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LIMITING A DEFENDANT'S PEREMPTORY CHALLENGES: *GEORGIA v. MCCOLLUM* AND THE PROBLEMATIC EXTENSION OF EQUAL PROTECTION

The Sixth Amendment grants to every criminal defendant the right to a jury of his or her peers.¹ Despite this guarantee, the percentage of defendants who actually reach the trial stage of their proceedings has always remained relatively low.² In spite of such low numbers, the jury system continues to serve a number of important roles in the criminal justice system. These include preventing government oppression by protecting defendants from the "overzealous prosecutor and . . . the compliant, biased, or eccentric judge,"³ while serving as a common sense shield between the defendant and the state.⁴ More importantly, the impact of a fair jury in cases

1. U.S. CONST. amend. VI. The Sixth Amendment provides in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." *Id.* In 1968, the Supreme Court held that the right to a trial by jury in criminal cases is "fundamental," and extended the application of this component of the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). As incorporated through the Due Process Clause, the Sixth Amendment has a somewhat different application to the states than it does in federal courts. For example, less than unanimous jury verdicts have been held sufficient to convict a defendant in state court, while such a verdict would continue to mandate a mistrial in federal court. *See Johnson v. Louisiana*, 406 U.S. 356, 363 (1972); *see also Apodaca v. Oregon*, 406 U.S. 404, 412 (1972) (holding that incorporation of the Sixth Amendment in *Duncan* carried no requirement of jury unanimity).

2. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 518 tbl. 5.30 (Timothy J. Flanagan & Kathleen Maguire eds., 1991) [hereinafter CRIMINAL JUSTICE STATISTICS] (listing statistics which show that over 70% of federal criminal cases are resolved before going to trial).

3. *Duncan*, 391 U.S. at 156; *see also Williams v. Florida*, 399 U.S. 78, 100 (1970) (stating that one purpose of the jury is to prevent oppression by the government); REID HASTIE ET AL., INSIDE THE JURY 4-5 (1983) (discussing the function of the jury); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 9 (1977) (discussing the purpose of the criminal jury); Lisa E. Alexander, Comment, *Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to a Trial by a Representative Jury*, 19 HASTINGS CONST. L.Q. 261, 261 (1991) (noting that a "critical function[]" of the jury is to "act as a buffer between [the] government and [the] defendant").

4. *See Williams*, 399 U.S. at 100. The principal benefit of a criminal jury has been stated as being "the interposition between the accused and his accuser of the commonsense [sic] judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.*; *see also HASTIE supra*

that do go to trial reaches far beyond the individual defendant. The jury in such cases helps to assure public confidence and popular approval of the entire criminal justice system.⁵

The jury verdict in the criminal case against the police officers accused of beating motorist Rodney King⁶ makes exceedingly clear the far-reaching impact of appearances of impropriety in jury composition and selection.⁷ Until

note 3, at 4 (describing the purpose and function of the jury); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 227 (1986) (discussing the importance of jury trials); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1028 (1990) (defining the jury as the conscience of the community).

5. See *Williams*, 399 U.S. at 100; see also CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 35-38 (1962) (describing the jury as the "conscience of the community"); VAN DYKE *supra* note 3, at 12 (stating that "[o]nly a verdict reached through [the] deliberation of twelve diverse individuals will carry weight with society as a whole").

6. On April 29, 1992, a suburban Los Angeles jury of ten whites and two hispanics acquitted three white police officers of charges stemming from the beating of black motorist Rodney King. Another officer was acquitted of all but one charge against him. Unbeknownst to the officers later charged, the beating itself was recorded on videotape and extensively replayed throughout the country. The criminal proceedings against the officers were therefore accompanied by significant publicity. Three days of rioting and urban unrest followed the jury's acquittals of the officers, stemming in part from what many saw as the verdict's statement of racial injustice in the American judicial system. Since the riots, many commentators have described the causes and effects of the jury verdict—igniting a renewed focus on minority jury representation. See, e.g., L.A. TIMES STAFF, UNDERSTANDING THE RIOTS: LOS ANGELES AND THE AFTERMATH OF THE RODNEY KING VERDICT (1992); Scott Armstrong & Daniel B. Wood, *L.A. Tries to Restore Calm Following Police Acquittals*, CHRISTIAN SCI. MONITOR, May 1, 1992, at 1; Mark Hansen, *Different Jury, Different Verdict?*, A.B.A. J., Aug. 1992, at 54; Andrew Kull, *Racial Justice*, THE NEW REPUBLIC, Nov. 30, 1992, at 17; Roger Parloff, *That Jury Still May Have Been Right*, LEGAL TIMES, June 22, 1992, at 31; Dennis Pfaff, *Did Verdict Pollute Jurors' Environment?*, L.A. DAILY J., May 7, 1992, at 7; Darlene Ricker, *Holding Out: Juries vs. Public Pressure*, A.B.A. J., Aug. 1992, at 48.

A controversial issue in the Rodney King case and a primary factor in the jury's racial makeup was the change of trial venue from urban to suburban Los Angeles. California's Court of Appeals upheld the trial court's order changing venue. *Powell v. Superior Court*, 283 Cal. Rptr. 777 (Cal. Ct. App. 1991).

7. See Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, N.Y.L.J., May 26, 1992, at 3 (recognizing the "inestimable harm" to public confidence in the jury procedure that was caused by the King verdicts). The appearance of impropriety in jury selection undermines citizens' faith in the verdicts these juries deliver, the criminal justice system that allowed them to be selected and, ultimately, representational government itself. This is particularly true for minority citizens who feel as if they have been excluded from the democratic administration of justice, regardless of any legal impropriety in the selection of a particular jury. See, e.g., *Powers v. Ohio*, 111 S. Ct. 1364, 1368-69 (1991) (discussing the injury to the democratic process that results from group exclusion from jury service); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (discussing the injuries imposed by discriminatory jury selection); see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726-27 (1992) (arguing that the primary injury in discriminatory exclusion from jury service is that imposed upon the excluded juror).

1986, however, inconsistencies in the racial composition of actual juries⁸ were largely beyond the control of most trial courts, which were instructed to respect the discretionary nature of jury selection procedures.⁹ Both prose-

8. The actual or "petit" jury is the group of citizens selected to hear the actual trial, as opposed to the "grand jury," which hands down the criminal indictment, and the jury "venire," which is the panel from which the petit jury is drawn. See Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975); see also BLACK'S LAW DICTIONARY 855-56 (6th ed. 1990) (defining "jury"). See generally VAN DYKE *supra* note 3, at 1-22 (discussing the history and makeup of trial juries).

9. See *United States v. Jenkins*, 701 F.2d 850, 859-60 (10th Cir. 1983) (upholding the state's use of a peremptory challenge to strike the only black sitting on the venire); *United States v. Boykin*, 679 F.2d 1240, 1245 (8th Cir. 1982) (upholding prosecutor's peremptory challenge of both black veniremen); *United States v. Greene*, 626 F.2d 75, 76 (8th Cir.) (affirming a district court ruling on the prosecutor's ostensibly discriminatory use of a peremptory), *cert. denied*, 449 U.S. 876 (1980); *Tiller v. State*, 284 S.E.2d 63, 64 (Ga. Ct. App. 1981) (upholding peremptory exclusion of all blacks from the jury); *People v. Payne*, 457 N.E.2d 1202, 1203 (Ill. 1983) (upholding the prosecutor's use of a peremptory challenge to exclude black jurors without explanation), *cert. denied*, 469 U.S. 1028 (1984); *State v. Andrews*, 451 So. 2d 175, 177 (La. Ct. App.) (upholding the prosecutor's use of peremptory challenge to exclude blacks from the jury), *cert. denied*, 457 So. 2d 17 (La. 1984); *Ward v. State*, 461 So. 2d 724, 726 (Miss. 1984) (upholding utilization of the peremptory challenge to exclude all blacks from the jury); *State v. Wilkerson*, 638 S.W.2d 308, 310 (Mo. Ct. App. 1982) (upholding a prosecutor's use of the peremptory challenge to exclude all blacks from the jury); *Small v. State*, 683 S.W.2d 43, 44 (Tex. Ct. App. 1984) (upholding the state's use of the peremptory challenge to exclude all black veniremen from the petit jury), *petition for discretionary review reused* (June 26, 1985).

Until 1986, the only Supreme Court case to address directly the discriminatory use of peremptory challenges was *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986). *Swain* provided only a limited remedy against a prosecutor's systematic abuse of the peremptory challenge, stating that "[i]f the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome." *Swain*, 380 U.S. at 224. However, this remedy mandated such a high evidentiary burden that it was effectively invoked only twice in the next twenty years. See *State v. Washington*, 375 So. 2d 1162 (La. 1979); *State v. Brown*, 371 So. 2d 751 (La. 1979), *cited in* Robert L. Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385, 405 (1985). The problem with the *Swain* remedy was that it mandated a particularized showing that an individual prosecutor routinely used discriminatory peremptory challenges to exclude blacks from jury service. *Swain*, 380 U.S. at 223. Yet records are generally not kept as to which party actually used the challenge to exclude which jurors, thereby making it virtually impossible to prove systematic abuse by the prosecutor. See Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 387 (1992); Doyel, *supra* at 405. This led the Supreme Court to later criticize *Swain's* evidentiary burden as "'most difficult'" to invoke. *Batson*, 476 U.S. at 92 n.17 (1986) (quoting *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971)); see also *McCray v. New York*, 461 U.S. 961, 965 (1985) (Marshall, J., dissenting from denial of certiorari) (calling the *Swain* test an "insurmountable burden"). Many commentators have also criticized the burden imposed on defendants by *Swain*. See Broderick, *supra* at 387; Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 196-97 (1978); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 94 (1990); Doyel, *supra* at 390; Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1614 (1985); Toni M.

cutors and defense attorneys were free to alter the representational makeup of minority groups on petit juries almost at will through their use of mechanisms such as the peremptory challenge.¹⁰

Peremptory challenges are strikes against members of the jury venire that need not be rationalized or explained.¹¹ In the criminal prosecution context, the peremptory challenge traditionally existed as a tool of discretion for both the state and the defendant,¹² ostensibly used to ensure the highest possible degree of jury impartiality.¹³ Peremptory challenges are ordinarily exercised after voir dire questioning and after any prospective jurors with articulated

Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 540-41 (1986); Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 323 (1965); Gary L. Geeslin, Note, *Peremptory Challenges — Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 161 (1967); Marc L. Greenberg, Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CINN. L. REV. 554, 554-55 (1977); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1721-24 (1977) [hereinafter Note, *Limiting the Peremptory Challenge*]; Jennie Rhine, Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1431 (1969); Phyllis N. Silverman, Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673, 677 (1983); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1159 (1966); Note, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 135-39 (1965); Lisa Van Amburg, Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U. L.J. 662, 665 (1974).

10. While the peremptory challenge has been used by litigants for some time as a tool to affect the racial makeup of juries, other mechanisms for both intentional and unintentional exclusion of minorities have also existed. See Therman A. Baker, Jr., *Voter Registration: A Remedy for Securing a Jury of One's Peers*, 34 HOW. L.J. 383 *passim* (1991) (identifying the discriminatory effect of assembling the jury venire from voter registration records); Note, *The Case for Black Juries*, 79 YALE L.J. 531 *passim* (1970) (arguing that the districts from which juries are drawn leads to racial disparity on such juries); see also *infra* note 66 (discussing further causes of minority under-representation on petit juries).

Several states attempted to address the discriminatory use of peremptory challenges before 1986. In particular, the California Supreme Court prescribed a remedy in 1978 based on that state's equivalent of the Sixth Amendment. See *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). For a listing of other state courts that addressed the discriminatory use of the peremptory, see *infra* note 42.

11. VAN DYKE, *supra* note 3, at 145.

12. See *id.* at 147 (giving a historical analysis of the peremptory challenge and the related "struck jury" system); see also Doyel, *supra* note 9, at 387 (arguing that the peremptory had been conceived as a tool for the defendant and was only later made available to the prosecutor).

13. See *Swain*, 380 U.S. at 219 (calling the peremptory challenge a tool to eliminate the extremes of partiality on both sides); see also Doyel, *supra* note 9, at 391 (discussing the value of peremptories as espoused in *Swain*); Gurney, *supra* note 4, at 230 (considering peremptory challenges necessary to remove partiality from the jury); Note, *Limiting the Peremptory Challenge*, *supra* note 9, at 1716-24 (discussing the role of peremptory challenges in jury selection).

biases have been struck "for-cause."¹⁴ Litigants have no constitutional right to the peremptory challenge.¹⁵ Rather, its use is limited by the terms and conditions codified in statutes and rules that vary in construction by jurisdiction.¹⁶ Courts, nonetheless, have long deferred to the discretionary use of

14. VAN DYKE, *supra* note 3, at 145-146. "For-cause" strikes are generally allowed only when a juror's bias is readily apparent, for instance when the juror is related to a litigant or key witness. Babcock, *supra* note 8, at 549. However, even when common sense indicates clear juror bias, the for-cause strike is often not allowed if the juror self-proclaims an ability to be impartial. *Id.* at 549-50; VAN DYKE, *supra* note 3, at 146. Furthermore, the range of for-cause strikes is limited by a number of factors, primarily restrictions on the questioning of jurors at voir dire. See Babcock, *supra* note 8, at 546-49 (discussing limitations on voir dire examination). Various courts place their own restrictions upon the nature of questions asked at voir dire, particularly as to racial biases. Moreover, some judges implement their own voir dire questions and disallow any litigant participation in jury questioning. These limiting factors illustrate that potential juror biases are often difficult to deduce from voir dire alone, and thus, the primary justification for the peremptory is to provide a method for lawyers to act on hunches of bias when such biases can not be adequately articulated from limited voir dire questioning. *Id.* at 549-50.

15. See, e.g., Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992) (stating that "peremptory challenges are not constitutionally protected fundamental rights"); Ross v. Oklahoma, 487 U.S. 81 (1988) (holding that the improper denial of peremptory challenges to a criminal defendant was not grounds for reversal, as the right to use the challenge is not constitutionally based); Frazier v. United States, 335 U.S. 497, 506 n.11 (1948) (stating that the peremptory challenge is not a constitutional right); United States v. Wood, 299 U.S. 123, 145 (1936) (same); see also Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall, J., concurring) (stating that the peremptory challenge is not of "constitutional magnitude," and that it may be withheld altogether); Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection be Extended to Private Litigants?*, 65 TUL. L. REV. 833, 837 (1991) (declaring that nothing in the Constitution requires use of the peremptory challenge).

