Washington and Lee Law Review

Volume 52 | Issue 5 Article 8

Winter 1-1-1996

A Remedy Without a Wrong: J.E.B. and the Extension of Batson to Sex-Based Peremptory Challenges

Brian A. Howie

A Remedy Without a Wrong: *J.E.B.* and the Extension of *Batson* to Sex-Based Peremptory Challenges

Brian A. Howie*

Table of Contents

I. Introduction

Since 1965, the Supreme Court has struggled to reconcile the peremptory challenge[1] with the dictates of the Fourteenth Amendment's Equal Pro-

* I wish to thank Professor Allan P. Ides, Michael A. Bosh, and Robert M. Howie for their helpful suggestions and encouragement in the writing of this Note.

1. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.3(d) (2d ed. 1992) (defining peremptory challenge). To select a jury for any civil or criminal trial, state courts and federal district courts select, at random, a certain number of names from a "jury list" or "jury wheel," which is a complete list of all citizens eligible for jury service within a court's jurisdiction. *Id.* § 22.2(a)-(b). This randomly selected group of potential

tection Clause.[2] In *J.E.B. v Alabama* ex rel. *T.B.*,[3] the Court held that a state's exercise of peremptory challenges on the basis of sex violates the Constitution.[4] Prior to *J.E.B.*, state prosecutors,[5] civil litigants,[6] and criminal defendants[7] could not strike a venire member[8] based on that member's race. However, the Court gave no indication in those cases that its rulings applied beyond the context of race-based peremptory challenges.[9]

In order to reach a result that Court precedent neither required nor permitted, the *J.E.B.* Court adopted novel approaches to both equal protection

---

jurors is the "venire" or "jury panel." *Id.* § 22.2(f). During the next stage, voir dire, the litigants question the venire members to determine which members will serve as trial or "petit" jurors. *Id.* § 22.3(a)-(b). Litigants can remove panelists from the venire in one of two ways: "challenges for cause" and "peremptory challenges" or "peremptory strikes." *Id.* § 22.3(c)-(d). Litigants have an unlimited number of challenges for cause with which to strike venire members on specific grounds of actual bias; however, the litigants must convince the trial judge that such bias actually exists. *Id.* § 22.3(c). Conversely, state and federal statutes or rules of criminal procedure typically limit the number of peremptory challenges, *see* FED. R. CRIM. P 24(b) (specifying number of peremptory challenges), but litigants do not have to justify peremptory strikes. LAFAVE & ISRAEL, *supra*, § 22.3(d). *But see infra* notes 36, 125 and accompanying text (explaining that litigants sometimes must provide race- and sex-neutral reasons for peremptory challenges). *See generally* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977) (discussing state and federal jury selection procedures).

2. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides, in part: "No State shall deny to any person within its jurisdiction the equal protection of the laws." *Id.*, *see infra* notes 154-63 and accompanying text (discussing Court's approach to Equal Protection Clause); *see also infra* notes 197-212 and accompanying text (discussing Court's attempt to balance Equal Protection Clause and peremptory challenges).

3. 114 S. Ct. 1419 (1994).

4. J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994); *see infra* notes 100-49 and accompanying text (discussing *J.E.B.*).

5. *See infra* notes 35-41 and accompanying text (discussing Supreme Court's prohibition of state prosecutors' use of race-based peremptory challenges).

6. *See infra* notes 63-71 and accompanying text (discussing Supreme Court's prohibition of civil litigants' use of race-based peremptory challenges).

7 *See infra* notes 72-77 and accompanying text (discussing Supreme Court's prohibition of criminal defendants' use of race-based peremptory challenges).

8. *See supra* note 1 (defining venire member). For the purposes of this Note, the terms "venire member," "jury panelist," and "potential juror" are synonymous.

9. *See* United States v Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) (explaining that Court gave no intimation of desire to expand Batson v Kentucky, 476 U.S. 79 (1986), to sex-based peremptory challenges), *cert. dismissed sub nom.* Washington v United States, 489 U.S. 1094 (1989), *and cert. denied* 493 U.S. 1069 (1990); *see also infra* notes 90-99 and accompanying text (discussing lack of indication in Court precedent that *Batson* applied to sex-based peremptory challenges).

and peremptory challenge case law First, the *J.E.B.* Court characterized the state's exercise of peremptory challenges as a sex-based classification by scrutinizing one party's strikes in a given case.[10] In addition, the Court ignored the historical underpinnings of the previous peremptory challenge cases and focused on the history of exclusion of women from jury venires[11] rather than on discrimination in the exercise of peremptory strikes.[12] This focus enabled the Court to extend the application of the Equal Protection Clause in the context of peremptory challenges, historically a special category [13] As a result, parties can raise more equal protection claims against the exercise of peremptory challenges because the Equal Protection Clause now governs more individual challenges.[14] In the process, the Court severely abridged an important right.[15] The long-term effect of these errors is that judicial scrutiny of peremptory challenges will increase,[16] and courts will require explanations where attorneys otherwise would not have to provide any explanations.[17] Thus, *J.E.B.* will have a profound impact upon the peremptory challenge. *Batson v Kentucky* — which held that the Equal Protection Clause governs the exercise of peremptory challenges in an individual case[18] — wounded the challenge; *J.E.B.* may effectively eliminate the peremptory strike.[19]

---

10. *See infra* notes 165-80 and accompanying text (criticizing *J.E.B.* Court's characterization of peremptory challenges as sex-based classification).

11. J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1422-24 (1994).

12. *See infra* notes 197-212 and accompanying text (discussing Court's requirement of persistent abuse in exercise of peremptory challenges to trigger equal protection scrutiny in individual cases).

13. *See J.E.B.*, 114 S. Ct. at 1422, 1429 (extending application of *Batson* to sex-based peremptory challenges); *see also infra* notes 197-212 and accompanying text (discussing Court's balance between Equal Protection Clause and peremptory strikes).

14. *See infra* notes 213-30 and accompanying text (arguing that *J.E.B.* subjects more peremptory challenges to equal protection scrutiny).

15. *See infra* notes 191-94 and accompanying text (discussing importance of peremptory challenge in system of trial by jury).

16. *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1429-30 (1994) (outlining procedure for evaluating sex-based challenges); *see also* Denise J. Arn, Batson*: Beginning of the End of the Peremptory Challenge?*, ARMY LAW., May 1990, at 33, 43 (explaining that extension of *Batson* to sex will result in more constitutional challenges to peremptory strikes).

17 *See supra* note 1 (defining peremptory challenge).

18. *See* Batson v. Kentucky, 476 U.S. 79, 96-98 (1986) (holding that criminal defendant may raise equal protection claim based on state's use of race-based peremptory challenges); *see also infra* notes 35-41 and accompanying text (discussing *Batson*).

19. *See* State v Harris, 432 S.E.2d 93, 97 n.2 (W Va. 1993) (stating that extension of *Batson* to sex will be death knell for peremptory challenge); Arn, *supra* note 16, at 43

Part II of this Note provides historical background by reviewing the Supreme Court peremptory challenge case law prior to *J.E.B.*[20] Part III discusses the majority, concurring, and dissenting opinions in *J.E.B.*[21] Part IV analyzes *J.E.B.* from the context of equal protection and jury selection cases and criticizes the *J.E.B.* Court's approach in both respects.[22] Part V proposes a new rule of criminal procedure to assist lower courts in dealing with equal protection challenges to peremptory strikes in the wake of *J.E.B.*[23]

II. The Supreme Court and Peremptory Challenges

The Court has described peremptory challenges, in general, as "a necessary part of trial by jury"[24] and, in criminal cases, as "one of the most important of the rights secured to the accused."[25] Nevertheless, the Court explained in *Swain v Alabama*[26] that the Equal Protection Clause might govern a state's exercise of these challenges in some circumstances.[27] Black

---

(arguing that extension of *Batson* to sex will result in serious erosion of peremptory challenge). Legal commentators have made similar predictions about the end of the peremptory challenge in recent years. *See* Michael A. Cressler, Note, Powers v Ohio*: The Death Knell for the Peremptory Challenge?*, 28 IDAHO L. REV 349, 353-54 (1991-1992) (criticizing Powers v Ohio, 499 U.S. 400 (1991), for diminishing importance of — if not abolishing — peremptory challenges); 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, 421-23 (1993) (explaining that Georgia v McCollum, 505 U.S. 42 (1992), may lead to elimination of peremptory challenges). Chief Justice Burger was one of the first to pronounce the peremptory challenge dead. *See* Batson v Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting) ("Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years.").

20. *See infra* notes 26-89 and accompanying text (discussing Supreme Court peremptory challenge cases prior to *J.E.B.*).

21. *See infra* notes 109-49 and accompanying text (discussing majority, concurring, and dissenting opinions in *J.E.B.*).

22. *See infra* notes 150-230 and accompanying text (criticizing *J.E.B.*).

23. *See infra* notes 231-54 and accompanying text (proposing model rule of criminal procedure to deal with peremptory challenges in wake of *J.E.B.*).

24. Swain v Alabama, 380 U.S. 202, 219 (1965), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986).

25. Pointer v United States, 151 U.S. 396, 408 (1894); *see infra* notes 191-94 and accompanying text (discussing Court's emphasis on importance of peremptory challenges).

26. 380 U.S. 202 (1965).

27 Swain v Alabama, 380 U.S. 202, 223-24 (1965), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986). In *Swain*, the Court considered equal protection challenges by Robert Swain, a black capital defendant, to the all-white grand jury that indicted him, the

criminal defendants[28] had to show evidence of a pattern of strikes against black venire members because the Court presumed that a prosecutor's motive in using strikes in any given case was to secure a fair and impartial jury [29] *Swain* also required black defendants to prove that a state consis-

---

all-white petit jury that convicted him, and the state's exercise of peremptory challenges against black venire members. *Id.* at 203, 209, 222-23. The Court first held that because Alabama did not, by statute, exclude blacks from the jury lists from which the court chose grand juries and venires, Swain failed to prove intentional discrimination. *Id.* at 206-09. Furthermore, the Court noted that statistical underrepresentation on grand juries or venires was insufficient to support Swain's challenge. *Id.* The Court also rejected Swain's challenge to Alabama's use of peremptory strikes in his particular case because, the Court explained, evidence from a single case could not overcome the presumption that in any given case, a state exercised its peremptory challenges to secure a fair and impartial jury. *Id.* at 221-22. However, the Court hinted that proof of a pattern of race-based strikes in "case after case, whatever the circumstances," *id.* at 223, might be sufficient to establish an Equal Protection Clause violation. *Id.* at 223-24. Because Swain did not present evidence of such a pattern, the Court rejected his claim. *Id.* at 225-28.

28. *See* Batson v Kentucky, 476 U.S. 79, 82 (1986) (explaining that defendant may challenge state's exercise of race-based peremptory strikes). Prior to the Supreme Court's decision in *Batson*, most of the defendants challenging jury selection practices were criminal defendants. *See, e.g.*, Hernandez v Texas, 347 U.S. 475, 476-77 (1954) (involving criminal defendant's challenge to selection of grand jury and petit jury panel); Akins v Texas, 325 U.S. 398, 399-400 (1945) (involving criminal defendant's challenge to selection of grand jury); Norris v Alabama, 294 U.S. 587, 588 (1935) (involving criminal defendant's challenge to selection of grand jury and petit jury venire); Rogers v Alabama, 192 U.S. 226, 229 (1904) (involving criminal defendant's challenge to selection of grand jury); *In re* Wood, 140 U.S. 278, 279-80 (1891) (involving criminal defendant's challenge to selection of grand jury and petit jury panel); Strauder v West Virginia, 100 U.S. 303, 304-05 (1879) (involving criminal defendant's challenge to selection of grand jury and petit jury panel). The Court subsequently extended the *Batson* doctrine and permitted states and civil litigants to raise equal protection challenges to a criminal defendant's or an opposing litigant's exercise of peremptory strikes. *See infra* notes 63-77 and accompanying text (discussing Supreme Court's extension of *Batson* doctrine to civil litigants and criminal defendants).

29. *See Swain*, 380 U.S. at 221-24 (describing presumption insulating prosecutor's use of peremptory challenges in individual case from equal protection scrutiny). In a dissent, Justice Goldberg criticized the majority for overlooking what he perceived as overwhelming evidence of abuse of the challenge. *Id.* at 233-38 (Goldberg, J., dissenting). However, Justice Goldberg did agree with the Court's requirement that a defendant show a pattern of abuse. *Id.* at 245-46 (Goldberg, J., dissenting). He explained:

> Only where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection. Drawing the line in this fashion achieves a practical accommodation of the constitutional right and the operation of the peremptory challenge system without doing violence to either.

Id. (Goldberg, J., dissenting).

tently struck black venire members regardless of the defendant's race.[30] Defendants had a difficult time overcoming this presumption, and some Supreme Court members,[31] lower courts,[32] and legal scholars[33] criticized *Swain*. Many lower courts attempted to work around the decision by crafting a remedy for abuse of the challenge.[34]

---

30. *Swain*, 380 U.S. at 223-24; *see* Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV 1611, 1658 & n.240 (1985) (explaining that *Swain* required criminal defendants to prove systematic discrimination in several cases regardless of defendants' race).

31. *See* Thompson v Illinois, 469 U.S. 1024, 1025-26 (1984) (Brennan, J., dissenting from denial of certiorari) (criticizing *Swain*'s reasoning as misconceived); McCray v New York, 461 U.S. 961, 964-65 (1983) (Marshall, J., dissenting from denial of certiorari) (criticizing *Swain*'s evidentiary burden).

32. *See* McCray v. Abrams, 750 F.2d 1113, 1120-22 & n.2 (2d Cir. 1984) (criticizing *Swain*'s reasoning and documenting difficulty of overcoming *Swain*'s evidentiary burden), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986); Commonwealth v Soares, 387 N.E.2d 499, 510 & n.11-12 (Mass.) (describing *Swain*'s approach as simplistic and negligible in its protection of criminal defendants' rights), *cert. denied*, 444 U.S. 881 (1979).

33. *See* Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV 257, 288 (1986) (describing evidentiary burden faced by criminal defendants seeking to challenge race-based peremptory strikes). Abramson writes that a defendant would need a "mammoth study of numerous *voir dires* over a long period of time" to satisfy the *Swain* standard. *Id., see also* Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV 192, 197-202 (1978) (describing *Swain* evidentiary standard as difficult to meet); Johnson, *supra* note 30, at 1657-69 (criticizing extreme difficulty of proving equal protection violation under *Swain*); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV 235, 293-303 (1968) (criticizing reasoning and result of *Swain*); George B. Smith, Swain v Alabama: *The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW L.J. 1571, 1575-78 (1984) (arguing that burden of proof in *Swain* is impossible to satisfy and that Court's reasoning is flawed); Roger C. Harper, Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV 1357, 1362 (1985) (describing *Swain*'s burden of establishing equal protection violations as insurmountable).

34. *See* United States v. Leslie, 759 F.2d 366, 373-75 (5th Cir. 1985) (invoking supervisory authority of federal judges to control government abuse in exercise of peremptory challenges), *rev'd*, 783 F.2d 541 (5th Cir. 1986) (en banc), *cert. granted and judgment vacated*, 479 U.S. 1074 (1987); United States v McDaniels, 379 F Supp. 1243, 1249-50 (E.D. La. 1974) (ordering new trial under Rule 33 of Federal Rules of Criminal Procedure because Government struck six of seven black venire members); People v Wheeler, 583 P.2d 748, 761-62 (Cal. 1978) (determining that state's challenge of every black venire member violated defendant's state constitutional right to jury drawn from representative cross-section of community); *Soares*, 387 N.E.2d at 515-16 (concluding that peremptory challenges based solely on group membership violated fair trial by impartial jury provisions of state constitution); *see also* Johnson, *supra* note 30, at 1659-63 (noting that lower courts have crafted solutions to avoid *Swain*'s standard); Toni M. Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV 501, 502-03 & nn.8-12 (1986) (same).

