middle tier" standard of review. *Id.* at 220-21 (Rehnquist, J., dissenting).

[126] 430 U.S. 199 (1977) (plurality opinion). Justices White, Marshall, and Powell joined Justice Brennan's opinion; Justice Stevens authored a concurring opinion akin to the one authored by the Justice in *Craig*. *Id.* at 217 (Stevens, J., concurring). Dissenting, Justice

Court again confronted an opportunity to label gender a "suspect classification." A plurality, again per Justice Brennan, determined that the Constitution forbade gender-based differentiation created by the school system's pension system because the system established a differentiation supported by nothing more than "'archaic and overbroad' generalizations,"[127] or 'old notions,'[128] such as 'assumptions as to dependency,'[129] that are more consistent with 'the role-typing society has long imposed,'[130] than contemporary reality."[131] The Justice never described the level of review given to gender-related equal protection issues as "strict scrutiny;" nor did the Court specifically describe gender as a

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Rehnquist was joined by Chief Justice Burger, Justice Stewart, and Justice Blackmun. *Id.* at 224 (Rehnquist, J., dissenting).

In *Goldfarb*, the respondent was the widower of a New York City school teacher. *Id.* at 202-03 (plurality opinion). Subsequent to his wife's death, the respondent sought to collect the decedent's pension benefits. *Id.* at 203 (plurality opinion). The pension policy, however, did not allow male spouses of female employees to collect the pension benefits unless the husband received at least one half of his support from the wife before her death. *Id.* No such restriction was placed on female spouses of male employees. *Id.* The district court, citing *Frontiero*, declared the pension policy unconstitutional. *Id.* The Court, granting certiorari without the case having even gone before the second circuit, affirmed. *Id.* at 202 (plurality opinion).

[127] *Id.* at 206-07 (plurality opinion) (citing Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (retreating from the "strict scrutiny" standard the Court applied to gender in *Frontiero*)).

[128] *Id.* (citing Stanton v. Stanton, 421 U.S. 7, 14 (1975)).

[129] *Id.* (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)). In *Weinberger*, the Court invalidated a pension provision similar to that presented in *Goldfarb* where the pension denied insurance benefits to widowers with children while extending the same benefits to widows with children. *Weinberger*, 420 U.S. at 638-39. The Court condemned the gender-based discrimination inherent in the insurance policy, stating:

> [While] the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support, . . . such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Id. at 645.

[130] Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) (plurality opinion) (citing *Stanton*, 421 U.S. at 15).

[131] *Id.* at 206-07 (plurality opinion).

"suspect classification."[132]

Defendants have been required to advance gender-based jury selection discrimination issues within the restrictive parameters of the foregoing legal framework. The fact that gender is not treated as a suspect classification entitled to the most exacting level of equal protection review probably caused the Court to dismiss an earlier opportunity to review on Fourteenth Amendment grounds the propriety of gender-based peremptory challenges in *Brown v. North Carolina*.[133] In declining certiorari, Justice O'Connor observed that *Batson* is a "statement about what this Nation stands for" and a "product of the unique history of racial discrimination in this country; it should not be divorced from that context."[134] Attorneys and their clients have thus turned to theories other than the Fourteenth Amendment to advance gender-based jury selection claims.

Unable to employ a Fourteenth Amendment argument to assert gender-motivated jury selection claims, criminal defendants pioneered Sixth Amendment jurisprudence to advance claims of gender-based discrimination. One of the most prominent early examples is *Ballard v. United States*.[135] In *Ballard*, two white male defendants were indicted and convicted for "using, and conspiring to use, the mails to defraud."[136] The respondents

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[132] In a dissenting opinion, Justice Rehnquist criticized the majority's attempt to include gender under the protective umbrella of the Equal Protection Clause. *Id.* at 225 (Rehnquist, J., dissenting).

[133] 479 U.S. 940 (1986). The Court denied certiorari to other gender-based peremptory challenge cases since *Brown*, but has did not issue further comment. *See, e.g.*, United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

[134] *Id.* at 942. Justice O'Connor failed to refer, however, to any discrimination suffered by women in this country, despite the fact that the Court had already recognized the existence of gender-motivated discrimination and had previously utilized the Fourteenth Amendment to remedy such discrimination. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976) (plurality opinion); Califano v. Goldfarb, 430 U.S. 199 (1977) (plurality opinion).

[135] 329 U.S. 187 (1946).

[136] *Id.* at 188. The Court had already reviewed and remanded the defendants' case on different grounds one year hence. *Id.* In the prior case, the Court reversed a ninth circuit decision to vacate the defendants' convictions. *Id.* (citation omitted). The Court's reversal was predicated on the Ninth Circuit's erroneous interpretation on the admissibility of evidence with regard to the defendants' religious beliefs; questions with regard to the defendants' Sixth Amendment issue were reserved. *Id.* (citation omitted). On remand, the

were United States attorneys who intentionally and systematically excluded women from the jury venire despite the fact that state law gave women the right to sit on juries.[137]

The Court reversed the defendant's conviction on the grounds that the Court had supervisory authority over lower federal courts.[138] Citing a federal statute which prohibited the disqualification of citizens from jury service because of race, color, or previous condition of servitude,[139] the Court expanded the statute to include gender.[140] In so doing, the Court reasoned that the goal of the statute was to create juries which reflect "a cross-section of the community" that truly represented the community.[141] Supporting this conclusion, the Court turned to broad social policy, stating:

> The systematic and intentional exclusion of women, like the exclusion of a racial group,[142] or an economic or social class,[143] deprives the jury system of the broad base it was designed by Congress to have in our democratic society . . . [t]he injury is not limited to the defendant — there is injury to the jury

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Ninth Circuit affirmed the defendants' convictions. *Id.* (citation omitted). The Court granted certiorari to consider the Sixth Amendment questions reserved in the earlier proceeding. *Id.* (citation omitted).

[137] *Id.* at 190. Women had been members of grand and petit juries in California (then in the Tenth District) since the beginning of the February Term, 1944. *Id.* n.1 (citation omitted).

[138] *Id.* at 193.

[139] *Id.* at 190 (citing 28 U.S.C. § 441).

[140] *Id.* at 193.

[141] *Id.* at 191 (citing Glasser v. United States, 315 U.S. 60, 86 (1942)).

[142] *Id.* at 195 (citing Smith v. Texas, 311 U.S. 128 (1940)).

