WHY THE PEREMPTORY CHALLENGE
SHOULD BE ABOLISHED

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INTRODUCTION

The peremptory challenge has been described as "one of the most impor-
tant” of the criminal accused’s privileges and a “vital” appurtenance to the Sixth Amendment right to trial by an impartial jury. Nevertheless, it is not a privilege of constitutional dimension. Nor has the peremptory’s utility in furthering the objective of a fair trial ever been demonstrated. Indeed, claims extolling the value of the peremptory challenge are predicated on nothing more than baseless speculation and courthouse apocrypha. The evils it propagates, however, are well-documented. The peremptory challenge is habitually employed to discriminate against citizens on the basis of invidious and atavistic classifications. It is used to affix marks of inferiority on historically disenfranchised

§ 1863(b)(5)(A)-(b)(6). The result is a “qualified jury wheel.” Id. § 1863(b)(7). Fourth, the court selects prospective jurors at random from the qualified wheel and summons them for duty. Id. § 1866 (1988). Last, these individuals are assembled into panels, or venires, from which a petit jury for a particular case is impanelled after voir dire is conducted and after counsel exercises their challenges.

Voir dire is the process by which judges or lawyers question prospective jurors, or venire members, about their backgrounds. Its goal is to uncover whether any person in the panel entertains biases or prejudices that would render her unable to render an impartial verdict. The judge, counsel, or both may make inquiries of the prospective jurors, although the court usually conducts the voir dire in the federal system. Federal Judicial Center, supra, at 46.

Two types of challenges may be used to exclude venire members from serving on the petit jury. First, the judge may excuse a venire member for “cause.” 28 U.S.C. § 1870 (1988). Challenges for cause allow the rejection of venire members “on narrowly specified, provable and legally cognizable basis of partiality,” Swain v. Alabama, 380 U.S. 202, 220 (1965), overruled on other grounds, Batson v. Kentucky, 476 U.S. 79 (1986), such as a personal relationship with a party, witness, or attorney in the litigation, or a biased state of mind concerning a party or issue in the case. The number of prospective jurors who may be excused for cause is unlimited, and the decision whether to exclude a venire member for cause is vested with the court. 28 U.S.C. § 1870.

Second, venire members may be barred from sitting on the petit jury by the use of peremptory challenges. In contrast to challenges for cause, peremptory challenges are exercised by the attorneys, who usually need not explain their reasons for excluding a given venire member. Federal Judicial Center, supra, at 51. Further, peremptories are circumscribed in number. The Federal Rules of Criminal Procedure afford the government and the defendant twenty peremptories each in capital criminal cases. Fed. R. Crim. P. 24(b). The government is allowed six peremptories in felony cases and three in misdemeanor cases, while the defendant is permitted ten and three, respectively. Id. In federal civil cases, the plaintiff and the defendant are each permitted three peremptory strikes. 28 U.S.C. § 1870. The court, in its discretion, may allow additional peremptory challenges when there are more than two parties to a suit. Id.; Fed. R. Crim. P. 24(b).


The Sixth Amendment states, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI.

4. Frazier, 335 U.S. at 506 n.11 (to withhold peremptory challenge altogether wouldn’t impair constitutional guarantees); United States v. Wood, 299 U.S. 123, 145 (1936) (nothing in Constitution requires peremptory challenges); Stilson v. United States, 250 U.S. 583, 586 (1919) (Constitution does not require “Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”); Pointer v. United States, 151 U.S. 396, 408 (1894) (peremptory challenges are based in statute); see also Swain, 380 U.S. at 219 (although Constitution doesn’t require peremptory challenges, it is one of accuseds’ most important rights).
groups. Its exercise subverts the representativeness of the petit jury. Its availability favors those, such as the government or the wealthy, who can commit substantial resources to lawsuits over those who cannot. Its utilization engenders costly litigation. In short, it stands as an anti-democratic artifact that countermands a century of civil rights legislation and without a substantial justification. In each of these ways, the peremptory challenge undermines not only the appearance of justice, but the cause and ends of justice itself.

The thesis of this article is that the peremptory challenge is offensive to both the federal Constitution and basic concepts of justice. Accordingly, the government's and the defendant's peremptory challenges in criminal trials should be eradicated from the American legal system. Although this article focuses on the use of the peremptory challenge in the criminal context, many of the conclusions it embraces warrant its abolition in civil cases as well.

Part I discusses the advent and death of the peremptory challenge in England. Part II summarizes the history of the peremptory challenge in this country through 1880. Part III summarizes the use of the peremptory challenge in this country after 1880. Part IV discusses the constitutionality of peremptory challenges. Part V discusses the "seat of pants" use of peremptory challenges. Part VI discusses the "experts" and the peremptory challenge. Part VII points out that peremptory challenges are an anathema to our democracy. Part VIII recommends that peremptory challenges should be abolished.

I. THE ADVENT AND DEATH OF THE PEREMPTORY CHALLENGE IN ENGLAND

Before 1305, the Crown not only selected those to be included on the jury list, but held an unlimited number of peremptories to strike individuals deemed unsuitable. Parliament, concluding that this method generated juries biased in favor of the government, rescinded the prosecutor's peremptory challenge and

5. The "petit" jury sits as the trier of fact in criminal or civil litigation. The modifier is used to distinguish it from the "grand" jury, which is the body that decides whether or not a criminal accused should be indicted and therefore be required to defend against criminal charges. As employed in this article, "jury" means the petit jury. See infra notes 136-45 and accompanying text for a discussion of how peremptories interfere with the representativeness of the jury.


Both parties had a right to be present at the election [of the jurors] and challenge for good cause members of the proposed jury... If it developed that the jurors testified under oath that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed. Knowledge did not mean first-hand knowledge, but declarations of a juror's father or other equally reliable sources were sufficient. The jurors of this court were knights, and their decision was conclusive of the dispute.

Id. See also 2 FREDERICK POLLOK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 614-31 (discussing juries before 1300).

7. Moore, supra note 6, at 54. The Crown's lawyers simply had to assert "quid non bons sunt pro rege" to exercise their peremptories. J. PROFATT, A TREASURY OF TRIAL BY JURY § 155, at 211 (1877).

8. See SIR EDWARD COKE ON LITTLETON *156 (stating Parliament found prosecutor's peremptories "mischievous to the subject tending to infinite... danger"); JON M. VAN DYKE, JURY
allowed the Crown to remove only those prospective jurors for whom it could demonstrate a “Cause Certain.” 9 Parliament’s design was quickly circumvented by the judicially created practice of “standing jurors aside.” 10 Under this procedure, the prosecutor initially assigns, without explanation, challenges for cause against members of the panel suspected of prejudice. The court orders those persons to “stand aside.” If, as is almost always the case, a twelve-member jury of unchallenged individuals can be seated, the judge dismisses those previously directed to “stand aside” without inquiry into whether they could be impartial. 11

The English Legislature refused in 1305, however, to revise the common law permitting criminal defendants to excuse members of the panel peremptorily. This prompted Sir William Blackstone to observe that the peremptory challenge was a defendant’s privilege. He denominated it “a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous.” Because “[a] prisoner should have a good opinion of his jury,” the “law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike.” 12

Blackstone’s often-quoted praise notwithstanding, over the centuries Parliament reduced the number of peremptories available to the defense. Although originally afforded thirty-five peremptory challenges, 13 defendants were allowed only twenty (unless charged with treason) by 1530. 14 This was decreased to

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10. He that challenges a Jury or Juror for the King shall shew his Cause. . . . [B]ut if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause Certain, and the truth of the same Challenge shall be enquired of according to the Custom of the Curt . . . .

Id.

11. Contrary to the United States Supreme Court’s intimation that the prosecutor’s right to “stand aside” and the peremptory are identical, Swain v. Alabama, 380 U.S. 202, 213 (1965), overruled on other grounds, Batson v. Kentucky, 476 U.S. 79 (1986), the two procedures are distinguishable. As one commentator has noted:

[A] juror directed to “stand-aside” may eventually be selected to serve on the jury; a juror peremptorily stricken is permanently excused and disqualified. Where jury selection was not completed because the defense used its peremptory challenges, or because the prosecutor exercised too many “stand asides,” the “stand-aside” jurors would be recalled and could be removed only if the prosecutor showed “cause.”


12. 4 WILLIAM BLACKSTONE, COMMENTARIES *353.


14. For Abjurations and Sanctuaries, 1530, 22 Henry 8, ch. 14, § 6; For the Continuation of Certain Acts, 1540, 32 Henry 8, ch. 3.
seven and then, pursuant to the 1977 Criminal Justice Act, to three.\textsuperscript{15} Finally, under the 1988 Criminal Justice Act, Parliament abolished the defense's peremptory altogether.\textsuperscript{16} Concern that defense lawyers were manipulating the peremptory challenge to pack juries with biased individuals, thereby defeating the ability of random draw techniques to ensure a representative petit jury, supplied the impetus behind the revision.\textsuperscript{17}

Interestingly, the slow demise of the peremptory in England has inspired calls for reviving the challenge for cause.\textsuperscript{18} The early English law entertained challenges for cause solely on the ground that a prospective juror held a specific bias, such as one arising from a relationship by blood or marriage to a litigant.\textsuperscript{19} When a party charged a juror with bias, the court appointed two "triers," who, after hearing evidence, determined whether the juror at issue should be excused.\textsuperscript{20} Non-specific biases, such as hostility toward the defendant, were not cognizable, and counsel were not permitted to question jurors on these matters.\textsuperscript{21} After all, at that time jurors were expected to be personally familiar with the controversy and, having been handpicked by the Crown, to favor the prosecution in criminal cases.\textsuperscript{22} Under modern English practice, counsel may not (except when national security is implicated) conduct background checks of panel members, apparently because they are thought to be inimical to the principle of random selection.\textsuperscript{23} Nor may attorneys cross-examine a prospective juror to develop a cause challenge, unless a prima facie case of bias has been shown by other means.\textsuperscript{24} Accordingly, even today, challenges for cause are exceedingly

\textsuperscript{15} Gobert, supra note 13, at 529.

\textsuperscript{16} Id.; Sean Enright, Reviving the Challenge for Cause, New L.J., Jan. 6, 1989, at 9. Even before legislative abolition of the peremptory in England, its use was infrequent. As of 1979, the prosecution or the defense exercised the right of challenge "in no more than one trial in seven, and only exceptionally was there more than a single challenge in a case." John Baldwin & Michael McConville, Jury Trials 92 (1979).

\textsuperscript{17} Criminal Justice: Plans for Legislation, Cmdnd. 9658 (HMSO 1986). One barrister described the legislative action

as the result of a sustained campaign in Parliament and in the press alleging that defence counsel were systematically abusing it. In multi-handed trials, it was said, counsel were pooling challenges to "pack" juries with individuals who were likely to acquit. The Cyprus spy trial was often cited as an example. In that instance seven jurors were challenged by defence counsel acting together. The jury, all young and male, acquitted all seven defendants. This case more than any other represented a watershed in the campaign to abolish the challenge, even though critics overlooked the fact that the entire jury panel summoned for the trial had been vetted for the prosecution by Special Branch and MI5.


\textsuperscript{19} Van Dyke, supra note 8, at 141.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Jury Vetting, supra note 18, at 69-70.

\textsuperscript{24} Enright, supra note 16, at 10.
rare.\textsuperscript{25}

II. THE USE OF PEREMPTORY CHALLENGES IN THIS COUNTRY THROUGH 1880

American colonial courts accepted the defendant's authority to exercise peremptory strikes, then conferred by English statute, as part of the common law.\textsuperscript{26} In 1789, when drafting the constitutional provision that would become the Sixth Amendment, the Select Committee of the House of Representatives first proposed that the amendment embrace "the right of challenge and other accustomed requisites."\textsuperscript{27} This formulation was abandoned because the language securing the accused's right to an "impartial jury"\textsuperscript{28} was considered sufficient to guarantee the right to question and challenge jurors.\textsuperscript{29} Nevertheless, in 1790 Congress explicitly afforded the defense thirty-five peremptories when treason had been charged and twenty challenges in all other capital cases.\textsuperscript{30}

The government's power to excuse jurors peremptorily was much less settled in early America. Some colonies, including Pennsylvania and Georgia, permitted the "stand aside" procedure, while others did not.\textsuperscript{31} Because Congress did not confer peremptory challenges on the government and made no mention of "standing aside" in the 1790 statute, the judiciary was left to contemplate whether those practices were permitted in federal court. Justice Joseph Story appeared to resolve the question in 1827 when he stated, in dictum, that the prosecutor's right to stand aside was part of the inherited common law.\textsuperscript{32} In 1856, however, the Supreme Court held to the contrary in United States v. Shackleford,\textsuperscript{33} and directed the district courts to follow the rule of the state in which they sat.\textsuperscript{34} Because many states by then had provided for the prosecutor's peremptory challenge,\textsuperscript{35} the effect of the Court's decision was somewhat muted. In 1865, presumably seeking to nullify Shackleford, Congress by statute granted

\textsuperscript{25} See id. (stating challenge for cause has been rendered "almost obsolete"); see also Morton, supra note 18, at 561-62.
\textsuperscript{26} Van Dyke, supra note 8, at 148.
\textsuperscript{27} Gazette of the U.S., Aug. 29, 1789, at 158.
\textsuperscript{28} U.S. Const. amend. VI.
\textsuperscript{30} An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 119 (1790).
\textsuperscript{31} Van Dyke, supra note 8, at 148-49. In addition, South Carolina and Georgia ratified the prosecutor's right to "stand aside" jurors during the colonial period. Id. Florida, Louisiana, and North Carolina later followed suit. Id. New York and Virginia, on the other hand, rejected the practice. Id.
\textsuperscript{33} 59 U.S. (18 How.) 588 (1856).
\textsuperscript{34} Id. at 590.
\textsuperscript{35} See Van Dyke, supra note 8, at 150, 171 n.57. By 1856, 14 states — Arkansas, Alabama, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Georgia, Mississippi, Missouri, North Carolina, Pennsylvania, and Tennessee — had permitted the prosecution to exercise peremptory strikes. Others, such as Connecticut, passed comparable legislation soon after Shackleford. See Colbert, supra note 11, at 11 n.39 (discussing states that adopted the peremptory challenge in 1800s).
the government five peremptory challenges in capital and treason cases and two in non-capital felonies.\textsuperscript{36}

This gradual establishment of the prosecution's ability to remove potential jurors peremptorily may have reflected, as one commentator has stated, the citizenry's "increasing acceptance of state power."\textsuperscript{37} Whatever the underlying purpose originally animating this trend,\textsuperscript{38} however, the peremptory soon was recognized — and indeed justified — as a powerful weapon to prohibit certain segments of the population from sitting as jurors. For example, in \textit{Hayes v. Missouri},\textsuperscript{39} the Supreme Court considered a state statute that gave the prosecutor fifteen peremptory challenges in capital cases tried in cities with populations of over 100,000, but only eight peremptories in other areas.\textsuperscript{40} While upholding the provision, the Court noted that the state had a legitimate interest in removing some elements from the jury:

> In our large cities there is such a mixed population; there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors.\textsuperscript{41}

Although other disfavored groups were the initial targets in the peremptory, African-Americans were not. This was because, by custom or law, they were excluded systematically from jury service altogether.\textsuperscript{42} Between 1777 and 1857, many northern states abolished slavery and dismantled the de jure impediments that denied blacks access to the legal system.\textsuperscript{43} In particular, these states

\begin{footnotesize}
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\item[36.] Act Regulating Proceedings in Criminal Cases, ch. 86, § 2, 13 Stat. 500 (1865). By the same statute, those accused of capital crimes or treason were afforded twenty peremptories, while individuals charged with noncapital felonies were allowed ten. \textit{Id.}
\item[37.] \textsc{Van Dyke}, \textit{supra} note 8, at 150.
\item[38.] \textsc{See} Colbert, \textit{supra} note 11, at 11-12 (stating that 19th century "[a]dvocates of the prosecutor's peremptory challenge argued that it was necessary to overcome jury sympathy for the defendant").
\item[39.] 120 U.S. 68 (1887).
\item[40.] \textit{Id.} at 69.
\item[41.] \textit{Id.} at 70-71; \textit{accord} Swain v. Alabama, 380 U.S. 202, 220-21 (1965) (exclusion of jurors based on religion, race, nationality, occupation, or affiliation allows counsel to procure unbiased panel), \textit{overruled on other grounds}, Batson v. Kentucky, 476 U.S. 79 (1986).
\item[42.] Generally, until a state compelled emancipation,
\item[43.] \textsc{Richard Kluger}, \textit{Simple Justice} 27 (1975).
\end{itemize}
\end{footnotesize}
began to repeal statutes forbidding blacks from sitting as jurors and testifying against whites. Despite the demise of these laws, de facto discrimination prevented African-Americans from sitting on juries until 1860.

