Once More into the Breach: The Peremptory Challenge After Edmonson v. Leesville Concrete Co.

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ONCE MORE INTO THE BREACH: THE PEREMPTORY CHALLENGE AFTER EDMONSON v. LEESVILLE CONCRETE CO.

The Constitution guarantees certain civil litigants the right to have their cases heard before a jury.\(^1\) In the furtherance of justice, the law requires that the jury be impartial.\(^2\) To ensure the vitality of this interest, the peremptory challenge was created by statute\(^3\) as a nonconstitutional\(^4\) device whereby litigants may remove, at voir dire,\(^5\) potential jurors suspected of bias.\(^6\) Federal

1. U.S. Const. amend. VII. "[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." \textit{Id.; see} Fed. R. Civ. P. 38. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." \textit{Id.; see also} Hodges v. Easton, 106 U.S. 408, 412 (1882) (right to jury trial is basic and fundamental right of our system of jurisprudence protected by Seventh Amendment).

2. \textit{See} Kiernan v. Van Schaik, 347 F.2d 775, 778 (3d Cir. 1965). The Seventh Amendment preserves the right to a jury trial for civil matters, but unlike the Sixth Amendment, it does not expressly provide for jury impartiality. \textit{Id.} The impartiality of the jury "is inherent in the requirement of the fifth amendment that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law'". \textit{Id.; see also} McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (plurality opinion) (stating that "[o]ne touchstone of a fair trial is an impartial trier of fact").

3. 28 U.S.C. § 1870 (1988). "In civil cases each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional challenges. . . ." \textit{Id.}


5. \textit{See} Black's Law Dictionary 1575 (6th ed. 1990). Voir dire is the term which "denote[s] the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." \textit{Id.} It is during voir dire that the attorneys exercise their right to challenge the prospective juror. Jon M. Van Dyke, \textit{Jury Selection Procedures: Our Uncertain Commitment to Representative Panels} 139 (1977).

6. \textit{See} Batson v. Kentucky, 476 U.S. 79, 87 (1986). The Court stated that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and
rules allow civil litigants a total of three peremptory challenges. Although peremptory challenges may be exercised without a stated reason, a challenge for cause requires a specified bias in order to be sustained.

In recent years, the peremptory challenge has come under siege by those who view it as a means of perpetuating racial discrimination in the judicial system. Because the peremptory challenge is

ability impartially to consider evidence presented at trial." Id. (citing Thiel v. Southern Pac. Co., 328 U.S. 217, 223-24 (1946)); Swain v. Alabama, 380 U.S. 202, 219 (1965). The Court in Swain noted that the purpose of the peremptory challenge is "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they will try the case will decide on the basis of the evidence placed before them, and not otherwise." Id.; see also Van Dyke, supra note 5, at 139 n.1 (consensus that all jurors possess some types of biases founded on their own personal experiences).

Blackstone has called the peremptory challenge an "arbitrary and capricious species of challenge", but concluded that "the law wills not [that a defendant] ... be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike." 4 WILLIAM BLACKSTONE, COMMENTARIES *353.


In addition to the peremptory challenge, there also exists the challenge for cause, which may only be exercised on statutory grounds. See Swain, 380 U.S. at 220. Both serve the same purpose and are employed by both sides at the voir dire stage. Id. The Swain opinion noted that a challenge for cause is founded upon "a narrowly specified, provable and legally cognizable basis of partiality." Id. In contrast, use of the peremptory challenge is prompted by the exerciser's subjective perception of the suspect juror or is based upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Id. (citing Lewis v. United States, 146 U.S. 370, 376 (1892)); see also Reynolds v. Benefield, 991 F.2d 506, 512 (8th Cir. 1991) ("grimace or stare may express hostility or displeasure quite as clearly as words shouted across a room"), cert. denied, 111 S. Ct. 2795 (1991). The peremptory challenge "permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Swain, 380 U.S. at 220 (citing Hayes v. Missouri, 120 U.S. 68, 70 (1870)).

28 U.S.C. § 1870 (1988); see supra note 3 (quoting section 1870 in part). The remaining part of section 1870 states that "[a]ll challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court." 28 U.S.C. § 1870 (1988).

See Powers v. Ohio, 111 S. Ct. 1364, 1369-70 (1991). The Court has consistently addressed, for more than a century, the subject of racism in the jury system. Id.; see also Batson v. Kentucky, 476 U.S. 79, 86 (1986) (purposeful racial discrimination in venire selection violates defendant's right to equal protection); Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (right to impartial jury includes jury pool drawn from fair cross-section of com-
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exercised without a reason, it is often subject to abuse by those who "have a mind to discriminate." In response, courts have followed two separate and distinct approaches.

Originally, litigants argued that discriminatory use of the peremptory challenge violated the Sixth Amendment's guarantee to a fair and impartial jury. The Supreme Court determined that
this guarantee included a jury venire drawn from a fair cross-section of the community.\textsuperscript{13} However, the Court later ruled in \textit{Holland v. Illinois}\textsuperscript{14} that this guarantee did not entitle a party to a petit jury which mirrored the racial composition of the community.\textsuperscript{16} Thus, the Court curtailed Sixth Amendment attacks on race-based peremptories.\textsuperscript{16}

The second approach was premised on the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{17} Litigants argued that discriminatory use of peremptory challenges violated both their own equal protection rights\textsuperscript{18} and those of the challenged jurors.\textsuperscript{19}

\textsuperscript{13} Taylor, 419 U.S. at 538; see also supra note 11 and accompanying text.
\textsuperscript{14} 493 U.S. 474 (1990).
\textsuperscript{15} Id. at 477.
\textsuperscript{16} Id. at 480-81.
\textsuperscript{17} U.S. CONST. amend. XIV, § 1. Section 1 provides in part:

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.

\textit{Id.}

Cases applying the Equal Protection Clause to the jury system date back to Strader v. West Virginia, 100 U.S. 303, 307 (1880). \textit{See supra} note 8. While the Equal Protection Clause of the Fourteenth Amendment is applicable only to actions of the state, it has been held to apply to the federal government through the Fifth Amendment's Due Process Clause. \textit{See Bolling v. Sharpe}, 347 U.S. 497, 500 (1954). Consequently, the Constitution may be invoked through either state or federal government action. \textit{Id.}; \textit{see also} United States v. Hawes, 529 F.2d 472, 475 (5th Cir. 1976) (same). \textit{See generally} \textbf{Laurence H. Tribe, American Constitutional Law} §18-1, at 1688 (2d ed. 1988) (state action doctrine); Harold C. Strickland, \textit{The State Action and the Rehnquist Court}, 18 HASTINGS CONST. LQ. 587, 643 (1991) (reviewing state action decisions of Rehnquist Court).

The Fifth Amendment states in pertinent part: "No person . . . shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend V.

\textsuperscript{19} \textit{Id.}
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Courts have adopted this approach, thereby restricting the use of the peremptory challenge.\(^2\)

In 1986, the Supreme Court ruled in Batson v. Kentucky,\(^21\) that a state prosecutor’s use of racially motivated peremptory challenges violated the Equal Protection Clause.\(^22\) Batson required that the defendant first make a prima facie showing that the challenge was based on race.\(^23\) If such a showing was made, the burden shifted to the state to provide a race-neutral explanation.\(^24\) The court would then evaluate the neutrality of the proffered explanation.\(^26\)

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\(^21\) 476 U.S. 79 (1986).

\(^22\) Id. at 84-85. Batson, a black criminal defendant, was convicted by an all-white jury of second-degree burglary and receipt of stolen goods. Id. at 82. Batson claimed that the prosecutor had intentionally used all four of his peremptory challenges to exclude blacks from the jury. Id. at 83-84.

