Controversy Over the Peremptory Challenge: Should Batson Be Expanded?

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Every individual is guaranteed the right to an impartial jury by the Sixth Amendment of the Constitution. The process by which a jury is selected is known as the voir dire. Potential jurors are

1 U.S. Const. amend. VI. The Sixth Amendment provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Id. See Darryl K. Brown, The Role of Race in Jury Impartiality and Venue Transfers, 53 MD. L. Rev. 107, 109 (1994). Under the Sixth Amendment to the Constitution, criminal defendants have the right to be tried by an impartial jury selected from a fair cross section of the community. Id.

Defendants also have separate rights, under Article III of the Constitution and the Sixth Amendment, either to have their trial conducted in the community in which the crime was committed or to have the trial moved to a different venue if pretrial publicity or other factors render an impartial jury improbable in the original venue. Id. (citing Swain v. Alabama, 380 U.S. 202 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963)); see also 28 U.S.C. § 1861 (1988). “All litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.” Id.; Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (holding that selection from representative cross-section of community is essential element of Sixth Amendment); Swain, 380 U.S. at 224 (stating that peremptory challenge may not be used to deny right to sit on jury to entire group), overruled by Batson v. Kentucky, 476 U.S. 79, 93 (1986) (rejecting evidentiary burden placed on defendant requiring proof that peremptory challenge was systematically used to exclude jurors of defendant’s race); Rideau, 373 U.S. at 733 (noting that right to fair treatment is basic right of due process).

The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury, but an impartial one. See Holland v. Illinois, 493 U.S. 474, 480 (1990) (stating that venire must be of fair cross section, but in selecting jury, both sides may eliminate persons inclined against their interests); see also Duren v. Missouri, 439 U.S. 357, 364 (1979) (explaining that if under-representation of one group is due to systematic exclusion, then fair cross section requirement has been violated).

2 See State v. Davis, 504 N.W.2d 767, 770 (Minn. 1993), cert denied, 114 S. Ct. 2120 (1994). The court stated that although it is assumed that all citizens can put aside their individual preconceived notions and prejudices, the voir dire is used to test that assumption. Id. The peremptory challenge is an opportunity for the parties to exercise their own intuitive judgment with respect to perceived juror bias. Id.; see also J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1431 (1994) (O’Connor, J., concurring) (stating that peremptory challenge allows attorneys to act on instinct); Swain, 380 U.S. at 212. “This system . . . provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes.” Id.; State v. Weatherspoon, 514 N.W.2d 266, 276 (Minn. 1994) (Randall, J., concurring) (stating that purpose of voir dire is to test potential juror’s ability to set aside prejudices); Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?, 92 COLUM. L. REV. 725, 771 (1992). The peremptory challenge is available to grant assurance of an accurate verdict by “resolving doubts . . . in favor of exclusion.” Id.
questioned during the voir dire and are excluded if deemed biased or ill-suited for the case at bar.³

Due to the fact that, in the past, the peremptory challenge was often used by attorneys in order to eliminate jurors based on race, the Supreme Court has restricted the uses of the challenge.⁴ In Batson v. Kentucky,⁵ the Supreme Court prohibited the use of peremptory challenges based solely on race on the grounds that such exclusion violated the Equal Protection rights of the defendant and the jurors.⁶ This limitation has been expanded beyond Batson,⁷ causing uncertainty regarding the future of the peremptory challenge.⁸ This expansion raises the issue of whose right is more important; the rights of litigants to select impartial juries, and

³ See Swain, 380 U.S. at 219 (stating that Alabama contended that its system of strikes without cause or judicial review is important means of securing impartial jurors); Stilson v. United States, 250 U.S. 583, 586 (1919) (noting that nothing in U.S. Constitution requires Congress or States to grant peremptory challenges); Pointer v. United States, 151 U.S. 396, 408 (1894) (finding that defendant was not prejudiced by having to make his strikes from list of qualified jurors without knowing those challenges made by government); see also Lewis v. United States, 146 U.S. 370, 378 (1892). "[F]or it is as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." Id.

⁴ See Underwood, supra note 2, at 725 (explaining that race discrimination has long been part of jury selection).

⁵ 476 U.S. 79 (1986). See Underwood, supra note 2, at 725. Since 1880, when the Supreme Court found that a black criminal defendant, tried by an exclusively white jury, had been denied equal protection in Strauder v. West Virginia, 100 U.S. 303 (1880), race discrimination in the jury selection process has been of great constitutional concern. Id.

⁶ Batson, 476 U.S. at 89 (finding that prosecution cannot assume black jurors as group will be partial towards black defendants).

⁷ See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1430 (1994) (extending Batson limitation to gender because gender discrimination also violates equal protection); Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (holding criminal defendant, as well as prosecutor, may not discriminate on racial grounds through peremptory challenges); Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 631 (1991) (extending Batson limitation to prohibit parties in civil lawsuits from excluding jurors solely on race); Powers v. Ohio, 499 U.S. 400, 416 (1991) (expanding Batson limitation to situations where juror and defendant are not of same race); see also Henry J. Reske, Another Limit on Peremptories, 80 A.B.A. J., June 1994, at 18 (noting that voir dire and juror questionnaires will become increasingly important as attorneys try to justify their peremptory strikes).

⁸ See Katherine Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv. L. Rev. 808, 811 (1989). The author explains that notwithstanding the importance of racial equality, Batson-type limitations should not be applied to criminal defendants. Id.; Susan M. Sabers, The Absence of State Action in Georgia v. McCollum, 39 S.D. L. Rev. 159, 159 (1994). Traditionally, the decision whether to strike a juror through the peremptory challenge has been vested with the accused. Id. By finding that a criminal defendant was a state actor for purposes of jury selection, the holding in McCollum significantly impeded a criminal defendant's ability to select an impartial jury. Id; see also Georgia v. McCollum, 112 S. Ct. 2348, 2352-53 (1992) (illustrating limitations placed on peremptory challenges).
thus ensure a fair trial, or the Equal Protection rights of potential jurors.\textsuperscript{9}

Part One of this Note will focus on the function and use of the peremptory challenge. Part Two will discuss \textit{Batson v. Kentucky}\textsuperscript{10} and its effect on the voir dire process. Part Three will examine further limitations that the Supreme Court has placed on the use of the peremptory challenge in cases following \textit{Batson v. Kentucky}, including the extension to gender. Finally, Part Four will discuss the problems that may result from further limitations on the peremptory challenge and will suggest a balancing test to determine whether a certain peremptory challenge should be permissible.

