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Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges

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Comment

Eliminating Unconstitutional Juries: Applying *United States v. De Gross* to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges

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> Prosecutors should be forever mindful that selecting jurors in a fair and nondiscriminatory manner is far more important than winning a case with highly suspect or questionable tactics.
>
> *Judge Leon Higginbotham*[1]

> When money talks for the very last time and when nobody walks a step behind; when there's only one race and that's mankind, then we shall be free.
>
> *Garth Brooks*[2]

In *United States v. De Gross*,[3] the defendant, Juana Espericueta De Gross, exercised seven peremptory challenges against male venirepersons. The government objected, asserting that this pattern of striking males violated the excluded jurors' constitutional rights to equal protection of the laws.[4] The trial court upheld the government's objection and disallowed De Gross's seventh peremptory challenge.[5] When the prosecutor challenged an Hispanic venirewoman, De Gross asserted that the challenge was unconstitutionally based on race.[6] The court rejected this protest and struck the potential juror.[7] On appeal,

1. United States v. Clemmons, 892 F.2d 1153, 1163 (3d Cir. 1989) (Higginbotham, J., concurring).

2. GARTH BROOKS, *We Shall Be Free*, on THE CHASE (Liberty Records 1992).

3. 960 F.2d 1433, 1436-37 (9th Cir. 1992) (en banc), *aff'g.* 913 F.2d 1417 (9th Cir. 1990).

4. *Id.* at 1436.

5. *Id.*

6. On appeal, De Gross argued that removal of the only Hispanic venireperson was unconstitutionally based upon the potential juror's race. *Id.* Rather than addressing this claim, an en banc panel of the Ninth Circuit addressed, *sua sponte*, whether the prosecutor's conduct constituted unconstitutional gender discrimination. *Id.* at 1443 & n.15.

7. *Id.* at 1436.

an en banc panel of the Ninth Circuit held that equal protection principles prohibit a party from peremptorily striking venirepersons on the basis of gender.[8] The court then determined that both parties' conduct established prima facie evidence of gender discrimination.[9]

United States v. De Gross presents an opportunity to review the scope, purpose, and usefulness of peremptory challenges.[10] More specifically, *De Gross* considers whether equal protection principles should prohibit parties from exercising peremptory challenges based on a prospective juror's gender. Because relatively few cases have applied equal protection analysis to non-racially-based peremptories,[11] *De Gross* can guide other courts in developing this area of jurisprudence. Future decisions can rely on *De Gross's* rationale in applying the Equal Protection Clause[12] to discriminatory peremptory challenges

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8. *Id.* at 1439.

9. *Id.* The en banc decision reached the same result as the original three-member panel, affirming the trial court's denial of De Gross's seventh peremptory challenge, but reversing and remanding the case. The court reversed based on the trial court's acceptance of the government's justification for excluding the female Hispanic venireperson. *Id.* at 1433

In reaching its decision, the en banc panel held that the government had standing to object to a defendant's peremptory challenges and that the Fifth Amendment limits a federal criminal defendant's peremptory challenges as well as the government's strikes. *Id.* These positions are in accord with recent Supreme Court decisions, Georgia v. McCollum, 112 S. Ct. 2348 (1992); Powers v. Ohio, 111 S. Ct. 1364 (1991), and are beyond the scope of this Comment.

10. Courts and commentators dispute the use of peremptory challenges in our judicial system. On the one hand, the peremptory challenge is "one of the most important of the rights secured to the accused." Pointer v. United States, 151 U.S. 396, 408 (1894). On the other, its use is "based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken." Batson v. Kentucky, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

11. The Supreme Court has conclusively held, however, that peremptory challenges based upon a potential juror's race violate the Equal Protection Clause. 476 U.S. at 89.

12. This Comment's analysis is limited to the equal protection doctrine. While the Supreme Court has regulated jury selection through the Sixth Amendment's provision requiring an impartial jury in criminal cases, the Court has refused to apply the Sixth Amendment to the selection of the petit jury. *See, e.g.*, Holland v. Illinois, 493 U.S. 474, 478 (1990) (holding the Sixth Amendment does not restrict the exclusion of a racial group at the peremptory challenge stage); Lockhart v. McCree, 476 U.S. 162, 174 (1986) ("an extension of the fair-cross section requirement to petit juries would be unworkable and unsound").

Nevertheless, the Sixth Amendment does provide a useful analogy to application of the Equal Protection Clause. The Court has interpreted the Sixth Amendment to require a jury which represents a cross-section of the commu-

against members of numerous cognizable groups in addition to race and gender.

This Comment fully endorses the holding in *De Gross* as a balanced and reasonable solution to preventing discrimination in the jury selection process while maintaining the usefulness of peremptory challenges. This Comment argues, however, that *De Gross* does not go far enough; future decisions should extend the protection which *De Gross* provides for gender-based peremptories to any group which warrants intermediate or strict scrutiny[13] under traditional equal protection principles.[14]

Part I analyzes the purposes of peremptory challenges in our judicial system and reviews the history of the equal protection doctrine as applied to the exercise of peremptory challenges. Part II closely examines the facts, analysis, and reasoning of *De Gross*. Part III addresses whether the Ninth Circuit correctly decided *De Gross* and whether the doctrine should extend beyond race and gender. This Comment concludes that an extension of the principles enunciated in *De Gross* to all heightened scrutiny equal protection groups would further the purposes of both peremptory challenges and the Equal Protection Clause.[15]

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nity. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Smith v. Texas, 311 U.S. 128, 130 (1940). Under this cross-section test, the Supreme Court has already extended the Sixth Amendment to protection of other cognizable groups such as gender. Taylor v. Louisiana, 419 U.S. 522, 537 (1975) ("we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male"); Duren v. Missouri, 439 U.S. 357 (1979). For a summary of Sixth Amendment principles and cases, see JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 48-83 (1977).

13. For an analysis of these categories, see *infra* notes 28-41 and accompanying text. This Comment employs the term "heightened scrutiny" to describe both "intermediate" and "strict" scrutiny.

14. The Supreme Court and lower courts have not yet developed a comprehensive classification system under equal protection analysis. Instead, the "pigeonholing" of various groups continues to be a source of controversy for both courts and commentators. For these reasons, this Comment limits its potential application to those groups that the Supreme Court currently regards as warranting heightened scrutiny under equal protection analysis. Consequently, if the Supreme Court expands these categories, lower courts should apply this doctrine accordingly.

15. Two elements make this proposal unique. First, this Comment fully applies equal protection analysis to all heightened scrutiny equal protection groups. Some commentators have either reached summary conclusions, or analyzed only one other group. *See infra* note 153. Another commentator concluded that *Batson* warrants application of equal protection principles, but did

I. THE RELATIONSHIP BETWEEN PEREMPTORY CHALLENGES AND THE EQUAL PROTECTION CLAUSE.

A. PEREMPTORY CHALLENGES

Voir dire[16] represents the stage of jury selection in which either the judge or the attorneys question prospective jurors in an attempt to uncover potential biases.[17] The overriding purpose of *voir dire* is to eliminate prospective jurors who cannot be impartial about the parties or the case.[18] *Voir dire* consists of two stages: challenges for cause and peremptory challenges. Statutes and decisional law provide the authority for exercise of both types of challenges.[19]

When challenging for cause, attorneys may reject a potential juror on a "narrowly specified, provable and legally cogni-

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not undertake such an analysis. *See* Jere W. Morehead, *Exploring the Frontiers of* Batson v. Kentucky: *Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289, 290 (1990).

Second, this Comment maintains that application of the doctrine will actually enhance the usefulness and effectiveness of peremptory challenges. Numerous commentators claim that such wide application will either render peremptories meaningless, or that the next logical step is the elimination of peremptories. *See infra* notes 181-83 and accompanying text.

16. A historical translation of *voir dire* is "[T]o speak the truth" or "to see what is said." VAN DYKE, *supra* note 12, at 140.

17. *Id.* at 139.

18. *Id.*

19. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991); *see also* Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

The Federal Rules of Criminal Procedure provide for the use of peremptory challenges in federal criminal cases:

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

Fed. R. Crim. P. 24(b) (1991). In civil suits, statutes govern the use of peremptories:

> 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 peremptory challenges and permit them to be exercised separately or jointly.

28 U.S.C. § 1870 (1989).

zable basis of partiality."[20] In contrast, peremptory challenges traditionally gave parties the right to excuse a venireperson "without a reason stated, without inquiry, and without being subject to the court's control."[21] The Supreme Court fundamentally altered this seemingly unlimited right in *Batson v. Kentucky*.[22] The court in *Batson* held that peremptory challenges based on a potential juror's race are unconstitutional.[23]

B. THE EQUAL PROTECTION DOCTRINE

In recent years, courts have employed the Equal Protection Clause[24] frequently to protect the rights of individuals.[25] The Supreme Court has developed three levels of Equal Protection scrutiny.[26] When the government has treated members of a cognizable group[27] differently than others, the Supreme Court determines the appropriate level of scrutiny based on the char-

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20. 380 U.S. at 220.

