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J.E.B. v. Alabama ex rel. T.B.: Strike Two for the Peremptory Challenge

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J.E.B. v. Alabama ex rel. T.B.: Strike Two for the Peremptory Challenge

'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'¹

"If counsel is depending upon a clearly applicable rule of law and if he wants to avoid a verdict of 'intuition' or 'sympathy,' if his verdict in amount is to be proved by clearly demonstrated blackboard figures for example, generally he would want a male juror.'"²

I. INTRODUCTION

As the above quotes demonstrate, and as acknowledged by the Supreme Court, African-Americans and women share a long history of exclusion from jury service.³ The peremptory challenge is one device that attorneys have traditionally used to exclude individuals in these groups from a jury panel.⁴ African-Americans receive protection from the peremptory challenge as a result of *Batson v. Kentucky*,⁵ which held that race-based peremptory challenges violate both defendants' and excluded jurors' equal protection rights guaranteed by the Fourteenth Amendment.⁶

Batson left open the question of whether the Fourteenth Amendment also prohibits gender-based peremptory strikes. The Supreme Court answered this question in 1994 with *J.E.B. v. Alabama ex rel. T.B.*⁷ Applying heightened equal protection scrutiny,⁸ the Court determined that gender-based peremptory challenges violate the equal protection rights of both defendants and excluded jurors.⁹

1. *Race Bias Pervades Jury Selection, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A28 (quoting uncited jury selection treatise) (quoted in *Batson v. Kentucky*, 476 U.S. 79, 104 n.3 (1986) (Marshall, J., concurring)).

2. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 n.10 (1994) (omission in original) (quoting 3 MELVIN M. BELLI, SR., *MODERN TRIALS* §§ 51.67, 51.68, at 446-47 (2d ed. 1982)).

3. *See id.* at 1425.

4. *See Batson*, 476 U.S. at 83; *see also J.E.B.*, 114 S. Ct. at 1422.

5. 476 U.S. 79 (1986).

6. *Id.* at 89.

7. 114 S. Ct. 1419 (1994).

8. *See infra* notes 97-99 for discussions of the three possible levels of scrutiny: rational basis scrutiny, intermediate level scrutiny, and strict scrutiny.

9. *J.E.B.*, 114 S. Ct. at 1427-29.

This Note critically analyzes the *J.E.B.* decision. First, it explains the jury selection procedure.¹⁰ It then reviews the cases leading up to *J.E.B.* which demonstrate how African-Americans and women were excluded from juries in the past.¹¹ This Note then examines the split in the lower courts over the application of *Batson* to gender exclusions.¹² Next, this Note discusses and critically analyzes the facts and opinions in *J.E.B.*¹³ and its probable impact.¹⁴ Finally, this Note concludes that the Supreme Court's latest decision is another step toward the elimination of the peremptory challenge.¹⁵

II. BACKGROUND

The "jury is a remarkable political institution."¹⁶ Trial by jury existed in England for centuries before the drafting of the United States Constitution.¹⁷ A trial by jury protects against government oppression¹⁸ because ordinary citizens become part of the judicial system and "can prevent its arbitrary use or abuse."¹⁹ Furthermore, it is fundamental to the American system of democracy.²⁰ "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."²¹ It empowers the people and provides them with a means to direct society.²²

10. See *infra* part II.A.

11. See *infra* part II.B-D.

12. See *infra* part II.E.

13. See *infra* parts III-IV.

14. See *infra* part V.

15. See *infra* part VI.

16. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 3 (1966).

17. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *349).

18. *Id.* at 155 (citing *Singer v. United States*, 380 U.S. 24, 31 (1965)).

19. *Balzac v. Puerto Rico*, 258 U.S. 298, 310 (1922), quoted in *Powers v. Ohio*, 499 U.S. 400, 406 (1991); see also *Duncan*, 391 U.S. at 156. The *Duncan* Court explained:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Id.

20. *J.E.B.*, 114 S. Ct. at 1430 (stating that "[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system").

21. *Id.* (quoting *Powers*, 499 U.S. at 407).

22. *Powers*, 499 U.S. at 407 (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN*

A. Jury Selection

Jury selection is a gradual process which begins with a large pool of potential jurors summoned to the courthouse.²³ Not every juror summoned in a case is selected to serve.²⁴ Potential jurors comprise the jury "venire."²⁵ In a process called "voir dire,"²⁶ both the judge and attorneys question the jury venire.²⁷ The judge may then exercise a "challenge for cause" and remove a juror for specific reasons, which may include partiality.²⁸ The "peremptory challenge,"²⁹ on the other hand, is available to attorneys.³⁰ By definition, an attorney can exercise a peremptory challenge for any reason and without explanation.³¹ After each side exercises its peremptory challenges, the

AMERICA 334-37 (Schocken 1st ed. 1961)).

23. In federal courts, potential jurors are randomly chosen from a list of voters. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 86 (1977). Most states also select potential jurors from standard lists. *Id.* at 85-86.

24. *Id.* at 86.

25. BLACK'S LAW DICTIONARY 1556 (6th ed. 1990). "Venire" is defined as "[t]he group of citizens from whom a jury is chosen in a given case. Sometimes used as the name of the writ for summoning a jury, more commonly called a 'venire facias.'" *Id.*

26. *Id.* at 1575. "Voir dire" is defined as "the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification[s] and suitability to serve as jurors." *Id.*

27. Attorneys are allowed to question jurors at the discretion of the trial judge. Potential jurors are questioned on a variety of matters including religious beliefs, jobs, and hobbies. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 158 (1989).

28. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965) *overruled in part by Batson v. Kentucky*, 476 U.S. 79 (1986). "[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality. . . ." *Swain*, 380 U.S. at 220 (citations omitted).

29. "Peremptory challenge" is defined as "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

30. FED. R. CRIM. P. 24 (setting forth the rule in criminal cases); 28 U.S.C. § 1870 (1988) (setting forth the number of challenges each party is entitled to in civil cases).

31. See *Lewis v. United States*, 146 U.S. 370, 378 (1892) (calling the peremptory challenge "an arbitrary and capricious right" (quoting *Lamb v. State*, 36 Wis. 424 (1874))).

Over 70 years later, the *Swain* Court had a similar impression of the peremptory challenge:

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.

380 U.S. at 220 (citations omitted).

remaining jurors form the "petit jury"³² which the court empanels to serve and decide the case.

B. A History of Exclusion: The African-American

African-Americans secured rights in the United States gradually.³³ In 1856, the Supreme Court held, in the infamous case of *Dred Scott v. Sandford*,³⁴ that the rights and privileges granted by the Constitution did not apply to African-Americans.³⁵ In this nineteenth century decision, decided prior to the United States Civil War and the passage of the Thirteenth and Fourteenth Amendments, the Court reasoned that African-Americans were property, not citizens.³⁶ Five years after the addition of the Fourteenth Amendment to the Constitution,³⁷ however, the *Slaughter-House Cases*³⁸ observed that the Fourteenth Amendment overturned *Dred Scott*.³⁹ Consequently, African-Americans and other minorities were declared citizens.⁴⁰

Nevertheless, African-Americans still had to fight for certain rights, including the right to serve as jurors and to have impartial juries. In 1879, the Supreme Court in *Strauder v. West Virginia*⁴¹ invalidated a state statute which permitted only white men to act as jurors.⁴² In this landmark case, the Court reasoned that forcing individuals to be tried by a group from which members of their race are explicitly banned offended the very idea of a jury of peers⁴³ and denied the defendant

32. BLACK'S LAW DICTIONARY 856 (6th ed. 1990). "Petit jury" is defined as "[t]he ordinary jury for the trial of a civil or criminal action." *Id.*

33. See generally HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (James A. Fox & Joseph Weis eds., 1993) (presenting a thorough historical analysis of African-Americans as jury members).

34. 60 U.S. (19 How.) 393 (1856).

35. *Id.* at 411.

36. *Id.* at 411, 450-51.

37. The first section of the Fourteenth Amendment provides:

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

U.S. CONST. amend. XIV, § 1.

38. 83 U.S. (16 Wall.) 36 (1872).

39. See *id.* at 80-81.

40. See *id.*

41. 100 U.S. 303 (1879).

42. *Id.* at 308.

43. *Id.* "The very idea of a jury is a body of men composed of the peers or equals of

equal legal protection.⁴⁴ The Court also considered the rights of excluded jurors and stated that exclusion based solely on color was an "assertion of their inferiority."⁴⁵

Strauder proved to be a limited victory, however, because states subsequently employed an array of devices to prevent African-Americans from actually serving on juries.⁴⁶ The Supreme Court's reaction to such tactics varied from case to case.⁴⁷

the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.*

44. *Id.* at 309. In its analysis, the Court kept the main purpose of the Fourteenth Amendment's Equal Protection Clause in mind. *Id.* at 310. The West Virginia statute was at odds with the aim of protecting against race or color discrimination:

It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Id. at 309-10.

45. *Id.* at 308.

46. *See, e.g.,* Avery v. Georgia, 345 U.S. 559, 561-62 (1953) (determining that a prima facie case of racial discrimination was established when jury members were selected from a box of county tax returns, with names of whites printed on white tickets and names of African-Americans printed on yellow tickets); Cassell v. Texas, 339 U.S. 282, 290 (1950) (holding that a prima facie case of racial discrimination was established when jury commissioners only chose those they knew for grand jury service, and they did not know any African-Americans).

47. *See* Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1923 n.27 (1992) [hereinafter *Beyond Batson*]. At first, the *Strauder* Court's holding was enforced only "in truly extreme situations." *Id.* (quoting VAN DYKE, *supra* note 23, at 60). Then, in *Norris v. Alabama*, 294 U.S. 587 (1935), the Court seemed willing to find racial discrimination in jury selection procedures. *Beyond Batson*, *supra*, at 1923. The *Norris* Court held that statements by jury commissioners that they did not consider race were insufficient to rebut a prima facie case of racial discrimination. *Id.* (citing *Norris*, 294 U.S. at 595, 598). After *Norris*, the Court established conflicting standards for setting forth a prima facie case, *id.* (citing Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half Step in the Right Direction*, 72 CORNELL L. REV. 1026, 1030 (1987)), and it was once again difficult to prove racial discrimination, *id.* (citing *Akins v. Texas*, 325 U.S. 398, 405-06 (1945) (no prima facie showing, despite the fact that jury commissioners purposefully selected only one black grand juror)). *Compare with* note 46, *supra* (citing two later cases in which the Court did find that a prima facie case was established).

