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NOTES

TAKING *BATSON* ONE GIANT STEP FURTHER: THE COURT PROHIBITS GENDER-BASED PEREMPTORY CHALLENGES IN *J.E.B. v.* *ALABAMA EX REL. T.B.*

The United States Constitution grants to every criminal defendant accused of serious crimes the right to a jury trial, and preserves for every civil litigant the right to a jury trial where it existed at common law.¹ The

1. U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution guarantees:

In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. The Supreme Court has held that the right to trial by jury applies to the states as well as the federal government through the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). There is no right to a jury trial for petty offenses. *Id.* at 159-61. The general rule is that the right to a jury trial exists where the maximum authorized incarceration period for the crime exceeds six months. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 539-42 (1989) (holding that a maximum penalty of six months in jail, \$1,000 fine, loss of a driver's license for ninety days, and an alcohol abuse education course, did not mandate the right to a jury trial for a charge of driving under the influence of alcohol); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (holding that a maximum penalty of one-year in prison triggers the right to a jury trial). If the maximum authorized penalty for a crime is six months or less, there is a presumption that no right to jury trial attaches. *Blanton*, 489 U.S. at 543-44. If a defendant is facing more than one charge, the maximum penalty for each charge is aggregated to determine if the defendant maintains the right to a jury trial. *United States v. Coppins*, 953 F.2d 86, 87-90 (4th Cir. 1991) (holding that the right to jury trial exists where the aggregate of maximum sentences for assault exceeds six months, although the actual sentence imposed was less than six months). Where the maximum prison term exceeds six months, however, a court can remove the right to jury trial through a pretrial commitment not to impose a sentence of more than six months. *United States v. Bencheck*, 926 F.2d 1512, 1519 (10th Cir. 1991).

In the absence of a maximum prison term greater than six months, a defendant is entitled to a jury trial only if the other penalties imposed indicate that the offense is one that the legislature has determined to be serious. *Richter v. Fairbanks*, 903 F.2d 1202, 1204-05 (8th Cir. 1990) (imposing the right to jury trial despite the fact that the jail sentence imposed was less than six months, where the mandatory penalty for a third conviction for

jury selection process is a complex mechanism designed to ensure that those selected will be fair and impartial decision-makers.² The process begins with calling members of the community to serve on the jury ve-

driving while intoxicated was a 15-year driver's license revocation). In determining whether monetary fines alone can trigger the right to a jury trial, courts focus on whether the level of potential fines is likely to have a serious impact on the defendant. *Compare* *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 665 (2d Cir. 1989) (providing that an organization has a right to a jury trial where a fine for criminal contempt exceeds \$100,000), *cert. denied*, 493 U.S. 1021 (1990) *with* *United States v. Hamdan*, 552 F.2d 276, 279-80 (9th Cir. 1977) (*per curiam*) (holding that an individual defendant has a right to a jury trial whenever the fine exceeds \$500). There is no constitutional right to a jury trial in juvenile cases. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-47 (1971) (holding that the policy considerations underlying the juvenile justice system militate against the entirely adversarial proceedings implicit in a jury trial).

In contrast to the right to a jury trial, there is no corresponding right to a non-jury trial. *Singer v. United States*, 380 U.S. 24, 34-36 (1965) (finding that a defendant's constitutional rights are not violated by conditioning a waiver of the right to jury trial on the consent of the prosecution and trial judge); *United States v. Parker*, 742 F.2d 127, 128 n.1 (4th Cir.) (contending that the defendants had no right to a non-jury trial for a perjury charge where the judge, who presided at the trial where the alleged perjury occurred, insisted on a jury trial for impartiality), *cert. denied*, 469 U.S. 1076 (1984).

The Seventh Amendment to the United States Constitution preserves the right to a jury trial where it existed in civil suits at common law. U.S. CONST. amend. VII. In *Jacob v. City of New York*, 315 U.S. 752 (1942), the Supreme Court asserted that "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Id.* at 752. Despite this broad principle, the Seventh Amendment has never been interpreted to provide a right to jury trials in state courts. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 471, 503-04 (1985). The determination of whether jury trials are required in individual states rests on an interpretation of each state's constitution. Fleming James, Jr., *Right to Jury Trial in Civil Actions*, 72 *YALE L. J.* 655 (1963). In fact, the only states that provide no constitutional guarantee to a jury trial in civil cases are Colorado, Utah, Louisiana, and Wyoming. FRIEDENTHAL, *supra*, at 471 n.2.

2. *See* JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 9 (1977). Historically, in federal courts the process of jury selection began with persons or organizations thought to be well-connected to the community recommending prospective jurors who met certain statutory requirements and who possessed characteristics such as integrity, judgment, character, and education. *See* FRIEDENTHAL, *supra* note 1, at 519. In 1966, however, the Fifth Circuit ruled that local officials could not impose requirements beyond the statutory qualifications for jury selection. *Rabinowitz v. United States*, 366 F.2d 34, 51 (5th Cir. 1966); *see* FRIEDENTHAL, *supra* note 1, at 519 (discussing the impact of the *Rabinowitz* decision). In 1968, Congress passed legislation revamping the jury selection process in federal courts. 28 U.S.C. §§ 1861-1871 (1988); *see also* FRIEDENTHAL, *supra* note 1, at 519-21 (detailing the changes under the 1968 legislation). To serve on a jury, a person had to be at least 18 years of age, a resident of that particular district for at least one year, sufficiently literate to complete a jury qualification form, fluent in English, mentally and physically capable to serve, and without felony convictions or pending charges. 28 U.S.C. § 1865(b); *see also* FRIEDENTHAL, *supra* note 1, at 520. In addition, Congress, for policy reasons, established guidelines for excluding or excusing certain persons from service, such as police, firefighters, and women with small children. 28 U.S.C. § 1863(b)(6); FRIEDENTHAL, *supra* note 1, at 520-21. Van Dyke wrote:

nire.³ From that group, the petit jury, which will decide questions of fact at the trial, is selected.⁴

During the voir dire process,⁵ each litigant is permitted to exclude, or strike, jurors in one of two ways.⁶ First, each party is given the opportunity to strike an unlimited number of jurors for cause.⁷ A “challenge for cause” requires the objecting party to show that the juror is biased and

The logical, and desirable, way to impanel an impartial and representative jury—and the method chosen by Congress—is to put together a complete list of eligible jurors and select randomly from it, on the assumption that the laws of statistics will produce representative juries most of the time. . . . Such a randomly selected jury will not necessarily be “impartial” in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience. But they will be impartial in the sense that they will reflect the range of the community’s attitudes, which is the best we can do.

VAN DYKE, *supra*, at 18. The states are not constrained by the Seventh Amendment to the Federal Constitution in choosing their jury selection procedures, although they must comply with the Equal Protection and Due Process Clauses of the Fourteenth Amendment. FRIEDENTHAL, *supra* note 1, at 521.

3. The jury venire is the panel from which the jury that will decide the case is drawn. BLACK’S LAW DICTIONARY 1556 (6th ed. 1990); *see also* VAN DYKE, *supra* note 2, at 23. The jury that hears a case and decides the issues of fact is called a petit jury, whereas the jury that decides whether there is probable cause to issue an indictment in a criminal case is referred to as a grand jury. BLACK’S LAW DICTIONARY 855 (6th ed. 1990); *see also* VAN DYKE, *supra* note 2, at 23.

4. VAN DYKE, *supra* note 2, at 18.

5. The voir dire process “is designed to expose a juror’s lack of qualification or bias.” FRIEDENTHAL, *supra* note 1, at 522; Cynthia M. McKnight, *Right to Jury Trial*, 82 GEO.L.J. 1033, 1043 (1994). The trial judge has broad discretion in conducting the voir dire examination. McKnight, *supra*, at 1043-45. The court may question the jurors or allow the attorneys involved in the case to pose questions to the jurors. *Id.* at 1045; FRIEDENTHAL, *supra* note 1, at 522. Allowing the attorneys to conduct the voir dire is principally criticized for creating the opportunity for attorneys to influence the jury pool by arguing their case during the selection process. FRIEDENTHAL, *supra* note 1, at 522; *see also supra* notes 3-4 and accompanying text (discussing the procedure for selecting the jury venire).

6. *See infra* notes 7-11 and accompanying text (noting that a litigant can challenge individual jurors through either a “challenge for cause” or a “peremptory challenge”). In addition, a party can challenge the jury selection process as a whole. FRIEDENTHAL, *supra* note 1, at 522. This challenge, called a “challenge to the array,” asserts that the selection procedures do not meet the constitutional or statutory requirements. *See* Ballard v. United States, 329 U.S. 187, 193-95 (1946) (sustaining a challenge to an array where women had been systematically excluded); Thiel v. Southern Pacific Co., 328 U.S. 217, 221-24 (1946) (sustaining a challenge to an array where daily wage earners were excluded); *see also* FRIEDENTHAL, *supra* note 1, at 522-23 (providing a general discussion of the challenge of the array).

7. FRIEDENTHAL, *supra* note 1, at 523; VAN DYKE, *supra* note 2, at 140. A challenge for cause must be validated by the court and requires a particularized finding of bias or partiality. VAN DYKE, *supra* note 2, at 140. Examples of such factors include the existence of a relationship with a party or witness; a general bias against members of a certain race or religion; a witness’s previous experience or interest in the subject matter of the litigation; or a juror’s state of mind if it would prevent him or her from being completely impartial. *Id.* at 143.

will be unable to decide the case on only the facts presented.⁸ The second method of striking jurors is the peremptory challenge, which allows a party to strike a juror from the venire without providing any justification.⁹ Indeed the peremptory challenge can be exercised "without a rea-

8. VAN DYKE, *supra* note 2, at 140. It is important to note that a challenge for cause requires that the challenging party satisfy the court that the juror meets an objective standard that warrants disqualification. FRIEDENTHAL, *supra* note 1, at 523. If a juror deliberately conceals information that prevents actual bias from being discovered, a subsequent conviction will be reversed. *United States v. Colombo*, 869 F.2d 149, 151-52 (2d Cir. 1989) (requiring a new trial where a juror deliberately failed to reveal that the government attorney was the juror's brother-in-law), *appeal after remand*, 909 F.2d 711 (2d Cir. 1990); McKnight, *supra* note 5, at 1047-48.

9. VAN DYKE, *supra* note 2, at 139-40. A peremptory challenge is "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). The peremptory challenge originated in English courts during the 13th century. Patrick J. Guinee, Comment, *The Trend Toward the Extension of Batson to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 833 (1994). In all English felony trials, the defendant could exercise 35 peremptory challenges, while the prosecutor could challenge an unlimited number of jurors. *Swain v. Alabama*, 380 U.S. 202, 212 (1965); see Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 339 (1993). Eventually, instead of an unlimited number of peremptory challenges, prosecutors could direct jurors to "stand aside" after questioning. *Id.* at 339. Once the entire panel had been examined and the defendant had exercised his peremptory challenges, the court would require the prosecutor to show cause for excluding "stand aside" individuals if there was a deficiency of jurors. *Id.*

The peremptory challenge became a part of the American legal system when Congress authorized its use in the Act of 1790. 1 Stat. 119 (1790) (permitting peremptory challenges in treason cases); *Swain*, 380 U.S. at 214. The Act provided that in federal courts a defendant was entitled to 35 peremptory challenges in trials for treason and 20 in trials for other offenses punishable by death. *Swain*, 380 U.S. at 214. In other trials, both parties had a right to exercise the peremptory challenge, although the basis for this right is not entirely clear. *Id.*; see Swift, *supra*, at 340 (discussing the origins of the peremptory challenge mechanism). In 1865, the government had five peremptory challenges in treason and capital cases while the defendant could exercise twenty; in other types of cases the government had two and the defendant ten. *Swain*, 380 U.S. at 214-15. Subsequently, Congress provided both the government and the defendant with twenty challenges in capital cases; and where the charge was punishable by more than one year imprisonment, the government received six and the defendant ten. *Id.* at 215 n.15.

Presently in federal courts, each party in a criminal case is given twenty peremptory challenges if the offense is punishable by death. FED. R. CRIM. P. 24(b). If the offense is punishable by more than one year in prison, the government is entitled to six and the defendant to 10. *Id.* If the crime is punishable by less than one year in prison, each side is entitled to three peremptory challenges. *Id.* In civil cases, each party is entitled to three peremptory challenges. 28 U.S.C. § 1870 (1988). In cases where there are multiple plaintiffs or defendants, the court may either consider each side a single party or allot additional peremptory challenges. *Id.*

The development of the peremptory challenge in the states was similar to that in the federal system. *Swain*, 380 U.S. at 215. By 1870, most states had enacted statutes granting the prosecution at least half the number, and often an equal number, of peremptory challenges as the defendant. *Id.* at 216.

son stated, without inquiry and without being subject to the court's control."¹⁰ Experts view this challenge as an indispensable tool for assembling a jury that is both apparently and actually impartial.¹¹ The power to exercise peremptory challenges went virtually unchecked until the Supreme Court decision in *Batson v. Kentucky*.¹² In *Batson* the Court held that the use of the challenge in a racially discriminatory manner violated the Equal Protection Clause of the Fourteenth Amendment.¹³ The Court required an attorney to articulate race-neutral reasons for using the challenge where the party-opponent established a prima facie case of racial discrimination.¹⁴

10. *Swain*, 380 U.S. at 220; see AMERICAN BAR ASSOCIATION JUDICIAL ADMINISTRATION DIVISION COMMITTEE ON JURY STANDARDS, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 78 (1993) [hereinafter ABA COMMITTEE]. The ABA Committee found that "[p]eremptories enable parties to exclude jurors they suspect of bias but of whom they lack sufficient proof of bias necessary to sustain a challenge for cause." *Id.*

11. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1438 n.3 (1994) (Scalia, J., dissenting); FRIEDENTHAL, *supra* note 1, at 524; see Comment, *The Right Of Peremptory Challenge*, 24 U. CHI. L. REV. 751, 762 (1957) (arguing that a primary justification for the peremptory challenge is its tendency to satisfy litigants that their case is being tried by an impartial jury). Despite this view, the peremptory challenge is not a constitutionally guaranteed right. *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Swain*, 380 U.S. at 219. Even where a defendant has been improperly denied a peremptory challenge the Supreme Court has declined to reverse a conviction, reasoning that only where the denial results in a biased jury would it amount to a violation of the Sixth Amendment. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988), *cert. denied*, 115 S. Ct. 441 (1994); see *McKnight*, *supra* note 5, at 1050 (discussing the *Ross* decision).

12. 476 U.S. 79 (1986).

13. U.S. CONST. amend XIV, § 1. The Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The Court has rejected arguments that discriminatory use of peremptory challenges violates the Sixth Amendment's guarantee of a fair trial. *Holland v. Illinois*, 493 U.S. 474 (1990). In *Holland*, the Court held that a defendant can use the Sixth Amendment to challenge the jury pool, but not the petit jury itself. *Id.* at 480-81. The Court has held, however, that a defendant, improperly denied the right to a peremptory challenge, could successfully argue a violation of the Sixth Amendment where the denial results in a biased jury. *Ross*, 487 U.S. at 88; see *McKnight*, *supra* note 5, at 1050 (discussing *Ross*).

14. *Batson*, 476 U.S. at 97. For a discussion of the procedure followed in challenging the improper use of an attorney's strikes, see CATHY E. BENNETT AND ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION §§ 17.11-.14 (1993).

