WHEN BATSON MET GRUTTER: EXPLORING THE RAMIFICATIONS OF THE SUPREME COURT’S DIVERSITY PRONOUNCEMENTS WITHIN THE COMPUTERIZED JURY SELECTION PARADIGM

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I. INTRODUCTION

The right to a jury trial is "the only anchor yet imagined by man, by which government can be held to the principles of its constitution."

—Thomas Jefferson

"Gentlemen, trials are too important to be left up to juries."

—Rankin Fitch (fictitious attorney portrayed by actor Gene Hackman)

It is "oft-stated" that a trial "is simply a dispute resolution system" in which the primary objective is "search[ing] for truth."

If truth-seeking is the end sought, then some might argue that the means have devolved into all-encompassing, win-at-all-costs endeavors that facilitate or encourage the use of "dubious tactics" by trial attorneys.

2. RUNAWAY JURY (20th Century Fox 2003).
6. See Glenn Garvin, That's Why the Good Lord Gave Us TiVo, MIAMI HERALD, Sept. 21, 2006, at 2E (reviewing a new television legal drama in which young district attorneys are instructed that "'[their] job is to win . . . Justice is God's problem'"); see also Margaret Graham Tebo, Law in the Low Country, 87 A.B.A. J. 40 (2001) (contrasting the civility of the legal practice in Charleston, South Carolina with the general prevalence of trial lawyers' aggressive tactics); Peter Brown, Lawyers' Party Hits a New Low, ORLANDO SENTINEL, May 16, 2003, at A22 (stating that trial lawyers have a "'win-at-all-costs' . . . mentality"). In 2002, the American Bar Association (ABA) published results of a consumer survey that found 74% of the public believed "lawyers are more interested in winning than in seeing that justice is served."
7. AMERICAN BAR ASSOCIATION, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 7 (Litigation 2002) [hereinafter A.B.A. PUBLIC PERCEPTIONS OF LAWYERS].

Frank J. Murray, Modern-Day Jousters Continue to Battle for Respect—Huge Decisions Don't Help Image, WASH. TIMES, July 17, 2000, at A1 (internal quotation marks omitted) (quoting Chief Justice Harding of the Florida Supreme Court). One commentator noted: "The most effective litigation tactics become those that suppress, distort, or otherwise defeat the truth. The implicit conclusion is that lying . . . is acceptable, if that is what it takes to
Reliance upon these "dubious tactics" perpetuates stereotypes that "lawyers are untrustworthy, manipulative, and [are] determined to win at all costs." Despite efforts within the profession both to address and correct these preconceived notions, "generally negative perceptions" of the legal profession remain pervasive.

One particular area that remains a veritable 'Achilles heel' wrought with tactical and strategic uncertainty is jury selection. Commentators emphasize that "the most important people in the courtroom are the jurors," and it has been characterized as "conventional wisdom . . . that most trials are won or lost in jury selection." The American Bar Association (ABA) recently issued guidelines emphasizing the importance of jury selection in capital cases. Voir dire, especially in capital cases, comprises the "ultimate part of the

8 Murray, supra note 7 (internal quotation marks omitted). See Garvin, supra note 6.
9 See, e.g., Michael Dayton, Winston-Salem Lawyer to Head N.C. Academy of Trial Lawyers in 2005-06, N.C. LAW. WEEKLY, June 13, 2005 (recounting recent efforts to address negative media and correct "negative perceptions that the public has of trial lawyers").
11 See, e.g., A.B.A. PUBLIC PERCEPTIONS OF LAWYERS, supra note 6, at 8, 17 (reporting that more than 70% of the public believed lawyers "manipulate both the system and the truth" and approximately 34% believed lawyers "deserve the bad reputation that they have").
12 See Warren Richey, High Court Revisits Racial Bias in Jury Selection, CHRISTIAN SCI. MONITOR, Oct. 16, 2002, at 3 (noting that the problem of juror selection, particularly with regard to race, is the Achilles heel of the American justice system).
14 John H. Blume et al., Probing "Life Qualification" Through Expanded Voir Dire, 29 HOFSTRA L. REV. 1209, 1209 (2001); see also Herald Price Fahringer, "Mirror, Mirror on the Wall . . .": Body Language, Intuition, and the Art of Jury Selection, 17 AM. J. TRIAL ADVOC. 197, 197 (1993) ("Acknowledged experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected."); Steven C. Serio, A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert, 53 AM. U. L. REV. 1143, 1147 (2004) ("Many scholars believe that most capital cases are won or lost during jury selection."). But see Dale W. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503, 507 (1965) (noting that many lawyers view voir dire with "disdain, as unlikely to affect materially the result, regardless of what was said or who was challenged or left on the panel").
16 The term "voir dire" is "an ancient phrase literally meaning 'to speak the truth.'" WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3, at 1050 (West, 4th ed. 2004).
17 See Blume et al., supra note 14, at 1209-11 (2001) (explaining that if the conventional wisdom that trials are won and lost at voir dire is correct, then its importance is more profound in capital cases). The right to an impartial jury in both criminal and civil cases is discussed infra Part II.A.
Simply stated, "the importance of selecting the right jury cannot be overemphasized." Considering that "once the last person on the jury is seated, the trial is essentially won or lost," it is surprising that jury selection, the "single most important aspect of the trial proceedings," remains cast as "mysterious," a "guessing game," often imbued by "seat-of-the-pants, back-of-the-neck judgment." Law schools often bypass instruction in jury selection, deemed "the most difficult" part of a trial, when designing their skills-based curricula. This pedagogical void may be justified for two reasons. First, jury selection is a "skill which is hard to teach and even more difficult to perform well." Second, practitioners characterize impaneling a jury as a "work of art" to which "no science or formula" attaches rather than an academic exercise.

18 Serio, supra note 14, at 1147-48.
20 Covington, supra note 13, at 575-76.
21 Id. at 575; see also Jamie Thompson, Is Jury Pool of 104 Big Enough? Nope, ST. PETERSBURG TIMES (Fla.), July 15, 2005, at 1A ("Selecting a jury is perhaps the most important act lawyers perform during a trial.").
23 Matt Roush, Going Inside Jury Room for Human Side of Justice, USA TODAY, Apr. 16, 1997, at 3D.
24 Covington, supra note 13, at 582 (citation omitted).
26 See Tracy L. Treger, Note, One Jury Indivisible: A Group Dynamics Approach to Voir Dire, 68 CHI.-KENT. L. REV. 549, 561 (1992) ("[A]t least one commentator has noticed the paucity of instruction in voir dire in trial advocacy courses."). Lack of law school training is highlighted by the rise of educational programs designed to "enhance ... skills in areas such as voir dire." Texas Access to Justice Commission Empowers Legal Aid Lawyers Through Training on Litigation and Appellate Advocacy, BUS. WIRE, June 1, 2006.
27 The Abrams Report (MSNBC television broadcast Dec. 30, 2004) (discussing jury selection in the context of a Michael Jackson trial); see also Covington, supra note 13, at 590 ("Law schools are more concerned with well-written briefs than eloquent oral presentations.").
A. The Art-Science Dichotomy of Jury Selection

The extent to which no formula applies to jury selection is best exemplified by the methodologies trial attorneys traditionally employ to select juries. Lawyers often rely upon "hunches, instinct, and educated guesswork," none of which are exact. For example, defense consultants hired during the O.J. Simpson trial noted preferences for prospective jurors who "would be more cerebral than emotional in their answers to voir dire questions." In addition to considering the form and substance of juror responses, lawyers also scrutinize non-

See Fox on the Record with Greta Van Susteren: Analysis of Scott Peterson Trial (Fox News Network television broadcast Nov. 10, 2004) (featuring an interview in which host Greta Van Susteren asks, "All right. Howard, how much of jury selection is science? How much is art? And the term I always use how much is voodoo?").

Kristen Reed, Lawyers To Begin Picking Jury, ORLANDO SENTINEL, July 5, 2006, at Cl; see also Matt Krupnick, Dyleski Trial Highlights Jury Selection Difficulties: Experts Say Finding People Not an Exact Science, and High-Profile Cases Are Even Harder, CONTRA COSTA TIMES (Cal.), July 18, 2006, at A1 ("[Experts say] there's little to suggest that jury selection is a science."). But see Jeff Kass, Traits of the 'Right' Juror—Many Factors Will Be Weighed in Picking Panel in Bryant Case, ROCKY MOUNTAIN NEWS (Colo.), July 12, 2004, at 6A ("[J]ury selection is as much art as science."); Meg Laughlin, Changes Sought in Al-Arian Jury Questionnaire, ST. PETERSBURG TIMES (Fla.), Feb. 1, 2006, at 4B ("[J]ury selection is [an] imperfect science."); Claude Solnik, Mock Juries Offer a Scrimmage or a Trial Run for Savvy Lawyers, LONG ISLAND BUS. NEWS (N.Y.), Mar. 3, 2006 ("[S]electing and tailoring cases to jurors has become a science.").

See Crawford, supra note 28 ("[J]ury picking is more of a crap shoot [than a science]."); see also Lee V. Coffee, 'Foxhole Formula' Picks Panel, COMMERCIAL APPEAL (Tenn.), Sept. 19, 2004, at B8 ("[J]ury selection is an inexact process that is more akin to a lottery than a science."). The inexact process of jury selection mirrors the enigma of jury deliberations. See Joanne Ostrow, Jury’s Closed-Door Task Opens to Dramatic Documentary, DENVER POST, Apr. 15, 1997, at E1 (reporting on a CBS documentary that touts, “For the first time, cameras secured in the walls and operated by remote control allow viewers to intrude into the sanctity of the jury room”).

Covington, supra note 13, at 577; see also Treger, supra note 26, at 561 ("[L]awyers have relied on their own intuition and beliefs, along with a modicum of common sense, to guess which venirepersons will be the most sympathetic to their clients.").

"The success of [a lawyer’s] 'gut feeling' approach is difficult to measure." Treger, supra note 26, at 561; see also Debra Sahler, Comment, Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule, 6 ALB. L.J. SCI. & TECH. 383, 384 n.2 (1996) ("Early jury selection methods relied on relatively basic statistical techniques to determine the association amongst certain demographic or background characteristics and attitudes of the community."). It is difficult to discern how individuals might respond in cases because "people have particular opinions and preconceptions that they don’t even know how it will affect them." Jamie Satterfield, Choosing Jury Part Finesse, Part Gut; Selection for 'Death-Qualified' Jurors Continues Today in Stanton Trial, KNOXVILLE NEWS-SENTINEL (Tenn.), May 15, 2003, at A1 (emphasis added). Moreover, jurors may "lie about their attitudes and prejudices during voir dire." Covington, supra note 13, at 580.

One criticism of lawyers during voir dire is that they "use it as an opportunity to preach at the jury" rather than to solicit answers to questions that "cause[] jurors to talk about
verbal cues such as facial features, mannerisms, and attire to predict personality and predisposition. Furthermore, numerous seminars provide practitioners with “insight and information on the latest trial techniques” related to jury selection, fostering an era in which “[t]he days of selecting juries based on an attorney’s whim and senses are being replaced.”

Today, jury selection constitutes either “part art, part science” or a “highly scientific art form.” Both characterizations reflect increased uses of technology and infusions of jury consultants into the voir dire process. Consultants and lawyers undertake “excessive efforts . . . to produce juries that they believe will be sympathetic to their cases.” Use of jury consultants, however, is not novel. Thirty-five years ago, counsel first employed “the use of social scientists as themselves.”

35 See, e.g., Kathy A. Goolsby, It’s Written All Over Your Face: When It Comes to Personality, Woman Says She Has You at ‘Hello,’ DALLAS MORNING NEWS, Sept. 24, 2004, at 1P (featuring a “certified face reader” who has “seen the skill used in jury selection”).

36 See Sahler, supra note 32, at 389 (“Some jury consultants use ‘body language’ [and] ‘will know what the odds say about which nefarious nose-attackers to strike’”).

37 See, e.g., Diana Walsh, The Art of High-Stakes Jury Picking: 2 Seasoned Consultants Compete in Courtroom, S.F. CHRON., Apr. 4, 2004, at A1 (“‘You’re taking a lot of factors into consideration,’ [one jury consultant] said. ‘You’re looking at the guy who dresses in the suit and tie versus the guy who comes in jeans and shorts.’”).

38 See Case Financial, Inc. Endorsed by Consumer Attorneys of California as Preferred Litigation Funding Provider, BUS. WIRE, June 24, 2004, http://findarticles.com/p/articles/mi_m0EIN/is_2004_June_24/ai_n6087055; see also Barbara Jones, Continuing Legal Education Seminar Centers on the Art, Science of Jury Selection, MINN. LAW., Nov. 18, 2002 (describing a jury selection training program offered by DecisionQuest director of research John D. Gilland and attorney Craig D. Diviney); Neighbor, Business Buzz, DAILY HERALD (Chi.), Nov. 4, 2003, at 3 (spotlighting the Trial Lawyers College, an exclusive three-week intensive program held at a Wyoming ranch and “presented by famous trial attorney Gerry Spence,” wherein participants can learn, among other things, how to “master[] jury selection”).

39 Sahler, supra note 32, at 384.

40 Satterfield, supra note 32.

41 John D. Bower, Letter to the Editor, Family Praises Hospice Staff, HATTIESBURG AM. (Miss.), Aug. 10, 2002, at 7A. One jury consultant described the coalescence of art and science: “While the science of jury selection is knowing what research shows and applying it appropriately, the art of it is reading people, understanding group dynamics and understanding the theme of the trial . . . .” Jones, supra note 38.

42 See, e.g., Live From . . . 1:00 PM EST: The Nuts & Bolts of Jury Selection (CNN television broadcast Feb. 16, 2005) (describing jury consulting firms’ facilities “with mock courtrooms, closed-circuit cameras, video editing and a high-tech control room that rivals some TV studios”); see also Martha Bellisle, Local Legal Experts Debate Jury Selection System, RENO GAZETTE-JOURNAL (Nev.), June 26, 2005, at 1A (noting the “growing use of sophisticated techniques to study . . . the jury selection process . . . .”).

43 Dalrymple, supra note 28.
consultants in...jury selection," facilitating the emergence of an "expensive" jury consulting industry. Now, as proverbial juries deliberate over the efficacy of pricy jury consultants, lawyers have begun to utilize new jury selection technologies incorporating computer software solutions that purport to assist with impaneling "a responsible jury."

B. The Specter of Computerized Jury Selection

Software programs designed to isolate and eliminate potential jurors during voir dire are a litigation strategy that critics allege may constitute "an illegitimate tampering with the adversary system." Use of the technology presents a formidable challenge for the profession. As early as 1981, the Congressional Office of Technology As-


See Thompson, supra note 21 (noting the high price of jury consultants); infra note 58 and accompanying text (comparing costs of consultants with the computerized alternative).

45 See, e.g., John Caher, The Jury is Still Out on Trial Consultants: Psychologists Don't Just Testify About the Defendant Anymore, They Help Pick Jurors, TIMES UNION (N.Y.), Oct. 24, 1994, at A1 ("Some lawyers view consultants as an essential tool in certain types of cases, but others dismiss them as purveyors of quack psychology and question whether they really offer any insight beyond the gut feelings and experiences of a skilled litigator"); see also Peter T. Kilborn, Investigators in Sniper Case Join Inquiry in W. Virginia, N.Y. TIMES, Aug. 19, 2003, at A14 (reporting that one judge disallowed jury consultants because he was "confident of the extensive experience of lawyers at both tables" and that "[j]ury selection is certainly a skill that attorneys develop").

46 As early as 1978, one scholar observed:

With the increased availability of computer access...[.] the trial lawyer will increasingly seek its assistance. Moreover, as the market for such programs and services becomes substantial, the computer programming and leasing industry will...provide specialized services...[T]he computer has clearly arrived in the legal community and its future looks impressive.


47 Bellisle, supra note 42 (quoting the brochure for "Trial Science," a company whose high-tech system purports to identify jury bias).

48 Treger, supra note 26, at 565 (pointing out this harsh critique of "social scientists' involvement with the selection of juries").

