Constitutional Law - Jury Selection - Peremptory Challenges

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CONSTITUTIONAL LAW—JURY SELECTION—PEREMPTORY CHALLENGES—The United States Supreme Court held that intentional gender discrimination by state actors when exercising peremptory challenges in the jury selection process violates the Equal Protection Clause of the Fourteenth Amendment.


A complaint for paternity and child support was filed by the State of Alabama (the "State") on behalf of T.B., the mother of a minor child, against petitioner J.E.B. (the "Petitioner") in the District Court of Jackson County, Alabama. A pool of thirty-six potential jurors was available when the matter came to trial, three of whom were subsequently excused for cause. Of the remaining pool of jurors, ten were male and twenty-three were female. In accordance with the Alabama Rules of Civil Procedure, a struck-jury system was employed to obtain twelve jurors. The State used nine of its ten peremptory challenges to remove male jurors and the Petitioner used all but one of his challenges to remove female jurors, resulting in a jury composed of twelve women.

Before the jury was impaneled, the Petitioner objected to the State's use of its peremptory challenges, claiming that the challenges violated the Equal Protection Clause of the Fourteenth Amendment because they were based solely on the gender of...

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3. Id. at 1422.
4. Id. at 1425 n.17. The Alabama Rules of Civil Procedure provide that, "[r]egular jurors shall be selected from a list containing the names of at least twenty-four competent jurors and shall be obtained by the parties or their attorneys alternately striking one from the list until twelve remain, the party demanding the jury commencing." ALA. R. CIV. P. 47.
5. A peremptory challenge is the 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).
7. Id. The Fourteenth Amendment provides:
   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.
the prospective juror. The Petitioner argued that the holding in *Batson v. Kentucky*, which prohibited peremptory strikes made solely on the basis of race, should be extended to include gender-based challenges as well. The district court rejected this claim and impaneled the all-female jury. On a post-judgment motion, the court reaffirmed its earlier ruling that *Batson* did not extend to gender-based peremptory challenges. The Petitioner appealed to the Alabama Court of Civil Appeals, which affirmed the ruling of the lower court. The Petitioner's appeal to the Supreme Court of Alabama was denied. He then petitioned to the United States Supreme Court, which granted certiorari in order to resolve the conflict of authority that existed on the issue of gender-based peremptory challenges.

The Supreme Court concluded that the Equal Protection Clause prohibited a state actor from intentionally discriminating in jury selection on the basis of gender, or on the assumption that an individual would be biased in a particular case solely because that person was a man or a woman. With Justice Blackmun writing for the majority, the Court initially determined that the rationale underlying its decision in *Batson* applied with equal force to discrimination based on sex.
State sought to distinguish *Batson* by arguing that gender discrimination was not as pervasive as racial discrimination and that the same standards should not be applied.\(^{20}\) This logic was rejected by the Court, citing a long history of gender discrimination with regard to jury service.\(^{21}\) However, the Court asserted that such a showing was not necessary, and reiterated that all gender-based classifications warranted heightened scrutiny under the Equal Protection Clause and required an "exceedingly persuasive justification" in order to be within constitutional limits.\(^{22}\) Thus, the Court decided that gender-based discrimination in the jury selection process could only be justified by showing that it substantially furthered the State's legitimate interest in a fair and impartial trial.\(^{23}\) The Court's evaluation of the merits of gender-based challenges weighed the likelihood that such challenges would substantially aid in securing an impartial jury against the corresponding detrimental effects of gender discrimination.\(^{24}\)

To determine whether the dangers posed by such discrimination outweighed the possible benefits, the Court applied the rationale used in *Edmonson v. Leesville Concrete Co.*\(^{25}\) and emphasized the potential harms that could result from discrimination in the jury process.\(^{26}\) The majority opinion examined the dangers of such discrimination as they applied to the litigants,

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\(^{20}\) *Id.* at 1425.
\(^{21}\) *Id.* at 1423-24. In fact, the Court found that there had been a longer history of discriminatory practices toward women than toward racial minorities in the jury selection process. *Id.* at 1425.
\(^{22}\) *J.E.B.*, 114 S. Ct. at 1425. The Court discussed the varying levels of scrutiny under the Equal Protection Clause and the treatment accorded to gender-based classifications. *Id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985) and Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).
\(^{23}\) *J.E.B.*, 114 S. Ct. at 1425. The Court noted that it was limiting its consideration of the matter to those peremptory challenges based on gender stereotypes only, and not the value of peremptory challenges as a whole, in determining if they were necessary to ensure a fair trial. *Id.* To this end, the State argued that in light of the perceived sympathies of men and women, gender-based challenges were necessary to obtain an impartial jury. *Id.* at 1426. While the Court recognized that it might be possible to find some statistical support for the proposition that male and female jurors were likely to favor a particular party in certain types of cases, the Court refused to accept such an argument because it rested on the very stereotypes that the Court sought to eliminate. *Id.* at 1427 n.11.
\(^{24}\) *Id.* at 1426-27.
\(^{26}\) *J.E.B.*, 114 S. Ct. at 1427. In holding that a private litigant in a civil case was a state actor for purposes of peremptory challenges, and therefore could not discriminate based on race, the Court in *Edmonson* expressed concern that any discrimination in a trial process sanctioned by a state would raise serious questions about the fairness of the entire process. See *Edmonson*, 500 U.S. at 628.
the community, and the individual jurors.\textsuperscript{27} Additionally, the Court noted that this type of discrimination denied citizens their right to participate directly in the democratic process and rendered the resultant jury unrepresentative of the community at large.\textsuperscript{28} The Court concluded that, in light of these concerns, the State's legitimate interest in achieving a fair trial was not strong enough to condone gender discrimination in the use of peremptory challenges.\textsuperscript{29}