Until 1994, the Court's restriction on the use of peremptory challenges was limited to racial discrimination.¹⁵ In *J.E.B. v. Alabama ex rel. T.B.*,¹⁶ however, the United States Supreme Court expanded *Batson*¹⁷ and its progeny¹⁸ to prohibit an attorney from exercising peremptory challenges to exclude jurors on the basis of gender.¹⁹ Applying *Batson*, the Court held that excluding jurors on the basis of gender is improper, regardless of whether the discriminatory strike is exercised by a prosecutor,²⁰ a defendant,²¹ or a civil litigant.²² Furthermore, it is irrelevant whether the litigant opposing the use of the challenge is not the same gender as the excluded juror.²³

J.E.B. originated as a paternity action brought by the State of Alabama on behalf of T.B., the mother of a minor child.²⁴ After each party struck jurors for cause, the venire comprised ten males and thirty-three females.²⁵ The State exercised nine of its ten peremptory challenges to

15. *Batson*, 476 U.S. at 97 (finding a violation of the Equal Protection Clause where a prosecutor used peremptory challenges to exclude jurors on the basis of race).

16. 114 S. Ct. 1419 (1994).

17. 476 U.S. 79 (1986).

18. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992) (holding that a criminal defendant's use of peremptory challenges to exclude jurors on the basis of race violates the Equal Protection Clause); see *infra* notes 125-34 and accompanying text (discussing the Court's holding in *McCollum*); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (holding that a civil litigant's use of peremptory challenges to exclude jurors on the basis of race violates the Equal Protection Clause); see *infra* notes 104-24 and accompanying text (discussing the Court's holding in *Edmonson*); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that a defendant has standing to object to the discriminatory use of peremptory challenges regardless of the fact that the defendant and excluded juror are not of the same race), *cert. denied*, 115 S. Ct. 366 (1994); see *infra* notes 89-103 and accompanying text (discussing the Court's holding in *Powers*).

19. *J.E.B.*, 114 S. Ct. at 1421.

20. *Id.* at 1422; cf. *Batson*, 476 U.S. at 95-98 (contending that a prosecutor's use of peremptory challenges to exclude jurors on the basis of race violates the Equal Protection Clause); see *infra* notes 63-88 and accompanying text (discussing the Court's holding in *Batson*).

21. *J.E.B.*, 114 S. Ct. at 1429; cf. *McCollum*, 112 S. Ct. at 2359 (maintaining that a criminal defendant's use of peremptory challenges to exclude jurors on the basis of race violates the Equal Protection Clause); see *infra* notes 125-34 and accompanying text (discussing the Court's holding in *McCollum*).

22. *J.E.B.*, 114 S. Ct. at 1429; cf. *Edmonson*, 500 U.S. at 619 (holding that a civil litigant's use of peremptory challenges to exclude jurors on the basis of race violates the Equal Protection Clause); see *infra* notes 104-24 and accompanying text (discussing the Court's holding in *Edmonson*).

23. *J.E.B.*, 114 S. Ct. at 1430; cf. *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that a defendant has standing to object to discriminatory use of peremptory challenges regardless of the fact that the defendant and excluded juror are not of the same race), *cert. denied*, 115 S. Ct. 366 (1994); see *infra* notes 89-103 and accompanying text (discussing the Court's holding in *Powers*).

24. *J.E.B.*, 114 S. Ct. at 1421.

25. *Id.*

strike male jurors,²⁶ while J.E.B., the petitioner, used all but one of his challenges to strike female jurors.²⁷ The resulting petit jury consisted entirely of females.²⁸ At trial, J.E.B. objected to the State's exercise of peremptory challenges, arguing that striking males on the basis of their gender violated the Equal Protection Clause of the Fourteenth Amendment.²⁹ He argued that *Batson* should apply equally to gender as to racial discrimination.³⁰ The trial court rejected the argument, and the jury subsequently found the petitioner to be the father of the child.³¹ The Alabama Court of Appeals affirmed the decision, holding that *Batson* did not apply to gender-based strikes.³² The United States Supreme Court granted certiorari to resolve a conflict among courts regarding the applicability of *Batson* to gender-based strikes.³³

The Supreme Court held that intentional gender discrimination in the exercise of peremptory challenges violates the Equal Protection Clause.³⁴

26. *Id.* at 1422. Alabama employs a "struck-jury" system whereby, once voir dire is completed and all challenges for cause have been exercised, the litigants alternately strike the remaining jurors until only twelve remain. ALA. R. CIV. P. 47(b) (1990); *J.E.B.* 114 S. Ct. at 1429 n.17 (discussing Alabama's jury selection process).

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

28. *Id.* Although the jury in this case comprised only females, the analysis is consistent, irrespective of whether males or females are improperly excluded. *Id.* at 1428; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (holding that a state-funded university which discriminated against males rather than females violated the Equal Protection Clause because the gender-based classification was not closely related to important governmental objectives).

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

30. *Id.*

31. *Id.* The trial court entered a judgment directing the petitioner to pay child support and, on post-judgment ruling, reaffirmed its holding that *Batson* did not apply to gender-based challenges. *Id.*

32. *J.E.B. v. Alabama, ex rel. T.B.* 606 So. 2d 156, 157 (Ala. Civ. App. 1992), *cert. granted sub nom.*, 113 S. Ct. 2330 (1993). The Alabama Court of Appeals relied on Alabama precedent in affirming the judgment. *Id.*; *see* *Murphy v. Alabama*, 596 So. 2d 42, 43 (Ala. Crim. App. 1991) (holding that the rule prohibiting discrimination in jury selection does not apply to gender-based strikes), *cert. denied sub nom.*, 596 So. 2d 45 (Ala. 1992), *cert. denied* 113 S. Ct. 86 (1992).

33. *J.E.B. v. Alabama ex rel. T.B.*, 113 S. Ct. 2330 (1993). *Compare* *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990) (extending *Batson* to prohibit gender-based peremptory challenges), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991); *Laidler v. State*, 627 So. 2d 1263 (Fla. App. 1993) (extending *Batson* to gender) *with* *United States v. Nichols*, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (declining to extend *Batson* to gender), *cert. denied*, 502 U.S. 1080 (1992); *United States v. Hamilton*, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (declining to extend *Batson* to gender), *cert. denied*, 493 U.S. 1069 (1990); *State v. Adams*, 533 So. 2d 1060, 1063 (La. Ct. App. 1988) (refusing to extend *Batson* to gender), *cert. denied*, 540 So. 2d 293 (La. 1989); *see infra* notes 148-57 and accompanying text (discussing the conflicting decisions of federal courts concerning the applicability of *Batson* to gender-based peremptory challenges).

34. *J.E.B.*, 114 S. Ct. at 1422. Justice Blackmun asserted that, in light of *Batson* and its progeny, it is "axiomatic" that intentional discrimination on the basis of gender violates the

Justice Blackmun, writing for the majority, applied the heightened scrutiny traditionally imposed on gender-based classifications.³⁵ Discrimination in jury selection, the Court argued, harms the litigants, the excluded juror, and the community as a whole.³⁶ The Court emphasized that its

Equal Protection Clause because it perpetuates "archaic, and overbroad stereotypes" concerning the roles of men and women. *Id.*

35. *Id.* at 1425. Heightened scrutiny is the level of constitutional scrutiny under the Equal Protection Clause which is applied to gender-based classifications to protect against outdated misconceptions concerning the roles of men and women. *Id.*; see *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (holding that the goal of equal protection jurisprudence with regard to gender-based classifications is to protect against stereotypical notions concerning the roles of men and women); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 576-80 (4th ed. 1991) (discussing heightened scrutiny). To ascertain which level of constitutional scrutiny is applied, the first step is to determine which type of classification is involved. NOWAK & ROTUNDA, *supra*, at 569-70. General economic classifications and classifications that burden groups that the Court has determined are not in need of special protection are afforded rational basis review. See, e.g., *Zobel v. Williams*, 457 U.S. 55 (1982) (ruling that an Alaska dividend distribution plan violated the Equal Protection Clause under a rational basis analysis because it discriminated against certain types of eligible recipients); NOWAK & ROTUNDA, *supra*, at 580-83. Courts are extremely deferential to the will of the legislature when analyzing laws under this test. NOWAK & ROTUNDA, *supra*, at 574-75. Under this test a classification will be upheld if it is rationally related to a legitimate governmental objective. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-42 (1985) (holding that a Texas city ordinance which discriminated against the mentally retarded violated the Equal Protection Clause as it was not rationally related to a legitimate governmental objective); NOWAK & ROTUNDA, *supra*, at 589-90.

An even more scrutinizing analysis than that applied to gender is applied to classifications that burden persons on the basis of race, national origin, alienage, illegitimacy, or gender. See NOWAK & ROTUNDA, *supra*, at 576-80. Laws which classify persons on the basis of race or national origin are considered "suspect" and are subjected to strict scrutiny. *Id.* at 605. Courts analyzing such a statute will give little deference to the legislature and will uphold the law only if it is necessary to achieve a compelling state interest. *Loving v. Virginia*, 388 U.S. 1 (1967); see also NOWAK & ROTUNDA, *supra*, at 575-76. Laws that classify persons on the basis of alienage, illegitimacy, and gender are subject to intermediate scrutiny. *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that the Equal Protection Clause prevents a state from conditioning the availability of welfare benefits on United States citizenship or residence in the United States for a specified number of years); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (holding that a Pennsylvania statute which set a six-year statute of limitations for paternity actions did not withstand heightened scrutiny, and thus denied children born out of wedlock equal protection as mandated by the Fourteenth Amendment); *Craig*, 429 U.S. at 210 (holding that an Oklahoma statute prohibiting the sale of certain types of beer to men under the age of 21, but permitting its sale to women over 18, was not substantially related to the achievement of an important government function and thus violated the Equal Protection Clause); see also NOWAK & ROTUNDA, *supra*, at 576-78 (discussing heightened scrutiny). To survive this level of constitutional scrutiny, the law must be substantially related to an important governmental objective. *Craig*, 429 U.S. at 198-99; NOWAK & ROTUNDA, *supra*, at 576.

36. *J.E.B.*, 114 S. Ct. at 1427. The litigants are injured by the risk that the prejudice, which infected the jury selection process, will distort the entire proceeding. *Id.* The juror is injured by the exclusion from the judicial process. *Id.* Finally, the community also is harmed because the prejudice will result in a loss of confidence in the judicial process, particularly where, as here, it exists within the courtroom. *Id.* at 1427-28; see *infra* notes

decision did not signal the elimination of peremptory challenges altogether because those groups that are afforded only rational basis review³⁷ can still be struck.³⁸ The Court concluded that the guarantees of the Equal Protection Clause would be meaningless if potential jurors could be excluded based on gender stereotypes.³⁹

Justice O'Connor concurred in the opinion, but wrote separately to express her concern over the increasing restrictions placed on peremptory challenges.⁴⁰ Justice O'Connor emphasized the value of an attorney's intuition in the jury selection process and asserted that the more restrictions placed on the peremptory challenge, the more it becomes a challenge for cause.⁴¹ In a separate concurrence, Justice Kennedy agreed with the majority's result, and illustrated why the Court's precedents mandated its decision.⁴² Justice Kennedy argued that a person denied the right to sit on a jury because of the discriminatory exercise of a peremptory challenge is no less injured than a person denied jury service because of a law banning her gender from serving on juries.⁴³

174-82 and accompanying text (discussing the injuries that gender-based peremptory challenges inflict).

37. See *supra* note 35 (discussing the different levels of constitutional scrutiny applied to legislation under Equal Protection Clause analysis).

38. *J.E.B.*, 114 S. Ct. at 1429. Justice Blackmun insisted that while parties still may remove jurors from the panel whom they feel might be less impartial than others, "gender simply may not serve as a proxy for bias." *Id.*

39. *Id.* at 1430. The Court was concerned that if gender-based strikes were sanctioned, a party could strike a minority woman from a jury claiming it was based on gender as a pretext for racial discrimination. *Id.* Indeed, all four cases involving gender-based peremptory challenges to reach the federal courts of appeals involved challenges exercised against minority women. *Id.* at 1430 n.18; see *United States v. Broussard*, 987 F.2d 215, 217 (5th Cir. 1993) (declining to extend *Batson* to gender-based peremptory challenges); *United States v. Nichols*, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (declining to extend *Batson* to gender), *cert. denied*, 502 U.S. 1080 (1992); *United States v. De Gross*, 913 F.2d 1417, 1423 (1990) (extending *Batson* to prohibit gender-based peremptory challenges), *reh'g granted*, 930 F.2d 695 (9th Cir. 1991); *United States v. Hamilton*, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (declining to extend *Batson* to gender), *cert. denied*, 493 U.S. 1069 (1990); see *infra* notes 148-57 and accompanying text (discussing the federal courts decisions regarding the applicability of *Batson* to gender-based strikes).

40. *J.E.B.*, 114 S. Ct. at 1430-33 (O'Connor, J., concurring).

41. *Id.* at 1431. Justice O'Connor emphasized the value of an attorney's intuition in exercising peremptory challenges specifically. *Id.* In her opinion, an experienced trial lawyer could recognize an unsympathetic or biased juror without being able to articulate a concrete reason sufficient to justify a challenge for cause. *Id.*

42. *Id.* at 1433-34 (Kennedy, J., concurring); see *infra* note 195 (discussing the precedents that compelled the *J.E.B.* decision).

43. *J.E.B.*, 114 S. Ct. at 1434. Justice Kennedy reasoned that the neutral phrasing of the Fourteenth Amendment extends equal protection to "any person" regardless of group status or the personal injury occasioned. *Id.* Thus, denying any person the right to participate in the judicial process is prohibited by the mandate of the Fourteenth Amendment. *Id.*

In dissent, Chief Justice Rehnquist maintained that the distinctions between race and gender militate against extending *Batson* to gender.⁴⁴ The Chief Justice further argued that racial groups warrant a greater degree of protection because they constitute a numerical minority in the United States, whereas the population is almost equally divided between the genders.⁴⁵ Justice Scalia also dissented arguing that, because all groups are subject equally to exclusion by peremptory challenges, no single group is denied equal protection.⁴⁶ Justice Scalia concluded that extending *Batson* to gender would trigger extensive collateral litigation thereby imposing additional responsibilities on already overburdened courts.⁴⁷

This Note first examines Supreme Court jurisprudence concerning Equal Protection violations and the placement of restrictions on an attorney's use of peremptory challenges to prohibit racial discrimination. This Note then examines the Court's application of those standards to gender-based challenges and analyzes the balancing test employed in *J.E.B. v. Alabama ex rel. T.B.* Next, this Note outlines the difficulties that lower courts will likely face in implementing the Court's decision in *J.E.B.* This Note suggests that the Court's reasoning in *J.E.B.* will eventually result in a prohibition on all peremptory challenges based upon classifications that receive heightened scrutiny under an Equal Protection Clause analysis. This Note concludes that the competing interests in *J.E.B.* forced the Court to strike an imperfect but necessary balance in deciding that, where a litigant's interest in participating in jury selection collides with the goal of eliminating invidious discrimination in the judicial system, the former must cede to the latter.

44. *Id.* at 1434-36 (Rehnquist, C.J., dissenting). Traditional Equal Protection analysis, the Chief Justice pointed out, affords racial and gender classifications different levels of constitutional scrutiny: strict scrutiny for race and heightened scrutiny for gender. *Id.* at 1435; see *supra* note 35 (discussing the heightened scrutiny analysis applied to gender-based classifications and strict scrutiny applied to race-based classifications).

45. *J.E.B.*, 114 S. Ct. at 1435.