49 See id. ("[C]ritics of scientific jury selection] fear that the juries will be manipulated in such a way that the constitutional guarantee of an impartial jury of ones' peers will become meaningless."); see also Recent Cases: Criminal Law—Racial Exclusion in Jury Pool Composition, 116 HARV. L. REV. 2678, 2678 (2003) ("[T]he advent of computerized juror-selection methods has not put an end to... disputes [regarding the composition of jury pools]").
sessment (OTA)\textsuperscript{51} forecasted that increased use of computer technology for jury selection could become problematic.\textsuperscript{52} It noted "the growing use of computerized dossiers of potential jurors along with computer models for predicting juror behavior."\textsuperscript{53} Moreover, it cautioned that "future computer technology and social scientific techniques may make this application cheap and improve its effectiveness. If so, the entire concept of an 'impartial' jury may be challenged."\textsuperscript{54}

The OTA's prescient observations have been realized.\textsuperscript{55} "The jury consulting industry has been growing since the 1970's,"\textsuperscript{56} and it has become "increasingly common for trial lawyers to rely on highly paid jury consultants."\textsuperscript{57} In addition, technological advances have substantially reduced the costs of computer-based alternatives to jury consultants.\textsuperscript{58} Although jury selection software is becoming a more at-

\textsuperscript{51} Between 1972 and 1995, the Office of Technology Assessment was a "nonpartisan analytical agency [that] assisted Congress with the complex and highly technical issues that increasingly affect[ed] our society." Office of Technology Assessment, OTA Archive, http://www.gpo.gov/ota (last visited Sept. 22, 2007).

\textsuperscript{52} See OFFICE OF TECHNOLOGY ASSESSMENT, COMPUTER-BASED NATIONAL INFORMATION SYSTEMS: TECHNOLOGY AND PUBLIC POLICY ISSUES 23 (Sept. 1981) [hereinafter OTA REPORT] (noting potential "Sixth Amendment issue[s]").

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} One television drama "implies, not unreasonably, that... unless you have someone... using fancy software to vet your jury... you do not stand a chance in court." Robert Lloyd, \textit{Trial Show Does Reality An Injustice}, \textit{L.A. Times}, Aug. 30, 2006, at E2 (emphasis added).

\textsuperscript{58} Jury selection software can cost as little as $1,000. See Amie K. Streater, \textit{Lawyers Get High-Tech Help to Pick Jurors}, \textit{PENSACOLA NEWS JOURNAL} (Fla.), Dec. 15, 2002, at 1A (reporting that the program, SmartJURY is "available to every lawyer in the nation for $995 a year"). By comparison, mock trials "can run... $20,000 a day." \textit{Live From...} (CNN television broadcast Feb. 16, 2005), \textit{supra} note 42; see also Treger, \textit{supra} note 26, at 566 ("Jury selection experts may charge as much as $200,000 for a single trial."); Streater, \textit{supra} note 57 (discussing costs to retain jury consultants).
tractive tool for practitioners, "[l]ittle legal precedent exists . . . for applying constitutional law to issues raised by computer-based information systems."\(^{59}\)

This article fills the void by examining the "legal and ethical ramifications"\(^{60}\) of introducing computer software into voir dire. It addresses whether software that considers race as one of several factors to inform trial lawyers' determinations of efficient and effective use of peremptory challenges survives constitutional scrutiny. Part II provides an overview of how the technology functions and assesses its efficacy. A two-fronted constitutional analysis follows. Part III analyzes the issue through a discussion of both the Sixth\(^{61}\) and Fourteenth Amendments by considering Batson v. Kentucky\(^{62}\) and its progeny. In so doing, it contextualizes the Supreme Court's proscription on the use of race-motivated decisions to exercise peremptory challenges. Part IV introduces Grutter v. Bollinger\(^{63}\) into the foray and maintains its relevance to voir dire in two ways: (1) the Court's diversity pronouncements have far-reaching ramifications beyond the context of university admissions; and (2) software calculations mirror university admissions policies. By implicitly placing an imprimatur of constitutionality upon any selection process—academic or otherwise—that incorporates race as one criterion among many, Part V argues that Grutter established a dangerous precedent under which software designed for jury selection withstands constitutional challenge by circumventing and undermining the principles enunciated in Batson. Software usage, permissible under Grutter, ultimately enables lawyers to act with complete impunity when exercising peremptory challenges by concealing any racially motivated decision to exclude prospective jurors.

\(^{59}\) OTA REPORT, supra note 52, at 22; see also Tresa Baldas, Computer Voir Dire, NAT'L L.J., Sept. 6, 2006, at 1 ("[L]awyers and legal experts . . . worry about computer glitches and constitutional challenges [to the use of computers in jury selection] involving racial . . . discrimination.").

\(^{60}\) See Baldas, supra note 59.

\(^{61}\) The Seventh Amendment, which pertains to jury trials in civil cases, is incorporated within the discussion of the Sixth Amendment. See infra text accompanying notes 71–73.


II. THE NUTS AND BYTES OF JURY SELECTION SOFTWARE

Numerous jurisdictions throughout the United States utilize software programs to generate jury pools. Most systems currently in use assist officials by determining eligibility or processing summons and do not directly relate to a juror's participation in any specific case. Although trial lawyers often challenge the manner in which an entire venire was summoned, the methods by which software generates jury selection venires from which jurors are ultimately impaneled is beyond the scope of this article. The software considered herein relates specifically to retaining and eliminating prospective jurors who, following the selection of a venire, are questioned during voir dire.

A. Establishing a Right to an Impartial Jury in Both Civil and Criminal Cases

Use of software during voir dire is applicable in both civil and criminal cases. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Civil litigants are guaranteed the right to a jury trial under the Seventh Amendment, which provides that "[i]n Suits at common law, . . . the right of trial by jury


65 See, e.g., Kevin Cole, Douglas County Simplifies Jury Duty: Those Not Selected on the First Day Do Not Have to Return, OMAHA WORLD-HERALD (Neb.), Oct. 7, 2006, at 1A (noting the emergence of an "e-Jury" system that enables jurors to answer summons online); Terry Dickson, New Jury List Will Resume Glynn Trials, FLA. TIMES-UNION, Aug. 31, 2000, at B1 (discussing computerized systems specifically designed to select jury pools); Pamela Lehman, Montco Makes Jury Selection Easier; Software Helps Determine Eligibility. Questions Put Online, MORNING CALL (Pa.), Dec. 8, 2004, at B5 (discussing implementation of computer program to manage prospective juror records).

66 See LAFAVE ET AL., supra note 16, at 1050 (discussing challenges to the manner of summoning the entire venire rather than the method of selection after selection of the venire).

67 Cf. Recent Cases, supra note 50, at 2678 (discussing Azania v. Indiana, 778 N.E.2d 1253 (Ind. 2002), wherein the Indiana Supreme Court held that computer programming errors "violated Indiana's requirement of an 'impartial and random selection' process" by excluding potential African American jurors from the overall jury selection pool).

68 See Baldas, supra note 59 ("Criminal and civil attorneys alike note that using computerized statistical data to help detect a biased juror is a useful tool, especially when they have a few peremptory strikes left and they don't know on which jurors to use them.").

69 U.S. CONST. amend. VI.
shall be preserved...”

Although the Seventh Amendment does not explicitly state that a civil jury must, like its Sixth Amendment counterpart, be impartial, courts have determined that “the right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury.”

A “civil litigant’s right to an impartial jury inheres in the [S]eventh [A]mendment’s preservation of a ‘right to trial by jury’ and the [F]ifth [A]mendment’s guarantee of due process.”

Because “the reasoning of the Sixth Amendment cases concerning juror bias is germane to the analysis” for cases governed by the Seventh Amendment, this article focuses upon the Supreme Court’s Sixth and Fourteenth Amendment jurisprudence.

B. Defining the Purpose of Voir Dire

Jury trials “allow[] for the popular participation of society in democratic decision-making.” The selection of an impartial jury, which ensures a fair trial, constitutes the primary goal of voir dire.

Although voir dire is “utilized in a strategic manner” by trial counsel, its purpose, contrary to popular belief, is not “to impanel a jury with a favorable attitude toward the client’s case.” Rather, it is designed to “eliminate those [individuals] who have particular biases... that you think would be unfair.”

Voir dire achieves two
purposes:  
it (1) "elicit[s] information [that] establish[es] a basis for challenges for cause"; 
and (2) "facilitate[s] the intelligent use of peremptory challenges." With regard to the latter purpose, use of peremptory challenges to eliminate potential jurors is permissible "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."

Because it is "virtually impossible for someone to be completely objective in everything," lawyers seek to eliminate people from a jury who would be "predisposed against their case." In order "[t]o conduct adequate voir dire, attorneys must develop a set of detailed questions for jurors to explore their backgrounds and specific views." Eliminating jurors for cause requires counsel to "convince the court that the challenged juror could not render an impartial verdict"; these strikes are usually directly related to specific answers elicited from the juror. The process for detecting bias is considerably difficult when lawyers face time constraints for expeditiously impaneling a jury.

As the Supreme Court acknowledged in Swain v. Alabama, the "essential nature" of a peremptory challenge is that it is "exercised without a reason stated, without inquiry and without being subject to the
Consequently, peremptory challenges are often exercised "in light of the limited knowledge counsel has" of prospective jurors or "upon the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, upon a juror's habits and associations." Software, however, is designed to eliminate arbitrary use of peremptory challenges by revealing information about jurors who, because of lack of time, are not directly questioned by counsel. It thereby enables lawyers to "make tough decisions when faced with the deadline pressures of voir dire."

C. Effectuating the Purpose of Voir Dire with Technology

The concept of software incorporates several elements designed to generate profiles of ideal jurors. Use of an "ideal" juror enables trial lawyers "to rank the juror on a scale for comparison to this 'ideal.'" In conjunction with consultants, lawyers develop juror profiles, determine what factors are relevant to the factual and legal circumstances underlying each case, and converge all data into a systematic platform to apply during voir dire.

In many ways, the "innovative" software streamlines this process. Armed with extensive information about each potential juror, the

89 Id. at 220–21 (emphasis added) (citations omitted).
90 One software program's goal is "to obtain only a few—2 or 3 more desirable jurors in order to change the outcome," rather than "to obtain a stacked jury." JuryQuest, http://www.juryquest.com (last visited Aug. 12, 2007) (providing an overview of the software and setting forth the software program's goals).
91 Baldas, supra note 59; see also Streater, supra note 58 ("[T]he software is merely a tool to help attorneys organize thoughts and notes, collect public records and process the information fast enough to make good decisions.").
92 See James V. Grimaldi, 'Runaway Jury' Aside, Consultants Are A Fact of Life in Courtrooms, WASH. POST, Oct. 20, 2003, at E3 (discussing ways in which jury consultants identify jurors likely to be favorable to their clients).
93 Covington, supra note 13, at 594. But see CBS Morning News (CBS television broadcast Aug. 31, 2004) (discussing jury selection and noting that some prosecutors "develop a profile of the ideal worst juror that you want to get off") (emphasis added).
94 See Treger, supra note 26, at 562 (explaining the process involved in scientific jury selection).
95 See, e.g., Latest Legal Tool Helps Select Jurors Who Predictably Will Return Verdicts for Clients, http://www.esquirelitigationsolutions.com/pr051004_smartjury.htm (last visited Sept. 28, 2007) [hereinafter Latest Legal Tool] ("This is the most innovative new software for the legal field.").
96 See Computers & Scientific Jury Selection, supra note 44, at 356 (predicting increased efforts to collect juror information, contemplating "comprehensive womb-to-tomb dossiers," and
software is an alternative to impaneling focus groups, devising survey-based demographic statistics, and staging mock trials. 97 Although no computer can "predict exactly what a juror will do if selected to decide a case,"98 the software utilizes "mathematical formulas and attitude scaling techniques"99 as well as "demographic profile[s] and verbal and nonverbal clues"100 to calculate the likelihood of a juror's bias. A juror's profile is scored and ranked according to potential bias—within one program, the scale ranges from "Ideal" to "Dangerous."101 Software determines a juror's demographic by analyzing an individual's age, gender, race, level of education, occupation, marital status, religious affiliation, income, and number of children.102 Another competing product removes religion, number of children, and income from its calculus but incorporates prior jury service.103 Ultimately, the software creates a thorough demographic survey of each juror.104

One of the software's most valuable features is its ability to "neatly note not only demographic information but also answer[] ... questions and observations of behavior that often get lost."105 Answers provided by jurors during voir dire are input into the program and, together with the demographic information, pro-

99 Horwitz, supra note 97.
100 Streater, supra note 58.
102 See Bellisle, supra note 42 (describing factors jury selection software takes into account).
103 See Horwitz, supra note 97 (describing the factors JuryQuest software takes into account in determining jurors' potential bias); see supra note 96 (discussing other information that jury selection software can provide for users).
104 See Streater, supra note 58 (explaining the output of jury selection software).
105 Id.
duce a rating that indicates juror bias or neutrality. Although a computer "is superior to someone trying to do this from the seat of their pants," creators of the software provide a caveat: "The lawyer picks the jury, not the computer. But [the software] is extremely useful."

D. Assessing the Efficacy of Technological Voir Dire

As researchers note, "the efficacy of psychological trial consulting is an empirical question, to be answered as any other empirical question would be—through controlled experimentation." If success rates were extremely high for selecting jurors "labeled acceptable by social scientists, then trial by jury would cease to function impartially and ultimately would have to be abandoned." Empirical data suggests that scientific jury selection techniques could account for "between 5% and 15% of the variance in verdicts," potentially enhancing a lawyer's ability to correctly classify jurors from 50% (completely random) to 69%. Nonetheless, ascertaining a success rate remains "speculative," and "there is good reason to be skeptical about the potential of scientific jury selection to improve selection decisions substantially."

Statistics for computerized jury selection tools may be more encouraging. One software program relies on demographic profiling data from a national survey that has a statistical error factor of 2% with a 95% level of confidence. In the recent Andrea Yates trial,

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106 Id.; see also supra text accompanying note 101 (discussing how SmartJury and JuryQuest incorporate this information).
107 Streater, supra note 58; see supra text accompanying notes 22–23 (describing voir dire as a guessing game).
108 Streater, supra note 57.
109 Stolle et al., supra note 44, at 143.
112 Treger, supra note 26, at 549.
113 Stolle et al., supra note 44, at 145 (citations omitted); see also Symposium, What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality, 40 AM. U. L. REV. 547, 564 (1991) ("Even with all the tools at our disposal, . . . researchers cannot always predict what individuals are going to do in a complex situation that has multiple determinants.").
114 Latest Legal Tool, supra note 95.
defense counsel used another software system that "rated seven [jurors] as significantly biased in favor of the defendant before the trial even began." Ultimately, a "sympathetic" jury produced a verdict of not guilty by reason of insanity. Success rates for the software are promising. Defense counsel using the software have prevailed in about half of the roughly 100 criminal trials in which the software has been used, . . . far greater than the national average." The software developer touts further that, of those cases in which a jury returned convictions, 80% of the panels returned lighter sentence recommendations than those sought by the prosecution. Beyond that, nearly 83% of civil litigants reportedly have prevailed utilizing the software.

Even if some argue that "it is foolish . . . [t]o have a lot of faith" in software, its use is expected to increase. Although scholars forecast a rise in hung juries if both sides utilize the software, many practitioners say they "can't overemphasize the importance of the software [which they see as] very valuable in [their] jury selection." Justice Breyer acknowledged that software is but one example of "a professional effort to fulfill the lawyer's obligation to help his or her client." Nonetheless, the software "can be misused." Justice Breyer cautioned that any regime "that permits or encourages the use of stereotypes work[s] at cross-purposes" with "the law's antidiscrimination command."

III. THE JURY AND CONSTITUTIONAL PROSCRIPTIONS ON RACE-BASED DISCRIMINATION

Justice Breyer observed that use of racial stereotypes "in the jury-selection process seems better organized and more systematized than ever before." In many ways, the technological advances that cre-
ated jury selection software are akin to biological mutations that enable organisms to survive and to resist attack\(^1\): it is "the direct result of the successful treatment of earlier forms of the virus [of racial bigotry] that has mutated in order to resist treatment."\(^2\) Just as a series of venire selection cases decided by the Supreme Court between 1880 and 1964 "provided the structural basis . . . to eliminate racism at the peremptory challenge stage,"\(^3\) software may foster a new era in which the peremptory challenge can withstand exposure "as a repository of the unexamined . . . hatreds held by attorneys and their clients."\(^4\) This Part considers the Sixth and Fourteenth Amendment jurisprudential principles affected by the introduction and use of software during voir dire.

