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## They Try: How the Supreme Court has Addressed Issues of Racial and Gender Discrimination in the Jury Selection Process

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# They Try: How the Supreme Court has Addressed Issues of Racial and Gender Discrimination in the Jury Selection Process

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# They Try: How the Supreme Court has Addressed Issues of Racial and Gender Discrimination in the Jury Selection Process

Jana Kelnhofer

## ABSTRACT

The rise of publicized police brutality cases (but not the rise in number of cases themselves) has resulted in an increase of public scrutiny of the court process. More often than not, police officers are found not guilty by a jury of their peers, only for the public to later find out that the jury was composed almost entirely of whites. How did this process start? How does it persist? Has the legal system attempted to address this problem, and discrimination in the jury selection process in general? By examining past Supreme Court decisions, this review explores the ways that the Supreme Court has addressed racial and gender discrimination in the jury selection process. However, since the Court does not have enforcement powers, this review also explores the tactics that prosecutors have developed to skirt around their opinions.

With the recent rise in recorded instances of police brutality, use of social media, and acquittals of police officers involved, the long debate about the role race plays in United States jury selection is once again at the forefront of the national dialogue. Legal precedents exist which seek to prevent blatant racial and gender discrimination in the United States' legal system, proving that the legal system has been receptive to these conversations in the past. This review examines the ways in which the United States Supreme Court has addressed issues of racial and gender discrimination in the jury selection process.

The methodology of this paper is rooted in the empirical analysis of U.S. Supreme Court decisions in cases concerning claims of discrimination during jury selection. The first half analyzes the cases that the Court ruled on prior to the Jury Selection and Service Act (JSSA) of 1968 and the second half analyzes cases that impact the "modern jury" in America. The conclusion discusses ways in which the Court's rulings still leave room for discrimination.

The Sixth Amendment to the United States Constitution sets up the federal American jury system, but

does so with little specification. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense (US Const. amend. VI).

If the sole mention of an "impartial jury" (meaning a jury that can judge the facts with an open mind) in the Sixth Amendment was not enough to convince the colonists that juries were a central part of the legal process (Hans and Vidmar 49), the Framers of the Constitution included the Seventh Amendment, which states, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law” (US Const. amend. VII). As a result, they extended the right to a jury to civil cases as well.

The United States Constitution was written during a time when legally owning another human through the form of slavery was permissible and when women were still prevented from voting. Therefore, it should come as no surprise that the authors did not consider issues of racial and gender discrimination nor how their system might perpetuate such discrimination while framing their document. Although the Framers likely felt no responsibility to prevent future racial and gender discrimination in the criminal process because of the societal norms under which they lived at the time, states had an opportunity to exercise their power when writing their own laws pertaining to the selection of jurors. In fact, the First Judiciary Act of 1789 established that federal jurors have to meet the qualifications required by the state in which the federal court was located, thereby increasing the influence that states had on the federal jury selection process (Fowler 2).

The jury selection process in most states proceeds in two parts. The first part is selection in which a state or federal official chooses names from a potential juror list (How Are Potential Jurors Selected?). When juries were initially established, and until 1968, a “key man” system was used in order to generate the original lists that jurors were chosen from. This system asked key members of the community to recommend members of the community that they believed were competent enough to stand trial (Hans and Vidmar 53). Since “communities are not organized randomly, and only certain subgroups were represented,” this system was discriminatory (Hans and Vidmar 53). For example, a key man in the South may have been less likely to recommend black jurors than white jurors due to social tensions and racism within the community. Although this “key man” system led to implicit, non-legislative instances of discrimination, legislative discrimination continued in states with laws that prohibited certain groups, such as African-Americans and women, from sitting on juries.

Alongside the Supreme Court, Congress played a vital role in passing the Jury Selection and Service Act (JSSA) of 1968, which mandated that juror lists be taken from voting rolls, in an attempt to address issues of past discrimination within jury selection (Hale 57). The selection of jurors from voting rolls presents problems since the people listed on the rolls are often the most politically engaged. Since minorities and low-income communities are the least likely to participate in the

voting process, the system puts them at risk of being left out from the jury selection (Hans and Vidmar 54). To prevent this, some states have started using driver’s license registration lists in order to develop a more complete list from which to choose potential jurors.