46. *Id.* at 1436-39. Justice Scalia recognized that if the discrimination resulted in segregated jury venires, he would find a violation of the Equal Protection Clause, but he argued that no constitutional violation occurred in *J.E.B.* because the jury venire comprised a fair cross-section of the community, and the litigants struck individual jurors based on their respective tactical considerations rather than any gender-based animus. *Id.*

47. *Id.* at 1439. Justice Scalia believed this overburdening of the court's would occur particularly in criminal cases, where many defendants have no concern for the cost or duration of litigation. *Id.*

I. THE EVOLUTION OF RESTRICTIONS ON PEREMPTORY CHALLENGES

A. Constitutional Attacks Prior to Batson

The Supreme Court first addressed the discriminatory use of peremptory challenges in *Swain v. Alabama*.⁴⁸ Relying on *Strauder v. West Virginia*,⁴⁹ the petitioner⁵⁰ in *Swain* argued that the prosecution violated the Fourteenth Amendment by exercising its peremptory challenges to discriminate invidiously against African-Americans in the selection of the petit jury.⁵¹ The Court reaffirmed the principle enunciated in *Strauder* that racial discrimination aimed at barring qualified groups from jury service violates the Constitution as well as the basic precepts of a republican society.⁵² Further, any group that may be subject to prejudice is entitled to relief under the Equal Protection Clause.⁵³

The *Swain* Court ruled that the exercise of peremptory challenges to exclude jurors on the basis of race in a particular case, however, as opposed to systematic exclusion, did not violate the Equal Protection Clause.⁵⁴ The Court found that peremptory challenges were essential to

48. 380 U.S. 202 (1965).

49. 100 U.S. 303 (1880). In *Strauder*, the petitioner was an African-American man challenging a murder conviction. *Id.* at 304. The petitioner argued that a West Virginia statute, restricting jury membership to white males violated the recently adopted Fourteenth Amendment. *Id.* at 305. In reversing the conviction, Justice Strong writing for the Supreme Court, observed that Congress intended the Fourteenth Amendment to secure for the recently emancipated African-American race those rights enjoyed by the white race. *Id.* at 306. In Justice Strong's words, "[t]his is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." *Id.* The Court added that the right to a trial by jury is the right to have one's life or liberty decided by one's peers. *Id.* at 308. In declaring the West Virginia statute unconstitutional, the Court found that it was not only discriminatory, but also reinforced the racial prejudice that Congress sought to eradicate through the passage of the Fourteenth Amendment. *Id.* The Court, however, significantly curtailed the impact of the *Strauder* decision in *Virginia v. Rives*, 100 U.S. 313 (1880). There, the Court held that while the state could not systematically exclude African-Americans from jury service, African-American defendants had no right to minority representation on the petit jury. *Id.* at 322-23.

50. The trial court convicted the petitioner, an African-American, of rape and sentenced him to death. *Swain*, 380 U.S. at 203.

51. *Id.* at 203. In addition, the petitioner alleged that the jury selection procedures operated to exclude black persons from participating on grand juries and petit jury venires. *Id.* at 205.

52. *Id.* at 204.

53. *Id.* at 205. The Court relied on *Hernandez v. Texas*, 347 U.S. 475 (1954), where the Court ruled that the exclusion of Mexican-Americans from jury service violated the Equal Protection Clause. *Id.* at 482.

54. *Swain*, 380 U.S. at 221. The petitioner in *Swain* presented statistical evidence demonstrating that, although African-American males over 21 years of age constituted 26% of the total population in Talladega County, no African-American had served on a

eliminate partial jurors and to assure litigants that the jurors will decide the case on the merits only.⁵⁵ The very nature of a peremptory challenge, the Court concluded, is that it is exercised without reason or explanation, often based upon impressions, habits, and associations discovered during voir dire.⁵⁶ The Court reasoned that subjecting a particular peremptory challenge to examination would alter the nature and operation of the strike.⁵⁷ Notwithstanding these considerations, the Court noted, the peremptory challenge is not designed to facilitate or justify the wholesale exclusion of an entire race from participating in the administration of justice.⁵⁸

Accordingly, the Court ruled that a presumption exists that the prosecutor used the challenge to obtain a fair and impartial jury.⁵⁹ A defendant can rebut this presumption by showing that in prior cases the prosecutor systematically excluded jurors on the basis of race.⁶⁰ The Court observed that the record before it contained "no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances . . . the prosecutor used his strikes to

jury in the previous 15 years. *Id.* at 205. In *Swain*, there were eight African-American males on the petit jury venire, but two were exempt and the remaining six were struck by the prosecutor. *Id.* The Court concluded from these statistics that the State had not totally excluded African-Americans from serving on juries, nor did the statistics reveal that the number was so small as to constitute forbidden token inclusion. *Id.* at 206. The Court found that although this jury selection process resulted in a jury list composed of a smaller proportion of the African-American population than the white population, the Constitution does not require a proportionate number of each race to be included on the jury list. *Id.* at 208.

55. *Id.* at 219. The peremptory challenge allows attorneys to expose bias through probing questions without the fear of incurring a juror's hostility. *Id.* at 219-20.

56. *Id.* at 220.

57. *Id.* at 221-22. Potential jurors are not judged solely as individuals, but also as members of the groups to which they belong. *Id.* at 221. The Court stressed that because the purpose of voir dire is to select an impartial jury, all groups are subject to the peremptory challenge. *Id.*

58. *Id.* at 224.

59. *Id.* at 222.

60. *Id.* at 223-24. The Court's remedy in *Swain* demanded such a high evidentiary burden that it was used effectively on only two occasions between the time the case was handed down until *Batson* replaced it. See *State v. Washington*, 375 So. 2d 1162 (La. 1979) (reversing a conviction for armed robbery where the prosecutor admitted using peremptory challenges to exclude African-American jurors in cases where the defendant was African-American); *State v. Brown*, 371 So. 2d 751 (La. 1979) (reversing a conviction where the prosecutor was not able to rebut a showing of continual and conscious rejection of African-American jurors through the use of peremptory challenges), cited in Robert L. Doyel, *In Search of a Remedy For The Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385, 405 n.140 (1985).

remove Negroes.”⁶¹ The Court, therefore, concluded that the petitioner had not demonstrated with sufficient particularity the systematic exclusion of African-American jurors by the prosecutor.⁶²

B. Limiting A Prosecutor's Peremptory Challenges: Batson v. Kentucky

In *Batson v. Kentucky* the Supreme Court substantially limited an attorney's use of the peremptory challenge for the first time.⁶³ The prosecutor in *Batson* used his peremptory challenges to strike all four African-Americans from the jury venire, resulting in an all-white jury.⁶⁴ After the petitioner moved to discharge the jury on the basis of Sixth and Four-

61. *Swain*, 380 U.S. at 226. The Court cited testimony that in many cases African-American defendants preferred to have no African-Americans on the jury trying them. *Id.* at 225.

62. *Id.* at 224. To demonstrate that a prosecutor systematically struck African-Americans from the jury, the Court required the defendant to prove that the prosecutor struck jurors in case after case, regardless of the crime committed or the defendant charged. *Id.* at 223. This high standard has been criticized as too heavy a burden. *Batson v. Kentucky*, 476 U.S. 79, 92 (1986). Justice Powell, in *Batson*, found that this burden effectively insulated a prosecutor's peremptory challenges from constitutional scrutiny. *Id.* at 92-93. A defendant's attempt to satisfy this burden is often hampered by the practical fact that the necessary evidence simply does not exist. Doyel, *supra* note 60, at 405-07. Generally, courts do not maintain permanent records of the race of the excluded jurors, who struck them, or whether they were challenged for cause or peremptorily challenged. *Id.*

Justice Goldberg, in a dissenting opinion, argued that the majority departed from the principles articulated in *Strauder* and retreated from the goal of eliminating discrimination in jury selection. *Swain*, 380 U.S. at 231 (Goldberg, J., dissenting). Justice Goldberg claimed that the Court's decision seriously impaired the authority of *Strauder* and erected barriers to the elimination of racial discrimination still practiced in violation of the Fourteenth Amendment. *Id.* Justice Goldberg argued that the statistical evidence presented by the petitioner established a prima facie violation of the Equal Protection Clause. *Id.* at 232. Twenty-six percent of the County's population was African-American and, in Justice Goldberg's words, "no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama." *Id.* at 231-32. Justice Goldberg asserted that although the peremptory challenge had a long tradition, it was not a constitutionally guaranteed right. *Id.* at 243. In support of this conclusion, Justice Goldberg emphasized that Congress has the power to regulate the number of peremptory challenges. *Id.* at 244. He also emphasized that the Supreme Court had restricted the use of peremptory challenges on several other occasions. *Id.*; see *Stilson v. United States*, 250 U.S. 583, 586-87 (1919) (finding no constitutional violation where several defendants were treated as one party for the purpose of exercising peremptory challenges); *Pointer v. United States*, 151 U.S. 396, 412 (1894) (finding that the rights of the defendant were not infringed by requiring him to exercise his peremptory challenges before the government). In his view, given the choice between upholding the constitutional mandate of equal protection or preserving the peremptory challenge, the former is preferable. *Swain*, 380 U.S. at 246 (Goldberg, J. dissenting).

63. 476 U.S. 79, 89 (1986). The petitioner was an African-American man indicted on charges of burglary and receipt of stolen goods. *Id.* at 82.

64. *Id.* at 83.

teenth Amendment violations, the trial court ruled that the constitutional right to a jury drawn from a cross section of the community applied only to the selection of the venire.⁶⁵

Justice Powell, writing for the majority, reversed the petitioner's conviction based on the Equal Protection Clause of the Fourteenth Amendment.⁶⁶ The Court found that racially-motivated peremptory challenges injured both the excluded juror and the defendant.⁶⁷ In addition, the Court found that exercising racially motivated peremptory challenges undermined public confidence in the judicial system.⁶⁸ The Court relied on prior decisions⁶⁹ that had found an equal protection violation where African-American jurors were excluded from the venire in a racially discriminatory manner, which in turn created an equal protection violation in the selection of the petit jury.⁷⁰

The Court found that the standard enunciated in *Swain v. Alabama*⁷¹ did not effectively eliminate a prosecutor's racially-motivated peremptory challenges.⁷² As a result, the Court adopted a three-part test for determining whether a defendant has established a prima facie case of discrim-

65. *Id.* The Supreme Court of Kentucky affirmed the conviction on both counts. *Id.* at 84.

66. *Id.* The Court expressed no view on the petitioner's Sixth Amendment claim. See *supra* note 13 (discussing the Court's prior holdings extending a defendant's Sixth Amendment claims to selection of the jury venire but not the petit jury).

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

68. *Id.* The harm to the community is exacerbated by the fact that the discrimination occurs in the courtroom. *Id.* at 87-88.

69. *Sims v. Georgia*, 389 U.S. 404, 407-08 (1967) (holding that where African-Americans constitute 24.4% of taxpayers, but only 4.7% of grand juries and 9.8% of jury lists, jury selection procedures violated the Fourteenth Amendment), *conformed to*, 159 S.E.2d 290 (Ga. 1968); *Whitus v. Georgia*, 385 U.S. 545, 553 (1967) (holding that the practice of selecting juries from tax lists which distinguished African-American citizens by a letter (c) appearing next to their name violated the Equal Protection Clause), *conformed to*, 153 S.E.2d 446 (Ga. 1967); *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (finding a violation of the Fourteenth Amendment where prospective African-American juror's names were placed on yellow cards, while white juror's names were placed on white cards); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (holding that a statute which prohibited African-Americans from jury service violated the Fourteenth Amendment).

70. *Batson*, 476 U.S. at 88 n.10. The Court found that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

71. 380 U.S. 202, 222-24 (1965). The Court overruled *Swain v. Alabama*. *Batson*, 476 U.S. at 100 n.25.

72. *Batson*, 476 U.S. at 92-93. The Court noted that because "this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." *Id.* (footnote omitted); see *supra* notes 59-62 and accompanying text (discussing the burden of proof imposed in *Swain*).

inatory jury selection.⁷³ Under this test, the defendant must first show he belongs to a cognizable racial group⁷⁴ and must establish that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire.⁷⁵ Next, the defendant is entitled to rely on the fact that peremptory challenges, by their very nature, allow those who choose to discriminate to do so.⁷⁶ Finally, the defendant must show facts and circumstances that raise an inference that the prosecutor used peremptory challenges to exclude potential jurors because of their race.⁷⁷

If satisfied, this test raises an inference that the prosecutor used the peremptory challenges in an intentionally discriminatory fashion.⁷⁸ The burden then shifts to the prosecutor to assert a race-neutral reason for the exclusion.⁷⁹ The Court stressed, however, that the burden on

73. *Id.* at 96; *see also* *Castaneda v. Partida*, 430 U.S. 482, 494-96 & n.17 (1977) (holding that where the population of the county was 79.1% Mexican-American, but only 39% of the persons summoned for grand jury service were Mexican-American, the petitioner established a prima facie case of racial discrimination). Several courts have had difficulty applying the test enunciated in *Batson*. *See infra* notes 221-25 (discussing lower court applications of *Batson*).

74. *Batson*, 476 U.S. at 96. Lower courts have held that *Batson* provides protection against discriminatory peremptory challenges exercised against: American Indians, *United States v. Chalan*, 812 F.2d 1302, 1313-14 (10th Cir. 1987); Hispanics, *United States v. Alcantar*, 832 F.2d 1175, 1179-80 (9th Cir. 1987), *appeal after remand*, 897 F.2d 436 (9th Cir. 1990), *cert. denied*, 113 S. Ct. 595 (1992); Mexican-Americans, *Bueno-Hernandez v. State*, 724 P.2d 1132, 1133-35 (Wyo. 1986), *cert. denied*, 480 U.S. 907 (1987); and French-Canadians, *Commonwealth v. Gagnon*, 449 N.E.2d 686, 691-92 (Mass. App. Ct. 1983), *affirmed on other grounds sub. nom.*, *Commonwealth v. Bourgeois*, 465 N.E.2d 1180 (Mass. 1984); *see also* BENNETT & HIRSCHHORN, *supra* note 14, at 329-30 (discussing the various groups to which lower courts have afforded *Batson* protection).

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

76. *Id.* The Court noted that there can be no dispute that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (finding a violation of the Fourteenth Amendment where prospective African-American juror's names were placed on yellow cards, while white juror's names were placed on white cards)).

77. *Id.*

78. *Id.*

79. *Id.* at 97. A race-neutral reason is one that is "based on something other than the race of the juror." BENNETT & HIRSCHHORN, *supra* note 14, at 333 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). Courts have accepted proffered race-neutral reasons where the juror knew one of the parties, *People v. Brown*, 505 N.E.2d 397, 401 (Ill. App. Ct. 1987), where the juror doubted his ability to sit in judgment or had a criminal conviction, *Thorne v. State*, 509 N.E.2d 877, 881 (Ind. Ct. App. 1987), *superseded*, 519 N.E.2d 566 (Ind. 1988). Conversely, in *United States v. Brown*, 817 F.2d 674, 675-76 (10th Cir. 1987), the Tenth Circuit held that presuming an African-American attorney would have an unfair advantage with an African-American juror is unacceptable. Furthermore, *People v. Pagel*, 232 Cal. Rptr. 104, 108 (Cal. App. Dep't Super. Ct. 1986), *cert. denied*, 481 U.S. 1028 (1987), held that excluding African-American jurors because the opposing counsel had struck white jurors is not a race-neutral explanation. Very recently, the Supreme Court in *Purkett v. Elem*, 115 S. Ct. 1769 (1995), held that a prosecutor's proffered explanation that

the prosecutor is less than the burden for supporting a challenge for cause.⁸⁰

Chief Justice Burger dissented,⁸¹ arguing that the principles announced in *Strauder*⁸² do not apply to petit juries.⁸³ The Chief Justice asserted that it is not necessarily discriminatory to use a peremptory challenge to exclude a potential juror on the belief that the juror will be biased in favor of a litigant because they share the same race.⁸⁴ Chief Justice Burger also voiced his misgivings regarding any future extension of the Court's decision.⁸⁵

he struck two African-American jurors because they had long, unkempt hair, moustaches, and beards satisfied his burden of articulating race-neutral explanations for the strikes. *Id.* at 1771. The Court stated that facial hair is not a characteristic associated with any race. *Id.* For a discussion of proffered race-neutral reasons that courts have accepted and rejected, see BENNETT & HIRSCHHORN, *supra* note 14, at 333-35.