The Court distinguished peremptory challenges based upon a person's race or sex from those challenges based on other characteristics, such as occupation, by determining that the latter did not promote unjust, historical stereotypes relating to a group's competence and inclinations.\textsuperscript{30} The Court then acknowledged the beneficial nature of the peremptory challenge in selecting a fair and impartial jury and asserted that its holding did not signify the demise of all peremptory challenges.\textsuperscript{31} Finally, the Court adopted the guidelines set out in \textit{Batson} for challenging an allegedly discriminatory use of a peremptory strike.\textsuperscript{32} If the State had to justify its actions, the reasons given had to be more than a mere guise, but they did not have to attain the level of justification required to sustain a challenge for cause.\textsuperscript{33} The Court reversed the decision of the Alabama Court of Civil Appeals and remanded the case.\textsuperscript{34}

In a concurring opinion, Justice O'Connor agreed that gender-based peremptory challenges were unconstitutional, but not when exercised by civil litigants or criminal defendants.\textsuperscript{35} She argued that while the government was a state actor, and there-

\textsuperscript{27} \textit{J.E.B.}, 114 S. Ct. at 1427. The possible harm to the litigants stemmed from the risk that the prejudice involved in the jury selection process would extend to the rest of the proceedings. \textit{Id}. The danger to the community was the willing participation by the State in a discriminatory act. \textit{Id}. The jeopardy to the individual resulted from the stigma attached to the rejected jurors that they were somehow incapable of deciding the case on the merits simply because of their sex. \textit{Id}. at 1423.

\textsuperscript{28} \textit{Id}. at 1430.

\textsuperscript{29} \textit{Id}. The Court asserted that the limitation did not prevent parties from removing those jurors who they believed would be less receptive to their case; it only eliminated gender as a basis for that belief. \textit{Id}. at 1429.

\textsuperscript{30} \textit{Id}. at 1429 n.14.

\textsuperscript{31} \textit{Id}. at 1429.

\textsuperscript{32} \textit{J.E.B.}, 114 S. Ct. at 1429-30. The court noted that the party challenging the strike had to make a prima facie showing of intentional discrimination before the proponent of the strike would be required to justify it. \textit{Batson}, 476 U.S. at 97.

\textsuperscript{33} \textit{J.E.B.}, 114 S. Ct. at 1430. The Court asserted that any gender-neutral, non-pretextual, explanation would suffice, even if it disproportionately affected one gender. \textit{Id}. at 1429.

\textsuperscript{34} \textit{Id}.

\textsuperscript{35} \textit{Id}. at 1432 (O'Connor, J., concurring).
fore was bound by the Equal Protection Clause, civil litigants and criminal defendants were not.\(^{36}\) She contended that while the gender of the juror made no difference as a matter of law, the practical reality was that gender could make a difference as a matter of fact.\(^{37}\) In light of this distinction, the rights of the jurors should not be elevated over the rights of the defendant or the litigants, because the jurors were only incidentally affected by outcome of the case, whereas the defendant or the litigants were directly affected.\(^{38}\)

In another concurring opinion, Justice Kennedy explained his position that the J.E.B. holding was in accord with established precedents and was mandated by the commands of the Equal Protection Clause.\(^{39}\) He observed that although the Fourteenth Amendment might originally have been designed and adopted to prevent racial discrimination, recent decisions have erased any doubt that it applied with equal force to sexual discrimination.\(^{40}\) Furthermore, because the Equal Protection Clause focused on the rights of individuals, a person who was denied jury service, through the use of a peremptory challenge, solely because of their sex, suffered the same injury as one who was excluded from jury service by law.\(^{41}\) Therefore, Justice Kennedy concluded that the individual nature of the guarantees under the Equal Protection Clause required the prohibition of gender-based peremptory challenges.\(^{42}\) He also commented that it was incumbent upon seated jurors to uphold equal protection principles and avoid tainting their decisions with any racial or sexual bias of their own, so as to protect the individual rights of the defendant in the same manner as Batson and J.E.B. protected the juror's rights.\(^{43}\)

In a dissenting opinion, Chief Justice Rehnquist asserted that

\(^{36}\) Id. Justice O'Connor reiterated her belief that Edmonson and McCollum, which treated civil litigants and criminal defendants as state actors, were wrongly decided. Id.

\(^{37}\) Id.

\(^{38}\) J.E.B., 114 S. Ct. at 1432-33 (O'Connor, J., concurring).

\(^{39}\) Id. at 1433-34 (Kennedy, J., concurring).

\(^{40}\) Id. at 1433. Justice Kennedy observed that while some of the original drafts of the amendment only prohibited discrimination on account of race or previous condition of servitude, the language of the final version granted equal protection to "any person." Id. And, although it took a long time, recent case law clearly indicated that gender classifications were presumptively invalid. Id. (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

\(^{41}\) J.E.B., 114 S. Ct. at 1434 (Kennedy, J., concurring).

\(^{42}\) Id.