The Thirteenth Amendment, which outlawed slavery, was enacted in 1865. Immediately afterward, every confederate state promulgated laws that imposed upon newly emancipated blacks the very restrictions that they had suffered under slavery. Mississippi, for instance, simply reenacted its old slave codes. Disenfranchisement was further accomplished by racial killings and violence.

44. See Colbert, supra note 11, at 31 n.140 ("Juror eligibility was generally tied to voting," and by 1860 Maine, Massachusetts, Michigan, New Hampshire, New York, and Vermont had granted limited voting rights to African Americans, theoretically allowing qualifying African Americans to serve as jurors). Most states, however, divested free blacks of the vote. Kluger, supra note 42, at 38.

Free blacks were generally denied political equality and were everywhere denied social equality. They were disenfranchised in Delaware in 1792, in Kentucky in 1799, in Maryland and Ohio in 1799, and in New Jersey in 1807. Between 1814 and 1861, they were either denied the vote or drastically restricted in their access to it in Connecticut, New York, Rhode Island, Tennessee, North Carolina, Pennsylvania, Indiana, Illinois, Michigan, Iowa, Wisconsin, Minnesota, and — after the bleeding there was over — Kansas. In New York, for example, free Negroes could vote only if they met a discriminatory property qualification of $250; no such qualification was required of whites.

Id.


46. Greene, supra note 45, at 299; Kluger, supra note 42, at 38; Colbert, supra note 11, at 31.

47. U.S. CONST. amend. XIII. Section 1 prohibits slavery and involuntary servitude within the United States and any place within the nation's jurisdiction. Section 2 enables Congress to enforce the amendment with appropriate legislation. Thus, other provisions of the Constitution protecting state control of slavery were abrogated. See, e.g., U.S. CONST. art. I, § 9, cl. 1 (barring congressional regulation of slave importation until 1888); U.S. CONST. art. IV, § 1, cl. 3 (fugitive slave clause).

48. See Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 70 (1873) (Black Codes placed such "onerous disabilities and burdens" on African-Americans "that their freedom was of little value."). For descriptions of the various Black Codes, see Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); T. Eisenberg, Civil Rights Legislation 9 (1987) (discussing Black Codes); Kluger, supra note 42, at 45-46 (discussing Black Codes and giving examples of laws); Milton Konvitz, A Century of Civil Rights 14 & n.26 (1961) (discussing South Carolina Black Code); Donald G. Nieman, To Set the Law in Motion: The Freedman's Bureau and the Legal Rights of Blacks 1865-1868, at 72-98 (1979) (discussing southern Black Codes); Theodore Branter Wilson, The Black Codes of the South 96-115 (1965) (discussing Black Codes of 1866).

49. See Act to Confer Civil Rights on Freedmen, 1865 Miss. Laws 82, 82-86.
mayhem perpetuated by the Ku Klux Klan and others, as well as widespread state refusals to protect the constitutional rights of their black citizens.\textsuperscript{50}

Congress countered this recalcitrance with a number of remedial devices designed to federalize civil rights.\textsuperscript{51} In order to effectuate the Thirteenth Amendment's promise of "removing every vestige of African slavery from the American Republic,"\textsuperscript{52} and to destroy the Black Codes,\textsuperscript{53} Congress passed the Civil Rights Act of 1866.\textsuperscript{54} The Act conferred citizenship upon all persons born in the United States and proscribed that blacks held the right "to full and equal benefit of all laws," including the right to sue and give evidence, "as is enjoyed by white citizens."\textsuperscript{55}

This, and other federal efforts, had mixed success in facilitating blacks' access to the judicial system. While the southern states revised their laws absolutely forbidding blacks from testifying against whites, they allowed such testimony only when one litigant to the action was black.\textsuperscript{56} African-Americans initially did, however, win greater participation in jury service. As Professor Colbert has observed:

> Although the 1866 Act did not specifically address the issue of the all-white jury, its guarantee that a person receive "the full and equal bene-

\textsuperscript{50} See, e.g., KLUGER, supra note 42, 58-60 (discussing violence in southern states against blacks to inhibit exercise of voting rights); Colbert, supra note 11, at 39-40 (same). Between 1865 and 1870, Ku Klux Klan violence was "so pervasive that local law enforcement authorities in several Southern states were unable to provide even the semblance of criminal law enforcement." ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1866-1876, at 81 (1985).


\textsuperscript{52} CONG. GLOBE, 38th Cong., 2d Sess. 155 (1865) (statement of Rep. Davis). This goal included the right of blacks to sit on juries, id. at 289 (remarks of Rep. Kelley), much to the dismay of the amendment's opponents. See id. at 181 (remarks of Rep. Voorhees) (opposing black jurors); id. at 291 (remarks of Rep. Stiles) (stating party which favors blacks as jurors will be condemned in future).

\textsuperscript{53} CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull) (stating purpose of the 1866 Act is to make laws that deny blacks equal rights illegal).


\textsuperscript{55} Id. § 1.

\textsuperscript{56} NIEMAN, supra note 48, at 25, 74, 94, 99-100, 109, 113; see also Blyew v. United States, 80 U.S. (13 Wall.) 581, 598-99 (1872) (Bradley, J., dissenting); Bowlin v. Commonwealth, 65 Ky. (2 Bush) 10 (1867).
fit of all laws . . . for the security of person and property” significantly changed the southern trial jury’s composition . . . . [B]lack jurors began to appear in several southern states, including Georgia, Texas, North Carolina, South Carolina, and Louisiana. By 1870, the integrated jury was a common sight in those states.57

Because escalating white mob violence between 1872 and 1876 soon imperiled this gain,58 Congress devised the Civil Rights Act of 1875: modeled after the 1866 Act and calculated to preserve the right of blacks to serve as jurors in state judicial proceedings.59 Although the statute still vested state officials with authority to determine whether a person possessed the necessary qualifications to sit as a juror, section four of the Act declared it a misdemeanor for a public official to disqualify any citizen from grand or petit jury service “on account of race, color or previous condition of servitude.”60

Five years later, the Supreme Court first addressed the de jure exclusion of blacks from jury service. In Strauder v. West Virginia,61 the defendant, who was black, had endeavors to remove the criminal action against him to federal court pursuant to federal statute.62 He contended that West Virginia’s law restricting jury eligibility to “white male persons”63 violated the 1875 Act and the Equal Protection Clause of the federal Constitution.64 The state trial judge rejected the defendant’s application, and he subsequently was convicted of murder by an all-white jury. Reversing, the Supreme Court held the state jury law was offensive to the Constitution.65 The Court noted that the “common purpose” of the Thirteenth and Fourteenth Amendments66 was to eradicate invidious dis-

57. Colbert, supra note 11, at 49-50 (footnotes omitted).
58. Id. at 62.
61. 100 U.S. 303 (1879).
When any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, . . . such suit or prosecution may . . . be removed, before trial, into the next Circuit Court of the United States to be held in the district where it is pending.
63. See 1872-73 W. Va. Acts 102 (“[a]ll white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided.”).
64. Strauder, 100 U.S. at 305-06.
65. Id. at 310-12.
66. U.S. CONST. amend. XIV. Adopted in 1868, section 1 provides:
tinctions, so prevalent previously, that had regarded blacks "as an inferior and subject race." 67 Accordingly, the statute's exclusion of blacks as jurors, by "implying [their] inferiority in civil society [and] lessening the security of their enjoyment of the rights which others enjoy," violated equal protection for blacks. 68 Apparently relying on both equal protection principles and the Thirteenth Amendment's prohibition against the maintenance of badges and incidents of slavery, 69 the Supreme Court wrote:

The very fact that colored people are singled out 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; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. 70

On the same day that Strauder was handed down, the Supreme Court issued its opinion in Virginia v. Rives. 71 In Rives, the defendant posited, as grounds to remove his state prosecution to federal court, that no black had ever served as a juror in the county where he was tried. The Court held that removal was not available when the practice of state officials, rather than state statute, occasioned the exclusion of blacks from jury service. 72 Because "it ought to be presumed" that state courts can redress an official's action to deprive an accused of a right afforded by state statute, the Supreme Court wrote, "it can hardly be said that [the defendant] is denied, or cannot enforce, 'in the judicial tribunals of

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No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. § 1.

67. Strauder, 100 U.S. at 306.

68. Id. at 308.

69. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-41 (1968) (Thirteenth Amendment intended to remove badges and incidents of slavery); Blyew v. United States, 80 U.S. (13 Wall.) 581, 601 (1872) (Bradley, J., dissenting) (same); United States v. Cruikshank, 25 F. Cas. 707, 711, 713 (C.C. La. 1874) (No. 14,897) (Bradley, J.) (Thirteenth and Fourteenth Amendments allow congress to prohibit discrimination based on race, color, or previous condition of servitude), aff'd, 92 U.S. 542 (1875). In Jones, Justice Douglas enumerated the exclusion of blacks from juries "solely on account of their race" as one of the badges of slavery prohibited by the Thirteenth Amendment. 392 U.S. at 445 (Douglas, J., concurring).

70. Strauder, 100 U.S. at 308.

71. 100 U.S. 313 (1879). The last case in this trilogy was Ex Parte Virginia, 100 U.S. 339 (1879). There, the Court affirmed the conviction of a state judge for failing to select qualified blacks as grand or petit jurors, in violation of § 4 of the 1875 Act. Id. at 344-49. The Court noted that the objective of the Thirteenth and Fourteenth Amendments was "to take away all possibility of oppression by law because of race or color" and thereby "raise the colored race from that condition of inferiority and servitude in which most of them had previously stood." Id. at 344-45. The 1875 Act, which assured "an impartial jury trial by jurors indifferently selected or chosen," id. at 345, was declared to be appropriate legislation designed to enforce the Fourteenth Amendment. Id. at 344-45.

72. Rives, 100 U.S. at 320.
the State, the rights which belong to him.'"73 The Court additionally rejected the defendant's argument that he had, under the Fourteenth Amendment, the right to have a jury partially composed of blacks. "A mixed jury in a particular case is not essential to the equal protection of the laws."74

The Rives Court's eagerness to entertain the apparently irrefutable presumption that state courts adequately would protect the rights of blacks75 was incompatible with the rationale undergirding the civil rights legislation enacted during Reconstruction, including the removal portion of the 1875 jury anti-discrimination statute. For example, the Habeas Corpus Act of 186776 authorized federal courts to review the legality of the detention of state prisoners.77 Like other post-Civil War legislation pertaining to Article III courts, the 1867 Act reflected congressional attempts to channel federal rights litigation into federal tribunals.78 This desire stemmed from a deep mistrust of the willingness or ability of state courts to administer federal mandates vigorously.79 Similarly, the

73. Id. at 321 (quoting § 651 of the Revised Statutes).
74. Id. at 323.
77. See Cong. Globe, 39th Cong., 1st Sess. 4151 (1866) (remarks of Rep. Lawrence); id. at 4229 (remarks of Sen. Trumbull); see also In re Ah Lee, 6 Sawyer 410, 5 F. 899, 901-02 (D. Or. 1880); Ex Parte Bridges, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1,862); Ex Parte McCready, 15 F. Cas. 1345, 1346 (C.C.E.D. Va. 1874) (No. 8,732).
79. Amsterdam, supra note 78, at 818, 828. According to Professor Amsterdam, the Thirty-Ninth Congress utterly repudiated the pre-bellum assumption that state courts, except in "narrow instances where they affirmatively demonstrated themselves unfit," were the proper fora for the adjudication of federal rights. Id. at 828. For statements that the Reconstruction Congress intended to federalize civil rights, see Reed v. Ross, 468 U.S. 1, 10 (1984) (Congress enacted 28 U.S.C. § 2254 to provide federal forum for state prisoners); Patsy v. Florida Bd. of Regents, 457 U.S. 496, 503-07 (1982) (explaining that Civil Rights Act of 1871 was designed to protect people from unconstitutional state action); Zwicker v. Koota, 389 U.S. 241, 246-47 (1967) (made article III judges principal executors of federal law, concluding Congress with the Act of March 3, 1895); Brown v. Allen, 344 U.S. 443, 499-500 (1953) (Frankfurter, J., separate opinion) (discussing Habeas Act of 1867 as giving federal courts habeas corpus jurisdiction); Blyew v. United States, 80 U.S. 581, 595-96 (1872) (Bradley, J., dissenting) (discussing Civil Rights Bill, Act of 1866 as intended to "counteract" discriminatory state action); see generally Kluger, supra note 42, at 47 (discussing Reconstruction legislation's alteration of division of powers between state and federal government); Gressman, supra note 51, at 1325-26 (discussing 1866 Act and Thirteenth and Fourteenth Amendments as federal
Civil Rights Act of 1871, also known as the Klan Act,\textsuperscript{80} vested federal courts with the paramount role in safeguarding constitutional liberties precisely because Congress perceived that state courts would not do so.\textsuperscript{81} At about the same time, the Supreme Court also retracted any meaningful constitutional basis for objecting to de facto discrimination in jury selection procedures. In \textit{Neal v. Delaware},\textsuperscript{82} the Supreme Court held that a prima facie equal protection violation was presented only if a defendant could demonstrate the total exclusion of blacks from the jury over a substantial period of time.\textsuperscript{83} The \textit{Neal} standard, which was echoed almost a century later in the much criticized \textit{Swain v. Alabama}\textsuperscript{84} decision, was virtually impossible to satisfy. This was not simply because the test itself was so stringent, but also because lower courts construing \textit{Neal} would act only when state officials admitted that they had purposely kept blacks off the juries.\textsuperscript{85}

Because \textit{Rives} and \textit{Neal} in tandem effectively placed beyond federal reach state officials who, by custom, excluded blacks from jury duty, and because Congress’s finding that state officials would not conform to federal strictures was well-founded, the 1875 Act and the promise of \textit{Strauder} were rendered moot. Stated differently, \textit{Rives}, \textit{Neal}, and \textit{Strauder} stood for the proposition that the states were free to exclude blacks from the venire if they did not do so by imple-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{80} The Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985(3), 1986 (1988)). Section 1 of the Act established criminal and civil liability for those who, under color of law, deprive another of federally protected rights. Section 2 prohibited the going about in disguise or conspiring to deprive another of federal rights.
\item \textsuperscript{82} 103 U.S. 370 (1880).
\item \textsuperscript{83} \textit{id}. at 397. The \textit{Neal} defendant's showing that no black had ever served as a juror in the state, even though 20 percent of its population was black, was held to establish an equal protection violation. \textit{id}.
\item \textsuperscript{85} See, \textit{e.g.}, \textit{State v. Thomas}, 157 S.W. 330, 334 (Mo. 1913) (challenge to jury panel rejected where jury commissioners denied discriminating against black); \textit{Ransom v. State}, 96 S.W. 953 55-56 (Tenn. 1906) (evidence that no blacks had served as jurors in 12 years insufficient to prove race discrimination); \textit{Hanna v. State}, 105 S.W. 793, 794 (Tex. Crim. App. 1907) (exclusively white jury commission, grand jury, and petition jury insufficient to prove race discrimination).
\end{enumerate}
\end{footnotesize}
menting absolute statutory impediments to jury service because of race. As we shall see in the next section, state officials, including prosecutors, systematically deprived blacks and other citizens of their right to sit as jurors and thereby participate in civic affairs. This end was accomplished by the employment of discretionary jury qualification standards and by the discriminatory use of the peremptory challenge. What is even more regrettable is that, almost seven centuries after Parliament recognized the inherent perniciousness of the peremptory challenge, it remains as a tool of discrimination.

