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Holland v. Illinois: Sixth Amendment Fair Cross-Section Requirement Does Not Preclude Racially-Based Peremptory Challenges

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HOLLAND V. ILLINOIS: SIXTH AMENDMENT FAIR CROSS-SECTION REQUIREMENT DOES NOT PRECLUDE RACIALLY-BASED PEREMPTORY CHALLENGES

INTRODUCTION

The sixth amendment guarantee of an impartial jury does not protect a criminal defendant against a prosecutor’s use of race-based peremptory challenges.²

A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment³ . . . [T]o say that the Sixth Amendment deprives the state of the ability to ‘stack the deck’ in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side.⁴

In Holland v. Illinois,⁵ the United States Supreme Court considered for the first time the applicability of the sixth amendment’s fair cross-section requirement to the petit jury in the context of groups excluded through peremptory challenges.⁶ Traditionally, black defendants have claimed that prosecutorial peremptory challenges to exclude black potential jurors violate the equal protection clause.⁷ Holland, who is white,⁸ gave this tradition a new twist. He contested the prosecution’s use of peremptory challenges to exclude blacks from his petit jury,⁹ urging the Court to hybridize¹⁰ the sixth amendment fair cross-section requirement and the rule established in Batson v. Kentucky.¹¹

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² Id. at 806-07.
³ Id. at 806.
⁴ Id. at 807.
⁵ Id. at 803.
⁶ The Court has previously applied the fair cross-section requirement to jury venires, see Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979); and has considered the requirement in the context of prospective jurors challenged for cause, see, Lockhart v. McCree, 476 U.S. 162 (1986); but has declined to consider the applicability of the requirement to peremptory challenges in selecting petit jurors until Holland. See, Michigan v. Booker, 775 F.2d 762 (6th Cir. 1985), cert. granted, and judgment vacated 478 U.S. 1001 (1986); Teague v. Lane, 489 U.S. 288 (1989).
⁸ The only other case in which the Supreme Court has considered a white defendant’s challenge to the exclusion of blacks is Peters v. Kiff, 407 U.S. 493 (1972). The case involved an equal protection and due process challenge to the systematic exclusion of blacks at the grand and petit jury levels. The Court upheld the challenge on due process grounds, specifically refusing to consider or apply a sixth amendment analysis.
⁹ Holland, 110 S.Ct. at 806.
¹⁰ Id.
¹¹ 476 U.S. 79 (1986). The Supreme Court in Batson extended the equal protection clause prohibition of race-
This note recaps the Supreme Court’s previous decisions regarding defendant’s objections to jury composition, including both equal protection and fair cross-section requirement analyses. It also discusses *Holland*, examines the various opinions in the case, and reviews the arguments for and against abolishing peremptory challenges. Finally, the note proposes a solution for the questions which *Holland* leaves unanswered.

**BACKGROUND**

Racial discrimination at all stages of jury selection has long plagued the courts. The United States Supreme Court has heard challenges to the systematic exclusion of racial groups at the venire stage and to the prosecutorial exclusion of groups via peremptory challenges at the grand and petit jury stages. Collectively, such challenges have been grounded in the equal protection clause of the fourteenth amendment and the fair cross-section requirement of the sixth amendment to the United States Constitution.
In 1880, Taylor Strauder challenged a West Virginia law that denied blacks the opportunity to participate as members of grand or petit juries. Strauder, a black former slave, was convicted of murder by an all-white jury. In his appeal to the United States Supreme Court, he claimed that because blacks were not permitted to serve on either his grand jury or his petit jury, he was deprived of equal protection of the laws.

The Court held that "the very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Thus, the Court stated that explicitly denying blacks the opportunity for participation on juries "is practically a brand upon them; affixed by the law," which stigmatizes them and denies them equal protection of the laws.

Strauder challenged the large-scale, systematic exclusion of blacks as a group from jury service. Blacks were excluded by law, which had implications transcending Strauder's own case. Eighty-five years later, in Swain v. Alabama, the Court considered a challenge to more limited racial exclusions. Swain, the black defendant, contested the prosecutorial use of peremptory challenges to exclude blacks from his jury. The Court held that Strauder was inapplicable because Swain did not involve the state's total exclusion of blacks. Noting that no criminal defendant may demand a proportionate number of his race on either the venire or jury, the Court established the elements of a prima facie equal protection violation: "[A defendant attacking the prosecutor's use of peremptory challenges] must, to pose the issue, show the prosecutor's systematic use of peremptory challenges over a period of time." Not until 1986, in Batson v. Kentucky, did a defendant mount a successful challenge to the use of peremptory challenges.

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19 Strauder v. West Virginia, 100 U.S. at 305 (1880).
20 Id. at 304.
21 Id. at 304-05.
22 Id. at 308.
23 Id.
25 Id. at 203.
26 100 U.S. 303 (1880).
27 Swain, 380 U.S. at 206. The Court stated that total exclusion of blacks by state officers at the jury pool stage supports an inference that the officers have invidiously discriminated against blacks. However, the same is not true where the discrimination is alleged to be a product of prosecutorial peremptory challenges, because the defendant may counteract the effects of the prosecution's challenges by using his own peremptories. Id. at 226-27.
28 Id. at 208.
29 Id. at 226-27 (emphasis added). This evidentiary standard stood until overruled in Batson, 476 U.S. 79 (1986).
equal protection challenge to the prosecutor’s use of racially-based peremptory challenges in a single case. The Court overruled the insuperable evidentiary burden of *Swain* and held that a defendant may establish a prima facie case of purposeful discrimination in the selection of petit jurors merely by showing: (1) that he is a member of a cognizable racial group, and (2) that the prosecutor has exercised peremptory challenges to remove members of the defendant’s race from the venire.

