CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION CLAUSE PROHIBITS LITIGANTS FROM EXERCISING PEREMPTORY CHALLENGES ON THE BASIS OF GENDER-*J.E.B. v. Alabama ex rel T.B.*, 114 S. Ct. 1419 (1994).

The Supreme Court has historically exalted the peremptory challenge[1] as an important element in achieving a fair and impartial jury trial in both criminal and civil cases.[2] During voir dire,[3]

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[1] "Peremptory" is defined as "arbitrary; not requiring any cause to be shown." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990) (citation omitted). Accordingly, the peremptory challenge is "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." *Id.* The peremptory challenge has also been defined as a "challenge without cause, without explanation and without judicial scrutiny . . . ." Swain v. Alabama, 380 U.S. 202, 212 (1965). While the challenge for cause is based upon specified and provable reasons, the peremptory is "an arbitrary and capricious species of challenge." *Id.* at 212 n.9 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *353), 220 (citation omitted). That is, it is based upon "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another . . . .'" *Id.* at 220 (citing Lewis v. United States, 146 U.S. 370, 376 (1892)).

As the *Swain* Court elaborated, the availability of peremptory challenges allows litigants to determine possible bias through questions during voir dire. *Id.* at 219. The Court explained that the availability of peremptories "facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." *Id.* at 219-20.

[2] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting) (citations omitted) ("By allowing the litigant to strike jurors for even the most subtle of discerned biases, the peremptory challenge fosters both the perception and reality of an impartial jury."); *Swain*, 380 U.S. at 220 (citations omitted) (noting that the use of the peremptory challenge guarantees a system characterized "'not only [by] freedom from any bias against the accused, but also [by freedom] from any prejudice against his prosecution'"). For a more detailed discussion of the importance of the peremptory challenge, see WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 145 (1875) ("The right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial."); Barbara L. Horwitz, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1439 (1993) (explaining that "the peremptory is as important today as ever in achieving what it was designed to accomplish").

Blackstone has also proclaimed the importance of the peremptory challenge: while the peremptory is an "'arbitrary and capricious species of challenge . . . the law wills not [that a defendant] . . . be tried by any one against whom he has conceived a prejudice, even without being able to assign a reason for such dislike.'" Gerald A. Bunting & Lesley A. Reardon, Note, *Once More Into the Breach: The Peremptory Challenge After* Edmonson v. Leesville Concrete Co., 7 ST. JOHN'S J. LEGAL COMMENT. 329, 330 n.6 (1991) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *353).

Some commentators, however, have criticized the peremptory challenge. *See, e.g.*, Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564 (1992) (stating that "the peremptory challenge poses a substantial danger of contributing to minority underrepresentation on jury panels"); Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 269 (1973) (footnote omitted) ("Whether the peremptory chal-

the system gives litigants the opportunity to strike potential jurors in two ways: for cause[4] or peremptorily.[5] Litigants employ the challenge for cause to eliminate jurors who possess actual, as opposed to perceived, bias.[6] The peremptory challenge, created by statute,[7] allows litigants to remove or strike potential jurors whom

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lenge, retained in both civil and criminal cases[,] . . . remains a necessary practice today is questionable."). As one author elaborated, whenever a litigant wishes to eliminate a particular minority group from the venire, that litigant will have a better chance of success than will the litigant who wishes to strike members of the majority race. Bray, *supra*, at 564. That is, "'[d]espite the fact that both parties have peremptories, the party relying on views more often expressed by minority group members will in practice be less able than her adversary to control the composition of the jury.'" *Id.* (quoting Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 800 (1986)). Additionally, Bray criticized the challenge by noting that if codified, the statute would be unconstitutional because it "'would lack a rational basis.'" *Id.* at 565 (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 204 (1989)).

3 "Voir dire" is a "phrase [that] denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). Both peremptory challenges and challenges for cause may be exercised during this examination. *Id.*

4 The challenge for cause is based upon "narrowly specified, provable and legally cognizable bas[es] of partiality . . . ." *Swain*, 380 U.S. at 220; *see also* Photostat Corp. v. Ball, 338 F.2d 783, 785-86 (10th Cir. 1964) (distinguishing the peremptory challenge from the challenge for cause). The *Photostat* court noted that under the common law, the challenge for cause was used to strike those jurors who had a relationship with one of the litigants. *Id.* at 785 (citation omitted). If such a relationship existed, the court explained, the judge could presume bias on the part of the juror. *Id.* (citations omitted). The court explained that combined with the peremptory challenge, the challenge for cause becomes the judge's measure for actual bias, whereas counsel may use the peremptory challenge to address any perceived bias. *Id.* at 786.

5 *See Swain*, 380 U.S. at 219. In most jurisdictions, each litigant is entitled to a specified number of peremptory challenges. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990); *see also infra* note 7 and accompanying text (explaining the use of the peremptory challenge under the FEDERAL RULES OF CRIMINAL PROCEDURE). It is only after each side has exhausted its peremptory challenges that litigants must "furnish a reason for subsequent challenges," or challenges for cause. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990) (citations omitted).

6 *Swain*, 380 U.S. at 220.

7 In criminal cases, the use of the peremptory challenge is governed by Rule 24 of the FEDERAL RULES OF CRIMINAL PROCEDURE, which provides in part:

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

FED. R. CRIM. P. 24(b). In civil cases, however, the United States Code provides that

the parties perceive as biased.[8]

Despite repeated endorsements of the peremptory challenge by both the Supreme Court and legal commentators,[9] the Court has taken steps in recent years to severely handicap the free exercise of the challenge.[10] Relying on equal protection principles,[11]

"each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges . . . ." 28 U.S.C. § 1870 (1988).

8 *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (citing Thiel v. Southern Pac. Co., 328 U.S. 217, 223-24 (1946) ("Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."); *Swain*, 380 U.S. at 219 (explaining that the purpose of the peremptory challenge is "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise").

The *Swain* Court also noted that the peremptory challenge is frequently used on grounds such as race, religion, and nationality-grounds not normally thought of as relevant to legal proceedings. *Id.* at 220 (footnote omitted). Additionally, the Court explained that these factors are often touched upon in voir dire, and that "the fairness of trial by jury requires no less." *Id.* at 221 (citations omitted).

9 See *supra* note 2 and accompanying text for a discussion of the benefits of the peremptory challenge.

10 *See* Powers v. Ohio, 499 U.S. 400, 405, 413 (1991). The Court has repeatedly addressed the issue of racism in the jury system. *See id.* at 404-05; *see also* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (asserting that the Fourteenth Amendment prohibits criminal defendants from exercising peremptory challenges on the basis of race); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (determining that the Fourteenth Amendment restricts private litigants in civil cases from striking potential jurors on the basis of race); *Batson*, 476 U.S. at 89 (holding that the Equal Protection Clause prevents the prosecutor from challenging jurors solely on the basis of race); *Powers*, 499 U.S. at 415 (concluding that the *Batson* rule applies regardless of whether the struck juror and criminal defendant share the same race); *Swain*, 380 U.S. at 224 (stating that the prosecutor's intentional and systematic removal of blacks from the jury may violate the Equal Protection Clause of the Fourteenth Amendment).

11 The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Historically, the Equal Protection Clause has been interpreted to prohibit only race-based discrimination. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding that a state statute confining jury service to white males violates equal protection). The *Strauder* Court explained that the then recently enacted Fourteenth Amendment was designed "to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." *Id.*

Justice Strong, writing for the *Strauder* Court, proffered that the Amendment can only be properly understood if viewed in light of "the history of the times . . . [in which it was] adopted, and the general objects [it] plainly sought to accomplish." *Id.* at 306 (citation omitted). The Court explained that because discrimination against blacks was easily foreseeable, the Equal Protection Clause was enacted for "protection against unfriendly action in the States where they were resident." *Id.*

The *Strauder* Court, relying heavily on the purpose and intention of the drafters of the Fourteenth Amendment, also declared that the Equal Protection Clause should

the Court has repeatedly and unequivocally held that the intentional exclusion of jurors on the basis of race violates the Fourteenth Amendment of the United States Constitution.[12] Most recently, in *J.E.B. v. Alabama ex rel T.B.*,[13] the Supreme Court extended the Fourteenth Amendment's prohibition of race-based exclusions to those based on gender.[14] In *J.E.B.*, the Court held that intentional gender-based discrimination in the exercise of the peremptory challenge is an unconstitutional violation of the Fourteenth Amendment's Equal Protection Clause.[15]

The State of Alabama filed a child support and paternity suit against J.E.B., the father of a minor child.[16] The State, suing on behalf of the child's mother, used nine of its ten peremptory challenges to remove men from the jury.[17] J.E.B., the petitioner, ob-

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not be interpreted as applicable to classifications based on gender, landownership, or age. *Id.* at 310. The Court "'doubt[ed] very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision.'" *Id.* at 307 (quotation omitted).

Over the next century, however, the Court did in fact hold that the Equal Protection Clause of the Fourteenth Amendment prohibits states from discriminating on the basis of classifications other than race. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (holding that a city violates equal protection when it requires a special use permit before leasing a building to mentally retarded persons); Bernal v. Fainter, 467 U.S. 216, 227-28 (1984) (footnotes omitted) (holding that equal protection prohibits a state from denying aliens the right to become notary publics); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (footnote omitted) (stating that equal protection prohibits a state-sponsored university from denying men admission solely on the basis of gender); Douglas v. California, 372 U.S. 353, 355 (1963) (holding that equal protection prevents a state from denying indigent defendants the right to counsel on appeal).

12 *See, e.g.*, *McCollum*, 112 S. Ct. at 2359 (holding that the Equal Protection Clause does not allow race-based peremptory challenges by criminal defendants); *Edmonson*, 500 U.S. at 628 (explaining that the Fourteenth Amendment prohibits race-based peremptory challenges by private civil litigants); *Powers*, 499 U.S. at 415 (concluding that the *Batson* rule applies regardless of whether the defendant and the juror are members of the same racial group); *Batson*, 476 U.S. at 89 (holding that a prosecutor may not intentionally and systematically exclude blacks from the jury); *Swain*, 380 U.S. at 224 (explaining that a prosecutor's intentional and systematic removal of blacks from the jury may constitute a violation of equal protection).

13 114 S. Ct. 1419 (1994).

14 *Id.* at 1422.

15 *Id.*

16 *Id.* at 1421. Jury selection began in October, 1991. *Id.* Of the panel of 36 potential jurors, comprised of 12 men and 24 women, the Court removed three jurors for cause. *Id.* Consequently, only 10 men remained on the panel of potential jurors. *Id.* at 1421-22.

