Comment

Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion

*Courtney A. Waggoner**

I. INTRODUCTION[1]

Throughout the past twenty years, the United States judicial system has seen many changes in what governmental acts pass constitutional muster.[2] One of the most hotly debated and rapidly evolving areas of constitutional law concerns the government's use of peremptory challenges in jury selection.[3] Little more than a century ago, states had the right to statutorily exclude certain races entirely from the jury pool.[4] Only in the past two decades, however, has the Supreme Court outlawed prosecutorial peremptory challenges based on race.[5] Further, it was not until 1994 that the Court opined that gender was no longer a tolerable

*J.D. expected May 2005. I would first like to thank my family and friends, especially my parents, Rick and Debbie Waggoner and my sister, Erin de Lucia, for their constant encouragement and unwavering support, not only throughout the writing of this article, but in all of my endeavors. I would also like to thank the members and editorial board of the Loyola University Chicago Law Journal for all of their advice and hard work, without which, this article would not have been possible. Finally, I would like to acknowledge the faculty and administration at Loyola, and thank them for their support in the production of the journal.

1. Please note that "peremptory challenge" will be used interchangeably with "peremptory strike" throughout this Comment.

2. *See infra* Parts II, III (discussing the changes concerning the constitutionality of peremptory challenges).

3. A peremptory challenge is a means by which a prosecutor can remove a potential juror from the jury pool without cause. Peter Michael Collins, *Taking* Batson *One Giant Step Further: The Court Prohibits Gender-Based Peremptory Challenges in* J.E.B. v. Alabama *ex rel. T.B.*, 44 CATH. U. L. REV. 935, 938 (1995).

4. *See* Strauder v. West Virginia, 100 U.S. 303, 309 (1879) (holding unconstitutional a West Virginia statute that banned African-Americans from the jury pool). "And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the state has expressly excluded every man of his race . . . is not a denial to him of equal legal protection." *Id*.

5. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986) (opining that eliminating a juror based on his or her race is violative of one's constitutional rights).

ground on which to exercise a peremptory strike.[6] The Court's movement to protect these two classes has prompted other similarly suspect classes to argue that they are also entitled to the same scrutiny.[7] More specifically, several recent decisions have questioned whether states should be permitted to use peremptory strikes based upon a potential juror's religion.[8]

Although courts are split on the treatment of religion-based peremptory challenges, the United States Supreme Court has yet to resolve the issue.[9] Because of this failure to resolve the uncertainty surrounding the removal of jurors based upon religious beliefs, courts are left to articulate their own opinions, sometimes based on confusing and inaccurate reasoning.[10] While some courts are unwilling to extend to religion the protection granted to race and gender, others make no distinction and grant the protection of individual rights to all of the above classes.[11]

Part II of this Comment will examine the classes of people meant to be protected by the Equal Protection Clause, the history surrounding peremptory challenges, and the key decisions that have led to race and

6. *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (admonishing the State's use of gender as a basis for peremptory challenges). "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* at 140.

7. *See infra* Part II.B.1 (discussing the treatment of religion as a suspect class).

8. *See generally* United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003) (affirming the State's exercise of peremptory challenges based on religious beliefs as opposed to religious affiliation); United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998) (scrutinizing in dicta the use of peremptory challenges in relation to religious beliefs and affiliation); State v. Davis, 504 N.W.2d 767, 772 (Minn. 1993) (upholding the prosecution's use of peremptory challenges in response to a potential juror's affiliation with the Jehovah's Witness faith) *cert. denied by* 511 U.S. 1115 (1994).

9. *See* Davis v. Minnesota, 511 U.S. 1115 (1994) (denying certiorari to 504 N.W.2d 767 (Minn. 1993)). A dissent argued that the issue should be heard and that strict scrutiny analysis should be applied to religious affiliations. *Id.* (Thomas, J., dissenting).

10. *See infra* Parts II.C.8, III (analyzing the different methods courts have used to address peremptory challenges and religion); *see also Davis v. Minnesota*, 511 U.S. at 1115 (Thomas, J., dissenting) (arguing that courts should hear religious bias challenges to a peremptory strike); *DeJesus*, 347 F.3d at 500 (declining to reverse a decision to uphold peremptory challenges based on religious affiliation); *Stafford*, 136 F.3d at 1114 (distinguishing between religious beliefs and religious affiliation); *Davis*, 504 N.W.2d at 767 (holding that peremptory challenges based on religion violate the Fourteenth Amendment).

11. *See infra* Parts II.C.8, III (analyzing the different methods courts have used to address peremptory challenges and religion); *see generally DeJesus*, 347 F.3d 500 (discussing peremptory challenges exercised by the State to remove two jurors based on their degrees of religious involvement); *Stafford*, 136 F.3d 1109 (analyzing the use of peremptory challenges in relation to religious beliefs and affiliation); *Davis*, 504 N.W.2d 767 (upholding the prosecution's use of peremptory challenges in response to a potential juror's affiliation with the Jehovah's Witness faith).

gender protection under the Fourteenth Amendment.[12] Part II will also explain the treatment of religion as a suspect class and the prohibition of peremptory challenges based on race and gender.[13] Part III will then examine recent cases dealing with peremptory challenges and religion and the difference in reasoning between the Third and Seventh Circuit Courts of the United States.[14] Then, Part IV will look at the consequences of treating religion as a suspect class in the context of peremptory challenges.[15] Part IV will also look at the potential eradication of peremptory challenges altogether due to the protection of yet another class of individuals.[16] Finally, Part V will recommend that the Supreme Court grant certiorari to examine religion-based peremptory challenges and set forth the appropriate framework for the limitations on government actions in this area.[17] This Part will then propose that the Supreme Court allow for this protection but distinguish between a potential juror's religious affiliation and his or her religious beliefs.[18]

II. BACKGROUND

Peremptory challenges have long been an integral litigation tool in the United States judicial system; this section will address the history and continuing reformation of these vital judicial mechanisms.[19] Part II.A of this section will begin with an explanation of the purpose and policies behind peremptory challenges.[20] It will explain the origin and importance of allowing a litigant to strike a potential juror without cause

12. *See infra* Parts II, III (detailing the historical development of the use of peremptory challenges and the recent treatment of religion and peremptory challenges).

13. *See infra* Parts II.A–II.C.6 (explaining the legal development of peremptory challenges, the Equal Protection Clause, suspect classes, and cases holding peremptory strikes based on race and gender to be invalid).

14. *See infra* Part III (evaluating the Third and Seventh Circuit cases related to peremptory challenges and religion, and explaining how the various circuits have utilized different reasoning).