In *Swain v. Alabama*,⁴⁸ the Supreme Court considered the constitutionality of using peremptory challenges to prevent African-Americans from serving as jurors.⁴⁹ Robert Swain was a nineteen-year-old African-American accused of raping a white woman.⁵⁰ At Swain's trial, the prosecutor utilized peremptory challenges to strike all six eligible African-Americans.⁵¹ In fact, no African-Americans had served on any petit jury in the county for fifteen years.⁵² Swain alleged that "invidious discrimination" in the selection of jurors violated his Fourteenth Amendment equal protection rights.⁵³

The *Swain* Court explained that in any given case a court will presume that the prosecutor acted on tactical considerations related to the case, the defendant, or the crime,⁵⁴ and that the prosecutor used the peremptory challenge to "obtain a fair and impartial jury to try the case."⁵⁵ This presumption is based on the notion that the peremptory challenge has long been considered a vital means to achieve an impartial and qualified jury.⁵⁶ Furthermore, prohibiting race-based peremptory challenges would change the very nature of the strike as one exercised for any reason.⁵⁷ Given this history, and the desire to

48. 380 U.S. 202 (1965), *overruled in part by* *Batson v. Kentucky*, 476 U.S. 79, 104 (1986). In *Batson*, the Court rejected the burden of proof that *Swain* established to prove a violation of the Equal Protection Clause. *Batson*, 476 U.S. at 92. See *infra* notes 54-63, 120-26, and accompanying text for a comparison of the burdens of proof set forth in *Swain* and *Batson*.

49. *Swain*, 380 U.S. at 221-24.

50. *Id.* at 203, 231.

51. *Id.* at 205.

52. *Id.*

53. *Id.* at 222-23. In support of his claim, Swain invoked *Strauder v. West Virginia*. *Id.* at 203. *Strauder* invalidated a state statute which permitted only white people to serve as jurors on the grounds that it contravened the purposes of the Fourteenth Amendment's Equal Protection Clause. *Id.* (citing *Strauder*, 100 U.S. at 308). See *supra* notes 41-45 and accompanying text for a discussion of *Strauder*.

54. *Swain*, 380 U.S. at 223.

55. *Id.* at 222.

56. *Id.* at 212-22. Justice White explained that "[w]hile challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Id.* at 220 (citing *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)). The peremptory challenges may be based on "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Id.* (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)). Thus, the peremptory challenge is "one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* (citing *State v. Thompson*, 206 P.2d 1037 (Ariz. 1949); *Lewis*, 146 U.S. at 378). The Court went on to explain that counsel has limited knowledge of venirepersons as individuals, so group affiliation is often used as a reason to strike them. *Id.* at 221.

57. *Id.* at 221-22. The Court explained:

preserve the nature of the peremptory challenge, the Court refused to hold that the use of race-based peremptory challenges in any particular case violated the constitutional mandate of the Fourteenth Amendment.⁵⁸

This conclusion, however, was not dispositive on the issue of whether it is constitutionally permissible to insulate from inquiry a particular prosecutor's consistent and systematic exercise of peremptory challenges to exclude African-Americans from jury service entirely.⁵⁹ Turning to that issue, the Court explained that the presumption that the prosecutor was motivated by permissible factors may be rebutted with proof that the particular prosecutor was responsible for excluding African-Americans "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be."⁶⁰ Such proof, the Court explained, might support an inference that the prosecutor was using the peremptory challenge to deny African-Americans the same right to participate in the administration of justice as white citizens.⁶¹

Although Swain demonstrated that no African-Americans had served on a petit jury for fifteen years, the Court found this evidence insufficient to raise an inference of systematic discrimination.⁶² In fact, rebutting the presumption that the prosecutor acted legitimately proved almost impossible.⁶³

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

Id.

58. *Id.* at 223.

59. *Id.*

60. *Id.*

61. *See id.* at 224 ("If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.").

62. *Id.* at 227.

63. *See Beyond Batson, supra* note 47, at 1923. Only two cases successfully made a prima facie case under the *Swain* standard. *Id.* at n.29 (citing *State v. Brown*, 371 So. 2d 751, 754 (La. 1979) (prima facie showing of discrimination established when the prosecutor's race-based peremptory challenges were systematic, continuous, and conscious); *State v. Washington*, 375 So. 2d 1162, 1164-65 (La. 1979) (prima facie

Therefore, for all practical purposes, the Fourteenth Amendment did not ensure African-Americans access to the petit jury as of 1965.⁶⁴ African-Americans had to wait until the Court's decision in *Batson v. Kentucky* to gain complete access to serve as jurors.⁶⁵

C. A History of Exclusion: Women

Like African-Americans, women were also historically denied access to jury service. Basically, courts held that allowing women to serve as jurors conflicted with society's view of the "natural" roles set for men and women.⁶⁶ Blackstone condoned the exclusion of women from jury service under "the doctrine of *propter defectum sexus*,"⁶⁷ which means "because not of the male sex," "defect of sex," or "not of the right sex."⁶⁸ Furthermore, although the Court held in *Strauder v. West Virginia*⁶⁹ that states could not expressly exclude African-Americans from the jury, it specifically allowed states to exclude women.⁷⁰

showing of discrimination established when the prosecutor's race-based peremptory challenges were systematic, continuous, and conscious)). In *Batson*, the Court noted: "[T]he defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges." 476 U.S. at 92 n.17 (quoting *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971)).

64. See, e.g., Michael J. Desmond, Note, *Limiting a Defendant's Peremptory Challenges: Georgia v. McCollum and the Problematic Extension of Equal Protection*, 42 CATH. U. L. REV. 389, 402 n.76 (1993) (pointing out that *Swain* did not prevent prosecutors from striking minorities). *Swain* only put "theoretical limits" on the peremptory challenge. *Id.* (quoting VAN DYKE, *supra* note 23, at 150). "*Swain* reduced the requirement of nondiscrimination at earlier stages of the jury selection process to a mere symbol." Alschuler, *supra* note 27, at 164.

65. See *infra* part II.D.

66. See JEANNE GREGORY, SEX, RACE AND THE LAW 13 (John Lea et al. eds., 1987) (discussing the interplay of the struggles for racial and sexual equality).

67. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1423 (1994) (quoting *United States v. DeGross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *362)).

68. Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 263 (1986) (discussing the jury system in light of the author's experiences as both a justice and as a juror). A Massachusetts court's statement in 1932 demonstrates how society viewed female jurors: "When they used the word 'person' . . . to describe those liable for jury service, no-one contemplated the possibility of women becoming so qualified." GREGORY, *supra* note 66, at 15 (quoting *Commonwealth v. Welosky*, 177 N.E. 656, 661 (Mass. 1931), *cert. denied*, 284 U.S. 684 (1932)).

69. 100 U.S. 303, 309 (1879).

70. *Id.* at 310. The Court explained: "It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.*

It was not until 1946, in *Ballard v. United States*,⁷¹ that the Supreme Court questioned the practice of limiting jury service to men.⁷² In this landmark case, the Court held that purposeful and systematic exclusion of women from the jury venire in a federal case was inconsistent with congressional intent to make the jury a cross section of the community.⁷³ In reaching this decision, the Court exercised its supervisory power over federal courts rather than looking at constitutional grounds.⁷⁴

Despite progress at the federal level, many states continued to exclude women either explicitly or through structural conditions imposed on the jury selection process.⁷⁵ In 1947, sixteen states simply denied women the right to serve as jurors.⁷⁶ Access in every state did not occur until 1966, when Alabama, the last of the states to hold this position, finally permitted women to serve as jurors.⁷⁷ Many states, however, then developed methods, such as registration requirements and exemptions from jury service, to discourage women from actually participating as jurors.⁷⁸

In the 1947 case of *Fay v. New York*,⁷⁹ the Supreme Court approved a New York statute that permitted women to serve as jurors, but which exempted them from jury service unless they volunteered to serve.⁸⁰ The defendants in *Fay* claimed that this exemption unfairly narrowed the choice of jurors and denied women due process and equal protection under the Fourteenth Amendment.⁸¹ The Court held that the Constitution supported neither the "contention" that women should be on juries, nor that verdicts "unleavened by feminine influence" should be set aside.⁸²

71. 329 U.S. 187 (1946).

72. *Id.* at 189-90.

73. *Id.* at 191-93. The Court explained that "Congress has provided that jurors in a federal court shall have the same qualifications as those of the highest court of law in the State." *Id.* at 190 (citing 28 U.S.C. § 411). Because California permits women to serve as jurors, the Court believed Congress contemplated that federal juries sitting in that state would include members of both sexes. *Id.* at 191.

74. *Id.* at 193.

75. *J.E.B.*, 114 S. Ct. at 1423.

76. *Id.* at 1423 n.3 (citing Wallace M. Rudolph, *Women on the Juries—Voluntary or Compulsory?*, 44 J. AM. JUDICATURE SOC'Y 206, 207 (1961)).

77. Abrahamson, *supra* note 68, at 269.

78. *J.E.B.*, 114 S. Ct. at 1423 (citing *Fay v. New York*, 332 U.S. 261, 289 (1947); *Hoyt v. Florida*, 368 U.S. 57 (1961)).

79. 332 U.S. 261 (1947).

80. *Id.* at 270.

81. *Id.* at 266.

82. *Id.* at 289-90.

Similarly, in *Hoyt v. Florida*,⁸³ only the names of women who voluntarily registered appeared on the state's jury lists.⁸⁴ As in *Fay*, the Court found this affirmative registration constitutional.⁸⁵ According to the Court, the requirement was reasonable in light of a woman's position as "the center of home and family life."⁸⁶ These Supreme Court decisions indicate that while women were permitted to serve as jurors, changing society's view of a woman's "natural role" was a slow process.

Another attack on a state registration statute was levied in 1975 in *Taylor v. Louisiana*.⁸⁷ Taylor took advantage of the Court's holding in *Duncan v. Louisiana*⁸⁸ that the Sixth Amendment guarantee of an impartial jury⁸⁹ applied to the states.⁹⁰ The Court noted that since 1940, all relevant decisions held that the Sixth Amendment right to a jury trial guarantees the "selection of a petit jury from a representative cross section of the community."⁹¹ Thus, the Court held that excluding women or requiring registration was unconstitutional if it resulted in almost entirely male jury venires.⁹² In dicta, the Court emphasized that it was not holding that the actual petit jury itself had to mirror the community.⁹³ Thus, *Taylor* did not threaten the use of race-

83. 368 U.S. 57 (1961).

84. *Id.* at 61.

85. *Id.* at 62.

86. *Id.*

87. 419 U.S. 522 (1975).

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

89. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

90. *Taylor*, 419 U.S. at 526 (citing *Duncan*, 391 U.S. at 145).

91. *Id.* at 528.

92. *Id.* at 537.

93. *Id.* at 538. This is still the case today, according to the following list of cases which, along with *Taylor*, will hereinafter be referred to as the "fair cross section cases." See, e.g., *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (explaining that the Sixth Amendment does not require that the petit jury be representative of the community) (quoting *Taylor*, 419 U.S. at 527); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (refusing "to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large"); *Duren v. Missouri*, 439 U.S. 357, 364 n.20 (1979) (reiterating that the Sixth Amendment prohibits systematic exclusion in the selection of the venire, but this does not mean that petit juries themselves must mirror the community) (citing *Taylor*, 419 U.S. at 538).

based or gender-based peremptory challenges to exclude potential jurors from the petit jury.⁹⁴ Furthermore, a juror excluded from the petit jury would have no claim because the Sixth Amendment only applies to criminal defendants.⁹⁵

Importantly, during the time period of *Taylor*, the Court changed its analysis of the Fourteenth Amendment's Equal Protection Clause as it applied to women.⁹⁶ As a result of *Craig v. Boren*⁹⁷ and other landmark cases,⁹⁸ the Court applied a heightened scrutiny standard when analyzing gender-based distinctions.⁹⁹ Thus, the Court required that gender-based distinctions be substantially related to an important government objective to withstand an equal protection challenge.¹⁰⁰

Despite these decisions, and the inroads made by women in other areas, the peremptory challenge remained. Women, like African-Americans, could not realistically attack the peremptory challenge with

94. *Holland*, 493 U.S. at 480. In discussing the Sixth Amendment's fair-cross-section requirement, the *Holland* Court stated that "it has never included the notion that, in the process of drawing the jury, the initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory-challenge system operates." *Id.*

95. See *supra* note 89 for the text of the Sixth Amendment.

96. See *J.E.B.*, 114 S. Ct. at 1424.

97. 429 U.S. 190, 197 (1976) (settling on heightened scrutiny to hold that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

98. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (holding that equal protection requires "exceedingly persuasive justification"); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) (applying strict scrutiny to a statutory distinction between the sexes); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (purporting to apply a traditional "rationality standard," the Court invalidated a gender-based classification).

