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ONCE MORE INTO THE BREACH: THE PEREMPTORY CHALLENGE AFTER *EDMONSON v. LEESVILLE CONCRETE CO.*

The Constitution guarantees certain civil litigants the right to have their cases heard before a jury.¹ In the furtherance of justice, the law requires that the jury be impartial.² To ensure the vitality of this interest, the peremptory challenge was created by statute³ as a nonconstitutional⁴ device whereby litigants may remove, at voir dire,⁵ potential jurors suspected of bias.⁶ Federal

¹ U.S. CONST. amend. VII. "[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." *Id.*; see FED. R. CIV. P. 38. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." *Id.*; see also *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (right to jury trial is basic and fundamental right of our system of jurisprudence protected by Seventh Amendment).

² See *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965). The Seventh Amendment preserves the right to a jury trial for civil matters, but unlike the Sixth Amendment, it does not expressly provide for jury impartiality. *Id.* The impartiality of the jury "is inherent in the requirement of the fifth amendment that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law'." *Id.*; see also *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (plurality opinion) (stating that "[o]ne touchstone of a fair trial is an impartial trier of fact").

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

⁴ See *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (peremptory challenges not required by Constitution); *Gray v. Mississippi*, 481 U.S. 648, 663 (1987) ("[p]eremptory challenges are not of constitutional origin"); *Stilson v. United States*, 250 U.S. 583, 586 (1919) (establishing that peremptory challenges are not constitutionally required); see also *United States v. Meredith*, 824 F.2d 1418, 1423 n.2 (4th Cir. 1987) (rejecting argument that additional peremptory challenges are required in multi-defendant cases), *cert. denied*, 484 U.S. 969 (1988). *But see Swain v. Alabama*, 380 U.S. 202, 219 (1965) (peremptory challenge "is one of the most important of the rights secured to the accused") (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894)); *Lewis v. United States*, 146 U.S. 370, 376 (1892) (right of challenge originates from common law with right of trial by jury). See generally Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 815 (1989) (party using peremptory is exercising right created by state).

⁵ See BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). Voir dire is the term which "denote[s] the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." *Id.* It is during voir dire that the attorneys exercise their right to challenge the prospective juror. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 139 (1977).

⁶ See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). The Court stated that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and

rules allow civil litigants a total of three peremptory challenges. Although peremptory challenges may be exercised without a stated reason,⁷ a challenge for cause requires a specified bias in order to be sustained.⁸

In recent years, the peremptory challenge has come under siege by those who view it as a means of perpetuating racial discrimination in the judicial system.⁹ Because the peremptory challenge is

ability impartially to consider evidence presented at trial." *Id.* (citing *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 223-24 (1946)); *Swain v. Alabama*, 380 U.S. 202, 219 (1965). The Court in *Swain* noted 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 will try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.*; see also VAN DYKE, *supra* note 5, at 139 n.1 (consensus that all jurors possess some types of biases founded on their own personal experiences).

Blackstone has called the peremptory challenge an "arbitrary and capricious species of challenge", but concluded that "the law wills not [that a defendant] . . . be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike." 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

There has been much discourse regarding the continued viability of the peremptory challenge in view of its potential for abuse. See generally Glen T. Johnson, *The Use of Peremptory Challenges to Exclude Blacks from Juries: An Overview*, 10 S.U. L. REV. 35 (1983) (discussing role of peremptories in criminal system and constitutional issues involved); Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half-Step in the Right Direction*, 72 CORNELL L. REV. 1026 (1987) (calling for elimination of peremptory challenge to ensure constitutional protection of minorities); Patricia E. Sacks, Note, *Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges*, 67 WASH. U.L.Q. 547 (1989) (discussing Sixth Amendment claims in regard to use of peremptories).

In addition to the peremptory challenge, there also exists the challenge for cause, which may only be exercised on statutory grounds. See *Swain*, 380 U.S. at 220. Both serve the same purpose and are employed by both sides at the voir dire stage. *Id.* The *Swain* opinion noted that a challenge for cause is founded upon "a narrowly specified, provable and legally cognizable basis of partiality." *Id.* In contrast, use of the peremptory challenge is prompted by the exerciser's subjective perception of the suspect juror or is based upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." *Id.* (citing *Lewis v. United States*, 146 U.S. 370, 376 (1892)); see also *Reynolds v. Benefield*, 931 F.2d 506, 512 (8th Cir. 1991) ("grimace or stare may express hostility or displeasure quite as clearly as words shouted across a room"), *cert. denied*, 111 S. Ct. 2795 (1991). The peremptory challenge "permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Swain*, 380 U.S. at 220 (citing *Hayes v. Missouri*, 120 U.S. 68, 70 (1870)).

⁷ See *supra* note 6.

⁸ 28 U.S.C. § 1870 (1988); see *supra* note 3 (quoting section 1870 in part). The remaining part of section 1870 states that "[a]ll challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court." 28 U.S.C. § 1870 (1988).

⁹ See *Powers v. Ohio*, 111 S. Ct. 1364, 1369-70 (1991). The Court has consistently addressed, for more than a century, the subject of racism in the jury system. *Id.*; see also *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (purposeful racial discrimination in venire selection violates defendant's right to equal protection); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (right to impartial jury includes jury pool drawn from fair cross-section of com-

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exercised without a reason, it is often subject to abuse by those who "have a mind to discriminate."¹⁰ In response, courts have followed two separate and distinct approaches.¹¹

Originally, litigants argued that discriminatory use of the peremptory challenge violated the Sixth Amendment's guarantee to a fair and impartial jury.¹² The Supreme Court determined that

munity): *Thiel v. Southern Pac. Co. Inc.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (individual's race is unrelated to his fitness as juror); *Smith v. Texas*, 311 U.S. 128, 130 (1940). The *Smith* Court held that "for 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.*; see also *Neal v. Delaware*, 103 U.S. 370, 397 (1881) (deliberate exclusion of blacks from grand and petit juries violates black defendant's constitutional rights); *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (discriminatory exclusion from jury service impairs defendant's right to impartial jury); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (statutory exclusion of blacks from jury service violated black defendant's right to equal protection); cf. *Holland v. Illinois*, 493 U.S. 474, 474 (defendant is entitled to impartial jury, not representative jury), *reh'g denied*, 494 U.S. 1050 (1990); *Teague v. Lane*, 489 U.S. 288, 314-15 (1989) (no requirement that petit jury mirror community and reflect various groups in population); *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (to require petit juries to represent fair cross-section of community would be "unworkable and unsound").

¹⁰ *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)); see also *Pointer v. United States*, 151 U.S. 396, 408 (1894) (peremptory challenge may be exercised "without reason or for no reason, arbitrarily and capriciously").

¹¹ See *Taylor v. Louisiana*, 419 U.S. 522, 525 (1975) (jury venire may be examined under Sixth Amendment analysis); see also Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1087 (1987). But see *Holland*, 493 U.S. at 482-83 (Sixth Amendment does not bar race-based peremptory strikes), *reh'g denied*, 494 U.S. 1050 (1990).

The second approach against racially discriminatory strikes used the Equal Protection Clause. See *Batson*, 476 U.S. at 89; *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965). See generally 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, 168 (1989).

¹² See *Holland*, 493 U.S. at 474 (Sixth Amendment guarantee of impartial jury does not prevent discriminatory use of race-based peremptory challenges). The Sixth Amendment route has turned out to be a dead-end with respect to peremptory challenges. *Id.* The *Holland* Court noted: "A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment . . ." *Id.* at 478. "To say that the Sixth Amendment deprives the state of the ability to 'stack the deck' in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side." *Id.* at 481; see, e.g., *Teague*, 489 U.S. at 314 ("absence of a fair cross section on the jury venire does not undermine . . . fundamental fairness"); *Lockhart*, 476 U.S. at 178 (exclusion of persons from jury service on basis of viewpoint, politics, or ideology would not violate Sixth Amendment); Debra L. Dippel, Note, *Holland v. Illinois: Sixth Amendment Fair Cross-Section Requirement Does Not Preclude Racially-Based Peremptory Challenges*, 24 AKRON L. REV. 177, 184 (1990). But see *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (refusal of trial judge to inquire about possible racial prejudice violated defendant's Sixth Amendment rights at penalty phase of capital trial); Alschuler, *supra* note 11, at

this guarantee included a jury venire drawn from a fair cross-section of the community.¹³ However, the Court later ruled in *Holland v. Illinois*¹⁴ that this guarantee did not entitle a party to a petit jury which mirrored the racial composition of the community.¹⁵ Thus, the Court curtailed Sixth Amendment attacks on race-based peremptories.¹⁶

The second approach was premised on the Equal Protection Clause of the Fourteenth Amendment.¹⁷ Litigants argued that discriminatory use of peremptory challenges violated both their own equal protection rights¹⁸ and those of the challenged jurors.¹⁹

159 (criticizing minimal inquiry made regarding race prejudice in jury selection).

As it stands, the Sixth Amendment guarantees an impartial jury drawn from a representative cross-section of the community as reflected in the venire. *Taylor*, 419 U.S. at 538. Defendants, however, are not entitled to a petit jury that mirrors the racial composition of the community. See *Holland*, 493 U.S. at 478; *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The rationale for the fair cross-section rule was that jury composition affected its partiality. *Id.*; see also *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (exclusion of identifiable group from jury results in loss of differing perspectives of "unsuspected importance").

The notion that a fair cross-section requirement precludes race-based peremptories endures in some states, where the state constitution embodies such a clause. See *People v. Wheeler*, 583 P.2d 748, 750 (Cal. 1978) (state constitution guarantees representative cross section in jury); *Commonwealth v. Soares*, 387 N.E.2d 499, 500 (Mass. 1979) (same); *State v. Gilmore*, 511 A.2d 1150, 1151 (N.J. 1986) (same).

¹³ *Taylor*, 419 U.S. at 538; see also *supra* note 11 and accompanying text.

¹⁴ 493 U.S. 474 (1990).

¹⁵ *Id.* at 477.

¹⁶ *Id.* at 480-81.

¹⁷ U.S. CONST. amend. XIV, § 1. Section 1 provides in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

Cases applying the Equal Protection Clause to the jury system date back to *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880). See *supra* note 8. While the Equal Protection Clause of the Fourteenth Amendment is applicable only to actions of the state, it has been held to apply to the federal government through the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Consequently, the Constitution may be invoked through either state or federal government action. *Id.*; see also *United States v. Hawes*, 529 F.2d 472, 475 (5th Cir. 1976) (same). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §18-1, at 1688 (2d ed. 1988) (state action doctrine); Harold C. Strickland, *The State Action and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 643 (1991) (reviewing state action decisions of Rehnquist Court).