While allowing a defendant to raise an equal protection challenge based solely upon the facts of his case, the Court explicitly stated that a defendant so claiming must be of the same race as the excluded jurors. In contrast, there is no same-race standing requirement under the sixth amendment.

**Supreme Court Consideration of Race-Based Exclusions Under the Fair Cross-Section Requirement**

In *Taylor v. Louisiana*, the United States Supreme Court held that a male defendant had standing to challenge a state law that automatically excluded women from jury service unless they specifically requested permission to serve. The Court held that this law violated the fair cross-section requirement of the sixth amendment and deprived Taylor of his right to an impartial jury trial. However, the Court cautioned that although petit juries must be drawn from a source which fairly represents the community, the petit juries, themselves, need not mirror the community.

The Court entertained a similar claim in *Duren v. Missouri*. The state statute at issue in *Duren*, the converse of the statute in *Taylor*, exempted women from jury service only upon request. Holding that the statute violated the sixth amendment’s fair cross-section requirement, the Court articulated the elements of a prima facie

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32 "Cognizable racial group" was defined in *Castaneda*, 430 U.S. at 494, as a group that is a “recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.”
33 *Batson*, 476 U.S. at 96. The Court also noted that the harm of such exclusions extends beyond the defendant to the excluded juror(s) and the entire community. *Id.* at 87.
34 *Id.* at 96.
35 *Holland*, 110 S.Ct. at 805.
37 *Id.* at 523.
38 *Id.* at 525. The Court noted that the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community and that the fair cross-section requirement is fundamental to the jury trial guaranteed by the sixth amendment. *Id.* at 527, 530. Only seven years earlier, in *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), the Court held that because "trial by jury in criminal cases is fundamental to the American scheme of justice," the sixth amendment is applicable to the states through the fourteenth amendment.
39 *Taylor*, 419 U.S. at 538.
41 *Id.* at 360.
42 *Id.* However, the Court reiterated that petit juries need not mirror the community. *Id.* at 364 n.20.
violation of that requirement:

(1) the group alleged to be excluded must be a "distinctive" group in the community;

(2) the representation of this group in venires from which juries are selected must not be fair and reasonable in relation to the number of such persons in the community; and

(3) this underrepresentation must be due to the systematic exclusion of the group in the jury-selection process. 43

Taylor44 and Duren45 dealt with the systematic exclusion of groups based upon sex rather than upon race. This exclusion occurred at the jury pool level in both cases. In Lockhart v. McCree,46 the Court reviewed the use of challenges for cause to exclude potential jurors at the venire stage.

"[P]rospective jurors whose opposition to the death penalty was so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial"47 were excluded from the jury that convicted McCree of capital felony murder.48 But the Court held that such a group, defined solely on the basis of a shared attitude that might impair the group members’ ability to perform as jurors, is not a "distinctive" group as required for fair cross-section purposes.49 Such screening of jurors as occurred in Lockhart enables the state to achieve its legitimate interest in obtaining one jury which can properly and impartially apply the law at both the guilt and sentencing phases of a capital trial.50 Finally, the Court held that "the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."51

In 1989, the Court decided Teague v. Lane,52 in which Teague, a black

43 Id.
47 Id. at 165. Here, the Court resumed consideration of the issue presented eighteen years earlier in Witherspoon v. Illinois, 391 U.S. 510 (1968). In Witherspoon, the court concluded that the convicted defendant’s due process rights would be violated by executing a capital sentence recommended by a jury procured by challenging for cause venire persons who expressed general objections to the death penalty. Id. at 522.
48 Lockhart, 476 U.S. at 166.
49 Id. at 174. Thus, the fair cross-section requirement was not violated.
50 Id. at 175-76. McCree’s was a bifurcated trial, in which a single jury determines innocence or guilt as well as sentencing. The Court noted in its discussion that in only one case, Ballew v. Georgia, 435 U.S. 223 (1978), has it even come close to applying the fair cross-section requirement to petit juries. In Ballew, however, the issue was not the composition of the jury, but the size of it. Lockhart, 476 U.S. at 174 n.14.
51 Id. at 184.
defendant, challenged his conviction by an all-white jury. During jury selection, the prosecutor used all his peremptory challenges to exclude blacks. Teague unsuccessfully moved for a mistrial on the ground that he had been denied his right to a jury of his peers. After his state court appeal failed, Teague appealed in federal court. He alleged a violation of the sixth amendment fair cross-section requirement at the petit jury level. Teague cited the concurring and dissenting opinions in the United States Supreme Court’s denial of certiorari in McCray v. New York in support of his appeal. The Court affirmed Teague’s conviction and held that the fair cross-section requirement does not apply to the petit jury, but is limited to the jury venire.

Teague presented the fair cross-section issue to the United States Supreme Court. Justice O’Connor’s majority opinion tidily disposed of the issue. She wrote:

In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d 690 (1975), this Court held that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community. The Court stated, however, that “[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition.” Id. at 538, 95 S.Ct. at 702. The principal question presented in this case is whether the Sixth Amendment’s fair cross-section requirement should now be extended to the petit jury. . . . [w]e leave the resolution of that question for another day.