I. THE PEREMPTORY CHALLENGE

A. Uses of the Peremptory Challenge

The peremptory challenge is a jury selection tool which allows a litigant to eliminate a limited number of potential jurors without cause.\textsuperscript{11} Attorneys use peremptory challenges to eliminate potential jurors whom they feel may be hiding their prejudices.\textsuperscript{12} They also allow attorneys to act upon hunches or instincts regarding the opinions and prejudices which potential jurors may have about the parties.\textsuperscript{13} Accomplished litigators can use their prior ex-

\textsuperscript{9} See Underwood, supra note 2 at 726 (arguing that focus should be on protecting juror's rights).
\textsuperscript{10} 476 U.S. 79 (1986).
\textsuperscript{12} See \textit{J.E.B.}, 114 S. Ct. at 1431 (O'Connor, J., concurring). "The principle value of the peremptory is that it helps produce fair and impartial juries." \textit{Id.} (citing Swain v. Alabama, 380 U.S. 202, 218-19 (1965)); Patrick J. Guinee, \textit{The Trend Toward the Extension of Batson to Gender-Based Peremptory Challenges}, 32 Duq. L. Rev. 833, 834 (1994) (stating that peremptory is used to eliminate extremes of partiality assuring litigators that case will be tried on evidence presented and not according to juror bias); Recent Case, 107 HARV. L. Rev. 1164, 1166-67 (1994) (commenting that \textit{Davis} court, in refusing to extend \textit{Batson} to religion, ignored First Amendment religious protection and sanctioned discrimination on religious grounds); Joseph Kelner & Robert S. Kelner, \textit{Peremptory Challenges}, N.Y. L.J., Dec. 28, 1993, at 123 (discussing trial lawyers' difficulty in carefully and properly using peremptory challenges); Reske, supra note 7, at 18 (claiming that limitations on peremptory challenges increases risk that biased persons will serve on juries).
\textsuperscript{13} See \textit{J.E.B.}, 114 S. Ct. at 1431 (O'Connor, J., concurring). In requiring counsel to provide explanations for excluding certain jurors, the Court is forcing them to articulate what is often inarticulable. \textit{Id.}; \textit{Swain}, 380 U.S. at 220 (noting that while challenges for cause
perience to identify and filter out jurors whom they believe may be harmful to their case. This is critical when an attorney deems a juror inappropriate, but cannot articulate a specific reason why, and is thus unable to support a challenge for cause. The nature of the peremptory challenge is somewhat arbitrary in that it can be used by attorneys without supplying concrete reasons for the exclusion of a potential juror.

B. History

The peremptory challenge is rooted in early English common law, spanning from the Ordinance for Inquests, through Blackstone’s era, to the present day in the United States. Although permit rejection of jurors on narrowly specified, provable and legally cognizable basis of partiality, peremptory challenges permit rejection for real or imagined partiality that is less easily designated or demonstrable (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1897)); Underwood, supra note 2, at 771. The peremptory challenge is important to the litigating parties because it gives added assurance of an accurate verdict by “resolving doubts in favor of exclusion.” Id.; Mark Curriden, The Death of the Peremptory Challenge, 80 A.B.A. J., Jan. 1994, at 62. “Throughout history, lawyers have been allowed to use their peremptory strikes to remove people who are likely to be predisposed.” Id. at 64. “No one likes discrimination, but this case comes down to whose rights should be given the most protection in court. The error being made is that we are giving more rights to the jurors not to be discriminated against than we are to a defendant to select a fair and impartial jury.” Id. (quoting Professor Randolph Stone, ABA Criminal Justice Section Chair). “Every time you use a strike, you are choosing one person over another. That’s discrimination. But that doesn’t mean we should abandon what has worked for hundreds of years.” Id. at 65. (quoting Lois N. Beasfield, Assistant Attorney General).

See Guinee, supra note 12, at 834 (explaining that attorneys use prior experiences when exercising peremptory challenges); Patricia F. Kaufman, The Beginning of the End of Peremptory Challenges: Georgia v. McCollum, 112 S. Ct. 2348 (1992), 16 HARv. J.L. & PUB. POL’Y 287, 292-93 (1993) (stating that peremptories are sole means of eliminating hidden partiality); Reske, supra note 7, at 18 (limiting peremptories means greater chance of having biased jurors); see also United States v. Hinojosa, 958 F.2d 624, 632 (5th Cir. 1992) (holding that trial judge does not abuse discretion in allowing exclusion of juror if that person’s education is insufficient for legal issues at stake).

See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1431 (1994) (O’Connor, J., concurring) (stating that just because attorney’s reason for excluding will not satisfy requirements for challenge for cause does not mean exclusion is not justified); Reske, supra note 7, at 18 (noting that essence of challenge is its ability to be utilized without judicial inquiry).

J.E.B., 114 S. Ct. at 1431 (O’Connor, J., concurring); Swain v. Alabama, 380 U.S. 202, 220 (1965) (noting that peremptory allows exclusion for real or perceived cause which lawyer cannot easily designate or demonstrate); BLACKSTONE’S COMMENTARIES ON THE LAW 907 (Bernhard C. Gavit, ed., 1941) (stating that peremptory is arbitrary type of challenge).

See Swain, 380 U.S. at 213.

BLACKSTONE’S COMMENTARIES ON THE LAW, supra note 16, at 907 (describing function of peremptory challenge).

See J.E.B., 114 S. Ct. at 1431 (O’Connor, J., concurring). “The peremptory’s importance is confirmed by its persistence: it was well established at the time of Blackstone and continues to endure in all the States.” Id. (citing Holland v. Illinois, 493 U.S. 474, 481 (1990)); see also Georgia v. McCollum, 112 S. Ct. 2348, 2355 (1992) (noting very old credentials of the peremptory challenge and long and widely held belief in its necessity to trial process); Powers v. Ohio, 499 U.S. 400, 429 (1991). The Court stated:
not explicitly granted by the Constitution, courts have deemed the peremptory challenge a necessary part of jury selection throughout the judicial history of the United States. Arguably, the usefulness of the peremptory challenge has been proven by its longevity.

On the other hand, allowing blatant discrimination during the voir dire should not be tolerated. Boundaries need to be set to prevent abuse of the peremptory challenge. Although limitations are necessary, altering such a long-standing practice of the law should be done slowly and carefully. Nevertheless, in just the past ten years, the United States Supreme Court has narrowed and severely limited the peremptory challenge. Even though there are substantial benefits to preventing discrimination, to do so at the expense of impartial juries may be counter-productive.

Last term, in *Holland*, we noted that "[t]he tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, . . . was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, . . . was recognized in an opinion by Justice Story to be part of the common law of the United States, . . . and has endured through two centuries in all the states . . . ."

*Id.* (citing *Holland*, 493 U.S. at 481); see also *Swain*, 380 U.S. at 212-19 (giving full and detailed account of long history and evolution of peremptory challenge in United States and England and its continuing significance in law of United States). *Blackstone’s Commentaries On The Law*, supra note 16, at 907 (describing functions of peremptory challenges and illustrating their long history).

20 See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (stating that persistence and use of peremptories demonstrates that they are necessary (citing *Lewis v. United States*, 196 U.S. 370 (1892))).

21 See *Dunnigan*, supra note 11, at 364. "Despite its long standing existence, the unqualified use of peremptory challenges is not ‘essential to the fairness of trial by jury.’" *Id.* (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)); supra notes 16-17 and accompanying text (describing history and use of peremptory challenge).

22 See *Underwood*, supra note 2, at 727 (stating that exclusion based on race is harmful not only to jurors but to society as well).

