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Holland v. Illinois: The Supreme Court Narrows the Scope of Protection Against Discriminatory Jury Selection Procedures

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NOTES

HOLLAND V. ILLINOIS: THE SUPREME COURT NARROWS THE SCOPE OF PROTECTION AGAINST DISCRIMINATORY JURY SELECTION PROCEDURES

I. INTRODUCTION

The right to trial by jury is a valued part of the American democratic tradition.[1] The jury protects the individual against government oppression[2] while affording citizens the opportunity to participate in the administration of justice.[3] Discrimination in the selection of jurors undermines both the unique function of the jury in the protection of individual liberty[4] and the opportunity that the jury provides for participation in the justice system.[5] The United States Supreme Court's decision in *Holland v. Illinois*[6] narrows the scope of protection against discrimination in the jury selection process by removing any Sixth Amendment basis for challenging the improper exercise of peremptory challenges.[7] By precluding any Sixth Amendment

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1. *See* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 1 (1977) (describing jury as most democratic of institutions). Van Dyke notes that the idea that ordinary citizens without experience in judicial decision-making should be assembled to decide issues of great importance is unusual in the world today. *Id.* Allowing citizens instead of judicial experts to render judicial decisions ensures that the judgment rendered reflects common sense and gives the decision a "stamp of democratic legitimacy." *Id.* at 219.

2. *See infra* notes 64-84 and accompanying text (discussing protective function of jury in common law history of development of jury); *infra* notes 86-119 and accompanying text (discussing case law recognizing protective function of jury).

3. *See* Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)) (stating that sharing in administration of justice through jury service is phase of civic responsibility).

4. *See* Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1559-60 (1988) (stating that discrimination in jury selection procedures undermines fact-finding ability of jury, contributes to unconscious racism, and influences outcome of jury deliberation); *infra* notes 144-57 and accompanying text (arguing that discriminatory jury selection procedures undermine common sense judgment of jury which serves to protect defendant from government oppression).

5. *See* Note, *supra* note 4, at 1560-61 (stating that underrepresentation of minorities on juries resulting from discriminatory jury selection procedures deprives minority citizens of basic democratic right to participate in administration of justice); *cf. Taylor*, 419 U.S. at 530 (stating that restricting jury service to only special groups or excluding identifiable segments of community is inconsistent with constitutional concept of jury trial).

6. 110 S. Ct. 803 (1990).

7. *See infra* notes 38-39 and accompanying text (discussing *Holland* Court's holding that Sixth Amendment does not prohibit discriminatory exercise of peremptory challenges);

challenge, the *Holland* decision effectively limits analysis of charges of discriminatory use of peremptory challenges to the test formulated in *Batson v. Kentucky*.[8] Under *Batson*, if a defendant shows that the prosecution used peremptory challenges to excuse potential jurors of the defendant's race solely on the basis of race, then the defendant establishes a violation of the defendant's Fourteenth Amendment right to equal protection of the laws.[9] The limited applicability of the *Batson* test, however, restricts effective protection against the discriminatory use of peremptory challenges.[10]

II. Description of Jury Composition Procedures

Although jury selection procedures vary greatly among jurisdictions,[11] the process generally consists of three stages.[12] The first stage is the compilation of the jury wheel, which is the list of persons who are qualified statutorily to serve as jurors.[13] The second stage is the selection of the venire, or panel, from the pool of eligible jurors through the exercise of disqualifications, excuses and exemptions of potential jurors.[14] The third

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infra note 20 and accompanying text (defining peremptory challenge and describing acceptable basis for exercise).

The Sixth Amendment provides in pertinent 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 . . . ." U.S. Const. amend. VI.

8. 476 U.S. 79 (1986); *see infra* notes 53-59 and accompanying text (describing *Batson* test for proving discriminatory use of peremptory challenges); *infra* notes 40, 158 and accompanying text (discussing *Holland* Court's default to *Batson* equal protection analysis for resolution of claims of discriminatory use of peremptory challenges).

9. *See infra* notes 41-59 (discussing *Batson* and equal protection analysis of claims of discriminatory use of peremptory challenges).

The Fourteenth Amendment provides in pertinent part: " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

10. *See infra* notes 159-236 and accompanying text (arguing that standing requirement, narrower scope of protected cognizable groups, and state action requirement cause *Batson* equal protection analysis to afford less protection against discriminatory jury selection procedures than Sixth Amendment fair cross-section analysis).

11. *See* J. Van Dyke, *supra* note 1, at 258-62 (summarizing state jury selection procedures); Daughtrey, *Cross Sectionalism in Jury-Selection Procedures after* Taylor v. Louisiana, 43 Tenn. L. Rev. 1, 7 n.24 (1975) (listing state statutory provisions governing jury selection procedures); Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (1988) (specifying federal jury selection procedures).

12. *See* J. Van Dyke, *supra* note 1, at 85-175 (dividing jury selection procedures into composition of jury wheel, composition of venire through grant of excuses, and composition of jury through exercise of challenges).

13. *See id.* at 85-109 (describing composition of jury wheel). According to Van Dyke, drawing names at random from lists of registered voters is the usual procedure for compiling the list of jurors that composes the jury wheel. *Id.* at 85-86. Federal courts and most state courts employ this random selection process. *Id.* Some state jurisdictions, however, allow court clerks or jury commissioners to consult "key men" within the community to solicit names of qualified jurors. *Id.* at 86-88.

14. *See id.* at 111-37 (describing selection of venire from jury wheel through disqualifi-

stage is the selection of the jury from the venire through voir dire and exercise of statutory challenges.[15]

For years, much of the litigation concerning discrimination in the jury selection process focused on the first two stages, the compilation of the jury wheel and the selection of the venire.[16] In recent years, however, litigation concerning discriminatory jury selection procedures increasingly has focused on the selection of the jury through the exercise of statutory challenges.[17] The statutory challenges exercised in the final stage of jury selection are of two kinds: challenges for cause and peremptory challenges.[18] Challenges for cause are available in unlimited numbers to either side upon a showing of actual or implied bias of the juror.[19] A limited number of

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cations, excuses and exemptions). The venire is the panel of potential jurors from which the jury for a specific trial is drawn. *See* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1717 (1977) (describing venire). A potential juror may be disqualified from the venire if the juror does not meet age, residency or literacy qualifications, or if the juror has a mental or physical infirmity or a felony indictment or conviction. *See* J. VAN DYKE, *supra* note 1, at 131-33 (describing disqualification process). A potential juror may be excused from the venire upon a showing that jury service would impose undue economic hardship, that the juror is a woman, aged or young, that the juror would have to travel too far to serve, or that the juror is ill. *Id.* at 119-26. Finally, certain persons are exempted from jury service on account of occupation. *Id.* at 130-31. For example, elected officials, clergy, doctors, police officers, and lawyers may not serve as jurors. *Id.*

15. *See* J. VAN DYKE, *supra* note 1, at 139-75 (describing selection of jury from venire through voir dire and exercise of challenges). Van Dyke explains that voir dire, literally "to speak the truth," is the process of questioning and challenging prospective jurors for bias. *Id.* at 139-40. Generally, the court or counsel tells the prospective juror something about the case and the parties and questions the juror to determine whether the juror is biased. *See* Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339 & n.13 (1982) (describing voir dire process); Note, *supra* note 14, at 1717 (same).

16. *See* Note, *The Civil Implications of* Batson v. Kentucky *and* State v. Gilmore*: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891, 895 (1988) (noting litigation aimed at eliminating discrimination in preparation of jury list and selection of venire); Batson v. Kentucky, 476 U.S. 79, 84 n.3 (1986) (listing cases concerning discriminatory jury selection procedures).

17. *See, e.g.*, Holland v. Illinois, 110 S. Ct. 803, 805 (1990) (considering whether prosecutor's exercise of peremptory challenges to exclude all black jurors from white defendant's jury violates defendant's Sixth Amendment right to trial by an impartial jury); Lockhart v. McCree, 476 U.S. 162, 165 (1986) (considering whether removal for cause of prospective jurors because of views on death penalty violates defendant's Sixth Amendment right to jury drawn from cross-section of community); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that prosecutor's exercise of peremptory challenges to remove potential jurors solely on basis of race violates defendant's Fourteenth Amendment right to equal protection).

18. *See* J. VAN DYKE, *supra* note 1, at 139-40 (describing challenges for cause and peremptory challenges); Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501, 519-20 (1986) (same); Saltzburg & Powers, *supra* note 15, at 339-42 (same).

19. *See* J. VAN DYKE, *supra* note 1, at 140 (describing challenge for cause); Massaro, *supra* note 18, at 519-20 (same); Saltzburg & Powers, *supra* note 15, at 340 (same). Saltzburg and Powers suggest that actual bias involves a finding by the court that a potential juror is prejudiced with respect to the particular defendant. *Id.* These commentators note that the

peremptory challenges are available to either side, and counsel may exercise peremptory challenges without stating a reason.[20] Because counsel need give no reason, the exercise of peremptory challenges to excuse potential jurors provides an opportunity for discrimination.[21]

III. SUMMARY OF *Holland* and *Batson*

The United States Supreme Court has often considered claims of discriminatory jury selection procedures. In *Holland v. Illinois*,[22] the Court considered whether a prosecutor's exercise of peremptory challenges to remove all black potential jurors from a white defendant's jury violated the defendant's Sixth Amendment right to trial by an impartial jury.[23] The white defendant, Holland, alleged that the prosecutor used peremptory challenges to remove the two black venire members of the thirty potential jurors assembled for trial.[24] Holland argued that this allegedly discriminatory use of peremptory challenges by the prosecution denied Holland a fair possibility of a jury representing a cross-section of the community, a right secured by the Sixth Amendment.[25]

The Court first distinguished Holland's Sixth Amendment claim from a claim based on the equal protection clause of the Fourteenth Amendment.[26]

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court implies bias if the juror is related to any of the parties to the litigation or if the juror has other special interests in the outcome of the trial or the participants. *Id.* Van Dyke notes that although challenges for cause are unlimited in number, the actual number of jurors excused upon a challenge for cause in a particular trial is usually very small. *See* J. VAN DYKE, *supra* note 1, at 140 (stating that court usually excuses only one to three jurors for cause in typical trial).

20. *See* J. VAN DYKE, *supra* note 1, at 139-40 (describing peremptory challenge); Massaro, *supra* note 18, at 520 (same); Saltzburg & Powers, *supra* note 15, at 340-42 (same). Saltzburg and Powers note that although no reason need be given for the exercise of peremptory challenges, individual litigants traditionally have used such challenges to remove jurors perceived to be biased against the party's interests. *Id.* at 341-42. These commentators note that because each side uses peremptory challenges to remove biased jurors, the resulting jury is free from extremes of bias and satisfies the impartial jury requirement imposed by the Sixth Amendment. *Id.* at 342; *see also* Note, *supra* note 14, at 1718-19 (arguing that purpose of peremptory challenge is to remove juror with specific bias toward individual case).

21. *See* Note, *supra* note 16, at 895-96 (noting that peremptory challenge allows counsel to remove prospective jurors solely on basis of race because challenge can be exercised without explanation).

22. 110 S. Ct. 803 (1990).

23. Holland v. Illinois, 110 S. Ct. 803, 805 (1990). The *Holland* Court first considered the preliminary issue of whether Holland, a white defendant, had standing to assert a Sixth Amendment challenge to the prosecutor's exercise of peremptory challenges to remove black potential jurors from Holland's jury. *Id.* Citing previous cases holding that every defendant may object to a venire that is unrepresentative of a cross-section of the community, the Court held that a defendant need not be a member of the group of jurors excluded from service to raise a Sixth Amendment challenge to the composition of the jury. *Id.* at 805-06.

24. *Id.* at 805.

25. *Id.* at 806; *see infra* notes 115-17 and accompanying text (discussing development and purpose of Sixth Amendment fair cross-section requirement).

26. *Id.* at 806-07.

The Court noted that the equal protection clause prohibits discrimination in jury selection at both the venire and the jury stages.[27] In contrast, the Court noted that the Sixth Amendment implicitly requires representation of a fair cross-section of the community on the venire.[28] The Court stated, however, that the fair cross-section requirement does not preclude a litigant from diminishing the representativeness of the jury through the exercise of peremptory challenges.[29] Indeed, the Court concluded that peremptory challenges enable each party to eliminate prospective jurors perceived to be biased against the party's interests and, therefore, preserve the impartiality of the jury.[30]

According to the *Holland* Court, the goal of jury impartiality is the central purpose of the Sixth Amendment right to jury trial.[31] Thus, the Court concluded that the Sixth Amendment fair cross-section requirement assures an impartial but not a representative jury.[32] The Court reasoned that if the goal of the Sixth Amendment was representation of a fair cross-section of the community on the jury, then the exercise of peremptory challenges to exclude any identifiable group from the jury would be impermissible.[33] The Court further reasoned that a rule extending the fair cross-section requirement to the jury would undermine recognized bases for exercising peremptory challenges[34] and ultimately would require the total

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27. *Id.* The *Holland* Court reasoned that the Fourteenth Amendment's "intransigent prohibition" of racial discrimination, and not an inseparable link between the venire and the jury stages, justifies the preclusion of race-based exclusion of potential jurors at the jury, as well as the venire, stage. *Id.* at 807; *see supra* notes 14-15 and accompanying text (discussing venire and jury stages of jury selection).

28. *Id.* at 807.

29. *Id.* The *Holland* Court reasoned that the Sixth Amendment fair cross-section requirement prevents the State from "stack[ing] the deck" in the State's favor, but that the State may use peremptory challenges "once a fair hand is dealt" to eliminate potential jurors belonging to groups which the State believes would unduly favor the other side. *Id.*

30. *Id.* at 809. The *Holland* Court reasoned that a party's perceptions of bias may rest on grounds of race, religion, nationality, occupation or affiliations of prospective jurors. *Id.* at 807 (quoting Swain v. Alabama, 380 U.S. 202, 220-21 (1965)).

31. *Id.* at 809. The *Holland* Court concluded that jury impartiality is the central purpose of the Sixth Amendment by reasoning that the peremptory challenge was a "venerable" tradition at the time of Blackstone. *Id.* at 808. The Court further noted that early legislation and case law support the inference that the peremptory challenge was part of the common law background of the Sixth Amendment. *Id.* & n.1. Finally, the Court noted that the states have used peremptory challenges during the two centuries since the Constitution. *Id.* Consequently, the Court concluded that the Sixth Amendment phrase "impartial jury" must take its content from this common law and case law tradition. *Id.*

32. *Id.* at 807.

33. *Id.* at 809.