99. See *supra* notes 97-98. In addition to heightened-level scrutiny, which is applied when gender-based classifications exist, two other levels of equal protection scrutiny exist. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985). The first level is rational basis scrutiny, under which "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. There is also strict scrutiny, which applies when a statute classifies by race, alienage, or national origin. *Id.* Such classifications will be permitted "only if they are suitably tailored to serve a compelling state interest." *Id.* See also Rachel A. Brown, Note, *Heller v. Doe: The Supreme Court Diminishes the Rights of Individuals With Mental Retardation*, 26 LOY. U. CHI. L.J. 99, 122-25 (1994) (discussing the three levels of constitutional scrutiny).

100. *Craig*, 429 U.S. at 197. The *Craig* Court interpreted *Reed* as establishing that statutes may be invalidated if gender is used as "an inaccurate proxy for other, more germane bases of classification." *Id.* (construing *Reed*, 404 U.S. at 75-76). Gender classifications cannot be based on "archaic and overbroad" generalizations. *Id.* (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

the Equal Protection Clause due to the almost insurmountable burden of proof imposed by *Swain*.¹⁰¹

D. *Batson v. Kentucky: Abolishing the Exclusion
of African-Americans*

In 1986, in *Batson v. Kentucky*, the Supreme Court once again considered the peremptory challenge.¹⁰² *Batson* was accused of second-degree burglary and receipt of stolen goods.¹⁰³ The prosecutor used peremptory challenges to strike all four African-Americans from the venire panel, leaving an all-white petit jury.¹⁰⁴ *Batson* argued that this violated his Sixth Amendment right to a jury drawn from a representative cross section of the community.¹⁰⁵

Batson chose this strategy to avoid asking the Court to reconsider its decision in *Swain v. Alabama*,¹⁰⁶ in which the Court had explained that it would presume that a prosecutor who excludes an African-American juror has acted on tactical considerations related to that particular case, defendant, or crime.¹⁰⁷ Granted, the *Taylor* Court had previously refused to apply the Sixth Amendment fair-cross-section requirement to petit juries, but it did so only in dicta.¹⁰⁸ Surprisingly, the Court overlooked *Batson*'s Sixth Amendment claim, and instead seized the opportunity to focus on equal protection and overrule *Swain*'s "crippling burden of proof."¹⁰⁹

In *Batson*, the Court returned to the reasoning of *Strauder v. West Virginia*,¹¹⁰ which held that the Equal Protection Clause did not permit states to expressly exclude African-Americans from serving as

101. See Susan L. McCain, Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1237-40 (1985) (discussing *Swain*'s application to cases involving both race-based and gender-based peremptory challenges); see also *supra* notes 48-64 and accompanying text for a discussion of *Swain*.

102. 476 U.S. 79 (1986).

103. *Id.* at 82.

104. *Id.* at 83.

105. *Id.*

106. 380 U.S. 202; see *supra* notes 48-63 and accompanying text.

107. *Batson*, 476 U.S. at 84 (citing *Swain*, 380 U.S. at 223). A defendant could only overcome this presumption by showing that the particular prosecutor has engaged in a case-by-case pattern of excluding black jurors. *Swain*, 380 U.S. at 223-24.

108. For a detailed discussion of the Court's holding in *Taylor v. Louisiana*, 419 U.S. 522 (1975), see *supra* notes 87-95 and accompanying text.

109. *Batson*, 476 U.S. at 84, 92. The dissent criticized the majority on this point: "In reaching the equal protection issue despite petitioner's clear refusal to present it, the Court departs dramatically from its normal procedure without any explanation." *Id.* at 115 (Burger, C.J., dissenting).

110. 100 U.S. 303 (1879).

jurors.¹¹¹ The Court acknowledged that subsequent decisions usually concerned discrimination during the selection of the jury venire, but reiterated that Fourteenth Amendment protection applies throughout the proceedings,¹¹² including selection of the petit jury.¹¹³ States would no longer be able to select the venire according to neutral procedures, and then discriminate in “other stages in the selection process.”¹¹⁴

Stressing that a defendant deserves a jury selected by non-discriminatory criteria,¹¹⁵ the Court held that peremptory challenges based on race, or the assumption that African-American jurors will be partial to defendants of the same race, violates a defendant’s equal protection rights.¹¹⁶ In addition, the Court emphasized that race-based exclusion from jury service (1) violates the potential juror’s constitutional rights;¹¹⁷ (2) diminishes public confidence in the justice system;¹¹⁸ and (3) stimulates racial prejudice.¹¹⁹

The Court put force behind its words by changing the “crippling burden of proof” set by *Swain*.¹²⁰ Rather than showing a pattern by the prosecutor in case after case, defendants can now point to facts in their particular case in order to prove discrimination.¹²¹ To make this showing, the defendant must prove three elements.

First, the defendant must belong to a cognizable racial group and members of that group must have been removed by peremptory

111. *Batson*, 476 U.S. at 85-89 (citing with approval *Strauder*, 100 U.S. 303 (1879)).

112. *Id.* at 88.

113. *Id.* at 88-89.

114. *Id.* at 88 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)) (citations omitted).

115. *Id.* at 86-87.

116. *Id.* at 89. The dissent noted that the majority was not applying conventional equal protection analysis. *Id.* at 123 (Burger, C.J., dissenting). This would entail asking if the racial classification was “suitably tailored to serve a compelling state interest.” *Id.* at 124 (Burger, C.J., dissenting) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). Chief Justice Burger indicated that the majority avoided applying conventional equal protection analysis because *Batson*’s claim would fail due to the fact that the state’s interest in peremptory challenges was “substantial, if not compelling.” *See id.* at 125 (Burger, C.J., dissenting).

117. *Id.* at 87. The Court noted that a person’s race is simply “unrelated to his fitness as a juror.” *Id.* (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

118. *Id.*

119. *Id.* at 88 (citing *Strauder*, 100 U.S. at 308). The *Strauder* Court described discrimination in jury selection as “a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.” *Strauder*, 100 U.S. at 308.

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

121. *Id.* at 95. *Cf. supra* notes 60-62 and accompanying text.

challenges.¹²² Second, the defendant may rely on the fact that “peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”¹²³ Third, the defendant must show that the exclusion and other relevant circumstances raise an inference of purposeful racial discrimination.¹²⁴ Once a prima facie showing is made, the state may present a neutral explanation to rebut the defendant’s case.¹²⁵ Then, the trial court will determine if purposeful discrimination has occurred.¹²⁶

In subsequent decisions, the Court interpreted *Batson* broadly. In 1991, in *Powers v. Ohio*,¹²⁷ the Court decided that the defendant need not belong to the same race as the excluded juror.¹²⁸ In *Hernandez v. New York*,¹²⁹ the Court applied *Batson* to determine if peremptory challenges were used to exclude Latinos because of their ethnicity.¹³⁰ Also in 1991, the Court applied *Batson* to civil cases in *Edmonson v. Leesville Concrete Co.*¹³¹

122. *Batson*, 476 U.S. at 96 (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (requiring the defendant to show that his group may be singled out for differential treatment)).

123. *Id.* (quoting *Avery*, 345 U.S. at 562) (citations omitted).

124. *Id.* Relevant circumstances may include a pattern of strikes against African-American venirepersons or statements and questions during voir dire. *Id.* at 97.

125. *Id.* It is not sufficient for the prosecutor to say he thought African-Americans would be partial because they happen to share the race of the defendant, or that he did not intend to discriminate. *Id.* at 97-98. The Equal Protection Clause forbids acting on such assumptions. *Id.*

126. *Id.* at 98.

127. 499 U.S. 400 (1991).

128. *Id.* at 416. The Court considered whether a white defendant may object on Fourteenth Amendment grounds when the prosecution exercises peremptory challenges to remove African-American venirepersons. *Id.* at 404. The Court acknowledged that *Batson* addressed the harm that defendants suffer when members of their own race are excluded from the jury. *Id.* at 406. However, *Batson* also considered the rights of the excluded juror and the community. *Id.* (citing *Batson*, 476 U.S. at 87). The Court held “that race is irrelevant to a defendant’s standing to object to the discriminatory use of peremptory challenges.” *Id.* at 416.

129. 500 U.S. 352 (1991).

130. *Id.* at 355. In *Hernandez*, the prosecutor claimed that he peremptorily struck two bilingual Latino jurors because he was “uncertain that they would be able to listen and follow the interpreter.” *Id.* at 356-58. The Supreme Court accepted this explanation as race-neutral, *id.* at 361, and held that the “trial court did not commit clear error in choosing to believe the reasons given by the prosecutor,” *id.* at 372.

131. 500 U.S. 614, 631 (1991). The African-American plaintiff in *Edmonson*, a negligence case, requested race-neutral explanations after Leesville Concrete Company exercised two peremptory challenges to remove African-American venirepersons. *Id.* at 616-17. In determining that *Batson* applied, the Court explained that “[a]lthough the conduct of private parties lies beyond the Constitution’s scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with authority of the government and, as a result, be subject to

Furthermore, in the 1992 case of *Georgia v. McCollum*,¹³² the Court subjected criminal defendants to the commands of *Batson*.¹³³ Here, the Court characterized the use of peremptory challenges as “state action.”¹³⁴ Thus, the Equal Protection Clause prohibits both prosecutors and defendants from discriminating on the basis of race in exercising peremptory challenges.¹³⁵ Indeed, the Court has consistently extended *Batson*’s restraint on race-based peremptory challenges to different types of litigants and cases.¹³⁶ In so doing, the Court continuously pulled away from *Swain*’s deference to the “old credentials” of the peremptory challenge as “one exercised without a reason stated, without inquiry and without being subject to the court’s control.”¹³⁷

E. Application of *Batson* to Gender by Lower Courts

Following *Batson*, a conflict of authority arose in the federal appellate courts over the constitutionality of gender-based peremptory strikes.¹³⁸ For example, in *United States v. Hamilton*,¹³⁹ the Fourth Circuit held that *Batson* did not apply to instances of peremptory strikes based on gender.¹⁴⁰ The Ninth Circuit, however, disagreed in *United States v. DeGross*.¹⁴¹ Relying on heightened scrutiny for gender classifications, the Ninth Circuit concluded that peremptory challenges are not “substantially related to the achievement of impor-

Constitutional constraints.” *Id.* at 620; see also *infra* note 315 for a detailed discussion of the Court’s reasoning.