In *Batson v Kentucky*,[35] the Supreme Court partially overruled *Swain* by holding that a criminal defendant could state an equal protection claim based on the state's use of peremptory challenges in an individual case.[36] The *Batson* Court explained that the evidentiary burden in *Swain* was "crip-

---

Many criminal defendants raised Sixth Amendment challenges to the state's use of peremptory strikes. *See* Booker v Jabe, 775 F.2d 762, 770-72 (6th Cir. 1985) (concluding that Sixth Amendment prohibits state from exercising peremptory challenges to exclude members of cognizable groups), *cert. granted and judgment vacated sub nom.* Michigan v Booker, 478 U.S. 1001, *reinstated on remand* Booker v Jabe, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray*, 750 F.2d at 1131 (concluding that Sixth Amendment prohibits race-based peremptory challenges); *see also Batson*, 476 U.S. at 112-15 (Burger, C.J., dissenting) (observing that Batson challenged state's use of race-based peremptory strikes under Sixth Amendment). Holland v Illinois, 493 U.S. 474 (1990), foreclosed any possibility of a Sixth Amendment attack on a state's exercise of peremptory challenges. *See infra* notes 42-48 and accompanying text (explaining that *Holland* held peremptory challenges immune from Sixth Amendment scrutiny).

For a full discussion of lower courts' approaches to *Swain*, see generally Phyllis N. Silverman, Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV 673 (1983) (reviewing lower courts' handling of *Swain* claims and discussing legislative alternatives to *Swain*).

35. 476 U.S. 79 (1986).

36. Batson v Kentucky, 476 U.S. 79, 96-98 (1986). In *Batson*, the Court considered an equal protection challenge by a black criminal defendant to the state's use of peremptory challenges to strike all blacks from the venire. *Id.* at 82-84. The Court rejected *Swain*'s pattern of abuse requirement as too burdensome and held that a defendant could challenge the state's use of peremptory strikes in a particular case. *Id.* at 92-95. The Court outlined a three-step process for evaluating those strikes. *Id.* at 96-98. First, the defendant must establish a prima facie case by showing: 1) that he is a member of a cognizable racial group, 2) that the prosecutor used peremptory challenges against members of the venire belonging to the defendant's racial group, and 3) that all relevant facts and circumstances of the particular case to raise the inference that the state had intentionally discriminated on the basis of race. *Id.* at 96-98. Second, when the defendant establishes the prima facie case, the burden shifts to the state to rebut the inference by justifying the strike with a race-neutral reason — one that cannot be a pretext but one that need not "rise to the level justifying exercise of a challenge for cause." *Id.* at 97-98. The third step is the trial court's determination of whether, under the totality of the circumstances, the defendant has proven purposeful discrimination. *Id.* at 98. Because Batson preserved his objections to the state's peremptory challenges, the Court remanded the case to give the state the opportunity to present race-neutral reasons for the peremptory strikes. *Id.* at 100.

For a full discussion of *Batson*, see Catherine Beckley, Note, Batson v Kentucky*: Challenging the Use of the Peremptory Challenge*, 15 AM. J. CRIM. L. 263, 290-302 (1988) (discussing *Batson*'s reasoning and implications). The Court's decision in *Batson*, however, left many issues surrounding peremptory challenges unresolved. *See* Albert W Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV 153, 169-99 (1989) (discussing seven areas of litigation that *Batson* created that lower courts had to resolve).

pling" to defendants and that *Swain* effectively prevented any equal protection claims from succeeding.[37] In addition, race-based challenges harmed the criminal defendant, the excluded juror, and the whole community by undermining public confidence in the fairness of the judicial system.[38] Relying on venire selection cases decided after *Swain*, the *Batson* Court concluded that a defendant could show purposeful racial discrimination in petit jury selection using evidence from a single case and required the state to provide race-neutral reasons for challenges after a defendant established a prima facie case of racial discrimination.[39] Justice Marshall concurred, but advocated abolishing the peremptory strike for both prosecutors and defense attorneys because the challenge had the inherent potential for abuse.[40] Justice Marshall

---

37 *See Batson*, 476 U.S. at 92-93 (explaining constitutional scrutiny given to state's use of peremptory challenges). The Court described the prosecutor's use of peremptory strikes as "largely immune from constitutional scrutiny." *Id.*, *see also supra* notes 31-33 (discussing criticism of *Swain*'s evidentiary burden).

38. *Batson*, 476 U.S. at 86-87; *see* David E. Marko, *The Case Against Gender-Based Peremptory Challenges*, 4 HASTINGS WOMEN'S L.J. 109, 121 (1993) (arguing that discriminatory exercise of peremptory challenges potentially results in jury that community perceives as biased). For a detailed criticism of the Court's reasoning in *Batson*, see Cressler, *supra* note 19, at 368-94 (criticizing Court's equal protection reasoning and public policy arguments in *Batson*).

39. *Batson*, 476 U.S. at 96-98. As commentators have noted, lower court decisions have fleshed out the contours of the questions that *Batson* left unanswered, such as what a defendant must do to establish a prima facie case and which reasons used to justify a peremptory challenge are sufficiently race-neutral. *See* Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v Kentucky, 25 WILLAMETTE L. REV 293, 309-38 (1989) (discussing application of *Batson* by lower courts); David D. Hopper, Note, Batson v Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV 811, 817-36 (1988) (same). For an argument that *Batson* imposes lower burdens on the defendant and higher burdens on the state than in other equal protection contexts, see Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1121-23 (1989) (arguing that test in *Batson* is stricter than test that Court uses in employment and housing discrimination cases). Also, *Batson* did not specify the procedures that lower courts should follow in resolving these issues. *Batson*, 476 U.S. at 99-100 & n.24; *see also id.* at 130-31 (Burger, C.J., dissenting) (criticizing majority for failing to establish procedures for lower courts to follow). For a full discussion of this issue, see Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for* Batson v Kentucky *Hearings*, 99 YALE L.J. 187, 193-206 (1989) (arguing that lower courts should permit defendant to attend *Batson* hearings and permit defendant to rebut state's reasons for exercising challenges); L. Ashley Lyu, Note, *Getting at the Truth: Adversarial Hearings in* Batson *Inquiries*, 57 FORDHAM L. REV 725, 732-43 (1989) (arguing that lower courts should hold adversarial hearings rather than *in camera* or *ex parte* proceedings).

40. *Batson*, 476 U.S. at 107 (Marshall, J., concurring); *see infra* note 237 (citing legal commentators who advocate abolishing peremptory challenges).

believed that the Court's test for assessing the constitutionality of the state's challenges was insufficient because the test still required "flagrant" discrimination and an assessment of the prosecutor's motive — something a reviewing court would only reluctantly second-guess.[41]

In *Holland v Illinois*,[42] the Court concluded that the Sixth Amendment[43] did not prohibit a state's use of race-based peremptory challenges and declined to extend *Batson* beyond the Fourteenth Amendment context.[44] Prior decisions of the Court had held that the Sixth Amendment's guarantee of trial by an impartial jury required that states draw petit juries from a representative venire, one that reflected a "fair cross-section" of the community [45] However, the *Holland* Court noted that, in these prior cases, the Court had explicitly refused to interpret the Sixth Amendment to require individual petit juries to reflect the community in composition and had refused to limit or prohibit peremptory challenges under the fair-cross-sec-

---

41. *Batson*, 476 U.S. at 104-08 (Marshall, J., concurring).

42. 493 U.S. 474 (1990).

43. U.S. CONST. amend. VI. The Sixth Amendment provides, in part: "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 " *Id.*

44. *See* Holland v Illinois, 493 U.S. 474, 478, 486-87 (1990) (concluding that Sixth Amendment does not prohibit state from using peremptory challenges to eliminate distinctive groups from venire). In *Holland*, the Court considered a white criminal defendant's Sixth Amendment challenge to Illinois's use of peremptory challenges to eliminate the only two black venire members. *Id.* at 475-76. The Court first decided that the defendant had standing to challenge the state's exercise of peremptory strikes because the Sixth Amendment does not require a racial correlation between the defendant and the excluded venire member. *Id.* at 476-77 Next, the Court explained that a defendant's Sixth Amendment right to an impartial jury only required the state to ensure that a venire represented a fair cross-section of the community *Id.* at 480. Including "all cognizable groups in the venire" satisfies this fair-cross-section requirement. *Id.* at 478-80. Because the Sixth Amendment requires an impartial jury and not a representative one — and ensuring a fair cross-section fulfills that requirement — the Court declined to allow defendants to challenge the selection of an individual juror under the Sixth Amendment. *Id.* at 480-83. Concluding that the peremptory challenge furthered the goal of an impartial jury by allowing both sides to eliminate extremes of partiality and bias, *id.* at 483-84, the Court refused to "obstruct[ ]" and "cripple" the challenge by adopting a *Batson*-type test for the Sixth Amendment. *Id.* at 484-87 For a full discussion of *Holland*, see generally Carolyn R. Alessi, Comment, Holland v Illinois: *Are Discriminatory Peremptory Challenges Constitutional?*, 26 NEW ENG. L. REV 173 (1991) (discussing and analyzing *Holland* within context of Sixth Amendment jurisprudence); Alice Biedenbender, Note, Holland v. Illinois: *A Sixth Amendment Attack on the Use of Discriminatory Peremptory Challenges*, 40 CATH. U. L. REV 651 (1991) (same).

45. *Holland*, 493 U.S. at 480 (citing and quoting Taylor v Louisiana, 419 U.S. 522, 527 (1975)).

tion requirement.[46] Reaffirming these holdings and re-emphasizing the role that the peremptory challenge plays in securing an impartial jury, the *Holland* Court concluded that the exercise of challenges against particular groups did not violate the Sixth Amendment.[47] Some commentators criticized *Holland* as a step backward from *Batson*.[48]

The Supreme Court, in *Powers v Ohio*,[49] dispelled any doubts that *Holland* had rendered *Batson* a dead letter by squarely addressing a question that the Court explicitly left open in *Holland*.[50] The Court permitted a criminal defendant of a different race than an excluded juror to raise an equal

---

46. *Id.* at 482 (citing and quoting Lockhart v McCree, 476 U.S. 162, 173 (1986), and Taylor v Louisiana, 419 U.S. 522, 538 (1975)).

47 *Id.* at 480-84.

48. *See* Alessi, *supra* note 44, at 189-97 (criticizing *Holland* for misreading prior Sixth Amendment opinions); Jefferson E. Howeth, Note, Holland v Illinois: *The Supreme Court Narrows the Scope of Protection Against Discriminatory Jury Selection Procedures*, 48 WASH. & LEE L. REV 579, 586-615 (1991) (criticizing *Holland* for misreading prior Sixth Amendment cases and limiting defendants' constitutional protection from discriminatory jury selection procedures). Howeth argues that *Batson* created a relatively limited Fourteenth Amendment cause of action against a state's use of peremptory challenges. *Id.* at 602-15. The Sixth Amendment, Howeth explains, imposes more lenient standing requirements, protects more cognizable groups, and involves no state action component. *Id.* Thus, by eliminating the Sixth Amendment avenue for attacking peremptory challenges, *Holland* limited the constitutional protection from discriminatory jury selection procedures. *Id.* at 602-03; *see also* Shola R. Ayeni, Comment, *Trial by an Impartial Jury Drawn from a Fair Cross-Section of the Community: A Fundamental Right Deeply Rooted in Our Natural Rights and Liberty*, 16 T. MARSHALL L. REV 93, 102-07 (1990) (criticizing Court's approach to Sixth Amendment in *Holland*); Debra L. Dippel, Note, Holland v Illinois: *Sixth Amendment Fair Cross-Section Requirement Does Not Preclude Racially-Based Peremptory Challenges*, 24 AKRON L. REV 177, 188-96 (1990) (arguing that *Holland* incorrectly subordinates constitutional command of nondiscriminatory jury selection procedures to state interest in preserving peremptory challenges). For positive commentary on *Holland*, see Biedenbender, *supra* note 44, at 674-78 (arguing that Court decided *Holland* correctly).

49 499 U.S. 400 (1991).

50. *See supra* note 44 (explaining that white defendant had standing to raise Sixth Amendment challenge to state's use of race-based peremptory challenges against black jury panelists). In *Holland*, Justice Scalia's majority opinion implied that *Batson* required a correlation between the race of the defendant and the excluded juror. *Holland*, 493 U.S. at 476-77 A concurring opinion by Justice Kennedy and the dissenting opinions by Justices Marshall and Stevens noted that the Court had not addressed the question of whether *Batson* required that correlation. *Id.* at 488 (Kennedy, J., concurring); *id.* at 490-91 (Marshall, J., dissenting); *id.* at 505 (Stevens, J., dissenting). Foreshadowing the Court's conclusion in *Powers*, all three Justices concluded that a white defendant would have standing under the Equal Protection Clause to challenge the exclusion of a black venire member. *Id.* at 488-90 (Kennedy, J., concurring); *id.* at 491-92 (Marshall, J., dissenting); *id.* at 507-08 (Stevens, J., dissenting).

protection claim on behalf of that juror.[51] The *Powers* Court reaffirmed *Batson*'s holding that a race-based peremptory strike constituted a violation of the Equal Protection Clause.[52] A race-based strike, the *Powers* Court explained, harmed the excluded juror and the community at large because the strike foreclosed the opportunity to participate in civic life by serving on a jury.[53] Such discriminatory challenges also caused a distinct injury to the defendant by calling into question the fairness and integrity of the entire proceeding.[54] In addition, because both the defendant and the excluded jury panelist share a common interest in removing racial discrimination from the jury selection process — and because the obstacles to an excluded jury panelist bringing an equal protection claim are so great — the *Powers* Court concluded that the defendant had standing to raise the equal protection claim of venire members of a different race.[55] The *Powers* Court therefore extended *Batson*'s protection to white criminal defendants.[56]

---

51. Powers v Ohio, 499 U.S. 400, 415 (1991). In *Powers*, the Court considered an equal protection challenge brought by a white criminal defendant to the state's use of peremptory strikes against black jury panelists. *Id.* at 402-03. The Court explained that the harm to an excluded venire member was as important as the harm to the individual defendant. *Id.* at 406. These harms prevented qualified citizens from serving on a jury and reinforced the Court's conclusion that race-based peremptory challenges violate the Equal Protection Clause. *Id.* at 406-09. Next, the Court considered whether this criminal defendant had standing to raise an excluded venire member's equal protection claim. *Id.* at 410. First, the Court determined that the defendant suffered a concrete injury because the state's use of race-based strikes raised doubts about the fairness and integrity of the proceedings. *Id.* at 411-13. Next, the Court concluded that the defendant and an excluded jury panelist had a close relationship because both had an interest in "eliminating racial discrimination from the courtroom." *Id.* at 413-14. Finally, the Court noted that a struck jury panelist would have great difficulty bringing an equal protection claim on his own because of the small amount of money involved and the difficulty of obtaining injunctive relief. *Id.* at 414-15. Because the defendant had standing, the Court held that he could challenge the state's peremptory strikes under the Equal Protection Clause on behalf of excluded venire members. *Id.* at 415.

52. *Id.* at 409-10.

53. *Id.* at 406.

54. *Id.* at 411. This harm satisfied the injury-in-fact requirement of the Court's standing test. *Id.*

55. *Id.* at 413-15. For a discussion of the *Powers* Court's third-party standing analysis, see Bradley R. Kirk, Note, *Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in* Powers v Ohio *and* Edmonson v Leesville Concrete Co., 19 PEPP L. REV 691, 704-11 (1992) (questioning *Powers* Court's standing analysis).