34. *Id.* at 810. Although the *Holland* Court did not define recognized bases for the exercise of peremptory challenges, the Court clearly contemplated factors such as race, religion, nationality, occupation or affiliation. *See supra* note 30 and accompanying text (listing acceptable bases for exercise of peremptory challenges according to *Holland* Court). The Court's reasoning is conclusory, but presumably the argument is that extension of the fair cross-section requirement to the jury would preclude the use of peremptory challenges to exclude members of groups defined in terms of race or the other listed factors because exclusion of such groups would destroy the cross-sectional nature of the jury.

elimination of peremptory challenges.[35] Because the peremptory challenge secures jury impartiality[36] and is intricately connected to the tradition of jury trial,[37] the Court concluded that the Sixth Amendment cannot be interpreted to prohibit the exercise of peremptory challenges.[38] Consequently, the *Holland* Court held that the Sixth Amendment does not provide a valid constitutional basis to challenge a prosecutor's discriminatory exercise of peremptory challenges to exclude potential jurors from a criminal defendant's jury.[39] The Court, however, was careful to suggest that the use of peremptory challenges to systematically exclude blacks from jury service is illegal under the Court's analysis in *Batson v. Kentucky*.[40]

In *Batson v. Kentucky*[41] the Supreme Court reconsidered the evidentiary burden imposed by prior case law on a criminal defendant who seeks to demonstrate a denial of equal protection by the prosecution's use of peremptory challenges to exclude jurors of the defendant's race from the jury.[42] An all-white jury convicted the black defendant, Batson, after the prosecutor exercised peremptory challenges to remove all four blacks on the venire.[43] Batson contended that the prosecutor's discriminatory exercise of peremptory challenges violated Batson's Sixth Amendment right to trial by

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35. *Id.* at 809. The *Holland* Court reasoned that extension of the fair cross-section requirement to the jury would require judges to attempt to "balance" the jury to ensure that it represents a cross-section of diverse perspectives within the community. *Id.* (citing Lockhart v. McCree, 476 U.S. 162, 178 (1986). A litigant's use of peremptory challenges to remove potential jurors perceived to be biased toward the litigant's interests destroys the cross-section on the jury. *Id.* Therefore, extension of the fair cross-section requirement to the jury would inevitably result in the elimination of peremptory challenges. *Id.*

36. *See supra* note 30 and accompanying text (describing *Holland* Court's conclusion that peremptory challenge secures jury impartiality).

37. *See supra* note 31 and accompanying text (describing *Holland* Court's reference to common law history and tradition of jury to interpret Sixth Amendment).

38. *Id.* at 808.

39. *Id.* at 811.

40. *Id.* at 810-11; *see infra* notes 41-59 (discussing *Batson*).

41. 476 U.S. 79 (1986).

42. Batson v. Kentucky, 476 U.S. 79, 82 (1986). Prior to the *Batson* Court's reconsideration of the issue, the rule of Swain v. Alabama, 380 U.S. 202 (1965), governed criminal defendants' claims of discriminatory use of peremptory challenges. In *Swain* an Alabama trial court convicted a black defendant of rape. *Id.* at 203. The prosecutor used peremptory challenges to remove the six blacks on the venire available for jury service. *Id.* at 210. The defendant offered evidence which tended to show that although the venires for criminal cases normally included an average of six to seven blacks, no blacks had actually served on juries in the 15 years prior to the defendant's trial. *Id.* at 205. The Court surveyed the history of the development of the peremptory challenge and noted the important role the peremptory challenge plays in the trial process. *Id.* at 212-19. Because of the importance of the peremptory challenge, the Court refused to hold that the equal protection clause requires an investigation of a prosecutor's motives in exercising peremptory challenges in any single case. *Id.* at 221-22. Instead, the *Swain* Court suggested that a defendant must show the prosecution's systematic use of peremptory challenges against Negroes over a period of time to establish a violation of the defendant's right to equal protection. *Id.* at 227.

43. *Batson*, 476 U.S. at 82-83.

an impartial jury drawn from a cross-section of the community.[44] The Supreme Court, however, chose to address Batson's claim in terms of Fourteenth Amendment equal protection principles.[45]

The Court initially noted that prior cases established that the equal protection clause protects a defendant from discrimination against jurors of the defendant's race in the composition of the venire.[46] The Court reasoned that discrimination in the composition of the venire harms the individual defendant, the excluded jurors, and the entire community.[47] The Court further reasoned that racial discrimination in the selection of the jury also harms the defendant, the excluded juror and the community.[48] Consequently, the *Batson* Court held that the equal protection clause prohibits the prosecution in a criminal trial from using peremptory challenges to exclude jurors solely on account of race or on the assumption that jurors of the defendant's race will be unable to judge impartially.[49]

The *Batson* Court then reassessed the prior rule requiring the defendant to prove the prosecution's exclusion of jurors of the defendant's race over a number of cases to establish a claim of discriminatory use of peremptory challenges.[50] Rejecting the "crippling" evidentiary burden imposed by this rule,[51] the Court concluded that a defendant may establish a prima facie case of discrimination in the selection of the jury by relying only on the prosecutor's use of peremptory challenges at the defendant's trial.[52] The *Batson* Court then formulated a new test for proving a prosecutor's discriminatory exercise of peremptory challenges.[53] The defendant first must

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44. *Id.* at 84 n.4.

45. *Id.* The *Batson* Court expressly reserved ruling on Batson's Sixth Amendment claims. *Id.* Writing for the Court in *Holland*, Justice Scalia noted the unprecedented nature of the *Batson* Court's action in granting certiorari on one constitutional question and subsequently deciding the case on another. Holland v. Illinois, 110 S. Ct. 803, 811 n.3. (1990).

46. *Batson*, 476 U.S. at 86 & n.7 (citing Hernandez v. Texas, 347 U.S. 475, 482 (1954); Cassell v. Texas, 339 U.S. 282, 287 (1950); Akins v. Texas, 325 U.S. 398, 403 (1945); Neal v. Delaware, 103 U.S. 370, 394 (1881); Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

47. *Id.* at 86-88. The *Batson* Court stated that racial discrimination in the selection of the venire harms the defendant by denying the defendant the protection afforded by trial by a jury of peers. *Id.* at 86 (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880)). The Court stated that discrimination in the composition of the venire harms the excluded juror by denying the juror the opportunity to serve on a jury for reasons unrelated to the juror's ability to serve. *Id.* at 87. Finally, the *Batson* Court stated that discriminatory jury selection procedures harm the community by undermining public confidence in the fairness of the justice system. *Id.*

48. *Id.* at 88. The *Batson* Court stated that the applicable principles in cases concerning discrimination in the composition of the venire also forbid racial discrimination in the selection of the jury. *Id.*

49. *Id.* at 89. The *Batson* Court expressly reserved decision on whether the discriminatory exercise of peremptory challenges by defense counsel would violate the equal protection clause. *Id.* n.12.

50. *Id.* at 90-93; *see supra* note 42 (describing pre-*Batson* test for establishing discriminatory use of peremptory challenges).

51. *Batson*, 476 U.S. at 92-93.

52. *Id.* at 96.

53. *Id.* at 96-98.

show that the defendant is a member of a cognizable racial group and that the prosecutor has used peremptory challenges to remove members of the defendant's race from the venire.[54] The defendant then may rely on the fact that peremptory challenges are subject to exercise in a discriminatory manner.[55] Finally, the defendant must show that these facts and all relevant circumstances suggest that the prosecutor excluded potential jurors on the basis of race.[56] When the defendant makes such a showing, the burden of proof shifts to the prosecution to offer a neutral explanation for challenging jurors of the defendant's race.[57] The *Batson* Court stated that an explanation of exclusion only on the basis of presumed group bias is insufficient.[58] The prosecutor's explanation, however, need not rise to a level justifying a challenge for cause.[59]

IV. CRITICISM OF *Holland*

A. Mischaracterization of Central Purpose of Jury Trial as Derived from Underlying Common Law History

The United States Supreme Court's decision in *Holland* mischaracterized the central purpose of the right to trial by jury as derived from the common law history underlying the Sixth Amendment.[60] Given the meager constitutional provisions for jury trial,[61] the *Holland* Court referred to underlying common law history to determine the meaning of the Sixth Amendment

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54. *Id.* at 96.

55. *Id.*

56. *Id.*

57. *Id.* at 97.

58. *Id.*; *see infra* note 129 and accompanying text (describing group bias).

59. *Batson*, 476 U.S. at 97; *see supra* note 19 and accompanying text (describing challenge for cause).

60. *See infra* notes 76-84 and accompanying text (arguing that central purpose of Sixth Amendment provision for trial by jury is protection of individual against government oppression and not jury impartiality as *Holland* Court held).

61. *See* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 968-69 (1926) (characterizing constitutional provisions for jury trial as meager).

The Constitution has only one reference to trial by jury, providing in pertinent part: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art III, § 2, cl. 3. The Sixth and Seventh Amendments to the Constitution also provide for jury trial, providing in pertinent 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 . . . ." U.S. CONST. amend. VI; "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII. Although not securing a right of jury trial, the Fifth Amendment provides in pertinent part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

guarantee.[62] On this basis, the *Holland* Court concluded that the goal of jury impartiality is the central purpose of the Sixth Amendment provision for trial by jury.[63] The history of the development of the jury, however, suggests that the central purpose of the Sixth Amendment right to jury trial is to protect the individual against the exercise of arbitrary government authority by interposing the judgment of a group of laymen between the individual and the government.[64]

Scholars long believed that the Magna Carta was the genesis of the right to trial by jury.[65] Historians now discount the Magna Carta as the source of the right to jury trial[66] and instead find the roots of the jury in Anglo-Saxon England.[67] The early English ancestors of the modern jury

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62. *See supra* note 31 and accompanying text (discussing *Holland* Court's reference to role of peremptory challenge in common law history underlying Sixth Amendment to interpret constitutional provision for trial by impartial jury); *see also Ex parte* Grossman, 267 U.S. 87, 108-09 (1925) (noting that constitutional language must be interpreted with reference to common law and institutions existing at time of framing); Frankfurter & Corcoran, *supra* note 61, at 968-69 (noting necessity of reference to historical background in application of constitutional provisions for jury trial given fact that framers assumed certain meanings and consequently incorporated meager textual guidance).

63. *See supra* note 31 and accompanying text (discussing *Holland* Court's conclusion that jury impartiality is central purpose of Sixth Amendment provision for jury trial given role of peremptory challenge in common law history).

64. *See* Duncan v. Louisiana, 391 U.S. 145, 151-56 (1968) (surveying history of trial by jury and concluding that Sixth Amendment grants right to trial by jury to criminal defendant to prevent oppression by government); *infra* notes 65-84 and accompanying text (arguing that history of development of jury suggests that protection of defendant is central purpose of jury).

65. *See* Duncan v. Louisiana, 391 U.S. 145, 151 & n.16 (1968) (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 349 (Cooley ed. 1899), and stating that at time of Constitution jury trial had been in existence in England for several centuries and that many traced right of jury trial to Magna Carta); L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY, 47 (2d ed. 1988) (stating that Magna Carta is commonly credited source of guarantee of trial by jury); J. PROFFATT, TRIAL BY JURY, 35-36 (1877) (stating that common and popular opinion is that Magna Carta secured trial by jury).

Scholars believed that the right of trial by jury derived from Article 39 of Magna Carta which provides that "[n]o freeman shall be taken or imprisoned or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land" (quoted in L. MOORE, *supra*, at 49).

66. *See* Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968) (noting that contemporary historians reject jury's "pedigree" traced to Magna Carta); Massaro, *supra* note 18, at 505 (noting that historians have shown that Magna Carta's reference to peers referred to special right of members of elite class to be tried by their equals and not to jury as commonly known today). *But see* L. MOORE, *supra* note 65, at 13-20, 48-49 (arguing that Frankish inquisition was precursor of jury and that Article 36 of Magna Carta, which provides that "writ of inquisition . . . shall be granted gratis, and shall not be denied," is provision guaranteeing jury trial).

67. *See* J. Van Dyke, *supra* note 1, at 2 (finding roots of jury in Anglo-Saxon England); J. PROFFATT, *supra* note 65, at 14-15 (finding early progenitors of jury in Anglo-Saxon sources). *But see* L. MOORE, *supra* note 65, at 1-21 (citing Greek, Roman, Scandinavian and Frankish analogues of jury); J. PROFFATT, *supra* note 65, at 2-14 (same).

developed because of practical concerns with the integrity and veracity of the trial process.[68] By enlisting neighbors of an individual who had knowledge of the facts in issue to return an accusation or resolve a dispute, these progenitors of the jury provided a more certain source of knowledge than that available to a distant government official.[69]

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68. *See* Massaro, *supra* note 18, at 505-06 (noting that trial by jury developed as result of practical necessity).

69. *See* Wells, *Early Opposition to the Petty Jury in Criminal Cases*, 30 L.Q. REV. 97, 105 (1914) (stating that jury's representative character was most important because jury used members of community with knowledge of parties and dispute).

The early Anglo-Saxon ancestors of the jury evinced this representative character. *See* J. PROFFATT, *supra* note 65, at 31 (referring to early ancestors of jury as system of popular representation). The basis of the Anglo-Saxon judicial system was the tithing, which was a representative group of ten people responsible for bringing its members to justice if guilty of a crime or exonerating its members if innocent. L. MOORE, *supra* note 65, at 21-22. The higher Anglo-Saxon county court also witnessed the development of the custom of referring matters for trial to a number of its members who possessed knowledge of the person charged or dispute in issue and who were sworn to give a true decision. J. PROFFATT, *supra* note 65, at 20-21. Because the members of these ancestors of the jury were representative of the community, they would know the circumstances surrounding the dispute and be able to judge wisely. Wells, *supra*, at 105. Although the "jurors" in the county court were sometimes sworn to decide an issue, in both criminal and civil matters the Anglo-Saxon courts mainly served to accuse or initiate the dispute resolution process; ultimate proof of guilt or liability was made by oath, compurgation, ordeal or official witness. L. MOORE, *supra* note 65, at 26-30.

The jury underwent significant changes during the reign of William the Conqueror, but the jury's purposes were still predominantly practical. *See* J. PROFFATT, *supra* note 65, at 30-31 (describing simultaneous adaptation and retention of central characteristics of jury under William). Upon William's defeat of Harold at the Battle of Hastings in 1066, William undertook to rule the English by their then-existing laws. *Id.* William utilized inquests to determine the laws of the English and to estimate the wealth and population of England, the results of the inquests being recorded in the Domesday Book completed between 1081 and 1086. L. MOORE, *supra* note 65, at 33. To utilize the inquest, the king sent his barons or justices into the villages where they summoned important men from the vicinity to testify under oath concerning the laws or value and extent of all property holdings. *Id.* The king also commissioned such justices to travel throughout the kingdom and administer justice. J. PROFFATT, *supra* note 65, at 32. The citizens summoned by the justice would have knowledge of local affairs unknown to the king's justice. *See* Wells, *supra*, at 105 (stating that jurors were chosen from community because they would be likely to know circumstances surrounding dispute). Thus, in both the inquests and the administration of the king's court the jury of local citizens summoned by the justice served the practical function of providing the information needed by the justice to satisfy his commission. *See* L. MOORE, *supra* note 65, at 37, 40 (describing self-informing nature of jury in that jurors had personal knowledge of truth of matter in dispute).

Seeking to strengthen the king's presence in the countryside, Henry II laid the foundation for the modern jury. J. VAN DYKE, *supra* note 1, at 2. Henry II developed the inquest into the ancestor of the modern grand jury by impaneling men to consider criminal cases and accuse those suspected of crimes. *Id.* The Assize of Clarendon in 1166 institutionalized these procedures, providing that the men impaneled to return accusations should be from the local villages and hundreds. *Id.* The Assize of Clarendon also provided a means of resolving civil disputes over possession of land by enabling the jurors assembled from the villages to render a verdict. L. MOORE, *supra* note 65, at 36. In both its accusatory and its judgmental roles, the assize's use of jurors having knowledge of local affairs unknown to the king's justice reflected practical concerns with the trial process. *See id.* at 37 (noting necessity of jurors' preparedness by having knowledge of case).