**A. Charting the Path to the Peremptory Challenge Cases**

The American "legacy of discrimination and segregation"\(^5\) within a society in which "race still matters"\(^6\) predates the Declaration of Independence.\(^7\) "Between 1777 and 1857, many northern states abolished slavery and dismantled *de jure* impediments that denied blacks access to the legal system" in the years that followed the Revolution.\(^8\) However, it was not until 1860 that African Americans were


\(^{134}\) Broderick, *supra* note 130, at 375 (quoting LORENZO J. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* 299 (1974)).
believed to have first served on a jury.\textsuperscript{135} "Racial inclusiveness on juries was a major constitutional and legislative issue" after the Civil War\textsuperscript{136} and, since the passage of the Reconstruction amendments, "race has been a prominent topic of constitutional attention."\textsuperscript{137} Beginning with \textit{Strauder v. West Virginia},\textsuperscript{138} the Supreme Court ensured that "[r]ace discrimination in jury selection [would constitute] a matter of constitutional concern."\textsuperscript{139}

1. \textit{De Jure Statutory Exclusion Under Strauder}

\textit{Strauder} represents the first instance in which the Supreme Court reaffirmed the "basic right of trial by an impartial jury"\textsuperscript{140} under the Sixth Amendment.\textsuperscript{141} The Court addressed the constitutionality of a state statute providing for de jure exclusion of racial and ethnic minorities from jury service:\textsuperscript{142} "[T]he first of these questions is ... whether, in the composition or selection of jurors ..., 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."\textsuperscript{143} The statute expressly denied individuals the "right to participate in the administration of the law, as jurors, because of their color."\textsuperscript{144} The Court held that restriction from jury service on the basis of race or color "amount[ed] to a denial of the equal protection of the laws" under the Fourteenth Amendment, which was

\textsuperscript{135} See James Forman, Jr., \textit{Juries and Race in the Nineteenth Century}, 113 YALE L.J. 895, 910 (2004) (expressing the notion that in both the North and the South no African Americans served on any juries until 1860).

\textsuperscript{136} \textit{Id.} at 897, 915 ("[D]iscrimination against black defendants was a significant Reconstruction concern.").


\textsuperscript{138} 100 U.S. 303 (1879), overruled by \textit{Taylor v. Louisiana}, 419 U.S. 522 (1975).


\textsuperscript{141} \textit{Strauder}’s reach extends, however, "to the composition of the venire and not the petit jury," Barber, \textit{supra} note 110, at 1228 n.16.


\textsuperscript{143} \textit{Strauder}, 100 U.S. at 305.

\textsuperscript{144} \textit{Id.} at 308.
enacted "to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it."\textsuperscript{145} As was recognized in later cases, the Court's holding made it clear that "purposeful exclusion of blacks from jury participation because of their race violates the equal protection clause."\textsuperscript{146}

\textit{Strauder} established the "principle that states could no longer pass hostile and discriminating legislation against blacks, legislation singling out blacks and branding them with a stamp of 'inferiority.'"\textsuperscript{147} As the first of "more than thirty cases involving Fourteenth Amendment equal protection challenges to the selection of jury venires,"\textsuperscript{148} \textit{Strauder} provided "the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."\textsuperscript{149} Still, \textit{Strauder} never explicitly established a right to a jury "of one's peers in a particular case."\textsuperscript{150} Rather, it only ensured that no "members of [the defendant's] race [could be] purposefully excluded."\textsuperscript{151} Why the Court prohibited race-based exclusion as opposed to requiring "inclusion to guarantee a jury representative of one's racial peers is not evident. The proposition is merely stated; no precedent is cited."\textsuperscript{152}

\section*{2. De Facto and 'Other Causes' Exclusions Under Rives}

Whatever "ray of hope" that \textit{Strauder} may have represented\textsuperscript{153} was dimmed\textsuperscript{154} by the Court's "restrict[ive] interpretation of it"\textsuperscript{155} in \textit{Vir-
Unlike the law at issue in *Strauder*, Virginia did not enact a facially discriminatory statute precluding minorities from jury service. Although Justice Strong "took the opportunity to reaffirm in powerful language" the Fourteenth Amendment's purpose "to ma[ke] the rights and responsibilities, civil and criminal, of the two races exactly the same," the Court nonetheless refused to extend *Strauder*’s reach to recognize "a right to have the jury composed in part of colored men." Rather, it determined that "[a] mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal Statute. It is not, therefore, guaranteed by the Fourteenth Amendment . . ." In so holding, the Court ignored allegations that African Americans "had never been allowed to serve as jurors in the court . . . in any case in which a colored man was interested." The defendants in *Rives* only challenged a lack of African American presence on the jury rather than any intentional exclusion on the basis of race. Thus, no Fourteenth Amendment violation could be sustained because no state action precluded the impaneling of a racially diverse jury. Any prejudices that may have operated to produce an all-white jury were, as Justice Field noted in concurrence, outside the purview of the Equal Protection Clause:

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157 See supra notes 142-46 and accompanying text.
158 The Court noted that "the laws of Virginia make no such discrimination . . . by law against the colored race, because of their color, in the selection of jurors." *Rives*, 100 U.S. at 321. The Virginia law provided that "all male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State, with certain exemptions . . . may be jurors." *Id.* at 334 (Field, J., concurring).
159 McConnell, supra note 153, at 136.
160 *Rives*, 100 U.S. at 318.
161 *Id.* at 323; see also James H. Druff, The Cross-Section Requirement and Jury Impartiality, 73 CAL. L. REV. 1555, 1564 n.43 (1985).
162 *Rives*, 100 U.S. at 323.
163 *Id.* at 322.
164 See id., 100 U.S. at 322 ("The assertions . . . fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The . . . jury which indicted them . . . may have been impartially selected."); see also Robert William Rodriguez, Batson v. Kentucky: Equal Protection, The Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges, 37 EMORY L.J. 755, 759 (1988).
165 Consequently, the "petition for a removal stated no facts that brought the case within the provisions of this section, and, consequently, no jurisdiction of the case was acquired by the Circuit Court of the United States." *Rives*, 100 U.S. at 323.
166 See id. at 320-23.
There are many ways in which a person may be denied his rights... [such as] from popular prejudices, passions, or excitement, biasing [sic] the minds of jurors and judges. Religious animosities, political controversies, antagonisms of race, and a multitude of other causes will always operate... as impediments to the full enjoyment and enforcement of civil rights.

These "other causes" "left the Court trying to achieve the Fourteenth Amendment's mandate without invading the sphere of private social relations." Thus, while the Court was "willing to invalidate facially discriminatory criminal laws," it eschewed "reliev[ing African Americans] from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions." As a result, *Rives* required that an accused establish that state officials' "adherence to a discriminatory state statute" precluded African Americans from serving as jurors in order to sustain an equal protection claim. *Rives* "sent a message to state legislators and administrators that a more subtle form of discrimination, such as a facially neutral jury selection statute, would be insulated from federal judicial review."

### 3. An Impossible Burden of Temporal Exclusion Under Neal

Following *Strader* and *Rives*, with the latter case concluding that evidence that non-whites had never served as jurors fell "short of showing that any civil right was denied," courts began "examin[ing] specific fact situations to determine whether the state had denied a minority defendant the protection guaranteed him by purposeful ex-

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167 *Id.* at 332–33 (Field, J., concurring).
169 *Id.*
170 *Rives*, 100 U.S. at 333 (Field, J., concurring).
171 As the Court reasoned,

> If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted [sic] the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as the [Civil Rights] act of Congress of March 1, 1875, which prohibits and punishes such discrimination.

*Id.* at 321 (emphasis added).
173 *Rives*, 100 U.S. at 322; *see supra* Part III.A.2.
When Batson met Grutter

clu[sion of] his peers from the jury.” 174 Neal v. Delaware175 provided “a crucial step in the process by which [the Court] rendered itself impotent concerning jury discrimination.” 176 The Neal Court “engag[ed] in historical sleight of hand”177 to reverse a defendant’s conviction178 while simultaneously deciding to deny a request for removal to federal court. 179 Although Delaware’s statutes and constitution “restrict[ed] the selection of jurors to white male citizens, being voters, and sober and judicious persons,”180 the Court nonetheless determined that no facially discriminatory statute was implicated because its exclusionary provisions were superseded by the Fourteenth and Fifteenth Amendments, enacted later than the Delaware constitution.181 Thus, it found that Delaware’s failure to enact legislation conflicting with the amendments did not constitute a denial of equal protection or civil rights warranting federal court jurisdiction.182 Its conclusion provided the Court with an opportunity to grant “unconsidered affirmation”183 of Rives and greater latitude to refine the standards for race-based juror exclusion enunciated inStrauder.184

The Neal Court ultimately held that a petitioner can demonstrate a prima facie equal protection violation upon a showing that African Americans were wholly precluded from jury service over an extended

175 103 U.S. 370 (1880).
177 Brand, supra note 129, at 545.
178 The defendant was deprived of an opportunity to present evidence in support of his argument that African Americans were completely eliminated from jury selection. Neal, 103 U.S. at 394; see also Daniel P. Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 MICH. L. REV. 2409, 2469 (2003).
179 See generally Neal, 103 U.S. 370.
180 Id. at 388.
181 See id. Although Delaware “had never, by a convention, or popular vote, formally abrogated the provision in its State Constitution restricting suffrage to white citizens [the provisions were nullified] as a matter of law, from the incorporation of the Fourteenth and Fifteenth Amendments into the fundamental law of the nation.” Id. at 389. Thus, the federal constitutional amendments “render[ed] inoperative, that provision which restricts the right of suffrage to the white race.” Id. Consequently, Delaware’s statute prescribing “qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election.” Id.
182 Id. at 392.
183 Schmidt, supra note 176, at 1456.
time period. It noted that the state "conceded in argument... [t]hat colored persons have always been excluded from juries in the courts of Delaware" and that "citizens of the African race, qualified in all respects to serve as jurors, were excluded from the panels, because of their race." The Court's holding, however, revealed two interwoven elements related to the conduct of state officials. First, the Court enunciated a temporal aspect to discriminatory conduct on the part of state officers, "whose job it was to secure jurors in a non-discriminatory fashion":

It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified.

Second, the Court "required a showing of discriminatory purpose as a predicate for finding wrongful exclusion": "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition."

The Court placed the burden of proving discrimination upon the petitioner. Such a "serious burden" would not shift to the state

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185 Neal, 103 U.S. at 397. A prima facie violation existed where "no colored citizen had ever been summoned as a juror in the courts of the State, —although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand." Id.
186 Id. at 393 (emphasis added).
187 Id.
189 Neal, 103 U.S. at 397.
190 Brand, supra note 129, at 546 (emphasis added).
191 Neal, 103 U.S. at 397. The lower court's own conduct, which reflected "the state of mind of the state official," was dispositive in prompting reversal. Id. at 393–94. The Chief Justice of the Delaware court remarked on the record that "the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries." Id. (internal quotation marks omitted).
192 The Court stated:

[1] It would be wholly unwarranted in us to infer ... a purpose to do otherwise than perform [a court's] duty by the selection of 'sober and judicious' persons to serve upon the juries, as the law requires, [and] would be a wrong on our part upon the well-known principle that, in the absence of proof to the contrary, a public officer, discharging an official obligation or function, is to be presumed to have done it faithfully according to law. It also seems to me plain that the court below properly refused to accept as true ... the unsupported statements of a party. ... Id. at 402–03.
193 Schmidt, supra note 176, at 1458.
for another fifty-five years. Consequently, the Neal Court articulated "an almost impossible evidentiary standard for proving intentional discrimination and establishing an equal protection violation," virtually requiring a petitioner to "delve into the state of mind of the state official."

4. Systematic Venire Exclusion Proscriptions Under Norris

Although Strauder, Rives, and Neal "ostensibly vindicated black rights, they had little effect on the racial composition of juries. In subsequent cases, the Court either found no evidence of intent or shut its eyes to such evidence." Moreover, these cases failed to produce any tangible progress "for most of the next century, [as] a state's racially exclusionary practices during jury selection became virtually immune from federal statutory or constitutional challenge." Such a phenomenon resulted, in part, "because of the history of Southern (and national) racism in the century following the Civil War. The combined effects of culture, economics, racist ideology, revanchism, inertia, and politics simply overwhelmed any influence of the Court's pronouncements." Slight progress, however, was reached in the 1935 decision Norris v. Alabama.

Norris, which stemmed from the infamous "Scottsboro Boys" case and a previous Supreme Court decision overturning convictions by recognizing a constitutional right to appointed counsel, "was no different from the Court's pronouncement fifty-five years earlier" in Neal. Whereas the Rives Court had dismissed allegations of historical exclusion in order to bypass finding denial of a federal

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196 Brand, supra note 129, at 546.
198 Colbert, supra note 195, at 65.
201 See generally D.AN T. CARter, SCOTTSBoro: A Tragedy of the American South (1979) (recounting the cases of nine African Americans falsely accused of raping two Caucasian women on a train, eight of whom were sentenced to death).
203 Brand, supra note 129, at 551.
right, the Norris Court addressed the issue directly: "[I]t is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect." As such, it assessed the constitutionality of excluding African Americans from jury service based, in large part, upon testimony by the county jury commissioner, who explained that no African American qualified for service under the Alabama statute.

Exhibiting a "willingness to review meaningfully the factual record of the state court," the Court recounted that no African American had served on a grand or petit jury in "the entire history" of the county in which the defendant was tried. Citing Neal, it established that it "would make an independent inquiry into whether a particular state's jury qualifications amount to purposeful discrimination." The Court concluded that "long-continued, unvarying, and wholesale exclusion of negroes from jury service... find[s] no justification consistent with the constitutional mandate." Thus, the Court held that the defendant had established a prima facie case of an equal protection violation and overturned his conviction, thereby "succeed[ing] in reversing the trend set by the Court in the first phase of the venire selection cases."

204 See supra Part III.A.2.

205 Norris, 294 U.S. at 590.

206 Id. at 598-99. The jury commissioner stated he knew of no African American in the county:

who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.

Id.

207 Brand, supra note 129, at 551.

208 Norris, 294 U.S. at 591. The Court cited testimony suggesting that:

no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives... The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury... [Moreover, t]he court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect.

Id.


210 Norris, 294 U.S. at 597.

211 Id. at 591.

212 Id. at 599.

213 Brand, supra note 129, at 551.
The *Norris* Court embraced the use of "statistical evidence to demonstrate disproportionate underrepresentation of African-Americans on jury venires,"\(^{214}\) for which "abundant evidence" demonstrated that a "large number" of qualified African Americans had been excluded.\(^{215}\) The so-called "rule of exclusion," for which *Norris* stands,\(^{216}\) "eased the evidentiary burden for establishing a prima facie case of purposeful discrimination."\(^{217}\) *Norris* shifted the burden to the state to prove nondiscriminatory justifications for exclusions such as "statistical disparity resulted from accident, or from the fact that no sufficiently qualified African-Americans were on the lists from which the venires were established."\(^{218}\) The state, with its reliance upon "sweeping characterization[s]\(^{219}\) contained in the county jury commissioner's testimony,\(^{220}\) "failed to rebut the strong prima facie case which defendant had made" by presenting "mere generalities."\(^{221}\)

B. Challenging the Peremptory Challenge

Although *Strauder* created the "impetus for restricting modern-day peremptory challenges,"\(^{222}\) the Court, following *Neal* and preceding *Norris*, "sat on its hands for the next half century"\(^{223}\) and virtually "winked at widespread exclusions of blacks from juries."\(^{224}\) *Norris*, however, began a trend in which defendants presented "proof of long-term near-total exclusion of blacks from jury venires coupled

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214 Id. at 552; see also Norris, 294 U.S. at 597 (noting that evidence was presented that "for many years no negro had been called for jury service itself tended to show the absence of the names of negroes from the jury rolls, and the State made no effort to prove their presence").