16. Prosecutor's and criminal defendant's use of the peremptory challenge is regulated in every jurisdiction by statute, court rule, or rule of criminal procedure. Following is a list of the codifications for the use of the peremptory challenge in criminal cases for the fifty states, the District of Columbia, and federal courts, updated through January, 1993: ALA. CODE § 12-16-100(a) (1986); ALASKA R. CRIM. P. 24(d); ARIZ. R. CRIM. P. 18.4(c); ARK. CODE ANN. § 16-33-305 (Michie 1987); CAL. CIV. PROC. CODE § 231 (Deering 1991); COLO. REV. STAT. ANN. § 16-10-104 (West 1986); CONN. GEN. STAT. ANN. § 54-82g (West 1985); DEL. SUPER. CT. CRIM. R. 24(b) (Michie 1991); D.C. CODE ANN. § 23-105 (1989); FLA. STAT. ANN. § 913.08 (West 1985); GA. CODE ANN. § 15-12-165 (Michie Supp. 1992); HAW. REV. STAT. § 635-30 (1988); IDAHO CODE §§ 19-2013, 2015, 2016 (1987); ILL. REV. STAT. ch. 110A, para. 434(d) (1985); IND. CODE ANN. §§ 35-37-1-3, 1-4 (Burns 1985); IOWA R. CRIM. P. 17(9), 17(10) (West Supp. 1992); KAN. STAT. ANN. § 22-3412 (1988); KY. REV. STAT. ANN. § 29A.290 (Michie/Bobbs-Merrill 1985); LA. CONST. art. I, § 17; LA. CODE CRIM. PROC. ANN. art. 795, 799 (West Supp. 1992); ME. REV. STAT. ANN. tit. 15, § 1258 (West 1964); MD. RULES 4-313 (1992); MASS. R. CRIM. P. 20(c) (West 1980); MICH. COMP. LAWS §§ 768.12, 768.13, 774.17 (1979); MINN. R. CRIM. P. 26.02, subd. 6 (West Supp. 1993); MISS. CODE ANN. § 99-17-3 (1973); MO. REV. STAT. § 494.480 (Supp. 1992); MONT. CODE ANN. § 46-16-116 (1991); NEB. REV. STAT. § 29-2005 (1989); NEV. REV. STAT. § 175.051 (1986); N.H. REV. STAT. ANN. §§ 606:3, 606:4 (1986); N.J. REV. STAT. § 2A:78-7 (Supp. 1992); N.M. STAT. ANN. § 38-5-14 (Michie Supp. 1992); N.Y. CRIM. PROC. LAW § 270.25 (Consol. 1986); N.C. GEN. STAT. § 15A-1217 (1988); N.D. R. CRIM. P. 24(b)(1) (Michie 1992-1993); OHIO REV. CODE ANN. § 2945.21 (Anderson 1987); OKLA. STAT. tit. 22, § 655 (1991); OR. REV. STAT.

the peremptory challenge.¹⁷ As a result of this deference, the peremptory challenge became susceptible to discriminatory abuse.¹⁸

The most significant result of the discriminatory use of the peremptory challenge is the exclusion of blacks and other racial minorities from actual jury service based on litigants' pre-conceived notions about the beliefs and

§ 136.230 (1990); PA. R. CRIM. P. 1106(2)(F), 1126 (West 1989); R.I. SUP. CT. R. CRIM. P. 24(b); S.C. CODE ANN. § 14-7-1110 (Law Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-20-20 (1988); TENN. R. CRIM. P. 24(c) (Michie 1992-1993); TEX. CRIM. PROC. CODE ANN. § 35.14 (West 1989); UTAH R. CRIM. P. 18 (Michie 1992); VT. STAT. ANN. tit. 12, § 1941 (1973); VA. CODE ANN. § 19.2-262 (Michie 1990); WASH. REV. CODE § 10.95.050 (1990); W. VA. CODE § 62-3-3 (1989); WIS. STAT. § 972.03 (1985); WYO. STAT. § 7-11-103 (1987). Peremptory challenges in federal courts are provided for in FED. R. CRIM. P. 24(b).

The Supreme Court recognized in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), that "[p]eremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate." *Id.* at 2083; *see also* *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1312 (5th Cir. 1988) (calling the peremptory a "statutory right to challenge jurors"), *aff'd en banc*, 895 F.2d 218 (5th Cir. 1990), *aff'd*, 111 S. Ct. 2077 (1991). Therefore, this Note treats all codifications of the peremptory challenge under the umbrella term "statute."

17. *Swain v. Alabama*, 380 U.S. 212 (1986), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986). In upholding the discretionary use of the peremptory challenge despite its propensity to lead to discrimination in jury selection, the *Swain* Court cited the "very old credentials" of the peremptory and specifically declared that racial minorities and other cognizable groups are subject to being challenged without cause. *Id.* at 212; *see also* *United States v. Jenkins*, 701 F.2d 850, 859-60 (10th Cir. 1983) (stating that "'examination of the prosecutor's reasons for the exercise of his challenges . . . would [be] wholly at odds with the peremptory challenge system as we know it'" (quoting *Swain*, 380 U.S. at 222)); *United States v. Boykin*, 679 F.2d 1240, 1245 (8th Cir. 1982) (finding that the "'defendant completely fails to establish . . . a systematic exclusion of Blacks'" as required by *Swain* (quoting the District Court's order addressing the Defendant's Motion for Summary Acquittal)); *United States v. Pearson*, 448 F.2d 1207, 1213-14 (5th Cir. 1971) (citing *Swain* for the proposition that discriminatory use of the peremptory cannot be established in any one case); *Thigpen v. State*, 270 So. 2d 666, 673 (Ala. Crim. App. 1972) (citing *Swain's* evidentiary burden in holding that "[w]e cannot therefore conclude that in this particular case there has been a denial of equal protection of the law"); *Commonwealth v. McFerron*, 680 S.W.2d 924, 927 (Ky. 1984) (mandating direct proof of a prosecutor's discriminatory intent to invalidate allegedly discriminatory use of the peremptory); *Johnson v. State*, 262 A.2d 792, 796 (Md. Ct. Spec. App. 1970) (quoting *Swain*, 380 U.S. at 220, for the proposition that "'[t]he essential nature of the peremptory challenge is that it is one exercised . . . without being subject to the court's control'").

18. *Compare Swain*, 380 U.S. at 221 (stating that discretionary use of the peremptory in a single case leads to acceptable discrimination in the use of the peremptory) *with* *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (stating that discretionary sentencing power, given to jurors in capital sentencing, leads to an unacceptable level of discrimination). In analyzing *Swain's* approval of the discriminatory use of the peremptory, one commentator has stated that "[i]n the so-called search for an impartial and qualified jury, . . . prosecutors often abuse[] the practice and use[] the peremptory challenge to exclude blacks from juries." Morehead, *supra* note 15, at 837; *id.* at n.34 (citing statistical studies on prosecutors' discriminatory use of the peremptory).

opinions of these minority groups.¹⁹ In *Batson v. Kentucky*,²⁰ the United States Supreme Court effectively addressed this issue for the first time. The Court provided a remedy for a defendant harmed by a prosecutor's racially motivated use of the peremptory challenge.²¹ *Batson*, however, was specifically limited to the prosecutor's use of the peremptory challenge to exclude minority jurors in the trials of minority defendants.²² Thus, in cases such as the Rodney King trial,²³ white defendants remained free to use their peremptory challenges to exclude blacks from petit juries.²⁴

Recognizing the importance of properly selected juries to the integrity of the criminal justice system,²⁵ it is clear that *Batson's* prohibition against the prosecutor's discriminatory use of the peremptory challenge addressed only part of a continuing problem. Verdicts handed down by discriminately

19. See *Batson*, 476 U.S. at 99 (stating that "[t]he reality of practice . . . shows that the challenge may be . . . used to discriminate against black jurors"). Commentators have also addressed the discriminatory effect of peremptory challenges. See Broderick, *supra* note 9, at 384 (concluding that the peremptory challenge continued to prevent minority representation on the petit jury despite the Supreme Court's pre-*Batson* efforts at eliminating discrimination in venire compilation); J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015 (1990) (discussing the continued problems of race discrimination associated with peremptory challenges even after the Court invalidated their discriminatory use by the prosecutor in *Batson v. Kentucky*).

20. 476 U.S. 79 (1986).

21. *Id.* at 100. The *Batson* Court held that "[i]f the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his [peremptory strike] . . . [the] petitioner's conviction [will] be reversed." *Id.* *Batson* established a three part prima facie test for a defendant seeking to prove a prosecutor's discriminatory use of the peremptory challenge. First, the defendant must show that "he is a member of a cognizable racial group" and that the prosecutor used the peremptory to exclude members of this group from the jury. *Id.* at 96. Second, the defendant is then entitled to rely on the fact that the discretionary nature of peremptory challenges allows "those to discriminate who are of a mind to discriminate." *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). Third, the defendant must then convince the trial judge that these and any other relevant facts give rise to an inference that the prosecutor used the peremptory in a racially discriminatory manner. See *id.* Upon making this prima facie showing, the burden shifts to the prosecutor to justify his or her strikes on legitimate, non-racial grounds. See *id.* at 97.

For a discussion of the burdensome remedy previously available under *Swain* to defendants harmed by the prosecutor's discriminatory use of the peremptory challenge, see *supra* note 9 and accompanying text.

22. *Batson*, 476 U.S. at 89. In limiting its holding, the *Batson* Court stated that "[w]e express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.* at 89 n.12.

23. See *supra* note 6 (discussing the Rodney King verdict and its aftermath).

24. The primary reason for the jury's racial disparity in the Rodney King trial was the change in trial venue to a predominantly white county, not the defendant's discriminatory use of the peremptory challenge. Kelner & Kelner, *supra* note 7, at 3. Nonetheless, the case serves to highlight the effect of a disparity in a jury's racial makeup.

25. See *supra* notes 5-7 and accompanying text (discussing the importance of jury integrity to society's respect for the jury's verdict).

selected juries diminish society's confidence in the criminal justice system, regardless of the party responsible for the jury's improper makeup.²⁶ In addition, the potential jurors struck by discriminatory peremptory challenges feel the stigma of such discrimination regardless of whether the prosecutor or the defendant is the party exercising the strike.²⁷ Recognizing the shortcomings of the *Batson* rule, the United States Supreme Court granted certiorari in *Georgia v. McCollum*²⁸ to address the issue of "whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges."²⁹

The *McCollum* case originated from a Georgia state criminal indictment³⁰ against the owners of an Albany, Georgia dry cleaner for an alleged attack upon two black customers.³¹ Considerable local publicity surrounded the case, as leaders of the black community distributed flyers urging fellow residents to boycott the McCollums' business in response to the attack.³² Prior to jury selection, the state moved to prohibit the defendants from using their peremptory challenges in a racially discriminatory manner.³³ Despite

26. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992) (acknowledging that the harm is the same, regardless of who invokes the challenge); *Powers v. Ohio*, 111 S. Ct. 1364, 1372 (1991) (recognizing that discriminatory use of peremptory challenge strikes at the integrity of the jury verdict, regardless of its effect upon defendant); *Batson*, 476 U.S. at 87 (noting that the injuries inflicted by discriminatory use of the peremptory are not limited to those suffered by a criminal defendant); see also Underwood, *supra* note 7, at 748-50 (discussing the injury to public confidence in jury verdicts that results from discriminatory jury selection).

27. Broderick, *supra* note 9, at 404-05 (identifying the injuries imposed upon excluded jurors by a criminal defendant's discriminatory use of the peremptory); Underwood, *supra* note 7, at 726-27 (arguing that the primary injury caused by the discriminatory use of the peremptory is that imposed upon the excluded juror). In *Strauder v. West Virginia*, 100 U.S. 303 (1880), overruled on other grounds by *Taylor v. Louisiana*, 419 U.S. 552 (1975), the Supreme Court first enunciated the idea that excluding blacks from jury service based on race resulted in a stigma being placed upon them, calling such an exclusion "practically a brand upon them, affixed by the law." *Id.* at 308. The idea of discriminatory action placing a stigma upon blacks is prevalent throughout much of Equal Protection jurisprudence. See Paul Brest, *The Supreme Court 1975 Term: Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-12 (1976).

28. 112 S. Ct. 370 (1991) (granting certiorari).

29. *McCollum*, 112 S. Ct. at 2352.

30. *Id.* at 2351. A grand jury in Dougherty County, Georgia, indicted the McCollums on charges of aggravated assault and simple battery. *Id.*

31. *Id.* The McCollums were white while the victims of their alleged assault were black. *Id.*

32. *Id.*; see also Joint Appendix at 38, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (No. 91-372) (containing a copy of the flier entitled "Keep the Dream Alive," that was distributed throughout the local black community to urge blacks not to patronize the McCollums' establishment) [hereinafter Joint Appendix].

33. *McCollum*, 112 S. Ct. at 2351; see also *State v. McCollum*, 405 S.E.2d 688, 689 (Ga. 1991), *rev'd*, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992). Because of the racial underpinnings of the crimes with which the McCollums had been charged and the fact that the county in which they were being tried was 43% black, the prosecutor argued that the defendants were

the state's argument that race was a factor in the alleged assault and its contention that the defendants expressed an intent to use their peremptory challenges to exclude blacks from the jury,³⁴ the trial court denied the prosecutor's motion.³⁵ The trial court based its decision on a finding that no Georgia appellate court nor federal court had yet restricted a defendant's use of the peremptory challenge.³⁶ In apparent recognition of the evolving law in this area,³⁷ the trial court certified the question for immediate appeal to the Georgia Supreme Court.³⁸

Although it acknowledged that the United States Supreme Court had recently prohibited a civil litigant's discriminatory use of the peremptory challenge, the Georgia Supreme Court refused to impose similar restrictions upon a criminal defendant.³⁹ Instead, it upheld the trial court by finding that the Supreme Court had not extended *Batson's* non-discrimination rule to the criminal defendant,⁴⁰ while at the same time declined to establish such a rule itself.⁴¹ Rather, the Georgia Supreme Court deferred to the discretionary nature of the peremptory challenge.⁴²

likely to use their peremptory challenges to exclude blacks from the jury. *McCollum*, 112 S. Ct. at 2351.

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

35. *McCollum*, 405 S.E.2d at 689. The trial court's order stated that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." Order of Superior Court of Dougherty County, Oct. 22, 1990 (Indictment No. 90 R 816), reprinted in Joint Appendix, *supra* note 32, at 14.

36. See *McCollum*, 112 S. Ct. at 2352.

37. The lower court proceedings in *McCollum* occurred while the United States Supreme Court was ruling on the issue of a civil litigant's discriminatory use of the peremptory in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). *Leesville* was decided after the trial court certified its denial of the prosecutor's pre-trial motion for review, but before the Georgia Supreme Court ruled in *McCollum*. See *infra* notes 97-105 and accompanying text (discussing the Supreme Court's decision in *Leesville*).

38. See *McCollum*, 112 S. Ct. at 2352. In denying the prosecutor's pretrial motion, the trial court stated that "because this issue is one of first impression . . . this order is of such importance to the case that an immediate review should be had." Order of Superior Court of Dougherty County, Oct. 22, 1990 at 2 (Indictment No. 90 R 816), reprinted in Joint Appendix, *supra* note 32, at 15).

39. *McCollum*, 405 S.E.2d at 689, *rev'd*, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

40. *Id.*

41. *Id.*

42. *Id.* In refusing to invalidate a criminal defendant's discriminatory use of the peremptory, the Georgia Supreme Court stated: "Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant." *Id.*

While the Georgia Supreme Court refused to impose such a prohibition, other states had already done so. See, e.g., *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *Riley v. State*, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 612 P.2d 716 (N.M. Ct. App. 1980); see also Neil C. McCabe, *Criminal Law Developments Under State Constitutions, 1989-1990*, 3 EMERGING ISSUES IN ST. CONST. L. 1,

A seven-justice majority of the United States Supreme Court reversed the Georgia court's decision⁴³ over the separate dissents of Justices O'Connor and Scalia.⁴⁴ In a problematic interpretation of the Fourteenth Amendment's "state action" doctrine,⁴⁵ the Court held that the McCollums' potential discriminatory use of the peremptory challenge fell within the confines of the Equal Protection Clause and thus, would be subject to *Batson's* non-discrimination rule.⁴⁶

In *McCollum*, the Court recognized that the justifications developed in *Batson v. Kentucky* for preventing a prosecutor from utilizing discriminatory peremptory challenges apply with equal force to a criminal defendant's use of the challenge.⁴⁷ Because the *McCollum* Court determined that the criminal defendant's discriminatory use of the peremptory challenge constituted state action,⁴⁸ it concluded that this use fell within the ambit of the Equal Protection Clause of the Fourteenth Amendment.⁴⁹ Moreover, *Mc-*

23 (1990) (noting that the New York Court of Appeals utilized its state constitution to address discriminatory peremptories). Unlike *Batson's* Equal Protection theory, these state court rulings were based on either the Sixth Amendment or an equivalent state constitutional provision and therefore applied equally to both the state's prosecutor and the defendant. See *Wheeler*, 583 P.2d at 761-62 (holding that the California Constitution's representative cross section requirement mandated that both parties be prohibited from discriminatory use of the peremptory); *Riley*, 496 A.2d at 1012-13; *Neil*, 457 So. 2d at 486-87; *Soares*, 387 N.E.2d at 514-19; *Crespin*, 612 P.2d at 718; see also *Batson v. Kentucky*, 476 U.S. 79, 126 n.6 (1986) (Burger, C.J., dissenting) (citing *United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986) (en banc) (stating that every jurisdiction which utilized a Sixth Amendment-type remedy for the discriminatory use of peremptories applied this remedy to the defendant as well as the prosecutor), *vacated*, 479 U.S. 1074 (1987))).