III. PEREMPTORY CHALLENGES IN THIS COUNTRY AFTER 1880

After 1880, state legislative bodies, emboldened by Rives and Neal, began to devise methods to ensure that blacks and members of other disfavored groups did not appear on the venire. The most common strategy had two components. Eligibility for inclusion on the jury list was typically contingent on satisfying voting requirements. Thus, the states’ endeavors to discourage and intimidate minorities from participating in the nation’s political arena at large had the ancillary effect of eliminating most blacks from the venire. The welter of prohibitive education, property, and residence prerequisites manufactured by many states, in conjunction with gerrymandering and other deceptive election devices, were so successful by 1910 that they reduced “the black man to a political cipher.”

The other component used to restrict participation in the judicial system, at both the federal and state level, involved granting a few officials discretion to select jurors on the basis of endlessly malleable standards, such as their “good character,” “intelligence,” or “approved integrity.” Often, the officials to whom this duty was delegated would rely upon prominent or “key men” in the community, such as municipal “officials, school authorities, ministers, doctors,

86. See Gibson v. Mississippi, 162 U.S. 565, 580-83 (1896) (holding, pursuant to Neal, Rives, and Strauder, that evidence of blacks’ exclusion from jury service, in absence of state law mandating that result, insufficient to warrant removal); Smith v. Mississippi, 162 U.S. 592, 600 (1896) (same).
87. Colbert, supra note 11, at 75-78, 81.
88. John Hope Franklin, From Slavery to Freedom 334 (3d ed. 1969); Kluger, supra note 42, at 9, 60, 62, 64, 67-68 & 137-38; Colbert, supra note 11, at 75-78.
89. Kluger, supra note 42, at 68.
and leading business men,"\(^91\) to compile lists of potential jurors.\(^92\) Although the Supreme Court validated these procedures by concluding that "it has not been shown that their actual administration was evil, only that evil was possible under them,"\(^93\) the combined result of these selection methods ensured that, by 1910, few blacks made it even to the venire stage.\(^94\) These methods also guaranteed that virtually no group besides middle-aged, middle-income, or affluent white males were represented through the first half of this century.\(^95\) Indeed, just before Ballard v. United States\(^96\) in 1946, in which the Supreme Court condemned the practice of excluding an individual woman from the venire unless she affirmatively sought to serve, women were disqualified from the jury altogether in twenty-one states, and could decline to serve because they were women in fifteen other states and the District of Columbia.\(^97\)

Between 1935 and 1970, the Supreme Court and Congress made efforts, with varying degrees of intensity and success, to make the venire more representative. Norris v. Alabama,\(^98\) in which nine black men were accused of raping two white women, comprised the first step. The uncontroverted evidence showed that during the prior fifty years no black had served on either a grand or petit jury in the two relevant Alabama counties.\(^99\) As one jury commissioner acknowledged, juries had been all-white for "the entire history of th[e]

\(^{91}\) Knox Report, supra note 90, at 17.

\(^{92}\) Inlay, supra note 90, at 247; Potash, supra note 90, at 82.

\(^{93}\) Williams v. Mississippi, 170 U.S. 213, 225 (1898).

\(^{94}\) Gilbert Thomas Stephenson, Race Distinctions in American Law 340-41 (1910); Colbert, supra note 11, at 78, 89-90.

\(^{95}\) See, e.g., Hearings on Proposals to Improve Judicial Machinery for the Selection of Federal Juries Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st sess. 128, 207-08, 211-12 (1967); Moore v. New York, 333 U.S. 565, 570 (1948) (Murphy, J., dissenting) ("blue ribbon" jury system used to select jurors based on superior intelligence and economic status upheld); Fay v. New York, 332 U.S. 261, 272-73 (1947) ("blue ribbon" system excluded women and laborers from special jury panels); Thiel v. Southern Pac. Co., 328 U.S. 217, 222-24 (1946) (jury commissioners intentionally excluded daily wage earners); United States v. Guzman, 468 F.2d 1245, 1247 (2d Cir. 1972) (use of voter registration lists resulted in underrepresentation of young jurors), cert. denied, 410 U.S. 937 (1973); United States v. James, 453 F.2d 27, 29 (9th Cir. 1971) (use of voter registration lists excluded blacks and "poor people"); United States v. Tijerina, 446 F.2d 675, 679-80 (10th Cir. 1971) (voter registration selection process excluded manual laborers, wage earners, and non-English speaking poor people); United States v. Butera, 420 F.2d 564 (1st Cir. 1970) (voter registration lists result in underrepresentation of young and very old people, women, and less educated), overruled on other grounds, Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985), cert. denied, 475 U.S. 1050 (1986); Inlay, supra note 90, at 249-50, 251 (typical juror under key man system was middle-aged, middle income, white male); Laura Rose Handman, Comment, Underrepresentation of Economic Groups on Federal Juries, 57 B.U. L. REV. 198, 200 (1977) (key man system resulted in underrepresentation of minorities and persons of low income).

\(^{96}\) 329 U.S. 187 (1946).

\(^{97}\) See Knox Report, supra note 90, at 23.

\(^{98}\) 294 U.S. 587 (1935). Norris stemmed from the impending retrial of the defendants following the Supreme Court's previous reversal of their convictions and death sentences in Powell v. Alabama, 287 U.S. 45 (1932), where the Court held that due process guarantees defendants the right to counsel in state capital cases. Id. at 71.

\(^{99}\) Norris, 294 U.S. at 591, 596-97.
 Officials, however, sought to justify the total exclusion by stating that there were no suitable blacks in the counties. As previously in Neal, the Court refused to accept the sweeping claim that every black was unqualified. More importantly, the Norris Court abandoned its willingness, articulated in Rives, to accept without question the self-serving statements by officials that racial discrimination was not responsible for the total elimination of blacks from the venire. If "mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service," the Court wrote, the Equal Protection Clause "would be but a vain and illusory requirement."

Although the Supreme Court frequently reaffirmed its "solemn duty to make independent inquiry" into whether purposeful racial discrimination was behind the complete exclusion of blacks from the venire, the peremptory challenge ensured that Norris did little to further minority representation on the petit jury itself. In response to Norris, jury commissioners would allow only a few blacks to be included in a series of grand juries or venire panels. As pointed out in Cassell v. Texas, until 1950 the Supreme Court adhered to its prior holdings that a prima facie equal protection violation was stated only when the exclusion of blacks from the venire was total over a long period of time, and refused to curtail this practice of tokenism. The circumscribed number of blacks who were called for jury duty were easily precluded from reaching the jury box by use of peremptory challenges.

It is not surprising that the peremptory was invested with this racially discriminatory purpose. After all, Parliament previously had recognized and the Supreme Court had praised the ability of the peremptory challenge to extirpate from the petit jury those deemed undesirable, and blacks long had been the target of racial animus. What was most remarkable was the speed and uniformity with which litigants began to employ the peremptory to deny blacks the right to participate in the legal system as actual jurors. Only seven months after Norris was issued, a newspaper reporter observed that "Negroes are just about as suc-

100. Id. at 591.
101. Id. at 598-99.
103. Norris, 294 U.S. at 599.
104. Id. at 598.
106. See Cassell v. Texas, 339 U.S. 282, 286 (1950) (jury commissioners limited number of blacks on grand jury to one); Akins v. Texas, 325 U.S. 398, 406 (1945) (number of blacks permitted to serve on grand jury limited to one); Kluger, supra note 42, at 297 (practice in Charleston was to place only token number of blacks on venire).
108. See Akins, 325 U.S. at 406 (finding no evidence of intentional discrimination notwithstanding jury commissioners' statements that they sought only one black on grand jury).
cessfully and consistently excluded from jury duty in the deep South today as they were before" the Court's decision.109 "It is a long cry from the jury roll to a jury room, and thus far few Negroes have made it," precisely because in both criminal and civil cases blacks "can be — and are — easily eliminated by one or both sides through the striking privilege."110 The result was the same in the North and Southwest as well.111 As one Los Angeles attorney recalled, "[V]ery few blacks were on jury panels . . . , and with the use of peremptory challenges, it was unusual for a black person to be on a jury in most cases between 1933-1943."112

The evidence is convincing that from 1930 to 1965 and beyond, prosecutors utilized the peremptory widely and systematically to bar blacks from sitting on the petit jury.113 Defense attorneys also, by tacit or explicit agreements with prosecutors, regularly used their peremptories to strike blacks.114 The Supreme Court of Alabama, in 1963, summed up almost thirty years of American history with one simple line. "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury."115

This, then, was the context in which the Supreme Court first addressed the invidiously discriminatory use of the peremptory challenge. In Swain v. Alabama,116 the defendant, a nineteen-year-old black man, was convicted and condemned to death for the rape of a white woman. In Talladega County, where Swain was tried, no African-American had served on a petit jury for at least

110. Id.; see also CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 333 (1940) (use of striking privilege to keep blacks off jury panels); Willard L. Eckhardt, Comments on Recent Cases, 24 ILL. B.J. 233, 234 (1936) (Supreme Court's decision in Powell v. Alabama, 287 U.S. 45 (1932), will have little effect because blacks may be barred by peremptory or for cause).
111. Colbert, supra note 11, at 88-93.
112. Id. at 92 n.451 (quoting letter from John McTernan to Douglas Colbert (Oct. 7, 1988)).
113. See, e.g., Batson v. Kentucky, 476 U.S. 79, 103-04 (Marshall, J., concurring) (summarizing cases showing that prosecutors routinely strike blacks); VANDYKE, supra note 8, at 154-57 (same); see generally Frederick L. Brown et al., The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 NEW ENGL. L. REV. 192, 206-09 (1978) (prosecutorial abuse of peremptory challenge warrants its elimination); Colbert, supra note 11, at 83-93 (discusses northern practice of excluding black jurors); Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. REV. 501, 509 (1986) (stating that disproportionate number of blacks excluded by peremptories); Honorable George Bundy Smith, Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries, 27 HOW. L.J. 1571, 1582-84 (1984) (legislation needed to curb prosecutorial abuse of peremptories); Beverly A. Chin, Note, Limiting the Defense's Use of Peremptory Challenges, 8 B.C. THIRD WORLD L.J. 103, 106 (1988) (prosecutorial use of peremptory challenges to exclude minorities).
114. See, e.g., Swain v. Alabama, 380 U.S. 202, 225 n.31 (1965) (agreement between prosecutor and defense counsel to strike black jurors first) overruled on other grounds, Batson v. Kentucky, 476 U.S. 79 (1986); id. at 235 (Goldberg, J., dissenting) (prosecutors arranged agreements with defense counsel to exclude blacks); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 406-07 (1959) (statement by public defender as to former practice of excusing blacks by agreement).
fifteen years, even though black males over twenty-one constituted one-quarter of all male residents and seven blacks on average appeared on each jury list, which usually contained one hundred individuals.\textsuperscript{117} Eight blacks were on the defendant's venire, two of whom were excused. The prosecutor used his peremptories to remove the remaining six blacks.\textsuperscript{118} The prosecutor subsequently testified that he used his strikes "depend[ing] on the race of the defendant and the victim of the crime."\textsuperscript{119} He also stated that he sometimes asked opposing counsel if the defense wanted blacks on the petit jury, and, if not, both counsel would employ their peremptories to exclude blacks first.\textsuperscript{120}

The Supreme Court, speaking through Justice White, held that because the record did not establish purposeful discrimination, no equal protection violation had been demonstrated.\textsuperscript{121} The Court stressed that the peremptory was a "necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."\textsuperscript{122} Despite an earlier Court decision holding that "[j]ury competence is an individual rather than a group or class matter,"\textsuperscript{123} the \textit{Swain} Court stated that prosecutors, in ostensible pursuit of impartiality, were entitled to strike prospective jurors solely on the basis of their group affiliations, "whether they be Negroes, Catholics, accountants or those with blue eyes."\textsuperscript{124} Invoking the \textit{Hayes} premise that the peremptory challenge performed the desirable function of keeping certain segments off the petit jury, Justice White wrote: "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society."\textsuperscript{125}

The Supreme Court did conclude, however, that the Fourteenth Amendment limits, at least in theory, a prosecutor's authority to strike blacks on the basis of race.\textsuperscript{126} Justice White first erected a presumption that in any particular case the state was utilizing its peremptories to achieve a fair and impartial jury.\textsuperscript{127} This presumption could not be defeated solely because a prosecutor peremptorily challenged all blacks on a given venire.\textsuperscript{128} But when a prosecutor

\textsuperscript{117} \textit{Id.} at 205.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 225.
\textsuperscript{120} \textit{Id.} at 225 n.31.
\textsuperscript{121} \textit{Id.} at 227-28.
\textsuperscript{122} \textit{Id.} at 212.
\textsuperscript{124} \textit{Swain}, 380 U.S. at 212.
\textsuperscript{125} \textit{Id.} at 218. The \textit{Swain} Court similarly noted:
In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of the jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case.
\textsuperscript{126} \textit{Swain}, 380 U.S. at 223-24.
\textsuperscript{127} \textit{Id.} at 222.
\textsuperscript{128} \textit{Id.}

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in a county,
in case after case, whatever the circumstances, whatever the crime and
whoever the defendant or the victim may be, is responsible for the re-
moval of Negroes who have been selected as qualified jurors by the
jury commissioners and who have survived challenges for cause, with
the result that no Negroes ever serve on petit juries, the Fourteenth
Amendment claim takes on added significance. In these circum-
stances, giving even the widest leeway to the operation of irrational but
trial-related suspicions and antagonisms, it would appear that the pur-
poses of the peremptory challenge are being perverted.\textsuperscript{129}

Swain, the Supreme Court found, failed to discharge this burden since he did not
demonstrate under what circumstances the state had struck blacks from the
venire.\textsuperscript{130}

Several courts and commentators vigorously condemned the \textit{Swain} decision
on a variety of grounds. First, and most prevalently, they objected that the bur-
den of proving purposeful discrimination, especially because few jurisdictions
maintained records of peremptory challenge use, was "virtually impossible" to
satisfy.\textsuperscript{131} Second, the \textit{Swain} Court placed its imprimatur on the arbitrary ex-
clusion of persons from the petit jury in a particular trial solely on the assump-
tion that group affiliations would interfere with certain jurors’ ability to be
impartial.\textsuperscript{132} Third, and as Justice Goldberg’s dissent in \textit{Swain} pointed out, the
Court turned established legal priorities on their heads. It exalted the peremp-
tory, which is not constitutionally required, over equal protection and fair cross-
section principles.\textsuperscript{133} In particular, because the \textit{Swain} test required a showing of
"systematic exclusion," defendants' ability to vindicate their constitutional
rights turned on the fortuity of whether they were the first or final victims in the
prosecutor’s series of racially discriminatory peremptory challenges.\textsuperscript{134} Last, by
entertaining the presumption that states were utilizing the peremptory in a le-
gally appropriate manner, the Supreme Court ignored years of well-documented

\textsuperscript{129} \textit{Id.} at 223-24.

\textsuperscript{130} \textit{Id.} at 224-25. The Court stated: "The difficulty with the record before us . . . is that it
does not with any acceptable degree of clarity, show when, how often, and under what circumstances
the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury
panels in Talladega County." \textit{Id.} at 224.

\textsuperscript{131} Brown, \textit{supra} note 113, at 197; \textit{accord} Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986);
McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984), \textit{vacated on other grounds}, 478 U.S. 1001
(1986); People v. Wheeler, 583 P.2d 748, 768 (Cal. 1978); Colbert, \textit{supra} note 11 at 94; Massaro,
\textit{supra} note 113 at 540-41; Smith, \textit{supra} note 113, at 1575; Brent J. Gurney, Note, \textit{The Case for
Abolishing Peremptory Challenges in Criminal Trials}, 21 HARV. C.R.-C.L. L. REV. 227, 240 (1986);
Note, \textit{The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The

\textsuperscript{132} See, \textit{e.g.}, Smith, \textit{supra} note 113, at 1576 (rationale behind total exclusion of particular
groups unsupportable).