132. 112 S. Ct. 2348 (1992).

133. *Id.* at 2359.

134. *Id.* at 2355 (citing *Edmonson*, 500 U.S. at 619-28). See *infra* note 315 and accompanying text for a detailed discussion of the Court’s reasoning on this point.

135. *Id.* at 2359.

136. See *supra* notes 127-35 and accompanying text.

137. *Swain*, 380 U.S. at 220.

138. Compare *United States v. Broussard*, 987 F.2d 215, 218-20 (5th Cir. 1993) (declining to extend *Batson* to gender); *United States v. Hamilton*, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (declining to extend *Batson* to gender), *cert. dismissed*, 489 U.S. 1094 (1989), and *cert. denied*, 493 U.S. 1069 (1990) with *United States v. De Gross*, 960 F.2d 1433, 1437-43 (9th Cir. 1992) (en banc) (extending *Batson* to prohibit gender-based peremptory challenges) and with *United States v. Nichols*, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (declining to address the issue), *cert. denied*, 112 S. Ct. 989 (1992).

139. 850 F.2d 1038 (4th Cir. 1988).

140. *Id.* at 1042. “While we do not applaud the striking of jurors for any reason relating to group classifications, we find no authority to support an extension of *Batson* to instances other than racial discrimination.” *Id.*

141. 960 F.2d at 1437-43.

tant government objectives."¹⁴² A similar split developed among state courts.¹⁴³ Finally, in 1994, the United States Supreme Court decided to directly address the constitutionality of gender-based peremptory challenges.¹⁴⁴

III. DISCUSSION

Due to the aforementioned conflict of authority,¹⁴⁵ the Supreme Court granted certiorari in *J.E.B. v. Alabama ex rel. T.B.*¹⁴⁶ to decide whether peremptory challenges made on the basis of gender, like race, violate the Equal Protection Clause.¹⁴⁷ In a six-to-three decision, the Court ruled the practice unconstitutional.¹⁴⁸ This is particularly true, the Court determined, because gender-based peremptory challenges rely on questionable stereotypes that have historically caused harm to women as a class.¹⁴⁹

142. *Id.* at 1439 (citations omitted).

143. *See, e.g.,* Di Donato v. Santini, 283 Cal. Rptr. 751 (Cal. Ct. App.), *review denied*, No. S011963, 1991 Cal. LEXIS 4582 (Cal. Oct. 2, 1991); Laidler v. State, 627 So. 2d 1263 (Fla. Dist. Ct. App. 1993) (extending *Batson* to gender); State v. Levinson, 795 P.2d 845, 849 (Haw. 1990) (extending *Batson* to gender); People v. Mitchell, 593 N.E.2d 882 (Ill. App. Ct. 1992) (extending *Batson* to gender), *aff'd in part and vacated in relevant part*, 614 N.E.2d 1213 (Ill. 1993); Tyler v. State, 623 A.2d 648 (Md. 1993) (extending *Batson* to gender, relying on state constitution); Commonwealth v. Hutchinson, 481 N.E.2d 188, 190 (Mass. 1985) (extending *Batson* to gender); State v. Gonzales, 808 P.2d 40 (N.M. Ct. App.) (extending *Batson* to gender), *cert. denied*, 806 P.2d 65 (N.M. 1991); People v. Irizarry, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990) (extending *Batson* to gender); State v. Burch, 830 P.2d 357 (Wash. Ct. App. 1992) (extending *Batson* to gender, relying on state and federal constitutions).

But see Murphy v. State, 596 So. 2d 42 (Ala. Crim. App. 1991) (refusing to extend *Batson* to gender), *cert. denied*, 596 So. 2d 45, and *cert. denied*, 113 S. Ct. 86 (1992); State v. Adams, 533 So. 2d 1060, 1063 (La. Ct. App. 1988) (refusing to extend *Batson* to gender), *cert. denied*, 540 So. 2d 338 (La. 1989); State v. Clay, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989) (refusing to extend *Batson* to gender); State v. Culver, 444 N.W.2d 662 (Neb. 1989) (refusing to extend *Batson* to gender); State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (refusing to extend *Batson* to gender).

144. *See infra* part III.

145. *See supra* notes 138-44.

146. 113 S. Ct. 2330 (1993).

147. 114 S. Ct. 1419, 1422 (1994).

148. *Id.*

149. *Id.* "Today we affirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.* The Court's holding was limited to state actors. However, Justice O'Connor predicted that *J.E.B.* would be extended to include defendants as state actors. *Id.* at 1433 (O'Connor, J., concurring); *see also infra* note 189.

A. *J.E.B. v. Alabama ex rel. T.B.: The Facts and Opinions Below*

On behalf of the mother of a minor child, the State of Alabama sought paternity and child support from J.E.B.¹⁵⁰ The jury venire consisted of twelve males and twenty-four females.¹⁵¹ The court excused three of the jurors for cause, leaving ten males and twenty-three females.¹⁵² The State used nine of its ten peremptory challenges to strike males.¹⁵³ Likewise, J.E.B. used all but one of his peremptory challenges to strike females.¹⁵⁴ The petit jury members were thus all female.¹⁵⁵

Before the court empaneled the jury, J.E.B. objected to the use of the State's peremptory challenges, claiming that the State excluded males solely on the basis of gender.¹⁵⁶ Applying *Batson's* prohibition against race-based peremptory challenges to gender, J.E.B. argued that the State violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁷

The District Court rejected the defendant's argument and ruled that *Batson* did not apply to gender.¹⁵⁸ The all-female jury then concluded that J.E.B. fathered the child and the court subsequently ordered him to pay child support.¹⁵⁹ The Alabama Court of Civil Appeals affirmed.¹⁶⁰ The Supreme Court of Alabama denied certiorari.¹⁶¹

B. *The Opinion of the Supreme Court*

The Supreme Court of the United States reversed the appellate court's ruling, holding that the Equal Protection Clause of the Fourteenth Amendment forbids discrimination on the basis of gender in the exercise of peremptory challenges.¹⁶² Writing for the majority, Justice Blackmun reviewed over one hundred years of the history of judicial

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

151. *Id.*

152. *Id.* at 1421-22.

153. *Id.* at 1422.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *J.E.B. v. Alabama ex rel. T.B.*, 606 So. 2d 156, 157 (Ala. Civ. App. 1992), cert. denied, No. 1911717, 1992 Ala. LEXIS 1296 (Ala. Oct. 23, 1992).

161. *Ex parte J.E.B.*, No. 1911717, 1992 Ala. LEXIS 1296 (Ala. Oct. 23, 1992).

162. *J.E.B.*, 114 S. Ct. at 1430.

treatment of women as jurors.¹⁶³ He explained that the express prohibition against female jurors in the United States originated at English common law¹⁶⁴ and that even when women were allowed to serve as jurors,¹⁶⁵ states designed barriers such as registration requirements and automatic exemptions to deter women from actually serving.¹⁶⁶

The State claimed that gender discrimination had never reached the level of race discrimination, and was therefore distinguishable.¹⁶⁷ Although Justice Blackmun refused to determine which group had suffered more in history,¹⁶⁸ he expounded on the similarities between race and sex discrimination.¹⁶⁹ He also explained that gender-based

163. *Id.* at 1422-25. "Gender-based peremptory strikes were hardly practicable for most of our country's existence, since, until the 19th century, women were completely excluded from jury service." *Id.* at 1422.

164. *Id.* at 1423. Justice Blackmun pointed out one exception:

If a woman was subject to capital punishment, or if a widow sought postponement of the disposition of her husband's estate until birth of a child, a *writ de ventre inspiciendo* permitted the use of a jury of matrons to examine the woman to determine whether she was pregnant. But even when a jury of matrons was used, the examination took place in the presence of 12 men, who also composed part of the jury in such cases.

Id. at 1423 n.4 (citing Grace E. Woodall Taylor, Note, *Jury Service for Women*, 12 U. FLA. L. REV. 224, 224-25 (1959)).

165. *Id.* *Ballard* marked the first time the Court questioned the fairness of excluding women from juries. *Id.* at 1424 (citing *Ballard v. United States*, 329 U.S. 187, 189-90 (1946)). By relying on its supervisory power, the *Ballard* Court held that federal courts could not exclude women from the venire. *Id.*; see also *supra* notes 71-74 and accompanying text.

166. *J.E.B.*, 114 S. Ct. at 1423. In *Hoyt*, for example, "the Court found it reasonable, 'despite the enlightened emancipation of women,' to exempt women from mandatory jury service by statute, allowing women to serve on juries only if they volunteered to serve." *Id.* at 1424 (quoting *Hoyt v. Florida*, 368 U.S. 57, 61 (1961)). The Court's reasoning changed in *Taylor*, and a similar statute exempting women was struck down: "'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 a jury trial.'" *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

167. *Id.* at 1425.

168. *Id.* "We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination.' . . ." *Id.* at 1425 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

169. *Id.* "While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'" *Id.* (quoting *Beyond Batson*, *supra* note 47, at 1921). The Court explained:

[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the

classifications call for heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause.¹⁷⁰

Justice Blackmun narrowed the issue of the constitutionality of gender-based peremptory strikes to only one question: "[W]hether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."¹⁷¹

The State explained that it used peremptory strikes against males because it concluded that males may feel more sympathetic and receptive to a defendant accused of fathering a child in a paternity action.¹⁷² Women, on the other hand, may feel more sympathetic and receptive to the arguments of the child's mother.¹⁷³ Rejecting the State's justification for striking males, the Court stated: "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"¹⁷⁴ The State did not adequately support the conclusion that gender predicts attitudes.¹⁷⁵ Even if it did, Justice Blackmun pointed out, the State's actions would still violate the Equal Protection Clause.¹⁷⁶

legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later.

Id. (alteration in original) (quoting *Frontiero*, 411 U.S. at 685 (footnotes omitted)).

170. *Id.*

171. *Id.* The Court relied on *Edmonson* when deciding that the only legitimate interest in the peremptory challenge is obtaining a fair and impartial jury. *Id.* at 1426 n.8 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)).

172. *Id.* at 1426.

173. *Id.*

174. *Id.* (citations omitted).

175. *Id.* at 1426-27. The Court pointed out that the State put forth only one study in support of its claim. *Id.* at 1426 n.9. Then, the Court cited other sources which conclude there are no significant differences between male and female jury verdicts. *Id.* "Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box." *Id.* at 1426-27.

176. *Id.* at 1427. The Court explained:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.