80. *Batson*, 476 U.S. at 97. A prosecutor may not, however, explain his challenges on the grounds that an African-American juror will be partial to the defendant because of their common race. *Id.* If the Court were to sanction any race-based peremptory challenges, the guarantee of equal protection to all citizens, embodied in the Fourteenth Amendment, would be meaningless. *Id.* at 97-98. In addition, the decision promotes respect for the criminal justice system by ensuring that no qualified juror is excluded from participation. *Id.* at 99.

Justice Marshall, in concurrence, argued that the Court's decision eliminates the discriminatory use of the peremptory challenge in theory only. *Id.* at 102-03 (Marshall, J., concurring). The only way to eliminate discriminatory strikes completely, according to Justice Marshall, is to ban the peremptory challenge altogether. *Id.* at 103. Justice Marshall suggested that "[a] prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." *Id.* at 106.

81. *Id.* at 112 (Burger, C.J., dissenting).

82. *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that a statute prohibiting African-Americans from serving on juries violated the Fourteenth Amendment); see *supra* note 49 (discussing the *Strauder* decision).

83. *Batson*, 476 U.S. at 122-23.

84. *Id.* (quoting *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (en banc)). Chief Justice Burger distinguished between the implication that an entire race is unfit for jury service and merely suggesting that each race may favor its own. *Id.* (construing *Leslie*, 783 F.2d at 554). The former is insulting and a violation of the Constitution, while the latter is not. *Id.*

85. *Id.* at 124. The Chief Justice predicted that, applying conventional equal protection principles, a defendant could object to the use of peremptory challenges exercised on the basis of gender, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry or profession. *Id.* (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (holding that a Texas city ordinance that discriminated with respect to the mentally retarded violated the Equal Protection Clause because it was not rationally related to a governmental objective)); see also, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (holding that a Minnesota statute banning the sale of milk in certain containers was rationally related to the legitimate state interest of promoting conservation and easing solid waste disposal problems); *Craig v. Boren*, 429 U.S. 190, 200 (1976) (holding that an Oklahoma statute prohibiting the sale of 3.2% beer to men under the age of 21 and women

Justice Rehnquist, dissenting,⁸⁶ rejected the majority's ruling as contrary to the holding of *Swain v. Alabama*.⁸⁷ He concluded that no inequality results from exercising peremptory challenges to strike African-American jurors so long as, in cases involving defendants of other races, jurors of the same race as the defendant may be excluded.⁸⁸

C. Prohibiting Race-Based Strikes Regardless of the Relationship Between the Litigant and the Excluded Juror: Powers v. Ohio

In *Powers v. Ohio*,⁸⁹ the Court addressed whether a criminal defendant may raise the claim of discriminatory use of the peremptory challenge, on behalf of the excluded juror, even if the defendant and the excluded juror do not share the same race.⁹⁰ The critical issue in *Powers* was whether the defendant had third-party standing to raise a claim of racial discrimi-

under 18 was not substantially related to the achievement of an important government function and thus violated the Equal Protection Clause); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-15 (1976) (holding that an age classification requiring state police to retire at age 50 was rationally related to the important governmental objective of protecting the public by ensuring physically fit police officers); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973) (holding that a statute, rendering ineligible for Food Stamp assistance any household containing an individual unrelated to any other member of the household, was not rationally related to the purpose of maintaining adequate nutrition and stimulating the agricultural economy); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding a statute that placed a fixed limit on the Aid to Families with Dependent Children Program grants, regardless of family size, because it was rationally related to the legitimate state interest in providing support to needy families and did not violate the Equal Protection Clause); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955) (holding that a provision of an Oklahoma statute prohibiting any person who is not a licensed optometrist or ophthalmologist from fitting, duplicating, or replacing lenses was rationally related to the legitimate state interest of regulating visual care). Chief Justice Burger argued that, in forcing an attorney to explain the basis for a peremptory challenge, the Court undermined the very definition of the strike. *Batson*, 476 U.S. at 127. The Chief Justice observed that "[a]nalytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.'" *Id.* (quoting *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984)).

86. *Batson*, 476 U.S. at 134 (Rehnquist, J., dissenting).

87. *Id.* at 134-35; see *Swain v. Alabama*, 380 U.S. 202, 221 (1965) (holding that the use of peremptory challenges to exclude jurors in a particular case is not a violation of the Equal Protection Clause).

88. *Batson*, 476 U.S. at 137-38.

89. 499 U.S. 400 (1991), *cert. denied*, 115 S. Ct. 366 (1994).

90. *Id.* at 402. The defendant, a white man charged with two counts of aggravated murder, challenged the prosecutor's use of peremptory challenges to exclude seven African-Americans from serving on the jury. *Id.* at 402-03. The trial court denied the petitioner's request to compel the prosecutor to articulate his reasons for excluding the African-American jurors. *Id.* at 403.

nation on behalf of the excluded juror.⁹¹ To establish standing, the litigant first must have suffered an "injury in fact," giving him a "sufficiently concrete interest" in the outcome of the disputed issue.⁹² Second, a close relationship must exist between the litigant and the third party.⁹³ Third, some hindrance preventing the third party from protecting his own interests must exist.⁹⁴

The Court found that racially discriminatory use of peremptory challenges causes a defendant cognizable injury,⁹⁵ thereby undermining the fairness of the judicial system.⁹⁶ Next, the Court found that a relationship exists between a criminal defendant and a juror, in that the latter is called to decide the fate of the former,⁹⁷ and both the excluded juror and the defendant share an interest in eliminating racial discrimination from the courtroom.⁹⁸ Finally, the Court examined the likelihood and ability of the excluded juror to assert his own rights to be free from discrimination.⁹⁹ Although the excluded juror could bring his own claim, the Court noted that such cases are rare.¹⁰⁰

91. *Id.* at 410 (citing *Singleton v. Wulff*, 428 U.S. 106 (1976)). *Singleton* outlines the standard to determine if a party has standing to raise an issue on behalf of a third person. *Singleton*, 428 U.S. at 114-16. There, the Supreme Court held that physicians had standing to challenge the constitutionality of a Missouri statute excluding abortions from Medicaid benefits. *Id.* at 113. The Court reasoned that if the physicians prevailed in their suit, they would benefit by receiving payments for abortions. *Id.* at 113; see generally Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (discussing the issue of third party standing in greater detail).

92. *Powers*, 499 U.S. at 411 (quoting *Singleton*, 428 U.S. at 112).

93. *Id.* (quoting *Singleton*, 428 U.S. at 113-14). In *Singleton*, the Court found that the relationship between the litigant and the third party must be such that the former is as effective a proponent of the rights involved as the latter. *Singleton*, 428 U.S. at 115.

94. *Powers*, 499 U.S. at 411 (citing *Singleton*, 428 U.S. at 115-16).

95. *Id.*

96. *Id.* When discrimination is sanctioned at the outset of a case, the trial will neither be perceived as fair nor instill respect for the law. *Id.* at 412.

97. *Id.* at 413. The Court asserted that "[v]oir dire permits a party to establish a relation, if not a bond of trust, with the jurors." *Id.* (emphasis omitted).

98. *Id.* An improperly excluded juror must endure the public humiliation of having been denied participation in the justice system because of his race, while the criminal defendant loses confidence in the fairness of the system. *Id.* at 411-14. In addition, the defendant is uniquely motivated to act on behalf of the excluded juror as this may lead to a reversal of the conviction. *Id.* at 414.

99. *Id.* at 414-15.

100. *Id.* Because excluded jurors are not part of the jury selection process they have no opportunity to voice their objections at the time of exclusion. *Id.* at 414. Moreover, there remains little incentive to bring a separate claim because of high litigation costs and the small financial reward for success. *Id.* at 415. Justice Kennedy remarked that "[t]he reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.*

The Court thus concluded that a defendant maintains standing to object on behalf of jurors excluded on the basis of race.¹⁰¹ The Court also observed that other reasons may exist for excluding a juror because of his race, aside from the fact that the defendant and juror are of the same race.¹⁰² Finally, the Court noted that the reasons for prohibiting the exclusion where the defendant and the juror share the same race also necessitate prohibiting the exclusion when they do not share the same race.¹⁰³

D. Applying Batson to Civil Litigants: Edmonson v. Leesville Concrete Co.

In *Edmonson v. Leesville Concrete Co.*,¹⁰⁴ the Court extended the *Batson* rule to civil litigants.¹⁰⁵ The respondent in *Edmonson* had used two of its three peremptory challenges, over objection, to exclude African-Americans from the jury.¹⁰⁶ On appeal, an en banc panel of the United States Court of Appeals for the Fifth Circuit ruled that *Batson* was inapplicable to civil cases.¹⁰⁷

101. *Id. Powers* is a significant expansion of *Batson* in that *Batson* required a defendant to show that he was a member of a cognizable racial group and that the prosecutor had struck jurors of the defendant's own race. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). By eliminating this requirement, the *Powers* Court placed more emphasis on protecting the rights of the excluded juror. Michael J. Desmond, Note, *Limiting A Defendant's Peremptory Challenges: Georgia v. McCollum and the Problematic Extension of Equal Protection*, 42 CATH. U. L. REV. 389, 404 (1993). The concern for the excluded juror and the community as a whole has been dubbed the "multiple ends" of *Batson*. *Allen v. Hardy*, 478 U.S. 255, 259 (1986).

102. *Powers*, 499 U.S. at 416.

103. *Id.* The court wrote, "to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms." *Id.*

104. 500 U.S. 614 (1991).

105. *Id.* at 616. The petitioner, an African-American man, was injured while working at a construction site and sued the respondent in federal court. *Id.* He claimed that the respondent was negligent in allowing a company truck to roll backwards and pin him against construction equipment. *Id.*

106. *Id.* at 616-17. The petitioner objected to the challenges and requested that the trial court require the respondent to articulate race-neutral reasons for striking the jurors. *Id.* at 617; see *supra* notes 71-80 and accompanying text (discussing the three part test set out in *Batson*). The district court held that *Batson* did not apply to civil proceedings. *Edmonson*, 500 U.S. at 617. The jury, composed of 11 white persons and one African-American, returned a verdict in favor of the petitioner, but attributed 80% of the negligence to him and accordingly, reduced his award to \$18,000. *Id.*

107. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir.), *mot. granted, cert. granted*, 498 U.S. 809 (1990). This was actually the second hearing before the United States Court of Appeals for the Fifth Circuit. *Id.* at 219. After the first hearing, a panel of the court held that *Batson* did apply to civil cases, finding that private parties become state actors when exercising peremptory challenges. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308 (1988), *on recons., en banc*, 895 F.2d 218 (5th Cir.), *mot. granted., cert. granted.*

To invoke the Fourteenth Amendment's mandate of equal protection under the law, the complaining party must show that the injury resulted from state action.¹⁰⁸ In order for an equal protection violation to occur a private litigant's exercise of a peremptory challenge must be characterized as state action.¹⁰⁹ Thus, for a private litigant to be bound by the Constitution, governmental authority must dominate the activity so pervasively that the private litigant is considered to act with governmental authority.¹¹⁰ Where this exists, the private litigant is considered a state actor when performing the activity.¹¹¹

The Court had no difficulty finding that governmental authority dominates the use of peremptory challenges.¹¹² The Court noted that peremptory challenges assist in jury selection and thus have meaning only in a courthouse.¹¹³ Because peremptory challenges are not a constitutional right, they exist only where the government provides litigants with the opportunity to exercise them.¹¹⁴

Having determined that the exercise of peremptory challenges qualifies as an activity dominated by governmental control, the Court next found

498 U.S. 809 (1990). After this decision, the full court ordered a rehearing. *Edmonson*, 500 U.S. at 617.

108. *Edmonson*, 500 U.S. at 619. Constitutional guarantees only apply where the state acts to restrict one's protected liberty. *Id.*; see also *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191-99 (1988) (holding that the imposition of disciplinary sanctions against a basketball coach by a state university acting in compliance with NCAA rules and recommendations did not turn the NCAA into a state actor, thus the association could not be held liable for a violation of the coach's civil rights); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 171-72 (1972) (holding that a private club is not a state actor simply because it has a liquor license issued by a state agency, and therefore, the club's discriminatory practices are not subject to constitutional scrutiny).

109. *Edmonson*, 500 U.S. at 619-20. The Court outlined the test for private conduct constituting state action in *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 937 (1982). In *Lugar*, a creditor seized the property of a debtor in an ex parte proceeding pursuant to statutory authority. *Id.* at 924-25. The Court employed a two-part test in determining that the creditor's actions amounted to state action. *Id.* at 937. First, the deprivation giving rise to the state action claim must stem from an exercise of authority granted by the state. *Id.* Second, the party acting must "fairly be said to be a state actor." *Id.*

110. *Edmonson*, 500 U.S. at 620; see *Lugar*, 457 U.S. at 939-41 (discussing private action that is attributable to the government).

111. *Edmonson*, 500 U.S. at 621; see *Lugar*, 457 U.S. at 941-42 (holding that a private party's participation in the seizure of property is sufficient to characterize that party as a state actor); see also *West v. Atkins*, 487 U.S. 42, 54 (1988) (holding that a private physician who contracted with a prison to attend to inmates' medical needs is a state actor).

112. *Edmonson*, 500 U.S. at 620.

113. *Id.* Justice Kennedy observed that "[b]y their very nature, peremptory challenges have no significance outside a court of law." *Id.*

114. *Id.* In deciding that the state action requirement was satisfied, the Court commented that "[w]ithout this authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts." *Id.* at 621.

that a private litigant is a state actor when exercising the challenge.¹¹⁵ The voir dire process, the Court found, is substantially controlled by the trial judge.¹¹⁶ In addition, the Court reasoned that jury selection is a traditional state function,¹¹⁷ and the fact that private litigants participate in the selection does not change the governmental character of the power.¹¹⁸ The Court finally stressed that the courtroom, more than anyplace else, must be free from racial discrimination lest it appear to support it.¹¹⁹

In dissent, Justice O'Connor rejected the Court's conclusion that a litigant functions as a state actor when exercising peremptory challenges.¹²⁰ Justice O'Connor argued that the government is responsible for providing the forum for dispute resolution, but not necessarily for everything that occurs in that forum.¹²¹ Justice O'Connor also asserted that, because the state always has employed private litigants to partake in the jury selection

115. *Id.* at 624.

116. *Id.* at 623-24. In fact, the Court's authority must be invoked for the parties to exercise the challenge. *Id.* at 624. Indeed, after a juror is struck, it is the court which must inform the juror that he is excused. *Id.* The Court noted that "[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose." *Id.*

117. *Id.* at 624-25. A jury, the Court observed, is a "quintessential governmental body," brought together by the power of the state and having its judgment enforced by the state. *Id.* at 624. The Court recognized that where the government confers the power to choose government employees or officials on a private body, that body will be bound by the Constitution. *Id.* at 625.