The Fifth Amendment states in pertinent part: "No person . . . shall be . . . deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amend V.

¹⁸ See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2079-80 (1991).

¹⁹ *Id.*

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Courts have adopted this approach, thereby restricting the use of the peremptory challenge.²⁰

In 1986, the Supreme Court ruled in *Batson v. Kentucky*,²¹ that a state prosecutor's use of racially motivated peremptory challenges violated the Equal Protection Clause.²² *Batson* required that the defendant first make a prima facie showing that the challenge was based on race.²³ If such a showing was made, the burden shifted to the state to provide a race-neutral explanation.²⁴ The court would then evaluate the neutrality of the proffered explanation.²⁵

²⁰ See *id.* at 2080; *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

²¹ 476 U.S. 79 (1986).

²² *Id.* at 84-85. *Batson*, a black criminal defendant, was convicted by an all-white jury of second-degree burglary and receipt of stolen goods. *Id.* at 82. *Batson* claimed that the prosecutor had intentionally used all four of his peremptory challenges to exclude blacks from the jury. *Id.* at 83-84.

The key aspect of *Batson* was that it overturned the evidentiary requirements set forth in *Swain v. Alabama*, 380 U.S. 202, 223-24 (1965). In *Swain*, a black defendant was convicted of rape in Talledega County, Alabama, and sentenced to death. *Id.* at 203. Although the petit jury venire in Talledega County included an average of seven blacks, no black had served on a petit jury since 1950. *Id.* at 205. The prosecution in *Swain* had used its peremptory strikes to eliminate all blacks on the venire. *Id.* at 210. The Court held that even if the exclusion of blacks from the venire raised a prima-facie case of discrimination under the Fourteenth Amendment, the petitioner was required to show that the prosecutor systematically excluded blacks over time, and not just at that particular trial. *Id.* at 224. The defendant was unable to meet this burden and his claim was rejected. *Id.* at 221-22.

However, in *Batson* the Court relaxed this evidentiary burden and laid down explicit ground rules for prosecutorial use of peremptory strikes. *Batson*, 476 U.S. at 96-97. The defendant can make a prima-facie showing of discrimination in the use of peremptory challenges "relying solely on the facts . . . in his case." *Id.* at 95. Furthermore:

[T]he defendant must first 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. Second, the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'. Finally, the defendant must show 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. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). Once a defendant satisfied these requirements, the burden shifted to the state to affirmatively show that there were non-racial grounds for the challenges. *Id.* at 97.

Although *Batson* involved state prosecution and the application of the Fourteenth Amendment, the same limitations are imposed on federal prosecutors through the Fifth Amendment. See *United States v. Lane*, 866 F.2d 103, 104 n.1 (4th Cir. 1989).

²³ *Batson*, 476 U.S. at 96-97.

²⁴ *Id.* at 97-98.

²⁵ *Id.* at 98; see *Sumlin v. Moore*, 583 So. 2d 1320, 1321 (Ala. 1991) (once race-neutral explanation is proffered, movant may come forward with evidence to show given explanations were pretextual).

For the next several years courts were divided as to whether *Batson* should apply in civil cases since private litigants, unlike state prosecutors, were not clearly state actors.²⁶ This issue was resolved by the Supreme Court decision in *Edmonson v. Leesville Concrete Co.*²⁷ which held that private civil litigants were precluded from using race as the basis for a peremptory challenge.²⁸

Part One of this Note provides the procedural background of *Edmonson* and analyzes Justice Kennedy's majority opinion. Part Two will examine the application of *Batson v. Kentucky* to peremptory challenges in criminal actions. Part Three of this Note will discuss the possible expansion, under equal protection principles, of the *Batson-Edmonson* doctrine as a further limitation on the discriminatory use of the peremptory challenge. This Note will conclude that the utility of the peremptory challenge has been so diminished by constitutional limitations that it should be abolished.

I. ANALYSIS OF *Edmonson*

A. Procedural Background

In *Edmonson*, the petitioner, a black man, brought a negligence action against his employer in the United States District Court for the Western District of Louisiana.²⁹ During voir dire, the respondent used two of its peremptory challenges to remove two black persons from the venire, and the third to remove a white person.³⁰ The judge denied petitioner's request for an explanation of

²⁶ See *Fludd v. Dykes*, 863 F.2d 822, 823 (11th Cir.) (*Batson* applies to civil cases), *cert. denied sub nom.* *Tiller v. Fludd*, 493 U.S. 872 (1989); *Clark v. Bridgeport*, 645 F. Supp. 890, 895 (D. Conn. 1986) (applying *Batson* to racially-motivated strikes used by assistant city attorney in civil trial); *cf.* *Maloney v. Washington*, 690 F. Supp. 687 (N.D. Ill.), *vacated sub nom.* *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988) (district judge should have allowed trial to continue and have losing party raise *Batson* issue on appeal). *But see* *Wilson v. Cross*, 845 F.2d 163, 164-65 (8th Cir. 1988) (dicta indicating unlikely *Batson* was intended to apply to civil actions); *Esposito v. Buonome*, 642 F. Supp. 760, 761 (D. Conn. 1986) (*Batson* inapplicable to civil matters).

²⁷ 111 S. Ct. 2077 (1991).

²⁸ *Id.*

²⁹ *Id.* at 2080-81. *Edmonson* was employed at a construction site located at Fort Polk, Louisiana. *Id.* at 2080. He was injured when one of Leesville's trucks rolled backwards and pinned him against some equipment. *Id.* Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1331. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1310 (5th Cir. 1988), *rev'd*, 895 F.2d 218 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077 (1991).

³⁰ *Edmonson*, 860 F.2d at 1310.

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the strikes and ruled that *Batson* did not apply to civil cases.³¹ Thereafter, a twelve-member jury comprised of eleven whites and one black, heard the case and rendered a verdict for the plaintiff.³² Although the jury found Edmonson sustained damages of \$90,000, they awarded him only \$18,000, finding him eighty percent contributorily negligent.³³

On appeal, Edmonson argued that Leesville's alleged racially motivated use of its peremptory challenges entitled him to a new trial.³⁴ The Fifth Circuit reversed the district court,³⁵ but at a rehearing en banc,³⁶ affirmed the district court's finding that *Batson* did not apply to civil actions.³⁷ The Supreme Court granted certiorari³⁸ and reversed the Fifth Circuit.³⁹

Justice Kennedy, writing for the majority,⁴⁰ found that the defendant's racially motivated peremptory challenges constituted "state action"⁴¹ in violation of the Equal Protection Clause,⁴² thereby permitting application of *Batson*.⁴³ The Court concluded that a party in a civil case had sufficient standing to raise the excluded jurors' equal protection claims on his own behalf,⁴⁴ and held that the jurors' equal protection rights under the Fifth Amendment had been abridged.⁴⁵

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1308. "If racially-motivated challenges are exercised by both parties, the remedy is not to condone them but to insist, when objection is made, that the guarantee of equal protection against all racial prejudice is enforced." *Id.* at 1314.

³⁶ *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077 (1991).

³⁷ *Id.* Writing for the majority, Judge Gee stated that "if governmental action is not present, then the courts hold no warrant to interfere, in the name of equal protection, with the system of civil peremptory challenges." *Id.* at 221.

³⁸ 111 S. Ct. 41 (1990).

³⁹ *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2081 (1991).

⁴⁰ *Id.* at 2080. Associate Justices White, Marshall, Blackmun, Stevens and Souter joined Justice Kennedy in the opinion. *Id.*

⁴¹ *Id.* at 2083-84.

⁴² *Id.* at 2087.

⁴³ *Id.* at 2088. *Batson* was decided on Fourteenth Amendment grounds, whereas *Edmonson* was decided on Fifth Amendment grounds. *See supra* note 17.

⁴⁴ *Id.* at 2087.

⁴⁵ *Id.*

B. *The Majority Opinion*

In extending *Batson* to a civil matter, the Court first had to cast Leesville's use of the peremptory strike as "state action," a prerequisite to securing the protection of the Fourteenth Amendment.⁴⁶ To accomplish this, the majority relied upon the two-part analysis set forth in *Lugar v. Edmondson Oil Co.*⁴⁷ which outlined the standards for determining state action. The first requirement of *Lugar* was that the "source" of the privilege exercised have its origin in state authority.⁴⁸ Accordingly, since peremptory challenges were provided for by statute, the first prong of *Lugar* was satisfied.⁴⁹ The second element under *Lugar* involved the determi-

⁴⁶ *Id.* at 2082. "[C]onstitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities." *Id.* (citing *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988)); see also *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

⁴⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). *Lugar* based its determination on whether alleged deprivation of constitutional rights resulted from the exercise of a right or privilege originating in state authority, and whether the private actor so charged could be described as a state actor. *Id.*

⁴⁸ *Edmondson*, 111 S. Ct. at 2083.

⁴⁹ *Id.* "In the federal system, Congress has established the qualifications for jury service, see 28 U.S.C. § 1865, and has outlined the procedures by which jurors are selected . . . [E]ach district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors." *Id.* at 2084. The Court continued:

The trial judge exercises substantial control over the *voir dire* in the federal system. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire *voir dire* by themselves, a common practice in the district court where the instant case was tried. The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes.

Id. (citations omitted).

It is submitted that the Court, in holding that use of a peremptory strike constituted an "extensive use of state procedures" distorted the role of the trial court. The opinion maintained that the federal court's role in establishing the qualifications and selection procedures for jurors, and the involvement of the bench in *voir dire* equated "state action." *Id.* In her dissenting opinion, Justice O'Connor observed that "the establishment of qualifications for jury service, the location and summoning of prospective jurors, the jury wheel, the voter lists, the jury qualification forms, the per diem for jury service—are independent of the statutory entitlement to peremptory strikes, or of their use." *Id.* at 2090 (O'Connor, J., dissenting) (emphasis added). Additionally, the dissent stated, "the judge does not 'encourage' the use of a peremptory challenge The decision to strike . . . is entirely up to the litigant, and the reasons for doing so are of no consequence to the judge." *Id.* The dissent went on to say that "[t]he judge does little more than acquiesce in this decision by excusing the juror." *Id.*

In highlighting the lack of significant state participation, Justice O'Connor stated that

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nation of whether a private party could be considered a “state actor.”⁵⁰ Towards this end, the *Edmonson* Court pursued an analysis consisting of three inquiries: whether there was “overt, significant assistance” to the private party by the government;⁵¹ whether the act in question was a “traditional government function;”⁵² and

“[n]o one is compelled by government action to use a peremptory challenge, let alone use it in a racially discriminatory way.” *Id.* at 2091. The dissent also quoted *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974), for the proposition that an individual’s use of a state-provided choice, where the initiative is supplied by the individual, did not equal state action. *Edmonson*, 111 S. Ct. at 2091.