As the jury developed beyond the initial practical role in the trial process,[70] the jury came to represent a valuable protection of the individual against the arbitrary exercise of government power.[71] Although now commonly discounted as the source of the right to jury trial,[72] the Magna Carta imposed a significant restraint on the scope of royal power by subjecting the validity of the king's actions against his barons to the judgment of the baron's peers.[73] A 1670 case involving William Penn and William Mead, and a subsequent habeas corpus action arising from that case, established the supremacy and independence of the jury verdict and the principle that the jury could stand between the government and the accused.[74] This principle—that the jury could protect an individual against the arbitrary

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70. *See supra* notes 68-69 and accompanying text (discussing practical function in trial process of early ancestors of jury). The jury procedure developed under William the Conqueror and Henry II became more widely accepted as a mode of proof after Pope Innocent III forbade trial by ordeal at the Fourth Lateran Council in 1215. *See* Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST., 1, 1-2 (1982) (stating that jury method of proof filled procedural void left by abolition of ordeal); Groot, *The Early-Thirteenth-Century Criminal Jury*, in TWELVE GOOD MEN AND TRUE 3 (J. Cockburn & T. Green eds. 1988) (same).

71. *See* Duncan v. Louisiana, 391 U.S. 145, 151 (1968) (noting that Declaration and Bill of Rights of 1689 provided for jury trial because jury protected against arbitrary rule and quoting Blackstone's characterization of jury as barrier between liberties of people and prerogative of crown).

72. *See supra* note 66 and accompanying text (discussing demise of theory that Magna Carta is source of right to jury trial).

73. *See* L. MOORE, *supra* note 65, at 48 (noting that main purpose of Magna Carta was to make king subject to law). Although Magna Carta elevated the barons' right to judgment by their peers over the king's arbitrary exercise of power, the king retained considerable control over the jury for several centuries. J. VAN DYKE, *supra* note 1, at 4. Use of juries of attaint to overturn and punish unfavorable verdicts in civil cases and the Star Chamber to punish unfavorable verdicts in criminal cases provided the crown with ready means to avoid the consequences of an unfavorable judgment. J. PROFFATT, *supra* note 65, at 47-49, 57-59. Even after the decline in use of juries of attaint, judges often rejected the jury's verdict or imprisoned or fined jurors. J. VAN DYKE, *supra* note 1, at 4.

74. *See* J. VAN DYKE, *supra* note 1, at 5 (discussing trial of Penn and Mead); L. MOORE, *supra* note 65, at 83-86 (same). Penn and Mead, young Quaker Activists, were on trial for conducting an unlawful assembly and disturbing the peace. J. VAN DYKE, *supra* note 1, at 5; L. MOORE, *supra* note 65, at 83. The jury refused to return a guilty verdict against the two even though the judges pressured them heavily, confining them for two days and nights without food and drink. J. VAN DYKE, *supra* note 1, at 5; L. MOORE, *supra* note 65, at 83-85. The Recorder then fined the jurors and imprisoned them until they paid the fine. J. VAN DYKE, *supra* note 1, at 5; L. MOORE, *supra* note 65, at 85.

Edward Bushell, the leader of the recalcitrant jurors, obtained a writ of habeas corpus. L. MOORE, *supra* note 65, at 86. In the historic decision in Bushell's case, Chief Justice Vaughan stated that jurors cannot be punished for their verdict. J. VAN DYKE, *supra* note 1, at 5. The Chief Justice emphasized that the purpose of the jury is to evaluate the evidence presented in the light of the jurors' understanding, reasoning and conscience. *Id.* In 1681 a grand jury asserted a similar independence when it refused to return an indictment for treason against the Earl of Shaftesbury. *Id.* The royal authorities eventually obtained an indictment from another grand jury, but this decision and the decision in Bushell's case firmly established the principle that a jury could stand between an accused and the king. *Id.*

exercise of government power—was the reason that the American colonists greatly valued and jealously guarded the right of trial by jury.[75]

The common law history of the development of the right to jury trial includes the history of the unique function of the jury as a protection against arbitrary government power,[76] as well as the history of the peremptory challenge.[77] The *Holland* Court, however, focused solely on the role of the peremptory challenge[78] in the common law history underlying the Sixth Amendment and, consequently, equated the central purpose of the Sixth Amendment right to jury trial with the goal of jury impartiality.[79] But the history of the development of the right to jury trial,[80] especially the early colonists' solicitude for the preservation of this right,[81] suggests that the central purpose of the Sixth Amendment jury trial provision is the protection of the individual defendant against government oppression.[82] The

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75. *See* Massaro, *supra* note 18, at 508 (stating that principal reason colonists highly prized right to jury trial was their belief that lay juries would prevent arbitrary exercise of government authority). The American colonists considered the right to jury trial a fundamental right. J. VAN DYKE, *supra* note 1, at 6. Revolutionary and constitutional documents of the time illustrate the colonists' high regard for the right of trial by jury. L. MOORE, *supra* note 65, at 99-104. Most of the colonial charters guaranteed trial by jury. *Id.* at 95-97. The Declaration of Rights of the First Continental Congress of 1774 claimed for the colonists the "inestimable privilege" of trial by a jury of peers. *Id.* at 99. The Declaration of Independence listed the crown's deprivation of the benefits of trial by jury as one of the reasons for separation from England. *Id.* at 100. The first constitutions of most of the thirteen original states incorporated provisions preserving the right of trial by jury. *Id.* at 99-102.

Early colonial writers often were effusive in their praise of the jury. *See* Massaro, *supra* note 18, at 508 (describing colonists' "expansive rhetoric" used to describe right to jury trial). Hamilton noted that opponents of the Constitution objecting to the lack of provision for jury trial in civil cases considered trial by jury to be "the palladium of free government." THE FEDERALIST No. 83, at 521-22 (A. Hamilton) (B. Wright ed. 1961). Jefferson characterized the jury as "the only anchor ever yet imagined" which could hold government to its constitutional foundations. *See* J. VAN DYKE, *supra* note 1, at 8 (quoting letter of Jefferson to Thomas Paine).

76. *See supra* notes 70-75 and accompanying text (discussing common law history of development of jury's role in protection of individual liberty).

77. *See* Holland v. Illinois, 110 S. Ct. 803, 808 & n.1 (1990) (discussing role of peremptory challenge in common law history underlying Sixth Amendment).

78. *See supra* note 30 and accompanying text (discussing *Holland* Court's analysis of function of peremptory challenge).

79. *See supra* note 31 and accompanying text (discussing *Holland* Court's conclusion that impartiality is central purpose of Sixth Amendment provision for trial by jury).

80. *See supra* notes 65-75 and accompanying text (summarizing common law history of development of right of trial by jury).

81. *See supra* note 75 and accompanying text (describing early American colonists' attitude toward right of jury trial).

82. *See* Holland v. Illinois, 110 S. Ct. 803, 814 (1990) (Marshall, J., dissenting) (distinguishing between separate "impartiality" concern and concern with "jury" as substantive constitutional concept inherent in Sixth Amendment and arguing that *Holland* majority's assumption that impartiality is sole purpose of Sixth Amendment is "flatly false"); Ballew v. Georgia, 435 U.S. 223, 229 (1978) (quoting Williams v. Florida, 399 U.S. 78 (1970), for proposition that purpose of jury trial is prevention of government oppression); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (stating that purpose of jury is to guard against the

requirement that the jury be impartial facilitates the central protective purpose of the Sixth Amendment right to jury trial by ensuring that the group of laymen assembled for judgment are impartial toward the accused.[83] The impartiality requirement, however, is not itself the central purpose of the Sixth Amendment jury trial provision.[84]

B. *Inconsistency with Prior Cases Recognizing Central Purpose of Sixth Amendment*

In addition to the inconsistency with common law history of the jury, the *Holland* decision also is inconsistent with the Court's prior precedents interpreting the Sixth Amendment right to jury trial. The *Holland* Court's assertion that jury impartiality is the central purpose of the right to trial by jury contradicts the Court's prior cases interpreting the Sixth Amendment.[85] In numerous cases the Court has recognized the unique role that the jury plays in the protection of individual liberties against government oppression.[86] In each of these cases the Court has stated that the purpose of the jury is to protect the accused against arbitrary government action.[87]

The Court first explicitly recognized the unique role the jury plays in the protection of individual liberties in *Duncan v. Louisiana*.[88] In *Duncan* the Supreme Court considered whether the Sixth Amendment right of trial by jury is a fundamental right entitled to protection against state abridgement under the Fourteenth Amendment due process clause.[89] In analyzing

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exercise of arbitrary power); Apodaca v. Oregon, 406 U.S. 404, 410 (1972) (citing Duncan v. Louisiana, 391 U.S. 145 (1968), and stating that purpose of jury trial is prevention of government oppression); Williams v. Florida, 399 U.S. at 100 (same); Duncan v. Louisiana, 391 U.S. at 151-56 (surveying history of trial by jury and concluding that Sixth Amendment secured right to trial by jury to defendant to prevent oppression by government).

83. *See* J. VAN DYKE, *supra* note 1, at 47 (stating that by use of term "impartial" framers contemplated jury that was fair because not biased in favor of prosecution and independent of outside influence).

84. *See supra* note 82 and accompanying text (arguing that protection of individual defendant against government oppression is central purpose of right to jury trial); *cf.* Holland v. Illinois, 110 S. Ct. 803, 814 (1990) (Marshall, J., dissenting) (distinguishing between separate "impartiality" concern and concern with "jury" as substantive constitutional concept inherent in Sixth Amendment).

85. *See* Holland v. Illinois, 110 S. Ct. 803, 818 (1990) (Marshall, J., dissenting) (suggesting that *Holland* majority has "selective amnesia" because majority glosses over every single fair cross-section case decided by Court).

86. *See infra* notes 88-119 and accompanying text (discussing Supreme Court cases interpreting Sixth Amendment and emphasizing protective function of jury).

87. *See infra* notes 92, 104, 117 and accompanying text (describing Supreme Court cases reasoning that protection of defendant is central purpose of jury secured by Sixth Amendment).

88. 391 U.S. 145 (1968).

89. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In *Duncan*, a Louisiana court tried and convicted the defendant, Gary Duncan, of simple battery without a jury in accordance with Louisiana law. *Id.* at 146. Under Louisiana law at the time, simple battery was a misdemeanor punishable by a maximum of two years imprisonment and a $300 fine. *Id.* Upon conviction, the court sentenced Duncan to 60 days in the parish prison and fined Duncan

this question, the Court briefly surveyed the history immediately preceding the adoption of the Sixth Amendment[90] and concluded that the right to trial by jury protects the criminal defendant from government oppression.[91] The Court reasoned that the right of jury trial interposes the common sense judgment of the defendant's peers between the defendant and the government and, thus, protects the defendant against the arbitrary exercise of government power.[92] Because of the protective function of the jury[93] and the deep national commitment to the right of jury trial reflected in state and federal constitutions,[94] the *Duncan* Court held that the due process clause of the Fourteenth Amendment prevents states from abridging the right of a criminal defendant to jury trial in serious criminal cases.[95]

After *Duncan*, the Supreme Court considered the specific contours of the right of trial by jury that the Sixth Amendment secures and that *Duncan* made applicable to the states.[96] In *Williams v. Florida*[97] the Court considered whether the Sixth Amendment guarantees trial by no less than twelve jurors.[98] In *Apodaca v. Oregon*[99] the Court considered whether the Sixth

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$150. *Id.* Duncan contended on appeal that the right of jury trial in criminal cases is a fundamental right which is essential to a fair trial. *Id.* at 148-49 (quoting Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963)). The State of Louisiana contended that the United States Constitution imposes no duty on the states to provide a jury trial in any criminal case. *Id.* at 149.

90. *Id.* at 151-54.

91. *Id.* at 155; *see also id.* at 188 (Harlan, J., dissenting) (noting that principal original virtue of jury trial was limitations which jury imposed on judiciary).

92. *Id.* at 156. The *Duncan* Court noted that the provision for trial by a jury of peers gives the accused an "inestimable safeguard" against a corrupt or overzealous prosecutor or a biased judge by substituting the common sense judgment of the jury for the professional, but possibly less sympathetic, reaction of the judge. *Id.*

93. *See supra* note 92 and accompanying text (describing protective function of jury).

94. Duncan v. Louisiana, 391 U.S. 145, 154-56 (1968). The *Duncan* Court noted that the provision for jury trial in both federal and state constitutions reflects a reluctance to entrust complete power over a citizen's life and liberty to a single judge or group of judges. *Id.* at 156.

95. *Id.* at 149, 156. The *Duncan* Court recognized that the trial of certain offenses without a jury would not violate the Sixth Amendment. *Id.* at 159. Thus, the Court held that petty crimes or offenses carrying possible penalties up to six months do not require a jury trial. *Id.*

96. *See supra* note 95 and accompanying text (describing *Duncan* Court's application of Sixth Amendment right to jury trial to states through incorporation in Fourteenth Amendment).

97. 399 U.S. 78 (1970).

98. Williams v. Florida, 399 U.S. 78, 86 (1970). In *Williams*, the defendant filed a motion prior to his trial for robbery to impanel a jury of twelve instead of a jury of six as provided by Florida law. *Id.* at 79-80. The Court surveyed the history underlying the inclusion of specific provisions for jury trial in the Constitution and amendments and concluded that this history is ambiguous as to whether those provisions guarantee a jury identical to the jury that existed at common law at the time of the Constitution. *Id.* at 92-99. Because the import of this history is ambiguous, the Court reasoned that the question of whether a particular feature of the jury is of constitutional significance must be resolved by reference to the function that the feature performs in relation to the purpose of the jury trial. *Id.* at 99-100.

99. 406 U.S. 404 (1972) (plurality opinion).

Amendment requires conviction of a defendant only upon a unanimous verdict.[100] In both cases the Court surveyed the history underlying the adoption of the Sixth Amendment and concluded that this history is ambiguous concerning the framers' intent to preserve specific features of the jury existing at common law.[101] Consequently, the Court reasoned that the relation of a given feature of the jury[102] to the purpose of the jury determines whether the Constitution requires the particular feature.[103] The purpose of the jury, the Court concluded, is to protect the individual defendant against government oppression, as noted in *Duncan*.[104] Indeed, the Court maintained that the essential feature of the jury is the interposition of the common sense judgment of the defendant's peers between the defendant and the government.[105] The Court reasoned that neither a jury of six instead of twelve jurors nor a less-than-unanimous verdict undermines the common sense judgment of the jury.[106] Consequently, the Court held that the Sixth Amendment requires neither trial by a twelve-member jury nor conviction by a unanimous verdict.[107]

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100. Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (plurality opinion). In *Apodaca* various petitioners appealed criminal convictions by less-than-unanimous jury verdicts. *Id.* at 405-06. The Court noted the similarity between the issues of the constitutional significance of the unanimity requirement presented in *Apodaca* and the number requirement presented in *Williams*. *Id.* at 406. As in *Williams*, the Court noted the ambiguity of the history underlying the adoption of the Sixth Amendment and concluded that the constitutional significance of the unanimity feature of the jury must be determined by reference to the purpose of the jury. *Id.* at 407-10.

