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The Peremptory Challenge: A Lost Cause?

by Robert T. Prior*

I. INTRODUCTION

The recent Supreme Court decision of Georgia v. McCollum1 marked the culmination of a series of cases dealing with racially discriminatory peremptory challenges in jury selection. In holding that the equal protection clause of the Fourteenth Amendment requires a criminal defendant to articulate a racially neutral explanation for peremptory challenges before striking jury members of a different race, the Court has significantly undermined the role of the peremptory challenge in American jurisprudence.2 Beginning with Batson v. Kentucky3 six years ago, the Court has progressively ruled that under no circumstance will a party on either side of a criminal trial or a civil lawsuit be able to utilize one of its peremptory challenges to strike a venireperson on account of that person’s race.

Under the Sixth Amendment, the criminally accused is assured a trial by an impartial jury of twelve persons who must unanimously agree on a verdict.4 This same right has been imputed to the civil litigant through the Seventh Amendment’s assurance that the right to a jury trial will be preserved in suits at common law.5 One method our legal system utilizes to ensure the selection of fair and impartial jurors is allowing the parties to remove individuals from the jury panel who may be unfavorable to their case. The two devices for effectuating such a removal are the challenge for cause and the peremptory challenge.

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2. Id. at 2359.
4. U.S. CONST. amend. VI.
5. U.S. CONST. amend. VII.
In exercising the challenge for cause, the challenging party must convince the court that the challenged juror could not render an impartial verdict. As long as this burden of proof is satisfied, parties are not limited in the number of jurors they may challenge for cause. The peremptory challenge, on the other hand, is exercised "without a reason stated, without inquiry and without being subject to the court's control." Parties exercise the peremptory challenge based upon their subjective opinion that a particular juror would be unfavorable to their case. Traditionally that opinion has remained the confidential province of the challenger. Because of the peremptory's discretionary nature, statutes limit the number that a party can exercise in every jurisdiction.

The peremptory challenge, by its very definition, is based on stereotypes and biases of some sort. "It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' [Cite], upon a juror's 'habits and associations,' [Cite], or upon the feeling that 'the bare questioning (a juror's) indifference may sometimes provoke a resentment . . . .' [Cite]."

Whenever a party exercises a peremptory strike, the challenging party has concluded that for some reason the struck juror would be unfavorable to their case. The possible reasons for such a strike are endless: the prospective jurors' race, gender, age, religion, level of education, political affiliation, or sexual orientation are all conceivable reasons. In any event, the challenger's decision to strike is "at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken."

This Comment first explores the history of the peremptory challenge and its important functions in today's judicial system. Next, it examines those cases dealing with racially discriminatory challenges prior to Batson. The Comment then analyzes Batson and its progeny, followed by a detailed scrutiny of the decision in McCollum. It concludes with an analysis of the impact of the Batson reasoning on the future of the peremptory challenge.

II. HISTORY AND IMPORTANCE OF THE PEREMPTORY CHALLENGE

The Constitution does not explicitly guarantee a right to exercise the peremptory challenge. Rather, the right has evolved in American jurisprudence as one means of ensuring that biased judges and overzealous prosecutors do not circumvent the Sixth and Seventh Amendments' guar-

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7. Id. at 220.
The challenge itself, however, has existed for almost 700 years in English jurisprudence and has become an integral part of both the American and English systems of jury selection.

At English common law, criminal defendants were permitted to strike up to thirty-five jurors without cause while the crown could strike an unlimited number. Perhaps due to the inequity of this system, Parliament enacted the Ordinance for Inquests in 1305 requiring the government to show cause before any juror could be struck. Because the peremptory challenge had become such an essential part of the jury selection process, however, the ordinance provided a "stand-aside" procedure for prosecutors. Under this system, the government could have objectionable jurors stand aside until selection was complete. If, at that time, an insufficient number of jurors remained, the court would require the prosecution to articulate a reason for precluding the set aside jurors from serving on the jury. Eventually, peremptories for both sides of a court proceeding became the settled law of England and that practice continues today.

The American colonists recognized the value of the peremptory challenge and adopted the concept at both federal and state levels, although stopping short of incorporating the idea as part of the new constitution. Congress readily enacted a statute allowing a defendant thirty-five peremptories in trials for treason and twenty in trials for other capital felonies. In trials for other offenses, the government extended the right to exercise peremptory challenges to the prosecution as well. In 1865, Congress provided the prosecution with five peremptory challenges in capital and treason cases and the defendant with twenty. Seven years later, Congress extended those challenges to noncapital felony cases.