Supreme Court precedent is also clear that there must be a sufficient nexus between the state and the discriminatory act in order for it to be attributable to the state. *See National Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 195 (1988) (state university’s decision to adopt association rules did not transform association into state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (private entity which performs function pursuant to government regulation to serve public not state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (decisions by administrators at state-funded nursing home not acts of state); *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981) (public defender not state actor); *Karmanos v. Baker*, 816 F.2d 258, 261 (6th Cir. 1987); *see also* *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 171-72 (1972) (private club not state actor by virtue of government-issued liquor license). *But see* *West v. Atkins*, 487 U.S. 42, 48 (1988) (private physician who contracted with state to provide medical services to prison is state actor); *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) (private parties conspiring with judge were actors under color of state law); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) (state’s conduct in tolerating conflict of interest by privately-retained counsel was state action); *Evans v. Newton*, 382 U.S. 296, 299 (1966) (private actions “may become so entwined with governmental policies or impregnated with a governmental character” that it can be considered state action); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (refusal to serve blacks in restaurant located in public parking facility constituted state action).

⁵⁰ *Edmonson*, 111 S. Ct. at 2087 (state action analysis test). The court stated:

[I]n determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

Id. at 2083 (citations omitted).

⁵¹ *Id.* at 2084 (quoting *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)). The court stated:

[A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the ‘final and practical denial’ of the excluded individual’s opportunity to serve on the petit jury. Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose.

Id. at 2084-85 (citations omitted).

⁵² *Id.* at 2085. “The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.” *Id.* at 2086.

whether the "injury caused [was] aggravated in a unique way by the incidents of governmental authority."⁵³ The majority was satisfied that all three requirements were met,⁵⁴ and that under such circumstances, a civil litigant was a state actor.⁵⁵

In the second part of the decision, the Court set forth the basis for allowing Edmonson to raise the excluded jurors' equal protection claim as his own.⁵⁶ Applying the rules of third-party standing, the Court stated that excluded jurors faced serious obstacles in protecting their own rights,⁵⁷ and that the litigant may have established a relationship or "bond" with the potential juror.⁵⁸ As a result, the Court concluded it would be proper for the civil litigant to raise the rights of the excluded venireperson.⁵⁹ The Court opined that this was appropriate since both the civil litigant and the venireperson had a mutual interest in eradicating racial dis-

⁵³ *Id.* at 2083. "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Id.* at 2087 (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). "To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." *Id.* at 2087.

⁵⁴ *Id.* at 2085.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2087. "[A] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Id.*

Generally, litigants must assert their own legal rights and interests and "cannot rest a claim to relief premised on the legal rights or interests of third parties." *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991) (citing *United States Dep't of Labor v. Triplett*, 110 S. Ct. 1428 (1990)); *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); see also *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (ordinarily person is barred from challenging constitutionality of state action by invoking rights of third parties).

This restriction is subject to limited exceptions. See *Powers*, 111 S. Ct. at 1370; see also *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (interests of third party are crucial). See generally *Alschuler*, *supra* note 11, at 193-94 (discussing third party rights and how they may be asserted).

⁵⁷ *Edmonson*, 111 S. Ct. at 2087; see also *Holland v. Illinois*, 493 U.S. 474, 489, *reh'g denied*, 494 U.S. 1050 (1990) (Kennedy, J., concurring). "[A] juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation, but possessing little incentive or resources to set in motion the arduous process needed to vindicate his own rights." *Id.*

⁵⁸ *Edmonson*, 111 S. Ct. at 2087-88. "[V]oir dire permits a party to establish a relation, if not a bond of trust, with the jurors." *Id.* (quoting *Powers v. Ohio*, 111 S. Ct. 1364, 1372 (1991)).

⁵⁹ *Id.* at 2088; see also *United States v. De Gross*, 913 F.2d 1417, 1420 (1990) (government has standing to assert equal protection rights of excluded juror), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991).

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crimination from the courtroom.⁶⁰

II. *Batson* IN ACTION

The extension of *Batson* to civil cases could arguably complicate and delay voir dire in civil suits.⁶¹ A review of how the *Batson* rule has operated in federal and state criminal trials provides a preview of what may be in store for civil litigants.⁶²

A. *Establishing a Prima Facie Case of Discrimination*

To demand a race-neutral explanation for peremptory challenges, the defendant must first establish a prima facie case of purposeful discrimination.⁶³ Under *Batson*, the formulation of a prima facie case required the defendant to show that he was a member of a cognizable racial group⁶⁴ and that the peremptory challenge was used to remove members of his race from the venire.⁶⁵ The defendant then had to show that "these facts and any other relevant circumstances raise[d] an inference" that the prosecutor challenged the veniremen on racial grounds.⁶⁶ If these fac-

⁶⁰ *Id.*

⁶¹ See James P. Connors, *Edmonson v. Leesville Concrete Co.: Effect on the Civil Jury Selection Process*, N.Y.L.J., Aug. 9, 1991, at 1.

⁶² See *infra* text accompanying note 88.

⁶³ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). Once the prima facie showing is made, the state then has the burden to come forward with a race-neutral explanation. *Id.* But see *United States v. Clemmons*, 892 F.2d 1153 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2623 (1990). In *Clemmons*, it was unclear to the circuit court whether or not the defendant had actually made a prima facie showing of discrimination. *Id.* Nevertheless, the district court demanded a neutral explanation from the prosecutor. *Id.* In reversing, the Third Circuit held that the court "cannot effectively close their eyes" to an insufficient neutral explanation despite the absence of a prima facie showing. *Id.*

Historically, the term "prima facie" in instances of discrimination differs from the conventional usage. *United States v. Alvarado*, 891 F.2d 439, 442 (2d Cir. 1989), *cert. granted, judgment vacated*, 110 S. Ct. 2995 (1990). Under such circumstances "prima facie" has been defined as a presentation of evidence sufficient to establish a "legally mandatory irrebutable presumption." *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). A presumption in the context of a prima facie case makes it "more likely than not" that the actions scrutinized were result of intentional discrimination. *Id.* at 442 n.2 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Ordinarily, "prima facie" refers to a presentation of evidence that, as a matter of law, warrants "submission of an issue for decision by the trier of fact." *Id.* at 442 (citing JOHN H. WIGMORE, *EVIDENCE* § 2494 (J. Chadborn rev. ed. 1981)).

⁶⁴ *Batson*, 476 U.S. at 96.

⁶⁵ *Id.* (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1976)).

⁶⁶ *Id.*

tors were established, an inference of intentional discrimination arose whereupon the government was required to provide a race-neutral explanation for each of the challenged strikes.⁶⁷

1. Membership in a "Cognizable Racial Group"

Under the Fourteenth Amendment, a cognizable racial group determination requires: (1) that the class be definable and limited by some clearly identifiable attribute;⁶⁸ (2) that a "common thread" of ideas, attitudes, and experience run through the group;⁶⁹ and (3) that there be a community of interest among the

⁶⁷ *Id.* at 97. *But see* *Hernandez v. New York*, 111 S. Ct. 1859, 1866 (1991) (where prosecutor provided race-neutral explanation and trial court ruled on its sufficiency, fact that defendant had not yet made prima facie showing was moot).

⁶⁸ *See* *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988) (Italian-Americans are cognizable group), *cert. denied*, 489 U.S. 1052 (1989); *see also* *United States v. Ruiz*, 894 F.2d 501, 506 (2d Cir. 1990) (Hispanics are cognizable group); *Roman v. Abrams*, 822 F.2d 214, 227 (2d Cir. 1987) (whites are cognizable group), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (Native Americans are cognizable group). *But see* *United States v. Sgro*, 816 F.2d 30, 33 (1st Cir. 1987) (appellant did not offer sufficient evidence to establish Italian-Americans as cognizable group), *cert. denied*, 484 U.S. 1063 (1988). *See generally infra* note 95 (discussion of Fourteenth Amendment's scope with respect to other groups).

⁶⁹ *See Biaggi*, 853 F.2d at 95-96. The Second Circuit found that Italian-Americans "share a common experience and culture, often share the same religious and culinary practices, often have commonly identifiable surnames, and have been subject to stereotyping . . . and discrimination" sufficient to exist as a cognizable group under *Batson*. *Id.* at 96. *But see* *Murphy v. United States*, 926 F.2d 50, 53 (1st Cir.) (Irish-Americans not cognizable group for *Batson* purposes), *cert. denied*, 112 S. Ct. 1102 (1991); *United States v. Angiulo*, 847 F.2d 956, 984 (1st Cir.) (defendant's failure to show that Italian-Americans have been or are currently subjected to discrimination negates cognizable group claim), *cert. denied*, 488 U.S. 928 (1988); *Sgro*, 816 F.2d at 33. The First Circuit in *Sgro* rejected the defendant's generalized statements that Italian-Americans as an ethnic group held similar "ideas, attitudes and experience." *Id.* Furthermore, the court seemed to take issue with the Second Circuit's assertion in *Biaggi* that Italian-Americans had commonly identifiable surnames. *Id.* "There was not a scintilla of evidence . . . that the undefined designation 'persons bearing Italian-American surnames' . . . meets the test to establish a . . . cognizable class." *Id.*

Deciding ethnic status purely on the basis of surnames is at best speculative. *See Mejia v. State*, 599 A.2d 1207, 1213 (Md. App. 1992). The assumption that a juror was Hispanic because of his Spanish surname was undermined by the fact that thirty-nine million Spaniards and fifty-eight million Filipinos have such surnames but are not Hispanic. *Id.* Furthermore, married women often assume the ethnic-sounding names of their spouses. *Id.* at 1214. "Did Rita Casini, for instance, cease to be Hispanic on the day she assumed the name Rita Hayworth? Did Lucille Ball, on the other hand, become Hispanic whenever she travelled as 'Mrs. Desi Arnaz?'" *Id.* The court in *Mejia* warned that such "unsubstantiated labeling" could reduce *Batson* to "an ethnic parlor game." *Id.* at 1215.