101. Williams v. Florida, 399 U.S. at 96-100; Apodaca v. Oregon, 406 U.S. at 407-410.

102. *See* Williams v. Florida, 399 U.S. at 86 (considering constitutional significance of number requirement for jury); Apodaca v. Oregon, 406 U.S. at 406 (considering constitutional significance of unanimity requirement for jury).

103. Williams v. Florida, 399 U.S. 78, 99-100 (1970); Apodaca v. Oregon, 406 U.S. at 410.

104. Williams v. Florida, 399 U.S. 78, 100 (1970); Apodaca v. Oregon, 406 U.S. at 410.

105. Williams v. Florida, 399 U.S. 78, 100 (1970); Apodaca v. Oregon, 406 U.S. 404, 410 (1972).

106. Williams v. Florida, 399 U.S. 78, 100-02 (1970); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972); *see supra* note 92 and accompanying text (describing role of common sense judgment of jury in protection of individual defendant).

The *Williams* Court reasoned that a reduction in the number of jurors would not undermine the common sense judgment of the jury as long as the number of jurors remained large enough to allow group deliberation and provide the possibility for representation of a fair cross-section of the community. *Williams*, 399 U.S. at 100. Although the *Williams* Court held that a six member jury is constitutionally acceptable, the Court later refused to allow a further reduction in number to a five member jury. Ballew v. Georgia, 435 U.S. 223, 228 (1978).

Following a chain of reasoning similar to that in *Williams*, the *Apodaca* Court concluded that the unanimity requirement does not materially contribute to the common sense judgment of the jury. *Apodaca*, 406 U.S. at 410. The Court reasoned that allowing a jury to convict or acquit by votes of 10 to two or 11 to one still effectively interposes the judgment of the defendant's peers between the defendant and the state. *Id.* at 410-11.

107. Williams v. Florida, 399 U.S. 78, 86 (1970); Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

The Court also referred to the protective function of the jury in *Taylor v. Louisiana*.[108] In *Taylor* the Court considered whether a state jury selection system that operated to exclude women from jury service violated a defendant's Sixth Amendment right to an impartial jury trial.[109] Because Louisiana constitutional and statutory provisions precluded the selection of women for jury service absent the filing of a written declaration of desire to serve,[110] the jury wheel for the district in which Taylor's trial occurred contained few women, and the venire for Taylor's trial contained no women.[111] Consequently, an all male jury tried and convicted Taylor of aggravated kidnaping.[112] Taylor contended that Louisiana's jury selection procedures violated his Sixth Amendment right to a jury drawn from a cross-section of the community.[113]

The Court initially noted that the fact that Taylor was not a member of the excluded class of jurors did not preclude Taylor from challenging the exclusion of women from his venire.[114] The Court then surveyed its prior cases interpreting the right of jury trial and concluded that the Sixth Amendment guarantee of trial by an impartial jury requires that the jury be drawn from a representative cross-section of the community.[115] The Court

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108. 419 U.S. 522 (1975).

109. Taylor v. Louisiana, 419 U.S. 522, 525-26 (1975).

110. *Id.* at 523, nn.1, 2. At the time defendant Taylor was tried, the Louisiana Constitution provided that "no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service." *Id.* at 523 n.1 (quoting LA. CONST. art. VII, § 41). The Louisiana Code of Criminal Procedure also provided that "[a] woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." *Id.* at 523 n.2 (quoting LA. CODE CRIM. PROC. art. 402). Both of these provisions were repealed as of January 1, 1975. *Id.* at 523 nn.1, 2.

111. *Id.* at 524. The Court noted that Louisiana's jury selection system did not disqualify women from jury service, but that the jury selection system did operate to systematically exclude women from jury service. *Id.* at 525-26. Thus, although women constituted 53% of the eligible jurors in the district in which Taylor's trial occurred, only 10% of the persons on the jury wheel and none of the persons on the defendant's venire were women. *Id.* at 524.

112. *Id.* at 524.

113. *Id.* at 526.

114. *Id.*

115. *Id.* at 526-28. The representative or fair cross-section requirement is implicit within the Sixth Amendment provision for trial by jury. Holland v. Illinois, 110 S. Ct. 803, 807 (1990). The *Taylor* Court traced the development of this implicit requirement in the Court's prior cases. Taylor v. Louisiana, 419 U.S. 522, 526-28 (1975). The Court cited the following cases: *Smith v. Texas*, 311 U.S. 128, 130 (1940) (stating that jury must be body truly representative of community in context of claim that systematic exclusion of blacks from grand jury violates defendant's Fourteenth Amendment right to equal protection of laws); *Glasser v. United States*, 315 U.S. 60, 85-86 (1942) (interpreting Sixth Amendment to require that jury be representative body which reflects cross-section of community); *Ballard v. United States* 329 U.S. 187 (1946) (noting federal statutory design to make jury reflect cross-section of community); *Brown v. Allen* 344 U.S. 443, 474 (1953) (declaring state source of jury lists acceptable if source reasonably reflects cross-section of population suitable in character and intelligence for jury duty); *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970) (quoting *Smith*

reasoned that the Sixth Amendment requires selection of jurors from a fair cross-section of the community because this requirement preserves the common sense judgment of the jury by ensuring that the jury's judgment reflects the viewpoints of distinct groups within the community.[116] The common sense judgment of the jury in turn protects the individual against the exercise of arbitrary government power—the central purpose of the jury.[117] Because women bring a unique perspective to the jury, the *Taylor* Court held that the systematic exclusion of women from jury service violates the Sixth Amendment fair cross-section requirement.[118] The Court was

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that idea of jury contemplates body truly representative of community); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (stating that number on jury should be large enough to provide fair possibility for obtaining representative cross-section of the community); *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (plurality opinion) (noting that jury will exercise common sense judgment as long as jury consists of group of laymen representative of cross-section of community who have duty and opportunity to deliberate on question of defendant's guilt); *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (opinion of Marshall, J., joined by Douglas and Stewart, JJ.) (noting that Sixth Amendment comprehends fair possibility of obtaining jury constituting representative cross-section of community).

After surveying these cases, the *Taylor* Court concluded that the fair cross-section requirement is an "essential component" of the Sixth Amendment right to jury trial which is "fundamental" to the jury trial guaranteed by the Sixth Amendment. Taylor v. Louisiana, 419 U.S. at 528-30; *see also* Daughtrey, *supra* note 11, at 19-50 (providing exhaustive summary of development of jury cross-section requirement).

116. Taylor v. Louisiana, 419 U.S. at 530. The *Taylor* Court's language is significant. The Court reasoned:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. . . . Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Id. at 530-31 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

117. *Id.* at 530. The *Taylor* Court referred to other functions of the jury, but the Court obviously perceived the protective role to be the central purpose of the jury. *Id.* The Court stated that "*[t]he* purpose of a jury is to guard against the exercise of arbitrary power . . . . Community participation in the administration of the criminal law . . . is *also* critical to public confidence in the fairness of the criminal justice system." *Id.* (emphasis added).

118. *Id.* at 533, 535-36. The *Taylor* Court noted that distinct groups bring unique perspectives to the jury which are vital to the judgment of the jury and possibly of critical importance in individual cases. *Id.* at 531-32. In deciding that women constitute a distinctive group for jury representation purposes, the *Taylor* Court noted that the two sexes are "not fungible." *Id.* (quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)). The Court further noted that the influence of the sexes upon each other is "imponderable" and that a

careful to note, however, that its holding imposed no requirement that the jury chosen from a fair cross-section of the community must reflect the various distinct groups in the community.[119]

C. Discriminatory Exercise of Peremptory Challenges Undermines Protective Function of Jury that is Central Purpose of Sixth Amendment

Both a survey of the common law history underlying the Sixth Amendment and an analysis of Supreme Court cases interpreting the Sixth Amendment provision for jury trial demonstrate that the central purpose of the jury is to protect the individual defendant against the arbitrary exercise of government power.[120] The Sixth Amendment provision for trial by an impartial jury, therefore, must be interpreted in light of this purpose.[121] Given this context, impartiality is an important feature of the jury because the requirement of impartiality protects the accused against government oppression.[122] Although peremptory challenges aid in impaneling an impartial jury,[123] if the discriminatory exercise of peremptory challenges undermines the central protective function of the jury, then such use of peremptories should be prohibited as a violation of the Sixth Amendment.[124]

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distinct quality is lost if either sex is excluded from the jury. *Id.*

The *Taylor* Court also intimated that the exclusion of distinct groups other than women from jury service would violate the Sixth Amendment fair cross-section requirement. *Id.* at 532. Thus the Court aptly reasoned:

> [T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
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> . . . .
>
> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 532 n.12 (quoting Peters v. Kiff, 407 U.S. 493, 502-504 (1972) (opinion of Marshall, J., joined by Douglas and Stewart, JJ.)).

119. *Id.* at 538.

120. *See supra* notes 65-75 and accompanying text (surveying common law history underlying Sixth Amendment); *supra* notes 88-119 and accompanying text (analyzing Supreme Court cases interpreting Sixth Amendment).

121. *Cf.* Holland v. Illinois, 110 S. Ct. 803, 808 (1990) (stating that constitutional phrase "impartial jury" must derive meaning from tradition of peremptory challenge and concluding that goal of jury impartiality is central purpose of Sixth Amendment).

122. *See supra* note 83 and accompanying text (describing relation of requirement of jury impartiality to central protective function of jury); *cf.* Holland v. Illinois, 110 S. Ct. at 814-15 (Marshall, J., dissenting) (noting distinction between Sixth Amendment requirement of impartiality and provision for "jury" trial and suggesting that impartiality requirement and fair cross-section requirement based on provision for "jury" trial provide distinct protections).

123. *See infra* note 128 and accompanying text (describing function of peremptory challenge in securing impartial jury).

124. *But see* Holland v. Illinois, 110 S. Ct. at 806 (holding that prohibition on exclusion

A party need give no reason when exercising a peremptory challenge to remove a potential juror.[125] As one court has noted, however, because no reason need be *given* for the exercise of a peremptory challenge does not mean that no reason need *exist*.[126] Thus, a party properly exercises a peremptory challenge to remove a prospective juror when the party believes the juror exhibits a specific bias toward the particular parties or witnesses in a case.[127] By enabling a party to reject a juror on the basis of real or perceived partiality not rising to the level of legal bias and justifying a challenge for cause, the peremptory challenge eliminates extremes of partiality on both sides and secures an impartial jury.[128]

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of cognizable groups through peremptory challenges has no basis in Sixth Amendment); Note, *The Impartiality Requirement of the Sixth Amendment and Peremptory Challenges:* Holland v. Illinois, 24 CREIGHTON L. REV. 339 (1990) (arguing that *Holland* Court correctly refused to apply fair cross-section requirement to jury).

125. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) (stating that essential nature of peremptory challenge is that peremptory is exercised without stating reason, without inquiry, and without being subject to court's control); *supra* note 20 and accompanying text (describing exercise of peremptory challenge without stating reason).

126. People v. Wheeler, 22 Cal. 3d 258, 274, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 901 (1978). In *Wheeler*, the Supreme Court of California considered whether the prosecution's use of peremptory challenges to remove all black potential jurors from two black defendants' jury violated the defendants' right under the California Constitution to trial by an impartial jury. *Id.* at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893. In the course of its opinion, the California court surveyed its own and the United States Supreme Court's cases developing the fair cross-section requirement. *Id.* at 266-72, 583 P.2d at 754-58, 148 Cal. Rptr. at 896-99. From this survey, the court concluded that both Article I, Section 16 of the California Constitution and the Sixth Amendment of the United States Constitution guarantee the right to trial by a jury drawn from a representative cross-section of the community. *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-90. The court maintained that the rationale for the cross-section requirement is that the cross-section requirement achieves an impartial jury by encouraging a representation of diverse groups on the jury so that inherent and unavoidable group biases—the beliefs and values resulting from jurors' group experiences—cancel each other out. *Id.* at 266-67, 276, 583 P.2d at 754-55, 761, 148 Cal. Rptr. at 896, 902. Because the fair cross-section requirement contemplates an interaction of diverse group biases, the *Wheeler* court held that the exercise of peremptory challenges to remove prospective jurors solely on the basis of group bias violates a defendant's constitutional right to trial by a jury drawn from a fair cross-section of the community. *Id.* at 266-67, 276, 583 P.2d at 755, 761-62, 148 Cal. Rptr. at 896, 902. In contrast to the impropriety of using peremptory challenges to remove potential jurors on the basis of group bias, the court concluded that peremptory challenges are proper only when used to remove jurors with a specific bias toward the particular case on trial or the parties or witnesses to that case. *Id.* at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

127. *Id.* at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901; *see* Note, *supra* note 14, at 1733 (arguing that jurors should be challenged peremptorily because counsel believes that jurors harbor situation-specific biases and not because jurors are members of group likely to represent distinctive perspectives within community).

128. *See* Holland v. Illinois, 110 S. Ct. 803, 807, 809 (1990) (describing use of peremptory challenges to exclude extremes of partiality); Swain v. Alabama, 380 U.S. at 219-20 (describing nature and function of peremptory challenges); Saltzburg and Powers, *supra* note 15, at 341-42 (stating that theory of peremptory challenge is that each side will exercise peremptories to remove jurors biased in favor of opposition thus resulting in impartial jury); Note, *supra* note 14, at 1718-19 (stating that party should exercise peremptory challenges to remove jurors harboring bias not sufficient to justify challenge for cause).

In contrast to specific bias, group bias is the shared attitudes or perspectives that a person possesses as a result of membership in a distinct and identifiable group within the community.[129] The Supreme Court has held that the state's exercise of peremptory challenges to exclude potential jurors from service on a jury solely on the basis of group bias violates a criminal defendant's Fourteenth Amendment right to equal protection of the laws.[130] In *Holland*, however, the Court held that the Sixth Amendment does not prohibit the state's exercise of peremptory challenges on the basis of group bias.[131] The *Holland* Court's refusal to find a Sixth Amendment basis for prohibiting the discriminatory exercise of peremptory challenges is illogical given the central protective purpose of the jury[132] and the Court's prior recognition of the prohibition against systematic exclusion of distinct groups from jury panels or venires on the basis of group bias.[133]

Prior to *Holland*, various state courts had found that the exercise of peremptory challenges to exclude prospective jurors from a jury solely on the basis of group bias violates either the Sixth Amendment or state constitutional provisions.[134] These courts reasoned that group bias actually serves an integral function in ensuring jury impartiality by allowing the divergent opinions and perspectives of different jurors to reciprocally influ-

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129. *See* People v. Wheeler, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902 (describing group bias); Note, *supra* note 14, at 1733 (same).

130. Batson v. Kentucky, 476 U.S. 79, 97 (1986); *see supra* notes 41-59 and accompanying text (discussing *Batson*).

131. Holland v. Illinois, 110 S. Ct. 803, 806 (1990).

132. *See supra* note 120 and accompanying text (concluding that survey of common law history underlying Sixth Amendment and Supreme Court cases interpreting Sixth Amendment suggests that central purpose of jury is protection of individual against government oppression).