\(^{43}\) Id. Justice Kennedy also stated that, "the Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender." Id.
Batson was distinguishable from J.E.B. based on acknowledged differences between racial discrimination and gender discrimination. His dissent contended that racial groups required a greater amount of protection because they were a numerical minority in society and have been subjected to more intense and determined efforts at discrimination than other groups. Rehnquist further argued that the holding in Batson should be interpreted as an affirmation that the primary purpose of the Fourteenth Amendment was to eliminate racial injustice. Finally, the dissent declared that the State had met its burden of proving that gender-based strikes substantially furthered the State's interest in achieving a fair trial because the biological and practical differences between the sexes could result in diverging viewpoints which could yield varying results in a courtroom.

In another dissenting opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the majority's long, detailed history of discrimination against women in the jury selection process was not on point because the alleged discrimination in this case was directed at men. Moreover, the dissent argued that historically, women were excluded from juries because it was thought that they were incompetent; but the reason for removing women, as well as any other potential juror, from the venire was because of doubt that they would favor the striking party's case. Therefore, the majority's reliance on the historical exclusion of women from juries was inapplicable to the present case, involving removal from the venire, because the reasons underlying the two actions were not analogous. The dissent also contended that if there indeed

44. Id. at 1434-35 (Rehnquist, C.J., dissenting). The difference was evidenced by the status the Court accorded to both groups under the Equal Protection Clause. Id. Racial classifications warranted "strict" scrutiny but gender classifications only merited "heightened" scrutiny. Id.; see, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that gender classifications had to be substantially related to an important state interest to be justified); Korematsu v. United States, 323 U.S. 214, 216 (1944) (determining that racial classifications were immediately suspect and could only be justified by a compelling state interest).

45. J.E.B., 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).
46. Id.
47. Id.
48. Id. at 1436 (Scalia, J., dissenting).
49. Venire is defined as the group of citizens from whom a jury is chosen in a given case. BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).
50. J.E.B., 114 S. Ct. at 1437 (Scalia, J., dissenting). It was also Justice Scalia's contention that because every group imaginable was susceptible to being peremptorily stricken, no one group was denied equal protection. Id.
51. Id.
had been an injury due to sex discrimination, it was suffered by the stricken juror and not the petitioner. Finally, the dissent asserted that because all peremptory challenges were based on some type of group characteristic, they could all be classified as stereotyping. However, Justice Scalia contended that the majority's logic implied that any strike based upon a group stereotype could never rationally further a legitimate government interest, thus placing all peremptory strikes in jeopardy because they could not pass the rational basis test, much less any form of heightened scrutiny. Therefore, he argued that the majority was creating a double standard; it arbitrarily deemed certain kinds of stereotypes, those based on race and gender, impermissible, while others, such as those based on occupation and hair color, apparently acceptable, despite the fact that none furthered a legitimate state interest. Justice Scalia opined that the peremptory challenge was a vital part of the adversarial nature of the jury trial; placing restrictions on its use would not only burden the court system in a practical manner, but would also compromise the fair trial process of the judicial system as a whole.

For over sixty years, the Supreme Court has maintained that a jury should be representative of the community. Nevertheless, discrimination in the jury process has been an enduring plague upon the justice system. Prior to the enactment of the Fourteenth Amendment, state law generally restricted jury service to white males. However, the Equal Protection Clause prompted the Court to take the first steps toward the elimination of discriminatory practices in jury selection in *Strauder v. West Virginia*.

In *Strauder*, an African-American defendant was convicted of

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52. *Id.* Moreover, the dissent contended that even if there was some remote injury to the petitioner, the error was harmless because the scientific evidence at trial established his paternity with 99.92% accuracy. *Id.*
53. *Id.* at 1438.
54. *Id.* Justice Scalia interpreted the Court's statement that it would not accept any argument "based on the very stereotype the law condemns" as rejecting all arguments offered to show that the government's only legitimate interest, obtaining a fair trial, could be rationally furthered by eliminating potential jurors based on any group characteristics. *Id.*
55. *J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting).
56. *Id.* at 1439.
57. See *Smith v. Texas*, 311 U.S. 128, 130 (1940) (reversing the conviction of an African-American defendant because of the systematic exclusion of African-Americans from the venire).
58. See, e.g., *Batson*, 476 U.S. at 88-89.
60. 100 U.S. 303 (1879).
murder in a jury trial. The Court considered whether a state law that excluded African-American men from the venire was a violation of the defendant's equal protection rights. In considering this question, the Court did not examine whether the defendant had a right to a jury composed of men of like race, but whether he had a right to have men of his race included in the pool of potential jurors. The Court observed that while the law guaranteed that a white man would have a jury selected from persons of his own race, it expressly denied the same right to an African-American man, resulting in unequal treatment under the law. Thus, the Court held that the exclusion of African-American men from the venire constituted a denial of equal protection under the laws to an African-American defendant. However, the Court asserted that the state had the right to exclude women and other persons it deemed not qualified for jury service.

The issue of unconstitutional jury selection processes was revisited by the Court in *Thiel v. Southern Pacific Co.* In *Thiel*, the petitioner brought a claim of negligence against the defendant railroad company. On appeal, the sole question the Court considered was whether the lower court had improperly denied the petitioner's motion to strike the entire jury. After a review of the procedures used to select the jury pool, the Court found that day laborers had been purposefully and systemat-
ly excluded. The Court determined that this type of economic exclusion was not sanctioned by any state or federal law and could not be tolerated. The Court emphasized the individual nature of jury service and how one's competence to serve was not based upon any group or class characteristics. The Court concluded that to allow such discrimination would undermine the very principles upon which a trial by jury was based.