\textsuperscript{133} \textit{Swain}, 380 U.S. at 243-44 (Goldberg, J., dissenting); Massaro, \textit{supra} note 113, at 539.

\textsuperscript{134} See, \textit{e.g.}, McCray v. Abrams, 576 F. Supp. 1244, 1247 (E.D.N.Y. 1983) (\textit{Swain} precludes
any remedy for first victim of discrimination), \textit{aff'd in part, vacated in part}, 750 F.2d 1113 (2d Cir.
1984), \textit{and vacated on other grounds}, 478 U.S. 1001 (1986); People v. Wheeler, 583 P.2d 748, 767
discrimination by prosecutors and defense attorneys alike.\textsuperscript{135}

In the years following \textit{Swain}, Congress and the judiciary endeavored to ensure that a broader spectrum of society would participate in the jury system. The Sixth Amendment long had been interpreted to mandate that a criminal jury be drawn from a fair cross-section of the community.\textsuperscript{136} To eradicate the "key men" method of compiling jury lists from the federal courts and to meaningfully effectuate the Sixth Amendment's command, Congress promulgated the Jury Selection and Service Act of 1968.\textsuperscript{137} The Act, which requires the clerks of the federal district courts to select prospective jurors on a random basis from a fair cross-section of the entire district in which the court is located,\textsuperscript{138} recognized that jury composition implicated the interests of both the public and the parties to lawsuits. It declared that all litigants entitled to trial by jury "shall have the right to grand and petit juries selected at random from a fair cross-section of the community" and that all otherwise qualified citizens "shall have the opportunity to be considered for service on grand and petit juries" in the district courts.\textsuperscript{139} The Act unmistakably prohibited exclusion "from service as a grand or petit juror" in the district courts "on account of race, color, religion, sex, national origin, or economic status."\textsuperscript{140}

In 1976, the United States Supreme Court, acting on a recommendation by the Advisory Committee on Criminal Rules,\textsuperscript{141} submitted an amendment to Federal Rule of Criminal Procedure 24(b) that would have reduced the number of peremptories afforded a federal criminal defendant from twenty to twelve in capital cases, from ten to five in felony trials, and from three to two in misdemeanor cases.\textsuperscript{142} The proposed revision also sought to equalize the available


\begin{quote}
It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.
\end{quote}

\textit{Id.} at 130 (citation omitted). Three years after \textit{Swain}, the Court held that a criminal defendant's right to a fair and impartial jury was applicable to the states through the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

\textsuperscript{138} \textit{Id.} § 1861.
\textsuperscript{139} \textit{Id.} Restrictions on jury service, such as minimum age, literacy, and mental and physical qualifications, and excusals based on undue hardship are set forth in §§ 1863(b)(5)(B)-(b)(6), and 1864-1865 of Title 28.
\textsuperscript{140} \textit{Id.} § 1862.
\textsuperscript{142} See id. at 12-13.
peremptory challenges assigned to the government and the defense. The reason for the amendment was two-fold. First, lowering the number of challenges was perceived to resolve a conflict between the dictates of the Jury Selection Act and the ability of the peremptory to diminish or destroy the representativeness of the jury. Although the amendment’s proponents did not question the value of the peremptory in assuring a fair trial, they argued that allowing fewer challenges would prevent their misuse as a method of systematically eliminating certain groups from the jury. Second, the Advisory Committee noted that reducing the number of peremptories would accelerate the voir dire process and permit the use of smaller venires. Congress rejected the amendment. The legislature's refusal to acquiesce in the revision stemmed from its concern that in the federal system, where the trial judge usually conducts the voir dire, counsel’s circumscribed ability to interrogate panel members hindered their capacity to develop grounds for cause challenges.

143. Id.
148. The Senate Judiciary Committee stated:
The proposed amendment by the Supreme Court to the rule would change it in a significant way. Of all the proposed amendments, it probably drew the most vigorous criticism in the House hearing and in the correspondence received by this Committee. . . .

The Committee has concluded that changes to Rule 24 should be studied further by the Judicial Conference. The basic problem seems to be in the voir dire procedures. The testimony before the House Subcommittee on Criminal Justice indicates that in most Federal courts the judge conducts voir dire. Only rarely are counsel permitted to question prospective jurors directly. Witnesses indicated that this makes it difficult for counsel to identify biased jurors and develop grounds to challenge for cause. The Committee believes the Judicial Conference should have the benefit of the comments that have been made on this rule since it was submitted to Congress in deciding whether to make such a change in the future.


The proposal was not resubmitted to Congress. In its report to the Committee on the Operation of the Jury System, the Subcommittee on the Conduct of the Voir Dire Examination declined to recommend further amendments to limit the number of peremptories. It posited that a reduction in peremptory challenges would do little to ensure representative juries and would interfere with the defendant's right to a fair trial.

Although the Jury Committee, in its 1971 recommendation to reduce peremptory challenges, stated that the continued availability of a large number of such challenges would be contrary to the cross-sectional philosophy of the Jury Selection and Service Act of 1968, your subcommittee believes that any such effect arising out of the exercise of peremptory challenges upon the cross-sectional makeup of the resulting jury would be de minimis in its impact. While the Jury Committee's 1971 recommendation also advocated equality in the number of peremptory challenges available to prosecution and defense, an argument can nevertheless be made that the common law tradition of according to a criminal defendant
Nevertheless, Swain's infirmities led some courts to limit the use of the peremptory challenge by relying on fair cross-section principles, which had been infused with new vitality in Taylor v. Louisiana. In Taylor, the Supreme Court reversed the conviction of a male defendant on the ground that a state law exempting a woman from jury service unless she made a written declaration of her wish to serve violated the Constitution's fair cross-section requirement. The Court reaffirmed that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." The Court expressed concern that prohibiting certain classes from jury service subverted the legitimacy of the criminal justice system.

Community participation in the administration of the criminal law... is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial.

Taylor, however, did not extend the Sixth Amendment requirement that the venire embrace a fair cross-section to the petit jury itself.

Likewise, the Supreme Court of California, since 1954, has recognized a
constitutional guarantee to an impartial jury as dictating that the venire be drawn from a representative cross-section of the community. In People v. Wheeler, the California Supreme Court, rejecting Swain's equal protection rubric and applying the cross-section doctrine to the petit jury, held that a prosecutor's use of the peremptory in a single trial to remove all black venire members created a prima facie violation of the state constitution. In the Wheeler court's view, a representative jury is one that "is as near an approximation of the ideal cross-section of the community as the process of random draw permits." A jury composed in this manner yields an impartial decision because it ensures the interaction of diverse viewpoints in the deliberation room, while striking members of the panel solely on the basis of group affiliation frustrates this end. The Wheeler court noted, however, that the right to an impartial factfinder does not necessitate that the composition of any given jury precisely reflect the demographic contours of the community. Rather, by protecting panel members from invidious discrimination, the system as a whole would better mirror the community.

Unlike the English Parliament, the Wheeler court did not discern the fair cross-section principle and the peremptory to be inherently incompatible. It stated that only peremptory challenges predicated on "specific" biases, which do not rely on racial or other pernicious classifications, and which relate to the particular case at hand, were permissible. Rooting out these types of biases, the Wheeler court stated, eliminated the "extremes of potential prejudice" present on the venire and therefore furthered the goal of securing an impartial jury.

To detect which strikes contravene the constitutional standard, Wheeler outlined a multistep procedure. When the prosecutor or an attorney for the defendant believes that opposing counsel is abusing the peremptory, counsel must make out a prima facie case of discrimination against a group of potential jurors. The prima facie case has three components: first, the moving attorney must show that opposing counsel has excluded jurors sharing an identifiable group characteristic. Second, counsel must demonstrate that the challenged ju-

154. The California constitutional analogue to the Sixth Amendment states: "Trial by jury is an inviolate right and shall be secured to all." CAL. CONST. art. 1, § 16.
156. 583 P.2d 748 (Cal. 1978).
157. Id. at 768. In Wheeler, the Court emphasized that Swain had proven ineffective in halting the "pernicious practice" of employing peremptory challenges in a racially discriminatory fashion. Id. at 767-68.
158. Id. at 761-62.
159. Id.
160. Id. at 762.
161. Id. at 761.
162. Id.
163. Id. at 762.
164. Id.
165. Id. at 761.
166. Id. at 760.
rors are members of a cognizable group. Lastly, counsel must prove that there is a strong likelihood that opposing counsel struck the venire members because of their group affiliation.\textsuperscript{167} If the trial judge agrees that a prima facie case has been established, opposing counsel is afforded an opportunity to dispel the inference of illegal discrimination.\textsuperscript{168} The rebuttal typically will consist of an explanation that the excused panel members evinced specific biases.\textsuperscript{169}

The Wheeler court acknowledged, however, that intuition or unfavorable impressions "conceive[d] upon the bare looks and gestures" of potential jurors might justify the exercise of peremptory challenges.\textsuperscript{170} Nevertheless, if the judge finds the proffered explanation unconvincing, the entire venire would be dismissed, a new one assembled, and jury selection would begin anew.\textsuperscript{171}

Several courts, interpreting their state constitutions or the Sixth Amendment, embraced Wheeler's general thesis and its procedure.\textsuperscript{172} The United States Supreme Court, in Batson v. Kentucky,\textsuperscript{173} adopted a similar scheme, but it relied instead on the Equal Protection Clause to limit the prosecution's latitude in barring African-Americans from the jury. The Court first disavowed Swain's "crippling" evidentiary burden by holding that discriminatory exclusion in even one case was enough to constitute an equal protection violation.\textsuperscript{174} Thus, a defendant, rather than being compelled to show that prosecutors had pursued an ongoing practice of selecting a particular group from the petit jury,\textsuperscript{175} now could "establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."\textsuperscript{176}

\textsuperscript{167} Id. at 764.
\textsuperscript{168} Id. at 764-65.
\textsuperscript{169} Id. at 765.
\textsuperscript{170} Id. at 760-61.
\textsuperscript{171} Id. at 765.


\textsuperscript{173} 476 U.S. 79 (1986).
\textsuperscript{174} Id. at 92-93, 96.
\textsuperscript{175} Id. at 95.
\textsuperscript{176} Id. at 96.
Although the Court declined to formulate any "particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," it did enunciate a general method of inquiry. After an objection is lodged, the trial court first must decide whether the defendant has stated the requisite prima facie case of purposeful discrimination by the prosecution against a "cognizable racial group," which Batson impliedly defined as a "recognizable, distinct class singled out for different treatment under the laws." In making this determination, the trial court should consider all relevant circumstances. "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his [or her] challenges may support or refute an inference of discriminatory purpose."

Once the defendant tenders a valid prima facie showing of discrimination, the burden shifts to the prosecutor to "come forward with a neutral explanation" for challenging the particular jurors. The Court stressed that the justification need not rise to the level required for a challenge for cause, but it also noted that the rebuttal could not rest on an assertion that the excluded jurors would be partial to the defendant because of their shared group membership or affiliation. Rather, the neutral explanation must be "related to the particular case to be tried."

This rationale repudiated the assumption in Swain that the government legitimately could wield its peremptories even for the supposedly trial-related reason that the common race of the defendant and venire member would render the latter less receptive to the government's evidence. In rejecting this assumption, Batson identified three distinct harms that stem from the discriminatory use of peremptories. First, such discrimination impairs the defendant's right to be tried by a jury "whose members are selected pursuant to nondiscriminatory criteria." Although the Court denominated this right to be one secured by the Equal Protection Clause, it couched much of its reasoning in Sixth Amendment terms. Second, the Court found that the racially discriminatory use of peremptories violates the excluded venire member's equal protection right

177. Id. at 99.
178. Id. at 96-97.
179. Id. (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).
180. Id.
181. Id. at 97.
182. Id.
183. Id.
184. Id.
185. Id. at 98.
186. Id. at 97.
187. Id. at 85-86.
188. Id. at 86.
189. Id. at 85 n.6 (Sixth Amendment requires that petit jury selection be from pool representing cross-section of community); id. at 86 n.8 (discriminatory jury selection prevents jury from fulfilling Sixth Amendment function because officials can use such juries to oppress individuals).
to participate in civic life as a juror. In contrast to the Swain Court’s statement that venire members may be challenged on the basis of their group affiliations, Batson notably began with the premise that “[a] person’s race simply ‘is unrelated to his fitness as a juror.’” Last, Batson declared that discriminatory jury selection methods undermine the community’s confidence in the fairness of the justice system and legitimizes racial prejudice in other arenas of human endeavor.

Justice Marshall, concurring in Batson, agreed with the Court’s analysis, but expressed little optimism that its remedial procedures would end the invidiously discriminatory use of peremptories. He identified two weaknesses in the majority’s approach. First, defendants could prevail only when “flagrant” violations of the Equal Protection Clause have transpired. “Prosecutors are left free to discriminate against blacks in jury selection provided they hold that discrimination to an ‘acceptable’ level.” Second, the Court’s focus on the subjective motivations of prosecutors in the exercise of their peremptories guaranteed frequent circumvention of its holding. “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” Justice Marshall suggested that even absent “outright prevarication” by prosecutors, conscious or unconscious racism harbored by attorneys and judges would render them more susceptible to manufacture or accept unmeritorious explanations for striking some jurors and thereby hinder effective administration of the constitutional mandate.

Justice Marshall concluded that because the peremptory’s “inherent potential” for abuse conflicted with the requirements of equal protection, the only way for the Court to terminate racial discrimination in the exercise of peremptories

190. Id. at 87.
193. Id. at 87-88.
194. Id. at 102-03.
195. Id. at 105 (Marshall, J., concurring).
196. Id. (Marshall, J., concurring).
197. Id. at 105-06 (Marshall, J., concurring).
198. Id. at 106 (Marshall, J., concurring).
199. Id. (Marshall, J., concurring). Justice Marshall wrote:

Nor is outright prevarication by prosecutors the only danger here. “[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.” A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge’s own conscious or unconscious racism may lead him to accept such a complaint as well supported. . . . Even if all parties approach the Court’s mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels — a challenge I doubt all of them can meet.

Id. (Marshall, J., concurring) (quoting King v. County of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984)).
would be to ban them altogether from the criminal justice system.\footnote{200} He argued that abolishing the government’s challenge without concomitantly eradicating the defense’s was an unacceptable solution for two reasons. First, Justice Marshall perceived that continuation of the defendant’s peremptories while depriving the prosecution of their use would upset the balance between the parties.\footnote{201} Second, given that the potential for prejudice reposes “in the defendant’s challenge as well,” the statutory privilege must yield to superior constitutional values.\footnote{202}

Standing as a microcosm of the judiciary’s expanding supervision over the peremptory, the Supreme Court increasingly has focused its attention on some issues unresolved by Batson. In Holland v. Illinois,\footnote{203} the Supreme Court announced that the Sixth Amendment’s fair cross-section requirement did not restrict the racially discriminatory exercise of peremptories. Speaking for the five-member majority, Justice Scalia noted that none of the Court’s previous cases had applied the cross-section principle to selection procedures for the petit jury.\footnote{204} In fact, each decision had stressed that, in contrast to the venire, the petit jury actually chosen need not mirror the community or reflect the distribution of various distinctive groups represented in the population.\footnote{205} This result inheres in the Sixth Amendment itself, the majority reasoned, because it seeks to ensure only that the government does not devise its jury lists to produce venires that disproportionately favor the government, thus generating petit juries that would share the same disposition.\footnote{206} Accordingly, the Sixth Amendment’s requirement of a fair cross-section “on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).”\footnote{207}

The majority then explained that the peremptory furthers the interest in obtaining impartial juries. Justice Scalia wrote that the Sixth Amendment’s “impartial jury” stricture arguably compels provision of the peremptory.\footnote{208} Although precedent did not support the proposition, he noted that any other interpretation of the Sixth Amendment would “cripple” the peremptory, and substantially hinder its end of generating unbiased juries through “eliminating the extremes of partiality on both sides.”\footnote{209} Thus, the Holland Court reasoned that applying the Sixth Amendment to peremptory challenges would lead to their destruction and undermine fair trial values. As Justice Scalia stated: “If the goal of the Sixth Amendment is representation of a fair cross-section of the community on the petit jury, then intentionally using peremptory challenges to

\footnotesize

\footnote{200} Id. at 107-08 (Marshall, J., concurring).
\footnote{201} Id. (Marshall, J., concurring).
\footnote{202} Id. at 108 (Marshall, J., concurring).
\footnote{203} 493 U.S. 474 (1990).
\footnote{204} Id. at 482-83.
\footnote{205} Id.
\footnote{206} Id. at 480-81.
\footnote{207} Id. at 480.
\footnote{208} Id. at 481-82.
\footnote{209} Id. at 484 (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965), overruled on other grounds, Batson v. Kentucky, 496 U.S. 79 (1986)).
exclude any identifiable group should be impermissible — which would . . . ‘likely require the elimination of peremptory challenges.’”

