NORTH CAROLINA LAW REVIEW

Volume 73
Number 2 *The University of North Carolina School of Law: A Sesquicentennial History*
Article 4

1-1-1995

J.E.B. v. Alabama ex. rel. T.B. and the Fate of the Peremptory Challenge

North Carolina Law Review

NOTE

J.E.B. v. Alabama ex rel. T.B. and the Fate of the Peremptory Challenge

Certain valuable talents possessed by effective litigators, such as the gift of intuition or the ability to read the mood of a courtroom, cannot be reduced to precise definition. These skills, whether innate or born of years of trial experience, flourish in our adversarial system. One of the most powerful procedural tools trial lawyers traditionally have used to take advantage of such visceral abilities is the statutory right[1] of the peremptory challenge.[2] Exercise of this right, which allows the attorney to request discharge of a prospective juror without cause during *voir dire*, is often premised upon no more than the attorney's "gut feeling" about a potential juror's demeanor. With its landmark 1986 decision in *Batson v. Kentucky*,[3] the Supreme Court considerably diminished the right to eliminate jurors in this manner.[4] More recently, the Court in *J.E.B. v. Alabama ex rel. T.B.*[5]

---

1. The right to peremptory challenges is not secured by the Constitution, but granted by statute or court rule. *See* United States v. Rucker, 557 F.2d 1046, 1048 (4th Cir. 1977); United States v. Macke, 159 F.2d 673, 674 (2d Cir. 1947); United States v. El Rancho Adolphus Prods., Inc., 140 F. Supp. 645, 649 (M.D. Pa. 1956).

2. Typically, three options are available to a party who wishes to challenge the empanelment of a particular jury. The first, the challenge to the array, allows a party to object if that party believes the pool of jurors chosen for the trial has been improperly chosen or is improperly constituted. A challenge to the array may be grounded in common law, in an alleged violation of a state or federal statute, or in an alleged violation of the Constitution. JAMES J. GOBERT, JURY SELECTION 144 (2d ed. 1990); *see, e.g.*, Glasser v. United States, 315 U.S. 60 (1942) (holding that common law requires jury to represent cross-section of the community at large); Taylor v. Louisiana, 419 U.S. 522 (1975) (construing U.S. CONST. amend. VI to require a jury that is a "air cross-section" of the community). The second, the challenge for cause, may be raised to dismiss a panel member for a specific reason, usually associated with the individual's ability to remain impartial. *See, e.g.*, 28 U.S.C. § 1870 (1988). The third option is that each party also retains the right to use a limited number of peremptory challenges to remove potential jurors without initially advancing any grounds for the strike. The number of peremptories is normally determined by statute. *See, e.g.*, 28 U.S.C. § 1870 (1988); *see also* Swain v. Alabama, 380 U.S. 202, 214-17 (1964) (discussing the evolution of peremptory challenges in the state and federal systems), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). *See generally* GOBERT, *supra*, at 143-314 (describing the three jury challenges available to litigants).

3. 476 U.S. 79 (1986).

4. *See infra* notes 33, 111-30 and accompanying text.

5. 114 S. Ct. 1419 (1994).

countenanced the continuing erosion of the once inviolable peremptory challenge[6] and perhaps moved one step closer to relegating the peremptory to the status of an historical footnote.[7]

In *J.E.B.*, the Court confronted the issue of whether the Equal Protection Clause of the Fourteenth Amendment[8] restricts the use of peremptory challenges to exclude potential jurors solely on the basis of gender.[9] Treating gender as a protected class,[10] the majority held that the use of peremptory challenges to effect gender discrimination during the jury selection process is unconstitutional.[11]

This Note addresses the Supreme Court's decision in *J.E.B.*, with particular emphasis on the competing concerns of the Equal Protection Clause and the judicial utility of the peremptory challenge system.[12] After reviewing the facts and conclusions of the case,[13] the Note traces the evolution of two distinct yet interrelated lines of Supreme Court precedent that constitute the substructure for the Court's holding in *J.E.B.*[14] The first series of cases addresses the application of Fourteenth Amendment limitations on jury qualification and selection,[15] including the Court's efforts to delineate the implications of *Batson* in response to subsequent constitutional challenges to the peremptory system.[16] The second line of cases addresses the establishment of gender as a protected class under the

---

6. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 118-21 (1986) (Burger, C.J., dissenting) (discussing the venerable tradition of the peremptory challenge); *Swain*, 380 U.S. at 212-20 (tracing the history of the peremptory challenge).

7. *See infra* notes 243-72 and accompanying text.

8. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

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

10. Most observers of the Supreme Court and, reluctantly, the Supreme Court Justices themselves, describe current equal protection methodology as recognizing three "tiers" of analysis. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring). Courts apply the lower tier, often called "low level" or "rational basis" review, to state actions that differentiate between classes of people on the basis of nonsuspect criteria. *See infra* notes 166-68 and accompanying text. Courts apply the upper tier review, or "strict scrutiny" to state actions that classify on the basis of race or other "suspect" classes. *See infra* notes 169-70 and accompanying text. Although fraught with confusion, much of it precipitated by the Court's own failure clearly to define the relevant criteria, observers now identify an "intermediate" tier of equal protection review, reserved for classifications based on gender and illegitimacy. *See infra* notes 171-210 and accompanying text.

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

12. *See infra* notes 243-72 and accompanying text.

13. *See infra* notes 21-74 and accompanying text.

14. *See infra* notes 75-210 and accompanying text.

15. *See infra* notes 75-165 and accompanying text.

16. *See infra* notes 131-65 and accompanying text.

Fourteenth Amendment.[17] Next this Note discusses the fusion in *J.E.B.* of the two lines of precedent and the scope of the inquiry that litigants now may face when using peremptory strikes.[18] It then addresses the potential consequences of *J.E.B.* on the peremptory challenge as a viable tool in the pretrial process.[19] Finally, the Note predicts the Court's probable approach to future conflicts over the use of peremptory challenges.[20]

J.E.B. was a suit for child support and paternity filed on behalf of the mother of a minor child.[21] The State of Alabama used nine of its ten statutory peremptory strikes to dismiss male jurors,[22] and the defendant countered by using nine of his ten to exclude women.[23] Before empaneling the resulting all-female jury, the court heard and rejected J.E.B.'s objection to the State's peremptory strikes.[24] J.E.B. argued that *Batson v. Kentucky*'s[25] prohibition against race-based peremptory strikes should be extended to bar gender-based challenges.[26] Denying a post-judgment motion by J.E.B. on the same issue, the district court restated that gender discrimination did not fall within the scope of *Batson*.[27] The Alabama Court of Civil Appeals upheld that ruling.[28] After the Supreme Court of Alabama denied certiorari,[29] the United States Supreme Court granted certiorari to determine "whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race."[30]

By a vote of six to three,[31] the Supreme Court reversed the

---

17. *See infra* notes 171-210 and accompanying text.
18. *See infra* notes 211-42 and accompanying text.
19. *See infra* notes 243-58 and accompanying text.
20. *See infra* notes 259-72 and accompanying text.
21. *J.E.B.*, 114 S. Ct. at 1421.
22. *Id.* at 1422.
23. *Id.* The original panel convened by the court included 36 prospective jurors, of whom 12 were male and 24 were female. Two male jurors and one female juror were excused for cause, leaving 10 male jurors remaining before the parties exercised their peremptory challenges. *Id.* at 1421.
24. *Id.* at 1422.
25. 476 U.S. 79 (1986).
26. *J.E.B.*, 114 S. Ct. at 1422.
27. *Id.*
28. J.E.B. v. Alabama *ex rel.* T.B., 606 So.2d 156, 157 (Ala. Civ. App. 1992), *rev'd*, 114 S. Ct. 1419 (1994).
29. J.E.B. v. Alabama *ex rel.* T.B., No. 1911717, 1992 Ala. LEXIS 1296, at *1 (Ala. Oct. 23, 1992).
30. *J.E.B.*, 114 S. Ct. at 1422.
31. *Id.* at 1421. Joining in Justice Blackmun's majority opinion were Justices Stevens, O'Connor, Souter, and Ginsburg. Justice O'Connor filed a separate concurring opinion,

judgment of the state court and remanded the case for a new trial.[32] The majority predicated its reversal on an extension of its holding in *Batson*, in which the court interpreted the Fourteenth Amendment to prohibit racially discriminatory challenges in the selection of the petit jury.[33] Sounding a theme that has been a crucial underpinning in many of the Court's juror discrimination cases,[34] the *J.E.B.* Court stated that "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[35] Noting both *Batson*'s mandate for the elimination of racial bias from the peremptory challenge phase of jury selection[36] and the fundamental right of all citizens to participate in the judicial system,[37] the Court held that the same guarantees necessarily apply in cases involving gender.[38]

In reaching its conclusion, the *J.E.B.* Court first invoked the watershed decision in *Strauder v. West Virginia*,[39] to support the principle that the Fourteenth Amendment acts as a check on discrimination in the jury selection process.[40] The majority noted that the *Strauder* Court had purported to eliminate prohibitions only against black male jurors, and expressly had refrained from extending the right of jury service to women.[41] The Court used this

---

and Justice Kennedy filed a separate opinion concurring in the judgment. Chief Justice Rehnquist filed a dissenting opinion, and Justice Scalia filed a separate dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined. *Id.* For discussion of the various opinions, see *infra* notes 53-74 and accompanying text.

32. *Id.* at 1430.

33. *Id.* at 1422-28.

34. *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348, 2353 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991); Powers v. Ohio, 499 U.S. 400, 406 (1990).

35. *J.E.B.*, 114 S. Ct. at 1427.

36. *Id.* at 1430. The Court stated that "[a]s with race, the 'core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender].' " *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) (alteration in original)).

37. *Id.*

38. *Id.*

39. 100 U.S. 303 (1880).

40. *J.E.B.*, 114 S. Ct. at 1423. In striking down a West Virginia jury statute, the Court in *Strauder* held that the language of the Fourteenth Amendment prescribed an affirmative right to "exemption from legal discriminations, implying inferiority in civil society." *Strauder*, 100 U.S. at 307-08; *see also infra* notes 76-85 and accompanying text (reviewing *Strauder*'s significance in connecting the Fourteenth Amendment to race-based juror selection).

