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When Worlds Collide: Peremptory Challenges, Gender, and Indeterminate Scrutiny in J.E.B. v. Alabama

Kevin A. Ashley

NOTES

WHEN WORLDS COLLIDE: PEREMPTORY CHALLENGES, GENDER, AND INTERMEDIATE SCRUTINY IN *J.E.B. V. ALABAMA*

Kevin A. Ashley[*] [**]

I. INTRODUCTION 262

II. PEREMPTORY CHALLENGES: THE PRE-*BATSON* LEGACY 263
- A. *The Traditions of the Jury and Peremptory Challenges* 263
- B. *The Traditions of Jury, Peremptories, and Discrimination* 265

III. *BATSON* AND ITS PROGENY 267
- A. Batson v. Kentucky 267
- B. *"Doctrine Creep": The Post-*Batson *Expansions* 268

IV. THE EVOLUTION OF INTERMEDIATE SCRUTINY 271
- A. *Gender Discrimination: A Legacy of Indifference* 271
- B. *Gender Discrimination: In Search of a Standard* 272
- C. *Intermediate Scrutiny* 277
- D. *The Post-*Craig *Flux* 278

V. WHEN WORLDS COLLIDE 283
- A. *Near Miss:* Taylor v. Louisiana 283

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B. *Collision:* J.E.B. v. Alabama 284
C. *Sorting Through the Rubble* 285

VI. AFTER WORLDS COLLIDE 287
A. *Analysis* 287
B. *A Better World* 289

VII. CONCLUSION 290

If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . .[1]

Oliver Wendell Holmes

I. INTRODUCTION

The United States Supreme Court's 1986 decision in *Batson v. Kentucky*[2] marked a turning point in applying the Equal Protection Clause in criminal jury trials.[3] Before *Batson*, the Court never had placed severe restraints on the use of peremptory challenges by prosecutors.[4] Within six years, the Court quickly extended *Batson* to the civil arena, clearly announcing total intolerance for any kind of racial strikes during jury selection.[5]

In 1994, the Court decided *J.E.B. v. Alabama*,[6] marking the extension of not only the *Batson* test, but also the entire *Batson* rationale, to gender-based classifications during jury selection.[7] The *J.E.B.* opinion unceremoniously broadens *Batson* to an entirely new field of play, without critically reviewing the underlying constitutional doctrines at stake.[8] The purpose of

1. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).
2. 476 U.S. 79 (1986).
3. *See* Jere W. Morehead, *Exploring the Frontiers of* Batson v. Kentucky: *Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289, 292 (1990).
4. *Id.*
5. Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will* Batson *Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289, 312 (1993).
6. 114 S. Ct. 1419 (1994).
7. *See id.* at 1421.
8. *See id.* at 1432-33 (O'Connor, J., concurring); *id.* at 1438-39 (Scalia, J., dissenting) (stating that extending *Batson* will burden the entire justice system).

this Note is to provide a more complete framework for the *J.E.B.* opinion by analyzing those fundamental doctrines, and suggesting a conclusion to *J.E.B.* more faithful to the Court's teachings.

Part II begins this analysis by reviewing the history, tradition, and purpose of peremptory challenges in both the English and American systems of justice. Part III continues examining peremptory challenges, focusing on the Court's previous efforts to balance carefully equal protection and peremptory challenges. Part IV presents the final doctrinal inquiry of the Note by analyzing the Court's treatment of gender-based classifications through the evolution and application of intermediate scrutiny. Part V discusses the collision of these doctrines which occurs in *J.E.B.*, and highlights the Court's lack of adherence to its own prior decisions. Part VI continues the discussion by proposing a solution in *J.E.B.* more consistent with two decades of Court opinions and six centuries of legal tradition.

II. PEREMPTORY CHALLENGES: THE PRE-*BATSON* LEGACY

A. *The Traditions of the Jury and Peremptory Challenges*

Trial by jury was first used in actions of trespass in late twelfth century England.[9] Until 1305, the King's lawyers were allowed to disqualify unlimited numbers of jurors simply by invoking the King's name.[10] In 1305, Parliament eliminated prosecutors' use of peremptory challenges, allowing challenges only for cause.[11] Although prosecutors were later allowed to "stand-aside" jurors,[12] prosecutorial use of the peremptory was gone forever. Criminal defendants, though, still were allowed to exercise up to thirty-five peremptory challenges[13] against any juror suspected of prejudice against them.[14] Blackstone described the peremptory challenge

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9. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 64 (2d ed. 1979). A trespass joined in issue by the parties caused the Sheriff to command 12 neighborhood men to inquire in the matter and state the truth of the facts. *Id.* The trial by jury of criminal defendants became widespread after the Church stopped using the "ordeal" to decide cases in 1215. *Id.* By the 14th century, juries had begun to take on a judicial character and the trial by facts became firmly separated from the application of law. *Id.* at 65-66. Before long, the distinction between "law" and "facts" became a principle sacred to generations of Englishmen that they should be judged by their peers, and not by meddling judges. *Id.* at 66.

10. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 9 (1990).

11. *Id.*

12. *Id.* at 10. Colbert describes the "stand-aside" as "distinguishable from the peremptory challenge in one important respect: a juror directed to 'stand-aside' may eventually be selected to serve on the jury; a juror peremptorily stricken is permanently excused and disqualified." *Id.* at 10 n.34. If jury selection could not be completed because too many jurors had been stricken by the defendant, or because of too many "stand-asides," jurors would then be selected from the "stand-aside" pool. *Id.*

13. Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of* McCollum, 70 DENV. U. L. REV. 313, 317 n.16 (1993).

14. Colbert, *supra* note 10, at 9 (quoting J. PROFATT, A TREATISE OF TRIAL BY JURY § 155, at

as based upon "sudden impressions" and "unaccountable prejudices" which we are unable to articulate, but still sense from looks and gestures.[15]

Although the English jury system underwent many subsequent changes through the eighteenth century, criminal defendants retained the right to peremptories based on two rationales.[16] First, the Crown had inherent advantages in criminal proceedings, and peremptories helped to balance the defendant's position.[17] Second, by allowing the defendant to strike jurors without cause, jury verdicts appeared more legitimate and worthy of respect.[18]

This legacy of the peremptory challenge found continued life in the American colonies, and persisted after independence from England.[19] In 1865, Congress voted to allow prosecutors a limited number of peremptories in federal criminal trials.[20] Advocates argued that the challenges were necessary to combat jury sympathy for defendants.[21] Today, prosecutorial peremptories remain in the federal courts,[22] and have existed in every state since 1919.[23] Although the Supreme Court held in *Stilson v. United States*[24] that peremptory challenges were not constitutionally guaranteed,[25] the endurance and widespread application of

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210-11 (1877)).

15. Colbert, *supra* note 10, at 10 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346-47 (Philadelphia, Robert Bell 1772)). Blackstone further wrote that the peremptory challenge had survived because of a sense of "tenderness and humanity to prisoners. . . . [A] prisoner . . . should have a good opinion of his jury. . . . [T]he law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike." *Id.*

16. Zalesne & Zalesne, *supra* note 13, at 317.

17. *Id.* The Crown's greatest advantage was that agents of the King controlled the larger panel of potential jurors from which the petit jury was drawn. *Id.*

18. *Id.* at 318.

19. *Id.* at 318-19. Although the final draft of the Sixth Amendment did not mention use of peremptory challenges by prosecutors or defendants, Congress codified the common-law rule in 1790, providing peremptory challenges to defendants, but not to prosecutors. Colbert, *supra* note 10, at 10-11.

20. Colbert, *supra* note 10, at 11 & n.38 (citing Act of Mar. 3, 1865, ch. 86, § 2, 13 Stat. 500). In capital and treason cases, the prosecution received five peremptory challenges, and the defense received 20. *Id.* In noncapital felonies, the prosecution received two challenges, and the defense 10. *Id.*

21. *Id.* at 11-12.

22. FED. R. CRIM. P. 24(b).

23. *See* Colbert, *supra* note 10, at 11 n.39. Given the facts surrounding *J.E.B. v. Alabama*, *see infra* text accompanying notes 228-32, it is somewhat ironic that Alabama was the first state to approve a prosecutor's peremptory challenge law in 1820. Colbert, *supra* note 10, at 11 n.39.

24. 250 U.S. 583 (1919).

25. *Id.* at 586. The Court upheld a lower court conviction of two defendants under the Espionage Act, ch. 30, 40 Stat. 217 (1917) (current version in scattered sections of 18, 22, and 50 U.S.C. (1988)). *Stilson*, 250 U.S. at 586. Writing for the Court, Justice Day stated that "[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants

peremptories stand as a testament to their continuing value and utility.[26]

B. *The Traditions of Jury, Peremptories, and Discrimination*

Strauder v. West Virginia[27] represents the Supreme Court's first attack on discrimination in jury selection using the Equal Protection Clause.[28] The West Virginia statute at issue provided that only white males could serve as jurors.[29] Although the Court held that the statute was unconstitutional under the Fourteenth Amendment,[30] the Court's opinion did not address the use of the peremptory challenge.[31] As a result, both nondiscriminatory and discriminatory uses of peremptories were allowed to continue, including race-based jury exclusions.[32] Although the purpose of the peremptory challenge was for the protection and peace of mind of defendants as well as the public at large,[33] unfettered use of peremptories was clearly in conflict with the very purpose of the Equal Protection Clause.[34] Still, it was eighty-five years before the Court addressed the discriminatory use of peremptory challenges in *Swain v. Alabama*[35] in 1965.