Having left the issue for another day, the Supreme Court had come all but full-circle in applying the fair cross-section requirement to the petit jury in the context

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53 Id. at 1065.
54 Id. The prosecutor defended the challenges by claiming they were an attempt to achieve a balance of men and women on the jury.
55 461 U.S. 961 (1983), denying cert. In particular, Teague referred to Justice Marshall’s dissenting opinion, which argued that the time had come to re-evaluate Swain, 380 U.S. 202 (1965), in light of fair cross-section principles, to determine whether the two could be reconciled. McCray, 461 U.S. at 968-70. Justice Brennan joined Justice Marshall’s dissenting opinion. Id. at 963.
56 Teague, 109 S. Ct. at 1066. A panel of the appellate court agreed with Teague that the sixth amendment fair cross-section requirement applies to petit juries and that Teague had established a prima facie case of discrimination. However, on rehearing the case en banc, the court ultimately held that the United States Supreme Court’s decision in Allen v. Hardy, 478 U.S. 255 (1986) precluded Teague from benefiting from the rule in Batson. Id. In Allen, the Supreme Court held that Batson, 476 U.S. 79 (1986), is inapplicable retroactively on collateral review of convictions that became final before the Batson opinion was announced.
57 Teague, 109 S. Ct. at 1065. The Court stated, “. . . [Teague] . . . urges that the ratio of Taylor cannot be limited to the jury venire, and he urges the adoption of a new rule.” Id. at 1069. “Because a decision extending the fair cross-section requirement to the petit jury would not be applied retroactively to cases on collateral review . . . we do not address [Teague’s] claim.” Id. at 1078. The opinion made mention of the Court’s practice of avoiding rendering advisory opinions and the justices’ reluctance to unnecessarily decide constitutional questions. Id.
of groups excluded via peremptory challenges. It was against that backdrop that the Court squarely faced the issue in *Holland*.58

**STATEMENT OF THE CASE**

Daniel Holland was convicted in the Circuit Court for Cook County, Illinois, of rape, deviate sexual assault, aggravated kidnapping and armed robbery.59 He appealed the convictions on five separate grounds.60 Salient among the assignments of error is Holland’s assertion that he was denied his constitutional right to a jury drawn from a fair cross-section of the community because the prosecution used peremptory challenges to excuse the only two blacks on the venire.61 Declining to rule on the issue, the appellate court reversed and remanded on other grounds.62

The state appealed to the Supreme Court of Illinois, which reversed the decision of the appellate court, affirmed the convictions, and remanded for resentencing on the aggravated kidnapping conviction.63 The Court refused to address the fair cross-section issue, holding that Holland lacked standing to assert a “Batson violation” because he is white.64 The Court further refused to hold that peremptory exclusion of particular racial groups violates the sixth amendment’s fair cross-section requirement.65

The United States Supreme Court granted Holland’s petition for certiorari.66 The Court considered two issues: (1) whether a white defendant has standing to raise a sixth amendment challenge to the prosecutor’s exercise of peremptory challenges to exclude all black potential jurors from his petit jury, and (2) whether such exclusion violates his sixth amendment right to trial by an impartial jury.67

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58 In his dissent from the grant of certiorari in *Michigan v. Booker*, 478 U.S. 1001 (1986), Chief Justice Burger prophesied the Court’s *Holland* holding. He would have flatly reversed the lower court’s conclusion that the sixth amendment prohibits parties in a criminal case from using peremptory challenges to exclude blacks from the petit jury. Referring to Justice Rehnquist’s dissent in *Batson*, in which he had joined, Chief Justice Burger noted that “because the case-specific use of peremptory challenges by the state does not deny blacks the right to serve as jurors in cases involving non-black defendants, it harms neither the excluded jurors nor the remainder of the community.” Id. at 1002 (emphasis added). He noted that a sixth amendment argument which alleges otherwise is without merit. Id. Having granted certiorari in *Booker*, the Court vacated the judgment and remanded the case for reconsideration in light of *Batson*, 476 U.S. 79 (1986), and *Allen*, 478 U.S. 255 (1986). *Booker*, 478 U.S. 1001 (1986).


60 Id., 497 N.E.2d at 1232.

61 Id. at 326, 497 N.E.2d at 1233. The prosecutor did not question either of the black prospective jurors before excusing them. *See Joint Appendix, Holland*, 110 S.Ct. 803 (1990) (available on Lexis).

62 *Holland*, 147 Ill. App. 3d at 346, 497 N.E.2d at 1245.


64 Id. at 157, 520 N.E.2d at 279. The Court noted that because Holland is white and the excluded prospective jurors are black, Holland cannot meet the *Batson* requirement that, to challenge the exclusion of prospective jurors on equal protection grounds, a defendant must be of the same race as those excluded.

65 Id. at 158, 520 N.E.2d at 280.


67 *Holland*, 110 S.Ct. at 805.

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The Majority Opinion

The United States Supreme Court held that a white defendant has standing to raise a sixth amendment challenge to the prosecutor’s exercise of peremptory challenges to exclude all black potential jurors from his petit jury.\(^68\) In Batson, the Court established a same-race standing requirement for equal protection challenges.\(^69\) However, there is no such requirement for sixth amendment standing because every defendant is entitled to object to a venire that does not represent a fair cross-section of the community.\(^70\)

Noting that Holland sought to extend the fair cross-section requirement from the venire to the petit jury, the Court stated that the scope of the sixth amendment guarantee, not Holland’s standing to assert the guarantee, was at issue.\(^71\) The Court held that the exclusion which Holland challenged did not violate his sixth amendment right to trial by an impartial jury.\(^72\)

The Court reasoned that sixth amendment’s requirement of a “fair possibility” of an impartial jury mandates only the inclusion of all cognizable groups in the venire and a jury of at least six persons.\(^73\) The sixth amendment fair cross-section requirement operates to insure an impartial jury, not a representative one,\(^74\) and applies only to the venire, not to the petit jury.\(^75\)

Distinguishing Holland\(^76\) from Batson,\(^77\) the Court emphasized that the Batson holding rested upon the fourteenth amendment’s prohibition of racial discrimination which, unlike the fair cross-section requirement, applies to both the venire and the petit jury.\(^78\) Batson involved an equal protection clause violation, while Holland had nothing to do with race, per se.\(^79\)