Dissenting in Holland, Justice Marshall, joined by Justices Brennan and Blackmun, rejected the majority’s claim that impartiality of the venire is the sole end of the fair cross-section mandate. Justice Marshall discerned two distinct commands emanating from the Constitution: (1) the jury must represent a fair cross-section of the population and (2) it must be impartial. The former requirement, he noted, ensures that the community’s common-sense judgment will operate to check governmental abuses, preserves public confidence in the fairness of the justice system as a whole, and furthers individual participation in the administration of justice — an important aspect of civil life and responsibility. Excluding persons on the basis of immutable and legally irrelevant characteristics impairs each of these goals, Justice Marshall concluded, and whether it occurs at the venire or peremptory stage is immaterial.

In Powers v. Ohio, the Court held that a criminal accused, regardless of his or her race, has standing to object to a prosecutor’s race-based use of peremptory challenges against prospective jurors. Justice Kennedy, writing for the seven member majority, emphatically reaffirmed Batson’s premise that the Constitution prohibits the use of skin color as a test for juror bias or competence. In doing so, however, Justice Kennedy focused on the equal protection rights of the excluded jurors not to be improperly divested of their right to serve, rather than on defendants’ Strauder-type equal protection rights not to be tried before juries from which members of their own race have been systematically excluded.

Accordingly, Powers represented a significant amplification of what previously lay dormant in Batson and even in Strauder: The Equal Protection Clause contains two distinct prohibitions against race-based peremptory challenges. The first guarantees that the state will not arbitrarily exclude members of the defendant’s race from the venire.

[A] defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State’s purposeful conduct. . . . Although a defendant has no right to a ‘petit jury composed in whole or in part of persons of [the defendant’s] own race,’ he or she does have the right to be tried by a jury whose members are selected by non-discriminatory criteria.

210. Id. (quoting Lockhart v. McCree, 476 U.S. 162, 178 (1986)).
211. Id. at 493 (Marshall, J., dissenting).
212. Id. at 494 (Marshall, J., dissenting).
213. Id. at 495 (Marshall, J., dissenting).
214. Id. at 496 (Marshall, J., dissenting).
216. Id. at 1366.
217. Id.
218. See id. at 1370. See supra notes 61-70 and accompanying text for a discussion of Strauder v. West Virginia, 100 U.S. 303 (1880).
219. Id. at 1367 (quoting Strauder, 100 U.S. at 305). The Court’s comment that a defendant “does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria”
The second equal protection right devolves upon those summoned for jury duty and forbids the state from inflicting public humiliation upon prospective jurors by implicitly declaring them unfit to serve on account of race. Discriminatory jury selection techniques propagate a uniquely acute level of stigmatic harm to those excluded, the Court suggested, because jury service is a basic incident of citizenship and a basic form of participation, nearly on par with voting, in our democratic scheme of government. "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."

Thus, the balance of the Powers decision involved whether the defendant, a white, had standing to assert the equal protection rights of black jurors who were struck. In answering this question in the affirmative, the Supreme Court applied its usual test for third-party standing. The litigant must demonstrate that she has suffered an injury-in-fact, that she has a close relationship to the third party whose rights she seeks to enforce, and that the third party is, as a practical matter, unable to protect his or her own interests. Powers recognized that a defendant realizes a cognizable injury stemming from the state's challenges against black venire members, and that the defendant has a "concrete interest" in "neutral jury selection procedures." The prosecutor's racial discrimination interjects a demonstrable illegality into this process. "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."

Subsequently, in Edmonson v. Leesville Concrete Co., the Supreme

apparently cannot be understood to apply literally to peremptories. Otherwise, the Court would not have needed to decide the third-party standing issue.

220. Id. at 1368-70, 1372.
221. Id. at 1368-69.
223. See, e.g., Craig v. Boren, 429 U.S. 190, 192-97 (1976) (beer vendor who suffered injury from law barring beer sales to males age 18-20 could advance constitutional claim on behalf of males affected); Singleton v. Wulff, 428 U.S. 106, 112-16 (1976) (party litigating matter must have suffered injury; litigant's rights must be closely related to third-party; and third-party must be impeded from enforcing own rights); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (medical personnel charged with aiding married couple to obtain contraceptives had standing to represent married couple's rights to use contraceptives).
225. Id. at 1371 (quoting Allen v. Hardy, 478 U.S. 255, 259 (1986)).
226. Id.
Court, again speaking through Justice Kennedy, held that a civil litigant's racially discriminatory use of peremptory strikes violates the equal protection rights of the challenged jurors.\textsuperscript{228} The Court easily concluded that invidious discrimination was no less damaging to the excluded venire member in the civil context than in a criminal case. In both instances, "race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice."\textsuperscript{229}

Because the equal protection components of the Fourteenth and the Fifth Amendments do not restrict the conduct of non-governmental entities,\textsuperscript{230} however, the primary dispute in \textit{Edmonson} was whether the employment of peremptories by a private party's attorney constituted state action regulated by those provisions. As it had in previous cases, the Court utilized a two-part framework to answer this question. First, the Court determined that the asserted constitutional deprivation stemmed from the exercise of a privilege having its source in state authority because the peremptory today is solely a creature of statute.\textsuperscript{231} Second, the Court found that private litigants could fairly be deemed government actors in using the peremptory challenge.\textsuperscript{232}

In reaching the latter conclusion, Justice Kennedy initially detailed the parties' extensive use of state procedures, facilitated by "'the overt, significant assistance of state officials,'" in effectuating their discriminatory animus.\textsuperscript{233} Private litigants, without the active participation of court personnel, including judges, would be powerless to exercise their peremptories at all. The \textit{Edmonson} Court then posited its most innovative thesis. The peremptory challenge, it noted, determines the selection of the petit jury, which is "a quintessential governmental body, having no attributes of a private actor."\textsuperscript{234} Drawing on the primary-election cases that subjected private organizations to constitutional dictates when the state's electoral apparatus grants those organizations the ability to choose officials,\textsuperscript{235} the Court ruled that the peremptory effectively delegated to private parties the traditional function of government to constitute juries.\textsuperscript{236}

\begin{itemize}
\item \textsuperscript{228} Id. at 2080.
\item \textsuperscript{229} Id. at 2082.
\item \textsuperscript{230} Id.; accord National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (Fourteenth Amendment offers no protection against even most unfair private conduct); Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (federal power limited against private action); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978) (Fourteenth Amendment violation must be "attributable" to state); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (state deprivation of rights is covered by Fourteenth Amendment; private acts are not); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (Fourteenth Amendment is implicated only if state enforces private discrimination).
\item \textsuperscript{231} Edmonson, 111 S. Ct. at 2083.
\item \textsuperscript{232} Id. at 2083-87.
\item \textsuperscript{233} Id. at 2084 (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)).
\item \textsuperscript{234} Id. at 2085.
\item \textsuperscript{235} Id. at 2085-86. In particular, the Court gleaned from Terry v. Adams, 345 U.S. 461, 481 (1946) (Clark, J., concurring), the principle that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's constraints." \textit{Edmonson}, 111 S. Ct. at 2085.
\item \textsuperscript{236} Edmonson, 111 S. Ct. at 2086.
\end{itemize}
If race-based peremptory challenges in civil actions could evade judicial scrutiny, "persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation." 237

IV. PEREMPTORY CHALLENGES AND THE CONSTITUTION

Given the peremptory’s "very old credentials," 238 to argue that the challenge is unconstitutional may appear, at first blush, quixotic. Yet, it is equally difficult to deny that the Equal Protection Clause, the Thirteenth Amendment, and the Sixth Amendment each express values that are wholly inimical to the very existence of the peremptory challenge. As even its defenders acknowledge, the peremptory is a device that in purpose and effect allows attorneys, activated by their own "crud[e]," and "hopelessly mistaken" stereotypes, 239 to exclude their fellow citizens from fully participating in civic affairs. It is also an instrument that undermines society's evolving attempts to ensure that juries fairly represent the judgment of the community.

A. Equal Protection and the Fourteenth Amendment

Although the Equal Protection Clause of the Fourteenth Amendment restricts only actions undertaken by the several states, the Supreme Court has construed the Due Process Clause of the Fifth Amendment to incorporate essentially the same standards of review for federal legislation. 240 Broadly stated, equal protection dictates that governmental entities may not, without an adequate explanation, unequally allocate benefits and burdens among similarly situated individuals. A classification subject to equal protection analysis may be created explicitly by legislative act or may arise out of the application of a statute that on its face contains no illegitimate distinctions. Thus, a facially neutral law may offend equal protection principles if it either in purpose and effect 241 or in administrative enforcement 242 establishes an impermissible classification.

Of course, the Equal Protection Clause does not forbid the state from manufacturing legal classifications of persons altogether. It does command, however, that any distinctions made must be justified. Courts employ three

237. Id. at 2087.
242. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (regardless of ordinance's original intent, its application was a "practical denial" of equal protection).
standards in testing the validity of any discerned classification. First, if the classification implicates fundamental rights or is based on race, alienage, or national origin, the state must demonstrate that the classification is necessary to advance a compelling governmental interest.243 Second, if the law creates distinctions between persons on the basis of sex, religion, or birth status, the state must prove that the law bears a substantial relationship to an important governmental interest.244 Last, courts will uphold all other classifications, such as age or living arrangements, unless the challenger shows that the statute does not comprise rational means to serve a legitimate end.245

_Batson, Powers, and Edmonson_ rightly centered on the equal protection rights of venire members who are struck from jury service on the basis of race or other invidious distinctions. The discriminatory exercise of peremptories works an injury of constitutional magnitude upon prospective jurors by classifying them in an irrelevant and illegitimate manner. Attorneys, by using the strikes in such a fashion, and the judiciary, by permitting this practice to continue unabated, place a judicial imprimatur on discrimination. As the dissenters in _Batson_ seemed to recognize, once one applies "unadulterated" equal protection analysis to the peremptory, it cannot continue to exist.246 It is, by definition,

243. See, e.g., Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (if classification harms suspect class or limits fundamental right, state must show compelling government interest); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) ("alien" classification in state law "subject to close judicial scrutiny"); Hunter v. Erickson, 393 U.S. 385, 391-92 (1969) (core of Fourteenth Amendment is prohibition of "unjustified" race-based classifications); Loving v. Virginia, 388 U.S. 1, 12 (1967) (denial of fundamental rights to marry based on racial classifications is "directly subversive" of due process and equal protection); Reitman v. Mulkey, 387 U.S. 369, 377 (1967) (state constitutional amendment allowing discrimination in housing violates federal constitution).


245. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (government limitation on living arrangements of mentally retarded subject to rational basis test); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (statute mandating retirement of state troopers at age 50 upheld under rational basis standard because elderly do not require "extra protection"); Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (statute prohibiting unrelated people sharing household from receiving food stamps unconstitutional because classification "clearly irrelevant to law's purpose").

246. _Batson v. Kentucky_, 476 U.S. 79, 123-25 (1986) (Burger, C.J., dissenting). Of course, this claim led the Chief Justice to conclude that the peremptory, apparently because of its long history, occupies an enclave independent of the Equal Protection Clause. Id. at 125 (Burger, C.J., dissenting). He also suggested that the state interest in maintaining the peremptory as a means to secure impartial juries is "substantial, if not compelling." Id. (Burger, C.J., dissenting).
"'an arbitrary and capricious right'" designed to allow exclusion of venire members upon the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" It is a vehicle to effectuate the unarticulated, and usually inarticulatable, prejudices of governmental actors.

The Equal Protection Clause, in contrast, forbids arbitrary or irrational governmental conduct or distinctions. That is, it requires the state to be able to justify its classifications in terms of advancing a public purpose, although the requisite strength of its interest and the necessary degree to which its means and ends must correlate will depend on the nature of that classification. Even minimal constitutional guarantees demand that the state's proffered rationale must be more than the product of "strained imagination." Rather, the connection between the method selected and the goal to be promoted conceivably must have "some objective basis." The peremptory, however, is always employed on subjective grounds not amounting to an objectively persuasive determination that the targeted venire member is biased or otherwise unfit to serve as a juror. If the contrary were true, the prospective juror would be excused for cause. Thus, although the state's interest in securing a fair trial is undoubtedly a "substantial, if not compelling" one, the peremptory, by its very nature, cannot in any way advance that end. This absence of any demonstrable countervailing governmental interest furthered by the concededly arbitrary and impressionistic exercise of authority represented by the peremptory results in the inevitable conclusion that it cannot survive any level of equal protection scrutiny, no matter how lenient.

The equal protection components of the Fourteenth and Fifth Amendments limit only state action. The conclusion of the Supreme Court that the govern-

250. Id.
251. Batson v. Kentucky, 476 U.S. 79, 125 (1986) (Burger, C.J., dissenting). A variation on the argument that the peremptory ensures a fair trial by eliminating the "extremes of partiality" from the petit jury, Swain, 380 U.S. at 219, is that the peremptory can rectify an unrepresentative panel by deeming a petit jury that more accurately mirrors the community or can be used to assure a racially diverse jury. See, e.g., Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting) (restricting peremptories may hinder minorities "in obtaining racially diverse juries"); Gobert, supra note 13, at 532-33 (peremptories can increase chance of minority representation where minorities are absent from first panel of jurors). To be sure, this is a possibility, and if that were the purpose or effect of the peremptory, it could well occupy a legitimate place in trial procedure. A regrettable century of blatant discrimination in order to disrupt the composition of juries, however, conclusively dispels any such hope.
252. Cf. Batson, 476 U.S. at 123 (Burger, C.J., dissenting) ("unadulterated equal protection analysis requires the government to prove rationality of its actions, while peremptory challenges are inherently" arbitrary and capricious).
253. See supra note 230 and text for a discussion of how the equal protection components of the Fourteenth and Ninth Amendments do not restrict the conduct of non-governmental entities.
ment's peremptory exclusion of members of the venire from the petit jury violates equal protection guarantees held by the challenged jurors did not settle the issue as to whether the same conduct by defense attorneys violates equal protection guarantees. The Court recently heard arguments in Georgia v. McCollum, a case which is expected to determine this issue.254

The argument that defense attorneys may operate independent of equal protection strictures postulates that they represent private parties and perform functions adversarial to the state,255 while courts, when giving effect to defense counsel’s peremptory strikes, engage in nothing more than a ministerial function.256 Edmonson disposed of much of this claim. The Court plainly rejected the contention that private litigants do not act together with or obtain “significant aid from state officials” in the exercise of their peremptories.257 Although the logical compass of Edmonson easily embraces the conclusion that the discriminatory use of peremptories by defense attorneys is fairly attributable to the government and therefore restricted by equal protection principles,258 the Court gave at least a hint that this might not be so. The state action inquiry is a fact sensitive one.259 As noted in Edmonson, the Court previously has highlighted one factual distinction between defense counsel and other attorneys that may be determinative.260

In Polk County v. Dodson,261 the Supreme Court held that a public defender, when representing a criminal accused, did not act under color of state


258. See Edmonson, 111 S. Ct. at 2095 (Scalia, J., dissenting) (majority decision will require elimination of defense peremptories).