23 *Id.*


26 See *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1433 (1994) (O’Connor, J., concurring) (expressing concern over characterization of criminal defendant as state actors and impact this has on peremptory challenges).
II. **Batson v. Kentucky, The First Substantial Limitation**

In the landmark 1986 case of *Batson v. Kentucky*, the Supreme Court placed the first serious limitations on the use of the peremptory challenge. In *Batson*, the prosecutor used peremptory challenges to exclude the only four black venire members, forcing a black defendant to face an all-white jury. The Court held that, although prosecutors may use peremptory challenges in order to obtain favorable juries, the Equal Protection Clause of the Fourteenth Amendment forbids the use of peremptory challenges based solely on race. This protection applies to both the defend-

27 *Batson*, 476 U.S. at 82 (stating that evidentiary burden placed on criminal defendant claiming denial of equal protection through prosecutor's use of peremptory challenges must be re-examined); cf. *Swain*, 380 U.S. at 224-26 (requiring showing that prosecutor engaged in pattern of discriminatory challenges), overruled by *Batson* v. Kentucky, 476 U.S. 79, 89 (1986).

Although *Batson* was the first U.S. Supreme Court case prohibiting discriminatory uses of peremptory challenges, such discrimination had already been found to violate the state constitutions of California and Massachusetts. *See* People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978) (holding that defendant's right to trial by jury drawn from a representative cross-section of the community was violated); Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass. 1979) (stating that prosecutor's exclusion of witnesses was race-based, therefore violating defendant's right to trial by jury fairly drawn from community), cert. denied, 444 U.S. 881 (1979); see also Dunnigan, *supra* note 11, at 355 (stating that *Batson* overruled *Swain*, which required defendant to show pattern of discrimination, and limited use of peremptories by prohibiting race-based challenges).

28 See *Batson*, 476 U.S. at 83. Prior to *Batson*, although the Court technically held that purposeful racial discrimination in jury selection was violative of equal protection, it severely limited a party's ability to support such a finding. *Swain*, 380 U.S. at 224. According to the Court in *Swain*, for criminal defendants to show purposeful discrimination, they would have to show that the particular prosecutor in the case had systematically excluded black jurors in a long pattern of cases. *Id.* The Court also held that the defendant is not entitled to have a jury that contains a number of minority members proportional to the number of minorities in the community. *Id.* at 208; *see also* Hernandez v. New York, 500 U.S. 352, 372-73 (1991) (O'Connor, & Scalia, JJ., concurring) (stating that challenges which merely have disproportionate effects on jury are not sufficient for equal protection violations); Strauder v. West Virginia 100 U.S. 303, 305 (1880) (holding that state statute allowing only white men on juries violated Fourteenth Amendment's Equal Protection Clause); cf. *J.E.B.*, 114 S. Ct. at 1429 (noting strikes based on characteristics disproportionately associated with one gender can be appropriate absent showing of pretext).

For criticism of the *Swain* decision, see McCray v. New York, 461 U.S. 961, 963-70 (1983) (Marshall, J., dissenting from denial of certiorari) (stating that *Swain* is inconsistent with other showings of prima facie violation and imposes nearly insurmountable burden on defendants); *Swain*, 380 U.S. at 231-47 (Goldberg, J., dissenting) (stating that Court's decision imposes additional barriers to elimination of jury discrimination).


30 *Batson*, 476 U.S. at 89 (referring to prosecutor's use of peremptory challenge). *See* 18 U.S.C. § 243 (1988). "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state on account of race, color or previous condition of servitude." *Id.*; Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)
Ant and the excluded juror.\textsuperscript{31} Equal Protection of the law guarantees that the defendant will not face a jury that has been racially stacked against him, and that a juror will not be excluded solely based on race.\textsuperscript{32} Although the majority in \textit{Batson} stated that its holding would not ruin the effectiveness of peremptory challenges,\textsuperscript{33} the dissenting Justices believed that the challenge would suffer grave damage.\textsuperscript{34}

Chief Justice Warren Burger, dissenting in \textit{Batson},\textsuperscript{35} criticized the Court's failure to consider the important function served by the peremptory challenge.\textsuperscript{36} The use of these challenges by attorneys, without explanation or cause, has long been regarded as a means of strengthening our jury system.\textsuperscript{37} The peremptory chal-

\textsuperscript{32} Id.
\textsuperscript{33} Batson, 476 U.S. at 98-99. "We do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice." Id.
\textsuperscript{34} Id. at 112-34 (Burger, C.J., dissenting) "[T]o permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge to collapse into the challenge for cause.'" Id. (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)); see also \textit{Batson}, 476 U.S. at 134-39 (Rehnquist, J., dissenting). The dissenting Justices particularly feared that the rule on impermissible uses of peremptory challenges might be extended to other bases such as sex, age, and religion. Id. at 124 (Burger, C.J., dissenting). The dissenting Justices also feared that the limitation on peremptory challenges would be extended to other parties in the lawsuit, such as defense attorneys. Id. at 119.
\textsuperscript{35} Id. at 112 (Burger, C.J., dissenting) (noting peremptory challenges based on any classification could be objectionable under equal protection scrutiny).
\textsuperscript{36} Batson, 476 U.S. at 119 (Burger, C.J., dissenting). Chief Justice Burger recognized that "'[t]he right of [the] challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.'" Id. (quoting W. Forsyth, HISTORY OF TRIAL BY JURY 175 (1852). Chief Justice Burger further noted that "'[t]he effect of the Court's decision ... will be to force the defendant to come forward and 'articulate a neutral explanation,' for his peremptory challenge, a burden he cannot probably meet." Id. at 129; see also Guinee, \textit{supra} note 12, at 848 (concluding that \textit{Batson} should remain sole limitation on peremptory challenges); Underwood, \textit{supra} note 2, at 760 n.159.
\textsuperscript{37} See \textit{Batson}, 476 U.S. at 121. "Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system ...." Id.; see also Babcock, \textit{supra} note 30, at 555. In discussing \textit{Swain}, the author states that "the critical importance of the peremp-
The peremptory challenge allows both sides to eliminate extremes of partiality from the jury and grants them the opportunity to ensure that the chosen jurors will decide the case only on the basis of the evidence presented.

Chief Justice Burger also argued that if Batson was decided on Equal Protection grounds rather than Sixth Amendment grounds, then race should not be the only limitation placed on the peremptory challenge. Burger predicted that every challenge could be subjected to objection on the basis that, because it excluded a potential juror who had some characteristic not shared by the remaining members, it constituted a "classification" subject to equal protection scrutiny. In theory, most potential jurors could establish at least one unique trait that distinguishes them.


Id. (explaining rationale of peremptory challenge).

See id. at 118 (Burger, C.J., dissenting) (noting Batson Court based decision on equal protection grounds); Strauder v. West Virginia, 100 U.S. 303, 310-12 (1880). The Strauder Court held that the State denied a black defendant equal protection of the laws when it put him on trial before a jury from which the prosecutor purposefully excluded members of his race. Id. The Court further noted that this type of discrimination was exactly the type that the then recently ratified Fourteenth Amendment sought to eliminate. Id. Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. Id.; see also Martin v. Texas, 200 U.S. 316, 319 (1906) (noting that defendant has right to be tried by jury whose members are selected pursuant to nondiscriminatory criteria).