21. *Id.*; *accord* 2 CHARLES WRIGHT, FEDERAL PRACTICE & PROCEDURE § 383, at 361-62 (1982).

22. 476 U.S. at 89. Indeed, practitioners deemed this right to be so basic that jury selection guides often advocated taking extreme measures in selecting juries. Perhaps the most commonly quoted collection is that of Clarence Darrow: "Never take a German; they are bullheaded. Rarely take a Swede; they are stubborn. Always take an Irishman or a Jew; they are the easiest to move to emotional sympathy. Old men are generally more charitable and kindly disposed than young men; they have seen more of the world and understand it." THE OXFORD BOOK OF LEGAL ANECDOTES 101 (M. Gilbert 1986).

23. 476 U.S. at 89.

24. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

25. In order to invoke equal protection, state action must be present. A court determines whether state action exists by applying a three-prong test. First, the exercise of some right or privilege, such as peremptory challenges, must have its source in state authority. Second, exercise of the right must deprive a party of some right. Third, the party charged with the deprivation must fairly be said to be a state actor. Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-42 (1982). This protection also extends to the federal government's actions via the Fifth Amendment's due process provision. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

26. Some commentators argue that the Supreme Court developed a fourth level of equal protection analysis in *City of Cleburne v. Cleburne Learning Ctr.*, 473 U.S. 432 (1985). *Cleburne* held that mentally retarded persons are not a quasi-suspect class. *Id.* at 442-43. Despite its holding, the Court's analysis represented a more rigid equal protection analysis than the Court normally accords to low scrutiny groups. *See id.* at 447-50.

27. In determining which groups conform to this definition, the Supreme Court examines the following three factors: whether the group has historically suffered disparate treatment as a group, whether the group has immutable traits, and whether the group has historically been politically powerless. *Id.* at 438; *see also infra* note 30.

acteristics and historical treatment of the group. In each of the three levels of scrutiny, a court examines the state's interests advanced by the action and the relationship between the state's interests and the action. If a court finds an insufficient state interest to justify the action, the court need not inquire into the adequacy of the relationship.

Under this equal protection analysis, the Supreme Court applies strict scrutiny[28] to infringements of fundamental rights[29] and distinctions based on suspect classes.[30] These suspect classes include race,[31] alienage,[32] national origin,[33] and religion.[34] More recently, the Court has developed an intermediate scrutiny[35] for quasi-suspect classes. Intermediate analysis

28. Under this strict scrutiny, the actor must demonstrate that a compelling interest supports the distinction and prove that the action is necessary to achieve that interest. *E.g. id.* at 440. The Supreme Court often refers to the latter prong as requiring the action to be sufficiently narrowly tailored. *Id.*

29. Fundamental rights include activities such as access to the courts, Griffin v. Illinois, 351 U.S. 12, 18 (1956); voting, Reynolds v. Sims, 377 U.S. 533, 554 (1964); and interstate travel, Shapiro v. Thompson, 394 U.S. 618, 630 (1969). Because the Supreme Court has not deemed serving upon a jury to be a fundamental right under the Equal Protection Clause, fundamental rights analysis is irrelevant for the purposes of this Comment.

30. The Court has defined suspect classes in various ways. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (per curiam) (heightened scrutiny applies to groups with "unique disabilities on the basis of stereotypical characteristics not truly indicative of their abilities"); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) (heightened scrutiny for "discrete and insular minorities").

31. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944).

32. Foley v. Connelie, 435 U.S. 291, 295 (1978); Graham v. Richardson, 403 U.S. 365, 371-72 (1971). Despite heightened scrutiny, aliens are ineligible for federal jury service. 28 U.S.C. § 1865(b)(1) (1988). Consequently, in federal courts, the discriminatory use of peremptory challenges to remove aliens is irrelevant since an attorney may challenge aliens for cause.

33. Castaneda v. Partida, 430 U.S. 482, 492 (1977); Hernandez v. Texas, 347 U.S. 475, 479 (1954).

34. Strict scrutiny applies where a statute or practice is patently discriminatory on its face. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

35. Under this analysis, the actor must demonstrate that the action is substantially related to an important governmental purpose. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976). A close relationship between the action and the state interest assures that the state has "determined [the classification] through reasoned analysis rather than through the mechan-

applies to illegitimacy[36] and gender.[37] When governmental action is not based upon a fundamental right or membership in one of the cognizable groups mentioned above, the Supreme Court utilizes low scrutiny analysis.[38] Courts employ low scrutiny analysis for economic measures,[39] and classifications including wealth[40] and age.[41]

In applying equal protection analysis, courts occasionally prohibit certain conduct if based on race or other high scrutiny groups, yet permit the same conduct if based on gender or other middle scrutiny groups.[42] A court may not reach such a conclusion, however, without actually determining whether the action can withstand intermediate scrutiny. Thus, the Supreme Court's determination that gender receives intermediate scrutiny entitles an individual who has allegedly been discriminated against on the basis of gender to have courts analyze equal protection claims at that level of scrutiny.

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ical application of traditional, often inaccurate, assumptions." 458 U.S. at 725-26.

36. *Cleburne*, 473 U.S. at 441; United States v. Clark, 445 U.S. 23, 27 (1980); *see* Lalli v. Lalli, 439 U.S. 259, 265 (1978). *But see* Trimble v. Gordon, 430 U.S. 762, 781 (1977) (Rehnquist, J., dissenting) (illegitimacy does not warrant heightened scrutiny).

37. Discrimination against males rather than females does not exempt the action from scrutiny or reduce the standard of review. *Hogan*, 458 U.S. at 723; *see Caban*, 441 U.S. at 388. The proper determination is whether males and females are similarly situated. *See Craig*, 429 U.S. at 199; Reed v. Reed, 404 U.S. 71, 77 (1971).

38. This doctrine requires only that the state have some rational basis for its action, and places the burden of proof on the plaintiff. *See, e.g.*, *Cleburne*, 473 U.S. at 440; Railway Express Agency v. New York, 336 U.S. 106, 110 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). Under this analysis, courts accept nearly any justification for a governmental action unless the plaintiff proves the action was arbitrary and capricious. Further, courts do not require that the state's action eradicate all evils of the same genus. 336 U.S. at 110.

39. *See, e.g.*, 336 U.S. at 110.

40. *See, e.g.*, *San Antonio Indep. School Dist.*, 411 U.S. at 29.

41. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (per curiam).

42. For example, a court may conclude that a certain action withstands intermediate scrutiny, but does not withstand strict scrutiny. As a result, the court would find the action constitutional if applied on the basis of gender, but unconstitutional if applied on the basis of race. *See, e.g.*, Michael M. v. Sonoma County Super. Ct., 450 U.S. 464 (1981) (statutory rape statute); Rostker v. Goldberg, 453 U.S. 57 (1981) (military draft registration).

C. APPLICATION OF EQUAL PROTECTION PRINCIPLES TO JURY COMPOSITION.

The Supreme Court first invoked the Equal Protection Clause to scrutinize the racial composition of juries more than one hundred years ago in *Strauder v. West Virginia*.[43] *Strauder* found a denial of equal protection when the state tried an African-American criminal defendant before a jury from which blacks were excluded by statute.[44]

The Court again considered application of the Equal Protection Clause to representation of minorities on juries in *Swain v. Alabama*.[45] In *Swain*, the Court reviewed the constitutionality of a prosecutor's exclusion of African-American venirepersons through the use of peremptory challenges. *Swain* held that the Equal Protection Clause does not apply to the removal of blacks from a single, particular jury.[46] While *Swain* recognized that an equal protection violation was possible, the Court required the defendant to prove an absence of blacks from juries "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be"[47] and to demonstrate that the prosecutor was responsible for the exclusion.[48]

The Supreme Court reconsidered *Swain* in *Batson v. Kentucky*.[49] *Batson* held that prosecutors could not use peremptory challenges based solely on a potential juror's race or on the assumption that African-American jurors as a group will be un-

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43. 100 U.S. 303 (1879).

44. *Id.* at 305. The West Virginia statute declared blacks ineligible to serve on a grand or petit jury. *Id.*

45. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

46. The Court presumed that "the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." *Id.* at 223.

47. *Id.* *Swain* rejected an equal protection claim where there had not been an African-American on a jury in the county in approximately fifteen years. *Id.* at 226.

48. *Id.* at 224. The *Swain* burden proved to be nearly insurmountable. In the twenty years following *Swain*, only two defendants were able to meet this burden. Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 27 CRIM. L. BULL., May-June 1991, at 216, 221. (citing State v. Brown, 371 So. 2d 751 (La. 1979) & State v. Washington, 375 So. 2d 162 (La. 1979)).