Over the years, the number of defendant's challenges gradually decreased while the government's number remained relatively constant. In modern federal felony trials the government has six peremptory strikes and the defendant ten. Additionally, each party in a federal civil trial is permitted three peremptory challenges, an extension of the common law unique to the United States.

State law in this area has virtually paralleled federal law. In almost all states, the right to exercise peremptory challenges stems from statutory

12. Id. at 213.
13. Id. Defendants in England may exercise seven peremptories today, although the right is rarely used. Id. at 213 n.12.
14. Id. at 214.
15. Id.
17. FED. R. CRIM. P. 24(b).
authority. Although the number of strikes varies from state to state, every state permits peremptory challenges to be exercised by each party in both criminal and civil trials.\textsuperscript{19}

Thus, the peremptory challenge has strong historical roots. Even more significant, however, are the important functions the peremptory has in today's judicial system. The peremptory plays a vital role in ensuring the Sixth Amendment's guarantee of a fair and impartial jury in all criminal prosecutions. Voir dire, or jury selection, in American trials consists of extensive and probing questions from both parties to the venire.\textsuperscript{20} The purpose of this extensive questioning is to determine if any prospective jurors would not be able to decide the case on the evidence placed before them. Those venirepersons who demonstrate bias or an inability to remain impartial with regard to either party may be challenged for cause. This extensive probing during voir dire to ascertain the possibility of bias may incur hostility in the potential jurors questioned. Especially in those cases when a venireperson is challenged for cause, and the challenge denied, is the risk of creating pretrial hostility in the challenged juror present. Furthermore, many jurors during voir dire may not give a party an articulate reason to challenge them for cause, though the party instinctively senses hostility from the prospective juror. A variety of factors may cause this type of pretrial hostility. The venireperson's occupation, social status, race, or simply the way the prospective juror looked at a party during voir dire are all possible reasons. Whatever the reason, hostility that exists before the trial on the merits even begins is sure to lead to an unfair trial.

The peremptory challenge alleviates these fears of juror hostility and eliminates extremes of impartiality on both sides. For the venirepersons offended during voir dire or unsuccessfully challenged for cause, the offending party may simply strike them from the venire through the exercise of a peremptory. The same applies to those jurors from whom a party senses hostility, but who did not create sufficient grounds for a challenge for cause. This ability to strike hostile jurors enhances the Sixth Amendment's guarantee of a fair and impartial jury indirectly as well. Because parties are aware of the peremptory's availability, they will be more vigorous in their efforts during voir dire to uncover jury bias and establish grounds to exercise a challenge for cause.\textsuperscript{21} Thus, the final jury will more likely be free from bias and able to render an impartial verdict.

The peremptory challenge also serves another important function. For those who come in contact with the judicial system—be they jurors, wit-

\textsuperscript{19} Swain, 380 U.S. at 217.
\textsuperscript{20} Id. at 218-19. In some jurisdictions, including federal courts, the judge questions the venire.
\textsuperscript{21} Id. at 219.
nesses, parties to a lawsuit, or criminal defendants—the ability to remove extremes of partiality is an explicit reminder of the right to an impartial jury. This ability increases confidence in the judicial system and serves as a reminder of one of the rights of being a citizen of the United States. Public confidence in our system is vital, for "to perform its high function in the best way' justice must satisfy the appearance of justice."\[123\]

In order to carry out these critical functions properly, the unfettered use of the peremptory challenge is necessary. As Blackstone recognized over two centuries ago, "'[the peremptory challenge is] an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.'"\[23\]

III. THE EARLY CASES

Due to the discretionary nature of the peremptory challenge, the Supreme Court has remained watchful for abuse of the privilege. The most prevalent form of perceived abuse has existed since the addition of the Civil War Amendments to the Constitution: striking a prospective juror based on that juror's race. The Court recognized this potential for discrimination soon after the amendments were adopted.

An early case, while not dealing with the peremptory challenge directly, applied the Fourteenth Amendment's equal protection clause to the jury selection process as a whole. In \textit{Strauder} \textit{v. West Virginia},\[24\] a state statute provided that only white male citizens over twenty-one years of age were eligible to serve as jurors. Strauder, the black defendant, was convicted of murder by a jury from which all blacks were removed pursuant to the state statute. On appeal, he alleged that the West Virginia statute precluding blacks from jury service violated his constitutional right to a trial by a jury selected and empaneled without discrimination against race or color.\[25\]

The Supreme Court held that the statute depriving blacks of the opportunity to serve on a jury violated the equal protection clause of the Fourteenth Amendment.\[26\] The Court found two separate Fourteenth Amendment violations: the rights of the defendant and the rights of the excluded jurors. With regard to the former, the Court stated: "[i]t is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, . . . and a negro is not, the latter is equally protected by the law with the

\[22\] \textit{Id.}
\[23\] \textit{Id.} (quoting \textit{Lewis v. United States}, 146 U.S. 370, 378 (1892)).
\[24\] 100 U.S. 303 (1879).
\[25\] \textit{Id.} at 304-05.
\[26\] \textit{Id.} at 310.
former."27 With regard to the rights of the excluded jurors, the Court stated that the equal protection clause was intended to extend to all races freedom from laws "implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."28 This extension of equal protection rights to the excluded jurors laid the groundwork for what may ultimately prove to be the demise of the peremptory challenge.