Id. at 1427 n.11 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975)) (prohibiting a Social Security Act classification that authorized benefits to widows but

Justice Blackmun wrote that the equal protection right to non-discriminatory jury selection procedures belongs not only to litigants, but also to potential jurors.¹⁷⁷ While prejudice in the selection of the jury may affect other aspects of the litigant's proceeding, excluded jurors have "practically a brand upon them, affixed by law, an assertion of their inferiority."¹⁷⁸ Furthermore, Justice Blackmun added, discriminatory exclusion harms the community, diminishes public confidence in the neutrality of the justice system, and stimulates prejudicial views.¹⁷⁹

Justice Blackmun was careful to note that the Court's decision did not eliminate the peremptory challenge.¹⁸⁰ Litigants may still exercise peremptory challenges against unacceptable jurors; "gender simply may not serve as a proxy for bias."¹⁸¹ Following the Court's reasoning in *Batson*, Justice Blackmun indicated that a litigant objecting to a gender-based peremptory strike must make a prima facie showing of intentional discrimination before the responding party must offer a gender-neutral explanation.¹⁸²

Justice Blackmun concluded his opinion by reiterating that attorneys may not exercise peremptory strikes based on gender or on the assumption that gender causes bias.¹⁸³ "As with race, the 'core

not to widowers, even though the justification for the differential treatment was "not entirely without empirical support"); *Craig v. Boren*, 429 U.S. 190, 201 (1976) (holding unconstitutional an Oklahoma law that established different drinking ages for men and women, despite the fact that the evidence supporting the differential treatment was "not trivial in a statistical sense"). The Court explained that even if some truth is present in stereotypes, the state must "look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B.*, 114 S. Ct. at 1427 n.11.

177. *Id.* at 1428 n.13. "It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation." *Id.* at 1428.

178. *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

179. *Id.* at 1427. The Court explained that cynicism is especially likely when cases involve gender-related issues. *Id.*

180. *Id.* at 1429. The Court also pointed out that peremptory strikes may be used against groups that are subject to rational basis equal protection analysis. *Id.* See also *supra* note 99 for a description of rational basis equal protection analysis. Furthermore, prosecutors can exercise peremptory challenges based on characteristics that are associated more with one gender than the other, provided there is no showing of pretext. *J.E.B.*, 114 S. Ct. at 1429. For example, challenging all those who have had military experience would affect men more than women, while challenging all nurses would affect women more than men. *Id.* at 1429 n.16.

181. *Id.* at 1429.

182. *Id.* "When an explanation is required, it need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual." *Id.* at 1430.

183. *Id.*

guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender]."¹⁸⁴

C. *The Concurring Opinions*

Justice O'Connor pointed out both the beneficial and the harmful aspects of the Court's decision in her concurring opinion.¹⁸⁵ While she agreed that the State had not supported its gender-based peremptory challenges with the "exceedingly persuasive" justification necessary under heightened equal protection scrutiny,¹⁸⁶ she disagreed that gender does not affect one's attitude.¹⁸⁷ A litigant's ability to act "on sometimes accurate gender-based assumptions about juror attitudes" is now diminished.¹⁸⁸ Furthermore, this decision burdens the trial process.¹⁸⁹ In light of these disadvantages, Justice O'Connor urged the Court to limit the decision to the government's exercise of peremptory challenges, and not to apply it to civil litigants or criminal defendants.¹⁹⁰

Also concurring, Justice Kennedy stated that precedent supported the Court's holding.¹⁹¹ Justice Kennedy reiterated that the Equal Protection Clause protects individuals, not groups.¹⁹² He further emphasized that race-motivated and gender-motivated peremptory challenges

184. *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986)).

185. *Id.* at 1430-33 (O'Connor, J., concurring).

186. *Id.* at 1430 (O'Connor, J., concurring) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

187. *Id.* at 1432 (O'Connor, J., concurring). Justice O'Connor stated:

We know that like race, gender matters. . . . Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case.

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

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

189. *Id.* (O'Connor, J., concurring). Justice O'Connor pointed out that "*Batson* mini-hearings" and "*Batson* appeals" are now common, and that *J.E.B.* may result in an even greater impact on the court system. *Id.* at 1431 (O'Connor, J., concurring).

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

191. *Id.* at 1433 (Kennedy, J., concurring). Justice Kennedy explained that gender classifications have been subjected to heightened scrutiny for over 20 years and that there is a strong presumption that gender classifications are invalid. *Id.* (Kennedy, J., concurring). He also pointed out that no member of the Court disputed that fact. *Id.* (Kennedy, J., concurring).

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

reduce citizens to "components of a racial [or] sexual . . . class."¹⁹³

D. *The Dissenting Opinions*

Chief Justice Rehnquist began his dissent by discussing the differences between race and gender discrimination.¹⁹⁴ He first noted that women do not constitute a numerical minority, as racial groups do, and then explained that women's fight for equality has not been as difficult.¹⁹⁵ He also explained that the Fourteenth Amendment primarily concerns race.¹⁹⁶

Chief Justice Rehnquist reasoned that because gender produces a difference in outlook, the exercise of peremptory challenges in recognition of sex differences is not a "derogatory and invidious act."¹⁹⁷ With these considerations in mind, Chief Justice Rehnquist believed that "the balance should tilt in favor of peremptory challenges when sex, not race, is the issue."¹⁹⁸

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a separate dissent which accused the majority of being more concerned with the appearance of the Court than with the actual issue.¹⁹⁹ The historical review of women as jurors, he believed, was wholly irrelevant because the striking of men and not women was mainly at issue.²⁰⁰ Besides, Justice Scalia added, if there is no scientific support for a difference in attitudes, the defendant is not

193. *Id.* (Kennedy, J., concurring) (alteration in original) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (O'Connor, J., dissenting)).

194. *Id.* at 1434 (Rehnquist, C.J., dissenting).

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

196. *Id.* (Rehnquist, C.J., dissenting). Justice Rehnquist believes that *Batson* and its progeny, which rely on the Fourteenth Amendment, were properly confined to the area of race-based peremptory challenges. *Id.* (Rehnquist, C.J., dissenting).

197. *Id.* (Rehnquist, C.J., dissenting). "The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room." *Id.* (Rehnquist, C.J., dissenting).

198. *Id.* (Rehnquist, C.J., dissenting). Justice Rehnquist believed the State had shown that gender-based peremptory challenges "substantially further" the State's interest in a fair and impartial trial. *Id.* (Rehnquist, C.J., dissenting) (quoting *Swain v. Alabama*, 380 U.S. 202, 212-20 (1965)).

199. *Id.* at 1436 (Scalia, J., dissenting). "Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors." *Id.* (Scalia, J., dissenting).

200. *Id.* (Scalia, J., dissenting). In the majority opinion, Justice Blackmun noted that equal protection protects both men and women. *Id.* at 1427-28.

injured if the jury is all male or all female.²⁰¹ Next, he argued that the peremptory challenge does not deny any group equal protection because everyone is subject to its exercise.²⁰² The system is thus “even-handed.”²⁰³

Justice Scalia distinguished this issue from the total exclusion of women from jury service.²⁰⁴ He noted that states previously denied women access to jury service because of society’s belief that females were incompetent.²⁰⁵ In contrast, attorneys exercise peremptory challenges to exclude potential jurors who may not seem favorable to a particular case.²⁰⁶ Thus, he articulated: “There is discrimination and dishonor in the former, and not in the latter.”²⁰⁷

Justice Scalia predicted that the Court’s holding will have negative consequences.²⁰⁸ He believed that the reasoning employed by the Court will spread to encompass other group classifications.²⁰⁹ Even if this is not the case, he added, the Court’s decision damages the character of the peremptory challenge because when a peremptory challenge can no longer be exercised with full freedom it fails its purpose.²¹⁰ Justice Scalia further asserted that criminal defendants will suffer most because they will now have to accept jurors whom they mistrust.²¹¹ Finally, Justice Scalia warned that the Court’s decision will impose substantial burdens on the justice system.²¹²

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

202. *Id.* (Scalia, J., dissenting). While the State struck men, J.E.B. struck women. *Id.* (Scalia, J., dissenting).

203. *Id.* (Scalia, J., dissenting). He accused the majority of focusing on the individual peremptory challenge, rather than the system as a whole. *Id.* (Scalia, J., dissenting).

204. *Id.* (Scalia, J., dissenting).

205. *Id.* (Scalia, J., dissenting).

206. *Id.* (Scalia, J., dissenting).

207. *Id.* (Scalia, J., dissenting).

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

209. *Id.* (Scalia, J., dissenting). All peremptory challenges are based on group characteristics that can be considered “stereotypes.” *Id.* (Scalia, J., dissenting).

210. *Id.* (Scalia, J., dissenting). Freedom is lost when prosecutors must give reasons for their strikes. *Id.* (Scalia, J., dissenting).

211. *Id.* (Scalia, J., dissenting).

212. *Id.* at 1439 (Scalia, J., dissenting). Collateral litigation will increase because “every case contains a potential sex-based claim,” and voir dire will be lengthened. *Id.* (Scalia, J., dissenting).

IV. ANALYSIS

The Court's decision in *J.E.B.* arose from a focus on the juror.²¹³ *Batson* and its progeny gradually set the stage for *J.E.B.* by shifting the focus away from the defendant to the excluded juror.²¹⁴ As jurors, both African-Americans and women share a remarkably similar history of exclusion.²¹⁵ Therefore, the *J.E.B.* Court could not justify its *Batson* prohibition against race-based peremptory strikes without similarly prohibiting gender-based peremptory strikes.²¹⁶ Accordingly, using heightened equal protection scrutiny long applied to gender classifications,²¹⁷ the Court invalidated gender-based peremptory strikes.²¹⁸

Nevertheless, *Batson* and *J.E.B.*, decided under Fourteenth Amendment analysis, conflict with the fair cross section cases²¹⁹ decided under Sixth Amendment analysis.²²⁰ While *Batson* and *J.E.B.* reject race or gender stereotyping, the fair cross section cases are riddled with assumptions and stereotypes that *Batson* and *J.E.B.* reject.²²¹ In short, the Court attempts to have the best of both worlds by relying on stereotypes in some circumstances, and prohibiting their use in others.

A. Application of Equal Protection

The *J.E.B.* decision is consistent with over twenty years of equal protection precedent in which the Court applied heightened scrutiny to gender-based classifications.²²² When evaluating equal protection challenges, a court focuses on the individual's rights.²²³ Accordingly, when evaluating gender-based peremptory strikes under the Equal Protection Clause, a court focuses on the individual juror and applies

213. Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1160-61 (1992) (arguing for the juror's rights).

214. See *J.E.B.*, 114 S. Ct. at 1427.

215. *Id.* at 1425.

216. *Id.* at 1427.

217. See *supra* notes 96-100 and accompanying text.

218. *J.E.B.*, 114 S. Ct. at 1430.

219. See *supra* note 93 and accompanying text (discussing the fair cross section cases).

220. See, e.g., *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 173 (1990) [hereinafter *Leading Cases*] (discussing the tension between *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Holland v. Illinois*, 493 U.S. 474 (1990)); see also *infra* notes 253-75 and accompanying text (explaining that *Batson* and *J.E.B.* apparently conflict with *Holland*).

221. See, e.g., *infra* notes 253-75 and accompanying text.

222. *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring).

223. See *id.* at 1433-34 (Kennedy, J., concurring).

heightened scrutiny.²²⁴ In concluding that gender discrimination in jury selection violates the Equal Protection Clause of the Constitution,²²⁵ the *J.E.B.* Court invoked the underlying theory of *Batson v. Kentucky*:²²⁶ "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."²²⁷

The reasoning in *Batson*, based on the Fourteenth Amendment's guarantee of equal protection, led to the *J.E.B.* Court's invalidation of gender-based peremptory challenges.²²⁸ *Batson* involved an African-American defendant's objection to the removal of African-American jurors.²²⁹ The Court has historically recognized an African-American defendant's unique need for special protection.²³⁰ However, the *Batson* Court also considered the rights of excluded jurors.²³¹ The Court determined that removing a juror on account of race or racial stereotypes violated that individual juror's equal protection rights.²³² Once a background feature, concern for the individual juror's equal protection rights has now moved to the forefront in *Batson* and subsequent cases.²³³

224. *See id.* (Kennedy, J., concurring).