49. 476 U.S. 79 (1986). *Batson* involved an African-American defendant indicted on charges of second-degree burglary and receipt of stolen goods. The prosecutor peremptorily struck the only four African-Americans on the venire, and an all-white jury convicted the defendant on both counts. *Id.* at 82-83.

able to consider the case impartially.[50] The Court reached its holding after determining that the state's interest in providing peremptories is to ensure a fair trial.[51] *Batson* found that rather than ensuring a fair trial, discriminatory use of peremptories caused harm to the defendant,[52] harm to the excluded juror,[53] and harm to the community at large.[54]

Batson rejected the onerous burden of *Swain*, holding instead that a showing of discrimination in a single case was sufficient to find a denial of equal protection.[55] The Court then implemented procedures for proving a case of prima facie discrimination.[56] The defendant must first demonstrate membership in a cognizable racial group[57] and that the prosecutor used peremptory challenges to remove potential jurors of the defendant's race.[58] Under this analysis, the defendant must prove that the peremptories were based on race, rather than benign

50. *Id.* at 89. The Supreme Court reversed the conviction upon finding a violation of these principles. *Id.* at 100.

51. *Id.* at 85-87; *accord Swain*, 380 U.S. at 219. Even Chief Justice Burger, dissenting in *Batson*, recognized this state interest: "[T]he state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic." *Batson*, 476 U.S. at 125.

52. *Id.* at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

53. *Id.* at 87 ("Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."). Further, exclusion of a person on the basis of group membership stigmatizes both the individual and the group.

54. *Id.* ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

55. The Court's recognition that the defendant could show unconstitutional discrimination solely on the facts of the case at bar represents the major distinction from *Swain*. *Id.* at 95.

56. The Court borrowed the procedure for shifting the burden of proof from the disparate treatment cases under Title VII of the Civil Rights Act of 1964. *Id.* at 94 n.18.

For convenience, this Comment describes the burden established in *Batson* by applying "prosecutor" and "defendant" to the conduct which each committed in *Batson*. Subsequent Supreme Court decisions demonstrate that the parties are interchangeable. *See* Georgia v. McCollum, 112 S. Ct. 2348 (1992).

57. The Court cited Castaneda v. Partida, 430 U.S. 482, 494 (1977), as the source of this phrase. In defining cognizable group, *Castaneda* required the defendant to establish that the group is one that is a "recognizable, distinct class, singled out for different treatment under the laws, as written or applied." *Id.*

58. *Batson*, 476 U.S. at 96. The Court has subsequently modified this lat-

factors.[59] The defendant must then raise an inference that the prosecutor took advantage of this discriminatory aspect of peremptories to exclude potential jurors on account of their race.[60] The defendant can meet this burden by either proving the existence of purposeful discrimination or establishing proof of disproportionate impact upon the cognizable group through circumstantial evidence which "demonstrate[s] unconstitutionality because . . . the discrimination is very difficult to explain on nonracial grounds."[61] If the defendant is able to establish such a prima facie showing, the prosecutor must explain the racial exclusion by demonstrating employment of racially neutral procedures in the peremptory process.[62] If the prosecution demonstrates use of neutral procedures, the burden shifts back to the defendant, leaving the defendant with the ultimate burden of persuasion.[63]

Although *Batson* applied equal protection analysis to the use of peremptory challenges,[64] the Court did not analyze the conduct in terms of a compelling state interest which is "sufficiently narrowly tailored." Additionally, the Court limited its consideration to the discriminatory use of peremptory challenges against African-American criminal defendants.[65] *Batson* thus sent contradictory signals to lower courts. On the one hand, it appears that the Court limited *Batson* to black criminal defendants and did not employ ordinary equal protection nomenclature. On the other, *Batson* expressly left the decision's implementation to lower courts[66] without articulating a definitive decision-making standard or delineating the scope of the

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ter requirement, since the excluded jurors and the defendant no longer need to share the same race. Powers v. Ohio, 111 S. Ct. 1364 (1991).

59. In attempting to prove that the prosecutor's actions were racially motivated, *Batson* allows the defendant to rely on the fact that peremptory challenges permit "those to discriminate who are of a mind to discriminate." 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

The Court has recently reviewed this requirement in Hernandez v. New York, 111 S. Ct. 1859 (1991). The Court held that a prosecutor's challenges of two Hispanic jurors were based on a difficulty in understanding the language and the case, and not on race.

60. *Batson*, 476 U.S. at 96.

61. *Id.* at 93 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

62. *Id.* at 94.

63. *Id.* at 94 n.18.

64. *Id.* at 89.

65. *See e.g., id.* ("the Equal Protection Clause forbids the *prosecutor* to challenge potential jurors solely *on account of their race* or on the assumption that *black* jurors as a group will be unable impartially to consider the State's case against a *black defendant*") (emphasis added).

66. *Id.* at 99-100 & n.24.

holding. Unsurprisingly, lower courts have exhibited confusion and inconsistency in implementing the decision.[67]

Subsequent Supreme Court decisions may assist lower courts in the application of this doctrine. In *Edmonson v. Leesville Concrete Co.*,[68] the Court extended the *Batson* doctrine to civil cases. *Powers v. Ohio*[69] applied *Batson* to cases in which the defendant and the excluded juror do not share the same race. In *Georgia v. McCollum*,[70] the Court recently decided that the Equal Protection Clause prohibits federal criminal defendants, in addition to prosecutors, from engaging in purposeful discrimination in the exercise of peremptory challenges.[71]

Numerous lower courts have addressed the issue of whether *Batson* applies to gender-based peremptory challenges. In *United States v. Hamilton*,[72] the Fourth Circuit refused to extend *Batson* to gender-based peremptory challenges. In *Hamilton*, the government's attorney freely admitted that he exercised three peremptory challenges against women to ensure that the jury would not be overly sympathetic to the female defendant.[73] Nevertheless, the Fourth Circuit concluded that the absence of broader language in *Batson* reflected an intention to prohibit only racially-based peremptory challenges.[74] The court bolstered its conclusion by noting the "important position of the peremptory challenge in our jury system."[75] Other courts have adopted an analogous approach. *State v. Oliviera*[76]

67. For a compilation of the numerous questions left unanswered by *Batson*, see Bonnie L. Mayfield, Batson *and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377, 379-83 (1988); *see also* Morehead, *supra* note 15, at 289 n.3 (noting that over 700 cases cite *Batson* and indicating a number of commentaries on the case).

68. 111 S. Ct. 2077 (1991).

69. 111 S. Ct. 1364 (1991).

70. 112 S. Ct. 2348 (1992).

71. *Id.* The court held that the defendant's action constituted state action. *De Gross* also addressed this issue, reaching the same conclusion. *See supra* note 9 and accompanying text.

72. 850 F.2d. 1038 (1988), *cert. dismissed, sub. nom.* Washington v. United States, 489 U.S. 1069 (1990).

73. 850 F.2d at 1041.

74. *Id.* at 1042 ("While the strictures of the Equal Protection Clause undoubtedly apply to prohibit discrimination due to gender in other contexts, there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges.").

75. *Id.* at 1042-43.

76. 534 A.2d 867 (R.I. 1987). The state's attorney had used six of seven peremptory challenges to remove male venirepersons. *Id.* at 869.

assumed that the *Batson* court was aware of a possible broader application, but "clearly preferred to limit the new standard to racially-based discrimination."[77] *Oliviera* found further support for this conclusion since the use of gender as a criterion for exercising peremptory challenges would render "*all* such challenges . . . inherently suspect."[78] In *Eiland v. State*,[79] a Maryland court noted the inconsistency of *Batson* with equal protection principles,[80] but held that enlarging the doctrine "would be presumptuous on our part."[81] The Eighth Circuit[82] and numerous state courts[83] have reached similar conclusions without considering the merits of the claims.

People v. Irizarry[84] represents one of the few instances in which a court willingly looked beyond the narrow language of *Batson* to determine whether the doctrine enunciated in *Batson* extends beyond race and nationality.[85] In *Irizarry*, a New York appellate court analyzed *Batson* by evaluating the harm to the defendant, the excluded juror, and the community.[86] Instead of

77. *Id.* at 870. The *Oliviera* court asserted that "the [*Batson*] Court refer[ed] solely to discrimination based upon *race*[,]" thereby widening the Court's preference to limit the standard to racially based discrimination. *Id.* (emphasis in original).

78. *Id.* (emphasis in original).

79. 607 A.2d 42 (Md. Ct. Spec. App. 1992).

80. "It is hard to imagine why [the Equal Protection Clause] should not also be aimed at gender-based peremptories directed at women—or at men. It is hard to imagine that it should not be aimed at peremptories based upon a juror's religion." *Id.* at 58.

81. *Id.* at 59. This position is contrary to *Batson's* direction leaving implementation to lower courts. *See supra* note 67.