133. *See* Lockhart v. McCree, 476 U.S. 162, 175 (1986) (stating that exclusion of large groups from venire violates purposes of fair cross-section requirement); *infra* notes 140-143 and accompanying text (discussing *McCree*). In the course of its opinion, the *McCree* Court discussed its prior jury representation cases. *Id.* at 175. The Court reasoned that these cases implicitly condemn the exclusion of large groups such as blacks, women, and Mexican-Americans from jury service because the exclusion of these groups for reasons unrelated to the ability of their members to serve as jurors in a particular case contravenes the purposes of the fair cross-section requirement. *Id.* In contrast to the unacceptable exclusion of jurors on the basis of group bias, the Court approved of the exclusion of jurors with specific biases which prevent them from impartially applying the law in a given case because such biases are attributes within the control of the jurors. *Id.* at 175-76.

134. *See* People v. Wheeler, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978) (holding that both Sixth Amendment to Federal Constitution and Article I, Section 16, of California Constitution guarantee right to trial by jury drawn from representative cross-section of community and that use of peremptory challenges to remove prospective jurors on sole ground of group bias violates right to trial by jury drawn from cross-section of community); Commonwealth v. Soares, 377 Mass. 461, ____, 387 N.E.2d 499, 516 (holding that exercise of peremptory challenges to exclude members of discrete groups from jury solely on basis of bias presumed from membership in group contravenes requirement inherent in Article 12 of Massachusetts Declaration of Rights that jury be drawn from fair and representative cross-section of community), *cert. denied*, 444 U.S. 881 (1979).

ence and offset each other, thus avoiding extremes of prejudice.[135] These courts thus interpreted the fair cross-section requirement, whether derived from the Sixth Amendment or state constitutional provisions, in a substantive sense[136] to guarantee the defendant a right to an impartial jury (a jury that balances and mediates jurors' diverse group biases)[137] and not just a jury composed of impartial jurors (jurors exhibiting no specific biases toward the case or parties).[138]

If the fair cross-section requirement of the Sixth Amendment guarantees a defendant the substantive right to an impartial jury, then the use of peremptory challenges to remove members of distinct groups from the jury destroys the jury's impartiality and violates the Sixth Amendment by upsetting the balance of group biases and subjecting the jury to the prejudices of the majority.[139] The Supreme Court, however, expressly rejected this substantive interpretation of the right to an impartial jury in *Lockhart v. McCree*.[140] In *McCree* the Supreme Court considered whether the Sixth Amendment fair cross-section requirement prohibits the removal for cause of prospective jurors whose opposition to the death penalty is so strong that the jurors would be unable to impose the death penalty at the sentencing phase of trial.[141] The *McCree* Court held that the Sixth Amendment right

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135. *See* People v. Wheeler, 22 Cal. 3d 258, 366-67, 583 P.2d 748, 755, 148 Cal. Rptr. 890, 896 (1978) (noting that representation of variety of groups on jury so antagonistic biases of group members "cancel each other out" is only practical way to achieve overall impartiality on jury); Commonwealth v. Soares, 377 Mass. 461, ____, 387 N.E.2d 499, 512 (quoting Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975)) (noting that assurance of diversity of individual jurors' opinions as influenced by group affiliation assures "diffused impartiality" on jury which is key objective of representative cross-section requirement), *cert. denied*, 444 U.S. 881 (1979); *see also* Note, *supra* note 14, at 1733 (stating that rationale behind representative cross-section rule in *Taylor* is that impartial jury is one in which group biases have opportunity to interact).

136. *See* Note, *supra* note 14, at 1726 (arguing that representative cross-section requirement is concerned with substantive definition of jury impartiality); Massaro, *supra* note 18, at 543 (arguing that Sixth Amendment right to "impartial jury" and component of this right that assures that jurors be "impartial" are independent concepts).

137. *See* People v. Wheeler, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978) (stating that interaction of jurors' diverse beliefs and values derived from group experiences achieves overall impartiality of jury).

138. *See id.* at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901 (equating impartial jurors with jurors having no specific biases toward case or parties); Lockhart v. McCree, 476 U.S. 162, 177 (1986) (defining impartial jurors as jurors who can lay aside impressions or opinions and render verdict based on evidence presented at trial and quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)).

139. *See* People v. Wheeler, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902 (stating that removing jurors because jurors hold beliefs derived from group experiences precludes interaction of diverse perspectives and subjects jury to domination by conscious or unconscious prejudices of majority).

140. 476 U.S. 162 (1986).

141. Lockhart v. McCree, 476 U.S. 162, 165 (1986). An Arkansas state court jury convicted the defendant, McCree, of capital felony murder but sentenced McCree to life imprisonment without parole. *Id.* at 166. The trial judge had removed for cause at voir dire all prospective

to an impartial jury guarantees only the right to trial by a jury composed of impartial jurors who are able to decide a case solely on the evidence adduced at trial.[142] The Court refused to interpret the impartial jury requirement in a substantive sense, reasoning that such an interpretation would require trial judges to undertake the impractical task of balancing various viewpoints on a jury, and, ultimately, would eliminate the peremptory challenge.[143]

Although the *McCree* Court refused to interpret the Sixth Amendment provision for an impartial jury to encompass the concept of a balancing of diverse group biases on the jury,[144] the Court recognized the impropriety of excluding jurors from jury panels or venires on the basis of group bias.[145] The Court reasoned that exclusion of entire groups from jury service possibly could undermine the common sense judgment of the jury that protects the

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jurors who stated that they could not vote for the imposition of the death penalty under any circumstances. *Id.* McCree contended that the exclusion of these jurors opposed to the death penalty violated his Sixth Amendment right to trial by an impartial jury selected from a representative cross-section of the community. *Id.* at 167. The Court noted that its prior cases had interpreted the fair cross-section requirement to apply only to the jury panel or venire and not the jury. *Id.* at 173 (citing Duren v. Missouri, 439 U.S. 357, 363-64 (1979), and Taylor v. Louisiana, 419 U.S. 522, 538 (1975)). The Court reasoned that application of the fair cross-section requirement to the jury would be unworkable because trial judges would have to "balance" juries to reflect the various groups in the community. *Id.* at 178. The Court also expressed fear that extension of the fair cross-section requirement to the jury would ultimately require the elimination of peremptory challenges. *Id.* at 178-79. Consequently, the *McCree* Court held that the Sixth Amendment fair cross-section requirement does not apply to the jury to prohibit the removal for cause of jurors adamantly opposed to the death penalty. *Id.* at 174.

142. *Id.* at 177-78 (citing Irvin v. Dowd 366 U.S. 717, 723 (1961)). *But see* Massaro, *supra* note 18, at 542 (stating that if term "impartial" in Sixth Amendment means only that jurors must be impartial, then term arguably is redundant because due process clause requires impartial tribunal).

143. *McCree*, 476 U.S. at 178-79. *But see* Note, *supra* note 14, at 1732 (noting that fair cross-section requirement demands only that defendant have jury from which no group has been excluded by peremptory challenges of prospective jurors on basis of group associations).

In the course of its opinion, the *McCree* Court succinctly summarized the theory of a substantive right to an impartial jury and clearly rejected that theory. The Court's language is instructive:

> McCree's "impartiality" argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial *jury* can be constructed only by "balancing" the various predispositions of the individual *jurors*. . . . We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." [citation omitted].
>
> . . . .
>
> In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints.

McCree, 476 U.S. at 177-78, 183 (emphasis in original).

144. *See supra* notes 141-43 and accompanying text (describing *McCree* Court's rejection of substantive interpretation of impartial jury).

145. *McCree*, 476 U.S. at 175.

criminal defendant.[146] Reaching a similar conclusion in *Taylor v. Louisiana*,[147] the Supreme Court concluded that the jury cannot perform its unique protective function if large, distinct groups within the community are excluded from the jury pool.[148] Implicit in the *Taylor* Court's reasoning is the premise that a jury composed of only special segments of the community reflects the judgment of those segments and not the common sense judgment of the community which shields the defendant from government oppression.[149]

The *Holland* Court erred by concluding that the Sixth Amendment provides no basis for a prohibition on the discriminatory use of peremptory challenges to remove jurors solely on the grounds of group bias.[150] A survey of the common law history underlying the Sixth Amendment[151] and an analysis of the Supreme Court's cases interpreting the Sixth Amendment provision for jury trial[152] demonstrate that the central purpose of the jury is to protect the individual defendant against the arbitrary exercise of government power.[153] The jury protects the defendant by interposing the common sense judgment of the community between the defendant and the government.[154] The Court has recognized that exclusion of distinct groups from jury service undermines the common sense judgment of the community provided by the jury.[155] The application of the common sense judgment of

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146. *Id.*

147. 419 U.S. 522, 530 (1975); *see supra* notes 108-19 and accompanying text (discussing *Taylor*).

148. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

149. *See id.* (noting that absence of distinct groups within community undermines common sense judgment of jury); *supra* note 118 and accompanying text (discussing *Taylor* Court's reasoning that exclusion of distinct groups from jury service violates Sixth Amendment fair cross-section requirement). *But see* Duren v. Missouri, 439 U.S. 357, 371-72 n.* (1979) (Rehnquist, J., dissenting) (attacking view that distinct groups bring unique perspectives to jury and arguing that fair cross-section requirement really reflects equal protection concerns).

The *Taylor* Court stated that restricting jury service to special groups or excluding major segments within the community "cannot be squared" with the constitutional concept of jury trial. *Taylor*, 419 U.S. at 530.

150. *See infra* notes 151-57 and accompanying text (arguing that discriminatory exercise of peremptory challenges undermines central protective function of Sixth Amendment provision for jury trial and, consequently, that discriminatory peremptories should be prohibited as violation of Sixth Amendment).

151. *See supra* notes 65-75 and accompanying text (surveying common law history underlying Sixth Amendment).

152. *See supra* notes 88-119 and accompanying text (analyzing Supreme Court's cases interpreting Sixth Amendment).

153. *See supra* note 120 and accompanying text (concluding from survey of common law history and analysis of Supreme Court cases that central purpose of Sixth Amendment right to jury trial is protection of individual defendant against government oppression).

154. *See supra* note 92 and accompanying text (discussing *Duncan* Court's description of function of jury's common sense judgment in protection of individual defendant).

155. *See supra* notes 129-49 and accompanying text (discussing *McCree* and *Taylor* Courts' recognition of effect of group bias-based discrimination in composition of venire on jury's common sense judgment).

the community, however, occurs on the jury and not the venire.[156] Thus, the *Holland* Court's holding is illogical in maintaining that the fair cross-section requirement of the Sixth Amendment prohibits the systematic exclusion of distinct groups from the venire while simultaneously allowing the destruction of the cross-section on the jury through the discriminatory use of peremptory challenges.[157] The exercise of peremptory challenges solely on the basis of group bias should be prohibited as a violation of the Sixth Amendment because such discriminatory exercise of peremptory challenges defeats the central purpose of the jury.

V. Narrower Scope of Protection against Discrimination under Equal Protection Analysis

By restricting claims concerning discriminatory use of peremptory challenges to a *Batson* equal protection analysis instead of a Sixth Amendment

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156. *See* McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of cert.) (noting that interaction of cross-section of community occurs not within venire but on jury selected from venire); Commonwealth v. Soares, 377 Mass. 461, ____, 387 N.E.2d 499, 513 (noting that representative venire or panel is insufficient if jury is not representative because desired interaction of cross-section of community occurs only within jury room), *cert. denied*, 444 U.S. 881 (1979); Note, *supra* note 14, at 1731 (noting that interplay of group perspectives occurs only on jury).

In *McCray*, Justice Marshall succinctly stated the argument for precluding the discriminatory exercise of peremptory challenges on the basis of the Sixth Amendment:

> The right to a jury drawn from a fair cross-section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury. . . . The desired interaction of a cross-section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues. The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process. There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can then be struck because of their race by a prosecutor's use of peremptory challenges.

McCray, 461 U.S. at 967-68.

157. *See* Holland v. Illinois, 110 S. Ct. 803, 825 (1990) (Stevens, J., dissenting) (noting that Sixth Amendment guarantees defendant impartial jury and not just impartial venire).

The concurrence of Justice White and Justice Rehnquist in the majority's opinion in *Holland* is particularly puzzling given their earlier position in Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion). In *Apodaca* Justice Rehnquist joined Justice White's opinion which at least implicitly acknowledged that the Sixth Amendment precludes the exclusion of jurors from the jury, as well as the venire, on the basis of group bias. In *Apodaca* the Court considered whether the Sixth Amendment right to jury trial prohibits conviction by a less-than-unanimous verdict. *Id.* at 406. Justice White addressed the petitioner's argument that a less-than-unanimous verdict undermines the Sixth Amendment fair cross-section requirement by allowing conviction without the acquiescence of minority elements within the community. *Id.* at 412-13. Justice White dismissed this argument because the Sixth Amendment does not require representation of "every distinct voice in the community . . . on every jury." *Id.* at 413. Instead, Justice White wrote that "the Constitution forbids . . . systematic exclusion of identifiable segments of the community from jury panels *and from the juries ultimately drawn from those panels* . . . ." *Id.* (emphasis added).

fair cross-section analysis,[158] the *Holland* Court effectively narrowed the scope of constitutional protection against discrimination in the jury selection process. The Sixth Amendment fair cross-section analysis and the *Batson* equal protection analysis of claims involving discriminatory use of peremptory challenges differ in several ways.[159] Specifically, the two analyses differ with respect to standing requirements,[160] the scope of cognizable groups to which the protections apply,[161] and the necessary prerequisite of state action.[162] In each of these respects, the fair cross-section analysis provides a broader scope of protection against discriminatory jury selection procedures.

A. Different Standing Requirements for Equal Protection and Fair Cross-Section Analyses

The Fourteenth Amendment equal protection and Sixth Amendment fair cross-section analyses of claims of discriminatory jury selection procedures have different standing requirements. A defendant need not be a member of a group allegedly excluded from the jury as a result of the discriminatory exercise of peremptory challenges to have standing to allege a violation of the Sixth Amendment fair cross-section requirement.[163] Tra-

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158. *See* Holland v. Illinois, 110 S. Ct. 803, 810-11 (1990) (holding that defendant has no valid constitutional challenge on basis of Sixth Amendment to prosecution's race-based use of peremptory challenges but that such use of peremptory challenges is unlawful under *Batson*); *supra* notes 41-59 and accompanying text (discussing *Batson*); *supra* notes 39-40 and accompanying text (discussing *Holland* Court's default to *Batson* analysis for claims of discriminatory use of peremptory challenges).

159. *See generally* Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081 (1987) (contrasting Fourteenth Amendment equal protection and Sixth Amendment fair cross-section analyses of jury discrimination claims and arguing that only Sixth Amendment analysis fully protects defendant's right to trial by impartial jury); Comment, Batson v. Kentucky*: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755 (1988) (distinguishing between equal protection and fair cross-section analyses, arguing that *Batson* correctly adopted equal protection analysis, and advocating reduction in number of peremptories and expansion of counsel's role in voir dire to facilitate equal protection against discriminatory jury selection procedures).

160. *See infra* notes 163-74 and accompanying text (discussing different standing requirements for fair cross-section and equal protection analyses).

161. *See infra* notes 175-90 and accompanying text (discussing differing definition of cognizable groups for fair cross-section and equal protection claims).

162. *See infra* notes 191-236 and accompanying text (discussing state action requirement inherent in equal protection analysis and lack of state action requirement for fair cross-section analysis).

163. See Magid, *supra* note 159, at 1091 (stating that defendant need not be member of excluded group to bring fair cross-section claim).