215 Norris, 294 U.S. at 597.


217 Colbert, supra note 195, at 83.

218 Brand, supra note 129, at 552.

219 Norris, 294 U.S. at 599.

220 See supra note 206 and accompanying text.

221 Norris, 294 U.S. at 598. The Court added that if "the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement." *Id.*


224 Id. at 71.
with a statistical demonstration of their availability to serve." Although it may have "represented a constitutional leap forward in successfully challenging and modifying state selection procedures," Norris failed to provide guidance in cases in which race-based exclusions were "less extreme." In fact, Norris "forced many states to use more subtle means of excluding blacks from jury service." Prosecutors’ increasing use of peremptory challenges "provided an all too effective means of effecting racial discrimination in jury selection through the mid-twentieth century" by ensuring that African Americans would remain precluded from serving as jurors despite their inclusion in jury pools.

1. The Nature of the Peremptory Challenge

"Impartiality," Chief Justice Hughes stated in United States v. Wood, "is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." Similarly absent from the Constitution is reference to the peremptory challenge, "one of the most important of the rights secured to the accused." The peremptory challenge "has very old credentials," with its origin...
dating to medieval England and its introduction into the American legal system as part of the common law.

The peremptory challenge is "not of itself a right to select, but a right to reject jurors." As Justice Field noted in *Hayes v. Missouri*, if, after the exercise of peremptory challenges, "those who remain [constitute] an impartial jury," then "the constitutional right of the accused is maintained." Impartiality, added Justice Frankfurter, "is an essential manifestation of its reality," and peremptory challenges are implicitly derived from within the Sixth Amendment right providing for trial of criminal defendants by an impartial jury.

The "essential nature" of a peremptory challenge, once referred to by the Supreme Court as "an arbitrary and capricious right," is its exercise "without a reason stated, without inquiry and without being subject to the court's control." Its functions are numerous. First, it impresses upon litigants that the jury system is an appropriate mechanism for resolving disputes. Second, it avoids "trafficking in the core of truth in most stereotypes" by "assur[ing] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." Third, it "shield[s] . . . the exercise of the challenge for cause" by "eliminat-
ing bias that a challenge-for-cause would be unable to detect.\textsuperscript{249} Although a growing number of scholars and judges advocate proscribing use of peremptory challenges,\textsuperscript{250} this article takes no position on either their efficacy or vitality in the American jurisprudential system.

2. Upholding the Practice Under Swain

The Court did not address states' efforts to implement "more subtle means of exclusion"\textsuperscript{251} after Norris until 1965, when it affirmed the use of peremptory challenges to strike African American jurors in Swain v. Alabama.\textsuperscript{252} First, the Court rejected the petitioner's challenge of Alabama's jury selection procedures, citing Rives for the proposition that a "defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn."\textsuperscript{253} Unlike the wholesale exclusion of African Americans that the Court addressed in Strauder, it concluded that Alabama's process, though "somewhat haphazard [and replete with] little effort . . . made to ensure that all groups in the community were fully represented,"\textsuperscript{254} did not produce a disparity sufficient enough to establish a prima facie case of an equal protection violation.\textsuperscript{255}

\begin{footnotesize}

\textsuperscript{250} One of the most vocal opponents was Justice Marshall, who noted that the Court's jurisprudence "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 v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring); see also Nancy S. Marder, Justice Stevens, The Peremptory Challenge, and the Jury, 74 FORDHAM L. REV. 1683, 1715 (2006) ("The elimination of the peremptory should be the next step. This would end the discrimination during jury selection that has persisted under Batson.").

\textsuperscript{251} Brand, supra note 129, at 564; see also Brand, supra, at 564–66 (offering possible reasons for the interstice between Norris and the Court's decision to review peremptory challenges in Swain).

\textsuperscript{252} 380 U.S. 202 (1965).

\textsuperscript{253} Id. at 208.

\textsuperscript{254} Id. at 209. Although the Court maintained that it was "wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels," it nonetheless acknowledged that "no negro has actually served on a petit jury since about 1950." Id. at 205–06.

\textsuperscript{255} See id. at 209 ("But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case." (footnote omitted)); Symposium, To Kill a Mockingbird, 45 ALA. L. REV. 403, 434 (1994).
\end{footnotesize}
Next, the Swain Court turned to "the exercise of peremptory challenges to exclude Negroes from serving on petit juries," marking the "first time the Supreme Court addressed the discriminatory use of peremptory challenges and the difficult task of balancing Equal Protection claims against the rationale behind the peremptory challenge system." Although "[r]ace-based peremptories were actually unconstitutional" after Strauder, Swain made them "virtually impossible to prove." Noting that voir dire "tends to be extensive and probing," the Court reviewed "the credentials and purposes of peremptories." Explaining that peremptory challenges are often based on "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," the Court then acknowledged that peremptory challenges are "no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." It refused to undermine the sanctity of the peremptory challenge by subjecting any underlying motivations for its use to scrutiny:

To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanta, would no longer be peremptory, each and every challenge being open to examination . . . .

Consequently, the majority concluded, the Court "cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case."

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256 Swain, 380 U.S. at 209.
258 Daniel M. Hinkle, Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?, 9 BUFF. CRIM. L. REV. 139, 144 n.35 (2005); see infra notes 285 & 290-300 and accompanying text.
259 Swain, 380 U.S. at 218-19.
260 LAFAVE ET AL., supra note 16, at 1061.
261 Swain, 380 U.S. at 220.
263 Swain, 380 U.S. at 221-22.
264 Id. at 222. In fact, the Court noted that the state was accorded a good-faith presumption that its uses of peremptory challenges were solely to effectuate the purposes underlying the Sixth Amendment. Id. Such a presumption "is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." Id.
By preserving the practice of peremptory challenges, the Court "set a high standard of proof before it would consider an Equal Protection claim." Acknowledging that the state may not employ peremptory challenges to strike African American jurors "for reasons wholly unrelated to the outcome of the particular case on trial," the Court accorded the state "a presumption that the prosecutor constitutionally exercised her challenges to achieve a fair and impartial jury." Although a rebuttable presumption, the burden rested upon defendants to produce "evidence . . . of what the prosecution did or did not do on its own account in any cases other than the one at bar." Thus, petitioners must, in order to state a prima facie equal protection violation, "show [a] pattern of discrimination" by alleging prosecutorial misconduct in prior cases wherein "the prosecutor used his strikes to remove Negroes":

[A] showing that negroes have not served during a specific period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination . . . . The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials.

Because the Court required that a "defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time," Swain erected "additional barriers to the elimination of jury discrimination practices" by im-

265 Relying upon the historical practice of the challenge itself, the Court effectively held "for the first time that preemptory challenges are not entirely preemptory." Pizzi & Hoffman, supra note 236, at 1439.
266 Siebert, supra note 257, at 312.
267 Swain, 380 U.S. at 224. The peremptory challenge may not "deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." Id. But see id. at 220–21 (noting that race, though a "frequently exercised" ground upon which peremptory challenges are exercised, is "normally thought irrelevant to legal proceedings or official action"). Thus, "although the Court technically held that purposeful racial discrimination in jury selection was violative of equal protection, it severely limited a party's ability to support such a finding." David Smith & Rachel Dennehy, Note, Controversy over the Peremptory Challenge: Should Batson Be Expanded?, 10 St. John's J.L. Comm. 453, 458 n.28 (1995).
268 Rodriguez, supra note 164, at 757.
269 "Petitioner has the burden of proof and he has failed to carry it." Swain, 380 U.S. at 226. But see id. at 238 (Goldberg, J., dissenting) (stating that "it seems clear that petitioner has affirmatively proved a pattern of racial discrimination in which the State is significantly involved, or for which the State is responsible").
270 Id. at 225.
271 Smith & Dennehy, supra note 267, at 458 n.27.
272 Swain, 380 U.S. at 226.
273 Id. at 227.
274 Id. at 231 (Goldberg, J., dissenting).
posing upon defendants "a crippling burden of proof" wherein "prosecutors' peremptory challenges [were] now largely immune from constitutional scrutiny."  

3. Articulating a New Standard Under Batson

In at least two post-Swain cases, federal courts endeavored to circumvent Swain's stringent burden by invoking the Sixth Amendment to proscribe racially discriminatory uses of peremptory challenges. Most courts, however, refused to follow the approach, opting instead to preserve "an unworkable ... precedent that was inconsistent with intervening major developments in the Court's equal protection jurisprudence." The Court's decision in Batson v. Kentucky, however, "eviscerated the heart" of Swain, a case once the "subject of extensive commentary" that today is "routinely mentioned in passing."

Batson "is a classic example of the Supreme Court's overruling a well-established, twenty-one year old precedent grounded in constitutional law." The Court "reexamined ... the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to

275 Batson v. Kentucky, 476 U.S. 79, 92 (1986). The burden has also been characterized as "insurmountable," which prompted many states to develop "alternative tests to Swain." Rodríguez, supra note 164, at 757.

276 Batson, 476 U.S. at 92-93; see also id. at 103 (Marshall, J., concurring) ("Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.").


278 See Batson, 476 U.S. at 82 n.1 (1986) (citing cases "adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation"); see also Stephen I. Shaw, Note, Batson v. Kentucky: The Court's Response to the Problem of Discriminatory Use of Peremptory Challenges, 36 CASE W. RES. L. REV. 581, 593 (1986) (noting that "deviations from Swain prior to Batson had been rare").

279 Sabel, supra note 249, at 282.


283 Brand, supra note 129, at 566.

284 Sabel, supra note 249, at 284.
exclude members of his own race from the petit jury.\textsuperscript{285} Although it acknowledged that "decisions of this Court have been concerned largely with discrimination during selection of the \textit{venire},\textsuperscript{286} the \textit{Batson} Court "extended the Fourteenth Amendment prohibition of racially discriminatory jury selection practices from the \textit{venire} context to the \textit{petit jury}.\textsuperscript{287} First, the Court broadly asserted that "harm from discriminatory jury selection" \textit{in toto}, rather than separating \textit{venire} from petit jury selection conduct, "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."\textsuperscript{288} Second, it invoked "standards that have been developed since \textit{Swain} for assessing a prima facie case under the Equal Protection Clause.\textsuperscript{289}

With regard to the latter, and in recognition that \textit{Swain}'s "crippling burden of proof" insulated prosecutorial uses of peremptory challenges from constitutional scrutiny,\textsuperscript{290} the Court "focused on the evidentiary burden required of a defendant making a claim of purposeful discrimination."\textsuperscript{291} First, it reaffirmed "the general equal protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.\textsuperscript{292} Proof of invidious intent, the Court reasoned, could be proven circumstentially by a showing of disproportionate impact.\textsuperscript{293}

Second, the Court emphasized that a "totality of relevant facts gives rise to an inference of discriminatory purpose."\textsuperscript{294} Such facts need not be inferred by systematic discriminatory use of peremptory

\begin{footnotes}
\textsuperscript{285} Batson, 476 U.S. at 82.
\textsuperscript{286} Id. at 88 (emphasis added).
\textsuperscript{288} Batson, 476 U.S. at 87.
\textsuperscript{289} Id. at 93.
\textsuperscript{290} Id. at 92-93.
\textsuperscript{291} Richers-Royland, \textit{supra} note 237, at 1207.
\textsuperscript{292} \textit{Batson}, 476 U.S. at 93 (quoting \textit{Washington v. Davis}, 426 U.S. 229, 240 (1976)). Discriminatory purpose, the Court has stated, "implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." \textit{Personal Administrator of Massachusetts v. Feeney}, 442 U.S. 256, 279 (1979).
\textsuperscript{293} Batson, 476 U.S. at 93 (citing \textit{Davis}, 426 U.S. at 242).
\textsuperscript{294} Id. at 94 (citing \textit{Davis}, 426 U.S. at 239-42); see \textit{infra} note 295.
\end{footnotes}
challenges over a period of time, as required by Swain. Rather, the Court recognized that a prima facie case of discrimination could be established "in other ways than by evidence of long-continued unexplained absence of members of [a particular] race 'from many panels.'" In fact, such recognition existed before Swain. Batson, however, elevated that recognition into binding authority, eliminating Swain's requirement that defendants "demonstrate a pattern of discrimination in prior cases." Under Batson, a defendant could establish purposeful racial discrimination "solely on the facts concerning [] selection in his case," a practice the Court borrowed from its Title VII "disparate treatment" jurisprudence.

To that end, Batson coalesced prior case law into a "three-prong" "evidentiary test" a defendant must satisfy in order to state a prima facie case of discriminatory use of peremptory challenges: (1) establish membership in a "cognizable racial group;" (2) assert that prosecutorial exercise of peremptory challenges removed venire

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295 Circumstantial evidence, however, need not constitute proof that "the prosecutor trying his case had consistently excluded blacks from petit juries in a number of cases." Michael W. Kirk, Sixth and Fourteenth Amendments—The Swain Song of the Racially Discriminatory Use of Peremptory Challenges, 77 J. CRIM. L. & CRIMINOLOGY 821, 830 (1986). A prosecutor's "pattern" of strikes against black jurors as well as his or her questions and statements during voir dire would be relevant circumstantial evidence of discriminatory purpose." Brand, supra note 129, at 576.

296 Batson, 476 U.S. at 95 (quoting Cassell v. Texas, 339 U.S. 282, 290 (1950) (plurality opinion)).

297 Cassell, as a plurality opinion, constituted only authoritative precedent. See Sara L. Rose, Comment, "Cruel and Unusual Punishment" Need Not Be Cruel, Unusual, or Punishment, 24 CAP. U. L. REV. 827, 843 (noting how plurality opinions are not binding authority). It was not binding authority. See Texas v. Brown, 460 U.S. 730, 736 (1983) (plurality opinion) ("While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue.").


299 Batson, 476 U.S. at 95.


301 Batson, 476 U.S. at 94–95.


303 Kirk, supra note 295, at 831.

304 But see DiPrima, supra note 184, at 904 (stating that federal district court judges frequently "by-pass the prima facie stage of Batson analysis").

305 Batson, 476 U.S. at 96.
members who themselves belong to that racial group, and (3) show “facts and any other relevant circumstances raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race.” With respect to the first and second elements, Batson never addressed what constituted a “cognizable racial group” and whether its protections extended only to prospective jurors who identified with that same group. As to the third element, the Court remained “confident[ ]” that a trial court was duly capable of discerning whether a prima facie cases had been presented.

A prima facie showing of discrimination constitutes the first of a “three-step burden-shifting framework” that comprised Batson’s holding. Once the defendant states a prima facie case of purposeful

306 Id. The first two elements of the Batson test require that defendant’s counsel must not only know that the accused is a member of a cognizable racial group, but also ascertain racial identifications of venire members. United States Army Legal Services Agency, DAD Notes, ARMY LAW., Nov. 1989, at 20.

307 Batson, 476 U.S. at 96. Although the defendant is “entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate,’” id. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)), the Court “did not clarify what other circumstances are relevant.” Eric N. Einhorn, Note, Batson v. Kentucky and J.E.B. v. Alabama ex rel. T.B.: Is the Peremptory Challenge Still Preeminent?, 36 B.C. L. REV. 161, 174 n.137 (1994). At least five relevant factors have been since identified: “(1) the number of racial group members in the venire panel; (2) the nature of the crime; (3) the race of the defendant and victim; (4) a pattern of strikes against racial group members; and (5) the prosecution’s questions and statements during voir dire.” Brian W. Bolster, Trial: Right to Jury Trial, 86 GEO. L.J. 1618, 1635 n.1747 (1998) (citations omitted).