For nearly a century after Strauder the peremptory strike, and its inherently discriminatory purpose, remained essentially unchallenged. Then, in the 1965 decision of Swain v. Alabama,29 the Supreme Court addressed the racially discriminatory use of the peremptory strike. In Swain an all white jury convicted and sentenced to death a nineteen year old black defendant for raping a seventeen year old white woman. Although eight black venirepersons were originally present, the trial court exempted two of them and the state utilized its peremptory challenges to strike the other six. Defendant moved to strike the jury venire and to void the jury based on alleged invidious racial discrimination. The trial court denied the motions and the state supreme court ultimately affirmed defendant's conviction. The United States Supreme Court granted certiorari.30

The Court first noted that the state's use of peremptory strikes is presumed to comply with the equal protection clause.31 The Court then stated that while it is impermissible for the government to exclude blacks from the jury for matters unrelated to the trial, the presumption of validity would not be overcome even when every black venireperson is struck.32 Rather, the defendant would have to show that the prosecution had systematically excluded blacks over a period of many cases, so that no black in the jurisdiction was ever empaneled as a juror.33 Because the defendant in Swain offered no proof of government misconduct beyond the facts of his own case, he failed to meet his evidentiary burden and the Court affirmed the holding of the lower court.34 Thus, while the Court held that the government's use of the peremptory challenge must comply with the equal protection clause, the onerous evidentiary burden placed

27. Id. at 309.
28. Id. at 308.
30. Id. at 203-05.
31. Id. at 221-22.
32. Id. at 224.
33. Id. at 223.
34. Id. at 224-28.
on defendant left the prosecution's strikes virtually immune from constitutional scrutiny.

IV. *Batson* and Its Progeny

The well-settled jurisprudence that protected the government’s use of the peremptory challenge came to an abrupt end two decades after *Swain* in the landmark decision of *Batson v. Kentucky*. In *Batson* a state court convicted a black defendant for burglary and receipt of stolen property. At trial, the state utilized its peremptory challenges to strike all four black venirepersons, leaving an all white jury. Defendant moved to void the jury on the ground that the government had violated defendant’s Sixth and Fourteenth Amendment rights to a jury drawn from a cross section of the community and to equal protection of the laws, respectively. The trial court denied the motion, reasoning that the cross-section requirement applied only to the selection of the venire and not the petit jury itself. On appeal, the Kentucky Supreme Court affirmed the trial court, ruling that defendant had not met *Swain*’s evidentiary burden of demonstrating a systematic exclusion of a group of jurors from the venire over a period of time. The United States Supreme Court granted certiorari.

The Supreme Court opinion focused solely on *Swain* and the Fourteenth Amendment’s equal protection clause and did not address petitioner’s Sixth Amendment claim. In undertaking the Fourteenth Amendment analysis, Justice Powell, writing for the majority, first reaffirmed the principle previously espoused in *Strauder* that a state’s purposeful or deliberate exclusion of blacks from a jury on account of race denies a black defendant equal protection of the laws. The Court noted that racial discrimination in the jury selection process also denies the equal protection rights of the excluded jurors. According to Justice Powell, such discrimination implied that the excluded jurors were either unqualified to serve as jurors in general, or were unable to decide impartially a case concerning a member of their own race. Additionally, selection procedures that purposefully excluded black jurors would undermine public confidence in the fairness of the judicial system.

The Court then explicitly overruled the evidentiary standard established in *Swain* that required defendants to show that prosecutors had systematically precluded blacks from serving on juries in case after case.

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36. *Id.* at 83–84.
37. *Id.* at 85.
38. *Id.* at 87.
39. *Id.* at 93.
Instead, defendants could focus solely on the prosecutor's conduct at the defendant's trial. To establish a prima facie case of purposeful discrimination, defendant would have to show: (1) "that he is a member of a cognizable racial group"; (2) that the prosecutor exercised peremptory strikes to remove venirepersons of that racial group; and, (3) that all relevant circumstances raise an inference that the prosecutor intended to exclude the venirepersons on account of their race.