82. United States v. Hoelscher, 914 F.2d 1527, 1540 (8th Cir. 1990) (the government's preference of men over women in narcotics cases does not show a *Batson* violation); United States v. Wilson, 867 F.2d 486, 488 (8th Cir. 1989) (prosecutor's explanation that he will strike women from street crime prosecutions is not the type of general assertion disapproved in *Batson*).

83. Dysart v. State, 581 So.2d 541 (Ala. Crim. App. 1990) (*Batson* applies only to racial discrimination, not to gender-based discrimination); Hannan v. Commonwealth, 774 S.W.2d 462 (Ky. Ct. App. 1989) (same); State v. Adams, 533 So.2d 1060 (La. Ct. App. 1988), *writ denied*, 540 So.2d 338 (La. 1989) (same); State v. Pullen, 811 S.W.2d 463 (Mo. Ct. App. 1991) (same); State v. Culver, 444 N.W.2d 662 (Neb. 1989) (same).

84. 560 N.Y.S.2d 279 (N.Y. App. Div. 1990) (mem.).

85. The court considered extension of *Batson* where the prosecutor exercised nine peremptory challenges against venirewomen. *Id.* at 279-80. The defendant, as a male, was declared to have standing to raise the claim. *Id.* at 280. Interestingly, the state conceded that *Batson* applies to gender-based discrimination. *Id.*

86. *Id.* at 280. The court departed from traditional equal protection analysis, holding that "strict scrutiny" analysis applies to gender-based peremptory challenges. *Id.*

explaining its analysis, however, the court simply held that *Batson* applied to gender-based discrimination and that excluding jurors solely because they are women denied both the defendant and the jurors equal protection of the laws.[87] Other decisions have prohibited gender-based peremptories under specific provisions of state constitutions.[88]

In addition to the gender discrimination cases, lower courts have attempted to determine whether other groups constitute a cognizable group within the rationale of *Batson*.[89] These decisions have considered peremptories based on national origin,[90] religion,[91] age,[92] and other subcategories.[93]

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87. *Id.* at 281.

88. *See* State v. Levinson, 795 P.2d 845 (Haw. 1990) (holding that the state constitution guarantees the right to serve on a jury and cannot be taken away for any prohibited reasons of race, religion, sex, or ancestry); State v. Gonzales, 808 P.2d 40 (N.M. Ct. App. 1991), *cert. denied*, 806 P.2d 65 (1991) (holding that exercise of gender-based peremptories violates state constitution); People v. Blunt, 561 N.Y.S.2d 90 (N.Y. App. Div. 1990) (same); *see also* Di Donato v. Santini, 283 Cal. Rptr. 751 (Cal. Ct. App. 1991) (holding gender is a cognizable group and peremptories based on gender are therefore prohibited under the federal and state constitutions); Commonwealth v. Hyatt, 568 N.E.2d 1148 (Mass. 1991) (addressing whether peremptories in a rape case were based on race or gender).

89. In reviewing *De Gross*, this Comment necessarily focuses upon gender-based peremptory challenges. Nevertheless, this focus produces several advantages. Lower court decisions considering an extension of *Batson* to gender have produced markedly different approaches and results. Application of *Batson* to gender also represents the broadest expansion of the doctrine, an expansion a number of commentators oppose. *See, e.g., infra* note 148 and accompanying text. Thus, by examining the effect of applying equal protection principles to gender-based peremptory challenges, this Comment will be able to assess the validity of the commentators' concerns.

90. *E.g.*, Murchu v. United States, 926 F.2d 50 (1st Cir. 1991) (per curiam), *cert. denied*, 112 S. Ct. 99 (1991) (Irish defendant not within *Batson*); United States v. Ruiz, 894 F.2d 501, 506 (2nd Cir. 1990) (Hispanics constitute a cognizable group under *Batson*); United States v. Bucci, 839 F.2d 825, 833 (1st Cir. 1988), *cert. denied*, 488 U.S. 844 (1988) (all ethnic and racial minority groups constitute a cognizable racial group). The Supreme Court has determined that, at least for Sixth Amendment purposes, Mexican-Americans constitute a clearly identifiable class. Castaneda v. Partida, 430 U.S. 482, 495 (1977); *see also* Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting) (classifications based on national origin are presumptively invalid).

91. United States v. Clemmons, 892 F.2d 1153, 1158 n.6 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

92. United States v. Mitchell, 886 F.2d 667, 671-72 (4th Cir. 1989); Graham v. Lynaugh, 854 F.2d 715, 723 (5th Cir. 1988), *vacated*, 492 U.S. 915 (1989); United States v. Cresta, 825 F.2d 538, 544-45 (1st Cir. 1987), *cert. denied sub nom.* Impemba v. United States, 486 U.S. 1042 (1988).

93. United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992) (African-American females); United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1037

Batson v. Kentucky unequivocally found peremptory challenges based upon the race of the potential juror unconstitutional.[94] Although *Batson* left implementation to the lower courts, the Court failed to declare the scope of its holding. This lack of direction has led to diverse results. Typically, lower courts have ignored the possible merits of an equal protection claim, holding that *Batson* applies only to peremptories based on race.[95] At least one decision determined that the Equal Protection Clause prohibits gender-based peremptory challenges.[96]

II. THE *DE GROSS* DECISION.

Prior to *United States v. De Gross*, lower courts applied two distinct approaches to gender-based peremptory challenges. Those refusing to extend *Batson v. Kentucky* adopted a narrow reading of *Batson's* language.[97] Those favoring application to gender-based peremptories relied upon *Batson's* broader rationale.[98] Arising in the midst of these conflicting positions, *De Gross* will play a substantial role in defining the scope of peremptory challenges and in determining whether peremptories will continue to be meaningful to practitioners as a fundamental part of the jury system.[99]

In *United States v. De Gross*,[100] Juana Espericueta De

(1987) (African-American males); United States v. Grandison, 721 F. Supp. 743, 745 n.1 (D. Md. 1988) (mem.), *aff'd*, 885 F.2d 143 (1989), *cert. denied*, 495 U.S. 934 (1990) (white women married to African-American men).

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

95. *See supra* notes 72-83 and accompanying text.

96. People v. Irizarry, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990) (mem.).

97. Indeed, the Court cautioned that there is no constitutional right to peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 98 (1986); Stilson v. United States, 250 U.S. 583, 586 (1919). The Supreme Court has expressly recognized that peremptory challenges "may be withheld altogether . . . ." Frazier v. United States, 335 U.S. 497, 505 n.11 (1948). Such language has led to concern, particularly among practitioners, that peremptories will soon be either eliminated or ineffectual. *See infra* note 183 and accompanying text (noting a number of commentators favoring abolition of peremptory challenges).

98. Subsequent Supreme Court decisions indicate the appropriateness of expanding the doctrine beyond the facts of *Batson*. Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088-89 (1991); Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991).

99. Courts, commentators, and practitioners have traditionally viewed peremptory challenges as a permanent, necessary, and inevitable part of the jury system. Powers v. Ohio, 111 S. Ct. at 1364; Batson v. Kentucky, 476 U.S. at 98; Swain v. Alabama, 380 U.S. 202, 219 (1965); Lewis v. United States, 146 U.S. 370, 376 (1892); VAN DYKE, *supra* note 12, at 166.

100. 960 F.2d 1433 (9th Cir. 1992) (en banc).

Gross pled not guilty to three counts of aiding and abetting the transportation of an alien within the United States.[101] During *voir dire*, De Gross exercised seven peremptory challenges against male venirepersons.[102] The government objected to the challenge of the seventh male, Wendell Tiffany, asserting that this pattern of striking males violated the excluded juror's constitutional rights to equal protection of the laws.[103] After De Gross offered no explanation for the removal of Tiffany, the trial court disallowed the peremptory challenge.[104] De Gross raised a similar objection when the prosecutor challenged Herminia Tellez, the only Hispanic on the venire.[105] De Gross claimed that the removal of Tellez was based on race and therefore unconstitutional under *Batson*. The government justified the exclusion of Tellez as merely an attempt to get "a more representative community of men and women on the jury."[106] The trial court accepted this explanation and struck Tellez.[107] The impaneled jury, consisting of three men and nine women, convicted De Gross.[108]

On appeal,[109] a three-member panel of the Ninth Circuit held that both De Gross's challenge of Tiffany and the government's challenge of Tellez violated the constitutional rights of the excluded venirepersons.[110] The court found each party based peremptories on the venireperson's gender in violation of equal protection principles. Shortly thereafter, the Ninth Circuit ordered a rehearing en banc.[111]

On rehearing, the en banc panel held that equal protection principles[112] prohibit a party from peremptorily striking

101. *Id.* at 1435.

102. That *De Gross* involved exclusion of males rather than females is irrelevant to equal protection analysis. *See supra* note 37.