It was not until Swain v. Alabama that the Court considered discrimination in conjunction with the peremptory challenge. In Swain, the state used peremptory challenges to remove all African-American members of the venire. The petitioner claimed that this was a violation of the Equal Protection Clause. The Court noted that the primary purpose of such a challenge was to enable both parties to preclude potential jurors suspected of harboring biased opinions from deciding the case.

The Court opined that the foundations for these suspicions were often inarticulable and could be grounded in intuition or prejudices that would normally be inappropriate in a legal proceed-

70. Id. at 221. The evidence revealed that the jury commissioner intentionally excluded from the jury lists all persons whose occupation indicated that they worked for a daily wage. Id. The commissioner had found by experience that day laborers would not sacrifice their wages to serve as a juror. Id. at 222.

71. Id. at 222-24. In light of the unconstitutional nature of the jury selection process, the Court did not consider whether the petitioner had suffered any injury as a result of the wrongful exclusions. Id. at 225.

72. Id. at 220.

73. Thiel, 328 U.S. at 220. According to the Court, the sanctioning of such discriminatory practices would work to establish the jury as an instrument of the socially and economically privileged, and would render meaningless the idea of a jury of one's peers. Id. at 223-24.


75. Swain, 380 U.S. at 209-10. Of the eight African-Americans on the venire, two were exempt and the remaining six were removed through the state's peremptory challenges. Id. at 205.

76. Id. at 203. The petitioner claimed that the state intentionally discriminated against African-Americans by excluding them from the venire or by assuring that the number of African-Americans on the venire would be small enough so that they could all be removed by peremptory challenges. Id. at 210 n.6. On the first claim, the Court held that the state was not excluding African-Americans from the venire. Id. at 205-06.

While considering the petitioner's claim, the Court delved into the long history of the peremptory challenge, tracing its roots back to English common law felonies. Id. at 212-13. The Court found that the challenge originated with the Ordinance for Inquests which provided that "they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain." Id. at 213 (citing 33 Edw. 1, Stat. 4 (1305)). From its common law origins, the peremptory challenge was provided for in the federal system by Congress as early as 1790 and has since been adopted by all the states statutorily. Swain, 380 U.S. at 213-17. Originally only applicable in felony cases, the use of peremptory challenges has been expanded to include all criminal cases as well as civil cases. Id.

77. Swain, 380 U.S. at 219.
ing.\textsuperscript{78} While recognizing that neither party possessed a constitutional right to a peremptory challenge, the Court admitted that the challenge had become an indispensable part of the right to a trial by jury.\textsuperscript{79} Accordingly, the Court held that the elimination of African-Americans from a jury in any singular case, through the use of peremptory challenges, was not a denial of equal protection.\textsuperscript{80} The Court concluded that any other holding would significantly alter the characteristics of such a challenge, depriving it of its usefulness.\textsuperscript{81}

In \textit{Taylor v. Louisiana},\textsuperscript{82} the Court abolished gender discrimination in the creation of the venire by holding that women could not be excluded or automatically exempted from the venire on the basis of their sex.\textsuperscript{83} The male petitioner in \textit{Taylor} was convicted by a jury selected from an all-male group of prospective jurors.\textsuperscript{84} The petitioner objected to this, based upon his Sixth Amendment right to trial by jury.\textsuperscript{85} The issue the Court addressed was whether the Louisiana Constitution, which contained an automatic exemption for women unless they indicated, in writing, their willingness to serve as a juror, was unconstitutional.\textsuperscript{86} In order to achieve the Sixth Amendment goal that a

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} at 220.
\item \textsuperscript{79} \textit{Id.} at 219 (citing Stilson v. United States, 250 U.S. 583, 586 (1919) and Lewis v. United States, 146 U.S. 370, 376 (1892)).
\item \textsuperscript{80} \textit{Swain}, 380 U.S. at 221. The Court asserted that if a prosecutor consistently and systematically removed qualified African-American jurors from the venire over a period of time, by way of peremptory challenges, such that no African-American ever served on a jury, that could amount to a denial of equal protection. \textit{Id.} at 223. However, in the case at hand, although no African-American had served on a jury in that county for fifteen years, the petitioner had failed to provide any evidence that the prosecutor's underlying motive during that time was solely to prevent African-Americans from serving on a jury. \textit{Id.} at 225-26.
\item \textsuperscript{81} \textit{Id.} at 220-22. The Court observed that the essential nature of the peremptory challenge was that it could be exercised for any reason, including reasons considered irrelevant to a legal proceeding. \textit{Id.} at 220. If it were subject to the restrictions of the Equal Protection Clause, every challenge made by the prosecutor would be open to an examination of its underlying motives. \textit{Id.} at 222. The end result, according to the Court, would be a ban on many of the challenge's uses. \textit{Id.}
\item \textsuperscript{82} 419 U.S. 522 (1975).
\item \textsuperscript{83} \textit{Taylor}, 419 U.S. at 537.
\item \textsuperscript{84} \textit{Id.} at 524.
\item \textsuperscript{85} \textit{Id.} The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. The Court noted that the Sixth Amendment was applied to the states through the Fourteenth Amendment. \textit{Taylor}, 419 U.S. at 526. The petitioner's motion was denied by the lower court. \textit{Id.} at 525.
\item \textsuperscript{86} \textit{Id.} at 524. The Louisiana Constitution provided that:
\end{itemize}