Swain, a young black man, argued that his conviction for the rape of a white woman violated the Equal Protection Clause because the prosecutor had struck all six black venire members.[36] Even though the Court was aware that peremptory challenges could be applied for discriminatory purposes, it was unwilling to sacrifice peremptories because of imperfec-

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in criminal cases; trial by an impartial jury is all that is secured." *Id.*

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

27. 100 U.S. 303 (1879).

28. Zalesne & Zalesne, *supra* note 13, at 323 n.53.

29. *Strauder*, 100 U.S. at 305.

30. *Id.* at 310.

31. *See id.*

32. *See* Swain v. Alabama, 380 U.S. 202, 231 (1965) (quoting the 1961 report of the United States Commission on Civil Rights, which concluded that "[t]he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th amendment [sic]").

33. Zalesne & Zalesne, *supra* note 13, at 317-18.

34. *See Strauder*, 100 U.S. at 306-07. The *Strauder* Court leaned heavily upon the language of the *Slaughter-House Cases* in arriving at its conclusion. *See id.* The Court had held in *Slaughter-House* that

> [n]o one can fail to be impressed with the one pervading purpose found in . . . all [the amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

In re Slaughter-House Cases, 83 U.S. 36, 71 (1872).

35. 380 U.S. 202 (1965), *modified*, Batson v. Kentucky, 476 U.S. 79 (1986).

36. *Id.* at 203, 209-10.

tions in their use.[37] In fact, the Court placed great weight on the history and purpose of peremptory challenges.[38] The Court concluded that peremptory challenges served important purposes in a pluralistic society and by definition were to be used without justification.[39] In the end, the *Swain* Court held that the Equal Protection Clause prohibited prosecutors from using peremptories to systematically exclude prospective jurors from the petit jury based on their race.[40]

The *Swain* majority defined "systematic exclusion" as requiring the defendant to demonstrate that the prosecutor had engaged in race-based exclusions in many cases.[41] Because Swain could not meet this burden, his conviction was upheld.[42] To the dissent, requiring a showing of systematic exclusion imposed "substantial additional burdens" upon the objecting party.[43] The Supreme Court would later describe this requirement as "a crippling burden of proof."[44]

In the years following *Swain*, courts and commentators largely condemned the decision.[45] Some criticized the seemingly impossible standard that the Court established, others denounced the Court's endorsement that group affiliations interfere with jurors' impartiality, and many condemned the implicit exultation of peremptory challenges over equal protection.[46] Although the *Swain* Court held that the Equal Protection Clause out-

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37. *Id.* at 209.

38. *Id.* at 220 ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."); *id.* at 221-22 ("To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory. . . ."). The majority concluded that

> [i]n the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case.

Id. at 222.

39. *Id.* at 220, 222.

40. *Id.* at 223-24.

41. *See id.*; Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 6 (1992).

42. *Swain*, 380 U.S. at 224, 228.

43. *Id.* at 242 (Goldberg, J., dissenting).

44. *Batson*, 476 U.S. at 92.

45. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 387 (1992).

46. *Id. Swain* also was frequently criticized because the burden of proving purposeful discrimination was virtually impossible, as few jurisdictions maintained records of how a given prosecutor had used peremptory challenges in other cases. *Id.* Requiring a showing of systematic exclusion also turned on the fortuity of whether a defendant was among the first or the last victims of a prosecutor's discriminatory use of peremptory challenges. *Id.*

weighed peremptory challenges,[47] the Court also recognized the great value of peremptory challenges and hesitated to deprive litigants of the right to reject biased jurors.[48] More than twenty years elapsed before the Court again addressed the racially discriminatory use of peremptory challenges in *Batson v. Kentucky*.[49]

III. *BATSON* AND ITS PROGENY

A. Batson v. Kentucky

Batson had been indicted for second-degree burglary and receipt of stolen goods.[50] At trial, the prosecutor used his peremptory challenges to strike all four black venirepersons.[51] When Batson's counsel objected on the basis that Batson also was black, the Court answered that parties were allowed to use peremptory challenges in any way they desired.[52] The resulting all-white jury convicted Batson on both charges.[53]

In deciding *Batson*, the Court fashioned a test clearly rejecting *Swain*'s systematic exclusion standard.[54] Where *Swain* required the defendant to establish a pattern of racially-discriminatory peremptory challenges over many cases,[55] *Batson* redirected the inquiry to the case at hand.[56] First, the defendant must show membership in a cognizable racial group.[57] Second, the defendant must show that the prosecutor struck members of the defendant's racial group during voir dire.[58] Third, the facts and other relevant indicators must raise an inference of racial discrimination by the prosecutor.[59]

After the defendant establishes this prima facie case of discrimination,

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47. *Swain*, 380 U.S. at 223-24.
48. *Id.* at 221-22.
49. 476 U.S. 79 (1986).
50. *Id.* at 82.
51. *Id.* at 83.
52. *Id.*
53. *Id.*
54. *Id.* at 92-93.
55. *See id.* at 91-92 (quoting *Swain*, 380 U.S. at 223).
56. *Id.* at 95. In refocusing the inquiry to the case at hand, the *Batson* majority explained that the idea that several must suffer discrimination before one can object was inconsistent with the Equal Protection Clause. *Id.* at 96. The Court also noted that decisions under Title VII recognized the capacity of plaintiffs to establish a prima facie case by relying solely on the facts of their case. *Id.* at 96 nn.18-19 (discussing cases of disparate treatment under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17)).
57. *Id.* at 96. The Court stated that defendants are "entitled" to rely upon the fact that peremptory challenges are a jury practice which give those with a mind to discriminate an opportunity to discriminate. *Id.*
58. *Id.*
59. *Id.*

the burden shifts to the prosecutor to establish a neutral explanation for dismissing black jurors.[60] Although the explanation need not reach the standard of a challenge for cause, any challenge exercised due to race-based assumptions fails.[61] In supporting its decision, the *Batson* Court discussed how racial discrimination in jury selection harms the accused and undermines public confidence in the justice system.[62] The Court also explained that the Fourteenth Amendment's purpose of ending governmental discrimination against blacks necessitated this encroachment on peremptory challenges.[63]

Throughout the majority opinion, the Court was careful not to completely overrule *Swain*.[64] Although the Court rejected *Swain*'s systematic exclusion test,[65] the Court did not argue with *Swain*'s valuation of peremptory challenges.[66] Instead, the *Batson* majority continued to embrace peremptory challenges, noting that peremptories serve in the selection of impartial juries and contribute to the administration of justice.[67] Thus, the Court saw the fault in *Swain* as being the failure to recognize the harm suffered by defendants because of discrimination.[68] As such, the *Batson* Court was not challenging or disavowing the value of the peremptory challenge, but the Fourteenth Amendment's command to eliminate racial discrimination clearly had to take precedence.[69]

B. *"Doctrine Creep": The Post-*Batson *Expansions*

During 1991 and 1992, the Court expanded *Batson* to the declaration that all racial strikes would be suspect in jury selection, irrespective of the case or party involved.[70] Of the three cases most expansive of *Batson*,

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60. *Id.* at 97.

61. *Id.* at 97-98.

62. *Id.* at 87.

63. *Id.* at 97-98.

64. *Id.* at 100 n.25. The footnote stated, "To the extent that anything in *Swain v. Alabama* is contrary to the principles we articulate today, that decision is overruled." *Id.* (citation omitted); *infra* notes 65-67 and accompanying text.

65. *Batson*, 476 U.S. at 95-96.

66. *Id.* at 99 n.22. In a concurring opinion, Justice Marshall wrote that "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Id.* at 102-03 (Marshall, J., concurring). In reply, the majority stated that "[w]hile we respect the views expressed in Justice Marshall's concurring opinion . . . we [do not] think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished. . . ." *Id.* at 99 n.22.

67. *Id.* at 87-88.

68. *See id.*

69. *See id.* at 88.

70. *See* Lynch, *supra* note 5, at 312-13. Professor Lynch explains that, in the post-*Batson* expansion cases, the Court was very willing to interpret other legal principles in such a way as to give the Equal Protection Clause more power and scope in curtailing discriminatory uses of peremptory chal-

Powers v. Ohio[71] set the pace for a broad interpretive framework.[72] Therefore, examining the expansion should begin with a look at *Powers*.

In *Powers*, a white defendant objected to the prosecutor's exclusion of black veniremembers.[73] The Court held that a criminal defendant may object to race-based peremptory challenges, regardless of whether the defendant and the excluded juror are of the same race.[74] The Court conceded that *Batson* had been premised upon prosecutors removing from the venire members who shared the same race as the defendant.[75] Yet, in fashioning a majority opinion, Justice Kennedy and six others agreed that criminal defendants have standing to raise the equal protection claims of excluded jurors.[76] In fact, the majority saw the value of participation as a juror[77] as rising to the same level of importance as public faith in jury determinations.[78] By focusing on the harm that the discriminatory use of peremptory challenges causes to excluded jurors,[79] the Court reshaped *Batson* from a protection and remedy for defendants to one imbuing to individual excluded jurors as well.[80]

During the same term as *Powers*, the Court also expanded *Batson* in deciding *Edmonson v. Leesville Concrete Co.*[81] Although *Batson* and *Powers* were criminal cases,[82] *Edmonson* extended *Batson* to the civil arena.[83] To do so, the Court had to find that the actions of civil parties

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lenges. *Id.* at 313.

71. 499 U.S. 400 (1991).