The second process, ‘voir dire,’ allows judges and attorneys to pick and choose the ultimate jury pool by asking potential jurors questions and by gauging their body language and verbal responses (How Are Potential Jurors Selected?). Two types of challenges that attorneys may exercise in order to eliminate potential jurors from the pool are challenges of cause and peremptory challenges (Spears 1499). Challenges of cause are not limited in number and can be used for legitimate instances of suspected bias, such as a juror who lived next door to a defendant. These are also left “under the court’s control,” meaning that a judge has to approve a challenge for cause (Spears 1499).

Peremptory challenges, on the other hand, are limited in number and the attorney does not have to disclose the reasons for eliminating jurors. Attorneys are able to exercise this challenge in order to eliminate jurors that they believe to be subconsciously biased or lying. This is also an avenue for attorneys to discriminate against particular jurors due to their demographic characteristics (Spears 1499). It is worth noting that other countries, such as Great Britain and Canada, that do not have voir dire process before a trial believe that the United States’ system is unusual and unnecessary (Hans and Vidmar 48).

Prior to the JSSA, the Supreme Court only examined discrimination occurring during the selection process. Following JSSA, the Court also ruled on instances of attorney initiated discrimination in voir dire, most notably, through the peremptory challenge (Hale 57).

### **Cases Before the Jury Service and Selection Act of 1968**

#### *Strauder vs. West Virginia (1880)*

The first case the Supreme Court heard relating to ‘de jure’ (by law) discrimination in the compilation of jury lists was *Strauder vs. West Virginia* (100 US 303 (1880)). In *Strauder*, an all white jury convicted a black man in West Virginia of murder (Schmidt 1415). The defendant argued that his Fourteenth Amendment Equal Protection Clause rights had been violated due to a West Virginia law which limited jury service to “all white male persons” (Schmidt 1415). Justice William Strong established that “[the Constitutional question] is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his

race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.” (*Strander*). Justice Strong was explicit in stating that the case was not about the rights to a particular type of jury in a trial, but about whether or not the process of selecting a jury was constitutional.

Writing for a six justice majority, Justice Strong argued that the prohibition of a whole race of people from jury participation “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” (*Strander*). Justice Strong went on to state that particular state laws may “confine the [jury] selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications” (*Strander*). The Equal Protection Clause of the Fourteenth Amendment is itself a barrier to de jure racial discrimination via the jury selection process. As a result, the defendant’s conviction was overturned and laws preventing whole races of people from participating in jury selection were ruled unconstitutional. In spite of this ruling, states used other preventative measures such as the “key man” system to discriminate in the jury selection process.

#### *Smith vs. Texas (1940)*

The next jury selection case that the Supreme Court heard dealt with de facto (not written into law, but experienced ‘by fact’) jury selection discrimination. In *Smith vs. Texas* (311 US 128 (1940)), the sheriff of the county was responsible for choosing jurors from the list provided by the key man system and only chose white male jurors whom he recognized for the trial of a black defendant (Hale 194). Even though there was no law that prevented black people from serving on juries, the structural racism under which the officials responsible for the selection of juries operated within served to bring about the same effect. In his majority opinion, Justice Hugo Black wrote that “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” (*Smith*). Prior to this decision, no jurisprudence had advocated for a jury that is “representative” of the community, with only a Constitutional guarantee that the jury would be “impartial.”

#### *Glasser vs. United States (1942)*

Two years later, the Court agreed to hear *Glasser vs.*

*United States* (315 US 60 (1942)). In Chicago, the League of Women Voters had provided a list of women to a county official responsible for choosing jurors to participate in the voir dire process (Hale 197). In many states, women were subject to an “affirmative registration” policy in order to be eligible to be considered for jury duty (Hans and Vidmar 52). This policy exempted women from the jury selection process unless they opted in (Hans and Vidmar 52). In response, the League of Women Voters and other politically active women’s groups held organizing events to encourage women to sign up for jury selection. The women they recommended had taken part in a training administered by a local prosecutor about jury duty to ensure the women were more aware of the process (Hale 197). Because the training was administered by a local prosecutor, the defendants argued that these jurors had a more “pro-government” view of legal proceedings and were less likely to remain impartial (Hale 197).

Despite the gendered nature of the case, Justice Frank Murphy did not consider gender when writing the majority opinion. Instead, he emphasized the *Smith* ruling which held that juries needed to be “truly representative of the community, and not the organ of any special group or class.” Justice Murphy, in accordance with *Smith*, warned the officials in charge of selecting federal that “they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community” (*Glasser*). In writing this, Justice Murphy reiterated the representative standard for juries mentioned in *Smith* while also establishing a “cross-section of the community” standard. Taken together, *Glasser* and *Smith* signal a transition from juror selection based on “competence” to jury selection based on a cross-sectional representation of the community in which the trial is held (Hale 200). The Sixth Amendment now guaranteed defendants the right to a representative jury, but Justice Murphy’s definition of “representative” would be tested in a case four years later.