103. United States v. De Gross, 960 F.2d at 1435-36.

104. The trial court required De Gross to justify the challenge only after finding a prima facie case of purposeful discrimination. *Id.* at 1436.

105. Although there may have been another Hispanic woman on the venire, the judge had previously removed her for cause. *Id.* at 1436 n.2.

106. *Id.* at 1436. Ten women and two men were seated in the jury box at that point. *Id.* at 1436 n.3.

107. *Id.* at 1436.

108. *Id.*

109. De Gross appealed the trial court's denial of her peremptory challenge of Tiffany. *Id.*

110. United States v. De Gross, 913 F.2d 1417, 1424-26 (9th Cir. 1990).

111. United States v. De Gross, 930 F.2d 695 (9th Cir. 1991).

112. Application of equal protection principles was critical to the court's analysis: "It distinguishes race and gender from other factors that are not improper bases for exclusion from juries, for example, one's occupation." 960 F.2d 1433, 1438 n.8 (9th Cir. 1992) (en banc).

venirepersons on the basis of gender.[113] In reaching this conclusion, the court noted the Fourth Circuit's decision in *United States v. Hamilton*,[114] but reasoned that the narrow language of *Batson* belied *Batson's* broader rationale.[115]

The court applied the equal protection doctrine to peremptories based on gender after analyzing the various harms such peremptories cause.[116] In its analysis, the en banc panel first noted that gender discrimination in the judicial system stimulates community prejudice which impedes equal justice for women.[117] Next, *De Gross* recognized that a defendant is entitled to a jury chosen in a nondiscriminatory manner.[118] Finally, *De Gross* found that peremptories based on gender, like those based on race, harm the excluded venireperson.[119]

After determining that the harms identified in *Batson* were equally applicable to gender-based peremptory challenges, the court considered whether such challenges violated the Equal Protection Clause. The court acknowledged that race and gender receive different levels of scrutiny under equal protection analysis.[120] Relying heavily on the language of *Batson*, *De*

113. The court applied its decision to the peremptory challenges of a federal criminal defendant. *Id.* at 1439-42. The concurrence disagreed with the majority with regard to whether state action existed, and therefore did not consider whether *Batson* extended to gender-based peremptory challenges. *Id.* at 1447 n.7. The Supreme Court has since determined that state action does exist for peremptory challenges, regardless of which party exercises such peremptories. Georgia v. McCollum, 112 S. Ct. 2348, 2356 (1992); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2085 (1991).

114. 850 F.2d 1038 (4th Cir. 1988).

115. 960 F.2d at 1438 n.6. "In so holding, *Hamilton* relied upon the fact that the Court's language was couched in racial terms. We believe that there is no more significance to that language than the fact that the case involved peremptory strikes against black venirepersons. *Batson's* rationale applies equally well to gender-based peremptory strikes." *Id.*

116. *Id.* at 1438. The *Batson* Court recognized that discrimination during jury selection harms the excluded venirepersons, undermines public confidence in the judicial system, and stimulates community prejudice. Batson v. Kentucky, 476 U.S. 79, 87-88 (1986). *See supra* notes 53-55 and accompanying text.

117. *De Gross*, 960 F.2d at 1438 (citing Personnel Administrator v. Feeney, 442 U.S. 256, 273 (1979)). The court concluded that "[p]ermitting gender-based peremptory challenges would simply affirm an erroneous and unconstitutional presumption that women are less qualified than men to serve as jurors." *Id.*

118. *Id.*

119. *Id.* at 1439 ("[F]ull community participation in the administration of the criminal justice system, whether measured by race or gender, is critical to public confidence in the system's fairness.").

120. *Id.* The Constitution permits gender discrimination only if substantially related to an important governmental interest. *Id.*

Gross concluded that the use of gender-based peremptory challenges nevertheless violated equal protection principles.[121] *De Gross* determined that a state's interest in permitting peremptory challenges is limited to impaneling a fair and impartial jury and found that challenges based solely on a potential juror's gender are not based on an inability to be impartial.[122] Instead, such challenges 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 to consider impartially the case against a member or a nonmember of their group."[123] The court therefore held that gender-based peremptory challenges do not achieve important governmental interests and violate equal protection principles.[124]

The court next addressed whether the challenges by each party violated these legal principles. Following the presumptions established in *Batson*, *De Gross* upheld the trial court's inference that the defendant challenged Tiffany because of his gender.[125] De Gross's refusal to explain her challenge constituted a failure to carry her burden and justified the district court's disallowance of the peremptory challenge. The Ninth Circuit further found that the prosecutor's challenge of Tellez established a prima facie case of gender discrimination.[126] The prosecutor's statement that he desired more men on the jury compelled this conclusion.[127] Because the trial court failed to disallow the challenge of Tellez, the en banc panel reversed the trial court's decision and remanded the case for a new trial.[128]

III. BEYOND *DE GROSS*: HOW FAR SHOULD THE *BATSON* DOCTRINE EXTEND?

United States v. De Gross is among the first cases to hold that *Batson v. Kentucky* applies to non-racially-based peremptory challenges. As such, *De Gross* raises several issues. The

121. *Id.*
122. *Id.*
123. *Id.* at 1439 (citations omitted).
124. *Id.*
125. *Id.* at 1442. The en banc panel upheld the lower court's determination after noting that De Gross used seven of her eight peremptory challenges against males. After challenging Tiffany, ten women and two men were seated on the jury, and only one man remained in the venire. *Id.*
126. *Id.* at 1442-43.
127. *Id.* at 1443.
128. *Id.*

first addresses whether *Batson's* language and rationale warrant the application of equal protection principles to groups other than race. This Comment asserts that *De Gross* correctly applied *Batson* to non-racially-based peremptory challenges. The second issue concerns whether courts should further expand this doctrine to protect cognizable groups other than race and gender. This Comment contends that equal protection principles and *Batson* justify prohibiting peremptory challenges against members of any cognizable group which warrant intermediate or strict scrutiny under traditional equal protection analysis. Third, *De Gross* raises the issue of whether continued extension of the *Batson* doctrine will render peremptory challenges virtually meaningless. This Comment argues that limiting peremptory challenges to those based on low scrutiny equal protection groups will advance the purposes of, and respect for, peremptory challenges and will promote the rationale of the Equal Protection Clause.

A. *De Gross* Correctly Applied *Batson* to Non-Racially-Based Peremptory Challenges.

In *United States v. De Gross*, the Ninth Circuit quickly dismissed the notion that the Supreme Court intended to limit *Batson v. Kentucky* to racial groups.[129] *De Gross's* holding directly contradicts the Fourth Circuit's analysis in *United States v. Hamilton*.[130] This circuit split raises the issue of whether *Batson's* language and rationale warrant an extension of these principles to non-racially-based peremptory challenges.

The Supreme Court's language strongly supports the view that lower courts should not narrowly construe *Batson*. First, the *Batson* majority did not attempt or intend to limit the decision to racial groups.[131] On the contrary, the decision expressly

129. *See supra* notes 114-16 and accompanying text.

130. The Fourth Circuit determined that the Supreme Court expressly limited *Batson* to racially motivated peremptory challenges. United States v. Hamilton, 850 F.2d. 1038, 1042 (4th Cir. 1988), *cert. dismissed, sub. nom.* Washington v. United States, 489 U.S. 1094 (1989). The reasoning applied in *Hamilton* came, in large part, from Justice Burger's dissent in *Batson*, where the Chief Justice contended that the Court applied a "hybrid" equal protection analysis which could be limited to peremptory exclusions of African-American criminal defendants. *Batson*, 476 U.S. at 126 (Burger, C.J., dissenting). Although Justice Burger believed the decision should be limited to race, he admitted that the Court "invokes general equal protection principles in support of its holding." *Id.* at 123. Burger fails to explain the incompatibility of these two positions.

131. Only Justice Burger's dissent advocated this position. *See id.* at 123-24.

left implementation to the lower courts.[132] Additionally, the Supreme Court's decision adopted the "cognizable group" standard.[133] By espousing the "cognizable group" criterion, *Batson* implicitly recognized that certain groups must receive additional protection because of their historical and disparate treatment. Because the "cognizable group" principle lies at the heart of the equal protection doctrine,[134] *Batson* must extend beyond race.[135]

In addition to *Batson's* specific language, the decision's rationale reveals the Supreme Court's unmistakable intent to incorporate traditional equal protection concepts.[136] Application of equal protection principles is implicit in *Batson's* overruling of *Swain v. Alabama*.[137] Indeed, limiting *Batson* to racial groups would be entirely inconsistent with the policies of equal protection.[138] The equal protection doctrine does not allow courts to apply strict scrutiny to racially-based classifications, yet apply absolutely no scrutiny to alleged discrimination

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132. *Id.* at 99-100 n.24.