56. *Powers*, 499 U.S. at 415. *Batson* involved an equal protection claim brought by a black criminal defendant against the state's exclusion of black venire members. Batson v Kentucky, 476 U.S. 79, 82-84 (1986); *see supra* note 36 (discussing *Batson*). *Powers* evoked an interesting response in legal commentary. *Compare* Cressler, *supra* note 19, at 368-94

In *Hernandez v New York*,[57] the Court rejected a defendant's objection to New York's use of peremptory challenges against Spanish-speaking jury panelists and implied that the *Batson* principle had limits.[58] The defendant had argued that language ability bore a close enough relation to ethnicity to make the language-based strike an unconstitutional race-based strike against Latinos.[59] The Court partially based its conclusion that the challenges did

---

(criticizing *Powers* Court for not overruling *Batson*) *with* Carolyn Holtschlag, *Recent Decisions*, 30 DUQ. L. REV 1025, 1048-51 (1992) (criticizing *Powers* Court for failing to completely abolish peremptory challenges). *See also* Kirk, *supra* note 55, at 728-29 (explaining that legislative change is preferable to judicial activism in solving problems of race-based peremptory challenges).

57 500 U.S. 352 (1991).

58. Hernandez v New York, 500 U.S. 352, 369-70 (1991). In *Hernandez*, the Court considered a criminal defendant's *Batson* challenge to New York's alleged use of peremptory challenges against Latino venire members. *Id.* at 355-56. During Hernandez's trial for attempted murder and weapons possession, the state peremptorily struck four Spanish-speaking jury panelists. *Id.* at 355-56. The state explained that it struck the venire members in question because they spoke Spanish and, based on their responses to questions and behavior during voir dire, the state doubted whether these jury panelists would rely solely on the court interpreter rather than their own linguistic ability to translate the testimony in the case. *Id.* at 356. The Court reviewed the lower court's rejection of the defendant's *Batson* claim under the deferential clearly erroneous standard because lower courts were better-situated to evaluate the credibility of the state's justification for its peremptory strikes. *Id.* at 364-69. Following the three-part *Batson* test, the Court concluded that the issue of whether the defendant proved his prima facie case was moot because the state had voluntarily provided a race-neutral reason for its use of challenges. *Id.* at 358-59. Next, the Court let stand as not clearly erroneous the lower court's finding that the state's explanation for its strikes was sufficiently race-neutral. *Id.* at 361-63. Although striking venire members based on their ability to follow court interpreters might have a disproportionate impact on Latinos, that impact, the Court explained, was insufficient to establish discriminatory intent. *Id.* Under the totality of the circumstances, the Court ultimately determined that the lower court did not commit clear error in choosing to reject Hernandez's *Batson* claim. *Id.* at 369-70. The lower court properly considered all the relevant factors, including, among others, the state's voluntary justification for its strikes, the fact that the court could determine only that three of the four jury panelists were Latino, and the lower court's assessment of the state prosecutor's demeanor and credibility, among others, in reaching its conclusion. *Id.* For a discussion of how lower courts have implemented *Hernandez*, see Cheryl A. O'Brien, Note, *Constitutional Law* — Hernandez v New York*: Did the Supreme Court Intend to Overrule* Batson*'s Standard of "Racially Neutral"?*, 15 W NEW ENG. L. REV 315, 334-38 (1993) (analyzing lower courts' treatment of *Hernandez*).

59. *Hernandez*, 500 U.S. at 360. The Court did not address this argument, but Justice Kennedy's plurality opinion hinted that a pure language-based strike might violate the Equal Protection Clause:

> [W]e do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation

not violate *Batson* on facts unrelated to language ability, such as the fact that many prosecution witnesses were Latinos, which diminished the likelihood that the state would deliberately exclude Latinos from the jury [60] In a dissent, Justice Stevens criticized the majority for permitting the state's justification for its challenges to rebut the defendant's prima facie case when that justification had an admittedly disproportionate impact against Latinos.[61] Because the Court seemed to require that the state's justification itself provide evidence of discriminatory intent, Justice Stevens expressed concern that the Court had raised the level of proof that *Batson* required.[62]

> that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

Id. at 371 (plurality opinion). This language probably explains the separate concurrence of Justices O'Connor and Scalia, who agreed that the lower court's findings as to discriminatory intent were not clearly erroneous but thought that the plurality opinion went further than necessary to arrive at this conclusion. *Id.* at 372-75 (O'Connor, J., concurring in the judgment).

Some commentators read *Hernandez* as a clear statement that *Batson* prohibits peremptory challenges based on ethnicity and ancestry *See* Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV 947, 967 n.125 (1994) (arguing that *Hernandez* prohibits peremptory challenges against Latino or Hispanic venire members); Steven M. Puiszis, Edmonson v Leesville Concrete Co.. *Will the Peremptory Challenge Survive Its Battle with the Equal Protection Clause?*, 25 J. MARSHALL L. REV 37, 43-44 n.32 (1991) (arguing that Court intended *Hernandez* to apply *Batson* to ancestry and ethnic heritage, which explains separate concurrence of Justices O'Connor and Scalia). *But see* Juan F Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV 1, 20-21 (1992) (arguing that *Hernandez* permits discrimination based on national origin and ethnicity in state's exercise of peremptory challenges).

60. *Hernandez*, 500 U.S. at 369-70. *But see* Andrew McGuire, Comment, *Peremptory Exclusion of Spanish-Speaking Jurors: Could* Hernandez v New York *Happen Here?*, 23 N.M. L. REV. 467, 471-72 (1993) (arguing that *Hernandez* legitimizes peremptory challenges based solely on language ability). McGuire argues that bilingual jurors have difficulty ignoring what a witness says in Spanish; therefore, the *Hernandez* Court's reliance on the venire members' behavior in concluding that the state's reason for striking the jurors was sufficiently race-neutral is likely to become the rule rather than the exception. *Id.* at 472 & n.46; *see also* Perea, *supra* note 59, at 15-21 (1992) (arguing that language-ability and demeanor during voir dire are pretextual reasons that permit prosecutors to discriminate on basis of ethnicity in exercising peremptory challenges).

61. *Hernandez*, 500 U.S. at 376-77 (Stevens, J., dissenting). As Justice Stevens explained, disproportionate impact is itself evidence of discriminatory intent. *Id.* at 376-78 & n.1. Thus, the Court permitted a justification that could provide evidence of discriminatory intent to rebut an inference of discriminatory intent that the defendant established in his prima facie case. *Id.*

62. *Hernandez*, 500 U.S. at 377-78 (Stevens, J., dissenting); *see* James S. Wrona, Casenote, Hernandez v New York: *Allowing Bias to Continue in the Jury Selection Process*,

In the same year, though, the Supreme Court expanded *Batson* in *Edmonson v Leesville Concrete Co.*[63] by holding that civil litigants may not exercise their peremptory challenges in a racially discriminatory manner.[64] Acknowledging that the Court decided *Batson* and *Powers* in the criminal context, the *Edmonson* Court explained that neither of those two cases suggested that litigants could use race-based peremptory strikes in civil cases.[65] A race-based peremptory challenge, the Court explained, harmed an excluded jury panelist in a civil trial as much as a similarly situated panelist in a criminal trial.[66] However, the *Edmonson* Court had to find state action

---

19 OHIO N.U. L. REV. 151, 157-61 (1992) (criticizing *Hernandez* for relying on prosecutor's explanation in determining race-neutrality of peremptory challenges and for employing clear error standard of review). For a related argument expressing concerns that lower courts would read *Hernandez* as partially overruling *Batson*, see O'Brien, *supra* note 58, at 332-45 (arguing that *Hernandez* did not overrule *Batson*'s requirement of nexus between state's justification for peremptory challenges and case at hand).

63. 500 U.S. 614 (1991).

64. Edmonson v Leesville Concrete Co., 500 U.S. 614, 630 (1991). In *Edmonson*, the Court considered an equal protection challenge by a black plaintiff against a defendant's use of peremptory strikes against black venire members. *Id.* at 616-17 Because the Equal Protection Clause applies only to state action, the Court had to determine whether Leesville Concrete Co. was a state actor under the two-part test developed in Lugar v Edmondson Oil Co., 457 U.S. 922, 939-42 (1982). *Edmonson*, 500 U.S. at 620. First, a federal statute provided authority for the defendant's peremptory challenges, satisfying the first prong of the *Lugar* test. *Id.* at 620-21, *Lugar*, 457 U.S. at 939. Next, the Court explained that "fairness" under the second prong of the *Lugar* test involved a factual inquiry into (1) the reliance of the defendant on state government assistance in striking jurors, (2) the function of the peremptory challenge in government, and (3) the potential aggravating effect of a strike authorized by the government. *Edmonson*, 500 U.S. at 621-22; *Lugar*, 457 U.S. at 939. To begin, the Court found that all private parties rely on a court's "overt [and] significant assistance," *Edmonson*, 500 U.S. at 624, to use a peremptory challenge: establishing juror qualifications, calling and excusing jurors, and controlling voir dire questions that may determine which jurors litigants will strike. *Id.* at 622-24. Next, private litigants used the peremptory strike as a tool in the process of selecting the jury, a "quintessential governmental body"; therefore, the jury selection process was a "traditional function of the government." *Id.* at 624-28. Finally, the Court found that race-based peremptory challenges caused greater harm because parties exercised such strikes within a courtroom. *Id.* at 628. Having found state action, the Court determined that the Equal Protection Clause therefore governed the defendant's use of peremptory strikes. *Id.* The Court concluded the analysis by determining, under Powers v Ohio, 499 U.S. 400, 410-15 (1991), that a civil litigant had third-party standing to raise the equal protection claims of excluded jurors. *Edmonson*, 500 U.S. at 628-30; *see supra* note 51 (discussing Court's third-party standing analysis in *Powers*). The Court remanded the case so the trial court could determine whether the plaintiff could make out a prima facie case of discrimination. *Edmonson*, 500 U.S. at 631.

65. *Edmonson*, 500 U.S. at 618.

66. *Id.* at 618-19.

before addressing the constitutionality of race-based peremptory challenges.[67] Applying the state action test,[68] the *Edmonson* Court determined that the parties had federal statutory authorization for their peremptory challenges.[69] The *Edmonson* Court determined that because selecting a jury was a "traditional government function," a civil litigant's exercise of those strikes carried the imprimatur of the judicial system.[70] The *Edmonson* Court completed its analysis by concluding, under *Powers*, that civil litigants, like criminal defendants, have standing to raise the equal protection claims of excluded jurors.[71]

The Supreme Court's final extension of *Batson* prior to *J.E.B.* came in *Georgia v McCollum*,[72] in which the Court held that a criminal defendant may not exercise peremptory strikes in a racially discriminatory manner.[73]

---

67 *Id.* at 619-20; *see also supra* note 2 (quoting Fourteenth Amendment's state action component).

68. *See* Lugar v Edmondson Oil Co., 457 U.S. 922, 939-42 (1982) (outlining and applying two-part test for determining presence of state action); *see also supra* note 64 (discussing application of *Lugar* in *Edmonson*).

69. Edmonson v Leesville Concrete Co., 500 U.S. 614, 620-21 (1991). The Court explained that at the state level, state statutes or rules of criminal procedure typically provide authorization for peremptory challenges. *Id.*

70. *Id.* at 621-28. Many commentators criticized the *Edmonson* Court's state action analysis. *See* Bill K. Felty, Note, *Resting in Mid-Air, the Supreme Court Strikes the Traditional Peremptory Challenge and Creates a New Creature, the Challenge for Semi-Cause:* Edmonson v Leesville Concrete Company, 27 TULSA L.J. 203, 216-20 (1991) (criticizing state action analysis in *Edmonson* as flawed); J. Patrick McCabe, Casenote, *The Use of Race-Based Peremptory Challenges in a Civil Trial to Exclude Potential Jurors During Voir Dire Violates the Equal Protection Rights of the Challenged Jurors*, 2 SETON HALL CONST. L.J. 861, 892-95 (1992) (arguing that *Edmonson* Court blurred distinction between state and private action to advance social policy goals). *But see* Mark L. Josephs, Comment, *Fourteenth Amendment — Peremptory Challenges and the Equal Protection Clause*, 82 J. CRIM. L. & CRIMINOLOGY 1000, 1018-23 (1992) (arguing that *Edmonson* Court applied state action test correctly).

71. *Edmonson*, 500 U.S. at 628-31. For a full discussion of *Edmonson* and its implications for the peremptory challenge, see Frederick V Olson, Casenote, Edmonson v Leesville Concrete Co.. *Reasoned or Result-Oriented Jurisprudence?*, 12 N. ILL. U. L. REV 497, 507-25 (1992) (concluding that *Edmonson* seriously weakens peremptory challenges).

72. 505 U.S. 42 (1992).

73. Georgia v McCollum, 505 U.S. 42, 49-55 (1992). In *McCollum*, the Court considered whether the Equal Protection Clause governed a criminal defendant's use of race-based peremptory challenges. *Id.* at 44-45. A lower court had denied Georgia's pretrial motion seeking to prevent several white defendants from using their peremptory challenges to strike all of the black members of the venire. *Id.* at 45. The Court first determined that a defendant's exercise of a race-based peremptory strike implicated the *Batson* concerns because such a strike harmed both the excluded jurors and the community at large. *Id.* at 48-

In *McCollum*, Georgia sought a declaration prior to jury selection in a criminal case that would have prohibited the defendant from exercising his peremptory strikes to remove all blacks from the jury panel.[74] The *McCollum* Court's analysis paralleled the *Edmonson* Court's analysis — first determining that a criminal defendant's exercise of a race-based peremptory challenge harms an excluded jury panelist, then finding that a defendant is a state actor when using his peremptory strikes.[75] In addition, the *McCollum* Court concluded that under *Powers*, the state had standing to raise the equal protection claim of an excluded venire member.[76] Many commentators criticized the decision for eroding the rights of criminal defendants.[77]

Although *McCollum* seems facially anomalous,[78] some Court members predicted *McCollum*'s result in prior opinions.[79] The decision was essen-

---

50; Batson v. Kentucky, 476 U.S. 79, 85-88 (1986). Next, the Court applied the state action test of *Lugar*, determining that a criminal defendant was a state actor when exercising peremptory strikes. *McCollum*, 505 U.S. at 50-55; *see supra* note 64 (discussing application of *Lugar* to civil litigants' use of peremptory challenges). The Court then determined that a state had standing to challenge the defendant's discriminatory use of peremptory strikes. *McCollum*, 505 U.S. at 55-56; *see supra* text accompanying note 55 (discussing *Powers* Court's application of third-party standing doctrine). Finally, the Court addressed concerns that the application of *Batson* to this context would interfere with a criminal defendant's constitutional rights. *McCollum*, 505 U.S. at 57-58. The Court rejected these concerns because barring a defendant's use of race-based challenges does not violate either the attorney-client privilege or the defendant's Sixth Amendment rights — trial by an impartial jury and effective assistance of counsel. *Id.* at 58. Consequently, the Court held that a criminal defendant's use of race-based peremptory challenges violated the Equal Protection Clause. *Id.* at 59.

74. *McCollum*, 505 U.S. at 44-45.

75. *Id.* at 48-55; *see supra* note 64 (discussing *Edmonson*).

76. *McCollum*, 505 U.S. at 55-56.

77 *See* Fred Glassman, Casenote, *The Supreme Court Strikes a Blow Against Minority Criminal Defendants*, 18 S. ILL. U. L. REV 255, 264-67 (1993) (arguing that *McCollum* harms ability of minority defendants to receive fair trial); Jennifer L. Urbanski, Casenote, Georgia v McCollum:. *Protecting Jurors from Race-Based Peremptory Challenges but Forcing Criminal Defendants to Risk Biased Juries*, 24 PAC. L.J. 1887, 1933-44 (1993) (arguing that *McCollum* denies criminal defendant important method of securing fair trial and impartial jury).

78. *Cf.* Georgia v McCollum, 505 U.S. 42, 62 (1992) (O'Connor, J., dissenting) (describing Court's holding in *McCollum* as "remarkable").