[143] *Id.* (citing Thiel v. Southern Pacific Railroad Co., 328 U.S. 217 (1946)). In *Thiel*, when the plaintiff sued a corporate defendant under a negligence theory, the jury commission systematically and intentionally excluded persons of middle and low income financial status from the jury venire. *Thiel*, 328 U.S. at 219. The plaintiff challenged the verdict against him, alleging the exclusion of persons from the venire based on economic class violated his right to a jury which reflected the composition of the community. *Id.* The Court vacated the jury verdict, stating wage earners constitute a substantial portion of the community and thus, to exclude them from the venire would "undermine and weaken the institution of jury trial." *Id.* at 223-24.

> system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.[144]

The Court's employment of supervisory authority over the federal court system rather than the Constitution, however, permitted the Court to later uphold a Florida jury selection statute that excluded women from the venire unless they stipulated, in writing to their desire to participate in the jury system.[145] The Court noted that although this system produced only a "minimal number of [women] jurors," the Court concluded this concern was irrelevant.[146]

Fourteen years later, in *Taylor v. Louisiana*,[147] the Court again addressed whether the "cross-section of the community" proposition set forth in *Ballard* was a requirement in criminal trials under the Sixth Amendment's guarantee to a fair jury trial. In *Taylor*, the defendant was indicted by a grand jury for aggravated kidnapping.[148] The defendant averred that he had a Sixth Amendment right to "'a fair trial by jury of a representative segment of the community.'"[149] The defendant moved to quash the petit jury, basing the motion on the allegation that the Louisiana jury selection scheme systematically excluded women from jury venires.[150]

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[144] Ballard v. United States, 329 U.S. 187, 195 (1946).

[145] Hoyt v. Florida, 368 U.S. 57, 57-58 (1961). In 1961, 47 states permitted women to serve as jurors; 18 of those states instituted automatic exemption which could only be revoked on some affirmative act of individual women who desired to serve on juries. *Id.* at 62. Florida justified the statute on the grounds that the general welfare requires that women not be forced from the home and family unless her situation permits. *Id.*

[146] *Id.* at 60-62. The Court, per Justice Harlan, reasoned that although women had shed the paternalism prevalent in American society, women were still "regarded as the center of home and family life." *Id.* at 62. In so determining, the Justice posited that Florida could legitimately employ this venire selection procedure to safeguard the sanctity of the home and family. *Id.*

[147] 419 U.S. 522 (1975).

[148] *Id.* at 524.

[149] *Id.* In Louisiana, women were not automatically placed on the jury venire. *Id.* at 525. Rather, women had to request in writing to "opt in" for jury service. *Id.* The state conceded that its "opt in" procedure for women had a systematic impact, resulting in a grossly disproportionate number of eligible women who were actually called for jury service. *Id.*

[150] *Id.*

The Court quashed the petit jury, and held that pursuant to the Sixth Amendment, the defendant had a right to a fair trial by an impartial jury chosen from a venire which reflected a "cross-section" of the community.[151] The majority reasoned: (1) the "fair cross-section" requirement assures that the jury will make its decisions based on the common sense judgment of the community, (2) widespread community participation in the legal system is critical to public confidence in the fairness of the criminal justice system, and (3) "sharing in the administration of justice is a phase of civic responsibility."[152] The Court then concluded that the intentional and systematic exclusion of women from the venire violated the Sixth Amendment.[153]

Five years later, in *Duren v. Missouri*,[154] the Court affirmed the principle that the Sixth Amendment requires juries to be selected from a "fair cross-section" of the community.[155] In *Duren*, the Court reversed the murder conviction of a male defendant who had been tried by an all male jury chosen from a venire which systematically excluded women.[156] In so doing, the Court established elements to prove a *prima facie* violation of the "fair cross-section requirement," stating:

> (1) that the group alleged to be excluded [must be] a "distinctive" group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the

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[151] *Id.* at 529-30.

[152] *Id.* at 530-31 (citing Thiel v. Southern Pacific Railroad Co., 328 U.S. 217, 227 (1946)).

[153] *Id.* at 531-33 (citing Ballard v. United States, 329 U.S. 187, 193 (1946)). Mysteriously, the Court decided *Taylor* without overruling *Hoyt*, which was decided 13 years earlier. *See generally id.*

[154] 439 U.S. 357 (1979).

[155] *Id.* at 360.

[156] *Id.* Whereas in *Taylor*, women were required to "opt in" for jury service, in *Duren*, women were automatically included but were permitted to "opt out" on the theory that the State wanted to foster the goal of keeping the home life stable. *Id.* at 362. The Court invalidated this system, finding it similar to the one at issue in *Taylor*, which automatically excluded an overwhelming number of women otherwise eligible for the venire. *Id.* at 362-63.

> community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[157]

The Court further explained that once a *prima facie* case is proven, the state has the burden to demonstrate that a significant state interest existed to justify the defendant's Constitutional right to an impartial jury drawn from a "fair cross-section" of the community.[158] The Court determined that excluding women so that they may care for their children at home is not a sufficiently valid interest to deprive the defendant of his or her Constitutional rights guaranteed by the Sixth Amendment.[159]

While the fair-cross section requirement effectively permitted gender-related jury selection issues to be brought before the Court without involving the Fourteenth Amendment, it became readily apparent that the Sixth Amendment approach had several significant shortcomings.[160] Some commentators have contended that the Sixth Amendment's guarantee that jury venires be drawn from a fair cross-section of the community should only apply in criminal cases.[161]

Moreover, because the Sixth Amendment speaks only to the rights of defendants, it was unlikely that a court would hold venirepersons had standing to challenge their removal, even if their removal would otherwise violate the "fair cross-section" requirement. The Fourteenth Amendment speaks to the rights of members in protected groups, rather than defendants[162] and thus, under an Equal Protection analysis, either a

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[157] *Id.* at 364.

[158] *Id.* at 368-69.

[159] *Id.* at 370.

[160] *See supra* note 143. Recall that in Thiel v. Southern Pacific Railroad Co., 328 U.S. 217 (1946), the Court held that persons of lower economic status could not be excluded from the jury venire. Although that case was a civil matter, the Court determined the outcome of that case using its supervisory powers over the federal court system, not the Sixth Amendment. *Thiel*, 328 U.S. at 221 (citing 28 U.S.C. §§ 411, 412, 413, 415).