The Court discounted Holland’s contention that the rule of Batson should be incorporated into the sixth amendment.\(^80\) Citing its holding in Lockhart,\(^81\) the Court

\(^68\) Id.
\(^69\) Id.
\(^70\) Id. See Taylor, 419 U.S. 522 (1975).
\(^71\) Holland, 110 S.Ct. at 806.
\(^72\) Id. at 811.
\(^73\) Id. at 806. See Taylor, 419 U.S. 522 (1975); Duren, 439 U.S. 357 (1979); Lockhart, 476 U.S. 162 (1986); Ballew, 435 U.S. 223 (1978); and Williams v. Florida, 399 U.S. 78 (1970) on jury composition and size requirements.
\(^74\) Holland, 110 S.Ct. at 807.
\(^75\) Id.
\(^76\) 110 S.Ct. 803 (1990).
\(^77\) 476 U.S. 79 (1986).
\(^78\) Holland, 110 S.Ct. at 807.
\(^79\) Id. at 810. The Court stated that Holland’s claim would be equally deficient were it to decry the exclusion of “postmen, or lawyers, or clergymen, or any number of other identifiable groups.”
\(^80\) Id. at 806. The court cited Lockhart, 476 U.S. 162 (1986) (the fair cross-section requirement has never been invoked to invalidate the use of peremptory challenges to prospective jurors or to require petit juries to reflect the composition of the community at large). See also, Taylor, 419 U.S. 522 (1975) (no requirement that petit juries chosen must mirror the community).
\(^81\) 476 U.S. 162 (1986).
noted that the representativeness required of the venire stage may be foregone at the petit jury stage to serve a legitimate state interest. In Holland, the assurance of impartiality provided by peremptory challenges constituted such an interest. The Court stated, "We have acknowledged that [the peremptory challenge] occupies 'an important position in our trial procedures,' . . . and has indeed been considered 'a necessary part of trial by jury' . . . ." "Peremptory challenges . . . are a means of 'eliminating' extremes of partiality on both sides,' . . . thereby 'assuring the selection of a qualified and unbiased jury' . . . ." 

The Court quickly dismissed Holland's claim that only prosecutorial peremptory challenges that intentionally exclude blacks should be barred. Even the theory of Holland's own case was incompatible with such a notion. The Court stated:

If the goal of the Sixth Amendment is representation of a fair cross-section of the community on the petit jury, [as Holland argues,] then intentionally using peremptory challenges to exclude any identifiable group should be impermissible -- which would, as we said in Lockhart, "likely require the elimination of peremptory challenges." 87

Any theory of the Sixth Amendment leading to that result is implausible. 88

Justice Kennedy's Concurring Opinion

While Justice Kennedy essentially agreed with the majority, he noted that the Court's holding does not alter the established rule that exclusion of a juror on the basis of race violates the juror's constitutional rights, whether the exclusion is by peremptory challenge or some other means. 89 Justice Kennedy stated that a defendant's race should not deprive him of standing in his own trial to vindicate the rights of his own jurors to serve on his jury. 90

82 Holland, 110 S.Ct. at 809 (citing Lockhart, 476 U.S. at 175).
83 Id. at 809. The Court stated that a prohibition on the exclusion of cognizable groups through the use of peremptory challenges would undermine, rather than support the notion of a constitutionally guaranteed impartial jury. "... [N]either the defendant nor the state should be favored. [T]he goal of jury impartiality with respect to both contestants] would be positively obstructed by a petit jury cross-section requirement which . . . would cripple the device of peremptory challenge." Id. at 809.
84 Id.
85 Id.
86 Id.
87 Id. (quoting in part Lockhart v. McCree, 476 U.S. 162, 178 (1986)).
88 Id. at 807-08.
89 Id. at 811.
90 Id. at 812. The majority did not dispute this. The majority flatly stated that it did not hold that a "white defendant does not have a valid constitutional challenge to such racial exclusion." Id. at 811. However, such a theory has generally been couched in equal protection terms and, as the majority noted, Holland did not seek review of an equal protection clause claim. Id. at n.3. The Court granted certiorari to examine Holland's sixth amendment claim and limited its review to that claim. Id.
Justice Kennedy also agreed with Justice Marshall’s conclusion that neither Batson\textsuperscript{91} nor the majority’s opinion precludes an equal protection claim by a defendant not of the same race as the excluded juror.\textsuperscript{92}

\textit{The Dissenting Opinions}

1. Justice Marshall

Justice Marshall accused the majority of “misrepresent[ing] the values underlying the fair cross-section requirement, overstat[ing] the difficulties associated with the elimination of racial discrimination in jury selection, and ignor[ing] the clear import of well-grounded precedents.”\textsuperscript{93} He noted that Batson was permitted to assert the rights of the members of his venire and of the general public.\textsuperscript{94} Marshall thought that Holland should be permitted to do the same.\textsuperscript{95}

Additionally, Justice Marshall discredited the majority’s assumption that impartiality is the sole end of the fair cross-section requirement.\textsuperscript{96} He reasoned that the fair cross-section requirement is not based upon the “constitutional demand for impartiality,” but rather on the notion that a jury is not a jury “in the eyes of the Constitution unless it is drawn from a fair cross-section of the community.”\textsuperscript{97} He concluded that the exercise of prosecutorial peremptory challenges solely to exclude blacks from a petit jury violates the sixth amendment.\textsuperscript{98}

According to Justice Marshall, the majority forged a single requirement from the fair cross-section requirement and the impartiality requirement. Justice Marshall viewed the two requirements as separate and distinct.\textsuperscript{99} He referred to the Court’s enumeration in \textit{Lockhart}\textsuperscript{100} and \textit{Taylor}\textsuperscript{101} of the purposes of the fair cross-section requirement,\textsuperscript{102} and chastised the majority for ignoring those purposes in reaching its