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

observation as a springboard for an overview of the history of prejudice against women in the federal and state courts.[42] In response to the State of Alabama's argument that " 'gender discrimination in this country . . . has never reached the level of discrimination' against African-Americans,"[43] the Court then offered a brief historical comparison of racial and gender discrimination in jury selection.[44] The Court stated that it was ultimately unimportant whether the level of bias experienced historically by women in America approached that experienced by African Americans,[45] but

---

42. *Id.* at 1423-24. In his caustic dissent, Justice Scalia criticized the majority for "treat[ing] itself to an extended discussion of the historic exclusion of women not only from jury service but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot)." *Id.* at 1436 (Scalia, J., dissenting). Justice Scalia felt that because the case at hand addressed the right of a male defendant to claim gender bias in the jury selection process, the majority's summary of discrimination against women was irrelevant. *Id.* (Scalia, J., dissenting).

43. *Id.* at 1425 (quoting Respondent's Brief at 9, *J.E.B.* (No. 92-1239)). Although the Court tersely depicted the State's argument as a suggestion that gender bias "is tolerable in the courtroom," *J.E.B.*, 114 S. Ct. at 1425, Alabama, in fact, made an argument that echoed the Court's own equal protection methodology. The state urged that

> [w]hile there is indeed an extensive history of gender discrimination in this country, it has never reached the level of discrimination which has historically been exercised against African-Americans, and has not given rise to the strict scrutiny of gender classifications which is granted to racial classifications. Moreover, gender discrimination has historically been directed against women, and not against men. J.E.B. should not now be able to claim heightened protection for men in a realm in which such protection has thus far not been granted to women.
>
> Even though J.E.B. may have his cause examined with heightened, intermediate scrutiny, the State's substantial interest . . . in establishing paternity of children withstands such scrutiny . . . .

Respondent's Brief at 9, *J.E.B.* (No. 92-1239).

44. *Id.*

45. *J.E.B.*, 114 S. Ct. at 1425. The Court was interested only in identifying the parallels between the two categories of discrimination, not determining "whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history." *Id.* The majority contended that similarities between historical discrimination against women and against racial minorities outweigh the dissimilarities "in some contexts," *id.* (citing Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)), but regrettably the Court refrained from discussing how these instances of intersecting circumstances specifically influence the exercise of heightened scrutiny. The Court has never defined satisfactorily the rationale for subjecting gender distinctions to a different standard of review than race. Predictably, the *J.E.B.* Court stopped just short of stating a comprehensive rationale that lower courts might use as a guideline for their own decisions. The Court instead relied on what amounts to a circular argument in support of the existence of heightened scrutiny: "It is necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination' . . . a history which warrants the heightened scrutiny we afford all gender-based classifications today." *Id.* (quoting

that it drew the analogy between race and gender discrimination only to reaffirm that gender is a protected class under the Fourteenth Amendment.[46]

The majority found that, because gender is a protected class, the primary question presented in *J.E.B.* was "whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."[47] The State argued that there was a "special state interest in this case": the determination of the paternity of a child born out of wedlock.[48] The Court rejected this argument, holding that the only valid state interest at issue in a challenge to the peremptory strike system is the achievement of a fair and impartial trial,[49] and that the State's use

---

Frontiero v. Richardson, 411 U.S. 677, 684 (1973)). Perhaps one explanation of the premise behind intermediate scrutiny is that

> gender stereotypes, like race prejudice, warp legislative judgments. However, the Court has refrained from applying to gender classifications the virtual per se rule of invalidity it has applied to de jure race discrimination. This judgment presumably reflects the view that even a legislature completely free of gender prejudice would, on occasion, utilize gender classifications to achieve its goals.

GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 699 (2d ed. 1991).

Chief Justice Rehnquist would put more emphasis on the differences, and thus more distance, between the two categories of discrimination; he urged that those distinctions mandate a result contrary to the majority's extension of *Batson*. *J.E.B.*, 114 S. Ct. at 1434-35 (Rehnquist, C.J., dissenting).

46. *J.E.B.*, 114 S. Ct. at 1425; *see also infra* notes 171-210 (tracing the evolution of the "heightened scrutiny" analysis for state actions that effect differentiation on the basis of gender).

47. *J.E.B.*, 114 S. Ct. at 1425-26 (footnote omitted). The Court recited the language of its earlier decisions requiring "substantial" furthering of an important state interest when addressing gender discrimination, but as Justice Rehnquist noted in Craig v. Boren, 429 U.S. 190, 220 (1976), this crucial terminology seems to have been plucked "out of thin air." See *infra* notes 196-210 and accompanying text for a discussion of *Craig* and the Court's development of an intermediate scrutiny standard.

48. *J.E.B.*, 114 S. Ct. at 1426 n.8.

49. *Id.* The Court found support, in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991), for the proposition that there was only one "legitimate interest [the state] could possibly have in the exercise of its peremptory challenges." *J.E.B.*, 114 S. Ct. at 1426 n.8. *But see* Swain v. Alabama, 380 U.S. 202, 219 (1965) (discussing an alternate purpose of the peremptory), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). The *Edmonson* Court, however, had cited no source for this proposition. The Court typically canvasses legislative history and other sources for the actual purpose of statutes in this context, but often must hypothesize the purpose in the absence of evidence of clear legislative intent. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 186-877 (1980) (Brennan, J., dissenting). In *J.E.B.* and *Edmonson*, however, the Court seems to have made no effort to research the various sources of the peremptory challenge to find a legislative purpose.

This arguably arbitrary narrowing of possible legislative purposes disturbed Justice Scalia, who said of the majority's characterization of the peremptory's purpose in *J.E.B.*: "It does not seem to me that even this premise is correct. . . . If the system of peremptory

of peremptory strikes in this instance clearly did not further that goal.[50] Finally, the Court held that the exercise of peremptory challenges violates the Equal Protection Clause in all cases where the only rationale for the differentiation is gender[51] because "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[52]

In a concurrence that had the tone of a dissent, Justice O'Connor focused at length upon what she termed the *J.E.B.* decision's "costs" to the trial system, including procedural delay and the potential for

---

strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function." *J.E.B.*, 114 S. Ct. at 1438 n.3 (Scalia J., dissenting). *But see Fritz*, 449 U.S. at 181 (Stevens, J., concurring in the judgment) (arguing that the Court "must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature").

50. *J.E.B.*, 114 S. Ct. at 1426-27. The Court refused to accept the State's attempt to justify its peremptory strikes on the basis of an alleged correlation between gender and attitude toward paternity suits, noting that the State was "urg[ing] this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box." *Id.* at 1427. The only justification that might have met with the Court's approval would have been a showing that gender-based exclusions furthered the state's objective of "securing a fair and impartial jury," *id.* at 1426 n.8, but it is difficult to imagine a justification that would meet this narrow criterion.

51. *Id.* at 1429-30. The Court said that "[p]arties 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.* at 1429. One of the difficulties in discussing peremptory strikes based on race or gender is that two potential sources of bias in the courtroom are being addressed simultaneously. First, and foremost in the Court's opinion in *J.E.B.*, is the unconstitutionality of any prejudice on the part of an attorney in striking jurors from the jury panel. Second, and still important to the Court, is the potential for bias by a jury member. However, as noted above, the Court refuses to allow bare suspicion of the latter type of bias to excuse peremptory strikes when the only basis for the suspicion is the potential juror's sex. *Cf.* Batson v. Kentucky, 476 U.S. 79, 97 (1986). The *Batson* Court held:

> "Just as the Equal Protection Clause forbids the states to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors . . . so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."

Id.

52. *J.E.B.*, 114 S. Ct. at 1427. The Court was careful not to ground its decision solely in either the harm discriminatory peremptory strikes cause to a litigant or in the harm inflicted on a potential juror. This is consistent with *Batson* and other recent cases, and may represent a tacit acknowledgement by the Court that neither of these individual justifications for its decisions is altogether convincing. *See infra* notes 211-28 and accompanying text.

unchecked bias in jurors.[53] Justice O'Connor agreed that gender discrimination should be subject to heightened scrutiny, and that the State of Alabama had not advanced a sufficient justification for its strikes.[54] However, she cited the "costs" of the decision as support for her belief that "the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants,"[55] a stance she originally espoused in *Edmonson v. Leesville Concrete Co.*[56]

Although he did not explicitly state his reasons for concurring only in the judgment,[57] Justice Kennedy seemed concerned primarily with the majority's analysis of the various lines of precedent.[58] Quoting the Equal Protection Clause itself,[59] Justice Kennedy stressed the central importance of individual rights in equal protection jurisprudence.[60] Presumably, Justice Kennedy would have focused almost entirely on the rights of excluded jurors, rather than those of the litigants,[61] in prohibiting gender-based peremptories.[62]

---

53. *Id.* at 1431 (O'Connor, J., concurring). *See infra* notes 243-58 and accompanying text (discussing consequences of the decision in *J.E.B.* on trial procedures).

54. *Id.* at 1430-31 (O'Connor, J., concurring).

55. *Id.* at 1433 (O'Connor, J., concurring).

56. 500 U.S. 614, 632-33 (1991); *see also* Georgia v. McCollum, 112 S. Ct. 2348, 2363 (1992) (O'Connor, J., dissenting) (noting the unique adversarial relationship between criminal defendants and the State which does not usually exist between the government and private litigants). The decisions in *Edmonson* and *McCollum* extended *Batson*'s prohibition against race-based peremptory strikes by a state to include such strikes by civil litigants and criminal defendants, respectively. *See infra* notes 144-65 and accompanying text.

57. *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring in the judgment). Justice Kennedy in fact stated that he was "in full agreement with the Court that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges." *Id.* (Kennedy, J., concurring in the judgment).

58. *Id.* at 1433 (Kennedy, J. concurring in the judgment).

59. *Id.* (Kennedy, J., concurring in the judgment); *see also supra* note 8.

60. *J.E.B.*, 114 S. Ct. at 1434 (Kennedy, J., concurring in the judgment); *see supra* note 10.

61. Presumably, Justice Kennedy felt that third-party standing rules afforded a litigant the firmest ground from which to challenge the constitutionality of peremptory strikes. Speaking for a majority of the Court in Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), Justice Kennedy explained that in Powers v. Ohio, 499 U.S. 400 (1991), the Court found that a "defendant may raise the excluded jurors' equal protection rights." *Edmonson*, 500 U.S. at 618 (citing *Powers*, 499 U.S. at 415); *see also infra* notes 146-55 and accompanying text.

62. Justice Kennedy acknowledged the existence of an intermediate scrutiny standard for gender classifications, but stated that "[t]he Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government." *J.E.B.*, 114 S. Ct. at 1433-34 (Kennedy, J., concurring in the judgment).