[161] As previously discussed, the Court has decided that the Fourteenth Amendment protects defendants and venirepersons excluded from the discriminatory use of peremptory challenges in civil litigation. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

[162] *See supra* notes 87-97 and accompanying text. Protected groups for fair cross-section purposes include: African-Americans, women, Mexicans, Spanish surnamed people, Latins in Miami, Native Americans, caucasians men, blue collar workers, the less educated,

defendant or an excluded venireperson has standing to challenge the exclusion of a member of a protected group.[163]

The greatest blow to the Sixth Amendment approach to jury selection, however, occurred when the Court in *Holland v. Illinois*[164] declined to extend the Sixth Amendment "fair cross-section of the community" requirement to peremptory challenges.[165] In *Holland*, a white defendant

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Hispanics, and people with deficient English speaking skills. Laurie Magid, *Challenges to Jury Composition*, 24 SAN DIEGO L. REV. 1082, 1104-11 (1984). Homosexuals and physically challenged persons do not fall within a "'distinctive' group" protected by the fair cross section analysis. Lockhart v. McCree, 476 U.S. 162 (1986).

[163] Magid, *supra* note 162, at 1104-11.

[164] 493 U.S. 474 (1990). Similar to the development of Fourteenth Amendment litigation regarding peremptory challenges, the Court passed up many opportunities to resolve the influence of the Sixth Amendment on the exercise of peremptory challenges. *See* Teauge v. Lane, 489 U.S. 288, 103 (1989) (declining to address the Sixth Amendment issue raised by the petitioner after determining the Court could not apply the Sixth Amendment retroactively to the petitioner's case); *see also* Booker v. Jabe, 478 U.S. 1001 (1986); United States v. Childress, 464 U.S. 1063 (1984); United States v. Thompson, 469 U.S. 1024 (1984). In *Lockhart*, 476 U.S. at 162, the Court had opportunity to address whether the Sixth Amendment's fair cross-section requirement prohibits the peremptory challenges against members of a "distinctive" group where such challenges would preclude the petit jury from reflecting a cross-section of the community. *Id.* at 173. The defendant contended the prosecutor's peremptory challenges against venirepersons who opposed the death penalty (so called "*Witherspoon*-excludables"), *see* Witherspoon v. United States, 391 U.S. 510 (1968) (invalidating a section of an Illinois statute which created a challenge for cause against venirepersons who opposed the death penalty), constituted the exclusion of a "distinct" group sufficient to warrant the fair cross section analysis set forth in *Duren*. *Id.* at 174-75; *see* Duren v. Missouri, 439 U.S. 357, 362 (1979).

[165] Before both *Holland* and *Batson* were decided, defendants in state and federal courts sought to extend the Sixth Amendment "fair cross-section" requirement to peremptory challenges, *see generally*, Taylor v. Louisiana, 419 U.S. 522 (1974); Duren v. Missouri, 439 U.S. 357 (1979), probably because the existing standard to prove discrimination in the jury selection process established by *Swain* was too exacting. *See* Shanley, *supra* note 28, at 73. Sixth Amendment objections were typically based on two objections: (1) that the excluded venirepersons were members of a "distinctive group" for Sixth Amendment purposes, and (2) that the excluded venireperson were challenged because of their membership in a "distinctive" group. *See* SALTZBERG, *supra* note 28, at 971. The development of the Sixth Amendment's reach in the area of peremptory challenges occurred before *Batson* and, like the development of Fourteenth Amendment's relationship to peremptory challenges, was employed by a considerable number of state and lower federal courts.

For example, in addition to asserting that the prosecutor violated the defendant's right to a fairly constructed jury under the Fourteenth Amendment, defendants have also contended that peremptory challenges taken by the prosecution are violative of the right to a jury representative of a cross-section of the community. *See* People v. Wheeler, 583 P.2d 748,

petitioned to have his conviction overturned on the grounds that the prosecutor peremptorily challenged the only two African-American venirepersons from the petit jury in violation of the fair cross-section requirement.[166]

Resting on a flawed argument which avoided Sixth Amendment precedent, the majority, per Justice Scalia, held that assuming a white defendant had standing to challenge the prosecutor's elimination of African-Americans from the jury,[167] the Sixth Amendment fair cross-section requirement did not limit peremptory challenges taken by prosecutors.[168] Dismissing the notion that defendants have a Sixth Amendment right to the "fair possibility" of a jury representative of the community where they are tried, (a theory successfully employed in state and

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762 (Cal. 1978); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979). In both cases, the state supreme courts held that in addition to violating the guarantees of a jury chosen through non-discriminatory procedure under state constitutional requirements, the discriminatory use of peremptories also violated the Sixth Amendment's promise of a jury reflective of a fair cross-section of the community. *Wheeler*, 583 P.2d at 762; *Soares*, 387 N.E.2d at 516; *see also* Shanley *supra* note 28, at 74-76. As previously mentioned, the California and Massachusetts Supreme Courts based their decisions upon their own states' constitutions with regard to the defendants' equal protection arguments as well as the Sixth Amendment. *See supra* note 39. Justifying this conclusion, the courts in *Wheeler* and *Soares* reasoned that although defendants were not entitled to a jury composed in whole or in part of the defendant's race, the defendant did have the right to the possibility of acquiring a jury which included members of his or her race. *Wheeler*, 583 P.2d at 762; *Soares*, 387 N.E.2d at 516. Discriminatorily exercised peremptory challenges, both courts reasoned, eliminated such a possibility. *Id.*

Although the California Supreme Court in *Wheeler* believed the Sixth Amendment prohibited the discriminatory use of peremptories, the court used the State constitution's guarantee instead of the Fourteenth Amendment because it feared the United States Supreme Court would be prompted to overrule such a decision in light of *Swain*. *Wheeler*, 583 P.2d at 761. This is indeed ironic, because the Court would subsequently overrule *Swain* in *Batson*, *see supra* notes 63-80, 87-97 and accompanying text, and decide squarely against *Wheeler* on the Sixth Amendment issue in *Holland*. Shanley, *supra* note 28, at 28 n.89.