The key aspect of Batson was that it overturned the evidentiary requirements set forth in Swain v. Alabama, 380 U.S. 202, 223-24 (1965). In Swain, a black defendant was convicted of rape in Talledega County, Alabama, and sentenced to death. Id. at 203. Although the petit jury venires in Talledega County included an average of seven blacks, no black had served on a petit jury since 1950. Id. at 205. The prosecution in Swain had used its peremptory strikes to eliminate all blacks on the venire. Id. at 210. The Court held that even if the exclusion of blacks from the venire raised a prima-facie case of discrimination under the Fourteenth Amendment, the petitioner was required to show that the prosecutor systematically excluded blacks over time, and not just at that particular trial. Id. at 224. The defendant was unable to meet this burden and his claim was rejected. Id. at 221-22.

However, in Batson the Court relaxed this evidentiary burden and laid down explicit ground rules for prosecutorial use of peremptory strikes. Batson, 476 U.S. at 96-97. The defendant can make a prima-facie showing of discrimination in the use of peremptory challenges "relying solely on the facts . . . in his case." Id. at 95. Furthermore:

[T]he defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). Once a defendant satisfied these requirements, the burden shifted to the state to affirmatively show that there were non-racial grounds for the challenges. Id. at 97.

Although Batson involved state prosecution and the application of the Fourteenth Amendment, the same limitations are imposed on federal prosecutors through the Fifth Amendment. See United States v. Lane, 866 F.2d 103, 104 n.1 (4th Cir. 1989).

\(^23\) Batson, 476 U.S. at 96-97.

\(^24\) Id. at 97-98.

\(^26\) Id. at 98; see Sumlin v. Moore, 583 So. 2d 1320, 1321 (Ala. 1991) (once race-neutral explanation is proffered, movant may come forward with evidence to show given explanations were pretextual).
For the next several years courts were divided as to whether \textit{Batson} should apply in civil cases since private litigants, unlike state prosecutors, were not clearly state actors.\textsuperscript{26} This issue was resolved by the Supreme Court decision in \textit{Edmonson v. Leesville Concrete Co.}\textsuperscript{27} which held that private civil litigants were precluded from using race as the basis for a peremptory challenge.\textsuperscript{28}

Part One of this Note provides the procedural background of \textit{Edmonson} and analyzes Justice Kennedy's majority opinion. Part Two will examine the application of \textit{Batson v. Kentucky} to peremptory challenges in criminal actions. Part Three of this Note will discuss the possible expansion, under equal protection principles, of the \textit{Batson-Edmonson} doctrine as a further limitation on the discriminatory use of the peremptory challenge. This Note will conclude that the utility of the peremptory challenge has been so diminished by constitutional limitations that it should be abolished.

\section*{I. Analysis of Edmonson}

\subsection*{A. Procedural Background}

In \textit{Edmonson}, the petitioner, a black man, brought a negligence action against his employer in the United States District Court for the Western District of Louisiana.\textsuperscript{29} During voir dire, the respondent used two of its peremptory challenges to remove two black persons from the venire, and the third to remove a white person.\textsuperscript{30} The judge denied petitioner's request for an explanation of...

\textsuperscript{26} See Fludd v. Dykes, 863 F.2d 822, 823 (11th Cir.) (\textit{Batson} applies to civil cases), cert. denied sub nom. Tiller v. Fludd, 493 U.S. 872 (1989); Clark v. Bridgeport, 645 F. Supp. 890, 895 (D. Conn. 1986) (applying \textit{Batson} to racially-motivated strikes used by assistant city attorney in civil trial); cf. Maloney v. Washington, 690 F. Supp. 687 (N.D. Ill.), vacated sub nom. Maloney v. Plunkett, 854 F.2d 152, 155 (7th Cir. 1988) (district judge should have allowed trial to continue and have losing party raise \textit{Batson} issue on appeal). But see Wilson v. Cross, 845 F.2d 163, 164-65 (8th Cir. 1988) (dicta indicating unlikely \textit{Batson} was intended to apply to civil actions); Esposito v. Buonome, 642 F. Supp. 760, 761 (D. Conn. 1986) (\textit{Batson} inapplicable to civil matters).

\textsuperscript{27} 111 S. Ct. 2077 (1991).

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} at 2080-81. Edmonson was employed at a construction site located at Fort Polk, Louisiana. \textit{Id.} at 2080. He was injured when one of Leesville's trucks rolled backwards and pinned him against some equipment. \textit{Id.} Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1331. \textit{Edmonson v. Leesville Concrete Co.}, 860 F.2d 1308, 1310 (5th Cir. 1988), \textit{rev'd}, 895 F.2d 218 (5th Cir. 1990), \textit{rev'd}, 111 S. Ct. 2077 (1991).

\textsuperscript{30} \textit{Edmonson}, 860 F.2d at 1310.
the strikes and ruled that Batson did not apply to civil cases.\textsuperscript{31} Thereafter, a twelve-member jury comprised of eleven whites and one black, heard the case and rendered a verdict for the plaintiff.\textsuperscript{32} Although the jury found Edmonson sustained damages of $90,000, they awarded him only $18,000, finding him eighty percent contributorily negligent.\textsuperscript{33}

On appeal, Edmonson argued that Leesville's alleged racially motivated use of its peremptory challenges entitled him to a new trial.\textsuperscript{34} The Fifth Circuit reversed the district court,\textsuperscript{35} but at a rehearing en banc,\textsuperscript{36} affirmed the district court's finding that Batson did not apply to civil actions.\textsuperscript{37} The Supreme Court granted certiorari\textsuperscript{38} and reversed the Fifth Circuit.\textsuperscript{39}

Justice Kennedy, writing for the majority,\textsuperscript{40} found that the defendant's racially motivated peremptory challenges constituted "state action"\textsuperscript{41} in violation of the Equal Protection Clause,\textsuperscript{42} thereby permitting application of Batson.\textsuperscript{43} The Court concluded that a party in a civil case had sufficient standing to raise the excluded jurors' equal protection claims on his own behalf,\textsuperscript{44} and held that the jurors' equal protection rights under the Fifth Amendment had been abridged.\textsuperscript{45}
B. The Majority Opinion

In extending *Batson* to a civil matter, the Court first had to cast Leesville’s use of the peremptory strike as “state action,” a prerequisite to securing the protection of the Fourteenth Amendment. To accomplish this, the majority relied upon the two-part analysis set forth in *Lugar v. Edmondson Oil Co.* which outlined the standards for determining state action. The first requirement of *Lugar* was that the “source” of the privilege exercised have its origin in state authority. Accordingly, since peremptory challenges were provided for by statute, the first prong of *Lugar* was satisfied. The second element under *Lugar* involved the determin-
nation of whether a private party could be considered a “state actor.”"56 Towards this end, the Edmonson Court pursued an analysis consisting of three inquiries: whether there was “overt, significant assistance” to the private party by the government;51 whether the act in question was a “traditional government function”;52 and

“[n]o one is compelled by government action to use a peremptory challenge, let alone use it in a racially discriminatory way.” Id. at 2091. The dissent also quoted Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974), for the proposition that an individual’s use of a state-provided choice, where the initiative is supplied by the individual, did not equal state action. Edmonson, 111 S. Ct. at 2091.

Supreme Court precedent is also clear that there must be a sufficient nexus between the state and the discriminatory act in order for it to be attributable to the state. See National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 195 (1988) (state university’s decision to adopt association rules did not transform association into state actor); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (private entity which performs function pursuant to government regulation to serve public not state actor); Blum v. Yaretsky, 457 U.S. 991, 1012 (1982) (decisions by administrators at state-funded nursing home not acts of state); Polk County v. Dodson, 454 U.S. 312, 324-25 (1981) (public defender not state actor); Karmanos v. Baker, 816 F.2d 258, 261 (6th Cir. 1987); see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-72 (1972) (private club not state actor by virtue of government-issued liquor license). But see West v. Atkins, 487 U.S. 42, 48 (1988) (private physician who contracted with state to provide medical services to prison is state actor); Dennis v. Sparks, 449 U.S. 24, 29 (1980) (private parties conspiring with judge were actors under color of state law); Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980) (state’s conduct in tolerating conflict of interest by privately-retained counsel was state action); Evans v. Newton, 382 U.S. 296, 299 (1966) (private actions “may become so entwined with governmental policies or impregnated with a governmental character” that it can be considered state action); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (refusal to serve blacks in restaurant located in public parking facility constituted state action).