309 Batson, 476 U.S. at 97 (expressing confidence in the ability of the trial courts to consider all relevant circumstances). But see McClain, supra note 229, at 298 (noting that the Court’s confidence that a trial judge’s “expertise in supervising voir dire will enable the judge to determine if the ‘relevant circumstances’ contribute to the creation of a prima facie case of discrimination seems unfounded” (footnote omitted)); Paul H. Schwartz, Comment, Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina, 69 N.C. L. REV. 1533, 1569 (1991) (stating that “the ultimate responsibility within each state for vindicating rights under the equal protection clause lies” not with trial court judges but rather with the state supreme court).

discrimination, the second step shifts the burden to the state,\textsuperscript{311} which is required to "come forward with a neutral explanation for challenging black jurors."\textsuperscript{312} Although the explanation "need not rise to the level justifying exercise of a challenge for cause,"\textsuperscript{313} a prosecutor is precluded from "stating merely" an assumption that a shared racial background among the defendant and the juror might affect the partiality of the latter.\textsuperscript{314} Additionally, the prosecutor must furnish a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."\textsuperscript{315} Thus, a court's determination of the reasonableness of a proffered explanation must be made "in light of the facts of the case."\textsuperscript{316} Finally, the third step requires that the trial court determine whether, in light of the state's "neutral explanation," the defendant established purposeful discrimination.\textsuperscript{317}

C. The Legacy of Batson and its Progeny

Although it "has never explained the justification for the prima facie requirement in the peremptory challenge context,"\textsuperscript{318} the Supreme Court has since elaborated upon and refined Batson, which gave minority defendants "an easier job in raising discrimination claims."\textsuperscript{319} For example, the Court engaged in a "significant expan-

\begin{footnotesize}
\begin{enumerate}
\item Once the burden shifts to the state, "trial courts face the difficult burden of assessing prosecutors' motives." Batson, 476 U.S. at 105–06 (Marshall, J., concurring) (citing King v. County of Nassau, 581 F. Supp. 493, 501-02 (E.D.N.Y. 1984)).
\item Batson, 476 U.S. at 97. "Neutral" is akin to "nonracial." Katherine Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 HARV. L. REV. 808, 809 (1989); see also Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) ("A neutral explanation ... means an explanation based on something other than the race of the juror.").
\item Batson, 476 U.S. at 97.
\item Id. A proponent was also precluded from merely denying a discriminatory motive or affirming good faith in making an individual decision. Id.; see also Antony Page, Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U. L. REV. 155, 167 (2005) (noting how assertions of good faith are insufficient under Batson).
\item Batson, 476 U.S. at 98 n.20 (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1983)).
\item Batson, 476 U.S. at 98. As one scholar observed, "Batson's success at this stage, therefore, depends largely on courts adequately scrutinizing prosecutors' proffered reasons to determine whether those reasons are genuine or merely pretexts for discrimination." Schwartz, supra note 309, at 1560; see also supra note 311.
\item DiPrima, supra note 184, at 904.
\item Glen Elsasser, Court's Latest Cures for Jury Bias, CHI. TRIB., May 11, 1986, at 1C.
\end{enumerate}
\end{footnotesize}
sion of Batson" when it held in Powers v. Ohio that a defendant could assert a Batson challenge against an excluded juror who was neither a member of, nor shared the same cognizable group, as the defendant. One year later, the Court extended Batson to civil proceedings in Edmonson v. Leesville Concrete Co., holding that civil litigants may not exercise peremptory challenges to exclude jurors on the basis of race. Further expanding the Batson doctrine by considering its inverse application, the Court's decision in Georgia v. McCollum prohibited a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges and permitted the state to assert the rights of excluded jurors. Not limited solely on account of race, the Court subsequently proscribed "discriminatory use of peremptory strikes based on gender" in J.E.B. v. Alabama. Two recent cases, Johnson v. California and Miller-El v. Dretke, further refined Batson by "acknowledge[ing] the onerous standard that a party faces when

322 Id. at 415. The Court determined that a white defendant had standing to raise an equal protection right of an excluded black juror. Id. at 410-16. Recognizing that "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom," id. at 413, the Court noted that "Batson was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors." Id. at 406 (citing Allen v. Hardy, 478 U.S. 255, 259 (1986) (per curiam)) (internal quotation marks omitted).
324 Noting that "discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial," id. at 619, the Court held that the state action doctrine applied to civil cases because the "selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race." Id. at 627.
326 Id. at 59. The Court built upon Edmonson's framework, finding that the "jury system as a whole, 'simply could not exist' without the 'overt, significant participation of the government,'" id. at 51 (quoting Edmonson, 500 U.S. at 622), to conclude that "a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection . . . ." Id. at 55.
327 Id. at 55-57; see Brand, supra note 129, at 582 (stating that McCollum permitted prosecutors to raise Batson objections "to race-based peremptory challenges by white criminal defendants against black jurors").
331 545 U.S. 231 (2005).
objecting to a peremptory challenge and decreasing the burden for the objecting party." 332

1. Johnson: Clarifying the Scope of a Prima Facie Case of Discrimination

In Johnson, the Court addressed whether, under Batson's first step of its three-step burden-shifting framework, an objecting party "must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." 334 After the prosecutor utilized three peremptory challenges to strike African-American jurors, the trial court "did not ask the prosecutor to explain the rationale for his strikes" and overruled the objection. 335 Batson, according to the California Supreme Court, established a "mandatory" rebuttable presumption that "does not merely constitute 'enough evidence to permit the inference' that discrimination has occurred." 336

The Johnson Court, however, reversed, finding no justification for a showing "so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination." 337 Rather, a defendant satisfies the first step "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." 338 Where the state responds with "a frivolous or utterly nonsensical justification for

332 Tiffany Mitchell, Should Courts Eliminate Peremptory Challenges?, 3 MINORITY TRIAL LAW. 1, 1 (Fall 2005).
333 See infra notes 310–17 and accompanying text.
334 Johnson, 545 U.S. at 168 (quoting People v. Johnson, 71 P.3d 270, 280 (Cal. 2003)).
335 Id. at 165. The trial court "simply found that petitioner had failed to establish a prima facie case . . . ." Id.
336 Id. at 167 (quoting Johnson, 71 P.3d at 278). The California Supreme Court based its interpretation of Batson upon the fact that the United States Supreme Court "reserved for state courts 'some flexibility in establishing the exact procedures to follow' in implementing Batson." El-Mallawany, supra note 151, at 3345 (quoting Johnson, 71 P.3d at 277). Justice Stevens, writing for the majority of the Court, found that California's "more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." Johnson, 545 U.S. at 168.
337 Johnson, 545 U.S. at 173.
338 Id. at 170.
339 Id. Such evidence "need only be sufficient to support a logical conclusion or suspicion that the prosecutor's exclusion of the juror might be the consequence of the juror's belonging to a cognizable racial group." El-Mallawany, supra note 151, at 3345 (footnote omitted).
its strike, the case does not end—it merely proceeds to step three,"\(^{340}\) which requires the court to determine "whether the opponent of the strike has carried his burden of proving purposeful discrimination."\(^{341}\) The Court's holding ensured that the "Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process"\(^{342}\) through an "appropriate standard"\(^{343}\) that requires only that the defendant establish an inference of discrimination.

2. Miller-El: Reining in Neutral Explanations and Emphasizing Court Assessment of Plausibility

In Miller-El, the Court "revisted Batson's steps two and three and conducted an extremely detailed and fact-intensive analysis of the prosecutor's use of peremptory challenges and other tactics during voir dire."\(^{344}\) It addressed "the chink in Batson's armor"\(^{345}\): a "weakness" surrounding "the particular reasons a prosecutor might give"\(^{346}\) for using peremptory strikes against jurors. Justice Souter acknowledged that "[i]f any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain."\(^{347}\) Consequently, defendants could avail themselves of "all relevant circumstances"\(^{348}\) in order to counterbalance the "large loophole" created by Batson.\(^{349}\)

\(^{340}\) Johnson, 545 U.S. at 171. Any reason, "so long as it is not based on race, is sufficient to shift the burden back to the defendant to prove that those reasons are pretextual or false." El-Mallawany, supra note 151, at 3347. Even statistical numbers "alone, without any other facts or circumstances," raise an inference of discrimination under the first step. Amanda S. Hitchcock, "Deference Does Not by Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals, 84 N.C. L. Rev. 1328, 1346 (2006); see also infra Part III.C.2.

\(^{341}\) Johnson, 545 U.S. at 171 (per curiam) (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)).

\(^{342}\) Id. at 172.


\(^{344}\) Id. at 972; cf. Lt. Col. Patricia A. Ham, Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements, ARMY LAW., July 2004, at 10, 28 (suggesting that only the third Batson step was implicated).

\(^{345}\) Hitchcock, supra note 340, at 1334.


\(^{347}\) Id.

\(^{348}\) Id. (quoting Batson v. Kentucky, 476 U.S. 79, 96–97 (1986)).

\(^{349}\) Jackson, supra note 236, at 107.
The contempt the Court had for prosecutorial techniques during voir dire was inherent in the opinion's tone, with the majority characterizing prosecutorial justifications for striking jurors to which the lower court held itself prostrate as "reek[ing] of afterthought." Addressing Batson's second step, the Court articulated a "critical point," namely that reasons proffered by the prosecution must have some veracity:

[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. Thus, the burden of providing a racially neutral explanation rested with the prosecution at the time action was taken, and the trial court bore the responsibility "to assess the plausibility of that reason in light of all evidence with a bearing on it." The Court's reliance upon statistical data was significant, suggesting that "detailed data of the prosecution's behavior during voir dire... appears to provide defense counsel with the greatest hope of presenting a successful Batson challenge." With regard to Batson's third step, Miller-El "signaled concerns by the Court that the lower federal courts were not sufficiently monitoring the quality of justice coming from the state courts."

350 See Miller-El, 545 U.S. at 253 ("The case for discrimination... include[s] broader patterns of practice during the jury selection. The prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race.").

351 Id. at 246. "The lower court's "readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible." Id.

352 Hitchcock, supra note 340, at 1340.

353 Miller-El, 545 U.S. at 252.

354 But see id. at 278–307 (Thomas, J., dissenting) (arguing that no evidence presented in the state court proceeding suggested discrimination against African-American veniremen).

355 Id. at 252 (majority opinion).

356 The Court noted that the "numbers describing the prosecution's use of peremptories are remarkable." Id. at 240; see also Hitchcock, supra note 340, at 1337 (noting the Court's reference to statistical evidence).

357 Maxwell C. Smith, Note, Bell v. Ozmint, 16 CAP. DEF. J. 121, 130 (2003). But see Davenport, supra note 343, at 982 (arguing that "statistics alone will likely continue not to be dispositive on the issue of discrimination").

3. Beyond Batson: The Affirmative Action Frontier

Some scholars question whether Miller-El represents "a testament to the failure of Batson to eradicate discrimination in voir dire." Inherent within these cases is a selection process wherein race informed the use of peremptory challenges. Following the Court's decision in Grutter v. Bollinger, which involved a separate but equally "selective selection" process, the intersection between "compelling state interests in the jury room [and] in the class room" has become more acute: Grutter "creates an opening to reinforce the right to a fair trial and obtain equal protection for minority defendants during jury selection." Whether Grutter, in fact, "provide[s] support for opening the process of jury selection . . . to more fully include people of color" depends upon whether its pronouncements on affirmative action within the university admissions context relate to Batson and the peremptory challenge cases.

IV. VIEWS FROM THE GRU7ER: A DISCOURSE ON APPOSITENESS

The Supreme Court granted certiorari in Grutter in order to "resolve the disagreement among the federal appellate courts regarding whether diversity is a compelling government interest that justifies narrowly tailored uses of race for admissions purposes in public universities." A majority "concluded that the 'narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student

360 See supra notes 92 & 93 and accompanying text.
361 See supra text accompanying notes 328 & 329.
365 Francis, supra note 364, at 298.
body' was not proscribed by the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{368} This Part considers whether \textit{Grutter}'s holding is applicable to circumstances beyond the educational context in which it was decided and argues that narrowly interpreting \textit{Grutter} is contrary to the majority opinion and the way in which courts have applied its reasoning.

A. A Narrow Interpretation: Limiting \textit{Grutter}'s Context to Academic Freedom and Education

It is conceivable to place \textit{Grutter} within the context in which the Court framed its inquiry: "to decide whether the use of race as a factor in student admissions . . . is unlawful."\textsuperscript{369} With firm reliance upon and adoption of Justice Powell's opinion in \textit{Regents of the University of California v. Bakke},\textsuperscript{570} the \textit{Grutter} Court concluded that "student body diversity 'is a compelling state interest.'"\textsuperscript{371} In doing so, the Court "gave a far more detailed explanation of the purpose and scope of educational institutional autonomy than the discussion offered by Justice Powell in \textit{Bakke}.'\textsuperscript{372} One of \textit{Grutter}'s lasting legacies is its "strong recognition of institutional academic freedom . . . ."\textsuperscript{373}

1. Inseparability of Academic Freedom from Education

Inherently context specific, academic freedom is designed "to protect scholarship and teaching in higher education from untoward political interference, primarily by granting universities autonomy over certain core scholarly and educational policies."\textsuperscript{374} Tracing the Supreme Court's development of academic freedom principles demonstrates its application within and limitation to classroom activity

\begin{thebibliography}{9}
\bibitem{370} 438 U.S. 265 (1978) (plurality opinion).
\bibitem{371} Caplen, \textit{supra} note 368, at 526 (quoting \textit{Grutter}, 539 U.S. at 325). "Bakke was the first—and before \textit{Grutter}, the only—case in which the Supreme Court examined the constitutionality of affirmative action in the context of university admissions." Joshua M. Levine, \textit{Comment, Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education}, 94 CAL. L. REV. 457, 457 (2006).
\end{thebibliography}
and intellectual inquiry. The Grutter Court, however, "utilized academic freedom principles to encompass university admissions policies" by determining that "academic judgments about admissions... have a sufficient First Amendment dimension that they ought to have special force in the compelling interest calculus." It emphasized that courts should defer to "educational judgment that... diversity is essential to [an institution's] educational mission..." Thus, an argument that Grutter is a limited reflection of "the Court's jurisprudence on race and education" is not without merit.

2. Application Dependent upon an Institution's Educational Mandate

At least one court construed Grutter "quite narrowly," lending support for a reading of the affirmative action case as limited to an educational context. In Lomack v. City of Newark, the Third Circuit addressed Grutter within the context of a race-based diversity mandate issued by the Newark Fire Department. The local government argued that it had a compelling interest in integrating its fire departments "because 'integrate in the workplace is no less important than in an educational setting."

375 See generally Caplen, supra note 368.
376 Id. at 527.
379 See Horwitz, supra note 372, at 568 n.493 ("I doubt Grutter carries much significance for the future of affirmative action programs outside the university.").
380 Lomack v. City of Newark, 463 F.3d 303, 309 (3d Cir. 2006); see also Comfort v. Lynn Sch. Comm., 418 F.3d 1, 16 (1st Cir. 2005) ("But Grutter teaches that the compelling state interest in diversity should be judged in relation to the educational benefits that it seeks to produce." (citing Grutter, 539 U.S. at 330) (emphasis added)).
382 Nancy C. Marcus, Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet, 15 Colum. J. Gender & L. 355, 402 (2006); see also Bulman-Pozen, supra note 382, at 1437 ("A strong case can be made for limiting the decision to university admissions: Grutter emphasizes the distinctive context of higher education and the particular deference the Court gives to academic decisions... ".
383 463 F.3d 303 (3d Cir. 2006).
384 Id. at 305-07.
385 Id. at 309 (quoting Brief of Appellees at 30, Lomack v. City of Newark, 463 F.3d 303 (3d Cir. 2006)).
on Grutter, agreed, noting that credible evidence suggested that a firefighter's training "is enhanced by a diverse, multi-generational environment" and that "[r]acial stereotypes can be broken down in this setting as well as in a classroom." The Third Circuit, however, reversed, adopting the plaintiffs' argument that "a fire department is not a law school and that the benefits of diversity to such an educational environment do not apply to a firehouse whose mission is to fight fires and deal with other community emergencies, not to educate tomorrow's leaders."

The Lomack court distinguished Grutter, which "established that educational benefits are compelling in a law school context," by declaring it inapplicable "in the firefighting context." Grutter, the Third Circuit maintained, "does not stand for the proposition that the educational benefits of diversity are always a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate." Thus, the court focused upon the "respective missions" of the institutions in question to conclude that "Grutter's holding regarding a compelling interest in the educational benefits of diversity is unavailing": a school educates students and prepares them for "work and citizenship," while a fire department "control[s], fight[s], and extinguish[es] . . . any conflagration which occurs within the city limits." The disparity between the two missions was strong enough for the Lomack court to reject the government's diversity benefits argument as a compelling interest.