Batson, 476 U.S. at 112 (Burger, C.J., dissenting) (noting petitioner specifically disclaimed any reliance on Equal Protection, instead basing his claim on Sixth Amendment, although Court decided on Equal Protection grounds); see also U.S. CONST. amend. VI. "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 . . ."; cf. Peters v. Kiff, 407 U.S. 493, 496 (1972). In Peters, the Court held that race-based jury selection violates the criminal defendant's right to due process of law, even when the Sixth Amendment jury right does not apply. Id.; DeStefano v. Woods, 392 U.S. 631, 632 (1968) (noting right to jury trial extends to serious criminal contempts).


Id.; "That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge on the basis of race." Id. (Burger, C.J., dissenting).

from the non-excluded jurors, thus creating grounds for appeal.\textsuperscript{44} Although \textit{Batson} has not been extended this far, Justice Burger accurately predicted that the \textit{Batson} holding would reach well beyond its originally intended limitation.\textsuperscript{45}

III. THE EXPANSION OF \textit{BATSON}

The \textit{Batson} Court's holding originally was limited to the discriminatory use of peremptory challenges by prosecutors in criminal cases where the juror was of the same race as the defendant.\textsuperscript{46} In 1991, the Supreme Court expanded the \textit{Batson} limitation to cases where the defendant and the excluded juror are not of the same race.\textsuperscript{47} This limitation was further expanded just two months later to apply in civil cases as well as in criminal cases.\textsuperscript{48} In 1992, the Supreme Court held that defense attorneys are also barred from using race-based peremptory challenges.\textsuperscript{49} Most recently, the Supreme Court extended the \textit{Batson} limitation beyond race to include gender as well.\textsuperscript{50}

\textbf{A. Limitation Applies Even When Defendant and Juror Are Of Different Races}

In \textit{Powers v. Ohio},\textsuperscript{51} the Supreme Court broadened the application of the rule established in \textit{Batson}.\textsuperscript{52} The \textit{Powers} Court held that the Equal Protection Clause prohibits race-based exclusion of jurors, even when the potential jurors and the defendant are not

\textsuperscript{44} See \textit{McCray v. Abrams}, 750 F.2d 1113, 1138-41 (2d Cir. 1984) (Meskill, J., dissenting), \textit{cert. denied}, 471 U.S. 1097 (1984) (stating that it is probable that every peremptory challenge could be objectionable on basis that, because it excluded venireman who had some characteristic not shared by remaining members of venire, it constituted "classification subject to equal protection scrutiny") \textit{Id.}

\textsuperscript{45} See supra note 7 and accompanying text (discussing increasing limits on peremptories following \textit{Batson}); \textit{see also J.E.B. v. Alabama ex rel. T.B.}, 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring) (explaining that although something is gained by prohibiting discriminatory peremptory challenges, in this instance, more is lost).


\textsuperscript{48} \textit{Edmonson v. Leesville Concrete Co., Inc.}, 500 U.S. 614, 631 (1991) (stating that \textit{Batson} applies in civil context).


\textsuperscript{50} \textit{J.E.B.}, 114 S. Ct. at 1430.


\textsuperscript{52} \textit{Id.} (holding that \textit{Batson} rule applies even when defendant and excluded juror are of different races).
of the same race. In *Powers*, the criminal defendant gained third party standing to assert the equal protection rights of the jurors. The Court reasoned that even though the defendant was not being directly harmed, a discriminatory peremptory challenge was impermissible because it condoned violation of the Constitution, cast doubt upon the judicial system, and allowed the rights of excluded jurors to remain unvindicated. The rights of the jurors were upheld using an Equal Protection analysis. The *Powers* decision significantly shifted the focus of the *Batson* protection to serve the rights of the jurors and not just the rights of the litigants. The *Powers* Court opened the door to claims based on any violation of the jurors’ Equal Protection rights, and it eventually allowed limits on peremptory challenges to be applied to defense counsel.

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53 Id. at 415. “To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.” Id.

54 Id. at 410-16 (determining criminal defendant meets third party standing requirements to raise equal protection claim based on discriminatory exclusion of jurors from panel because defendant suffered injury in fact, shares common interest in outcome with juror and juror is hindered from protecting own interests); see Singleton v. Wulff, 428 U.S. 106, 112 (1976) (stating that to raise third party rights litigant must have “injury-in-fact”); Eiseinstadt v. Baird, 405 U.S. 438 (1972) (granting standing to doctor fighting for right of third parties to use contraceptives).

55 *Powers*, 499 U.S. at 412 (stating active discrimination by prosecutor through use of peremptory challenge violates Constitution and lead to cynicism regarding jury's impartiality and ability to adhere to law); *Batson*, 476 U.S. at 85-86 (holding that exclusion of black citizens from jury violates Fourteenth Amendment); *Swain*, 380 U.S. at 223 (stating that purposeful exclusion of blacks as jurors violates Equal Protection Clause).

56 See *Powers*, 499 U.S. at 412 (finding that wrongful exclusion of jurors based on race casts doubts on court's ability to adhere to law); *Batson*, 476 U.S. at 87-88 (stating that purposeful exclusion of black persons from juries undermines confidence in justice system); Dunnigan, supra note 11, at 358 (suggesting that discriminatory jury selection might undermine public confidence in fairness of judicial system).

57 *Powers* v. Ohio, 499 U.S. 400, 413 (1991) (stating that barriers to suit by juror are too great); Singleton v. Wulff, 428 U.S. 106, 115-16 (1976) (stating that ability of third party to assert own rights is factor in determining standing).

58 See *Powers*, 499 U.S. at 415-16 (stating that Fourteenth Amendment mandates eliminating discrimination from all state acts); *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting). Chief Justice Burger stated that *Batson* did not use conventional Equal Protection analysis because it was limited to race. Id. at 123-24. If conventional analysis were to be applied, it would include exclusions on many other bases, including but not limited to sex, age and religion. Id.

59 *Batson*, 476 U.S. at 124-25 (Burger, C.J., dissenting). Chief Justice Burger points out that the Court failed to express whether the Constitution imposes a limit on the peremptory challenge's use by defense counsel. Id. However, it is clear that the majority's holding limits both prosecutors and defense attorneys. Id. at 126.
B. Batson Applies to Civil Cases and to Criminal Defendants

In Edmonson v. Leesville Concrete Company, Inc., the Supreme Court held that litigants in civil cases may not exercise race-based peremptory challenges. In Georgia v. McCollum, the Supreme Court held that criminal defendants are also barred from using peremptory challenges based on the race of potential jurors. These cases greatly expanded Batson’s holding which was originally limited to the use of peremptory challenges by the prosecution in criminal cases. The Court found both civil litigants and criminal defendants to be “state actors,” bringing their use of peremptory challenges within the control of the Equal Protection Clause. Thus, these two cases further shifted the fo-