The *Holland* Court found that a white defendant had standing to contest the exclusion of black jurors. Holland v. Illinois, 110 S. Ct. 803, 805-06 (1990). The Court stated that the Sixth Amendment entitles a defendant to contest a venire not designed to represent a fair cross-section of the community, whether or not the defendant belongs to the groups systematically excluded. *Id.* at 805. The *Holland* Court concluded that a defendant would likewise have standing to contest the exclusion of groups to which the defendant did not belong from

ditional standing analysis supports the finding that a defendant has standing to contest the exclusion of jurors of a different group on the basis of the Sixth Amendment fair cross-section requirement.[164] To have standing to assert a violation of a constitutional right, the defendant first must satisfy the article III case or controversy requirement for federal jurisdiction by demonstrating an "injury in fact" and then show that the defendant is the proper proponent of the protected legal right.[165] The exclusion of distinct groups from the jury undermines the fair cross-section requirement and distorts the common sense judgment of the jury,[166] causing the defendant injury in fact by denying the defendant a decision reflecting the common sense judgment of the community.[167] The defendant also is the proper proponent of the right asserted because the right to trial by a jury drawn from a cross-section of the community is a personal right of the defendant guaranteed by the Sixth Amendment.[168]

In contrast to the broad basis of standing to assert a Sixth Amendment jury discrimination claim, the *Batson* Court impliedly restricted standing to assert an equal protection claim to only those defendants who are members of the same racial group as the excluded jurors.[169] This position follows the Court's prior decisions in which the Court apparently assumed without

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the jury because the applicability of the fair cross-section requirement to the jury is a question of the scope of the Sixth Amendment guarantee and not of the defendant's standing to assert the guarantee. *Id.* at 806.

The *Taylor* Court found that a male defendant had standing to contest the exclusion of female jurors. Taylor v. Louisiana, 419 U.S. 522, 526 (1975). The *Taylor* Court stated that there is no rule that claims of violations of the fair cross-section requirement may be raised only by defendants who are members of the group allegedly excluded from jury service. *Id.*

164. *See* Magid, *supra* note 159, at 1096-97 (stating that traditional standing analysis demonstrates defendant's right to contest exclusion of jurors from groups to which defendant does not belong).

165. *See* Singleton v. Wulff, 428 U.S. 106, 112 (1976) (describing two-part standing test). The *Singleton* Court defined "injury in fact" as a "sufficiently concrete interest" in the outcome of a party's suit to make the suit a case or controversy for purposes of a federal court's Article III jurisdiction. *Id.*

166. *See supra* notes 149, 155 and accompanying text (describing effect of exclusion of distinct groups from jury on common sense judgment of jury).

167. *See* Magid, *supra* note 159, at 1096-97 (arguing that exclusion of distinct groups of jurors undermines fair cross-section requirement and therefore causes defendant injury in fact).

168. *See Singleton*, 428 U.S. at 113 (stating that individual has standing as matter of course to assert violation of individual's own personal rights guaranteed by constitution); Magid, *supra* note 159, at 1097 (arguing that defendant is proper proponent of violation of personal right to trial by jury drawn from cross-section of community).

169. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that equal protection clause forbids prosecutor from challenging potential jurors solely on account of race or on assumption that black jurors cannot impartially consider State's case against black defendant). The assumption of a same class rule is even clearer in the *Batson* Court's description of the test by which a defendant makes a prima facie case of discrimination on the basis of equal protection principles. *Id.* at 96-97. Describing the first step in this test, the Court stated that the defendant must show that the defendant is a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire. *Id.* at 96.

deciding that a defendant must be a member of the excluded class to have standing to raise an equal protection claim.[170] The Court, however, has not expressly decided the issue of whether a same class rule applies to defendants seeking to assert an equal protection claim on the basis of discriminatory jury selection procedures.[171] Although a majority of the Supreme Court Justices in *Holland* concluded in separate concurring and dissenting opinions that a same class rule need not apply to an equal protection jury discrimination claim,[172] the issue was not before the *Holland* Court. Thus, until the Court rules on the issue as presented[173] a defendant who seeks to assert an

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170. *See, e.g.*, Hobby v. United States, 468 U.S. 339, 347 (1984) (addressing white defendant's due process claim challenging exclusion of women and blacks from position of grand jury foreperson and distinguishing earlier equal protection case where black defendants were members of class allegedly excluded from position of grand jury foreperson); Rose v. Mitchell, 443 U.S. 545, 565 (1979) (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)) (stating that to establish equal protection violation in selection of grand jury foreman defendant must show that procedures for selecting grand jury foreman resulted in substantial underrepresentation of defendant's race or of group to which defendant belongs); Castaneda v. Partida, 430 U.S. at 492 (quoting Hernandez v. Texas, 347 U.S. 475, 477 (1954)) (stating that defendant is denied equal protection when all persons of defendant's race or color are excluded from grand jury); *see also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.2(c) (1984) (stating that under equal protection analysis only defendant who is member of excluded class can make constitutional challenge); Magid, *supra* note 159, at 1100 & nn.9, 10 (comparing divergent lower federal court holdings concerning same class rule).

171. *See* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 186 n.130 (1989) (arguing that Supreme Court has not decided issue of same class rule and that decisions that members of excluded class *may* challenge exclusion of other members of class from jury under equal protection clause do not justify conclusion that other defendants may not challenge such exclusion); Magid, *supra* note 159, at 1100 (stating that language in Supreme Court cases suggesting same class rule is arguably dicta because language appears in cases in which defendant is member of excluded group).

The Supreme Court may soon resolve the question of the applicability of a same class rule to a criminal defendant seeking to contest the prosecution's discriminatory use of peremptory challenges under *Batson*. Powers v. Ohio, 59 U.S.L.W. 3021 (1990), directly presented the question whether a white defendant has standing under *Batson* to challenge the prosecution's removal of black prospective jurors. The Supreme Court granted certiorari, 58 U.S.L.W. 3526 (1990), and has heard oral argument in the case, 59 U.S.L.W. 3307 (1990).

172. *See* Holland v. Illinois, 110 S. Ct. 803, 812 (1990) (Kennedy, J., concurring) (stating that there is no reason to conclude that defendant's race should deprive defendant of standing to vindicate jurors' right to sit.); *id.* at 813-14 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (stating that defendant in *Batson* had standing to raise own rights and rights of members of venire and of general public and that white defendant should also have such standing); *id.* at 821-22 (Stevens, J., dissenting) (stating that suggestion that only defendants of same race or ethnicity as excluded jurors can enforce jurors' right to equal protection recognized in *Batson* is itself inconsistent with equal protection clause); *see also* Alschuler, *supra* note 171, at 183-95 (arguing that defendant should have standing to challenge exclusion of jurors of different race on basis of violation of defendant's right to equal protection or on alternate basis of third party standing to assert rights of excluded jurors). *But see* Magid, *supra* note 159, at 1101-04 (arguing that defendant should not have third party standing to assert rights of jurors of different race excluded from jury service).

173. *See supra* note 171 (noting that Supreme Court has heard oral argument on issue of applicability of same class rule to *Batson* challenge in Powers v. Ohio, 59 U.S.L.W. 3021 (1990)).

equal protection claim on the basis of discriminatory jury selection procedures likely will encounter the same class rule applied by lower courts.[174]

B. *Different Cognizable Groups Protected by Equal Protection and Fair Cross-Section Analyses*

Different cognizable groups receive protection under the Fourteenth Amendment equal protection and Sixth Amendment fair cross-section analyses. In *McCree* the Supreme Court stated that in evaluating an alleged Sixth Amendment violation a distinct or cognizable group must be defined by reference to the purposes of the fair cross-section requirement.[175] The *McCree* Court suggested that these purposes are the protection of the defendant against arbitrary government power, the preservation of public confidence in the criminal justice system, and the provision of an opportunity to exercise civic responsibilities.[176] Although the *McCree* Court dis-

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174. *See, e.g.*, United States v. Rodriguez, 917 F.2d 1286, 1288 (11th Cir. 1990) (stating that Hispanic defendant lacked standing under *Batson* to contest prosecutor's use of peremptory challenges to exclude black jurors); United States v. Rodriguez-Cardenas, 866 F.2d 390, 392 (11th Cir. 1989) (same), *cert. denied*, 110 S. Ct. 1110 (1990); United States v. Townsley, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (stating that *Batson* is clear and straightforward in denying standing to white defendants to challenge exclusion of black jurors), *cert. dismissed*, 59 U.S.L.W. 3687 (1991); United States v. Angiulo, 847 F.2d 956, 984 (1st Cir.) (stating that nonblack defendants could not contest government's use of peremptory challenges to remove black jurors under rule in *Batson*), *cert. denied*, 488 U.S. 928 (1988); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.) (stating that under *Batson* nonblack defendants could not make out prima facie case of discrimination on account of government's use of peremptory challenges to remove black jurors), *cert. denied*, 484 U.S. 928 (1987); United States v. Cronn, 717 F.2d 164, 169 (5th Cir. 1983) (holding that white male had no standing to raise equal protection violation as result of underrepresentation of females and racial minorities in position of grand jury foreperson), *cert. denied*, 468 U.S. 1217 (1984); United States v. Coletta, 682 F.2d 820, 823-24 (9th Cir. 1982) (stating that defendants who failed to show exclusion of group of which defendants were members from position of grand jury foreperson lacked standing to raise equal protection violation), *cert. denied*, 459 U.S. 1202 (1983); State v. Massey, 247 Kan. 79, ____, 795 P.2d 344, 348-49 (1990) (finding that white defendant lacked standing under *Batson* to challenge prosecutor's use of peremptory challenges to exclude black jurors); Congdon v. State, 260 Ga. 173, 175, 391 S.E.2d 402, 404 (1990) (same), *vacated*, 59 U.S.L.W. 9999 (1991). *But see* United States v. Prine, 909 F.2d 1109, 1113 (8th Cir. 1990) (finding that white defendants had standing to challenge prosecutor's use of peremptory challenges to exclude black juror), *cert. denied*, 111 S. Ct. 1318 (1991); Birt v. Montgomery, 725 F.2d 587, 607 (11th Cir.) (finding that white male defendant had standing under equal protection clause to challenge exclusion of blacks and women from venire), *cert. denied*, 469 U.S. 874 (1984); United States v. Perez-Hernandez, 672 F.2d 1380, 1385-86 (11th Cir. 1982) (finding that Hispanic man had standing to present equal protection challenge to exclusion of blacks and women from grand jury); Bryant v. State, 565 So. 2d 1298, 1300-01 (Fla. 1990) (holding that white defendants had standing to challenge prosecutor's use of peremptory challenges to exclude black jurors).

175. Lockhart v. McCree, 476 U.S. 162, 174 (1986); *see supra* notes 140-43 and accompanying text (discussing *McCree*).

176. *McCree*, 476 U.S. at 174-75 (quoting Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975)).

cussed only groups defined by race or gender,[177] the range of cognizable groups for purposes of the fair cross-section requirement clearly extends beyond these limits. Thus, for purposes of a Sixth Amendment fair cross-section claim, a cognizable group is one that is distinct from the community in that its members share unique experiences and perspectives which other segments of the community cannot adequately represent.[178]

Because the holding in *Batson* rests on equal protection principles,[179] the protected cognizable groups would be those groups which are suspect classes in that they historically have been the object of discrimination or politically powerless.[180] Thus, groups defined by race,[181] national origin,[182] gender,[183] alienage,[184] and illegitimacy[185] have qualified as cognizable groups requiring different levels of scrutiny for purposes of equal protection claims and probably would qualify for protection under the *Batson* analysis. Groups defined by economic or social status, arguably cognizable for Sixth Amendment purposes,[186] would not be cognizable for equal protection purposes.

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177. *Id.* at 175.

178. *See* Note, *supra* note 14, at 1736-37 (defining cognizable group for purposes of fair cross-section requirement as group possessing any identifiable group characteristic that gives members distinctive experiences and perspectives within community which is inadequately represented if group is excluded).

An early Supreme Court jury discrimination case suggests that economic, social, religious, racial, political or geographical groups within the community should receive protection against systematic exclusion from jury service. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946). On the basis of this rationale, the *Thiel* Court held that daily wage earners cannot be excluded from jury lists. *Id.* at 225. The Jury Selection and Service Act of 1968 also contains its own equivalent of the fair cross-section requirement that prohibits exclusion of jurors on the basis of race, color, religion, sex, national origin, or economic status. 28 U.S.C. § 1862 (1988).

179. *See supra* note 49 and accompanying text (describing *Batson* holding that equal protection clause prohibits prosecution from using peremptory challenges to exclude potential jurors on basis of race).

180. *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (designating group as suspect class by considering whether group historically has suffered purposeful unequal treatment or occupied position of political powerlessness which commands extraordinary protection from majoritarian political process).

181. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stating that classifications based on race are constitutionally suspect and subject to rigid scrutiny).

182. *See* Hernandez v. Texas, 347 U.S. 475, 479 (1954) (stating that exclusion of eligible persons from jury service because of national origin is discrimination prohibited by Fourteenth Amendment).

183. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (stating that classification based on gender is subject to scrutiny under equal protection clause and that party advocating questioned classification must show that classification serves important government objective and is substantially related to achievement of objective).

184. *See* Foley v. Connelie, 435 U.S. 291, 294-96 (1978) (stating that classification on basis of alien citizenship is subject to demands of equal protection clause and that state must show rational relationship between classification and protected interest).

185. *See* Lalli v. Lalli, 439 U.S. 259, 265 (1978) (stating that classification based on illegitimacy is invalid under equal protection clause if not substantially related to permissible state interest).

186. *See supra* note 178 and accompanying text (describing cognizable groups for purposes of fair cross-section analysis).

Consequently, the range of cognizable groups that would receive protection against discrimination under the *Batson* equal protection analysis would be narrower than the range of cognizable groups for purposes of the Sixth Amendment fair cross-section requirement.[187]

The *Batson* analysis, however, may afford protection against discriminatory jury selection procedures to an even narrower scope of cognizable groups than those groups that qualify for protection under the equal protection clause. Although the *Batson* holding is based on equal protection principles, the Court expressly held only that a prosecutor may not exercise peremptory challenges against potential jurors on account of race.[188] The *Batson* Court made no mention of extension of the rule to other groups cognizable under equal protection principles.[189] Disagreement among lower federal and state courts evinces the uncertain applicability of the *Batson* holding beyond the context of racial discrimination.[190]

C. *Different State Action Requirements for Equal Protection and Fair Cross-Section Analyses*

The Fourteenth Amendment equal protection and Sixth Amendment fair cross-section analyses of claims of discriminatory use of peremptory challenges differ with respect to the requirement of state action. Because the *Batson* holding rests on equal protection principles,[191] the rule of *Batson*

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187. *See* Comment, *supra* note 159, at 789 (noting that *Batson* test, resting on equal protection grounds, applies only to cognizable groups that are judicially protected because of past discrimination while fair cross-section test, resting on prohibition against discrimination on basis of group bias, encompasses range of groups not covered by equal protection clause).

188. Batson v. Kentucky, 476 U.S. 79, 89 (1986); *see* Alschuler, *supra* note 171, at 180 (stating that holding and other restrictive references to race in *Batson* do not resolve issue of constitutionality of peremptory challenges based on juror's gender because issues of nonracial exclusion were not before Court, and Court did not address such issues).