#### *Thiel vs. Southern Pacific Railways (1946)*

In *Thiel vs. Southern Pacific Railways* (328 US 217 (1946)), Gilbert Thiel sued the railroad company after he had jumped out of a moving car under the charge that they should have known that he was “out of his right mind” and prevented him from boarding the train. Jurors of the trial were only wealthy, white businessmen because the state often refrained from calling hourly wage earners to sit for jury duty due to the financial hardship a day of jury duty may pose to them (Hans and Vidmar 55). Writing the majority opinion, Justice

Murphy had an opportunity to elaborate on his new standards authored in *Glaser*. Justice Murphy wrote that:

[A representative cross-section] does not mean, of course, that every jury must contain representatives of all economic, social, religious, political, and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter.

Justice Murphy clarified that while the virtual representation of every cross-section in a community on every jury is impossible, states must avoid systematically preventing any particular group from partaking in the juror selection process. He continued to admit that while the state's reasoning for preventing wage earners from participating in the jury selection process is a nice gesture, any attempt to constitutionally allow this practice "would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged" (*Thiel*). Therefore, it was unconstitutional to exclude this class of people based on economic status, and *Thiel's* initial conviction was overturned.

*Ballard vs. United States (1946)*

Although the Court clarified its position on representative juries and had greatly raised the threshold for Constitutionally acceptable juror selection processes, it still had only ruled on discrimination on the basis of class and race. With *Ballard vs. United States* (329 US 187 (1946)), the Court finally considered the issue of gender. In this case, female jurors were excluded for reasons that are "unclear in the decision" (Fowler 3). Justice William Douglas, authoring the majority opinion, wrote "a flavor, a distinct quality, is lost if either sex is excluded" (*Ballard*). The Court's analysis was not based on the fact that women and men are equal and both deserve to sit on juries, but rather, that women bring a distinct perspective to the jury process, and therefore, including them is essential to establishing a representative cross-section of the community (Fowler 4). Because California had no law preventing females from serving on juries, this decision did not have legis-

lative implications and struck down no laws. Instead, the decision served as a mere affirmation that the Court believed women should serve on juries, rather than a judicial mandate that forced states to allow women to face consideration for jury service.

*Hernandez vs. Texas (1954)*

Before hearing another case regarding gender discrimination in the selection of juries, the Court heard *Hernandez vs. Texas* (347 US 475 (1954)). This case dealt with a Mexican national accused of murder in Texas who faced an all-white jury. He claimed that his Equal Protection Clause rights had been violated due to the exclusion of Mexicans on the jury, but the Court first required him to prove that Mexicans were a distinct "group" that gained protection under the clause (*Hernandez*). Previously, Mexicans were often considered "white" as evident by the single "Hispanic or white" option in most demographic surveys. Hernandez had to prove that he still faced discrimination. While Hernandez provided several statistical examples that demonstrated the racial discrimination against Mexicans in Texas, Justice Warren, writing for the majority, pointed out that the original courthouse that heard the case had segregated toilets: one unlabeled and the other labeled "colored or hombres aqui" (*Hernandez*). In addition, Hernandez proved that although Mexicans were included on the jury rolls, they had not been present on a jury in this particular Texan county in 25 years (*Hernandez*). The Court ruled that Mexicans are a distinct group and are protected against jury discrimination by the Equal Protection Clause. With time, the Court eliminated avenues for de jure and de facto discrimination of races, social classes, and gender to a certain degree in the process of random jury selection.

*Hoyt vs. Florida (1961)*

However, when the Court was asked to rule on the issue of de jure gender discrimination to solidify the *Ballard* precedent, the Court seemingly stalled the expansion of juror rights. In *Hoyt vs. Florida* (368 US 57 (1961)), a woman murdered her husband with a baseball bat after he admitted to infidelity and rejected her attempts for reconciliation. Like many states, Florida had an affirmative registration policy that forced women to register in order to be considered for jury duty, whereas men were automatically registered (Hans and Vidmar 42). As a result, there were no women on the defendant's jury because there were so few women registered. Justice John Harlan II, writing for the majority, stated that "despite the enlightened emancipation of

women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly reserved to men, woman is still regarded as the center of home and family life” (*Hoyt*). Therefore, he concluded, women have legitimate reasons to avoid jury duty, and thus the state law was a rational means to attend to their needs.