133. *Id.* at 96. *Batson's* use of "cognizable racial group" illustrates only that the discriminatory peremptory challenge in the case concerned exclusion of a member of a racial group. *See* United States v. DeGross, 960 F.2d 1433, 1438 n.6 (1992) (en banc).

134. The Equal Protection Clause guarantees equal treatment of similarly situated individuals. When governmental action disproportionately impacts upon "discrete and insular minorities," the Supreme Court will apply heightened scrutiny. *See supra* notes 24-30 and accompanying text.

135. Traditional equal protection analysis supports this Comment's assertion that courts must apply the *Batson* doctrine with the level of scrutiny normally accorded to various groups. *See infra* notes 178-81 and accompanying text.

136. Although *Batson* does not utilize the language of "strict scrutiny" or "compelling state interest," the Supreme Court conceded that equal protection principles were applicable. 476 U.S. at 84.

137. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). *Swain* explicitly permitted consideration of group affiliation, even if irrelevant to the goal of achieving an impartial jury. *Id.* at 220-21. The fundamental philosophy of the Equal Protection Clause, however, prohibits consideration of group affiliations without justifiable reason. *See supra* notes 27-28. By overruling *Swain* and holding that peremptory challenges cannot be based solely upon group affiliation, *Batson* incorporates this fundamental principle in its doctrine and supports the rationale of the Equal Protection Clause.

138. Donald C. Hanratty, Note, *Moving Closer to Eliminating Discrimination in Jury Selection: A Challenge to the Peremptory*, 7 N.Y.L. SCH. J. HUM. RTS. 204, 228 (1989) (citing Chew v. State, 527 A.2d 332, 346-47 (1987)) ("[I]t is not clear how the *Batson* decision can rest on the equal protection clause and not incorporate general equal protection law principles."); Barbara Isabel Campbell, Note, Batson v. Kentucky: *Two Years Later*, 24 TULSA L.J. 63, 77 (1988) ("To apply *Batson* only to blacks . . . would be a strange application of the equal protection clause.").

against other cognizable groups.[139] Any other reading of the equal protection doctrine is inapposite to the long-accepted application of the Fourteenth Amendment beyond the confines of race.[140]

Analysis of the harms identified by *Batson* likewise supports the conviction that the Supreme Court did not intend to limit the decision to racial discrimination. *Batson* illustrated the existence of harm to the defendant, the excluded juror, and the community at large.[141] As *De Gross* accurately points out, the stigmatization, stereotyping, and fairness concerns which peremptory challenges raise are wholly applicable to peremptories based on gender.[142] Like the historical racial discrimination against African-Americans, women have faced "a long and unfortunate history of sex discrimination."[143] Based on this shared history, *De Gross* acknowledged that exclusion of venirepersons from juries based solely on their gender generates these same concerns.

Under the Sixth Amendment, the Supreme Court has held that it is unconstitutional to exclude women as a class from the venire based solely on their sex.[144] *De Gross* reached the same conclusion with respect to peremptory challenges after analyzing the language and rationale of *Batson*. The court concluded that the harms present in *Batson* were also present when based

139. This is different from claiming that only racial groups may be protected from certain arbitrary actions. Instead, such a requirement simply compels courts to consider extension of protection to other groups prior to outright rejection. *See supra* note 42 and accompanying text.

140. Such a position would represent a return to the standard enunciated in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

141. *See supra* notes 52-55 and accompanying text.

142. *De Gross*, like *Batson*, restricts its language to the specific group at issue. Thus, the *De Gross* decision does not address the issue of whether the harms also impact upon other cognizable groups. This Comment addresses this issue *infra* in Section III(B).

143. Frontiero v. Richardson, 411 U.S. 677, 684 (1973). As *De Gross* points out, "[t]he history of juries in the United States is one of pervasive, government sanctioned exclusion of women." United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc). The court then noted that "[i]t was not until 1975 that the Supreme Court held that systematically excluding women from juries violates defendants' Sixth Amendment rights." *Id.*

144. Taylor v. Louisiana, 419 U.S. 552, 537 (1975). "[T]he exclusion of women from jury panels may at times be highly prejudicial to the defendants." Ballard v. United States, 329 U.S. 187, 195 (1946). In *Lockhart v. McCree*, 476 U.S. 162, 175 (1986), the Court concluded that the exclusion of women "raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community."

on gender and therefore held that the rationale of the *Batson* decision equally applied to gender-based peremptory challenges.[145] The language and rationale of *Batson*, Supreme Court precedent, and solid reasoning all support the Ninth Circuit's reasoning in *De Gross*.

Several courts[146] and commentators[147] have illogically restricted *Batson* to racially-based peremptory challenges. The decisions posit that because *Batson's* language failed to include other groups, courts should not extend *Batson* beyond that domain.[148] This rationale, however, fundamentally misconceives *Batson*. Because *Batson* dealt with black criminal defendants, one can readily understand the Court's references to that group's exclusion.[149] By failing to undertake *Batson's* legal analysis, these courts violate fundamental equal protection

145. *De Gross*, 960 F.2d at 1438. English common law prohibited women from jury service under the doctrine of *propter defectum sexus*, or "defect of sex." *Id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES 362). Evidence of this distressing history is prevalent. A Supreme Court Justice once proclaimed: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

146. *See e.g.*, United States v. Hamilton, 850 F.2d. 1038 (4th Cir. 1988), *cert. dismissed, sub. nom.* Washington v. United States, 489 U.S. 1094 (1989); State v. Oliviera, 534 A.2d 867 (R.I. 1987). Several Supreme Court Justices have also espoused such a conviction. Justice O'Connor reasoned that "[o]utside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies." Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring in denial of certiorari). Chief Justice Burger concluded that *Batson* clearly contained a limitation to race-based discrimination. Batson v. Kentucky, 476 U.S. 79, 123-24 (1986) (Burger, C.J., dissenting).

147. *E.g.* Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1053 (1991) (By stressing race, "the Court implicitly licensed discrimination on nonracial grounds").

148. *United States v. Hamilton* is an example of a court refusing to analyze a claim of gender discrimination on its merits, reasoning that "if the Supreme Court in *Batson* had desired, it could have abolished the peremptory challenge or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification." *Hamilton*, 850 F.2d at 1042. Washington v. United States, 489 U.S. 1094 (1989). This Comment argues that these trial courts wrongly permitted such challenges. Further, the appellate courts should have recognized the legal errors and reversed the trial court decisions.

149. *De Gross*, 960 F.2d at 1438 n.6; *see also* Shirley S. Sagawa, Batson v. Kentucky: *Will it Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14, 22 (1987-88) (citing Washington v. Davis, 426 U.S. 229, 245 (1976)) ("When the Court makes a statement about equal protection, its literal holding often refers specifically to the group that is the subject of the litigation. However, the Court often does not intend its decision to be so limited.").

principles,[150] ignore *Batson's* directive to implement the decision,[151] abdicate their judicial responsibility, and deprive litigants of their right to have their claims fully considered.[152]

B. EQUAL PROTECTION ANALYSIS REQUIRES APPLICATION OF THE DOCTRINE TO ALL HEIGHTENED SCRUTINY GROUPS.

United States v. De Gross determined that *Batson's* language and rationale, coupled with Supreme Court precedent, warranted the inference that the *Batson* doctrine should prohibit gender-based peremptories.[153] As with *Batson*, *De Gross* addresses only the group at issue before the court. Thus, future courts could avoid applying the *Batson* doctrine to other groups by construing *De Gross* narrowly.[154] This Comment contends that rather than adopting such a narrow reading, future decisions should extend the protection which *De Gross* provides for gender-based peremptories to any group which warrants

150. *See supra* note 42 and accompanying text.

151. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986).

152. A litigant asserting unconstitutional gender discrimination in the jury selection process is entitled to a principled resolution of this claim. Because no issue of gender discrimination was presented in *Batson* and because the Supreme Court did not discuss the merits of this issue even in dictum, the burden of providing a reasoned consideration of the litigant's claim must fall initially upon lower courts.

Albert W. Alschuler, *The Overweight Schoolteacher from New Jersey and Other Tales: The Peremptory Challenge after* Batson, 25 CRIM. L. BULL., 57, 64 n.31 (1989).

153. A doctrine which prohibits peremptories only on the basis of race and gender is only a slight improvement over a doctrine which prohibits only racial discrimination. For a contrary view, see S. Alexandria Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305, 1329 (1991) ("Prohibition of gender-based peremptory challenge is not only a logical extension of the *Batson* prohibition, but is also the logical place to end the restructuring of the peremptory challenge."); *see also* Mayfield, *supra* note 67, at 404 (exploring the extension of *Batson* only to other strict scrutiny classes of race, alienage, and national origin. The author then states that she will not discuss extension to other groups because she believes such an argument would fail).