A number of states, however, continued to adhere to *Swain's* evidentiary burden, mandating proof of a prosecutor's systematic abuse of the peremptory challenge. See *Beed v. State*, 609 S.W.2d 898, 903 (Ark. 1980); *Blackwell v. State*, 281 S.E.2d 599, 599-600 (Ga. 1981); *Gilliard v. State*, 428 So. 2d 576, 579 (Miss.), *cert. denied*, 464 U.S. 867 (1983); *People v. McCray*, 443 N.E.2d 915, 916-19 (N.Y. 1982), *cert. denied*, 461 U.S. 961 (1983); *State v. Lynch*, 268 S.E.2d 161, 168-69 (N.C. 1980).

43. *McCollum*, 112 S. Ct. at 2359.

44. *Id.* at 2361 (O'Connor, J., dissenting); *id.* at 2364 (Scalia, J., dissenting).

45. *Id.* at 2354-57; see also *infra* note 169 (discussing the state action doctrine in the context of peremptory challenges). This Note considers *McCollum's* interpretation of "state action" as problematic in that it classifies a criminal defendant, whose primary goals are directly contrary to those of the state, as a state actor. For further criticism of the majority's holding on this issue, see *infra* notes 190-202 and accompanying text (discussing Justice O'Connor's criticism of the majority's state action holding as stated in her *McCollum* dissent).

46. *McCollum*, 112 S. Ct. at 2359.

47. *Id.* at 2353-54.

48. *Id.* at 2354-57. In summarizing its finding of state action, the *McCollum* Court held that "when 'a government confers on a private body the power to chose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality.'" *Id.* at 2356 (quoting *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991)).

49. *Id.* at 2354-57.

Collum recognized that a prosecutor had standing to represent the rights of jurors excluded by the defendant's discriminatory use of the peremptory challenge.⁵⁰

In limiting a defendant's use of the peremptory challenge, the Court discussed the resulting effect upon a criminal defendant's interests in obtaining a fair trial, but nonetheless concluded that discriminatory peremptories were constitutionally impermissible.⁵¹ Moreover, the Court rejected the contention that requiring non-racial explanations for apparently discriminatory peremptory challenges would infringe upon the integrity of a defendant's trial strategy.⁵² It was these traditional prerogatives of criminal defendants that the dissenting opinions of Justices O'Connor and Scalia focused on⁵³ and that the concurring opinions of Chief Justice Rehnquist and Justice Thomas reluctantly restricted.⁵⁴

This Note analyzes the traditional role of the peremptory challenge, its susceptibility to discriminatory abuse and the restrictions the Supreme Court has placed upon its use. In doing so, this Note focuses on the shortcomings of the Equal Protection remedy prescribed by the Court in *Batson v. Kentucky* and *Georgia v. McCollum*. To address these shortcomings, this Note proposes a reexamination of the Sixth Amendment as a more effective remedy for the discriminatory use of the peremptory challenge. In proposing such a remedy, this Note suggests that the Sixth Amendment should be utilized as a means for invalidating peremptory challenge statutes that allow litigants the discretion discriminately to exclude members of cognizable community groups from petit jury panels.

Because *McCollum* dealt only with the racially discriminatory use of the peremptory challenge, the Court could invoke the highest level of judicial scrutiny over the use of the peremptory challenge. However, Equal Protection jurisprudence is not limited to racial discrimination, and, in fact, lower courts have already addressed the discriminatory use of peremptory challenges in non-racial contexts. See, e.g., *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992) (prohibiting gender-based discrimination in the use of peremptory challenges); see also *infra* note 234 (listing lower courts that have addressed an expansion of the ban on discriminatory use of the peremptory to include gender).

For a discussion of the Supreme Court's treatment of state classifications based on race, gender and other suspect groups, see 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 18.3, 18.5, 18.11, 18.14, 18.20 (2d ed. 1992).

50. *McCollum*, 112 S. Ct. at 2357.

51. *Id.* at 2357-58 (noting that "if race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of the Constitution.' " (quoting *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991))).

52. *Id.* at 2358.

53. *Id.* at 2361 (O'Connor, J., dissenting); *id.* at 2364 (Scalia, J., dissenting).

54. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring).

I. CONSTITUTIONAL ATTACKS ON DISCRIMINATORY JURY SELECTION

Both the Fourteenth Amendment's Equal Protection Clause and the fair-cross-section requirement of the Sixth Amendment have been used as a means to challenge the discriminatory selection of criminal juries.⁵⁵ Accordingly, a thorough examination of discriminatory jury selection must begin with a historical analysis of the application of both Amendments to this issue.

A. Fourteenth Amendment Applications to Discriminatory Jury Selection and Service

1. Initial Equal Protection Attacks on the Discriminatory Use of Peremptory Challenges

The Supreme Court has long recognized that the Fourteenth Amendment was conceived in part to prevent the state from excluding blacks from jury service.⁵⁶ In *Strauder v. West Virginia*,⁵⁷ the Court struck down a West Virginia statute that mandated the exclusion of blacks from the jury selection process.⁵⁸ While an important symbolic step, the practical impact of the *Strauder* decision was significantly diminished by the Court's restricted interpretation of it in the companion case *Virginia v. Rives*.⁵⁹ In *Rives*, the Court held that while the state could not block the access of blacks to the jury selection process, black defendants had no right to actual minority representation on their petit jury panels.⁶⁰

Strauder's application of the Fourteenth Amendment to the jury selection process was expanded considerably in the 100 years following the decision. *Strauder* has been cited in cases involving both specific and systematic dis-

55. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (Fourteenth Amendment basis); *Duren v. Missouri*, 439 U.S. 357 (1979) (Sixth Amendment basis); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (Sixth Amendment basis); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Fourteenth Amendment basis), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975).

56. See *Strauder*, 100 U.S. at 306-07. In *Batson*, 476 U.S. at 79, the Supreme Court cited *Strauder* as the foundation of judicial efforts to eradicate discrimination from the jury selection process. *Id.* at 85. *Batson* stated that the "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id.* at 79.

57. 100 U.S. 303 (1880), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975).

58. *Id.* at 310.

59. 100 U.S. 313 (1880), *overruled on other grounds by Greenwood v. Peacock*, 384 U.S. 808 (1966).

60. *Strauder*, 100 U.S. at 335; see also Broderick, *supra* note 9, at 379-80 (citing *Rives* for the proposition that while states could not enact statutes which prevented blacks from jury service, black defendants had no actual right to minority representation on their petit juries).

crimination in the compilation of the jury venire,⁶¹ the grand jury⁶² and the petit jury itself.⁶³ In preserving the limiting language of the *Rives* decision, however, the Court has consistently refused to acknowledge a defendant's constitutional right to *actual* minority group representation on a petit jury.⁶⁴ Thus, while minorities cannot be excluded from the *opportunity* for jury service, the use of mechanisms such as the peremptory challenge have functioned to exclude minorities from *actual* jury service.⁶⁵

Although the peremptory challenge was not the only cause of minority exclusion from jury service,⁶⁶ it was a primary cause of minority under-representation on the petit jury itself.⁶⁷ Until recently, the peremptory challenge was an effective tool for litigants seeking to exclude minorities from juries based on preconceived notions of minority juror bias.⁶⁸ In *Swain v.*

61. See, e.g., *Taylor*, 419 U.S. at 536 n.19.

62. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 497 n.8 (1972), *overruled on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972).

63. See, e.g., *Georgia v. McCollum*, 112 S. Ct. 2348, 2351 (1992) (holding unconstitutional a defendant's use of the peremptory challenge to exclude minorities from a petit jury); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991) (invalidating a civil litigant's use of the peremptory challenge to exclude minorities from a petit jury); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (holding unconstitutional a prosecutor's use of the peremptory challenge to exclude minorities from petit jury service).

64. See, e.g., *Powers v. Ohio*, 111 S. Ct. 1364, 1367 (1991) (finding that a defendant has no right to a petit jury composed of persons of his or her own race); *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (rejecting the Sixth Amendment as a mechanism for obtaining actual minority representation on the petit jury). See generally *infra* notes 121-23 and accompanying text (discussing the Supreme Court's reluctance to extend the fair-cross-section requirement to petit juries).

65. See Broderick, *supra* note 9, at 384 (concluding that despite the Supreme Court's efforts to ensure minority representation on jury venires, the peremptory has "easily precluded [blacks] from reaching the jury box"); Morehead, *supra* note 15, at 837 (calling abuse of the peremptory a common means for excluding blacks from jury service); see also Underwood, *supra* note 7, at 725 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986), as the last step in eradicating racial discrimination from jury selection).

66. See generally VAN DYKE, *supra* note 3, at 30 (recognizing that reliance on voter registration lists, infrequently updated juror lists, and conscious as well as unconscious discrimination by jury commissioners are among the reasons for minority under-representation on juries); Broderick, *supra* note 9, at 382-83 (discussing discriminatory practices used to keep minorities off voting records and jury lists); Colbert, *supra* note 9, at 75-78, 81 (arguing that the Thirteenth Amendment is the only effective means for addressing the numerous mechanisms that exclude blacks from actual petit jury service).

67. See VAN DYKE, *supra* note 3, at 150. In his comprehensive pre-*Batson* work on discriminatory jury selection, Jon Van Dyke stated that while "years of litigation . . . finally included [minorities] on [jury] list[s], the prosecution frequently used its peremptory challenges to excluded them from the jury box." *Id.* at 150; see also Broderick, *supra* note 9, at 384 (asserting that despite gains in minority representation on jury venires, the peremptory challenge assured these gains would do "little to further minority representation on the petit jury itself").

68. See VAN DYKE, *supra* note 3, at 150 (noting that the peremptory challenge was frequently used to exclude minorities from actual jury service).

Alabama,⁶⁹ the Supreme Court first recognized the impropriety of using the peremptory challenge to perpetuate the systematic exclusion of blacks from jury service.⁷⁰ However, in a widely criticized opinion,⁷¹ the majority strongly advocated deference to the "very old credentials"⁷² of the challenge and specifically acknowledged the legitimacy of a prosecutor peremptorily striking blacks from jury panels.⁷³ In doing so, the Court refused to alter the discretionary character of the peremptory challenge by prescribing an effective remedy for its improper use.⁷⁴ When prosecutors used the peremptory challenge to exclude blacks from jury service, defendants convicted by such juries were given a remedy only when they could show systematic abuse of the peremptory challenge by a particular prosecutor.⁷⁵ Following *Swain*, a prosecutor's ability peremptorily to strike minorities from jury panels remained virtually unconstrained.⁷⁶ More than twenty years later, the Supreme Court finally sacrificed the discretionary nature of the peremptory

69. 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986). The majority opinion in *Swain* was written by Justice White. *Id.* Justices Harlan and Black concurred in the result, *id.* at 228 (Harlan, J., concurring); *id.* (Black, J., concurring), while Justice Goldberg wrote a dissenting opinion joined by Chief Justice Warren and Justice Douglas. *Id.* (Goldberg, J., dissenting).

70. *Id.* at 223 (providing for a remedy only upon a showing of the prosecutor's systematic exclusion of black jurors).

71. See Doyel, *supra* note 9, at 394-409 (criticizing *Swain*'s disregard of established Equal Protection principles for the statutory privilege of peremptory challenges). The *Swain* decision was criticized for elevating the "very old credentials," *Swain*, 380 U.S. at 212, of the peremptory challenge above the clear constitutional mandate of the Fourteenth Amendment. Doyel, *supra* note 9, at 396 (arguing that the statute-based peremptory challenge could not override a constitutional mandate). For further criticisms of the evidentiary burden mandated by *Swain*, see *supra* note 9.

72. *Swain*, 380 U.S. at 212.

73. *Id.* at 221. In *Swain*, Justice White's majority opinion stated that "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.*

74. *Id.* at 221-22. In *Swain*, the Court stated that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge." *Id.*

75. *Id.* at 223-24. The remedy *Swain* did proscribe was only available:

[w]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible [through use of the peremptory] for the removal of Negroes [from jury service] . . . with the result that no Negroes ever serve on petit juries

Id. at 223. Only in such a case could "the presumption protecting the prosecutor . . . be overcome." *Id.* at 224.

Because such a systematic degree of discrimination had not been argued or proven below, the Court upheld *Swain*'s rape conviction and death sentence, as handed down by an all-white jury. *Id.* at 205 (acknowledging death sentence); *id.* at 208 (affirming conviction).

76. See, e.g., VAN DYKE, *supra* note 3, at 150 (declaring that *Swain* put only "theoretical limits" on the state's exercise of the peremptory); Morehead, *supra* note 15, at 838-39 (stating that most attempts to meet the *Swain* burden failed).

challenge so ardently protected in *Swain*, for the clear non-discriminatory mandate of the Fourteenth Amendment.

In *Batson v. Kentucky*,⁷⁷ the Supreme Court recognized that the reasoning of *Strauder* applied with equal force to the prosecutor's discriminatory use of peremptory challenges.⁷⁸ *Batson* acknowledged that the prosecutor's discriminatory use of the peremptory challenge imposed a fundamental injury upon the minority defendant by "den[ying] him the protection that a trial by jury is intended to secure."⁷⁹ Moreover, the majority opinion recognized additional injuries being inflicted upon excluded jurors and the community itself.⁸⁰ The Court found that excluded jurors were stigmatized when struck solely on the basis of their race,⁸¹ while society's confidence in the criminal justice system was undermined by the existence of racial discrimination within the courtroom.⁸² *Batson* reversed *Swain*'s systematic discrimination requirement and established a prima facie test for proving a prosecutor's racially discriminatory use of the peremptory challenge.⁸³ However, while *Batson* addressed the most onerous aspect of the discriminatory peremptory challenge, its abuse by the prosecutor,⁸⁴ the limited ruling left many questions unanswered.⁸⁵

77. 476 U.S. 79 (1986).

78. *Id.* at 85-86. *Batson* cited *Strauder* for the proposition that the Equal Protection Clause applied to jury selection procedures. *Id.* at 85. Furthermore, *Batson* held that while the Equal Protection Clause did not guarantee equal representation of blacks on the petit jury, it did prohibit the state from using any discriminatory means to prevent blacks from serving on the jury. *Id.* at 85-86.

79. *Id.* at 86.

80. *Id.* at 87. These injuries, along with those imposed upon the defendant, were later described as the "multiple ends" of *Batson v. Kentucky* and helped justify an expansion of the prohibition against the discriminatory use of the peremptory challenge. See *Powers v. Ohio*, 111 S. Ct. 1364, 1368 (1991) (citing *Batson*'s "multiple ends" in expanding the ban on discriminatory peremptories to the trials of non-racial minority defendants) (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam) (quoting *Brown v. Louisiana*, 447 U.S. 323, 329 (1980))).

81. See *supra* note 27 and accompanying text (discussing the stigmatizing effect of discriminatory peremptory challenges).

82. *Batson*, 476 U.S. at 87.

83. See *supra* note 21 (enumerating *Batson*'s prima facie test).

84. *Batson*, 476 U.S. at 100. The *Batson* Court restricted its holding to the prosecutor's challenge of minority jurors in trials involving minority defendants. *Id.* at 89 n.12.

85. An important question left open by *Batson* was whether its holding would be given retroactive application. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court answered in the negative, holding that the prima facie remedy for discriminatory use of the peremptory challenge would only be applicable to cases where jury selection proceedings began after the decision in *Batson*. *Id.* at 296 (citing the retroactive application test of *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam)).

2. *Beyond Batson: Expanding Judicial Control Over the Discriminatory Peremptory Challenge*

Following *Batson*, the Supreme Court began to shift its focus away from the injury that discriminatory peremptory challenges imposed upon the criminal defendant and elevated the importance of other recognized injuries.⁸⁶ Specifically, the Court began examining the injury inflicted upon excluded jurors.⁸⁷ *Powers v. Ohio*⁸⁸ represented the initial step in this direction.⁸⁹

In *Powers*, a white defendant was granted standing to challenge the prosecutor's discriminatory use of the peremptory challenge despite the fact that the defendant did not share the race of the excluded juror.⁹⁰ In moving away from *Batson*'s focus on injuries to the defendant, the Court acknowledged the "multiple ends" of *Batson*⁹¹ and maintained that a defendant's race was irrelevant to addressing the discriminatory use of the peremptory challenge.⁹² The majority then applied a third-party standing test⁹³ to rec-

86. See *supra* notes 79-82 and accompanying text (discussing the injuries *Batson* recognized as resulting from the discriminatory use of peremptory challenges).

87. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 *passim* (1991) (recognizing the broader injuries of *Batson* in the context of civil litigation); *Powers v. Ohio*, 111 S. Ct. 1364, 1368-70 (1991) (addressing the broader injuries of discriminatory peremptories by granting criminal defendants standing to raise such issues on appeal).

88. 111 S. Ct. 1364 (1991).

89. Following *Batson* but prior to *Powers*, the Supreme Court decided *Holland v. Illinois*, 493 U.S. 474 (1990). In *Holland*, the Court explicitly refused to apply the *Batson* rule to white defendants through the Sixth Amendment's "'fair cross section'" requirement. *Id.* at 487 (quoting *Teague v. Lane*, 489 U.S. 288 (1989)) (concluding that the Sixth Amendment is not a valid basis for challenging discriminatory peremptories). In signaling a break from previous indications that a Sixth Amendment application to discriminatory peremptories existed, the *Holland* Court declared that "[w]hile statements in our prior cases have alluded to such a [Sixth Amendment] requirement, satisfying it has not been held to require anything beyond the inclusion of all cognizable groups in the venire." *Id.* at 478.

90. *Powers*, 111 S. Ct. at 1373. In order to object to a prosecutor's discriminatory use of the peremptory under *Batson*, "the defendant first [had to] show that he [was] a member of a cognizable racial group, and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (citation omitted).

91. *Batson*'s "multiple ends" were first acknowledged by the Supreme Court in *Allen v. Hardey*, 478 U.S. 255, 259 (1986). See *supra* note 80.

92. *Powers*, 111 S. Ct. at 1373. The *Powers* Court stated that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.*

93. *Id.* at 1370-73. In order for a party to challenge an action as unconstitutional, Article III of the United States Constitution requires the party to present an actual case or controversy for resolution. 1 ROTUNDA & NOWAK, *supra* note 49, § 2.13(a), at 161. Inclusive in this requirement is the doctrine of third party standing, which mandates that a party representing the primary injuries of another, himself have suffered some direct injury. *Id.* § 2.13(f)(3), at 220. For an analysis of the Supreme Court's somewhat haphazard approach to third party standing, see Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

ognize a defendant's right to represent the injuries of jurors struck by the prosecutor's misuse of the peremptory challenge.⁹⁴

Powers represented a recognition of the broader injuries inflicted by the discriminatory use of the peremptory challenge.⁹⁵ Moreover, in recognizing these broader injuries, it signaled that *Batson* would no longer be limited to the prosecutor, but could soon be expanded to restrict all litigants' discriminatory use of the peremptory challenge.⁹⁶

Batson was first expanded beyond its conventional application to the criminal prosecutor in *Edmonson v. Leesville Concrete Co.*⁹⁷ In *Leesville*, the Court held that a civil litigant's discriminatory use of the peremptory challenge inflicted the same injury upon excluded jurors as did the prosecutor's use of the peremptory addressed in *Batson*.⁹⁸ The significance of *Leesville*, however, was not in the injury recognized. Rather, it was in the Court's characterization of a civil litigant's use of the peremptory as "state action"⁹⁹ under the Fourteenth Amendment.¹⁰⁰ The Court found the peremptory challenge to be state action because it is conducted with significant support of the state,¹⁰¹ is often implemented through the judge himself,¹⁰² and involves the performance of a traditional function of government.¹⁰³ Moreover, the Court found the state action test¹⁰⁴ to be particularly applicable to

94. *Powers*, 111 S. Ct. at 1370-74. The *Powers* decision adopted a standard three-part test for third party standing. First, the litigant—here, the defendant—must suffer an injury in fact; second, the litigant must have a close relation in interest to the injured third party—here, the excluded juror; and finally, the injured third party must somehow be hindered in representing his or her own injuries. *Id.* at 1370-71.

95. *Id.* at 1369 (stating that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process").

96. See *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (declaring that traditional concepts of Equal Protection would be extended to discriminatory use of the peremptory challenge).

97. 111 S. Ct. 2077 (1991).

98. *Id.* at 2088-89 (extending *Batson*'s prima facie test to the civil litigant).

99. See *id.* at 2082. For an analysis of the state action question as it has applied to the peremptory challenge, see *infra* note 169.

100. *Leesville*, 111 S. Ct. at 2083 (holding that the exercise of a peremptory challenge by a civil defendant is an act pursuant to a course of state action).

101. *Id.* at 2084, citing *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988). In *Tulsa Professional Collection Services*, the Supreme Court stated that "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." 485 U.S. at 486.

102. *Leesville*, 111 S. Ct. at 2084 (1991).

103. *Id.* at 2085. In characterizing the peremptory challenge as a "traditional function" of government, the *Leesville* Court stated that "[t]he peremptory challenge is used in selecting an entity that is a quintessential governmental body." *Id.*

104. The Court in *Leesville* employed a test for state action developed in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). See *Leesville*, 111 S. Ct. at 2082-87. *Lugar* involved an action by a debtor against a creditor who had seized property in fulfillment of a debt. The

the peremptory challenge because it is exercised within the courthouse itself.¹⁰⁵

B. Application of the Sixth Amendment to Discrimination in the Jury Selection Process

While the *Batson*, *Powers*, and *Leesville* decisions were all rooted in Equal Protection, these decisions had significant Sixth Amendment underpinnings.¹⁰⁶ The Sixth Amendment provides, in relevant part, that every criminal defendant shall have the right to an "impartial jury of the State and district wherein the crime shall have been committed."¹⁰⁷ This language has been interpreted to require states to provide mechanisms for ensuring that juries represent a "fair cross section" of the communities from which they are drawn.¹⁰⁸ It was not until 1968, however, that the Supreme Court extended the fair-cross-section requirement to the states.¹⁰⁹ Accordingly, the

debtor alleged that the creditor, in relying upon the state for statutory authority relating to the seizure, had acted jointly with the state to deprive him of property without due process of law. *Lugar*, 457 U.S. at 924-25. For an analysis of the state action test enunciated in *Lugar*, see *infra* notes 169-73 and accompanying text.

105. *Leesville*, 111 S. Ct. at 2087 (noting that it was particularly egregious for such injuries to be occurring in a court of law).

106. See Broderick, *supra* note 9, at 393-94 (discussing the basic *Batson* rationale). Judge Broderick stated that, although the *Batson* decision was rooted in the Equal Protection Clause, "it couched much of its reasoning in Sixth Amendment terms." *Id.* at 393. Similarly, as *Powers* and *Leesville* are based upon the *Batson* decision, much of their reasoning is also "couched" in Sixth Amendment terms. See *id.* See generally *Powers v. Ohio*, 111 S. Ct. 1364, 1368-69 (1991); *Leesville*, 111 S. Ct. at 2077 *passim*.

107. U.S. CONST. amend. VI.

108. See *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975). The correct interpretation of the "fair cross section" requirement has been an issue of some debate on the Supreme Court. See *id.* at 526. The most significant recent discussion of the issue took place in *Holland v. Illinois*, 493 U.S. 474 (1990), where Justice Scalia stated:

The fair-cross-section venire requirement is obviously not explicit in th[e] [Sixth Amendment] text, but is derived from the traditional understanding of how an "impartial jury" is assembled. That traditional understanding includes a representative venire, so that the jury will be, as we have said, "drawn from a fair cross section of the community."

Id. at 480 (quoting *Taylor*, 419 U.S. at 527).

Justice Marshall has expressed a more expansive interpretation of the fair-cross-section requirement, arguing that it applies to the petit jury itself as well as the jury venire. *Id.* at 496 (Marshall, J., dissenting) (arguing that the fair-cross-section requirement should extend to the petit jury in order to comport fairly with the meaning of the Sixth Amendment); see also *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (calling the requirement "'a fair possibility for obtaining a representative cross-section'" (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975).

109. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (finding the right to a trial by jury in criminal cases to be "fundamental" and therefore applicable to the states through the Due Process Clause of the Fourteenth Amendment).

requirement's impact on the selection of criminal juries before that time was limited.¹¹⁰

Following its extension to the states, defendants utilized the fair-cross-section requirement to allege that the juries that convicted them were not representative of the communities they were selected to represent.¹¹¹ In *Witherspoon v. Illinois*,¹¹² the Supreme Court addressed such a challenge in the context of a prosecutor's use of for-cause jury strikes to exclude persons opposing capital punishment from jury service.¹¹³ The Court held that this exclusion violated the defendant's Sixth Amendment right to be sentenced by an impartial jury.¹¹⁴ The Court's holding was based in part on the theory that a significant portion of the population opposes capital punishment,¹¹⁵ and that excluding this group from jury service would deny a capital defendant's jury the perspective of this excluded group.¹¹⁶

In *Lockhart v. McCree*,¹¹⁷ the Supreme Court again addressed the issue of for-cause exclusions of jurors who expressed a reluctance to impose capital punishment.¹¹⁸ In line with *Witherspoon*, the Court found that an exclusion of these jurors would deny the defendant the perspective of persons who

The test of whether a constitutional right should be incorporated through the Due Process Clause was stated in *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). Incorporation depends on whether the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). In recognizing the fundamental right to a trial by jury, *Duncan* expanded the *Palko* test by further defining "fundamental" to mean "fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 149.

110. As nearly 90% of criminal cases are tried in state courts, the Sixth Amendment guarantee of a jury trial applied to a relatively small percentage of cases before 1968. See CRIMINAL JUSTICE STATISTICS, *supra* note 2, at 501 tbl. 5.16, 544 tbl. 5.46 (presenting tables which illustrate the number of felony defendants convicted in federal and state courts in 1988).

111. See, e.g., *Adams v. Texas*, 448 U.S. 38 (1980) (holding the Sixth Amendment to be a limitation on the state's power to exclude jurors); *Ballew v. Georgia*, 435 U.S. 223 (1978) (finding that the five-member jury that convicted the defendant failed adequately to represent the relevant community); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that the for-cause exclusion of potential jurors with general scruples against capital punishment violated a defendant's Sixth Amendment right to an impartial jury), *overruled by* *Adams v. Texas*, 448 U.S. 38 (1980).

112. 391 U.S. 510 (1968).

113. *Id.* at 513.

114. *Id.* at 522-23.

115. *Id.* at 520. The *Witherspoon* Court based its holding in part on a study that showed that in 1966, 42% of Americans favored capital punishment, while 47% opposed it. *Id.* at 520 n.16.

116. *Id.* at 520. The *Witherspoon* Court stated that "a jury that must choose between life imprisonment and capital punishment . . . must do nothing less . . . than express the conscience of the community," *id.* at 519, and noted that a restricted jury speaks only for a "distinct and dwindling minority" within the community. *Id.* at 520.

117. 476 U.S. 162 (1986).

118. *Id.* at 165.

oppose capital punishment, and therefore, deny him a fair cross section on his jury.¹¹⁹ Clarifying *Witherspoon*, however, the Court held that the Sixth Amendment did not prevent the exclusion of jurors whose scruples against capital punishment would impede their ability to carry out the sentencing duties required of them by law.¹²⁰

The *Lockhart* ruling exemplifies the Court's continued unwillingness to recognize the right to actual representation of any cognizable group on the petit jury.¹²¹ The primary rationale for this reluctance was restated in *Lockhart* as "a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury."¹²² Simply stated, the Court fears a flood of fair-cross-section claims if it directly extends the fair-cross-section requirement to the petit jury.¹²³

In *Taylor v. Louisiana*,¹²⁴ the Court again utilized the Sixth Amendment to prevent a state from excluding a discrete group in the community from the possibility of jury service.¹²⁵ The *Taylor* case involved a male defendant convicted of aggravated kidnapping by a petit jury selected from an all-male venire.¹²⁶ The trial court employed a jury selection system that excluded

119. *Id.*

120. *Id.* at 184. The *Lockhart* Court held that "so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case," the Constitution does not require removal based on their views toward capital punishment. *Id.*

121. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (holding that a defendant has no right to a petit jury of his own race); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (rejecting a requirement of proportional representation of minorities on petit jury), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975); *see also infra* notes 251-55 and accompanying text (discussing the Supreme Court's reluctance to expand the fair-cross-section requirement to the petit jury).

122. *Lockhart*, 476 U.S. at 174 (quoting *Batson*, 476 U.S. at 85 n.6).

123. Extension of the Sixth Amendment's fair-cross-section requirement to the petit jury implies the recognition of a fundamental right to a jury panel that in fact reflects a fair cross section of the community. *See Doyel, supra* note 9, at 414-18. Accordingly, a defendant's showing that a particular group in the relevant community was not represented on the jury that convicted him would presumably give rise to a Sixth Amendment claim. *See id.* at 415. Of course, such a ruling would make any jury selection system, no matter how balanced, virtually impossible to implement. *Id.* Recognition of a right to a fair cross section on the petit jury could be even more problematic as classifications that impinge upon the exercise of fundamental rights have been held to trigger strict equal protection scrutiny. *See* 3 ROTUNDA & NOWAK, *supra* note 49, § 18.3 (discussing strict scrutiny review for classifications that impinge on a fundamental right); *see also Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that a non-suspect wealth classification that inhibited the fundamental right to interstate travel is subject to strict scrutiny), *overruled by Edelman v. Jordan*, 415 U.S. 651 (1974); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding that a classification based on wealth, which impinged upon the fundamental right to vote, is subject to strict scrutiny); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that a wealth classification, which denied an indigent defendant the fundamental right of equal access to the judicial process, is subject to strict scrutiny).

124. 419 U.S. 522 (1975).

125. *See id.* at 537-38.

126. *Id.* at 524.

women from jury service unless they filed a written declaration of their desire to serve.¹²⁷ The Court held that this system violated the fair-cross-section requirement by systematically excluding women from petit jury service.¹²⁸

In *Duren v. Missouri*,¹²⁹ the Court followed the Sixth Amendment rationale of *Taylor* to invalidate a procedure that allowed women to excuse themselves from jury service without reason.¹³⁰ Applying the rule enunciated in *Taylor*, the Court found that women were a “‘distinctive’ group” within the community¹³¹ and that the Missouri exclusion procedure led to their significant under-representation on jury venires.¹³² Based on these findings, the Court held that the procedure violated the Sixth Amendment’s fair-cross-section requirement.¹³³

While the Sixth Amendment has primarily been utilized to address measures that create an imbalance on the jury venire, it has also been referred to as a means for addressing the discriminatory use of peremptory challenges.¹³⁴ The Supreme Court itself suggested such an application in *Mc-*

127. *Id.* at 523. When *Taylor* went to trial, a provision of the Louisiana Constitution mandated that women would not be selected for jury duty unless they filed a written statement of their desire to be called for jury service. LA. CONST. art. VII, § 41, amended by LA. CONST. art. V, § 33 (Supp. 1975).

128. *Taylor*, 419 U.S. at 531.

129. 439 U.S. 357 (1979).

130. *Id.* at 357. While the measure in *Duren* might also have been attacked under the Equal Protection Clause, the Missouri Supreme Court refused to accept the defendant’s Equal Protection claim. *State v. Duren*, 556 S.W.2d 11 (Mo. 1977), *rev’d*, 439 U.S. 357 (1979), and *vacated*, *Lee v. Missouri*, 439 U.S. 461 (1979). On appeal to the United States Supreme Court, only a Sixth Amendment claim was argued and thus, it was the only claim addressed. *Duren*, 439 U.S. at 363 n.19. The Sixth Amendment provided an outcome substantially the same as the Equal Protection Clause would have, while avoiding the problematic application of the lesser level scrutiny utilized in gender-based Equal Protection jurisprudence. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (asserting that classifications by gender must be substantially related to the achievement of important governmental objectives). The language of *Boren* has been characterized as establishing a test of ‘mid-level’ scrutiny. See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 497-98 n.4 (1981) (Stevens, J., dissenting) (discussing the different tiers of Equal Protection analysis).

131. *Duren*, 439 U.S. at 364.

132. *Id.* at 366. In *Duren*, the petitioner presented statistical evidence which showed that women, while representing over half the adults in the community, made up approximately 15% of the jury venires. *Id.* at 365.

133. *Id.* at 370.