Although *Hoyt* seems out of line with the Court’s previous decisions regarding juries, it was just a further distinction. The issues in *Strauder*, *Smith*, and *Thiel* all dealt with state prevention of particular classes of jurors in the jury selection process. On the other hand, the *Hoyt* ruling found that women were not *prevented* from participating in the jury selection process, they just had to take extra steps in order to place their name on the rolls. The ruling in *Ballard* did not apply to *Hoyt* either: *Ballard* regarded the happenstance of women’s elimination from an actual jury, while *Hoyt* pertained to the statute that led to the absence of women on a particular jury. Despite emphasizing the importance of women on juries in *Ballard*, the ruling in *Hoyt* held that states could achieve this standard but it would be up to the women to register for jury selection rather than have the state do it automatically. As a result, Florida’s law stood and the Court’s jurisprudence explicitly solidified the legal differences between the sexes (*Hoyt*).

Eventually Congress solved almost all, if not all, of the Court’s previous problems by enacting the Jury Selection and Service Act (JSSA) of 1968 (Hale 237). JSSA required that federal courts to choose jurors from a voter registration list in the community. If that list was not able to produce a representative cross-section it could be supplemented with other lists (Hale 243). While JSSA prevented states from using the “key man” system, it did not prohibit states from giving exemptions to particular groups (Hale 268). As a result, many states continued to exempt women. Additionally, legal scholars argue that using voting registration lists is discriminatory because only the most politically active register to vote, leaving out a large swaths of low-income and minority populations from being considered for jury selection (Hans and Vidmar 54). In fact, choosing jurors from voter registration rolls has been shown to decrease voter registration numbers because citizens fear selection for jury duty (Knack 99). Although the struggle for a more representative jury was not over, the passing of JSSA was a turning point in the evolution of jury selection and paved the way for the modern jury that the United States uses today.

### The Creation of the Modern Jury Post-JSSA

#### *Duncan vs. Louisiana (1968)*

Although JSSA only applied to federal juries, it was quickly applied to states through Supreme Court action. In *Duncan vs. Louisiana* (1968) (391 US 145 (1968)), a black boy named Gary Duncan received a fine of \$150 and was sentenced to 60 days in prison for simple battery. Duncan requested a jury for his trial, but the Louisiana Constitution only guaranteed a jury for capital punishment and hard labor cases (*Duncan*). Justice Byron White, writing for a seven Justice majority stated, “The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States” (*Duncan*). As a result, the Court centralized criminal court proceedings for the entire country, finally extending refined Sixth Amendment standards to all of the states.

#### *Taylor vs. Louisiana (1975)*

While Congress and the Supreme Court continued to refine the jury selection process, the past decision of *Hoyt* seemed incongruent with their new direction. In *Taylor vs. Louisiana* (419 US 522 (1975)), seven years after the passage of JSSA, Louisiana still used an affirmative registration policy for all female jurors. Billy Taylor, the appellant, was a man charged with kidnapping who claimed that his Sixth Amendment rights had been violated in virtue of women being systematically excluded from the jury selection process (*Taylor*). While the Court admitted that hearing *Taylor*, on the surface, seemed unnecessary due to the Jury Service and Selection Act and the 30 years of precedent discussed above, the Court had never answered whether affirmative registration deprived a defendant of their Sixth Amendment rights (*Taylor*). This is because *Hoyt* was based on Equal Protection claims, not the Sixth Amendment.

In an 8-1 decision, the Court ruled that the systematic exclusion of females from jury selection violated Taylor’s Sixth Amendment rights (*Taylor*). Although the Court attempted to distinguish between the *Hoyt* and *Taylor* rulings, Justice White, writing for the majority, emphasized that as time had passed, societal expectations had changed (*Taylor*). In Footnote 17, he lists off several Department of Labor statistics that demonstrate the large percentages of women who work outside of the home. That being said, the decision *did* extend permission to states to continue to regulate its jury selection procedures as long as it remained in alignment with the representative cross-section requirement that the Court had established (*Taylor*). Ultimately, *Taylor*

prevented the future use of state-sponsored juror discrimination legislation against women and overturned *Hoyt vs. Florida* (1961).