With respect to certain ethnic and racial groups such as Hispanics and blacks, the court may take judicial notice of their status as cognizable groups. *See United States v. Alvarado*, 891 F.2d 439, 444 (2d Cir. 1989), *cert. granted, judgment vacated*, 110 S. Ct. 2995 (1990).

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members of the group such that the group's interests cannot be adequately represented on the jury if the group is excluded.⁷⁰ The defendant may show that the Fourteenth Amendment has been violated by the exercise of a race-based peremptory strike by asserting either his own equal protection rights⁷¹ or those of the excluded juror.⁷² The Court has since held, in *Powers v. Ohio*,⁷³ that defendants may raise the equal protection rights of excluded jurors irrespective of the defendant's status in a cognizable group.⁷⁴ The *Powers* Court's rationale thus focused solely on the excluded juror's membership in a cognizable group.⁷⁵ Similarly, *Edmonson* focused on the excluded jurors' rights to equal protection independent of the litigant's membership in a cognizable group.⁷⁶ As a consequence, a civil party's membership in a cognizable group is probably irrelevant.⁷⁷

2. Other "Relevant Circumstances"

Under *Batson*, once cognizable group status has been established, the defendant may put forth other circumstantial evidence to raise an inference that peremptory strikes were motivated by race.⁷⁸ Application of this directive has led to significantly differ-

But with respect to other groups, for example whites, the trial court may call upon the defense to establish cognizable group status factually at a hearing. *Biaggi*, 853 F.2d at 96; see also *United States v. Bucci*, 839 F.2d 825, 823-33 (1st Cir.), cert. denied, 488 U.S. 844 (1988). "Whether Italian-Americans comprise a group needing 'protection' from 'community prejudices' is a 'question of fact'. The important consideration . . . is not whether a number of people see *themselves* as forming a separate group, but whether others, by treating those people unequally, *put them* in a distinct group." *Id.* at 833 (quoting *Hernandez v. Texas*, 347 U.S. 475, 478 (1954)).

⁷⁰ See *Hernandez*, 347 U.S. at 477-78. The Court found that the existence of a cognizable group depended upon their distinctiveness in the community. *Id.* "[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need . . . protection. Whether such a group exists within a community is a question of fact." *Id.* at 478.

⁷¹ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

⁷² *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991).

⁷³ 111 S. Ct. 1364 (1991).

⁷⁴ *Id.* at 1373.

⁷⁵ *Id.* at 1372.

⁷⁶ *Edmonson*, 111 S. Ct. at 2087.

⁷⁷ *Id.* Justice Kennedy's opinion stated that the new *Powers* rule would apply to civil cases. *Id.* "[W]e find the relation between the excluded venireperson and the litigant challenging the exclusion to be just as close in the civil context as in a criminal trial." *Id.*

⁷⁸ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986); see *infra* note 80.

ent approaches in the circuit courts in determining how convincing the circumstantial evidence must be to support such an inference.⁷⁹ Some courts of appeals have required a pattern of strikes against minority jurors.⁸⁰ Others have held that a single strike against a minority juror raises an inference of discrimination.⁸¹

⁷⁹ *Id.* The *Batson* court suggested instances where such "relevant circumstances" would exist: "[A] pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Id.* at 97. The Supreme Court also ruled that the trial court bears the ultimate responsibility for determining whether a prima facie case has been established. *Id.* "[T]rial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning . . . use of peremptory challenges creates a prima facie case of discrimination . . ." *Id.*

The Supreme Court recently confronted the issue of what constitutes a supportable inference. See *Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991). "If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." *Id.*

The circuit courts have uniformly ruled that determination of a prima facie case of purposeful discrimination should be treated as a finding of fact, "entitling the trial judge's ruling to great deference on review and subjecting it to reversal only in the face of clear error." *United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990); see *Riddick v. Edmiston*, 894 F.2d 586, 592 (3d Cir. 1990) (trial court fairly considered petitioner's claim); *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988) (district court's findings must be upheld unless clearly erroneous), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988) (accepting trial judge's credibility choice); *United States v. Hamilton*, 850 F.2d 1038, 1041 (4th Cir. 1988) (accepting trial court's finding of no discrimination), *cert. denied*, 493 U.S. 1069 (1990).

⁸⁰ See *United States v. Alvarado*, 891 F.2d 439, 444 (2d Cir. 1989), *cert. granted, judgment vacated*, 110 S. Ct. 2995 (1990). In *Alvarado*, the defendant contended that the prosecutor's use of four of six peremptory challenges against minority jurors amounted to a minority challenge rate of sixty-seven per cent. *Id.* at 440. The court held that "statistical disparities are a relevant factor" in determining a prima facie case of discrimination, but that since the number of challenges was small, the statistical anomaly is not as significant as those in employment discrimination cases where "normally a larger universe is analyzed." *Id.* at 444.

⁸¹ See *United States v. Clemmons*, 892 F.2d 1153, 1155-56 (3d Cir. 1989) (exclusion of one black juror sufficient to establish prima facie case), *cert. denied*, 110 S. Ct. 2623 (1990); *United States v. Clemons*, 843 F.2d 741, 747 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988). "Striking a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks." *Id.* at 747. This has been termed a "per se" rule and is followed in several other circuits. See generally *United States v. Briscoe*, 896 F.2d 1476, 1489 (7th Cir.) (striking of single black juror violated Equal Protection Clause even if other blacks are seated), *cert. denied*, 111 S. Ct. 173 (1990); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) (same); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987) (same), *cert. dismissed*, 487 U.S. 1265 (1988); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (exclusion of one juror could be sufficient to raise inference, but noting this may not always be adequate). *But see United States v. Grandison*, 885 F.2d 143 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2178 (1990). Here, the court rejected the contention that a prima facie case arose each

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Still other courts have rejected a statistical approach altogether.⁸²

B. Evaluating Race-Neutral Explanations

The lack of precise criteria to evaluate racially neutral explanations is perhaps the most unsettled aspect of the *Batson* and *Edmonson* holdings.⁸³ The initial determination has been left for the trial judge to make on a case-by-case basis.⁸⁴ In jurisdictions where

time a black was peremptorily struck. *Id.* at 149. The court acknowledged that the district court was not precluded from considering the composition of the resultant petit jury although such data was "not dispositive." *Id.* at 147; *United States v. Lane*, 866 F.2d 103, 107 (4th Cir. 1989) (no per se rule exists to give rise to prima facie case of discrimination).

⁸² See *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94-95 (5th Cir. 1988) (prosecutor's use of six of seven challenges to exclude members of defendant's race while others remained in venire did not support discriminatory finding); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988). In *Sangineto-Miranda*, the Sixth Circuit held that a prosecutor's use of all his peremptory strikes against blacks did not show purposeful discrimination. *Id.* at 1521. The court stated:

We reject such a per se rule, particularly because it does not take into account considerations that may be very relevant, including the percentage of the racial group in the district jury pool or original jury; the pattern of strikes exercised by the defense; the number of strikes available to the government; and the composition of the jury actually sworn.

Id. The court continued:

The Sixth Circuit attempted to formulate a statistical approach to the problem:

If . . . the final jury sworn has a percentage of minority members that is significantly less than the percentage in the group originally drawn for the jury . . . then that would be a factor pointing toward an inference of discrimination. If . . . the percentage of minority members in the ultimate jury is the same or greater, that would be a factor tending to negate the inference of discrimination.

Id. at 1521-22.

The Ninth Circuit has also concluded that the striking of two black veniremen does not create an inference of discrimination. See *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987).

The statistical approach was criticized by the Third Circuit on other grounds. See *United States v. Clemons*, 843 F.2d 741, 748 n.6 (3d Cir.) (observing that district with low minority population defendant would have difficulty proving discrimination where venire itself is mostly non-black), *cert. denied*, 488 U.S. 835 (1988). Such a result did occur in *United States v. David*, 844 F.2d 767 (11th Cir. 1988). Where, the court upheld the district court's finding that the small number of blacks on the jury and the state's unused ability to strike all black members of the venire did not establish a pattern of strikes. *Id.* at 768.

⁸³ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). A race-neutral explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* The Court held, however, that no valid explanation could be predicated on the assumption that shared race would lead to partiality. *Id.* Nor could a prosecutor claim such strikes were made in good faith. *Id.* at 98. The explanation must be sufficient to overcome the prima facie presumption of discrimination in the eyes of the trial judge. *Id.* This explanation should be "clear and reasonably specific" to form legitimate motives for the peremptory strike. *Id.* at 98 n.20 (citing *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

⁸⁴ *Batson*, 476 U.S. at 98 n.21. "Since the trial judge's findings . . . will turn on evalua-

the court participates in voir dire, those findings of whether a particular explanation was satisfactorily race-neutral have been accorded "especial deference."⁸⁵ Appeals courts are loath to overturn such findings unless the trial court's findings are "clearly erroneous."⁸⁶ As a result, cases decided since *Batson* reveal a variety of standards for determining acceptable race-neutral explanations,⁸⁷ including those based on facial expressions and "inappropriate gestures,"⁸⁸ those where the excluded juror had children the same age as the defendant,⁸⁹ and one where the prosecutor claimed to always object to jurors whose profession began with the letter "p."⁹⁰

The Eighth Circuit, in contrast has articulated a test based upon "comparability,"⁹¹ which compares the characteristics of the individual peremptorily struck with those jurors not struck.⁹² When

tion of credibility, a reviewing court ordinarily should give those findings great deference." *Id.*: see also *United States v. Ruiz*, 894 F.2d 501, 506-07 (2d Cir. 1990) (judge has obligation to evaluate prosecutor's explanation in light of defendant's prima facie case); *Sangineto-Miranda*, 859 F.2d at 1521. The findings of the trial court must be upheld on appeal unless they are found to be "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

⁸⁵ *Ruiz*, 894 F.2d at 506 (quoting *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988)).

⁸⁶ *Anderson*, 470 U.S. at 574.