Once a defendant made a prima facie showing, the evidentiary burden would shift to the state to articulate a racially neutral explanation for excluding the black jurors. While this explanation would not have to rise to the level of a justification for a challenge for cause, the prosecutor would have to do more than deny that he had a discriminatory motive in making the strikes. The trial court would then determine if purposeful discrimination had, in fact, occurred. In light of its new holding, the Court remanded the case to the trial court to allow defendant an opportunity to establish a prima facie case of purposeful discrimination.

For four years after the decision in Batson the Court did not consider a single case dealing with the peremptory challenge, leaving implementation of the new decision to the state and federal courts. Then, during the 1990 term, the Court handed down two decisions that had significant impact on peremptory challenges.

In Powers v. Ohio, a grand jury indicted a white defendant and charged him with murder. At trial, the government used seven of its ten peremptory strikes to exclude black jurors. Defendant objected, citing Batson, and contending that his own race was irrelevant to the right to object to the prosecution's peremptory challenges. Power's argument was directly at odds with the requirement delineated in Batson that a defendant "first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." The trial court overruled defendant's objections, and ultimately the jury returned a guilty verdict.

On grant of certiorari, the Supreme Court renounced the first two prongs of the prima facie case established in Batson. The Court ruled defendant's race irrelevant in considering an objection to the prosecu-

40. Id. at 96.
41. Id.
42. Id. at 97-98.
43. Id. at 98.
45. Id. at 1366.
46. 476 U.S. at 96.
47. 111 S. Ct. at 1366.
tion's use of peremptory challenges to strike venirepersons on account of their race.\footnote{48} Once again, the Court did not focus solely on protecting individual defendants from discrimination. Rather, the Court considered the harm to excluded jurors by discriminatory strikes. The Court stated that these strikes "foreclose[d] a significant opportunity to participate in civic life."\footnote{49} Despite the holding in \textit{Batson}, the Court in \textit{Powers} held that the race of the defendant played no part in the denial of equal protection to black venirepersons in the jury selection process.\footnote{50} Thus, \textit{Powers} significantly reduced the prima facie showing required by \textit{Batson}. That showing could now be satisfied simply by demonstrating that all relevant circumstances raised an inference that the government intended to exclude a potential venireperson on account of race.

The Court devoted a significant portion of the \textit{Powers} opinion to whether a criminal defendant had standing to raise the equal protection rights of jurors excluded from service as a result of discriminatory strikes. In making this standing determination, the Court applied three specific criteria that it traditionally applied to determine whether a litigant had the right to bring an action on behalf of third parties.\footnote{51}

First, the litigant must have suffered an injury-in-fact that gave him a sufficiently concrete interest in the disputed issue.\footnote{52} According to the majority, the defendant in a criminal case sustains such an injury when the government utilizes its peremptory challenges in a discriminatory fashion. The Court noted that the jury acts as a vital check against wrongful exercise of power by the State, and that "intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee."\footnote{53}

Second, the litigant must have a close relation to the third party.\footnote{54} The Court recognized that criminal defendants and excluded jurors share a common interest in eliminating racial discrimination from the courtroom. The juror excluded because of race suffers personal humiliation and loses confidence in the judicial system; likewise, the criminal defendant loses confidence if his objections to discriminatory strikes are not heard. The Court held that "[t]his congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror."\footnote{55}

\begin{flushright}
48. \textit{Id.} at 1370.
49. \textit{Id.}
50. \textit{Id.}
52. 111 S. Ct. at 1370.
53. \textit{Id.} at 1371.
54. \textit{Id.} at 1370.
55. \textit{Id.} at 1372.
\end{flushright}
The final inquiry in the standing analysis turned on whether there was some hindrance to the excluded juror's ability to protect his or her own interests. While individual jurors subjected to racial exclusion had the legal right to bring suit against the State, the obstacles to bringing such a suit were insurmountable: jurors have no right to be heard at the time of their exclusion; declaratory or injunctive relief against an individual prosecutor would be difficult to obtain because it was unlikely that discrimination against the juror at the voir dire stage would recur; and, the economic burdens of litigation would not justify the small financial stake involved. The majority summarized, "[t]he reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." Consequently, the Court held that a criminal defendant has third-party standing to vindicate the constitutional rights of jurors excluded due to discriminatory challenges.