118. *Id.* at 626. At this point the Court analogized to other cases where private persons performing state functions were found to be state actors. *See West v. Atkins*, 487 U.S. 42, 54 (1988) (holding that a private physician who contracted with a prison to attend to inmates' medical needs is considered a state actor); *Terry v. Adams*, 345 U.S. 461 (1953) (finding that a private political organization which selected only white candidates to run for office is subject to constitutional restraints).

119. *Edmonson*, 500 U.S. at 628. Justice Kennedy remarked that because the courtroom is where the law itself unfolds, if racially motivated peremptory challenges were permitted, the integrity of the judicial system would be undermined. *Id.* The Court relied on *Powers* to conclude that the civil litigant may raise the excluded juror's rights on his behalf. *Id.* at 628-29. Applying the *Powers* rationale, the *Edmonson* Court found that when peremptory challenges are used to discriminate, the opposing litigant not only suffers a concrete, redressable injury but also has a close relation with the excluded juror. *Id.* at 629-30; *see supra* notes 89-103 and accompanying text (discussing application of the third-party standing doctrine enunciated in *Powers*). The Court concluded that in a civil proceeding, the constitutional guarantee of an impartial jury is just as paramount, the verdicts are just as binding, and the mandate from Congress to eliminate racial discrimination is just as strong as in a criminal proceeding. *Edmonson*, 500 U.S. at 630.

120. *Edmonson*, 500 U.S. at 631-32 (O'Connor, J., dissenting). This argument would also form the basis for Justice O'Connor's dissent in *Georgia v. McCollum*. *See infra* note 134 (discussing Justice O'Connor's dissent in *McCollum*).

121. *Edmonson*, 500 U.S. at 632. The decision to exercise a peremptory challenge lies solely within the litigant's discretion, without any governmental encouragement. *Id.* at 635. Justice O'Connor asserted that "[t]he government otherwise establishes its require-

process and never has performed this function exclusively, jury selection is not a traditional government function.¹²² Moreover, when attorneys exercise a peremptory challenge, they do so to effectively protect their clients, not simply to assist the government in jury selection.¹²³ Justice O'Connor concluded that while the goal of eliminating racism from the courtroom is necessary and important, every courtroom action is not state action.¹²⁴

E. The Criminal Defendant As A State Actor: Georgia v. McCollum

In *Georgia v. McCollum*,¹²⁵ the Court addressed a question unanswered by prior cases: whether the Constitution prohibits a criminal defendant from exercising peremptory challenges in a racially discriminatory manner.¹²⁶ The Court's decision balanced the goal of eliminating racial discrimination in jury selection against the criminal defendant's Sixth Amendment right to an impartial jury.¹²⁷

The Court acknowledged that the rule in *Batson* was designed, in part, to protect individual jurors from being excluded on account of their race.¹²⁸ In addition, the Court found that racially motivated peremptory

ments for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason." *Id.* at 638.

122. *Id.* at 640. The state action test requires, *inter alia*, the activity in question to be a traditional function performed exclusively by the state. *Id.* Indeed, Justice O'Connor argued, it cannot be maintained that the government traditionally has performed this function exclusively because the peremptory challenge is older than the government itself. *Id.*

123. *Id.* at 642. Justice O'Connor relied on *Polk County v. Dodson*, 454 U.S. 312 (1981), which stated that a public defender does not act under color of state law when representing his client. *Id.* at 325; *see infra* note 131 (discussing the *Dodson* case).

124. *Edmonson*, 500 U.S. at 643-44.

125. 112 S. Ct. 2348 (1992).

126. *Id.* at 2352. The respondents in *McCollum*, who were white, were indicted for allegedly assaulting two African-Americans. *Id.* at 2351. A leaflet was distributed in the local African-American community that described the attack and urged residents to boycott the respondents' business. *Id.* Prior to jury selection, the prosecutor moved to prohibit the respondents from exercising peremptory challenges to exclude African-American jurors. *Id.* The state argued that the victim's race was a factor in the assault and that the respondents had indicated their intent to exclude African-Americans from the jury. *Id.* The trial court denied the motion holding that *Batson's* prohibition against racially motivated peremptory challenges did not apply to a criminal defendant. *Id.* at 2352. The issue was certified for immediate appeal by the Georgia Supreme Court, which with three justices dissenting, affirmed; thereby declining to restrict a criminal defendant's right to exercise peremptory challenges. *State v. McCollum*, 405 S.E.2d 688, 689 (Ga. 1991), *rev'd*, 112 S. Ct. 2348 (1992).

127. U.S. CONST. amend. VI; *McCollum*, 112 S. Ct. at 2357-58; *see supra* note 1 and accompanying text (discussing the right to trial by jury).

128. *McCollum*, 112 S. Ct. at 2353. The Court reasoned that it is irrelevant who initiates the discriminatory use of peremptory challenges because the resultant harm to the excluded juror is the same. *Id.* When a juror is struck impermissibly, the Court found,

challenges undermine public confidence in both the jury selection procedure and in the justice system as a whole.¹²⁹ A court that allows the discriminatory use of peremptory challenges, regardless of which side initiates the challenge, “is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizen’s confidence in it.”¹³⁰ The exercise of a peremptory challenge is performed in the context of selecting the jury—“a quintessential governmental body”—and as such must adhere to constitutional principles.¹³¹

In balancing the principles of *Batson* and its progeny against the rights of the criminal defendant, the Court refused to accord criminal defendants broad latitude in exercising peremptory challenges where doing so would perpetuate racial stereotypes.¹³² The Court announced that the right to a fair trial does not entail the right to engage in racial discrimina-

“[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.* Protecting the rights of the excluded jurors is one of the “multiple ends” for which *Batson* was designed. *Id.*; see *supra* note 101 (noting the “multiple ends” of *Batson*).

129. *McCullum*, 112 S. Ct. at 2353-54. The Court opined that public confidence in the law is especially important in racially-charged trials where tempers flare and emotions run high. *Id.* at 2354. One of the purposes of having a jury is to impress upon the criminal defendant and the community that a judgment is given according to law by persons who are fair. *Id.* at 2353. That purpose is frustrated, the Court noted, when litigants act in violation of the very laws which the jury is brought together to uphold. *Id.* at 2353-54.

130. *Id.* at 2354.

131. *Id.* at 2356. The Court ruled that a state has standing to raise a claim of discriminatory use of peremptory challenges on behalf of the excluded juror. *Id.* at 2357. First, the state suffers cognizable injury when a defendant discriminates in the exclusion of jurors because “the fairness and integrity of its own judicial process is undermined.” *Id.* Second, as the juror is the representative of all its citizens, there is a relation that permits and even compels the state to protect the Fourteenth Amendment rights of its jurors. *Id.* Finally, as argued in *Powers*, the barriers are great for an excluded juror to bring a claim on his own behalf. *Id.*; see *supra* notes 100-01 (discussing the difficulties an excluded juror must face in enforcing his own rights). The Court also addressed the argument that a public defender is not a state actor when representing a criminal defendant. *McCullum*, 112 S. Ct. at 2356; see also *supra* notes 123-27 and accompanying text (discussing Justice O’Connor’s dissent in *Edmonson* which argued that a private litigant is not a state actor for purposes of equal protection analysis). The argument relied on *Polk County v. Dodson*, 454 U.S. 312, 314 (1981), which involved a section 1983 claim by a defendant asserting that a public defender violated his constitutional rights. *Id.* The Court ruled that a public defender does not act under color of state law when representing his client, stating that “it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.” *Id.* at 321-22, 325 (footnote omitted). The *McCullum* Court distinguished activity associated with selecting the jury from that at issue in *Polk* and concluded that when the government confers upon a party the power to choose a body such as a jury, that party is bound by constitutional limitations. *McCullum*, 112 S. Ct. at 2356.

132. *McCullum*, 112 S. Ct. at 2358. The Court noted, however, that this holding does not preclude a defendant from excluding a juror when he has reason to believe that the particular juror will not be impartial because of racial prejudice. *Id.* at 2358-59. Mechanisms exist for confronting and removing jurors whose racism will pervert their judgment,

tion.¹³³ As in *Batson* and its progeny, when the state establishes a prima facie case of discriminatory use of peremptory challenges, the defendant must answer with a race-neutral justification for the strikes.¹³⁴

F. *The History of Gender Discrimination in Jury Selection*

Traditionally, women were excluded entirely from jury service.¹³⁵ Even after the ratification of the Nineteenth Amendment¹³⁶ in 1920,

but this does not permit a defendant to exclude a juror based on assumptions regarding that juror's race. *Id.* at 2359.

133. *Id.* at 2358. The Court also held that its ruling would not infringe upon a criminal defendant's Sixth Amendment rights by forcing defense counsel to reveal trial strategy or privileged communication in articulating race-neutral reasons for a peremptory challenge. *Id.* In such a situation, the defense attorney could explain the strike *in camera* to avoid revealing trial strategy to the prosecution. *Id.*

134. *Id.* at 2359. Chief Justice Rehnquist and Justice Thomas concurred in the judgment. *Id.* They argued, in separate opinions, that no state action occurs when a criminal defendant exercises a peremptory challenge. *Id.* Insofar as *Edmonson* set a precedent, however, they conceded that the Court must extend the restriction to include a criminal defendant. *Id.* Justice Thomas argued that the Court's decision signified a mis-ordering of priorities by elevating the right of an individual to sit on a jury above the rights of a criminal defendant. *Id.* at 2360.

Justice O'Connor dissented, citing her reasoning in *Powers*. *Id.* at 2361; *Edmonson*, 500 U.S. at 631 (O'Connor, J., dissenting); see *supra* notes 120-24 and accompanying text (discussing Justice O'Connor's dissent in *Edmonson*). Justice O'Connor argued that *Polk County v. Dodson* already had rejected the notion that a criminal defense attorney was a state actor when representing a defendant. *McCullum*, 112 S. Ct. at 2361-62; *Polk County v. Dodson*, 454 U.S. 312, 321 (1981). That the Court had prohibited race-based peremptory challenges by prosecutors in *Batson* and civil litigants in *Edmonson*, by itself, does not warrant extending the principle to criminal defendants. *McCullum*, 114 S. Ct. at 2363. In support, Justice O'Connor noted that on other occasions the Court had held the prosecution to higher standards than the defense. *Id.* at 2364; see *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the prosecution to disclose evidence favorable to the accused). The need for independence was even more apparent in this case because of the direct adversarial relationship between the criminal defendant and the government. *McCullum*, 114 S. Ct. at 2363. Justice O'Connor stressed that "[f]rom arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between the government and the accused is clear for all to see." *Id.*; see also Susan M. Sabers, Note, *The Absence of State Action in Georgia v. McCullum*, 39 S.D. L. REV. 159, 174 (1994) (arguing that there is no room for a criminal defense attorney to serve the interests of a state when representing a client). Sabers argues that the result reached by the majority in *McCullum* was outcome-determined by the majority's decision to rid the courtroom of racial discrimination. *Id.* at 173. She asserts that in determining that a criminal defendant is a state actor, the Court did not correctly apply the state action test to the facts of *McCullum*. *Id.* at 172. In all criminal cases, Sabers maintains, the role of criminal defendant and state actor are mutually exclusive. *Id.* at 174.

135. In *Strauder v. West Virginia*, while holding that states could not exclude African-Americans from jury service, the Court found that states were free to restrict jury service to males. 100 U.S. 303, 310 (1879); see *supra* note 49 (discussing *Strauder*).

136. U.S. CONST. amend XIX. The Nineteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." *Id.*

which guaranteed to all women the right to vote, many states continued to deny women the right to serve on juries.¹³⁷ Indeed, even those states that purported to allow female jurors often implemented procedures to deter women from participating.¹³⁸ These barriers included affirmative registration requirements¹³⁹ and automatic exemptions for all women.¹⁴⁰ Exclusion of women from jury service rested on stereotypical attitudes that women were “too fragile and virginal to withstand the polluted courtroom atmosphere.”¹⁴¹

In 1946, the Supreme Court in *Ballard v. United States*¹⁴² addressed the propriety of excluding women from jury service. The *Ballard* Court noted that excluding women from juries resulted in a loss of diversity¹⁴³ and ruled that women could not be excluded from jury service in federal courts.¹⁴⁴ Women were not permitted to serve on juries in all fifty states, however, until 1968 when Mississippi repealed its statute barring women from jury service.¹⁴⁵ Even still, it was not until 1975 that the Supreme

137. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1423 (1994).

138. *Id.*

139. An affirmative registration requirement exempted women from jury service unless they registered. *Hoyt v. Florida*, 368 U.S. 57, 58-59 (1961) (upholding an affirmative registration statute that exempted women from mandatory jury service).

140. Automatic exemptions permitted women to decline to serve on a jury because of their gender. *Fay v. New York*, 332 U.S. 261, 289 (1947) (noting that, in 1942, 15 of the 28 states that permitted women to serve on juries allowed them to claim a gender-based exemption).

141. *J.E.B.*, 114 S. Ct. at 1423 (citing *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949) (commenting that “[c]riminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady”)).

142. 329 U.S. 187 (1946).

143. In *Ballard*, a mother and her son were indicted for mail fraud involving the promotion of an allegedly fraudulent religious program. *Id.* at 194. The government conceded that women were not included on the jury panel in the jurisdiction where the case was tried. *Id.* at 190.

144. *Id.* Justice Douglas, in *Ballard*, argued that:

[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

Id. at 193-94 (footnote omitted). This decision applied only to federal courts and even 15 years later, the Court still was unwilling to extend *Ballard*'s prohibition on the exclusion of women from jury service to the states. *Hoyt v. Florida*, 368 U.S. 57, 61 (1961). In *Hoyt*, the Court found that because of a woman's status as the center of home and family life, it was reasonable for a state to exempt women from jury service and permit them to serve only if they volunteered. *Id.* at 62.

145. Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection 2* U.C.L.A. W. L.J. 35, 38 (1992). Women were not permitted to serve on juries in Alabama

Court declared unconstitutional, under the Sixth Amendment, a Louisiana statute which provided for affirmative registration for women, thus effectively ending the exclusion of women from jury service in state courts.¹⁴⁶

Two years after *Batson's* prohibition against race-based peremptory challenges,¹⁴⁷ the constitutionality of gender-based peremptory challenges first surfaced in *United States v. Hamilton*.¹⁴⁸ In *Hamilton*, the defendants objected to the government's exclusion of three African-American females from the jury.¹⁴⁹ On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the convictions.¹⁵⁰ The court rejected the defendants' argument that the Equal Protection Clause prohibited gender-based peremptory challenges,¹⁵¹ ruling that no authority existed supporting such an extension of *Batson*.¹⁵² Following *Hamilton*, the Courts of Appeals for the Fifth and Seventh Circuits also declined to extend *Batson* to gender-based strikes.¹⁵³

until 1966, when the United States District Court for the Middle District of Alabama declared a state statute barring women from service unconstitutional. *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (per curiam) (holding that the practice of excluding African-Americans from jury service violated Alabama law and the United States Constitution and that a statute excluding women from jury service violated the Fourteenth Amendment's Equal Protection Clause).

146. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). *Taylor* involved a Louisiana state statute exempting women from jury service unless they filed a written declaration of their desire to serve. *Id.* at 523. The defendant claimed that this statute violated his Sixth Amendment right to a fair trial by a jury drawn from a fair cross section of the community. *Id.* at 524. The Supreme Court agreed, and rejected the State's argument that women's distinctive role in society was a rational basis for the exemption. *Id.* at 533-34. The Court concluded that more than a rational basis is needed to justify excluding an entire segment of society from jury service and the State had failed to advance any such argument warranting exclusion. *Id.* at 534.

147. 476 U.S. 79 (1986).