154. Such an approach would fail to create a just and consistent method of dealing with discriminatory peremptory challenges and would tempt attorneys to "go as far as they can" in the exercise of discriminatory peremptories in the hope that the judge is willing to overlook their indiscretions. In one recent article, the author addresses a state's interest of impartiality under the Equal Protection Clause. Based on this analysis and extensive policy reasoning, the author concludes gender based peremptories violate equal protection principles, yet neglects to apply this rationale beyond gender. Note, Beyond *Batson*: Eliminating Gender-Based Peremptory Challenges, 105 HARV. L. REV. 1920, 1922 (1992).

heightened scrutiny under traditional equal protection principles.[155]

A two-part analysis demonstrates the appropriateness of this conclusion. First, the three types of harms which *Batson* enunciated most often occur when a court permits peremptories based on membership in, or characteristics of, a group which receives heightened scrutiny under equal protection analysis. When these harms are intensified, *Batson's* rationale fully applies. Second, the only acknowledged state's interest in permitting peremptories is to ensure an impartial jury.[156] When parties exercise peremptories against members of a heightened scrutiny group, this interest must be either substantial or compelling.[157] Because parties base discriminatory peremptories only on stereotypes which do not enhance the likelihood of an impartial jury, the state's interest is insufficient.[158]

1. Analysis of the Harms Which *Batson* Articulated.

Batson[159] and subsequent Supreme Court decisions[160] recognized that peremptory challenges which eliminate members of cognizable groups harm the defendant, the excluded juror, and the community as a whole.

Discriminatory peremptory challenges harm the defendant by compromising the representative quality of the jury.[161] The

155. This proposal results in a malleable doctrine which may change as certain groups are granted more or less scrutiny under traditional equal protection analysis. For instance, if courts applied middle level scrutiny to age classifications, peremptories based on age should be prohibited.

156. *See infra* note 174. Even *Swain v. Alabama* acknowledged this interest: "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." 380 U.S. 202, 219 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

157. *See supra* notes 28 and 35 and accompanying text.

158. Several commentators have accepted this type of application. *See* Brown v. North Carolina, 479 U.S. 940, 945 (1986) (Brennan, J., dissenting from denial of certiorari) ("[W]e may not pick and choose which constitutional rights we will and will not vindicate in monitoring the jury selection process."); Morehead, *supra* note 15, at 303 ("The spirit of *Batson* compels protection of any cognizable group, including women, that has historically been the victim of discrimination").

159. *Batson*, 476 U.S. at 86-88.

160. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080, 2088 (1991); Powers v. Ohio, 111 S. Ct. 1364, 1368-72 (1991).

161. "[D]iscriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered

Supreme Court has acknowledged, especially in criminal cases, the importance of assuring a defendant of fair proceedings.[162]

Prejudicial peremptories also injure the excluded juror.[163] To have an effective system of justice, citizens must have the opportunity to participate in the administration of justice[164] and the right to be considered on an individual, rather than on a group, basis.[165] Further, the exclusion of jurors may have a profound impact upon their opinion of our judicial system[166] and upon the excluded group as a whole.[167]

Perhaps most importantly, the Supreme Court has recognized the detrimental impact discriminatory peremptory chal-

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among unpopular or inarticulate minorities.'" Batson v. Kentucky, 476 U.S. 79, 86 n.8 (1986) (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting))

162. The purpose of the jury system is to impress upon the criminal defendant . . . that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in those terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Powers, 111 S. Ct. at 1372.

163. Batson v. Kentucky, 476 U.S. at 795, 87 (1986); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991).

164. Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991). "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* at 1370. This notion applies equally to gender, religion, and other cognizable groups.

165. *Batson*, 476 U.S. 87. Such peremptory challenges "harm the excluded venireperson because discriminatory challenges are based on group membership whereas juror competence depends upon an individual's qualifications." United States v. DeGross, 913 F.2d 1417, 1422 (9th Cir. 1990).

166. "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard." *Powers*, 111 S. Ct. at 1372.

167. United States v. DeGross, 913 F.2d 1417, 1423 (9th Cir. 1990) (Gender discrimination in the judicial system is "a stimulant to community prejudice which impedes fair treatment for women."); Sagawa, *supra* note 149, at 33 & 41 ("Striking women from a jury in reliance on these maxims perpetuates damaging views of women." Sagawa further notes that the stigma of an excluded group "carries over into unknown other facets of life, affecting not only the way others see the excluded group, but the way its members view themselves.").

Based on the harms which such generalizations cause, the Supreme Court has condemned unequivocally the use of racial stereotypes to procure an impartial jury. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test."); *Powers*, 111 S. Ct. at 1370.

lenges have upon the community as a whole.[168] *Batson* concluded that such practices "undermine public confidence in the fairness of our system of justice."[169] In this situation, "it is not necessary to assume the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[170]

In *Batson*, the Supreme Court found that each of these harms arise when a party exercises racially-based peremptory challenges. *De Gross* strongly emphasized that each harm occurs not exclusively with racially-based peremptory challenges, but also with gender-based peremptory challenges.[171] Upon examination, it becomes apparent that these harms will develop whenever parties base peremptories upon membership in, or attributes of, a heightened scrutiny equal protection group. When a party exercises peremptories against heightened scrutiny groups, the opposing party is more likely to recognize the prejudicial nature of the challenge, the excluded venireperson is more inclined to lose confidence in our system of justice, and the public as a whole is more likely either to perpetuate the stereotype or view the decision as biased and unfair.[172] While

168. Batson v. Kentucky, 476 U.S. 79, 87 (1986). With the present use of peremptory challenges, many believe that their use is the "most significant means by which prejudice is injected into the jury selection system." Steinberg, *supra* note 48, at 216 (quoting Carl H. Imlay, *Federal Jury Reformation: Serving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 270 (1973)).

169. *Batson*, 476 U.S. at 87. Subsequent cases elaborated on this notion. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."); Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991) ("The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause").

170. Peters v. Kiff, 407 U.S. 493, 503-04 (1972).

> Fulfilling the goal of impartiality requires that we provide an opportunity for the full range of views. Our ability to elicit the community's conscience on the difficult issues of justice is diminished by the exclusion of broad groups of people, and the legitimacy of the jury's verdict is thereby impaired.

VAN DYKE, *supra* note 12, at 42.

171. United States v. DeGross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc).

172. For instance, if a party peremptorily challenges a Buddhist venireperson based solely upon that person's religion (perhaps because the opposing party also belongs to the Buddhist religion), the challenge will more likely offend and anger the opposing party, the excluded venireperson, and the Buddhist community. Compare this situation to a peremptory challenge based on a potential juror's inability to stay awake. This latter example is unlikely to

these harms cause grave concerns when applied to members of cognizable groups, the considerations lessen greatly and require a lower level of equal protection scrutiny when removal of persons occurs based on benign characteristics or attributes not directly associated with members of a cognizable group.[173]

2. Peremptories and the State's Interests.

The *Batson* holding reconfirmed that a state's interest in permitting peremptory challenges is to ensure a fair and impartial jury.[174] Determination of this governmental interest,[175] however, extends only to ensuring a fair trial and no further.[176]

In order to apply the equal protection doctrine, one must determine whether peremptory challenges will advance the state's interests. Ideally, a party can exercise peremptory challenges based on the party's perception of a particular juror's ability to fairly try the case. Peremptories exercised on the basis of membership in, or attributes of, a heightened scrutiny equal protection group, however, are based upon stereotypes rather than a factual assessment of an individual's ability to im-

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raise complaints and is much more likely to ensure a reasoned decision by an impartial jury.

173. Where the group in question has not experienced historical underrepresentation or widespread discrimination in jury service, there is minimal gain from granting protection against such discrimination; similarly, where the group has little cohesiveness or recognizability as a group, there is little possibility that the group will be stigmatized as a result of the occasional exclusion that it might experience.

Sagawa, *supra* note 149, at 23.

174. *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986). Indeed, "the impartiality of the adjudicator goes to the very integrity of the legal system." Gray v. Mississippi, 481 U.S. 648, 688 (1987).

175. Courts must limit their inquiry to the interests of the government and not of the parties. Thus, considerations regarding a litigant's interest in winning are irrelevant. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 204 (1989). As one commentator put it, "it is not the value of *all* peremptory challenges - the peremptory challenge as an institution - that should determine the weight of the state interest, but the value of *unexplained peremptory challenges against members of discrete groups*." Sagawa, *supra* note 149, at 23.

176. Justice Burger, dissenting in *Batson*, misses the significance of this point when he admits that the state's interest is to ensure a fair trial and that this interest is substantial, if not compelling. *Batson*, 476 U.S. at 125. Although Burger is correct in his statement, this interest is only compelling when parties use peremptories to ensure a fair trial. When parties use peremptory challenges in a discriminatory manner, the court can no longer ensure a fair trial.

partially consider the case.[177] Without some further justification to act on instinct, such challenges wholly fail to ensure an impartial jury. Because an impartial jury cannot be obtained through such challenges, the challenges do not advance a substantial or compelling state interest.[178] Consequently, courts must conclude that such challenges violate the Equal Protection Clause.