17 *Id.* at 1421, 1422. J.E.B. also exercised all but one of his peremptory strikes to exclude female jurors. *Id.* at 1422. Alabama uses what is known as the "struck-jury" system, where litigants alternately strike jurors until 12 people remain to comprise the jury. *Id.* at 1429 n.17 (citation omitted). Alabama argued that this method of jury selection precluded litigants, at least in some cases, from being able to provide race or

jected to the State's use of its peremptory challenges, claiming that the strikes were used against male jurors wholly on account of gender, in violation of the Fourteenth Amendment of the Constitution.[18] The petitioner relied on *Batson v. Kentucky*,[19] which prohibited race-based peremptory challenges, to argue that intentional gender-based discrimination was likewise prohibited.[20]

The trial court, after rejecting J.E.B.'s equal protection claim, empaneled an all-female jury.[21] The jury found J.E.B. to be the child's father, and the court ordered the payment of child support.[22] Subsequently, the court denied the petitioner's post-judgment motion and reaffirmed its decision that the *Batson* rule does not apply to gender-based peremptory challenges.[23] The Court of Civil Appeals of Alabama, relying on Alabama precedent, affirmed the ruling of the trial court.[24] Subsequently, the Supreme Court of

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gender-neutral explanations for their strikes. *Id.* For example, the State claimed that a litigant may find it necessary to strike jurors from the venire randomly after there is no articulable reason for doing so, thus making a race or gender-neutral explanation impossible. *Id.* The Court, however, noted that Alabama had "managed to maintain its struck-jury system even after the ruling in *Batson*, despite the fact that there are counties in Alabama that are predominately African-American." *Id.* Most likely, the Court reasoned, the voir dire process helps litigants establish race-neutral reasons for their strikes. *Id.* Therefore, the Court determined that a state's jury selection methods "cannot insulate it from the strictures of the Equal Protection Clause. Alabama is free to adopt whatever jury-selection procedures it chooses so long as they do not violate the Constitution." *Id.*

18 *Id.* at 1422 (citation omitted). Specifically, the petitioner argued that the logic and reasoning of prohibiting peremptory strikes based on race should likewise prohibit intentional discrimination based on gender. *Id.*

19 476 U.S. 79 (1986). For a more in-depth analysis of *Batson*, see *infra* notes 66-74 and accompanying text.

20 *J.E.B.*, 114 S. Ct. at 1422.

21 *Id.* (citation omitted).

22 *Id.* Blood tests and other evidence offered at trial proved with 99.92% accuracy that J.E.B. was in fact the child's father. *Id.* at 1437 (Scalia, J., dissenting). The father, however, contended that the blood test results should not have been allowed into evidence because the State did not prove a "proper chain of custody." J.E.B. v. Alabama ex rel. T.B., 606 So. 2d 156, 157 (Ala. Civ. App. 1992), *rev'd*, 114 S. Ct. 1419 (1994). Specifically, J.E.B. claimed that the phlebotomist's failure to take the stand rendered the test results inadmissible. *Id.* The appellate court, however, held that the supervisor of the DNA laboratory established a proper chain of custody, and affirmed the trial court's ruling. *Id.* (citation omitted).

23 Brief for Petitioner at 4-5, J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) (No. 92-1239). In the post-judgment motion, J.E.B. requested an order for judgment notwithstanding the verdict, or alternatively, for a new trial. *Id.* at 4. The petitioner argued that the Equal Protection Clause of the Fourteenth Amendment prohibits the State from exercising the peremptory challenge solely on the basis of gender. *Id.* Additionally, J.E.B. challenged the trial court's failure to instruct the State to "articulate a nondiscriminatory reason for challenging the jurors, in accordance with . . . *Batson v. Kentucky*." *Id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986)).

24 *J.E.B.*, 606 So. 2d at 157 (citations omitted). Specifically, the court relied upon

Alabama denied certiorari.[25]

The United States Supreme Court granted certiorari[26] to decide whether the Equal Protection Clause prohibits the use of peremptory challenges based on gender.[27] Relying on a long history of cases confronting the issues of race and gender discrimination in jury selection and the use of the peremptory challenge,[28] the

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a series of decisions of the court of criminal appeals, all of which refused to extend *Batson* to gender-based strikes. *Id.* (citations omitted). Accordingly, the court held that peremptory challenges on the basis of gender do not violate equal protection. *Id.* (citing Murphy v. State, 596 So. 2d 42, 43 (citations omitted) ("The law currently states that *Batson* does not extend to gender-based strikes."), *cert. denied*, 113 S. Ct. 86 (Ala. 1992); Fisher v. State, 587 So. 2d 1027, 1031 (Ala. Crim. App. 1991) (finding that the appellant "failed to provide any indication that he was prejudiced by the State's exercise of peremptory strikes against females on the venire"), *cert. denied*, 587 So. 2d 1039 (Ala. 1991); Daniels v. State, 581 So. 2d 536, 539 (Ala. Crim. App. 1990) (holding that "*Batson* offers no authority for the extension of the principles contained therein beyond racial discrimination"), *cert. denied*, 581 So. 2d 541 (Ala. 1991); Dysart v. State, 581 So. 2d 541, 543 (Ala. Crim. App. 1990) (explaining that "[w]hile the strictures of the Equal Protection Clause undoubtedly apply to prohibit discrimination due to gender in other contexts, there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges"), *cert. denied*, 581 So. 2d 545, 546 (Ala. 1991).

[25] *J.E.B.*, 114 S. Ct. at 1422 (citing J.E.B. v. Alabama ex rel. T.B., No. 1911717 (Ala. Oct. 23, 1992)).

[26] 113 S. Ct. 2330 (1993).

[27] *J.E.B.*, 114 S. Ct. at 1422. As the United States Supreme Court noted in *J.E.B.*, there is a decided split of authority in the federal courts of appeals as to whether *Batson* should apply to gender-based peremptory strikes. *J.E.B.*, 114 S. Ct. at 1422 n.1 (*comparing* United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990), *aff'd on reh'g*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (extending *Batson* to gender-based strikes) *with* United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993) (holding that *Batson* does not prohibit peremptory challenges on the basis of gender); United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991) (refusing to extend *Batson* to gender), *cert. denied*, 112 S. Ct. 989, 990 (1992); United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (rejecting the extension of *Batson* to gender-based strikes), *cert. dismissed sub nom.* Washington v. United States, 489 U.S. 1094 (1989), *and cert. denied sub nom.* Hamilton v. United States, 493 U.S. 1069 (1990)).

Similarly, the state courts have also split on the issue of whether the Constitution prohibits gender-based peremptory strikes. *Id.* (*comparing* Laidler v. State, 627 So. 2d 1263, 1264 (Fla. Dist. Ct. App. 1993) (allowing an extension of *Batson* to gender); State v. Burch, 830 P.2d 357, 365 (Wash. Ct. App. 1992) (same) *with* Murphy v. State, 596 So. 2d 42, 43 (Ala. Crim. App. 1991) (refusing to extend *Batson* to gender), *cert. denied*, 113 S. Ct. 86, 87 (1992); State v. Culver, 444 N.W.2d 662, 666 (Neb. 1989) (same); State v. Clay, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989) (same)) (other citations omitted).

[28] Throughout its comprehensive study of jury selection and the peremptory challenge, the Court examined several of its previous decisions dealing with discrimination in the jury selection process. *Id.* at 1421, 1424; *see, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84 (1986) (citation and footnote omitted) (reaffirming that the Equal Protection Clause prohibits states from discriminating on the basis of race in the use of peremptory challenges); Ballard v. United States, 329 U.S. 187, 193 (1946) (explaining that a state cannot deny women the right to serve on juries); Strauder v. West

Court held that intentional gender-based discrimination violates equal protection.[29]

The Supreme Court has considered issues of discrimination in jury selection procedures on many occasions.[30] In *Strauder v. West Virginia*,[31] the first case to confront racial discrimination in the courtroom,[32] the Court ruled on the constitutionality of a state statute limiting eligibility for jury service to white males.[33] The Court held that a state denies its citizens equal protection under the laws when it allows for a jury selected through racially discriminating means.[34] Justice Strong, however, emphasized that the Court's

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Virginia, 100 U.S. 303, 310 (1879) (determining that a state statute limiting potential jurors to white males is unconstitutional).

[29] *J.E.B.*, 114 S. Ct. at 1422. Justice Blackmun applied the heightened scrutiny test of *Reed v. Reed* to determine that gender is an unconstitutional measure for determining juror competence and impartiality. *Id.* at 1424 (citing Reed v. Reed, 404 U.S. 71, 76 (1971) (citation omitted)). Specifically, the Court asked whether "'an exceedingly persuasive justification'" for the gender-based exclusions existed. *J.E.B.*, 114 S. Ct. at 1425 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)). Justice Blackmun ultimately concluded that peremptory strikes based on gender do not substantially further any important governmental interest, and thus lack the justification necessary to withstand constitutional scrutiny. *Id.* at 1426-27 (citation and footnotes omitted).

[30] *See, e.g., Batson*, 476 U.S. at 82, 89-90 (questioning whether the State's use of the peremptory challenge on the basis of race constitutes a denial of equal protection); Swain v. Alabama, 380 U.S. 202, 209 (1965) (considering whether the peremptory challenge may be used to exclude blacks from juries); *Strauder*, 100 U.S. at 305 (questioning whether an entire race may be excluded from jury service).

[31] 100 U.S. 303 (1879). *See generally* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992); Genevieve A. Harley, Comment, *Restricting the Discriminatory Use of Peremptory Challenges*, 20 LOY. U. CHI. L.J. 1113 (1989).

[32] Holland v. Illinois, 493 U.S. 474, 478-79 (1990) (citing Strauder v. West Virginia, 100 U.S. 303 (1879)) ("It has long been established that racial groups cannot be excluded from the venire . . . . That constitutional principle was first set forth . . . under the Equal Protection Clause [in] *Strauder v. West Virginia* . . . ."