260. Edmonson, 111 S. Ct. at 2086.

law for section 1983 purposes,\textsuperscript{262} which is coextensive with contours of the state action requirement.\textsuperscript{263} The Court reasoned that

[I]t is the function of the public defender to enter ‘not guilty’ pleas, move to suppress State’s evidence, object to evidence at trial, cross-examine State’s witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.

...[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.\textsuperscript{264}

Dodson stands for the proposition that the existence of an employment relationship between a defense attorney and the government does not convert the lawyer into a state actor — not that defense counsel is never deemed a state actor.\textsuperscript{265} Dodson also does not dispositively answer the question whether the peremptory’s inherent incompatibility with the equal protection rights of potential jurors necessitates abolition of defense challenges. Thus, there is some utility in examining more closely whether a defense attorney becomes a governmental actor for the limited purpose of exercising peremptories during jury selection.

The first aspect of the state action test is indisputably met. In criminal cases, the deprivation of venire members’ equal protection rights stems from defense counsel’s exercise of a privilege that finds its source in state and federal statutes alone. The second part of the inquiry, whether defense attorneys fairly could be deemed government actors in utilizing the peremptory challenge, is of course where controversy arises. In resolving this dimension of its standard, the Court has examined the extent to which the ostensibly private actor relies on governmental assistance and benefits, whether that party is performing a traditional governmental function, and whether the injury inflicted “is aggravated in a unique way by the incidents of governmental authority.”\textsuperscript{266}

Edmonson’s analysis of the foregoing principles, which determined that civil litigants were state actors when using the peremptory, applies with equal force to defense attorneys. The Court’s conclusion that the peremptory dele-

\textsuperscript{262} Id. at 325.

\textsuperscript{263} Lugar, 457 U.S. at 929.

\textsuperscript{264} Dodson, 454 U.S. at 320-21 (citation omitted).

\textsuperscript{265} Id. at 324-25; see also Edmonson, 111 S. Ct. at 2086 (characterizing Dodson as holding “a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties.”) (emphasis added); Branti v. Finkel, 445 U.S. 507, 519 (1980) (primary, but not exclusive, job of public defender is to represent criminal defendant).

gates to private parties the traditional function of government to configure juries is not altered by the status of the attorneys working to constitute that body. The first and third factors, which regard the degree of state aid involved in the nature of the injury, blend together and provide in some ways an even stronger justification for declaring defense counsel to be state actors when exercising their peremptories than civil attorneys.

The forum in which defense lawyers exercise the peremptory challenge is a paradigmatically public one. Pursuant to detailed statutes and jury plans, government officials compel potential jurors, upon pain of criminal sanction, to serve. 267 In many jurisdictions, attorneys scrutinize juror data collected and compiled by officials to determine whom to strike. 268 From the seal of the court emplaced over the bench, to the activities of a robed judge, to the presence of marshals and other employees, the courtroom is infused with symbols of the state's imprimatur. The judge holds extensive supervisory power over the number and exercise of peremptories, 269 and, backed by the state's coercive power, enforces the litigant's discriminatory decision. 270 Thus, as with counsel for private civil litigants, defense attorneys "could not exercise [their] peremptory challenges absent the overt, significant assistance of the court." 271

Given that the state's authority is inexorably linked to the origin, scope, use, and enforcement of the peremptory, it seems odd indeed to assert that its discriminatory application by a defense attorney is merely a private affair. For within this environment, challenged members of the venire, many of whom will

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268. There is no uniform disclosure practice. Under 28 U.S.C. § 1863(b)(7), each district court's jury plan may regulate when and how much juror information is furnished to counsel and may permit its judges to keep names of jurors and other information confidential altogether if necessary. See JURY SYSTEM REPORT, supra note 144, at 4-5. One fairly dated survey, conducted by Judge E. Gordon West, found that

31 of the responding courts by rule or established practice prohibit the disclosure of juror venire lists prior to the day of trial, while 51 courts permit this disclosure at varying times prior to such day. . . . [A] similar variation existed in the practices of the district courts as to the time at which litigants and attorneys are first informed as to the identity of prospective jurors.

Id. at 5.

269. See FED. R. CRIM. P. 24(b) (granting trial judge discretion to enlarge number of strikes in criminal cases when there are more than two parties); Sawyer v. United States, 202 U.S. 150, 165 (1906) (stating supervisory power of court extends to manner in which peremptory challenges are exercised); United States v. Leslie, 759 F.2d 366, 373-75 (5th Cir. 1985) (declining to follow Swain pursuant to court's supervisory power), vacated, 479 U.S. 1074 (1987). United States v. McDaniels, 379 F. Supp. 1243, 1248-50 (E.D. La. 1974) (holding Swain standard not violated where prosecutor employed peremptory challenges to remove six of seven blacks from venire, but new trial granted in interests of justice); see also Gomez v. United States, 490 U.S. 858, 873 (1989) ("Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice."). Moreover, the court's authority to supervise the parties' use of peremptories is implicit in Swain and explicit in Batson and its progeny. See supra notes 116-30 and accompanying text for a discussion of Swain v. Alabama, 380 U.S. 202 (1965) and supra notes 173-202 and accompanying text for a discussion of Batson v. Kentucky, 476 U.S. 79 (1986).

270. Edmonson, 111 S. Ct. at 2084-85.

271. Id. at 2084.
have no other contact with the judiciary, cannot help but conclude that both the parties and the judge, who appears to control the proceedings and act on behalf of the justice system, have deemed them unworthy to serve as jurors on account of a legally irrelevant attribute, such as race, gender, religion, sexual orientation, or socioeconomic status. This “overt wrong, often apparent to the entire jury panel,” is grossly amplified by the apparatus of government authority in which it transpires. As the Court has noted in a different context, “[A] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character.” Of course, it was the state that commanded the juror to publicly expose herself to such contemptuous treatment in the first place. The insult is accentuated by the Court’s inaction, which must be perceived as at least tacit approval of the discrimination, and by other, more subtle conduct by the judge, such as giving due regard or respect to the defense attorney who made the challenge. Further, a refusal to extend Edmonson to criminal defense attorneys would carry its own special affront. It would broadcast to the struck juror: “This is a criminal matter. Although we may allow you to decide a mere civil dispute, this case is far too serious and important to entrust to your kind.”

The Dodson Court’s observation that defense attorneys fulfill an “adversarial function” when advancing the cause of their clients, thus, is insufficient to free those attorneys from observing the equal protection rights of venire members. First, state power and official prestige is so insinuated into the use of the peremptory that the adversarial function of the defense, standing alone, does not demand a result contrary to Edmonson. Both Powers and Edmonson emphasized the perceptions of racial offense and systemic harms that are generated by racial discrimination in the courtroom. These, and other forms of discrimination, are not abated by the identity of the attorney who initiates the discriminatory act.

Second, Edmonson signaled a distinction between the situation presented in Dodson and the problem of race-based challenges by counsel for the criminal accused. Edmonson formulated the state action question at a middle level of generality. The Court did not ask if the role of private parties is a governmental one during all phases of the trial process. Unlike the dissenters, the majority also did not phrase the pertinent state action issue very narrowly, that is, as whether the government substantially encouraged litigants to use their strikes in a discriminatory manner. Instead, the Court asked whether “a private entity becomes a government actor for the limited purpose of using peremptories during jury selection.” The Court answered in the affirmative, reasoning that: “The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of

273. Id. at 1372.
274. Edmonson, 111 S. Ct. at 2091 (O’Connor, J., dissenting).
275. Id. at 2086.
race."276 Given that the Court also characterized Dodson as holding that "a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties,"277 the Court essentially rendered Dodson inapplicable to the state action inquiry in the context of peremptories.

Even if defense attorneys are not state actors within the meaning of the Constitution's equal protection strictures when exercising their peremptories, the Thirteenth Amendment nevertheless precludes them, as well as civil counsel, from striking black venire members solely on account of race. As Justice Kennedy explicitly noted in Edmonson, the Thirteenth Amendment applies to purely private conduct.278 An indispensable feature of slavery and the Black Codes, which the Thirteenth Amendment targeted specifically, was the de jure exclusion of blacks from most aspects of the legal system, including the ability to serve as jurors. The Court has recognized that denying blacks the right to participate as jurors on the basis of color is "an assertion of their inferiority" and affixes the brand of slavery upon them.279 Although wielding the peremptory against jurors solely because of their skin color may differ in procedural detail from outright statutory exclusion, the two methods are identical in substance, purpose, and effect as far as the struck juror is concerned.280

276. Id.
277. Id.
278. Id. at 2082.
280. But cf. United States v. Leslie, 783 F.2d 541 (5th Cir. 1986), judgment vacated, 479 U.S. 1074 (1987), remanded, 813 F.2d 658 (1987). In Leslie, the Fifth Circuit attempted to distinguish the practices:

Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try any case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed litigants in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that particular case than others on the same venire.

Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further venire-pool exclusion bespeaks a priori across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its inferiority, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not.

Id. at 554 (emphasis in original).

This argument stands reasonable in part, but it fails altogether to come to grips with the traditional and present use of the peremptory to perpetuate in the legal system the fact and vestiges of racial discrimination. Moreover, not only is the contention completely incompatible with the reasoning of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny, the Court twice specifically dismissed it in Powers v. Ohio, 111 S. Ct. 1364 (1991). First, the Court wrote that "[t]he suggestion that racial classifications may survive when visited upon all persons is no more authoritative today
B. The Sixth Amendment

Rather than promote fair trials, there is every reason to conclude that the peremptory undermines them. We begin by identifying the main infirmities in the Batson-Holland axis. Batson suggests that the defendant has an equal protection right in the nondiscriminatory selection of the petit jury that is independent of the venire person's equal protection right not to be excluded from the jury for invidious reasons. The Holland majority claims that the fair cross-section principle applies only to the methods ofconfigurating the venire and is no restraint to proceedings occurring at the voir dire.

As related earlier, Batson and its progeny mandate that the defendant possesses an equal protection right "to be tried by a jury whose members are selected by nondiscriminatory criteria." This right of an accused cannot be harmonized with the existence of a peremptory challenge which serves to effectuate every conceivable discriminatory classification. There would have been no need to decide, as the Court did in Powers, whether a criminal defendant has third-party standing to assert the equal protection rights of excluded jurors. If the Constitution guarantees to the defendant that the jury will be composed without reliance on discriminatory selection methods, that right alone should suffice to invalidate the state's race-based exclusion of prospective jurors, without regard to the impact on excluded venire persons.

The defendant's own identified interest in the fairness of selection methods stems not from the Equal Protection Clause, but from the Sixth Amendment. Cases such as Powers rely on Strauder, which unquestionably held that a defendant is denied equal protection of the laws when tried by a jury from which members of his or her own race have been purposefully excluded by the state. The defendant's right not to be tried by a jury from which certain groups are excluded most directly emanates from the Sixth Amendment's guarantee that the jury will be drawn from a fair cross-section of the community. As Justice Stevens stated in his dissent in Holland:

In my opinion, it is appropriate to review petitioner's equal protection claim, because a showing that black jurors have been eliminated solely on account of their race not only is sufficient to establish a violation of the Fourteenth Amendment but also is sufficient to establish a violation of the Sixth Amendment. A jury that is the product of such a racially discriminatory selection process cannot possibly be an "impartial jury" within the meaning of the Sixth Amendment.

For instance, in Witherspoon v. Illinois, the Supreme Court reviewed a
statute that permitted “a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment or that he is opposed to the same.” The trial judge removed for cause forty-seven venire persons, most without any questioning whether their beliefs would interfere with their ability to apply the law to the facts in an impartial manner. The Supreme Court declared that the state violated the Sixth and Fourteenth Amendments by using the challenge for cause to exclude an entire class of individuals who expressed reservations about capital punishment without determining whether they could uphold their oath as jurors. A jury composed in such a fashion, the Court observed, could not possibly act as the conscience of the community.

Recently, the Third Circuit Court of Appeals held that the perfunctory removal of potential jurors for cause on the ground that they knew the defendant, without attempting to ascertain whether their bare acquaintance rendered them sufficiently biased to warrant excusal, violated the Jury Selection and Service Act’s fair cross-section requirement. The Court noted that whether these persons were excused when compiling the jury list or during voir dire is irrelevant because presuming partiality at any stage of the proceeding detracted from the representativeness of the venire.

Understood in this light, Holland misstated the question. To the extent the issue is whether any given petit jury must accurately mirror the demographics of the community, courts justifiably have answered it in the negative. That conclusion, however, does not elucidate whether the Sixth Amendment distinguishes between the manner in which systematic exclusion of certain groups from the venire is accomplished. Certainly nothing in the amendment’s language militates in favor of such a distinction. It speaks of trial by “impartial jury,” not by impartial venire. Whether litigants skew the representativeness of the jury prior to drawing up the venire or prior to empaneling the petit jury is simply not pertinent. Both purposely deny the criminal accused the right to be tried by a “jury” drawn from a fair cross-section of the community. Moreover, if the overbroad for-cause exclusion of venire persons from the petit jury results

286. Witherspoon, 391 U.S. at 514-15. But see Holland, 493 U.S. at 483-84 (if representative jury is goal of Sixth Amendment, “using peremptory challenges to exclude any identifiable group” is improper); Lockhart v. McCree, 476 U.S. 162, 173 (1986) (stating that Court has not previously “invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges”)
287. Witherspoon, 391 U.S. at 518, 520.
288. Id. at 520.
290. Id.
in an impermissibly unrepresentative jury, it is difficult indeed to discern any principled reason why using the peremptory in such a manner does not do so as well. Both are exercised after the venire is called, and both upset its representativeness and hence its impartiality.

Even the Holland Court had to acknowledge implicitly that the Sixth Amendment does not turn on distinctions between representativeness and impartiality, between peremptory or for-cause challenges, or between the venire and the petit jury. The Court reasoned that without the fair cross-section requirement,

the State could draw up jury lists in such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor. 292

Embedded in this statement is a recognition that the ostensibly differing concepts identified by the Court overlap and elide into one another.

The process of inclusion or exclusion of venire persons during voir dire necessarily affects the make-up of the petit jury, and an impartial jury is effectively synonymous with a representative one selected within the confines of the random-draw and for-cause challenge processes. 293 Thus, peremptorily excluding venire members from participating in the petit jury either because they belong to a particular class 294 or because they possess unique viewpoints which do not interfere with their ability to be impartial, 295 which we expect them to bring to the case in order to express part of the community’s common-sense judgment, undermines the very concept of trial by impartial jury envisioned by the Sixth Amendment. That is not to say, of course, that the fair cross-section dictates of the Sixth Amendment are precisely coextensive with impartiality or are fully discharged by assembling a representative petit jury. After all, the prevailing view of the population, such as through exposure to pre-trial publicity, might be that the defendant is guilty regardless of the facts. Yet, after a representative panel is convened and after members who are unable to adhere to basic fair trial commands are purged for cause, the Sixth Amendment is satisfied. Any further action designed to mute the diversity of the panel is done only at the expense of

292. Holland, 493 U.S. at 480-81 (emphasis added).

293. Morton, supra note 18, at 562; Gurney, supra note 131, at 244-53; Robert Mork, Comment, The Sixth Amendment: Limiting the Use of Peremptory Challenges, 16 J. Marshall L. Rev. 349, 360 (1983).

294. See Lockhart, 476 U.S. at 175. The Court wrote that barring groups such as blacks, women, and Mexican-Americans from jury participation "raise[s] at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community" and "undeniably [gives] rise to an ‘appearance of unfairness.’" Id.

295. Gurney, supra note 131, at 248 ("Once the jurors are in the jury room, they must deliberate and negotiate to reconcile their contrary viewpoints and reach a verdict. This process ensures that the verdict will rest on shared values. . . . Hence, peremptorily eliminating jurors because they have biases destroys the very impartiality which the peremptory challenge is thought to preserve.") (emphasis in original).
the Sixth Amendment. 296

It is because this result so plainly follows that the Holland Court, itself noting that application of the Sixth Amendment cross-section requirement to the peremptory would lead to its abolition, 297 is ultimately reduced to calling the claim "implausible" in light of the peremptory's "venerable" history. 298 That is not an argument born of logic and is contrary to the terms and purpose of the Sixth Amendment. Moreover, where the peremptory is at issue, the past is a double-edged sword. It is true that it is an instrument of ancient origin, but it is also undeniable that it has served, far more often than not, the very end of altering the random distribution of various viewpoints in order to defeat the panel's representativeness and thus the possibility of producing a verdict reflecting the community's judgment.