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61 Id. at 616. The Edmonson Court’s attention to the rights of excluded jurors picked up a theme that was first sounded in Strauder v. West Virginia, 100 U.S., 303, 307-08 (1880) (finding that Fourteenth Amendment supplies right to exemption from unfriendly legislation, including legal discrimination); Underwood, supra note 2 at 726 n.9 (citing Carter v. Jury Commission, 306 U.S. 320 (1970) as only decision prior to 1991 that expressly stated that potential jurors have right to be free from race discrimination during jury selection).
63 Id. at 2359 (finding that defendants have obligation to supply racially neutral explanation for peremptory challenges if state demonstrates prima facie case of racial discrimination).
64 See Batson v. Kentucky, 476 U.S. 79, 98-99 (1986) (stating that prosecutor is limited in use of peremptory challenge); see also J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1421 (1994). “Since Batson, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory.” Id. “We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state sponsored group stereotypes rooted in, and reflective of, historical prejudice.” Id.; McCollum, 112 S. Ct. at 2352-53 (including Edmonson and McCollum itself in “unbroken chain of decisions” rendered by Court in attempt to prevent racial discrimination in jury selection procedures); Powers v. Ohio, 499 U.S. 400, 402 (1991) (expanding harm of discriminatory use of peremptory challenges to not only excluded jurors and court system but to community at large); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618 (1991). The Court referred to Powers as part of the culmination of a “century of jurisprudence dedicated to the elimination of racial prejudice within the jury selection process”. Id. at 618; Curriden, supra note 13, at 63 (citing Edmonson and McCollum in list of cases showing expansion of Batson); Andrew G. Gordon, Note, Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection, 62 Fordham L. Rev. 685, 691-93 (1993) (discussing Batson’s progeny).
65 McCollum, 112 S. Ct. at 2354-55. Racial discrimination only violates the Constitution when attributable to state action. Id. at 2354. Thus, for an Equal Protection claim to be raised in McCollum, the Court had to find that the criminal defendant was a state actor. Id. The factors considered in finding a party to be a state actor are: the extent of the actor’s reliance on governmental assistance, whether the actor performs “a traditional governmental function,” and whether the presence of governmental authority aggravates the injury caused. Id. at 2355. The Court held that a defense attorney exercising peremptory challenges satisfies these state actor requirements. Id.
66 Id. at 2354. The Court in McCollum found the state action required by the Equal Protection Clause by relying on the two part analysis it used in Edmonson. Id. The first step asked “whether the claimed [constitutional] deprivation has resulted from the exercise
cus away from protection of the litigants rights towards protection of the jurors’ rights.

C. Extension to Gender

In April 1994, the Supreme Court extended Batson to prohibit the use of discriminatory peremptory challenges based on gender in J.E.B. v. Alabama ex rel. T.B. In J.E.B., the State of Alabama, acting on behalf of a mother in a paternity suit, used nine of its ten peremptory challenges to exclude men from the jury, resulting in an all-female jury. The Court reasoned that the State’s exclusion of males from the jury, solely because of their gender, violated their right to equal protection under the Constitution.

The J.E.B. Court expanded the restrictions placed on lawyers during voir dire, but stated that this decision did not implicitly eliminate all peremptory challenges. It appears that it may be difficult, after this latest expansion of Batson, to stop the further erosion of the peremptory challenge; however, courts must find a way to preserve this most important challenge.

Justice Sandra Day O’Connor’s concurrence in J.E.B. stated that the extension of Batson to gender should be limited to the state’s use of peremptory challenges. Justice O’Connor noted of a right or privilege having its source in state authority.” Id. (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982)). The McCollum Court held that the first step was satisfied because peremptory challenges were established by state law. Id. at 2355. The second step asks whether the party causing the deprivation can be described as a state actor. Id. Characteristics to be considered are the extent to which the actor relies on governmental assistance, if the actor is performing a “traditional governmental function,” and whether the governmental authority involved aggravates the injury suffered. Id. The Court found that criminal defendants rely heavily on governmental assistance, that peremptory challenges are a traditional governmental function, and that the courtroom setting could greatly intensify the effects felt from discrimination. Id. at 2355-56.

67 See J.E.B., 114 S. Ct. at 1430. The Court stated: "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.

68 Id. at 1421-22. 36 potential jurors were assembled, 12 males and 24 females. Id. After three jurors were removed for cause, the panel consisted of 33 jurors, 10 of whom were male. Id.

69 Id. at 1422.

70 Id. at 1421. The Court stated: “We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.” Id.

71 See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1429 (1994) (explaining that parties may still remove potential jurors whom they feel are less acceptable than others; however, gender cannot serve as reason for this removal).

72 Babcock, supra note 30, at 552 (stating that peremptory challenges serve functions that challenges for cause could not).

73 See J.E.B., 114 S. Ct. at 1433 (O’Connor, J., concurring). The state of Alabama brought suit on behalf of the petitioner, thus it truly was a “state actor” who made the
that extending *Batson* to gender would burden the state and federal trial process,\(^7^4\) limit the ability of counsel to act on gender based assumptions,\(^7^5\) and bring the Court a step closer to the elimination of peremptory challenges.\(^7^6\)

Chief Justice William Rehnquist dissented, stating that *Batson* should not be extended beyond race at all.\(^7^7\) He noted that race-based characteristics trigger the "strict scrutiny" standard of review,\(^7^8\) whereas gender-based classifications only trigger heightened scrutiny.\(^7^9\) Chief Justice Rehnquist stated that classifications based on gender are less harmful than those based on race.\(^8^0\)

challenges in question. *Id.* Justice O'Connor reaffirmed her position that it was a mistake for the Court to find civil litigants and criminal defendants to be state actors for equal protection purposes. *Id.*; see also Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982) (noting that state action was necessary for invoking Equal Protection Clause). *Id.*

\(^7^4\) See *J.E.B.*, 114 S. Ct. at 1432. (O'Connor, J., concurring). The addition of *Batson* related duties to already overburdened courts has been often used as another reason to limit *Batson*. *Id.*; Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 644 (1991) (Scalia, J., dissenting). "Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to side shows and less and less to the merits of the case." *Id.*; *Batson*, 476 U.S. at 131 (Burger, C.J., dissenting) (wishing luck to federal and state judges who will have to deal with additional procedural requirements); see also Guinee, *supra* note 12, at 845. "In practice, the expansion of *Batson* to embrace sex-based challenges will lengthen the voir dire, as virtually every strike may be challenged on the basis of suspected gender discrimination." *Id.*

\(^7^5\) See *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring) (stating that majority holding severely limits counsel's ability to act on intuition).

\(^7^6\) See *id.* at 1431 (discussing costs of extending *Batson* to gender); see also Reske, *supra* note 7, at 18. The author states that *Batson* and its progeny, including *J.E.B.*, are high stakes cases because there is no harmless error analysis when a peremptory challenge is found to be discriminatory. *Id.*; Curriden, *supra* note 13, at 64 (stating that value of peremptory strikes would be sacrificed if *Batson* were to be expanded). But see Guinee, *supra* note 12, at 845. There are some commentators who believe that it would be best to completely eliminate the peremptory challenge. *Id.* (citing Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369, 371 (1992)).


\(^7^8\) See *J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting) (stating that race-based classifications trigger strict scrutiny).