[33] *Strauder*, 100 U.S. at 305. Before his trial commenced, Strauder, a black man, objected to a West Virginia statute that disqualified all black men from jury service. *Id.* at 304. The statute read: "'All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . .'" *Id.* at 305 (quotation omitted). Strauder petitioned for removal to the circuit court in order to litigate the issue. *Id.* at 304. The trial court denied the petition, and a jury comprised solely of white men subsequently voted to convict Strauder of murder. *Id.*

[34] *Id.* at 310. In reaching its decision, the Court noted that:

> [the] question[ ] is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

Id. at 305.

holding should not be interpreted to apply to any group, other than blacks, who might be excluded from jury service.[35]

It was not until 1946, in *Thiel v. Southern Pacific Co.*,[36] that the Court revisited the issue of discrimination in jury selection.[37] In *Thiel*, the plaintiff filed a civil suit in state court alleging negligence against a railroad company.[38] During the course of jury selection, all persons who worked for a daily wage were intentionally excluded from the jury panel.[39] The Court held that the trial court should have granted the motion to strike the panel of jurors.[40]

Later that year, in *Ballard v. United States*,[41] the Court considered whether the intentional exclusion of women from a panel of potential jurors renders a defendant's conviction invalid.[42] The Supreme Court did not decide the issue on equal protection grounds, but rather, relying on its holding in *Thiel*, determined that the intentional and systematic exclusion of women from the panel of jurors violated congressional intent.[43] The Court ex-

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35 *Id.* at 310. The Court explained that the State may dictate the qualifications of jurors, such as limiting those eligible for jury duty to landowners, certain age groups, or men. *Id.* Justice Story proclaimed:

> We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. . . . "It is so clearly a provision for that race [blacks] and that emergency [slavery], that a strong case would be necessary for its application to any other."

Id. (quotation omitted).

36 328 U.S. 217 (1946).

37 *See id.* at 219-20.

38 *Id.* at 218.

39 *Id.* at 219.

40 *Id.* at 225. Justice Murphy, writing for the Court, began the analysis by noting that the idea of an impartial jury selected from a fair cross-section of society "does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible." *Id.* at 220 (citations omitted). The Justice explained, however, that jurors must be selected by non-discriminatory means. *Id.* The Court elaborated that:

> [r]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Id.

41 329 U.S. 187 (1946).

42 *Id.* at 189-90. In *Ballard*, the government conceded "that women were not included in the panel of grand and petit jurors in the Southern District of California where the indictment was returned and the trial had; [and] that they were intentionally and systematically excluded from the panel." *Id.* (footnote omitted).

43 *Id.* at 193 (citation omitted). The Court noted that women have been permitted

plained that Congress has instructed the federal courts to follow the rules of the highest court of the state in which they sit in deciding who is eligible for jury service.[44]

Justice Douglas, writing for the majority, rejected the argument that an all-male jury, because it is drawn from various groups within society, is as representative as a jury containing women.[45] The Justice explained that the numerous differences between the sexes warrant inclusion of both men and women on the jury.[46] Thus the Court, concluding that the exclusion of either sex would constitute an unrepresentative jury, dismissed the defendant's indictment.[47] The Court justified its holding by explaining that the exclusion of women from the panel of jurors could prejudice both the defendant and the entire system that Congress contemplated.[48]

Despite the Court's holding in *Ballard*, women remained a minority on juries for many years.[49] It was not until 1975, in *Taylor v.*

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to serve on juries in the Southern District of California since 1944. *Id.* at 190 n.1 (citation omitted).

44 *Id.* at 190 (citation omitted). Specifically, the Court explained that by congressional statute, "jurors in a federal court shall have the same qualifications as those of the highest court of law in the State." *Id.* (citation omitted). Under this congressionally created system, federal courts sitting in states where women are eligible for jury service should empanel juries representative of both sexes. *Id.* at 191.

45 *Id.* at 193-94. The Court refuted the theory that "the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex." *Id.* at 193 (footnote omitted).

46 *Id.* at 193-94 (footnote omitted). Justice Douglas declared: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community comprised of both; the subtle interplay of influence one on the other is among the imponderables." *Id.* (footnote omitted). Recognizing this fact, the Court proclaimed that the exclusion of either sex "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." *Id.* at 194.

47 *Id.* at 195, 196.

48 *Id.* at 195. Specifically, the Justice asserted that "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.*

49 *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 69 (1961) (citations omitted) (explaining that the disproportionate amount of women on a jury does not make the jury selection process constitutionally invalid); Fay v. New York, 332 U.S. 261, 284 (1947) (citations and footnote omitted) (holding that "blue-ribbon" or "special" juries are not unconstitutional merely because a class of persons is underrepresented in a particular jury).

In *Fay*, the Court considered the constitutionality of a "blue-ribbon" or "special" jury used in the State of New York. *Fay*, 332 U.S. at 264. The Court explained that a blue-ribbon jury resulted when the State granted exemptions from service to women who chose not to serve, despite the fact that women were qualified to serve as jurors in New York at the time. *Id.* at 267 (footnotes omitted).

Louisiana,[50] that the Court relied upon the Constitution to squarely

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Justice Jackson, writing for the Court, concluded that "woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice . . . ." *Id.* at 290. The *Fay* Court observed that "because of the long history of unhappy relations between the two races, Congress has put these cases in a class by themselves." *Id.* at 282. In analyzing the scope of the Fourteenth Amendment, the Justice noted in *Rawlins*, the Court held that the intentional exclusion of occupational groups such as lawyers, dentists and engineers from jury selection lists was constitutionally permissible. *Id.* at 283 (citing Rawlins v. Georgia, 201 U.S. 638, 640 (1906)). The Justice explained, however, that:

> We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection . . . . But we do say that since Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations [against blacks] to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection . . . .

Id. at 283-84 (footnote omitted). Therefore, the Court held that in order to prove a violation of equal protection, the petitioner must prove a clear showing of discrimination; demonstrating the underrepresentation of a class, such as women, was not enough. *Id.* at 284 (citations and footnote omitted).

Similarly, in *Hoyt*, the Court considered the constitutionality of a Florida statute that provided that no woman would be called for jury service unless she volunteered for it. *Hoyt*, 368 U.S. at 58 (quotation omitted). Hoyt argued that because very few women volunteered for jury duty, the practical application of the statute meant that most juries consisted entirely of men. *Id.* at 64.

The Court rejected the petitioner's claim that the statute was unconstitutional on its face, and concluded that a state may constitutionally relieve women from jury service. *Id.* at 62. The Court explained that Florida was not attempting to exclude women from service, but rather, gave women the privilege of serving without imposing service as an obligation. *Id.* at 60 (quoting *Fay*, 332 U.S. at 277). Justice Harlan reasoned that the case "in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service." *Id.* at 68 (citations omitted). Additionally, the Court stated that "the disproportion of women to men on the list independently carries no constitutional significance. In the administration of the jury laws proportional class representation is not a constitutionally required factor." *Id.* at 69 (citing *Fay*, 332 U.S. at 290-91) (other citations omitted).

Hoyt, however, was overruled by the Court in *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). See *infra* notes 50-59 and accompanying text for a discussion of *Taylor*. The *Taylor* Court stated that:

> [it was] no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. To this extent we cannot follow the contrary implications of the prior cases, including *Hoyt v. Florida*.

Taylor, 419 U.S. at 537.

[50] 419 U.S. 522 (1975). *See generally* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD.

hold that women cannot be excluded from jury venires.[51] The *Taylor* Court diverged from the reasoning of the *Ballard* Court, which relied upon the intent of Congress,[52] by reasoning that such exclusion violated defendants' Sixth Amendment right to a trial by an impartial jury drawn from a fair cross-section of society.[53]

Justice White, delivering the opinion in *Taylor*, explained that women comprised over fifty percent of persons eligible for jury service in the Louisiana district, yet only ten percent of the group from which the venire was selected were women.[54] In fact, the Justice noted that in the case *sub judice*, no females were included in the venire of 175 people.[55] Relying on *Ballard*, in which the Court decided the exact same issue upon non-constitutional grounds, the *Taylor* Court first held that the systematic exclusion of women violates the Sixth Amendment's fair cross-section requirement.[56] Justice White further held that although litigants do not have a right to a jury of any certain composition,[57] the state may not exclude women as a class or allow for automatic exemptions based on sex if such exemptions result in all-male venires.[58]

L. REV. 337 (1982); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980).

51 *Taylor*, 419 U.S. at 537. Similar to *Hoyt*, the statute in question in *Taylor* provided that a "'woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.'" *Id.* at 523 n.2 (quotation omitted). The appellant, Taylor, argued that because the statute resulted in an all-male jury, it constituted a systematic exclusion of women from the jury. *Id.* at 524. Taylor further claimed that the statute deprived him of his constitutional guarantee of a jury made up of a representative cross-section of the community. *Id.*

52 *See* Ballard v. United States, 329 U.S. 187, 193 (1946).

53 *Taylor*, 419 U.S. at 525.

54 *Id.* at 524 (footnote omitted). The parties stipulated that the "discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation" of a Louisiana statute. *Id.* (citation omitted).

55 *Id.*

56 *Id.* at 531. The Court explained that:

> Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.

Id. at 530-31 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)) (alteration in original).

57 *Id.* at 538 (citing Fay v. New York, 332 U.S. 261, 284 (1947)) (other citation omitted). The Court explained that it was imposing "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.*

58 *Id.* at 537 (overruling *Hoyt v. Florida*); *contra supra* note 48 (discussing the facts and holding of *Hoyt*). Justice White held that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinc-

Although the *Strauder*, *Ballard*, and *Taylor* Courts settled the issue of intentional discrimination in preliminary jury selection procedures,[59] the Supreme Court did not address the Fourteenth Amendment implications of a prosecutor's use of the peremptory challenge until 1965 in *Swain v. Alabama*.[60] The Court reviewed petitioner Swain's claim that the State violated the Fourteenth Amendment by using its peremptory strikes to intentionally remove all six blacks from the final venire.[61] Justice White, writing for the majority, held that the striking of blacks in a particular case is not a violation of equal protection.[62] The Court also stated, how-

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tive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538.

59 *See Taylor*, 419 U.S. at 531 (explaining that the systematic exclusion of women from the venire violates the Sixth Amendment fair cross section requirement); Ballard v. United States, 329 U.S. 187, 193 (1946) (holding that the intentional exclusion of women from the jury panel violates congressional intent); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (determining that the exclusion of black men from jury service solely on account of race is a denial of equal protection).

60 380 U.S. 202 (1965). *See generally* Saltzburg & Powers, *supra* note 50; Hon. George Bundy Smith, Swain v. Alabama: *The Use of Peremptory Challenges to Strike Blacks From Juries*, 27 How. L.J. 1571 (1984).