\textsuperscript{91} 476 U.S. 79.
\textsuperscript{92} \textit{Holland}, 110 S. Ct. at 812. Justice Kennedy noted that had Holland based his claim upon the fourteenth amendment equal protection clause, the claim would be meritorious. \textit{Id.} at 811.
\textsuperscript{93} \textit{Id.} at 812.
\textsuperscript{94} \textit{Id.} at 813-14.
\textsuperscript{95} See \textit{id.} at 814. Justice Marshall relied upon the absence of a specific holding by the Court, either in \textit{Batson}, 476 U.S. 79, or in \textit{Holland}, that a defendant has no fourteenth amendment interest in the racial composition of his jury when the excluded jurors are of a race different from his own.
\textsuperscript{96} \textit{Holland}, 110 S. Ct. at 814.
\textsuperscript{97} \textit{Id.} Justice Marshall stated that “jury” is a term of art; a body of people qualifies as a “jury” only after meeting certain constitutional minima.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 815.
\textsuperscript{100} 476 U.S. 162.
\textsuperscript{101} 419 U.S. 522.
\textsuperscript{102} The purposes of the fair cross-section requirement, as set forth in \textit{Lockhart}, 476 U.S. 162, and \textit{Taylor}, 419 U.S. 522, are (1) to guard “against the exercise of arbitrary power and [to] ensur[e] that the commonsense judgment of the community will [guard against] the overzealous prosecutor,” (2) to “preserv[e] public confidence in the fairness of the criminal justice system,” and (3) to “[implement the] belief that sharing in the administration of justice is a phase of civic responsibility.” \textit{Holland}, 110 S. Ct. at 815.
On that basis, Justice Marshall concluded that a defendant’s sixth amendment interest is impaired not only by the “exclusion from his jury of a significant segment of the community” through peremptory challenges, but also where such an exclusion results from improper selection of the venire.\footnote{Id. at 816.} Justice Marshall rejected the majority’s contention that a prohibition on the use of peremptory challenges to exclude members of distinctive groups solely on the basis of their distinctive attribute would cripple the peremptory challenge system.\footnote{Id. at 819.} He claimed this was one of many arguments that the majority fabricated in creating an opinion which “‘insulates an especially invidious form of racial discrimination in the selection of petit juries from Sixth Amendment scrutiny.’”\footnote{Id. at 819.}

2. Justice Stevens

Referring to the Court’s decision in \textit{Batson},\footnote{476 U.S. 79.} Justice Stevens opined that the Court erred in not considering the equal protection claim Holland raised in the Supreme Court of Illinois but failed to assert before the United States Supreme Court.\footnote{Id. at 820.} He wrote that “‘a showing that black jurors have been eliminated solely on account of their race not only is sufficient to establish a violation of the Fourteenth Amendment but also is sufficient to establish a violation of the Sixth Amendment.’”\footnote{Id. at 825.}

Justice Stevens also insisted that the sixth amendment guarantees defendants not only an impartial jury venire or jury pool, but an impartial jury.\footnote{Id. at 826.} “[B]y providing that juries be drawn through fair and neutral selection procedures from a broad cross-section of the community,” the sixth amendment ensures that a jury will reflect the views of the community.\footnote{Id. at 826.}

Relying upon the Court’s holding and Justice White’s concurring opinion in

\footnote{Id. at 817.}
\footnote{Id. at 816.} Justice Marshall argued that the majority misread the cases that it cited in support of its conclusions. “‘...[T]hese cases do not suggest that fair cross-section principles are inapplicable to the petit jury, [they] simply recognize that those principles do not mandate a petit jury that mirrors ... the community.’”\footnote{Id.}

\footnote{Id. at 819.} Justice Marshall suggested that whatever damage might be done to the system of peremptory challenges by applying the fair cross-section requirement to petit juries has already been done under the fourteenth amendment equal protection clause. Id. Justice Stevens reached a similar conclusion. Id. at 828-29.

\footnote{Id. at 819.} 476 U.S. 79. Justice Stevens mentioned that although \textit{Batson} did not assert an equal protection claim, the Court decided his case on equal protection grounds. \textit{Holland}, 110 S. Ct. at 821.

\footnote{Id.}
\footnote{Id. at 820.}
\footnote{Id. at 825.}
\footnote{Id. at 826.}
Batson, Justice Stevens concluded:

[where a defendant can] prove for equal protection purposes that the prosecutor's "strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try" the case, . . . and that the state is operating a discriminatory "selection procedure" . . . that same showing necessarily establishes that the defendant does not have a fair possibility of obtaining a representative cross-section for sixth amendment purposes.

Under that analysis, Justice Stewart found merit in Holland's sixth amendment claim. 114

ANALYSIS

The Court's approach in Holland was premised upon a strict interpretation of both the sixth amendment and prior case law, especially Batson. Staunchly unwilling to consider an equal protection issue, the Court focused upon the only claim which Holland had actually presented: the fair cross-section claim. The narrow effect of the decision was to explicitly maintain the inapplicability of the fair cross-section requirement to the petit jury and, more particularly, to racist peremptory challenges. The broad effect of the decision was to subjugate the elimination of racially discriminatory jury selection to the "legitimate state interest" in maintaining the system of peremptory challenges.

112 476 U.S. 79. Specifically, Justice Stevens referred to that part of the opinion in which the Court established an exception to the irrebuttable presumption established in Swain, 380 U.S. 202, that the prosecutor is using the state's challenges to obtain a fair and impartial jury. Under that exception, a defendant may establish from "the totality of relevant facts" that the prosecutor had other motives. Holland, 110 S. Ct. at 826.

113 Id. at 826-27.

114 Id. at 826.

115 110 S. Ct. 803.