Once the Court eliminated legislative routes to potential juror discrimination, it began to examine attorney-sponsored discrimination. As mentioned earlier, the voir dire process allows attorneys to question potential jurors before a trial in order to determine who will serve on the jury. Attorneys have two options to eliminate jurors: challenge for cause and peremptory challenges. Since the judge or justice overseeing the specific case must approve challenges for cause, lower courts tend to handle these issues themselves. Peremptory challenges, on the other hand, are up to the lawyer's discretion and the lawyer does not have to disclose their reasoning for eliminating a potential juror. When the initial JSSA was debated in Congress, both challenge for cause and peremptory challenges were cited as one of the remaining ways in which attorneys and courts could retain control over the juror selection process (Hale 238).

*Swain vs. Alabama (1965)*

The Court heard its first case about discriminatory peremptory challenges before the JSSA even passed through Congress. In *Swain vs. Alabama* 380 US 202 (1965), Robert Swain, a black man, was sentenced to death by an all-white jury. He argued that his Equal Protection Clause rights were violated when the prosecution struck all black jurors from the pool during voir dire. Although the Court upheld the notion that systematically excluding jurors on the basis of race is in violation of the Equal Protection clause, a defendant would have to prove that a prosecutor was consistently racist, no matter the case or circumstance (*Swain*). Swain was unable to obtain this proof of a pattern of discrimination because it was a timely and costly endeavor, despite there having been no black juror who served on a jury in the county in fifteen years (Raphael and Ungvarsky 233). In addition, many states did not even keep lists of the demographic characteristics of jurors, making it virtually impossible to prove a past pattern of discrimination (Hale 261). Although the Court *did* address the issue of performing peremptory challenges in a discriminatory way, the burden it placed on the defendant resulted in a very low probability of successfully challenging peremptory strikes.

*Batson vs. Kentucky (1986)*

This all changed with *Batson vs. Kentucky* (476 US 79 (1986)). In 1986, James Batson was arrested in Ken-

tucky for second-degree burglary (*Batson*). During the voir dire before his trial, the prosecutor used his peremptory challenges to strike all four black potential jurors from the juror list (*Batson*). Batson argued that this was in violation of his Sixth Amendment right to an impartial jury and in violation of the Equal Protection Clause from the Fourteenth Amendment. The Court, represented by Justice Lewis Powell writing the majority opinion, agreed. After asserting that prosecutors may use peremptory challenges in any manner they choose, Justice Powell stated, "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant" (*Batson*). With this, using peremptory challenges to eliminate jurors on the sole basis of race was ruled unconstitutional.

To correct the limitations of *Swain*, the Court provided a legitimate test to be used in order to challenge a peremptory strike on the basis of race through *Batson* called "The Batson Test" (More Perfect). First, if a defendant suspects that a prosecutor is wielding discriminatory peremptory challenges, they must assert a prima facie case of discrimination (*Batson*). 'Prima facie' means based on first impressions; therefore, this does not require extensive background investigations by the defendant. In presenting their prima facie claim, defendants may cite actions at their specific trial, departing from the consideration of all trials of a particular prosecutor as proscribed in *Swain*. In addition, presenting a prima facie challenge requires defendants to pass a three-pronged test. First, the defendant must show that he or she is a member of a "cognizable racial group... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race" (*Batson*). Second, the defendant may rely on the fact that peremptory challenges constitute a "jury selection practice that permits those to discriminate who are of mind to discriminate" (*Batson*). Finally, the defendant must use these facts to "raise an inference," or confer to others, that the prosecutor was attempting to eliminate the jurors in question because of their race (*Batson*).

After a defendant has demonstrated a legitimate prima facie challenge to a peremptory strike, the second part of the test requires the state and prosecutor to come forward with a race-neutral reason as to why they excluded the black juror(s) (*Batson*). Although the fundamental feature of peremptory challenges is that they can be exercised without explanation, the Court silenced these foreseeable objections by specifying that the race neutral reasoning does not have to meet the



level of the reasoning for a challenge for cause (*Batson*). A race neutral reason cannot be, however, that the eliminated juror would be partial to the defendant because of their race (*Batson*). Although older than the American legal system itself (More Perfect), the peremptory challenge is not a constitutionally guaranteed part of the American criminal justice system which allows the Court to comfortably place limits on it (*Batson*).

With *Batson*, the Court argued that racial discrimination against potential jurors not only hurts the defendant, but also those who are called for jury duty. While this was consistent with the *Strander vs. West Virginia* ruling in 1880, Justice Powell asserted that jury discrimination was also harmful to the community at large, as “selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice” (*Batson*). Justice Powell emphasized the less obvious but equally profound consequences of discrimination that erode the integrity of the justice system anytime a juror is dismissed due to race.