225. *See id.* at 1430.

226. *See J.E.B.*, 114 S. Ct. 1419.

227. *Batson*, 476 U.S. at 87 (citing *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 223-24 (1946)).

228. *See J.E.B.*, 114 S. Ct. at 1430.

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

230. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 306-12 (1879). In describing the purpose of the Fourteenth Amendment, the Court commented:

[I]t require[s] little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. . . . The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves.

Id. at 306; *see also, e.g.*, *Batson*, 476 U.S. at 83-89 (describing the period after *Strauder* as one in which the Court made unceasing efforts to eradicate racial discrimination in venire selection procedures, and citing cases in support of this proposition).

231. *See supra* note 117 and accompanying text.

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

233. *See J.E.B.*, 114 S. Ct. at 1427-28 (citing *Powers v. Ohio*, 499 U.S. 400 (1991)); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Edmonson v. Concrete Co.*, 500 U.S. 614 (1991); *Babcock*, *supra* note 213, at 1142; Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 76-79 (1993) (offering persuasive criticism of the Court's focus on the juror);

It was this added focus on the individual juror, rather than the sole focus on the defendant, that led the Supreme Court to declare gender-based peremptory challenges unconstitutional.²³⁴ The Court rejected the respondent's argument that gender-based peremptory strikes are permissible even though race-based peremptory strikes are not.²³⁵ In response to this argument, the Court explained that the analogy between African-Americans and women with respect to jury service is strong.²³⁶ Both African-Americans and women have a history of blatant exclusion.²³⁷ Such exclusion is particularly significant because jury service, like voting, is one of the few opportunities for a citizen to participate in the democratic process.²³⁸ Jury service is a fundamental aspect of full citizenship.²³⁹ Community inclusion and equality lie at the heart of our democratic society's promise of equal protection.²⁴⁰

Justice Scalia's argument that gender-based peremptory strikes are not discriminatory because all groups are equally subjected to the peremptory challenge²⁴¹ is reminiscent of the separate-but-equal doctrine of *Plessy v. Ferguson*.²⁴² In fact, his argument is insupportable because the Court has rejected the argument that racial

Beyond Batson, *supra* note 47, at 1921-22 n.16.

234. Babcock, *supra* note 213, at 1160.

235. *J.E.B.*, 114 S. Ct. at 1425.

236. *Id.*

237. See *supra* part II.B-C.

238. See, e.g., *J.E.B.*, 114 S. Ct. at 1430 (explaining the connection between jury duty and the democratic process) (quoting *Powers*, 499 U.S. at 407).

239. See *Beyond Batson*, *supra* note 47, at 1928-30 (discussing jury participation as an attribute of citizenship); Babcock, *supra* note 213, at 1165 (explaining how jury service, along with voting, was a primary goal of the woman suffragists); see also *supra* notes 16-22 and accompanying text (describing the importance of jury service).

240. *J.E.B.*, 114 S. Ct. at 1430. The Court stated:

When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

In view of these concerns, the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man.

Id. (citations omitted).

241. *Id.* at 1437 (Scalia, J., dissenting). "Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection." *Id.* (citing *Powers*, 499 U.S. at 423-24 (Scalia, J., dissenting); *Batson*, 476 U.S. at 137-38 (Rehnquist, J., dissenting)).

242. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954); see *Powers*, 499 U.S. at 410 (citing *Plessy*, 163 U.S. 537). In *Plessy*, the Court upheld a state statute requiring the segregation of African-Americans and whites on railroad cars on the theory the facilities were "separate but equal." 163 U.S. at 550-52.

classifications are permissible based on the assumption that all persons suffer equally.²⁴³ Furthermore, as Justice Kennedy pointed out, “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.”²⁴⁴

Contrary to Justice Scalia’s theory, it is irrelevant that attorneys will strike both men and women from juries solely because of their gender. The reasons behind these peremptory strikes may reinforce discriminatory stereotypes²⁴⁵ and cause ultimate harm which may or may not be equal.²⁴⁶ Furthermore, the fact that the system as a whole is even-handed does not console the individual juror summoned to the courthouse, subjected to open and public sexism, and then dismissed as unworthy solely because of gender.²⁴⁷ Thus, in finding gender-based peremptory strikes violative of equal protection, the Court’s decision is consistent with precedent.

B. Consistency and Conflict With the Fair Cross Section Cases

The decision in *J.E.B.* supports the goal of the fair cross section cases, which strive to ensure a fair and impartial jury.²⁴⁸ As recently as 1990, in *Holland v. Illinois*,²⁴⁹ the Court held that the Sixth Amend-

243. See *Powers*, 499 U.S. at 410. “This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.” *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

244. *J.E.B.*, 114 S. Ct. at 1434 (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)) (alteration in original). See *supra* notes 191-93 and accompanying text.

245. *Id.* at 1427. “When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women.” *Id.*

246. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). As a result of stereotypical notions that women are naturally delicate and in need of protection, women were denied the right to hold office, bring suit in their own name, hold or convey property, and vote. *Id.* at 685. Today, effects of stereotypes continue to pervade educational institutions, the job market, and the political arena. *Id.* at 686-87; cf. Richard A. Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to Topics*, 24 UCLA L. REV. 581, 600 (1977) (suggesting that *Brown v. Board of Education* may have been motivated by the tacit recognition that African-American schools were almost always inferior).

247. See *Powers*, 499 U.S. at 413-14.

248. See *supra* notes 93-95 and accompanying text for a discussion of the fair cross section cases. See also Deborah L. Forman, *Gender and Jury Selection*, 2 UCLA WOMEN’S L.J. 35, 55-56 (1992) (discussing how *Batson* may indirectly further jury impartiality by ensuring representativeness); *Beyond Batson*, *supra* note 47, at 1931-34 (explaining that gender-based peremptory challenges do not promote jury impartiality).

249. 493 U.S. 474 (1990).

ment guarantee of an impartial trial requires the jury venire to be selected from a representative cross section of the community.²⁵⁰ The fair-cross-section requirement prevented the exclusion of distinct groups from the jury venire.²⁵¹ Thus, prior to *Batson* and *J.E.B.*, the State could still use race-based or sex-based peremptory challenges to prevent members of these groups from actually serving on a petit jury.²⁵²

While *Batson* and *J.E.B.* support the goal of the fair cross section cases, nagging discrepancies still exist. In *Holland*, the Court pointed out that a representative jury venire assures impartiality by preventing the State from securing a group of jurors "disproportionately ill disposed towards one or all classes of defendants."²⁵³ This statement necessarily presumes that particular groups may be partial to a certain class of individuals. *Batson* and *J.E.B.*, on the other hand, reject the assumption that a juror is partial because of membership within a particular race or gender group.²⁵⁴

In sum, *Holland* rejected a claim that race-based peremptory challenges violate the Sixth Amendment by denying a "fair possibility" of a representative petit jury.²⁵⁵ The *Holland* Court explained that while the Sixth Amendment requires a representative jury venire,²⁵⁶ the Court has never held that the Sixth Amendment prohibits the exercise of peremptory challenges to exclude members from the petit jury.²⁵⁷ According to Justice Scalia, this serves the Sixth Amendment by

250. *Id.* at 480.

251. *See id.*

252. *See id.* at 477-78. *Contra id.* at 514-15 (Stevens, J., dissenting). Dissenting in *Holland*, Justice Stevens argued that the Sixth Amendment should prevent the use of discriminatory peremptory challenges in selecting the petit jury: "The Sixth Amendment guarantees the accused an 'impartial jury,' not just an impartial jury venire . . ." *Id.* at 514 (Stevens, J., dissenting).

253. *Id.* at 480.

254. *See supra* notes 116, 174-76, and accompanying text.

255. *Holland*, 493 U.S. at 478.

256. *Id.* at 480. While describing how an impartial jury is viewed, the Court returned to *Swain*:

[The peremptory challenge] is often exercised . . . on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

Id. (alteration in original) (quoting with approval *Swain v. Alabama*, 380 U.S. 202, 220-21 (1965)).

257. *Id.* at 481.

“‘eliminat[ing] extremes of partiality on both sides.’”²⁵⁸ Again, this view directly conflicts with *Batson* and *J.E.B.*, which reject the assumption that a juror is partial because of membership within a particular race or gender group.²⁵⁹ Thus, the Court’s Sixth Amendment interpretation in *Holland* seems to encourage what equal protection prohibits.²⁶⁰

Dissenting in *Holland*, Justice Stevens attempted to reconcile the conflict by maintaining that discriminatory peremptory challenges violate both the Sixth and the Fourteenth Amendments.²⁶¹ Justice Stevens explained that the fair-cross-section requirement, implied through the Sixth Amendment,²⁶² requires use of a “neutral selection mechanism to generate a jury representative of the community”²⁶³ and that a representative jury helps ensure inclusion of a variety of group perspectives.²⁶⁴

Furthermore, Justice Stevens explained, the truth-seeking process is enhanced when the diverse views of the community are included.²⁶⁵ The inclusion of different perspectives thus helps to serve a defendant’s Sixth Amendment right to an impartial jury.²⁶⁶ In the meantime, Justice Stevens argued that *Batson*’s equal protection rule is complementary.²⁶⁷ Discriminatory peremptory challenges interfere with a defendant’s chance to obtain a representative jury.²⁶⁸ If the “selection procedure”²⁶⁹ is discriminatory under equal protection because “‘strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try’ the case,”²⁷⁰ the “same showing

258. *Id.* at 484 (alteration in original) (quoting *Swain*, 380 U.S. at 219).

259. See *supra* notes 116, 174-76, and accompanying text.

260. See *Leading Cases*, *supra* note 220, at 173.

261. 493 U.S. at 505-07 (Stevens, J., dissenting).

262. *Id.* at 511 (Stevens, J., dissenting).

263. *Id.* at 512 (Stevens, J., dissenting).

264. *Id.* at 513 n.10 (Stevens, J., dissenting) (quoting *VAN DYKE*, *supra* note 23, at 18).

265. See *id.* at 515 (Stevens, J., dissenting). “[B]y providing that juries be drawn through fair and neutral selection procedures from a broad cross section of the community, [the Sixth] Amendment insures a jury that will best reflect the views of the community—one that is not arbitrarily skewed for or against any particular group or characteristic.” *Id.* (Stevens, J., dissenting); see also Barbara Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?*, 92 COLUM. L. REV. 725, 749 (1992) (arguing that exclusion of distinct groups causes “impoverished factfinding”).

266. See *Holland*, 493 U.S. at 515 (Stevens, J., dissenting).

267. *Id.* at 516 (Stevens, J., dissenting).

268. *Id.* (Stevens, J., dissenting).

269. *Id.* (Stevens, J., dissenting) (quoting *Batson*, 476 U.S. at 101).