79. *See* Edmonson v Leesville Concrete Co., 500 U.S. 614, 644 (1991) (Scalia, J., dissenting) (arguing that *Edmonson*'s analysis logically applies to criminal defendants' use of peremptory strikes); Batson v Kentucky, 476 U.S. 79, 125-26 (1986) (Burger, C.J., dissenting) (arguing that "clear and inescapable import" of *Batson* is to limit use of peremptory challenges by defendants as well as prosecutors). In *Batson*, Justice Marshall advocated the abolition of peremptory challenges for both the state and the criminal defendant, explaining: "Our criminal justice system 'requires not only freedom from any bias against the accused,

tially an amalgam of the Court's novel approaches to third-party standing in *Powers* and to state action in *Edmonson*.[80] In addition, commentators had noted the incongruity of prohibiting prosecutors from exercising peremptory challenges on the basis of race but permitting criminal defendants to do so.[81] Therefore, the result in *McCollum* was not entirely surprising.[82]

In summary, prior to *J.E.B.*, peremptory challenge jurisprudence had evolved to the point at which state (and federal) prosecutors,[83] civil litigants,[84] and criminal defendants[85] could not exercise peremptory challenges on the basis of race. In addition, a party challenging such race-based strikes could rely on the facts of an individual case[86] and did not need to be a member of the same racial group as the excluded juror.[87] Moreover, the Court had suggested that although peremptory challenges associated with linguistic ability might survive equal protection scrutiny, pure language-based strikes might not survive.[88] Finally, the Court had refused to apply the Sixth Amendment to the exercise of peremptory strikes,[89] making the Equal Protection Clause the only avenue by which a party could raise a constitutional challenge to an opposing party's exercise of peremptory strikes.

---

but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (quoting Hayes v Missouri, 120 U.S. 68, 70 (1887)).

80. *See McCollum*, 505 U.S. at 50-56 (applying *Edmonson*'s state action analysis and *Powers*' third-party standing analysis).

81. *See* E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM. L. REV 355, 358-68 (1988) (arguing that Court should extend *Batson* to limit criminal defendants' exercise of race-based peremptory challenges); John J. Hoeffner, Note, *Defendant's Discriminatory Use of the Peremptory Challenge After* Batson v. Kentucky, 62 ST. JOHN'S L. REV 46, 52-65 (1987) (arguing that courts or legislatures should limit criminal defendants' use of race-based peremptory strikes). *But see* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV L. REV 808, 811-38 (1989) (arguing that Court should not impose *Batson* rule on criminal defendants' use of race-based peremptory challenges).

82. *See McCollum*, 505 U.S. at 69 (Scalia, J., dissenting) (explaining that *McCollum* follows logically from *Edmonson*).

83. Batson v Kentucky, 476 U.S. 79, 96-98 (1986).

84. Edmonson v Leesville Concrete Co., 500 U.S. 614, 630 (1991).

85. Georgia v McCollum, 505 U.S. 42, 59 (1992).

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

87 Powers v Ohio, 499 U.S. 400, 402-03 (1991).

88. Hernandez v New York, 500 U.S. 352, 369-71 (1991).

89. Holland v Illinois, 493 U.S. 474, 478 (1990).

Prior to *J.E.B.*, the Court declined to hear several cases that involved challenges to a party's use of peremptory strikes based on sex[90] or other factors unrelated to race.[91] Of course, some commentators had argued that *Batson*'s rationale applied with equal force to sex-based challenges,[92] and many courts had extended *Batson* in this fashion.[93] However, many federal[94]

---

90. *See* United States v Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991) (noting that *Batson* only applies to race-based peremptory challenges), *cert. denied*, 502 U.S. 1080 (1992); United States v Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (same), *cert. dismissed sub nom.* Washington v United States, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990); Murphy v State, 596 So. 2d 42, 43 (Ala. Crim. App.) (same), *writ denied*, 596 So. 2d 45 (Ala. 1991), *cert. denied*, 113 S. Ct. 86 (1992); Fisher v State, 587 So. 2d 1027, 1030 (Ala. Crim. App.) (same), *cert. denied*, 587 So. 2d 1039 (Ala. 1991), *cert. denied*, 503 U.S. 941 (1992); Daniels v State, 581 So. 2d 536, 538-39 (Ala. Crim. App. 1990) (same), *writ denied*, 581 So. 2d 541 (Ala.), *cert. denied*, 502 U.S. 914 (1991).

91. *See* Murchu v United States, 926 F.2d 50, 54-55 (1st Cir.) (concluding that Irish are not cognizable group under *Batson*), *cert. denied*, 502 U.S. 828 (1991); State v Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to exercise of peremptory challenges based on religious affiliation), *cert. denied*, 114 S. Ct. 2120 (1994).

92. *See* Marko, *supra* note 38, at 121-27 (arguing that *Batson*'s rationale logically prohibits sex-based challenges); Jere W Morehead, *Exploring the Frontiers of* Batson v Kentucky*: Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289, 299-304 (1990) (arguing that spirit of *Batson* requires extension of *Batson*'s protections to any cognizable group); Eric K. Ferraro, Note, United States v De Gross*: The Ninth Circuit Expands Restrictions on a Criminal Defendant's Right to Exercise Peremptory Challenges*, 23 GOLDEN GATE U. L. REV. 109, 132-33 (1993) (concluding that similar history of discrimination in jury service against blacks and women justifies similar treatment of those groups under Equal Protection Clause in peremptory challenge context); S. Alexandria Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305, 1327-31 (1991) (explaining that prohibition of sex-based challenges is logical extension of *Batson*'s rationale).

93. *See* United States v De Gross, 960 F.2d 1433, 1437-39 (9th Cir. 1992) (en banc) (expanding *Batson* to prohibit sex-based challenges in civil and criminal trials). For state court extensions of *Batson*, see Di Donato v Santini, 232 Cal. App. 3d 721, 731 (Cal. Ct. App. 1991) (concluding that sex-based challenges in civil trials violate state and federal constitutions); Laidler v State, 627 So. 2d 1263, 1263-64 (Fla. Dist. Ct. App. 1993) (holding that sex-based challenges violate state and federal constitutions); State v Levinson, 795 P.2d 845, 849-50 (Haw. 1990) (concluding that sex-based peremptory challenges violate state constitution); People v Mitchell, 593 N.E.2d 882, 888-89 (Ill. App. Ct. 1992) (holding that sex-based challenges are unconstitutional under principles of both state and federal constitutions and state and federal case law), *aff'd in part and vacated in part*, 614 N.E.2d 1213 (Ill. 1993); Commonwealth v Soares, 387 N.E.2d 499, 516 (Mass.) (concluding that sex-based challenges violate state constitution), *cert. denied*, 444 U.S. 881 (1979); State v Gonzales, 808 P.2d 40, 48 (N.M. Ct. App.) (concluding that state constitution prohibits sex-based peremptory challenges), *cert. denied*, 806 P.2d 65 (N.M. 1991); People v Blunt, 561 N.Y.S.2d 90, 92 (N.Y App. Div 1990) (concluding that sex-based peremptory challenges violate state constitution and state statutory law); People v Irizarry, 560 N.Y.S.2d 279, 280

and state courts[95] that considered the issue declined to extend *Batson*. In addition, all of the Court's extensions of the *Batson* principle — *Powers*, *Edmonson*, and *McCollum* — appeared in the context of race-based peremptory challenges exercised against black venire members.[96] None of these cases ever hinted that *Batson*'s principles applied to sex-based peremptory challenges.[97] Indeed, Justice O'Connor had described *Batson* as a special rule relevant only in the context of race.[98] Against this

---

(N.Y App. Div 1990) (concluding that *Batson* applies to sex-based challenges); State v Burch, 830 P.2d 357, 362-63 (Wash. Ct. App. 1992) (concluding that sex-based challenges violate state and federal constitutions).

94. *See* United States v Broussard, 987 F.2d 215, 219-20 (5th Cir. 1993) (refusing to extend *Batson* to sex-based strikes); United States v Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (same), *cert. dismissed sub nom.* Washington v United States, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990); *cf.* United States v Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991) (declining to recognize black women as cognizable group for purposes of *Batson* challenge), *cert. denied*, 520 U.S. 1080 (1992).

95. *See* Stariks v State, 572 So. 2d 1301, 1303 (Ala. Crim. App. 1991) (declining to extend *Batson* to sex-based peremptory challenges); Hannan v Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989) (concluding that *Batson* offers no authority for prohibiting sex-based challenges); State v. Clay, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989) (concluding that *Batson* does not apply to sex-based challenges); State v Culver, 444 N.W.2d 662, 666 (Neb. 1989) (declining to extend *Batson* to sex-based challenges); State v Oliviera, 534 A.2d 867, 870 (R.I. 1987) (same).

96. See Georgia v McCollum, 505 U.S. 42, 44-45 (1992) (considering ability of criminal defendant to exclude all black venire members); Edmonson v Leesville Concrete Co., 500 U.S. 614, 616 (1991) (assessing civil litigant's use of two of three peremptory challenges to exclude black venire members); Powers v Ohio, 499 U.S. 400, 403 (1991) (evaluating use of seven of ten peremptory challenges to remove black venire members).

97 *See McCollum*, 505 U.S. at 59 (stating Court's holding in *McCollum*). The *McCollum* Court explained, "[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination *on the ground of race* in the exercise of peremptory challenges." *Id.* (emphasis added); *see also Edmonson*, 500 U.S. at 630 (discussing Court's holding). The *Edmonson* Court summarized its holding as follows: "We conclude that courts must entertain a challenge to a private litigant's *racially* discriminatory use of peremptory challenges in a civil trial." *Id.* (emphasis added); *see also Batson*, 476 U.S. at 96 (discussing test for assessing peremptory challenges). In outlining the test to evaluate a state's peremptory strikes, the *Batson* Court explained that a defendant had to establish membership in a "cognizable *racial* group." *Id.* (emphasis added).

98. Brown v. North Carolina, 479 U.S. 940, 941-42 (1986) (O'Connor, J., concurring in denial of certiorari). Describing *Batson*, Justice O'Connor explained: "[*Batson*] is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact. In my view, that special rule is a product of the unique history of racial discrimination in this country; it should not be divorced from that context." *Id.* at 942. *But see infra* notes 126-32 and accompanying text (discussing Justice O'Connor's concurring opinion in *J.E.B.*, approving of extension of *Batson* to sex-based peremptory challenges).

background, *J.E.B.* represented a decisive break with *Batson* and its progeny [99]

III. J.E.B. v Alabama *ex rel.* T.B.

A. The Facts

In 1991, Alabama filed a paternity suit on behalf of T.B., an unwed mother, against J.E.B., the putative father.[100] The court selected a thirty-six person venire, twelve of whom were men.[101] After challenges for cause eliminated two men and one woman, Alabama exercised nine of its ten peremptory strikes against male jury panelists; the defendant struck the sole remaining male and exercised his ten remaining challenges against female jury panelists — which resulted in an all-woman jury [102]

J.E.B. challenged Alabama's use of peremptory strikes as a violation of the Equal Protection Clause and asked the trial court to extend *Batson*'s protections to sex.[103] The trial court refused, and the trial proceeded with the all-woman jury, which returned a verdict establishing J.E.B.'s paternity [104] J.E.B., through a post-judgment motion, renewed his argument that *Batson* should apply to sex, but the trial court reaffirmed its earlier ruling.[105] The Alabama Court of Civil Appeals, relying on state precedent, affirmed the judgment,[106] and the Alabama Supreme Court denied certiorari.[107] The United States Supreme Court granted certiorari.[108]

---

99. *Cf.* Puiszis, *supra* note 59, at 51-52 (explaining that Court's extension of *Batson* to sex-based challenges is questionable). *But see* Thomas A. Hett, Batson v Kentucky*: Present Extensions and Future Applications*, 24 LOY. U. CHI. L.J. 413, 429-31 (1993) (arguing that prior Court decisions and federal statutory law indicate possible future application of *Batson* to sex-based challenges).

100. J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994).

101. *Id.*

102. *Id.* at 1421-22.

103. *Id.* at 1422.

104. *Id.*

105. *Id.*

106. J.E.B. v State *ex rel.* T.B., 606 So. 2d 156, 157 (Ala. Civ App. 1992), *rev'd*, J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994). In refusing J.E.B.'s request, the Alabama Court of Civil Appeals relied on prior decisions by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *Id.* at 157 (citations omitted).

107 J.E.B. v State *ex rel.* T.B., No. 1911717 (Ala. Oct. 23, 1992).

108. J.E.B. v Alabama *ex rel.* T.B., 113 S. Ct. 2330 (1993).

B. The Majority Opinion

Justice Blackmun, for the majority,[109] began by recounting the long history of discriminatory treatment of women in the selection of jury panels.[110] Initially, society perceived women as too "fragile and virginal" for courtrooms.[111] Court decisions, however, eventually recognized that diversity on the jury assured impartiality, and consequently, these decisions allocated the civic duty of jury service to more citizens.[112]

The majority then explained that the state's use of sex-based strikes was a classification that had to survive heightened scrutiny — that is, the strikes had to further substantially the state's legitimate interest in securing a fair and impartial jury [113] The long history of discrimination against women in America, the majority explained, justified this level of scrutiny [114] Alabama argued that a historical perception that men favor putative fathers and that women favor mothers in paternity suits justified the sex-based strikes.[115] The majority, refusing to accept as a justification for sex-based peremptory challenges "the very stereotype the law condemns," rejected this argument.[116] Because Alabama could not prove that sex accurately predicted venire members' attitudes, Alabama could not show that a sex-based strike substantially furthered the goal of securing an impartial jury [117]

---

109. J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994). Justices Stevens, O'Connor, Souter, and Ginsburg joined Justice Blackmun's opinion; Justice O'Connor filed a concurring opinion; Justice Kennedy filed an opinion concurring in the judgment. *Id.*

110. *Id.* at 1422-24.

111. *Id.* at 1423.

112. *Id.* at 1424 (citing Taylor v. Louisiana, 419 U.S. 522 (1975)). In *Taylor*, the Court rejected an "affirmative registration" statute for women seeking to participate in the jury system. *Taylor*, 419 U.S. at 533-35.

113. *J.E.B.*, 114 S. Ct. at 1424-26; *see* Craig v Boren, 429 U.S. 190, 197-98 (1976) (requiring that sex classification serve important governmental objectives and be substantially related to achieving those objectives); *infra* notes 154-59 and accompanying text (discussing different standards of review under Equal Protection Clause).

114. *J.E.B.*, 114 S. Ct. at 1425 (citing Frontiero v Richardson, 411 U.S. 677, 684 (1973), for rationale for giving sex classifications heightened scrutiny).

115. Respondent's Brief on the Merits at *10, J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239).

116. *J.E.B.*, 114 S. Ct. at 1426 (quoting Powers v Ohio, 499 U.S. 400, 410 (1991)). Justice Blackmun explained that Alabama's arguments were similar to arguments supporting the statutory exclusion of women from venires and, therefore, were inherently suspect. *Id.* at 1426-27

117 *Id.* The majority also suggested that statistical proof supporting Alabama's contention that the historical perception was a good predictor of a juror's sympathies would not

Instead, the majority explained, a sex-based strike implicated the *Batson* harms[118] because such challenges reinforced stereotypes and prejudices.[119] The Court explained that a sex-based strike harmed the defendant because prejudices might pervade the entire trial.[120] Furthermore, a sex-based challenge violated a jury panelist's right to nondiscriminatory jury selection practices.[121] Finally, a sex-based strike harmed the whole community and undermined public confidence in the judicial system by placing the state's imprimatur on outdated stereotypes.[122]

The *J.E.B.* majority explained that its decision did not eliminate the peremptory challenge because parties could still use the strike against any group subject to "rational basis" scrutiny under the Equal Protection Clause.[123] Furthermore, careful questioning of venire members during voir dire would permit attorneys to develop sufficiently sex-neutral reasons to justify their strikes.[124] Justice Blackmun concluded his analysis by adopting, as the standard for sex discrimination, *Batson*'s three-part test for evaluating a party's allegation of intentional discrimination in the exercise of peremptory challenges.[125]

C. The Concurring Opinions

Justice O'Connor, concurring, explained that *Batson* had already created administrative difficulties for lower courts and speculated that *J.E.B.* would only exacerbate the problems of jury selection.[126] Justice O'Connor detailed the historical importance of the peremptory challenge

---

enable sex-based strikes to survive heightened scrutiny *Id.* at 1427 n.11.