The Court's next decision expanded *Batson* even further. In the 1991 decision of *Edmonson v. Leesville Concrete Co.*, the Court held that the use of peremptory challenges by private civil litigants to exclude jurors because of their race violated the equal protection rights of the challenged jurors. Donald Edmonson, a black construction worker, was injured when a truck rolled back and pinned him against some construction equipment. Edmonson sued the owners of the truck in federal court for the negligence of their employee. During voir dire, defendants used two of their peremptory challenges to strike black prospective jurors. Edmonson objected, requesting that the court require defendant to articulate a race-neutral explanation in accordance with *Batson*. The district court denied the request, ruling that *Batson* did not apply in civil proceedings. A divided en banc panel for the court of appeals affirmed the district court, holding that the use of peremptories in civil proceedings did not constitute state action and therefore did not implicate constitutional guarantees.

Justice Kennedy, writing for the majority, first analyzed the state action question in light of the framework established in *Lugar v. Edmonson Oil Co.* State action exists under *Lugar* if a two-part test is satisfied. First, the claimed constitutional deprivation must result from the exercise

56. *Id.* at 1370-71.
57. *Id.* at 1373.
58. *Id.*
59. *Id.* at 1374.
61. *Id.* at 2080.
62. *Id.* at 2081.
of a right or privilege having its source in state authority. Under the majority's rationale, that prong was easily satisfied with regard to peremptory challenges since they are permitted in a given jurisdiction "only when the government, by statute or decisional law, deems it appropriate ."

The second prong under Lugar is satisfied if the private party charged with state action fairly could be described as a state actor. In determining that issue with regard to Edmonson, Justice Kennedy found it useful to apply three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." Applying these three principles, Justice Kennedy ruled that private litigants in civil proceedings satisfied the second prong of Lugar as well. First, private litigants "could not exercise [their] peremptory challenges absent the overt, significant assistance of the court." Second, the exercise of a peremptory challenge involves traditional government functions: "guarding the rights of litigants and 'insur[ing] continued acceptance of the laws by all of the people.' " Third, the injury caused by discriminatory strikes was exacerbated because the government permitted the discrimination to take place in the courthouse itself. Thus, six justices agreed that state action, the most difficult hurdle to overcome in the context of peremptory challenges and private litigation, existed. Three justices in dissent concluded that "a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action."

Finally, the Court turned to the issue of standing. The majority held that, like the criminal defendant in Powers, opposing parties in private litigation have third-party standing to raise the rights of excluded jurors in cases of discriminatory peremptories. The three-part analysis the Court had undertaken in the criminal context in Powers was satisfied for the same reasons and with equal force in the civil context.

64. Id. at 939-41.
65. 111 S. Ct. at 2083.
66. 457 U.S. at 939-42.
67. 111 S. Ct. at 2083.
68. Id. at 2084.
69. Id. at 2085 (quoting 111 S. Ct. at 1369).
70. Id. at 2087.
71. Id. at 2089 (O'Connor, J., dissenting).
72. Id. at 2087.
73. Id. See supra text accompanying notes 50-57.
V. GEORGIA v. McCOLLUM The Loop Is Closed On Racially Discriminatory Strikes

In the mere five years since Batson first encroached on the traditional scope of the peremptory challenge, the entire jury selection system that had existed in this country for two centuries had suffered significant inroads. Not only did prosecutors have to articulate a race-neutral reason for striking black jurors when the defendant was black, but the same requirement existed with white defendants. Further, all parties in civil litigation were precluded from discriminatorily striking black jurors. The next logical step necessary to close the loop with regard to peremptory challenges and black jurors was inevitable: imposition of the Batson requirement on criminal defendants. Indeed, in his dissent in Edmonson, Justice Scalia predicted: "[t]he effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from doing so—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible."

Justice Scalia's portent became a reality two years later. On August 10, 1990, in Dougherty County, Georgia, three white defendants were criminally charged with aggravated assault and simple battery. The victims were all black. Shortly after the indictment, a leaflet was disseminated in the local black community urging those in the community not to patronize the defendants' business. Thus, the atmosphere of the subsequent trial was particularly racially charged. Before voir dire, the government moved to prohibit defendants from exercising peremptory challenges in a racially discriminatory manner. It sought an order from the court providing that if the prosecution could prove a prima facie case of racial discrimination on the part of defendants, the court would require defendants to state a race-neutral explanation for their peremptories. The trial court denied the motion and the issue was certified for immediate appeal. The Supreme Court of Georgia affirmed the trial court, acknowledging the recent holding of Edmonson, but declining to take the precedential step of denying a criminal defendant the free exercise of his peremptory challenges. The United States Supreme Court granted certiorari.