⁸⁷ See *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir.) (upholding peremptory strike where prosecutor perceived "poor attitude" from juror during voir dire), *cert. denied*, 484 U.S. 928 (1987). The Ninth Circuit held that "a prosecutor may use peremptory challenges when he cannot formulate and sustain a legal objection to a juror, and yet has reason to question the impartiality of a juror due to his habits and associations." *Id.* at 457; see also *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94 (5th Cir. 1988). *But see* *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) (use of "subjective judgements" to justify peremptory challenges is "particularly susceptible to the kind of abuse prohibited by *Batson*"). Intuitive bases for peremptories were seemingly rejected by the Supreme Court unless accompanied by a clear, specific reason. *Batson*, 476 U.S. at 98 n.20.

⁸⁸ See *Ruiz*, 894 F.2d at 506.

⁸⁹ *United States v. Alvarado*, 891 F.2d 439, 441 (2d Cir. 1989), *cert. granted, judgment vacated*, 110 S. Ct. 2995 (1990).

⁹⁰ *United States v. Romero-Reyna*, 889 F.2d 559, 560 (5th Cir.), *cert. denied*, 110 S. Ct. 1818 (1990). The court accepted this explanation despite the fact that the prosecutor did not challenge a white production supervisor, payroll clerk and part-time secretary. *Id.* at 561.

⁹¹ See *Reynolds v. Benefield*, 931 F.2d 506, 511 (8th Cir.), *cert. denied*, 111 S. Ct. 2795 (1991).

⁹² *Id.* at 510. The court in *Reynolds* explained that the characteristics of the individual juror which prompted the strike cannot be present in those white venirepersons not struck. *Id.*: see also *United States v. Wilson*, 853 F.2d 606, 610, *vacated*, 861 F.2d 514 (1988), *aff'd on reh'g*, 884 F.2d 1121 (8th Cir. 1989). "[I]f the government strikes one prospective black juror because of the cut of his or her clothing, this peremptory challenge will be suspect if

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seated jurors possess the characteristic used as grounds for peremptorily striking another juror, the offered explanation will be rejected as a mere pretext for discrimination.⁹³

Since the circuit courts have entertained different methods with which to analyze peremptory challenges, the application of *Batson* has been at best uneven. Consequently, pretextual explanations and subtle discrimination may continue to flourish in the courtroom. It is suggested that the abolishment of the peremptory challenge is the only way to sweep discrimination out of the judicial system.

the government allows white panel members with a similar cut of cloth to remain on the panel." *Id. But see* Garrett v. Morris, 815 F.2d 509, 513-14 (8th Cir.) (black venire persons struck for lack of education while whites with same education level accepted), *cert. denied sub nom.* Jones v. Garrett, 484 U.S. 898 (1987).

The Ninth Circuit has also suggested use of the "comparability" test. *See* United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987) (defense counsel able to point out to court potential discrepancies in prosecution's use of peremptory strikes); *cf.* United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (reasons for striking blacks equally applicable to whites were not "bona fide").

The "comparability" test was also used in the Second Circuit for determining a race-neutral explanation in the context of the Sixth Amendment's fair cross-section requirement. *See* Roman v. Abrams, 822 F.2d 214, 219 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989). There, the court rejected the prosecutor's claim that knowledge of electronics, bookkeeping, and computers could prevent a juror from accepting the reasonable doubt standard, or that jurors with relatives in law enforcement community would vote against conviction. *Id.* The circuit court concluded that the race-neutral explanations constituted "a lot of lawyer circumlocution, folklore and cant, either unbelievably trivial and incredible, or pointing . . . to the inescapable inference that the prosecution set out to skew the jury selection . . ." *Id.* at 220.

The district court record in *Roman* showed that ten out of eleven challenges had been used against white jurors, who were the 'cognizable group' in this case. *Roman v. Abrams*, 608 F. Supp. 629, 635 (S.D.N.Y. 1985), *rev'd*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989). Furthermore, the reasons advanced for these challenges, such as a juror's relationship to a police officer, appeared pretextual because the record showed that two empaneled jurors were relatives of police officers. *Id. But see* United States v. Lance, 853 F.2d 1177 (5th Cir. 1988). The Fifth Circuit affirmed a finding of no discriminatory intent where the state, in providing a neutral explanation, stated criteria that if applied evenly would have resulted in a white juror being struck. *Id.* at 1180. As a result, the court sustained the strikes stating that it is proper for the prosecutor to use intuition as an explanation for his decision. *Id.* at 1181. "[T]he vagarious process of choosing jurors need not be controlled by a simple equation; it may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *Id.*

⁹³ United States v. Wilson, 884 F.2d 1121, 1124 (8th Cir. 1989).

III. LIMITS ON THE PEREMPTORY CHALLENGE UNDER EQUAL PROTECTION PRINCIPLES

In addition to the limits imposed by *Batson* and *Edmonson* on the peremptory challenge, further restrictions may exist under equal protection principles.⁹⁴ Although the *Batson* court made it clear that racially-motivated challenges violated the Equal Protection Clause,⁹⁵ it did not define the scope of this protection. As a result, lower courts are divided as to whether *Batson* should extend beyond race-based peremptory challenges.⁹⁶ Some courts take a narrow approach⁹⁷ and hold that *Batson* must be limited to its facts, because the case did not explicitly state that equal protection prin-

⁹⁴ See *United States v. De Gross*, 913 F.2d 1417, 1422 (9th Cir. 1990) (using equal protection analysis to extend *Batson* to gender-based peremptory challenges), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991); *People v. Green*, 148 Misc. 2d 666, 668, 561 N.Y.S.2d 130, 132 (Westchester County Ct. 1990) (using equal protection to analyze peremptory challenge of hearing-impaired juror); see, e.g., *Chew v. State*, 527 A.2d 332, 336 (Md. Ct. Spec. App. 1987), *vacated*, 562 A.2d 1270 (1989). "Although the ultimate reach of *Batson* still lies shrouded in an unseen future, its choice of a constitutional predicate is loaded with latent growth potential." *Id.*; see also *O'Hair v. White*, 675 F.2d 680, 691 (5th Cir. 1982) (exclusion of atheists from jury service violated Equal Protection Clause); *Coleman v. United States*, 379 A.2d 951, 953-54 (D.C. 1977) (motion to exclude all Catholic jurors from venire where Roman Catholic priests were plaintiffs on assumption they could not be impartial violated equal protection); cf. *People v. Viggiani*, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y.C. Crim. Ct. N.Y. County 1980) (sexual preference not basis for exercising challenge for cause under equal protection principles).

⁹⁵ See *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986). The central concern of the framers of the Constitution was to end governmental discrimination based on race. *Id.* at 97-98; see also *Swain v. Alabama*, 380 U.S. 202, 203 (1965) (core guarantee of Fourteenth Amendment is prot.); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1800) (same). See generally JUDITH BAER, EQUALITY UNDER THE CONSTITUTION 57-72 (1983) (discussing original intent of Fourteenth Amendment); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949) (origins and application of Equal Protection Clause).

⁹⁶ Compare *De Gross*, 913 F.2d at 1422 (interpreting *Batson* to extend to gender-based peremptory challenges) with *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991) (*Batson* should be restricted to race-based peremptory challenges), *cert. denied*, 112 S. Ct. 989 (1992). See generally *Chew*, 527 A.2d at 350. The *Chew* court noted that "[t]o hold that, in the jury selection process, the equal protection clause is only available to black defendants is philosophically indefensible." *Id.*

⁹⁷ See *United States v. Mitchell*, 886 F.2d 667, 671 n.2 (4th Cir. 1989) (*Batson* limited to race); *United States v. Hamilton*, 850 F.2d 1038, 1043 (4th Cir. 1988) (same), *cert. denied*, 110 S. Ct. 1069 (1990); cf. *State v. Pullen*, 811 S.W.2d 463, 467 (Mo. App. 1991). In *Pullen*, the court was confronted with the issue of whether *Batson* should extend to gender. *Id.* at 465. Although the majority found "[no] grand distinction between race discrimination and gender discrimination that makes one less offensive than the other," they held to *Batson*'s "parameters of racial discrimination." *Id.* at 467; see *State v. Watson*, 572 N.E.2d 97, 106 (Ohio 1991) (same).

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ciples would apply to peremptory challenges beyond those based on race.⁹⁸ Consequently, these courts would most likely refuse to apply *Batson* to strikes based on gender, religion, or sexual preference.⁹⁹

Other courts broadly interpret *Batson* as incorporating general anti-discrimination principles,¹⁰⁰ which potentially prohibit discriminatory strikes against any constitutionally recognized group.¹⁰¹ It is suggested that since the foundation of *Batson* is the Equal Protection Clause which protects all cognizable groups, the broader approach is the correct interpretation of *Batson*.

A. *The Equal Protection Analysis of Batson*

Before equal protection principles are applied to a claim of discrimination, there must be a showing that the discrimination is invidious.¹⁰² This is explicit when a law is discriminatory on its face,¹⁰³ and it is then analyzed under conventional three-tiered equal protection analysis¹⁰⁴ which includes strict,¹⁰⁵ middle-tier,¹⁰⁶

⁹⁸ *Batson*, 476 U.S. at 89.

⁹⁹ See *supra* note 97 and accompanying text (listing courts which refuse to extend *Batson* beyond race).

¹⁰⁰ See, e.g., *Chew v. State*, 527 A.2d 332, 346 (Md. Ct. Spec. App. 1987), *vacated*, 562 A.2d 1270 (1989). "It is by no means clear how the *Batson* opinion can rest exclusively on the equal protection clause without incorporating general equal protection law principles." *Id.*; *United States v. Greer*, 939 F.2d 1076, 1086 (*Batson* applies to challenges based on religious affiliation), *reh'g en banc ordered*, 948 F.2d 934 (5th Cir. 1991); *United States v. De Gross*, 913 F.2d 1417, 1422 (9th Cir. 1990) (*Batson* applies to gender-based discrimination), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991); *People v. Irizzary*, 165 A.D.2d 715, 716, 560 N.Y.S.2d 279, 280 (1st Dep't 1990) (*Batson* applies to gender under state and federal constitutions); *People v. Green*, 148 Misc. 2d 666, 668, 561 N.Y.S.2d 130, 132 (Westchester County Ct. 1990) (using equal protection to analyze peremptory challenge of hearing-impaired juror); cf. *People v. Viggiani*, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y.C. Crim. Ct. N.Y. County 1980) (sexual preference not basis for exercising challenge for cause under equal protection principles).