Although *Batson* established a specific test to confront the issues of racial discrimination, the case is also notable for Justice Thurgood Marshall’s concurrence. Justice Marshall, a pioneer in the legal-based anti-racial discrimination movement through his work with the National Association for the Advancement of Colored People, stated “The decision will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely” (*Batson*). This reignited a long-standing debate within the legal community about peremptory challenges.

Although peremptory challenges are used in order to discriminate and eliminate jurors based on demographic characteristics, they are also used as a barrier to racial discrimination. An attorney, for example, can gauge from body language and verbal cues that a potential juror holds racial bias, but they cannot eliminate this juror unless the juror explicitly states that they are racist. In this case, the attorney would need the peremptory challenge. This highlights how even attorneys working *against* racial bias need the peremptory challenge. With the *Batson* decision, the Court allowed the peremptory challenge avenue for racial discrimination to remain open, although restrained.

#### *Holland vs. Illinois (1990)*

Following *Batson*, there was a string of cases addressing issues that arose from the decision. In *Holland vs. Illinois* (493 US 474 (1990)), a white defendant was accused of multiple felony charges and accused the

state of violating his Sixth Amendment rights to be tried by a representative cross-section of the community. Justice Antonin Scalia, writing for the majority, determined that although the defendant in question was white and therefore not a member of a “cognizable racial group,” (*Batson*) the defendant still had grounds to sue since he was addressing a Sixth Amendment challenge instead of an Equal Protection Clause challenge (*Holland*). The Court ruled that the elimination of black jurors in this particular case was constitutional, since the Sixth Amendment does not guarantee a presence of a particular cognizable group (*Holland*). This means that *Batson* cannot be applied to Sixth Amendment cases and is only valid for Equal Protection issues. Accordingly, Justice Scalia asserted that no issues of Equal Protection were raised in this case because the petitioner was a white man (*Holland*). The Court ruled that his conviction should stand and that the jury selection process was constitutional.

#### *Powers vs. Ohio (1991)*

In *Powers vs. Ohio* (499 US 400 (1991)), departing slightly from *Holland*, a white defendant argued that the elimination of black jurors through peremptory challenges constituted a violation of the Equal Protection Clause, not the Sixth Amendment, and that his own race was irrelevant to the constitutional question. Therefore, the question concerned whether a white man who is a defendant has standing (i.e., a sufficient connection to the harm stemming from a law or action) to file an Equal Protection Clause on behalf of black jurors. The Court ruled that although “an individual juror does not have a right to sit on any particular petit jury, he or she does possess the right not to be excluded from one on account of race” (*Powers*). Unlike in *Holland*, the Court emphasized the impact of discriminatory jury selection on the jurors themselves.

Justice Anthony Kennedy’s majority demonstrated the above in his opinion, adding that even though *Powers* was a white man, he had standing in this case because any racial discrimination in the jury selection process “casts doubt” on the eventual verdict as a whole – ultimately directly affecting both parties and the whole system (*Powers*). Furthermore, defendants have a large incentive to advocate against jury discrimination in their case specifically because this can potentially lead to the reversal of a verdict (*Powers*). Even further, a defendant may file these “third-party” claims in regards to a violation of someone else’s rights under the Equal Protection Clause because the incentives for an eliminated juror to raise a discrimination claim are low (*Powers*). Any defendant, white or black, is able to

bring a discrimination suit with regards to the rights of the jurors because both parties are affected: the defendant has a large personal incentive to challenge their selection, and because jurors are unlikely to bring these claims themselves. Although the *Powers* precedent seems to contradict the *Holland* precedent, it does not—*Holland* addressed a Sixth Amendment claim, while *Powers* addressed the Equal Protection Clause.

*Edmonson vs. Leesville Concrete Company (1991)*

The ruling in *Powers* would soon be tested when Thaddeus Edmonson slipped and fell while working his construction job and sued in civil court for financial compensation (500 US 614 (1991)). In *Edmonson vs. Leesville Concrete Company* (1991), the attorneys representing Leesville Concrete Company struck almost all the black jurors using peremptory challenges. However, the Equal Protection Clause only protects against state action, and in a civil case, both parties are considered private actors. Therefore, *Edmonson* forced the Court to consider whether or not *Batson* challenges are applicable in civil trials.