[166] *Holland*, 493 U.S. at 476. The defendant also raised an Equal Protection issue, but the Court granted certiorari only for the Sixth Amendment action. *Id.*

[167] *Id.* The majority stated because the petitioner did not raise the issue whether a Sixth Amendment cross section claim could be sustained if the defendant was not part of the group alleged by the defendant to have been excluded, the Court would not address it. *Id.* at 477. Rather, the majority stated that the Court would address the issue presented under the assumption that the defendant was not a member of the allegedly excluded distinctive group because there was no obvious reason to preclude such standing without a more thorough review. *Id.*

[168] *Id.* at 478.

lower federal court decisions),[169] the Justice reasoned that the Court has never required a petit jury to conform to the fair cross-section requirement.[170] Quoting *Taylor*, Justice Scalia opined that the Sixth Amendment only guaranteed the defendant a jury drawn from a fair cross-section of the community, not a jury representative of the community's racial and ethnic composition.[171]

The Court further maintained that a prosecutor may use peremptory challenges to sacrifice a venire representative of the community because the peremptory challenge system advances the state's legitimate interest in achieving an impartial jury.[172] The majority also contended that extending the Sixth Amendment's fair cross-section requirement to the exercise of peremptory challenges would invite defendants to appeal every conviction obtained by a jury which excluded some distinctive group.[173] The Court feared that such a result would have the effect of eviscerating the peremptory challenge.[174]

In separate dissenting opinions, Justice Marshall and Justice Stevens reproached the majority for ignoring what, until *Holland*, was settled Sixth Amendment doctrine.[175] Justice Marshall, joined by Justices Brennan and

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[169] *Id.* In *Holland*, Justice Scalia noted that while the "fair possibility" may have been implicated in dicta of earlier opinions, the Court has never construed the "fair possibility" to "require anything beyond the inclusion of all cognizable groups in the venire," *id.* (citing Lockhart v. McCree, 476 U.S. 162 (1986)), "and the use of juries numbering at least six persons." *Id.* (citing Ballew v. Georgia, 435 U.S. 223 (1978)). *See also Wheeler*, 583 P.2d at 761-62; *Soares*, 387 N.E.2d at 516.

[170] *Id.*

[171] *Id.* at 477-80. Justice Scalia poignantly expressed this point, stating, "[t]he Sixth Amendment of a cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one, (which it does)." *Id.* at 480.

[172] *Id.* at 482-83.

[173] *Id.* at 483-84.

[174] *Id.* In a concurring opinion, Justice Kennedy agreed with the Court's holding, but stated that the majority's decision should not be confused so as to allow the use of peremptories to exclude venirepersons from the petit jury because of race. *Id.* at 488 (Kennedy, J., concurring) (citing Batson v. Kentucky, 476 U.S. 79 (1986)). However, the Justice also agreed with Justice Marshall that the majority's decision did not decide whether a defendant had standing to challenge the peremptory strike of distinctive groups even though the defendant was not a member of such a group. *Id.* at 488-89 (Kennedy, J., concurring).

[175] *Id.* at 490 (Marshall, J., dissenting); *id.* at 504 (Stevens, J., dissenting).

Blackmun, argued that the Sixth Amendment jury venire analysis espoused in *Taylor* regarding the jury venire should be applied to all stages of jury selection, including peremptory challenges.[176]

Addressing the issue decided by the majority, Justice Marshall stated that the majority opinion incorrectly assumed that the fair cross-section requirement was designed solely as a means of achieving an impartial jury.[177] As justification for this assertion, Justice Marshall first contended that impartiality was only one concern of the Sixth Amendment because the Sixth Amendment guaranteed defendants the right to a trial by an impartial jury.[178] The Justice then maintained that the Court's traditional construction of the "jury" has always implied that the jury is both fairly drawn and representative of the community judging the defendant.[179]

Second, Justice Marshall postulated that in an effort to spare the peremptory challenge from extinction, the majority ignored the Court's prior distinctions between the fair cross-section requirement and the impartiality requirement.[180] The Justice criticized the majority, arguing that a jury representative of a fair cross-section of the community was constitutionally

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[176] *Id.* at 490 (Marshall, J., dissenting). Justice Marshall first commented on the majority's failure to address whether defendants have a Sixth Amendment claim even if the a defendant is not a member of the "distinctive" racial group alleged to be excluded from the petit jury. *Id.* at 490-92 (Marshall, J., dissenting). The Justice posited that any defendant, irrespective of a defendant's race, has a Fourteenth Amendment interest where racially motivated peremptory challenges are used to keep venirepersons off the petit jury. *Id.* at 492 (Marshall, J., dissenting).

[177] *Id.* at 492-93 (Marshall, J., dissenting).

[178] *Id.*

[179] *Id.* at 493 (Marshall J., dissenting). Justice Marshall turned to case law to support this definition of "jury," and first observed that *Taylor* recognized that the fair cross-section requirement and the impartiality requirement were distinct protections, both guaranteed by the Sixth Amendment. *Id.* at 494 (Marshall, J., dissenting) (quoting Taylor v. Louisiana, 419 U.S. 522, 536 (1974)) (noting the Court in *Taylor* stated the "Sixth Amendment [guarantees the] right to trial by an impartial jury drawn from a cross section of the community."). Continuing, the dissent relied on *Duren*, which also held that excluding women from the venire violates the defendant's right to a trial by an impartial jury. *Id.* (citation omitted). Finally, the Justice reminded the majority that in the recent *Lockhart* decision, the Court analyzed the Sixth Amendment's impartiality requirement and fair cross-section requirement separately. *Id.* at 495 (Marshall, J., dissenting) (citation omitted).

[180] *Id.* at 500-01 (Marshall, J., dissenting).

mandated, unlike peremptory challenges.[181] Moreover, Justice Marshall asserted that a prohibition on the use of peremptory challenges purposely used to exclude members of "distinctive" groups would not destroy the peremptory challenge system because the Court has only recognized a few groups — racial, ethnic, gender, and economic — as "distinctive."[182] In conclusion, the Justice feared the majority's holding would improperly permit prosecutors to peremptorily strike African-Americans from petit juries.[183]

It is ironic that the Court's decision in *Holland* effectively "closed the chapter on the Sixth Amendment approach,"[184] because prior to *Batson*, it was widely believed that the Court would more than likely limit the Fourteenth Amendment and proceed along the Sixth Amendment logic adopted in *Taylor* and *Duren*.[185] The gravamen of the majority's reasoning in *Holland* rests on so narrow a reading of precedent that the opinion turns a blind eye to reality. Of course, the majority accurately observed that the Court had never determined a defendant had a Sixth Amendment right to a petit jury reflecting the racial, ethnic, or gender composition of the community.[186] *Holland's* failure to hold that such a right exists, however, eviscerates the meaning of the term "jury" — a body of persons, sharing the same rights and privileges as the defendant, chosen from the defendant's community, pursuant to fair procedures, for the purposes of trying the defendant — *Holland* allows litigants to continue using the peremptory challenge in a manner that "deprive[s] the jury system of the broad based

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[181] *Id.* at 501-02 (Marshall, J., dissenting) (rejecting the notion that the Court's holding in *Holland* would eviscerate the "fair trial values" served by the peremptory challenge system) (citing Batson v. Kentucky, 476 U.S. 76, 98-99 (1986)). In *Batson*, the Court noted that there was ample evidence that the peremptory challenge is often used in a discriminatory manner against African-American venirepersons. *Id.*; *see generally* Swain v. Alabama, 380 U.S. 202, 221 (1965) (Goldberg, J., dissenting).