72. *See* Broderick, *supra* note 45, at 396. Even Judge Broderick, arguing *for* the complete abolishment of the peremptory challenge, concedes that *Powers* was a "significant amplification" of the *Batson* and *Strauder* decisions. *See id.*

73. *Powers*, 499 U.S. at 402. Powers, a white man, was indicted in an Ohio court on two counts of aggravated murder and one count of attempted aggravated murder. *Id.* In selecting the jury, the prosecutor used six of nine peremptories to strike blacks from the jury. *Id.* at 403.

74. *Id.* at 404.

75. *Id.* at 406; *see supra* text accompanying note 52.

76. *Powers*, 499 U.S. at 415.

77. *Id.* at 409.

78. *See id.* at 411-14. *See generally* Zalesne & Zalesne, *supra* note 13, at 318 (stating that the peremptory challenge has legitimized the jury system in the public's eyes since its adoption in America).

79. *Powers*, 499 U.S. at 406.

80. *Id.* at 409. Justice Kennedy wrote that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* Justice Scalia, joined by Chief Justice Rehnquist, argued that *Batson* required racial identity between the defendant and the excluded jurors. *Id.* at 420 (Scalia, J., dissenting). Justice Scalia also argued that extending *Batson* to strikes of individual jurors would effectively abolish the peremptory challenge. *Id.* at 425 (Scalia, J., dissenting).

81. 500 U.S. 614 (1991).

82. *See supra* notes 50, 73 and accompanying text.

83. *Edmonson*, 500 U.S. at 616. Edmonson, a construction worker, was injured when a Leesville employee allowed a company truck to roll backward, pinning Edmonson against other construction equipment. *Id.* Edmonson was a black man, and Leesville used two of its three peremptories in remov-

qualified as state action under the Fourteenth Amendment.[84] In another opinion penned by Justice Kennedy, the majority held that, because peremptory challenges were allowed to exist as a result of government action,[85] civil parties exercised peremptory challenges as government actors.[86] Having overcome that hurdle, the Court easily concluded that racial discrimination in civil-trial selection harmed excluded jurors no less than in criminal trials, and on that basis the prohibition of *Powers* was extended to civil cases.[87]

Although she joined in the Court's opinions in *Batson* and *Powers*, Justice O'Connor dissented in *Edmonson*, joined by Chief Justice Rehnquist and Justice Scalia.[88] Troubled by the majority's state action rationale, Justice O'Connor noted that attorneys for private litigants represent only their clients, not the government,[89] and the government is not responsible for the private litigants' uses of peremptory challenges.[90]

During 1992, the Court placed the final piece of the race-based peremptory challenge puzzle with *Georgia v. McCollum*.[91] Returning to the criminal context, the *McCollum* Court held that the Equal Protection Clause is violated when a criminal defendant's attorney uses peremptory challenges for purposeful racial discrimination.[92] The Court relied upon *Edmonson* for the conclusions that criminal defendants engage in state action when exercising peremptory challenges, and that the State has standing to exert the constitutional rights of excluded jurors.[93] The majority also addressed the effect of its holding upon peremptory challenges,

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ing two blacks from the jury. *Id.* at 616-17. The resulting jury of 11 white persons and 1 black person returned a verdict for Edmonson, but found him 80% contributorily negligent in causing his injuries. *Id.* at 617.

84. *See id.* at 619; Broderick, *supra* note 45, at 401.

85. *Edmonson*, 500 U.S. at 622.

86. *See id.* at 621. In finding state action, the Court also relied upon the court's assistance in exercising the peremptories, the jury system as a traditional function of government, and the fact that the jury trial occurs in the courthouse. *See id.* at 622-23; Lynch, *supra* note 5, at 314.

87. *Edmonson*, 500 U.S. at 619.

88. *Id.* at 631 (O'Connor, J., dissenting).

89. *Id.* at 641 (O'Connor, J., dissenting).

90. *Id.* at 644 (O'Connor, J., dissenting). Justice O'Connor's premise was that, in order to constitute state action, private actions must comprise conduct which only the government traditionally engages in. *Id.* at 640 (O'Connor, J., dissenting). Because peremptory challenges are exercised by both the government and private parties, state action could only occur where it was the government's use of peremptory challenges which had resulted in discrimination. *See id.*

91. 112 S. Ct. 2348 (1992).

92. *Id.* at 2359. Three white defendants had been charged with the assault and battery of two African Americans. *Id.* at 2351. During voir dire, the prosecutor sought an order that if the defense struck jurors in a manner sufficient to support a prima facie case of racial discrimination, the trial court would require a racially neutral explanation. *Id.* at 2351-52. The trial court, and ultimately the Supreme Court of Georgia, denied the order. *Id.* at 2352.

93. *Id.* at 2356-57.

concluding that the administration of justice was served by restricting criminal defendants' use of peremptory challenges instead of allowing for the possibility of race-based strikes.[94]

Ironically, *McCollum* represents the extension of *Batson* to the core of the peremptory challenge's greatest protection: the criminal defendant.[95] For over six centuries, defendants' exercise of peremptory challenges existed relatively unaffected by the shifting legal contours in England and America.[96] But in only six years the prohibition against racially discriminatory peremptory challenges expanded from *protecting* the equal protection rights of defendants, to honoring public interest ideals—even at the risk of *detriment to* criminal defendants.[97] Whereas *Batson* was well grounded in the dictates of the Fourteenth Amendment,[98] thus justifying an imposition on the use of peremptory challenges, *Powers*, *Edmonson*, and *McCollum* each continued to expand farther and farther away from *Batson*'s focus on protecting defendants against racial discrimination.

IV. THE EVOLUTION OF INTERMEDIATE SCRUTINY

A. *Gender Discrimination: A Legacy of Indifference*

Although in 1879 the Court announced in *Strauder v. West Virginia*[99] that racial discrimination was "practically a brand upon" blacks,[100] the discriminatory treatment of women went untreated by the Court for many more years. During most of its existence, the Constitution of the United States has not been interpreted as commanding the equal treatment of men and women; in fact, laws allowing unequal treatment have been the norm.[101] Even after the post-Civil War amendments to the Constitution, women were not allowed to vote, and in many states women could not

94. *See id.* at 2358.

95. *See supra* text accompanying notes 14, 16-17.

96. *See supra* text accompanying notes 9, 14, 16, 19.

97. Zalesne & Zalesne, *supra* note 13, at 329-32. Zalesne and Zalesne explain that the Court's shifting focus from litigating parties to the jurors reflects a willingness to honor communitarian goals, even at the possible expense of criminal defendants. *Id.* The authors further note that although the civil trial context traditionally has accommodated the rights of jurors and litigants, importing this accommodation to the criminal context was "unusual." *Id.*

98. *See Batson*, 476 U.S. at 97-98.

99. 100 U.S. 303 (1879).

100. *Id.* at 308.

101. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (upholding an Oregon statute prohibiting the employment of women in factories for more than 10 hours daily); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176-77 (1874) (holding that although women were "persons" and "citizens" under the Fourteenth Amendment, the right to vote was not a privilege of citizenship and therefore could be denied to women). *See generally* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 918-22 (1983) (discussing the pre-1970 equal protection doctrine and the renewal of the women's movement during the 1960s and 1970s).

enter into contracts, hold property, engage in litigation, or even control their own money.[102]

The first constitutional challenge to the unequal treatment of women occurred in 1873 in *Bradwell v. Illinois*.[103] When Myra Bradwell was denied the right to become a lawyer by the Illinois Bar and the Illinois courts, she appealed to the United States Supreme Court under the Equal Protection Clause.[104] The Court, however, did not believe that the Fourteenth Amendment afforded her any unique protection.[105] In fact, it would be another century before the Court reviewed gender-based classifications under any standard other than the rational basis applied to economic classifications.[106] As such, gender classifications were upheld, if at all, as rationally related to a legitimate government interest.[107]

B. *Gender Discrimination: In Search of a Standard*

Beginning in the 1971 case of *Reed v. Reed*,[108] the Court began viewing gender classifications with suspicion and an eye toward greater protection under the Constitution.[109] In *Reed*, the Court reviewed a provision of the Idaho probate code giving preference to men over women when more than one person sought appointment as the administrator of a

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102. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 162. (Then Professor) Ginsburg stated that, prior to the 1970s, "[t]he Constitution . . . gave women the vote, but only that. In other respects, our fundamental instrument of government was thought an empty cupboard for sex equality claims." *Id.* at 164.

103. 83 U.S. (16 Wall.) 130 (1872).

104. *See id.* at 137-38. Bradwell argued that it was the right of every person to engage in the lawful employment of their choice. *Id.* at 140 (Bradley, J., concurring). The Supreme Court of Illinois had denied her request to join the state Bar, and therefore to practice law, because the common law of the State was that only men were admitted to the Bar, and the legislature had never undertaken to alter the common law. *Id.* (Bradley, J., concurring). In what has become a notorious concurrence, Justice Bradley stated that the idea of a woman adopting a career outside the home, separate from her husband, was "repugnant" and against the "law of the Creator." *Id.* at 141 (Bradley, J., concurring).

105. *See id.* at 138-39. The fact that Bradwell's complaint was based upon gender discrimination, and not racial discrimination, may have been fatal to her case. *See* Francisco Valdez, *Diversity and Discrimination in Our Midst: Musings on Constitutional Schizophrenia, Cultural Conflict, and "Interculturalism" at the Threshold of a New Century*, 5 ST. THOMAS L. REV. 293, 315 n.105 (1993) (observing that the day before it decided *Bradwell*, "the Court took pointed note of the fact that 'the freedom of the slave race' was the overarching 'purpose' and 'foundation' of the [14th] Amendment").

106. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 14.21-.22 (4th ed. 1991).

107. *See id.*

108. 404 U.S. 71 (1971).