189. *See* Batson v. Kentucky, 476 U.S. 79, 123-24 (1986) (Burger, CJ., dissenting) (stating that *Batson* majority's holding contains limitation on basis of race and noting that holding does not extend to other groups protected by equal protection clause).

190. *Compare* United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) (rejecting argument that equal protection clause compels extension of *Batson* rule to gender-based peremptory challenges), *cert. dismissed*, 489 U.S. 1094 (1989), *and cert. denied*, 110 S. Ct. 1109-10 (1990) *and* State v. Culver, 233 Neb. 228, ____, 444 N.W.2d 662, 665-66 (1989) (holding that equal protection clause does not prohibit gender-based peremptory challenges) *and* State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (stating that *Batson* does not extend to gender-based discrimination) *with* United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990) (holding that equal protection principles prohibit gender-based peremptory challenges) *and* United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987) (assuming but not deciding that principles of *Batson* extend to ethnic as well as racial groups), *cert. denied*, 484 U.S. 1063 (1988) *and* State v. Levinson, 71 Haw. 492, ____, 795 P.2d 845, 849-50 (1990) (holding that gender-based peremptory challenges violate equal protection under state constitution).

191. *See* Batson v. Kentucky, 476 U.S. at 89 (holding that equal protection clause forbids prosecutor to challenge potential jurors solely on account of race or on assumption that black jurors as group are unable to consider impartially state's case against black defendant).

The Fourteenth Amendment equal protection clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

offers protection against discriminatory jury selection procedures only if such discrimination results from state action.[192] A prosecutor's discriminatory exercise of peremptory challenges, as in *Batson*, easily satisfies the state action requirement because a prosecutor exercises power on behalf of the state.[193] The question of whether the requisite state action exists to invoke the equal protection clause is much less certain when considering defense counsel's exercise of peremptory challenges in a criminal trial[194] or a private litigant's exercise of peremptory challenges in a civil trial.[195]

1. Discriminatory Use of Peremptory Challenges by Criminal Defendant

The *Batson* Court expressly declined to rule on the question of whether the Constitution limits a criminal defense counsel's use of peremptory challenges.[196] Although the Supreme Court has not subsequently addressed this issue, commentators have argued for or against the extension of the *Batson* holding to preclude a criminal defendant's discriminatory exercise of peremptory challenges.[197] Commentators advocating the extension of the *Batson* holding to criminal defense counsel's use of peremptories note that the defense acts as an officer of the court by exercising statutorily-granted power to select jurors who are paid public employees.[198] The court then

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192. *See* Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 811-12 (1989) (stating that equal protection clause obviously limits only state action); *see also* Note, *supra* note 16, at 949 (stating that federal and state constitutional rights are intended to restrain only federal and state governmental action is axiomatic).

193. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (stating that action of party whose official character lends weight of State to party's decisions is state action) (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961)).

194. *See generally* Goldwasser, *supra* note 192, at 811-20 (discussing state action question and concluding that defense counsel's exercise of peremptory challenges does not constitute state action); Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM. L. REV. 355, 358-61 (1988) (arguing that defendant's use of peremptory challenges constitutes state action); Note, *Defendant's Discriminatory Use of the Peremptory Challenge after* Batson v. Kentucky, 62 ST. JOHN'S L. REV. 46, 52-57 (1987) (same).

195. *See generally* Note, *supra* note 16, at 949-955 (discussing state action question and concluding that civil litigant's exercise of peremptory challenges constitutes state action).

196. Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986).

197. *Compare* Alschuler, *supra* note 171, at 197 (arguing that courts should not hesitate to hold that criminal defendant's discriminatory exercise of peremptory challenges constitutes state action) *with* Goldwasser, *supra* note 192, at 811-20 (arguing that *Batson* equal protection-based limitations on prosecution's use of peremptories do not apply to defense). *See also* United States v. De Gross, 913 F.2d 1417, 1423-24 (9th Cir. 1990) (holding that criminal defendant's exercise of peremptory challenge is state action subject to equal protection clause); People v. Kern, 75 N.Y.2d 638, 657, 554 N.E.2d 1235, 1246, 555 N.Y.S.2d 647, 658 (holding that judicial enforcement of defense counsel's racially discriminatory peremptory challenges constitutes state action for purposes of state equal protection provision and that *Batson* applies to defense), *cert. denied*, 111 S. Ct. 77 (1990).

198. *See* Alschuler, *supra* note 171, at 197 (describing defense counsel's use of peremptory challenges).

ratifies the peremptory challenge by excusing the juror.[199] Because the defense attorney thus functions in the jury selection process by exercising state-granted power under the auspices of the court, the defense counsel's discriminatory exercise of peremptory challenges constitutes state action.[200]

Commentators arguing against a finding of state action in a criminal defendant's exercise of peremptory challenges cite constitutional state action doctrine to distinguish a defendant's exercise of peremptory challenges from accepted forms of state action.[201] These commentators suggest that a private party's exercise of a state-created right, the occurrence of private conduct in a state-provided forum, or the involvement of counsel do not in themselves implicate state action.[202] These commentators also argue that a court exercises only a ministerial function in the exercise of peremptory challenges.[203] Because these factors fail to demonstrate the required "nexus" between private and state conduct, a defendant's exercise of peremptory challenges does not constitute state action.[204]

Although some lower courts considering the applicability of the *Batson* rule to a criminal defendant's use of peremptory challenges have found state action on the part of the defense,[205] the Supreme Court has not addressed this issue since *Batson*. If the Court should decide that a defendant's discriminatory exercise of peremptory challenges is not state action

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199. *See id.* (noting role of court in excusing challenged jurors).

200. *See id.* at 197-98 (arguing that courts should hold that defendant's exercise of peremptory challenges is subject to constitutional restraints because state should not be permitted to delegate power to determine composition of official tribunals and then disclaim responsibility for predictably discriminatory exercise of such authority).

201. *See* Goldwasser, *supra* note 192, at 816 (stating that accepted state action doctrine refutes much of argument in favor of finding state action in defendant's use of peremptory challenges).

202. *See id.* (arguing against finding of state action in defense's use of peremptory challenges and citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (exercise of state-created right); Paisey v. Vitale 807 F.2d 889, 893 (11th Cir. 1986) (private conduct in state forum); Polk County v. Dodson, 454 U.S. 312 (1981) (involvement of counsel)).

203. *See id.* at 819 (noting court's ministerial role in peremptory challenges).

204. *See id.* at 816-20 (arguing that defense counsel's exercise of peremptory challenges does not demonstrate necessary relationship between private defendant and government to constitute state action and quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)). In *Jackson*, the Supreme Court noted the difficulty of characterizing a private party's action as state action for purposes of Fourteenth Amendment protection. *Jackson*, 419 U.S. at 349-50. The Court stated that determination of whether a private party's action constitutes state action must turn on whether there is a "sufficiently close nexus" between the state and the private party to attribute the party's action to the state. *Id.* at 351. Elaborating on this test in a later case, the Court explained that the requirement of a close "nexus" between private and state action ensures that the invocation of constitutional protections occurs only when the state is sufficiently responsible for the challenged action. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

205. *See* United States v. De Gross, 913 F.2d 1417, 1423-24 (9th Cir. 1990) (holding that criminal defendant's exercise of peremptory challenge is state action subject to equal protection clause); People v. Kern, 75 N.Y.2d 638, 657, 554 N.E.2d 1235, 1246, 555 N.Y.S.2d 647, 658 (holding that *Batson* applies to defense and listing cases finding state action in defense's use of peremptory challenges), *cert. denied*, 111 S. Ct. 77 (1990).

for equal protection purposes, the Court's decision would narrow substantially the *Batson* holding's scope of protection to preclude only the prosecution's discriminatory exercise of peremptory challenges.[206] Unlike the equal protection clause, the Sixth Amendment contains no state action requirement.[207] Instead, the Sixth Amendment guarantees a criminal defendant a right to trial by an impartial jury.[208] The impartiality of the jury is important because the impartiality requirement protects the defendant from government oppression.[209] The government, however, also has an interest in the impartiality of the jury that tries a criminal defendant.[210] Had the *Holland* Court recognized a Sixth Amendment basis for prohibiting discriminatory peremptory challenges, the Court might have avoided the potentially narrow scope of applicability of a rule based on the equal protection clause.[211]

2. Discriminatory Use of Peremptory Challenges by Civil Litigant

The *Batson* Court did not address the issue of a civil litigant's discriminatory use of peremptory challenges.[212] The state action requirement inher-

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206. *See supra* note 49 and accompanying text (describing *Batson* Court's holding that equal protection clause prohibits prosecution's discriminatory exercise of peremptory challenges and *Batson* Court's express reservation of decision on whether defense counsel's discriminatory exercise of peremptory challenges violates equal protection clause).

207. *See* U.S. CONST. amend. VI (granting criminal defendant positive right to impartial jury); U.S. CONST. amend. XIV, § 1 (restraining state from denying citizen equal protection of laws).

The Sixth Amendment provides in pertinent 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 . . . ." U.S. CONST. amend VI. The Fourteenth Amendment equal protection clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

208. *See supra* note 207 (quoting Sixth Amendment provision for jury trial).

209. *See supra* note 122 and accompanying text (noting function of Sixth Amendment requirement of impartiality).

210. *See* Holland v. Illinois, 110 S. Ct. 803, 809 (1990) (noting that although Sixth Amendment secures right to impartial jury only to individual and not to state, Sixth Amendment expresses goal of jury impartiality with respect to both defendant and state); Batson v. Kentucky, 476 U.S. 79, 107-08 (1986) (White, J., concurring) (arguing for abolition of peremptory challenges for both prosecution and defense and noting that criminal justice system requires both freedom from bias against accused and freedom from prejudice against prosecution of accused).

211. *But cf.* Goldwasser, *supra* note 192, at 820 n.74 (noting possible problems of standing for government seeking to assert equal protection violation because state has no equal protection rights, but recognizing possibility of third party standing); Alschuler, *supra* note 171, at 198 (same).

The government also faces potential problems when challenging defense counsel's discriminatory exercise of peremptory challenges on a Sixth Amendment basis because the Sixth Amendment secures a right to trial by an impartial jury only to the individual defendant and not to the State. Holland v. Illinois, 110 S. Ct. 803, 809 (1990). The *Holland* Court, however, recognized that the Sixth Amendment contemplates a jury that is impartial with respect to both the defendant and the State. *Id.*

212. *See supra* note 49 and accompanying text (discussing *Batson* holding that equal

ent in a *Batson* equal protection analysis, however, also applies when evaluating a claim concerning a civil litigant's discriminatory exercise of peremptory challenges.[213] When the government is a party to a civil suit, the equal protection clause precludes the government attorney's discriminatory use of peremptory challenges.[214] The Eighth Circuit Court of Appeals has concurred in this conclusion.[215] Whether the requisite state action exists in a suit between two private litigants when one party exercises peremptory challenges in a discriminatory manner is not as obvious.

One commentator has argued that a private litigant's discriminatory exercise of peremptory challenges constitutes state action for equal protection purposes.[216] The argument focuses on characteristics of the peremptory challenge process emphasized by commentators arguing for extension of the *Batson* rule to a criminal defendant's exercise of peremptory challenges[217]—a state-licensed attorney exercises statutorily-granted power to select jurors under the supervision of the trial judge.[218] Because of these features of the peremptory challenge process in a civil trial, the argument concludes that a private litigant's discriminatory exercise of peremptory challenges demon-

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protection clause prohibits prosecution's discriminatory use of peremptory challenges in criminal trial).

Although the Supreme Court did not consider the constitutionality of a civil litigant's discriminatory exercise of peremptory challenges in *Batson*, the Court may soon resolve this issue. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir.) (en banc), *cert. granted*, 111 S. Ct. 41 (1990), directly presented the question of the applicability of the *Batson* rule to private counsel's exercise of peremptory challenges in a civil suit. The Supreme Court has heard oral argument in the case. 59 U.S.L.W. 3514-15 (1991).

213. *See* Note, *supra* note 16, at 950 (stating that state action requirement is issue when court seeks to control private litigant's use of peremptory challenges).

214. *See* Alschuler, *supra* note 171, at 184 n.123 (noting that equal protection clause precludes discrimination by government lawyers in both civil and criminal cases).

215. *See* Reynolds v. City of Little Rock, 893 F.2d 1004, 1008 (8th Cir.) (holding that government counsel's actions in excluding black jurors through use of peremptory challenges violates equal protection clause whether exclusion occurs in criminal or civil case), *petition for cert. filed*, 59 U.S.L.W. 3053 (1990). In *Reynolds* the administratrix of a mentally disturbed black man killed by Little Rock Police brought a civil rights claim under 42 U.S.C. § 1983. *Id.* at 1005. The attorney for the City used peremptory challenges to remove the two black members of the venire. *Id.* When challenged by opposing counsel, the attorney for the City refused to offer a reason for his use of peremptories on the ground that the *Batson* rule did not apply to civil cases. *Id.* at 1008. The court noted that the crucial distinction in *Batson* was not between criminal and civil cases but between government actors and private actors. *Id.* Reasoning that the justifications for the rule in *Batson* apply equally in a civil suit against a governmental entity and in a government prosecution of an accused, the court held that government counsel's use of peremptory challenges to purposefully remove black jurors violates the equal protection clause whether the exclusion occurs in a criminal or a civil case. *Id.* at 1008-09.

216. *See* Note, *supra* note 16, at 951-55 (arguing that private litigant's discriminatory exercise of peremptory challenges constitutes state action).

217. *See supra* notes 197-200 and accompanying text (discussing argument that *Batson* test should apply to criminal defendant's discriminatory exercise of peremptory challenges).

218. *See* Note, *supra* note 16, at 951-53 (noting factors favoring finding of state action in private litigant's discriminatory exercise of peremptory challenges).

strates the required "nexus" with state power to invoke equal protection principles.[219] The lower federal and state courts which have considered this issue, however, have reached different outcomes.[220]

The Sixth Amendment by its terms applies only to criminal cases[221] and, therefore, can offer no basis for protection against discrimination in civil trials. The Seventh Amendment provision for jury trial in civil cases,[222] however, can be interpreted to include a fair cross-section requirement like that implicit in the Sixth Amendment provision for jury trial in criminal cases.[223] Although the Seventh Amendment does not expressly provide for

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219. *See id.* at 951 (quoting Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (arguing for finding of state action in private litigant's discriminatory exercise of peremptory challenges because private exercise of peremptory challenge creates requisite "nexus" with state power); *supra* note 204 and accompanying text (discussing "nexus" requirement).