The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided however, that no woman shall be drawn for jury service unless she shall have previous-
jury should be drawn from a venire representative of the community, the Court deemed it essential that women be included in the selection process.\textsuperscript{87} The Court rejected the argument that women had a distinctive place in society which would be compromised by jury service.\textsuperscript{88} Rather, in light of the expanding role of women in society, the Court held that a fair cross-section of the community could no longer be achieved without the inclusion of women.\textsuperscript{89}

Having established the constitutional parameters regarding eligibility for jury service, the Court was faced with the issue of whether to expand those limits in \textit{Batson v. Kentucky}.\textsuperscript{90} The petitioner in \textit{Batson} was an African-American defendant in a criminal case.\textsuperscript{91} During jury selection, the prosecution used its peremptory challenges to strike the four African-American members of the venire, and the petitioner moved to discharge the jury.\textsuperscript{92}

The Court found that the same principles relied on to prevent discrimination during the formation of the venire also applied to the state’s use of peremptory challenges when selecting the jury.\textsuperscript{93} Accordingly, the Court held that the Equal Protection Clause prohibited the state from exercising peremptory challeng-

\textsuperscript{87} Taylor, 419 U.S. at 534-35. The Court had previously declared that women could not be excluded from venires in federal trials within those states that allowed women to be members of the jury pool. \textit{See} Ballard v. United States, 329 U.S. 187, 193 (1946). However, the Court later held that it was still permissible to exempt women from jury service by statute, requiring them to volunteer if they wanted to serve. \textit{See} Hoyt v. Florida, 368 U.S. 57, 64 (1961), overruled by \textit{Taylor} v. Louisiana, 419 U.S. 522 (1975).

\textsuperscript{88} Taylor, 419 U.S. at 534-35. Citing statistics regarding the number of women in the workforce, the Court found that the traditional notion of a woman’s role was no longer viable. \textit{Id.} at 535 n.17. Moreover, although it might be burdensome for some women to serve on juries, they could be exempted from jury service in the same manner as men who could not serve due to some special hardship. \textit{Id.} at 535. The inconvenience of administering these additional exemptions could not justify the potential exclusion of all women from jury service. \textit{Id.}

\textsuperscript{89} \textit{Id.} at 531.

\textsuperscript{90} 476 U.S. 79 (1986).

\textsuperscript{91} \textit{Batson}, 476 U.S. at 82. The petitioner, an African-American man, was charged with burglary and receiving stolen property. \textit{Id.}

\textsuperscript{92} \textit{Id.} at 83. The petitioner’s motion was based upon his constitutional rights to a trial by a jury and equal protection under the laws. \textit{Id.} Relying on \textit{Swain}, the lower court denied the petitioner’s motion and the jury subsequently convicted him. \textit{Id.} On appeal, the petitioner argued that the Kentucky Supreme Court should have followed the decisions of two other states which had found this practice to be unconstitutional under the Sixth Amendment. \textit{Id.}

\textsuperscript{93} \textit{Id.} at 86-88.
es that were based solely on race. In overruling Swain, the Court found that the Swain test was unworkable, overly burdensome, and inconsistent with more recent decisions concerning the requisite proof to establish racial discrimination in the creation of the venire. The Court concluded that a violation of the Equal Protection Clause could be found from the facts of a single case and that it was not necessary to show a pattern of racial discrimination by the state.

The Court then outlined the necessary elements for a prima facie case of intentional discrimination by a state in its use of peremptory challenges. First, the defendant had to show that he was a member of a cognizable racial group, and that the State had used its challenges to remove other members of his racial group from the venire. The defendant was then entitled to use this and other relevant evidence to raise an inference of intentional discrimination. Once the presumption was raised, the burden shifted to the state to provide a racially neutral explanation for its actions, but such an explanation did not have to meet the requirements of a challenge for cause. Despite this limitation on their use, the Court reaffirmed its position that peremptory strikes still played a vital role in obtaining a fair trial and were an important part of the legal process.

94. Id. at 89. The Court declined to express any opinion as to whether this constitutional limit was similarly imposed on peremptory challenges initiated by the defendant. Id. at 89 n.12.

95. Id. at 93-95. A prima facie case of discrimination in selecting the defendant's venire could be established when the defendant showed he was a member of a racial group singled out for differential treatment and that members of the defendant's race were substantially underrepresented on the particular venire from which his jury was selected, providing an opportunity for discrimination. Id. at 95 (citing Whitus v. Georgia, 385 U.S. 545 (1967)). Once a prima facie case was established, the burden shifted to the State to provide racially neutral grounds, in the form of selection criteria and procedures, as opposed to mere assertions, for the exclusion of members of a certain race from the venire. Batson, 476 U.S. at 94 (citing Alexander v. Louisiana, 405 U.S. 625 (1972)).

96. Batson, 476 U.S. at 95. The Court asserted that this conclusion was consistent with other recent cases interpreting the Equal Protection Clause. Id. (citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)).


98. Id.

99. Id. at 96-97.

100. Id. at 97. The Court remanded the case to the lower court with instructions to apply this test and reverse the petitioner's conviction if the state had engaged in deliberate discrimination. Id. at 100.

101. Id. at 98-99. Shortly after the Batson decision, the Court denied certiorari in the case of Brown v. North Carolina. See Brown v. North Carolina, 479 U.S. 940 (1986). In doing so, the Court declined to extend the Batson holding beyond the sphere of race-based challenges. Brown, 479 U.S. at 941 (O'Connor, J., concurring). In Brown, the petitioner claimed that peremptory challenges based upon the prospec-
The Court extended Batson in Powers v. Ohio. The petitioner in Powers, a white man, objected to the state's use of peremptory challenges to remove African-American members of the venire. The Court considered whether the petitioner's status as a member of a race other than that of the excluded persons prevented him from raising a claim under Batson. The Court concluded that it did not, and held that a criminal defendant had the standing to raise objections to those peremptory challenges exercised by the prosecutor which were based solely on race, regardless of whether the defendant and the excluded jurors were of the same race.