51 Edmonson, 111 S. Ct. at 2087 (state action analysis test). The court stated: [I]n determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. Id. at 2083 (citations omitted).

52 Id. at 2084 (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)). The court stated: A private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the ‘final and practical denial’ of the excluded individual’s opportunity to serve on the petit jury. Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose.

Id. at 2084-85 (citations omitted).

53 Id. at 2085. “The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.” Id. at 2086.
whether the "injury caused [was] aggravated in a unique way by the incidents of governmental authority." The majority was satisfied that all three requirements were met, and that under such circumstances, a civil litigant was a state actor.

In the second part of the decision, the Court set forth the basis for allowing Edmonson to raise the excluded jurors' equal protection claim as his own. Applying the rules of third-party standing, the Court stated that excluded jurors faced serious obstacles in protecting their own rights, and that the litigant may have established a relationship or "bond" with the potential juror. As a result, the Court concluded it would be proper for the civil litigant to raise the rights of the excluded venireperson. The Court opined that this was appropriate since both the civil litigant and the venireperson had a mutual interest in eradicating racial dis-

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53 Id. at 2083. "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." Id. at 2087 (citing Rose v. Mitchell, 443 U.S. 545, 556 (1979)). "To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." Id. at 2087.
54 Id. at 2085.
55 Id.
56 Id. at 2087. 
58 This restriction is subject to limited exceptions. See Powers, 111 S. Ct. at 1370; see also Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 956 (1984); Eisenstadt v. Baird, 405 U.S. 438, 446 (1972) (interests of third party are crucial). See generally Alschuler, supra note 11, at 193-94 (discussing third party rights and how they may be asserted).
59 Edmonson, 111 S. Ct. at 2087; see also Holland v. Illinois, 493 U.S. 474, 489, rehr'g denied, 494 U.S. 1050 (1990) (Kennedy, J., concurring). "[A] juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation, but possessing little incentive or resources to set in motion the arduous process needed to vindicate his own rights." Id.
60 Edmonson, 111 S. Ct. at 2087-88. "[V]oir dire permits a party to establish a relation, if not a bond of trust, with the jurors." Id. (quoting Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991)).
61 Id. at 2088; see also United States v. De Gross, 913 F.2d 1417, 1420 (1990) (government has standing to assert equal protection rights of excluded juror), rehr'g granted, 930 F.2d 695 (9th Cir. 1991).
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crimination from the courtroom.\textsuperscript{60}

II. \textit{Batson in Action}

The extension of \textit{Batson} to civil cases could arguably complicate and delay voir dire in civil suits.\textsuperscript{61} A review of how the \textit{Batson} rule has operated in federal and state criminal trials provides a preview of what may be in store for civil litigants.\textsuperscript{62}

A. Establishing a Prima Facie Case of Discrimination

To demand a race-neutral explanation for peremptory challenges, the defendant must first establish a prima facie case of purposeful discrimination.\textsuperscript{63} Under \textit{Batson}, the formulation of a prima facie case required the defendant to show that he was a member of a cognizable racial group\textsuperscript{64} and that the peremptory challenge was used to remove members of his race from the venire.\textsuperscript{65} The defendant then had to show that “these facts and any other relevant circumstances raise[d] an inference” that the prosecutor challenged the veniremen on racial grounds.\textsuperscript{66} If these fac-

\textsuperscript{60} Id.


\textsuperscript{62} See infra text accompanying note 88.

\textsuperscript{63} Batson v. Kentucky, 476 U.S. 79, 97 (1986). Once the prima facie showing is made, the state then has the burden to come forward with a race-neutral explanation. \textit{Id. But see United States v. Clemmons, 892 F.2d 1153 (3d Cir. 1989), cert. denied, 110 S. Ct. 2623 (1990). In Clemmons, it was unclear to the circuit court whether or not the defendant had actually made a prima facie showing of discrimination. \textit{Id. Nevertheless, the district court demanded a neutral explanation from the prosecutor. \textit{Id. In reversing, the Third Circuit held that the court "cannot effectively close their eyes" to an insufficient neutral explanation despite the absence of a prima facie showing. \textit{Id.}

Historically, the term “prima facie” in instances of discrimination differs from the conventional usage. United States v. Alvarado, 891 F.2d 439, 442 (2d Cir. 1989), \textit{cert. granted, judgment vacated}, 110 S. Ct. 2995 (1990). Under such circumstances “prima facie” has been defined as a presentation of evidence sufficient to establish a “legally mandatory irrebuttable presumption.” \textit{Id. (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981)). A presumption in the context of a prima facie case makes it “more likely than not” that the actions scrutinized were result of intentional discrimination. \textit{Id. at 442 n.2 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). Ordinarily, “prima facie” refers to a presentation of evidence that, as a matter of law, warrants “submission of an issue for decision by the trier of fact.” \textit{Id. at 442 (citing JOHN H. WIGMORE, EVIDENCE § 2494 (J. Chadbourn rev. ed. 1981)).

\textsuperscript{64} Batson, 476 U.S. at 96.

\textsuperscript{65} Id. (citing Castaneda v. Partida, 430 U.S. 482, 494 (1976)).

\textsuperscript{66} Id.
tors were established, an inference of intentional discrimination arose whereupon the government was required to provide a race-neutral explanation for each of the challenged strikes.\textsuperscript{67}

1. Membership in a “Cognizable Racial Group”

Under the Fourteenth Amendment, a cognizable racial group determination requires: (1) that the class be definable and limited by some clearly identifiable attribute;\textsuperscript{68} (2) that a “common thread” of ideas, attitudes, and experience run through the group,\textsuperscript{69} and (3) that there be a community of interest among the

\textsuperscript{67} Id. at 97. But see Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991) (where prosecutor provided race-neutral explanation and trial court ruled on its sufficiency, fact that defendant had not yet made prima facie showing was moot).

\textsuperscript{68} See United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (Italian-Americans are cognizable group), \textit{cert. denied}, 489 U.S. 1052 (1989); see also United States v. Ruiz, 894 F.2d 501, 506 (2d Cir. 1990) (Hispanics are cognizable group); Roman v. Abrams, 822 F.2d 214, 227 (2d Cir. 1987) (whites are cognizable group), \textit{cert. denied}, 489 U.S. 1052 (1989); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (Native Americans are cognizable group). But see United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987) (appellant did not offer sufficient evidence to establish Italian-Americans as cognizable group), \textit{cert. denied}, 484 U.S. 1063 (1988). See generally infra note 95 (discussion of Fourteenth Amendment’s scope with respect to other groups).

\textsuperscript{69} See Biaggi, 853 F.2d at 95-96. The Second Circuit found that Italian-Americans “share a common experience and culture, often share the same religious and culinary practices, often have commonly identifiable surnames, and have been subject to stereotyping . . . and discrimination” sufficient to exist as a cognizable group under \textit{Batson}. \textit{Id.} at 96. But see Murphy v. United States, 926 F.2d 50, 55 (1st Cir.) (Irish-Americans not cognizable group for \textit{Batson} purposes), \textit{cert. denied}, 112 S. Ct. 1102 (1991); United States v. Angiulo, 847 F.2d 956, 984 (1st Cir.) (defendant’s failure to show that Italian-Americans have been or are currently subjected to discrimination negates cognizable group claim), \textit{cert. denied}, 488 U.S. 928 (1988); Sgro, 816 F.2d at 33. The First Circuit in \textit{Sgro} rejected the defendant’s generalized statements that Italian-Americans as an ethnic group held similar “ideas, attitudes and experience.” \textit{Id.} Furthermore, the court seemed to take issue with the Second Circuit’s assertion in \textit{Biaggi} that Italian-Americans had commonly identifiable surnames. \textit{Id.} “There was not a scintilla of evidence . . . that the undefined designation ‘persons bearing Italian-American surnames’ . . . meets the test to establish a . . . cognizable class.” \textit{Id.}

Deciding ethnic status purely on the basis of surnames is at best speculative. See Mejia v. State, 599 A.2d 1207, 1213 (Md. App. 1992). The assumption that a juror was Hispanic because of his Spanish surname was undermined by the fact that thirty-nine million Spaniards and fifty-eight million Filipinos have such surnames but are not Hispanic. \textit{Id.} Furthermore, married women often assume the ethnic-sounding names of their spouses. \textit{Id.} at 1214. “Did Rita Casini, for instance, cease to be Hispanic on the day she assumed the name Rita Hayworth? Did Lucille Ball, on the other hand, become Hispanic whenever she travelled as ‘Mrs. Desi Arnaz?’ ” \textit{Id.} The court in \textit{Mejia} warned that such “unsubstantiated labeling” could reduce \textit{Batson} to “an ethnic parlor game.” \textit{Id.} at 1215.