*Lugar vs. Edmondson Oil Company (1982)*

In order to test whether *Batson* should apply to civil cases, Justice Kennedy, writing for the majority, used a two-pronged test from a different case, *Lugar vs. Edmondson Oil Company* (457 US 922 (1982)). First, he would have to determine whether the “claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority” (*Edmonson*). Second, “whether the private party charged with the deprivation could be described in all fairness as a state actor” (*Edmonson*). Justice Kennedy asserted that the peremptory challenge *absolutely* had its source in state power as it has no use outside of a court of law (*Edmonson*). In addition, the Court determined that any actor that relies on “significant assistance from state officials” is a state actor, and since the system of peremptory challenges strongly relies on the American justice system, Leesville Concrete Company was determined to be a state actor (*Edmonson*). With these two criteria met, the Court’s extension of the right to file Equal Protection claims on behalf of jurors to civil trials determined that *Edmonson* met all the criteria established in *Powers*.

*Georgia vs. McCollum (1992)*

Although the Court determined that a company in a civil suit was a state actor, they had still only ruled on

the use of peremptory challenges by the state, state actors, and the prosecution. However, both prosecution and defense were able to exercise peremptory challenges in a trial, meaning the defense in any trial was legally able to eliminate jurors on the basis of race. This was addressed in the case of *Georgia vs. McCollum* (505 US 42 (1992)), where three white men were arrested for assaulting a black man. When the prosecution filed a motion to prevent the defense from using peremptory challenges in order to eliminate black potential jurors, the Georgia court denied their request, stating that no Supreme Court decision prohibited the defense from using peremptory strikes in a racially discriminatory manner (*Georgia*).

When this reached the Supreme Court, the Court ruled in a 7-2 decision that there are four main reasons that a defendant may not exercise racially discriminatory peremptory challenges. First, racial discrimination of jurors through peremptory challenges harms the individual juror by subjecting him to “open and public” racial discrimination (*Georgia*). Second, Justice Harry Blackmun addressed the Equal Protection clause and the state-action requirement in writing that a defendant’s exercise of peremptories does constitute state action, as it helps to compile a state sponsored body -- the jury (*Georgia*). Third, the state has standing to sue because it “suffer[s] a concrete injury when the fairness and the integrity of its own judicial process is undermined” (*Georgia*). Finally, the Court added that the denial of discriminatory exercise of peremptory challenges does not violate any constitutional rights, as no one has a right to utilize any strategy to racially discriminate (*Georgia*).

With *Georgia*, the Court broadly expanded the ruling of *Batson*. Their ruling finally held that the racially discriminatory use of peremptory challenges was unconstitutional, no matter which party in a case attempts to use them. Beginning in 1990, the Court started quickly addressing some remaining issues with the *Batson* ruling with *Holland*, *Powers*, *Edmonson*, and *Georgia* which were decided in the span of two years. That being said, the Court still remained silent on the issue of discriminatory uses of peremptory challenges relating to gender.

*J.E.B. vs. Alabama (1994)*

In 1994, the Court decided to hear a case relating to the gender in the form of *J.E.B. vs. Alabama* (511 US 127 (1994)). The defendant was a white male who neglected to pay child support. The prosecution struck all male jurors from the pool with the notion that female jurors would be more sympathetic to a woman seeking

child support (*J.E.B.*). The Court, led by Justice Blackmun, decided that since the defendant's claim was based on the stereotype that women would be less sympathetic to a man, it was in violation of the Equal Protection Clause (*J.E.B.*). The Court's analysis was based almost solely on a discussion of the rights of the female jurors. In this case, they had a right to *not* be ideologically stereotyped into having a particular opinion about child support payments. This strayed from the previous focus on the rights of the defense and prosecution, and therefore, it was determined that a strike against any potential juror for their gender is enough to constitute a violation of the Equal Protection Clause.

The Court deliberately asserted that preventing the elimination of jurors based on gender did not eliminate the total use of a peremptory challenge, since attorneys may present gender-neutral reasons for striking jurors in the same procedure that *Batson* establishes (*J.E.B.*). This case, due to the previous ruling in *Georgia*, applies to both the defense and prosecution. In accordance, Justice Sandra Day O'Connor's agreed that the Equal Protection Clause prohibited the elimination of jurors on the basis of gender from state actors, but she also believed that "like race, gender matters" (*J.E.B.*). Therefore, there were legitimate reasons to eliminate a juror based on gender, and a defendant needs to have rights to eliminate jurors based on their gender in order to protect them against the state. This was, however, almost a moot point since the rights of jurors outweighed the rights of the defendant. The majority did not address the rights of the defendant and instead only considered the rights of potential jurors. Just like Justice Thurgood Marshall's concurrence in *Batson*, Justice O'Connor's took the majority's opinion a step further.