\(^7^9\) *Id.* (stating that gender-based classifications trigger heightened scrutiny); see also, e.g., Kadrmas v. Dickerson Pub. Sch., 487 U.S. 450, 459 (1988) (noting that heightened scrutiny has generally been applied to cases of gender-based and illegitimacy-based discrimination); Clark v. Jeter, 486 U.S. 456, 461 (1988) (discussing different levels of scrutiny applied to equal protection claims); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (stating that in order to pass heightened scrutiny test, must show that gender-based policy was necessary to achieve important governmental objective); Craig v. Boren, 429 U.S. 190, 197 (1976) (noting that classifications based on gender must serve significant government interests).

\(^8^0\) See, e.g., *Kadrmas*, 487 U.S. at 458-59 (stating that heightened scrutiny is less demanding standard of review than strict scrutiny); Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 977 (1st Cir. 1989) (stating that classifications based on sex only require heightened scrutiny).
He also argued that the costs of extending *Batson* to gender, such as longer trials, more complex appeals, and less control by litigants, outweigh any benefits.\(^8^1\)

Justice Antonin Scalia also dissented and noted that since all groups are subjected to peremptory challenges, no one group is denied equal protection.\(^8^2\) Justice Scalia argued that by unnecessarily extending *Batson* to gender, the Court would eventually extend *Batson* further than intended.\(^8^3\)

D. Possible Expansion to Religion

In May 1994, the Supreme Court declined to grant certiorari to *State v. Davis*,\(^8^4\) a Minnesota case which involved the exclusion of a juror by a peremptory challenge based on religion.\(^8^5\) In *Davis*, the prosecutor removed a black man from the jury and the defense objected on *Batson* grounds.\(^8^6\) The prosecutor was required to provide a race-neutral explanation for the challenge.\(^8^7\) The prosecutor explained that the potential juror was not stricken from the jury because of his race, but rather because he was a Jehovah's Witness.\(^8^8\) The court found that religious discrimination in jury

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\(^8^1\) *J.E.B.*, 114 S. Ct. at 1435.
\(^8^2\) *Id.* at 1437 (Scalia, J., dissenting). Just as the plaintiff in *J.E.B.* used its peremptory challenges to exclude men, the male defendant used all but one of his peremptory challenges to exclude women. *Id.* Thus, both men and women actually were treated equally. *Id.*; *see also*, e.g., *Powers v. Ohio*, 499 U.S. 400, 423-24 (1991) (Scalia, J., dissenting) (arguing that when a group, like all others, has been made subject of peremptory challenges, it has received equal treatment); *Batson v. Kentucky*, 476 U.S. 79, 137-38 (1986) (Rehnquist, J., dissenting) (stating that race-based strikes are permissible provided that no one race is singled out, all races being excluded equally).

\(^8^3\) *Id.*, 114 S. Ct. at 1439. Justice Scalia also referred to Burger's dissent in *Batson* (476 U.S. at 124), which listed many of the possible groups to which the *Batson* decision could extend. *Id.*

\(^8^4\) 504 N.W.2d 767 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994).

\(^8^5\) *See* United States v. Clemmons, 892 F.2d 1153, 1157 (3d Cir. 1989) (stating that striking potential juror because of religious affiliation is not violation of equal protection), cert. denied, 496 U.S. 927 (1990); *cf* *State v. Everett*, 472 N.W.2d 864, 869 (Minn. 1991) (holding that *Batson* limitation does not extend to age discrimination).

\(^8^6\) *Davis*, 504 N.W.2d at 768. The defendant claimed that the prosecutor struck the potential juror because of his race. *Id.*

\(^8^7\) *Id.* at 768; *see also* *Batson v. Kentucky*, 476 U.S. 79, 94 (1986). The Supreme Court stated that the prosecutor must demonstrate that permissible race-neutral criteria were used. *Id.* (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1971)).

\(^8^8\) *Davis*, 504 N.W.2d at 768. The prosecutor explained that "it was highly significant to the State . . . that the man was a Jehovah [sic] Witness. I have a great deal of familiarity with the sect of Jehovah's [sic] Witness. I would never, if I had a preemptory [sic] challenge left, strike or fail to strike a Jehovah [sic] Witness from my jury." *Id.* She explained that since Jehovah's Witnesses were reluctant to exert control over fellow humans, such persons would not make good jurors in criminal trials. *Id.*

In my experience . . . that faith is very integral to their daily life in many ways, many Christians are not. That was reinforced at least three times a week when he goes to
selection is not so severe a problem as to warrant extending *Batson*, thus further eroding the peremptory challenge system. The defendant was convicted and the Supreme Court denied certiorari.

Justice Ginsburg's concurrence in denial of certiorari provides some insight into the Court's view on religion-based peremptory challenges. She noted that the Minnesota Supreme Court had observed that a person's religion is not as obvious as his/her gender or race and that questions regarding a juror's religion during voir dire are usually considered improper. Restricting peremptory challenges based on less self-evident characteristics, such as religion, could lead to *Batson* type objections to peremptory challenges on an unlimited number of characteristics. The peremp-

church for separate meetings. The Jehovah [sic] Witness faith is of a mind that the higher powers will take care of all things necessary. In my experience Jehovah [sic] Witness are [sic] reluctant to exercise authority over their fellow human beings in the Court House.

Id. 89 Id. at 768. The Minnesota Supreme Court gave two main reasons for refusing to extend *Batson* to religion. Id. One reason was that the U.S. Supreme Court had not applied *Batson* to any area outside of race. Id. However, the Court did note that the U.S. Supreme Court would soon examine peremptory challenges based on gender (citing *J.E.B. v. Alabama ex rel. T.B.*, 113 S. Ct. 2330 (1994)). Id. The second reason was that religious affiliation is not as self-evident as race or gender. Id. at 771.

Prior discrimination based on religion in jury selection “is not as prevalent, or flagrant, or historically ingrained” as is discrimination based on race. Id. Thus, the Court reasoned, *Batson*’s extension to religion would unnecessarily erode the peremptory challenge while still failing to remedy any injustice to religious groups. Id.; see also *United States v. Clemons*, 892 F.2d 1153, 1156 (3d Cir. 1989). The Court explained that the defendant’s right to equal protection was not violated by the prosecutor’s strike of prospective jurors, even if the jurors were, in fact, black, where prosecutor subjectively believed a prospective juror to be of Asian-Indian origin and struck him because of uncertainty about his religious perspective. Id. 90 State v. Davis, 504 N.W.2d 767, 768 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994).


92 Id. at 2120 (Ginsburg, J., concurring) (stating that there are significant differences between religious affiliation and gender).

93 Id. But see id. at 2120-22 (Thomas, J., dissenting). Justice Thomas argued that in light of the *J.E.B.* decision (applying *Batson* to gender), *Batson* could very well be applied to other biases outside of race, such as religion. Id. *Batson* had previously been limited to race-based challenges, but Justice Thomas points out that once that wall was broken, no logical stopping point exists. Id. at 2121.