15. *See infra* Part IV.A (identifying the potential problems for peremptory challenges with the protection extended to religion).

16. *See infra* Part IV.B (describing how the total elimination of peremptory challenges poses a potential problem with the extension of protection to religion).

17. *See infra* Part V (arguing that the Supreme Court must set forth an opinion on the limitations of peremptory challenges and religion).

18. *See infra* Part V (recommending that the Supreme Court establish a definitive opinion on the status of peremptory challenges and religion).

19. *See* Part II (detailing the historical development of peremptory challenges, their past limitations and the related cases).

20. *See infra* Part II.A (differentiating between "for cause" and "peremptory" challenges and explaining the legal principles behind the two challenges).

by use of a peremptory challenge.[21] Part II.B will discuss the Fourteenth Amendment generally and the Equal Protection Clause's different standards of review based upon class.[22] This Part will also discuss some of the classes that are regularly granted strict scrutiny analysis under the Equal Protection Clause and will show how the Court should extend this protection to religion.[23] Part II.C will begin by presenting a brief history of racial discrimination before moving into the central cases shaping the use of peremptory challenges.[24] After chronicling the historical exclusion of African-Americans from juries altogether, this Part will explore the major cases leading up to the Supreme Court's decision that race-based peremptory challenges are constitutionally unacceptable.[25] Part II.C will then discuss in detail the Supreme Court opinion holding that gender-based peremptory challenges are also unconstitutional.[26] Finally, Part II.C will conclude with a discussion of two state supreme court cases, *State v. Davis* and *People v. Wheeler*.[27]

A. Tools for Excusing a Potential Juror: For Cause and Peremptory Challenges

The United States Constitution guarantees each defendant accused of a crime the right to a trial by jury.[28] Prior to trial, a large number of potential jurors are considered for the twelve or fewer jury spots.[29] After a "pool" of potential jurors is formed through jury summons, the

21. *See infra* Part II.A (comparing the elimination of potential jurors by using for cause and peremptory challenges).

22. *See infra* Part II.B (discussing the Equal Protection Clause of the Fourteenth Amendment).

23. *See infra* Part II.B (illustrating how the Equal Protection Clause of the Fourteenth Amendment has been extended to religion).

24. *See infra* Part II.C.1–4 (analyzing the historical treatment of discrimination in peremptory challenges); *see also* United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003) (discussing peremptory challenges exercised by the State to remove two jurors based on their degrees of religious involvement).

25. *See infra* Part II.C.3–4 (delineating the two main cases, *Swain v. Alabama* and *Batson v. Kentucky*, which have contributed to the holding that peremptory challenges based on race violate the Fourteenth Amendment).

26. *See infra* Part II.C.6 (discussing *J.E.B. v. Alabama* ex rel. *T.B.* and the Court's holding that gender stereotypes are an improper basis on which to exercise a peremptory challenge).

27. *See infra* Part II.C.8 (examining *State v. Davis* and *People v. Wheeler*, in which the Minnesota and California Supreme Courts consider peremptory challenges based on religion).

28. U.S. CONST. amend. VI.

29. Sherry F. Colb, *Too Religious for the Jury?: A Federal Court Upholds Peremptory Challenges Based on Religious Involvement*, *at* http://writ.news.findlaw.com/colb/20031105.html (last visited May 24, 2004). Only six states permit juries with fewer than twelve members to decide felony cases, but nearly twenty states permit small juries in misdemeanor cases. GEORGE F. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 479 (6th ed. 1992).

group is broken up into smaller units for specific trials.[30] Once organized into these smaller groups, the judge and attorneys for each side question the venire about various topics, including personal background, personal opinions, and life experiences.[31] This process of learning about any propensities or biases that a juror might have in relation to fairly weighing the evidence is called voir dire.[32] Through the process of voir dire, an attorney may challenge a prospective juror in one of two ways: for cause or by use of a peremptory challenge.[33] If an attorney can prove, based on the prospective juror's answers, that he or she is incapable of serving on the jury, an unlimited amount of jurors can be eliminated for cause.[34]

30. *Voir Dire: Creating the Jury*, *at* http://www.crfc.org/americanjury/voir_dire.html (last visited May 24, 2004).

31. Venire is defined as "a panel of persons who have been selected for jury duty and from among whom the jurors are to be chosen." BLACK'S LAW DICTIONARY 1553 (7th ed. 1999). *See also Creating the Jury*, *supra* note 30. Some examples of the types of questions that may be asked of potential jurors in a murder case are as follows:

> "You'll be seeing sad pictures of Johnny – the way he looked after his dead body was left in a ditch . . . [w]ill this make you so angry you won't be able to be objective . . .?"
>
> "Anyone feel they could decide a civil case where money is concerned, but don't want to serve on a criminal murder case?"
>
> "Is there anyone here who doesn't watch news on television on a regular basis?"
>
> "Is there anyone on the panel who does *not* agree that you will decide this case only on what you hear in this courtroom?"
>
> "Have you known *anyone* who was murdered or whom someone attempted to murder? Or have you known the family of a murder victim or attempted murder victim?"
>
> "Have any of you ever been trained in medical areas – for example, as a doctor, nurse, or emergency technician – or does anyone close to you have any type of medical training?"
>
> "There will be a police officer here to testify. How many of you think that simply because a police officer says something, it must be true?"

JURY SELECTION: SAMPLE VOIR DIRE QUESTIONS, 558–69 (Starr Litigation Services, Inc. ed., 2001).

32. "Voir dire" is an Anglo-French term that literally means "to speak the truth" and is defined as "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." BLACK'S LAW DICTIONARY, *supra* note 31, at 156; s*ee also Creating the Jury*, *supra* note 30 (explaining the literal definition of *voir dire*).

33. Collins, *supra* note 3, at 937–38. "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Batson v. Kentucky, 476 U.S. 79, 135 (1986) (Rehnquist, J., dissenting).

34. Colb, *supra* note 29. An attorney can challenge a prospective juror "for cause" if that person states or otherwise expresses a bias against the attorney's case. *Id*. A juror who has been struck for cause is one who "could not be trusted to engage in neutral, objective fact-finding." *Id.* The number of for cause strikes is not set by law, and will "depend entirely on the number of potential jurors about whose ability to carry out their duties either party can convincingly raise serious questions to the judge." *Id.*

Another method available to prosecutors to excuse jurors is the peremptory challenge.[35] Unlike a "for cause" elimination, a peremptory challenge allows an attorney to strike a juror without justification.[36] Instead, peremptory challenges are based on things such as intuition or past experiences.[37] These discretionary strikes made their way into American law from England and have been codified in federal statutes since 1790.[38] Peremptory challenges are imperative not only for occasions where a "for cause" challenge has been denied, but also when the concern about a potential juror's fairness is not enough to illicit a "for cause" challenge.[39] During early examinations, courts were disinclined to question the underlying motives of a peremptory challenge.[40] However, following several landmark cases, attorneys are now prohibited from using peremptory challenges to remove a juror based on race or gender.[41]

B. The Fourteenth Amendment: Equal Protection Clause Analysis

Under the Fourteenth Amendment to the United States Constitution,

35. Collins, *supra* note 3, at 938.

36. *Id*.

37. Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567, 576 (1996).

38. *Id.* at 575 (citing Act of April 30, 1790, ch. 9, § 30, 1 Stat. 112, 119). The framers initially considered including the right to peremptory challenges in the Constitution, but ultimately rejected the idea. Pamela R. Garfield, J.E.B. v. Alabama *ex rel. T.B.*: *Discrimination by any Other Name . . .*, 72 DENV. U. L. REV. 169, 172 (1994).

39. State v. Davis, 504 N.W.2d 767, 770 (Minn. 1993); *see generally* John P. Marks, Bader v. State*: The Arkansas Supreme Court Restricts the Role Religion May Play in Jury Selection*, 55 ARK. L. REV. 613 (2002) (discussing an Arkansas Supreme Court decision regarding the State's use of peremptory challenges based on religion).

40. *E.g.*, Swain v. Alabama, 380 U.S. 202, 218–19 (1965) (holding that the Constitution does not require an explanation of the motives behind peremptory challenges). *See also* Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL'Y 323, 327 (2003) (outlining the origins of the United State's inheritance of the peremptory challenge from England during colonial times).

41. *See Swain*, 380 U.S. at 218–19 (holding that the Constitution does not require an explanation of the motives behind peremptory challenges). The Court found the purpose of peremptory challenges justifies its use against any person for any reason. *Id*. at 212. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that State's peremptory challenge would be deemed constitutional unless supported by a race neutral explanation). *Batson* overruled *Swain v. Alabama*. *See* Purkett v. Elem, 514 U.S. 765 (1995) (per curiam) (limiting the protections afforded to race and gender-based peremptory challenges); J.E.B. v. Alabama *ex rel. T.B.*, 511 U.S. 127, 144–46 (1994) (extending heightened scrutiny to gender when deciding the basis for peremptory challenges).

all citizens are guaranteed equal protection of the law.[42] In an effort to reconcile this constitutional promise with legislative measures, the judicial system has refused to uphold any law that burdens a specific fundamental right or targets a suspect class.[43] In determining whether a governmental action is unconstitutional, the Court has developed a three-standard approach: rational basis, intermediate scrutiny and strict scrutiny.[44] The applicable standard of review dictates the amount of deference that courts will give to the legislative action.[45]

If a challenged legislative measure does not specifically affect a suspect class or does not endanger a fundamental right, then it will only undergo a rational-basis review.[46] Rational-basis review consists of determining whether the challenged classification is rationally related to a legitimate state interest.[47] When drafting regulations that are aimed at generally benign areas, such as economic regulation, states are given leeway to create legislation as long as they do not infringe upon fundamental rights.[48]

The middle level of scrutiny is called intermediate scrutiny, which is sometimes applied to classes warranting a heightened level of scrutiny.[49] In determining whether an action that is subject to intermediate scrutiny is constitutionally valid, courts will analyze: (1) the importance of the governmental objective; and (2) whether the objective can be fulfilled by using the classification at issue.[50]

42. U.S. CONST. amend. XIV, § 1. This amendment was adopted in 1868 for the purpose of "securing to a race recently emancipated, a race that through many generation had been held in slavery, all the civil rights that the [majority] race enjoy[s]." Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

43. Romer v. Evans, 517 U.S. 620, 631 (1996) (examining the constitutionality of an amendment to the Colorado state constitution that prohibited all executive, legislative, and judicial actions designed to protect homosexual citizens from discrimination). The Court states that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate end. *Id.*

44. Marianne E. Kreisher, *Religion: The Cognizable Difference in Peremptory Challenges*, 5 WIDENER J. PUB. L. 131, 136 (1995) (detailing the three standards used in equal protection analyses: (1) rational basis; (2) intermediate scrutiny; and (3) strict scrutiny).

45. *Id.*

46. *See id.* (describing the positive correlation between stricter standards of review and a challenge's effect on a suspect class).

47. *Id.*

48. *See id.* (implying that states tend to have less restrints in creating legislation when there is low risk of adverse effects on fundamental rights).

49. *Id.* at 137. The classes most often warranting this intermediate level of scrutiny are gender, alienage, and illegitimacy. Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 446–47 (2004).

50. Kreisher, *supra* note 44, at 137 (discussing the factors used to determine constitutionality

Intermediate scrutiny is not as rigorous as strict scrutiny; therefore, classifications that would sometimes be deemed unconstitutional if affecting a class subject to strict scrutiny are permitted.[51] However, in the case of peremptory challenges, gender, which is traditionally subject only to intermediate scrutiny, has been held to a standard equivalent to strict scrutiny.[52]

When a class is deemed "suspect,"[53] then, under an equal protection analysis, legislation may not single out members of that class unless that legislation is narrowly tailored to address a compelling state interest.[54] This form of scrutiny applied to regulations affecting suspect classes is labeled "strict scrutiny."[55] Strict scrutiny triggers a presumption against

under intermediate scrutiny). "When applying the intermediate level of scrutiny, courts examine whether the classification 'serve[s] important governmental objectives and [is] substantially related to [the] achievement of those objectives.'" *Id.* (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

51. *See id.* at 136–37 (contrasting results under intermediate scrutiny with results under strict scrutiny).

52. *See infra* Part II.C.6 (discussing *J.E.B. v. Alabama* ex rel. *T.B.*); *see also* Rainey v. Chever, 527 U.S. 1044 (1999) (applying intermediate scrutiny to a gender-based classification imposing support obligations on fathers of out of wedlock children); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (discussing the current stance of law as subjecting gender to intermediate scrutiny); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (examining the State's use of gender as a basis for peremptory challenges). *J.E.B.* held that the State's use of peremptory challenges based on gender stereotypes, did not provide substantial aid to litigant's efforts to secure fair and impartial juries, and therefore fails to withstand heightened scrutiny. *Id*. at 140, 143.