118. Batson v Kentucky, 476 U.S. 79, 87-88 (1986) (discussing harms of racially discriminatory peremptory strikes); *see supra* note 38 (discussing *Batson* harms).

119. *J.E.B.*, 114 S. Ct. at 1427-28.

120. *Id.* at 1427

121. *Id.*

122. *Id.*

123. *Id.* at 1429; *see infra* note 158 and accompanying text (defining rational basis scrutiny under Equal Protection Clause). The majority also suggested that a peremptory strike based on a common sex characteristic — such as military service for men or nursing for women — would be constitutional. *J.E.B.*, 114 S. Ct. at 1429 n.16.

124. *J.E.B.*, 114 S. Ct. at 1429.

125. *Id.* at 1429-30 (citing Batson v Kentucky, 476 U.S. 79, 96-98 (1986)); *see also supra* notes 35-41 (discussing *Batson*). In other words, courts will now require litigants to produce sex-neutral reasons for peremptory challenges to rebut a prima facie case of sex discrimination. *J.E.B.*, 114 S. Ct. at 1429-30.

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

and its value in securing an impartial jury [127] *J.E.B.* would hurt the peremptory challenge, Justice O'Connor explained, because additional constitutional restrictions would make it even more difficult to justify a strike that, by definition, needed no justification.[128] Because of the relevance of race and sex in jury deliberations, peremptory strikes based on assumptions about a man's or woman's likely predisposition in a particular case would assist a litigant in securing an impartial jury [129] Justice O'Connor, however, acknowledged that *J.E.B.* made these often factually accurate assumptions irrelevant as a matter of constitutional law [130] Thus, *Batson*'s special rule for race now governed sex as well.[131] Finally, Justice O'Connor argued that the Court should limit *J.E.B.* to its facts and thereby allow criminal defendants and civil litigants to exercise sex-based peremptory strikes without constitutional scrutiny [132]

Justice Kennedy, concurring in the judgment of the Court, explained that *J.E.B.* was merely a logical outgrowth of Supreme Court precedents.[133] For Justice Kennedy, the only question was whether a sex-based strike could survive heightened scrutiny [134] Emphasizing the Equal Protection Clause's emphasis on individual rights, Justice Kennedy argued that the injury that a sex-based strike caused did not differ from the injury that a statute that banned either men or women from a venire would cause.[135] Justice Kennedy concluded that because sex-based peremptory challenges assess the juror on group characteristics — rather than on individual

---

127 *Id.* (O'Connor, J., concurring).

128. *Id.* (O'Connor, J., concurring).

129. *Id.* at 1432 (O'Connor, J., concurring).

130. *Id.* (O'Connor, J., concurring).

131. *Id.* (O'Connor, J., concurring).

132. *Id.* at 1432-33 (O'Connor, J., concurring). Justice O'Connor's proposed limitation to the Court's holding in *J.E.B.* is consistent with her prior opinions. *See* Georgia v McCollum, 505 U.S. 42, 66-68 (1992) (O'Connor, J., dissenting) (arguing that criminal defendant is not state actor when exercising peremptory challenges); Edmonson v Leesville Concrete Co., 500 U.S. 614, 644 (1991) (O'Connor, J., dissenting) (arguing that civil litigant is not state actor when exercising peremptory challenges). In addition, Justice O'Connor no doubt proposed this limitation out of concern for the future of the challenge; as she explained, "In extending *Batson* to gender we have taken a step closer to eliminating" peremptory challenges. *J.E.B.*, 114 S. Ct. 1432 (O'Connor, J., concurring).

133. *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring in the judgment).

134. *Id.* (Kennedy, J., concurring). Justice Kennedy explained that earlier cases had established beyond doubt that the Equal Protection Clause applied to both race and sex discrimination. *Id.* (Kennedy, J., concurring).

135. *Id.* at 1434 (Kennedy, J., concurring).

fitness — sex-based strikes do not comport with the Equal Protection Clause.[136]

D. The Dissenting Opinions

Chief Justice Rehnquist, dissenting,[137] argued that the differences between race and sex discrimination justified limiting *Batson* to race-based peremptory strikes.[138] The Chief Justice explained that in *Batson*, the Court balanced the peremptory challenge — and the values that it serves — against the dictates of the Equal Protection Clause.[139] *Batson* simply recognized that the Fourteenth Amendment is essentially about race, so the balance tipped against peremptory challenges in the race context.[140] Differences between the sexes do contribute to a difference in "outlook brought to the jury room"; therefore, the balance should tip in favor of sex-based strikes because they substantially further the state's interest in securing an impartial jury [141]

Justice Scalia authored a caustic dissent that criticized the majority's political correctness in denouncing male chauvinism and discrimination against women in a case in which the equal protection challenge centered on peremptory strikes exercised against male venire members.[142] Justice Scalia began by attacking the majority's contention that the excluded jurors suffered an injury and argued that because the majority believed that male and female jurors were interchangeable for purposes of the petit jury, J.E.B. could not have suffered an injury [143] Justice Scalia also disagreed with the majority's contention that group-based strikes were inherently unconstitutional and argued that because any party can strike either sex — and in this case, the parties did strike both sexes in equal numbers — the jury selection system did not discriminate as a whole; in using sex-based strikes, each party simply attempts to secure a jury that favors that party's side.[144] Finally, Justice

136. *Id.* (Kennedy, J., concurring).

137 *Id.* at 1434-36 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist also joined Justice Scalia's dissent. *Id.* at 1436 (Scalia, J., dissenting).

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

139. *Id.* at 1435 (Rehnquist, C.J., dissenting).

140. *Id.* (Rehnquist, C.J., dissenting).

141. *Id.* (Rehnquist, C.J., dissenting).

142. *Id.* at 1436-38 (Scalia, J., dissenting).

143. *Id.* at 1436-37 (Scalia, J., dissenting). Justice Scalia argued that J.E.B. did not suffer an injury but conceded that J.E.B. probably had standing under *Powers* to raise the claim of an excluded juror. *Id.* (Scalia, J., dissenting).

144. *Id.* at 1437 (Scalia, J., dissenting).

Scalia argued that the majority's reasoning placed all peremptory challenges based on group characteristics at risk because parties base all challenges on stereotypes.[145] Under the majority's rationale, no peremptory challenge could ever satisfy the heightened scrutiny or rational basis equal protection tests because of the Court's refusal to accept a justification based on a stereotype.[146] Justice Scalia observed that the Court's decision would hurt criminal defendants because such defendants would be almost completely unable to challenge possibly biased jurors.[147] He also noted that the additional administrative costs would harm the justice system.[148] The Court's decision, Justice Scalia concluded, seriously and unnecessarily damaged an essential trial practice.[149]

IV Analysis

J.E.B.'s conclusion that sex-based peremptory challenges are unconstitutional is incorrect for two reasons. First, the Court mischaracterized the state's use of challenges as a sex-based classification subject to heightened scrutiny under the Equal Protection Clause.[150] This error will erode the challenge's viability because every peremptory challenge is now potentially an act of sex discrimination.[151] Second, the *J.E.B.* Court disregarded Court precedent that clearly indicated that only a history of abuse *in the exercise of the peremptory challenge* justifies subjecting any given peremptory challenge in a single case to equal protection scrutiny [152] Because no history

---

145. *Id.* at 1438 (Scalia, J., dissenting).

146. *Id.* (Scalia, J., dissenting) (quoting Powers v Ohio, 499 U.S. 400, 410 (1991)).

147 *Id.* at 1438 (Scalia, J., dissenting).

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

149. *Id.* (Scalia, J., dissenting). Justice Scalia observed:

> In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.

Id. (Scalia, J., dissenting).

150. *See infra* notes 165-76 and accompanying text (arguing that peremptory challenge system does not classify on basis of sex).

151. *See infra* notes 177-80 and accompanying text (discussing implications of *J.E.B.* Court's mischaracterization).

152. *See infra* notes 181-210 and accompanying text (discussing Court precedent indicating that pattern of abuse is required before giving constitutional scrutiny to peremptory challenges in individual case).

of abuse exists in the context of sex, the Court has provided a remedy for a nonexistent problem — a remedy that seriously undermines an important trial tool.[153]

A. Sex Classifications

The Equal Protection Clause generally prevents states from treating similarly situated groups of people differently [154] In enacting legislation, a state can classify people, as long as the state does not base the classification on arbitrary factors.[155] Courts subject classifications to different levels of judicial scrutiny depending on the basis for the classification.[156] For example, courts view state-made distinctions based on race, ethnicity, or national origin as inherently suspect and review those distinctions under a "strict scrutiny" test.[157] Courts examine classifications in the context of economic and social welfare legislation, on the other hand, under a more deferential "rational basis test."[158] Finally, courts view sex-based classifications as quasi-suspect and review them under an intermediate or "heightened scrutiny" standard.[159]

---

153. *See infra* notes 222-29 and accompanying text (discussing implications of *J.E.B.* and possible extensions).

154. *See* Missouri v. Lewis, 101 U.S. 22, 31 (1879) (stating purpose of Equal Protection Clause). The *Lewis* Court explained that the Clause means that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Id.*

155. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.2 (5th ed. 1995) (explaining limits on state's ability to draw classifications).

156. *See infra* notes 157-59 and accompanying text (describing different levels of scrutiny under Equal Protection Clause).

157 *See* Palmore v Sidoti, 466 U.S. 429, 432-34 (1984) (applying strict scrutiny to race-based child custody determination); Loving v Virginia, 388 U.S. 1, 11-12 (1967) (applying strict scrutiny to statutory scheme prohibiting interracial marriages). The state must have a compelling interest justifying the differential treatment, and the state must narrowly tailor the classification to advance that interest. *See Palmore*, 466 U.S. at 432-33 (defining strict scrutiny).

158. *See* Nordlinger v. Hahn, 505 U.S. 1, 11-17 (1992) (applying rational basis scrutiny to state proposition requiring state to treat residents who purchased property prior to proposition's enactment differently than residents who purchased property after proposition's enactment in assessing property taxes); City of New Orleans v Dukes, 427 U.S. 297, 303-06 (1976) (applying rational basis scrutiny to city ordinance exempting certain street vendors from general prohibition on such vendors). Under rational basis, courts determine whether a legitimate state interest exists and whether the classification is rationally related to the furtherance of that interest. *See Nordlinger*, 505 U.S. at 11 (defining rational basis scrutiny); *Dukes*, 427 U.S. at 303-04 (same)).

159. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727-33 (1982) (applying

To challenge state action under the Equal Protection Clause, a party must initially prove the existence of a classification.[160] Such differential treatment by a state actor typically manifests itself in one of three ways: The state action discriminates on its face,[161] in its application,[162] or by design.[163] Peremptory challenges are an example of state acts that can discriminate in their application because challenges are neutral on their face and do not discriminate by design, but litigants can apply them in a discriminatory fashion.[164]

In *J.E.B.*, the Court erroneously characterized the state's use of peremptory challenges as a sex-based classification subject to equal protection scrutiny [165] J.E.B. argued that the state's use of peremptory challenges to remove nine of the ten men on the jury panel was unconstitutional sex discrimination.[166] However, J.E.B. used ten of his eleven strikes to eliminate women from the same panel.[167] Thus, J.E.B., a state actor under *Edmonson*,[168] also discriminated on the basis of sex. As a practical matter, the

---

heightened scrutiny to state-supported, all-women nursing school); Craig v Boren, 429 U.S. 190, 199-210 (1976) (applying heightened scrutiny to state statute that treated 18-20 year-old males differently than 18-20 year-old females with respect to purchase of 3.2% beer). Under heightened scrutiny, a state must prove that the classification advances an important government interest, and the classification must be substantially related to furthering that interest. *See Hogan*, 458 U.S. at 723-27 (defining heightened scrutiny); *Craig*, 429 U.S. at 197-99 (same).

160. *See* NOWAK ET AL., *supra* note 155, § 14.2 (explaining that classification of similarly situated individuals resulting in differential treatment triggers Equal Protection Clause).

161. *See* Brown v. Board of Educ., 347 U.S. 483, 487-88 (1954) (involving state statutes mandating racial segregation in public education).

162. *See* Palmore v. Sidoti, 466 U.S. 429, 430-31 (1984) (involving child-custody court order applying race-neutral state law in racially discriminatory fashion); *cf.* Korematsu v United States, 323 U.S. 214, 215-17 (1944) (involving discriminatory application of race-neutral Executive Order).

163. *See* Hunter v Underwood, 471 U.S. 222, 229-30 (1985) (involving state statute designed and enacted to disenfranchise black citizens).

164. *See* Batson v Kentucky, 476 U.S. 79, 96 (1986) (explaining that peremptory challenges give those with discriminatory motives ability to discriminate).

165. *See infra* notes 166-76 and accompanying text (criticizing characterization of peremptory challenges in *J.E.B.* as sex-based classification).

166. Petitioner's Brief on the Merits at *6-7, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239).

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

168. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627-28 (1991) (explaining that civil litigant is state actor when exercising peremptory challenges).

only difference between J.E.B.'s actions and the state's actions was that the state discriminated against men and J.E.B. discriminated against women.[169]

As a matter of constitutional law, however, the peremptory challenge system did not classify between the sexes in this case.[170] Men and women each represent approximately one half of the population, so any given venire will roughly reflect that equality [171] For the purposes of selecting the petit jury then, men and women are similarly situated on the jury panel. And because the peremptory challenge system subjects all potential jurors to the same possibility of arbitrary removal from the panel, the system as a whole does not treat men and women differently [172] Indeed, *J.E.B.* demonstrates the fact that the system does not classify between men and women; in this case, both sides struck men and women in almost identical proportions.[173] The fact that J.E.B. ended up facing an all-female jury is simply the product of a disproportionately high number of women venire members[174] — quite literally, the luck of the jury panel draw [175] Surprisingly, Alabama did not raise this argument, although one amicus party seems to have realized the argument's potential.[176]

---

169. *J.E.B.*, 114 S. Ct. at 1421-22. Of course, in exercising its strikes, the state acted on behalf of a woman — T.B., the mother in the paternity suit. *Id.* at 1421.

170. *Cf. id.* at 1437 (Scalia, J., dissenting) (arguing that sex-based strikes do not violate Equal Protection Clause because peremptory challenge system treats both sexes even-handedly).

171. *See* BUREAU OF THE CENSUS, ECONOMICS AND STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION — GENERAL POPULATION CHARACTERISTICS: UNITED STATES tbl. 14, at 19-20 (showing that men represent 48.7% and women 51.3% of population of United States).

172. *See* Swain v Alabama, 380 U.S. 202, 221 (1965) (explaining that peremptory challenge system subjects all venire members to equal possibility of removal), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986).

173. J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421-22 (1994) (describing exercise of peremptory challenges in case). J.E.B. used 91% of his strikes against women, and Alabama used 90% of its strikes against men. *See id.*

174. *See id.* at 1421 (stating that venire in J.E.B.'s case consisted of 24 women and 12 men).

175. *See* United States v. Broussard, 987 F.2d 215, 219-20 (5th Cir. 1993) (arguing that because women are not numerical minorities, sex-based peremptory challenges are impracticable). The Fifth Circuit explained that the fact that "women are not numerical minorities looms large because the focus of *Batson* is upon selecting a petit jury from a randomly chosen venire. This means that striking women, or men, for the sole reason of their sex cannot succeed except in isolated cases." *Id.* at 220. *J.E.B.* was one of those isolated cases.

176. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at *28-29, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239) (implicitly recognizing value of focusing on one party's exercise of peremptory challenges). The United States

Unfortunately, the *J.E.B.* Court also was not aware of this analytical approach.[177] Consequently, litigants can now challenge every single strike by an opposing party as an act of sex discrimination.[178] Because the peremptory challenge functions best when free of judicial regulation,[179] *J.E.B.*'s expansion of the number of strikes subject to judicial scrutiny seriously erodes the challenge's effectiveness.[180]

B. History of Abuse

Prior to *Swain*, the Supreme Court never directly addressed the constitutionality of peremptory challenges.[181] In 1879, however, the Court began applying the Equal Protection Clause to state jury selection procedures and held that a West Virginia statute limiting the class of persons eligible for jury service to white males constituted a denial of equal protection.[182] The Court

---

carefully worded the description of the parties' exercise of peremptory challenges in *J.E.B.*. "The State used nine of its 10 peremptory strikes to remove male jurors; petitioner used one of his 11 strikes to remove a male juror." *Id.* Of course, if petitioner used only one strike against a male jury panelist, by definition he used 10 of his 11 strikes against female jury panelists. Thus, the United States, though supporting J.E.B., may have realized that a characterization of peremptory challenges in this case as a classification required focusing solely on one of the parties' challenges and not both.

177 *J.E.B.*, 114 S. Ct. at 1424-26 (analyzing state's exercise of peremptory challenges as sex-based classification).

178. Every venire member is a man or woman, and because the Court considers both men and women to be cognizable groups under the Fourteenth Amendment, *see* Mississippi Univ for Women v Hogan, 458 U.S. 718, 723-24 (1982) (explaining that courts give discrimination against either men or women same level of scrutiny under Equal Protection Clause), every peremptory strike removes a cognizable group member and is therefore challengeable by the nonstriking party.

179. *See infra* note 194 and accompanying text (explaining that peremptory challenge works best when court interference is minimal).

180. *See infra* notes 213-31 and accompanying text (discussing how *J.E.B.* will erode peremptory challenge).

181. *See* McCray v. Abrams, 750 F.2d 1113, 1118 (2d Cir. 1984) (explaining that *Swain* is only Supreme Court case to directly address constitutionality of state's exercise of race-based peremptory challenges), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986); *see also supra* notes 26-34 and accompanying text (discussing *Swain*).

182. *See* Strauder v West Virginia, 100 U.S. 303, 310 (1879) (concluding that state statute limiting jury service to white men denied black defendant equal protection of laws). The defendant in *Strauder* challenged both the grand jury and the petit jury panel in his case. *Id.* at 304-05. However, the Court couched its holding in broad terms, failing to specify whether the Equal Protection Clause governed the selection of individual petit jurors: "[T]he statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored

quickly expanded this principle to forbid officials charged with administering grand jury and venire selection procedures from systematically excluding members of the defendant's race in selecting grand or petit jury panels.[183] Subsequent cases consistently reaffirmed this nondiscrimination principle.[184] However, at the time the Court decided *Swain*, a criminal defendant had to show a pattern of discriminatory behavior in selecting the grand or petit jury venire to establish an equal protection violation.[185] Defendants could not rely on the facts of their own cases to satisfy the evidentiary burden.[186]

---

man when he is put upon trial for an alleged offence against the State." *Id.* at 310.

183. *See* Neal v Delaware, 103 U.S. 370, 394 (1880) (explaining that defendant has right to jurors selected without racially discriminatory practices); Virginia v Rives, 100 U.S. 313, 322-23 (1879) (same).

184. *See* Arnold v North Carolina, 376 U.S. 773, 774 (1964) (reversing conviction because of systematic exclusion of blacks from grand juries); Eubanks v Louisiana, 356 U.S. 584, 585-86, 589 (1958) (reversing conviction because of systematic exclusion of blacks by jury commission from grand juries); Hernandez v Texas, 347 U.S. 475, 480-82 (1954) (reversing conviction because of systematic exclusion by state against Mexicans in selection of grand juries and petit jury panels); Cassell v Texas, 339 U.S. 282, 287-90 (1950) (plurality opinion) (reversing conviction because of racial discrimination in selection of grand jurors in defendant's case); Hill v Texas, 316 U.S. 400, 404 (1942) (reversing conviction because of systematic exclusion by jury commissioners of blacks from grand juries); Smith v Texas, 311 U.S. 128, 131-32 (1940) (same); Rogers v Alabama, 192 U.S. 226, 229-31 (1904) (same); Carter v Texas, 177 U.S. 442, 447-49 (1900) (same); *cf.* Reece v Georgia, 350 U.S. 85, 87-90 (1955) (stating that allegation of discriminatory administration of facially race-neutral grand jury statutory selection scheme stated constitutional claim).

185. *See, e.g.*, Eubanks v. Louisiana, 356 U.S. 584, 587 (1958) (requiring that criminal defendant show complete and continuous exclusion of blacks by jury selection plan in selecting grand juries); Hernandez v Texas, 347 U.S. 475, 480-81 (1954) (requiring that criminal defendant establish pattern of exclusion of Mexicans by state in selecting citizens for jury service); Patton v Mississippi, 332 U.S. 463, 465-66 (1947) (requiring that criminal defendant prove systematic exclusion of blacks by jury administration officials in selecting grand juries and petit jury venires); Hill v Texas, 316 U.S. 400, 404-06 (1942) (explaining that criminal defendant must establish continuous exclusion of blacks by jury commissioners in selecting grand juries); Hale v Kentucky, 303 U.S. 613, 616 (1938) (requiring that criminal defendant show systematic and arbitrary exclusion of blacks by state in selecting citizens for jury service); Norris v Alabama, 294 U.S. 587, 596-99 (1935) (explaining that criminal defendant established prima facie case of racial discrimination in selection of grand juries and petit jury venires).

186. *But see* Cassell v Texas, 339 U.S. 282, 290 (1950) (plurality opinion) (reversing denial of motion to quash indictment because of discrimination in selection of grand jury). In *Cassell*, four members of the Court suggested that a defendant could establish a prima facie case of racial discrimination in the state's administration of a jury selection system by using the facts of his own case. *Id.* However, the other three justices in the majority concurred only in the judgment, citing a history of discrimination in the selection of names for grand jury lists. *Id.* at 294-95. The Court later adopted the *Cassell* approach and permitted defend-

Some members of the Court argued that the nondiscrimination principle in these early cases applied to all jury selection procedures, including the peremptory challenge.[187] Indeed, several of the prior cases contain broad language that seems to support this interpretation.[188] However, none of these cases mentioned peremptory strikes or involved a challenge to the exercise

---

ants to challenge the selection of the venire or panel based on the facts of their particular case. *See* Batson v Kentucky, 476 U.S. 79, 95 (1986) (reaffirming that defendant need not prove discriminatory pattern in venire selection to establish Equal Protection Clause violation).

187 *See* Swain v Alabama, 380 U.S. 202, 239 (1965) (Goldberg, J., dissenting) (arguing that majority misconstrued prior Court cases on jury selection procedures), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986). In his dissent, Justice Goldberg wrote:

> The Court's jury decisions, read together, have never distinguished between exclusion from the jury panel and exclusion from the jury itself. The very point of all these cases is to prevent that deliberate and systematic discrimination against Negroes or any other racial group that would prevent them, *not merely from being placed on the panel, but from serving on the jury.*

Id. (Goldberg, J., dissenting) (emphasis added).

Justice White's majority opinion in *Swain* cited similarly broad language. *Id.* at 203-04. However, Justice White ultimately treated the peremptory challenge differently, refusing to "woodenly appl[y]," *id.* at 227, the test developed in prior cases to the peremptory challenge. *Id.* at 221-22, 226-28.

188. *See, e.g.*, Eubanks v Louisiana, 356 U.S. 584, 585 (1958) (explaining that indictment by grand jury or trial by petit jury where state excludes members of defendant's race constitutes denial of equal protection); Patton v Mississippi, 332 U.S. 463, 465 (1947) (explaining that state's race-based exclusion of blacks from grand and petit juries violates Equal Protection Clause); Martin v Texas, 200 U.S. 316, 321 (1906) (describing, in expansive terms, constitutional right of accused concerning jury selection); Virginia v Rives, 100 U.S. 313, 322-23 (1879) (concluding that discrimination based on race in selection of jurors violates Equal Protection Clause); *supra* note 182 (quoting Strauder v West Virginia, 100 U.S. 303 (1879)). For example, the *Martin* Court wrote: "What an accused is entitled to demand is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color." *Martin*, 200 U.S. at 321.

In addition to case law prohibiting discrimination in jury selection, a federal statute prohibited both states and the federal government from disqualifying or deliberately excluding any citizen from grand or petit jury service based on the potential juror's race. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336-37 (1875) (codified as amended at 18 U.S.C. § 243 (1994)). The statute provided that violations constituted misdemeanor offenses and were punishable by fines up to $5,000. *Id.* Four years after its enactment, the Supreme Court entertained a constitutional challenge to the statute by a state judge indicted for violating the statute's provisions; the Court sustained the statute's constitutionality under the Thirteenth and Fourteenth Amendments. *Ex Parte* Virginia, 100 U.S. 339, 340, 344-49 (1879) (denying writ of habeas corpus to state judge indicted under Civil Rights Act of 1875 and affirming Act's constitutionality).

of such strikes.[189] In addition, the Court's approach to peremptory challenges in *Batson* suggests that twenty-one years after *Swain*, the Court still treated the venire selection cases as only persuasive authority that did not directly control equal protection challenges to petit jury selection procedures like peremptory strikes.[190]

However, in cases decided prior to and contemporaneously with the venire selection cases, the Court extolled the virtues of the peremptory challenge.[191] The Court explained that the challenge enabled litigants to eliminate potentially biased jurors and allowed both parties to secure an impartial jury [192]

---

189. *See* McCray v Abrams, 750 F.2d 1113, 1118 (2d Cir. 1984) (stating that *Swain* is only Supreme Court opinion to directly address constitutionality of race-based peremptory challenges), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986); *cf.* Reece v Georgia, 350 U.S. 85, 86-87 (1955) (involving grand jury selection practices); Patton v Mississippi, 332 U.S. 463, 464-65 (1947) (involving grand jury and petit jury selection practices); Hale v Kentucky, 303 U.S. 613, 614-15 (1938) (involving grand jury selection practices); Martin v Texas, 200 U.S. 316, 318 (1906) (same); Gibson v Mississippi, 162 U.S. 565, 584 (1896) (same). This lack of equal protection challenges to peremptory strikes is due to the fact that the Court did not consider the Equal Protection Clause as governing peremptory challenges. *See* Gibson v Mississippi, 162 U.S. 565, 580-81 (1896) (citing expansive examples of equal protection violations but excluding use of peremptory challenge). The *Gibson* Court summarized the jury selection cases as follows: "[T]o compel a [black] man to submit to a trial before a jury *drawn from a panel* from which were excluded, *because of their color*, men of his race was a denial of the equal protection of the laws " *Id.* at 581 (emphasis added).

190. *See* Batson v Kentucky, 476 U.S. 79, 96 (1986) (analogizing petit jury selection to selection of venire). The *Batson* Court analyzed venire selection cases decided after *Swain* and concluded that a criminal defendant no longer had to show a pattern of discrimination but could rely on the facts of his case to challenge venire selection procedures. *Id.* The *Batson* Court then argued, by analogy, that the principles of those cases supported the Court's conclusion that defendants could rely on the exercise of peremptory challenges in their individual case to establish purposeful discrimination. *Id.* at 96. Thus, the Court, in 1986, continued to distinguish the selection of the jury panel from the selection of the petit jury in the context of the Equal Protection Clause.

191. *See* Pointer v United States, 151 U.S. 396, 408 (1894) (describing peremptory challenge as one of defendant's most important rights); Lewis v United States, 146 U.S. 370, 376 (1892) (describing peremptory challenge as essential to system of trial by jury); Hayes v Missouri, 120 U.S. 68, 70 (1887) (describing peremptory strike as one of most effective means of eliminating unfit jurors). In more recent cases, the Court has continued to acknowledge the importance of the challenge, though not quite as vigorously *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1429 (1994) (explaining that state has legitimate interest in using peremptory challenge to secure fair and impartial jury); Georgia v McCollum, 505 U.S. 42, 57 (1992) (describing peremptory strike as one way to achieve impartial jury and fair trial); Batson v Kentucky, 476 U.S. 79, 98-99 (1986) (describing peremptory strike as important part of trial procedure).

192. *See* Holland v Illinois, 493 U.S. 474, 481-83 (1990) (describing peremptory

For example, the Court reversed convictions in which trial courts denied or abridged the exercise of a peremptory challenge.[193] The Court noted that if a party could not exercise the challenge free of judicial regulation, the strike would be useless.[194]

Thus, the jury selection and peremptory challenge cases appear inconsistent; the Court provided constitutional protection, with an attending reversible error rule, for a practice that the Constitution does not require[195] and that has the inherent potential for discriminatory use.[196] *Swain* clarified this apparent conflict by striking a balance between the peremptory challenge and the Equal Protection Clause.[197] In *Swain*, the Court concluded that the Clause did not

---

challenge as tool that litigants historically used to secure an impartial jury); United States v Marchant, 25 U.S. (12 Wheat.) 297, 298 (1827) (explaining that right of peremptory challenge permits criminal defendant "to say who shall not try him"). In *Swain*, the Court suggested another goal that the challenge furthered:

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way, the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Swain v Alabama, 380 U.S. 202, 219 (1965) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986).

193. *See* Harrison v United States, 163 U.S. 140, 141-42 (1896) (reversing conviction because trial court denied defendant full number of peremptory challenges); Lewis v United States, 146 U.S. 370, 378-80 (1892) (reversing conviction because venire members were not present in courtroom when defendant exercised challenges and because trial court deprived him of three challenges); *cf.* Gulf, Colo. & S. Fe Ry. v Shane, 157 U.S. 348, 351 (1895) (reversing verdict of negligence because trial court denied defendant ability to strike jurors from venire panel); Mutual Life Ins. Co. v Hillmon, 145 U.S. 285, 293-94 (1892) (ordering new trial because trial court denied defendants their full right of peremptory challenge).

194. *See* St. Clair v. United States, 154 U.S. 134, 148 (1894) (condemning jury selection system that prevents defendant from exercising peremptory challenges without restriction); Lewis v United States, 146 U.S. 370, 376-78 (1892) (explaining that courts must give defendant freedom to exercise challenge). The *Lewis* Court explained that the challenge is by definition arbitrary and that "it must be exercised with full freedom, or it fails of its full purpose." *Id.* at 378 (quoting Lamb v State, 36 Wis. 424, 427 (1874)); *cf.* United States v Shackleford, 59 U.S. (18 How.) 588, 589-90 (1855) (explaining that judge has no discretionary authority to deny peremptory challenges to any party in any case).

195. *See* Stilson v. United States, 250 U.S. 583, 586 (1919) (explaining that Constitution does not require either states or Congress to provide peremptory challenges to any party in court).

196. *See* Batson v Kentucky, 476 U.S. 79, 96 (1986) (quoting Avery v Georgia, 345 U.S. 559, 562 (1953)) ("Peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'").

197 Swain v. Alabama, 380 U.S. 202, 221-22, 224-28 (1965), *overruled in part*, Batson

govern a party's use of challenges in an individual case but might govern the use of challenges if a defendant could show a pattern of abuse across several cases.[198]

Twenty-one years after *Swain*, however, the *Batson* Court rejected this burden of proof as "crippling" and impossible to meet.[199] The *Batson* Court arrived at this conclusion after finding that states flagrantly abused peremptory challenges.[200] In other words, because states continued to use peremptory challenges to strike black venire members in large numbers in case after case, the *Batson* Court refused to continue presuming that a state exercised any given challenge to secure a fair and impartial jury [201] Thus, *Batson* provides an example of the Court responding to practical realities; jury selection practices in the country exposed *Swain*'s presumption, in the race context, as wholly arbitrary and irrational.[202] This interpretation of *Batson* explains the vote shift of Justice White, who authored *Swain*[203] but voted with the *Batson* majority [204] In his *Batson* concurrence, Justice White explained that

---

v Kentucky, 476 U.S. 79 (1986); *see supra* notes 26-34 and accompanying text (discussing *Swain*).

198. *Swain*, 380 U.S. at 221-28.

199. *Batson*, 476 U.S. at 92-93; *see supra* notes 31-33 (citing criticism of *Swain*'s evidentiary standard).