270. *Id.* (Stevens, J., dissenting) (quoting *Batson*, 476 U.S. at 87).

necessarily establishes that the defendant does not have a fair possibility of obtaining a representative cross section for Sixth Amendment purposes."²⁷¹ Justice Stevens' analysis could also apply to gender.

Justice Stevens' reconciliation is problematic, however, because generalizations about group perspectives also involve stereotypes.²⁷² It is unclear why stereotypes can be used to conclude that perspectives differ, but cannot be used to conclude that these different perspectives may cause a white juror to disfavor an African-American defendant, a female juror to disfavor a male defendant, and so forth.²⁷³ Furthermore, Justice O'Connor has indicated that both race and gender affect impartiality.²⁷⁴ Refusing to permit litigants to exercise race-based and gender-based peremptory challenges is not a denial of this fact, she reasoned, but is instead a "special rule of relevance, a statement about what this Nation stands for."²⁷⁵

C. *The Status of the Peremptory Challenge*

Currently, the rights of jurors are not threatened to the point of eliminating all peremptory challenges. The Court avoided taking on the peremptory challenge issue as a whole,²⁷⁶ and chose instead to assail only pieces of the overall practice.²⁷⁷ Previously, in *Swain v. Alabama*,²⁷⁸ the scales were weighted in favor of the peremptory challenge.²⁷⁹ Under *Swain's* rationale, in any given case, prosecutors

271. *Id.* (Stevens, J., dissenting).

272. *See, e.g.*, Johnson, *supra* note 233, at 79-80.

273. *Id.* at 80. In the context of race, Professor Johnson points out that assumptions about different experiences and knowledge are related to assumptions about impartiality:

To the extent black jurors as a group have had different experiences of racism than white jurors as a group, they are more likely to differ in their readiness to convict an accused black defendant. The first example that comes to mind concerns experiences of police brutality and racial hostility: jurors with these experiences are likely to view police testimony in resisting arrest cases with greater skepticism.

Id.

274. *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring).

275. *Id.* (O'Connor, J., concurring) (quoting *Brown v. North Carolina*, 479 U.S. 940, 942 (1986) (O'Connor, J., dissenting in denial of certiorari)).

276. *Id.* at 1425. "In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom." *Id.* at 1425-26.

277. Only peremptory challenges based on gender were examined. *Id.* at 1426.

278. 380 U.S. 202 (1965). *See supra* notes 48-64 and accompanying text for a discussion of *Swain*.

279. *See Batson v. Kentucky*, 476 U.S. 79, 93 (1986).

could remove jurors for whatever reason and without question.²⁸⁰ As a result, equal protection applied only in theory.²⁸¹

Subsequently, in *Batson* and in *J.E.B.*, the Court applied the Equal Protection Clause to reject the State's explanation for race-based²⁸² and gender-based strikes.²⁸³ By prohibiting only race-based and gender-based strikes, the Court has only weakened the peremptory challenge to the extent required to give life to equal protection. Thus, rather than abolish the peremptory challenge in its entirety,²⁸⁴ the Court attempted to achieve a balance between the litigant's interest in the peremptory challenge as a means to an impartial jury and the juror's interest in equal protection.

Dissenting in *Batson*, Chief Justice Burger claimed that the peremptory challenge either exists or it does not: "Analytically, there is no middle ground."²⁸⁵ If peremptory challenges must be explained, they are no longer peremptory,²⁸⁶ but instead "collapse into the challenge for cause."²⁸⁷ Justice O'Connor expressed similar views in *J.E.B.* when she explained that unlike challenges for cause, peremptory challenges are often based on intuition, hunches, and inarticulable reasons.²⁸⁸ Litigants may be unable to verbalize an acceptable race- or gender-neutral explanation even if their reasons do not relate to these factors.²⁸⁹

Nevertheless, the majority insists that after *J.E.B.*, the peremptory strike still has force.²⁹⁰ First, the party challenging the strike must make a prima facie showing of intentional discrimination before the court will require that the attorney exercising the strike give an

280. 380 U.S. at 220.

281. *Batson*, 476 U.S. at 102 (Marshall, J., concurring) (quoting *Commonwealth v. Martin*, 336 A.2d 290, 295 (Pa. 1975)). Justice Marshall described *Swain's* burden of proof as one which required that "justice . . . sit supinely by' and be flouted in case after case before a remedy is available." *Id.*

282. *Id.* at 89.

283. *J.E.B.*, 114 S. Ct. at 1425.

284. See *supra* note 180 and accompanying text.

285. *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

286. *Id.* (Burger, C.J., dissenting) (quoting *Swain*, 380 U.S. at 222).

287. *Id.* (Burger, C.J., dissenting) (quoting *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984)).

288. *J.E.B.*, 114 S. Ct. at 1430-33 (O'Connor, J., concurring). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *Id.* at 1431 (O'Connor, J., concurring).

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

290. *Id.* at 1429.

explanation.²⁹¹ "When an explanation is required, it need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual."²⁹² Also, an attorney may remove members of groups that are subject to "rational basis" review.²⁹³ Furthermore, an attorney may base strikes on factors that are disproportionately associated with one gender.²⁹⁴ Thus, while acknowledging the continued existence of the peremptory challenge, a majority of the Court felt it reasonable to require a neutral explanation for an apparently discriminatory peremptory strike.²⁹⁵

V. IMPACT

J.E.B., along with *Batson* and its progeny, will impact everyone considered in the opinions: the community, the jurors, and the defendants. The nondiscriminatory rules of *Batson* and *J.E.B.* will enhance community confidence in the justice system.²⁹⁶ The issues surrounding discriminatory peremptory challenges, however, do not end there. Courts will likely extend *Batson* and *J.E.B.*, and it is questionable whether or not the peremptory challenge will survive.

A. Community Confidence in the Judicial System

An important factor in the Court's decision in *Batson* and *J.E.B.* was confidence in the judicial system.²⁹⁷ Consistent with democratic concepts, the American public envisions a proper jury as representative of the community, and not comprised of any certain group or class.²⁹⁸

291. *Id.*

292. *Id.* at 1430.

293. *Id.* at 1429 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985) (explaining that under "rational review," classifications are sustained if "rationally related to a legitimate state interest")).

294. *Id.* The Court stated that these strikes may be appropriate as long as there is not a showing of pretext. *Id.*

295. *Id.*

296. *Cf. id.* at 1427 (citing *Powers v. Ohio*, 499 U.S. 400, 412 (1991)) (stating that discriminatory peremptory challenges risk "creating the impression that the judicial system has acquiesced in suppressing full participation by one gender.").

297. *J.E.B.*, 114 S. Ct. at 1427 (stating that "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."); *Batson*, 476 U.S. at 87 (stating that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.") (citing *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of certiorari); *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

298. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (quoting *Glasser v. United*

Discriminatory jury selection undermines confidence in the jury's neutrality, its ability to adhere to the law, and the fairness of the verdict it determines.²⁹⁹ By rendering discriminatory peremptory challenges illegal, *Batson* and *J.E.B.* will improve the appearance of the judicial system.

Confidence in the judicial system is also increased by the fact that courts are taking steps to eliminate discrimination within the jury selection procedure.³⁰⁰ Courts enforce antidiscrimination laws in almost every other major institution.³⁰¹ The moral authority to police others for compliance is strengthened when courts apply the same standards to themselves.³⁰²

One could argue that the public is unaware of discrimination because litigants are not required to explain the basis for peremptory challenges. In a much-cited article, Professor Babcock praised the peremptory challenge as a means to allow "covert expression of what we dare not say but know is true more often than not."³⁰³ She later acknowledged, however, that she failed to recognize that "tides of racial passion swept through the courtroom when peremptory challenges were exercised."³⁰⁴ Babcock contends that citizens know what is happening.³⁰⁵ This belief has also been expressed by the Supreme Court.³⁰⁶ In *Powers v. Ohio*,³⁰⁷ Justice Kennedy explained

States, 315 U.S. 60, 85-86 (1942)).

299. *J.E.B.*, 114 S. Ct. at 1427 (citing *Powers*, 499 U.S. at 412).

300. See Underwood, *supra* note 265, at 749 (stating that discrimination in the jury selection process decreases public confidence in the judicial system).

301. *Id.* (citing U.S. CONST. amend. XIV (state actors); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691(f) (1988) (lenders); Civil Rights Act of 1964, Title II, 42 U.S.C. §§ 2000a-2000a-6 (1988) (places of public accommodation); Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1988) (employers); Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1988) (providers of housing for sale or rent)).

302. See *id.*

303. Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 554 (1975), quoted with approval in *Batson v. Kentucky*, 476 U.S. 79, 121 (1986) (Burger, C.J., dissenting).

304. Babcock, *supra* note 213, at 1147. For example, an excluded juror wrote a District Attorney the following letter:

If we Blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why are we subject to fines of \$250.00 if we don't appear and told it's our civic duty if we ask to be excused? Why bother to call us down to these courts and then overlook us like a bunch of naive or better yet ignorant children? We could be on our jobs or in schools trying to help ourselves instead of in courthouse halls being made fools of.

Amicus Brief for Elizabeth Holtzman at 18, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263), quoted in Underwood, *supra* note 265, at 725.

305. Babcock, *supra* note 213, at 1147.

306. See, e.g., *J.E.B.*, 114 S. Ct. at 1428 ("The message it sends to all those in the

that “[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character.”³⁰⁸

The composition of the jury is important to the American public.³⁰⁹ It is common for newspapers to report the race and gender of jury members.³¹⁰ As the *J.E.B.* Court pointed out, the practice of using peremptory challenges in a discriminatory fashion contributes to the suspicion that the “‘deck has been stacked’ in favor of one side.”³¹¹ By banning discriminatory peremptory challenges, the Court enhances community confidence in the judicial system.³¹²

B. Extension of *J.E.B.*

Like *Batson*, courts will likely extend *J.E.B.* to invalidate more than the prosecutors’ discriminatory peremptory challenges in criminal cases. The Court was quick to apply *Batson*’s prohibition against race-based peremptory challenges to defendants in addition to prosecutors.³¹³ The Court determined that the same harms to the juror and community occur whether a state or a defendant exercises the discriminatory peremptory challenge.³¹⁴ The Court viewed the defendant as a state actor for purposes of applying *Batson* because the peremptory challenge involves state action.³¹⁵ The same reasoning

courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.”); *Batson*, 476 U.S. at 103 (Marshall, J., concurring) (“Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.”).

307. 499 U.S. 400 (1991).

308. *Id.* at 413-14.

309. *Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

310. *See, e.g., id.* at 2360 & n.1 (Thomas, J., concurring) (commenting that race is regularly noted by newspapers and referring to a computer search which revealed “that the phrase ‘all white jury’ has appeared over two hundred times in the past five years in the *New York Times*, *Chicago Tribune*, and *Los Angeles Times*”).

311. 114 S. Ct. at 1427 (citing *Powers*, 499 U.S. at 412).

312. *See supra* note 297.

313. *McCollum*, 112 S. Ct. at 2353. After dedicating a major portion of her concurrence to explaining why *Batson* should not have been extended, Justice O’Connor then predicted that *J.E.B.* will also be extended. *J.E.B.*, 114 S. Ct. at 1432-33 (O’Connor, J., concurring).