94 *Davis*, 114 S. Ct. at 2120; see also Lawrence S. Robbins, *High Court Sends Mixed Messages*, N.Y. L.J., July 11, 1994, at S1. The author notes: *J.E.B.* marks the Court's first extension of *Batson* to a classification other than race. It now remains to be seen whether *Batson* will be extended to peremptory challenges based on potential juror’s religion. Although the Court recently denied certiorari in a case involving just this issue, perhaps because of its reluctance to revisit the controversial area of peremptory challenges so soon after *J.E.B.*, a peremptory strike based on religion appears to violate the principle elaborated in *J.E.B.*, and in time the issue is likely to return to the Supreme Court.

Id.
tory challenge must be shielded from further restrictions which threaten its effectiveness. In order to preserve the peremptory challenge, the Court must decide against future expansion of Batson to religion.

IV. ARGUMENT AGAINST FURTHER EXPANSION

Batson was intended to recognize a person's right to be free from racial discrimination in the jury selection process. It was then expanded to include a prohibition of discrimination based on gender. It now appears that Batson is becoming a permanent roadblock to peremptory challenges, and subsequently, to the ability of litigants to select an impartial jury. The Supreme Court, having focused on the Constitution's Equal Protection Clause, may be systematically eliminating the peremptory challenge.

See, e.g., J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (stating that further limitations on peremptory challenges could erode this effective tool). Id. at 1430-33 (O'Connor, J., concurring) (agreeing with Court's decision to extend Batson to gender for government's use only, but arguing against further expansion). See Batson v. Kentucky, 476 U.S. 79, 89 (1986) (stating that State exercise of peremptory challenges is subject to Equal Protection Clause); see also Underwood, supra note 2, at 725-26. The argument that peremptory challenges based solely on race violates the criminal defendant's right to equal protection of the laws is frequently invoked for the ban on jury discrimination. Id. at 728 (stating that this argument is flawed since rights of jurors should be considered in this situation). Id. See J.E.B., 114 S. Ct. at 1427.

See Guinee, supra note 12, at 845; see also J.E.B., 114 S. Ct. at 1432 (O'Connor, J., concurring). "In extending Batson to gender we have added an additional burden to the stated and federal trial process and taken a step closer to eliminating the peremptory challenge. . . ." Id. See J.E.B., 114 S. Ct. at 1431 (O'Connor, J., concurring). "The principal value of the peremptory challenge is that it helps produce fair and impartial juries. Id. (citing Swain v. Alabama, 380 U.S. 202, 218-19 (1965)).

See Dunnigan, supra note 11, at 358. The Equal Protection Clause does not provide that all people shall be free from discrimination, but rather that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Id. (citing U.S. Const. amend. XIV, § 1). "The right to participate as a juror without reference to one's race is a federal right, guaranteed by the Fourteenth Amendment, and a defendant deprives jurors of that right when she challenges them solely because of their race." Id. at 359; see also Swain, 380 U.S. at 224 (stating that to establish violation of Equal Protection Clause in jury selection, defendant must show that there was pattern of repeated exclusion of members of particular race); Strauder v. West Virginia, 100 U.S. 303, 309 (1880) (laying foundation for Batson and its progeny by holding that state denied African-American his Equal Protection rights by trying him before jury that had purposely excluded members of his race).

See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring). Justice O'Connor stated that "[i]n extending Batson to gender we have added an additional burden to the state and federal trial process, taken a step closer to eliminating the peremptory challenge, and diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes." Id.; State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (explaining that further extending Batson would further complicate and
Although it would be optimal to fully preserve the equal protection rights of the jurors, it is not always possible to do so because their rights may conflict with the need of the litigants to select impartial juries through the use of peremptory challenges. Peremptory challenges work by allowing parties to exclude jurors whom they feel may be predisposed against them. Sometimes this decision is reached by relying on group generalizations regarding the potential juror. Even by thorough questioning, attorneys cannot always uncover jurors' true beliefs. Group characterizations or generalizations may be the only factor an attorney has to rely on. From a statistical standpoint it may be substantiated that certain gender, religious, or racial groups favor particular types of litigants. Although such generalizations are often not true, parties to a case must often rely on such generalizations in an attempt to select a jury that is most favorable to them. Since cases can be won or lost by the vote of one juror, in some situations litigants should be able to use any juror characteristics available to them in order to decide whether to exclude a juror.

But see J.E.B., 114 S. Ct. at 1429. The Court explained that this latest decision was not intended to eliminate the use of peremptory challenges altogether. Id. "Parties may still remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias." Id.

See Curriden, supra note 13, at 62. The author quotes University of Chicago law professor Randolph Stone, who states that although no one likes discrimination, it comes down to a question of whose rights deserve the most protection. Id.

See Babcock, supra note 30, at 549-58 (discussing purpose and function of peremptory challenges).

See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring). "We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to convict than male jurors." (citing R. Hastie, et al., Inside the Jury 140-41 (1983)).

See Batson v. Kentucky, 476 U.S. 79, 128 (1986) (Burger, C.J., dissenting) (citing Turner v. Murray, 476 U.S. 28, 36-37 (1986)) (stating that jurors are reluctant to reveal prejudices and that excluding jurors of race different than defendant's may be only means of eliminating such prejudice).

See id. at 124 (Burger, C.J., dissenting) (citing United States v. Leslie, 783 F.2d 541, 554 (5th Cir. 1986)). "To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." Id. at 123.

See Batson, 476 U.S. at 128 (Burger, C.J., dissenting) (discussing juror's reluctance to discuss prejudices; see also J.E.B., 114 S. Ct. at 1431 (O'Connor, J., concurring) (stating that attorneys must sometimes rely on their instincts in exercising peremptory challenges).

See Brown, supra note 1, at 119-25 (explaining that individual's race or gender may play part in how they interpret case).
Sometimes, even without statistical support, the potential ramifications may be such as to warrant the use of generalizations.\(^{111}\)

The problem with the use of peremptory challenges made based on such classifications is that the Equal Protection rights of those jurors might be violated.\(^{112}\) Thus, the needs of the litigants to use certain classifications to help them select favorable juries conflicts with the need to protect the rights of those jurors.\(^{113}\)

One way to remedy this conflict is to balance the needs of the litigants to select a favorable jury against the Equal Protection rights of the jurors.\(^{114}\) In executing such a balancing test, courts should consider the potential gain or loss to the litigants,\(^{115}\) the degree of harm that may be inflicted upon potential jurors,\(^{116}\) the needs of the state to protect the litigants\(^{117}\) as well as the jurors,\(^{118}\) and the proper functioning and legitimacy of the judicial system as a whole.\(^{119}\)

To illustrate how this balancing test would work, consider the example of a defendant in a criminal case who wishes to exclude a juror based on the juror's age, religion, or gender. In balancing the rights of the defendant against those of the juror, it is apparent that the defendant has his liberty at stake, whereas the harm to the juror would most likely consist of embarrassment or frus-

\(^{111}\) Id.; see also Babcock, supra note 30, at 554. "[W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Id.

\(^{112}\) See Underwood, supra note 2, at 726.

\(^{113}\) Cf. J.E.B., 114 S. Ct. at 1430 (O'Connor, J., concurring) (discussing impact these limitations have on litigants).

\(^{114}\) Id. at 1426, 1431.