134. In *Batson v. Kentucky*, the petitioner’s appeal was based on a Sixth Amendment claim, although the Court’s decision in the case was based on the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79, 84 n.4 (1986) (stating that while petitioner raised both Sixth Amendment and Fourteenth Amendment issues, the case would be decided under the Equal Protection Clause of the Fourteenth Amendment). See *supra* notes 77-85 and accompanying text (discussing *Batson*’s Equal Protection holding). The petitioner in *Batson* based his claim on the Sixth Amendment to avoid asking the Court to overturn *Swain v. Alabama*. *Batson*, 476 U.S. at 84 n.4. Moreover, *Swain* was decided in 1965, before the Sixth Amendment was

Cray v. New York.¹³⁵ Although the Court refused to hear McCray's appeal, its denial of certiorari was based in large part on the facts and timing of the case, rather than the merits of the Sixth Amendment issues being raised.¹³⁶

While *Batson v. Kentucky* indicated that the Equal Protection Clause would be the primary mechanism for addressing discriminatory peremptories,¹³⁷ the Sixth Amendment was not entirely rejected as a means for addressing questions left open by *Batson*.¹³⁸ In *Holland v. Illinois*,¹³⁹ however, the Court conclusively decided a Sixth Amendment claim against the dis-

extended to the states by *Duncan v. Louisiana*, 391 U.S. 145 (1968). Nevertheless, since the state's opposition to overturning *Batson*'s conviction was based on the Equal Protection decision in *Swain*, the *Batson* Court was able to overrule *Swain* on Equal Protection grounds. *Batson*, 476 U.S. at 84.

135. 461 U.S. 961 (1983) (denying certiorari). Justice Stevens wrote a concurrence in the denial of certiorari that was joined by Justices Blackmun and Powell. In his concurrence, Justice Stevens agreed with the dissent that the fair-cross-action requirement was applicable to the discriminatory use of peremptory challenges. *Id.* at 961 (Stevens, J., concurring in denial of certiorari). However, the concurring Justices believed a more appropriate case was necessary to address adequately the issue. *Id.* Justice Marshall's dissent, joined in by Justice Brennan, asserted that the fair-cross-section requirement should prevent the discriminatory use of peremptories. *Id.* at 963 (Marshall, J., dissenting in denial of certiorari). Justice Marshall stated that he "would grant certiorari to consider whether petitioner's Sixth Amendment rights . . . were violated by the prosecutors' use of peremptory challenges to exclude all Negroes from the juries." *Id.* at 969-70.

136. In his concurrence, Justice Stevens stated:

My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date.

Id. at 961-62.

In addition to the Supreme Court's recognition of the Sixth Amendment in *McCray*, several state courts have interpreted the Sixth Amendment, or their own state's equivalent to its fair-cross-section requirement, as precluding the discriminatory use of peremptory challenges. *See, e.g.,* *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978); *Riley v. State*, 496 A.2d 997, 1012-13 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 377 N.E.2d 499, 514-19 (Mass.), *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 612 P.2d 716, 718 (N.M. Ct. App. 1980).

137. *Batson*, 476 U.S. at 84 n.4.

138. *See* *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* addressed the retroactive application of *Batson*'s prima facie Equal Protection test, and alternatively, raised a Sixth Amendment claim. *Id.* at 294, 297. The Court rejected both claims, holding that neither *Batson* nor a potential Sixth Amendment remedy would have retroactive application. *Id.* at 296. The *Batson* opinion was specifically limited to addressing a prosecutor's use of the peremptory to strike minority jurors in trials of minority defendants. *Batson*, 476 U.S. at 82, 89 n.12, 99. Thus, *Batson*'s retroactive application, its application in cases where the defendant and the struck juror did not share the same race, and its restriction upon a defendant's discriminatory use of the peremptory, were issues left for another day.

139. 493 U.S. 474 (1990).

crimINARY use of peremptory challenges.¹⁴⁰ *Holland* involved a prosecutor's discriminatory use of the peremptory challenge to exclude black jurors in the trial of a white defendant.¹⁴¹ Unlike the Equal Protection Clause, the Sixth Amendment does not require group identification between a litigant and an excluded juror.¹⁴² The Court, therefore, granted standing to a white defendant to challenge the peremptory exclusion of black veniremen under the Sixth Amendment.¹⁴³ Despite granting him standing, however, the Court rejected *Holland's* Sixth Amendment claim as a basis for challenging the composition of his convicting jury.¹⁴⁴ The majority thereby flatly refused to extend the fair-cross-section requirement to petit juries.¹⁴⁵ Accordingly, the Sixth Amendment requires only an impartial jury selected from a panel drawn by non-discriminatory means.¹⁴⁶ After *Holland*, discrimination in the selection of the petit jury would be addressed only through the Equal Protection Clause.¹⁴⁷

II. GEORGIA V. MCCOLLUM: APPLYING BATSON'S EQUAL PROTECTION ANALYSIS TO THE CRIMINAL DEFENDANT

In *Georgia v. McCollum*,¹⁴⁸ the Supreme Court held that the Constitution prohibited a criminal defendant from utilizing peremptory challenges in a

140. *Id.* at 483-84 (stating that the use of the fair-cross-section requirement to address discriminatory peremptory challenges "would positively . . . obstruct[]" the goal of the Sixth Amendment).

141. *Id.* at 475-76. Because the *Batson* ruling was limited to claims by minority defendants that members of their own race were being excluded by the prosecutor, *Holland* marked the first attack on the discriminatory use of the peremptory challenge outside this limited context. See *Batson*, 476 U.S. at 82, 89 n.12, 99.

142. *Holland*, 493 U.S. at 477; see also *Duren v. Missouri*, 439 U.S. 357 (1979) (considering a male defendant's Sixth Amendment standing to challenge the exclusion of women from jury service).

143. *Holland*, 493 U.S. at 477.

144. *Id.* at 487.

145. *Id.* at 478. The Court stated that "[w]hile statements in our prior cases have alluded to such a 'fair possibility' requirement, satisfying it has not been held to require anything beyond the inclusion of all cognizable groups in the venire." *Id.*; see also *Lockhart v. McCree*, 476 U.S. 162 (1986). The *Holland* decision effectively closed the door to any expansion of the Sixth Amendment to the petit jury. The Sixth Amendment interpretations of *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v. Missouri*, 439 U.S. 357 (1979), would thereafter be limited to addressing discriminatory procedures that lead to an under-representation of minorities on the jury venire.

146. *Holland*, 493 U.S. at 480.

147. *Id.* at 487 n.3 (referring to the defendant's potential Equal Protection claim); see also *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (using Equal Protection analysis to extend *Batson* to criminal defendants); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (using Equal Protection analysis to expand *Batson* into civil cases); *Powers v. Ohio*, 111 S. Ct. 1364 (1991) (using Equal Protection analysis to expand *Batson's* rationale to cover discriminatory use of peremptories in trials of non-racial minority defendants).

148. 112 S. Ct. 2348 (1992).

racially discriminatory manner.¹⁴⁹ Rather than simply addressing the unanswered issue of *Batson*'s application to a criminal defendant,¹⁵⁰ however, the *McCullum* decision's reliance on the Equal Protection Clause¹⁵¹ extends that doctrine into a problematic area of dubious state action.¹⁵² This extension ultimately may threaten to eliminate the peremptory challenge altogether,¹⁵³ along with any non-discriminatory benefits it may still provide.¹⁵⁴

*A. The Majority Opinion: Extending the Non-Discriminatory Rule of
Batson v. Kentucky*

The Supreme Court in *McCullum* overruled a decision by the Georgia Supreme Court¹⁵⁵ and held that the non-discriminatory rule of *Batson v. Kentucky*¹⁵⁶ prohibited criminal defendants from utilizing racially discrimi-

149. *Id.* at 2359 (holding that the Constitution prohibits a criminal defendant from using racially discriminatory peremptory challenges).

150. *See* *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986).

151. U.S. CONST. amend. XIV, § 1; *see McCullum*, 112 S. Ct. at 2357 (stating the basis of its holding in Equal Protection terms).

152. *See infra* note 169 (discussing *McCullum*'s problematic interpretation of state action).

153. Judge Raymond J. Broderick of the United States District Court for the Eastern District of Pennsylvania has stated that *Powers v. Ohio* and *Edmonson v. Leesville Concrete Co.* "have paved the way for the total elimination of peremptory challenges." Broderick, *supra* note 9, at 421; *see also* James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555, 1596 (1985) (arguing for elimination of the peremptory challenge). *But see* Underwood, *supra* note 7, at 761 (noting that the peremptory will continue to exist in a restricted form even after an extension of *Batson* to the criminal defendant).

154. A number of legitimate functions of the peremptory challenge were recognized in *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled on other grounds by* *Batson v. Kentucky*, 476 U.S. 79 (1986). First, the challenge enables a fair and impartial jury to be impanelled in fact as well as in the eyes of the litigants. *Id.* at 212. Second, the challenge helps to eliminate the existence of juror partiality not deducible under voir dire questioning. *Id.* at 219. Third, the peremptory challenge gives assurance to the parties that the jurors will decide their case solely based on the evidence before them, and not on any preconceived notions or bias. *Id.* Fourth, the challenge allows "justice [to] . . . satisfy the appearance of justice." *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Fifth and finally, the peremptory permits more liberal voir dire questioning because attorneys know that if such questioning offends a juror, that juror can be removed peremptorily. *Swain*, 380 U.S. at 219-220; *see also* Druff, *supra* note 153, at 1592-93 (arguing that a primary benefit of the peremptory is that it saves judicial resources from being spent on extensive voir dire examinations). The benefits of the peremptory remaining after an extension of *Batson* to the criminal defendant are discussed in Underwood, *supra* note 7, at 761-68.

155. *State v. McCollum*, 405 S.E.2d 688 (Ga. 1991), *rev'd*, 112 S. Ct. 2348 (1992).

156. 476 U.S. 79 (1986).

natory peremptory challenges.¹⁵⁷ Applying *Batson*'s Equal Protection analysis,¹⁵⁸ the majority based its holding on three primary conclusions.¹⁵⁹

1. *Acknowledging the Injuries Inflicted by a Criminal Defendant's Discriminatory Use of the Peremptory Challenge*

Batson v. Kentucky identified the broad injuries inflicted by racial discrimination in the selection of jurors.¹⁶⁰ However, the focus of *Batson* was on the injuries inflicted by a prosecutor's discriminatory use of the peremptory challenge.¹⁶¹ In order to extend *Batson*'s prohibition to the criminal defendant, the *McCollum* Court had to acknowledge that a defendant's discriminatory challenges inflicted injuries similar to those identified in *Batson*. In doing so, the Court acknowledged that *Batson* was designed to serve "'multiple ends,'" ¹⁶² protecting not only the criminal defendant, but also the jurors stigmatized by their discriminatory exclusion from jury service.¹⁶³ In acknowledging this stigma, the Court declared that, from the excluded juror's perspective, it did not matter which party challenged their service on the jury.¹⁶⁴ The only relevant question was whether they were challenged solely because of their race.¹⁶⁵ The Court went on to recognize the inability

157. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992). In conclusion, *McCollum* stated that "[w]e hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." *Id.* Chief Justice Rehnquist along with Justices White, Stevens, Kennedy and Souter joined Justice Blackmun's majority opinion. *Id.* at 2351. Chief Justice Rehnquist and Justice Thomas also filed concurring opinions. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring). Justices O'Connor and Scalia filed dissenting opinions. *Id.* at 2361 (O'Connor, J., dissenting); *id.* at 2364 (Scalia, J., dissenting).

158. *Batson*, 476 U.S. at 93-96.

159. *McCollum*, 112 S. Ct. at 2353.

160. *Batson*, 476 U.S. at 87. *Batson* recognized that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.*

161. *Id.* at 89.

162. See *Powers v. Ohio*, 111 S. Ct. 1364, 1368 (1991) (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam) (quoting *Brown v. Louisiana*, 447 U.S. 323, 329 (1980)) (acknowledging the "multiple ends" of *Batson v. Kentucky*); see also *supra* note 80 (discussing the multiple ends of *Batson*).

163. *McCollum*, 112 S. Ct. at 2353. The Supreme Court identified its purpose in expanding *Batson* as "remedy[ing] the harm done to the 'dignity of persons' and the 'integrity of the courts.'" *Id.* (quoting *Powers*, 111 S. Ct. at 1366). In *Powers*, decided the previous term, the Court focused specifically on the injury to the excluded juror, comparing the denial of jury service to the denial of the right to vote. *Powers*, 111 S. Ct. at 1368-69. The focus on the rights of defendants and the injury imposed upon them, as recognized in *Batson*, had become a secondary concern. *Id.*

164. *McCollum*, 112 S. Ct. at 2353. The Supreme Court stated that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination." *Id.*

165. *Id.*

of excluded jurors to bring suit on their own behalf,¹⁶⁶ and granted the prosecutor third-party standing to represent their injuries.¹⁶⁷ Reiterating the broad scope of the injuries inflicted by any litigant's discriminatory use of the peremptory challenge,¹⁶⁸ the Court turned to the issue of what remedy, if any, would be available for such discrimination.

2. *Criminal Defendants as State Actors—The Majority's Interpretation of Lugar v. Edmondson Oil Co.*

While acknowledging that a defendant's discriminatory use of the peremptory challenge inflicts injuries similar to those recognized in *Batson v. Kentucky*, in order for the *McCullum* Court to restrict such challenges under the Fourteenth Amendment it had to characterize them as "state action."¹⁶⁹ In

166. *Id.* at 2357. The Supreme Court has long recognized that minorities could themselves bring suit to contest their discriminatory exclusion from jury service. *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970). However, such jurors, whether excluded by discrimination in the compilation of the jury venire, or excluded by discriminatory peremptory challenges, have little motivation for bringing such suits. See generally Underwood, *supra* note 7, at 757 (discussing difficulties that face jurors in bringing suit contesting their exclusion from jury service).

167. *McCullum*, 112 S. Ct. at 2357 (declaring that "the State [through the prosecutor] is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial"). The standing decision in *McCullum* was based on a third-party standing test enunciated in *Powers*, 111 S. Ct. at 1370-73.

168. *McCullum*, 112 S. Ct. at 2353-54. The *McCullum* opinion reviewed the harm that discriminatory peremptories impose upon criminal defendants, excluded jurors, and society itself. *Id.* This review was premised upon language in *Powers v. Ohio* and *Edmonson v. Leesville Concrete Co.*, which moved away from a focus on injuries to litigants and toward a recognition of the more expansive harm done to society's confidence in jury verdicts. See *Powers*, 111 S. Ct. at 1369 (recognizing that one purpose of the jury is to interject a "democratic element [into] the law" and "insure[] continued acceptance of the laws by all of the people"); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991) (stating that "[i]f 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").

169. *McCullum*, 112 S. Ct. 2354. The Fourteenth Amendment states in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). This language has been interpreted as restricting the application of the Fourteenth Amendment to discriminatory state actions, thus "limit[ing] the operation of the Fourteenth Amendment . . . [to] prevent[] federal courts from using the Amendment to govern directly the actions of individuals." Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 595 (1991); see also *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

The doctrine of "state action" under the Fourteenth Amendment has several components. For purposes of discriminatory peremptory challenges, only the component concerning significant state involvement in private actions need be addressed.

While the Fourteenth Amendment makes clear that private actions are not within its scope, the determination of which actions constitute "state action" is often problematic. Justice Rehnquist stated the general rule as such: "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that

finding that a defendant's use of the peremptory challenge was state action, the Court used a test developed in *Lugar v. Edmondson Oil Co.*¹⁷⁰ *Lugar* prescribed a two-prong test for determining state action.¹⁷¹ This test asked first "whether the claimed deprivation [of a constitutional right by a private actor] has resulted from the exercise of a right or privilege having its source in state authority."¹⁷² *Lugar's* second inquiry was whether the person being charged with state action could "be appropriately characterized as [a] 'state actor[.]'"¹⁷³ Based primarily on language in *Edmonson v. Leesville Concrete Co.*, which interpreted *Lugar*,¹⁷⁴ the *McCollum* majority found that both prongs of *Lugar's* state action test were met when a defendant used the peremptory challenge.¹⁷⁵ The Chief Justice and Justice Thomas wrote concurring opinions based entirely on the *Leesville* interpretation of state ac-

the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

The relevant state action inquiry involves delegations of state power to private actors. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), upon which the *McCollum* state action determination was based, exemplifies this examination. *Lugar* involved a creditor's seizure of a debtor's property in an *ex parte* proceeding pursuant to a statutory grant of authority. *Id.* at 924-25. In holding that the seizure constituted state action, the Court enunciated a two-part rule. First, the deprivation giving rise to a state action claim must be rooted in an exercise of authority granted by the state. *Id.* at 939. Second, the party causing such a deprivation must "fairly be said to be a state actor." *Id.* at 937. Other cases have enunciated similar state action rules. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-65 (1978) (holding that a warehouseman's sale of goods pursuant to a statute was not state action); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (garnishing of wages by a creditor acting under statutory authority held to be "state action"); *Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948) (invalidating racially restrictive covenants on land as court enforcement of these would be "state action"). For a general discussion of the relevant state action requirement, see 2 ROTUNDA & NOWAK, *supra* note 49, § 16.3. See also Strickland, *supra*, *passim* (discussing the evolution of the state action doctrine under the Rehnquist Court).