In *Swain*, a black man was convicted of rape and sentenced to death by an all-white jury, even though there were eight blacks on the final venire. *Swain*, 380 U.S. at 203, 205. Of the eight blacks on the venire, two were exempt and the remaining six were struck peremptorily by the prosecutor. *Id.* at 205. The petitioner claimed that discrimination existed because black males made up 26% of the population eligible for jury service, yet only constituted 10-15% of jury panels drawn since 1953, and because no black person had ever actually served on a petit jury in Talladega County since 1950. *Id.* at 205. Before discussing the Fourteenth Amendment, the *Swain* Court addressed the issue of what constituted proof of discriminatory intent, and held that a mere underrepresentation of blacks on a jury is not sufficient proof of a prosecutor's intent to discriminate in violation of the Equal Protection Clause. *Id.* at 208-09 (citations omitted). The Court began its analysis by examining the basic tenets of jury selection and discrimination as determined by *Strauder*. *Id.* at 203. (citations omitted). The Court reaffirmed that "'[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.'" *Id.* at 204 (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)). Despite the *Strauder* Court's findings, however, the *Swain* Court held that "purposeful discrimination may not be assumed or merely asserted." *Id.* at 205. (citations omitted). Thus, the Court found that the average of six, seven, or eight blacks on a jury panel does not constitute unlawful discrimination under the case law of the Court. *Id.* at 206 (citations omitted). Although Alabama's juries did contain an underrepresentation of black members, the Court explained that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit juries are drawn." *Id.* at 208 (citations omitted). Thus, the Court held that the underrepresentation of the black race by 10% does not prove purposeful discrimination. *Id.* at 208-09 (citations omitted).

61 *Id.* at 210 (footnote omitted).

62 *Id.* at 221. The Court examined the "very old credentials" of the peremptory

ever, that a prosecutor's systematic and intentional exclusion of blacks from *every* jury panel might present a prima facie case under the Fourteenth Amendment.[63] In those circumstances, Justice White explained, the goals of the peremptory challenge would be perverted.[64] The *Swain* Court, however, did not pursue the issue further because it found that the petitioner had not met its burden of proof in showing a purposeful exclusion of blacks through the use of the peremptory challenge.[65]

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challenge. *Id.* at 212. Quoting Blackstone, Justice White explained: "'[I]n criminal cases . . . there is . . . allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge. . . .'" *Id.* at 212 n.9 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353). The function of the peremptory challenge, the Court wrote, is "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.* at 219. Thus, Justice White stated that the peremptory is "exercised without a reason stated, without inquiry and without being subject to the court's control," and is often based upon the "'sudden impressions and the unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Id.* at 220 (citations and quotation omitted). Furthermore, the Justice emphasized that the challenge may be exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Id.* (footnote omitted). Relying on these notions, the *Swain* Court held that a prosecutor's use of the peremptory challenge against blacks *in a particular case* does not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 221.

63 *Id.* at 224. The petitioner argued that because no black person had ever served on a petit jury in a civil or criminal case in Talladega County, prosecutors were consistently and systematically excluding blacks from juries by using the peremptory challenge in a way contrary to the provisions of the Fourteenth Amendment. *Id.* at 222-23. The Court held that while "'[t]he fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the defendant is a Negro does not constitute a violation of the defendant's constitutional rights,'" a prosecutor's peremptory removal of every black eligible for service in every case, so that no black person ever serves on a jury, "takes on added significance." *Id.* at 223 & n.30 (quotation omitted).

64 *Id.* at 223-24. Justice White elaborated:

> [i]f the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Id. at 224.

65 *Id.* at 226. Justice White explained that:

> Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the per-

The *Swain* Court's holding remained good law until 1986 when the Court altered the decision in *Batson v. Kentucky*.[66] *Batson*

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emptory strike system or on whether the prosecutor systematically strikes Negroes in the county.

Id. at 228 n.32.

In a powerful dissenting opinion, Justice Goldberg, joined by Chief Justice Burger and Justice Douglas, explained that the majority, despite purporting to rely on *Strauder*, essentially departed from that case's basic holding. *Id.* at 231 (Goldberg, J., dissenting). Justice Goldberg reiterated that *Strauder* stands for the notion that, under the Equal Protection Clause, a state may not exclude persons from a jury merely because of their race. *Id.* at 229 (Goldberg, J., dissenting) (quotation omitted). The *Swain* dissent asserted that the petitioner did in fact present a prima facie case of intentional discrimination by showing that no black had ever served on a petit jury in Talladega County. *Id.* at 238 (Goldberg, J., dissenting). Thus, Justice Goldberg propounded:

> I deplore the Court's departure from its holding[ ] in *Strauder*. . . . By affirming petitioner's conviction on this clear record of jury exclusion because of race, the Court condones the highly discriminatory procedures used in Talladega County under which Negroes never have served on any petit jury in that county. By adding to the present heavy burden of proof required of defendants in these cases, the Court creates additional barriers to the elimination of practices which have operated in many communities throughout the Nation to nullify the command of the Equal Protection Clause in this important area in the administration of justice.

Id. at 246 (Goldberg, J., dissenting) (citation omitted).

66 476 U.S. 79, 93 (1986); *see Swain*, 380 U.S. at 221 (holding that the striking of blacks in a particular case is not a denial of equal protection); *supra* notes 60-65 and accompanying text (discussing the facts and holding of *Swain*). For a more detailed analysis of the *Batson* decision, see generally Underwood, *supra* note 31; J. Christopher Peters, Note, Georgia v. McCollum: *It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth?*, 53 LA. L. REV. 1723 (1993).

The *Batson* Court noted that the *Swain* holding had been widely commented upon. *Batson*, 476 U.S. at 90 n.14 (citing Roger C. Harper, Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1375 (1985) (arguing that the *Swain* Court's presumption that the prosecutor's use of the peremptory challenge is non-discriminatory "has been an insurmountable barrier to a successful equal protection challenge"); Imlay, *supra* note 2, at 270 (stating that "given the license of the *Swain* decision, it [the peremptory challenge] is probably the single most significant means by which [ ] prejudice and bias is injected into the jury selection system"); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1175 (1966) (explaining that "[t]he Court in *Swain*. . . threw up its hands in the face of the[ ] problems [resulting from the decision], and in effect handed the states a blank check for discrimination")) (other citations omitted). The Court observed that some commentators, on the other hand, have urged the Court to adhere to *Swain*'s holding. *Id.* (citing Saltzburg & Powers, *supra* note 50). Saltzburg and Powers maintained that:

> the recent decisions prohibiting the use of certain traits as grounds for peremptorily challenging jurors are misconceived . . . and . . . in the long run . . . may do more harm to the litigation process than does the *Swain* rule. There are problems with peremptory challenges, but they are not those superficially identified in the recent cases that stand in opposition to *Swain*.

Saltzburg & Powers, *supra* note 50, at 338-39.

involved a criminal trial of a black man in which the prosecutor used peremptory challenges to remove all four blacks from the venire.[67] Batson, the petitioner, challenged the State's practice under the Sixth Amendment's fair cross section requirement as well as under the Fourteenth Amendment's Equal Protection Clause.[68]

Justice Powell, writing for the Court, began by reaffirming the principle announced in *Strauder* that the Fourteenth Amendment prevents a state from purposefully excluding a potential juror because of that person's race.[69] In a departure from its holding in *Swain*, however, the Court determined that a state's ability to strike potential jurors is governed by the Equal Protection Clause, just as discrimination in the selection of the venire is prohibited by the Clause.[70] Thus, the Court held that the Equal Protection Clause prevents a prosecutor from challenging jurors solely on the basis of race or based on the presumption that, as a group, black jurors will

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67 *Batson*, 476 U.S. at 82-83.

68 *Batson*, 476 U.S. at 83. The petitioner conceded that *Swain* allowed the State to use the peremptory challenge against potential jurors solely because of race in an individual trial. *Id.* Batson asked the Court to adopt the decisions of other states, however, and to hold that such practices violated the Sixth Amendment. *Id.* (citing Commonwealth v. Soares, 387 N.E.2d 499, 518 (Mass.) (holding that defendants "made a prima facie showing of improper exercise of peremptory challenges on the basis of group membership, and shifted the burden to the prosecutor to justify his challenges as predicated not on group affiliation, but on individual characteristics specific to each group member excluded"), *cert. denied*, 444 U.S. 881 (1979)); People v. Wheeler, 583 P.2d 748, 766 (1978) (concluding that defendants "made a prima facie showing that the prosecutor was exercising peremptory challenges against black jurors on the ground of group bias alone"). Additionally, the petitioner attempted to prove that the State had implemented a "pattern" of discrimination in its use of the peremptory challenge, thus establishing a violation of the Equal Protection Clause under *Swain*. *Id.* at 83-84.

69 *Id.* at 85 (citing Strauder v. West Virginia, 100 U.S. 303, 310 (1879)). The Court explained that *Strauder* "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Id.* Relying on *Thiel* and *Ballard*, the Court explained that racial discrimination harms more than just the accused: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87 (citing Ballard v. United States, 329 U.S. 187, 195 (1946)) (other citation omitted).

70 *See id.* at 91, 97 (citations omitted). Relying on the basic tenets of earlier cases, the Court overruled the portion of *Swain* that allowed the prosecutor to use the peremptory challenge on the basis of race. *Id.* at 96. The Court did not, however, express any opinion as to whether the holding should apply to defendants' exercise of the peremptory challenge. *See id.* at 89. *But see infra* notes 80-96 and accompanying text (discussing the extension of *Batson* to a criminal defendant's use of the peremptory challenge).

be unable to remain neutral when the defendant is also black.[71]

The *Batson* Court also departed from the holding in *Swain* by concluding that a defendant may use evidence of the prosecutor's use of the peremptory challenge to establish a prima facie case of purposeful discrimination.[72] In determining whether the defendant has met his burden of proof, the Court advised, the trial court must take all relevant circumstances into account; one such relevant circumstance would be a pattern of challenges against a group that might raise an inference of discrimination.[73] Finally, the Court emphasized that the peremptory challenge is an important part of the trial process and explained that its holding was not meant to thwart the contribution that the challenge makes to the justice system.[74]

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71 *Batson*, 476 U.S. at 89. Justice Powell rejected the "assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.*

72 *Id.* at 96. Justice Powell noted that in *Swain*, the Court held that a black defendant could only establish a prima facie case of purposeful discrimination by proving that the system in general was being perverted. *Id.* at 91 (citing Swain v. Alabama, 380 U.S. 202, 224 (1965)). The *Batson* Court, however, lessened the burden on the defendant by reaffirming subsequent decisions holding that the "'total or seriously disproportionate exclusion of Negroes from jury venires,' [ ] 'is itself such an "unequal application of the law . . . as to show intentional discrimination."'" *Id.* at 93 (quoting Washington v. Davis, 426 U.S. 229, 241, 242 (1976)).

More specifically, the Court relied upon *Castaneda v. Partida* to reiterate the standards for establishing a prima facie case of discrimination. *Id.* at 96 (citing Castaneda v. Partida, 430 U.S. 482, 494-95 (1977)). First, the defendant must show "that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* (citing *Castaneda*, 430 U.S. at 494). Second, the defendant may rely on the undisputed fact that the peremptory challenge allows "'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). Finally, the defendant must prove that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.*

73 *Id.* at 96-97. Once the defendant has established this requisite showing of purposeful discrimination, the burden then shifts to the prosecution to provide a race-neutral explanation for striking the black juror. *Id.* at 97. The Court explained that the prosecutor's reason need not, however, "rise to the level justifying exercise of a challenge for cause." *Id.* (citations omitted).