116 See supra note 91.

117 See supra note 91.

118 The Court rejected Holland's "fundamental thesis" that a prosecutor's use of racially-based peremptory challenges violates the fair cross-section requirement. Holland, 110 S. Ct. at 806.

119 The Court noted that "[t]he tradition of peremptory challenges . . . was already venerable at the time of Blackstone" (citing 4 W. BLACKSTONE, COMMENTARIES 346-48 [1769]), "and has endured through two centuries in all the States" (citing Swain, 380 U.S. at 215-17). Holland, 110 S. Ct. at 808. "The constitutional
An analysis of the majority opinion in the context of the three separate opinions and the Court's prior decisions indicates that the Court has merely perpetuated an unnecessary evil.

**Holland and Fourteenth Amendment/Equal Protection Precedent**

Although his case was decided on the basis of the sixth amendment fair cross-section requirement, Holland did urge the Court to hybridize that requirement with the *Batson* rule. Thus, a thorough analysis of the case must incorporate a discussion of *Batson* and its equal protection antecedents.

In the 110 years since *Strauder*, the Court has been increasingly willing to allow criminal defendants to establish a prima facie case of racial discrimination in jury selection under the equal protection clause. Evolving from a recognition of only persistent and widespread discrimination in *Strauder* and *Swain*, the Court now recognizes racially discriminatory jury selection practices in a single case. The standard the Court established in *Batson* recognizes that discrimination may be a product not only of the system used to assemble the venire, but also of the peremptory challenges which play a role in disassembling it. Thus, *Batson* allows a defendant to establish a prima facie equal protection clause violation on the facts of his own case - provided that he is of the same race as the excluded jurors.

Holland urged the Court to abandon this same-race standing requirement. On the facts of his own case, he sought to establish a prima facie violation not of the equal protection clause, but of the fair cross-section requirement. The majority found that Holland did have standing to assert a sixth amendment challenge to the exclusion of all black potential jurors from his petit jury, as would any defendant. However, the Court did not find that he had established a prima facie violation of the sixth amendment.

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121 476 U.S. 79.
122 See supra note 11.
123 476 U.S. 79.
124 100 U.S. 303.
125 Id.
127 476 U.S. 79.
128 Id.
129 See supra note 11.
130 *Holland*, 110 S. Ct. at 806.
131 Id.
132 Id. at 805.
133 Id. at 811. The Court emphasized that it merely held that *Holland* had no "valid constitutional challenge based on the Sixth Amendment." Id. (emphasis in original).
The Court did not need to abolish the Batson same-race standing requirement for Holland to have standing to assert his sixth amendment claim. Thus, in the eyes of the Court, the obstacle to Holland’s success must have been his failure to assert an equal protection claim at the same time he urged modification of the Batson standing requirement. Had he done so, the only question would have been whether the Court would allow a white defendant to raise an equal protection challenge to the exclusion of blacks from his jury. This question remains unanswered.

However, assuming Holland did assert an equal protection claim for which he had standing, the equal protection clause would certainly have applied to the petit jury. In Batson, the Court determined that the clause applies both to the venire and to the petit jury. This underscores Holland’s error in asserting a claim based upon the fair-cross-section requirement (which does not apply to petit juries) rather than upon the equal protection clause (which does).

One can only speculate as to why the Court decided Holland on sixth amendment grounds in light of its decision in Batson upon an unasserted equal protection claim. However, the questionable basis of the Batson decision may provide some insight into Holland. In his dissent in Batson, Chief Justice Burger scathingly criticized the Court’s action. Only Justice Stevens attempted to justify the Court’s logic. He urged that the Court properly addressed the equal protection issue because the state relied upon it as a ground for affirmance, although Batson did not assert it. At least two commentators have theorized that the Court decided Batson upon equal protection rather than fair cross-section grounds because the former has been the traditional vehicle through which the Court has decided racially discriminatory jury selection cases.

From these comments on the Court’s Batson decision, several hypotheses can be advanced for the Court’s failure to follow the same strategy in Holland. Perhaps the most tenuous of these hypotheses is premised upon judicial mindsets. Chief Justice Burger mentioned the impropriety of the Court’s action in Batson.
Justice Scalia delivered the majority opinion in *Holland*. Theoretically, Justice Scalia filled the ideological position on the Court vacated by Chief Justice Burger. If Justice Scalia and Chief Justice Burger are viewed as ideologically similar, it would follow that a majority opinion authored by Justice Scalia would not repeat the *Batson* Court's errors.

A more sound argument logically and obviously extends from Justice Stevens' statement in *Batson*.\(^{144}\) Apparently, the Court defers to the arguments of the parties in determining the proper basis upon which to decide a case. In *Holland*,\(^{145}\) both parties briefed only the sixth amendment fair cross-section issue.\(^{146}\) Accordingly, the Court could quite logically be expected to limit its analysis to that issue.

A third proposition stems from the Court's tradition of deciding racial discrimination cases under the equal protection clause. Assuming that *Batson*\(^{147}\) merely followed that tradition, the Court's observation that *Holland*\(^{148}\) lacked a racial issue precluded a decision based upon the equal protection clause.

Regardless of the *Holland*\(^{149}\) Court's reason for its decision, it is clear the Court ignored its equal protection precedent. The Court was more deferential to its prior sixth amendment decisions.