[182] *Holland*, 493 U.S. at 502.

[183] *Id.* Justice Stevens also dissented. *Id.* at 504 (Stevens, J., dissenting). Agreeing with Justice Marshall, Justice Stevens contended that even though the defendant did not so request, the majority should have considered the defendant's claim in light of the Fourteenth Amendment and *Batson* as well as under the Sixth Amendment. *Id.* Acknowledging that the Court reviewed *Batson* in such a manner, the majority replied that the Court's decision to hear *Batson* on an issue not petitioned by the defendant was an exception to the Courts traditional rule of hearing only questions presented by the parties in the case. *Id.* at 507 n.5.

[184] Shanley, *supra* note 28, at 82.

[185] *See* LAFAVE, *supra* note 6, at 849.

[186] Shanley, *supra* note 28, at 80 (agreeing with the majority in *Holland*).

system it was designed to have."[187] Consequently, the state can prevent jurys from reflecting racial, ethnic, and gender makeup of the community where the defendant is tried, making it impossible to pass "common sense judgments of the community"[188] on the defendant's conduct.

With the Sixth Amendment route closed, proponents of eliminating gender-motivated peremptory challenges were forced to look once more toward the Equal Protection Clause. Some commentators believed it was the Court's refusal to consider *Brown*,[189] that conclusively resolved the issue of gender-motivated peremptory challenges.[190] Certain factors, however, may have helped foreclose this conclusion.

First, the Court issued *Brown* the same year *Batson* was decided. The Court has since expanded the realm of *Batson*, however, to proscribe racially-motivated peremptory challenges in almost every context of litigation.[191] Thus, the Court may have been more willing to extend *Batson* to gender-motivated peremptory challenges, as recent debate has re-examined the propriety of gender-motivated peremptory challenges.[192]

Second, it is increasingly being argued that the peremptory challenge system should be abandoned because it is inherently discriminatory and is not

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[187] Ballard v. United States, 329 U.S. 187, 195 (1946).

[188] Taylor v. Louisiana, 419 U.S. 527, 530-31 (1974).

[189] *See supra* notes 133-134 and accompanying text.

[190] *See, e.g.*, Steven M. Puiszis, Comment, Edmonson v. Leesville Concrete Co.: *Will the Peremptory Challenge Survive Its Battle with the Equal Protection Clause?*, 25 J. MARSHALL L. REV. 37, 51-52 (1991) ("In light of the Court's holding in *Holland*, Justice O'Connor's comments in *Brown*, and the current philosophical makeup of the Court, it appears questionable whether *Batson* will be extended to prohibit the use of gender-based peremptory challenges.").

[191] *See, e.g.*, Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding a defendant may raise a *Batson* claim where the defendant is not the same race as the excluded juror); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991); (holding *Batson* proscribes racially-motivated peremptory challenges in civil cases); Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding defendant's counsel may not exercise racially-motivated peremptory challenges, even where the defendant's counsel is not a public defender).

[192] *See generally Beyond* Batson, *supra* note 32; S. Alexandra Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305 (1991) (arguing that the Court should abolish peremptory challenges); Jere W. Morehead, *Exploring the Frontiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Apply to Gender?*, 14 AM. J. TR. ADVOC. 289 (1990) (positing that the Equal Protection Clause prohibits gender-based peremptory challenges).

necessary to produce impartial juries.[193] In fact, one of the strongest arguments against extending *Batson* to proscribe virtually all forms of racially-motivated peremptory challenges is that it will induce establishing a

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[193] Justice Marshall advanced this position in a concurring opinion to *Batson*. Batson v. Kentucky, 476 U.S. 76, 102 (1986) (Marshall, J., concurring). The Justice believed discrimination in jury selection would persist as long as the selection process entailed peremptory challenges. *Id.* at 102-03 (Marshall, J., concurring). Supporting this contention, Justice Marshall first produced case law evidence and socio-scientific sources that demonstrated despite *Strauder*, its progeny, and *Swain*, discrimination against African-Americans in the jury selection process has always existed and continues today. *Id.* at 104-05 (Marshall, J., concurring). The Justice also repeated that such exclusionary practices are utterly unconstitutional. *Id.*

Justice Marshall, however, doubted that the test enunciated by the majority would adequately protect the Fourteenth Amendment right of minorities to partake in the administration of justice. *Id.* at 105 (Marshall, J., concurring). Looking to the supreme courts in California and Massachusetts, which had already adopted the analysis pronounced by the majority, the Justice observed that defendants have not been able to challenge the prosecutor's use of peremptory challenges unless the peremptories were flagrantly discriminatory. *Id.* Specifically, Justice Marshall pointed to instances where prosecutors in these states allowed only one or two African-American venirepersons to survive peremptory challenges, so that an "acceptable" amount of minorities appear on petit juries. *Id.* (citing Commonwealth v. Robinson, 415 N.E.2d 805, 809-10 (1981); People v. Rouseau, 129 Cal. App. 3d 526, 536-37, 179 Cal. Rptr. 829, 897-98 (1982)).

Furthermore, Justice Marshall speculated whether trial judges could ever accurately assess prosecutors' motives in peremptorily striking African-American venirepersons. *Id.* The Justice cited examples where minority venirepersons have been peremptorily challenged for being "uncommunicative," insensitive, or dour. *Id.* at 105-06 (Marshall, J., concurring) (citing King v. County of Nassau, 581 F. Supp. 493 (E.D.N.Y. 1984); People v. Hall, 672 P.2d 854 (1983)). Moreover, the Justice feared prosecutors would continue to discriminate unconsciously, because attorneys may determine their "seat of the pants" instincts, traditionally associated with peremptories, find that African-American venirepersons are always "sullen," "distant," or otherwise unfit as a white venireperson. *Id.* at 106 (Marshall, J., concurring).