¹⁰¹ See *Powers v. Ohio*, 111 S. Ct. 1364, 1378 (1991) (Scalia, J., dissenting). The dissent admitted that the peremptory challenge is used to discriminate against "religion, sex, age, political views, [and] economic status" in a way that would trigger unconstitutionality in any other context. *Id.* The *Batson* dissent also noted that equal protection principles would presumably prohibit the exclusion of jurors based on religious or political affiliation, mental capacity, or profession." *Batson v. Kentucky*, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting) (citations omitted).

¹⁰² See, e.g., *Chew*, 527 A.2d at 334 (describing history and application of Equal Protection), *vacated*, 562 A.2d 1270 (1989); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (same).

¹⁰³ *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

¹⁰⁴ *Id.* (describing three tiers of equal protection analysis and application).

and rational basis scrutiny.¹⁰⁷ In other instances, a law may be facially neutral but administered in a discriminatory manner or have a discriminatory impact.¹⁰⁸ In such cases, the complaining party has the burden of proving "purposeful discrimination"¹⁰⁹ before equal protection principles are applied. If the complainant is successful, the burden then shifts to the state to "rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria . . . have produced the monochromatic result."¹¹⁰

The *Batson* Court noted that peremptory challenges fell within facially neutral parameters since the statute authorizing peremptories was neutral.¹¹¹ The Court further noted that they could be administered in a discriminatory manner.¹¹² Accordingly, the burden was on the complaining party to present a prima facie case of purposeful discrimination.¹¹³ Since facially neutral laws have been found to be discriminatory on bases other than race,¹¹⁴ it is sub-

¹⁰⁵ See *infra* note 116 (describing classifications which receive strict scrutiny).

¹⁰⁶ See *infra* note 117 (describing classifications which receive heightened, or middle-tier, scrutiny).

¹⁰⁷ See *infra* note 118 (describing classifications receiving minimal scrutiny).

¹⁰⁸ See *Washington v. Davis*, 426 U.S. 229, 241 (1976) (analyzing neutral recruiting procedures); *Yick Wo v. Hopkins*, 118 U.S. 356, 360 (1886) (neutral statute requiring permits to operate laundries applied in discriminatory fashion).

¹⁰⁹ See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977) (defendant had burden to prove purposeful discrimination in selection of jury venire); *Arlington Heights v. Metropolitan Hous. Dev't Corp.*, 429 U.S. 252, 266 (1977) (defendant has burden of persuasion to prove purposeful discrimination where statute is facially neutral); *Washington*, 426 U.S. at 240 (black applicants to police force had burden to prove purposeful discrimination in administration of neutral statute which had disparate impact on black test-takers). The "burden of proof" model was adopted from Title VII cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

¹¹⁰ *Washington*, 426 U.S. at 241 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

¹¹¹ *Batson v. Kentucky*, 476 U.S. 79, 88 (1986).

¹¹² See *id.* The *Batson* Court noted that equal protection violations may exist when "the procedures implementing a neutral statute operate to exclude persons from the venire on racial grounds." *Id.* at 88; see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2079 (1991) (peremptory challenge susceptible to abuse).

¹¹³ *Batson*, 476 U.S. at 96-97.

¹¹⁴ See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979). *Feeney* involved a facially neutral statute which gave an absolute lifetime hiring preference to veterans for civil service positions. *Id.* As a result, the majority of jobs went to men. *Id.* at 260. The plaintiff, a female employed by the government, alleged the law violated equal protection. *Id.* at 259. Although the Court determined that the statute had a discriminatory impact on women, it did not find a showing of purposeful discrimination. *Id.* at 280-81.

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mitted that discriminatory challenges should likewise be found discriminatory if based on religion, gender, or other cognizable characteristics. It is submitted that the *Batson* approach does not prohibit its expansion to other discriminatory strikes, but merely sets forth the procedure to be followed before equal protection principles are applied to peremptory challenges.

B. Expansion of Batson to Other Cognizable Groups Under Equal Protection Principles

In the future, should courts apply conventional equal protection principles to the discriminatory use of peremptory challenges, the requirements of presenting a prima facie case should remain the same.¹¹⁵ If discrimination is found to exist, then equal protection principles should be applied.¹¹⁶ This would require the trial court to determine the level of scrutiny applied to the cognizable group in question.¹¹⁷ Each cognizable group would receive a different level of protection in accordance with its classification as either suspect,¹¹⁸ quasi-suspect,¹¹⁹ or non-suspect.¹²⁰ The court would

¹¹⁵ See *supra* notes 64-68 and accompanying text (analyzing requirements of establishing prima facie case).

¹¹⁶ See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). When a statute classifies on the basis of race, alienage, or national origin, the law will receive strict scrutiny from the court. *Id.* at 440. However, if a law classifies on the basis of gender, it will receive a heightened judicial scrutiny. *Id.* Finally, if a law classifies on the basis of some non-suspect classification such as age, the law need only meet a rational basis test in order to survive. *Id.* at 441.

¹¹⁷ *Id.* at 440-42.

¹¹⁸ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race is suspect classification). Besides race, other classifications considered suspect include those based on alien status and ethnic origin. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (classifications based on alienage are suspect and subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (law based on ethnic origins or ancestry are suspect and subject to strict scrutiny); see also *Regents Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (reverse discrimination admissions policy disfavoring whites is suspect). The *Bakke* Court characterized an affirmative action admissions policy as an "undeniabl[e] . . . classification based on race and ethnic background." *Id.* at 289. See generally Kenneth Karst & Harold Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 965-66 (1974) (general discussion of appropriate level of scrutiny); Douglas R. Widin, Note, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 412-13 (1983) (giving standards to test whether class is suspect and criticism of current standard).

¹¹⁹ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender is quasi-suspect group); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-81 (1979) (gender is quasi-suspect category and law giving employment preference to veterans not discriminatory to women under heightened scrutiny); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (gen-

then determine whether the interest in sustaining the peremptory challenge is sufficient to outweigh the discrimination claim.¹²¹ It is

der-based classifications are quasi-suspect and receive heightened scrutiny under middle tier of equal protection).

Classifications based on illegitimacy are also accorded quasi-suspect status. *See e.g.*, *Califano v. Boles*, 443 U.S. 282, 293-96 (1979) (Social Security Act upheld which denied survivors' benefits to illegitimate child using less demanding standard than strict scrutiny); *Matthew v. Lucas*, 427 U.S. 495, 510 (1976) (acknowledged analysis to be in "this realm of less than strictest scrutiny"); *cf.* *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982) (invalidated statute of limitations which limited time that illegitimate children had to bring paternity suit). In *Mills*, the state interest in disallowing paternity claims was to prevent fraudulent or stale claims. *Id.* at 92. The Court stated that "[s]uch restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Id.* at 99.

Sexual preference should probably be a quasi-suspect classification, although courts have classified it as suspect. *See* *Watkins v. United States Army*, 875 F.2d 699, 728 (9th Cir. 1989) (homosexuals constitute suspect group), *cert. denied*, 111 S. Ct. 384 (1990); *Jantz v. Muci*, 759 F. Supp. 1543, 1538 (D. Kan 1991) (same). *But see* *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (no fundamental right to practice homosexual sodomy using rational basis test); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (gay men and women do not compromise suspect or quasi-suspect group), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990). For a thorough analysis of the topic, see EDITORS OF HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* (1990); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 812-821 (1984).

¹²⁰ *See Cleburne*, 473 U.S. at 446 (mentally retarded non-suspect group). "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a state interest." *Id.* at 440. *See generally* Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974) (mental illness not suspect class as determined by Supreme Court).

Distinctions based on age are also non-suspect. *See, e.g.*, *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2397 (1991) (mandatory retirement law for judges over 70 upheld under rational basis test); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (same); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1370-71 (4th Cir.) (retirement age of 50 upheld), *cert. denied*, 110 S. Ct. 147 (1989). *But see* Martin Levine, *Comments on the Constitutional Law of Age Discrimination*, 57 CHI. KENT. L. REV. 1081, 1083 (1981) (urging age discrimination be treated as suspect).

Discrimination based on youth has primarily been an issue in jury selection cases. *See* Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1049-61 (1978). Jury challenges based on age are permitted. *See infra* note 152 and accompanying text (cases involving age-based challenges).

¹²¹ *See* *Batson v. Kentucky*, 476 U.S. 79, 125 (1986) (Burger, C. J., dissenting) (discussing interest in peremptory challenge). Balancing the state interest in various laws is a crucial part of the equal protection analysis. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976) (per curiam) (state had compelling interest in limiting political contributions to campaigns); *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (per curiam) (residency requirements upheld due to state's compelling interest in preventing fraudulent voter lists); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (government's interest in keeping Japanese-Americans in isolation during wartime sufficiently compelling). *But see* *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (government interest in preventing fraudulent voting procedures not enough to justify infringement on right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (state had no compelling interest in putting limits on welfare recipient's benefits); Mc-

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submitted that an analysis of this interest is essential in determining when, if ever, a discriminatory peremptory challenge should be sustained.

Historically, the peremptory challenge was thought to be “essential” to a fair trial by jury.¹²² Its purpose of assembling a fair and impartial jury¹²³ was presumably achieved by allowing parties to exclude, without explanation, those jurors whom they believed were biased based upon intangible and “sudden impressions.”¹²⁴ If used in this fashion, the challenge would legitimately serve its purpose by eliminating biased jurors from the jury.

Although the interest of a party in obtaining a fair and impartial jury is clear, it is questionable whether peremptory challenges actually further this interest.¹²⁵ It is submitted that when challenges are used to dismiss jurors based upon stereotypes or presumed group bias, they do not meet the goal of assembling a fair and impartial jury, but instead meet the attorney’s goal of creating a biased jury.

Batson essentially held that the interest in race-based peremptory challenges was not compelling enough to survive the strict scrutiny of the court.¹²⁶ However, the issue of whether this interest should survive an equal protection claim based on characteris-

Laughlin v. Florida, 379 U.S. 184, 196 (1964) (state had no compelling interest in enforcing racially discriminatory miscegenation and cohabitation law).

¹²² See *Batson*, 476 U.S. at 125 (Burger, C.J., dissenting) (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)).

¹²³ *Batson*, 476 U.S. at 99 n.22 (historically, peremptory challenge has served in selection of impartial jury); see *Swain v. Alabama*, 380 U.S. 202, 212 (1965) (peremptory challenge allows parties to obtain fair and impartial jury); *Pointer v. United States*, 151 U.S. 396, 408 (1894) (defendant’s peremptory is one of most important rights given to accused).