109. *See* NOWAK & ROTUNDA, *supra* note 106, § 14.22, at 739. In her article, Professor Freedman explains that the "reemergence of the women's movement" in the 1960s brought about an environment receptive to new "challenges to sex discrimination." Freedman, *supra* note 101, at 921. Two major goals of this renewed movement were to allow women access to opportunities previously enjoyed only by men, and to "obtain equal rewards for women" once those opportunities were attained. *Id.*

decedent's estate.[110] Because of this statutory preference, no hearing was required.[111] The State of Idaho argued that the preference made the appointment process less litigious and thus more efficient.[112] Although the Court did not rule that gender was a "suspect" class like race,[113] the Court struck down the preference.[114]

In a unanimous opinion, Chief Justice Burger stated that giving "a mandatory preference to members of either sex" merely for administrative convenience was precisely the kind of "arbitrary legislative choice forbidden by the Equal Protection Clause."[115] The Court held that dissimilar treatment of men and women was justified only where a rational relationship existed between a State objective and a *difference* between men and women.[116] In other words, a mere rational relationship was no longer sufficient to justify a gender classification: *Reed* required a rational relationship *plus* a difference between men and women.[117]

Reed stood in sharp contrast to other decisions by the Court granting great deference to legislation decisionmaking under the "rational basis" test.[118] Ten years earlier, in *Hoyt v. Florida*,[119] the Court upheld a state law exempting women from jury service, but allowing them to give up their exempt status if they wished.[120] In *Hoyt* and other cases,[121] the Court had in fact justified its decision upon nothing more than administrative convenience.[122] Similar to the Florida legislature in *Hoyt*,[123] the State of Idaho in *Reed* had a persuasive argument that appointing adminis-

110. *Reed*, 404 U.S. at 72-73.

111. *Id.* at 76.

112. *Id.*

113. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that laws "which curtail the civil rights of a single racial group are immediately suspect" and therefore subject "to the most rigid scrutiny").

114. *Reed*, 404 U.S. at 77.

115. *Id.* at 76.

116. *See id.*

117. *See id.*

118. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961) (holding that the equal protection safeguard is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective"). *But see* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (holding that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

119. 368 U.S. 57 (1961).

120. *Id.* at 58, 69.

121. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (holding that as long as the legislative belief was not totally irrational, Michigan could restrict all women who were not the wife or daughter of a bar owner from being bartenders if the legislature believed that by doing so preventive measures against moral and social problems could be reduced), *overruled in part by* Craig v. Boren, 429 U.S. 90 (1976).

122. NOWAK & ROTUNDA, *supra* note 106, § 14.21, at 738-39.

123. *Hoyt*, 368 U.S. at 64.

trators without requiring hearings was similarly convenient.[124] However, in rejecting the State's argument, the Court seemed to be signaling that a new standard was being born. The reach of the new standard remained to be seen.

Two years later, a plurality of the Court in *Frontiero v. Richardson*[125] held that gender-based classifications should receive strict scrutiny.[126] Justice Brennan wrote that both the unfortunate history of sex discrimination in America, and the immutability of sex as a characteristic of birth, compelled the elevation of gender to this heightened status.[127] The legislation at issue denied women in the uniformed services the same dependent benefits as similarly-situated men.[128] Although a majority of the Court struck down the legislation,[129] Justice Brennan's call for strict scrutiny commanded only four votes, and has never been seriously reconsidered by the Court.[130] In fact, almost like a reaction to the *Frontiero* plurality, the Court's next two gender-classification opinions seemed to reiterate the views of some Justices that enough differences existed between race and gender that strict scrutiny would never extend to gender.

In *Kahn v. Shevin*,[131] the Court held that a $500 property tax exemption given to widows, but not widowers, was justified because women were more likely to face difficulties in the job market.[132] Similarly, in *Schlesinger v. Ballard*,[133] the Court ruled that the beneficial treatment afforded to women line officers by the U.S. Navy was warranted because women were restricted from holding combat-related positions in the military.[134] *Kahn* and *Ballard* were both situations where the Court upheld laws which were seen as reasonably compensating women as a class for

124. *See Reed*, 404 U.S. at 76; NOWAK & ROTUNDA, *supra* note 106, § 14.22, at 739.

125. 411 U.S. 677 (1973).

126. *Id.* at 688 (Brennan, J., plurality opinion).

127. *Id.* at 684-87 (Brennan, J., plurality opinion).

128. *Id.* at 678-79 (Brennan, J., plurality opinion). Justice Brennan's plurality opinion was joined by Justices Douglas, White, and Marshall. *Id.* at 678 (Brennan, J., plurality opinion). Justice Stewart concurred in the judgment, agreeing only that the statute invidiously discriminated between men and women. *Id.* at 691 (Stewart, J., concurring). Justice Powell, with Justice Blackmun and Chief Justice Burger, also concurred in the judgment, but specifically rejected the extension of strict scrutiny to sex-based classifications. *Id.* at 691-92 (Powell, J., concurring). Justice Rehnquist dissented. *Id.* at 691 (Rehnquist, J., dissenting).

129. *See id.* at 678-79 (Brennan, J., plurality opinion); *id.* at 691 (Stewart, J., concurring); *id.* at 691-92 (Powell, J., concurring).

130. *See* Freedman, *supra* note 101, at 917 n.13 (describing *Frontiero* as the "high water mark of the effort to obtain strict scrutiny of sex classifications").

131. 416 U.S. 351 (1974).

132. *Id.* at 352-54.

133. 419 U.S. 498 (1975).

134. *Id.* at 508.

past economic discrimination.[135] In both cases, these "benign classifications" would have been struck down had gender achieved strict scrutiny status in *Frontiero*.[136] Instead, the decisions seemed to mark a shift back to the calculus of *Reed*—something more than a mere "rational relationship," but, at least to five Justices in *Frontiero*,[137] something less than strict scrutiny.

During 1975 the Court decided two more gender-classification cases, but without resolving the growing gender-based classification dilemma. In *Weinberger v. Wiesenfeld*,[138] the Court overturned a provision of the Social Security Act awarding survivor's benefits to widows, but not widowers, with dependent children.[139] Justice Brennan again wrote the opinion of the Court, but unlike his *Frontiero* opinion, he made no attempt to invoke strict scrutiny.[140] In fact, Justice Brennan did not specifically mention any standard of review whatsoever.[141] Instead, Justice Brennan characterized *Frontiero* as teaching that "archaic and overbroad" gender classifications were unconstitutional.[142] Justice Brennan wrote that, like *Frontiero*, the provision at issue in *Wiesenfeld* implied that earnings of male workers were more important to a family than were the earnings of female workers,[143] which made the provision "irrational."[144] Simultaneously, Justice Brennan seemed to reject the paternalistic notions embraced in *Kahn* and *Ballard*, stating that the "recitation of a benign, compensatory purpose" did not foreclose an inquiry into the true underlying purposes of a statute.[145] Whether because of his archaic and overbroad characterization, the move away from strict scrutiny, or maybe because of a perceived nod to the irrationality of the legislation,[146] Justice Brennan's

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135. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-27, at 1566 (2d ed. 1988).

136. *See Ballard*, 419 U.S. at 511 (Brennan, J., dissenting); *Kahn*, 416 U.S. at 357 (Brennan, J., dissenting). Professor Gunther coined probably the most well-known description of strict scrutiny when he wrote " 'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In the same article, Professor Gunther noted how the Warren Court had left a legacy of "new equal protection," which "embraced a rigid two-tier attitude." *Id.* at 8.

137. *See* Freedman, *supra* note 101, at 917 n.13.

138. 420 U.S. 636 (1975).

139. *Id.* at 638-39.

140. *See id.* at 642-53.

141. *See id.*

142. *Id.* at 643 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

143. *Id.*

144. *Id.* at 651.

145. *Id.* at 648.

146. Justice Rehnquist filed a concurrence illuminating the disagreements which still belied the question of a standard of review for gender classifications, and the remaining divisions over *Frontiero*. *See id.* at 655 (Rehnquist, J., concurring). Justice Rehnquist wrote:

Wiesenfeld opinion garnered the support of a unanimous Court.[147]

Justice Blackmun's opinion in *Stanton v. Stanton*,[148] decided three months after *Wiesenfeld*, leaned more heavily upon the *Reed* approach.[149] Regarding child-support payments in divorce proceedings, Utah law defined the period of minority for males as extending to age twenty-one, while minority for females ended at age eighteen.[150] The Utah Supreme Court had upheld the statute based upon the "reasonable basis" that women tended to mature and marry earlier.[151] On the other hand, men should be encouraged to get a good education before undertaking their primary responsibility of providing a home.[152] In reversing the Utah court, the Supreme Court specifically noted that it was unnecessary to decide whether gender was an inherently suspect class.[153] Instead, the Court found that the distinction drawn between men and women contained nothing rational.[154]

Despite the Court's inability to precisely define a standard for reviewing gender-based classifications, the four years following *Reed* indicated some growing consensus. The Court never backed down from *Reed*'s holding that rational basis review was insufficient. Likewise, *Frontiero* made clear that gender and race were not constitutionally equivalent: a majority of the Court could not agree to apply strict scrutiny.[155] Still,

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> I see no necessity for reaching the issue of whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero v. Richardson*. . . . I would simply conclude, as does the Court . . . that the restriction of . . . benefits to surviving mothers does not rationally serve any valid legislative purpose. . . . To my mind, that should be the end of the matter.

Id. (Rehnquist, J., concurring).