148. 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

149. *Id.* at 1040. In *Hamilton*, several African-American defendants, convicted on drug-related charges, argued that the prosecutor had exercised race and gender-based peremptory challenges in violation of the Equal Protection Clause. *Id.* at 1039-40.

150. *Id.* at 1043. The Court of Appeals accepted as race-neutral and reasonable the prosecutor's assertion that he struck the female jurors because he wanted more men on the jury. *Id.* at 1041.

151. *Id.* at 1040.

152. *Id.* at 1042. The court asserted that if the Supreme Court had intended *Batson* to prohibit gender-based strikes, it would have abolished peremptory challenges altogether or included gender, age, and other classifications within the prohibition of race-based peremptory challenges. *Id.*

153. *United States v. Broussard*, 987 F.2d 215, 219-20 (5th Cir. 1993). In *Broussard*, the district court refused to allow the defendant to exercise peremptory challenges against two females. *Id.* at 217. The United States Court of Appeals for the Fifth Circuit reversed the conviction, finding that the district court's extension of *Batson* prohibiting the defendant from exercising peremptory challenges was not harmless error. *Id.* at 221. The United

In *United States v. De Gross*,¹⁵⁴ however, the United States Court of Appeals for the Ninth Circuit extended *Batson* to prohibit a defendant from exercising gender-based peremptory challenges.¹⁵⁵ The Ninth Circuit applied the heightened scrutiny test afforded gender-based classifications which upholds the classification only if it is "substantially related to the achievement of important governmental objectives."¹⁵⁶ The court concluded that gender-based challenges are based on assumptions that persons of that gender are unqualified to serve as jurors and, therefore, such challenges are not substantially related to the important governmental objective of ensuring an impartial jury.¹⁵⁷

II. *J.E.B. v. ALABAMA EX REL. T.B.*: EXPANDING *BATSON*'S PRINCIPLES TO PROHIBIT GENDER DISCRIMINATION

In *J.E.B. v. Alabama ex rel. T.B.*, the petitioner objected to the State's exercise of peremptory challenges to eliminate males from the jury.¹⁵⁸ The trial court rejected the petitioner's argument that the Equal Protection Clause prohibits gender-based peremptory challenges.¹⁵⁹ On appeal, the Alabama Court of Civil Appeals affirmed the decision, refusing to extend *Batson* to gender-based strikes.¹⁶⁰ The United States Supreme

States Court of Appeals for the Seventh Circuit addressed this question in *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), cert. denied, 502 U.S. 1080 (1992). In *Nichols*, the defendant argued that his due process rights were violated when the prosecutor used peremptory challenges to strike all the African-American females from the venire. *Id.* at 1262. The Seventh Circuit affirmed the conviction, ruling that striking the jurors because they were females with assailable family backgrounds was permissible under *Batson*. *Id.* at 1263-64.

154. 913 F.2d 1417 (9th Cir. 1990).

155. *Id.* at 1423. The defendant was "convicted . . . of two counts of aiding and abetting the transportation of an alien within the United States." *Id.* at 1419. At trial the government objected to the defendant's exercise of a peremptory challenge to exclude a male juror. *Id.* The government established that the defendant previously exercised peremptory challenges to exclude seven male jurors. *Id.* After the defendant offered no explanation, the trial court disallowed the challenge. *Id.* In addition, the defendant objected to the prosecutor's use of a peremptory challenge to strike a Hispanic woman. *Id.* The prosecutor admitted that his reason for striking the juror was gender-based. *Id.* at 1419-20.

156. *Id.* at 1422; see *supra* note 35 (discussing the heightened scrutiny test applied to gender-based classifications).

157. *DeGross*, 913 F.2d at 1422. The Court asserted that like race, a person's gender is simply not related to his fitness as a juror. *Id.* In reaching its decision, the Court relied heavily on the *Batson* Court's discussion of the injuries inflicted on the litigants, the excluded juror, and the community. *Id.* at 1422-23.

158. *J.E.B.*, 114 S. Ct. at 1422; see *supra* notes 24-29 and accompanying text (discussing the facts of *J.E.B.*).

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

160. 606 So. 2d 156 (Ala. Civ. App. 1992), cert. denied, 113 S. Ct. 2330 (1993). The Alabama Court of Civil Appeals relied on Alabama precedent in affirming the judgment. *Id.* at 157 (citing *Ex parte Murphy*, 596 So. 2d 45 (Ala.) (holding that the rule prohibiting

Court granted certiorari to resolve a growing conflict among state and federal courts.¹⁶¹

In *J.E.B.*, the Supreme Court held that the use of peremptory challenges to exclude jurors on the basis of gender violates the Equal Protection Clause.¹⁶² Unlike *Batson*, which was limited specifically to a prosecutor's actions,¹⁶³ the *J.E.B.* Court prohibited all participants in the jury selection process from exercising gender-based peremptory challenges.¹⁶⁴ In reaching its conclusion, the majority found that the histories of racial and gender discrimination were similar enough to warrant an expansion of *Batson*.¹⁶⁵ Although the Court repeatedly has emphasized

discrimination in jury selection does not apply to gender-based strikes), *cert denied*, 113 S. Ct. 86 (1992)).

161. *J.E.B. v. Alabama ex rel. T.B.*, 113 S. Ct. 2330 (1993) (granting certiorari). Compare *United States v. De Gross*, 913 F.2d 1417, 1422 (9th Cir. 1990) (extending *Batson* to prohibit gender-based peremptory challenges); *Laidler v. State*, 627 So. 2d 1263, 1264 (Fla. App. 1993) (extending *Batson* to gender) with *United States v. Nichols*, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (declining to extend *Batson* to gender), *cert. denied*, 502 U.S. 1080 (1992); *United States v. Hamilton*, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (declining to extend *Batson* to gender), *cert. denied*, 493 U.S. 1069 (1990); *State v. Adams*, 533 So. 2d 1060, 1063 (La. App. 1988) (refusing to extend *Batson* to gender), *cert. denied*, 540 So. 2d 338 (La. 1989); see *supra* notes 148-57 and accompanying text (discussing the conflicting decisions of federal courts as to the applicability of *Batson* to gender-based peremptory challenges).

162. *J.E.B.*, 114 S. Ct. at 1422. Justice Blackmun delivered the opinion of the Court. *Id.* at 1421. Justices Stevens, O'Connor, Souter, and Ginsburg joined in Justice Blackmun's opinion. *Id.* Justices O'Connor and Kennedy each filed an opinion concurring in the judgment. *Id.* at 1430 (O'Connor, J., concurring); *Id.* at 1433 (Kennedy, J., concurring). Chief Justice Rehnquist filed a dissenting opinion. *Id.* at 1434 (Rehnquist, C.J., dissenting). Justice Scalia filed a dissenting opinion in which the Chief Justice and Justice Thomas joined. *Id.* at 1436 (Scalia, J., dissenting).

163. 476 U.S. 79, 89 (1986) (prohibiting a prosecutor from exercising peremptory challenges to exclude members of the defendant's race from serving on the jury); see *supra* notes 71-80 and accompanying text (discussing the Court's ruling in *Batson*).

164. *J.E.B.*, 114 S. Ct. at 1430. Although the Court did not specifically rule that its holding applies to all exercises of peremptory challenges, neither did the Court restrict its holding to any certain actor, such as the prosecutor, as it had in previous cases involving racial discrimination. *Batson*, 476 U.S. at 89. Thus, as the Court has read the Equal Protection Clause to prohibit racial discrimination in the use of peremptory challenges, logic dictates that the same analysis will apply the prohibition against gender discrimination to all parties. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (prohibiting a criminal defendant from exercising race-based peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (prohibiting a civil litigant from exercising race-based peremptory challenges); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a criminal defendant has standing to object to race-based peremptory challenges without showing that the defendant and the excluded juror share the same race), *cert. denied*, 115 S. Ct. 366 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor may not exercise race-based peremptory challenges).

165. *J.E.B.*, 114 S. Ct. at 1425. The Court concluded that discrimination on the basis of gender violates the mandate of the Fourteenth Amendment, particularly where, "the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes."

otherwise,¹⁶⁶ *J.E.B.* signals the Court's willingness to sacrifice the effectiveness of the peremptory challenge in order to eliminate invidious discrimination in the jury selection process.

A. *The Majority Opinion: Extending Batson to Prohibit Gender-Based Peremptory Challenges*

The *J.E.B.* Court began its decision by reviewing the heightened scrutiny analysis constitutionally accorded to gender-based classifications.¹⁶⁷ This standard, the Court reasoned, protects against governmental policies that reflect archaic and overbroad generalizations based on outdated stereotypes about men and women that have resulted in historic discrimination.¹⁶⁸ For gender-based discrimination to pass constitutional muster, a state must show that the discrimination substantially furthers the state's legitimate interest¹⁶⁹ in promoting a fair and impartial trial.¹⁷⁰

Id. at 1422. In tracing the chronology of gender discrimination in jury selection, Justice Blackmun found that women and African-Americans shared a history of total exclusion warranting the protection that *Batson* affords. *Id.* at 1425; see also Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992) (arguing that, notwithstanding the differences between them, the shared history of women and African-Americans warrants applying *Batson* to gender-based peremptory challenges) [hereinafter *Beyond Batson*].

166. *Batson*, 476 U.S. at 98-99. Throughout *Batson* and its progeny, the Court specifically has affirmed its belief that the decisions do not detract from the value of the peremptory challenge. Thus, the Court in *Batson* emphasized that "we do not agree that our decision today will undermine the contribution the [peremptory] challenge generally makes to the administration of justice." *Id.* In *McCullum*, the Court reiterated, "[w]e do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice." *McCullum*, 112 S. Ct. at 2358. In *J.E.B.*, the Court commented that the "conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges." *J.E.B.*, 114 S. Ct. at 1429.

167. *J.E.B.*, 114 S. Ct. at 1425; see *Craig v. Boren*, 429 U.S. 190, 200 (1976) (holding that an Oklahoma statute which prohibited the sale of 3.2% beer to men under the age of 21 and women under 18 was not substantially related to the achievement of an important government function and thus violated the Equal Protection Clause); see *supra*, note 35 (discussing the heightened scrutiny analysis applied to gender-based classifications).

168. *J.E.B.*, 114 S. Ct. at 1424; see *Craig*, 429 U.S. at 198-99; *Schlesinger v. Ballard*, 419 U.S. 498, 506-07 (1975).

169. Gender-based classifications require "an exceedingly persuasive justification" to survive judicial scrutiny, and the classification must be substantially related to achieving an important governmental end. *J.E.B.*, 114 S. Ct. at 1425; see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (holding that a state-funded, single-sex university violated equal protection because the gender-based classification was not closely related to important governmental objectives); *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (stating that gender "classifications must bear a close and substantial relationship to important governmental objectives") (citations omitted).

170. *J.E.B.*, 114 S. Ct. at 1425. The Court found that the interest in a fair and impartial jury is the only legitimate interest the State possibly could have, because no other interest

The State of Alabama argued that its exercise of peremptory challenges to exclude males was legitimate because men on the jury would be more sympathetic to the petitioner, a male alleged to be the father of a non-marital child.¹⁷¹ The Court summarily rejected this argument as “the very stereotype the law condemns.”¹⁷² The Court viewed the respondent’s arguments as reminiscent of the notions advanced to justify the total exclusion of women from juries.¹⁷³

The majority recognized that the *Batson* decision protected several interests.¹⁷⁴ The *J.E.B.* Court found this to be equally true where gender discrimination in jury selection is implicated.¹⁷⁵ The Court found that individual litigants, whether the state, a criminal defendant, or a party to a civil action, are harmed by the risk that gender prejudice will infect the entire proceeding.¹⁷⁶ In addition, the community as a whole is harmed because the state will be perceived as participating in invidious discrimination, inevitably undermining confidence in the judicial system.¹⁷⁷ The

is substantially related to the discrimination in question. *Id.* at 1426 n.8. In so holding, the Court rejected the State’s argument that gender-based peremptory challenges should be permitted in this particular case because it is a paternity action. *Id.* Illegitimate children, the State asserted, are “victims of historical discrimination and entitled to heightened scrutiny under the Equal Protection Clause.” *Id.* Therefore, gender-based peremptory challenges would further the State’s interest in protecting the illegitimate child. *Id.*

171. *Id.* at 1426.

172. *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The Court dismissed the State’s contention that its decision to strike the male jurors was based on the perception that men would be more sympathetic to the putative father, finding it untenable that gender alone is an accurate predictor of a juror’s attitudes. *Id.* at 1426-27. The Court gave little regard to a study cited by the State in which the authors concluded that in rape cases female jurors are more likely to convict than male jurors. *Id.* at 1426 n.9 (quoting REID HASTIE ET AL, *INSIDE THE JURY* 140 (1983)). The majority of studies, the Court found, suggest that there is no appreciable difference in the attitudes of male and female jurors. *J.E.B.*, 114 S. Ct. at 1426 n.9; see VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 76 (1986); 1 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 143, at 207 (1949). The Court emphasized that the existence of statistical support does not, alone, justify gender discrimination that otherwise violates the Equal Protection Clause. *J.E.B.*, 114 S. Ct. at 1427 n.11.

173. *J.E.B.*, 114 S. Ct. at 1426.

174. *Id.* at 1427; see *Georgia v. McCollum*, 112 S. Ct. 2348, 2353-54 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991); *Powers v. Ohio*, 499 U.S. 400, 414 (1990) (discussing the harm that race-based peremptory challenges inflict), *cert. denied*, 115 S. Ct. 366 (1994); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). Justice Thomas, in his concurrence in *Edmonson*, maintained that the Court’s emphasis on the “multiple ends” of *Batson* has exalted the rights of the excluded juror above the rights of criminal defendants. *McCollum*, 112 S. Ct. at 2361 (Thomas, J., concurring).

175. *J.E.B.*, 114 S. Ct. at 1427; see *infra* notes 176-82 and accompanying text (applying *Batson*’s multiple ends to gender).

176. *J.E.B.*, 114 S. Ct. at 1427.

177. *Id.* Justice Blackmun argued that “[t]he community is harmed by the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of con-

Court found that permitting the proliferation of gender-based stereotypes would invite cynicism regarding the jury's objectivity.¹⁷⁸ Court-sanctioned gender discrimination also risks creating the impression that the judicial system denies full participation in jury service to otherwise qualified citizens.¹⁷⁹

Furthermore, the Court noted that excluded jurors are personally injured when they are the subject of gender-motivated discrimination in the exercise of peremptory challenges.¹⁸⁰ Notwithstanding the fact that women do not constitute a numerical minority, and that women, as a group, are likely to be represented on the jury even if all peremptory challenges are exercised discriminatorily, the harm to each excluded individual juror remains.¹⁸¹ In describing this individual harm, the Court noted that each individual maintains a right not to be excluded from a jury on the basis of impermissible gender-based stereotypes.¹⁸² Justice Blackmun emphasized that this decision does not proscribe the effective use of the peremptory challenge.¹⁸³ He noted that while gender may not serve as the sole motivation for a peremptory challenge, a party may still remove any group normally afforded rational basis review from the panel.¹⁸⁴ More-

fidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *Id.*

178. *Id.*

179. *Id.* Justice Blackmun wrote that this is of particular concern where the case involves gender related issues such as rape, sexual harassment, or paternity. *Id.*

180. *Id.* The Court argued that it makes no difference when the discrimination is directed at males, who historically have not been subjected to gender discrimination, because the Fourteenth Amendment protects males and females equally from intentional gender-based discrimination by state actors. *Id.* at 1428; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (holding that a state university's policy that discriminated against males rather than females is subject to heightened scrutiny as a gender-based classification); *cf.* 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 inflicted by racial discrimination in jury selection is to the excluded juror, and the primary reason for prohibiting such discrimination is to provide all citizens with equal opportunities to participate in the institutions of American self-government).