Chief Justice Rehnquist, dissenting, found fault with the majority's statement that Equal Protection concerns outweigh the costs of limiting the use of peremptory challenges.[63] While acknowledging that *Batson* was a "sea-change" in the evolution of the jury selection process, he nevertheless interpreted that case in part as a recognition that "race lies at the core of the Fourteenth Amendment."[64] He contended that the differences between race and gender discrimination, and their corresponding standards of review,[65] meant "that the balance should tilt in favor of peremptory challenges when sex, not race, is the issue."[66]

Chief Justice Rehnquist, joined by Justice Thomas, also signed the dissent of Justice Scalia, who wrote that the majority's "conclusion can be reached only by focusing unrealistically upon the individual exercises of the peremptory challenge, and ignoring the totality of the practice."[67] In characteristically withering terms,[68] Justice Scalia accused the majority of prohibiting gender-based peremptories "simply to pay conspicuous obeisance to the equality of the sexes . . . . The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions."[69] Justice Scalia argued, like Justice Kennedy, that the only constitutionally-cognizable harm at issue in *J.E.B.* was the wrong suffered by excluded male jurors.[70] However, Justice Scalia, unlike Justice Kennedy, disagreed with the "uniquely expansive third-party standing analysis" used by the Court

---

63. *Id.* at 1434-35 (Rehnquist, C.J., dissenting). The majority stated that in assessing the constitutionality of gender-based strikes, it did not "weigh the value of peremptory challenges as an institution against [the Court's] asserted commitment to eradicate invidious discrimination from the courtroom." *Id.* at 1425-26. However, the Court's decision, at a minimum, did require an implicit comparison of one facet of the traditional peremptory "institution" with the constraints of the Equal Protection Clause; in that respect at least, the Court determined that the concerns of the Fourteenth Amendment certainly overpowered those of keeping the peremptory system intact.

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

65. *See infra* text accompanying notes 169-70, 206-10 (discussing equal protection analysis of discrimination based on race and gender).

66. *J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).

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

68. Justice Scalia also stated that the majority's opinion in *J.E.B.* was "an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes." *Id.* at 1436 (Scalia, J., dissenting). Later in his dissent, discussing the majority's reasoning, he lamented that it was "largely obscured by anti-male-chauvinist oratory." *Id.* at 1438 (Scalia, J., dissenting).

69. *Id.* at 1439 (Scalia, J., dissenting).

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

in previous cases to supply litigants a cause of action.[71] He observed that the result in *J.E.B.*, a retrial for a defendant who "by implication of the Court's own reasoning" was not harmed and whose paternity had been conclusively determined, "illustrates why making restitution to Paul when it is Peter who has been robbed is such a bad idea."[72] Finally, Justice Scalia contended that the peremptory challenge, as an institution, is not discriminatory unless one focuses on specific exercises of the challenge;[73] in the aggregate, he argued, peremptory challenges do not deny equal protection to any particular group.[74]

The Court's concern for both constitutional equal protection and the peremptory challenge is reflected in many of its decisions concerning jury selection[75] and is clearly demonstrated in a review of the cases leading up to *J.E.B.* The seminal case on the relevance of the Fourteenth Amendment to race-based juror selection is *Strauder v. West Virginia*,[76] decided a short twelve years after the

---

71. *Id.* (Scalia, J., dissenting); *see, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618-19 (1991); Powers v. Ohio, 499 U.S. 400, 410-15 (1991).

72. *J.E.B.*, 114 S. Ct. at 1437 (Scalia, J., dissenting). Scientific evidence presented at trial established the defendant's paternity with 99.92% accuracy. *Id.* (Scalia, J., dissenting).

73. *Id.* (Scalia, J., dissenting). Justice Scalia went on to clarify his position, saying that "[t]he situation would be different if both sides systematically struck individuals of one group, so that the strikes evinced group-based animus and served as a proxy for segregated venire lists." *Id.* at 1437 (Scalia, J., dissenting) (citing Swain v. Alabama, 380 U.S. 202, 223-24 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986)).

74. *Id.* at 1437 (Scalia, J., dissenting). The majority sharply criticized this reasoning, stating that Justice Scalia "fail[ed] to advance *any* justification for his apparent belief that the Equal Protection Clause, while prohibiting discrimination on the basis of race in the exercise of peremptory challenges, allows discrimination on the basis of gender." *Id.* at 1428 n.12. An answer to this criticism may lie in the fact that although Justice Scalia noted the precedent of *Batson*, *Powers*, *Edmonson* and *McCollum*, *see infra* notes 111-165, to call attention to what he termed the "irrationality" of the majority's approach, *J.E.B.*, 114 S. Ct. at 1439 (Scalia, J., dissenting), he rejected the third-party standing analysis. Therefore, Scalia presumably would reject most claims of unconstitutional peremptory strikes unless that claim was raised by an excluded juror. *See also* Georgia v. McCollum, 112 S. Ct. 2348, 2364-65 (1992) (Scalia, J., dissenting) (agreeing with Justice O'Connor that it is "terminally absurd" to hold that a criminal defendant resisting prosecution is a state actor); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 644-45 (1991) (Scalia, J., dissenting) (agreeing with Justice O'Connor that private attorneys who employ peremptory challenges are not state actors); Powers v. Ohio, 499 U.S. 400, 426-29 (1991) (Scalia, J., dissenting) ("There is . . . no sound basis for abandoning the normal injury-in-fact requirements applicable to third-party standing . . . .").

75. *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348, 2357-58 (1992); Batson v. Kentucky, 476 U.S. 79, 98-99 (1986); Swain v. Alabama, 380 U.S. 202, 222-24 (1964), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

76. 100 U.S. 303 (1880). Recognizing the deep historical roots of the Fourteenth Amendment's application to jury selection beginning with *Strauder*, the Court in 1992 noted that "[o]ver the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service." *McCollum*, 112 S. Ct. at

adoption of the Amendment itself.[77] In *Strauder*, a black defendant charged with murder challenged the constitutionality of a state statute that limited jury service to white males.[78] Interpreting the Equal Protection Clause to guarantee black citizens "exemption from legal discriminations, implying inferiority in civil society,"[79] the Court ruled that "the statute of West Virginia . . . amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the State."[80] Although declining to decide whether the Fourteenth Amendment would bar jury discrimination against groups other than blacks,[81] the Court made clear that it did not consider such an application of the Equal Protection Clause likely.[82] Significantly, the Court framed its discussion in terms of discrimination against both potential jurors[83] and the litigants themselves.[84] However, although discussing the harm caused to potential jurors by the West Virginia statute, the

---

2352.

77. The Fourteenth Amendment was enacted in 1868. U.S. CONST. amend. XIV, § 1.

78. *Strauder*, 100 U.S. at 304-05.

79. *Id.* at 308.

80. *Id.* at 310.

81. *Id.* The Court said that it was "not now called upon to affirm or deny that it had other purposes." *Id.* However, the Court also hinted that a more expansive interpretation was at least conceivable by asserting that even if the protection of blacks "is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers." *Id.* at 307. The Court reinforced this implication by later adding that "if a law should be passed excluding all naturalized Celtic Irishmen . . . there [would] be [no] doubt of its inconsistency with the spirit of the amendment." *Id.* at 308.

82. *Id.* at 307. The Court recalled its statements in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), that the Fourteenth Amendment was designed only for the protection of the "emancipated race," and reasoned that a state might still confine jury selection "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.* at 310; *cf. J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring) (noting that initial drafts of the Fourteenth Amendment prohibited discrimination only against blacks, but that this language was not included in the draft that eventually was ratified).

83. *Strauder*, 100 U.S. at 308. The Court, in stark language, declared that the fact that the West Virginia law "singled out" blacks and "expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law." *Id.*

84. *Id.* The Court asserted that denying a litigant a jury selected "without discrimination against [individuals of] his color," *id.* at 309, would be tantamount to denying the litigant the right to a fair jury trial, because "the very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine." *Id.* at 308.

Court ultimately based it decision solely on the harm caused to the litigant,[85] perhaps to avoid issues of third-party standing.

In 1961,[86] the Court in *Hoyt v. Florida*[87] recognized that the Fourteenth Amendment reached "not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions" made without a reasonable basis.[88] In *Hoyt*, a woman convicted by an all-male jury of murdering her husband claimed that a Florida statute granting all female citizens an exemption from registering for jury service was unconstitutional.[89] In effect, the statute automatically placed the names of all qualified[90] males onto the jury list, while it required all women to register with the Clerk of Court; predictably, "only a minimal number of women" registered.[91] Stating that the current case presented "narrower issues,"[92] the Court refused to scrutinize "the continuing validity of . . . dictum in *Strauder* . . . to the effect that a State may constitutionally 'confine' jury duty 'to males.' "[93] The Court held that the primary issue is whether the

---

85. *Id.* at 310.

86. After *Strauder*, more than 50 years passed before the Court first addressed the issue of gender bias in the selection of jurors in Ballard v. United States, 329 U.S. 187, 189-90 (1946). In deciding that women who qualified for jury service under state law could not be barred from jury panels in a federal court in that state, the *Ballard* Court did not address constitutional issues. *Id.* at 193. The Court reached its conclusion based on its "power of supervision" over the federal courts. *Id.* Congress had specified that qualifications for federal jurors were to be the same as those for jurors in the forum state, and women were qualified as jurors under local law in California; thus, the Court stated that to deny women the right to serve as jurors would be a "departure from the scheme of jury selection" established by Congress. *Id.* at 191-93.

Although an important milestone in the development of women's right to participate in jury trials, *see generally J.E.B.*, 114 S. Ct. at 1424 (calling attention to the significance of *Ballard* in the general advancement of gender law), *Ballard* created no binding precedent for courts to use in determining the extension of Fourteenth Amendment protections to female litigants or prospective female jurors. The Civil Rights Act of 1957, however, gave women the *statutory* right to serve on federal juries. Pub. L. No. 85-315, part V, § 152, 71 Stat. 638 (codified as amended at 28 U.S.C. § 1861 (1988)).

87. 368 U.S. 57 (1961).

88. *Id.* at 60 (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)). The Court at this time applied only the "rational relation" test to gender-based classifications. *Id.* at 61.

89. *Id.* at 58.

90. The qualifications for jury service were the standard age, citizenship, and residency requirements. *Id.* at 58 n.1.

91. *Id.* at 58.

92. *Id.* at 60.