74 *Id.* at 98-99. Justice Rehnquist, however, did not share the Court's optimism concerning the effect of the holding on the future of the peremptory challenge. *See id.* at 134 (Rehnquist, J., dissenting). The Justice maintained that "'[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory. . . .'" *Id.* at 136 (Rehnquist, J., dissenting) (quoting *Swain*, 380 U.S. at 221-22).

Chief Justice Burger shared Justice Rehnquist's skepticism in a separate dissenting opinion. *See id.* at 112 (Burger, C.J., dissenting) (citation omitted). Specifically, Chief Justice Burger explained that if racial classifications in the exercise of the per-

A few years after the Court radically changed its interpretation of the Fourteenth Amendment as applied to a state's exercise of the peremptory challenge, the Supreme Court considered a series of cases questioning the application and limits of the *Batson* rule.[75] In the first of these cases, *Powers v. Ohio*,[76] the Court considered the issue of whether a criminal defendant may question the prosecution's race-based peremptory strike if the defendant and the stricken juror are of different races.[77] The Court relied on *Batson v. Kentucky*, where the defendant and the challenged juror were both black, to hold that the Equal Protection Clause prohibits a state from using the peremptory challenge to exclude otherwise qualified jurors solely on the basis of race, regardless of whether the defendant and the excluded juror share the same race.[78]

Two months after its holding in *Powers*, the Court, in *Edmonson*

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emptory challenge are subject to equal protection analysis, so then would classifications based upon sex or upon mental capacity. *Id.* at 124 (Burger, C.J., dissenting) (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985); Craig v. Boren, 429 U.S. 190, 210 (1976)) (other citations omitted). The Chief Justice explained that "[i]n short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a 'classification' subject to equal protection scrutiny." *Id.* (citation omitted). Additionally, the Chief Justice contended that to allow inquiry into the reasons behind a prosecutor's use of the peremptory challenge "would force 'the peremptory challenge [to] collapse into the challenge for cause.'" *Id.* at 127 (Burger, C.J., dissenting) (alteration in original) (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

75 *See* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (holding that the Equal Protection Clause prevents a criminal defendant's discriminatory use of the peremptory challenge); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (deciding that private civil litigants may not exercise the peremptory challenge in a discriminatory manner); Powers v. Ohio, 499 U.S. 400, 415 (1991); *Batson*, 476 U.S. at 98-99 (holding that *Batson* applies whether or not defendant and excluded juror share the same race); *infra* notes 81-96 and accompanying text (explaining the Court's extension of *Batson* in subsequent case law).

76 499 U.S. 400 (1991). *See generally* Underwood, *supra* note 31; Bradley R. Kirk, Note, *Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in* Powers v. Ohio *and* Edmonson v. Leesville Concrete Co., 19 PEPP. L. REV. 691 (1992).

77 *Powers*, 499 U.S. at 404 (citation omitted). In *Powers*, a white man objected to the State's use of peremptory strikes against black men, and asked the trial court to compel the prosecutor to provide a race-neutral explanation for each strike. *Id.* at 402, 403. The trial court overruled the petitioner's objections and denied his request for race-neutral explanations. *Id.* at 403 (citation omitted).

78 *Id.* at 415. First, the Court noted that while the *Powers* petition for certiorari was pending, the Court decided *Holland v. Illinois*, and held that the Sixth Amendment does not prevent the prosecutor from using peremptory challenges to exclude potential jurors whose race differs from that of the defendant. *Id.* at 403-04 (citing Holland v. Illinois, 493 U.S. 474 (1990)). Five members of the *Holland* Court, however, concluded that a defendant might successfully object to the discriminatory use of the peremptory challenge on equal protection grounds. *Id.* at 404 (citing *Holland*, 493

v. Leesville Concrete Co.,[79] decided the issue of whether a private party in a civil proceeding may use the peremptory challenge to exclude jurors solely on the basis of race.[80] The Court cited the divided panel of the Fifth Circuit Court of Appeals for the proposition that private parties, when exercising the peremptory challenge, become state actors for equal protection purposes.[81] Justice Kennedy, relying upon *Lugar v. Edmonson Oil Co.*,[82] held that Leesville Concrete's peremptory challenges were made "pursuant to a course of state action" and therefore violated excluded jurors' constitutional rights.[83]

Similarly, one year later in *Georgia v. McCollum*,[84] the Court considered whether the Equal Protection Clause prevents a criminal defendant from exercising race-based peremptory challenges.[85]

U.S. at 488 (Kennedy, J., concurring); 493 U.S. at 491 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.); 493 U.S. at 507 (Stevens, J., dissenting)).

In *Powers*, the Court found that a criminal defendant "suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race." *Powers*, 499 U.S. at 413. Therefore, the Court explained, "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom," thus making it "necessary and appropriate for the defendant to raise the rights of the juror." *Id.* at 413-14. The Court concluded that the fact that the defendant and the excluded juror were of different races was irrelevant to the defendant's standing to object to the race-based exclusion of the juror. *Id.* at 415.

79 500 U.S. 614 (1991). *See generally* Cynthia L. Eldridge, Note, *Peremptory Challenges in Civil Cases—Does* Edmonson *Alleviate Racial Discrimination in the Jury Selection Process?*, 13 MISS. C. L. REV. 261 (1992); Kirk, *supra* note 76.

80 *Edmonson*, 500 U.S. at 616. In *Edmonson*, respondent Leesville Concrete used two out of its three peremptory strikes to exclude black persons from the venire. *Id.* The district court refused Edmonson's request that Leesville provide race-neutral explanations for the strikes. *Id.* at 617. Specifically, the district court held that *Batson* does not apply in civil cases involving private parties. *Id.* Consequently, the court empaneled a jury that included only one black person. *Id.*

81 *Id.* at 617 (citation omitted). The Court explained that "to limit *Batson* to criminal cases 'would betray *Batson*'s fundamental principle [that] the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause.'" *Id.* (citation omitted) (alteration in original).

82 457 U.S. 922 (1982).

83 *Edmonson*, 500 U.S. at 616, 622. The Supreme Court relied upon *Lugar* to determine "where the governmental sphere ends and the private sphere begins." *Id.* at 620. In *Lugar*, the Court considered what constituted state action by asking first "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, . . . private parties[ ] may be appropriately characterized as 'state actors.'" *Lugar*, 457 U.S. at 939. Finding that the *Lugar* test was satisfied in *Edmonson*, the Court held that the petitioner was a state actor for equal protection purposes, and was therefore prohibited from exercising the peremptory challenge in a racially discriminatory manner. *Edmonson*, 500 U.S. at 616, 622.

84 112 S. Ct. 2348 (1992). *See generally* Peters, *supra* note 66; Salvatore Picariello, Note, 23 SETON HALL L. REV. 1160 (1993).

85 *McCollum*, 112 S. Ct. at 2351.

Justice Blackmun explained that the Court must consider four factors in deciding whether the Equal Protection Clause forbids criminal defendants from engaging in such challenges.[86] First, the Justice asked whether a criminal defendant's use of race-based challenges causes the injury addressed by *Batson*.[87] Second, the Court examined whether the defendant's use of the peremptory challenge constitutes state action.[88] Third, Justice Blackmun asked whether the prosecutor had standing to object to the peremptory strike.[89] Finally, the Court questioned whether the criminal defendant's constitutional rights should override the extension of *Batson* to criminal defendants.[90] Relying on *Lugar*, *Powers*, and *Edmonson*, the Court found that the State met each element of this four part test, and therefore demonstrated a prima facie case of intentional discrimination by the defendant.[91] Accordingly, the

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86 *Id.* at 2353.

87 *Id.* Justice Blackmun noted that "[a]s long ago as *Strauder*, this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror," and harms not only the defendant but "'extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.'" *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986); citing Strauder v. West Virginia, 100 U.S. 303, 308 (1879)). Thus, the Court declared that whether it is done by "the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *Id.* at 2354.

88 *Id.* Relying on *Lugar*, the Court considered whether the constitutional deprivation was a consequence of a state authorized right or privilege, and whether the party accused of the deprivation could logically be classified as a state actor. *Id.* at 2355 (citing *Lugar*, 457 U.S. at 941-42). Finding that the State proved both of these factors, the *McCollum* Court held that criminal defendants are state actors for equal protection purposes, and thus the defendant's race-based peremptory strikes violated the Fourteenth Amendment. *Id.* at 2355, 2357 (citations omitted).

89 *Id.* at 2357. Relying on *Powers*, the Court held that "[a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial." *Id.*

90 *Id.* at 2357-58. The Court stated that the final question of "whether the interests served by *Batson* must give way to the rights of a criminal defendant" depends upon whether peremptory challenges are fundamental rights subject to constitutional protection. *Id.* The Court held that "the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Id.* at 2358 (citations omitted). Thus, the Court concluded that because the defendant possesses no absolute right to the peremptory challenge, the interests served by *Batson* and protected by the Constitution preclude a criminal defendant from using the challenge in a racially discriminatory manner. *Id.* at 2358, 2359.

91 *Id.* at 2353-59. The Court held that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." *Id.* at 2359. The Court concluded that peremptory strikes "must not be based on either the race of the juror or the racial stereotypes held by the party." *Id.*

Court determined that under the *Batson* rule, the defendant was required to provide a race-neutral explanation for the use of a peremptory challenge.[92]

Amid this debate over the Fourteenth Amendment's applicability to gender and race discrimination in both venire selection and litigants' exercise of the peremptory challenge, the Court decided *J.E.B. v. Alabama ex rel. T.B.*.[93] Justice Blackmun, writing for the majority, addressed the question of whether *Batson*'s prohibition of intentional discrimination on the basis of race should be extended to gender.[94] The Court answered in the affirmative, holding that the Fourteenth Amendment prohibits the exercise of gender-based peremptory challenges.[95]

The majority prefaced its analysis by explaining that beginning with *Batson*, the Court has repeatedly strived to achieve fair and nondiscriminatory jury selection procedures.[96] Justice Blackmun recognized, however, that recent case law has dealt primarily with

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92 *Id.* at 2353, 2359 (quoting Batson v. Kentucky, 476 U.S. 79, 97 (1986)) (footnote omitted). Justice Thomas, although concurring in the judgment, wrote separately to express a "general dissatisfaction with [the Court's] continuing attempts to use the Constitution to regulate peremptory challenges." Id. at 2359 (Thomas, J., concurring) (citations omitted). Admonishing the Court's departure from the basic holding of *Strauder* (in that *McCollum* restricts criminal defendants' use of the peremptory challenge and thus elevates the rights of the juror above those of the criminal defendant), the Justice pronounced that "I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes." *Id.* at 2359-60 (Thomas, J., concurring) (citing Strauder v. West Virginia, 100 U.S. 303 (1879)).