Finally, Justice Marshall recalled Justice Goldberg's dissent in *Swain*, which stated that peremptory challenges violate defendants' Fourteenth Amendment rights, the Court was obligated to choose the latter over the former. *Id.* at 107 (Marshall, J., concurring) (citing Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting)). Justifying this position, Justice Marshall observed the Court had held that the peremptory challenge was not a constitutional requirement, and may even be withheld altogether without impairing the constitutional guarantee to an impartial jury. *Id.* The Justice concluded that if all peremptories were be eliminated, including those exercised by defendants' counsel, the cost would be less than the damage now incurred because peremptories are inherently discriminatory. *Id.* at 108 (Marshall, J., concurring); *see generally* Puiszis, *supra* note 190.

legal framework for the very destruction of peremptories themselves.[194]

Obviously, the Court must find that gender-based peremptory challenges are unconstitutional if the Court determines that gender, like race, is a "suspect classification" entitled to "strict scrutiny" review.[195] Even if the Court re-affirms that gender is only entitled to "middle-tier" review, however, the Court can still find that gender-motivated peremptory challenges violate the Fourteenth Amendment. The Constitution commands, and the Court has repeatedly affirmed, that the enpanelment of impartial juries is a Constitutional right.[196] The Court has also repeatedly held that although the peremptory challenge is not a constitutional right,[197] the peremptory has a long history and tradition in the Anglo-American legal system[198] and has been recognized as a method of satisfying the Constitutional mandate that empaneled juries be impartial.[199]

Assuming peremptory challenges are vital to the process of formulating impartial juries, the Court's "middle tier" Equal Protection analysis mandates that "classifications by gender must serve important government interest and must be substantially related to achievement of those objectives."[200] The Court may determine that gender-motivated peremptories are not substantially related to achieving an impartial jury. This position was employed recently by the Ninth Circuit in *United States v. DeGross*,[201] where the court extended *Batson's* logic to prohibit peremptory challenges based solely on a

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[194] *See supra* note 193. Dissenting in *Edmonson*, Justice Scalia predicted that one consequence of the Court's holding was that the already overburdened federal and state courts would now have to ensure that race is not among other valid reasons for peremptorily striking jurors in civil litigation (gender, sex, age, political views, or economic status). *Edmonson*, 111 S. Ct. at 2095-96 (Scalia, J., dissenting).

[195] *See supra* note 40.

[196] U.S. CONST. amend VI; *see supra* note 42.

[197] Swain v. Alabama, 380 U.S. 202, 219 (1965); *Batson*, 476 U.S. at 108 (Marshall, J., concurring).

[198] *Swain*, 380 U.S. at 219; *Batson*, 476 U.S. at 91.

[199] *Id.*

[200] Craig v. Boren, 429 U.S. 197-98 (plurality opinion); *see also id.* at 211 (Stevens, J., concurring); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977) (plurality opinion) (quoting *Craig*, 429 U.S at 197).

[201] 913 F.2d 1417 (9th Cir. 1990), *rev'd en banc*, 960 F.2d 1433 (1992).

venireperson's gender.[202] The court acknowledged that the Constitution will permit discrimination against women if the discriminatory action is "substantially related" to an important governmental objective.[203] Observing that achieving an impartial jury is an important government objective, the court stated peremptories are useful when an attorney is not "able to justify a sudden and immediate impression that a particular venireperson will be impartial."[204]

The court reasoned, however, that challenges based solely on the venireperson's gender are not based on any sudden impression of a venireperson's ability to be impartial.[205] Similar to race-based peremptories, gender based peremptories are made on the false assumption that members of a certain group are unfit to serve as impartial jurors.[206] The court then applied the reasoning used in *Batson* and its progeny to hold (1) that like racial discrimination, gender discrimination in the judicial system is a "stimulant to community prejudice which impedes equal justice for women;"[207] (2) because the defendant is entitled to be tried by a jury chosen from non-discriminatory procedures, gender discrimination, akin to racial discrimination, harms the defendant's equal protection rights;[208] and (3) similar to racial discrimination, gender discrimination in the courtroom undercuts the public's confidence in the integrity and fairness of the judicial

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[202] *Id.* at 1439. In *DeGross*, the state objected to the peremptory challenges taken by the female defendant against all of the male venirepersons. *Id.* at 1435-36.

The Fourth Circuit, when approached with the issue of gender based peremptory challenges, has determined that *Batson's* language was specific to race, and thus, its logic should not be applied to gender. *See* United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. dismissed sub. nom.* Washington v. United States, 489 U.S. 1049 (1989), *cert. denied*, 493 U.S. 1069 (1990).

Additionally, several federal courts have refused to extend Fourteenth Amendment protection to some ethnic groups. *See* United States v. Campione, 942 F.2d 429 (1991) (Italian); Murchu v. United States, 926 F.2d 50 (1991) (Irish).

[203] *Id.* (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).

[204] *DeGross*, 960 F.2d at 1439 (citing Batson v. Kentucky, 476 U.S. 79, 123 (1986)).

[205] *Id.*

[206] *Id.* (citing *Batson*, 467 U.S. at 86; Norris v. Alabama, 294 U.S. 587, 599 (1934)).

[207] *Id.* at 1438 (citing *Batson*, 476 U.S. at 87-88; Personnel Administrator v. Feeney, 442 U.S. 256, 273 (1979)).

[208] *Id.* (citing *Batson*, 476 U.S. at 87).

system.[209]

In addition to the court's reasons in *DeGross*, as other commentators have indicated, there are social concerns for eliminating gender-motivated peremptory challenges. The first is that, as the Court has recognized, with the exception of voting, participation in jury service is the ultimate exercise of participatory citizenship;[210] gender-motivated peremptory challenges undermine the rights of women to participate in the jury system and in democratic government.[211]

Furthermore, despite the Court's traditional re-affirmance of the importance of the peremptory challenge to achieving an impartial jury,[212] commentators have been increasingly skeptical of the peremptory challenge's ability to meet that goal. For example, in the Sixth Amendment line of cases, the Court has noted impartiality is more likely to arise where jurors represent a diverse cross-section of the community.[213] Removing certain classes or groups of persons from the venire solely because of their membership in a group destroys the jury's diversity, and thus, inherently cuts away at this impartiality.[214]

Finally, as previously discussed, the stereotypes upon which attorneys act to remove certain classes and groups from petit juries are often ill-founded and misguided.[215] Specifically, studies conclusively demonstrate

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[209] *Id.* (citing Taylor v. Louisiana, 419 U.S 522, 530 (1975)).