181. J.E.B., 114 S. Ct. at 1428 n.13. The Court commented that "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id.*

182. *Id.* at 1428.

183. *Id.* at 1429. Justice Blackmun rebutted the argument that all peremptory challenges are based on a stereotype or bias of some kind by noting that, while this may be true, it is only where they reinforce the same stereotypes that were used to exclude persons from voting, jury service, and other protected activities that the Equal Protection Clause is violated. *Id.* at 1428 n.14.

184. *Id.* at 1429. A statute will survive rational basis review if the classification at issue is rationally related to a legitimate state interest. NOWAK & ROTUNDA *supra* note 35, at 574-75; *see* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (holding a Texas city ordinance that discriminated against the mentally retarded violative

over, a party may even strike persons based on characteristics that are generally associated with one gender, so long as the reason for the strike is the associated characteristic and not gender itself.¹⁸⁵

The rule is essentially the same as in *Batson*: the party objecting to the strikes must establish a prima facie case of intentional gender discrimination, after which the party exercising the peremptory challenge must articulate a gender-neutral reason for the strike.¹⁸⁶ The *J.E.B.* Court reiterated the position it took in *Batson*, namely that the race or gender-neutral explanation need not rise to the level necessary to support a challenge for cause, but must merely demonstrate that the strike was motivated by something other than race or gender.¹⁸⁷ To rule otherwise, the Court concluded, would depart from the spirit of the Equal Protection Clause and deny the opportunity for participation in the fair administration of justice.¹⁸⁸

B. *The Concurring Opinions*

Justice O'Connor, in concurrence, recognized that while eliminating gender discrimination in jury selection is important, the majority's holding would further burden courts and unreasonably constrain experienced litigators from relying on intuition.¹⁸⁹ As objections to the use of peremptory challenges increase, Justice O'Connor argued, judicial time and resources will be diverted from the merits of the case to the jury selection

of the Equal Protection Clause because it was not rationally related to a governmental objective). Examples of classifications which merit only rational basis review are general economic or social welfare classifications, that do not burden a class the Court has determined is entitled to a higher standard of protection, such as race or gender. *Id.* at 440-41.

185. *J.E.B.*, 114 S. Ct. at 1429. The Court noted that it would be permissible to strike all members of the jury with military experience, even though the strike would affect men disproportionately, because the number of men with military experience far exceeds the number of women. *Id.* at 1429 n.16.

186. *Id.* at 1429-30. In *Powers*, the Supreme Court modified the rule in *Batson* by eliminating the requirement that the litigant prove that he is a member of a cognizable racial group and that the prosecutor struck jurors of the defendant's race. *Powers v. Ohio*, 499 U.S. 400, 416 (1990), *cert. denied*, 115 S. Ct. 366 (1994); *cf. supra* notes 71-80 and accompanying text (discussing the test for determining if a peremptory challenge is impermissibly race-motivated). Applying this principle to the Court's decision in *J.E.B.*, a male litigant could object to the exclusion of female jurors and vice versa.

187. *J.E.B.*, 114 S. Ct. at 1430; *see Batson v. Kentucky*, 476 U.S. 79, 97 (1986). The Court in *Batson* stressed that although the requirement limits the traditional nature of the peremptory challenge, the prosecutor's explanation need not equal a challenge for cause. *Id.*

188. *J.E.B.*, 114 S. Ct. at 1430. Justice Blackmun attested that the decision in *J.E.B.* enforces the Constitutional guarantee that all citizens, regardless of race, ethnicity, or gender, have the opportunity to participate in democracy. *Id.*

189. *Id.* at 1431 (O'Connor, J., concurring).

process.¹⁹⁰ In addition, Justice O'Connor contended, the peremptory challenge is an important tool to help litigators select the most impartial and unbiased jury possible.¹⁹¹ Peremptory challenges require an attorney to use her intuition to evaluate a juror's sympathies.¹⁹² Developed through experience and educated guesses, this intuition is often impossible to articulate.¹⁹³ As more restraints are imposed, Justice O'Connor argued, peremptory challenges increasingly resemble challenges for cause.¹⁹⁴

Justice Kennedy also concurred in the judgment, finding that *stare decisis* compelled the Court's decision.¹⁹⁵ Prior cases, he noted, prohibited

190. *Id.* Justice O'Connor wrote, "[i]n further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event." *Id.* In expressing her concerns over the additional litigation this issue will initiate, Justice O'Connor noted that *Batson* mini-hearings are common and because women constitute a larger proportion of potential jurors than African-Americans, a greater amount of litigation over this issue can be expected. *Id.*

191. *Id.* Justice O'Connor observed that "[p]eremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." *Id.* (quoting *Holland v. Illinois*, 493 U.S. 474, 484 (1990)). Justice O'Connor argued that if the peremptory challenge were not of significant value, it would not have endured from the thirteenth century to the present. *Id.*

192. *Id.* Justice O'Connor asserted that an experienced trial attorney could recognize potential bias in jurors without being able to justify it sufficiently to satisfy a challenge for cause. *Id.* For a criticism of the "intuitive" approach to exercising peremptory challenges, see Swift, *supra* note 9, at 362-63 (advocating a complete ban on intuitive challenges because the decision is not reviewable by trial courts).

193. *J.E.B.*, 114 S. Ct. at 1431. Expressing confidence in an attorney's intuition Justice O'Connor asserted that "[o]ur belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *Id.*

194. *Id.* In addition, Justice O'Connor advocated limiting the Court's decision to challenges exercised by the state. *Id.* The private litigant and the criminal defendant are not state actors and as such should not be bound by the same restraints that prohibit the states from discriminating. *Id.* at 1432. In her opinion, the holding in *J.E.B.* should be limited to its facts, where the state acts to discriminate based on gender; rather than encompass the decisions of *Powers* and *McCullum* which hold that, for purposes of jury selection, a private party is a state actor. *Id.* at 1433.

195. *Id.* (Kennedy, J., concurring). Justice Kennedy traced the evolution of precedents directing the majority to its conclusion. *Id.* First, *Strauder v. West Virginia*, 100 U.S. 303 (1880), declared that the Fourteenth Amendment prohibits states from enacting laws banning African-Americans from jury service. *Id.*; see *supra* note 49 (discussing the Court's conclusion in *Strauder*). Next, *Craig v. Boren* held that gender-based classifications are presumptively invalid and are subject to heightened scrutiny. 429 U.S. 190, 204-05 (1976); see *supra* note 35 and accompanying text (discussing the heightened scrutiny analysis as applied to gender-based classifications). Finally, *Duren v. Missouri* held that discrimination in jury selection that results in under-representation of women is impermissible. 439 U.S. 357, 360 (1979).

gender discrimination in jury selection generally.¹⁹⁶ This precedent, according to Justice Kennedy, requires refining the analysis to prohibit gender discriminatory peremptory challenges specifically.¹⁹⁷ Jurors, he continued, are called to decide a case as representatives of the community, not on the basis of their gender.¹⁹⁸ Justice Kennedy concluded that the judicial system should condemn discrimination in jury selection just as it condemns jurors who decide factual issues according to their individual prejudices.¹⁹⁹

*C. The Dissent: Finding Gender-Based Peremptory Challenges
Acceptable as a Matter of Biology and Policy*

Chief Justice Rehnquist dissented, arguing that significant distinctions between race and gender warrant not extending *Batson* to prohibit gender-based peremptory challenges.²⁰⁰ That Equal Protection jurisprudence accords these classifications different levels of scrutiny is clear evidence of a distinction.²⁰¹ Further, differences in the biologies and experiences of the two genders necessitate a realization that gender differences may affect the jury's decision.²⁰²

Justice Scalia, also dissenting,²⁰³ noted that the petitioner used all but one of his peremptory challenges to remove women from the jury.²⁰⁴ Applying the majority's reasoning, then, the petitioner inflicted injury

196. *J.E.B.*, 114 S. Ct. at 1433-34 (Kennedy, J., concurring).

197. *Id.* at 1434. Justice Kennedy argued that the Equal Protection Clause is predicated on the belief of individual rights. *Id.* The injury to the excluded juror is the same whether he impermissibly has been excluded from jury service because of a law banning his gender or because a litigant has used a peremptory challenge to strike him because of his gender. *Id.*

198. *Id.* Justice Kennedy stressed that "[n]othing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice." *Id.*

199. *Id.* (suggesting that a juror who is guided by his prejudice when deciding a case abandons his oath).

200. *Id.* at 1434-35 (Rehnquist, C.J., dissenting).

201. *Id.* at 1435. In addition, Chief Justice Rehnquist argued that gender classifications do not warrant as strict a judicial standard as racial classifications because the population in our society is almost evenly divided between the genders. *Id.*

202. *Id.* In Chief Justice Rehnquist's opinion, this factor could establish the required showing that gender discrimination substantially furthers the state's legitimate interest in securing a fair trial. *Id.*

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

204. *Id.* at 1436-37. Justice Scalia argued that, insofar as the petitioner was just as guilty as the respondent of using peremptory challenges in a discriminatory manner, the Court's decision "illustrates why making restitution to Paul when it is Peter who has been robbed is such a bad idea." *Id.* at 1437. He also argued that any error in the striking of jurors certainly was harmless as the scientific evidence presented at trial established that the petitioner was the father of the child with 99.92 percent accuracy. *Id.*

upon the excluded female jurors.²⁰⁵ Justice Scalia, however, found this acceptable because both men and women are equally subject to a peremptory strike, and thus neither group is denied equal protection.²⁰⁶ The strikes in this case only indicated each party's attempt to assemble a jury that would be most favorably disposed to its case.²⁰⁷

III. STRIKING THE BALANCE

A. *The Incompatible Goals of an Impartial Jury and the Elimination of Gender Discrimination in Jury Selection*

In *J.E.B.*, the Court was compelled to weigh the competing interests involved when discrimination is alleged in the exercise of peremptory challenges.²⁰⁸ In striking this balance, the Court weighed a litigant's interest in securing an impartial jury²⁰⁹ against society's interest in the elimination of invidious discrimination in the jury selection process.²¹⁰ The Court reasoned that the harm caused by gender-based peremptory challenges outweighs the interest in an impartial jury.²¹¹ Thus, the Court impliedly ruled that it is willing to sacrifice the traditional view of an

205. *Id.* at 1437.

206. *Id.* Justice Scalia argued that it would be unacceptable if both parties systematically struck jurors of a certain group, "so that the strikes evinced group-based animus and served as a proxy for segregated venire lists." *Id.*

207. *Id.* Justice Scalia, agreeing with Justice O'Connor, expressed his concerns that the majority's decision will initiate extensive collateral litigation in the jury selection process especially in criminal cases, where a defendant is not concerned with efficiency or cost. *Id.* at 1439.

208. *Id.* at 1425.

209. *Id.* at 1425-26. The majority commented that the state has a legitimate interest in employing peremptory challenges to ensure a fair and impartial jury. *Id.* at 1429; *see supra* notes 1-3 and accompanying text (discussing the right to a jury trial).

210. *J.E.B.*, 114 S. Ct. at 1425-26; *cf.* *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986) (holding that "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions [stereotypes], which arise solely from the jurors' race").

211. In his concurrence in *Georgia v. McCollum*, Justice Thomas maintained that the Court's decision signaled its willingness to sacrifice the rights of a criminal defendant to protect the rights of a juror. 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring). In *McCollum*, the Court refused to permit a criminal defendant from exercising race-based peremptory challenges in a racially charged trial. *Id.* at 2359. In *Edmonson v. Leesville Concrete Company*, the Court ruled that a civil litigant may not discriminate in the exercise of peremptory challenges in selecting the jury that will try his case. 500 U.S. 614, 630 (1991).

impartial jury rather than allow discrimination to persist in the courtroom.²¹²

Although the unfettered discretion afforded by peremptory challenges does present the opportunity to discriminate,²¹³ the peremptory challenge nonetheless is an effective means of securing an impartial jury. As Justice O'Connor observed in her concurrence in *J.E.B.*, peremptory challenges allow each party to strike those jurors they believe are least partial to their case, thereby eliminating the extremes of partiality on each side.²¹⁴ The result is the most impartial and unbiased jury possible.²¹⁵

Competing with the interest of achieving an impartial jury is the goal of eliminating state-sanctioned discrimination in jury selection and the Court's dedication to protecting the rights of the excluded juror.²¹⁶ Gender discrimination in the selection of juries denies the excluded juror the opportunity to participate in the administration of justice.²¹⁷ It also subjects the excluded juror to the public humiliation of having been denied this opportunity.²¹⁸ Because, by nature, peremptory challenges are exer-

212. Of course, where there are concrete reasons for concluding that jurors' prejudices will interfere with their ability to decide the issue impartially, the juror will be subject to a challenge for cause. *J.E.B.*, 114 S. Ct. at 1429.

213. *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). For a discussion of some of the more prominent cases in which peremptory challenges have been used to eliminate racial groups from the petit jury, see *VAN DYKE*, *supra* note 2, at 155-56.

214. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring) (quoting *Holland v. Illinois*, 493 U.S. 474, 484 (1990)). Ideally, peremptory challenges should be exercised with the goal of seating an impartial jury, they should not be used by a party "to shape a jury to ensure a favorable decision." Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 716 (1993). *But see Beyond Batson*, *supra* note 165, at 1931-32 (arguing that gender-based peremptory challenges do not further the interest of jury impartiality).

215. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring).

216. *Strauder v. West Virginia*, 100 U.S. 303 (1880) (stating that the elimination of discrimination in jury selection invokes the mandate of the Equal Protection Clause of the United States Constitution); see *Batson*, 476 U.S. at 84 (holding that racial discrimination in the exercise of peremptory challenges violates the Fourteenth Amendment); see also *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

217. *J.E.B.*, 114 S. Ct. at 1430. Given the Court's unwavering adherence to the principle drawn from *Batson*, it clearly is axiomatic that a juror has a right not to be excluded from jury service because of certain traits, and is therefore injured when excluded based on nothing more than race or gender. See *id.* at 1427; see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 600, 619 (1991); *Powers v. Ohio*, 499 U.S. 400, 411 (1991), *cert. denied*, 115 S. Ct. 366 (1994); *Batson*, 476 U.S. at 87; *Beyond Batson*, *supra* note 165, at 1936 (arguing that "[b]ecause juries are supposed to represent the conscience of the community, the exclusion of individuals based on gender signals that the targeted gender does not belong to the political community").