Additionally, Justice Thomas concluded that the Court's decision created an "inquiry that ha[s] no clear stopping point." *Id.* at 2360 (Thomas, J., concurring). Thus, the Justice predicted that "[e]ventually, we will have to decide whether black defendants may strike white veniremen . . . . Next will come the question whether defendants may exercise peremptories on the basis of sex." *Id.* at 2360-61 (citation and footnote omitted).

93 114 S. Ct. 1419 (1994).

94 *Id.* at 1421.

95 *Id.* at 1422.

96 *Id.* at 1421. Justice Blackmun began the Court's historical analysis by noting that while a defendant has "'no right to a "petit jury composed in whole or in part of persons of his own race"' . . . the 'defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.'" *Id.* (quoting *Batson*, 476 U.S. at 85-86 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1879))). Additionally, the Court recognized that under the authority of *Powers*, *Edmonson*, and *McCollum*, the Fourteenth Amendment's prohibition of discrimination applies regardless of whether the proceeding is civil or criminal, and that "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Id.* (citing Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991)).

the race-based exclusion of jurors.[97] The Justice noted that the gender-based peremptory strike is a recent phenomenon.[98]

Relying on this foundation, the Court analyzed the level of scrutiny afforded classifications based on gender.[99] Justice Blackmun explained that beginning with *Reed v. Reed*,[100] the Court has

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97 *Id.* at 1421.

98 *Id.* at 1421, 1422. Justice Blackmun explained that gender-based peremptory challenges "were hardly practicable for most of our country's existence, since, until the 19th century, women were completely excluded from jury service." *Id.* at 1422 (footnote omitted). In fact, the Justice commented that "[s]o well-entrenched was this exclusion of women that in 1880 this Court, while finding that the exclusion of African-American men from juries violated the Fourteenth Amendment, expressed no doubt that a State 'may confine the selection [of jurors] to males.'" *Id.* at 1422-23 (second alteration in original) (quoting Strauder v. West Virginia, 100 U.S. 303, 310 (1879)) (other citations omitted).

Thus, the Justice began the Court's analysis with a comprehensive historical survey of cases confronting the exclusion of women from the jury. *See id.* at 1423 (citing Hoyt v. Florida, 368 U.S. 57, 62 (1961); Fay v. New York, 332 U.S. 261, 289-90 (1947); *Strauder*, 100 U.S. at 310). Justice Blackmun explained that it was not until 1946, in *Ballard v. United States*, that the Court first questioned the constitutionality of depriving women of the right of jury service, and held that defendants do not receive a fair trial if women are excluded from jury panels. *Id.* at 1424. (citing Ballard v. United States, 329 U.S. 187, 193-94 (1946)). The Court recognized, however, that even after women were granted the right to sit on juries, many states continued to exclude women by allowing "exemptions" to women that were intended to deter them from service. *Id.* at 1423 (citing *Fay*, 332 U.S. at 289).

The rationale for such exclusion, the Court explained, originated in the English common law, which excluded women because of "'the doctrine of *propter defectum sexus*, literally, the "defect of sex."'" *Id.* (quoting United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (quotation omitted)) (footnote omitted).

The Court explained that in the United States, however, the practice of excluding women from juries was based upon the "ostensible need to protect women from the ugliness and depravity of trials." *Id.* (citing Bailey v. State, 219 S.W.2d 424, 428 (Ark. 1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady."); Bradwell v. State, 16 Wall. 130, 141 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.")) (other citation omitted).

99 *Id.* at 1424.

100 404 U.S. 71 (1971). In *Reed*, Chief Justice Burger decided the constitutionality of a section of the Idaho Code. *Id.* at 74 (footnote omitted). The Court explained that section 15-312 "designate[d] the persons who are entitled to administer the estate of one who dies intestate," and provided "'[o]f several persons claiming and equally entitled . . . to administer, males must be preferred to females. . . .'" *Id.* at 72-73 (quotation omitted). The Court reversed the decision of the Idaho Supreme Court and held that the challenged section violated the Fourteenth Amendment's Equal Protection Clause and was therefore void. *Id.* at 74 (footnote omitted).

In its analysis, the Court noted that section 15-312 mandated preferential treatment to males solely on the basis of sex, "thus establish[ing] a classification subject to

applied heightened scrutiny to gender-based classifications.[101] This heightened scrutiny, the Court stated, functions to limit the exercise of government policies premised on gender-based stereotypes.[102]

While the majority stipulated that the experiences of racial minorities and women have been different, the Court claimed that the similarities between the discriminatory histories of the two groups negate those differences.[103] Justice Blackmun, however, found it unnecessary to determine whether racial minorities or women have suffered more from state-sponsored discrimination, and

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scrutiny under the Equal Protection Clause." *Id.* at 75. The Chief Justice also recognized that although states may treat different classes of people in different ways, the Equal Protection Clause forbids states from legislating differential treatment of classes "on the basis of criteria wholly unrelated to the objective of that statute." *Id.* at 75-76 (citations omitted). Applying heightened scrutiny to the classification, the Court explained that it "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* at 76 (quotation omitted). Failing to find a rational relationship between any legitimate state objective and the statute in question, the Court held that the statute made an "arbitrary legislative choice" solely on the basis of sex, and therefore violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 76-77.

101 *J.E.B.*, 114 S. Ct. at 1424.

102 *J.E.B.*, 114 S. Ct. at 1424 (citations omitted). Relying on *Craig*, the Court explained that it will apply heightened scrutiny "in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender . . . or based on 'outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas."'" *Id.* at 1424-25 (quoting Craig v. Boren, 429 U.S. 190, 198-99 (1976) (citations omitted)) (other citation omitted).

In *Craig*, the petitioner asked the Court to declare invalid an Oklahoma statute providing different drinking ages for men and women. *Craig*, 429 U.S. at 192. The Court, relying on *Reed*, declared that statutory classifications based on gender are governed by the Equal Protection Clause, and therefore must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197 (quoting *Reed*, 404 U.S. at 75). The majority also noted that decisions following *Reed* have applied the two-prong heightened scrutiny test. *Id.* at 198 (citing Stanton v. Stanton, 421 U.S. 7, 13 (1975)) (other citations omitted). Finding statistical evidence regarding the State's purported interest (traffic safety) and its correlation to gender unconvincing, the Court held that the Oklahoma statute invidiously discriminated against men aged 18-20 in violation of the Equal Protection Clause. *Id.* at 204.

103 *J.E.B.*, 114 S. Ct. at 1425 (quoting Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)). Expanding this proposition, the Court relied upon *Frontiero v. Richardson*, stating that "'[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Id.* (quoting Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (plurality opinion)). Justice Blackmun elaborated: "[c]ertainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to end for women many years after the embarrassing chapter in our history came to an end for African-Americans." *Id.*

concluded instead that the nation's long history of sex discrimination justifies the heightened scrutiny afforded all classifications based on gender.[104] Recognizing that the only legitimate interest that the litigant may possess lies in the desire to obtain a fair and impartial trial,[105] the Court held that peremptory challenges based on gender are not substantially related to any important governmental interest and, therefore, fail the heightened scrutiny test.[106]

The Court next addressed the respondent's claim that men and women view certain issues differently, thereby justifying the gender-based peremptory challenge.[107] Justice Blackmun ultimately rejected the respondent's argument, asserting that the Court will not allow the stereotype that men and women possess different world views to serve as a defense to gender-based peremptory strikes.[108] Justice Blackmun explained that the jurisprudence in this area confirms that gender classifications premised on stereo-

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104 *Id.* (quoting *Frontiero*, 411 U.S. at 684). Justice Blackmun explained that under the Court's recent "equal protection jurisprudence, gender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *Id.* (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)) (other citations omitted).

For a more detailed discussion of the levels of scrutiny applied in equal protection analysis, see generally Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

105 *J.E.B.*, 114 S. Ct. at 1426 & n.8 (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("'[The] sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact.'")).

106 *Id.* at 1425-26. Accordingly, the Court refused to decide whether gender-based classifications are inherently suspect, thereby deserving strict scrutiny. *Id.* at 1425 n.6 (citing *Hogan*, 458 U.S. at 724 n.9 (holding that a state-sponsored school's policy of denying admission to men does not serve any legitimate state interest, and asserting that the Court "need not decide whether classifications based upon gender are inherently suspect"); Stanton v. Stanton, 421 U.S. 7, 13 (1975) (finding "it unnecessary in this case to decide whether a classification based on sex is inherently suspect")) (other citation omitted).

107 *Id.* at 1426 & n.9 (quoting REID HASTIE ET AL., INSIDE THE JURY 140 (1983) ("Neither student nor citizen judgments for typical criminal case material have revealed differences between male and female verdict preferences. . . . The picture differs [only] for rape cases, where female jurors appear to be somewhat more conviction-prone than male jurors.")). The Court observed, however, that the majority of studies have found that gender plays no significant role in a juror's verdict. *Id.* at 1426 n.9 (quoting VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 76 (1986) ("[I]n the majority of studies there are no significant differences in the way men and women perceive and react to trials . . . .")).

108 *Id.* at 1426 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)). Justice Blackmun declared that the Court would "not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" *Id.* (quoting *Powers*, 499 U.S. at 410). The Court explained that respondent's rationale that gender is an "accurate predictor of juror's attitudes" was similar to the arguments proffered decades ago to exclude women from jury service. *Id.* at 1426-27 (footnote omitted). Accepting this argument, Justice Blackmun explained, would require the Court to hold that "gross

types, even if statistically supported, violate equal protection.[109]

The majority observed that discriminatory jury selection procedures harm not only the litigants, but also the community and the wrongfully excluded jurors.[110] Additionally, the Court explained, the fact that the discriminatory practice was directed at men in this case, rather than at women, did not exempt it from the heightened scrutiny afforded all gender-based classifications.[111] In light of these determinations, the Court concluded that, like race, gender is an unconstitutional measure of juror competence and impartiality.[112] Justice Blackmun elaborated that the opportunity to participate in government through the jury system is essential to a democratic society.[113] Therefore, the Court held that the basic promise of the Equal Protection Clause would be violated were the Court to allow the State to exclude jurors solely on account of gender-based assumptions regarding a juror's ability and

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generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender." *Id.* at 1427.