With respect to certain ethnic and racial groups such as Hispanics and blacks, the court may take judicial notice of their status as cognizable groups. See United States v. Alvarado, 891 F.2d 439, 444 (2d Cir. 1989), \textit{cert. granted, judgment vacated}, 110 S. Ct. 2995 (1990).
members of the group such that the group’s interests cannot be adequately represented on the jury if the group is excluded.\textsuperscript{70} The defendant may show that the Fourteenth Amendment has been violated by the exercise of a race-based peremptory strike by asserting either his own equal protection rights\textsuperscript{71} or those of the excluded juror.\textsuperscript{72} The Court has since held, in \textit{Powers v. Ohio},\textsuperscript{73} that defendants may raise the equal protection rights of excluded jurors irrespective of the defendant’s status in a cognizable group.\textsuperscript{74} The \textit{Powers} Court’s rationale thus focused solely on the excluded juror’s membership in a cognizable group.\textsuperscript{75} Similarly, \textit{Edmonson} focused on the excluded jurors’ rights to equal protection independent of the litigant’s membership in a cognizable group.\textsuperscript{76} As a consequence, a civil party’s membership in a cognizable group is probably irrelevant.\textsuperscript{77}

2. Other “Relevant Circumstances”

Under \textit{Batson}, once cognizable group status has been established, the defendant may put forth other circumstantial evidence to raise an inference that peremptory strikes were motivated by race.\textsuperscript{78} Application of this directive has led to significantly differ-
ent approaches in the circuit courts in determining how convincing the circumstantial evidence must be to support such an inference. Some courts of appeals have required a pattern of strikes against minority jurors. Others have held that a single strike against a minority juror raises an inference of discrimination.

The Batson court suggested instances where such "relevant circumstances" would exist: "[A] pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." Id. at 97. The Supreme Court also ruled that the trial court bears the ultimate responsibility for determining whether a prima facie case has been established. Id. "[T]rial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning . . . use of peremptory challenges creates a prima facie case of discrimination . . . ." Id.

The Supreme Court recently confronted the issue of what constitutes a supportable inference. See Hernandez v. New York, 111 S. Ct. 1859, 1868 (1991). "If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." Id.

The circuit courts have uniformly ruled that determination of a prima facie case of purposeful discrimination should be treated as a finding of fact, "entitling the trial judge's ruling to great deference on review and subjecting it to reversal only in the face of clear error." United States v. Moore, 895 F.2d 484, 485 (8th Cir. 1990); see Riddick v. Edmiston, 894 F.2d 586, 592 (3d Cir. 1990) (trial court fairly considered petitioner's claim); United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (district court's findings must be upheld unless clearly erroneous), cert. denied, 489 U.S. 1052 (1989); United States v. Lance, 853 F.2d 1177, 1181 (5th Cir. 1988) (accepting trial judge's credibility choice); United States v. Hamilton, 850 F.2d 1038, 1041 (4th Cir. 1988) (accepting trial court's finding of no discrimination), cert. denied, 493 U.S. 1069 (1990). See United States v. Alvarado, 891 F.2d 439, 444 (2d Cir. 1989), cert. granted, judgment vacated, 110 S. Ct. 2995 (1990). In Alvarado, the defendant contended that the prosecutor's use of four of six peremptory challenges against minority jurors amounted to a minority challenge rate of sixty-seven per cent. Id. at 440. The court held that "statistical disparities are a relevant factor" in determining a prima facie case of discrimination, but that since the number of challenges was small, the statistical anomaly is not as significant as those in employment discrimination cases where "normally a larger universe is analyzed." Id. at 444.

"Striking a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks." Id. at 747. This has been termed a "per se" rule and is followed in several other circuits. See generally United States v. Briscoe, 896 F.2d 1476, 1489 (7th Cir.) (striking of single black juror violated Equal Protection Clause even if other blacks are seated), cert. denied, 110 S. Ct. 173 (1990); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987) (same); United States v. Gordon, 817 F.2d 1533, 1541 (11th Cir. 1987) (same), cert. dismissed, 487 U.S. 1265 (1988); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (exclusion of one juror could be sufficient to raise inference, but noting this may not always be adequate). But see United States v. Grandison, 885 F.2d 143 (4th Cir. 1989), cert. denied, 110 S. Ct. 2178 (1990). Here, the court rejected the contention that a prima facie case arose each
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Still other courts have rejected a statistical approach altogether.82

B. Evaluating Race-Neutral Explanations

The lack of precise criteria to evaluate racially neutral explanations is perhaps the most unsettled aspect of the Batson and Edmonson holdings.83 The initial determination has been left for the trial judge to make on a case-by-case basis.84 In jurisdictions where time a black was peremptorily struck. *Id.* at 149. The court acknowledged that the district court was not precluded from considering the composition of the resultant petit jury although such data was "not dispositive." *Id.* at 147; United States v. Lane, 866 F.2d 103, 107 (4th Cir. 1989) (no per se rule exists to give rise to prima facie case of discrimination).88 See United States v. Terrazas-Carrasco, 861 F.2d 98, 94-95 (5th Cir. 1988) (prosecutor's use of six of seven challenges to exclude members of defendant's race while others remained in venire did not support discriminatory finding); United States v. Sangineto-Miranda, 859 F.2d 1501, 1521 (6th Cir. 1988). In *Sangineto-Miranda*, the Sixth Circuit held that a prosecutor's use of all his peremptory strikes against blacks did not show purposeful discrimination. *Id.* at 1521. The court stated:

We reject such a per se rule, particularly because it does not take into account considerations that may be very relevant, including the percentage of the racial group in the district jury pool or original jury; the pattern of strikes exercised by the defense; the number of strikes available to the government; and the composition of the jury actually sworn.

*Id.* The court continued:

The Sixth Circuit attempted to formulate a statistical approach to the problem:

If ... the final jury sworn has a percentage of minority members that is significantly less than the percentage in the group originally drawn for the jury ... then that would be a factor pointing toward an inference of discrimination. If ... the percentage of minority members in the ultimate jury is the same or greater, that would be a factor tending to negate the inference of discrimination.

*Id.* at 1521-22.

The Ninth Circuit has also concluded that the striking of two black veniremen does not create an inference of discrimination. See United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.), cert. denied, 484 U.S. 928 (1987).

The statistical approach was criticized by the Third Circuit on other grounds. See United States v. Clemons, 843 F.2d 741, 748 n.6 (3d Cir.) (observing that district with low minority population defendant would have difficulty proving discrimination where venire itself is mostly non-black), cert. denied, 488 U.S. 835 (1988). Such a result did occur in United States v. David, 844 F.2d 767 (11th Cir. 1988). Where, the court upheld the district court's finding that the small number of blacks on the jury and the state's unused ability to strike all black members of the venire did not establish a pattern of strikes. *Id.* at 768.