The *McCollum* Court's decision that the defendant's use of a peremptory challenge constitutes state action will likely be subjected to much criticism. The primary reason for this, as the dissent noted, is that the defendant and state in a criminal proceeding are adverse and not cooperating parties. *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting). In contrast, *Lugar* and other interpretations of state action involved state encouragement and cooperation in a private citizen's conduct. *Id.* at 2361-63.

In light of the state action requirement of the Fourteenth Amendment, several commentators have suggested the Thirteenth Amendment, which has no such requirement, as a means of addressing the discriminatory use of the peremptory challenge. Colbert, *supra* note 9, at 1; see also Broderick, *supra* note 9, at 406 (suggesting that even if the state action requirement prevents using the Fourteenth Amendment to prohibit defendants' discriminatory use of the peremptory, the Thirteenth Amendment could nonetheless be invoked).

170. 457 U.S. 922 (1982).

171. *Id.* at 939.

172. *Id.*

173. *Id.*

174. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-87 (1991).

175. *Georgia v. McCollum*, 112 S. Ct. 2348, 2354-55 (1992) (holding a criminal defendant's discriminatory use of the peremptory challenge to be state action).

tion.¹⁷⁶ While neither justice agreed with the opinion in that case,¹⁷⁷ nor with the extension of *Batson* to the criminal defendant, they concurred based solely on their belief that *Leesville* was controlling.¹⁷⁸ Justice Thomas's widely quoted concurrence¹⁷⁹ stated that the ruling would cause black defendants to "rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes."¹⁸⁰

3. *The Sixth Amendment Implications of Restricting a Defendant's Use of the Peremptory Challenge*

The *McCullum* opinion recognized that in spite of imposing an injury upon excluded jurors, the rights of criminal defendants to effective assistance of counsel and jury impartiality¹⁸¹ might nonetheless preclude an extension of *Batson v. Kentucky* to the criminal defendant.¹⁸² However, the Court found that restricting the defendant's use of the peremptory challenge would not so impinge on these rights as to prevent an extension of *Batson*.¹⁸³ It was argued that if defendants were required to explain their grounds for peremptory challenges under a prima facie claim of discriminatory use,¹⁸⁴ such an explanation could reveal critical defense trial strategy, thereby denying defendants the full benefit of effective assistance of counsel.¹⁸⁵ The

176. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring).

177. See *Leesville*, 111 S. Ct. at 2089 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). Justice Thomas was not on the Court at the time of the *Leesville* decision. See *id.* at 2080.

178. *McCullum*, 112 S. Ct. at 2359. Chief Justice Rehnquist stated that "I . . . continue to believe [*Leesville*] to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case on the issue of 'state action' under the Fourteenth Amendment." *Id.*

179. See, e.g., Marcia Coyle, *New Trio Stands Up to Court's Hard Right*, NAT'L L.J., Aug. 31, 1992, at S1; Henry Gottlieb, *Defense Learns Bias in Voir Dire is a Two-Way Street*, N.J. L.J., Oct. 5, 1992, at 3; Tony Mauro, *A Chaotic Court Closes Its Term — Chaotically*, THE CONN. L. TRIB., July 6, 1992, at 4; Art Pine & David G. Savage, *Defense Can't Exclude Jurors Based on Race*, L.A. TIMES, June 19, 1992, at A1; Thomas Sancton, *Judging Thomas*, TIME, July 13, 1992, at 30; Stuart Taylor, *Centrists Hit Some False Notes*, TEX. LAW., July 27, 1992, at S-2.

180. *McCullum*, 112 S. Ct. at 2360 (Thomas, J., concurring).

181. *Id.* at 2358-59.

182. *Id.* at 2353. The Supreme Court identified a primary issue in *McCullum* as "whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case." *Id.*

183. *Id.* at 2358.

184. *Id.*; see also *supra* note 21 (analyzing the prima facie test enunciated in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

185. *McCullum*, 112 S. Ct. at 2358; see also 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, 831-33 (1989) (discussing the impact of defendants' explanations of peremptories upon effective assistance of counsel). For a discussion of the possible effects a *Batson* evidentiary hearing might have on revealing trial strategy, see L. Ashley Lyu, Note,

majority answered this contention by holding that the availability of an *in camera* review to evaluate these explanations eliminated any risk of revealing defense strategies.¹⁸⁶

In addition, the McCollums' defense counsel claimed that removing the defendant's right to unrestricted use of the peremptory would impinge upon his ability to create an impartial jury.¹⁸⁷ Answering this contention, the Court ruled that the Sixth Amendment right to jury impartiality applied equally to both the prosecutor and the defendant alike.¹⁸⁸ Thus, a defendant cannot claim a unilateral violation of this right, since the prosecutor already was barred from discriminatory use of the peremptory.¹⁸⁹

B. The McCollum Dissent: Defendants as State Adversaries, Not State Actors

In dissent, Justice O'Connor criticized the majority's restriction of a criminal defendant's use of the peremptory challenge.¹⁹⁰ Her dissent focused on the issue of state action, arguing that the governing test should be that developed in *Polk County v. Dodson*,¹⁹¹ and not the *Lugar* test applied by the majority.¹⁹² Justice O'Connor interpreted *Polk County* as settling the ques-

Getting at the Truth: Adversarial Hearings in Batson Inquiries, 57 FORDHAM L. REV. 725, 740-41 (1989).

186. *McCollum*, 112 S. Ct. at 2358.

187. Respondent's Brief at 13, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (No. 91-372).

188. *McCollum*, 112 S. Ct. at 2358.

189. *Id.*; see *Batson v. Kentucky*, 476 U.S. 79 (1986) (barring prosecutors from discriminatory use of the peremptory challenge).

190. *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting).

191. 454 U.S. 312 (1981). In *Polk County*, the Court held that a public defender could not be considered as acting "under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325. The defendant in *Polk County* claimed a violation of his constitutional right to fair representation and brought suit against his public defender under 42 U.S.C. § 1983. *Id.* at 312. While the specific issue in *Polk County* was whether a public defender was acting under color of state law for the purposes of 42 U.S.C. § 1983, that issue closely follows the state action requirement of the Fourteenth Amendment. *McCollum*, 112 S. Ct. at 2356 n.9 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1009 n.20 (1982)). Section 1983 originated in the Civil Rights Act of 1871 and provides a remedy for any person whose constitutional rights have been deprived by someone acting under color of state law. See *Collins v. Harker Heights*, 112 S. Ct. 1061, 1064, 1066 (1992). For purposes of this Note, the relevancy of § 1983 is that a considerable amount of litigation under it has revolved around the often difficult interpretation of the phrase "under color of state law." *Id.* at 1066; see, e.g., *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). For a general discussion of the state action requirement as it relates to the peremptory challenge, see *supra* note 169.

192. Justice O'Connor believed that the characterization of peremptory challenges as private or state action depended on a "realistic appraisal of the relationship between defendants and the government that has brought them to trial." *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting). It was this relationship and its interpretation in *Polk County* that

tion of state action as it related to the trials of criminal defendants.¹⁹³ Any action by a criminal defendant that could be characterized as a “ ‘traditional function’ ” of defense counsel could not be considered state action.¹⁹⁴ While the *McCullum* majority narrowly read *Polk County* as limited to characterizations of some actions by public defenders,¹⁹⁵ Justice O'Connor took a more expansive view, finding that it stood for the proposition that criminal defendants had the constitutional right to be entirely free from state control.¹⁹⁶ Thus, Justice O'Connor believed there was no way to characterize a defendant's use of the peremptory challenge as state action within the confines of the Fourteenth Amendment.¹⁹⁷

Justice O'Connor also criticized what she identified as the majority's underlying attempt to balance *Batson*'s restrictions upon a prosecutor's use of the peremptory challenge with corresponding restrictions upon a criminal defendant.¹⁹⁸ Her dissent noted that contradictory restrictions are inherent in the Constitution, with the Fourteenth Amendment explicitly restricting only actions of the state.¹⁹⁹ Moreover, Justice O'Connor argued that if equality was the majority's aim, the *McCullum* decision may have the opposite result, removing from minority defendants a traditional tool for ensuring greater minority representation on their juries.²⁰⁰

Justice O'Connor believed mandated a finding that peremptory challenges not be considered as state action. *Id.*

193. *Id.* at 2362. Justice O'Connor quoted *Polk County* for the proposition that “defending an accused ‘is essentially a private function,’ not state action.” *Id.* (quoting *Polk County*, 454 U.S. at 319).

194. *Id.* (stating that when performing “ ‘traditional functions,’ ” including exercise of the peremptory challenge, defense counsel cannot be considered as acting under state authority (quoting *Polk County*, 454 U.S. at 325)).

195. *Id.* at 2356. The *McCullum* majority interpreted *Polk County* as only preventing a public defender's “employment from *alone* being sufficient to support a finding of state action.” *Id.* The Court cited *Polk County* for the proposition that “while performing certain administrative, and possibly investigative, functions,” a public defender could be considered a state actor. *Id.* (citing *Polk County*, 454 U.S. at 325).

196. *Id.* at 2362 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), for the proposition that the Constitution conferred upon criminal defendants the unrestricted right to effective assistance of counsel). Implicit in this right Justice O'Connor found that “the defense's freedom from state authority . . . is a constitutionally mandated attribute of our adversarial system.” *Id.*

197. *Id.* at 2363 (O'Connor, J., dissenting). Justice O'Connor stated that “*Dodson* makes clear that the unique relationship between criminal defendants and the State precludes attributing [criminal] defendants' actions to the State, whatever is the case in civil trials.” *Id.*

198. *Id.* at 2363-64.

199. *Id.* at 2364. In her dissent, Justice O'Connor stated that “[t]he concept that the government alone must honor constitutional dictates . . . is a fundamental tenet of our legal order, not an obstacle to be circumvented.” *Id.*

200. *Id.* Justice O'Connor cited the *amicus* brief of the NAACP for the proposition that the peremptory challenge had, particularly since *Batson*, been an effective tool for assuring minority defendants a better chance of obtaining minority representation on their juries. *Id.*;

Justice O'Connor's dissent was in large part adopted by Justice Scalia.²⁰¹ Justice Scalia, however, wrote separately to emphasize his disapproval of the majority's compromising of criminal defendants' traditional unfettered access to peremptory juror strikes.²⁰²

III. THE PROBLEMATIC EQUAL PROTECTION RESOLUTION TO A DEFENDANT'S DISCRIMINATORY PEREMPTORIES

In the twenty years following *Swain v. Alabama*,²⁰³ the Supreme Court was widely criticized for its refusal to restrict prosecutor's discriminatory use of the peremptory challenge.²⁰⁴ Finally addressing the issue in *Batson v. Kentucky*,²⁰⁵ the Court established an Equal Protection remedy for defendants contesting a prosecutor's misuse of the peremptory challenge.²⁰⁶ The state action requirement of this remedy implicitly restricted *Batson's* rule to the criminal prosecutor.²⁰⁷ The *Batson* opinion itself gives little direct indication about its reason for preferring an Equal Protection remedy over one based on the Sixth Amendment,²⁰⁸ used by several state courts previously addressing the issue.²⁰⁹ One rationale for *Batson's* reliance on the Equal Protection Clause may have been to prevent an expansion of the ruling to

see also supra notes 176-80 and accompanying text (discussing the concurring opinion of Justice Thomas, who also addressed this issue).

201. *McCollum*, 112 S. Ct. at 2364 (Scalia, J., dissenting).

202. *Id.* at 2364-65. Justice Scalia stressed the "sheer inanity," *id.* at 2364, of characterizing a criminal defendant as a state actor, noting that "[i]n the interest of promoting the supposedly greater good of race relations . . . we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish." *Id.* at 2365.

203. 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

204. *See supra* note 9 (citing criticisms of the *Swain* decision).

205. 476 U.S. 79 (1986).

206. *Id.* at 96 (establishing a prima facie Equal Protection remedy); *see also supra* note 21 (discussing *Batson's* remedy).

207. *See* Goldwasser, *supra* note 185, at 812-13 (stating that the state action requirement prevents *Batson's* limitations from applying to the criminal defendant); *see also supra* note 169 (discussing the state action requirement in the context of peremptory challenges). *But see* *Batson*, 476 U.S. at 125 (Burger, C.J., dissenting). Chief Justice Burger's dissent cited *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986) (en banc), *vacated*, 479 U.S. 1074 (1987), for the proposition that states that adopted a Sixth Amendment-type remedy for discriminatory use of the peremptory made the prohibition applicable to both the prosecutor and the defendant. *Batson*, 476 U.S. at 125. Noting this dual application, Chief Justice Burger stated that "the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike." *Id.* at 125-26.

208. *Batson*, 476 U.S. at 84 n.4 (asserting reliance on Equal Protection); *see also supra* note 134 (discussing the Sixth Amendment basis of *Batson's* appeal to the Supreme Court).

209. The state courts addressing the issue utilized the Sixth Amendment fair-cross-section requirement, or their state's equivalent, to limit a prosecutor's discriminatory use of the peremptory challenge. *See* *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 612 P.2d 716 (N.M. Ct. App. 1980).

criminal defendants, who have traditionally been thought to derive the most benefit from the peremptory challenge.²¹⁰ Despite *Batson*'s reliance on the Equal Protection Clause, the Supreme Court built on the precedent of *Edmonson v. Leesville Concrete Co.*,²¹¹ and overcame the state action barrier in *Georgia v. McCollum*, prohibiting criminal defendants from using discriminatory peremptory challenges.²¹²

A. The Problematic Ramifications of *McCollum*'s Equal Protection Rule

1. Defining Criminal Defendants as State Actors

The extension of *Batson v. Kentucky* to the criminal defendant was strongly criticized by the dissenting opinions of Justices O'Connor and Scalia in *Georgia v. McCollum*.²¹³ The focus of these opinions was on the majority's characterization of a criminal defendant as a "state actor" when exercising the peremptory challenge.²¹⁴ Because the applicable state action inquiry turns on an interpretation of ambiguous terms such as "fairly attributable"²¹⁵ and "traditional functions" of defense counsel,²¹⁶ the majority was able to construe these terms to extend the application of the

Although *Batson* was decided based on Equal Protection grounds, the petitioner had not raised a Fourteenth Amendment claim, wanting to avoid asking the Court to overturn directly *Swain v. Alabama*, 380 U.S. 202 (1965), overruled by *Batson*, 476 U.S. at 79. See *Batson*, 476 U.S. at 113-15 (Burger, C.J., dissenting) (quoting from oral argument).

210. See VAN DYKE, *supra* note 3, at 147-49; Goldwasser, *supra* note 185, at 827 (recognizing peremptory as a device to protect defendants); Note, *Limiting the Peremptory Challenge*, *supra* note 9, at 1718 (recognizing that the peremptory was traditionally a defendant's tool); see also Massaro, *supra* note 9, at 515 (calling the jury trial itself "the privilege of the accused").

211. 111 S. Ct. 2077 (1991); see also *supra* notes 97-105 and accompanying text (discussing the Court's holding in *Edmonson*, 111 S. Ct. at 2077).

212. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992) (holding that the Fourteenth Amendment prohibits a defendant's discriminatory use of peremptory challenge); see also *supra* notes 155-89 and accompanying text (discussing the majority opinion in *McCollum*).