109 *Id.* at 1427 n.11 (quoting Craig v. Boren, 429 U.S. 190, 201 (1976) (holding that an Oklahoma law providing different drinking ages for males and females is invalid despite evidence described as "'not trivial in a statistical sense'"); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (declaring that the Social Security Act, which provided benefits to widows but denied them to widowers, is unconstitutional even though the rationale for the classification was "'not entirely without empirical support'")).

110 *Id.* at 1427.

111 *Id.* at 1428 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (determining that the state's "discriminat[ion] against males rather than against females does not exempt it from scrutiny or reduce the standard of review")) (other citation omitted). Thus, the Court rejected the respondent's argument that men, because they have not historically suffered discrimination based on gender, should be denied constitutional protection in jury selection. *Id.*

Justice Blackmun also rejected the " popular refrain that *all* peremptory challenges are based on stereotypes of some kind," and noted that peremptories based on "group characteristics other than race or gender . . . do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on ju.ies, pursuing their chosen professions, or otherwise contributing to civic life." Id. at 1428 n.14. (citing Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1173 (1993)).

112 *Id.* at 1421. Justice Blackmun emphasized that the Court's decision "does not imply the elimination of all peremptory challenges." *Id.* at 1429. Additionally, the Justice explained, litigants may still use the peremptory challenge to strike groups of jurors who would normally be subject to rational basis review. *Id.* (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985)) (other citation omitted). Justice Blackmun asserted that "[e]ven strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." *Id.* (footnote omitted).

113 *Id.* at 1430 (footnote omitted).

impartiality.[114]

In a concurring opinion, Justice O'Connor agreed with the Court's holding that the Equal Protection Clause forbids state-sponsored gender discrimination.[115] The Justice wrote separately, however, to stress that the majority's holding was not without costs.[116] Most importantly, the Justice asserted, while the Court may have succeeded in eliminating gender-based discrimination, it also dealt a serious blow to the peremptory challenge by further constitutionalizing the practice.[117] For this reason, Justice O'Connor contended, the Court's holding should apply only to the government's exercise of gender-based peremptory strikes, thus shielding private civil litigants' or criminal defendants' use of the challenge from constitutional scrutiny.[118]

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114 *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 97-98 (1986)). Accordingly, the Court reversed the judgment of the Court of Civil Appeals of Alabama and remanded the case for further proceedings. *Id.*

115 *Id.* at 1430 (O'Connor, J., concurring).

116 *Id.* at 1431 (O'Connor, J., concurring). Justice O'Connor explained that both *Batson* mini-hearings and *Batson* appeals were already commonplace in the courts. *Id.* Thus, the Justice maintained, by "further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event." *Id.*

Additionally, Justice O'Connor reiterated that the "'essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.'" *Id.* (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965)). Justice O'Connor explained that simply because an attorney cannot meet the standard necessary to strike the juror for cause "does not mean that the lawyer's instinct is erroneous." *Id.* Therefore, the Justice determined that "as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable." *Id.* In so doing, the Justice explained, the peremptory becomes more of a challenge for cause than a discretionary device. *Id.* Furthermore, the Justice contended, the Court's holding will "increase the possibility that biased jurors will be allowed onto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic." *Id.*

Justice O'Connor next discussed the correlation between gender and jurors' attitudes. *Id.* at 1432 (O'Connor, J., concurring). The Justice maintained that litigants' gender-based assumptions may often be accurate:

> We know that like race, gender matters. . . . [O]ne need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. "'Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.'"

Id. (quoting Beck v. Alabama, 447 U.S. 625, 642 (1980)) (other citation omitted). Consequently, Justice O'Connor asserted, the extension of *Batson* to gender is costly in that it burdens the court system, brings us one step closer to the demise of the peremptory challenge, and precludes litigants from acting on what are sometimes correct gender-based assumptions about jurors' beliefs. *Id.*

117 *See id.* at 1431 (O'Connor, J., concurring).

118 *Id.* at 1432 (O'Connor, J., concurring). The Justice contended that the Court

Justice Kennedy, also concurring with the majority opinion, wrote separately to emphasize why precedent made the Court's holding necessary.[119] The Justice joined the Court's holding that gender-based peremptory strikes violate the Constitution.[120] Additionally, Justice Kennedy stressed that the Court's holding should serve to encourage jurors who are chosen by non-discriminatory means to likewise refrain from resorting to racial or gender bias in jury deliberations.[121]

In dissent, Chief Justice Rehnquist explained that the significant differences between gender and race discrimination demonstrate that *Batson* should not be extended to gender-based peremptory challenges.[122] Unlike the majority, the Chief Justice

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"made the mistake of concluding that private civil litigants were state actors when they exercised peremptory challenges" in *Edmonson*, and then "compounded the mistake by holding that criminal defendants were also state actors" in *McCollum*. *Id.* (citing Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)). The Justice stressed that not everything that happens in the court system can be called state action. *Id.* Accordingly, Justice O'Connor maintained that the Equal Protection Clause should not preclude criminal defendants and private civil litigants from exercising gender-based peremptory challenges. *Id.* at 1433 (O'Connor, J., concurring).

119 *Id.* (Kennedy, J., concurring).

120 *See id.* at 1433-34 (Kennedy, J., concurring). First, Justice Kennedy observed that "[i]n recognition of the evident historical fact that the Equal Protection Clause was adopted to prohibit government discrimination on the basis of race, the Court most often interpreted it in the decades that followed in accord with that purpose." *Id.* at 1433 (Kennedy, J., concurring).

The Justice recounted that "much time passed before the Equal Protection Clause was thought to reach beyond the purpose of prohibiting racial discrimination and to apply as well to discrimination based on sex." *Id.* Relying on this history, the Justice concluded that "there is no doubt under [the Court's] precedents . . . that the Equal Protection Clause prohibits sex discrimination in the selection of jurors." *Id.* (citing Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975)).

121 *Id.* at 1434 (Kennedy, J., concurring). Justice Kennedy explained that:

> [o]nce seated, a juror should not give free rein to some racial or gender bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.

Id.

122 *Id.* at 1434-35 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist elaborated that equal protection jurisprudence shows that the differences between race and gender justify the different degrees of protection afforded each group. *Id.* at 1435 (Rehnquist, C.J., dissenting). Race-based classifications, the Chief Justice explained, "are inherently suspect, triggering 'strict scrutiny,'" while classifications based on gender

asserted that gender-based peremptory strikes do "'substantially further'" the legitimate state interest of ensuring fair and impartial trials.[123] Accordingly, Chief Justice Rehnquist declared that the Constitution does not mandate the extension of *Batson* beyond race.[124]

Justice Scalia, joined by the Chief Justice and Justice Thomas, also dissented from the Court's holding.[125] First, Justice Scalia contended that the petitioner did not suffer any injury.[126] Second, Justice Scalia explained that because all groups were subject to the peremptory challenge, no group was denied equal protection.[127] Additionally, Justice Scalia posited that a woman who is struck from a venire because of stereotypes regarding her qualifications to serve as a juror suffers a real harm, while a woman struck peremp-

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"are judged under a heightened, but less searching standard of review." *Id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Additionally, the Justice averred, all of the Court's post-*Batson* decisions have involved race-based peremptory challenges and "have described *Batson* as fashioning a rule aimed at preventing purposeful discrimination against a cognizable *racial* group." *Id.* (emphasis added) (citing *McCollum*, 112 S. Ct. at 2359; *Edmonson*, 500 U.S. at 616; Powers v. Ohio, 499 U.S. 400, 402 (1991); Holland v. Illinois, 493 U.S. 474, 476-477 (1990)) (other citations omitted).

123 *Id.* (citing Swain v. Alabama, 380 U.S. 202, 212-20 (1965); Batson v. Kentucky, 476 U.S. 79, 118-20 (1986) (Burger, C.J., dissenting)).

124 *Id.* at 1435-36 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist concluded that "the Constitution simply does not require the result which [the Court] reaches." *Id.* at 1436 (Rehnquist, C.J., dissenting).

125 *Id.* at 1436 (Scalia, J., dissenting).

126 *See id.* at 1437 (Scalia, J., dissenting). Justice Scalia observed that the petitioner had the opportunity to, and in fact did, strike women from the jury. *Id.* at 1436 (Scalia, J., dissenting). Consequently, the dissent argued that the petitioner, a state actor under *Edmonson* and *McCollum*, "actually *inflicted* the harm on female jurors." *Id.* at 1437 (Scalia, J., dissenting) (citing *McCollum*, 112 S. Ct. at 2352; *Edmonson*, 500 U.S. at 626-27) (footnote omitted). In so doing, the Justice posited, the Court "accord[ed] petitioner a remedy because of the wrong done to male jurors" under a "uniquely expansive" reading of third-party standing. *Id.* (citing Powers v. Ohio, 499 U.S. 400, 415 (1991)).

127 *Id.* (citing *Powers*, 499 U.S. at 423-24 (Scalia, J., dissenting); Batson v. Kentucky, 476 U.S. 79, 137-38 (1986) (Rehnquist, J., dissenting)). The Justice argued that:

> [s]ince all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection . . . . That explains why peremptory challenges coexisted with the Equal Protection Clause for 120 years. This case is a perfect example of how the system as a whole is even-handed. . . . [F]or every man struck by the government petitioner's own lawyer struck a woman.

Id. (citing *Powers*, 499 U.S. at 423-24 (Scalia, J., dissenting); *Batson*, 476 U.S. at 137-38 (Rehnquist, J., dissenting)). The Justice explained that there could only be a denial of equal protection if both sides had intentionally struck members of a group "so that the strikes evinced group-based animus and served as a proxy for segregated venire lists." *Id.* (citing *Swain*, 380 U.S. at 223-24).

torily because of doubt that she, as an individual, lacks impartiality does not.[128]

Justice Scalia, like Justice O'Connor, observed that the majority's holding damaged the peremptory challenge system.[129] The Justice asserted that the demise of the "real peremptory" will affect the criminal defendant most dramatically.[130] Justice Scalia explained that the Court's holding harmed a practice that has historically been considered the cornerstone of a fair jury trial.[131]

While the *J.E.B.* Court reached the only politically correct decision in its effort to abolish discrimination from the courtroom, it ignored the fact that the decision contradicts the very nature of the peremptory challenge. The peremptory challenge, hailed as the most important right afforded litigants, has repeatedly been defined as a challenge based upon prejudice and discrimination.[132]

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128 *Id.* (citing *Powers*, 499 U.S. at 424 (Scalia, J., dissenting)). The Justice elaborated: "[t]here is discrimination and dishonor in the former, and not in the latter—which explains the 106-year interlude between [the Court's] holding that exclusion from juries on the basis of race was unconstitutional . . . and [the Court's] holding that peremptory challenges on the basis of race were unconstitutional." *Id.* at 1437-38 (Scalia, J., dissenting) (citing Strauder v. West Virginia, 100 U.S. 303, 310 (1879); *Batson*, 476 U.S. at 89).