83 Batson v. Kentucky, 476 U.S. 79, 97 (1986). A race-neutral explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* The Court held, however, that no valid explanation could be predicated on the assumption that shared race would lead to partiality. *Id.* Nor could a prosecutor claim such strikes were made in good faith. *Id.* at 98. The explanation must be sufficient to overcome the prima facie presumption of discrimination in the eyes of the trial judge. *Id.* This explanation should be "clear and reasonably specific" to form legitimate motives for the peremptory strike. *Id.* at 98 n.20 (citing Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

84 *Batson*, 476 U.S. at 98 n.21. "Since the trial judge's findings ... will turn on evalua-
the court participates in voir dire, those findings of whether a particular explanation was satisfactorily race-neutral have been accorded "especial deference." Appeals courts are loath to overturn such findings unless the trial court's findings are "clearly erroneous." As a result, cases decided since Batson reveal a variety of standards for determining acceptable race-neutral explanations, including those based on facial expressions and "inappropriate gestures," those where the excluded juror had children the same age as the defendant, and one where the prosecutor claimed to always object to jurors whose profession began with the letter "p." The Eighth Circuit, in contrast has articulated a test based upon "comparability," which compares the characteristics of the individual peremptorily struck with those jurors not struck. When

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seated jurors possess the characteristic used as grounds for peremptorily striking another juror, the offered explanation will be rejected as a mere pretext for discrimination.93

Since the circuit courts have entertained different methods with which to analyze peremptory challenges, the application of Batson has been at best uneven. Consequently, pretextual explanations and subtle discrimination may continue to flourish in the courtroom. It is suggested that the abolishment of the peremptory challenge is the only way to sweep discrimination out of the judicial system.

The government allows white panel members with a similar cut of cloth to remain on the panel.” Id. But see Garrett v. Morris, 815 F.2d 509, 513-14 (8th Cir.) (black venire persons struck for lack of education while whites with same education level accepted), cert. denied sub nom. Jones v. Garrett, 484 U.S. 898 (1987).

The Ninth Circuit has also suggested use of the “comparability” test. See United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987) (defense counsel able to point out to court potential discrepancies in prosecution’s use of peremptory strikes); cf United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (reasons for striking blacks equally applicable to whites were not “bona fide”).

The “comparability” test was also used in the Second Circuit for determining a race-neutral explanation in the context of the Sixth Amendment’s fair cross-section requirement. See Roman v. Abrams, 822 F.2d 214, 219 (2d Cir. 1987), cert. denied, 489 U.S. 1052 (1989). There, the court rejected the prosecutor’s claim that knowledge of electronics, bookkeeping, and computers could prevent a juror from accepting the reasonable doubt standard, or that jurors with relatives in law enforcement community would vote against conviction. Id. The circuit court concluded that the race-neutral explanations constituted “a lot of lawyer circumlocution, folklore and cant, either unbelievably trivial and incredible, or pointing . . . to the inescapable inference that the prosecution set out to skew the jury selection . . . .” Id. at 220.

The district court record in Roman showed that ten out of eleven challenges had been used against white jurors, who were the ‘cognizable group’ in this case. Roman v. Abrams, 608 F. Supp. 629, 635 (S.D.N.Y. 1985), rev’d, 822 F.2d 214 (2d Cir. 1987), cert. denied, 489 U.S. 1052 (1989). Furthermore, the reasons advanced for these challenges, such as a juror’s relationship to a police officer, appeared pretextual because the record showed that two empaneled jurors were relatives of police officers. Id. But see United States v. Lance, 853 F.2d 1177 (5th Cir. 1988). The Fifth Circuit affirmed a finding of no discriminatory intent where the state, in providing a neutral explanation, stated criteria that if applied evenly would have resulted in a white juror being struck. Id. at 1180. As a result, the court sustained the strikes stating that it is proper for the prosecutor to use intuition as an explanation for his decision. Id. at 1181. “[T]he vagarious process of choosing jurors need not be controlled by a simple equation; it may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable.” Id.

93 United States v. Wilson, 884 F.2d 1121, 1124 (8th Cir. 1989).
In addition to the limits imposed by *Batson* and *Edmonson* on the peremptory challenge, further restrictions may exist under equal protection principles. Although the *Batson* court made it clear that racially-motivated challenges violated the Equal Protection Clause, it did not define the scope of this protection. As a result, lower courts are divided as to whether *Batson* should extend beyond race-based peremptory challenges. Some courts take a narrow approach and hold that *Batson* must be limited to its facts, because the case did not explicitly state that equal protection prin-

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*See United States v. De Gross, 913 F.2d 1417, 1422 (9th Cir. 1990) (using equal protection analysis to extend *Batson* to gender-based peremptory challenges), rehr'g granted, 930 F.2d 695 (9th Cir. 1991); People v. Green, 148 Misc. 2d 666, 668, 561 N.Y.S.2d 130, 132 (Westchester County Ct. 1990) (using equal protection to analyze peremptory challenge of hearing-impaired juror): see, e.g., Chew v. State, 527 A.2d 332, 336 (Md. Ct. Spec. App. 1987), vacated, 562 A.2d 1270 (1989). Although the ultimate reach of *Batson* still lies shrouded in an unseen future, its choice of a constitutional predicate is loaded with latent growth potential." *Id.*; *see also* O'Hair v. White, 675 F.2d 680, 691 (5th Cir. 1982) (exclusion of atheists from jury service violated Equal Protection Clause); Coleman v. United States, 379 A.2d 951, 953-54 (D.C. 1977) (motion to exclude all Catholic jurors from venire where Roman Catholic priests were plaintiffs on assumption they could not be impartial violated equal protection); cf. People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y.C. Crim. Ct. N.Y. County 1980) (sexual preference not basis for exercising challenge for cause under equal protection principles).


*Compare* De Gross, 913 F.2d at 1422 (interpreting *Batson* to extend to gender-based peremptory challenges) *with* United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991) (*Batson* should be restricted to race-based peremptory challenges), *cert. denied*, 112 S. Ct. 989 (1992). *See generally* Chew, 527 A.2d at 350. The *Chew* court noted that "[*t*]o hold that, in the jury selection process, the equal protection clause is only available to black defendants is philosophically indefensible." *Id.*

*See* United States v. Mitchell, 886 F.2d 667, 671 n.2 (4th Cir. 1989) (*Batson* limited to race); United States v. Hamilton, 850 F.2d 1038, 1043 (4th Cir. 1988) (same), *cert. denied*, 110 S. Ct. 1069 (1990); *cf.* State v. Pullen, 811 S.W.2d 463, 467 (Mo. App. 1991). In *Pullen*, the court was confronted with the issue of whether *Batson* should extend to gender. *Id.* at 465. Although the majority found "[*n*]o grand distinction between race discrimination and gender discrimination that makes one less offensive than the other," they held to *Batson*’s "parameters of racial discrimination." *Id.* at 467; *see* State v. Watson, 572 N.E.2d 97, 106 (Ohio 1991) (same).
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... would apply to peremptory challenges beyond those based on race. Consequently, these courts would most likely refuse to apply Batson to strikes based on gender, religion, or sexual preference.

Other courts broadly interpret Batson as incorporating general anti-discrimination principles, which potentially prohibit discriminatory strikes against any constitutionally recognized group. It is suggested that since the foundation of Batson is the Equal Protection Clause which protects all cognizable groups, the broader approach is the correct interpretation of Batson.

A. The Equal Protection Analysis of Batson

Before equal protection principles are applied to a claim of discrimination, there must be a showing that the discrimination is invidious. This is explicit when a law is discriminatory on its face, and it is then analyzed under conventional three-tiered equal protection analysis which includes strict, middle-tier, and...
and rational basis scrutiny.\textsuperscript{107} In other instances, a law may be facially neutral but administered in a discriminatory manner or have a discriminatory impact.\textsuperscript{108} In such cases, the complaining party has the burden of proving "purposeful discrimination"\textsuperscript{109} before equal protection principles are applied. If the complainant is successful, the burden then shifts to the state to "rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria . . . have produced the monochromatic result."\textsuperscript{110}

The \textit{Batson} Court noted that peremptory challenges fell within facially neutral parameters since the statute authorizing peremptories was neutral.\textsuperscript{111} The Court further noted that they could be administered in a discriminatory manner.\textsuperscript{112} Accordingly, the burden was on the complaining party to present a prima facie case of purposeful discrimination.\textsuperscript{113} Since facially neutral laws have been found to be discriminatory on bases other than race,\textsuperscript{114} it is sub-