53. A suspect class is defined as a group "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1975)).

54. Colleen Carlton Smith, Zelman*'s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1990–91 (2003). The framework to evaluate most equal protection claims is: "(1) Does the government's classification target a suspect (or semi-suspect) class; and (2) [I]f so, does the state have a sufficiently compelling interest that justifies targeting the selected group?" *Id.* at 1991 (citing *Rodriguez*, 411 U.S. at 17). "Under . . . Equal Protection analysis, the strict scrutiny standard is: . . . the law or practice at issue must be narrowly tailored to serve a compelling government interest." Benjamin Hoorn Barton, *Religion-Based Peremptory Challenges after* Batson v. Kentucky *and* J.E.B. v. Alabama: *An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 208 (1995) (citing Larson v. Valente, 456 U.S. 228, 247 (1982) and Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986)).

55. Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 867–68 (2004). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 575 (4th ed. 1991) (explaining when strict scrutiny is used); Kreisher, *supra* note 44, at 136–37 (defining strict scrutiny). Strict scrutiny analysis "is the highest level [of scrutiny] and applies to classifications based on suspect classes and fundamental rights." *Id*. at 136.

> Under strict scrutiny the courts will not defer to the legislature but, instead, will engage in an independent analysis to determine whether the classification serves a compelling

a law or practice when that law or practice is aimed at a particularly sensitive class of persons.[56] The strict scrutiny approach attempts to weigh the government interest against the risk of discriminatory effects or outcomes.[57] Although equal protection under the Fourteenth Amendment was initially created in response to racial inequalities, the constitutional protections have been extended to gender and other classes.[58] The Supreme Court has created a hierarchy of classes, where some classes are inherently more suspect than others.[59] Based on this scheme, the Court has subjected certain laws and practices to higher levels of scrutiny, depending upon the class's level of suspicion.[60]

1. Is Religion a Suspect Class?

The Fourteenth Amendment provides that no person shall be denied the equal protection of the laws of the United States by legislative action or judicial practices.[61] The Supreme Court has interpreted this constitutional provision to mean that any law or practice that burdens a fundamental right or is aimed at a suspect class is unconstitutional, and therefore will not be upheld.[62] The Court treats both race and gender as suspect classes for the purposes of peremptory challenges, forcing the Court to weigh the legitimate interests of the state against those of the proposed action or legislation.[63]

> governmental interest. This test is applied to legislation that deals with fundamental constitutional rights, or classifications based on "race, alienage, or national origin."

Id. at 136–37.

56. *See* Kreisher, *supra* note 44, at 137 (describing the strong presumption strict scrutiny creates against a law or practice).

57. *See id.* (explaining the balancing test included under the strict scrutiny standard).

58. *See* Hamburger, *supra* note 55, at 867 (analyzing the Fourteenth Amendment and different standards of scrutiny).

59. *Id.* "The Supreme Court has had to distinguish among different classifications and has adopted a scheme in which some [classes] are more 'suspect' than others." *Id.* While race and national origin are subject to the highest level of scrutiny, classifications such as age and "mental retardation" do not call for such strict standards. City of Cleburne. v. Cleburne Living Ctr., 473 U.S. 432, 441–43 (1985) (holding that "mental retardation" is not a classification calling for a more strenuous standard of review than given to social or economic legislation).

60. *See id.* (holding that an equal standard of review should apply to mental capacity and social or economic legislation).

> Moreover, the Court has had to subject different types of classification to different degrees of scrutiny, initially because the Equal Protection Clause did not specify any forbidden classification, but especially during the past half century because the clause has increasingly been understood to protect against not only unequal constraints on natural liberty but also unequal privileges from government.

Id. at 867–68.

61. Romer v. Evans, 517 U.S. 620, 631 (1996).

62. *Id.*

63. *See infra* Part II.C.1–6 (discussing cases that have held race and gender to be an

As seen in multiple opinions, the Court has routinely held race to be a per se suspect class, demanding a legitimate purpose from the state before upholding the act.[64] The purpose behind these opinions was to, in effect, eliminate state-supported racial discrimination.[65] The Supreme Court's treatment of gender parallels that of race when dealing with peremptory challenges.[66] The Court has opined that gender-based discrimination is as damaging as race-based discrimination.[67] Both race and gender are immutable characteristics that can serve to impose stigmas on certain sectors of the population.[68] Some argue that religion is not an immutable characteristic, and therefore should not merit the same protection as race and gender.[69] However, religion should, and

impermissible ground upon which to exercise a peremptory challenge).

64. *See* McCleskey v. Kemp, 481 U.S. 279, 294–95 (1987) (scrutinizing Georgia death penalty cases and the potential statistical evidence surrounding African-Americans and disproportionate death penalty sentencing); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (discussing whether a Florida court should award sole custody of a child to the father because the mother was cohabitating with an African-American man); Vill. of Arlington Heights v. Metro. Hous. Dev., 429 U.S. 252, 265–66 (1977) (discussing a village zoning decision and its relation to racial discrimination); Washington v. Davis, 426 U.S. 229, 239 (1976) (analyzing a law, though neutral on its face, which serves to affect a disproportionate number of members of a certain race); Loving v. Virginia 388 U.S. 1, 11 (1967) (analyzing whether a statutory scheme adopted by Virginia to make it unlawful for races to intermarry is within constitutional boundaries); Gomillion v. Lightfoot, 364 U.S. 339, 346–47 (1960) (holding unconstitutional an Alabama law that changed voting boundaries, which in effect removed African-American voters from the district); Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (analyzing whether a San Francisco ordinance regarding laundry permits, which served to effectually discriminate against Chinese immigrants in the city, violated the Constitution).

65. JEROME A. BARRON, ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY—CASES AND MATERIALS 594 (6th ed. 2002).

66. *See generally* Craig v. Boren, 429 U.S. 190, 197–98 (1976) (examining a law that allowed women over eighteen years of age to consume alcohol, while men needed to be at least twenty one years old before they were permitted to consume alcohol); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (discussing the right for a woman to claim her spouse as a dependent for purposes of attaining medical and dental benefits equal to those of males claiming their spouses); Reed v. Reed, 404 U.S. 71, 75–76 (1971) (striking down a law that gave males a preference over females in regard to estate administration).

67. In *Bakke*, Justice Brennan opined that "gender-based classification too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part). In the Brief of the Appellees in *Frontiero v. Richardson*, the Solicitor General wrote that "sex, like race or national origin, is a visible and immutable biological characteristic that bears no necessary relation to ability." Brief for Appellees at 10, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694).