129 *Id.* at 1438 (Scalia, J., dissenting). The Justice maintained that:

> much damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its whole character when (in order to defend against 'impermissible stereotyping' claims) 'reasons' for strikes must be given . . . . And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for 'reasoned peremptories' that the Court demands.

Id. at 1438, 1439 (Scalia, J., dissenting).

130 *Id.* at 1438 (Scalia, J., dissenting) (citing Georgia v. McCollum, 112 S. Ct. 2348 (1992)).

131 *Id.* at 1439 (Scalia, J., dissenting). The Justice declared that "[t]he Constitution of the United States neither requires nor permits this vandalizing of our people's traditions." *Id.*

132 *See Batson*, 476 U.S. at 121 (Burger, C.J., dissenting) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)); *see also* Lewis v. United States, 146 U.S. 370, 376 (1892) (stating that the peremptory challenge is often based upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another"). Chief Justice Burger, dissenting in *Batson*, explained that "'to enunciate [these prejudices] in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.'" *Batson*, 476 U.S. at 121 (Burger, C.J., dissenting) (quoting Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 553-54 (1975)). In fact, before the recent case law overruling *Swain*, the Court recognized that the peremptory challenge was "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain*, 380 U.S. at 220 (footnote omitted).

Thus, the Court's recent rulings, which disallow peremptories based on race and gender while allowing them if premised on other permissible prejudices, are illogical and incomplete.

The Court has taken a further step toward banning peremptories entirely,[133] yet has chosen again to walk the middle road: on the surface the Court praised the peremptory challenge as an important right, while in practice the Court struck a severe blow to the challenge. Thus, the Court continued to avoid condemning the exercise of the challenge as inherently biased, while simultaneously chipping away at its effectiveness. In so doing, the Court ignored the critical issue of whether peremptory challenges truly serve the function for which they were created: to ensure a fair and impartial jury trial.[134] Until the Court confronts this basic issue, the peremptory challenge's place in the system will remain confused and uncertain.[135]

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133 Although the immediate implication of the Court's recent decisions is a remedy of discrimination in the courtroom, the long term effect is a blow to the peremptory challenge. *See* Bray, *supra* note 2, at 568 (footnote omitted) ("The jury selection system can easily survive the loss of peremptory challenges.").

134 The Court has repeatedly praised the peremptory as an essential element in achieving a fair and impartial jury. *See Batson*, 476 U.S. at 99 n.22 (noting that historically, the peremptory challenge has been important in selecting an impartial jury); *Swain*, 380 U.S. at 212 (declaring that the peremptory challenge helps parties obtain a fair and impartial jury); Pointer v. United States, 151 U.S. 396, 408 (1894) (hailing the peremptory challenge as "one of the most important of the rights secured to the accused").

Some commentators, however, have contended that the peremptory challenge is merely a tool that litigants use to achieve a "stacked" jury. *See* Richard Singer, *Peremptory Holds: A Suggestion (Only Half Specious) of a Solution to the Discriminatory Use of Peremptory Challenges*, 62 U. DET. L. REV. 275, 288 (1985). Singer contended that "neither side really wishes an impartial jury, but rather wishes to do everything possible to find jurors more attuned to its world view." *Id.* In so doing, it would seem that litigants are able to secure an unfair and partial jury, contrary to the very purpose of the challenge.

135 For a discussion urging the Court to abolish the peremptory challenge, see Bunting & Reardon, *supra* note 2, at 358. The authors explained that:

> the Court has recognized that the [peremptory] challenge must yield to the constitutional requirements of equal protection. The recent cases of *Edmonson* and *Powers*, combined with a potential expansion to other cognizable groups will so dilute the effectiveness of the peremptory challenge, that it should be abolished in order to eradicate discrimination from the courtroom. The right to a fair and impartial jury is best served by abolishing the challenge outright, rather than allowing discrimination to continue under the uneven protection of *Batson* and *Edmonson*.

Id. at 358; *see also Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

Alternatively, authors have also argued that the peremptory challenge is an essen-

To achieve its goal of eradicating discrimination from the courtroom, the Court must ban the practice that is by definition based upon often inarticulable prejudices.[136] Concerns regarding the procedural impact of the Court's decision upon the entire system further contribute to the case for abolition of the peremptory. First, the Court's holding in *J.E.B.* will add to the number of *Batson* mini-hearings, in which litigants may demand explanations for strikes appearing to be gender-based. Consequently, the problem of over-crowded dockets will only increase as trials are stretched out, additional appeals are heard, and new trials are granted.[137] Second, and even more troublesome, is the fact that the Court has provided little guidance to the lower courts regarding implementation of the new rules.[138] Thus, "'[t]he pursuit of judicial perfection will require both trial and appellate courts to provide

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tial and irreplaceable component of the jury selection process. *See generally* Babcock, *supra* note 132; Horwitz, *supra* note 2. Horwitz asserted that "[t]he Supreme Court has, in essence, already abandoned the peremptory challenge as an outmoded relic of dissimilar judicial objectives from those of the present day. Yet, the peremptory is as important today as ever in achieving what it was designed to accomplish." Horwitz, *supra* note 2, at 1439 (footnote omitted).

136 *See supra* note 116 and accompanying text (explaining that an inarticulable suspicion is central to the use of the peremptory challenge).

137 Justice O'Connor stated that "*Batson* mini-hearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well. Demographics indicate that today's holding may have an even greater impact than did *Batson* itself." *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring). Additionally, as Justice Scalia argued in dissent:

> damage has been done . . . to the entire justice system, which will bear the burden of the expanded quest for 'reasoned peremptories' that the Court demands. The extension of *Batson* to sex, and almost certainly beyond . . . will provide the basis for extensive collateral litigation . . . . [E]very case contains a potential sex-based claim.

Id. at 1439 (Scalia, J., dissenting) (citing *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting)); *see also* Alschuler, *supra* note 2, at 156 (recognizing that *Batson* "produced cumbersome procedures that will generate burdensome litigation for years to come").

138 Dissenting in *Batson*, Chief Justice Burger recognized that

> The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: '[w]e make no attempt to instruct [trial] courts how best to implement our holding today.' . . . That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today.

Batson, 476 U.S. at 130-31 (Burger, C.J., dissenting) (citation omitted); *see also* Michael N. Chesney & Gerald T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for* Georgia v. McCollum, 67 NOTRE DAME L. REV. 1049, 1055 (1992) (criticizing the *Batson* Court for providing little guidance to litigants trying to rebut a prima facie case of discrimination).

speculative and impractical answers to artificial questions.'"[139] Third, as litigants are able to mask the real reasons for their strikes by claiming that the strikes were based upon what remain permissible stereotypes, the Court's decision may in fact be meaningless.[140] Thus, the Court's attempt to abolish discrimination will fail, and the peremptory is likely to collapse under the weight of these Court-created difficulties.

It seems that clever litigants have already devised and tested methods of circumventing the Court's holding in *J.E.B.* In *New York v. Allen*,[141] a recent New York Appellate Division case, the court was forced to consider implementation of the extension of *Batson* to gender-based peremptory challenges.[142] In *Allen*, the prosecution used ninety percent of its peremptory challenges to strike men for what it claimed were gender-neutral reasons, yet failed to strike women falling within those reasons.[143] The court held that the explanations were merely pretextual and served to mask the State's true intent to discriminate on the basis of gender.[144] Accordingly, the court reversed the convictions and ordered a new trial to consider the criminal charges against the defendant.[145]

Among the many problems with the New York court's implementation of *J.E.B.*'s extension of *Batson* to gender is that *Batson* merely required the party accused of discrimination to present race-neutral explanations for those strikes.[146] *Batson* did not require, as the *Allen* appellate court did, that the prosecutor give gender-neutral reasons for jurors who *were not struck* who might possibly be perceived as possessing some of the same undesirable

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139 *Batson*, 476 U.S. at 131 (Burger, C.J., dissenting) (quoting Holley v. J. & S. Sweeping Co., 192 Cal. Rptr. 74, 79 (Ct. App. 1983) (Holmdahl, J., concurring)).

140 *See Batson*, 476 U.S. at 106 (Marshall, J., concurring) ("If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."). Additionally, the potential for abuse of the peremptory challenge is not diminished by the Court's holding, but rather is increased as litigants are given the opportunity to question each and every strike. As Chief Justice Burger contended, "it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a 'classification' subject to equal protection scrutiny." *Id.* at 124 (Burger, C.J., dissenting) (citations omitted).

141 616 N.Y.S.2d 672, 673 (App. Div. 1994).

142 *See id.*

143 *Id.*

144 *Id.* at 673-74.

145 *Id.* at 674.

146 Batson v. Kentucky, 476 U.S. 79, 97 (1986).

characteristics as any excluded male juror.[147] The appellate court, in ordering those explanations, shifted the burden of proof onto the State, contrary to the holding of *Batson*.[148] Thus, the *J.E.B.* Court's failure to provide guidance to the lower courts, while adding to the confusion created by *Batson*, has already produced serious problems in the implementation of the new rule.

Although the majority claimed that the threat of discrimination is that it "'invites cynicism respecting the jury's neutrality'" into the courtroom,[149] the Court failed to recognize that its holding will actually invite skepticism into the entire jury selection process. The potential for cynicism is increased, not diminished, as attorneys are encouraged to challenge every peremptory strike as gender-based. Additionally, the Court has raised the right to sit on a jury—not a constitutional right—over the litigant's right to a fair and impartial trial, which is guaranteed by the Constitution.

Lastly, and perhaps most importantly for the future of the peremptory challenge, is the fact that the Court failed to address the question of just what stereotypes the law condemns.[150] Will they change over time? Is it the duty of each trial court to decide which classifications are permissible? Until the Court faces these questions and evaluates the effectiveness of the peremptory challenge as a tool to ensure a fair and impartial trial, the system is forced to proceed according to a logic that is destined to collapse under the weight of its own deficiencies.

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147 *Allen*, 616 N.Y.S.2d at 674 (Casey, J., dissenting) (citing *Batson*, 476 U.S. at 97).

148 *See Batson*, 476 U.S. at 97 (resting the burden of coming forward with a prima facie case of discriminatory intent on the party alleging discrimination).

149 J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1427 (1994) (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)).

150 *See id.* at 1426 (quoting *Powers*, 499 U.S. at 410).