¹²⁴ See *supra* note 6 and accompanying text (description of peremptory challenges).

¹²⁵ See *Powers v. Ohio*, 111 S. Ct. 1364, 1372 (1991).

¹²⁶ *Batson*, 476 U.S. at 98-99. However, in his dissent, the Chief Justice discussed the state’s interest in preserving the peremptory challenge, and stated that “[u]nder conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges.” *Id.* at 125 (Burger, C.J., dissenting). The dissent also observed that “the state interest involved here has historically been regarded by this Court as substantial, if not compelling.” *Id.*

The Ninth Circuit disagrees with this analysis. In *De Gross*, the court balanced the interest of the government in exercising a peremptory challenge and concluded that they were “not substantially related to achieving an impartial jury.” *United States v. De Gross*, 913 F.2d 1417, 1422 (1990), *reh’g granted*, 930 F.2d 695 (9th Cir. 1991). For a general discussion of the difficulties in measuring the state interest, see Lawrence G. Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 TUL. L. REV. 928, 932-42 (1985).

tics other than race is one that must still be resolved.¹²⁷ If the challenge is directed against a quasi-suspect group, the interest must be deemed "substantially related to achieving an important government objective".¹²⁸ Similarly, if the challenge is directed against non-suspect individuals, the challenge must be rationally related to that interest in order to be sustained.¹²⁹ The following sections suggest how these issues may be resolved in the future.

1. Suspect Classifications

Suspect classifications, including those based on race and ethnic origin, are subject to strict scrutiny.¹³⁰ *Batson* and *Edmonson* have already determined that the interest in exercising discriminatory peremptory challenges against suspect groups is not "compelling" enough to outweigh their equal protection claims.¹³¹ Application

¹²⁷ See *supra* note 95.

¹²⁸ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976). The concurring opinion acknowledged its use of a different analysis, but stated "while I would not endorse . . . a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential rational basis standard of review . . . takes on a sharper focus when we address a gender-based classification." *Id.* at 210 (Powell, J., concurring); see also *supra* note 119, and accompanying text (description of quasi-suspect groups).

¹²⁹ See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (law classifying by age not suspect and upheld under rational basis test); see also *supra* note 117, and accompanying text (description of non-suspect groups).

¹³⁰ See *United States v. Carolene Prod., Inc.*, 304 U.S. 144, 153 n.4 (1938). "[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry." *Id.*

Although classifications based on alienage are suspect, they have not received protection in the context of jury selection. See *United States v. Gordon-Nikkar*, 518 F.2d 972, 976-77 (5th Cir. 1975) (aliens have no right to serve as juror); *Perkins v. Smith*, 370 F. Supp. 134, 138-39 (D. Md. 1974) (same), *aff'd*, 426 U.S. 913 (1976). *Perkins* involved a claim by a resident alien who objected to the exclusion of aliens from jury service. *Id.* at 134. The Maryland District Court, using a rational basis test, ruled that there are situations "where citizenship bears some rational relationship" to qualifications for jury service. *Id.* at 138 (citing *Sugarman v. Dougall*, 339 F. Supp. 906, 911 (S.D.N.Y. 1970) (Lumbard, J., concurring)). The court stated that since jury service "goes to the heart of representative government", it "may fairly be concluded that [citizens] as a class . . . are more likely to make informed and just decisions . . . than are non-citizens." *Id.* at 136; see also *Foley v. Connelie*, 435 U.S. 291, 300 (1978) (state police have rational basis for excluding aliens from police force). See generally Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275 (1977) (justification for aliens receiving suspect classification).

¹³¹ See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2077 (1991); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986); see also *Castaneda v. Partida*, 430 U.S. 482, 492 (1977) (exclusion of suspect group from venire based on ethnic origin violates Fourteenth Amendment); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (same); *Strauder v. West Virginia*,

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to other groups¹³² depends on whether they can sufficiently prove cognizable group status.¹³³ In addition, it is suggested that peremptory challenges exercised against a group based upon religious affiliation, which is clearly a cognizable group, should be deemed "suspect" and receive the strict scrutiny of the courts.¹³⁴

2. Quasi-Suspect Classifications

Although the category of "quasi-suspect" groups is not fully defined, it has been held to encompass such classifications as gen-

100 U.S. 303, 308 (1880) (exclusion of blacks from jury venire denial of equal protection).

¹³² See, e.g., *United States v. Willie*, 941 F.2d 1384, 1399 (10th Cir. 1991) (Native Americans cognizable group for *Batson* purposes), *cert. denied*, No. 91-6705, 1992 WL 39056 (U.S., Feb. 24, 1992); *United States v. Biaggi*, 853 F.2d 86, 96 (2d Cir. 1988) (*Batson* applicable to Italian-Americans), *cert. denied*, 489 U.S. 1052 (1989); *Commonwealth v. Gagnon*, 449 N.E.2d 686, 692 (Mass. App. Ct. 1983) (French-Canadians are cognizable group for *Batson* purposes). *But see* *Murphy v. United States*, 926 F.2d 50, 55 (1st Cir.) (Irish-Americans not cognizable group for *Batson* purposes), *cert. denied*, 112 S. Ct. 1102 (1991); *United States v. Di Pasquale*, 864 F.2d 271, 277 (3d Cir. 1988) (*Batson* does not apply to Italian-Americans), *cert. denied*, 492 U.S. 906 (1989); *United States v. Sgro*, 816 F.2d 30 (1st Cir. 1987) (same), *cert. denied*, 484 U.S. 1063 (1988).

¹³³ See *supra* note 70 and accompanying text (describing test for proving cognizable group status).

¹³⁴ See *O'Hair v. White*, 675 F.2d 680, 691 (5th Cir. 1982) (atheists deemed "suspect" group whose exclusion from jury service violated state's equal protection clause). The *O'Hair* Court noted that not only does the Fourteenth Amendment reach class exclusions based on race, but "all other exclusions which single out any class of persons for different treatment not based on some reasonable classification." *Id.* (quoting *Hernandez v. Texas*, 347 U.S. 475, 478 (1954)). The Fifth Circuit has also addressed the possible exclusion of Jewish jurors based on alternate theories of race and religion. *United States v. Greer*, 939 F.2d 1076, 1086 n.9 (5th Cir.), *reh'g en banc ordered*, 948 F.2d 934 (1991). The court noted "[w]hether Jewish jurors are viewed as members of a 'race' or a religion, a defendant's exercise of peremptory challenges against them is subject to *Batson's* strictures." *Id.* (citation omitted). In *Greer*, defendants were members of a white supremacist group known as the Hammerskins which advocated the separation of races and anti-Semitism. *Id.* at 1081. Defendants were convicted of beating minorities and vandalizing Jewish temples and businesses. *Id.* at 1082-83. After their conviction, they claimed the trial court erred in not allowing their motion to dismiss all Hispanic, black, and Jewish jurors for cause. *Id.* at 1084. The court cited *Edmonson* and noted that "even if the defendants had learned which prospective jurors were Jewish, they constitutionally could not have based their peremptory challenges upon this information, for the Supreme Court has sought to eliminate racial and ethnic discrimination in the process of jury selection." *Id.* at 1085; see also *Coleman v. United States*, 379 A.2d 951, 953 (D.C. 1977) (court denied motion to exclude Roman Catholic venirepersons from jury based on assumption they could not be impartial to priest-plaintiffs). The *Coleman* Court stated that "mere potentiality for bias based on religious affiliation cannot justify the elimination of a prospective juror." *Id.*; *Cooper v. Pate*, 382 F.2d 518, 522 (7th Cir. 1967) (strict scrutiny applied to religious-based equal protection claim); *People v. Kagan*, 101 Misc. 2d 274, 277, 420 N.Y.S.2d 987, 989 (Sup. Ct. N.Y. County 1979) (systematic exclusion of Jewish jurors violates state constitution).

der¹³⁶ and sexual preference.¹³⁶ Such classifications are afforded a "heightened scrutiny," with the state having to show a substantial interest between the classification and an important government objective.¹³⁷ It is submitted that since the interest in such challenges is not substantially related to obtaining a fair and impartial jury,¹³⁸ individuals in quasi-suspect groups should be afforded the right to invoke equal protection analysis in the discriminatory use of peremptory challenges.

a. Gender-Based Peremptory Challenges

Lower courts are split on whether to protect gender-based peremptory challenges.¹³⁹ In *United States v. Hamilton*,¹⁴⁰ the Fourth Circuit held that peremptory challenges exercised on the basis of gender were not covered by the equal protection principles in *Batson*.¹⁴¹ The court followed a narrow interpretation, and held that

¹³⁶ See *infra* note 137 and accompanying text (cases involving gender-based discrimination).

¹³⁶ See *infra* note 149 and accompanying text (cases involving sexual preference).

¹³⁷ See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (substantial relationship test).

¹³⁸ *United States v. De Gross*, 913 F.2d 1417, 1422 (1990), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991) (no substantial relationship between impartial jury and gender-based peremptory challenge).

¹³⁹ See *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991) (will not extend *Batson* to gender), *cert. denied*, 112 S. Ct 989 (1992); *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) (same), *cert. denied*, 493 U.S. 1069 (1990). *But see De Gross*, 913 F.2d at 1422 n.8 (extending *Batson* to gender).

State courts seem to be similarly split. See *Stariks v. State*, 572 So. 2d 1301, 1303 (Ala. Crim. App. 1990) (will not extend *Batson*); *State v. Crowder*, 515 N.E.2d 783, 786 (Ill. App. Ct. 1987) (same); *Hannan v. Commonwealth*, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989) (same); *State v. Clay*, 779 S.W.2d 673, 676 (Mo. App. W.D. 1989) (same). For courts agreeing with the Ninth Circuit position, see *Ex parte Dysart*, 581 So. 2d 545, 546-47 (Ala. Crim. App. 1991) (Maddox, J., dissenting); *State v. Levinson*, 795 P.2d 845, 848 (Haw. 1990).