68. BARRON ET AL., *supra* note 65, at 594 (describing the detrimental effects of a class-based society).

69. Kreisher, *supra* note 44, at 165.

> It is usually easy to determine a person's race and gender based solely on appearance. However religion is not usually apparent to the naked eye; "religious affiliation (or lack thereof) is not as self-evident as race or gender." It is sometimes possible to look

does, enjoy many of the same protections as other suspect classes because the freedom to choose one's religion is a right granted by the Constitution.[70] In addition, some courts have even gone so far as to deem religion an immutable characteristic.[71]

Further, individual religions have been the basis of a long history of discrimination, much like race and gender.[72] Although the Supreme

> at the name or physical characteristics of a person and guess that person's religion. However, religion is different from race and gender in that the only way to determine a person's religion with certainty is to inquire. Even then it is difficult to determine how great an influence religious belief has on the individual. Although religion is an association based on conscience, it is important to recognize that religious affiliation is a voluntary choice and can be changed.

Id. at 167–68 (quoting State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993)).

70. U.S. CONST. amend. I. "In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." Larson v. Valente, 456 U.S. 228, 246 (1982); "[D]iscrimination . . . [that is] purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens . . .would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes." Am. Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92 (1900).

71. Kreisher, *supra* note 44, at 165. In some instances, the legislature has provided by statute that religion is immutable. *Id.* (arguing that the religious beliefs of a potential juror may create such a bias that the litigant should be permitted to strike a potential juror based on his religious beliefs); *see also* Galloway v. Louisiana, 817 F.2d 1154, 1159 (5th Cir. 1987) (addressing a civil rights violation and holding that to support such a claim a plaintiff must show membership in some group with inherited or immutable characteristic to meet the burden of proof); Schwager v. Sun Oil Co., 591 F.2d 58, 60 (10th Cir. 1979) (holding that the plaintiff established a prima facie case of age discrimination).

72. BARRON ET AL., *supra* note 65, at 594.

> Religious prejudice has taken many forms in this country. Puritans in colonial New England banished Baptists, Catholics were discriminated against in many colonies (there were laws prohibiting them from holding public office or starting their own schools; some colonies taxed ship captains who transported Catholics), as were Quakers. After the revolution, several state constitutions prohibited Jews and Catholics from holding public office. In the 1830s, the Mormons were attacked, their leader was killed by a mob and they were driven out of several states before finding refuge in Utah. Just before the Civil war, the American Party, better known as the Know-Nothing Party, became popular with its anti-immigrant, anti-Catholic views; that anti-Catholic bigotry would be apparent in the opposition to the Presidential candidacies of Al Smith in 1928 and John Kennedy in 1960. Antisemitism has been present throughout our history, from prohibitions of public worship of Judaism in some colonies to the exclusion of Jews from the neighborhoods, clubs and professions dominated by the Protestants throughout much of the nineteenth and twentieth centuries to the attacks on synagogues and virulent anti-Semitism propaganda of neo-Nazi groups in recent years. There was an [sic] element of religious prejudice directed against Muslims after the terrorist attacks of September 11, 2001, as the hijackers proclaimed themselves to be devout Muslims and some Americans assumed that all Muslims were on a mission from Allah to destroy America.

73 AM. JUR. 3D *Religious Prejudice as Violation of Right to Fair Trial* § 2 (2003); *see also* Richard Wronski, *Fear of Hate Crime Lingers*, CHI. TRIB., Sept. 5, 2002, at A9 (discussing

Court has not yet set forth an opinion stating such, it has been argued that these protections should be extended in the case of peremptory challenges to prevent the same generalizations and stereotypes that are the root of racial or gender-based strikes.[73] By failing to recognize the similar discriminatory motive behind religion-based challenges, courts are failing to protect the individual rights of potential jurors.[74]

C. Unacceptable Uses for Peremptory Challenges

The United States has a long history of discrimination, which has been specifically aimed at several classes in particular. This Part will

religion-based discrimination).

73. Wronski, *supra* note 72, at 9. Some faiths have stereotypes surrounding them, which if allowed to influence a prosecutor's decision, would have the same effect as basing a peremptory challenge on race or gender. *See generally* J. Suzanne Bell Chambers, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569 (1995) (discussing the relation of religion to juror bias for the purpose of peremptory challenges and addressing whether equal protection principles should be applied to peremptory strikes based on religion in light of past Supreme Court decisions holding that peremptory strikes could not be used to discriminate based on race or gender). One source cautions: "On the matter of religion, attorneys who are defending are advised that Presbyterians are too cold; Baptists are even less desirable; and Lutherans, especially Scandinavians, will convict. Methodists may be acceptable. Keep Jews, Unitarians, Universalists, Congregationalists, and agnostics." REID HASTIE ET AL., INSIDE THE JURY 123 (1983).

74. Some courts mistakenly believe "that because members of a religious faith share the same doctrinal convictions by definition, then moral, social, political and philosophical beliefs characteristic of the faith may fairly be attributed to all of them." Scot Leaders, *Unresolved Differences: Constitutionality of Religion-Based Peremptory Strikes, the Need for Supreme Court Adjudication*, 3 TEX. F. ON C.L. & C.R. 99, 107–08 (1997). *See also* Susan Hightower, *Sex and the Peremptory Strike: An Empirical Analysis of* J.E.B. v. Alabama*'s First Five Years*, 52 STAN. L. REV. 895, 903 (2000) (discussing the impact of *J.E.B. v. Alabama* ex rel. T.B. on peremptory challenges and showing that the case has done little to extend restrictions on the peremptory challenge although many predicted the opposite effect).

> Other than the differing views on religion, courts have been extremely reluctant to extend the supervision of *Batson* and *J.E.B.* to peremptory strikes against other categories of jurors. Both before and after J.E.B., people of Italian American descent have been found to be a cognizable racial group protected under Batson from discrimination based on national origin in the use of peremptory challenges. Yet lower courts have refused to extend Batson to a plethora of other categories. Classifications on which challenges are still permissible include veniremembers' age, reservations about the death penalty, socioeconomic status (including unemployment or poverty), occupation, disability, and obesity. On the other hand, a California appellate court recently held that gays and lesbians cannot be excluded from juries under the state constitution. In an interesting line of cases growing out of the Supreme Court's decision in Duren v. Missouri, plaintiffs have asserted that states are guilty of discrimination against women jurors in violation of the Equal Protection Clause when they refuse to pay for child care, particularly for sequestered jurors, but those claims are a step removed from the subject of the peremptory strike and so far have been unavailing.