The Court focused on the injury to the potential juror, as well as to the community as a whole, that resulted from this type of discriminatory conduct. The Court determined that a defendant in a criminal case had sufficient standing to raise the equal protection claims of the potential jurors who were unconstitutionally excluded from jury service because of their race. The Court noted that racially discriminatory practices within the judicial process threatened its integrity, and that both the criminal defendant and the potential juror had a viable interest in eliminating such practices. The Court concluded, however, that because the defendant's motivation to ensure fairness in the juror's views on capital punishment also fell within the purview of the Equal Protection Clause. Id. at 943 (Brennan, J., dissenting). In her concurrence, Justice O'Connor stated that, as a matter of law, a juror's race was irrelevant to their judgment of the case but a juror's views on capital punishment were not. Id. at 942 (O'Connor, J., concurring). Furthermore, the Court's denial of certiorari, as explained by Justice O'Connor, implied that Batson was strictly limited to those challenges motivated solely by the prospective juror's race. Id. at 941.

Powers, 499 U.S. at 402-03. The petitioner's claims were based on both Sixth Amendment and Fourteenth Amendment principles. Id. However, the Court found that the Sixth Amendment did not place any restrictions on the selection of jurors through peremptory strikes, and limited its analysis to the petitioner's claim under the Fourteenth Amendment. Id. at 403-04 (citing Holland v. Illinois, 493 U.S. 474 (1990)).

Powers, 499 U.S. at 403.

Id. at 402.

Id. at 406-10. The Court rejected the state's argument that a defendant's standing to present a claim under Batson was conditional upon his identity with the excluded juror as members of the same race. Id. at 406. Such a construction was not in accord with accepted principles relating to a person's ability to raise constitutional claims or with the guarantees of the Equal Protection Clause. Id.

Id. at 410-15. The Court identified three elements that had to be present to enable a litigant to bring a claim on behalf of a third party. Id. at 411. There had to be an "injury in fact" to the litigant, there had to be a close relationship between the litigant and the third party, and there must be an impediment to the third party's ability to bring the claim. Id.
proceedings far outweighed that of the dismissed jurors, the interests of justice could best be served by allowing the defendant to raise the equal protection claim.109

Another extension of the Batson ruling occurred in Edmonson v. Leesville Concrete Co., Inc.110 The petitioner in Edmonson was involved in a negligence action against the respondent corporation.111 When the respondent used two of its three peremptory challenges to remove African-American members from the venire, the petitioner requested a race-neutral explanation for this action.112 Asserting that Batson did not apply to civil proceedings, the trial court denied the request.113

The issue considered by the Court was whether Batson applied to civil proceedings in which the state was not a party.114 The Court noted that the injury to the excluded juror and the apparent sanctioning of discrimination by the state within its own court system were essentially the same in civil cases as in criminal cases.115 The Court held that civil litigants were state actors when exercising peremptory challenges.116 The Court used a two-step analysis to reach its conclusion. First, the Court found that the alleged deprivation of the asserted constitutional right was the result of a privilege derived from state authority, namely, the statutory provision for peremptory challenges.117

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111. Edmonson, 500 U.S. at 616. The petitioner, an African-American man, was a construction worker who was injured when one of the defendant's trucks rolled backwards and pinned him against some other construction equipment. Id.
112. Id. at 617.
113. Id. The jury rendered a verdict for the petitioner, but also found his contributory negligence to be 80%, and awarded him only 20% of the total damages. Id. A divided panel of the Fifth Circuit Court of Appeals reversed, and held that Batson applied to civil litigants. Id. (citing Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1989), rev'd, 895 F.2d 218 (5th Cir. 1990)). The full court then ordered a rehearing en banc and affirmed the district court, holding that peremptory challenges exercised by civil litigants were not subject to review. Edmonson, 500 U.S. at 617 (citing Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc)).
114. Edmonson, 500 U.S. at 628. Because this case was brought in a federal court, the equal protection component of the Fifth Amendment's Due Process Clause was applied. Id. (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).
115. Edmonson, 500 U.S. at 628.
116. Id. In reaching this conclusion, the Court referred to its decision in Powers, regarding the ability of a third party to bring an action, and its holding in Thiel, which involved a civil proceeding. Id. at 618-19.
117. Id. The Court noted that peremptory challenges existed only by statute or case law and served no purpose outside the courtroom. Id. Without such state authority, it would not have been possible for the respondent to have conducted its actions in an allegedly discriminatory manner. Id. at 621. The authorizing statute provided "[i]n civil cases, each party shall be entitled to three peremptory challenges.
Second, the Court determined that it was not unfair to categorize the private party accused of the constitutionally impermissible action as a state actor.\textsuperscript{118} In addition, the Court reasoned that civil actions furthered the state's interest in punishing and deterring wrongful actions.\textsuperscript{119} The Court concluded that allowing such constitutionally abhorrent conduct to arise in a process so intertwined with governmental authority would create the unacceptable impression that the state endorsed such conduct.\textsuperscript{120}