147. Justice Douglas did not take part in the consideration or decision. *Id.* at 653. Justice Powell also included a concurring opinion in which Chief Justice Burger joined. *See id.* at 654 (Powell, J., concurring). Justice Powell believed the majority opinion went further than it had to, needing not to engage in a discussion of whether the surviving parent elects to assume primary child care. *Id.* at 654 (Powell, J., concurring). Instead, Justice Powell concluded that the statutory scheme impermissibly discriminated, and was supported by "no legitimate governmental interest." *Id.* at 655 (Powell, J., concurring).

148. 421 U.S. 7 (1975).

149. *See supra* notes 108-24 and accompanying text.

150. *Stanton*, 421 U.S. at 9.

151. *Id.* at 10.

152. *Id.*

153. *Id.* at 13.

154. *Id.* at 17. The Court noted that, other than Arkansas, Utah was the only state which still fixed the age for minority at 18 for women and 21 for men. *Id.* at 15. The Court also discussed that the days of women primarily remaining at home to rear children, and only men being employed outside the home, were long past. *Id.* at 14-15.

155. *See Frontiero*, 411 U.S. at 691 (Powell, J., concurring) (stating that the Court need not reach the issue of whether classifications based on sex are inherently suspect and must be subjected to close judicial scrutiny); *id.* at 688 (Brennan, J., plurality opinion) (stating that classifications based on sex should be treated like classifications based on race and should be subject to strict judicial scrutiny).

when *Craig v. Boren*[156] was decided in 1976, with five members of the Court agreeing upon a standard of review previously unknown in gender-classification cases, the Court's discussion was heated.

C. *Intermediate Scrutiny*

In *Craig*, an Oklahoma statute allowed the sale of 3.2% beer to women aged eighteen or older, but not to men under age twenty-one.[157] In striking down the statute, Justice Brennan's majority opinion announced that, based upon unnamed "previous cases," to withstand constitutional challenge, gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives"[158]—so-called "intermediate" scrutiny.[159] This standard seemed to split the difference between the "mere rationality" of legislation needed to withstand rational-basis review and the "compelling purpose" required by strict scrutiny.[160]

In the process of overturning the Oklahoma statute and justifying an intermediate tier of analysis, Justice Brennan mentioned that *Reed* and its progeny had struck down laws based upon "overbroad generalizations" and "outdated misconceptions."[161] Although concerned about the new standard of review,[162] Justice Powell concurred in the judgment, believing the distinction drawn by the Oklahoma statute was not fairly and substantially related to the object of the legislation.[163] Dissenting, Chief Justice Burger tersely stated that making gender a disfavored classification was without independent constitutional basis, and could not be justified under Equal Protection Clause precedent.[164] Justice Rehnquist's more lengthy dissent focused on two aspects of the decision. First, he disagreed that a special level of scrutiny could be justified where the group challenging the classification had not been the subject of historical discrimination.[165] Justice Rehnquist's second disagreement was with the new stan-

156. 429 U.S. 190 (1976).

157. *Id.* at 191-92 n.1.

158. *Id.* at 197.

159. *Id.* at 218 (Rehnquist, J., dissenting).

160. *See* Freedman, *supra* note 101, at 926 n.57.

161. *Craig*, 429 U.S. at 198-99.

162. *See id.* at 210 (Powell, J., concurring). Justice Powell agreed that *Reed* was the most relevant precedent. *Id.* (Powell, J., concurring). He wrote that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Id.* at 210-11 n.* (Powell, J., concurring).

163. *Id.* at 211 (Powell, J., concurring).

164. *See id.* at 216-17 (Burger, C.J., dissenting).

165. *Id.* at 219 (Rehnquist, J., dissenting). Justice Rehnquist also pointed out that, prior to *Craig*, the Court had never applied heightened scrutiny to invalidate discrimination harmful to men, except where a personal interest protected by the Constitution was involved. *Id.* (Rehnquist, J., dissenting). In

dard itself: not found in the Equal Protection Clause, unsupported by precedent, and "apparently com[ing] out of thin air."[166]

D. *The Post-*Craig *Flux*

Since *Craig*, intermediate scrutiny has become a fixture on the constitutional landscape. Although this new level of scrutiny is seen in a variety of forms, each is more or less true to the *Craig* standard.[167] The following cases highlight the more prominent intermediate scrutiny arguments made by the post-*Craig* Court.

In *Califano v. Goldfarb*,[168] decided shortly after *Craig*, the Court reviewed a provision of the Federal Old-Age, Survivors, and Disability Insurance Program (OASDI) which granted greater survivors' benefits to widows than widowers.[169] A plurality of the Court found the provision to be no different than the OASDI provision at issue in *Wiesenfeld*,[170] and invalidated the provision on those grounds.[171] Four Justices dissented, stating that the legislation should be upheld because it focused favorable treatment upon a group that historically showed a high level of need.[172] The dissent further maintained that this case was not like *Wiesenfeld*, where a separate OASDI provision totally excluded widowers from the benefitted class.[173] They argued that the provision did not invidiously discriminate, but in fact ameliorated the characteristic economic depression of widows.[174]

Nineteen days after *Goldfarb*, the Court decided *Califano v. Web-*

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fact, *Wiesenfeld*, *see supra* notes 138-47 and accompanying text, also could have been seen as a case of discrimination harmful to men, but the Court chose to construe the harm as occurring to female workers. *Id.* at 219 n.1 (Rehnquist, J., dissenting). After *Craig*, several other cases, discussed in this Note, ultimately saw the application of intermediate scrutiny for the benefit of men. *See, e.g.*, *infra* notes 168-74 and accompanying text (discussing Califano v. Goldfarb, 430 U.S. 199 (1977)); *infra* notes 204-11 and accompanying text (discussing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)); *infra* notes 228-39 and accompanying text (discussing *J.E.B.*, 114 S. Ct. at 1419).

166. *Craig*, 429 U.S. at 220 (Rehnquist, J., dissenting).

167. TRIBE, *supra* note 135, § 16-32, at 1601-02. Laurence Tribe catalogues the different techniques employed under the rubric of "intermediate scrutiny" into six general types: (1) assessing importance, (2) demanding close fit, (3) altering perspective by focusing on the challenged rule, (4) requiring current articulation, (5) limiting the use of afterthought, and (6) permitting rebuttal. *Id.* § 16-32.

168. 430 U.S. 199 (1977).

169. *Id.* at 201 (Brennan, J., plurality opinion).

170. *Id.* at 205 (Brennan, J., plurality opinion); *see also supra* notes 138-47 and accompanying text (discussing *Wiesenfeld*).

171. *Goldfarb*, 430 U.S. at 217 (Brennan, J., plurality opinion).

172. *Id.* at 233 (Rehnquist, J., dissenting). Justice Rehnquist's dissent was joined by Chief Justice Burger, Justice Stewart, and Justice Blackmun. *Id.* at 224 (Rehnquist, J., dissenting).

173. *Id.* at 241 (Rehnquist, J., dissenting).

174. *Id.* at 242 (Rehnquist, J., dissenting).

ster.[175] Under the Social Security Act, women retirees were granted higher old-age benefits than similarly-situated men, based upon a more generous mathematical formula for establishing the number of wage-earning years.[176] In a per curiam decision, the Court upheld the formula because it compensated women as a group for the effects of past discrimination.[177] In upholding the formula, the Court cited *Kahn* and *Ballard*,[178] again implying that classifications based upon paternalistic notions could be justifiable. The same four Justices dissenting in *Goldfarb*[179] concurred in the *Webster* decision, although they were somewhat baffled by the distinction between the two cases.[180] Surprisingly, *Craig* did not supply the basis for the decisions in either *Goldfarb* or *Webster*, and the contrast between the two cases signaled a continued lack of agreement on the parameters of the intermediate standard.

The Court's decision in *Personnel Administrator v. Feeney*[181] extended its ruling in *Washington v. Davis*[182] to gender classifications.[183] The Court's 1976 decision in *Davis* held that statutes which resulted in racially disparate impacts were unconstitutional only if a discriminatory purpose could be proven.[184] The *Feeney* Court reviewed a state statute which preferred all veterans who were applicants over all nonveterans.[185] Although acknowledging that the preference overwhelmingly advantaged men,[186] consistent with *Davis*, the Court upheld the legislation because it did not purposefully discriminate on the basis of gender.[187] Justice Stewart's majority opinion in *Feeney* characterized the *Craig* standard as requiring "an

175. 430 U.S. 313 (1977).

176. *Id.* at 314-16. In effect, the Social Security Act formula allowed women retirees to exclude three more lower earning years than similarly-situated men, thus increasing the calculation of the average monthly wage upon which benefits were then based. *Id.*

177. *Id.* at 318, 321. In justifying its opinion, the Court wrote that the Social Security Act provision at issue was not a result of "overbroad" classifications of societal stereotypes. *Id.* at 317 (quoting *Ballard*, 419 U.S. at 508). Instead, the Court agreed to uphold the provision because it redressed society's historical disparate treatment of women. *Id.*

178. *Id.* at 318; *see also supra* notes 131-37 (discussing *Kahn* and *Ballard*).

179. *See supra* note 172. In *Webster*, Chief Justice Burger wrote a concurrence, specifically mentioning the *Goldfarb* dissent as his basis. *Webster*, 430 U.S. at 321 (Burger, C.J., concurring).

180. *Webster*, 430 U.S. at 321 (Burger, C.J., concurring). Chief Justice Burger wrote, "[w]hile I am happy to concur in the Court's judgment, I find it somewhat difficult to distinguish the Social Security provision upheld here from that struck down so recently in [*Goldfarb*]." *Id.* (Burger, C.J., concurring).

181. 442 U.S. 256 (1979).

182. 426 U.S. 229 (1976).