When one "strictly scrutinizes" the Newark transfer policy and finds it to be designed to eliminate de facto segregation in its firehouses, . . . with attendant educational, sociological and job-performance enhancements as well, one is led to the inevitable conclusion that this policy was implemented to achieve a 'compelling interest' of the City.
Id. at *21.
388 Lomack, 463 F.3d at 305.
390 Lomack, 463 F.3d at 309 (emphasis in original).
391 Id. at 310 (emphasis added).
392 Id.
393 Id. at 309 (quoting Grutter v. Bollinger, 539 U.S. 306, 331 (2003)).
394 Id. at 310 (quoting NEWARK, N.J. GEN. ORD. vol. I, tit. II, ch. 21, § 1.2 (2005)).
395 Id.; see supra note 380.
B. A Broad Interpretation: Extending Grutter’s Context to Non-Education Based Programs

While *Grutter* "may be difficult to extend beyond academic decision making and outside of the higher education context because of the key element of academic freedom under the First Amendment," a plausible reading and interpretation of *Grutter* suggests otherwise. The majority’s holding, "perversely designed to prolong . . . controversy and . . . litigation," has "serious collateral consequences" that "encourage a proliferation of diversity-based applications" both within and without the context of the American educational system. With regard to the former, Justice Scalia "foreshadowed that future lawsuits will question whether a university has exceeded the bounds of good faith," among other things, and that he "do[es] not look forward" to those cases brewing on the horizon. Rather than foreclose the latter, *Grutter* embraces the possibility of wide application through the "valence and atmospherics" of the Court’s broad-stroked invocations of patriotism and national security.

1. Reexamining ‘Marketplace’ Interests in Diversity

The justifications employed by *Grutter*’s majority militate against a limited application of the case solely within the educational sphere. *Grutter* generated an “unprecedented number” — “at least eighty-

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397 See Haddon, supra note 366, at 552 (noting the existence of a “promising basis from which to extend Grutter’s influence beyond the education setting”). But see Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 Ky. L.J. 263, 263–64 (2003-2004) (arguing that the *Grutter* Court "was careful to limit its discussion to the question before it . . . Whether it would consider racial diversity . . . in other contexts . . . was left for another day").
398 *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).
399 *Id.* at 364 (Thomas, J., concurring in part and dissenting in part).
400 Caplen, supra note 367, at 864.
401 *Id.* at 864 n.88.
402 *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part).
404 Caplen, supra note 368, at 29 (stating that "the Grutter Court seemed swept by the nationalistic fervor inherent in [the amici curiae] claim[s]"); see infra Part IV.B.2.
four"—of amicus briefs "ever submitted in a single case before the Court," which is evidence of its strong and questionable reliance upon expert studies and reports. Two "compelling briefs," cited for the proposition that the benefits of student body diversity are "not theoretical but real," "came from the military and from a number of large American corporations, all of whom were talking about their own need for diversity." Thus, "[w]hile these briefs support affirmative action in education, . . . their language suggests they are laying the groundwork to justify workplace affirmative action."

The Grutter majority, "[i]n resounding terms, . . . answered that diversity is a social good because it is consistent with the interests articulated by the utilitarian strand of the business, military, and professional elite amici, along with the universities." In fact, the Court's recitation of the "'substantial benefits' associated with diversity [was] a conclusion based entirely on what others told the Supreme Court." It invoked themes resonating with the views of the Fortune 500 companies upon which it relied, particularly the need to de-

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406 Dennis J. Shields, A Response to Professor Crump's Narrow Tailoring Analysis of Grutter: Does It Matter How Many Angels Can Dance on the Head of a Pin?, 56 FLA. L. REV. 761, 770 n.38 (2004). Sixty-nine of the briefs were filed in support of the University of Michigan Law School. Id.


408 Justice Thomas criticized the majority for its "heavy reliance upon social science evidence." Caplen, supra note 368, at 28 n.219; see also Moran, supra note 407, at 243 ("Viewing Grutter v. Bollinger against other canonical American race cases, it does not necessarily follow that social science is the best way to address the questions Grutter raised; and yet, social science was clearly the method of choice.")

409 Stephen Henderson, Supreme Court's Affirmative Action Ruling Extending Beyond Schools, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Dec. 26, 2003; see also Estlund, supra note 403, at 20 n.97 ("The majority was especially impressed, it appears, with the brief of the retired generals . . . .").


411 Henderson, supra note 409.

412 Bulman-Pozen, supra note 382, at 1438 (emphasis added).

413 Brown-Nagin, supra note 379, at 1481.


velop skills for today’s “increasingly global marketplace . . .”\textsuperscript{416} Notwithstanding that the global marketplace to which \textit{Grutter} alluded is distinguishable from the original conception of a “marketplace of ideas” articulated in \textit{Keyishian v. Board of Regents},\textsuperscript{417} the majority dismissed the clear difference between these marketplaces without consideration.\textsuperscript{418}

Instead, \textit{Grutter} clumsily fused an amalgamation of the two marketplace metaphors,\textsuperscript{419} failing to reconcile the former, an economically driven “marketplace” built upon “succe\[ss\] in America,”\textsuperscript{420} with the latter, an academic “marketplace” imbibed with “wide exposure to that robust exchange of ideas which discovers truth . . .”\textsuperscript{421} Moreover, the Court’s emphasis upon universities and law schools as a “training ground for a large number of our Nation’s leaders”\textsuperscript{422} belies another, if not more important, staple of the American experience and “major form of human capital investment”\textsuperscript{423}: on-the-job train-


\textsuperscript{417} 385 U.S. 589, 603 (1967) (citation omitted).

\textsuperscript{418} See infra notes 420–421 & 424.

\textsuperscript{419} \textit{Grutter}’s “marketplace rationales . . . suggest\[] that a diverse legal profession is essential not only for economic or market reasons but, more importantly, also for broader democratic reasons.” Carla D. Pratt, \textit{Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown}, 43 \textit{Hous. L. Rev.} 55, 61 (2006).

\textsuperscript{420} \textit{Grutter}, 539 U.S. at 333. The amicus brief submitted on behalf of 3M and cited by the majority noted:

\begin{quote}
[T]he changing face of America is reflected in the marketplace, as both the workplace and the purchasers of products and services become increasingly diverse. The individuals who run and staff the amid [sic] businesses must be able to understand, learn from, collaborate with, and design products and services for clientele and associates from diverse racial, ethnic, and cultural backgrounds. American multinational businesses, including amid [sic], are especially attuned to this concern because they serve not only the increasingly diverse population of the United States, but racially and ethnically diverse populations around the world.
\end{quote}

Brief for 3M et al. as Amici Curiae Supporting Appellants at *9-10, \textit{Grutter} v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447), 2001 WL 34624918. The companies cite no authority—legal, scientific, or otherwise—in support of these propositions. \textit{See id.}

\textsuperscript{421} Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); \textit{see also} Healy v. James, 408 U.S. 169, 180–81 (1972) (“The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.” (emphasis added) (citation omitted)).

\textsuperscript{422} \textit{Grutter}, 539 U.S. at 332; cf. Alison Bath, \textit{Execs, Officials Focus on Future Economy at Summit, RENO GAZETTE-J.} (Nev.), Apr. 12, 2005, at 1H (“E\[e\]very worker might not need—or want—a college education.”).

ing. Given that "[d]iversity training is now commonplace in corporate America," it is difficult to link the value of classroom diversity with workplace diversity, the latter of which is achieved independ-

424 Dean Ellwood emphasized the importance of "industry-based training or sector-based training," which differs from the educational training offered in universities or law schools. Confronting Poverty: What Role for Public Programs?, 10 EMPL. RTS. & EMPLOY. POL’Y J. 9, 36 (2006). Senator John Edwards echoed a similar sentiment, recognizing that job training itself is a form of education. Senator John Edwards, Restoring the American Dream: Fighting Poverty and Strengthening the Middle Class, Keynote Address at the Journal of Gender, Race & Justice Eleventh Annual Symposium (Oct. 14, 2007), in 10 J. GENDER RACE & JUST. 383, 387 (2007). Additionally, "there is a strong difference between having a college degree and being highly skilled." Andrew Soukup, Education Lapses Leave State Vulnerable; Fewer Degrees in Indiana than in Most of the Nation, SOUTH BEND TRIB. (Ind.), May 15, 2005, at B1; see also Michael W. Freeman, Atlanta Executive Encourages Haines City Students at Chamber Event to Learn Trades, LEDGER (Fla.), Apr. 22, 2004, at R14 (noting numerous "skilled professions in many other industries where a college degree is not needed and a skilled trade education is much more appealing to the employer").

Universities do not provide adequate training for students post-graduation. See, e.g., Carolyn Carlson, Education’s the Issue in District 15, ALBUQUERQUE J., Oct. 19, 2006, at 1 ("Employers . . . are saying our students are coming to them without basic skills . . . ."); Leigh Rivenbark, How to Be the Employee Your Company Can’t Live Without, HR MAGAZINE, Aug. 1, 2006, at 131 ("A college degree does not always translate into useable job skills . . . .") (book review); Hallie Grossman, Standardized Tests May Decide Funding, DAILY COLLEGIAN (Pa.), available at http://www.collegian.psu.edu/archive/2006/01/01-27-06dci/01-27-06dnews-05.asp ("Employers are saying they need certain skills, and . . . people graduating don’t have them—they are saying this is not what we want from a college education."); Stephen Haycox, There’s No ‘A’ For Effort in the Real World, ANCHORAGE DAILY NEWS, Sept. 16, 2005, at B6 ("Students today are not getting the education that used to be implied in a college degree, as many employers testify.").

Virtually all justifications enumerated by the corporate amici in Grutter reflect less upon the importance of training received in the formal, university context and more upon on-site, job-specific training within a respective industry:

[T]hey can make valuable contributions to the workforce. First, a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to these consumers. Third, a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world.

Brief for 3M et al., supra note 428, at *10–*11. But see Employers Need Skilled Workers, ADVOCATE (La.), Dec. 19, 2004, at 10B (stating that employers "are having the most trouble finding workers with basic skills, problem-solving skills and work ethic"). The nexus between college education and on-the-job contribution is tenuous at best, given that "[a] large majority—70% of our current workforce—is not college educated, and these workers continue to make vital contributions." The 21st Century Workplace: Preparing for Tomorrow's Employment Trends Today: Hearings Before the Senate Committee on Health, Education, Labor and Pensions, 109th Cong. 38 (2005) (testimony of Jared Bernstein) (emphasis added).

Consequently, the majority's "justificatory rhetoric," which focused entirely upon "stimulating the global economy, populating the domestic and global workforce with socially intelligent workers, and providing legitimacy for the legal profession and the political economy as a whole," falls without the scope of the academy. As such, extending *Grutter* beyond its educational context is entirely appropriate.\footnote{426}

2. Deconstructing "Work and Citizenship" Arguments

In addition to adopting wholesale the posture of American businesses,\footnote{430} the *Grutter* Court invoked a "work and citizenship" metaphor to justify diversity as a compelling interest.\footnote{431} Bolstered by amicus curiae from members of the military,\footnote{432} the Court's pronouncements provide ample support for extra-educational application, particularly since it grounded national security concerns following the September 11, 2001 terrorist attacks\footnote{433} within a diversity necessity.\footnote{434} The amici to which the Court attributed "great weight"\footnote{435} noted:

\begin{flushleft}
\footnote{426}{See Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 Neb. L. Rev. 631, 683 (2005) ("The 'relevant differences' between achieving diversity in the workplace and achieving diversity in the classroom demand different strict scrutiny tests.") (footnote omitted). For a contrasting view arguing that the Court draws a distinction between diversity as integration and diversity as difference, see generally Bulman-Pozen, *supra* note 382.}
\footnote{427}{Brown-Nagin, *supra* 379, at 1455.}
\footnote{428}{Id. at 1481 (citations omitted).}
\footnote{429}{See infra notes 440 & 500. But see infra note 460.}
\footnote{430}{See *supra* Part IV.B.1.}
\footnote{431}{See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982))).}
\footnote{432}{See Estlund, *supra* note 403, at 20 n.97 ("The majority was especially impressed, it appears, with the brief of the retired generals . . ."); see also Caplen, *supra* note 368, at 29 ([the Court] seemed swept by the nationalistic fervor inherent in their claim.).}
\footnote{433}{See infra note 442.}
\footnote{434}{See *Grutter*, 539 U.S. at 331 ("To fulfill its mission, the military 'must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.'" (quoting Brief for Julius W. Becton, et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241, 02-516), at 29, [available at http://www.ypcomm.umich.edu/admissions/legal/gruamicus-ussc/um/MilitaryL-both.pdf])); see also text accompanying *infra* notes 436 & 440-42.}
The modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness. "[T]he current leadership views complete racial integration as a military necessity—that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is critical to national security."

Yet the military amici grounded their national security argument not upon Supreme Court precedent, but rather upon the Fortune 500 company briefs, emphasizing that, "[l]ike our military security, our economic security and international competitiveness depend" upon diversity. In this respect, the Court’s reliance upon the military amici’s national security justification for diversity is merely a reflected version of the corporate argument imbued with a greater sense of “far-fetched” urgency.

The “work and citizenship” metaphor the Court employed is expansive, not limiting. While Grutter maintains that “[t]he mission of a school is to educate students, ‘prepare[ ] students for work and citizenship,’ and cultivate future leaders,” these goals are not necessar-

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436 Brief for Julius W. Becton, et al., supra note 434, at 17–18 (alteration in original).
437 The military amici employed a system justification motive designed to “defend and justify the social status quo . . . .” Gary Blasi & John T. Jost, System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice, 94 CAL. L. REV. 1119, 1119 (2006). Allusions to national security were potentially persuasive because the military brief “reduced the pull of ego and group justification motives, given that far fewer individuals or groups are likely to compete for spots in the military than in the academic admissions contexts . . . .” Id. at 1153-54.
438 Caplen, supra note 368, at 29 n.230.
442 Reference to the military amici “fit seamlessly with contemporary sociopolitical dynamics, since the nation and the world were captivated by the U.S. war against Iraq in the months before Grutter and Gratz were decided.” Brown-Nagin, supra note 379, at 1482.
444 Lomack v. City of Newark, 463 F.3d 303, 309–10 (3d Cir. 2006) (second alteration in original).
ily within the exclusive purview of the educational system.\textsuperscript{445} Justice O'Connor's opinion has been read to embrace "democratic legitimacy as a justification for diversity"\textsuperscript{446} by lauding "social goods like professionalism, citizenship, or leadership."\textsuperscript{447} Yet the Court suggests that it is only through access to a \textit{legal} education that the "utopian goals"\textsuperscript{448} of democracy\textsuperscript{449} and citizenship\textsuperscript{450} are effectuated.