93. *Id.* (quoting Strauder v. West Virginia, 100 U.S. 303, 310 (1880)). In eschewing the constitutional question, the Court noted in justification that the proposition that states could limit jury duty to males had "gone unquestioned for more than eighty years in the decisions of the Court." *Id.* (citing Fay v. New York, 332 U.S. 261, 289-90 (1947)). The Court found support for its position in the fact that congressional policy had reflected the

purported "exemption" is "in substance an exclusionary device"[94] and determined that the "relevant inquiry" into this issue is "whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation."[95] Applying this "rational relation" test, the Court found that the differentiation between men and women in the statute and its application bore a rational relation to the state's interest in protecting "home and family life."[96] The Court overruled *Hoyt* in 1975.[97] However, in doing so, it employed a Sixth Amendment analysis rather than equal protection methodology, leaving its underlying rationale undisturbed.[98]

Between 1964 and 1994 the Supreme Court addressed few cases involving gender differentiation in jury selection, but it took significant steps in addressing racial discrimination in that context. In 1965, the Court decided *Swain v. Alabama*,[99] which involved alleged discriminatory use of peremptory challenges in the trial of a black man accused of rape.[100] The defendant claimed that the state had used its peremptory strikes to exclude all blacks from the petit

---

same posture until just four years earlier. *Id.* Ironically, even though Congress made women eligible for jury service in the federal courts by passing the Civil Rights Act of 1957, the Court found no reason to follow Congress's lead in that instance, asserting that there was "no indication that such congressional action was impelled by constitutional considerations." *Id.* at 60 n.2 (citing *Fay*, 332 U.S. at 290).

94. Presumably, had the Court determined that the statute was exclusionary, it might have been compelled to reconsider the dictum from *Strauder* that it so carefully avoided examining.

95. 368 U.S. at 61.

96. *Id.* at 62-63. The Court said that

> [d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

Id. at 61-62. The majority in *J.E.B.* characterized the *Hoyt* ruling as an "unwilling[ness] to translate [the Court's] appreciation for the value of women's contribution to civic life into an enforceable right to equal treatment under state laws governing jury service." *J.E.B.*, 114 S. Ct. at 1424.

97. Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

98. *Id.* at 533-37 (requiring the jury to be drawn from a fair cross section of the community).

99. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

100. *Id.* at 203.

jury.[101] He also advanced a "broader claim" that prosecutors in the county where the trial was held had "systematically exercised their strikes to prevent any and all Negroes . . . from serving on the petit jury."[102] The Court responded to the first claim by agreeing with the state that the peremptory challenge system

> affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said, in and of itself, 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. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position.[103]

The Court went on to examine at length the "history" and "actual use" of the peremptory challenge[104] to support its conclusion that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge."[105] The Court did not explain why the peremptory challenge system was sacrosanct even as against Equal Protection Clause demands in individual cases, but instead avoided the issue of constitutional supremacy by asserting that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court."[106]

---

101. The defendant also tried to establish that the state purposefully had discriminated against blacks in the selection of the grand jury and the petit jury venire. *Id.* at 205. The Court rejected Swain's statistical evidence, which tended to show that "only 10 to 15% of the grand and petit jury panels drawn from the jury box" between 1953 and 1964 had been black males, while black men comprised 26% of all men in the county of eligible age for jury service. *Id.* The Court held that the defendant had not met the "quantum of proof," *id.*, necessary to show purposeful discrimination, in part because "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn." *Id.* at 208.

102. *Id.* at 222-23.

103. *Id.* at 212.

104. *Id.* at 212-21. The Court said that the "function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.* at 219.

105. *Id.* at 221-22.

106. *Id.* at 222. Summarizing its decision, the Court said that it had "decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case

However, the *Swain* Court, in response to the defendant's claim of widespread discrimination in the use of peremptories, held that a "State's *systematic* striking of Negroes in the selection of petit juries" might give rise to a valid claim under the Equal Protection Clause.[107] The proof required to establish such a prima facie claim would be extensive, and would be required to sustain a rational "inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice" that the majority enjoys.[108] A defendant making a challenge against the state still had to overcome the strong presumption that the prosecutor was using the state's challenges in an impartial manner.[109] The Court then demonstrated the narrowness of its new holding and the strength of the presumption: Despite a showing that no blacks had served on a petit jury in Talledega County for some fifteen years, the Court found that the record did not show "with any acceptable degree of clarity . . . when, how often, and under what circumstances the prosecutor alone [was] responsible for striking those Negroes who have appeared on petit jury panels in Talledega County."[110]

Batson v. Kentucky,[111] decided in 1986, invited the Supreme Court to revisit the question posed twenty years earlier in *Swain*.[112] In *Batson*, a black defendant in a criminal trial complained that the prosecution had used peremptory challenges to remove all black persons from the jury panel.[113] The Court noted that the defendant claimed, rather than a violation of his rights under the Equal Protection Clause, a violation of his Sixth and Fourteenth Amendment right to an impartial jury drawn from a cross section of the community.[114] However, the Court observed that the defendant had "framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own

---

he is trying." *Id.* at 223. The Court did not, however, state any constitutional justification for erecting such a formidable presumption.

107. *Id.* at 224 (emphasis added).
108. *Id.*
109. *Id.* at 222.
110. *Id.* at 224.
111. 476 U.S. 79 (1986).
112. *See supra* notes 99-106 and accompanying text.
113. *Batson*, 476 U.S. at 82-83.
114. *Id.* at 84-85 n.4.

precedents."[115] In response, the Court itself reframed the defendant's arguments and directly addressed the Fourteenth Amendment precedent in *Swain*.[116] Rejecting the "evidentiary formulation" in *Swain* as irreconcilable with current standards for making out a prima facie case under the Equal Protection Clause,[117] the Court overruled the portion of *Swain* that required a showing of systematic use of peremptories by the state to prove a violation of the Fourteenth Amendment.[118]

Echoing language from *Strauder v. West Virginia*,[119] the Court then declared that, despite the fact that a defendant does not have a right to a jury made up " 'in whole or in part of persons of his own race,' "[120] a "defendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria."[121] The Court stated that this right to nondiscriminatory jury selection extended to the exercise of individual peremptory challenges[122] and held that a criminal defendant "may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[123] As Chief Justice Burger

---

115. *Id.*

116. With patent irony, the Court credited the State with correctly contending that "resolution of petitioner's claim properly turns on application of equal protection principles," and that the Court "must reconsider *Swain* to find a constitutional violation on this record." *Id.* at 85 n.4.

117. *Id.* at 91-93.

118. *Id.* at 90-96; *see* Swain v. Alabama, 380 U.S. 202, 220-24 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). The Court held that because lower courts had interpreted *Swain* to require "proof of repeated striking of blacks over a number of cases . . . to establish a violation of the Equal Protection Clause," *Batson*, 476 U.S. at 92, a "crippling burden of proof" now rested on defendants, with the undesirable result that "prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." *Id.* at 92-93.

119. 100 U.S. 303 (1880).

120. *Batson*, 476 U.S. at 85 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

121. *Id.* at 85-86 (citing Martin v. Texas, 200 U.S. 316, 321 (1906); *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

122. *Batson*, 476 U.S. at 95-96. The Court based this extension on post-*Swain* decisions prohibiting racial discrimination in the selection of jury venires in individual cases, and observed that " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Id.* at 95 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977)).

123. *Id.* at 96. The Court acknowledged the fact that most of its previous decisions concerning jury selection dealt with discrimination in "the selection of the venire," but found that "the principles announced there also forbid discrimination on account of race

noted in his dissent, however, the majority did not apply the "conventional equal protection framework" to the exercise of the peremptory challenge, and the ruling reflected only general equal protection principles.[124]

The *Batson* Court went on to establish a three-part test for determining whether a defendant has established a valid prima facie case:

> [T]he defendant first must 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.[125]

The Court constructed this test by drawing on similar tests for prima facie discrimination developed in previous decisions.[126] Once a defendant makes the above showing, the burden shifts to the State to proffer "a neutral explanation for challenging black jurors."[127] The Court added, however, that this explanation need not "rise to the level justifying exercise of a challenge for cause."[128] The Court "express[ed] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel";[129] nor did it address whether limits could be imposed on gender discrimination[130] in civil trials.

---

in selection of the petit jury." *Id.* at 88. The Court declared that defendants were guaranteed equal protection throughout a trial, and that "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Id.* at 88 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

124. The Chief Justice summarized the "three-tier" structure of equal protection analysis and then observed that the majority may have been trying to "avoid acknowledging that the state interest involved [in the peremptory challenge] has historically been regarded by this Court as substantial, if not compelling." *Id.* at 125 (Burger, C.J., dissenting).

125. *Id.* at 96 (citations omitted) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

126. *Id.* at 94.

127. *Id.* at 97.

128. *Id.*

129. *Id.* at 89 n.12.

130. However, Chief Justice Burger predicted that "if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not

The Supreme Court answered, in three subsequent rulings, some of the questions left open by its decision in *Batson*. Of these post-*Batson* juror discrimination cases, *Powers v. Ohio*[131] is arguably the most significant. In *Powers*, the Court addressed the question of whether a defendant had standing to challenge the constitutionality of race-based peremptory strikes exercised against venire members of another race.[132] Acknowledging that *Batson* stood for the proposition that a defendant could bring an equal protection claim by "showing that the prosecutor used [peremptory strikes] for the purpose of excluding members of the defendant's race,"[133] the Court rejected the State's claim in *Powers* that "the race of the objecting defendant constitutes a relevant precondition for a *Batson* challenge."[134] Building upon a recognition that discrimination against a potential juror is in itself a violation of the Fourteenth Amendment,[135] the Court sought to empower a litigant to challenge that discrimination. However, traditional precepts of third-party standing, which provide only "limited exceptions" to the rule that "a litigant . . . cannot rest a claim to relief on the legal rights or interests of third parties,"[136] threatened to make such empowerment impossible. The Court noted that its decisions required three criteria to be satisfied before according a party third-party standing: a tangible injury to the litigant, a "close relation to the third party," and the existence of some obstacle to the third party's capability of protecting himself.[137]

The Court solved this problem by liberalizing the traditional rules of third-party standing.[138] First, the Court found an injury to the

---

only race, but also sex." *Id.* at 124 (Burger, C.J., dissenting) (citing Craig v. Boren, 429 U.S. 190 (1976)).

131. 499 U.S. 400 (1991).

132. *Id.* at 402. In *Powers*, a white criminal defendant claimed that the State had discriminated against potential jurors by using seven peremptory strikes to eliminate black members of the petit jury venire. *Id.* at 401-03.

133. *Id.* at 405.

134. *Id.* at 406. The Court said that *Batson* was designed to serve a number of purposes, "only one of which was to protect individual defendants from discrimination in the selection of jurors." *Id.* (citing Allen v. Hardy, 478 U.S. 255, 259 (1986) (per curiam)). However, by effectively removing the only significant requirement that the party bringing the claim would have to meet—the requirement that defendant and the excluded jurors be of the same race—*Powers* essentially made it unnecessary for a litigant to claim discrimination against himself.