\textsuperscript{107} See infra note 116 (describing classifications which receive strict scrutiny).
\textsuperscript{108} See infra note 117 (describing classifications which receive heightened, or middle-tier, scrutiny).
\textsuperscript{109} See infra note 118 (describing classifications receiving minimal scrutiny).
\textsuperscript{111} See, e.g., Castaneda v. Partida, 430 U.S. 482, 494-95 (1977) (defendant had burden to prove purposeful discrimination in selection of jury venire); Arlington Heights v. Metropolitan Hous. Dev't Corp., 429 U.S. 252, 266 (1977) (defendant has burden of persuasion to prove purposeful discrimination where statute is facially neutral); \textit{Washington}, 426 U.S. at 240 (black applicants to police force had burden to prove purposeful discrimination in administration of neutral statute which had disparate impact on black test-takers). The "burden of proof" model was adopted from Title VII cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).
\textsuperscript{112} \textit{Washington}, 426 U.S. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).
\textsuperscript{114} See id. The \textit{Batson} Court noted that equal protection violations may exist when "the procedures implementing a neutral statute operate to exclude persons from the venire on racial grounds." \textit{Id.} at 88; \textit{see also} Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2079 (1991) (peremptory challenge susceptible to abuse).
\textsuperscript{115} \textit{Batson}, 476 U.S. at 96-97.
\textsuperscript{116} \textit{See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 259 (1979). Feeney} involved a facially neutral statute which gave an absolute lifetime hiring preference to veterans for civil service positions. \textit{Id.} As a result, the majority of jobs went to men. \textit{Id.} at 260. The plaintiff, a female employed by the government, alleged the law violated equal protection. \textit{Id.} at 259. Although the Court determined that the statute had a discriminatory impact on women, it did not find a showing of purposeful discrimination. \textit{Id.} at 280-81.
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mitted that discriminatory challenges should likewise be found discriminatory if based on religion, gender, or other cognizable characteristics. It is submitted that the Batson approach does not prohibit its expansion to other discriminatory strikes, but merely sets forth the procedure to be followed before equal protection principles are applied to peremptory challenges.

B. Expansion of Batson to Other Cognizable Groups Under Equal Protection Principles

In the future, should courts apply conventional equal protection principles to the discriminatory use of peremptory challenges, the requirements of presenting a prima facie case should remain the same. If discrimination is found to exist, then equal protection principles should be applied. This would require the trial court to determine the level of scrutiny applied to the cognizable group in question. Each cognizable group would receive a different level of protection in accordance with its classification as either suspect, quasi-suspect, or non-suspect. The court would

115 See supra notes 64-68 and accompanying text (analyzing requirements of establishing prima facie case).
116 See Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985). When a statute classifies on the basis of race, alienage, or national origin, the law will receive strict scrutiny from the court. Id. at 440. However, if a law classifies on the basis of gender, it will receive a heightened judicial scrutiny. Id. Finally, if a law classifies on the basis of some non-suspect classification such as age, the law need only meet a rational basis test in order to survive. Id. at 441.
117 Id. at 440-42.
119 See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (gender is quasi-suspect group); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-81 (1979) (gender is quasi-suspect category and law giving employment preference to veterans not discriminatory to women under heightened scrutiny); Craig v. Boren, 429 U.S. 190, 204 (1976) (gen-
then determine whether the interest in sustaining the peremptory challenge is sufficient to outweigh the discrimination claim. It is

der-based classifications are quasi-suspect and receive heightened scrutiny under middle tier of equal protection.

Classifications based on illegitimacy are also accorded quasi-suspect status. See e.g., Califano v. Boles, 443 U.S. 282, 293-96 (1979) (Social Security Act upheld which denied survivors' benefits to illegitimate child using less demanding standard than strict scrutiny); Matthew v. Lucas, 427 U.S. 495, 510 (1976) (acknowledged analysis to be in "this realm of less than strictest scrutiny"); cf. Mills v. Habluetzel, 456 U.S. 91, 101 (1982) (invalidated statute of limitations which limited time that illegitimate children had to bring paternity suit). In Mills, the state interest in disallowing paternity claims was to prevent fraudulent or stale claims. Id. at 92. The Court stated that "[s]uch restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." Id. at 99.


120 See Cleburne, 473 U.S. at 446 (mentally retarded non-suspect group). "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a state interest." Id. at 440. See generally Gary J. Simson, Note, Mental Illness: A Suspect Classification?, 83 YALE L.J. 1237 (1974) (mental illness not suspect class as determined by Supreme Court).


Discrimination based on youth has primarily been an issue in jury selection cases. See Donald H. Zeigler, Young Adults as a Cognizable Group in Jury Selection, 76 MICH. L. REV. 1045, 1049-61 (1978). Jury challenges based on age are permitted. See infra note 152 and accompanying text (cases involving age-based challenges).

121 See Batson v. Kentucky, 476 U.S. 79, 125 (1986) (Burger, C. J., dissenting) (discussing interest in peremptory challenge). Balancing the state interest in various laws is a crucial part of the equal protection analysis. See, e.g., Buckley v. Valeo, 424 U.S. 1, 25-29 (1976) (per curiam) (state had compelling interest in limiting political contributions to campaigns); Marston v. Lewis, 410 U.S. 679, 681 (1973) (per curiam) (residency requirements upheld due to state's compelling interest in preventing fraudulent voter lists); Korematsu v. United States, 323 U.S. 214, 216 (1944) (government's interest in keeping Japanese-Americans in isolation during wartime sufficiently compelling). But see Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (government interest in preventing fraudulent voting procedures not enough to justify infringement on right to vote); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (state had no compelling interest in putting limits on welfare recipient's benefits); Mc-
submitted that an analysis of this interest is essential in determining when, if ever, a discriminatory peremptory challenge should be sustained.

Historically, the peremptory challenge was thought to be "essential" to a fair trial by jury. Its purpose of assembling a fair and impartial jury was presumably achieved by allowing parties to exclude, without explanation, those jurors whom they believed were biased based upon intangible and "sudden impressions." If used in this fashion, the challenge would legitimately serve its purpose by eliminating biased jurors from the jury.

Although the interest of a party in obtaining a fair and impartial jury is clear, it is questionable whether peremptory challenges actually further this interest. It is submitted that when challenges are used to dismiss jurors based upon stereotypes or presumed group bias, they do not meet the goal of assembling a fair and impartial jury, but instead meet the attorney's goal of creating a biased jury.

Batson essentially held that the interest in race-based peremptory challenges was not compelling enough to survive the strict scrutiny of the court. However, the issue of whether this interest should survive an equal protection claim based on characteris-

Laughlin v. Florida, 379 U.S. 184, 196 (1964) (state had no compelling interest in enforcing racially discriminatory miscegenation and cohabitation law).

See Batson, 476 U.S. at 125 (Burger, C.J., dissenting) (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)).

Batson, 476 U.S. at 99 n.22 (historically, peremptory challenge has served in selection of impartial jury); see Swain v. Alabama, 380 U.S. 202, 212 (1965) (peremptory challenge allows parties to obtain fair and impartial jury); Pointer v. United States, 151 U.S. 396, 408 (1894) (defendant's peremptory is one of most important rights given to accused).

See supra note 6 and accompanying text (description of peremptory challenges).


Batson, 476 U.S. at 98-99. However, in his dissent, the Chief Justice discussed the state's interest in preserving the peremptory challenge, and stated that "[u]nder conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges." Id. at 125 (Burger, C.J., dissenting). The dissent also observed that "the state interest involved here has historically been regarded by this Court as substantial, if not compelling." Id.

The Ninth Circuit disagrees with this analysis. In De Gross, the court balanced the interest of the government in exercising a peremptory challenge and concluded that they were "not substantially related to achieving an impartial jury." United States v. De Gross, 913 F.2d 1417, 1422 (1990), reh'g granted, 930 F.2d 695 (9th Cir. 1991). For a general discussion of the difficulties in measuring the state interest, see Lawrence G. Sager, Some Observations About Race, Sex, and Equal Protection, 59 TUL. L. REV. 928, 932-42 (1985).
tics other than race is one that must still be resolved.\textsuperscript{127} If the challenge is directed against a quasi-suspect group, the interest must be deemed "substantially related to achieving an important government objective".\textsuperscript{128} Similarly, if the challenge is directed against non-suspect individuals, the challenge must be rationally related to that interest in order to be sustained.\textsuperscript{129} The following sections suggest how these issues may be resolved in the future.