183. *Feeney*, 442 U.S. at 280.

184. *Davis*, 426 U.S. at 247-48.

185. *Feeney*, 442 U.S. at 280.

186. *Id.* at 269.

187. *Id.* at 280.

exceedingly persuasive justification" for preferring men over women.[188] To what degree "exceedingly persuasive justification" differs from *Craig*'s actual language of "important governmental objectives" and "substantially related,"[189] Justice Stewart did not elaborate.[190]

In *Michael M. v. Superior Court*,[191] the Court upheld a California statute making a man criminally liable for having sexual intercourse with a women under age eighteen who was not his wife.[192] Thus, only men were held criminally liable for the act of sexual intercourse.[193] In a plurality opinion, Justice Rehnquist wrote that, where gender classifications are not invidious but realistically reflect differences between the sexes, the Court historically has upheld the statute.[194] The plurality also found that the California legislature's stated purpose of preventing illegitimate teen pregnancies was due great deference.[195]

To uphold the legislation, the plurality leaned heavily upon the rationale that women are uniquely situated to become pregnant—a deterrent to intercourse not shared by men.[196] As such, the criminal sanction of the statute served to "equalize" the deterrents.[197] Regarding the discriminatory impact of the statute, Justice Stewart's concurring opinion stated that "a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional."[198] In the concluding sentence of his concurrence, Justice Stewart stated that the Constitution does not require states to pretend that "demonstrable differences between men and women do not really exist."[199]

Although concurring in the judgment, Justice Blackmun wrote that his

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188. *Id.* at 273.

189. *Craig*, 429 U.S. at 197; *see also supra* text accompanying note 158 (articulating Justice Brennan's test in *Craig*).

190. *Feeney*, 442 U.S. at 282. In dissent, Justice Marshall, joined by Justice Brennan, wrote that the absolute veterans' preference statute showed purposeful discrimination. *Id.* at 282, 283 (Marshall, J., dissenting). Justice Marshall supported his conclusion by pointing out that the 70-year-old veterans' preference system kept women in the same occupations traditionally held by women, thus perpetuating the archaic assumptions about gender roles which the Court had held invalid in cases like *Stanton* and *Wiesenfeld*. *Id.* at 285 (Marshall, J., dissenting).

191. 450 U.S. 464 (1981).

192. *Id.* at 476 (Rehnquist, J., plurality opinion).

193. *Id.* (Rehnquist, J., plurality opinion).

194. *Id.* at 469 (Rehnquist, J., plurality opinion) (citing *Webster*, 430 U.S. at 313).

195. *Id.* at 470 (Rehnquist, J., plurality opinion).

196. *Id.* at 471 (Rehnquist, J., plurality opinion).

197. *Id.* at 473 (Rehnquist, J., plurality opinion).

198. *Id.* at 478 (Stewart, J., concurring).

199. *Id.* at 481 (Stewart, J., concurring). Some commentators have argued that, in cases subsequent to *Michael M.*, Chief Justice Rehnquist and Justice Stewart have expanded the concept of "real" sex differences beyond only natural or biological differences to include "cultural behavior patterns" and sometimes even legislation. *See* Freedman, *supra* note 101, at 944-45.

affirmance was based on the *Craig* test as applied in *Ballard*, *Wiesenfeld*, and *Kahn*,[200] three cases where the Court struggled with justifying paternalistic bases for classifications. In the *Michael M.* dissent, Justices Brennan, White, and Marshall believed that the Court's opinion focused too much on the issue of teenage pregnancy while allowing the discriminatory effect of the statute to go untouched.[201] In the dissent's view, the State had not fulfilled its burden of proving the importance of the objective and the substantial relationship of the classification.[202] In the end, the *Craig* test survived, but four votes had been cast for a distinction based upon "clear differences between the sexes."[203] Although Justice Blackmun concurred on different grounds, at a more general level of abstraction his concurrence appears to indicate that justifiable differences can withstand intermediate scrutiny.

In *Mississippi University for Women v. Hogan*,[204] the Court invalidated a Mississippi statute which denied enrollment of men at a state-supported university.[205] In the majority opinion, Justice O'Connor focused on the State's inability to provide an "exceedingly persuasive justification" for maintaining a single-sex nursing school.[206] The four dis-

200. *Michael M.*, 450 U.S. at 483 (Blackmun, J., concurring).

201. *Id.* at 488-89 (Brennan, J., dissenting).

202. *Id.* (Brennan, J., dissenting). Professor Freedman explains that the general approach of Justices Brennan and Marshall, and often Justice White, in sex discrimination cases was to strictly focus on whether the classification at issue was "substantially related" to an "important government objective." Freedman, *supra* note 101, at 949. Whether the underlying classification could be justified on a biological basis was immaterial to the Justices. *Id.*

203. *Michael M.*, 450 U.S. at 469 (Rehnquist, J., plurality opinion); *id.* at 478 (Stewart, J., concurring).

204. 458 U.S. 718 (1982). Between *Michael M.* and *Hogan*, the Court decided Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980). In *Wengler*, a Missouri statute provided death benefits to a widow, but not to a widower unless he was mentally or physically handicapped or proved actual dependence on his wife's income. *Id.* at 144-45. In holding that the legislation was unconstitutional, *id.* at 152, the Court distinguished its decision from *Kahn* by concluding that the Missouri statute discriminated against both men *and* women. *Id.* at 147. The Court also held that the State had the burden of justifying the gender-based discrimination and establishing why a gender-neutral alternative would be less effective. *Id.* at 151. Again, a mere claim of "administrative convenience" was not enough; there had to be an offer of proof. *Id.*

205. *Hogan*, 458 U.S. at 719-20, 733. The State of Mississippi argued that the purpose of the statute, creating an all women's nursing school, was to "provid[e] the greatest practical range of educational opportunities" for women citizens. *Id.* at 721 (citation omitted). At the time of the *Hogan* decision, Mississippi University for Women was the oldest state-supported all-female college in the country. *Id.* at 720. The state statute creating the college had become law in 1884 and the charter of the school remained essentially unchanged until 1982 when *Hogan* was decided. *Id.* at 720 n.1.

206. *Id.* at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)). Justice O'Connor stated that the State had failed to establish that the stated objective of the statute was indeed the actual purpose underlying the discriminatory classification. *Id.* at 730. Even if that requirement had been met, Justice O'Connor wrote, the State still would have to prove that the gender-based classification was "substantially and directly related to its proposed compensatory objective." *Id.*

senting Justices believed that intermediate scrutiny was being inappropriately applied when it resulted in invalidating State efforts to expand women's opportunities.[207] Dissenting separately, Justice Blackmun explained his concern that the "rigid rules" of sex discrimination were being taken too far.[208] As a result, Justice Blackmun believed an important value—choice—was being sacrificed merely to achieve "needless conformity."[209]

Besides being one of the last important gender discrimination cases decided by the Court before 1994, *Hogan* provides two other interesting perspectives. The first perspective is of Justice O'Connor's opinion for the *Hogan* majority. In applying the *Craig* test, Justice O'Connor expertly drags the State's justifications through the briar patch of prohibitions to gender-based classifications (e.g., "archaic and stereotypic notions") collected by the Court over the previous decade.[210] While nothing about Justice O'Connor's analysis is inaccurate, the sheer number of "briars" indicates the variety of shapes into which intermediate scrutiny can be molded to yield a desired conclusion.[211]

From another perspective, the *Hogan* dissent reminds us that the Court has never abandoned the underlying premise of *Reed* that differences between men and women can justify their dissimilar treatment.[212] The differences may be biological, as in *Michael M.*,[213] or historical, as in *Ballard*,[214] *Kahn*,[215] and *Webster*,[216] where the Court considered past

207. *See id.* at 733 (Burger, C.J., dissenting); *id.* at 734-35 (Blackmun, J., dissenting); *id.* at 740 (Powell, J., dissenting).

208. *Id.* at 734 (Blackmun, J., dissenting).

209. *Id.* at 734-35 (Blackmun, J., dissenting).

210. *Id.* at 724-25. For example, Justice O'Connor's application of the *Craig* test can be summarized as follows: "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification.' " *Id.* at 724 (citations omitted). This is accomplished by "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed . . . [are] substantially related to the achievement of those objectives.' " *Id.* Later Justice O'Connor adds, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.* at 725. In the end, what started as a two-step analysis has grown by at least one step, and the uncertainty of what "exceedingly persuasive justification" means from Justice Stewart's opinion in *Feeney* persists. *See supra* text accompanying notes 188-90.

211. Not surprisingly, intermediate scrutiny may best be described as a standard allowing the Justices to cast their votes upon nothing more than individual perceptions of the classification made, and the governmental interest at stake, in each case. NOWAK & ROTUNDA, *supra* note 106, § 14.23, at 750.

212. *Reed*, 406 U.S. at 76; *see also supra* text accompanying notes 108-17 (discussing the *Reed* Court's conclusion that for the Court to uphold a gender-based classification, there had to be a rational relationship plus a difference between men and women).

213. *See supra* text accompanying notes 191-99.

214. *See supra* text accompanying notes 133-36.

215. *See supra* text accompanying notes 131-32, 135-36.

216. *See supra* text accompanying notes 175-78.

discrimination against women in upholding gender-based classifications. The single conclusion arising from these diverse perspectives is that intermediate scrutiny is uniquely flexible in equal protection analysis, especially compared to the narrow confines in which rational-basis review and strict scrutiny operate. In the end, intermediate scrutiny allows for the balancing of competing interests and the consideration of real differences, but disallows classifications based upon stereotyped views of men and women in society. The result is a viable and useful standard of equal protection review filling a constitutional gap which existed for almost two hundred years.