V. "SEAT OF THE PANTS" USE OF PEREMPTORY CHALLENGES

In all the literature and case law on the peremptory challenge, no one has set forth any actual evidence that the peremptory effectively encourages fair trial values by eliminating biased venire members or any detailed argument how it could do so. Instead, its supporters confess that it permits the rejection of jurors for "real or imagined partiality," 299 which has no substantial basis in fact. 300 The use of peremptories, they admit, is predicated on "seat-of-the-pants instincts" that may be "crudely stereotypical" and in many cases are "hopelessly

296. As one commentator has urged:
The logical, and desirable, way to impanel an impartial and representative jury — and the method chosen by Congress — is to put together a complete list of eligible jurors and select randomly from it, on the assumption that the laws of statistics will produce representative juries most of the time. This approach safeguards the selection process from possible manipulation and ensures the independence of the jury. Such a randomly selected jury will not necessarily be "impartial" in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience. But they will be impartial in the sense that they will reflect the range of the community's attitudes, which is the best we can do. . . . [I]t also ensures that the diversity within our society is reflected on our juries because each population group is represented insofar as possible in proportion to its strength in population.

Van Dyke, supra note 8, at 18.

297. Holland v. Illinois, 494 U.S. 474 (1990). The Holland Court stated: "if the goal of the Sixth Amendment is representation of a fair cross-section of the community on the petit jury, then intentionally using peremptory challenges to exclude any identifiable group should be impermissible — which would, as we said in Lockeart, 'likely require the elimination of peremptory challenges.'"

Id. at 483-84 (quoting Lockeart v. McCrae, 476 U.S. 162, 173 (1986)).

298. Id. at 481-82.


300. Batson, 476 U.S. 79. Dissenting, Chief Justice Burger stated that

[Peremptory challenges are often lodged, of necessity, for reasons 'normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.' Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch.

Id. at 123 (Burger, C.J., dissenting) (quoting Swain, 380 U.S. at 220).
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mistaken.” The primary claim in support of the peremptory’s efficacy is that class or group membership is an appropriate proxy for “potential” partiality. This “assumption or belief” that a particular characteristic may render a venire member “more likely” to harbor unknown biases, we are told, is warranted by “[c]ommon human experience, common sense, psychosociological studies, and public opinion polls.” Another commentator, shying away from even this profoundly weak justification, was ultimately reduced to stating merely, that “race matters” in shaping people’s experiences, attitudes, and perceptions.

Exercise of the peremptory challenge is typically misdirected at the outset. It would be remarkable indeed if the peremptory challenge could work its objective of rooting out venire members who are actually too partial to serve on the petit jury. It is in this sense that the peremptory’s proponents altogether fail to address the salient issue. The question is not whether socioeconomic status, race, education, religion, vocation, age, and other associations affect, as a factual matter, one’s view of the case. Nor is it whether a given venire contains persons clinging to secret biases or unconscious prejudices. Rather, the issue is whether attorneys or their clients, with imperfect knowledge and in spite of their own prejudices, should have the prerogative of using peremptory challenges to deny persons the constitutional right to be jurors in order to accomplish their objective of obtaining, not an impartial jury, but a jury which would be partial.

The proxy argument itself is thoroughly defective in other ways as well. First, even if accepted in full, it could not supply a sufficient quantum of “reasonable suspicion” to warrant even an automobile stop. It is nevertheless permitted for the purposes of divesting a person of a valuable incident of citizenship. Second, based on the unremarkable premise that race is factually pertinent to one’s psychological make-up, proponents of the proxy argument conclude that race is therefore sufficiently determinative of enough individual group members’ fitness to sit as impartial jurors that all members of the group may be excluded. If this argument were correct, then one should ask why

301. Id. at 138 (Rehnquist, J., dissenting).
304. Babcock, supra note 302, at 553.
305. Goldwasser, supra note 256, at 834 n.165.
306. Stated more simply, defenders of the peremptory and others confuse the attitudes and life experiences that jurors inevitably bring to the case with the biases that do indeed impair a litigant’s right to receive a fair trial. See, e.g., Jim Detjer, Jurors Take Their Biases to Court, Two Studies Report, PHILA. INQUIRER, Feb. 20, 1990, at A10 (studies show 10-15% of jury verdicts based on personal biases). Contrary to some lawyers’ condescending belief that those who survive the peremptory stage are blissfully empty automatons anxious for orders, impartiality does not mean that jurors are void of any preconceived notions. Instead, the Sixth Amendment’s fair trial requirement commands that juries be composed of individuals whose opinions will not prevent or substantially impair their ability to apply faithfully the law to the facts adduced at trial. Wainwright v. Witt, 469 U.S. 412, 434 (1985); Irvin v. Dowd, 366 U.S. 717, 723 (1963); Beck v. Washington, 369 U.S. 541, 557 (1962); United States v. Casey, 835 F.2d 148, 151 (7th Cir. 1987); United States v. Salamone,
middle-aged, middle-income, or affluent white males, who have been grossly over-represented through much of this century, comprise the only group peculiarly immune from this inability to set aside parochial concerns and judge cases fairly. Third, the proxy argument requires one to hold that group or racial stereotypes, although irrelevant and forbidden in all other areas of the law, suddenly take on a "core of truth" in the courtroom and are an appropriate criterion in the jury selection context.\footnote{307} This mysterious conversion process is unexplained by its advocates. It is further inconsistent with the Batson Court's observation that racial discrimination in the justice system is not so easily and neatly contained.\footnote{308} If attorneys may exclude individuals from jury service solely on reliance of an alleged truth value of stereotypes, it is difficult to understand why state officials likewise cannot use the same reasoning to withhold all manner of benefits from the members of certain groups, or why private employers, who too often must operate with inexact information, cannot legally use such stereotypes in employment decisions.

Moreover, racial categorizations have never been known for their incisiveness. Although stereotypes may be quite revealing about those who embrace them, they are devoid of informational content about their subjects. Generalizations adopted by some trial attorneys as the basis for their use of peremptory challenges make this clear:

"Avoid all women in all defense cases," (Darrow); "Women are sympathetic and extraordinarily conscientious," (Goldstein); "Females are good for all defendants except attractive female defendants," (Katz and Karcher); "On emotionalism — ethnically high to low, Irish, Jewish, Italian, French, Spanish, and Slavic," (Goldstein); "Take smiling jurors, especially if they smile at the attorney," (Darrow); "Be wary of smiling jurors who are trying to disarm attorneys [sic]," (Harrington & Dempsey); "Presbyterians are too cold; Baptists are even less desirable . . . Keep Jews, Unitarians, Congregationalists, and agnostics," (Darrow); "Information on religion is not usually helpful," (Appleman).\footnote{309}

\footnote{307} Babcock, supra note 302, at 553-54. [T]he peremptory, made without giving any reason, avails trafficking in the core of truth in most common stereotypes. . . . [and] allows the covert expression of what we dare not say but know is true more often than not. Id. See also Goldwasser, supra note 256, at 837 ("Because litigants do not know prospective jurors personally and are provided with only limited information about the jurors during voir dire, they often have no choice but to exercise peremptories on the basis of stereotypes. . . . But it is also true that certain experiences and perspectives can actually be identified with certain groups. In other words, not all stereotypes are inaccurate.").


\footnote{309} Quoted in Morton, supra note 18, at 562; see also Melvin Belli, 3 Modern Trials §§ 51.6-51.68, at 446-47 (2d ed. 1982) (stating that "a male juror is more sound than a woman
Available empirical evidence does not support the thesis that peremptories advance fair trial goals in the least. According to one English survey, conviction rates actually increased by seven percent when defense attorneys exercised their peremptory strikes.310 In another study, Professors Hans Zeisel and Shari Seidman Diamond, analyzing twelve criminal cases tried in federal court, found little benefit in the peremptory.311 The study found that counsel’s overall performance in striking biased venire members was “not impressive.”312 Jurors removed by peremptory challenges produced essentially the same proportion of guilty votes as the real jurors who had escaped the strikes.313 Prosecutors used approximately as many accurate challenges as bad ones, while defense lawyers did only “slightly better” on the whole.314 The authors cautioned that even these averages, however, were misleading because the performance from attorney to attorney was “highly erratic.”315 These results, they concluded, indicate that counsel were unable to identify prejudiced jurors.316

VI. PEREMPTORY CHALLENGE AND THE EXPERTS

The inherent perniciousness of the peremptory’s ability to vitiate the Sixth Amendment’s promise of trial by impartial jury is aggravated by the modern trend toward using sociological studies, opinion polls, and even psychics or astrological charts to further upset the representativeness of the panel. In one well-known case, several social scientists offered their services in defense of Joan Little, a young black woman who was accused of murdering a white male jail guard. He died from ice pick puncture wounds, and semen was found on his leg. She successfully contended at trial that the deceased guard had raped her.317

Three of the social scientists who contributed to the defense of the case

juror” and describing women as, among other things, “severest judges of their own sex” and “more acutely opinionated” than men).

310. Gobert, supra note 13, at 531.
312. Id. at 517.
313. Id. at 513. Zeisel and Diamond’s study is unique, since normally any correlation between the exercise of peremptory challenges and success at trial cannot be determined:

Because the excused jurors do not attend the trial, there is no way of knowing how they would have voted had they not been removed. Our experiment attempted to secure this missing information by asking the peremptorily excused jurors to remain as shadow jurors in the courtroom and to reveal at the end of the trial how they would have voted in the case. This allowed us to become retrospectively clairvoyant — to see how well the prosecutor and defense counsel performed in their attempts to eliminate hostile jurors.

Id. at 492.
314. Id. at 517.
315. Id.
316. Id. at 518, 528. Professors Zeisel and Diamond also noted that when the attorneys performed at opposite extremes of one another in use of peremptories, the outcome of the trial likely was altered. Id. at 518-19, 524, 528-29. That, of course, suggests not that a fair jury has been selected, but rather that a serious miscarriage of justice has occurred at the hands of partial jurors.
employed the following six factors in the decision whether to accept or strike a venire person. First, on the basis of a random sample survey of Wake County we had developed a mathematical model of the juror who would be ideal for the defense. Second, we observed the behavior of the potential juror during the voir dire and rated him or her on a psychological characteristic known as authoritarianism. Third, we observed the "body language" including both kinesic and paralinguistic behavior in order to determine the degree to which a potential juror was defense or prosecution oriented. Fourth, the attorneys drew upon their voir dire experience and common sense. Fifth, we had a psychic who observed the potential jurors and advised us of their aura, "karma," and psychic vibrations. Finally, Ms. Little was asked how she felt about any juror whom we were seriously considering accepting.\footnote{318}

The "most important scientific tool," the mathematical model, they noted, was constructed at a cost of $35,000 in 1975 dollars.\footnote{319} Its purpose was to predict "the likelihood that a potential juror would be willing to vote Joan Little not guilty before hearing any of the evidence."\footnote{320} In the end, notwithstanding the trial judge's observation that the prosecution's case was "one of the weakest he had seen in more than twenty years on the bench," the team asserted that application of these data in utilizing the defendant's peremptories "made a difference in the outcome of the Little trial."\footnote{321}

Despite the veneer of objectivity, many of the observations posited by social scientists are tendered in the form of sweeping generalizations akin to the offensive stereotypes heartily embraced by some trial lawyers and upon which proponents of the peremptory build their proxy argument. One key concept of social scientists is that of authoritarianism, which they describe as a personality trait held by "rigid, racist, anti-semitic, sexually repressed, politically conservative, highly punitive individuals who will accept the word of an authority figure over that of a lesser person."\footnote{322} Group dynamics literature defines authoritarians as "men, whites, those with prestige occupations, higher education, and age."\footnote{323} This is nothing but the same old specious reasoning which some prosecutors used for decades to justify striking blacks from venires whatever the race of the defendant.\footnote{324}

Many findings, recast in impressive jargon and particularly once they trickle down to lawyers or jury selection "consultants," closely track the

\footnotesize{318. \textit{Id.} at 214.}
\footnotesize{319. \textit{Id.}}
\footnotesize{320. \textit{Id.} at 216.}
\footnotesize{321. \textit{Id.} at 224.}
\footnotesize{323. Hans \& Vidmar, supra note 322, at 85.}
unexpurgated writings of Clarence Darrow. The social psychologists leading the
jury selection research for the Harrisburg Seven defense eventually came up with
these criteria: “Certain religious categories — e.g., Episcopalians, Presbyterians,
Methodists, and fundamentalists — warranted exclusion from the jury and
Catholics, Brethren, and Lutherans warranted inclusion.”325 Following Dar-
row’s “take smiling jurors” dictum, another advises that a prospective juror
“who leans forward toward counsel, smiles and whose legs are not crossed is
suggesting that they [sic] are friendly and responsive to counsel’s questions.”326
A psychologist compiling data from the Berrigan Brothers and Vietnam Veter-
ans Against the War trial concluded, “Women in the North were more likely
than men to be open-minded toward the antiwar defendants, but in the South
were less open-minded than men.”327

Such psychological or social scientific research, particularly as depicted in
the legal trade journals, reinforces demeaning stereotypes and gives tremendous
comfort to attorneys, who appear to need too little prompting, to act on those
assumptions in the courtroom in their effort to circumvent Batson.328 Like
other investigatory techniques and like the folklore beloved by some trial lawy-
ers, scientific jury selection tools undermine the random draw techniques man-
dated by Congress and the Constitution, and subject prospective jurors to a
stigma that is all the more hurtful because it has been affixed by “experts.” The
concern here is not only that these selection techniques are discriminatory, but
also that such methods simply magnify the expense of a legal system which al-

325. Eugene I. Polakon, Jury Selection Theories, Trial, June 1987, at 26, 29. See supra text
accompanying note 309 quoting some of Darrow’s views regarding desirability of jurors within cer-
tain religious backgrounds.

326. Ralph W. Gallagher, The Use of a Consultant in Voir Dire, Trial Dipl J., Winter 1984,
at 24, 26.

327. Hans & Vidmar, supra note 322, at 83 (emphasis deleted).

328. The point is not to condemn an entire profession. As Professors J. Alexander Tanford and
Sarah Tanford note, legitimate psychologists and psycholegal research in fact could assist in abating
reliance on stereotypes. Tanford & Tanford, supra note 322, at 777. Unfortunately, an examina-
tion of the literature written for lawyers demonstrates that what may be valid scientific findings are not
only translated into simplistic, stereotypical terms but, worst yet, are expressed in insidiously neutral
language and typically are conjoined with claims that adherence to the advice will produce a winning
case. See id. at 752-53, 779. Moreover, when lawyers attempt to incorporate psychology’s insights
into their cases, such as by using evidence on the unreliability of eyewitness testimony, see id. at 749,
they degenerate their already simplistic understanding of the research even further into gross racial
insult.

Nor should one conclude that sociological research has no place at all in the legal system. For
example, in a high profile case, the results of telephone surveys of citizens from the area where the
trial is to be held may be useful in ascertaining whether venue should be changed. See McConahay,
 supra note 317, at 209-13. The problem emerges when neutral sounding “demographic” informa-
tion, that pertaining to “age, gender, race, education, occupation, religion, and political party,”
Hans & Vidmar, supra note 322, at 82, is employed to construct profiles of “good” and “bad”
jurors along these “demographic” lines. These do nothing but employ suspect classifications — used
because of their claimed influence on attitudes — as criteria for jury qualification. That is to say,
they use these classifications as a proxy for jury fitness, just as lawyers have for generations. Substit-
tuting one stereotype for another, particularly one obscured by professional idiom, cannot erase the
fact that such generalizations are and should be legally irrelevant.
ready is too costly and which tends to favor the party, usually the state, with the
greater resources. 329 Rare is the criminal defendant who can afford to retain
consultants or whose case is sufficiently noteworthy to attract volunteers.