135. *Id.* at 406-08; *see* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

136. *Powers*, 499 U.S. at 410 (citing Department of Labor v. Triplett, 494 U.S. 715, 720 (1990)).

137. *Id.* at 411.

138. *Id.*

defendant in the fact that "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt."[139] Second, the Court said that both the defendant and excluded venireperson "have a common interest in eliminating racial discrimination from the courtroom" and that both may otherwise "lose confidence in the court and its verdicts."[140] This "congruence of interests,"[141] the Court observed, makes the litigant an appropriate advocate of the excluded juror's rights.[142] Finally, the Court identified a number of impediments to the assertion by excluded jurors of their own rights, not the least of which were "practical barriers . . . because of the small financial stake involved and the economic burdens of litigation."[143] Examined separately, each of the three rationales the Court advanced to satisfy third-party standing rules was only a modest expansion of frequently accepted propositions; together, however, they represent a significant departure from traditional analysis. By recognizing a defendant standing in this type of case, the Court cleared a major obstacle from the path extending the availability of *Batson* claims to a wide range of litigants.

Another question the Court left unanswered in *Batson* was whether the prohibition against the exercise of race-based peremptories was limited only to criminal cases. On its face, the Fourteenth Amendment only prohibits discriminatory actions by a state,[144] and the Court traditionally has carefully protected the right of private litigants to "structure their personal relations as they choose subject only to the constraints of statutory or decisional law."[145]

---

139. *Id.* (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)). *But see id.* at 426-29 (Scalia, J., dissenting) (arguing that under traditional third-party standing, an injury must be palpable or concrete).

140. *Id.* at 413-14.

141. *Id.* at 414.

142. *Id.* The Court also justified its conclusion by reference to similar cases: "Here, the relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases." *Id.* at 413 (citing Department of Labor v. Triplett, 494 U.S. 715 (1990); Craig v. Boren, 429 U.S. 190 (1976); Griswold v. Connecticut, 381 U.S. 479 (1965)).

143. *Id.* at 415. The Court also noted the fact that "jurors are not parties to the jury selection process" and that the difficulty individual jurors face in proving that discrimination would likely recur as obstacles to the assertion of their own rights. *Id.* at 414-15.

144. U.S. CONST. amend. XIV, § 1; *see also supra* note 8.

145. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991); *see also* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (discussing constitutional dichotomy between state action and private conduct); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (opining that adherence to state action requirement preserves individual freedom).

However, in *Edmonson v. Leesville Concrete Co.*,[146] decided in 1991, the Court addressed this issue and in the context of peremptory strikes reached a different conclusion. Prefacing its discussion of state-actor status, the majority said that courts must occasionally determine "where the government sphere ends and the private sphere begins."[147] The Court noted that private individuals' relations were almost always beyond the scope of the Constitution, but that "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and . . . subject to constitutional constraints."[148] The Court enumerated two questions designed to determine if the action of a private citizen had crossed into the governmental sphere: first, whether the allegedly unconstitutional action was grounded in state authority, and second, "whether the private party charged with the deprivation could be described in all fairness as a state actor."[149] The Court found that the statutory source of the peremptory strikes in question in *Edmonson* was clear, and thus that the first part of the state action test had been met.[150] Turning to the second question, the Court discussed at length the nature of the peremptory challenge and its role in trial procedure.[151] Citing the "extensive use of state procedures"[152] and the aid afforded to litigants by state officials, the fact that the peremptory is a "traditional function" of government,[153] and the fact that the harm caused by the discrimination is magnified by the government's acquiescence,[154] the Court found the use of peremptory challenges to be a proxy for state action by private litigants.[155]

In *Georgia v. McCollum*,[156] decided one year after *Edmonson*, the Court addressed whether a state could contest a criminal

146. 500 U.S. 614.
147. *Id.* at 620.
148. *Id.*
149. *Id.* (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 941-42 (1982)).
150. *Id.*
151. *Id.* at 621-28.
152. *Id.* at 622.
153. *Id.* at 624.
154. *Id.* at 628.
155. *Id.* at 627. Justice O'Connor roundly criticized the majority in her dissent, and was joined in that dissent by Chief Justice Rehnquist and Justice Scalia. She contended that "[n]ot everything that happens in a courtroom is state action. A trial, particularly a civil trial is by design largely a stage on which private parties may act .... The government erects the platform; it does not thereby become responsible for all that occurs upon it." *Id.* at 632 (O'Connor, J., dissenting).
156. 112 S. Ct. 2348 (1992).

defendant's use of peremptory challenges.[157] In *McCollum*, the State of Georgia, prior to jury selection, sought to bar the white defendants from using peremptory strikes to exclude black jurors.[158] The Court identified four criteria for determining whether a criminal defendant's use of peremptories was governed by constitutional concerns, two of which were almost foregone conclusions in light of *Powers* and *Edmonson*.[159] As to the two remaining questions, the Court first addressed "whether the exercise of peremptory challenges by a criminal defendant constitutes state action."[160] The defendants argued that "the adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge";[161] however, the Court found that the extent of the appropriation of governmental power necessarily involved in the exercise of peremptories, as described in *Edmonson*, outweighed such concerns.[162] The other difficult question for the Court was "whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case."[163] The Court held that because the peremptory challenge was not granted by the Constitution, a prohibition of its use in a discriminatory fashion was not an infringement of the defendant's constitutional rights.[164] The

157. *Id.* at 2353.

158. *Id.* at 2351. The State made this claim prior to jury selection because opposing counsel had indicated a clear intent to use peremptories in a discriminatory fashion. *Id.* Furthermore, the State claimed that because Georgia law gave each party 20 peremptory strikes in this type of felony case, the defendants likely would be able to strike all African-American venirepersons. *Id.* at 2351 & n.2.

159. *Id.* at 2353. The two easily answered questions were "whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*" and "whether prosecutors have standing to raise this constitutional challenge." *Id.* The Court answered the former with reference to *Strauder* and *Batson*, focusing primarily on the perpetration of harm to the community by discrimination in jury selection, *id.* at 2353-54; it answered the latter simply by applying the *Powers* third-party standing analysis, *id.* at 2357 ("[A] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party's ability to protect its own interests.").

160. *Id.* at 2353.

161. *Id.* at 2356. The defendants relied on Polk County v. Dodson, 454 U.S. 312 (1981), in which the Supreme Court ruled that "a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant." *Id.* (citing *Polk County*, 454 U.S. at 325). The Court in *McCollum* rejected the defendants' argument, stating that the determination of state actor status for a public defender depended on the character of the function he was performing. *Id.*

162. *Id.*

163. *Id.* at 2353.

164. *Id.* at 2358.

Court ruled, therefore, that a criminal defendant could be considered a state actor in the narrow context of the peremptory challenge system.[165]

Prior to 1971, the Supreme Court analyzed all equal protection claims by applying a "rational relation" test to any challenged government action or statute, unless the government classification in question differentiated among individuals on the basis of race.[166] Under this standard, a court faced with "a challenge to a legislative classification . . . should ask, first, what the purposes of the statute are and, second, whether the classification is rationally related to achievement of those purposes."[167] Most statutes pass this test for constitutionality unless they are patently arbitrary; correlatively, government actions are accorded a strong presumption of constitutionality.[168] However, if the classification differentiates on the grounds of race, courts apply a more rigorous examination to the statute or government action. This upper tier of equal protection analysis is commonly referred to as "strict scrutiny."[169] Under this standard, a statutory distinction violates the Equal Protection Clause

---

165. *Id.* at 2356. Justice O'Connor, calling the holding "perverse," expressed amazement at the majority's "conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection." *Id.* at 2361 (O'Connor, J., dissenting). Justice Scalia, agreeing with Justice O'Connor's demonstration of the "sheer inanity" of the ruling, added that *McCollum* represented the reduction of the logic employed in *Edmonson* "to the terminally absurd." *Id.* at 2364 (Scalia, J., dissenting).

166. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) ("One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.").

167. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting); *see also* Heller v. Doe, 113 S. Ct. 2637, 2642-43 (1993) ("[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification' "); Schweiker v. Wilson, 450 U.S. 221, 234 (1981) ("[T]he pertinent inquiry is whether the classification employed . . . advances legitimate legislative goals in a rational fashion."); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (striking down as "clearly irrelevant" to the legislative purpose of the program a classification that determined eligibility to participate in the federal food stamp program based on whether or not the household was composed solely of related persons); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (stating that classification schemes in state legislation must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

168. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971).

169. *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (Harlan, J., dissenting).

if it does not further a compelling governmental interest in the most narrowly-tailored manner possible.[170] That is, if the governmental interest is not compelling, or if another method of achieving the governmental interest exists that does not discriminate on the basis of race, the statute will be ruled unconstitutional.

Beginning with *Reed v. Reed*[171] in 1971, the Supreme Court began to carve out a new category of equal protection analysis to address discrimination based on gender.[172] In *Reed*, the Court addressed the constitutionality of an Idaho probate code provision that gave preference to males over females in the selection of estate administrators.[173] The Court first noted that the Equal Protection Clause forbids a state from "legislat[ing] that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[174] Although the Court professed to be employing the rational-relation test,[175] its actions belied this assertion. Ruling that the statute, although designed to advance an ostensibly rational state objective,[176] was not consistent with the Equal Protection Clause, the Court for the first time struck down a gender classification under the aegis of the Equal Protection Clause[177] and "implicitly rejected" application of the rational-relation standard to gender.[178] Although it took several subsequent decisions for the Court to clarify this new, heightened standard of review and to advance specific criteria for its application, the Court's ruling in *Reed* essentially began the

---

170. *E.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

171. 404 U.S. 71 (1971).

172. *Id.* at 76.

173. *Id.* at 73. The code section provided that when more than one person of the same entitlement class sought to administer a decedent's estate, males would be preferred over females. *Id.* In *Reed*, both the adoptive mother and adoptive father of a minor decedent sought to be appointed administrator of their son's estate; by virtue of the statute, the probate court appointed the father. *Id.* at 72.