In 1992, in \textit{Georgia v. McCollum,}\textsuperscript{121} the Court further expanded the \textit{Batson} doctrine when it held that defendants in criminal cases were also prohibited from exercising peremptory challenges in a racially discriminatory manner.\textsuperscript{122} In \textit{McCollum}, the white defendants were charged with battery and simple assault against two African-Americans.\textsuperscript{123} The Court considered whether a criminal defendant could be required to tender a racially neutral explanation for his peremptory challenges when the state succeeded in establishing a prima facie showing of discrimination as outlined in \textit{Batson}.\textsuperscript{124}

The majority identified four factors that were dispositive of the issue of whether a defendant's peremptory challenges could be restricted by the Equal Protection Clause.\textsuperscript{125} First, the

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\textsuperscript{118} Edmonson, 500 U.S. at 622. To determine if the nature of the relevant action was governmental, thus enabling the person performing the action to qualify as a state actor, the Court considered three factors. \textit{Id.} at 621-22. These included the extent to which the actor relied on government assistance, whether the actor was performing a traditional government function, and the aggravating effects of governmental authority on the resulting injury. \textit{Id.}

\textsuperscript{119} \textit{Id.} at 625.

\textsuperscript{120} \textit{Id.} at 627-30. Under the Court's analysis, because it would be impossible for any party to exercise peremptory strikes without prior affirmative action by the government, evidenced by the summoning of the jury and the procedures required to discharge a juror, it was impractical to separate the state's actions from the litigants' actions. \textit{Id.} at 624.

\textsuperscript{121} 112 S. Ct. 2348 (1992).

\textsuperscript{122} \textit{McCollum}, 112 S. Ct. at 2359.

\textsuperscript{123} \textit{Id.} at 2351.

\textsuperscript{124} \textit{Id.} Asserting that the defendants had announced their intent to remove African-Americans from the venire with peremptory strikes, the state moved for an order that would have required the defendants to explain their strikes once the state made a prima facie showing of discrimination. \textit{Id.} The order was denied, and the issue was certified for immediate appeal. \textit{Id.} The Supreme Court of Georgia affirmed the trial court's ruling, holding that peremptory challenges were an essential part of the defendant's right to trial by jury and should not be diminished. \textit{Id.} (citing State \textit{v. McCollum,} 405 S.E.2d 688, 689 (Ga. 1991), rev'd, 112 S. Ct 2348 (1992)).

\textsuperscript{125} \textit{McCollum}, 112 S. Ct. at 2353.
Court determined that regardless of whether the discriminatory conduct was pursued by the state or by the defendant, the resultant harms were the same. Next, the Court decided that the defendant's use of peremptory challenges qualified as a state action, thus subjecting such conduct to the restrictions imposed by the Equal Protection Clause. The third determination made by the Court was that the state had sufficient standing to question the defendant's action. Finally, the Court concluded that the rights of the defendant did not supersede the constitutional interests protected by the Batson doctrine. Thus, the Court found that while the Sixth Amendment right to a fair trial guaranteed the defendant an impartial jury free of racial prejudice, it did not recognize the viability of such prejudices as a legitimate means to achieve this end.

The subsequent holding in J.E.B. v. Alabama that eliminated gender-based peremptory challenges was the culmination of a long and arduous process begun by the Supreme Court over one-hundred years ago in Strauder v. West Virginia. Beginning with Strauder, the Court slowly and cautiously embarked on a path toward eliminating discriminatory practices in jury selection. In Strauder, the Court took the initial step on this pilgrimage when it prohibited the exclusion of African-Americans from the venire. Many years later, the Court in Taylor officially extended the guarantees of the Equal Protection Clause to women, as far as the venire selection process was concerned.

126. Id. at 2354. The Court found that the overwhelming need for integrity within the judicial system did not allow for discrimination by any party. Id. at 2353-54. In addition, there were no distinguishing characteristics between the discrimination suffered by the potential jurors when they were excluded by the state or by the defendant. Id.

127. Id. at 2356. Applying the same rationale used in Edmonson, the Court found that the defendant in a criminal case relied on the same governmental assistance and functions as a private litigant in a civil case. Id. at 2354-56. The Court rejected the contention that the adversarial nature of a criminal proceeding precluded a defendant from being categorized as a state actor. Id. at 2356. However, depending upon the nature and context of the action taken, the defendant could not always be a state actor for any given function. Id.

128. Id. at 2357. The Court relied directly on its analysis in Powers to arrive at this conclusion. Id. See notes 102-09 and accompanying text for a complete discussion of Powers.

129. Id. at 2358. Initially, the Court noted that peremptory challenges were not a constitutional right, but merely a state created privilege. Id. The usefulness of the peremptory challenge could not be significantly curtailed by this limitation. Id. Moreover, any detrimental effects that accrued were justified as the necessary price for the abrogation of racial discrimination in the legal process. Id. at 2358-59.

130. McCollum, 112 S. Ct. at 2359.

131. Strauder, 100 U.S. at 310.

Although the Court was more reluctant to place limits on discriminatory uses of peremptory challenges, its eventual decisions in this area paralleled those made with regard to the selection of the venire. Initially, the Court resisted attempts to restrict peremptory challenges by imposing a very heavy burden on the defendant to prove his case. In Swain, the Court set as a threshold requirement the total exclusion of African-Americans from all juries in a given area over a period of time as the test for racial discrimination in the selection of a jury from the venire. However, the Court eventually overruled Swain, holding in Batson that race-based peremptory challenges by the state in criminal cases were unconstitutional in every instance. From there, the Court gradually expanded this doctrine to include race-based challenges exercised by the defendant in a criminal case or by any of the litigants in a civil case, even if the party seeking to enforce the doctrine was not a member of the race that was excluded.