Justice Blackmun delivered the opinion of the Court. His analysis in determining whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges consisted of four questions: (1) whether a criminal defendant's exercise of racially discriminatory peremptory challenges levied the same harms addressed by

75. 111 S. Ct. at 2095.
76. 112 S. Ct. at 2351-52.
Batson; (2) whether a criminal defendant's exercise of peremptory challenges constituted state action; (3) whether the government had standing to raise the constitutional rights of excluded jurors; and (4) whether the constitutional rights of a criminal defendant outweighed the constitutional rights of jurors who were excluded as a result of racially discriminatory peremptory strikes.77

A. Harms Addressed by Batson

The majority first recognized Power's edict that "'Batson "was designed 'to serve multiple ends,'” only one of which was to protect individual defendants from discrimination in the selection of jurors.'”78 Additionally, the Court noted that the juror excluded due to a racially discriminatory peremptory challenge “is subjected to open and public racial discrimination.”79 Finally, because of the heated and volatile nature of a race-related crime, Justice Blackmun recognized a particular need for public confidence in the jury selection process in Dougherty County.80 Consequently, all three of the harms addressed by the Court in Batson were present and, to some extent, heightened in McCollum.81

B. State Action

In determining whether a criminal defendant's exercise of peremptory challenges constitutes state action under the equal protection clause, the Court turned to the familiar two-pronged framework of Lugar v. Edmonson Oil Co.82 The analysis was strikingly similar to the determination of state action in Edmonson. Lugar's first inquiry, whether the constitutional deprivation resulted from the exercise of a right having its source in state authority, was easily satisfied since peremptory challenges are specifically authorized by state or federal statute.83 Lugar's second prong, whether the private party charged with the conduct can be described as a state actor, was also fulfilled. Justice Blackmun applied the same three principles that Justice Powell had utilized in Edmonson. First, the majority determined that the extent to which a criminal defendant relies on government assistance and benefits is "equivalent to those found in the civil context in Edmonson."84 Second,

77. Id. at 2353.
78. Id. (quoting 111 S. Ct. at 1368).
79. Id.
80. Id. at 2354.
81. See supra text accompanying notes 36-37.
83. 112 S. Ct. at 2354.
84. Id. at 2355.
the selection of a jury in a criminal case "fulfills a unique and constitutionally compelled governmental function" that was even more critical than jury selection in the civil context of Edmonson.\textsuperscript{85} Last, as in Edmonson, the Court concluded that the courtroom setting in which peremptories are exercised in the criminal context would lead to "the perception and the reality . . . that the court has excused jurors based on race, an outcome that will be attributed to the State."\textsuperscript{86}

After affirmatively finding the existence of state action in the exercise of a peremptory strike by a criminal defendant, Justice Blackmun distinguished the 1981 decision in Polk County v. Dodson\textsuperscript{87} that, respondents argued, should be determinative.\textsuperscript{88} In Polk County, defendant sued his public defender under 42 United States Code section 1983, claiming that the public defender had failed to provide adequate representation.\textsuperscript{89} The Supreme Court held that state action did not exist since a public defender engaged in his general representation of a criminal defendant did not qualify as a state actor.\textsuperscript{90}

In distinguishing the public defender in Polk County from the criminal defendants in McCollum, Justice Blackmun noted that it was not the adversarial relationship between the public defender and the state in Polk County that had precluded a finding of state action; rather, the adversarial relationship prevented the defender's government employment from alone being sufficient to satisfy the state action requirement.\textsuperscript{91} The public defender's status depended "on the nature and context of the function he . . . perform[ed]."\textsuperscript{92} In fact, the Court had previously held in Branti v. Finkel\textsuperscript{93} that when a public defender's function consisted of "making personal decisions on behalf of the State . . ." then his status as a state actor is undeniable.\textsuperscript{94}

Justice Blackmun implicitly recognized that the criminal defendant's relationship with the state was adversarial like the public defender's in Polk County; he explicitly recognized that the defendant's function in exercising a peremptory challenge necessarily carried the imprimatur of the state.\textsuperscript{95} Furthermore, the mere fact that defendant exercised the peremptory challenge to further his own interest in acquittal did not affect the

\begin{itemize}
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. at 2356.
\item \textsuperscript{87} 454 U.S. 312 (1981).
\item \textsuperscript{88} 112 S. Ct. at 2356.
\item \textsuperscript{89} 454 U.S. at 314.
\item \textsuperscript{90} Id. at 319; 112 S. Ct. at 2356.
\item \textsuperscript{91} 112 S. Ct. at 2356.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} 445 U.S. 507 (1980).
\item \textsuperscript{94} 112 S. Ct. at 2356.
\item \textsuperscript{95} Id.
\end{itemize}
finding of state action since "[w]henever a private actor's conduct is
debated 'fairly attributable' to the government, it is likely that private
motive will have animated the actor's decision."96