Given that democracy "has no universal meaning,"\textsuperscript{451} the ability for members of "all racial and ethnic groups" to participate in "the civic life of our Nation"\textsuperscript{452} is not an end justified by any one prescribed or defined set of means.\textsuperscript{453} While the \textit{Grutter} Court suggests the exclusiv-

\begin{thebibliography}{99}
  \bibitem{445}See, \textit{e.g.}, \textit{In re Carroll}, 896 A.2d 566, 576–77 (Pa. 2006) (noting that participation in "public associations and positions in addition to [an individual's] official, paid positions . . . simply reflect[s] active lives of good citizenship"); \textit{infra} note 453.
  \bibitem{446}Guinier, \textit{supra} note 405, at 118.
  \bibitem{447}Horwitz, \textit{supra} note 372, at 550.
  \bibitem{449}"Lawyers are the administrators of our democracy." Pratt, \textit{supra} note 419, at 62; \textit{see also} Lackland H. Bloom, Jr., \textit{Grutter and Gratz: A Critical Analysis}, 41 Hous. L. Rev. 459, 506 (2004) (noting the Court's acknowledgement that "lawyers play a pivotal role in protecting legal rights and also tend to hold a disproportionate number of leadership positions").
  \bibitem{450}\textit{Grutter}, 539 U.S. at 332–33. Of note is the fact that \textit{Gratz v. Bollinger}, 539 U.S. 244 (2003), \textit{Grutter}'s companion case in which the Court invalidated the University of Michigan's \textit{undergraduate} admissions program, is bereft of any discussion of the importance or virtue of education in "preparing students for . . . citizenship." \textit{Grutter}, 539 U.S. at 332; \textit{see also} Danielle C. Gray & Travis LeBlanc, \textit{Integrating Elite Law Schools and the Legal Profession: A View from the Black Law Student Associations of Harvard, Stanford, and Yale Law Schools}, 19 \textit{HARV. BLACK LETTER} L.J. 43, 49 (2003) (stating that "ignor[ing] important differences between the law school and undergraduate contexts . . . leads to conflation of the two in the Court's deliberations"). \textit{But see} Richard H. Sander, \textit{A Systematic Analysis of Affirmative Action in American Law Schools}, 57 \textit{STAN. L. REV.} 367, 400–10 (2004) (comparing admissions data from both the undergraduate and law school and concluding the latter functions as a quota since the "steepness of the curves for both blacks and whites negates the possibility that there is some nonacademic, nonracial factor . . . . The only logical possibilities are that schools 'race-track' admissions . . . .'); Girardeau A. Spann, \textit{The Dark Side of Grutter}, 21 \textit{CONST. COMMENT.} 221, 245 (2004) ("[I]t is likely that the \textit{Grutter} and \textit{Gratz} affirmative action programs are very similar in actual operation."). Thus, \textit{Grutter}'s emphasis is not upon education generally but rather "what happens at the doorstep of legal education.")
  \bibitem{452}Pratt, \textit{supra} note 419, at 62.
  \bibitem{453}Grutter, 539 U.S. at 332.
  \bibitem{454}\textit{See, e.g.}, Jimmie M. Garland Sr., \textit{Look Back So You Are Ready to Forge Ahead}, \textit{LEAF-CHRONICLE} (Clarksville, Tenn.), Nov. 5, 2006, at 13A (attaching no educational requirement—legal, medical, or otherwise—as a prerequisite for Americans' abilities to "demonstrate our support for democracy in many ways. We can volunteer our service to local programs, serve as jurors, or simply serve as members of boards and committees appointed to conduct the business of our community").
\end{thebibliography}
ity of the law school classroom forum as the conduit through which to fulfill the "dream of one Nation, indivisible," 
individualized process that encompasses "a characteristic of personhood" rather than requiring an institutionalized setting. Just as "fundamental [a] role in maintaining the fabric of society" is reflected within other fora. Relevant here is the importance of the jury, itself a "basic right[] of citizenship" which "invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government." One scholar notes:

Like university classrooms, the jury room should be a place where stereotypes are minimized and discussion is lively and enlightening for participants because it makes for the cultivation of better, more responsive citizens. This citizenship-building is enhanced by diverse members of the community self-consciously engaging in deliberation as part of their participation in democratic governance.

In essence, the work and citizenship metaphor, when applied to jury service, furthers the judiciary's "legitimacy in the eyes of the citi-

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454 See Brown-Nagin, supra note 379, at 1484 (noting that the Grutter Court "conceded that professions such as law are conduits to leadership," which fosters "'legitimacy in the eyes of the citizenry'" (quoting Grutter, 539 U.S. at 332)).

455 Grutter, 539 U.S. at 332.


458 See Haddon, supra note 366, at 553 ("The fact that the Court reached its decision that diversity is a compelling interest by emphasizing its willingness to defer in light of the university's 'special niche'... does not lead inexorably to the conclusion that only universities will be accorded... the latitude to be race-conscious.").

459 Grutter, 539 U.S. at 331.

460 Courts "may be reluctant" to apply Grutter's reasoning within contexts external to higher education out of "fear that—once unleashed—forward-looking justifications cannot be constrained." Helen Norton, Stepping Through Grutter's Open Doors: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking, 78 TEMP. L. REV. 543, 574 (2005).

461 See supra text accompanying note 75.

462 Lockhart v. McCree, 476 U.S. 162, 176 (1986) (stating that wholesale exclusion from jury service constitutes a "substantial deprivation of the[ ] basic rights of citizenship").


464 Haddon, supra note 366, at 553.
nenry."\(^{465}\) Such an interpretation arguably furthers the system's "operational need."\(^{466}\)

3. Embracing "Operational Needs" Justifications

A third interpretation of *Grutter*, and one already recognized by courts, suggests that its application transcends the educational realm by "conclusively establish[ing] the possibility of non-remedial objectives for race-based programs."\(^{467}\) Courts have accepted "operational needs" arguments to justify diversity programs implemented post-*Grutter* by characterizing the decision as an ""operational needs' opinion."\(^{468}\) Moreover, *Grutter*’s "operational needs" underpinnings, bolstered by its reference to national security concerns and the military amici,\(^{469}\) suggest that the incorporation of a "critical mass" of minorities within a university admissions calculus\(^ {470}\) is appropriate in the law enforcement context.\(^ {471}\) Although the Third Circuit in *Lomack* did not consider an operational needs argument when it invalidated the Newark Fire Department diversity policy,\(^ {472}\) it nonetheless acknowledged its application by coordinate courts.\(^ {473}\)

\(^{465}\) *Id.* at 555.

\(^{466}\) See infra Part IV.B.3.


\(^{468}\) *Lomack v. City of Newark*, 463 F.3d 303, 310 n.8 (3d Cir. 2006). *Grutter* "found that law schools have an operational need for a diverse student body in order to effectively achieve their educational mission." *Id.; see also* Colloquium, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 776 (noting that *Grutter* adopted the law school’s "operational needs" justification).

\(^{469}\) See supra Part IV.B.1.

\(^{470}\) Grutter v. Bollinger, 539 U.S. 306, 318 (2003). Critical mass, according to the law school, means 'meaningful numbers' or 'meaningful representation,' which [the Director of Admissions] understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated . . . . [T]here is no number, percentage, or range of numbers or percentages that constitute critical mass.

\(^{471}\) See supra Part IV.B.1.

\(^{472}\) The City "does not argue that diversity within individual fire companies is in any other way necessary, or even beneficial, to the Fire Department's mission of fighting fire, i.e., that the Department has an operational need for diverse fire companies . . . ." *Lomack v.*
The Seventh Circuit, beginning with *Wittmer v. Peters*, the foreground in broadly applying the "operational needs" argument to non-university education contexts, with one scholar suggesting that *Grutter*’s "non-remedial justifications for the use of race" were actually foreshadowed by Judge Posner in *Wittmer*. Before the Supreme Court granted certiorari in *Grutter*, Judge Posner, in *Reynolds v. City of Chicago*, recognized that operational needs were "completely different" from remedial grounds. Although the *Reynolds* court found no past discrimination against Hispanics that justified the promotion of an Hispanic policeman, it concluded that the city’s minority promotion program "was justifiable in order to make the police force more effective in performing its duties."

While the same court noted in *Petit v. City of Chicago* that it was "odd" to liken police department examinations that comprised the criterion for promotion to university admissions programs, it did not eschew from applying *Grutter*’s reasoning to conclude that "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city." Just as *Grutter* deferred to a university’s aca-

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City of Newark, 463 F.3d 303, 310 (3d Cir. 2006). Even were the city to have raised the defense, the *Lomack* court posited, "no evidence supports it." *Id.*

87 F.3d 916 (7th Cir. 1996).


See, e.g., *Wittmer*, 87 F.3d at 919 ("[L]aw-enforcement and correctional settings [are singled out] as the very clearest examples of cases in which departures from racial neutrality are permissible.").

Fridkin, *supra* note 467, at 517.

296 F.3d 524 (7th Cir. 2002).

Id. at 529.

The need, apparently, was rooted in two arguments. First, Hispanic lieutenants, as department supervisors, "set the tone for the department," decreasing the likelihood that non-Hispanic officers would be sensitized to "special problems" specific to policing Hispanic neighborhoods. *Id.* at 530. Second, effective execution of the duties of the police "requires that the police have the trust of that community [to which the officer belongs] and they are more likely to have it if they have 'ambassadors' to the community of the same ethnicity." *Id.*

352 F.3d 1111 (7th Cir. 2005), cert. denied, 541 U.S. 1079 (2004).

Id. at 1112.

Id. at 1114; see also Horwitz, *supra* note 372, at 569 n.493; David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 805 n.145 (2005) (relying on *Petit* to establish the proposition that "diversity in the workplace would be beneficial in other public agencies whose employees have frequent interaction with a diverse public").
ademic judgments, the Seventh Circuit "believe[d] that it is proper . . . to rely on the views of experts and Chicago police executives."484 Noting that the police department issued examinations and "standardized the scores based on race"485 in order to account for statistical error,486 the Petit court found that the city's determinations were not unlike those considered in Grutter, where "race can be a 'plus' factor in the context of individualized consideration of each and every applicant."487 Moreover, given that the city's promotions were based upon an examination system that was time-limited, the court found that the promotion program the city employed satisfied Grutter's mandate.488 Thus, Petit serves as an "important example of the way in which Grutter can be extended beyond the educational context."489

C. Implications of the Broad Interpretation of Grutter

The Grutter Court "extended the application of academic freedom to university admissions decisions, an area far beyond the scope originally contemplated by the Court."490 In so doing, the Court held itself prostrate to "the voices of the military, the captains of industry, [and the] leaders of education, . . . [who were] critically important in persuading the Court that racial diversity is essential, not simply within the legal academy, but in the economy, military, and culture."491 Beginning with Wittmer and Reynolds and ultimately culminating in Petit, a nexus between Grutter's academic diversity context and an "operational needs" justification becomes more acutely pronounced.

484 Petit, 352 F.3d at 1114.
485 Id. at 1117.
486 Id. Scores were adjusted to account for disparate, "skewed results" that occurred based upon the day on which the examination was administered. Bram A. Maravent, Is the Rooney Rule Affirmative Action? Analyzing the NFL's Mandate to Its Clubs Regarding Coaching and Front Office Hires, 13 SPORTS LAW. J. 233, 261 (2006) (discussing Petit and Grutter within the context of hiring coaches and administrators within the National Football League).
487 Petit, 352 F.3d at 1116-17.
488 Id. at 1118. The court noted that the city ceased race-conscious promotions after the 1991 examinations, further support that the system implemented was for a short period of time. Id. Yet Grutter permitted at least a quarter-century to pass before any race-conscious admissions program be phased out. See infra note 495 and accompanying text.
490 Caplen, supra note 368, at 4.
491 Sylvia A. Law, Where Do We Go From Here? The Fourteenth Amendment, Original Intent, and Present Realities, 13 TEMP. POL. & CIV. RTS. L. REV. 691, 705 (2004).
1. Impact Across the Jurisprudential Landscape

It has been recognized that the "precedential value of Grutter is uncertain . . . . [because] the case may or may not be limited to the educational context in which it was decided."492 The application of Grutter by the Reynolds and Petit courts,493 however, suggests the judiciary's approval of race-conscious decision-making in circumstances wherein "exposure to a racially diverse environment" is likely, if not necessary.494 Given the fact that Grutter "will remain the law of the land for at least the next quarter of a century,"495 its potential applications beyond the educational context are virtually endless since "attaining cross-cultural competence does not end with a diploma . . . ."496 Thus, it is reasonable to anticipate Grutter's impact across a wide jurisprudential landscape: from its "migration to the employment context"497 of workplace diversity under Title VII498 and application within the healthcare profession,499 to Title IX gender discrimination in athletics500 and infiltration into the jury selection process.501

2. Validating "Plus-Factor" Selection Processes

The Grutter Court's approval of race as a "plus-factor" determinant in university admissions was premised upon holistic, individualized

492 Spann, supra note 450, at 226.
493 Although predating the Supreme Court's review of Grutter, Reynolds relied upon the Sixth Circuit's en banc Grutter decision, Reynolds v. City of Chicago, 296 F.3d 524, 527 (7th Cir. 2002), which the Court ultimately affirmed.
494 Norton, supra note 460, at 572.
495 Alex M. Johnson, Jr., The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings, 81 IND. L.J. 309, 310 (2006); see also Grutter v. Bollinger, 539 U.S. 306, 343 (Ginsburg, J., concurring) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); id. at 346 ("From today's vantage point, one may hope . . . that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.").
496 Norton, supra note 460, at 572.
497 Bulman-Pozen, supra note 382, at 1448.
498 See generally Estlund, supra note 403.
499 See Norton, supra note 460, at 571-72 (applying the rationale for racially diverse workforces to the healthcare setting).
501 See Wilkenfeld, supra note 415, at 2293 (arguing that Grutter enables "discrimination—such as that engaged in when judges focus on the ethnic composition of juries—[to] survive an equal protection challenge").
consideration of an applicant.\textsuperscript{502} Adhering to \textit{Grutter}’s mandate requires \textit{any} selection process, regardless of application of the “operational needs” justification, to similarly utilize race as one of several criteria applied on an individualized basis.\textsuperscript{505} Only in this way, \textit{Grutter} instructs, will such a process survive constitutional challenge.\textsuperscript{504} For example, the “plus-factor” principle, which Justice Powell favored in \textit{Bakke} and the Court explicitly adopted in \textit{Grutter}, has been invoked to permit states’ use of race as “one element \textit{among many} that determines the shape districts take.”\textsuperscript{505}

If affirmative action constitutes “minority-mindfulness in decisionmaking resulting in . . . a preference,”\textsuperscript{506} then quantifying the precise amount of “mindfulness” that factors into a decision is virtually impossible.\textsuperscript{507} \textit{Grutter}’s good-faith presumption to educational institutions, extended by the Seventh Circuit to police departments in \textit{Petit},\textsuperscript{508} has limitless application and substantial repercussions. Validating selection processes in which a “plus-factor” for race is one component encourages those exercising the decision-making authority “to conduct themselves with near-total impunity.”\textsuperscript{509} If the “admin-

\textsuperscript{502} Under its admissions policy, administrators evaluate “all the information available in [an applicant’s] file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.” \textit{Grutter} v. \textit{Bollinger}, 539 U.S. 306, 315 (2003). The policy, with its consideration of race as a “plus-factor,” “remain[s] flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” \textit{Id.} at 337. \textit{But see infra} note 507.

\textsuperscript{503} \textit{See supra} note 502.

\textsuperscript{504} \textit{See Grutter}, 539 U.S. at 337 (distinguishing the law school ‘plus-factor’ admissions policy from the policy at issue in \textit{Gratz}, which awarded “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity”).


\textsuperscript{506} Anupam Chander, \textit{Minorities, Shareholder and Otherwise}, 113 \textit{YALE L.J.} 119, 120 n.3 (2003).

\textsuperscript{507} \textit{See Eric Slater, Lawsuit Charges UC Admissions with Fraud}, \textit{L.A. TIMES}, June 9, 1995, at B4 (stating that the University of California system “has made a secret” of the weight that race carries during the admissions process”). Although the “Harvard Plan,” appended to Justice Powell’s opinion in \textit{Bakke}, notes that a “farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer,” Regents of University of California v. \textit{Bakke}, 438 U.S. 265, 323 (1978), what that \textit{something} constitutes remains undefined and amorphous. For an empirical discussion of the complexity of admissions decisions and the theory that “the American public has a more expansive notion of merit than the leading protagonists in the affirmative action debate,” see Carol M. Swain et al., \textit{Life after Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities}, 16 \textit{HARV. BLACK LETTER L.J.} 147, 149, 165–79 (2000).

\textsuperscript{508} \textit{See supra Part IV.B.3.}

\textsuperscript{509} Caplen, \textit{supra} note 367, at 864; \textit{see also} Jessica Garrison, \textit{The Nation; Yale Accuses Princeton in Hack Attack}, \textit{L.A. TIMES}, July 26, 2002, at 1 (reporting that admissions personnel from Princeton University infiltrated Yale University’s “online admissions notification system
istrative and judicial safeguards" that protect students within the admissions context are "unknown," leaving the only way to potentially unveil the secrecy of admissions decisions to the courts, then those safeguards are similarly unascertainable in other contexts. A particular cause of concern, therefore, arises within any context wherein a "plus-factor" racial element is employed within a selection calculus. The realm of jury selection, with the incorporation of software to inform voir dire and the exercise of peremptory challenges of prospective jurors, is no exception.

V. RAMIFICATIONS OF INTERSECTING, COMPETING PRINCIPLES

Having advanced the position that Grutter extends "beyond the education setting," it is not difficult to parallel similarities between university admissions' selection processes and the voir dire selection process. Just as a "unique and essential feature of the jury is its de-

and looked through student files during the peak college admissions period in April . . . to see confidential admissions decisions on 11 students who applied to both universities”).