200. *Batson*, 476 U.S. at 92-93 & nn.16-17; *see supra* notes 31-33 (citing cases and commentary documenting difficulty of establishing equal protection violation under *Swain*).

201. *See* Batson v Kentucky, 476 U.S. 79, 96 (1986) (permitting defendant to show intentional discrimination in selection of petit jury "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial"); *id.* at 103-04 & n.2 (Marshall, J., concurring) (documenting abuse of peremptory challenge against black venire members).

202. *Cf.* Broussard v United States, 987 F.2d 215, 218-20 (5th Cir. 1993) (arguing that experience demonstrated that *Swain*'s presumption — that any particular peremptory challenge is not based on race — was incorrect).

203. Swain v Alabama, 380 U.S. 202, 203 (1965), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986).

204. *See Batson*, 476 U.S. at 100-02 (White, J., concurring). Throughout his career on the Court, Justice White adopted a realistic approach to cases and demonstrated a firm conviction that "law should reflect a pragmatic appraisal of the circumstances to which the law is to be applied." Allan P Ides, *The Jurisprudence of Byron White*, 103 YALE L.J. 419, 456 (1993) (discussing legal realism in Justice White's jurisprudence). Justice Brennan also joined both the *Swain* and *Batson* majorities. *Swain*, 380 U.S. at 228; *Batson*, 476 U.S. at 81, 108. However, his vote shift reflected a more fundamental change of philosophy Dissenting from the Court's denial of certiorari in a pre-*Batson* case, Justice Brennan explained that *Swain*'s equal protection reasoning was incorrect because *Swain* impermissibly allowed prosecutors to presume that black jurors would be partial to black defendants simply because of the racial correlation. *See* Thompson v United States, 469 U.S. 1024, 1025-27 (1984)

prosecutors should have taken *Swain* as a warning that race-based peremptory strikes might violate the Equal Protection Clause.[205]

Batson therefore stands for the proposition that only a history of abuse in the exercise of peremptory challenges justifies relaxing *Swain*'s pattern-of-abuse evidentiary requirement.[206] *Batson* overruled *Swain* only to the extent that *Swain* permitted race-based peremptory challenges in a particular case to avoid constitutional scrutiny.[207] *Swain* should still provide the appropriate standard for assessing a party's exercise of peremptory challenges based on sex or any other nonracial characteristic.[208] Other cognizable groups must demonstrate a pattern of abuse of peremptory challenges in case after case to receive *Batson*'s protection.[209] As a matter of constitutional law, the

---

(Brennan, J., dissenting from denial of certiorari) (criticizing *Swain*).

205. *Batson*, 476 U.S. at 100-01 (White, J., concurring). Justice White explained: "It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." *Id.* at 101.

206. *See Broussard*, 987 F.2d at 218-20 (arguing that practical necessity justified *Batson*'s result). The Fifth Circuit explained, "[I]t was experience and functional necessity — not analogical reasoning that decided *Batson* " *Id.* at 220.

207 *See* Batson v Kentucky, 476 U.S. 79, 100-01 (1986) (White, J., concurring) (explaining that *Batson* overruled *Swain*'s presumption immunizing peremptory challenges against blacks in individual cases from equal protection scrutiny); United States v Broussard, 987 F.2d 215, 219 (5th Cir. 1993) (noting that *Batson* rejected *Swain*'s interpretation of Equal Protection Clause's applicability to race-based peremptory challenges). The Fifth Circuit elaborated, "Th[e] view of peremptory challenges as not presenting equal protection issues at all in a discrete case was rejected in *Batson, at least for race.*" *Id.* (emphasis added); *see also* United States v Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) (explaining that *Batson* relaxed *Swain*'s evidentiary burden in race context), *cert. dismissed sub nom.* Washington v. United States, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990); State v Davis, 504 N.W.2d 767, 768-69 (Minn. 1993) (describing *Batson* as limited exception to *Swain*), *cert. denied*, 114 S. Ct. 2120 (1994).

208. *See* Broussard v United States, 987 F.2d 215, 220 (5th Cir. 1993) (arguing that *Swain* standard governs exercise of sex-based challenges). The Fifth Circuit explained: "We are persuaded that *Swain* is a sound accommodation of the interests of fair trial and interests in selection free of gender bias. Experience has not taught us that *Swain* is inadequate for gender." *Id.*, *see also Davis*, 504 N.W.2d at 768-71 (arguing that *Swain* provides applicable standard for equal protection challenges to peremptory strikes outside context of race). *But see* Brief for the United States as Amicus Curiae at *36-37, *J.E.B.* (No. 92-1239) (arguing that adherence to *Swain* in context of sex-based challenges is unwise).

209. *See Broussard*, 987 F.2d at 220 (refusing to extend *Batson* to sex-based challenges because experience did not reveal pattern of sex discrimination in exercise of peremptory challenges); *Davis*, 504 N.W.2d at 771 (declining to extend *Batson* to religion-based challenges because experience did not reveal pattern of religious discrimination in exercise of peremptory strikes). The Minnesota Supreme Court explained that "[b]ecause religious bigotry

special attention that the Court gives to problems of race justifies a reading of *Batson* that limits that decision to its facts.[210] As a matter of policy, the Court's continued recognition of the importance of the peremptory challenge[211] supports a narrow reading of *Batson* that attempts to preserve the balance that the *Swain* Court struck between the challenge and the Equal Protection Clause.[212]

By focusing on the state's use of peremptory strikes in a single case,[213] the *J.E.B.* Court erroneously departed from *Swain*'s evidentiary standard. Indeed, the *J.E.B.* Court extended *Batson*'s reduced evidentiary standard to cases of sex-based peremptory strikes despite the lack of any evidence that states systematically use peremptory strikes to keep unbiased, qualified women off juries; the Court frankly acknowledged that "[d]iscrimination on the basis of gender in the exercise of peremptory challenges is a relatively recent phenomenon."[214] In other words, the *J.E.B.* Court provided a remedy

---

in the use of the peremptory challenge is not as prevalent, or flagrant, *or historically ingrained* in the jury selection process as is race, we conclude that neither the federal nor our state constitution requires an extension of *Batson*." *Id.* (emphasis added). The Supreme Court, in *Powers*, *Edmonson*, and *McCollum*, did analyze peremptory challenges in individual cases. Georgia v McCollum, 505 U.S. 42, 44-46 (1992); Edmonson v Leesville Concrete Co., 500 U.S. 614, 616-17 (1991); Powers v Ohio, 499 U.S. 400, 403 (1991). But because those cases only dealt with race-based challenges, they did not extend *Batson* beyond the race context. *See supra* note 97 (explaining that post-*Batson* cases dealt only with race-based challenges).

210. *See* Palmore v Sidoti, 466 U.S. 429, 432 (1984) (explaining that courts give race-based classifications exacting scrutiny); Korematsu v United States, 323 U.S. 214, 216 (1944) (describing race-based classifications as immediately suspect).

211. *See supra* notes 191-94 and accompanying text (discussing Court's emphasis on importance of peremptory challenge).

212. *See supra* notes 197-210 and accompanying text (discussing *Swain*'s balance between peremptory challenges and Equal Protection Clause).

213. *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421-22 (1994) (applying Equal Protection Clause to state's exercise of peremptory challenges in single case). The *J.E.B.* Court did not discuss or mention *Swain* at all.

214. *J.E.B.*, 114 S. Ct. at 1422. In almost all of the venire selection cases, black criminal defendants alleged a pattern of discriminatory practices, supported with substantive proof. *See* Arnold v. North Carolina, 376 U.S. 773, 774 (1964) (documenting discriminatory selection practices). In *Arnold*, a defendant alleged that although 4,819 black men appeared on county juror rolls and 2,499 black men appeared on the poll tax list, the county clerk could remember only one black man serving on a grand jury in 24 years. *Id.* In contrast, J.E.B. did not substantiate his argument with proof that sex-based strikes are widespread. *See* Petitioner's Brief on the Merits at *7-16, *J.E.B.* (No. 92-1239) (arguing for extension of *Batson* to sex-based peremptory challenges based on application of heightened scrutiny test and *Batson*'s harms analysis). Not only have litigants historically not abused the peremptory challenge in the context of sex, but the fact that J.E.B. used almost all of his strikes against

for a problem that does not exist. The Court invoked the history of discrimination against women in the selection of venires to justify its conclusion.[215] But exclusion from the venire implies that the state has determined that a particular group is inherently inferior and unfit to serve as jurors in any case.[216] Exclusion from a particular jury by peremptory challenge only implies that a litigant has determined as a matter of trial tactics that a venire member might be biased in a particular case.[217] The Court analogized the history of discrimination against women in venire selection to the history of discrimination against blacks in venire selection and reasoned that the *Batson* rule should logically protect women in petit jury selection in the same way in which the rule protects blacks.[218] But this analysis ignores the fact that the Court subjected peremptory challenges in a single case to equal protection scrutiny when faced with evidence of abuse of the peremptory challenge — and not when faced with evidence of discrimination in venire selection.[219] In the equal protection context, the Court has consistently treated discrimination on the basis of race differently than discrimination on the basis of sex.[220]

---

women and Alabama used almost all of its strikes against men demonstrates that the peremptory challenge system does not discriminate against either men or women — even in individual cases. *See supra* notes 165-76 and accompanying text (discussing Court's mistaken characterization of peremptory challenge system as sex-based classification).

215. *J.E.B.*, 114 S. Ct. at 1422-27 Some lower courts have relied on similar grounds in extending *Batson* to sex-based challenges. *See* United States v De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (relying on history of exclusion of women from juries and harms from state-sanctioned sex discrimination to justify extending *Batson* to sex-based challenges); Laidler v State, 627 So. 2d 1263, 1263-64 (Fla. Dist. Ct. App. 1993) (explaining that history of discrimination against women in jury service justified extending *Batson* to sex-based challenges). *But see* United States v Broussard, 987 F.2d 215, 220 (5th Cir. 1993) (arguing that exclusion of women from jury service does not justify extension of *Batson*).

216. *See* United States v Leslie, 783 F.2d 541, 554 (5th Cir. 1986) (en banc) (comparing effect of exclusion from venire to exclusion from petit jury), *judgment vacated*, 479 U.S. 1074 (1987); *see also J.E.B.*, 114 S. Ct. at 1437 (Scalia, J., dissenting) (comparing reasons for exclusion of women from venire with reasons for exclusion of women from petit jury). Justice Scalia noted: "Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case." *Id.*

217 *See Leslie*, 783 F.2d at 554 (comparing exclusion from venire to exclusion from petit jury).

218. *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1425 (1994) (explaining that blacks and women share history of exclusion from jury service).

219. *See* Batson v Kentucky, 476 U.S. 79, 100-01 (1986) (White, J., concurring) (explaining that evidence of persistent abuse in exercise of peremptory challenge justifies partially overruling *Swain*).

220. *Compare* Palmore v Sidoti, 466 U.S. 429, 432-33 (1984) (explaining that courts

Choosing logic over experience is usually a poor way to make constitutional law; as one court has written, "If the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias and, for that matter, an endless number of other biases."[221]

In fact, many lower courts have faced constitutional challenges to a party's use of religion-based peremptory strikes.[222] Because *J.E.B.* con-

---

give race-based classifications most exacting scrutiny) *and supra* note 157 (defining strict scrutiny) *with* Craig v Boren, 429 U.S. 190, 197-99 (1976) (explaining that courts give sex-based classifications intermediate or heightened scrutiny) *and supra* note 159 (defining heightened scrutiny). A majority of the Court has never adopted the strict scrutiny test for sex classifications. *Compare* Craig v Boren, 429 U.S. at 197-99 (applying heightened scrutiny to sex-based classification) *with* Frontiero v Richardson, 411 U.S. 677, 682-88 (1973) (plurality opinion) (applying strict scrutiny to sex-based classification). Determining the appropriate level of review for sex classifications is still an open question. J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1425 n.6 (1994) (stating that whether sex-based classifications are inherently suspect is open question); Harris v Forklift Systems, 114 S. Ct. 367, 373 n.* (1993) (Ginsburg, J., concurring) (same).

221. State v Davis, 504 N.W.2d 767, 769 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). The *Davis* court was no doubt paraphrasing Justice Holmes's well-known aphorism: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1923).

222. *See Davis*, 504 N.W.2d at 771 (declining to extend *Batson* to prohibit religion-based peremptory challenges); *cf.* People v Johnson, 767 P.2d 1047, 1054 n.3 (Cal. 1989) (in bank) (noting that *Batson*'s applicability to religious groups is questionable), *cert. denied*, 494 U.S. 1038 (1990); State v Antwine, 743 S.W.2d 51, 64 (Mo. 1987) (en banc) (explaining that litigant's exercise of peremptory challenges is based on perceptions formed about potential jurors and that *Batson* makes only race-based perceptions unacceptable), *cert. denied*, 486 U.S. 1017 (1988); People v Kagan, 420 N.Y.S.2d 987, 989-90 (Sup. Ct. 1979) (concluding, prior to *Batson*, that state's use of peremptory challenges to strike five venire members with Jewish-sounding names did not violate *Swain*). *But see* Casarez v State, No. 1114-93, 1994 WL 695868, at *6-9 (Tex. Crim. App. Dec. 14, 1994) (holding religion-based strikes unconstitutional under strict scrutiny test). *But cf.* United States v Greer, 939 F.2d 1076, 1085-86 & n.9 (5th Cir. 1991) (stating in dicta that *Batson* prohibits peremptory challenges based on race, religion, and national origin), *modified in part by a divided court*, 968 F.2d 433 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1390 (1993). Sitting en banc, seven judges in the Fifth Circuit refused to address whether a defendant could strike Jewish venire members because of their religion, 968 F.2d at 437 n.7, and seven judges suggested that such strikes constituted an equal protection violation. *Id.* at 445-46. Some lower courts have concluded that religion-based strikes violate state constitutional provisions. *See* Joseph v State, 636 So. 2d 777, 780-81 (Fla. Dist. Ct. App. 1994) (concluding that Florida's exercise of peremptory challenges against Jewish venire members based on their religion violated state constitution); *cf.* People v Wheeler, 583 P.2d 748, 761-62 (Cal. 1978) (concluding that use of peremptory challenges to remove potential jurors solely on basis of membership in cognizable group violates state constitution); State v Levinson, 795 P.2d 845, 849-50 (Haw. 1990) (suggesting that religion-based peremptory challenges would violate state constitution).

cluded that sex-based challenges failed heightened scrutiny, strikes of potential jurors who are members of other classes entitled to a higher level of scrutiny than rational basis — such as religious affiliation and illegitimacy[223] — may now also be unconstitutional.[224] In any event, a defendant challenging religion-based strikes of potential jurors can rely on *J.E.B.* to make a strong argument. In any given venire, representation of religious groups will most likely be proportionately small, so members of different religions are not similarly situated.[225] Therefore, the peremptory challenge system classifies on the basis of religion.[226] In addition, after *J.E.B.*, members of religious groups probably do not need to show any pattern of abuse in the exercise of peremptory challenges.

Yet, last term, the Court declined to review a state court decision refusing to extend *Batson*'s protections to challenges based on religious affiliation.[227] Justices Thomas and Scalia, arguing that the principles of *J.E.B.*

---

223. *See* Mathews v. Lucas, 427 U.S. 495, 504-06 (1976) (applying heightened scrutiny to classification based on illegitimacy). The practical effect of an extension of *Batson* to illegitimates is unclear. Religion, on the other hand, clearly does arise in the context of peremptory challenges. *See supra* note 222 (discussing approach of lower courts to constitutionality of religion-based strikes). In the context of religion, the Court has applied strict scrutiny under the First Amendment's Establishment Clause to religion-based classifications. *See* Larson v. Valente, 456 U.S. 228, 244-46 (1982) (applying strict scrutiny to statutory scheme preferring some religious denominations over others in granting exemption to registration and reporting requirements for charitable institutions). Although the Court has never applied the Equal Protection Clause to a religion-based classification, the Court's review of such classifications in *Larson* is at least comparable to its review of sex-based classifications under the heightened scrutiny standard. *Compare id.* at 248-51 (requiring state to affirmatively show, with evidence, that classification is closely fitted to advancing state's interest) *with* Craig v Boren, 429 U.S. 190, 199-210 (1976) (requiring state to prove, with strong evidence, that classification substantially furthers state interest).