174. *Id.* at 75-76. The Court added that under the traditional analysis "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

175. *Id.*

176. The Court noted that the objective of the statute, as declared by the Idaho Supreme Court, was to further a legitimate state interest in reducing the administrative workloads of Idaho probate courts by eliminating one area of conflict certain to arise under the probate code. *Id.*

177. STONE ET AL., *supra* note 45, at 678.

178. Frontiero v. Richardson, 411 U.S. 677, 683 (1972).

development of a requirement of heightened scrutiny for reviewing gender classifications.[179]

In *Frontiero v. Richardson*,[180] the Supreme Court explicitly confirmed its implication in *Reed* that gender classifications warrant a higher level of judicial scrutiny than other classifications, and in fact a plurality of the Court believed that gender, like race, should be considered an "inherently suspect" category.[181] If that rationale had been adopted in a majority opinion, classifications based on gender presumably would now require the same "strict scrutiny" as those based on race. Writing for four Justices,[182] Justice Brennan presented a litany of reasons why gender should be recognized as a suspect class.[183] After laying the foundation with an interpretation of the holding in *Reed*,[184] he recounted the long history of gender discrimination in the United States, concluding that prejudice toward women was still substantial.[185] Given the immutability and "high visibility of the sex characteristic,"[186] Justice Brennan wrote that "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[187] Finally, Justice Brennan bolstered his argument for establishing gender as a suspect class by noting that Congress, "a coequal branch of Government,"[188] apparently had "concluded that classifications based upon sex are inherently invidious."[189]

---

179. In addition to gender, the Court now apparently also recognizes illegitimacy as a "heightened scrutiny" classification. STONE ET AL., *supra* note 45, at 732-41.

180. 411 U.S. 677 (1972).

181. *Id.* at 688. Although borrowing the analytical posture that the Court had established for Fourteenth Amendment challenges, Justice Brennan actually reached this decision under the Due Process Clause of the Fifth Amendment. *Id.* at 690-691.

182. Justices Douglas, White, and Marshall joined Justice Brennan in the plurality decision. *Id.* at 678. Chief Justice Burger and Justices Stewart, Blackmun, and Powell concurred in the judgment. Justice Rehnquist voiced the lone dissent. *Id.* at 691.

183. *Id.* at 682-88.

184. *Id.* at 682-83.

185. *Id.* at 684-86.

186. *Id.* at 686.

187. *Id.*

188. *Id.* at 687-88.

189. Justice Brennan based this conclusion on language in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)-(c) (1988), the Equal Pay Act of 1963, 29 U.S.C. §206(d) (1988), and the Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972) (which had recently passed in both the House and Senate). *Frontiero*, 411 U.S. at 687.

Applying "strict scrutiny" to the statute in *Frontiero*,[190] Justice Brennan concluded that the government's stated purpose in drafting the statute—administrative convenience—was not compelling.[191] "[W]hen we enter the realm of 'strict judicial scrutiny,' " he wrote, "there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."[192] Therefore, the challenged classification could not survive.[193] Justice Powell, concurring in the judgment, wrote separately to explain that he could not "join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex . . . are 'inherently suspect and must therefore be subjected to close judicial scrutiny.' "[194] Although Justice Powell refrained from voicing direct opposition to such an expansion of equal protection methodology, he noted that the Court did not need to reach that issue in *Frontiero*, and should "reserve for the future any expansion of [the *Reed*] rationale."[195]

In *Craig v. Boren*[196] and *Mississippi University for Women v. Hogan*, [197] the Court refined an intermediate level of review for gender classifications. In *Craig*, the Court ruled on the constitutionality of an Oklahoma statute that made it illegal to sell reduced-alcohol beer to males under twenty-one years of age, but only prohibited the sale of such beer to females if they were under the age of eighteen.[198] Noting *Reed*'s authority, the Court stated that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those

---

190. In *Frontiero*, a female Air Force officer sought to claim her husband as a dependent to obtain increased benefits under federal statute. *Frontiero*, 411 U.S. at 678; *see* 37 U.S.C. §§ 401 (1988, Supp. III 1991, & Supp. V 1993), 403 (1988 & Supp. III 1991); 10 U.S.C. §§ 1072 (1988, Supp. I 1989, Supp. IV 1992, & Supp. V 1993), 1076 (1988, Supp. I 1989, & Supp. II 1990). The statutes automatically accorded dependent status to wives of servicemen, but required a servicewoman to show that her husband was "in fact dependent upon her for over one-half of his support." *Frontiero*, 411 U.S. at 678-79; *see* 37 U.S.C. § 401; 10 U.S.C. § 1072.

191. *Frontiero*, 411 U.S. at 683, 688-91.

192. *Id.* at 690.

193. *Id.* at 691.

194. *Id.* (Powell, J., concurring in the judgment) (quoting *id.* at 682 (plurality opinion)).

195. *Id.* at 692 (Powell, J., concurring in the judgment). Justice Powell believed that the Court should withhold the expansion of *Reed* until the ratification, or the failure of the states to ratify, the Equal Rights Amendment. *Id.*

196. 429 U.S. 190 (1976).

197. 458 U.S. 718 (1981).

198. *Craig*, 429 U.S. at 191-92. The action was brought by "Craig, a male then between 18 and 21 years of age, and by . . . Whitener, a licensed vendor of 3.2% beer." *Id* at 192.

objectives."[199] Although the Court cited no authority for the wording of these criteria,[200] it went on to apply them to the case at hand, and ruled that the statute was unconstitutional.[201] In dissent, Justice Rehnquist contended that the Court's standard "apparently comes out of thin air."[202]

The Court applied the new standard again in *Hogan*, in which a male nurse sought admission to a state university's nursing school to obtain his baccalaureate degree, but was refused solely because of his gender.[203] Applying the "heightened scrutiny" standard,[204] the Court found that the State had "fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classifications."[205] The majority summarized the test for gender discrimination developed in *Reed*, *Craig*, and related cases.[206] First, a disputed statute must differentiate between citizens on the basis of gender.[207] Once a party has established this fact, the burden shifts to the party seeking to enforce the statutory classification to show "an 'exceedingly persuasive justification' for the classification."[208] This justification must demonstrate that the differentiation "serves 'important governmental objectives' and . . . [is]'substantially related to the achievement of those objectives.' "[209] Finally, the Court stated that the test for a gender classification must

---

199. *Id.* at 197.

200. The use of the term "important" to describe the governmental interests at issue finds no precedent in earlier cases, falling as it does between the "legitimate" interests required by the "rational-relation" test and the "compelling" interests required by strict scrutiny. The requirement of "substantial relation" apparently is drawn from an earlier formulation of the rational-relation test, which is noted in *Reed*. 404 U.S. at 76; *see also infra* note 174.

201. *Craig*, 429 U.S. at 201.

202. *Id.* at 220 (Rehnquist, J., dissenting). Justice Rehnquist also pointed out the apparent inconsistency of applying heightened judicial scrutiny to a statute that purportedly discriminates against males, when much of the Court's support for applying more than a "rational relation" test rested on the long history of discrimination against women in the United States. *Id.* at 217-20 (Rehnquist, J., dissenting).

203. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 720-21 (1981).

204. *Id.* at 727-31.

205. *Id.* at 731 (citing Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

206. *Id.* at 723; *see* Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Caban v. Mohammed, 441 U.S. 380, 394 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979).

207. *Hogan*, 458 U.S. at 723 (citing Reed v. Reed, 404 U.S. 71, 75 (1971)).

208. *Id.* at 724 (quoting *Kirchberg*, 450 U.S. at 461; *Feeney*, 442 U.S. at 273).

209. *Id.* at 724 (quoting *Wengler*, 446 U.S. at 150); *see* Craig v. Boren, 429 U.S. 190, 197 (1976).

be applied "free of fixed notions concerning the roles and abilities of males and females."[210]

Batson[211] and its offspring set the stage for the decision in *J.E.B.*, extending the long arm of the Equal Protection Clause to race-based peremptory strikes. The cases derived from *Reed* enabled the *J.E.B.* Court logically to expand the reach of equal protection to gender-based peremptory strikes. However, the fusion of the two lines of precedent is not a perfect one. Most importantly, although *Reed* and the decisions that followed it were based squarely on the developing three-tiered equal protection methodology,[212] *Batson*,[213] *Powers*,[214] *Edmonson*,[215] and *McCollum*[216] were based on previous jury venire cases[217] and a more general equal protection rationale.[218] On the particular facts of *Batson*, in which a black defendant contested the use of peremptories to eliminate venirepersons of his own race, the Court could have fashioned a suspect class analysis[219] under which race-based peremptories would have to pass the test of strict scrutiny.[220] Instead, the Court employed a general equal protection analysis to determine that no

---

210. *Hogan*, 458 U.S. at 724-725. Justice Powell, dissenting, advanced the same objection that Justice Rehnquist raised in Craig, *see supra* note 202, concerning the application of intermediate scrutiny to state actions against males. *Hogan*, 458 U.S. at 740-42 (Powell, J., dissenting). The majority justified its approach with reference to Caban v. Mohammed, 441 U.S. 380, 394 (1979), and Orr v. Orr, 440 U.S. 268, 279 (1979), two cases establishing that the fact that a "statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Hogan*, 458 U.S. at 723.

211. Batson v. Kentucky, 476 U.S. 79 (1986).

212. *See supra* note 10.

213. *See supra* notes 111-30 and accompanying text.

214. *See supra* notes 131-43 and accompanying text.

215. *See supra* notes 146-55 and accompanying text.

216. *See supra* notes 156-65 and accompanying text.

217. Batson v. Kentucky, 476 U.S. 79, 84-85 (1986)

218. *Id.* at 88-96; *see also id.* at 123 (Burger, J., dissenting) (describing the majority's support for the decision in *Batson*).

219. If the Court had chosen to approach the problem using the tier model, it presumably could have found the requisite harm to the litigant by applying a *Strauder*-derived test.

220. On the facts of *Powers*, *McCollum*, and *Edmonson*, however, the Court would have found such a framework untenable; there would have been no direct harm to the litigant to trigger a higher level of scrutiny. In those cases, the issue of third-party standing was the crucial nexus that allowed the litigant to state a claim; without a cognizable harm to the juror, the litigant presumably would have been unable to contest the discriminatory use of peremptories. The Court seemed at the time to be moving away from requiring any direct harm to the litigant, as it seemed willing to do in *Batson*, and towards hanging its judicial hat on the new twist it had recently put on third-party standing in *Powers*. *See supra* notes 138-43 and accompanying text.

race-based peremptory strikes *ever* will be tolerable in the courtroom.[221] As a result, the "*Batson* test" for race-based peremptories is simply an identification test; if a litigant's use of peremptory strikes meets the criteria of the test, the strikes will be summarily disallowed unless the litigant can offer race-neutral justifications for them.