Of course, some will protest that the psychological or sociological portraits
of particular groups, though distasteful, are scientifically valid and contain much
truth. 330 Even if they are correct, advocates of this argument again miss the
issue. The question is not whether as an empirical proposition “certain classes
of people statistically have predispositions that would make them inappropriate
jurors for particular kinds of cases.” 331 Rather, it is whether the legal and polit-
ical structure of a pluralistic democracy should be shaped and ordered in ac-
cordance with such claims. The question is whether political burdens, benefits,
and opportunities should be allocated pursuant to a scheme that accepts such
information as relevant. It is whether the public sphere should be permitted to
consider immutable characteristics in reaching determinations about the worth,
qualifications, and value of persons. Obviously, the Constitution already has
answered each of these questions in the negative. 332

VII. PEREMPTORY CHALLENGE AND DEMOCRACY

Independent of the specific provisions of the federal Constitution and
whether private parties are constrained by them, there are other reasons that
warrant the legislative abolition of peremptory challenges. Initially, the perem-
tory challenge violates a basic tenet of our democracy and stands as an anomaly
in the configuration of our justice system. Stated simply, the fundamental postu-
late of equality underlying our society is that human beings have a right to
equal concern and respect in the design and operation of our political institu-
tions. 333 Although this principle finds partial expression in the equal protection

329. See, e.g., Proposed Amendments to the Federal Rules of Criminal Procedure: Hearing
Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95 Cong., 1st Sess.
72-73 (1977) (Statement of Richard Thornburgh, Acting Deputy Attorney General); HANS & VID-
MAR, supra note 322, at 93-94; Amitai Etzioni, Creating an Imbalance, Trial, Winter 1984, at 28;
McConahay, supra note 317, at 228.

330. See, e.g., Goldwasser, supra note 256, at 834-38 nn. 165, 173 (stereotype based on race and
other generalization are valid determiners of juror biases).

331. Babcock, supra note 302, at 553; see also Goldwasser, supra note 256, at 837 (“But it is
also true that certain experiences and perspectives can actually be identified with certain groups. In
other words, not all stereotypes are inaccurate.”).

332. But see Goldwasser, supra note 256, at 835-38. Professor Goldwasser repeatedly states
that the prohibition against racially discriminatory peremptories is merely “aspirational” and is
based on solely “an ideal,” not reality. Id. She reaches this conclusion only by failing to distinguish
between what she considers to be a fact of everyday life as confirmed by behavioral studies and what
the Constitution commands in the arrangement of our legal and political institutions. In regard to
the latter, there is nothing precatory in the Fifth, Thirteenth, Fourteenth, or Fifteenth Amendments.

333. See, e.g., ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 469-73 (1981) (participation
in moral discourse demonstrates mutual respect between all parties involved); JOHN RAWLS, A THE-
ORY OF JUSTICE 511 (1971) (equality of respect, regardless of social states, is a fundamental basis for
morality of human beings); Joseph Raz, Liberalism, Skepticism, and Democracy, 74 IOWA L. REV.
761 (1989) (democratic pluralism allows participation by those with different, and even contradic-
tory, ways of life).
components of the Constitution, it is more abstract and inheres in the very idea of equality and democracy. There are two crucial aspects to this right. The first is the right to equal treatment, that is, to the same distribution of political "goods or opportunities as anyone else has or is given," even if a differential apportionment might work for the general welfare.\textsuperscript{334} The other right is to treatment by the government as an equal, which may be described as "the right to equal concern and respect in the political decisions about how these goods and opportunities are to be distributed," or the right to be taken into account when the interests of the community are weighed.\textsuperscript{335}

The peremptory challenge is altogether inconsistent with the former premise of equality. Indeed, the peremptory has no parallel in our democratic form of government. It entrusts to private individuals the distribution of the goods of political participation. That this device allows allocation of the opportunity to serve in civic life based on litigants' bare preferences,\textsuperscript{336} on the basis of stereotypes, and rarely in furtherance of any public interest, accentuates its anti-egalitarian character. Because the peremptory constitutes a governmental delegation of authority to enforce, by law, demeaning and specious categorizations or raw capriciousness, it cannot be said that the government is treating its citizens with respect, let alone equal respect, in the design and management of a fundamental political institution. One could imagine the response if the elective franchise, which is the only other significant occasion for most people to share actively in the political destiny of their community, were allocated today in such a manner.

The peremptory is a renegade in this nation's trial procedures. The legitimacy of the judiciary rests predominantly on how closely it conforms to the ideals that support it, and people will accept the decrees of courts only so long as the institution is perceived to be both unbiased and governed by the "quiet rationality" that is its distinction.\textsuperscript{337} It uses reason to confront disputes that are some of the most intractable, frightening, and emotion-laden that society has to offer. In the courtroom, the dispassion of the rule of law ideally answers hysteria and rumor. Every accusation or idea is tested by discourse and evidence. The logic of the court's decision-making is laid bare to the litigants, other judges, scholars, the media, and the community. The trial itself must unfold in public view.\textsuperscript{338}

\begin{itemize}
\item \textsuperscript{334} Ronald Dworkin, Taking Rights Seriously 273 (1977).
\item \textsuperscript{335} Id.
\item \textsuperscript{336} See id. Professor Dworkin distinguished between personal preferences, which relate to one's "own enjoyment of some goods or opportunities," and external preferences, which pertain to "the assignment of goods and opportunities to others." Id. at 234. The latter preference, which the peremptory effectuates, should not be accorded any weight in political decision making. See Ronald Dworkin, A Reply by Ronald Dworkin, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 282-86 (M. Cohen ed., 1983) (bestowing benefits on one type of person more than others "defeats the egalitarian cast" of an apparently neutral Constitution); cf. Joseph Raz, Professor Dworkin's Theory of Rights, 26 POL. STUD. 123, 131 (1978) (only those external preferences inconsistent with concern and respect for persons should be excluded from system).
\item \textsuperscript{337} Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991).
\item \textsuperscript{338} Many commentators who have addressed the adversary system and its acceptance by the public emphasize that these features are indispensable for its success. See, e.g., Peter Arnella, Re-
In contrast stands the peremptory challenge. It functions as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients. With the few exceptions now interposed by courts, the peremptory is exercised secretly, for any or no reason at all, unchecked by inquiry or debate. It is the apparatus whereby we are alleged to "allow[e] the covert expression of what we dare not say but know is true more often than not."339

Although such a duplicitous practice may have been fondly regarded in the Star Chamber, it represents the antithesis of the open discussion that characterizes all other phases of American trial proceedings and that secures its integrity. Indeed, those preconceptions and stereotypes that have animated the peremptory's history are shielded from view not because they are impolite, but precisely because they could not survive public dissection if revealed. They, like all infirm ideas, thrive only when not exposed to the light of reasoned examination. Sounding a similar theme, Justice Kennedy has written:

Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.340

This passage also intimates what may be the peremptory's greatest conflict with modern values. If we cannot abide by the simple imperatives of respect and reasoned treatment of our fellow citizens who have been ordered to serve the public good in an institution legitimized by its commitment to rationality, but instead must resort to insult and exclusion for purposes unrelated to objective qualifications, then we should carry little hope for the continued existence of our pluralistic democracy.


340. Edmonson, 111 S. Ct. at 2088.

To the extent that there is imbalance on juries, then, the underrepresented group will less
the widely publicized riots following an all-white jury's acquittal of a white Miami police officer in the death of a black man demonstrate, this threat is not academic or hypothetical. It further answers the often repeated claim that the peremptory advances confidence in the legal system by producing juries of which the litigants approve because they held a role in selecting them. This argument ignores the peremptory's countervailing ability to diminish the public's overall estimation of the judiciary's fairness. Also, to urge that criminal defendants secure juries of which they hold a good opinion, in the face of historical evidence that state's attorneys systematically have excluded from jury service members of an individual defendant's own race, is totally unpersuasive.

Abolishing the peremptory also would assist in safeguarding the privacy of venire persons. A common practice in jurisdictions that release venire lists sufficiently in advance of trial involves the direct investigation of potential jurors. This usually entails checking public (or even confidential) records, interviewing venire members' neighbors or co-workers, or staking out their homes to observe personal habits. Even apart from the obvious dangers of bribery and other forms of tampering or the implicit threat to physical safety that such contact may carry, investigation damages the privacy interests of prospective jurors and thereby undermines the integrity of the jury system. More than sixty years ago the Supreme Court observed:

The most exemplary [jurors] resent having their footsteps dogged by private detectives. . . . The mere suspicion that [a juror], his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility.

readily accept their decisions and will rarely feel the ameliorating effect which is one of the supposed advantages of the jury system.

Another primary objective of the jury system is to increase confidence in and support for the law-enforcement process. . . . Selection which is or even appears to be discriminatory . . . destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness.

Id.


344. See, e.g., United States v. Barnes, 604 F.2d 121, 172 (2d Cir. 1979) (defendant should be permitted to examine background of potential jurors) (Meskill, J., dissenting); see generally HANS & VIDMAR, supra note 322, at 83-84; Joshua Okun, Investigation of Jurors by Counsel: Its Impact on the Decisional Process, 56 GEO. L.J. 839 (1968).

345. Barnes, 604 F.2d at 134 n.3 (collecting incidents).

Like the peremptory, the existence of which fosters the use of such investigations, this intrusive device is used by too many attorneys to manifest their contempt for potential jurors by treating them not as fellow citizens who have shouldered an important public service, but rather as mere instruments for counsel's own ends.

Of course, suffering the costs exacted by maintenance of the peremptory challenge would be warranted if it comprised a constitutional right or if it had a utility demonstrably greater than its disadvantages. Neither, however, is so. Nor can the Batson regime's prohibition against invidiously discriminatory challenges inhibit the full range of evils engendered by the peremptory.

VIII. PEREMPTORY CHALLENGES SHOULD BE ABOLISHED

For more than two-hundred years, we have taken great pride in the protections guaranteed to all of us by our federal Constitution. During all these years, however, in selecting a jury, parties were given the right to use peremptory challenges to exclude qualified citizens without having to give a reason for the disqualification. As heretofore pointed out, the unreported reason for the strike was generally because of the potential juror's race, gender, religion, ethnic origin, or some other reason having no relevance to the potential juror's ability to be impartial. Despite the advances represented by Batson, the peremptory challenge had been, and will continue to be, used to discriminate in our citadels of justice — our court rooms.347

In 1986, our Supreme Court in Batson recognized for the first time that peremptory challenges were being used to discriminate in our court rooms immune from constitutional scrutiny.348 In his concurring opinion in Batson, Justice Marshall was the first Supreme Court Justice to point out that the only way to solve the apparent conflicts between the use of peremptory challenges and the constitutional right to equal protection and an impartial jury was to eliminate the peremptory challenge entirely. Justice Marshall stated:

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167-169; Inlay, Federal Jury Reform: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in Swain, emphasized that “[w]here it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.” 380 U.S. at 244, 85 S.Ct. at 849. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory

347. See supra notes 89-237 and accompanying text for discussion of discriminatory use of peremptory challenges.

challenges entirely in criminal cases. 349

In its 1990 term, the Supreme Court appears to have paved the way for the total elimination of peremptory challenges. In Powers it extended the Batson limitation on the use of peremptories by holding that a defendant need not be of the same race as the excluded potential juror to challenge race-based use of peremptories. 350 In Edmonson, the Court extended Batson to all civil jury trials. 351 Dissenting in Edmonson, Justice Scalia made some cogent observations, even suggesting that an alternative solution to the peremptory's conflicts with constitutional values may be to abolish it. Justice Scalia wrote:

Thus, yet another complexity is added 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. Judging by the number of Batson claims that have made their way even as far as this Court under the pre-Powers regime, it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. Alternatively, of course, the States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion. 352

Although the Batson regime is certainly preferable to Swain's judicial tolerance of invidious discrimination in the courtroom, Batson and its progeny unquestionably require lawyers and judges to expend increasing amounts of time in litigating whether the reason given by the trial lawyer for striking the potential juror was not a "pretext for discrimination." As Justice Scalia points out, this "sideshow" inevitably detracts from the merits of the case. 353 The cost to society in the use of trial time for procedures which accomplish no justiciable purpose, except perhaps to rescue the peremptory from the extinction it deserves, is certainly another reason to abolish peremptory challenges.

More fundamentally, Batson does not and cannot abate the discriminatory use of the peremptory. 354 Judge Higginbotham, former Chief Judge of the Third Circuit Court of Appeals, has observed:

I have been similarly disturbed in the past year by a series of other cases where the Batson issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted. 355

352. Edmonson, 111 S. Ct. at 2096 (Scalia, J., dissenting).
353. Id. (Scalia, J., dissenting).
354. People v. Bolling, 591 N.E.2d 1136 (N.Y. 1992) (wherein three judges of the Court of Appeals of New York called upon the New York Legislature to eliminate all peremptory challenges: "Peremptories have outlived their usefulness and, ironically, appear to be disguising discrimination — not minimizing it.").
355. United States v. Clemmons, 892 F.2d 1153, 1159 (3d Cir. 1989) (Higginbotham, J., con-
This is at least in part due to courts’ inability or unwillingness to engage in the difficult and distasteful task of determining whether a member of the bar is telling the truth about his or her motivations. In a sense, courts have replaced their earlier practice of accepting at face value the assertions of jury commissions that no discrimination has occurred with the assertions of attorneys to the same effect. Such unquestioning reliance now, as then, reduces the Equal Protection Clause to a “vain and illusory requirement.”

The Batson procedure is also inherently underinclusive. Proper judicial oversight may curtail some discriminatory peremptory challenges in cases where potential jurors are stricken on the basis of their race or gender since these characteristics are generally apparent. The Batson limitation can do little, if anything, however, to curtail strikes based on the religious beliefs or ethnic origins of potential jurors, because these characteristics are usually not cognizable.

The total elimination of peremptory challenges can be expected to increase the use of challenges for cause and require the trial judge to determine whether the potential juror will be biased or fair. The greater resort to challenges for cause is a small price to pay for the elimination of a procedure which has permitted officers of the court to exclude citizens who may be well-qualified jurors from exercising their constitutional right to serve on the jury. Since the challenge for cause is made on the record and must be ruled on by the trial judge in open court, exclusions for cause are subject to public view and appellate review. The increased use of challenges for cause will provide no assurance that some jurors partial to one side or the other will not be seated on the jury. The increased use of challenges for cause and the elimination of peremptory challenges will, however, terminate a procedure which has violated the constitutional right of venirepersons to serve on the jury.

Those with a strong attachment to the status quo may oppose the total elimination of peremptory challenges from a system of justice which has, for the most part, served our country well. Our Supreme Court has awakened us, however, to the fact that the use of peremptory challenges, which have enjoyed an exemption from judicial review, have fostered discrimination in our courtrooms for more than two-hundred years. This flaw in our judicial fabric must be eliminated. The Batson procedures may alleviate some forms of discrimination, but they will not totally eliminate the discriminatory use of the peremptory challenge.

Jury trials are barometers used by our democratic society to evaluate the fairness of our judicial system. We must make reasonably certain that our juries represent the conscience of the community and that no citizen, on the basis of invidious discrimination, will ever be excluded from participating in this most important responsibility of citizenship — service on a jury. As judges and law-

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357. See United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (holding “Batson’s rationale applies equally well to gender-based peremptory strikes”).
yers, we must provide the vital force to bring about the total elimination of the peremptory challenge.

EPilogue—Recent Developments of Interest

The United States Supreme Court, in Georgia v. McCollum, held: "... the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." Justice Blackmun, in the majority opinion, also stated:

Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.

Justice Marshall recently reiterated his opposition to peremptories in an interview in the American Bar Association's Journal, stating: "I would not use them, ... I would be opposed to them. They are there, and I have used them, but I have talked to a hundred prominent, practicing lawyers who quietly will tell you they are willing to take the first 12."

360. Id. at 14.