213. *McCollum*, 112 S. Ct. at 2365 (O'Connor, J., and Scalia, J., dissenting). Justice O'Connor's dissent on the issue of state action is ironic in light of her otherwise more expansive views on state action. See *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988) (White, J., joined by O'Connor, J., and others dissenting); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 548 (1987) (O'Connor, J., dissenting), cited in Strickland, *supra* note 169, at 654. Chief Justice Rehnquist and Justice Thomas also disagreed with the majority's characterization of state action in *McCollum*. However, they felt compelled to side with the majority based on the precedent of *Edmonson v. Leesville Concrete Co. McCollum*, 112 S. Ct. at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring).

214. See *supra* notes 169-75 and accompanying text (discussing *McCollum*'s finding of state action).

215. *McCollum*, 112 S. Ct. at 2356; see also *id.* at 2361 (O'Connor, J., dissenting) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)).

216. *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting). In refuting the dissent's contention that criminal defendants could not be state actors, the *McCollum* majority interpreted *Polk County v. Dodson*, 454 U.S. 312 (1981), as meaning only that "the determination

Equal Protection Clause to the criminal defendant.²¹⁷ However, *McCollum*'s state action holding opens the door for further characterization of a criminal defendant's action as "state action."²¹⁸ The holding also reverses the Court's previous tendency to treat an accused's case against the state as inherently private, the adversarial relationship negating any implication of state action.²¹⁹

2. Georgia v. McCollum: A Remedy Effective in Name Only?

While the immediate implication of the *McCollum* decision may reveal that it was an effective statement against discrimination within the judicial system,²²⁰ *McCollum*'s long-term impact could well lead to the end of peremptory challenges.²²¹ This is foreseen by the unwillingness of the Supreme Court in *Batson v. Kentucky* to enunciate particular procedures to be followed when objections alleging the discriminatory use of peremptories are made.²²² Moreover, an examination of lower court applications of *Batson*

whether a *public defender* is a state actor . . . depends on the nature and context of the function he is performing." *McCollum*, 112 S. Ct. at 2356 (emphasis added).

217. *McCollum*, 112 S. Ct. at 2354-57. Writing before *McCollum* was decided, several commentators suggested that a criminal defendant's use of the peremptory challenge constituted state action. See Joel H. Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 COLUM. HUM. RTS. L. REV. 177, 192 (1991); E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 361 (1988); Michael N. Chesney & Gerald T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for Georgia v. McCollum*, 67 NOTRE DAME L. REV. 1049, 1061-74 (1992).

218. See Goldwasser, *supra* note 185, at 816 (stating that if a defendant's use of the peremptory challenge is characterized as state action, "everything that occurred in the context of a lawsuit . . . could give rise to a constitutional claim").

219. See *Polk County*, 454 U.S. at 324. In *Polk County*, the Court stated that "Dodson argues that public defenders making withdrawal decisions are viewed . . . as hostile state actors. We think there is little justification for this view, if indeed it is widely held." *Id.*

220. See Underwood, *supra* note 7, at 774 (concluding that extending *Batson* to the criminal defendant would be an effective continuation of the Court's recent attacks on jury discrimination).

221. See Broderick, *supra* note 9, at 421 (stating that recent Supreme Court cases "appear[] to have paved the way for the total elimination of peremptory challenges"); Doyel, *supra* note 9, at 415 (arguing that an application of traditional equal protection doctrines could end the peremptory); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 568 (1992) (stating that "[t]he jury selection system can easily survive the loss of peremptory challenges").

222. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986). The *Batson* opinion gives little indication to trial courts on how the remedy it mandates is to be implemented. See Chesney & Gallagher, *supra* note 217, at 1055 (stating that the *Batson* Court gave little guidance for prosecutors seeking to rebut a defendant's prima facie case of discrimination). The *Batson* Court itself stated that "[w]e decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99. Thus, the development of implementation procedures was left to trial and lower appellate courts. In summarizing the effect of *Batson*'s requirement that lower courts develop procedures for im-

gives mixed results regarding the effectiveness of the prima facie test that *Batson* did prescribe.²²³ This examination illustrates the significant adminis-

plementing the prima facie remedy, one commentator stated that “[g]iven the [*Batson*] Court’s nebulous description of the prima facie case, it is not surprising that there are almost as many concepts of sufficient proof of discrimination as there are reviewing courts.” David D. Hopper, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 821 (1988).

223. See Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 369-71 (1990) (examining lower court implementation of *Batson*); Steven M. Puiszis, *Edmonson v. Leesville Concrete Co.: Will the Peremptory Challenge Survive Its Battle With the Equal Protection Clause?*, 25 J. MARSHALL L. REV. 37 (1991) (discussing lower court applications of *Batson*’s prima facie test).

Courts have regularly experienced problems with pretextual justifications for the discriminatory use of peremptories. See, e.g., *United States v. Payne*, 962 F.2d 1228, 1233 (6th Cir. 1992) (validating a prosecutor’s use of the peremptory challenge to exclude two jurors not because they were black, but because they were members of the NAACP). See generally Stephanie B. Goldberg, *Batson and the Straight-Faced Test*, A.B.A. J., Aug. 1992, at 82 (discussing shortcomings of the *Batson* test). Under *Batson*’s prima facie test, prosecutors are able to give false, non-discriminatory justifications for an apparently discriminatory pattern of peremptory strikes. See Broderick, *supra* note 9, at 421 (discussing the burden imposed on trial courts to determine if the reason for a peremptory strike is pretextual); Alan B. Rich, *Peremptory Jury Strikes in Texas After Batson and Edmondson*, 23 ST. MARY’S L.J. 1055, 1090-94 (1992) (discussing the problem of pretext in *Batson* hearings in Texas); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1029 (1991) (discussing the pretext issue); Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533, 1556 (1991) (discussing problems with *Batson*’s application in North Carolina). Despite subjecting a prosecutor’s explanations for peremptory challenges to a hard look, reported cases reveal that trial courts accept justifications for challenges which, on their face, appear to be questionable. See, e.g., *State v. Jackson*, 821 P.2d 1374, 1377-78 (Ariz. Ct. App. 1991) (striking a black juror because he wore a ponytail, indicating to the prosecutor a tendency toward liberalism and “doing his own thing”); *State v. Castillo*, 751 P.2d 983, 985-86 (Ariz. Ct. App. 1987) (striking several hispanic jurors because of their “relative youthfulness” and “hesitant manner” (citation omitted)); *People v. Charron*, 238 Cal. Rptr. 660, 665 (Cal. Ct. App. 1987) (striking two hispanics and one black based on their “limited degree of sophistication and educational background”); *Smith v. Coastal Emergency Servs., Inc.*, 538 So. 2d 946, 948 (Fl. Dist. Ct. App. 1989) (upholding the peremptory exclusion of a black juror who knew someone with same last name as the defendant); *People v. Mack*, 538 N.E.2d 1107, 1109-13 (Ill. 1989) (upholding use of thirteen of sixteen peremptories to exclude black venire-persons, five of these strikes upheld based on: (1) lack of eye contact; (2) hesitancy in answering questions regarding capital punishment; (3) response to venire questions in casual manner, while looking at defense counsel; (4) juror did not seem to understand questions; (5) answers to death penalty questioning did not seem candid), *cert. denied*, 493 U.S. 1093 (1990); *People v. Melchor*, 535 N.E.2d 1082, 1085-86 (Ill. App. Ct. 1989) (upholding the striking of four black jurors because of their youth and possible inability to appreciate seriousness of crime).

While these cases are only a small example of the recognized non-discriminatory justifications for exercising peremptories, they serve to indicate the highly subjective nature of distinguishing between pretextual and legitimate justifications under *Batson*’s prima facie remedy. See generally Lyu, *supra* note 185, at 732-39 (discussing the hearing which ensues after a defendant establishes a prima facie case of discrimination).

trative burden involved in the application of *Batson's* prima facie remedy.²²⁴ The difficulties of *Batson* will undoubtedly increase with the extension of its remedy²²⁵ to address peremptories exercised by the criminal defendant.²²⁶ Thus, while *Batson* and *McCollum* demonstrate the Supreme Court's willingness to address discrimination within the judicial system, the debatable effectiveness of the prima facie remedy suggests that the actual effect on the racial makeup of petit juries may not be so significant.²²⁷

An additional factor limiting the effectiveness²²⁸ of the *Batson/McCollum* remedy is that peremptory challenges are not the sole cause of unbalanced representation on petit juries.²²⁹ For example, California has restricted the criminal defendant's discriminatory use of the peremptory challenge since 1978,²³⁰ nevertheless, a jury with no black members acquitted the police officers in the racially charged Rodney King trial.²³¹ Thus, *Batson* and *McCollum* at best represent only a partial step in addressing the larger problem of racial discrepancies in petit jury composition.

224. See 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, 156 (1989) (arguing that the *Batson* decision "produced cumbersome procedures that will generate burdensome litigation for years to come"); William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 142 (recognizing the burdens *Batson* imposes on trial and appellate courts).

In *Batson* itself, there was some disagreement as to the burden its holding would impose. The majority opinion discredited any potential administrative burden, stating that it was not "persuaded by the State's suggestion that our holding will create serious administrative difficulties." *Batson*, 476 U.S. at 99. However, Justice White took issue with this, stating in his concurring opinion that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding." *Id.* at 102 (White, J., concurring).

225. See *supra* note 21 (discussing *Batson's* remedy); see also *supra* note 224 and accompanying text (discussing the burden that *Batson's* holding imposes on lower courts).

226. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

227. See Alschuler, *supra* note 224, at 156 (stating that "[t]he *Batson* decision condemned only [a] narrowly defined form of discrimination and provided only a weak corrective for it").

228. Whether *Batson's* remedy is effective depends upon whether it furthers the ultimate goal of creating balanced juries, racially and otherwise. *Cf. Batson*, 476 U.S. at 85-88. Thus, mechanisms that address discrimination in venire selection, while creating racially balanced jury pools, may have little effect on obtaining more racially balanced petit juries. The focus of whether a remedy is effective must be on the petit jury because it is their verdict that society reflects upon in assessing the integrity of the criminal justice system. See VAN DYKE, *supra* note 3, at 1-15 (discussing the important societal role of the criminal jury).

229. See *supra* note 66 (discussing additional causes of minority under-representation on petit juries).

230. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978) (adopting a Sixth Amendment type remedy to prevent litigants from using racially motivated peremptory challenges); see also *supra* note 42 (discussing *Wheeler's* application to the criminal defendant).

231. See *supra* note 6 (discussing jury verdict in the Rodney King case).

3. *The Inevitable Expansion of Batson and McCollum Beyond the Context of Race*

Another problematic aspect of *McCollum* is the forthcoming extension of its Equal Protection analysis into non-racial discriminatory uses of the peremptory challenge.²³² While the Supreme Court has signaled a reluctance to expand *Batson's* prohibition outside the context of race,²³³ a prohibition on gender-based discriminatory peremptories has already been recognized in a number of state and federal courts.²³⁴ Moreover, other groups have claims to the application of *Batson's* prima facie remedy as Equal Protection jurisprudence recognizes a number of non-racial classifications as suspect or quasi-suspect.²³⁵ Accepting the argument that *McCollum* alone will in-

232. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2361 (1992) (Thomas, J., concurring) (stating his belief that the ban on discriminatory peremptories will soon expand to gender); see also Bonnie L. Mayfield, *Batson and Groups Other than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377, 401 (1988) (stating that the *Batson* Court implied a strict scrutiny standard of review for prosecutors' discriminatory use of peremptory challenges); 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 *passim* (1990) (arguing that *Batson's* guarantees must be extended to gender).

233. Underwood, *supra* note 7, at 767 (quoting *Hernandez v. New York*, 111 S. Ct. 1859, 1872-73 (1991)). Professor Underwood, whose work was cited by the Supreme Court in *McCollum*, 112 S. Ct. at 2348, 2354, 2356 n.8, 2357 n.10, cited *Hernandez* for the proposition that "the Court indicated that it would not lightly expand the prohibition to categories other than race." Underwood, *supra* note 7, at 767.

234. See *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992) (en banc); *State v. Levinson*, 795 P.2d 845 (Haw. 1990); *People v. Mitchell*, 593 N.E.2d 882 (Ill. App. Ct.), *appeal granted*, 602 N.E.2d 467 (Ill. 1992); *People v. Blunt*, 561 N.Y.S.2d 90 (App. Div. 1990); *People v. Irizarry*, 536 N.Y.S.2d 630 (Sup. Ct. 1988); *State v. Burch*, 830 P.2d 357 (Wash. Ct. App. 1992). Other courts addressing the issue have refused to extend *Batson's* prohibition beyond the context of race. See *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), *and cert. denied*, 493 U.S. 1069 (1990); *Daniels v. State*, 581 So. 2d 536 (Ala. Crim. App. 1990), *cert. denied*, 112 S. Ct. 315 (1991); *State v. Morgan*, 553 So. 2d 1012 (La. Ct. App. 1989), *cert. denied*, 558 So. 2d 600 (La. 1990); *Eiland v. State*, 607 A.2d 42 (Md. Ct. Spec. App.), *cert. granted*, 613 A.2d 394 (Md. 1992); *State v. Culver*, 444 N.W.2d 662 (Neb. 1989).

235. See 3 ROTUNDA & NOWAK, *supra* note 49, §§ 18.5-18.24 (discussing suspect classifications recognized under the doctrine of Equal Protection); see also *Batson v. Kentucky*, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting). In dissent, Chief Justice Burger stated that "if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry, or profession." *Id.* (citations omitted). One state court has already recognized that *Batson's* prohibition extends beyond the context of race and even gender. *Levinson*, 795 P.2d at 849. In *Levinson*, the Hawaii Supreme Court stated that "[w]e hold that the right to serve on a jury is a privilege of citizenship, guaranteed by the constitution, and provided for by statute, and that, under our Constitution, that right cannot be taken away for any of the prohibited bases of race, religion, sex or ancestry." *Id.*

crease the administrative burden upon trial courts during jury selection,²³⁶ the additional burden of extending the *Batson/McCollum* analysis beyond the context of race will likely outweigh any remaining non-discriminatory benefits of the peremptory challenge.²³⁷ As there is no constitutional right to the peremptory challenge,²³⁸ state legislatures may very well conclude that this increased administrative burden is not worth any remaining benefit the peremptory may have.²³⁹

B. *The Sixth Amendment Alternative: Looking to the Legislature, Not the Defendant*

Acknowledging the injuries that *McCollum* sought to redress,²⁴⁰ even an attenuated finding of state action could perhaps be justified if not for the alternative and less problematic remedy in the fair-cross-section requirement of the Sixth Amendment. The Equal Protection Clause guarantees to individuals that the state will not take arbitrary and irrational action against them.²⁴¹ This Clause is therefore the logical remedy for individuals claiming that discriminatory challenges have injured them by excluding persons from their petit juries.²⁴² On the other hand, a defendant's discriminatory use of

236. See *supra* note 224 (discussing the administrative burden imposed by *Batson* and *McCollum*).

237. *Id.*; see also *supra* note 154 and accompanying text (discussing the non-discriminatory benefits of peremptory challenges). But see Underwood, *supra* note 7, at 768 (arguing that extending *Batson*'s nondiscriminatory mandate to the criminal defendant would not outweigh the benefits of the peremptory challenge).

238. See, e.g., *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992) ("peremptory challenges are not constitutionally protected fundamental rights"); *Ross v. Oklahoma*, 487 U.S. 81 (1988) (holding that the improper denial of a peremptory challenge to a criminal defendant was not grounds for reversal, as the right to the challenge is not constitutionally based).

239. Following *McCollum*, the Georgia legislature amended its statute granting the right to peremptory challenges. GA. CODE ANN. § 15-12-165 (Michie Supp. 1992). For the criminal defendant in non-capital cases, the legislature reduced the number of available peremptories from twenty to twelve; and for the prosecutor from ten to six, one half the number granted the defendant. *Id.* In capital cases, the number of peremptories remained the same, with twenty available to the defendant and ten to the prosecutor. *Id.* Conceivably, a state supreme court could recognize a state constitutional right to the use of peremptory challenges; however, this is unlikely given the historical role of the peremptory challenge as a *means* of assuring a fair jury, not a right in and of itself. *McCollum*, 112 S. Ct. at 2358 (finding that "peremptory challenges are not constitutionally protected fundamental rights").

240. *McCollum*, 112 S. Ct. at 2353. Describing its purpose in extending *Batson* to the criminal defendant, the *McCollum* Court stated that "the extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of persons' and to the 'integrity of the courts.'" *Id.* (quoting *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991)).