Instead of finally bringing the *Reed* and *Batson* approaches into harmony, the *J.E.B.* Court actually seemed to engage in a judicial sleight of hand: By spending a great deal of time tracing the history of gender bias in this country and comparing it to racial discrimination, the Court directed attention away from the incomplete welding of the two lines of cases.[222] Despite the Court's effort, fissures in the framework are still visible. Unlike the *Batson* Court, the *J.E.B.* Court first recognized the tier model of equal protection and examined gender-based peremptories using the heightened scrutiny criteria from *Reed*.[223]

At this point, having found discrimination against excluded jurors, the Court might have applied the *Powers* third-party standing analysis and concluded that the litigant had standing to address the harm done to those jurors as members of the protected class. Instead, the Court invoked general equal protection principles, emphasizing the triumvirate of harms articulated in *Strauder* and *Batson*: damages inflicted on the litigant, on excluded jurors and on the community.[224] The Court finally rested its decision on the harm done to excluded jurors, [225] and did seem to find that harm in the discrimination identified by the suspect class analysis, but by employing both analyses the Court may have created confusion for the lower courts.[226] In fact, the Court seemed unwilling to forego nay of the

221. *See supra* notes 119-25 and accompanying text.
222. *J.E.B.*, 114 S. Ct. at 1225.
223. *Id.* at 1424-26.
224. *Id.* at 1427.
225. *Id.* at 1430.
226. Though the Court did not say so explicitly, it may have applied the *Powers* third-party standing rule to furnish the petitioner with a right to raise the equal protection claim on behalf of the excluded jurors. *See id.* at 1437 (Scalia, J., dissenting). However, *J.E.B.* is more closely analogous to *Batson* than it is to *Powers*, in that the excluded jurors in *J.E.B.* were members of the same "group" as the petitioner, and thus under the general equal protection analysis of *Batson* a cognizable injury to the defendant could be found without third-party standing.

potential justifications[227] for prohibiting the discriminatory peremptory challenge.[228]

The separate criteria used in the *Batson* and *Reed* lines of cases and the decision in *J.E.B.* together suggest a new standard for analyzing alleged gender bias in the use of peremptory challenges. Under this hypothetical analysis, a party seeking to show gender bias first must make out a prima facie case of discriminatory intent in the use of peremptories under the three-part *Batson* test,[229] as modified by *Powers*, *Edmonson*, and *McCollum*.[230] If a prima facie case were made, the burden then would shift to the party defending his use of peremptories to justify that use.[231] Given the difference between the intermediate scrutiny accorded to gender classifications and the strict scrutiny accorded to race classifications, this justification should not need to be unequivocally gender-neutral.[232] To rebut the presumption of an invalid use of peremptory strikes, the party

---

227. Those justifications presumably include: a general equal protection or suspect class analysis in cases in which the litigant and excluded jurors are members of the same class; a general equal protection of suspect class analysis, using liberalized third-party standing rules to give litigants a cause of action; and perhaps a fundamental rights justification, *see J.E.B.*, 114 S. Ct. at 1430 (suggesting that the basis for disallowing discrimination against individual jurors is the abridgement of the right to participate in the justice system).

228. The Court's efforts to "bundle" together several justifications for the decision in *J.E.B.* may have been the impetus for Justice Kennedy's separate opinion, which outlined his understanding of recent precedent and its implications for *J.E.B.* Id. at 1433-34 (Kennedy, J., concurring in judgment). Justice Kennedy had written for the majority in *Powers*, 499 U.S. 400, 400 (1991), and *Edmonson*, 500 U.S. 614, 614 (1991); those decisions clearly reflected a desire for one overriding rationale in the examination of peremptories, and seemed to find such a rationale in the grant of third-party standing to litigants. *Powers*, 499 U.S. at 410-16; *Edmonson*, 500 U.S. at 618-19.

229. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

230. Technically, the first criterion of the *Batson* test may be no longer valid, though the Court has not specifically overturned it. Now that any litigant is afforded the right of third-party standing by *Powers*, *see supra* notes 131-43 and accompanying text, there should be no need for a party to "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." *Batson*, 476 U.S. at 96 (citation omitted). However, courts continue to apply the first prong, but require only proof that a party has used peremptory challenges to remove individuals "on the basis of race." Hernandez v. New York, 500 U.S. 352, 358 (1991).

231. *Batson*, 476 U.S. at 97; *see supra* note 127-28 and accompanying text.

232. *Batson* required that the justification be neutral, 476 U.S. at 97, but the Court in *J.E.B.* implied that some acceptable exercises of a peremptory might possess gender-oriented nuances. The Court said that "strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." *J.E.B.*, 114 S. Ct. at 1429. As a practical matter, however, litigants would be well-advised to proffer a gender-neutral justification rather than attempt to justify a strike based on gender-related rationale.

defending that use would have to show an "exceedingly persuasive justification"[233] for the gender classifications—that is, a showing that the differentiation between genders was substantially related to the realization of the sole government objective of a fair and impartial jury.[234]

Unfortunately, the Court's own summary of its holding leaves no more room for conventional, intermediate scrutiny of gender-based peremptories than *Batson* did for strict scrutiny in the context of race-based strikes.[235] The Court clearly stated that all peremptory strikes based on gender are prohibited.[236] However, its foundation for this sweeping prohibition is not at all clear. Part of the confusion certainly lies in the incomplete syllogism between the Court's decision concerning the State's action in this case and the application of that decision to all peremptories. The Court first presented the question of whether gender-based peremptories are substantially related to an important government interest in the abstract.[237] Then, however, it addressed the State of Alabama's justification[238] for the use of its peremptories, declared that the proffered justification was invalid, and concluded that the only valid government interest at issue was a state's interest in securing a fair and impartial jury.[239]

At this stage, the Court abandoned its intermediate-scrutiny inquiry. Had it stated simply and explicitly that a state's interest in securing a fair and impartial jury is never substantially furthered by the use of gender-based peremptories, the syllogism would have been complete. Such a result would have ensured that the holding in *J.E.B.* described a test similar to the one created by the *Batson* Court[240]—a test that simply identifies gender discrimination in peremptory strikes and instructs trial courts to disallow those peremptories when identified because the "substantial relation" question already has been resolved. Instead, the Court in *J.E.B.* abandoned its analysis in mid-stride and returned to a general equal rights analysis.[241] The Court could have avoided the muddy result in *J.E.B.* and established a test

233. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
234. *J.E.B.*, 114 S. Ct. at 1426.
235. *Id.* at 1430.
236. *Id.* at 1429-30.
237. *Id.* at 1426.
238. *See supra* notes 48-50 and accompanying text.
239. *J.E.B.*, 114 S. Ct. at 1426 n.8.
240. *See supra* notes 125-30 and accompanying text.
241. *J.E.B.*, 114 S. Ct. at 1429.

that worked just like the *Batson* test by focusing solely on a suspect class analysis.[242]

At every stage in the Court's odyssey towards making the peremptory challenge system fully consonant with the Equal Protection Clause, commentators have mourned the impending loss of the peremptory as a viable tool in the trial process.[243] To be sure, the Court's recent decisions have burdened the once unfettered challenge with a number of caveats.[244] Nevertheless, no matter how restrictive the Court's rulings have been, the crucial question for litigators is probably not how much more of the peremptory system the Court will eliminate, but how to maximize the value of peremptories within the confines of the present system. To do so, though, one must recognize some of the procedural "costs"[245] that

---

242. Fortunately, trial courts seem to be responding to *J.E.B.* by treating the inquiry into gender-based peremptories in the same manner they have treated *Batson* inquiries. Some courts are demanding that litigants whose strikes are being challenged under *J.E.B.* come forward with gender-neutral justifications. *E.g.*, Commonwealth v. Fruchtman, 633 N.E.2d 369, 371 (Mass. 1994); Robertson v. Commonwealth, 445 S.E.2d 713, 714 (Va. 1994).

243. A brief survey of the titles of journal articles published following the decisions in *Powers*, *Edmonson* and *McCollum* is instructive. *E.g.*, Robert T. Prior, *The Peremptory Challenge: A Lost Cause?*, 44 MERCER L. REV. 579 (1993); David M. Tyler, *The Cleansing of the Peremptory Challenge or an Invitation to the Grim Reaper*, 71 MICH. B.J. 674 (1992); William C. Waller, Recent Development, *The Beginning of the End of Peremptory Challenges:* Georgia v. McCollum, 16 HARV. J.L. & PUB. POL'Y 287 (1993); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); Michael A. Cressler, Comment, Powers v. Ohio: *The Death Knell for the Peremptory Challenge?*, 28 IDAHO L. REV. 349 (1991-1992); Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367 (1993); J. Christopher Peters, Note, Georgia v. McCollum: *It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth?*, 53 LA. L. REV. 1723 (1993).

244. The Supreme Court Justices themselves have also been quick to recognize the damage that their decisions cause to the peremptory system. Originating in the majority opinion in *Swain v. Alabama*, *see supra* notes 99-110 and accompanying text, but relegated to the dissent in *Batson*, is a strong conviction that the peremptory system should remain inviolate, and that each ruling making peremptory strikes more vulnerable to attack does irreparable harm to that system. *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348, 2359-60 (1992) (Thomas, J., concurring in judgment); Batson v. Kentucky, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting). The Court in *J.E.B.* anticipated such criticism in its opinion and contended that its decision would not eliminate the use of peremptory challenges altogether. *J.E.B.*, 114 S. Ct. at 1429. To buttress this conclusion, the Court pointed to the fact that many federal courts already had prohibited strikes based on gender. *Id.* While the Court listed jurisdictions that had barred gender-based strikes, *id.* at 1422 n.1, and suggested that these prohibitions corresponded with the continuing vitality of peremptories, it did not present hard evidence of the effect such restrictions might have had on the actual frequency of use in those courts. *Id.* at 1429.

245. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring).

go hand-in-hand with the decision in *J.E.B.*, and also keep a weather eye open for rulings that might affect the peremptory practice.

The first probable consequence of the ruling in *J.E.B.* is a further blurring of the line between peremptory challenges and challenges for cause. The Court in *Batson* maintained that a party seeking to justify a disputed peremptory strike was *not* required to present an explanation rising to the same level as would be required of a challenge for cause.[246] However, as Chief Justice Burger noted in his dissent, the majority cleared the way for litigants to assail the validity of peremptory strikes without advancing a new, clear standard for delineating between such strikes and strikes made for cause.[247] He believed that it was "readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.' "[248] Justice O'Connor echoed this statement in *J.E.B.*, when she stated that "as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable. In so doing we make the peremptory challenge less discretionary and more like a challenge for cause."[249]

The second major consequence of *J.E.B.* is judicial delay. Justice Scalia voiced concern over the potential for such delay in his dissent in *Edmonson*,[250] contending that the decision added another complication "to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case."[251] Justice O'Connor, suggesting in her concurrence in *J.E.B.* that erosion of the peremptory challenge institution had already occurred, noted that "*Batson* mini-hearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well. Demographics indicate that today's holding may have an even greater impact than did *Batson* itself."[252] Although

246. *Batson*, 476 U.S. at 97; *see also J.E.B.*, 114 S. Ct. at 1430 (stating that the challenge need only be based on a characteristic other than gender).