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

315. *Id.* at 2355 (citing *Edmonson v. Concrete Co.*, 500 U.S. 614 (1991)). In his analysis, Justice Blackmun relied on *Edmonson*:

[T]he *Edmonson* Court found that the peremptory challenge system, as well as the jury system, as a whole, ‘simply could not exist’ without the ‘overt and significant participation of the government.’ . . . [P]eremptory challenges perform a traditional function of the government: ‘Their sole purpose is to

applies equally to gender-based peremptory challenges.³¹⁶

A more uncertain question is whether courts will extend the rule of *Batson* and *J.E.B.* beyond race and sex. In his dissent to *J.E.B.*, Justice Scalia emphasized that all peremptory challenges are at risk because they are all based on stereotypes of some kind.³¹⁷ So far, the Court has not altered the balance it created with *Batson* and *J.E.B.*³¹⁸

For example, the Court recently refused to review a case involving a peremptory strike based on religion. In *State v. Davis*,³¹⁹ the prosecutor exercised a peremptory challenge on religious grounds.³²⁰ When challenged, the prosecutor explained that, in her experience, Jehovah's Witnesses were reluctant to exercise authority over others.³²¹ The Minnesota Supreme Court refused to apply *Batson*, reasoning that religious discrimination was less historically pervasive than racial discrimination.³²² The United States Supreme Court denied

permit litigants to assist the government in the selection of an impartial trier of fact.' . . . [T]he courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action.

Id. at 2355-56. *Contra J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring) (quoting *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting)); *McCullum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting). Justice O'Connor reiterated her objections to *Edmonson* and *McCullum*, including the fact that states and criminal defendants are naturally "antagonistic" to each other. *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring).

316. *McCullum*, 112 S. Ct. at 2353 n.4 (quoting *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887))).

317. *J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting). "Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection." *Id.* at 1437 (Scalia, J., dissenting) (citations omitted).

318. *Id.* at 1428 n.14. The Court pointed out that other groups have not experienced the degree of discrimination that African-Americans and women have:

The popular refrain is that *all* peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.

Id. (citing *Babcock*, *supra* note 213, at 1173).

319. 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

320. *Id.* at 768.

321. *Id.*

322. *Id.* at 770-71. "[T]here is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system." *Id.* at 771. "To extend *Batson* . . . would not serve to remedy any long-standing injustice perpetrated by the court system against specific individuals and classes, as *Batson* clearly does." *Id.* The Minnesota Supreme Court also made two other key observations,

certiorari.³²³

In dissent to the denial of certiorari, Justices Thomas and Scalia argued that, given the Court's reasoning in *J.E.B.*, no sound reason exists for allowing religious-based peremptory challenges.³²⁴ Religious-based classifications, like gender-based classifications, are subject to heightened equal protection scrutiny.³²⁵ The dissenting justices did not deny that religious discrimination has not been as pervasive as race discrimination, but argued that *J.E.B.* disavowed the understanding that *Batson* does not apply "[o]utside the uniquely sensitive area of race"³²⁶

Neither the Minnesota Supreme Court nor the dissents to the denial of certiorari address the fact that the First Amendment specifically addresses religion.³²⁷ Courts have interpreted the two religion clauses

according to Justice Ginsburg in her concurrence in denial of certiorari. *Davis*, 114 S. Ct. at 2120 (Ginsburg, J., concurring in denial of certiorari). First, "religious affiliation (or lack thereof) is not as self-evident as race or gender." *Davis*, 504 N.W.2d at 771, quoted in *Davis*, 114 S. Ct. at 2120 (Ginsburg, J., concurring in denial of certiorari). Second:

"Ordinarily . . . , inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper. . . . [P]roper questioning . . . should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment."

Id. at 772, quoted in *Davis*, 114 S. Ct. at 2120 (Ginsburg, J., concurring in denial of certiorari) (citations omitted).

323. *Davis*, 114 S. Ct. at 2120.

324. *Id.* at 2121 (Thomas, J., dissenting). "I can only conclude that the Court's decision to deny certiorari stems from an unwillingness to confront forthrightly the ramifications of the decision in *J.E.B.*" *Id.* at 2122 (Thomas, J., dissenting).

325. *Id.* at 2121 (Thomas, J., dissenting); *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting). Dissenting in *Davis*, Justice Thomas stated:

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

Davis, 114 S. Ct. at 2121 (Thomas, J., dissenting) (citing *cf. Larson v. Valente*, 456 U.S. 228, 244-46 (1982)).

326. See *Davis*, 114 S. Ct. at 2121 (Thomas, J., dissenting) (citing *Davis*, 504 N.W.2d at 771-72 (quoting *Brown v. North Carolina*, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring in denial of certiorari))).

327. See Recent Cases, 107 HARV. L. REV. 1164, 1166 (1994) (pointing out that the Minnesota Supreme Court ignored the First Amendment's specific protection of religious freedom [hereinafter Recent Cases]. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

of the First Amendment as commanding governmental neutrality toward religious affiliation.³²⁸ In *McDaniel v. Paty*,³²⁹ the Court determined that the “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits.”³³⁰ One could argue that religious-based peremptory challenges violate the First Amendment by removing certain individuals from jury service solely because of their religion or the stereotypes associated with their religion.³³¹ Accordingly, the argument successfully made in *J.E.B.* may logically lead to a prohibition against religious-based peremptory challenges.³³²

C. *The Future of the Peremptory Challenge*

The future of the peremptory challenge is questionable. If the Court extends *Batson* and *J.E.B.* beyond race and gender, it will strip the peremptory challenge of its power, layer by layer.³³³ In short, under the Court’s recent decisions, equal protection will continuously be at odds with “an arbitrary and capricious right” like the peremptory challenge.³³⁴

In addition, peremptory challenges based on race and gender did not necessarily end with *Batson* and *J.E.B.*³³⁵ Justice Marshall argued

328. Recent Cases, *supra* note 327, at 1166. “The [religion clauses] should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses . . . prohibit classification in terms of religion to confer a benefit or impose a burden.” *Id.* at 1166 n.29 (alteration in original) (quoting PHILIP B. KURLAND, RELIGION AND THE LAW 112 (1962), *quoted in* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1241 (5th ed. 1980)).

329. 435 U.S. 618 (1978).

330. *Id.* at 639 (Brennan, J., concurring) (invalidating a Tennessee law preventing clergy from holding public office), *quoted in* Recent Cases, *supra* note 327, at 1167.

331. Recent Cases, *supra* note 327, at 1167.

332. *See* *Davis*, 114 S. Ct. at 2121-22 (Thomas, J., dissenting) (stating that there is no sound reason not to prohibit religion-based peremptory challenges after the decision in *J.E.B.*); Recent Cases, *supra* note 327, at 1169 (arguing that the First Amendment prohibits religion-based peremptory challenges).

333. *See, e.g., J.E.B.*, 114 S. Ct. at 1438-39 (Scalia, J., dissenting). Justice Scalia claims that prohibiting even race- and gender-based strikes damages the character of the peremptory challenge. *Id.* (Scalia, J., dissenting).

334. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892))). Chief Justice Burger warned that “unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires minimum ‘rationality’ in government actions has no application to ‘an arbitrary and capricious right.’” *Id.* (Burger, C.J., dissenting); *see infra* notes 340-41 and accompanying text for the Court’s comments that the peremptory challenge is not a constitutional right.

335. *See, e.g., Batson*, 476 U.S. at 102-03 (Marshall, J., concurring).

that the only way to eliminate discrimination is to prohibit the peremptory challenge altogether.³³⁶ He explained that challenges must be flagrant in order to establish a prima facie case under *Batson*.³³⁷

Furthermore, attorneys have offered a number of purportedly legitimate reasons to explain peremptory strikes which in reality are a mere pretext for intentional discrimination.³³⁸ The attorneys and judges themselves may be affected by unconscious racism or sexism, and may not recognize that they are acting in a discriminatory manner or permitting its occurrence.³³⁹ Therefore, race-based and gender-based peremptory challenges are still at issue.

In final analysis, however, it must be recognized that equal protection is a constitutional command, while the peremptory challenge is not.³⁴⁰ As such, the constitutional command of equal protection

336. *Id.* at 103 (Marshall, J., concurring).

337. *Id.* at 105 (Marshall, J., concurring). Relying on the experience of states which had a *Batson* rule, Justice Marshall indicated that prosecutors may avoid suspicion by keeping race-based peremptory challenges to an "acceptable level." *Id.* (Marshall, J., concurring).

338. *Id.* at 105-06 (Marshall, J., concurring); *see, e.g.*, *United States v. Nichols*, 937 F.2d 1257, 1263 (7th Cir. 1991) (allowed to strike juror because she was living with her fiancée), *cert. denied*, 112 S. Ct. 989 (1992); *United States v. Williams*, 936 F.2d 1243, 1247 (11th Cir. 1991) (allowed to strike juror because prosecutor had convicted an unrelated defendant who lived in the same area as the juror), *cert. denied*, 112 S. Ct. 1279 (1992); *United States v. Williams*, 934 F.2d 847, 849 (7th Cir. 1991) (allowed to strike young single mother because she may have "other concerns"); *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989) (allowed to strike juror because of age, residence, and type of employment); *United States v. Clemons*, 843 F.2d 741, 744 (3d Cir.) (allowed to strike black jurors because of age and marital status), *cert. denied*, 488 U.S. 835 (1988).

See *supra* notes 121-24 and accompanying text for a discussion of the standards for assessing a prima facie case under *Batson*. Once a prima facie case has been established, a neutral explanation may be offered, and the trial court determines if purposeful discrimination has been established. See *supra* notes 125-26 and accompanying text.

339. See *Batson*, 476 U.S. at 106 (Marshall, J., concurring). "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to mind if a white juror had acted identically." *Id.* (Marshall, J., concurring).

340. *Batson*, 476 U.S. at 107 (Marshall, J., concurring). Justice Marshall also pointed out that the Court has repeatedly stated that the peremptory challenge is not a constitutional right. *Id.* at 108 (Marshall, J., concurring). Also, in *Georgia v. McCollum*, the Court stated:

The final question is whether the interests served by *Batson* must give way to the rights of a criminal defendant. As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.

supersedes the peremptory challenge.³⁴¹ In sum, the balance that the Court seeks may gradually lean toward equal protection until the peremptory challenge is abolished.

VI. CONCLUSION

The Court's decision in *J.E.B.* constitutes strike two for the peremptory challenge. By applying heightened equal protection analysis and by focusing on the jurors rather than solely on the defendant, the Court found gender-based peremptory challenges unconstitutional. It would be very difficult to justify prohibiting race-based peremptory challenges, but not gender-based peremptory challenges, when African-Americans and women share a remarkably similar history of exclusion from jury service.

Nevertheless, the issues arising from discriminatory peremptory challenges do not end there. The Court has not yet reconciled the inconsistencies between its philosophy in the fair cross section cases and its reasoning in *Batson* and *J.E.B.* Furthermore, it is likely that the Court will extend *Batson* and *J.E.B.* until the constitutional guarantee of equal protection commands the abolishment of the peremptory challenge.

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112 S. Ct. 2348, 2357-58 (1992) (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919)).

341. *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (citations omitted). "[W]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." *Id.* (Marshall, J., concurring) (quoting *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting)).