C. The Standing of the State

Applying the same three-pronged analysis the Court had employed in
Powers and Edmonson, Justice Blackmun ruled that the State of Georgia
had third-party standing to challenge a criminal defendant's discrimina-
tory use of peremptory challenges. First, the State suffered even more of
a concrete injury than the criminal defendant in Powers since "the fair-
ness and integrity of its own judicial process [was] undermined."97 Sec-
ond, the State's relationship to the potential excluded jurors was closer
than the relationships in both Powers and Edmonson: "[a]s the repre-
sentative of all its citizens, the State is the logical and proper party to
assert the invasion of the constitutional rights of the excluded jurors in a
criminal trial."98 Finally, the barriers that thwarted the excluded jurors
from exerting their own constitutional rights in Powers and Edmonson
were no less formidable in McCollum.99

D. Rights of Excluded Jurors Versus Rights of Criminal Defendants

In determining whether the interests served by Batson should give way
to the constitutional rights of criminal defendants, Justice Blackmun reit-
erated the principle that peremptory challenges are not, in themselves,
constitutionally protected; rather, they are merely one state-created
means of ensuring that the Sixth Amendment's guarantee of an impartial
jury and a fair trial are achieved.100 Although such previous decisions as
Swain and Edmonson had established the important role of the peremp-
tory challenge in ensuring a fair trial, for Justice Blackmun it would be
"an affront to justice to argue that a fair trial includes the right to dis-
 criminate against a group of citizens based upon their race."101

Further, the Court held that the prohibition of discriminatory peremp-
tory challenges did not violate the defendant's Sixth Amendment right to
the effective assistance of counsel.102 In the event a race-neutral expla-
nation by a criminal defendant's counsel would divulge confidential commu-
nications or trial strategy, the trial judge could arrange an in camera pro-

96. Id.
97. Id. at 2357.
98. Id.
99. Id.
100. Id. at 2357-58.
101. Id. at 2358.
102. Id.
ceeding. In any event, the majority ruled that “neither the Sixth Amendment right nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct.”

Finally, the application of *Batson* to a criminal defendant did not violate the defendant’s Sixth Amendment right to a trial by an impartial jury. The Court recognized that a defendant should have the ability to remove jurors whom the defendant believed could not suppress their racism and make an impartial decision. However, the Court found “a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice.”

The assumption that a juror would be impartial merely because that juror was of a particular race did not provide a legitimate basis for exercising a peremptory challenge. Therefore, the Court concluded that the criminal defendant should be precluded from making such a discriminatory use of the challenge.

Thus, Justice Blackmun’s four inquiries were satisfied. Accordingly, the Court held that the equal protection clause prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.

VI. Analysis and Conclusion

Without ever explicitly stating so, the Supreme Court has conducted an implicit balancing test throughout this line of cases. On one side of the scale, the Court considered the peremptory challenge and its important role in our judicial system. The Court examined not only the challenge’s long historical tradition, but also its functions in protecting the Sixth and Seventh Amendment rights to an impartial jury. Because the peremptory challenge alleviates fears of juror hostility created during voir dire, eliminates extremes of impartiality on both sides of a trial, leads to more vigorous efforts during voir dire to uncover venire bias, and increases public confidence in our judicial system, the Court has remained cautious when asked to undermine this fundamental guarantee.

On the other side of the scale, the Court considered, most significantly, the equal protection rights of venirepersons when they are struck from the venire as part of a discriminatory classification—race in this context. In conducting this balance, the Court clearly expressed its judgment: with
regard to racial stereotypes, the equal protection clause trumps the peremptory challenge. That judgment, while noble in theory, may lead ultimately to the demise of the peremptory challenge and harm the Sixth Amendment right to an impartial jury that the Court has so vehemently attempted to protect.

Batson and its progeny have laid the analytical foundation for further limitations on the use of the peremptory challenge in jury selection. When the Court agreed to conduct a balancing test in this context, it contemplated occasions when the rights of excluded venirepersons would overcome the right of a party to use a peremptory. It is not difficult to fashion a rule from Batson and its progeny: whenever a venireperson is struck through the use of a peremptory challenge and that strike is based on a discriminatory classification, the strike will be valid only where the Sixth and Seventh Amendment right of an impartial jury afforded to an accused in the criminal context and a civil litigant, respectively, outweighs the equal protection rights of the excluded juror. We know now that exclusions resulting from a classification based on race will never be valid under this test. But since discrimination and stereotypes of some sort are an inherent part of the peremptory challenge, the question becomes when, in this balancing process, the Supreme Court will consider the right to an impartial jury to outweigh the equal protection rights of the venireperson discriminated against.