220. *Compare* Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281, 1282, 1286-87 (7th Cir. 1990) (holding that court's involvement in exercise of peremptory challenges constitutes state action for equal protection purposes and that *Batson* forbids private litigant from exercising race-based peremptory challenges), *petition for cert. filed*, 59 U.S.L.W. 3615 (1991) *and* Fludd v. Dykes, 863 F.2d 822, 828 (11th Cir.) (stating that judge's decision to proceed to trial with jury selected from venire on basis of race constitutes state action for purposes of equal protection clause and that *Batson* applies to civil suit), *cert. denied*, 110 S. Ct. 201 (1989) *and* Maloney v. Washington, 690 F. Supp. 687, 689-90 (N.D. Ill.) (concluding that use of racially motivated peremptory challenges in civil cases violates equal protection clause because plaintiff's use of federal court's powers constitutes state action), *mandamus granted and order vacated sub nom.* Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988) *and* Thomas v. Diversified Contractors, Inc., 551 So. 2d 343, 345 (Ala. 1989) (holding that *Batson* jury selection standards apply to civil as well as criminal cases but not addressing state action issue) *with* Polk v. Dixie Ins. Co., 897 F.2d 1346, 1347 (5th Cir.) (holding that *Batson* does not apply to civil suit between private parties but not addressing state action issue), *petition for cert. filed*, 59 U.S.L.W. 3095 (1990) *and* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 221-26 (5th Cir.) (en banc) (concluding that neither trial judge, who exercises merely ministerial function in use of peremptory challenges, nor private counsel are state actors for equal protection purposes and holding that *Batson* does not apply to civil suit), *cert. granted*, 111 S. Ct. 41 (1990) *and* Esposito v. Buonome, 642 F. Supp. 760, 761 (D. Conn. 1986) (holding that *Batson* does not apply to civil case where plaintiff raises issue of defense's discriminatory use of peremptory challenges but not addressing state action issue) *and* Chavous v. Brown, S.C. , 396 S.E.2d 98, 99-100 (1990) (holding that neither trial judge's ministerial role in peremptory challenges nor private counsel's acts constitute state action for equal protection purposes and that *Batson* does not apply to civil suit).

221. *See supra* note 207 (quoting Sixth Amendment provision for jury trial).

222. *See* U.S. CONST. amend. VII (providing for jury trial in civil cases). The Seventh Amendment provides in pertinent part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

223. *See* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 45 (1976) (stating that exclusion of minorities from juries violates fair cross-section requirement inherent in Sixth and Seventh Amendments); Note, *supra* note 16, at 957-59 (discussing argument that Seventh Amendment prohibits discriminatory exercise of peremptory challenges and arguing that logic dictates that Sixth and Seventh Amendments contemplate right to similar types of jury trial in criminal and civil cases); *supra* note 115 and accompanying text (discussing *Taylor* Court's description of fair cross-section requirement implied from Sixth Amendment jury trial provision).

an "impartial" jury as the Sixth Amendment does,[224] some courts have interpreted the Seventh Amendment to require an impartial jury.[225] More importantly, the history underlying the adoption of the Seventh Amendment demonstrates that the drafters of the bill of rights ultimately provided for jury trial in civil cases for the very reason that the drafters guaranteed trial by jury in criminal trials—to protect the individual against government oppression.[226] The fair cross-section requirement inheres in the Sixth Amendment right to jury trial because it preserves the common sense judgment of the community which protects the defendant against government oppression.[227] By analogy, a fair cross-section requirement also should apply to the civil jury because the Seventh Amendment jury trial provision reflects similar protective concerns.[228]

The discriminatory exercise of peremptory challenges in either the criminal or the civil context undermines the common sense judgment of the jury and the jury's role in the protection of the individual.[229] If the *Holland* Court had recognized this fact and precluded the discriminatory exercise of peremptory challenges as a violation of the Sixth Amendment fair cross-section requirement,[230] then an analogous prohibition on the discriminatory use of peremptory challenges in a civil trial would derive from the Seventh Amendment.[231] Because the Seventh Amendment has no state action require-

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224. *See supra* note 222 (quoting Seventh Amendment provision for jury trial); *supra* note 207 (quoting Sixth Amendment provision for jury trial).

225. *See* Kiernan v. Van Schaik, 347 F.2d 775, 778 (3d Cir. 1965) (implying requirement of impartiality in Seventh Amendment provision for jury trial in civil case on basis of Fifth Amendment due process clause).

226. *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670-71 (1973) (noting that proponents of civil jury trial advocated provision for civil jury to protect debtor defendants, to frustrate unwise legislation, to overturn practices of courts of vice-admiralty, to vindicate interests of private citizens in litigation with government, and to protect litigants against oppressive judges).

227. *See supra* notes 116-17 and accompanying text (discussing *Taylor* Court's description of function of cross-section requirement in preservation of common sense judgment of jury and protection of individual against government oppression).

228. *See supra* note 226 and accompanying text (describing historical concerns for protection of individual underlying Seventh Amendment provision for jury trial).

229. *See supra* notes 151-57 and accompanying text (arguing that *Holland* Court wrongly concluded that exclusion of groups from jury through discriminatory use of peremptory challenges does not undermine common sense judgment and protective purpose of jury).

230. *See supra* notes 39, 158 and accompanying text (describing *Holland* Court's holding that Sixth Amendment provides no basis for prohibition of discriminatory exercise of peremptory challenges); *supra* notes 151-57 and accompanying text (arguing that discriminatory exercise of peremptory challenges undermines central protective function of Sixth Amendment provision for jury trial and, consequently, that discriminatory peremptories should be prohibited as violation of Sixth Amendment).

231. *See supra* notes 223-28 and accompanying text (arguing by analogy to Sixth Amendment that Seventh Amendment provision for jury trial includes fair cross-section requirement).

A Seventh Amendment fair cross-section requirement would provide a basis for protection against discriminatory use of peremptory challenges in civil cases. Such protection, however, would apply only in federal courts because the Supreme Court has yet to apply the Seventh

ment,[232] a Seventh Amendment-based prohibition of discriminatory peremptory challenges would avoid the difficult question of whether a private litigant's exercise of peremptory challenges constitutes state action inherent in an equal protection analysis.[233] Because the *Holland* Court found no Sixth Amendment basis for precluding discriminatory peremptory challenges,[234] however, any argument against such challenges in a civil trial based on a Seventh Amendment fair cross-section requirement would fail. Consequently, if the Court eventually finds that a private litigant's discriminatory exercise of peremptory challenges does not constitute state action for equal protection purposes,[235] the rule of *Batson* effectively will be limited to application only in criminal cases.[236]

VI. CONCLUSION

The Supreme Court's decision in *Batson v. Kentucky*[237] represented a significant advance in the protection of a criminal defendant against discriminatory jury selection procedures.[238] The *Batson* holding extended to the jury the protection against discriminatory jury selection procedures that earlier cases applied to the venire[239] while enabling a defendant to prove such discrimination by reference to the prosecutor's acts in the defendant's case alone.[240] The *Batson* Court, however, specifically refused to address both the defendant's Sixth Amendment claims[241] and the question of whether

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Amendment to the states through the Fourteenth Amendment. Woods v. Holy Cross Hosp., 591 F.2d 1164, 1171 n.12 (5th Cir. 1979); *see also* Hattaway v. McMillian, 903 F.2d 1440, 1451 n.16 (11th Cir. 1990) (stating that Seventh Amendment does not apply to state court proceedings).

232. *See supra* note 222 (quoting Seventh Amendment provision for jury trial).

233. *See supra* notes 213-20 and accompanying text (discussing whether civil litigant's exercise of peremptory challenges constitutes state action for equal protection purposes).

234. *See supra* notes 39, 158 and accompanying text (describing *Holland* Court's holding that Sixth Amendment provides no basis for prohibition of discriminatory exercise of peremptory challenges).

235. *See supra* note 212 (noting that Supreme Court has heard oral argument on case presenting question of applicability of *Batson* to civil trial, which necessarily entails analysis of state action issue for private litigant's exercise of peremptory challenge).

236. *See* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 221-26 (5th Cir.) (en banc) (concluding that neither trial judge nor private counsel are state actors for equal protection purposes and holding that *Batson* does not apply to discriminatory exercise of peremptory challenges in civil suit), *cert. granted*, 111 S. Ct. 41 (1990); Chavous v. Brown, S.C. , 396 S.E.2d 98, 99-100 (1990) (same).

237. 476 U.S. 79 (1986).

238. *See supra* notes 41-59 and accompanying text (discussing *Batson*).

239. *See supra* notes 46-49 and accompanying text (discussing *Batson* Court's reasoning that equal protection clause prohibits prosecution's racially discriminatory use of peremptory challenges as well as discrimination in composition of venire).

240. *See supra* notes 50-59 and accompanying text (discussing *Batson* test for proving prosecutor's discriminatory exercise of peremptory challenges by relying only on prosecutor's acts at defendant's trial).

241. *See supra* note 45 and accompanying text (discussing *Batson* Court's decision to consider defendant's claims under Fourteenth Amendment equal protection principles instead of Sixth Amendment fair cross-section principles).

the prohibition on discriminatory exercise of peremptory challenges extended to the defense.[242] Confronted with an opportunity to address the Sixth Amendment issue in *Holland v. Illinois*,[243] the Supreme Court refused to find a Sixth Amendment basis for prohibiting discriminatory peremptory challenges.[244] Focusing on the Sixth Amendment provision for an impartial jury, the *Holland* Court concluded that jury impartiality is the central purpose of the Sixth Amendment provision for jury trial[245] and that peremptory challenges, which serve to ensure jury impartiality, should remain unencumbered by Sixth Amendment-based restrictions.[246] The *Holland* decision thus relegated analysis of claims of discriminatory use of peremptory challenges to the *Batson* test.[247] Because the *Batson* analysis rests on equal protection principles,[248] the *Batson* analysis necessitates inquiries concerning a party's standing to assert a claim of discrimination,[249] the membership of excluded jurors in certain suspect classes,[250] and the question of whether the exercise of peremptory challenges constitutes state action.[251] All such inquiries, however, are inapplicable to a fair cross-section analysis derived from the Sixth or Seventh Amendment provisions for jury trial.[252] Because lower courts generally have interpreted the *Batson* holding quite strictly,[253]

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242. *See supra* note 49 and accompanying text (discussing *Batson* Court's refusal to consider whether defense counsel's discriminatory exercise of peremptory challenges would violate equal protection clause).

243. 110 S. Ct. 803 (1990).

244. *See supra* note 39 and accompanying text (discussing *Holland* Court's holding that Sixth Amendment provides no basis to prohibit prosecutor's discriminatory exercise of peremptory challenges).

245. *See supra* note 31 and accompanying text (discussing *Holland* Court's conclusion that jury impartiality is central purpose of Sixth Amendment jury trial provision).

246. *See supra* notes 33-40 and accompanying text (discussing *Holland* Court's reasoning that recognition of Sixth Amendment-based prohibition on discriminatory peremptory challenges would undermine role of challenge in securing jury impartiality but stating that discriminatory use of challenges is illegal under *Batson*).

247. *See supra* notes 40, 158 and accompanying text (discussing *Holland* Court's default to *Batson* analysis of claims of discriminatory peremptory challenges).

248. *See supra* note 49 and accompanying text (discussing *Batson* Court's holding that equal protection clause precludes prosecution's racially discriminatory use of peremptory challenges).

249. *See supra* notes 169-74 and accompanying text (discussing issue of standing to assert claim of discriminatory peremptory challenges under *Batson* equal protection analysis).

250. *See supra* notes 180-90 and accompanying text (discussing cognizable groups under *Batson* equal protection analysis).

251. *See supra* notes 196-204 and accompanying text (discussing state action issue for criminal defendant's exercise of peremptory challenges); *supra* notes 213-20 and accompanying text (discussing state action issue for civil litigant's exercise of peremptory challenges).

252. *See supra* notes 163-68 and accompanying text (discussing standing issue for fair cross-section claim); *supra* notes 175-78 and accompanying text (discussing cognizable groups for purposes of fair cross-section claim); *supra* note 207 and accompanying text (discussing lack of state action issue for fair cross-section claim).

253. *See supra* note 174 (listing lower court cases applying "same-class" standing rule to *Batson* equal protection claims); *supra* note 190 (listing lower court cases refusing to extend *Batson* beyond context of racial discrimination); *supra* note 220 (listing lower court cases

the *Holland* Court's decision to default to the *Batson* analysis narrows the scope of protection against discriminatory exercise of peremptory challenges.

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refusing to apply *Batson* to context of civil suit because civil litigant's exercise of peremptory challenges does not constitute state action for equal protection purposes).

Addendum

On April 1, 1991, the United States Supreme Court followed the lead of the five concurring and dissenting Justices in *Holland* and held that a criminal defendant has standing to object to the prosecution's use of race-based peremptory challenges to exclude jurors regardless of whether the defendant and the excluded jurors share the same race. *Powers v. Ohio*, 59 U.S.L.W. 4268, 4269 (1991). In *Powers*, a white defendant raised a *Batson* objection to the prosecution's use of peremptory challenges to remove seven black prospective jurors. *Id.* Writing for the seven-member majority, Justice Kennedy first reviewed prior discriminatory jury selection cases and held that the equal protection clause prohibits the prosecution from using peremptory challenges to exclude prospective jurors solely because of race. *Id.* at 4269-71. The *Powers* Court then considered whether a criminal defendant has standing to assert the equal protection rights of excluded jurors. *Id.* at 4271. The *Powers* Court noted that the propriety of a litigant's assertion of third-party standing depends upon the litigant having suffered an "injury-in-fact," the existence of a close relation between the litigant and the third party, and the existence of some hindrance to the third party's assertion of personal rights. *Id.* Justice Kennedy reasoned that the discriminatory use of peremptory challenges undermines the integrity and appearance of fairness of the trial process and causes the defendant injury in fact. *Id.* at 4271-72. Justice Kennedy further noted that the defendant and jurors establish a close relation during voir dire that continues throughout the trial. *Id.* at 4272. Finally, Justice Kennedy noted that substantial procedural and economic barriers prevent excluded jurors from bringing suit on their own behalf. *Id.* Consequently, the *Powers* Court held that a criminal defendant can assert third-party equal protection rights of jurors excluded by the prosecution's discriminatory use of peremptory challenges. *Id.*

On June 3, 1991, the United States Supreme Court extended the *Batson* rule to the context of a civil trial and held that a private litigant's use of peremptory challenges to remove prospective jurors on the basis of race violates the jurors' equal protection rights. *Edmonson v. Leesville Concrete Co.*, 59 U.S.L.W. 4574, 4575 (1991). In *Edmonson*, a black plaintiff sought to raise a *Batson* challenge to the defendant's use of two of three peremptory challenges to exclude black jurors from the jury impaneled to hear his negligence claim. *Id.* Writing for the six-member majority, Justice Kennedy first noted that racial discrimination is harmful in the context of either civil or criminal proceedings. *Id.* The *Edmonson* Court then addressed the question of whether a private litigant's exercise of peremptory challenges constitutes state action that implicates constitutional protections. *Id.*

Relying on the state action test enunciated in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the *Edmonson* Court asked whether the asserted constitutional deprivation resulted from the exercise of a right derived from state authority and whether the private party responsible for causing the deprivation fairly could be characterized as a state actor. *Id.* at 4576. The Court easily concluded that the defendant's exercise of peremptory chal-

lenges satisfied the first part of the *Lugar* test because the defendant exercised the peremptory challenges pursuant to a federal statute. *Id.* The Court also found that a private litigant's exercise of peremptory challenges is state action implicating constitutional protections. *Id.* The *Edmonson* Court noted that a private litigant relies on the substantial participation of the court in the exercise of peremptory challenges, that the selection of a jury through the use of peremptory challenges in a civil trial constitutes the private performance of a traditional government function, and that the incidents of government authority evident in the courtroom aggravate the injury caused by discriminatory peremptory challenges. *Id.* at 4576-78. Consequently, the *Edmonson* Court held that a private litigant's racially discriminatory exercise of peremptory challenges constitutes state action that violates the equal protection rights of the challenged jurors. *Id.* at 4575-76