241. See U.S. CONST. amend. XIV, § 1.

242. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). In describing the injury to defendants of discriminatory jury selection, the *Batson* Court stated that "[t]he very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in

the challenge, while inflicting the injury to excluded jurors recognized in *McCullum*,²⁴³ also inflicts an injury upon the community whose views the jury is called to represent.²⁴⁴ In addition to the third-party standing recognized in *McCullum*,²⁴⁵ a prosecutor, as the courtroom representative of the community,²⁴⁶ should also, under the Sixth Amendment, be able to challenge a defendant's discriminatory exclusion of jury members. The fair-cross-section requirement of the Sixth Amendment, previously used only to prohibit the state from creating a non-representative jury venire,²⁴⁷ has been recognized as a guarantee to the community that its voice in the criminal justice system, the petit jury,²⁴⁸ will be fairly drawn from a representative cross section of that community.²⁴⁹ This guarantee means that the state will not, to the extent possible, implement jury selection mechanisms that lead to an absence of identifiable groups on petit juries.²⁵⁰ Except in one notable case,²⁵¹ the Supreme Court has shown a consistent reluctance to recognize any type of Sixth Amendment fair-cross-section right to community group representation on the petit jury.²⁵² Examining the Court's traditional ap-

society as that which he holds.' " *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975)). The Equal Protection Clause is also the logical remedy for class actions by community members contending that members of their minority group are under-represented on juries. See *Carter v. Jury Comm'n*, 396 U.S. 320 (1970).

243. *McCullum*, 112 S. Ct. at 2353. *McCullum* stated that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination." *Id.*

244. *Id.* The *McCullum* opinion recognized this broader injury, stating that "the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* (quoting *Batson* 476 U.S. at 87).

245. *Id.* at 2357.

246. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty").

247. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 360 (1979) (using the Sixth Amendment to invalidate a measure that allowed women to excuse themselves from jury service); *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (holding that the Sixth Amendment guarantee of a jury trial contemplates a jury drawn from a fair-cross-section of the community); see also *supra* notes 106-47 and accompanying text (discussing use of the Sixth Amendment to address discriminatory jury selection).

248. See *JOINER*, *supra* note 5, at 35-38 (discussing the role of the jury as the "conscience of the community").

249. See *Peters v. Kiff*, 407 U.S. 493, 500 (1972). The Supreme Court stated in *Peters* that "exclusion of a discernible class from jury service . . . destroys the possibility that the jury will reflect a representative cross section of the community." *Id.*

250. See *id.* at 500-01.

251. See *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (invalidating a Georgia law which allowed five-member juries in criminal cases). *Ballew's* recognition of the fair-cross-section requirement's application outside the context of the jury venire has only been applied in addressing the number of petit jurors. See *Lockhart v. McCree*, 476 U.S. 162, 173 n.14 (1986).

252. See *Holland v. Illinois*, 493 U.S. 474, 478 (1990); *Lockhart*, 476 U.S. at 173 (stating that "[w]e have never invoked the fair-cross-section principle . . . to require petit juries . . . to

proach to the fair-cross-section requirement, it becomes apparent why the Court in *Batson* and *McCollum* thought it necessary to continue rejecting the Sixth Amendment option in favor of an Equal Protection remedy.²⁵³

The Supreme Court manifests a pervasive fear regarding the application of the fair-cross-section requirement to the petit jury.²⁵⁴ Specifically, the Court is concerned that an extension of the fair-cross-section requirement will allow convicted defendants to claim that some segment of the community was not fairly reflected on their petit jury.²⁵⁵ However, if the fair-cross-section debate is focused on the legislative mechanisms developed to implement jury selection rather than on defendants' use of these mechanisms, extending the fair-cross-section requirement to the petit jury would not require recognizing a fundamental right to particular group representation on the petit jury.²⁵⁶ Moreover, such an extension may be a more effective means of achieving actual minority representation on petit juries.²⁵⁷

1. Application of the Sixth Amendment to Peremptory Challenges

In proposing a renewed focus on the Sixth Amendment, this Note suggests a fair-cross-section remedy as an alternative to *McCollum's* extension of the Equal Protection Clause, but only for a defendant's discriminatory use

reflect the composition of the community at large"). In *Holland*, the Supreme Court solidified its reluctance to extend the fair-cross-section requirement, conclusively stating that "[a] prohibition upon the exclusion of cognizable groups [from the petit jury] through peremptory challenges has no conceivable basis in . . . the Sixth Amendment." *Holland*, 493 U.S. at 478.

253. The petitioner in *Batson* specifically based his appeal on the Sixth Amendment in order to avoid asking the Court directly to overturn *Swain v. Alabama*, 380 U.S. 202 (1965). *Batson v. Kentucky*, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting) (noting the Sixth Amendment basis of petitioner's appeal).

254. See, e.g., *Holland*, 493 U.S. at 477 (holding that a defendant has no right to actual minority group jury representation); *Batson*, 476 U.S. at 85-86 & n.6 (finding no right to minority representation on the petit jury); see also, Doyel, *supra* note 9, at 414, 415 (noting the *Swain* Court's fear of applying equal protection scrutiny to peremptory challenges).

255. *Holland*, 493 U.S. at 484-86. In *Holland*, the majority argued that an extension of the fair-cross-section requirement to the petit jury would undermine the goal of achieving more representational juries, because such an extension would eliminate the effectiveness of the peremptory challenge as a tool for ensuring unbiased jurors. *Id.*; see also Massaro, *supra* note 9, at 533 (discussing the impact of an extension of the fair-cross-section requirement to the petit jury).

For further discussion on the constitutional implications of extending the fair-cross-section requirement to the petit jury, see Doyel, *supra* note 9, at 415 (discussing the Due Process implications of expanding the fair-cross-section requirement to the petit jury); Druff, *supra* note 153, at 1581 (suggesting that the Supreme Court's reluctance to recognize a fundamental right to a fair cross section on the petit jury stems from its refusal to acknowledge that a fair cross section is necessary in order for a defendant to receive a fair trial).

256. See *supra* note 255 and accompanying text (discussing the problematic aspects of recognizing a fundamental right to a fair-cross-section on the petit jury).

257. See *infra* notes 275-77 and accompanying text.

of the peremptory.²⁵⁸ The Supreme Court, utilizing the fair-cross-section requirement, would invalidate peremptory challenge statutes²⁵⁹ that allow a defendant to exercise the challenge in a discriminatory manner. Based on the precedent of *Duren v. Missouri*²⁶⁰ and *Taylor v. Louisiana*,²⁶¹ the Court, in the context of an interlocutory appeal such as *McCullum*, would invalidate such statutes because they prevent identifiable groups in the community from being fairly represented on the petit jury.²⁶² States then wanting to continue granting criminal defendants the non-discriminatory benefits of the peremptory challenge²⁶³ would have to amend their statutes to include non-discriminatory language.²⁶⁴ This alternative ruling would, by focusing on peremptory challenge statutes themselves, resolve the Court's past reluctance to extend the fair-cross-section requirement to the petit jury.

258. Thus, a prima facie Equal Protection challenge would remain available to defendants contesting a prosecutor's discriminatory use of the peremptory challenge. *Batson*, 476 U.S. at 85-89. Moreover, there remains the remedy of class action suits by minorities contesting their under-representation on jury venues. *Carter v. Jury Comm'n*, 396 U.S. 320 (1970).

259. See *supra* note 16 (listing the codification of peremptory challenges in every American jurisdiction).

260. 439 U.S. 357 (1979).

261. 419 U.S. 522 (1975). For a further analysis of the fair-cross-section requirement and its applicability to the peremptory challenge, see generally Andrew P. Stempler, Case Comment, *Constitutional Law—The Extent of a Fair Cross Section of the Community in Jury Selection—Holland v. Illinois*, 110 S. Ct. 803 (1990), 24 SUFFOLK U. L. REV. 820 (1990) (approving *Holland's* restricted interpretation of the Sixth Amendment's application to peremptory challenges).

262. The Supreme Court made an analogous ruling in *Furman v. Georgia*, 408 U.S. 238 (1972), holding that statutes which gave jurors too much discretion in capital sentencing, violated the Eighth Amendment because they lead to disparate and discriminatory sentencing results. *Id.* at 239-40; see also *id.* at 249 (Douglas, J., concurring) (finding the capital punishment statutes at issue unconstitutional because they were "administered arbitrarily or discriminatorily" (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970))).

263. See *supra* note 154 (discussing the non-discriminatory benefits of the peremptory challenge).

264. Following the United States Supreme Court decision in *Batson v. Kentucky*, the Louisiana Legislature did amend its peremptory challenge statute to prohibit discriminatory use by the prosecutor. 1986 LA. ACTS 323. This Act amended Article 795(B) of the Louisiana Code of Criminal Procedure, stating in part that "[a] peremptory challenge may be made by the state at any time before the juror is accepted by it, and by the defendant at any time before the juror is sworn. A peremptory challenge by the state shall not be based solely upon the race of the juror." 1986 LA. ACTS 323 (emphasis added). In 1990, the Louisiana Legislature further amended the statute, essentially codifying *Batson* and the prima facie test which had developed under it. See LA. CODE CRIM. PROC. ANN. art. 795(B) (West Supp. 1992).

While these amendments do not address the extension of *Batson* to the criminal defendant, or to other suspect classifications, such as gender, they do show the potential for legislative reform. Supporting this proposition, one commentator has suggested an amendment that courts could make to their Rules of Criminal Procedure which would also bar discriminatory use of the peremptory challenge. See Tanford, *supra* note 19, at 1058.

Furthermore, a directive to legislatures prevents recognition of a right to actual group representation on the petit jury. Invalidating peremptory challenge statutes would merely signify that non-discriminatory language needed to be included in such statutes.²⁶⁵ Once new statutes were in place, a defendant's discriminatory use of the peremptory would violate the statute and not the Sixth Amendment itself.²⁶⁶ The failure of a particular jury precisely to reflect some group within the relevant community would not, itself, constitute a violation of the Sixth Amendment so long as the mechanisms used to create that jury had sufficient safeguards against improper use.

2. *Advantages of a Legislative Remedy Over McCollum's Extension of Equal Protection*

A Sixth Amendment legislative remedy for defendants' discriminatory use of the peremptory challenge has a number of advantages over the Equal Protection approach taken by the Court in *McCollum*.²⁶⁷ First, a legislative remedy avoids *McCollum*'s problematic "state action" interpretation.²⁶⁸ Invalidating legislative action prevents the illogical conclusion reached in *McCollum* that the "government is responsible for decisions criminal defendants make while fighting state prosecution."²⁶⁹

265. This proposal would be in line with the Supreme Court's previous decisions interpreting the fair-cross-section requirement. For example, in *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court stated "that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* at 538.

266. Adoption of new peremptory challenge statutes may not remove the necessity of *Batson* hearings to determine whether a defendant used the peremptory challenge discriminately to exclude jurors. However, because a Supreme Court holding invalidating present statutes would force legislatures to reevaluate their jury selection mechanisms, alternatives to the *Batson* hearing could be developed. For example, a legislature may determine that expanded voir dire proceedings would allow further utilization of for-cause challenges, thus allowing a reduction in the number of peremptories as well as a decrease in the potential for pretextual peremptory challenges. See *supra* notes 222-23 and accompanying text (discussing the problem of pretextual peremptory challenges).

267. See *supra* note 49 (discussing the application of Equal Protection in *Batson* and *McCollum*).

268. *Georgia v. McCollum*, 112 S. Ct. 2348, 2354-57 (1992) (finding a defendant's use of the peremptory to be state action). The state action requirement remains under a legislative remedy approach because the Sixth Amendment is incorporated through the Fourteenth Amendment's Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). However, this requirement is clearly met when the state legislature passes a peremptory challenge statute. See *Illinois v. Krull*, 480 U.S. 340, 351 (1987) (noting that state legislatures are obligated to uphold and abide by the United States Constitution); see also *supra* note 169 (discussing state action in the context of peremptory challenges).

269. *McCollum*, 112 S. Ct. at 2364 (O'Connor, J., dissenting); see also *supra* notes 190-202 and accompanying text (discussing the dissenting opinions of Justices O'Connor and Scalia).

Second, a legislative remedy encourages a more defined commitment to removing discrimination within the judicial system.²⁷⁰ A judicial directive to legislatures would necessitate beneficial legislative deliberation and debate, unlike judicial rule making,²⁷¹ and would relieve trial courts, prosecutors and defendants of the burden of developing the rules necessary to enforce *McCullum*'s non-discriminatory directive.²⁷²

Third, a legislative remedy places the expansion of *McCullum* in the hands of state legislatures, thereby avoiding the requirement that lower courts address such expansion through case-by-case Equal Protection analysis.²⁷³ Under this remedy, the Supreme Court would invalidate present peremptory statutes that do not contain restrictions on the use of the peremptory, but would find statutes with a minimal level of restriction constitutional.²⁷⁴

Fourth, and finally, a legislative remedy furthers the ultimate goal of obtaining jury panels that are more representative of the entire community from which they are drawn.²⁷⁵ Amended peremptory statutes would focus on preventing litigants from using selected group bias as a basis for excluding jury venire members.²⁷⁶ However, the value of the peremptory would

270. *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986) (calling racial discrimination within the judicial system "most pernicious").

271. See Pizzi, *supra* note 224, at 147-51 (discussing the benefits of a legislative remedy for discriminatory peremptory challenges); see also *supra* note 264 (citing the peremptory challenge reforms enacted by Louisiana's legislature).

272. See Alschuler, *supra* note 224, at 156 (arguing that *Batson* continues to place a significant burden on trial courts in formulating non-discriminatory rules); see also *supra* notes 222-24 and accompanying text (discussing the problematic enforcement of *Batson*'s non-discriminatory rule).

273. See Tanford, *supra* note 19, at 1059 (stating that the implementation of *Batson* is now left up to individual judges); see also *supra* note 234 (citing lower court applications of *Batson* and *McCullum* in the context of gender discrimination).

Expanding the prohibition against discriminatory peremptories into non-race classifications is sure to entail a significant amount of litigation. See *Batson*, 476 U.S. at 124 (1986) (Burger, C.J., dissenting) (stating that *Batson*'s Equal Protection basis will lead to an expansion of the ruling into other recognized suspect classifications).

274. See *supra* note 264 (discussing the legislative deliberation in Louisiana following the *Batson* decision); see also *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (holding invalid peremptory challenges based on race, religion, sex, or ancestry). The Supreme Court has made analogous rulings in the context of invalidating over-broad capital sentencing procedures. See *Furman v. Georgia*, 408 U.S. 238, 255-59 (1972) (Douglas, J., concurring) (invalidating capital sentencing statutes and giving legislatures permission to develop less discretionary alternatives).

275. See generally VAN DYKE, *supra* note 3, at 1-15 (arguing that the true purpose of juries is to represent the whole of the community they were drawn from).

276. See Note, *Limiting the Peremptory Challenge*, *supra* note 9, at 1716, 1732 (arguing that the Sixth Amendment mandates that peremptory strikes be available only for case-specific biases and not biases based on any group affiliation).

remain in that it could still be used to remove so-called "situation-specific biases."²⁷⁷

IV. CONCLUSION

It is difficult to criticize the Supreme Court's laudable goal of eliminating discrimination entirely from the criminal justice system. The Court's reliance on an Equal Protection Clause remedy in *Georgia v. McCollum*, however, unnecessarily exposes the peremptory challenge to the threat of extinction. The Sixth Amendment's fair-cross-section requirement represents an alternative to the Equal Protection Clause analysis presently in place. While this alternative would continue to restrict use of the peremptory challenge, it would establish legislative control over the peremptory, relieve the judicial burden of developing Equal Protection remedies and avoid *McCollum's* problematic characterization of a criminal defendant as a state actor.

In large part, a fear of recognizing the right to actual minority representation on petit juries has clouded any vision of the Sixth Amendment as a practical alternative to addressing discriminatory peremptories. A Sixth Amendment legislative remedy, however, need not imply such a right. Recognizing that the problems of minority exclusion from jury service are far from resolved, a focus on the inclusionary guarantee of the Sixth Amendment may present the only means to address fully and effectively this important issue.

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277. *Id.*; see also *supra* note 154 and accompanying text (discussing the non-discriminatory benefits of peremptory challenges).