1. Suspect Classifications

Suspect classifications, including those based on race and ethnic origin, are subject to strict scrutiny.\textsuperscript{130} \textit{Batson} and \textit{Edmonson} have already determined that the interest in exercising discriminatory peremptory challenges against suspect groups is not "compelling" enough to outweigh their equal protection claims.\textsuperscript{131} Application

\textsuperscript{127} See supra note 95.

\textsuperscript{128} See, e.g., Craig v. Boren, 429 U.S. 190 (1976). The concurring opinion acknowledged its use of a different analysis, but stated "while I would not endorse ... a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential rational basis standard of review ... takes on a sharper focus when we address a gender-based classification." \textit{Id.} at 210 (Powell, J., concurring); see also supra note 119, and accompanying text (description of quasi-suspect groups).

\textsuperscript{129} See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (law classifying by age not suspect and upheld under rational basis test); see also supra note 117, and accompanying text (description of non-suspect groups).

\textsuperscript{130} See United States v. Carolene Prod., Inc., 304 U.S. 144, 153 n.4 (1938). "[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry." \textit{Id.}

Although classifications based on alienage are suspect, they have not received protection in the context of jury selection. See United States v. Gordon-Nikkar, 518 F.2d 972, 976-77 (5th Cir. 1975) (aliens have no right to serve as juror); Perkins v. Smith, 370 F. Supp. 134, 138-39 (D. Md. 1974) (same), aff'd, 426 U.S. 913 (1976). \textit{Perkins} involved a claim by a resident alien who objected to the exclusion of aliens from jury service. \textit{Id.} at 134. The Maryland District Court, using a rational basis test, ruled that there are situations "where citizenship bears some rational relationship" to qualifications for jury service. \textit{Id.} at 138 (citing Sugarman v. Douglas, 339 F. Supp. 906, 911 (S.D.N.Y. 1970) (Lumbard, J., concurring)). The court stated that since jury service "goes to the heart of representative government", it "may fairly be concluded that [citizens] as a class . . . are more likely to make informed and just decisions . . . than are non-citizens." \textit{Id.} at 136; see also Foley v. Connellie, 435 U.S. 291, 300 (1978) (state police have rational basis for excluding aliens from police force). \textit{See generally} Gerald M. Rosberg, \textit{The Protection of Aliens from Discriminatory Treatment by the National Government}, 1977 Sup. Ct. Rev. 275 (1977) (justification for aliens receiving suspect classification).

\textsuperscript{131} See Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2077 (1991); Batson v. Kentucky, 476 U.S. 79, 93 (1986); see also Castaneda v. Partida, 430 U.S. 482, 492 (1977) (exclusion of suspect group from venire based on ethnic origin violates Fourteenth Amendment); Hernandez v. Texas, 347 U.S. 475, 478 (1954) (same); Strauder v. West Virginia,
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to other groups\textsuperscript{132} depends on whether they can sufficiently prove cognizable group status.\textsuperscript{133} In addition, it is suggested that peremptory challenges exercised against a group based upon religious affiliation, which is clearly a cognizable group, should be deemed "suspect" and receive the strict scrutiny of the courts.\textsuperscript{134}

2. Quasi-Suspect Classifications

Although the category of "quasi-suspect" groups is not fully defined, it has been held to encompass such classifications as gen-

100 U.S. 303, 308 (1880) (exclusion of blacks from jury venire denial of equal protection).


\textsuperscript{133} See supra note 70 and accompanying text (describing test for proving cognizable group status).

\textsuperscript{134} See O'Hair v. White, 675 F.2d 680, 691 (5th Cir. 1982) (atheists deemed "suspect" group whose exclusion from jury service violated state's equal protection clause). The \textit{O'Hair} Court noted that not only does the Fourteenth Amendment reach class exclusions based on race, but " 'all other exclusions which single out any class of persons for different treatment not based on some reasonable classification.' " \textit{Id.} (quoting \textit{Hernandez v. Texas}, 347 U.S. 475, 478 (1954)). The Fifth Circuit has also addressed the possible exclusion of Jewish jurors based on alternate theories of race and religion. United States v. Greer, 939 F.2d 1076, 1086 n.9 (5th Cir.), \textit{reh'g en banc ordered}, 948 F.2d 934 (1991). The court noted "[w]hether Jewish jurors are viewed as members of a 'race' or a religion, a defendant's exercise of peremptory challenges against them is subject to \textit{Batson}'s strictures." \textit{Id.} (citation omitted). In \textit{Greer}, defendants were members of a white supremacist group known as the Hammerskins which advocated the separation of races and anti-Semitism. \textit{Id.} at 1081. Defendants were convicted of beating minorities and vandalizing Jewish temples and businesses. \textit{Id.} at 1082-83. After their conviction, they claimed the trial court erred in not allowing their motion to dismiss all Hispanic, black, and Jewish jurors for cause. \textit{Id.} at 1084. The court cited \textit{Edmonson} and noted that "even if the defendants had learned which prospective jurors were Jewish, they constitutionally could not have based their peremptory challenges upon this information, for the Supreme Court has sought to eliminate racial and ethnic discrimination in the process of jury selection." \textit{Id.} at 1085; \textit{see also Coleman v. United States}, 379 A.2d 951, 953 (D.C. 1977) (court denied motion to exclude Roman Catholic venirepersons from jury based on assumption they could not be impartial to priest-plaintiffs). The \textit{Coleman} Court stated that "mere potentiality for bias based on religious affiliation cannot justify the elimination of a prospective juror." \textit{Id.}; Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967) (strict scrutiny applied to religious-based equal protection claim); People v. Kagan, 101 Misc. 2d 274, 277, 420 N.Y.S.2d 987, 989 (Sup. Ct. N.Y. County 1979) (systematic exclusion of Jewish jurors violates state constitution).
der and sexual preference. Such classifications are afforded a "heightened scrutiny," with the state having to show a substantial interest between the classification and an important government objective. It is submitted that since the interest in such challenges is not substantially related to obtaining a fair and impartial jury, individuals in quasi-suspect groups should be afforded the right to invoke equal protection analysis in the discriminatory use of peremptory challenges.

a. Gender-Based Peremptory Challenges

Lower courts are split on whether to protect gender-based peremptory challenges. In United States v. Hamilton, the Fourth Circuit held that peremptory challenges exercised on the basis of gender were not covered by the equal protection principles in Batson. The court followed a narrow interpretation, and held that

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138 See infra note 137 and accompanying text (cases involving gender-based discrimination).
139 See infra note 149 and accompanying text (cases involving sexual preference).
138 United States v. De Gross, 913 F.2d 1417, 1422 (1990), reh'g granted, 930 F.2d 695 (9th Cir. 1991) (no substantial relationship between impartial jury and gender-based peremptory challenge).


New York courts have also extended Batson to gender-motivated peremptories, holding them violative of the equal protection clauses under the state and federal constitutions. See People v. Irizzary, 165 A.D.2d 715, 716, 560 N.Y.S.2d 279, 280 (1st Dep't 1990); People v. Blunt, 162 A.D.2d 86, 89, 561 N.Y.S.2d 90, 93 (2d Dep't 1990); see also People v. Merkle, 143 A.D.2d 145, 146, 531 N.Y.S.2d 601, 602 (2d Dep't 1989), appeal denied, 73 N.Y.2d 858, 534 N.E. 2d 342, 537 N.Y.S.2d 504 (1988). The Irizzary court expressly noted that "although the issue of gender-based discrimination has not been squarely addressed by the Supreme Court, the People concede that the trial court correctly held [Batson] principles to apply." Irizzary, 165 A.D.2d at 716, 560 N.Y.S.2d at 280.

140 Hamilton, 850 F.2d at 1042.
141 Id. "While we do not applaud the striking of jurors for any reason relating to group
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since Batson only addressed the issue of race, it was limited to its facts. The court considered the utility of the peremptory challenge so great as to warrant the overruling of a challenge admittedly based on gender.