### Conclusion

After *J.E.B.*, the Court rarely heard large impact cases relating to racial or gender discrimination in the jury selection process. The cases they did hear were very fact specific and did not result in any broad reaching precedents. That being said, in a post-*Batson* and *J.E.B.* United States, discrimination continues to persist in jury selection. First, after *Batson* and *J.E.B.*, many organizations that advised lawyers on courtroom tactics and behavior began writing how-to guides that taught the art of discreetly continuing discrimination through the use of peremptory challenges (Object Anyway). For example, a webpage from the National Legal Research Group titled "Exercising Peremptory Challenges in Light of J.E.B." is littered with advice such as "keep good records" and "do not highlight race or gender in your records." In fact, in the most recent *Batson* case

brought to the Supreme Court, *Foster vs. Chatman* (2016) (578 US \_\_\_\_ (2016)), a Georgia attorney labeled all black jurors with a lowercase 'b' next to their name in his notes. These black jurors were later eliminated from the jury pool through the use of peremptory challenges. This labeling inspired Justice Elena Kagan to retort, "Isn't this the clearest *Batson* violation we have ever seen?" during oral arguments (More Perfect). In addition, *Foster* even led famous legal scholar and journalist, Linda Greenhouse, to suggest that the Court should evaluate the constitutionality of peremptory challenges as a whole in the next term, a reminder of Justice Thurgood Marshall's original concurrence in *Batson* (Greenhouse).

Additionally, if the 'neutral' explanations given by prosecutors for their racial and gendered elimination of jurors are often accepted rather than questioned, then the effects of *Batson* are diluted. In fact, researchers Michael Raphael and Edward Ungvarsky present a hypothetical potential juror who is named Pat (Raphael and Ungvarsky 233). Pat happens to be an African American woman. In order to eliminate Pat, a prosecutor can:

Show either that Pat has served on a jury before, or that Pat has never served on a jury before. The prosecutor can explain that Pat is young or that Pat is old. He can say that he does not want a juror with Pat's occupation for this case, or that Pat is unemployed. If Pat or Pat's relatives have had any involvement with law enforcement in the past, the prosecutor can exclude Pat regardless of whether the involvement has some connection to Pat. The prosecutor can declare that something in Pat's demeanor is bothersome. The prosecutor can even focus on a random aspect of the juror's character or past dealings, even if it only remotely relates to some aspect of the case or to the legal process in general (Raphael and Ungvarsky 237).

Not only do prosecutors have a large amount of legally acceptable options at their disposal for addressing a *Batson* challenge, but judges are also often reluctant to deny a prosecutor's "neutral reasoning" because they often work with the same group of prosecutors and like to maintain a positive working relationship (Greenhouse). Bryan Stevenson, founder of the organization Equal Justice Initiative which practices law in the Deep South, cites another example of an unreasonable neutral explanation that passed the judge's *Batson* standard (More Perfect). In his particular case, the prosecutor struck two black jurors and explained that they lived

in the same part of town as the defendant (More Perfect). Although this explanation appeared neutral, many towns in the South are still racially segregated, making this explanation directly correlated with race. The judge, however, still accepted the “neutral” explanation.

Not all research points to a failing *Batson* system. In one study, the author found that conclusions were drawn about the broader population based off of results from a small sample size. This was seen in with a country in North Carolina actually over representing particular populations that were present in voir dire (Rose 700). If the initial makeup of a jury pool was nine percent African American, then the representation on the jury in this study was often higher for that particular population.

The Court has ruled on very few *Batson* cases in recent years, but legal scholars have begun to contemplate expanding *Batson's* ruling to other cognizable groups such as members of the LGBTQ community and members of particular religions. The Supreme Court has not expanded *Batson* to these groups yet, but it is important to note that it will likely be a lengthy process seeing as it originally took the Court 18 years to expand the ruling to gender. In March of 2017, the Court addressed racial discrimination retroactively by allowing a judge to declare a new trial if it is discovered that jurors made racist comments in the jury deliberation room (*Pena-Rodriguez*). If biased jurors successfully get chosen from voir dire, judges now have a corrective measure that they can use – but only if jurors blatantly display their bias during deliberation. Although the Court is slow to expand *Batson*, the Justices are aware and responsive to conversations around discrimination. As the United States continues to engage in an evolving dialogue about the intersections between racial, gender, sexual, and religious discrimination within the justice system, the Court has the capacity to effectuate change in accordance.

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 J.E.B. vs. Alabama, 511 US 127 (1994)  
 Lugar vs. Edmonson Oil Company, 457 US 922 (1982)  
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