Lower courts have already begun to analyze the issue with regard to discrimination based on gender. Most notably, in United States v. De Gross,107 the Ninth Circuit Court of Appeals held that principles of equal protection "prohibit peremptory challenges exercised on the basis of a venireperson's gender."108 Other circuits, on the other hand, have found that Batson does not prohibit the use of peremptory challenges based on sex.109 Inevitably, the Supreme Court will be faced with the issue of gender discrimination and other possible grounds for discrimination in the use of peremptory strikes. In this sense, the Court may have figuratively painted itself into a corner, having no alternative now but to further undermine the rights guaranteed by the Sixth and Seventh Amendments.

The Court could have avoided this precarious result if, six years ago, it had taken a firm stance and held that the rights of a party seeking to exercise the peremptory challenge outweigh the rights of potential excluded jurors in all circumstances. The right to an impartial jury is fundamental to our judicial system and the peremptory's role in ensuring that this right is extended to all parties is vital.

107. 913 F.2d 1417 (9th Cir. 1990).
108. Id. at 1423.
The rights of the excluded juror, however, are more tenuous. What the Court has considered to be "open and public discrimination," is, in fact, not so open. Struck jurors are not told why they have been excluded. They are simply instructed that their presence is no longer necessary. While some may be suspicious about the rationale for exclusion, the most that they suffer is hurt pride or indignation. Further, the Court has based its equal protection rationale for the excluded juror on the fact that they are deprived of "a significant opportunity to participate in civic life." While this is undoubtedly true, it overlooks the reality that most venirepersons would rather not serve on the jury. Jury service, while a virtuous civic duty, also disrupts the venireperson's life, in some cases for extended periods of time.

No matter how much the Court abhors infringement of these important but tenuous rights of the venire, logic dictates that even in the most egregious circumstance they will not outweigh a party's interest in having the case decided by a fair and impartial jury. Indignation is one thing; but prison sentences and large judgments are another. While the former is a regrettable and sometimes painful fact of life in our society, the latter constitutes a personal and tangible deprivation of liberty or property fundamental under our Constitution and laws. Thus, the Court's decision in *Batson* to employ an implicit balancing test was unnecessary and has opened the door to significant frustration of the right to an impartial jury.

However, while it is true that the *Batson* balancing test, taken to its logical extreme, could ultimately lead to the end of the peremptory challenge as a useful device for ensuring an impartial jury, the Court may still legitimately avoid such a result. The level of constitutional scrutiny under the equal protection clause varies according to the class being discriminated against. Race is considered a suspect class, and thus racial discrimination has traditionally received strict scrutiny. Under strict scrutiny analysis, the discrimination in question must be "necessarily" related to a "compelling" state interest. Hence, throughout the *Batson* line of cases, the Court may have implicitly held that while the government interest of providing an impartial jury is sufficiently compelling, the use of a peremptory challenge to exclude jurors based on their race is not necessarily related to that interest.

Classifications other than race receive more deferential treatment. Gender based classifications have traditionally received intermediate level scrutiny: the government classification must be "substantially" related to

110. 111 S. Ct. at 2348, 2353.
111. 111 S. Ct. at 1370.
an "important" government objective.\textsuperscript{113} Other classifications such as age, level of education, or occupation receive only low level scrutiny, and must only be "rationally" related to a "legitimate" state interest.\textsuperscript{114} Thus, peremptory strikes that discriminate on a basis other than race may survive these lower levels of constitutional scrutiny, and the peremptory may not lose its vitality outside of the \textit{Batson} line of reasoning.

In conclusion, this Comment has shown that the American jury selection process has undergone significant change during the past six years. What once was left to the complete discretion of the parties to a lawsuit has now become a sphere of intense court inquiry, at least when race is involved. In light of the Supreme Court's expanded view of the equal protection clause in recent decades, this limitation on the scope of the peremptory challenge did not come as a surprise to many. What comes as a surprise, however, is the Court's willingness to hold the rights of a potentially excluded juror, who, realistically, may not even want to serve on the jury, above the rights of the criminally accused and the civil defendant, who desperately need every protection our system offers. The rulings of the past six years, in essentially doing away with the peremptory challenge with regard to race, may have unintentionally deprived our legal system of one of its primary virtues—an impartial jury.

\textsuperscript{113} See, \textit{e.g.}, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
\textsuperscript{114} See, \textit{e.g.}, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (denial of permit for a group home for the mentally retarded not rationally related to legitimate state purpose).