\(^{115}\) See id. at 1431 (asserting that peremptory challenge is fundamental part of selecting impartial juries); Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring) (stating that protecting jurors over defendants is serious misordering of priorities, leaving defendants with less means of protecting themselves).

\(^{116}\) See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1428 (1994). "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." Id.; Powers v. Ohio, 499 U.S. 400, 406-07 (1991) (holding that race-based exclusion violates juror's right to participate in civic life); Batson, 476 U.S. at 87 (stating that United States Supreme Court has long recognized that denial of jury service based on race is unconstitutional).

\(^{117}\) See Batson v. Kentucky, 476 U.S. 79, 86 (1986). "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Id.

\(^{118}\) See Curriden, supra note 13, at 63 (stating that discriminatory challenges subject individual juror to public discrimination) (quoting Georgia v. McCollum, 112 S. Ct. 2346 (1992)).

\(^{119}\) See Curriden, supra note 13, at 63 (stating that discriminatory challenges undermine public confidence in judicial system).
tration. Although the state should not seek to promote this type of harm to jurors, the interest in protecting the defendant's liberty outweighs the need to protect the juror. In contrast, civil litigants will usually only suffer financial harm from a negative jury verdict. In such a situation, it seems that the rights of the litigants and the rights of the jurors are more balanced. Depending on the facts of each case, such as the amount a litigant stands to lose and the effect that loss will have upon a litigant, the balance may tip in favor of either the litigants or the juror. It seems more likely that a juror's rights will outweigh a litigant's rights in a civil case than in a criminal case. This difference in treatment is justified because the litigants are in different situations, the criminal defendant standing to lose much more than a civil litigant.

The peremptory challenge was designed to protect the rights of the litigants. Their rights are of paramount importance because the litigants will be directly affected by the outcome of the case.

120 See J.E.B., 114 S. Ct. at 1437 (Scalia, J., dissenting) (stating that no harm is done to female litigant who is struck because she is not well disposed to litigant's case); State v. Davis, 504 N.W.2d 767, 770 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994). "The fact that some unbiased jurors may be excused in the process is an affordable price to pay for removing doubts about a particular juror's impartiality and competence, especially when the vote of one biased juror can make a critical difference." Id.

121 See supra note 118 (describing effects on juror).


123 See J.E.B., 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting). "Under the Equal Protection Clause, these differences mean that the balance should tilt in favor of peremptory challenges when sex, not race, is the issue." Id.

124 Contra Underwood, supra note 2, at 755 (stating that limitations should apply equally to criminal and civil litigants).

125 See Underwood, supra note 2, at 745 (suggesting this as a possible argument but disagreeing with its validity).

126 See J.E.B., 114 S. Ct. at 1432 (O'Connor, J., concurring). "Limiting the accused's use of the peremptory is a serious misordering of our priorities, for it means 'we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors who faces imprisonment or even death.'" Id. (quoting Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring)). See also Goldwasser, supra note 8, at 808. The author states, "[b]ecause of the protective function of the jury itself, the peremptory challenge in criminal trials 'has long been recognized primarily as a device to protect defendants.'" Id. (quoting Swain v. Alabama, 380 U.S. 202, 242 (1965)).

127 J.E.B., 114 S. Ct. at 1430. "Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system." Id. Cf. id. at 1432 (O'Connor, J., concurring). "The peremptory challenge is a paramount right to the accused." Id.
Jurors, on the other hand, suffer few, if any, consequences from exclusion, and may even desire to be excluded.\textsuperscript{128}

Given the purposes of the peremptory challenge and its function within our judicial system,\textsuperscript{129} the Supreme Court's limitations\textsuperscript{130} and potential limitations\textsuperscript{131} present serious threats to the very existence of the challenge.\textsuperscript{132} As the Court limits the ability of the parties to exclude potential jurors, it is more likely that a biased or ill-suited juror will be chosen.\textsuperscript{133} Excluding an unbiased juror is a small price to pay for removing doubts about a particular juror's impartiality, especially when the vote of one biased juror can make a critical difference.\textsuperscript{134}

\textsuperscript{128} See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1431-32 (1994) (O'Connor, J., concurring); But see J.E.B., 114 S. Ct. at 1428 (stating that all potential jurors have right not to be excluded summarily based on discriminatory presumptions); Batson, 476 U.S. at 89. The Court stated that "[t]he State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause." Id.; see also Powers v. Ohio, 499 U.S. 402, 407 (1991) (explaining that privilege of jury duty allows significant participation in democratic process); Underwood, supra note 2, at 743. "Whether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." Id. (quoting Carter v. Jury Commission, 396 U.S. 320, 330 (1970)).

\textsuperscript{129} State v. Davis, 504 N.W.2d 767, 769 (Minn. 1993). "We can not hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Id. (quoting Swain v. Alabama, 380 U.S. 202, 222 (1965)).

\textsuperscript{130} See J.E.B., 114 S. Ct. at 1430 (holding that the limitation extends to gender as well); Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992) (stating that criminal defendants are prohibited from excluding potential jurors solely on basis of race); Edmondson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (further expanding limitation to civil litigants); Powers v. Ohio, 499 U.S. 400, 409 (1991) (prohibiting exclusion even when juror and defendant are of different races); Batson, 476 U.S. at 89 (prohibiting exclusion solely on basis of race).

\textsuperscript{131} See supra notes 65-69 and accompanying text (examining J.E.B. decision prohibiting use of peremptory challenge based on gender). But see supra notes 82-89 and accompanying text (discussing Davis decision denying extension of Batson to religious affiliation).

\textsuperscript{132} See Davis, 504 N.W.2d at 769 (stating that due to value of peremptory challenge court cannot examine reason behind every peremptory challenge); see also J.E.B. 114 S. Ct. 1430 (O'Connor, J., concurring).

\textsuperscript{133} See J.E.B., 114 S. Ct. at 1431 (O'Connor, J., concurring). Justice O'Connor stated, "We also increase the possibility that biased jurors will be allowed unto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic." Id. The principal value of the peremptory challenge is that it helps produce fair and impartial juries. Id. at 1430; Swain, 380 U.S. at 220 (explaining that essential nature of peremptory challenge is that it can be exercised without having to justify it).

\textsuperscript{134} See Underwood, supra note 2, at 728-36 (arguing that racial composition of jury may or may not affect verdict); J.E.B., 114 S. Ct. at 1432 (O'Connor, J., concurring). Although every citizen has a fundamental right to have the opportunity to be selected to sit on a jury, and although discrimination is harmful in whatever form it appears, the fact still remains that the injury to the litigants far exceeds the injury to a particular juror who is unfairly excused. Id. This is particularly true in the case of a defendant in a criminal trial. Id.
The peremptory challenge is an important and essential tool in litigation, where it serves an imperative function in selecting a fair and impartial jury. The usefulness of this challenge has been seriously diminished by the limitations placed upon it. Although reducing discrimination is an extremely important goal, the cost of meeting this goal should not reduce the likelihood of obtaining a fair and impartial jury. Since the litigants themselves have much more at stake than the jurors, justice requires that no further limitations be placed on the use of the peremptory challenge.

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