Id. at 903–04 (footnotes omitted).

begin by looking at *Brown v. Board of Education*, the classic Supreme Court case dealing with racial discrimination.[75] Then, this Part will discuss *Strauder v. West Virginia* and the Supreme Court's opinion that the statutory exclusion of African-Americans from juries is unconstitutional.[76] This Part will next review the Court's *Swain v. Alabama* opinion, and the resulting burden of proof related to race-based peremptory challenges.[77] Part III.C.4 will introduce *Batson v. Kentucky* as the Supreme Court's definitive opinion on the constitutionality of racial discrimination in jury selection.[78] Then, Part III.C.5 will discuss the limitations on *Batson*, while Part III.C.6 will look at the recent Supreme Court decision outlawing gender-based peremptory challenges.[79] Parts III.C.7–8 will then address peremptory challenges based upon religion and discuss two state supreme court cases dealing with the constitutionality of such challenges.[80]

1. A Brief Treatment of the Historical Racial Discrimination Against African-Americans

Racial discrimination has an extensive history in the United States judicial system.[81] Many have commented on the failure to provide African-Americans equal rights and equal protection in the antebellum

75. *See infra* Part II.C.1 (discussing *Brown v. Board of Education*, which held that separate but equal schools are inherently unequal and therefore violative of equal protection).

76. *See infra* Part II.C.2 (discussing *Strauder v. West Virginia* and stating that in all states, African-Americans were to be protected by the same laws as their white counterparts, which also prohibited states from depriving African-America defendants the right to have African-American jurors); *see also* Strauder v. West Virginia, 100 U.S. 303, 312 (1879) (holding a state statute preventing African-Americans from serving on juries unconstitutional since it violated the Equal Protection Clause).

77. *See infra* Part II.C.3 (discussing *Swain v. Alabama* and holding that although peremptory challenges are not necessarily subject to equal protection scrutiny, they cannot be used to specifically exclude African-American jurors); *see also* Swain v. Alabama, 380 U.S. 202, 227 (1965) (holding that the Constitution does not require an explanation of the motives behind peremptory challenges).

78. *See infra* Part II.C.4 (discussing *Batson v. Kentucky*, which revisited the reasoning in *Strauder*); *see also* Batson v. Kentucky, 476 U.S. 79, 99 (1986) (holding that intentionally excluding African-American jurors violates equal protection and denies the accused an unbiased judgment by his peers).

79. *See infra* Parts II.C.5–6 (discussing *Purkett v. Elem*, and *J.E.B. v. Alabama*, ex rel. *T.B.*); *see also* Purkett v. Elem, 514 U.S. 765, 769 (1995) (discussing pretextual reasoning for peremptory challenges following the *Batson v. Kentucky* decisions); J.E.B. v. Alabama, *ex rel.* T.B., 511 U.S. 127, 138 (1994) (discussing the State's use of gender as a basis for a peremptory strike).

80. *See infra* Parts II.C.7–8 (discussing peremptory challenges and religion and opinions discussing the issue from the Minnesota and California Supreme Courts).

81. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW, 34–39 (1997) (discussing legalized discrimination against African-Americans in antebullum America).

South.[82] In addition, although Reconstruction sought to eliminate the maltreatment of African-Americans, racially motivated violence and discrimination continued for many years following the surrender of the Confederacy in 1865.[83] This racial violence continued in the years following the Supreme Court's *Brown* opinion, which invalidated de jure segregation in the country's public schools.[84]

The Court decided *Brown* in 1952 after granting certiorari to a group of cases that all dealt with racial segregation and came from Kansas, South Carolina, Virginia, and Delaware.[85] *Brown* required the Court to determine whether the Equal Protection Clause of the Fourteenth Amendment prohibited the "separate but equal" doctrine, wherein equality is presumed when both races are provided with equivalent, but separate, facilities.[86] In its opinion, the Court discussed the fact that courts had dealt with the "separate but equal" doctrine since *Plessy v. Ferguson*.[87] However, the Court reasoned that education is one of the, if not *the*, most important governmental functions and that to extend

82. *Id.* Many authors and scholars have commented on the social policies in effect before the American Civil War, especially the victimization of African-Americans based on the failure to offer them the protections of the criminal law. *Id*. "Malcolm X spoke of how he 'learned to hate every drop of that white rapist's blood that is in me.'" *Id.* (quoting MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X, 2 (1965)). "In the writings of Toni Morrison [and] Patricia Williams . . . the rape of slave women surfaces time and again as unredressed violation." *Id.*

83. *Id.* at 39–68 (discussing violence against African-Americans from before the Civil War until the civil rights movement one hundred years later). "Throughout the 1860s and 1870s, congressional hearings, newspaper accounts, and magazine articles were filled with stories featuring blacks who were beaten, murdered, raped, or robbed by angry, resentful, racist Southern whites whom local authorities were either unwilling or unable to restrain or punish." *Id*. at 39.

84. *See generally* Brown v. Board of Educ., 347 U.S. 483, 486–88 (1954) (stating the consolidated opinion of multiple cases challenging racial segregation in America's public schools). "In the five years following [*Brown*] . . . white supremacists engaged in 210 recorded acts of racially motivated violence. The list includes six murders, twenty nine assaults with firearms, forty four beatings, and sixty bombings." KENNEDY, *supra* note 81, at 63.

85. *Brown*, 347 U.S. at 486. The cases were "premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion." *Id.* In the Kansas case, the plaintiffs were African-American children of elementary school age who were challenging a Kansas statute permitting cities of more than 15,000 people to maintain separate schools for African-American and white students. *Id.* at 486, n.1. The South Carolina case dealt with elementary and high school African-American students and their request to enjoin the state constitution and code, which required racial segregation in public schools. *Id.* In the case coming out of Virginia, the plaintiffs were high school age African-American students challenging the state constitution and code, also requiring segregation in public schools. *Id*. Finally, the Delaware case concerned elementary and high school African-American students who were challenging the state constitution and code providing the same as both the South Carolina and Virginia constitutions and codes. *Id*.

86. *Id.*

87. *Id.* at 491; *see also* Plessy v. Ferguson, 163 U.S. 537, 547–49 (1896) (holding that in the context of train cars, providing separate accommodations for each race did not stamp one race with a "badge of inferiority").

Plessy to the school environment would be extraordinarily detrimental to the children and to the nation as a whole.[88] The Court concluded by holding that separate schools are inherently unequal and that the plaintiffs had been denied equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment.[89]

2. The Exclusion of African-Americans from Juries: *Strauder v. West Virginia*

Before the Civil War, Massachusetts was the only state that permitted African-Americans to serve on juries.[90] During the Reconstruction era, some Southern jurisdictions began allowing African-American men to serve; however, officials in other states routinely barred all African-Americans from the venire.[91] One of the first cases to challenge a state

88. *Brown*, 347 U.S. at 493–94.