[210] Powers v. Ohio, 111 S. Ct. 1364, 1369 (1991); *see also Beyond* Batson, *supra* note 32, at 1927.

[211] *Beyond* Batson, *supra* note 32, at 1927-28 (citations omitted).

[212] Swain v. Alabama, 380 U.S. 202, 220-21 (1965); Batson v. Kentucky, 476 U.S 79, 91 (1986); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991); *see also Beyond* Batson, *supra* note 32, at 1930-31.

[213] *See* Thiel v. Southern Pacific Railroad Co., 328 U.S. 217, 227 (1945) (Frankfurter, J., dissenting); Ballard v. United States, 329 U.S. 187, 193 (1946); *Taylor*, 419 U.S. at 530-31; *See also* Hurwitz, *supra* note 17, at 32 n.11.

[214] *See Beyond* Batson, *supra* note 32, at 1929; *see also supra* note 32 (doubting that removing persons from the petit jury solely because of group or class membership does little to enhance impartiality because membership in those groups is not a true indicator of how those persons would vote once on a jury).

[215] *See supra* note 32; *see also Beyond* Batson, *supra* note 32, at 1932; Hanz Seizel and Shari Diamond, *The Effect of Peremptory Challenge on Jury and Verdict*, 30 STAN. L. REV. 491, 507, 513-18 (1978) (determining that peremptory challenges only have a minimal effect on creating an impartial jury).

that gender alone is an unreliable predictor of how a person will decide to vote once on the petit jury.[216]

Should the Court act to end the practice of exercising gender-motivated peremptory challenges, peremptory strikes against venirepersons opposite the gender of a party will most likely be challenged by the other litigant. The legal right to challenge gender-motivated peremptory strikes, however, may fail to precipitate much change in the number of women appearing on petit juries. This sad fact is due in large part to the great discretion given to trial judges to determine what conduct violates a litigant's or a stricken juror's Fourteenth Amendment rights.[217]

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[216] *See supra* note 32; *see also* Fulero & Penrod, *supra* note 29, at 237-38; JEFFERY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY § 3-102, at 44-45 (1987) (stating that attorneys' race and gender based stereotypes fail to account for the interaction of characteristics, such as age, education, and wealth which would affect the voting patterns of jurors).

[217] Justice Marshall had predicted in the concurring opinion in *Batson* that the use of peremptories in racially discriminatory manners would not cease. *Beyond* Batson, *supra* note 32, at 1935 n.118. In fact, it is still very difficult to prove a *prima facie* case of discriminatory jury selection practices, and thus it remains "relatively easy for attorneys to conceal their reasons for exercising peremptory challenges." *Id.*

For example, in Hernandez v. New York, 111 S. Ct. 1859 (1991) (plurality opinion), the Court observed that *Batson* is not violated every time an African-American venireperson is struck from a jury, stating "[t]here will seldom be much evidence bearing on [the attorney's discriminatory intent], and the best evidence will often be the demeanor of the attorney who exercises the challenge." *Id.* at 1869.

Many lower federal circuit courts have cited to the Court's observation in *Hernandez*. The circuits do not agree, however, on what attorney responses will justify peremptorily challenging minority venirepersons without violating a defendant's and a venireperson's *Batson* rights. *See* United States v. Campbell, 980 F.2d 245 (4th Cir. 1992) (upholding dismissal of African-American venireperson who was dissatisfied with police protection in his neighborhood); Parker v. Singletary, 974 F.2d 1562 (1992) (upholding dismissal of African-American venireperson who expressed that jury service would impair her ability to care for a disabled relative); Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990) (holding hostile facial reactions to attorney's question was insufficient grounds upon which to justify peremptorily striking an African-American venireperson), *cert. denied sub nom.* Barfield v. Lamar, 111 S. Ct. 2263 (1991); United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989) (holding defendant's *Batson* rights were violated where an African-American venireperson was dismissed because he conveyed a 'bad feeling' toward the attorney).

As illustrated above, when attorneys are requested to justify the use of a peremptory strike against a member of a protected group by counsel, the answers given vary. The justifications most secure from reversal on *Batson* grounds are those based on impressions given by the venireperson that do not satisfy the attorney's need for a mature, stable, and intelligent juror. United States v. Castro-Romero, 964 F.2d 942 (9th Cir. 1989) (dismissing African-American venireperson in a case with children witnesses because the venireperson stated children were prone to lie on the witness stand); United States v. Coronado, 988 F.2d

The Court can limit this discretion, however, by applying a modified version of the analysis set forth in *Batson*.[218] As per the present system, litigants could retain an unlimited number of "challenges for cause," which require attorneys to prove to the trial judge that the venireperson is somehow biased in favor of or against one party.[219] Attornies would also be

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123 (9th Cir. 1992) (upholding dismissal of African-American and Hispanic venirepersons on the grounds that one of the venirepersons may have been dishonorably discharged from the armed services and another was a sibling of a convicted felon); *see* Brown v. Kelly, 973 F.2d 116, 118 (2d Cir. 1992) (stating "[the] prospective juror's age, employment, history, education, family structure, and longevity of residence . . ." as well as a venireperson's dress, demeanor, and ability to respond to directions are characteristics well suited for being a juror).

Other federal circuits have been less demanding. For example, one circuit decided an attorney who employed peremptories to keep women off the petit jury did not violate *Batson* because the attorney believed men were better jurors in street crime cases. United States v. Wilson, 867 F.2d 486, 488 (8th Cir.), *cert. denied,* 493 U.S. 827 (1989). In another case, the same federal circuit decided that even though the attorney could not recall specific reasons why he peremptorily struck minority venirepersons, the judge determined *Batson* was not violated because the attorney presented a list of objective criteria used to evaluate venirepersons. United States v. Nicholson, 855 F.2d 481, 482-83 (8th Cir. 1989).

Other federal courts have held an attorney's perception of a venireperson's demeanor and body language are sufficient grounds upon which to exercise peremptory challenges against African-American venirepersons without offending *Batson*. *See* United States v. Pofahl, 990 F.2d 1456 (5th Cir. 1993); United States v. Sherrills, 929 F.2d 393 (8th Cir. 1991); United States v. Garrison, 849 F.2d 104 (4th Cir.), *cert. denied,* 488 U.S. 996 (1988). One court has gone so as far to hold that even if a jury is selected in a discriminatory manner in clear violation of *Batson* and its progeny, the defendant's conviction will not be overturned if any reasonable jury could have reached the same verdict as the discriminatorily selected jury. United States v. Martinoff, 972 F.2d 343 (4th Cir. 1992).