V. WHEN WORLDS COLLIDE

A. *Near Miss:* Taylor v. Louisiana

During 1975, between *Swain* and *Batson*, and before the announcement of intermediate scrutiny in *Craig*,[217] the Court decided *Taylor v. Louisiana*,[218] holding that the exclusion of women from juries denied a defendant's Sixth Amendment right to a jury trial.[219] The Louisiana Code of Criminal Procedure provided that a woman could only be selected for jury service if she had previously filed a written declaration indicating a desire to serve.[220] The Court overturned the statute not on the basis of the differing treatment of men and women, but because the Sixth Amendment commands juries be drawn from venires representative of the community.[221]

In reviewing the precedent supporting the Sixth Amendment's "fair cross section" requirement,[222] the Court discussed the value of having women on juries.[223] The Court noted that the presence of women helps

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217. *See supra* notes 153-54 and accompanying text.

218. 419 U.S. 522 (1975).

219. *Id.* at 537. As a result of the state statute, only 10% of the citizens on the "jury wheel" were women, even though the parish in which Taylor was being tried was composed of 53% women. *Id.* at 524. In fact, the venire drawn for Taylor's case totaled 175 men and no women. *Id.*

220. *Id.* at 523.

221. *Id.* at 537.

222. *Id.* at 526-31.

223. *Id.* at 530-32. The exclusion of women from juries was yet another tradition adopted from our English heritage.

> In England there was one exception to the rule that only males could serve as jurors. If a woman pleaded pregnancy a *writ de ventre inspiciendo* was allowed in two situations: (1) if she was subject to capital punishment or (2) if a widow sought postponement of the disposition of her husband's estate until the birth of a child. A *writ de ventre inspiciendo* permitted the use of a jury of matrons to examine the woman to determine the question of pregnancy. Even when a jury of matrons was used, however, the examination was in the presence of twelve men, who also comprised part of the jury in such cases.

insure the "diffused impartiality" of juries because women are "sufficiently numerous and distinct from men."[224] The Court further noted that a community, and by implication a jury, composed solely of men or women is distinctly different in quality and character from a community containing members from both groups.[225] The Court also cited with approval studies of women jurors' performance which concluded that women bring to juries their own perspectives and values which influence both the jury's deliberation and verdict.[226] Ultimately, the Court concluded that the Louisiana law was unconstitutional because the systematic exclusion of women by the State prevented the formation of a fair jury.[227] Men and women were to be treated the same, and the foundation for that conclusion was firmly grounded in recognizing and embracing the differences between men and women.

B. *Collision:* J.E.B. v. Alabama

The Court never faced the direct collision of the independent doctrines of intermediate scrutiny and limited peremptory challenges until the 1994 term. In *J.E.B.*,[228] the State of Alabama had filed suit against the defendant seeking paternity and child support.[229] Of the twelve men and twenty-four women comprising the venire, the State used nine of twelve peremptory challenges to strike men; similarly, the defense used all but one strike to dismiss women.[230] As a result, all the selected jurors were women.[231] J.E.B. objected to how the State used its challenges, but the trial court upheld the State's capacity to make gender-based strikes.[232] The jury found J.E.B. to be the biological father, and the trial court entered an order against the defendant directing child support payments.[233]

Writing for a majority of five, Justice Blackmun stated that the cases further defining *Batson*—although addressing racial discrimination—apply

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Grace E.W. Taylor, Note, *Jury Service for Women*, 12 U. FLA. L. REV. 224, 224-25 (1959) (citing Willoughby's Case, Cro. Eliz. 566, 78 Eng. Rep. 811 (K.B. 1597)). (Now Professor) Taylor's Note is also interesting for its discussion of the mounting pressure on the Florida legislature to require compulsory jury service for women. *See id.* at 224-31.

224. *Taylor*, 419 U.S. at 530-31.

225. *Id.* at 531-32 (quoting *Ballard*, 329 U.S. at 193-94).

226. *Id.* at 532 n.12 (citing Wallace M. Rudolph, *Women on Juries—Voluntary or Compulsory?*, 44 J. AM. JUDICATURE SOC. 206 (1961); 55 J. SOC. & SOC. RES. 442 (1971); 3 J. APPLIED SOC. PSYCHOL. 267 (1973); 19 SOCIOMETRY 3 (1956)).

227. *Id.* at 538.

228. 114 S. Ct. at 1419.

229. *Id.* at 1421.

230. *Id.* at 1421-22.

231. *Id.*

232. *Id.*

233. *Id.*

equally to gender discrimination under the Equal Protection Clause.[234] Justice Blackmun described as "axiomatic" that intentional gender discrimination violates the Equal Protection Clause.[235] Later in the opinion, Justice Blackmun noted that *Taylor*,[236] even though grounded in the Sixth Amendment, was consistent with the gender-based heightened scrutiny applied since *Reed*.[237] Justice Blackmun described the core of the issue in *J.E.B.* as being whether exercising peremptory challenges based on gender stereotypes substantially helped a party secure a fair jury.[238] Concluding that the State's gender-based strikes were reminiscent of the arguments once used to exclude women from jury service, the Court reversed the decision against J.E.B.[239]

C. *Sorting Through the Rubble*

Although deceptively straightforward, Justice Blackmun's opinion assumes a level of similarity between race and gender beyond any the Court has ever announced. For example, the blunt statement that *Batson* and its progeny apply equally to gender discrimination[240] was never conceded in the *Batson* line of cases,[241] and in fact was implicitly rejected by Justice O'Connor as recently as 1991 in *Hernandez v. New York*.[242] In a concurrence joined by Justice Scalia, Justice O'Connor wrote in *Hernandez* that equal protection precedent established that peremptory strikes constitute a *Batson* violation only if the prosecutor struck a juror because of race.[243]

Similarly, as discussed in part IV of this Note, *supra*, Justice

234. *Id.* at 1421. In reaction to this point, Chief Justice Rehnquist wrote in dissent that because race lies at the core of *Batson*, and there are "sufficient differences between race and gender discrimination," the Constitution did not require the result reached by the majority. *Id.* at 1434-36 (Rehnquist, C.J., dissenting).

235. *Id.* at 1422.

236. *See supra* notes 218-27 and accompanying text.

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

238. *Id.* at 1425-26.

239. *Id.* at 1426, 1430.

240. *Id.* at 1421.

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

242. 500 U.S. 352 (1991). In *Hernandez*, a criminal defendant sought review of a prosecutor's use of peremptory challenges excluding four Latino potential jurors. *Id.* at 355-56. The prosecutor explained that two of the potential jurors, who were bilingual, had been excluded because he was unsure whether they would accept the official interpreter's version of what was said by Spanish-speaking witnesses. *Id.* at 356. The defendant argued that Spanish-language ability bore such a close relation to race that exercising peremptory challenges to exclude Spanish-speakers was a *Batson* violation of the Equal Protection Clause. *Id.* at 360. The Supreme Court upheld the New York Court of Appeals' decision, finding that the prosecutor's basis for exercising the peremptory challenges was race-neutral, and therefore did not violate *Batson*. *Id.* at 372.

243. *Id.* at 373 (O'Connor, J., concurring) (citing Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991)).

Blackmun's "axiom" that intentional gender discrimination violates the Equal Protection Clause is mistaken. In *Kahn*,[244] *Ballard*,[245] and *Webster*,[246] a majority of the Court upheld gender-based classifications which took into account past discrimination against women.[247] Additionally, a plurality of the Court in *Michael M.* upheld a statute discriminating between men and women, concluding that classifications based upon clear differences were neither invidious nor unconstitutional.[248] Notably, Justice Blackmun specially concurred in *Michael M.*, based not upon the "clear differences" rationale, but on the Court's previous applications of heightened scrutiny in *Kahn*, *Ballard*, and *Webster*.[249]

Equally problematic in *J.E.B.* is the majority's invocation of *Taylor*. In guaranteeing women the right to jury participation, *Taylor* was clearly decided upon differences between men and women,[250] and the perspectives and values each uniquely supply to the deliberation and result of jury proceedings.[251] The nonfungibility of men and women noted in *Taylor*[252] creates a paradox Justice Blackmun ignores: if men and women indeed bring a unique perspective to the jury, a litigant's desire to eliminate extreme viewpoints based on those perspectives is by definition not a stereotype. In her *J.E.B.* concurrence, Justice O'Connor hints at this paradox when she notes that, while the Constitution is intolerant of racial discrimination, we all know that race and gender matter.[253]

This paradox, together with the recognition that race and gender can make a difference, represent the collision of intermediate scrutiny and peremptory challenges which the *J.E.B.* majority fails to address. Contrary to Justice Blackmun's characterizations,[254] the jurisprudence of race is not interchangeable with the jurisprudence of gender. The Court clearly

244. *See supra* text accompanying notes 131-32, 135-36.

245. *See supra* text accompanying notes 133-36.

246. *See supra* text accompanying notes 175-78.

247. *See supra* text accompanying note 177. Chief Justice Rehnquist also wrote in his *J.E.B.* dissent that "[t]he two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room." *J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).

248. *See supra* text accompanying notes 191-99.

249. *Michael M.*, 450 U.S. at 483 (Blackmun, J., concurring); *supra* text accompanying note 200.

250. *Taylor*, 419 U.S. at 530-32; *supra* notes 223-24 and accompanying text.

251. *Taylor*, 419 U.S. at 531-32; *supra* text accompanying note 225.

252. 419 U.S. at 531 (quoting *Ballard*, 329 U.S. at 193-94).