When the J.E.B. case arose, all of the essential elements were in place to broaden the Batson doctrine and prohibit gender-based peremptory challenges, in addition to race-based challenges, just as the Court had done earlier when dealing with discrimination in the selection of the venire. In J.E.B., the majority's long discourse of the historical exclusion of women and African-Americans from jury service emphasized the Court's opinion that there was very little difference between the causes and effects of race-based exclusions and gender-based exclusions. Thus, the Court naturally seized the opportunity to terminate the practice of gender discrimination within the jury system, just as it had done with racial discrimination.

Despite its recent decisions restricting peremptory challenges, the use of peremptory challenges as a tool for assuring a fair


134. Swain, 380 U.S. at 223. The required showing of proof to establish an equal protection claim with regard to peremptory challenges, as defined in Swain, was exceedingly difficult to attain. Dave Harbeck, Eliminating Unconstitutional Juries: Applying United States v. DeGross to all Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges, 77 MINN. L. REV. 689, 696 n.48 (1993). In the twenty years during which the Swain test was followed, only two defendants succeeded in meeting its requirements. Id. (citing Marvin B. Steinberg, The Case for Eliminating Peremptory Challenges, 27 CRIM. L. BULL., May-June 1991, at 216, 221).

135. Batson, 476 U.S. at 89.

136. See McCollum, 112 S. Ct. at 2361; Edmonson, 500 U.S. at 628; Powers, 499 U.S. at 402.

trial has consistently been defended by the Court. In J.E.B., the majority opinion reaffirmed the importance of the peremptory challenge and asserted its continuing viability as a method for ensuring a fair trial. Given the Court’s strong support of peremptory challenges, it is unlikely that they are in immediate danger of being eliminated altogether. However, the nature of the J.E.B. opinion, relying as it did on a heightened scrutiny analysis, seemed to indicate that additional limitations could be imposed on the use of peremptory challenges. As noted by the Court in J.E.B., the issue considered was whether the discriminatory conduct by the state actor could be justified as being substantially related to the state’s interest in obtaining a fair trial. This is the general test applied to all groups that merit heightened scrutiny when raising a claim under the Equal Protection Clause. Aside from classifications based on gender, additional groups justifying heightened scrutiny under the Equal Protection Clause include classifications based on national origin and religious affiliation. Thus, in addition to a gender-based challenge, under the analysis employed by the Court in J.E.B., any challenge based upon one of these group characteristics would likewise be unconstitutional.

It is unlikely that the Court is ready to go beyond these special groups though when considering the validity of a peremptory challenge based upon a class trait. One indication of this was the Court’s denial of certiorari in Brown v. North Carolina, where the Petitioner’s claim was based upon the exclusion of potential jurors who were against capital punishment, and thus were not members of a cognizable group for purposes of the Equal Protection Clause. Moreover, the majority in J.E.B. goes so far as to distinguish challenges based on group characteristics, such as race and gender, from those based on other qualities of a prospective juror, such as occupation, stating that
the latter are acceptable because they do not promulgate injurious stereotypes relating to the capabilities of the entire group.\footnote{145. *J.E.B.*, 114 S. Ct. at 1428 n.14.}

Although the majority in *J.E.B.* did not expressly extend its holding to apply to other heightened scrutiny groups, Justice Scalia acknowledged in his dissent that this would be the practical result.\footnote{146. *Id.* at 1438 (Scalia, J., dissenting).} The same conclusion was also reached by former Chief Justice Burger in his dissent in *Batson*, where he stated that under an Equal Protection analysis, peremptory challenges based upon the sex or religion of prospective jurors, in addition to other traits, would be impermissible.\footnote{147. *Batson*, 476 U.S. at 123-24 (Burger, C.J., dissenting).} The subsequent use of equal protection principles to decide *J.E.B.* seemed to validate Burger’s claim. Thus, despite the Court’s reluctance to extend *Batson* to all heightened scrutiny groups at once, it appears likely that the Court will place additional restrictions on the use of peremptory challenges when other cases involving heightened scrutiny groups arise.

Should the Court decline to do so however, it would be forced to distinguish both *Batson* and *J.E.B.* The most plausible rationale for severing the ties to other heightened scrutiny groups in this area would be based upon the historical discrimination endured by African-Americans and women with regard to jury selection. Other groups warranting heightened scrutiny were relatively unaffected by this type of discrimination. Such a result, while arguably defensible on a superficial level given the Court’s emphasis on the historical roots of jury discrimination in both *Batson* and *J.E.B.*, would be inconsistent with the equal protection analysis in *J.E.B.*

The same types of harm resulting from race and gender discrimination are also present when discrimination is based upon any attribute, such as religious preference, that entitles a group to heightened scrutiny under the Equal Protection Clause.\footnote{148. Harbeck, cited at note 134, at 711-14. The resultant harm is to the defendant, the excluded juror, and the entire community, insofar as state sanctioned discrimination within the judicial system undermines the system as a whole. *Id.*} These harms are not lessened simply because the particular group at which the discrimination is directed has not been unduly subjected to similar discrimination in the past. Therefore, the analysis and holding in *J.E.B.* should eventually assure that all
groups which merit heightened scrutiny under the Equal Protection Clause will be protected from discrimination in the exercise of peremptory challenges.

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