Under equal protection analysis, courts must generally assess the relationship between the state's goal and the action which is the subject of the claim. Regarding peremptory challenges, courts should determine whether peremptories correlate to the fairness of trials. Because the above analysis yields the conclusion that discriminatory peremptories do not ensure an impartial jury, however, courts need not reach the issue of whether factors such as gender, religion, or national origin have any relation to fitness as a juror.[179]

A much different result occurs when parties exercise peremptories based on something other than membership in, or attributes of, a heightened scrutiny group. In these circumstances, a party need only provide a rational basis for a peremptory challenge. Accordingly, this proposal does not hinder a party's ability to remove a person due to characteristics such as personality or attentiveness. For example, a court could approve peremptories based on a party's belief that removal of inattentive persons from a complicated case is more likely to ensure a fair trial.[180]

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177. "[P]eremptory challenges are often based on assumptions, fears, and hunches, none of which would seem to translate into a compelling interest." Robert L. Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385, 409 (1985).

178. Assuming, arguendo, that empirical data were shown to conclusively establish that membership in a group correlates with the outcome and impartiality of jury verdicts, the harms which discriminatory peremptories cause would not constitute substantial or compelling state interests. Nevertheless, parties may still exercise some peremptories based on stereotypes. For example, a prosecutor may believe that all professors are willing to give criminals a second chance and will never convict for a first offense. Whether or not this stereotype is true, professors do not constitute a cognizable group which warrants heightened scrutiny. Accordingly, the state need only have a rational basis, such as appeasing the prosecutor, to justify peremptories against professors.

179. An insufficient state interest renders the second prong of this analysis irrelevant.

180. Some parties will undoubtedly attempt to justify discriminatory peremptories by advancing neutral bases for removal. This Comment contends, however, that *Batson's* shifting burdens will adequately allow courts to see

C. EXPANDING *DE GROSS* WILL NOT RENDER PEREMPTORY CHALLENGES MEANINGLESS.

Immediately after the Supreme Court decided *Batson v. Kentucky*, many predicted that *Batson* would render peremptories meaningless.[181] These dire prognostications have not come to fruitation.[182] Other commentators reached the opposite conclusion, declaring that the shortcomings of *Batson* illustrate the need to abolish peremptory challenges.[183] In the face of these diametrically opposed views, the Supreme Court has repeatedly underscored the importance of peremptory challenges.[184]

Peremptory challenges serve to increase the likelihood of ensuring an impartial jury. Their use, however, should not extend to permitting an attorney to shape a jury to ensure a favorable decision.[185] Ideally, peremptory challenges would help achieve impartial juries while serving many important

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through such insincere explanations. *See infra* notes 189-90 and accompanying text.

181. *See, e.g.*, State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) ("[I]f the use of gender as a criterion for exercising peremptory challenges is prohibited, *all* such challenges will become inherently suspect. Opposing counsel could demand an alternative explanation for every challenge exercised. The damage to the peremptory challenge, a vital component of trial by jury, would be enormous, if not fatal."); Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, J., dissenting) ("[I]t is quite probable that every peremptory challenge could be objected to on the basis that . . . it constituted a 'classification' subject to equal protection scrutiny.").

182. Instead, several states which have broadly prohibited peremptory challenges based on certain group affiliations for more than a decade have found no decay in peremptory challenges. Both California and Massachusetts courts have found that the policies do not undermine the effectiveness of peremptory challenges. *See, e.g.*, People v. Hall, 672 P.2d 854 (Cal. 1983) (en banc); Commonwealth v. Reid, 424 N.E.2d 495, 500-01 (Mass. 1981).

183. *See, e.g.*, Steinberg, *supra* note 48, at 227-29; Hanratty, *supra* note 138 at 239-40; Harris, *supra* note 147, at 1062; Rosemary Purtell, *The Continued Use of Discriminatory Peremptory Challenges after* Batson v. Kentucky: *Is the Only Alternative to Eliminate the Peremptory Challenge Itself?*, 23 NEW ENG. L. REV. 221, 257-60 (1988); Alschuler, *supra* note 175, at 206-09; Sagawa, *supra* note 149, at 44-47. At least one Supreme Court Justice has also advocated this position. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

184. *See supra* notes 67-72 and accompanying text. *Batson* does not elevate peremptories to the level of a challenge for cause, since a party must first claim and present evidence of such discrimination. *See Batson*, 476 U.S. at 96. This commitment, coupled with the *Batson* court's decision to limit rather than abolish peremptories, supports the belief that the Supreme Court does not favor abolition of peremptory challenges. Jo, *supra* note 153, at 1326.

185. Robert L. Pidcock, Note, *Discriminatory Use of Peremptory Challenges in Jury Selection*, 29 N.M. L. REV. 563, 573 (1989).

purposes[186] apart from the purpose of challenges for cause.[187]

Courts can obtain the proper balance by prohibiting peremptory challenges based on membership in, or attributes of, a heightened scrutiny equal protection group. Admittedly, trial courts will need to scrutinize the justifications for peremptory challenges.[188] The procedural shifting of burdens developed in *Batson*, however, will aid lower courts in making such decisions. Additionally, lower courts have now applied *Batson* for more than six years. The courts, therefore, cannot claim that application on a somewhat broader scale is overly burdensome.[189]

Expansion of *Batson* enhances respect for peremptories and for decisions made without discriminatory peremptories, rather than rendering peremptories meaningless. Practitioners can still rely on factors such as personality, responsiveness, and

186. One survey found that the majority of trial lawyers considered a jury's composition to be either "important" or "very important." *See* Jeffery R. Boyll, *Behavioral Trial Consulting: What do Practicing Attorneys Think?*, 13 TRIAL DIPL. J. 97, 99 (1990). For a summary of the major functions of peremptory challenges, see 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, 828-29 (1989).

187. One major distinction between challenges for cause and peremptory challenges is that the former requires that a court find an admitted or apparent prejudice whereas the latter permits a party to exclude prospective jurors for unconscious or unexpressed biases. Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 554 (1975); Andrea B. Horowitz, Note, *Ross v. Oklahoma: A Strike Against Peremptory Challenges*, 1990 WIS. L. REV. 219, 223-24 (1990); Joe Marcum, Note, *Mitchell v. State: Continuing Erosion of the Peremptory Challenge in Equal Protection Litigation*, 42 ARK. L. REV. 1093, 1095 (1989); Jo, *supra* note 153, at 1326. Because attorneys can challenge for cause when the bias is apparent, they still need peremptories to remove jurors they believe are biased but who deny bias on *voir dire*. VAN DYKE, *supra* note 12, at 146. This is especially true if one believes that "[a] juror's general promise to be fair is relatively meaningless." ROBERT A. WENKE, THE ART OF SELECTING A JURY 62 (2d ed. 1988).

188. A number of evidentiary and procedural problems have occurred under *Batson*. This topic, however, is beyond the scope of this Comment. For an excellent analysis of problems and possible solutions, however, see David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 826-38 (1988). If courts do not take such measures, many of Justice Marshall's concerns regarding continued discrimination may come true. *See* Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring).

189. While some argue that such a proposal is unworkable and unmanageable, mere administrative convenience is insufficient to justify denial of constitutional rights. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) (holding that administrative convenience, standing alone, does not justify the use of a suspect classification under equal protection strict scrutiny).

characteristics such as being a leader or follower to achieve an impartial jury.[190] Rather than relying on discriminatory stereotypes, consideration of these factors, coupled with a prospective juror's personal experiences, are infinitely more likely to procure an impartial jury.[191] Concurrently, parties, jurors, and the community will hold greater respect for the decisions which our judicial system then renders.

CONCLUSION

The notion that peremptory challenges allow a party to exclude a juror for any reason clashes with the tenets of the Equal Protection Clause. *Batson v. Kentucky* intensified this tension by holding that peremptory challenges based on the race of a juror are unconstitutional. *United States v. De Gross* correctly extended the *Batson* doctrine to gender-based peremptories.

In the wake of *De Gross*, future courts must determine the doctrine's proper breadth. Equal protection analysis of governmental interests yields the conclusion that peremptories can survive merely a rational basis scrutiny. Thus, courts must prohibit peremptory challenges based on heightened scrutiny equal protection groups. Equal protection principles must prevail in the tension between peremptory challenges and the Equal Protection Clause because of the peremptory's purpose in ensuring an impartial, rather than a favorable jury. This resolution will enhance the likelihood of an impartial jury, increase respect for the use of peremptory challenges, and create much greater respect for our judicial system.

190. Steinberg, *supra* note 48, at 867-68. Other typical grounds may include inattentiveness, inability to comprehend issues in a complicated case, or any of a large variety of other reasons.

191. WENKE, *supra* note 187, at 62.