**Holland and Sixth Amendment/Fair Cross-Section Requirement Precedent**

Holland claimed that the total exclusion of blacks from his petit jury violated the sixth amendment fair cross-section requirement.\(^{150}\) The Court carefully followed its decisions in *Taylor*,\(^ {151}\) *Duren*,\(^ {152}\) and *Lockhart*.\(^ {153}\) However, the facts of each of these cases are dissimilar to those in *Holland*.\(^ {154}\) In *Taylor* and *Duren*, the fair cross-section requirement was applied to the venire.\(^ {155}\) In *Lockhart*, the fair cross-section analysis was applied to challenges for cause based upon prospective jurors' attitudes about capital punishment.\(^ {156}\)

\(^{144}\) 476 U.S. 79.
\(^{145}\) 110 S. Ct. 803.
\(^{147}\) 476 U.S. 79.
\(^{148}\) 110 S. Ct. 803.
\(^{149}\) Id.
\(^{150}\) Id. at 806.
\(^{151}\) 419 U.S. 522.
\(^{152}\) 439 U.S. 357.
\(^{153}\) 476 U.S. 162.
\(^{154}\) 110 S. Ct. 803.
\(^{155}\) *Taylor*, 419 U.S. 522; *Duren*, 439 U.S. 357.
\(^{156}\) *Lockhart*, 476 U.S. 162.
In contrast, Holland's case presented the sixth amendment issue in the context of the petit jury, rather than the venire. Additionally, the case involved peremptory challenges, not challenges for cause. The Court refused to apply the fair cross-section requirement to the petit jury. The Court indicated its unwillingness to prevent the peremptory challenge system from achieving its purpose of maintaining jury impartiality.

Apparently, the Court's decision turned upon the semantic distinction between "representativeness" and "impartiality." The fair cross-section requirement is a means of assuring representativeness, while the peremptory challenge is a means of assuring impartiality. The Court noted that representativeness may, and often must, be sacrificed to uphold the constitutional guarantee of an impartial jury. Therefore, the fair cross-section requirement must end where the peremptory challenge begins.

Although its explanation was somewhat protracted, the Court essentially said that the fair cross-section requirement operates up to and including the venire stage of jury selection. The fair cross-section requirement secures a venire representative of the community. At that point, the parties may peremptorily challenge any member of the group who may be unable to fairly apply the law to the facts of the case. The peremptory challenges secure an impartial jury.

If the fair cross-section requirement were made applicable to the petit jury, the petit jury would have to be as representative of the community as the venire from which it is drawn. This contradicts not only the Court's holdings in Taylor and Duren, but the Constitution as well. Furthermore, a requirement that the petit jury be representative of the community allows no challenges to the venire. This requirement would destroy jury impartiality.

Carried to its extreme, the application of the fair cross-section requirement to the petit jury would result in the venire becoming the jury. Technically, any challenge to the venire would violate its representativeness. Thus, it seems that not

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157 But see Wilson, Prosecutorial Misuse of Peremptory Challenges and the Sixth Amendment, 29 How. L. J. 481, 493-94 (1986). This commentator argues that the fair cross-section requirement is rendered a nullity if not applicable to petit juries. She wrote "[i]f the objective of the [fair] cross-section requirement is to achieve impartiality by fostering interaction among jurors whose beliefs and backgrounds differ, the rule must be applied to the selection of petit juries . . . ." She insisted that because the interaction among jurors occurs at the petit jury stage, any practice which excludes groups from the jury and effectively hampers juror interaction violates the fair cross-section requirement.

158 See Holland, 110 S. Ct. 803.

159 Id.

160 Id.

161 Id.

162 Id.

163 419 U.S. 522.

164 439 U.S. 357.
only peremptory challenges but challenges for cause would necessarily cease to exist. Consequently, there would be no need for voir dire. In fact, the venire itself could be eliminated because those who would have been seated on the venire could now be seated as the jury. Because neither party would participate in selecting the jury, jury impartiality would be destroyed.

If the peremptory challenge is the guardian of jury impartiality, the Court properly limited the applicability of the fair cross-section requirement to the petit jury stages of jury selection. Assuming that the Court properly analyzed the sixth amendment, the Court correctly refused to apply the fair cross-section requirement to the petit jury. Had the Court extended the fair cross-section requirement to the petit jury, the Court would have encouraged large-scale violation of criminal defendants' constitutional right to trial by an "impartial jury".165 More specifically, the very remedy which Holland sought would have violated the right upon which he based his claim.

To Hybridize Or Not To Hybridize?

Holland leaves unanswered the question of whether a white defendant may successfully raise an equal protection challenge to the exclusion of blacks from his petit jury. As a result, the Holland Court essentially ignored the issue of racially discriminatory jury selection. The Court was blind to all but the fair cross-section requirement issue.

Accordingly, Holland raises the question of whether the equal protection analysis and the fair cross-section requirement analysis should be merged. Holland urged that a white defendant should be allowed to establish a prima facie violation of the fair cross-section requirement where blacks were excluded from his jury, just as a black defendant may establish a prima facie equal protection violation where such an exclusion occurs. But should a white defendant be permitted to establish a prima facie equal protection violation based upon the exclusion of blacks from his jury?

It has been argued that "the Batson prima facie standard is simply the Duren standard without the statistical analysis in the second step. The two could therefore be merged quite easily . . . ."