253. *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring). Justice O'Connor's concurrence is relatively narrow, and she explains that the "blow against gender discrimination is not costless." *Id.* at 1431 (O'Connor, J., concurring). Justice O'Connor later recounts her dissent in *Edmonson*, reiterating that the extension of *Batson* to the civil arena was a mistake by the Court. *Id.* at 1432 (O'Connor, J., concurring). As a result, she concludes that the *J.E.B.* decision should be constrained to state action. *Id.* (O'Connor, J., concurring).

254. *See id.* at 1421; *supra* text accompanying note 234.

decided in *Frontiero*[255] that gender and race differ enough that gender classifications are not measured against a strict scrutiny standard.[256] In fact, Justice O'Connor might say that applying intermediate scrutiny to gender discrimination reflects our suspicion of gender classifications, but our intolerance is reserved for race-based classifications.[257]

VI. AFTER WORLDS COLLIDE

A. *Analysis*

A more faithful adherence to *Batson* and the jurisprudence of intermediate scrutiny would have resulted in a fundamentally different, and likely less divisive, conclusion in *J.E.B.* Initially, it is important to accept that race and gender are different methods of classification. This is perhaps best illustrated in our equal protection jurisprudence, in which race and gender classifications are treated so differently: not by accident, indecision, or judicial gloss, but by explicit decision.[258]

The next important consideration is that gender classifications are less likely to violate the Equal Protection Clause than are racial classifications. As the Court summarized in *Webster*, what offends equal protection are invidious classifications, especially those based upon gender-role stereotypes.[259] In contrast, gender classifications which advance important governmental objectives are allowed to stand, including classifications based upon real gender differences or compensation for past discrimination.[260]

The Court has lacked consensus on the extent to which eradicating past discrimination represents an important governmental objective.[261] However, the command of the Sixth Amendment to an "impartial jury"[262] is clearly of such importance. And in achieving this objective, as the Court stated more than a century ago, the peremptory challenge is "es-

255. *See supra* text accompanying notes 125-30.

256. *See supra* text accompanying note 130.

257. *See supra* text accompanying note 253.

258. *See supra* text accompanying notes 125-30 & note 128. Professor Mayfield argues that *Batson*'s protections only extend to groups previously identified as being suspect or groups that should be classified as suspect. Bonnie L. Mayfield, Batson *and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377, 404 (1988). Professor Mayfield concluded in the same article that the Supreme Court had shown no inclination to expand the *Batson*-protected classifications beyond the strict scrutiny classifications. *Id.* at 416.

259. *See Webster*, 430 U.S. at 317; *supra* notes 175-79 and accompanying text.

260. *Webster*, 430 U.S. at 317.

261. *Compare Goldfarb*, *supra* text accompanying notes 168-74, *with Webster*, *supra* text accompanying notes 175-79 (representing opposite decisions in two factually similar cases, decided within three weeks of each other, where the Court was faced with federal statute provisions providing less survivors benefits to widowers than widows).

262. U.S. CONST. amend. VI.

sential to the fairness of trial by jury."[263]

Admittedly, the analysis cannot stop here. *Batson* and its progeny certainly stand for the proposition that the peremptory challenge has been weakened.[264] In considering the proper application of these cases to gender classifications, a return to the core of *Batson* itself is both proper and instructive.

Underlying *Batson* is a balancing of the dictates of equal protection against the value of peremptory challenges.[265] In its equal protection analysis, *Batson* focused solely on racial discrimination,[266] concluding that the Equal Protection Clause is superior to peremptory challenges.[267] But in consciously refraining from overruling *Swain*'s support for peremptory challenges,[268] the *Batson* majority stated that peremptories occupy an "important position" in trial procedures and contribute to the administration of justice.[269] Moreover, the majority patently rejected Justice Marshall's proposition that peremptory challenges be totally abolished.[270] In the end, *Batson* concluded that the history and purpose of the Fourteenth Amendment was to protect citizens from racial discrimination,[271] and to the extent peremptory challenges threatened that indisputable command, peremptories must yield.[272] While the effect of this conclusion was to weaken the historical deference to peremptory challenges, *Batson* was not a statement of opposition to peremptory challenges. Instead, *Batson* was a decision reaffirming the constitutional command for

263. Lewis v. United States, 146 U.S. 370, 376 (1892) (quoted in *Batson*, 476 U.S. at 125 (Burger, C.J., dissenting)). More recently the Court has written that the right to a fair trial is "the most fundamental of all freedoms [and] must be maintained at all costs." Estes v. Texas, 381 U.S. 532, 540 (1965).

264. *See* Zalesne & Zalesne, *supra* note 13, at 332.

265. *See J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting). In balancing these two factors, the majorities in *Batson* and *J.E.B.* do not address all of the costs associated with diminished peremptory challenges. In *Batson*, Justice Powell claimed that no serious administrative burdens would result from the Court's decision. *Batson*, 476 U.S. at 99. Subsequent literature has shown Justice Powell's prediction to be inaccurate. *See* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 636-37 (1994). Justice O'Connor notes in her *J.E.B.* concurrence that *Batson* "mini-hearings" are now routine in both state and federal courtrooms, and *Batson* appeals have "proliferated." *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring). Justice Scalia concludes that the cost will fall hardest upon the criminal defendant, though, because voir dire cannot fill the gap left by the loss of unexplained peremptory challenges. *Id.* at 1438 (Scalia, J., dissenting).

266. *Batson*, 476 U.S. at 84-98.

267. *Id.* at 98-99; *J.E.B.*, 114 S. Ct. at 1430.

268. *Batson*, 476 U.S. at 100 n.25.

269. *Id.* at 98-99.

270. *Id.* at 99 n.22; *see also supra* note 66 (quoting Justice Marshall's proposition, and the *Batson* majority's rejection).

271. *Batson*, 476 U.S. at 84-96; *supra* text accompanying notes 62-63.

272. *See Batson*, 476 U.S. at 98-99.

racial equality.

Like *Batson*, *J.E.B.* also requires balancing the commands of equal protection against the value of peremptory challenges. Yet, the commands of equal protection are not as unyielding in cases of gender classifications as with racial classifications. The failure to incorporate this distinction is the critical flaw of the *J.E.B.* opinion.

B. *A Better World*

Justice Blackmun's solution in *J.E.B.* was to import the *Batson* test without acknowledging the fundamental constitutional distinction between race and gender.[273] Just as gender classifications are a lesser burden to the Equal Protection Clause than are racial classifications, gender classifications should place a lesser burden on peremptory challenges. Because gender is a favored classification, it would be incorrect to allow peremptory challenges to remain unfettered; but wholesale application of *Batson* equally distorts the history of gender-based classifications and ignores the rule of stare decisis.[274]

Undoubtedly, the Court could have fashioned a test in *J.E.B.* which balanced the continuing importance of peremptory challenges and the lesser commands of the Equal Protection Clause regarding gender classifications. Even appropriate changes to the *Batson* test itself could have achieved this result. For example, instead of allowing evidence of disproportionate impact to establish discriminatory intent, as allowed in *Batson*,[275] a gender-based test could require proof of actual intent to discriminate based upon "archaic or overbroad generalizations" or societal role-typing.[276] In response, a litigant accused of discriminatively using peremptories would receive an opportunity to establish that the gender classifications made, if any, were based upon "clear differences,"[277] important governmental objectives,[278] or overcoming past discrimination.[279] Given the great malleability of the intermediate scruti-

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273. *See supra* text accompanying notes 234-43.

274. In the recent case of Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), Justice O'Connor discussed the rule of law and the importance of stare decisis. Writing for the plurality, Justice O'Connor stated that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.* at 2808 (O'Connor, J.) (plurality opinion).

275. *See Batson*, 476 U.S. at 96-97; *supra* text accompanying notes 57-60.

276. *See supra* text accompanying notes 142-45, 182-87.

277. *See supra* text accompanying notes 191-99.

278. *See supra* text accompanying notes 157-60.

279. *See supra* text accompanying notes 175-77.

ny standard,[280] a variety of similar tests were available to the *J.E.B.* majority. No matter which test had been selected, the most important feature would have been that it was based upon intermediate scrutiny and not upon strict scrutiny.

VII. CONCLUSION

J.E.B. v. Alabama represents an infrequent intersection in constitutional law where two important and previously independent doctrines must be weaved into one workable solution. Where the doctrines are inherently in competition, the Court should take extra care in forming an opinion and developing a test which reflects the true nature of the history and current understanding of each doctrine. The Court's solution in *J.E.B.* failed to apply the jurisprudence of intermediate scrutiny in questioning the degree to which equal protection forbids gender-based uses of peremptory challenges. Instead, the Court indiscriminately applied the *Batson* test, which reflected a different constitutional standard and balanced a set of competing values inapposite to gender-based classifications.

The result in *J.E.B.* distorts the Court's two decades of struggle to develop an intermediate level of equal protection scrutiny which rejects stereotyped gender roles, while it recognizes real differences between men and women. Additionally, by applying the *Batson* standard to gender classifications, *J.E.B.* strikes a crucial blow to the continued viability of peremptory challenges. By declining to construct a test reflecting the constitutional differences between race and gender, *J.E.B.* threatens all litigants' abilities to empanel an unbiased jury.

In contrast, a standard more faithful to intermediate scrutiny precedent would have strengthened the ability of the courts to eradicate gender-based discrimination without sacrificing the confidence in the jury system which peremptory challenges have provided for more than six centuries. The challenge before the Court in a post-*J.E.B.* world is to protect each litigant's day in court and preserve the public confidence in the jury system. The blind pursuit of conformity is not the path to either of these goals.

280. *See supra* notes 210-11 and accompanying text.