New York courts have also extended *Batson* to gender-motivated peremptories, holding them violative of the equal protection clauses under the state and federal constitutions. See *People v. Irizzary*, 165 A.D.2d 715, 716, 560 N.Y.S.2d 279, 280 (1st Dep't 1990); *People v. Blunt*, 162 A.D.2d 86, 89, 561 N.Y.S.2d 90, 93 (2d Dep't 1990); see also *People v. Merkle*, 143 A.D.2d 145, 146, 531 N.Y.S.2d 601, 602 (2d Dep't.), *appeal denied*, 73 N.Y.2d 858, 534 N.E. 2d 342, 537 N.Y.S.2d 504 (1988), *cert. denied*, 490 U.S. 1024 (1989). The *Irizzary* court expressly noted that "although the issue of gender-based discrimination has not been squarely addressed by the Supreme Court, the People concede that the trial court correctly held [*Batson*] principles to apply." *Irizzary*, 165 A.D.2d at 716, 560 N.Y.S.2d at 280.

¹⁴⁰ *Hamilton*, 850 F.2d at 1042.

¹⁴¹ *Id.* "While we do not applaud the striking of jurors for any reason relating to group

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since *Batson* only addressed the issue of race, it was limited to its facts.¹⁴² The court considered the utility of the peremptory challenge so great as to warrant the overruling of a challenge admittedly based on gender.¹⁴³

The Ninth Circuit, in *United States v. De Gross*,¹⁴⁴ came to the opposite conclusion when it balanced the value of the peremptory challenge against equal protection principles.¹⁴⁵ In *De Gross*, the government objected to a female criminal defendant using her peremptories to exclude men from the jury.¹⁴⁶ The circuit court opinion emphasized the Fourteenth Amendment's protection against all types of discrimination based on stereotypes such as race or gender,¹⁴⁷ and concluded that *Batson* extended beyond race.¹⁴⁸ The court used a conventional equal protection approach, and analyzed the challenges using heightened scrutiny,¹⁴⁹ finding no substantial relationship between the use of such challenges and the goal of achieving an impartial jury.¹⁵⁰

b. Challenges Based on Sexual Preference

Although courts have had difficulty classifying sexual preference into one category,¹⁵¹ it is submitted that discrimination based

classifications, we find no authority to support an extension of *Batson* to instances other than racial discrimination." *Id.*

¹⁴² *Id.* at 1042-43.

¹⁴³ *Id.*

¹⁴⁴ *United States v. De Gross*, 913 F.2d 1417, 1422 (1990), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991).

¹⁴⁵ *Id.* at 1419.

¹⁴⁶ *Id.* at 1422 n.8.

¹⁴⁷ *Id.* at 1422.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1422.

¹⁵⁰ *Id.* at 1422-23. The *De Gross* court acknowledged that peremptory challenges are a "necessary means for achieving the important governmental objective of impaneling a fair and impartial jury." *Id.* However, they went on to note that:

[C]hallenges explained by . . . gender are not based on a party's sudden impression of a particular venireperson's ability to be impartial. Rather, like racial challenges, they are based either on the false assumption that members of a certain group are unqualified to serve as jurors, or on the false assumption that members of certain groups are unable impartially to consider the case against a member or a non-member of their group.

Id. (citation omitted)

¹⁵¹ See *Watkins v. United States Army*, 875 F.2d 699, 728 (9th Cir. 1988) (homosexuals are suspect group), *cert. denied*, 111 S. Ct. 384 (1990); *Jantz v. Muci*, 759 F. Supp. 1543, 1551 (D. Kan. 1991) (same). *But see High Tech Gays v. Defense Indus. Sec. Clearance*

upon sexual orientation belongs in the quasi-suspect class. Accordingly, those courts which classify sexual preference as a quasi-suspect classification should protect those individuals from discriminatory challenges, since no substantial interest is served by excluding jurors on this basis.¹⁵² Although the expansion of *Batson* to quasi-suspect groups will restrict the use of the peremptory challenge even further, it is proposed that the extension is necessary to prevent discrimination from tainting the trial process.¹⁵³

3. Non-Suspect Groups

The non-suspect category includes classifications based on age¹⁵⁴ and disability.¹⁵⁵ For these groups, the interest in exercising

Office, 895 F.2d 563 (homosexuals do not comprise either suspect or quasi-suspect group), *reh'g denied*, 909 F.2d 374 (9th Cir. 1990); *Doe v. Webster*, 769 F. Supp. 1, 3 (D.D.C. 1991) (homosexuals are non-suspect and judged according to rational basis test).

Classifications based on sexual preference continue to be relevant in certain areas. See *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (sexual preference relevant to service in military), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984); *Matter of Longstaff*, 716 F.2d 1439, 1442 (5th Cir. 1983) (relevant for purposes of immigration), *cert. denied*, 467 U.S. 1219 (1984); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (relevant to determine fitness of parent regarding custody of children); *Gaylord v. Tacoma School Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (sexual preference relevant to fitness to teach), *cert. denied*, 434 U.S. 879 (1977). *But see* Robert C. Farrell, *Equality, Classification, and Irrelevant Characteristics*, 12 VT. L. REV. 11, 46-54 (1988). "Sexual preference is an irrelevant characteristic, because each of the justifications offered to demonstrate its relevance — the criminal law, religious precept, morality and decency, and public hostility — is devoid of merit and unacceptable under our constitutional scheme." *Id.* at 54. See generally Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1305 (1985) (because homosexuals have historically been victims of discrimination, legislation affecting them should be subject to strict scrutiny).

¹⁵² See *supra* note 119 and accompanying text (citing cases which apply heightened scrutiny to quasi-suspect class).

¹⁵³ See *People v. Viggiani*, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y.C. Crim. Ct. N.Y. County 1980). The *Viggiani* case held that a challenge for cause based upon the prospective juror's sexual preference was unconstitutional. *Id.* The assumption on the part of the defendant that the juror would be biased was deemed a denial of equal protection under the state constitution. *Id.* The court concluded it would be "a divisive assumption that justice may turn on sexual preference." *Id.*

¹⁵⁴ See *supra* note 120 and accompanying text. For age discrimination in jury selection, see *United States v. De La Rosa*, 911 F.2d 985, 991 (5th Cir. 1990) (age of juror is legitimate reason to strike), *cert. denied*, 111 S. Ct. 2275 (1991); *United States v. Moreno*, 878 F.2d 817, 820-21 (5th Cir.) (same), *cert. denied*, 493 U.S. 979 (1989); *cf. LaRoche v. Perrin*, 718 F.2d 500 (1st Cir. 1983) (young are identifiable group for Sixth Amendment purposes); *Hamling v. United States*, 418 U.S. 87, 137-38 (same), *reh'g denied*, 419 U.S. 885 (1974).

For cases involving age-based peremptory challenges, see *United States v. Ferguson*, 935 F.2d 862, 865 (7th Cir. 1991) (upheld peremptory challenges based on age), *cert. denied*,

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a discriminatory peremptory challenge must be shown to be rationally related to the goal of assembling a fair and impartial jury.¹⁵⁶ Although it could be argued that the interest in achieving an impartial jury is rationally related to the exercise of discriminatory challenges, it remains difficult to reconcile an act done “arbitrarily” with a rationally-related test.¹⁵⁷ However, it is submitted that if the use of the peremptory challenge is to be continued in the future, it should be limited at this point to preserve what is left of the peremptory’s power. Accordingly, the striking of non-suspect jurors should not be subject to review.

Although it is tempting to retain the peremptory challenge, even in a reduced capacity, it is submitted that in light of its possible expansion under equal protection principles in both the criminal and civil context, the judicial process would be better served by eliminating peremptory challenges completely.

112 S. Ct. 907 (1992); *United States v. Hoelscher*, 914 F.2d 1527, 1540 (8th Cir. 1990) (age-based peremptory challenges do not implicate *Batson*), *cert. denied sub nom. Giuffrida v. United States*, 111 S. Ct. 971 (1991); *United States v. McCoy*, 848 F.2d 743, 745 (6th Cir. 1988) (same): *see also* *United States v. Mitchell*, 886 F.2d 667, 671 n.2 (4th Cir. 1989) (although defendant objected to peremptories directed at all jurors under age 25, court concluded *Batson* only applied to race); *State v. Everett*, 472 N.W.2d 864 (Minn. 1991) (court analyzed case as if *Batson* applied to age-based peremptories, but found defendant failed to make prima facie case).

In New York, the court of appeals has ruled that age goes to one’s ability to serve as a juror. *See* *People v. Foster*, 64 N.Y.2d 1144, 1145, 480 N.E.2d 340, 341, 490 N.Y.S.2d 726, 727 (1985), *cert. denied*, 474 U.S. 857 (1985).

¹⁵⁶ *See* *People v. Green*, 148 Misc. 2d 666, 668, 561 N.Y.S.2d 130, 132 (Westchester County Ct. 1990) (peremptory challenge based solely on hearing-impairment violated juror’s equal protection rights under state constitution); *cf.* *People v. Guzman*, 76 N.Y.2d 1, 6-7, 556 N.Y.S.2d 7, 10-11, 555 N.E.2d 259, 262-63 (1990) (denial of defendant’s challenge for cause not error where there was evidence deaf juror could carry out juror duties). *But see* *Eckstein v. Kirby*, 452 F. Supp. 1235, 1245 (E.D. Ark. 1978) (statutes prohibiting hearing impaired from jury service not unconstitutional because potential communication problems exist with fellow jurors during deliberations). *See generally* Harold Manson, *Jury Selection: The Courts, the Constitution, and the Deaf*, 11 PAC. L.J. 967, 982-88 (1980) (deaf persons are suspect group and should be accorded strict scrutiny).

¹⁵⁷ *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-46 (1985) (minimal scrutiny applied to zoning law which discriminated against mentally retarded).

¹⁵⁸ *See* *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting). The Chief Justice noted the difficulty, if not impossibility, of applying a “rational” equal protection analysis to an “arbitrary and capricious” right. *Id.* He stated, “[a] clause that requires a minimum ‘rationality’ in government actions has no application to an ‘arbitrary and capricious right.’ ” *Id.*

CONCLUSION

The unfettered use of peremptory challenges has traditionally been regarded as essential to the right to a fair and impartial jury.¹⁶⁸ However, because they are exercised without a reason, peremptory challenges are often susceptible to discriminatory abuse. Such challenges are premised on the pernicious stereotype that presumes an inherent group bias among jurors who belong to a recognizable group. Consequently, discriminatory peremptory challenges serve to remove otherwise qualified jurors, thereby tainting the judicial process and possibly resulting in an unfair and partial jury.

The application of *Batson* to civil actions indicates that the Court has recognized that the 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*.

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¹⁶⁸ See *Swain v. Alabama*, 380 U.S. 212, 219-21 (1965); see *supra* note 123.