170 This merger would eliminate both the Batson same-race standing requirement and the restriction of the fair cross-section requirement cause of action to purposeful discrimination at the jury pool and venire

165 See U.S. Const. amend. VI, supra note 18.
166 110 S. Ct. 803.
167 Id.
168 476 U.S. 79.
169 439 U.S. 357.
170 Comment, supra note 11, at 389. The commentator notes that if the standards were combined, the defendant would need to show that the excluded group is a distinctive group which is underrepresented on the petit jury as a result of systematic exclusion in the jury selection process. Id.
Such a standard would be unworkable. Although it would permit the Court to address the issue of racial discrimination against black prospective jurors in the case of a white defendant, it would also necessarily extend the fair cross-section requirement to the petit jury. As stated previously, such an application of the fair cross-section requirement would be self-defeating. Thus, it appears that the equal protection clause and the fair cross-section requirement function best when they function separately.\textsuperscript{171}

\textit{The Separate Opinions: Encouraging Broader Interpretation And Attacking The Venerable Peremptory Challenge}

In response to the majority’s strict interpretivism, the separate opinions in \textit{Holland}\textsuperscript{172} encouraged a broader reading of constitutional principles and Court precedent. Even Justice Kennedy, who concurred with the majority, insisted that the Court’s narrowly-drawn opinion effectively ignored black prospective jurors’ rights in the trial of white criminal defendants.\textsuperscript{173}

More poignant were the dissenting opinions of Justices Marshall and Stevens.\textsuperscript{174} Both of the dissenting opinions insisted that the fair cross-section requirement must be applied to the petit jury.\textsuperscript{175} Interestingly, neither Marshall nor Stevens believed that this would impair the peremptory challenge system.\textsuperscript{176}

Justice Marshall’s observation that the states are not obliged to permit peremptory challenges\textsuperscript{177} suggests that the challenges are not the essential guardians of impartiality which the majority fancies them to be. As at least one commentator has noted, peremptory challenges have never been constitutionally mandated or protected.\textsuperscript{178}

Both Justices Marshall and Stevens insisted that the Court improperly shielded peremptory challenges from sixth amendment attack, given that the \textit{Batson}\textsuperscript{179} Court willingly left peremptory challenges completely unguarded against equal protection attacks.\textsuperscript{180} Justice Marshall contended that applying the fair cross-section require-

\textsuperscript{171} For a thorough discussion of this proposition, see Magid, \textit{Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts}, 24 SAN DIEGO L. REV. 1081 (1987).

\textsuperscript{172} 110 S. Ct. 803.

\textsuperscript{173} Id. at 811-12.

\textsuperscript{174} Id. at 812-29.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 818.


\textsuperscript{179} 476 U.S. 79.

\textsuperscript{180} See \textit{Holland}, 110 S. Ct. at 818, 828.
ment to the petit jury would damage peremptory challenges no more than the equal protection clause already had. 81 Justice Stevens curtly reminded the Court of its statements in Batson which suggested that equal protection scrutiny of all racially discriminatory peremptory challenges would ensure that no citizen could be excluded from jury service on racial bases, and would "further the ends of justice." 82

Unlike the majority, Justices Marshall and Stevens did not exalt the peremptory challenge. Although neither of them explicitly advocated the abolition of the peremptory challenge, much scholastic commentary suggests that both equal protection and fair cross-section requirement objectives can be achieved only by eliminating peremptories either for the prosecution alone or for both parties.83

Total abolition of peremptory challenges would be extremely harsh. It is also rather unlikely.84 Less severe alternatives exist and appear to be more workable. Perhaps the most obvious option is to impose upon peremptory challenges the same criteria under the sixth amendment as were imposed under the equal protection holding in Batson.85 Thus, in asserting both equal protection and fair cross-section violations, defendants could inquire into the prosecutor’s motives for peremptorily challenging a juror. However, such an inquiry would destroy the peremptory nature of the challenge.

Another option is to reduce or equalize the number of peremptory challenges available to each party.86 Finally, one commentator has proposed a procedure to affirmatively select jurors, by allowing each party to choose, rather than exclude, particular jurors.87

Perhaps the most effective solution to the problems which Holland88 presents

181 Id. at 819.
182 Id. at 828 (quoting Batson, 476 U.S. at 98-99).
187 110 S. Ct. 803.
is one neither courts nor commentators have previously proposed. It would incorporate both judicial and legislative reforms and balance both equal protection and fair cross-section considerations without abolishing the peremptory challenge. If the Court were to remove the Batson same-race standing requirement, a white defendant could establish a prima facie equal protection violation where blacks are excluded from his petit jury. This would truly achieve the Batson Court's goal of ensuring that no citizen is excluded from jury service on the basis of race. It would also bypass the inapplicability of the fair cross-section requirement to the petit jury.

The Court's reverence for the peremptory challenge indicates that any remedial measures applied to the peremptory challenge itself will likely come from Congress rather than the Court. Thus, a legislative modification to the sacred peremptory challenge system which would eliminate the need for close scrutiny of the challenges and curb racial discrimination in jury selection in its infancy would be well-advised. The decision as to what type of modification should be made is best left to Congress' discretion. However, Congress' modification should maintain the core concept of the peremptory challenge without allowing the device to be used against the very goal to which it purportedly aspires.

In any event, the high esteem accorded the peremptory challenge system indicates that such a change will be slow in coming.

CONCLUSION

Although a semantically-oriented analysis of the sixth amendment connotes that the Holland Court properly refused to apply the fair cross-section requirement to the petit jury, countervailing considerations suggest otherwise. The contours of the rights of excluded black prospective jurors remain undefined. It is equally unclear whether a white defendant has standing to assert an equal protection claim based upon the exclusion of black prospective jurors.

Furthermore, notwithstanding the Court's insistence in Batson that peremptory challenges be carefully monitored to curb racially discriminatory jury selection practices, the Holland Court upheld the much-revered peremptory challenge without even wincing as it perpetuated the very practices it had denounced in Batson.

Currently, there is a wide schism between fair cross-section and equal protection principles. It appears that the way to strike a balance between these principles is neither to hybridize the two concepts, nor to abolish peremptory

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189 476 U.S. 79.
190 Id. at 98-99.
191 110 S. Ct. 803.
192 476 U.S. 79.
193 110 S. Ct. 803.
challenges. Rather, the best way to reconcile the fair cross-section requirement and the equal protection clause might be to combine legislative and judicial actions addressing both concepts. This double-edged legislative and judicial sword may well be the proper response to the questions the Court has - again - left unanswered.

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