218. *Cf. Powers*, 499 U.S. at 413-14 (explaining that the injury stems from being excluded not because the person is incompetent to be a juror, but because a litigant has made

cised within the walls of a courthouse,²¹⁹ gender discrimination in this context calls into question the fairness of not only the particular proceeding, but also the judicial system as a whole.²²⁰

B. The Difficulty in Applying J.E.B. v. Alabama ex rel. T.B.

The lower courts, which have the task of implementing *J.E.B.* will have even more difficulty eliminating gender-based strikes than they have had in eliminating racially motivated strikes.²²¹ Various federal circuit court decisions have interpreted *Batson* to allow a challenge so long as it is not "frivolous,"²²² or to accept mere intuition as a valid race-neutral reason for striking jurors.²²³ Courts also have interpreted *Batson* to require that once the prosecutor articulates a race-neutral reason, the burden shifts back to the opponent to show that the proffered race-neutral reasons are

the decision to exclude jurors based on their race). Justice Kennedy, writing for the majority in *Powers* observed that, "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id.*

219. See *Edmonson*, 500 U.S. at 628. The discrimination is even more egregious in the courtroom, according to Justice Kennedy, because of the role that the judicial system plays in securing the rights of a free society. *Id.*

220. See *id.* (arguing that racial discrimination undermines the integrity of the judicial system).

221. Adding to this confusion is the Supreme Court's recent decision in *Purkett v. Elem*, 115 S. Ct. 1769 (1995), where the Court accepted as race-neutral a prosecutor's explanation that he struck two African-American jurors because they had long, unkempt hair, moustaches, and beards. *Id.* at 1771. The Court stated *Batson's* requirement of articulating a race-neutral reason for the strike "does not demand an explanation that is persuasive, or even plausible." *Id.* In dissent, Justice Stevens argued that the Court strayed from the standard established in *Batson* by "the surprising announcement that any neutral explanation, no matter how 'implausible or fantastic,' even if it is 'silly or superstitious,' is sufficient to rebut a prima facie case of discrimination." *Id.* at 1774 (Stevens, J., dissenting) (citations omitted). Applying this holding to gender-based challenges, lower courts will be required to accept implausible and unpersuasive explanations as gender-neutral. See *infra* notes 222-25 and accompanying text (discussing the inconsistent application of the *Batson* decision by federal court judges). The issue of gender discrimination will arise more often than race discrimination because the population is almost equally divided among the genders whereas there is a great disparity in numbers between the races. See *infra* notes 226-33 and accompanying text (discussing the increased probability that gender can be made an issue in jury selection).

222. *Jones v. Jones*, 938 F.2d 838, 841 (8th Cir. 1991), cited in *Swift*, *supra* note 9, at 360-61 (discussing various lower court interpretations of *Batson*).

223. *United States v. Briscoe*, 896 F.2d 1476, 1489 (7th Cir.), cert. denied, 498 U.S. 863 (1990); *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94 (5th Cir. 1988), cited in *Swift*, *supra* note 9, at 359. According to *Batson*, however, mere intuition is not sufficient to satisfy the requirement that an attorney articulate a neutral reason for striking a juror. *Batson v. Kentucky*, 476 U.S. 79, 98 n.20 (1986). A prosecutor's explanation must be "clear and reasonably specific" and reveal "legitimate reasons" for the challenge. *Id.* (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

pretextual.²²⁴ These interpretations are not consistent with each other, nor are they consistent with *Batson*.²²⁵

It is difficult to conceive of a case where a party could not argue that the opposing party exercised a peremptory challenge based on a gender stereotype prohibited by *J.E.B. v. Alabama ex rel. T.B.* Women and men constitute nearly equal percentages of the population, and, as such, the chances are much greater that when an attorney strikes a juror, gender, as opposed to race, can be made an issue.²²⁶ Whenever an attorney strikes a juror where gender conceivably is an issue, she risks being forced to articulate the reasons for doing so.²²⁷ As Justice O'Connor argued in her *J.E.B.* concurrence, attacks on an attorney's strikes transform the jury selection process from what was once a small part of the trial to the main event.²²⁸ Litigation, generated by allegations of discriminatory jury selection, will be especially frequent in criminal cases where most defendants have little concern for the conservation of time or cost.²²⁹ Good intentions aside, *J.E.B.* will result in additional burdens on the already depleted and overburdened courts.²³⁰ In addition, courts will experience great difficulty in deciding whether the proffered reason is an unacceptable gender-based strike.²³¹ The *J.E.B.* Court did note that the decision

224. *Jones*, 938 F.2d at 844.

225. See *supra* notes 73-80 and accompanying text (discussing the test formulated in *Batson*).

226. *J.E.B.*, 114 S. Ct at 1434-35 (Rehnquist, C.J., dissenting).

227. Commentators have suggested that *Batson*'s requirement that an attorney articulate race-neutral reasons to counter an attack on her exercise of peremptory challenges is nothing more than an exercise in creativity. Swift, *supra* note 9, at 362; see Forman, *supra* note 145, at 59. To eliminate gender discrimination in jury selection, Forman proposes a system of proportional representation. *Id.* at 75. As the genders comprise a relatively equal percent of the population, this would result in juries that were made up of an equal number of women and men. *Id.* Swift argues that only prohibiting all strikes based on subjective and unverifiable data will eliminate the discriminatory use of peremptory challenges. Swift, *supra* note 9, at 362-63. These "soft data" reasons for excluding jurors, such as body language, speech, or intuition of the attorney, are impossible for a judge to analyze effectively. *Id.* "Hard data" reasons, on the other hand, such as employment or level of education, would be permissible if substantially related to the facts of the case. *Id.* at 363-64. Arguably, all attorneys can easily conjure up a race-neutral reason for a peremptory challenge sufficient to survive a *Batson* attack. Forman, *supra* note 145, at 59; Swift, *supra* note 9, at 362. Presumably, it would be just as simple for an attorney to articulate a gender-neutral reason for striking a juror when required to do so.

228. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring).

229. *Id.* at 1439 (Scalia, J., dissenting).

230. See Guinee, *supra* note 9, at 845 (arguing that the application of *Batson* to gender-based peremptory challenges will lengthen voir dire because almost all strikes may be challenged as gender-based, undoubtedly protracting the already slow litigation process).

231. Cf. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (arguing that while a prosecutor could easily assert facially neutral reasons for challenging a juror, courts are ill-equipped to evaluate those reasons); cf. Swift, *supra* note 9, at 362 (noting

still allows parties to strike jurors where the basis for the strike is a characteristic that is disproportionately associated with one gender.²³² Exactly how disproportionate the association must be or whether a certain association is per se impermissible remains unclear.²³³

Courts will be faced with the task of deciphering which strikes are legitimate exercises of peremptory challenges and which are impermissible.²³⁴ Courts will have to balance the interest in obtaining an impartial jury against the excluded juror's interest in participating in the administration of justice.²³⁵ Regardless of the final resolution, however, litigators will

that peremptory challenges based on subjective reasons can mask both overt and covert discrimination). Swift advocated eliminating all peremptory challenges that are not based on objective data because it is impossible for courts to effectively evaluate whether an attorney's intuitive reason is legitimate. Swift, *supra* note 9, at 361-62.

232. *J.E.B.*, 114 S. Ct at 1429. For example, while military service disproportionately is associated with men, it would be permissible for an attorney to strike all persons from the jury who had served in the military. *Id.* at 1429 n.16. In a recent case, however, the Court of Criminal Appeals of Alabama, applying *J.E.B.*, affirmed a lower court's decision which found that a prosecutor's proffered reason for excluding three male jurors was impermissibly gender-based. *Allen v. State*, No. CR 92-1463, 1994 WL 575991 (Ala. Crim. App. Oct. 21, 1994). The prosecutor argued that he struck three jurors because their occupations might have given them special knowledge of gear shifts in tractors. *Id.* at *1. The court found that the occupations (truck driver, mechanic, and construction company employee) were male-dominated and resulted in de facto discrimination. *Id.* The lower court found that "in making a decision to strike these occupations, the State also made a decision to strike males." *Id.*

233. For example, in the prosecution of a defendant for rape, it would seem at first glance that a defense attorney using peremptory challenges to strike all persons from the jury who had previously been the victim of sexual assault would be permissible. Although the challenge is not based on any gender stereotype, it almost certainly will result in the removal of only female jurors. In a recent case where the prosecution objected to the defense's use of peremptory challenges to strike females from the jury, the New York Supreme Court, Appellate Division, ruled that the defense attorney's explanation that he had struck jurors on the basis of their status as crime victims was not pretextual. *People v. Dixon*, 615 N.Y.S. 2d 904, 909 (N.Y. App. Div. 1994). The court found that there "is a rational basis for the suspicion that a crime victim might be less sympathetic to an accused criminal than would a person who has never been victimized by crime." *Id.* Likewise, it would seem that there is a rational basis for concluding that female jurors would be more sympathetic than male jurors to a plaintiff suing the manufacturer of breast implants for causing cancer. This could motivate a defense attorney to exercise peremptory challenges against female jurors to eliminate any possibility of bias in favor of the plaintiff. The rationale for the strikes would not be based on gender stereotypes, although the result would be the same, the elimination of jurors because of their gender.

234. See *supra* notes 231-33 and accompanying text (arguing that courts will have difficulty in evaluating the legitimacy of gender-based strikes).

235. *J.E.B.*, 114 S. Ct. at 1425-26. For gender-based strikes to survive heightened scrutiny, the discrimination must substantially further the State's interest in achieving a fair and impartial trial. *Id.* at 1425. In *Edmonson v. Leesville Concrete Company*, the Court found that, regardless of the parties or causes involved in the action, the sole purpose of the peremptory challenge is to assist in the selection of a fair and impartial jury. 500 U.S. 614, 620 (1991).

have lost the ability to participate in selecting the least partial jury to judge their client. Moreover, litigants who are prohibited from striking jurors and consequently believe them to be partial, will lose some measure of respect for the jury's verdict and the justice system as a whole.²³⁶

C. *Beyond J.E.B. v. Alabama ex rel. T.B.: Future Restrictions on the Exercise of Peremptory Challenges*

Despite the Court's assurances to the contrary,²³⁷ the *J.E.B.* holding clearly diminishes the value of the peremptory challenge. What remains uncertain, however, is exactly how the courts will further restrict their use. Beginning with *Batson* and continuing through *J.E.B.*, the Supreme Court has articulated a rule of law mandating that peremptory challenges not be a vehicle for perpetuating invidious discrimination based on impermissible stereotypes.²³⁸ Under this approach, the same standard must be applied to prohibit the exclusion of other classes of jurors who have been subjected to unlawful discrimination based on group stereotypes.²³⁹ As Justice Scalia noted in his dissent in *J.E.B.*, "we can expect to learn from the Court's peremptory/stereotyping jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not."²⁴⁰

If the Court's holding is carried to its logical conclusion, the exercise of peremptory challenges should be prohibited whenever the characteristic upon which the strike is based is one that has been afforded heightened scrutiny.²⁴¹ Examples of such characteristics include religious affilia-

236. See Forman, *supra* note 145, at 67 (discussing the importance of peremptory challenges in allowing litigants to have some input as to the make-up of the jury that will decide their fate). In *J.E.B.*, Justice Scalia argued that if peremptory challenges give litigants a greater belief in jury impartiality, the challenges are worthwhile because "the appearance of justice is as important as its reality." *Id.* at 1438 n.3 (Scalia, J., dissenting).

237. See *supra* note 166 and accompanying text (discussing the Court's assertions that the effectiveness of the peremptory challenge has not been curtailed).

238. See *Batson* 476 U.S. 79, 89 (1986); *Powers v. Ohio* 499 U.S. 400, 409 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992); *J.E.B.* 114 S. Ct. at 1422.

239. In his dissent in *Batson*, Chief Justice Burger argued that conventional equal protection principles dictate that *Batson*'s prohibition of race-based peremptory challenges apply to gender, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry or profession. *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting); see *supra* notes 81-85 and accompanying text (discussing Chief Justice Burger's dissent in *Batson*).

240. *J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting).

241. See *supra* notes 167-70 and accompanying text (discussing the heightened scrutiny analysis applied in *J.E.B.*). The harm to the parties, to the excluded juror, and to the community as a whole are the same when a person is excluded from the jury based on any characteristic which is accorded heightened scrutiny, not just gender. Harbeck, *supra* note

tion²⁴² and illegitimacy.²⁴³ In previous cases, the Court has found a Constitutional violation where a state discriminates against persons on the basis of either of these characteristics.²⁴⁴ It is not difficult to envision cases where an attorney would rationally conclude that a member of a

214, at 713; see *supra* notes 174-82 and accompanying text (discussing the harms inflicted when a juror is improperly excluded on the basis of gender).

242. See *Larson v. Valente*, 456 U.S. 228, 246-47 (1982) (applying strict scrutiny to invalidate a Minnesota statute that imposed registration and reporting requirements upon religious organizations soliciting more than 50% of their funds from nonmembers). Recently, however, the Supreme Court denied certiorari in *Davis v. Minnesota*, 114 S. Ct. 2120 (1994). In *Davis*, after the petitioner objected to the prosecutor's strike of an African-American juror, the prosecutor asserted that she struck the juror on the grounds that he was a Jehovah's Witness, and in her experience persons of that faith were reluctant to exercise authority over fellow men. *Id.* at 2121 (Thomas, J., dissenting from denial of certiorari). Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari, arguing that the principles of *J.E.B.* compel prohibiting the exercise of peremptory challenges based on religious affiliation. *Id.* He argued that:

In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed "heightened" or "intermediate" scrutiny, *J.E.B.* would seem to have extended *Batson's* equal protection analysis to all strikes based on the latter category of classifications—a category which presumably would include classifications based on religion.

Id. (citations omitted).

Recently, however, the Court of Criminal Appeals of Texas has extended the rule in *Batson* to prohibit religious-based peremptory challenges. *Casarez v. State*, No. 1114-93, 1994 WL 695868 (Tex. Crim. App. Dec. 14, 1994). In *Casarez*, the defendant, charged with aggravated sexual assault, objected on *Batson* grounds to the prosecutor's use of peremptory challenges against two African-Americans. *Id.* at *1. The State responded that it had not struck the jurors on the basis of race, but because of their Pentecostal religion. *Id.* The defendant objected again arguing that the challenge based on religion violated the Equal Protection Clause. *Id.* The trial court overruled the objection and the defendant appealed. *Id.* The Court of Criminal Appeals relied on state court decisions and decisions of the United States Supreme Court including *Larson v. Valente* to conclude that classifications based on religion are afforded heightened scrutiny. *Id.* at *8. The Court reversed the conviction finding that the same reasons for prohibiting race-based peremptory challenges in *Batson* and gender-based challenges in *J.E.B.* apply to peremptory challenges based on religion. *Id.* at *10.

243. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding that a Pennsylvania statute that set a six-year statute of limitations for paternity actions did not withstand heightened scrutiny and thus violated the Equal Protection Clause); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (holding that a New York statute requiring a judicial finding of paternity to permit an illegitimate child to inherit through intestate succession was substantially related to an important state interest). The Court repeatedly has applied heightened scrutiny analysis when considering a classification based on illegitimacy. *Lalli*, 439 U.S. at 265; *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); *Clark*, 486 U.S. at 461.

244. See *Larson*, 456 U.S. at 246-47 (applying strict scrutiny to invalidate a Minnesota statute that imposed registration and reporting requirements upon religious organizations that solicit more than 50% of their funds from nonmembers); *Clark*, 486 U.S. at 463-65 (holding that a Pennsylvania statute which set a six-year statute of limitations for paternity actions did not withstand heightened scrutiny and, thus denied illegitimate children equal protection as mandated by the Fourteenth Amendment).

certain religious group or a person who was born out of wedlock would be more sympathetic to the opposing party. This could precipitate the exercise of a peremptory challenge absent the requisite "challenge for cause" foundation. These areas are likely to be the next logical expansions of the *Batson/J.E.B.* principle, but how far the Court will extend this line of cases in the interests of eliminating invidious discrimination is, as yet, unknown.

IV. CONCLUSION

In *J.E.B.*, the Supreme Court ruled that the interest in eliminating gender discrimination from the courtroom outweighs the traditional view of the unfettered peremptory challenge. The analysis that the Court employed to prohibit race-based peremptory challenges applies equally to other classifications where the Court has condemned historic discrimination. As the Court continues to expand upon the *Batson* line of cases, there will remain fewer instances where an attorney can legitimately exercise a peremptory challenge. Although the Court might never actually eliminate the peremptory challenge altogether, continued expansion of the *Batson* principles eventually could render peremptory challenges unavailing in most circumstances.

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