[218] The *Batson* analysis, set forth in *supra* note 97 and accompanying text, provides that the party objecting to a peremptory challenge must first demonstrate that he or she is a member of a cognizable racial group and the challenge was exercised in part because of that fact. Batson v. Kentucky, 476 U.S. 76, 95 (1986); Parker v. Singletary, 974 F.2d 1562 (1992); United States v. Collins, 972 F.2d 1385 (1992); *Castro-Romero*, 964 F.2d at 942; United States v. Wilson, 867 F.2d 486, 488 (8th Cir.), *cert. denied,* 493 U.S. 827 (1989); United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989). The objection must be made at the time cause for the objection arises, *see, e.g.*, United States v. Ortiz-Martinez, 1993 WL 272040 (8th Cir. Mo. 1993); United States v. Mojica, 984 F.2d 1426 (7th Cir. 1992), and must prove that the challenger possessed discriminatory intent. United States v. Martin, 996 F.2d 312 (10th Cir. 1993); *Collins*, 972 F.2d at 1400-02. If the first prong of the analysis is satisfied, the burden shifts to the party making the challenge, which must then present a legitimate, non-discriminatory justification for exercising the challenge. *Id.*; United States v. Joe, 928 F.2d 99 (4th Cir. 1991).

[219] *See supra* notes 15-17 and accompanying text (explaining "challenges for cause").

permitted to exercise a limited number of peremptories upon first demonstrating a legitimate, non-discriminatory justification for peremptorily discharging a venireperson.[220] This system permits attorneys to remove venirepersons from petit juries for any reason *except* race or gender motivated reasons and facilitates judges' efforts to ensure peremptory challenges are not being exercised in a discriminatory manner.

V. CONCLUSION

The Court's treatment of racial discrimination in the jury selection process has been markedly different from that of women. This is largely due to the fact that the Fourteenth Amendment literally required the Court to end state sponsored discrimination against African-Americans.[221] The Fourteenth Amendment, however, does not literally require persons of different gender be treated equally. Thus, the Court has recognized states may differentiate between men and women where there is a substantial justification for the differentiation.[222]

The arguments which were successfully applied to eradicating the racially-motivated peremptory challenge are just as applicable to the gender-based analysis. As the Ninth Circuit illustrated in *DeGross*, similar to the case of a venireperson's race, a venireperson's gender is entirely divorced from the concept of the ability to be impartial.[223] Moreover, reasons such

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[220] This unofficial "system" is the current reality in the realm of peremptory challenges against race, aside from the fact that the current scheme places the burden of proving discrimination on the objecting party. *See, e.g.*, *Mojica*, 984 F.2d at 1449-50; *Castro-Romero*, 964 F.2d at 943. For a related discussion, see Underwood, *supra* note 18, at 768-74. *See generally* Alan B. Rich, *Peremptory Jury Strikes in Texas After* Batson *and* Edmonson, 23 ST. MARY'S L.J. 1055 (1992). Placing the burden upon the *challenger* has three benefits: first, this scheme permits courts to ensure venirepersons are discharged from service because of non-discriminatory criteria; second, this scheme does not impair the attorney's power to have venirepersons removed from the jury for any other reasons; third, the proposed system saves the court time, as it bypasses the first prong of the *Batson* analysis.

[221] For an excellent historical example, see generally CARTER, *supra* note 59.

[222] Reed v. Reed, 404 U.S. 71, 75 (1971); Frontiero v. Richardson, 411 U.S. 677, 684 (1972) (plurality opinion); Weinberger v. Wiesenfeld, 420 U.S. 636, 644-45 (1975); Craig v. Boren, 429 U.S. 190, 198-99 (1976) (plurality opinion); Califano v. Goldfarb, 430 U.S. 199, 204-06 (1977) (plurality opinion).

[223] United States v. DeGross, 960 F.2d 1417 (9th Cir. 1990), *rev'd en banc*, 960 F.2d 1433, 1439 (1992).

as maintaining good public confidence in the judicial system, furthering the public goal of enhancing participation in our nation's civic responsibilities, and maintaining diversity on juries so that disputes and criminal cases are truly decided by a person's neighbors and peers — all of which have justified the elimination of racially-motivated peremptory challenges — apply to the elimination of gender-motivated peremptory challenges as well.

Eliminating gender-motivated peremptory challenges however, will take more than a pronunciation by the Court in *J.E.B. v. T.B*,[224] because even with the support of the law, attorneys will continue to employ peremptories in a discriminatory manner. The case of racially-motivated peremptory challenges provides a sad example of the persistence of racial stereotypes in our nation's courts.[225] Likewise, in states where gender-based peremptory challenges have been banned, some justifications given by attorneys (and accepted by judges) to justify the discharge of women venirepersons echo of attempts to exclude African-Americans on the theory that African-Americans are somehow unfit to serve as impartial jurors in criminal cases.[226] With the support of law, however, the vigilant effort of attorneys and judges will help our society step closer to eliminating racial and gender discrimination in the judicial system.

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[224] 606 So.2d 156 (Ala. 1992), *cert. granted*, 61 U.S.L.W. 3771 (U.S. May 18, 1993) (No. 92-1239).

[225] Some federal judges have accepted the rationale that an attorney's perception of a venireperson's demeanor and body language alone are sufficient grounds upon which to exercise peremptory challenges against African-American venirepersons without offending *Batson*. *See Sherrills*, 929 F.2d at 394-95; *Barfield*, 911 F.2d at 648; *Garrison*, 849 F.2d at 106. The danger with this approach is that the law will permit striking African-Americans by attorneys who believe *all* African-Americans have "unsuitable" demeanor and body language compared to that of whites. *See* Batson v. Kentucky, 476 U.S 76, 105-06 (1986) (Marshall, J., concurring).

[226] *See, e.g., Wilson*, 867 F.2d 486, 488 (8th Cir.) (holding an attorney who employed peremptories to keep women off the petit jury did not violate *Batson* because the attorney believed men were better jurors in street crime cases), *cert. denied*, 493 U.S. 827 (1989); *compare Norris*, 294 U.S. at 598 (observing the jury commissioner of Morgan County, Alabama attempted to justify the fact that no African-Americans had *ever* sat on a criminal jury by stating he did not know of any African-American "fit" to serve as an impartial juror in a criminal case) (emphasis added).