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. at 494.

89. *Id.* at 495.

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place . . . . Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Id.

90. KENNEDY, *supra* note 81, at 169.

91. *Id.* The exclusion of African-Americans from jury service was handled both overtly and clandestinely, as seen in this quote from an African-American newspaper: "We have been told for eight years past [that] the names of colored men have been in the jury box . . . [but] not one colored man's name has ever been drawn." *Id.* (quoting *Colored Tribune*, June 3, 1876, which discussed African-American exclusion from juries). *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876–901 (1994) (examining the history of discrimination against suspect classes in criminal juries and the long struggle undertaken by minority groups to attain the right to sit on a jury); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection; Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 572–620 (1994) (discussing the impact of *Batson v. Kentucky* and its progeny and arguing that the judicial system has been unable to successfully discover and combat racially motivated peremptory challenges); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 75–101 (1990) (discussing the constitutional repercussions surrounding the use of peremptory challenges, especially as they relate to race and illuminating the inherent injustice of the all-white jury); s*ee generally* Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 421–82 (1986) (discussing the evolving civil rights of African-Americans in the Antebellum North in the years following the Civil War and the complexity of race relations during that time); Benno C. Schmidt, Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L.

statute barring African-Americans from jury service was heard by the Supreme Court in 1876.[92] *Strauder v. West Virginia* arose from an objection to a West Virginia statute enacted in 1873, which expressly limited jury service to white males.[93] The plaintiff in *Strauder*, an African-American male, was convicted of murder in a West Virginia circuit court in October 1874.[94] The jury that convicted the plaintiff was made up solely of white males, pursuant to a state statute.[95] The plaintiff appealed the conviction, averring that he was deprived of his fundamental rights under the Fourteenth Amendment.[96]

The Court found it critical in its determination of the plaintiff's constitutional challenge to consider whether, in jury selection, prosecutors can purposefully and categorically exclude persons of the defendant's race.[97] In deciding *Strauder*, the Court attempted to interpret the reach of the recently drafted amendments to the Constitution, specifically the Fourteenth Amendment.[98] The purpose of

REV. 1401, 1406–14 (1983) (examining the pre-*Batson* era and offering a historical treatment of race and peremptory challenges).

92. *See* Strauder v. West Virginia, 100 U.S. 303 (1879) (holding a state statute preventing African-Americans from serving on juries unconstitutional); *see also* Captain Denise J. Arn, *Government Appellate Division Notes: Batson: Beginning of the End of the Peremptory Challenge?*, 1990 ARMY LAW. 33, 34–37 (1990) (outlining the history behind *Batson v. Kentucky*); Michael J. Plati, Comment, *Religion-based Peremptory Strikes in Criminal Trials and the Arizona Constitution: Can They Coexist?*, 26 ARIZ. ST. L.J. 883, 886–88 (1994) (discussing the history of Equal Protection Clause violations and peremptory challenges); *see generally* Newton N. Minow and Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 654–62 (1991) (discussing the effect of media on the general biases all potential juries).

93. *See generally Strauder*, 100 U.S. at 312 (holding a state statute preventing African-Americans from serving on juries unconstitutional). The law in question was enacted on March 12, 1873, and defined citizens eligible to serve as jurors as "[a]ll white male persons who are twenty-one years of age and who are citizens of this State." *Id.* at 305.

94. *Id*. at 304.

95. *Id.*

96. *Id.* Before the criminal indictment commenced, the plaintiff (then defendant), presented his petition stating that:

> [B]y virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the state; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man.

Id.

97. *Id.* at 305

98. *Id.* The Fourteenth Amendment states that:

the Fourteenth Amendment was to secure the freedom and equal protection of recently emancipated African-Americans, who had been denied the same civil rights granted to white citizens.[99]

In *Strauder*, the Court specifically held that the Fourteenth Amendment was meant to ensure that African-Americans were subject to and granted protection by the same laws as their white counterparts.[100] More specifically, the Court explained that the Amendment dictated a positive immunity, or right, granted to African-American citizens.[101] In addition, the Court held that the state had violated the Constitution by depriving African-American defendants the opportunity to have people of their own race judge their actions.[102] The Court's subsequent decision to strike down the statute was the first major decision to recognize and observe the rights of African-Americans as related to jury service.[103]

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, not deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

99. *Strauder*, 100 U.S. at 306. Preceding cases showed that when these amendments were added to the Constitution, they were created in the pursuit of equality and the elimination of the racial hierarchy. *Id. See generally* Slaughter-House Cases, 16 Wall. 36, 49 (1873) (discussing, in consolidated cases, a Louisiana statute held to violate the Equal Protection Clause of the Fourteenth Amendment).

100. *Strauder*, 100 U.S. at 307.

101. *Id.* at 308. The Court held that West Virginia's statute inflicted multiple harms, including one specifically burdening the entire African-American community:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. In addition to harming the African-American community as a whole, the Court also recognized the harm done specifically to the defendants as individual citizens: "It is not easy to comprehend, how it can be said that while every white man is entitled to a trial by a jury . . . selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former." *Id.* at 309. This positive immunity is essentially the exemption from "legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.* at 308.

102. KENNEDY, *supra* note 81, at 171.

103. *Strauder*, 100 U.S. at 309. Although *Strauder* served to outlaw statutes excluding African-Americans from juries, states still managed to prevent the race from fully enjoying this right. KENNEDY, *supra* note 81, at 172. In an effort to articulate this trend, shortly after *Strauder*, Gilbert T. Stephenson published his findings after a project in which he sent

3. *Swain v. Alabama* and the Initial Challenge of Using Peremptory Strikes Based Upon Race

After *Strauder* outlawed the statutory exclusion of certain races from juries, prosecutors began to rely on peremptory challenges to create the same exclusionary effect.[104] *Swain v. Alabama* was the first case

questionnaires to the clerks of court in every Southern county where African-Americans made up at least one half of the population. *Id.* at 172–73. Some of Stephenson's responses were as follows:

> Alabama – County No. I, 10,000 white people, 13,000 Negroes: "Negroes are not allowed to sit upon juries in this county. It sometimes happens that names of Negroes are placed in our jury-box by mistake on the part of the jury commissioners, and are regularly drawn to serve as jurors; this, however, is a very rare occurrence. Once in the past four years, a Negro was drawn as a grand juror (by mistake) who appeared and insisted upon the court's impaneling him with other jurors, which was done in accordance with law, the court having no legal right to discharge or excuse him. My recollection is he served two days, when he was taken out at night and severely beaten, and was then discharged by his own petition by the court. This will convey to your mind that negro jurors are not wholesomely regarded and tolerated in this county."
>
> Georgia – County No. 1, 5,000 white people, 24,000 Negroes: "No Negroes serve on our jury. There are no Negro names in the jury box."
>
> Georgia – County No. 10, 2,500 white people, 4,000 Negroes: "There has never been a Negro juror to serve in this county nor any other county surrounding this to my knowledge . . . I am, satisfied if one should be put on any jury that the white men on would flatly refuse to serve at all."
>
> North Carolina – County No. 2, 11,000 white people, 19,000 Negroes: "I will say that Negroes do not serve on the jury in this county and have not since we, the white people, got the government in our hands."
>
> South Carolina – County No. 4, 18,000 white people, 41,000 Negroes: "We are careful and painstaking in making our lists; therefore, we never allow a Negro to serve for the reason of the general moral unfitness, and general depravity."