247. *Batson*, 476 U.S. at 127-28 (Burger, C.J., dissenting).

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

249. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring).

250. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting).

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

252. *Id.* at 4225 (O'Connor, J., concurring). Apparently, Justice O'Connor was concerned that with roughly equal numbers of men or women on any venire, it was highly likely that a litigant could strike enough jurors of the same sex to provoke a claim of gender discrimination.

the Court in *J.E.B.* never addressed the number of venire members of one sex that would have to be excluded in order to satisfy the third prong of the *Batson* test, that question certainly will become an important and potentially time-consuming one.[253] The *J.E.B.* Court has armed attorneys with yet another motion to file, another issue to hold for appeal; the Court has also given a valuable tool to any attorney who desires to slow the pretrial process.

Another, more systemic consequence of the ruling in *J.E.B.* may be the multiplication of pretextual rationales offered by attorneys for the exercise of peremptories.[254] By forcing attorneys to "articulate what we know is often inarticulable,"[255] *Batson* and *J.E.B.* place attorneys in the uncomfortable position of either admitting that race or gender may have played a part in their decision to strike a member of the venire or stating a pretextual gender or race-neutral explanation.[256] The Court in *J.E.B.* suggested that the answer to this dilemma lay in properly managed voir dire, which "can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions . . . both unnecessary and unwise."[257] The Court seemed to believe that any dilemma of this nature arose for the very same reason that drove its ruling on *J.E.B.*: the existence of prejudice in the hearts of attorneys and litigants.[258]

The Supreme Court's decision in *J.E.B.* puts the Court in a familiar position with respect to the peremptory challenge system. As soon as the *Batson* Court lifted away the first shovelful of dirt from the peremptory's foundation, it became clear that the extent of that

---

253. For example, if a state has ten peremptory strikes at its disposal, at what point does it cross the line from "neutral" to "discriminatory," assuming no other overt actions that indicate prejudice? After exercising eight of the peremptory strikes against women? After using four in a row to strike men? After striking three black men, when there are black women and white men on the venire that were not struck peremptorily?

254. Justice Marshall first voiced concern about the potential for pretextual justifications in his concurrence in *Batson*. 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring). *See generally* Douglas B. Dykes, *Articulation of Non-Race Based Reasons for Peremptory Challenges After* Batson v. Kentucky, 17 AM. J. TRIAL ADVOC. 245 (1993) (canvassing prosecutors' explanations for peremptory challenges in the wake of *Batson*).

255. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring).

256. *See* Andrew G. Gordon, Note, *Beyond* Batson v. Kentucky: *A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 693-710 (1993) (discussing the problem of pretextuality).

257. *J.E.B.*, 114 S. Ct. at 1429.

258. *Id.* at 1430 (discussing the specific problem of gender as a proxy for race discrimination); *cf.* Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1813 (1993) ("[T]he *Batson* line of cases acts as a lightning rod for all of the Court's unexpressed concerns about racism in the criminal justice system").

holding would need to be interpreted in subsequent rulings.[259] Similarly, *J.E.B.* now requires clarification, especially in two areas. First, how far will the Court go towards extending equal protection restrictions to the other heightened and strict scrutiny classifications of alienage, nationality, and illegitimacy?[260] Second, will the Supreme Court accept the same third-party standing analysis advanced in *Powers*,[261] or the state action rationales allowed in *Edmonson* and *McCollum*[262] by a litigant pursuing a claim of gender bias in the exercise of peremptories? As to the latter question, the answer is almost certainly "yes." The inexorable march of *Batson* extensions provides a clear lesson that the Court believes that discrimination cannot be weeded out of the courtroom until each party's acts are governed by the precepts of the Fourteenth Amendment.[263] However, since the lower courts will rule on these extensions first, and the liberal nature of the Court's recent extensions of *Batson* is relatively apparent, the Court probably will not hear such cases unless a serious conflict of authority develops.

As to the first question, concerning other Fourteenth Amendment protected classes, the Court has provided few hints as to future

---

259. *See supra* notes 129-30 and accompanying text.

260. Stone, *supra* note 45, at 718-757 (discussing the statuses of various classes). The Court recently denied certiorari for a case involving religion-based peremptory strikes. *See* Davis v. Minnesota, 114 S. Ct. 2120 (1994) (mem.), *denying cert. to* 504 N.W.2d 767 (Minn. 1993). In *Davis*, a prosecutor used a peremptory challenge to strike a black man from the jury venire in a robbery trial. *Id.* at 2120-21 (Thomas, J., dissenting). When the defendant objected and asked for a race-neutral justification, the prosecutor explained that she had removed the juror based on the fact that he was a Jehovah's Witness. *Id.* at 2121 (Thomas, J., dissenting). The majority did not give a reason for not reviewing the case, but Justice Scalia joined Justice Thomas in a dissent stating that "given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause[,] . . . a category which presumably would include classifications based on religion." *Id.* at 2121 (Thomas, J., dissenting).

261. That is, will the Court accept the argument that a litigant may pursue the claim of an excluded juror, even if that juror is of the opposite sex? *See supra* notes 131-43 and accompanying text.

262. That is, will civil litigants be recognized as state actors in their use of gender-based peremptory strikes? *See supra* notes 144-65 and accompanying text.

263. Perhaps even more revealing is the fact that the Court in *Batson* explicitly identified questions that the decision left open, 476 U.S. at 89 n.12, while the *J.E.B.* Court did not. Furthermore, lower courts have already begun the process of extending *J.E.B.* *See, e.g.*, Martins v. Connecticut Light & Power Co., 645 A.2d 557 (Conn. App.) (extending *J.E.B.* restrictions on gender-based strikes to civil trials in which the government is not a party), *cert. denied*, 648 A.2d 154 (Conn. 1994).

extensions of *Batson*.[264] However, with the extension of *Batson* to gender, a classification subject only to intermediate scrutiny, the further extension of *Batson* to the other two "inherently suspect" classes, nationality and alienage, perhaps need not occur at the Supreme Court level. Certainly litigants will find it difficult to make a coherent argument that, in the particular context of the peremptory challenge, classes traditionally subject to higher scrutiny actually warrant less scrutiny than gender. However, given the lengthy historical analysis the *J.E.B.* Court undertook in comparing race and gender,[265] the lower courts might not feel confident about extending *Batson* to illegitimacy, the other classification subject to intermediate scrutiny.[266]

The ultimate value of *J.E.B.*, perhaps even more significant than its role as a guarantor of justice in jury selection, may lie in the insight it provides into current equal protection methodology. The tier system, designed to operate almost reflexively, was created to ensure the sovereignty of the Fourteenth Amendment over actions affecting certain classes that had been identified previously as being at a special risk of discriminatory state acts. However, the mechanical nature of the tier analysis also makes it difficult for the Court to extend equal protection to groups that are not recognized as deserving some form of automatic scrutiny.[267] Once the Court recognizes a new classification, even if it does so in only a narrow context, it tacitly approves subjecting the classification to scrutiny in other contexts by virtue of the tier structure. *J.E.B.* highlights the inflexibility of this approach. In the context of the peremptory challenge, groups that are

---

264. There undoubtedly will be a renewed flood of claims requesting extensions of *Batson* to prohibit peremptories exercised against other classes of individuals. *See, e.g.*, Missouri v. Kelly, No. 46975, 1994 WL 449408 (Mo. Ct. App. Aug. 23, 1994) (concerning a defendant claiming the improper removal of three venire members by peremptory strikes based on their age).

265. *See supra* notes 42-46 and accompanying text.

266. *See* Clark v. Jeter, 486 U.S. 456, 451 (1988); Levy v. Louisiana, 391 U.S. 68, 72 (1968). As a practical matter, few trial attorneys probably ever inquire about a potential juror's legitimacy.

267. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 (1973) (Marshall, J., dissenting); *see also* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 *passim* (1984) (predicting the collapse of multi-leveled analysis in equal protection cases); *The Supreme Court, 1987 Term: Leading Cases*, 102 HARV. L. REV. 143, 201-11 (1988) (discussing treatment of equal protection analysis during the 1987 Supreme Court Term); *cf.* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 17-20 (1972) (observing the Supreme Court's dissatisfaction with the rigid dichotomy of the old "two-tier" analysis).

a numerical minority in society are the most vulnerable classes because it is easier for a litigant to remove *all* members of that group from the venire.[268] When the group in question also has been subject to almost any level of historic discrimination, the stigma of being excluded certainly is no less a "brand upon them, affixed by the law"[269] than it is for any other group. With a more flexible framework, the Court might be able to recognize discriminatory exercise of peremptories as abhorrent to the principles of equal protection, without fear of setting unalterable precedent for nonjury contexts. Instead, the Court has created a rigid structure with vague internal components that often create confusion in the lower courts and an appearance of vacillation on the part of the Court itself.[270] To the extent the majority in *J.E.B.* may have been trying to avoid the constraints of the tier system by retaining the *Strauder-Batson* general equal protection principles as a partial basis for the opinion, perhaps the Court is moving towards a workable hybrid; if so, it will need to make this intent more apparent in future decisions.

In the aftermath of *J.E.B. v. Alabama*, courts and commentators once again will question the continuing vitality of the peremptory challenge. No doubt some will take up the banner that the late Justice Marshall once carried, and insist that the peremptory be eliminated altogether.[271] Stripped to its essentials, however, the fate of the peremptory probably depends on two very practical, competing concerns: the vigor with which its merits are championed by litigators and the amount of judicial gridlock the recent limitations will create. In *J.E.B.*, the Court may have made its last statement about the peremptory for some time, but it is worth noting that the peremptory challenge in most instances is granted by statute[272] and any severe impact the Supreme Court's decisions have on the already sluggish wheels of justice might induce legislative bodies to curtail or eliminate the peremptory themselves. However, it is far more likely that the

---

268. For example, if Class *X* makes up approximately five percent of the population, the venire in a given case is made up of 100 people, and each party is allowed 10 peremptory strikes, a litigant can easily strike all members of Class *X* if that is his intent.

269. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

270. For instance, the Court has never satisfactorily defined what qualifies as a "substantial relation," the difference between "important" and "compelling" state interests, or the difference between strict and heightened scrutiny. *See also* Shaman, *supra* note 267 at 175-77 (describing "internal inconsistencies" within the multi-tier equal protection framework).

271. Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J. concurring).

272. *See supra* note 1.

peremptory will remain in place, damaged but still useful, and courts and litigators will do what they always do when confronted with new restrictions: adapt.

LANCE KOONCE