The Ninth Circuit, in United States v. De Gross, came to the opposite conclusion when it balanced the value of the peremptory challenge against equal protection principles. In De Gross, the government objected to a female criminal defendant using her peremptories to exclude men from the jury. The circuit court opinion emphasized the Fourteenth Amendment's protection against all types of discrimination based on stereotypes such as race or gender, and concluded that Batson extended beyond race. The court used a conventional equal protection approach, and analyzed the challenges using heightened scrutiny, finding no substantial relationship between the use of such challenges and the goal of achieving an impartial jury.

b. Challenges Based on Sexual Preference

Although courts have had difficulty classifying sexual preference into one category, it is submitted that discrimination based classifications, we find no authority to support an extension of Batson to instances other than racial discrimination."

Id. at 1042-43.

Id.

144 United States v. De Gross, 913 F.2d 1417, 1422 (1990), reh'g granted, 930 F.2d 695 (9th Cir. 1991).

Id. at 1419.

Id. at 1422 n.8.

Id. at 1422.

Id.

Id. at 1422.

Id. at 1422-23. The De Gross court acknowledged that peremptory challenges are a "necessary means for achieving the important governmental objective of impaneling a fair and impartial jury." Id. However, they went on to note that:

[C]hallenges explained by . . . gender are not based on a party's sudden impression of a particular venireperson's ability to be impartial. Rather, like racial challenges, they are based either on the false assumption that members of a certain group are unqualified to serve as jurors, or on the false assumption that members of certain groups are unable impartially to consider the case against a member or a non-member of their group.

Id. (citation omitted)

upon sexual orientation belongs in the quasi-suspect class. Accordingly, those courts which classify sexual preference as a quasi-suspect classification should protect those individuals from discriminatory challenges, since no substantial interest is served by excluding jurors on this basis. Although the expansion of Batson to quasi-suspect groups will restrict the use of the peremptory challenge even further, it is proposed that the extension is necessary to prevent discrimination from tainting the trial process.

3. Non-Suspect Groups

The non-suspect category includes classifications based on age and disability. For these groups, the interest in exercising

Office, 895 F. 2d 563 (homosexuals do not comprise either suspect or quasi-suspect group), rehr'g denied, 909 F. 2d 374 (9th Cir. 1990); Doe v. Webster, 769 F. Supp. 1, 3 (D.D.C. 1991) (homosexuals are non-suspect and judged according to rational basis test).

Classifications based on sexual preference continue to be relevant in certain areas. See Dronenburg v. Zech, 741 F. 2d 1388, 1398 (sexual preference relevant to service in military), rehr'g denied, 746 F. 2d 1579 (D.C. Cir. 1984); Matter of Longstaff, 716 F. 2d 1439, 1442 (5th Cir. 1983) (relevant for purposes of immigration), cert. denied, 467 U.S. 1219 (1984); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (relevant to determine fitness of parent regarding custody of children); Gaylord v. Tacoma School Dist. No. 10, 559 P. 2d 1340 (Wash. 1977) (sexual preference relevant to fitness to teach), cert. denied, 434 U.S. 879 (1977). But see Robert C. Farrell, Equality, Classification, and Irrelevant Characteristics, 12 VT. L. REV. 11, 46-54 (1988). "Sexual preference is an irrelevant characteristic, because each of the justifications offered to demonstrate its relevance — the criminal law, religious precept, morality and decency, and public hostility — is devoid of merit and unacceptable under our constitutional scheme." Id. at 54. See generally Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285, 1305 (1985) (because homosexuals have historically been victims of discrimination, legislation affecting them should be subject to strict scrutiny).

See supra note 119 and accompanying text (citing cases which apply heightened scrutiny to quasi-suspect class).

See People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S. 2d 979, 982 (N.Y.C. Crim. Ct. N.Y. County 1980). The Viggiani case held that a challenge for cause based upon the prospective juror's sexual preference was unconstitutional. Id. The assumption on the part of the defendant that the juror would be biased was deemed a denial of equal protection under the state constitution. Id. The court concluded it would be "a divisive assumption that justice may turn on sexual preference." Id.

See supra note 120 and accompanying text. For age discrimination in jury selection, see United States v. De La Rosa, 911 F. 2d 985, 991 (5th Cir. 1990) (age of juror is legitimate reason to strike), cert. denied, 111 S. Ct. 2275 (1991); United States v. Moreno, 878 F. 2d 817, 820-21 (5th Cir.) (same), cert. denied, 493 U.S. 979 (1989); cf. LaRoche v. Perrin, 718 F. 2d 500 (1st Cir. 1983) (young are identifiable group for Sixth Amendment purposes); Hamling v. United States, 418 U.S. 87, 137-38 (same), rehr'g denied, 419 U.S. 885 (1974).

For cases involving age-based peremptory challenges, see United States v. Ferguson, 935 F. 2d 862, 865 (7th Cir. 1991) (upheld peremptory challenges based on age), cert. denied,
a discriminatory peremptory challenge must be shown to be rationally related to the goal of assembling a fair and impartial jury. Although it could be argued that the interest in achieving an impartial jury is rationally related to the exercise of discriminatory challenges, it remains difficult to reconcile an act done "arbitrarily" with a rationally-related test. However, it is submitted that if the use of the peremptory challenge is to be continued in the future, it should be limited at this point to preserve what is left of the peremptory's power. Accordingly, the striking of non-suspect jurors should not be subject to review.

Although it is tempting to retain the peremptory challenge, even in a reduced capacity, it is submitted that in light of its possible expansion under equal protection principles in both the criminal and civil context, the judicial process would be better served by eliminating peremptory challenges completely.

112 S. Ct. 907 (1992); United States v. Hoelscher, 914 F.2d 1527, 1540 (8th Cir. 1990) (age-based peremptory challenges do not implicate Batson), cert. denied sub nom. Giuffrida v. United States, 111 S. Ct. 971 (1991); United States v. McCoy, 848 F.2d 743, 745 (6th Cir. 1988) (same); see also United States v. Mitchell, 886 F.2d 667, 671 n.2 (4th Cir. 1989) (although defendant objected to peremptories directed at all jurors under age 25, court concluded Batson only applied to race); State v. Everett, 472 N.W.2d 864 (Minn. 1991) (court analyzed case as if Batson applied to age-based peremptories, but found defendant failed to make prima facie case).

In New York, the court of appeals has ruled that age goes to one's ability to serve as a juror. See People v. Foster, 64 N.Y.2d 1144, 1145, 480 N.E.2d 340, 341, 490 N.Y.S.2d 726, 727 (1985), cert. denied, 474 U.S. 857 (1985).


Cleburne v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting). The Chief Justice noted the difficulty, if not impossibility, of applying a "rational" equal protection analysis to an "arbitrary and capricious" right. Id. He stated, "[a] clause that requires a minimum 'rationality' in government actions has no application to an 'arbitrary and capricious right.'" Id.
CONCLUSION

The unfettered use of peremptory challenges has traditionally been regarded as essential to the right to a fair and impartial jury. However, because they are exercised without a reason, peremptory challenges are often susceptible to discriminatory abuse. Such challenges are premised on the pernicious stereotype that presumes an inherent group bias among jurors who belong to a recognizable group. Consequently, discriminatory peremptory challenges serve to remove otherwise qualified jurors, thereby tainting the judicial process and possibly resulting in an unfair and partial jury.

The application of *Batson* to civil actions indicates that the Court has recognized that the challenge must yield to the constitutional requirements of equal protection. The recent cases of *Edmonson* and *Powers*, combined with a potential expansion to other cognizable groups will so dilute the effectiveness of the peremptory challenge, that it should be abolished in order to eradicate discrimination from the courtroom. The right to a fair and impartial jury is best served by abolishing the challenge outright, rather than allowing discrimination to continue under the uneven protection of *Batson* and *Edmonson*.

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188 See Swain v. Alabama, 380 U.S. 212, 219-21 (1965); see supra note 123.