224. *See* Dave Harbeck, *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, 710-15 (1993) (arguing that Court should extend *Batson*'s protections to groups subject to heightened scrutiny).

225. *See supra* notes 165-76 and accompanying text (arguing that peremptory challenge system does not classify on basis of gender because of proportional representation in population).

226. *See supra* notes 154-163 and accompanying text (discussing classifications).

227 *See* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (refusing to extend *Batson* to religion-based peremptory challenges), *cert. denied*, 114 S. Ct. 2120 (1994). *Davis* involved the state's use of a peremptory challenge against a potential juror because the juror was a Jehovah's Witness and therefore "reluctant to exercise authority over [his] fellow human beings in [the] Court House." *Id.* at 768 (quoting prosecutor at trial). The Court also denied certiorari in several cases involving sex-based peremptory challenges before finally deciding *J.E.B.*, *see supra* note 90 (citing cases involving sex-based challenges where Court

required extending *Batson* to religion-based strikes, dissented from the denial of certiorari.[228] Their argument is quite strong because the Court has never attempted to limit *Batson* to race-based strikes and has permitted peremptory challenges based on national origin or ethnicity, the other two suspect classes.[229] This area of peremptory challenge case law clearly remains a possibility for future extensions of *Batson*.

In sum, *J.E.B.* represents the Court's wooden application of constitutional principles developed in the race context to the sex context, with little thought given to the policies underlying the principles. Because the *J.E.B.* Court chose logic over experience, the Court created a remedy for a problem that existed only in the Court's opinion. The result will be an expansion of the already enormous scope of peremptory challenge litigation[230] and a further erosion of the peremptory challenge as an important tool for litigants in the courtroom.

V A New Approach

Peremptory challenges have a pedigree that predates English common law [231] Prior to *Swain*, however, the Supreme Court paid scant attention to

---

denied certiorari), so the denial in this case does not necessarily mean that the Court will not address religion-based strikes in the future.

228. Minnesota v Davis, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting from denial of certiorari). Justice Thomas explained:

> *J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on [heightened scrutiny characteristics] [N]o rationale [exists] for distinguishing between strikes exercised on the basis of various classifications that receive heightened scrutiny

Id. (Thomas, J., dissenting from denial of certiorari).

229. *See* Hernandez v. New York, 500 U.S. 352, 369 (1991) (plurality opinion) (arguing that peremptory challenges based on ethnicity would constitute intentional discrimination). Justice Kennedy, in his plurality opinion, explained: "We discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors." *Id.* at 369 (plurality opinion). By implication, ethnicity-based strikes would constitute a *Batson* violation. *See id.* at 373-75 (O'Connor, J., concurring) (arguing that ethnicity-based peremptory challenges constitute a *Batson* violation). Quoting *Batson*, Justice O'Connor wrote: "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely on account of their race* or on the assumption that *[Hispanic] jurors as a group* will be unable impartially to consider the State's case." *Id.* at 373-74 (O'Connor, J., concurring) (quoting Batson v Kentucky, 476 U.S. 79, 89 (1986)).

230. *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (discussing effect of *Batson* on jury trials). Justice O'Connor explained that "*Batson* mini-hearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well." *Id.*

231. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *354 & nn.u-x (discussing history

the exercise of peremptory strikes.[232] Today, parties litigate endlessly over peremptory challenges and raise *Batson*-type claims at every opportunity [233] At the Supreme Court level, the topic of debate concerns the ongoing attempt to reconcile the peremptory challenge with the Equal Protection Clause.[234] Many legal commentators also have attempted to resolve the conflict.[235]

The simplest approach to the problem is to avoid the conflict by abolishing the challenge altogether — a position strongly advocated by Justice Marshall[236] and supported by some legal commentators.[237] Alternatively, the Court could overturn *Batson* and permit litigants to challenge venire members "arbitar[ily] and capricious[ly]."[238] Ideally, the Court would overturn *J.E.B.* and permit litigants to challenge potential jurors based on any characteristic except race, national origin, or ethnicity [239] The Court, however,

---

of peremptory challenges); *see also* Batson v Kentucky, 476 U.S. 79, 118-21 (1986) (Burger, C.J., dissenting) (tracing history of peremptory challenges); Swain v Alabama, 380 U.S. 202, 212-21 & nn.9-29 (1965) (same), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986).

232. *See* McCray v Abrams, 750 F.2d 1113, 1118 (2d Cir. 1984) (stating that *Swain* is only Supreme Court opinion dealing with peremptory challenges), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986).

233. *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (explaining that *Batson* hearings in trial courts are routine).

234. *See id.* at 1435 (Rehnquist, C.J., dissenting) (explaining that *Batson* required constitutional balance between Equal Protection Clause and peremptory challenges to tilt against challenge in context of race); *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting) (explaining that Constitution compels choosing Equal Protection Clause over peremptory challenge), *overruled in part*, Batson v Kentucky, 476 U.S. 79 (1986).

235. *See infra* notes 243-48 and accompanying text (discussing commentators' approach to both preserving peremptory challenge and satisfying Equal Protection Clause).

236. *See* Batson v Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (advocating abolition of peremptory challenges entirely from judicial system).

237 *See* Craig M. Bradley, *Reforming the Criminal Trial*, 68 IND. L.J. 659, 662-63 (1993) (arguing that states and federal government should abolish peremptory challenges); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMPLE L. REV. 369, 399-423 (1992) (arguing that peremptory challenges do not advance fair trial goals, are antithetical to pluralistic and democratic societies, are tools of discrimination in courtrooms, and are repositories of insult, fear, and hatred); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV C.R.-C.L. L. REV 227, 244-56 (1986) (urging states to abolish use of peremptory challenges in criminal trials).

238. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *353 (discussing peremptory challenges). At least one commentator has advocated overturning *Batson*. *See* Cressler, *supra* note 19, at 394 (concluding that Court should overrule *Batson*, *Powers*, and *Edmonson*).

239. *See supra* notes 213-30 and accompanying text (discussing implications of Court's opinion in *J.E.B.*).

continues to reaffirm the importance of the challenge to trial by an impartial jury,[240] but simultaneously gives the Equal Protection Clause a broad interpretation.[241] The Court, therefore, is unlikely to adopt any of these approaches.[242]

Most commentators attempt to deal with the conflict directly For example, one commentator advocated modifying the number of peremptory challenges that parties to a civil or criminal proceeding can exercise.[243] Another scholar proposed an ethical rule that would govern an attorney's exercise of a peremptory challenge.[244] Several scholars have explored the possibilities of affirmative jury selection.[245] Another scholar suggested challenging the use of peremptory challenges under the Thirteenth Amendment.[246]

The most workable and effective proposal, however, is a modification of the existing rules of criminal and civil procedure.[247] Other commentators have proposed new procedural rules governing how courts should deal with peremptory challenges.[248] The following proposed rule would amend

---

240. *See supra* notes 191-94 and accompanying text (discussing Court cases that positively endorsed peremptory challenges and their function in system of trial by jury).

241. *See* J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (explaining that core guarantee of Equal Protection Clause is that states will not discriminate).

242. *See id.* at 1429 (1994) (explaining that peremptory challenges exercised against groups subject to rational basis scrutiny are not unconstitutional). In addition, Justice Blackmun explained that challenges exercised on the basis of characteristics associated predominantly with one sex may survive equal protection scrutiny *Id.* at 1429 & n.16; *see also supra* note 123 and accompanying text (noting *J.E.B.* Court's example of permissible peremptory challenge).

243. *See* Hopper, *supra* note 39, at 836-39 (arguing that number of peremptory challenges should be linked to facts of case).

244. *See* Andrew G. Gordon, *Beyond* Batson v Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV 685, 712-17 (1993) (proposing ethical rule to govern attorneys' exercise of peremptory challenges).

245. *See* Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV 781, 806-11 (1986) (proposing affirmative jury selection system to curb peremptory challenge abuses); Hans Zeisel, Comment, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV 1165, 1165-72 (1987) (discussing implications of affirmative juror selection, especially in capital cases).

246. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV 1, 115-25 (1990) (arguing that race-based peremptory challenges violate Thirteenth Amendment).

247 FED. R. CIV P 47(b); FED. R. CRIM. P 24(b). The Federal Rules of Civil Procedure provide that 28 U.S.C. § 1870 shall govern peremptory challenges in civil cases. FED. R. CIV P 47(b).

248. *See* Marko, *supra* note 38, at 128-30 (proposing model rule of criminal procedure

Federal Rule of Criminal Procedure 24(b); a similarly worded version would amend Federal Rule of Civil Procedure 47(b). States also could adopt this rule in whole or in part.

Amended Version of Federal Rule of Criminal Procedure 24(b):

(b) Peremptory Challenges

(1) Number

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

(2) Limitations and Objections

(a) Neither the government nor any defendant may exercise a peremptory challenge against a potential juror solely on the basis of the potential juror's race, national origin, ethnicity, or sex.

(b) Either the government or any defendant may object to the exercise of a peremptory challenge on the grounds that the challenge is exercised in violation of subsection (a) of this section, provided that the objecting party establishes a prima facie case.

(i) A prima facie case shall consist of evidence of a pattern of peremptory challenges exercised in the case at hand against potential jurors belonging to a group governed by subsection (a), as well all relevant facts and circumstances surrounding jury selection, such as the challenging party's questions during voir dire and the potential juror's response to those questions.

(ii) Once an objecting party has established a prima facie case, the court shall allow the challenging party the opportunity to rebut the inference of intentional discrimination.

(iii) The objecting party is then entitled to show that the challenging party's rebuttal is a pretext for discrimination.

---

for peremptory challenges). Marko's rule abolishes the government's peremptory challenges and prohibits a defendant from exercising challenges against cognizable groups. *Id.*, *see also* Susan L. McCoin, Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV 1225, 1254-58 (1985) (proposing model court rule and model rule of criminal procedure). McCoin permits both the government and the defendant to peremptorily challenge potential jurors, but she tailors her rule specifically to deal with sex-based challenges. *Id.* at.1257 In addition, she allows venire members to raise a claim of sex discrimination in a litigant's exercise of challenges. *Id.*

(iv) The court shall then determine whether the objecting party has proven intentional discrimination by a preponderance of the evidence.

(c) All peremptory challenges not prohibited by subsection (a) are presumptively valid, but the presumption of validity may be rebutted as provided by subsection (d).

(d) Either the government or any defendant may object to a peremptory challenge that is not governed by subsection (a) provided:

(i) The challenge is exercised against a potential juror belonging to a cognizable group that is not governed by subsection (a).

(ii) The objecting party establishes, by clear and convincing evidence drawn from a pattern of cases, that the challenging party exercised the challenge solely on the basis of the potential juror's membership in the cognizable group.

(iii) The challenging party is given an opportunity to rebut the inference of discrimination and the objecting party is given an opportunity to show that the challenging party's rebuttal is a pretext for discrimination. The court shall then determine whether the objecting party has proven intentional discrimination by clear and convincing evidence.

(e) For purposes of subsection (d), a cognizable group is a group that (i) is defined by a clearly identifiable factor, (ii) has a common thread of attitudes, ideas, or experiences, and (iii) shares a community of interests such that the group cannot be adequately represented if the group is excluded from the jury

(3) Remedy

If an objecting party prevails under subsections (b) or (d) of section (2), the court shall order that the challenged potential juror be recalled and impaneled, and for each juror recalled and impaneled, the court shall reduce by one the number of challenges the challenging party has remaining.

(4) Timeliness

An objection to the exercise of a peremptory challenge under subsection (b) or (d) of section (2) must be made at or before the conclusion of the impaneling of the jury

(5) Recordation

The court shall make a record of the peremptory challenges as exercised by the government and the defendant.

The existing Rule 24(b) would constitute subsection (1) of the proposed rule, providing the number of potential jurors the government and the defendant may peremptorily challenge.[249] Subsections (2)(a) and (b) codify existing

249. *See* FED. R. CRIM. P 24(b) (providing requisite number of peremptory challenges both government and defendant may exercise in criminal cases).

Court doctrines: *Batson*, *Powers*, *Edmonson*, *McCollum*, and *J.E.B.*[250] The rule prohibits litigants from exercising peremptory challenges based on any strict scrutiny characteristic or sex. The test for a party to prove intentional discrimination is essentially the same as the test that the Court established in *Batson*, although the Court never explicitly imposed a preponderance of the evidence burden of proof.[251] The proposed rule includes this burden to provide some guidance to the lower courts; however, because *Batson* hearings are highly fact-specific, lower courts should have latitude to determine what evidence is relevant when determining whether a party has established a prima facie case. Finally, both criminal defendants and the government can challenge the opposing party's use of peremptory strikes.

Subsection (2)(c) creates a rebuttable presumption that all other peremptory challenges — those based on religion, illegitimacy, or rational basis characteristics — are valid. Subsection (2)(d) revitalizes *Swain* and requires a lower court to find compelling evidence of abuse of the challenge across a pattern of cases before invoking the remedy in section (3).[252] The rule provides a workable definition of "cognizable group" taken from a lower court opinion.[253]

Sections (3), (4), and (5) are procedural measures, partially adopted from other proposed rules.[254] Section (3) is designed to deter abuse of the peremptory challenge; by impaneling the challenged venire member, the rule should prevent litigants from exercising such a strike on one of the strict scrutiny grounds listed in subsection (2)(a). Section (4) is meant to insure

---

250. *See supra* parts II-III (explaining state of law pre- and post-*J.E.B.*). Justice O'Connor's proposed limitation of *J.E.B.*'s holding to the government's use of sex-based challenges, J.E.B. v Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring), is simply untenable because the Court did not adopt her approach to state action in either *Edmonson* or *McCollum*. McCollum v Georgia, 505 U.S. 42, 62-68 (1992) (O'Connor, J., dissenting); Edmonson v Leesville Concrete Co., 500 U.S. 614, 635-38 (1991) (O'Connor, J., dissenting). In neither of those two cases did the Court base its finding of state action on the fact that the litigants involved exercised race-based as opposed to sex-based challenges. *McCollum*, 505 U.S. at 51-55; *Edmonson*, 500 U.S. at 624-28.

251. *See* Batson v Kentucky, 476 U.S. 79, 96-98 (1986) (describing three-step process for lower courts to evaluate state's exercise of peremptory challenges).

252. *See supra* notes 197-212 and accompanying text (discussing balance *Swain* struck between challenge and equal protection doctrines). This subsection of the rule codifies the doctrine that *Batson* is only a remedy that courts should invoke when experience demonstrates that a remedy is needed. *See supra* note 206 (describing *Batson* as prophylactic device).

253. Murchu v. United States, 926 F.2d 50, 54 (1st Cir.) (defining cognizable group for purposes of *Batson* challenge), *cert. denied*, 502 U.S. 828 (1991).

254. *See* Marko, *supra* note 38, at 128-30 (including timeliness and recordation provisions); McCoin, *supra* note 248, at 1254-58 (same).

that lower courts have an opportunity to rule on *Batson*-type objections while the events are still fresh in all the parties' minds. Section (5) requires that the court make a record of which parties strike which jury panelists; this record will facilitate any ruling that courts will make under subsections (2)(b)(iv) and (2)(d)(iii).

VI. Conclusion

J.E.B. demonstrates why relying entirely on analogy and logic to make constitutional law is often a bad idea. Although many of the problems of sex discrimination are similar to the problems of race discrimination, this correlation does not require the Supreme Court to treat both kinds of discrimination in the same manner. In *J.E.B.*, the Court ignored the *Swain* balance and extended a rule (*Batson*) grounded in historical discrimination that women have not experienced. Because litigants have not abused the peremptory challenge system in striking women, either historically or in *J.E.B.*, the Court's decision will cause more damage to the judicial system than it will remedy