Caplen, supra note 368, at 31.

See Garrison, supra note 509, at 1 (noting that admissions decisions are confidential).


See, e.g., In re Cendant Corp., 260 F.3d 183, 193 (3d Cir. 2001) (stating, in a case where an auction of sealed bids was used to choose counsel in class action litigation, "[t]hrowing a veil of secrecy over the selection process deprives class members of [the] opportunity . . . [to] exercise effective control" in the selection of counsel); EEOC v. Ford Motor Co., 645 F.2d 183, 198 (4th Cir. 1981), rev’d, 458 U.S. 219 (1982) (noting that a "secret selection process" facilitated an environment of "'loose . . . procedures' which 'operated to perpetuate the status quo’"); Doyle v. United States, 220 Ct. Cl. 285, 292 (Cl. Ct. 1979) (acknowledging, in a lawsuit by military officers who alleged they were passed over for promotion by selection boards, that there was "uncertainty concerning the mechanics of the selection process" because the proceedings were conducted in secrecy); Arizona Bd. of Regents v. Phoenix Newspaper, 806 P.2d 348, 353 (Ariz. 1991) (Corcoran, J., dissenting) (disagreeing with majority's holding that university's board of regents was not required to release information on all prospective candidates for university president position and stating that the "secret process of selection used by the Board of Regents in this case is at odds with the Public Records Law").

See infra Part V.

Haddon, supra note 366, at 552; see also Wilkenfeld, supra note 415, at 2304 ("While the Grutter case dealt with the issue of affirmative action in education, its influence reaches far beyond these limits."); supra Part IV.B-C.

See supra Part III.C.3. Education has been characterized as “unique from employment, minority business contracts and redistricting,” but not from jury selection. Roy Carleton Howell, Affirmative Action in Higher Education: Bakke Has Been Affirmed, 26 N.C. CENT. L.J.
liberative decision-making role"\(^{517}\) that ensures that the "trial process [is] open to jurors who will contribute to the 'robust exchange of ideas' in deliberation,"\(^ {518}\) universities similarly share a "unique goal of 'paramount importance' to have 'students who will contribute the most to the robust exchange of ideas.'\(^ {519}\)

If *Batson* and its progeny "have made a further muck of things by transforming voir dire into a lengthy ordeal involving inquiries into inappropriate questions of race and ethnicity,"\(^ {520}\) then factoring *Grutter* 's "sorry muddle of 'utter logical confusion'"\(^ {521}\) into the equation presents devastating consequences for peremptory challenge jurisprudence, particularly when considering the equivocal software variable.\(^ {522}\)

A. Applying *Grutter* to the Jury Selection Process

Scholars focus upon citizenship elements shared by both *Grutter*’s majority and the jury selection process\(^ {523}\) and forecast that "*Grutter* creates the possibility for litigants to encourage courts to carry over the interest in a fair cross section at the venire stage to the composition of the jury."\(^ {524}\)

The opposite, in fact, occurs within the software context. Utilizing race as a "plus-factor"\(^ {525}\) together with various criteria, lawyers can attribute varying weight in order to produce statistically favorable juries;\(^ {526}\) *Grutter* encourages and promotes a validly

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\(^{517}\) Haddon, *supra* note 366, at 552.

\(^{518}\) Id. at 553 (footnote omitted).


\(^{522}\) See *Victoria Loe*, *Fear of Computing; Study Finds Rampant Technophobia*, DALLAS MORNING NEWS, July 27, 1993, at 4D (noting that new technologies are “difficult to understand” and that a majority of adults “find the pace of change in technology confusing”).

\(^{523}\) See supra note 519.

\(^{524}\) Haddon, *supra* note 366, at 553; see also Wilkenfeld, *supra* note 415, at 2292 (arguing that *Grutter* legitimizes "judicial attempts to ensure that petit juries reflect the diversity of their communities").

\(^{525}\) See supra Part IV.C.2.

constitutional software scheme in which "race... still matters" without threat of succumbing to Batson challenges. Ways in which Grutter's "intellectually muddled" principles dilute and drown Batson in a sea of superfluity within the software context and how those uses substantially threaten to tamper with the legal system follow.

1. Batson's Step One: Taking a Byte out of Inferences of Discrimination

Parties asserting Batson challenges must establish a prima facie case of discrimination. To that end, the party must demonstrate "facts and any other relevant circumstances" that raise an inference of race-based exclusion. Raising these inferences in response to software that accords varying weight upon multiple criteria, however, becomes problematic. With a wide array of indicia—including race—factoring into the calculus used to inform exercise of peremptory strikes, any exclusion could be effectuated after execution of multiple permutations based upon indiscernible computations of "systematic evidence of juror values by demographic and social groupings."

As one software program developer recognizes, "[p]erception is inherently selective, and values are one of the mechanisms through which selective perception takes place." Thus, while a challenger may perceive that a peremptory strike violated Batson, the requisite inference needed to sustain the objection may, by virtue of the manner in which the interactive software calculates user perceptions, fall short of this threshold requirement. Because the software is designed to consider multiple, objective factors together with individualized and customized subjective factors such as lawyers' back-

528 Charles Krauthammer, Ruling Puts the Ball Back in Proper Court, RICH. TIMES-DISPATCH (Va.), June 27, 2003, at A19.
529 See supra text accompanying note 49 and accompanying text.
530 See supra Part III.C.1.
532 See supra note 526 and accompanying text.
533 See supra note 96 and accompanying text.
534 JuryQuest, supra note 90.
535 Id.
536 See supra note 339 and accompanying text.
537 See supra note 96.
grounds and experiences, a party's ability to infer discriminatory motivation is substantially hindered.

One might argue that software use is indistinguishable from non-computerized jury selection. Yet, in many ways, the software's platform mirrors selection processes of university administrators, who assess both objective factors as well as non-quantifiable intangibles the Court terms "soft" variables. Admissions decisions, however, are virtually unassailable, and a Batson challenger would likely encounter similar difficulty attacking peremptory strikes informed by software. Like an admissions policy conforming to Grutter's pronouncements, which considers race but avoids quantification of an exact "critical mass" in order to avoid creating quotas, software can account for race as an unquantifiable "plus factor" within its broader "mathematical formulas" that generate juror rankings. Any race-based exclusions stemming from software usage, therefore, would likely be insulated from attack due to an abundance of quantitative

538 See supra note 101 and accompanying text.
539 See Johnson v. California, 545 U.S. 162, 172 (2005) (stating that Batson is designed to respond to "suspicions and inferences" of racially-motivated peremptory challenges).
540 "[A]dmissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school." Grutter v. Bollinger, 539 U.S. 306, 315 (2003). For objective factors jury selection software considers, see supra note 96.
541 Grutter, 539 U.S. at 315; see also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978) (opinion of Powell, J.) (quoting Harvard College's admissions program, which acknowledges that it considers "differences in the background and outlook that students bring with them," such as the case where "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer"). For "soft" variable factors jury selection software considers, see supra notes 100-01 and accompanying text.
542 See Caplen, supra note 367, at 864 (noting that Grutter permits "university administrators to conduct themselves with near-total impunity"). By affirming the University of Michigan Law School's admissions policy, Grutter implicitly affirmed admissions decisions decided under that system. Grutter, 539 U.S. at 316. Although Gratz v. Bollinger, 539 U.S. 244 (2003), invalidated the undergraduate admissions policy, the Court neither analyzed the qualifications of rejected candidates nor scrutinized those decisions. See generally id. Moreover, the Court did not retroactively admit students rejected under the invalidated admissions policy, a remedy mooted by the passage of time. See id. at 249-52 (noting one of the litigants' subsequent graduation from another institution); see also De Funis v. Odegaard, 416 U.S. 312, 319 (1974) (rendering as moot a claim against a law school "[b]ecause the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation"). Thus, constitutionality of an admissions regime under which decisions were based did not affect those underlying decisions. See supra Part IV.C.2.
543 Grutter, 539 U.S. at 381 (Rehnquist, C.J., dissenting) ("In practice, the Law School's program bears little or no relation to its asserted goal of achieving 'critical mass'").
544 Horowitz, supra note 97.
545 See supra note 101 and accompanying text.
and qualitative variables upon which the program relies. As such, lawyers' "scientifically informed" decisions to strike jurors, like university admissions decisions, would be immune from review, rendering any perceived exclusion on account of race far removed from purposeful exclusion and below the threshold of disproportionate impact.

2. Batson's Step Two: The "Inclusionary Value" of Exclusion

Assuming arguendo that a challenge to computer-informed peremptory challenges survives Batson's first step, difficulties abound at the second step. Under Batson, the proponent of an alleged race-based strike must, once an objecting party establishes a prima facie case of discrimination, provide a "neutral explanation" for the challenge. In Miller-El, the Court acknowledged that facially neutral reasons must meet a minimum level not justifiable by "afterthought." Ultimately, the reasons proffered will either "stand or fall on the [basis of] plausibility.

The software affords defenders of peremptory challenges numerous avenues through which to maneuver in order to assert non-racial justifications for exercising peremptory strikes. Software calculations may be utilized as a sword: they are presumably scientific and mathematical, products of a coalescence of numerous indicia of
which race is one element. Thus, lawyers may assert an array of neutral justifications—any non-racial factor, in fact, built into the software’s calculus—for removing jurors. Additionally, software calculations may be utilized as a shield. Because the software calculates multiple factors to produce objective rankings, lawyers may argue an incapability of determining the influence one factor—such as race—contributed to each rating. As neutral explanations, both alternatives are devoid of “pretextual significance” and are plausible. Furthermore, the software user’s methodology, analogous to university admissions decisions, remains protected from the court under “a veil of secrecy.” Consequently, the software may diminish lawyer accountability and responsibility for decisions from the jury selection equation, enabling parties to justify race-based peremptories under non-racial pretexts, thereby “vitiate ... constitutional protections.”

3. Batson’s Step Three: Replacing Court Monitoring with Computer Monitors

Lawyer accountability is only as effective as judicial oversight of both the software and voir dire. As to the latter, while Batson was designed to “subject more peremptory challenges to judicial scrutiny and to counteract the discriminatory manipulation of jury selection procedures,” increased judicial scrutiny continues to waver to

556 See supra notes 96 & 102-03 and accompanying text.
557 See infra note 558.
558 The Court addressed this situation in J.E.B. v. Alabama:
Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of Batson itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender [or other classification] could insulate effectively racial discrimination from judicial scrutiny.

559 See Miller-El, 545 U.S. at 252; J.E.B., 511 U.S. at 145.
560 Neal Kumar Katyal, The Promise and Precondition of Educational Autonomy, 31 HASTINGS CONST. L.Q. 557, 566 (2003); see also Paul G. Haskell, The University as Trustee, 17 GA. L. REV. 1, 25 (1982) (“One of the more carefully kept secrets in educational administration is admissions policy.”)

561 Hinkle, supra note 258, at 169.
562 By its nature, the peremptory challenge was permitted “without judicial scrutiny,” Page, supra note 314, at 158. Cf. Goodwin, supra note 19, at 739, 749 n.103 (acknowledging judicial scrutiny with regard to peremptory strikes against cognizable groups).
"latitude allowed in the exercise of peremptory strikes." The Court's extensive detail of manipulative techniques employed by the prosecution in Miller-El, however, reflects its condemnation of "dismissive and strained interpretation[s]" of evidence by reviewing courts. Moreover, Miller-El suggests that courts must be actively engaged in, rather than removed from, voir dire.

Software usage, by further removing courts from an active role during voir dire, undermines these ideals. Because "[t]echnological standards are internally constrained by their inability to be designed as general legal norms that approximate both individual judicial determinations and socially beneficial jurisprudence," software mechanics may be difficult to understand and explain when questioned by courts. Computer illiteracy and "a reluctance to use . . . new technology" on the part of judges and lawyers alike dissuades scrutiny of incomprehensible elements contained within the software and the ratings it calculates. Consequently, a court's ability to discern, under Batson's third step, the reasonableness of a proffered neutral explanation for a peremptory strike is significantly inhibited. Moreover, in the absence of uniform policies regarding software usage, educating the court in its mechanics will likely be cumbersome, delaying voir dire with disruptive technological inquiry, and overall impacting the expeditious administration of a court's caseload.

564 See Cox, supra note 150, at 771 ("[J]udicial decisions have placed limitations on preemptory challenges, making them subject to the court's scrutiny by forcing attorneys to disclose their reasons for striking jurors they believe will be biased.").
567 Id. at 265 (citation omitted).
568 See supra note 358 and accompanying text.
570 See supra note 522.
572 See, e.g., Patti Waldmeir, Supreme Court Goes Hands-Off on Innovation: Ageing US Justices Try to Encourage Advances in Technology that Will Shape the Economy for Decades to Come, FIN. TIMES (London), July 5, 2005, at 10 (noting the age of the Supreme Court justices and their "rare display of judicial humility in the face of technology").
573 See supra notes 316-17 and accompanying text; supra Part III.C.2.
B. Ethical Considerations for Lawyers

Just as the judiciary may be presently ill-equipped to address the impact of software upon voir dire, "legal ethics have not kept pace" with advanced jury selection techniques.574 The Model Rules of Professional Conduct "do not bar or place any restrictions on attorneys using jury consultants" or software.575 Within the past five years, "jury selection standards, professional standards, practice guidelines, and ethical principles" have been proposed,576 but "[d]ebates about the ethical issues associated with scientific jury selection" persist.577 Notwithstanding a lawyer's ethical duty to zealously represent clients578 by selecting jurors whose impaneling would favor clients' cases,579 a lawyer's current limitations only concern candor requirements proscribing knowingly presenting "false statement[s] of fact" when providing neutral explanations to the court and ensuring that software is utilized appropriately.580 Consequently, software, designed, in part, to "predetermine or appear to predetermine" a case's outcome,581 presents serious ethical challenges requiring consideration and reflection in order to prevent lawyers from using technology "to evade the bars of the Equal Protection cases [that] may potentially contribute to the denial of Equal Protection."582

VI. CONCLUSION

Jury selection software offers an infusion of science into a realm typically characterized as an art form.583 Its introduction into court-
rooms across the country may afford litigants a greater opportunity to establish a rapport with prospective jurors and expeditiously conclude jury selection by finely tuning voir dire questioning. Notwithstanding these laudable goals, incorporation of this technology into voir dire potentially undermines established jurisprudential precedent protecting litigants and jurors from impermissible denial of equal protection afforded by the Constitution.

Because the software rates jurors after considering various factors, including race, its selection process is akin to the procedures in which university admissions offices engage when identifying and isolating ideal applicants to whom offers are extended. In this way, *Grutter* places an imprimatur of constitutionality upon software that effectively engages in a similar calculus within a different context. Because software that calculates race as a "plus-factor" may be permissibly used during voir dire based upon *Grutter*, it runs afoul of the protections against race-based discriminatory peremptory challenges set forth in *Batson*. Software usage poses a threat to undermining each part of *Batson*’s three-step standard, leaving litigants and jurors with virtually no protections against improper exercise of peremptory strikes. As litigants continue to embrace technology in the courtroom, neither the courts nor the profession’s ethical canons are currently equipped to keep pace and address related concerns. Until the profession does so, software infusion into the jury selection process presents a *Grutter-Batson* dilemma greater than the "large loophole" the Court has attempted to fill since *Batson*. As a result, litigants may effectively conceal all racially motivated decisions to exclude jurors, evade the protections set forth in *Batson*, and reverse achievements of the Civil Rights era on the basis of "plus-factor" selection processes and in the name of technological advancement.

584 See supra notes 80 & 84–87 and accompanying text.
585 See supra text accompanying note 582; Parts V.A.1–3.
586 See supra Part I.C.
587 See supra notes 93 & 539–49 and accompanying text.
588 See supra Parts IV.C.1–2; V.A.1–3.
589 See supra Part IV.C.2.
590 See supra text accompanying notes 525–28.
591 See supra Parts V.A.1–3.
592 See supra text accompanying notes 581–82.
593 See supra Part V.B; note 59 and accompanying text.
594 See supra text accompanying note 349.
595 See supra notes 345–49 and accompanying text.
596 See supra text accompanying notes 49, 125–26.