Id. at 173 (quoting Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 254–68 (1969)). In situations where a county refused to permit African-Americans to serve on the jury, the African-American defendants usually did not have the money to hire an attorney to make the appropriate Constitutional challenge to the law. *Id.* at 174. Obtaining a competent lawyer to make an argument against the county was also difficult because many of the attorneys depended upon the "good will" of the white citizens and were therefore reluctant to attack the local government and jeopardize their careers. *Id.* In fact, in 1959, a panel, composed of federal court of appeals judges, took judicial notice that "lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries." *Id.* (quoting United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir. 1959)).

104. *See* Swain v. Alabama, 380 U.S. 202, 208 (1965) (noting a defendant is not constitutionally entitled to demand a proportionate number of his race on the jury that tries him). *See generally* Michael W. Kirk, *Sixth And Fourteenth Amendments: The* Swain *Song Of The Racially Discriminatory Use Of Peremptory Challenges*, 77 J. CRIM. L. & CRIMINOLOGY 821, 823–27 (1986) (discussing *Swain v. Alabama* and the State's use of peremptory challenges to specifically remove African-Americans from the jury in a case with an African-American defendant); Honorable George Bundy Smith, Swain v. Alabama*: The Use of Peremptory Challenges to Strike Blacks From Juries*, 27 HOW. L.J. 1571, 1572–95 (1984) (discussing states' use of peremptory challenges to remove African-Americans from juries by the use of peremptory challenges).

concerning racially motivated peremptory strikes.[105] *Swain* dealt with the conviction and sentencing of an African-American man by an all-white jury for the rape and murder of a white woman.[106] During voir dire, the prosecutor struck all six African-American jurors.[107] Although the defense objected to the state's peremptory strikes, the trial court ruled against the constitutional challenge; the Supreme Courts of Alabama and the United States affirmed the trial court's decision.[108]

The United States Supreme Court concluded that nothing in the Constitution required a trial court judge to scrutinize the motives behind a peremptory strike as long as the prosecutor was using them as a tool for litigation.[109] The Court noted that peremptory challenges by the State are appropriate as long as they are rationally related to the case at bar.[110] In addition, the Court held that subjecting peremptory challenges to equal protection analysis and forcing strict scrutiny review would be fallacious and insulting to the very intent behind the peremptory challenge.[111] The Court further reasoned that allowing all

105. *See generally Swain*, 380 U.S. at 227–28 (holding that the Constitution does not require an explanation of the motives behind peremptory challenges).

106. *Id.* At the time of the trial in 1965, twenty-six percent of the people eligible for jury service were African-American; however, no African-American had served on a jury in the county since 1950. KENNEDY, *supra* note 81, at 194; *see also* Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in* Maycomb, 45 ALA. L. REV. 403, 433 (1994) (highlighting the persistent racism in the criminal justice system and suggesting ways for future law enforcement officials, lawyers and judges to eliminate the underlying biases); Alfredo Mirande, *"Now that I Speak English, No Me Dejan Hablar ['I'm Not Allowed to Speak']": The Implication of* Hernandez v. New York, 18 CHICANO-LATINO L. REV. 115, 120 (1996) (discussing *Swain* and the percentage of African-Americans avilable in the county to serve on a jury); James B. Zouras, Shaw v. Reno: *A Color-Blind Court in a Race-Conscious Society*, 44 DEPAUL L. REV. 917, 976–92 (1995) (discussing the racism that is prevalent in major voting rights, affirmative action and jury selection cases).

107. *Swain*, 380 U.S. at 204.

108. *Id.*

109. *Id.* at 222. According to the majority:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case . . . [this] presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed . . . because they were Negroes . . . [allowing another result] would establish a rule wholly at odds with the peremptory challenge system as we know it . . .
>
> Therefore it is permissible to insulate from inquiry the removal of Negroes from a particular jury.

Id.

110. *Id.* at 223. Peremptory challenges are appropriate if they are founded upon "acceptable considerations related to the case . . . the particular defendant involved and the particular crime charged." *Id.*

111. *Id.* at 221. The majority opined that this treatment would lead to "a radical change in the nature and operation of the challenge [because it] . . . would no longer be peremptory, each and

peremptory challenges to go without examination would effectively render all groups equally susceptible to exclusion.[112]

However, the Court did recognize that the use of peremptory challenges by states as a means to specifically exclude African-Americans from the jury was in violation of one's constitutional rights.[113] Although the Court recognized and prohibited the use of strikes in a discriminatory manner, it also established an exceedingly high evidentiary burden for the party attempting to prove discrimination.[114] The Court held that an equal protection violation would be found *only* if the defendant showed a history or trend of removing African-American jurors during voir dire.[115] Due to the extreme burden associated with proving constitutionality, many defendants were unable to counter the state's use of the peremptory

every challenge being open to examination." *Id.*

112. *Id.* at 212. Each and every group would be uniformly at risk regardless of "whether they be Negroes, Catholics, accountants or those with blue eyes." *Id.*

113. *Id.* at 224. In an effort to prevent African-Americans, as a class, "the same right and opportunity to participate in the administration of justice enjoyed by the white population" by using peremptory strikes "for reasons wholly unrelated to the outcome of the particular case on trial" would violate the Constitution. *Id.*

114. *Id.* The opinion states that "it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." *Id.* at 223. In essence, the Court was allowing prosecutors to legitimately take race (among other considerations) into account when using their peremptory challenges. KENNEDY, *supra* note 81, at 196. In addition, the Court held that the prosecutor could not use racially charged peremptory challenges for reasons "unrelated to winning a given case," which translated into the exemption from constitutional scrutiny as long as the challenge was "trial-related." *Id.*

115. *Swain*, 308 U.S. at 224. More specifically the court required that the State "in case after case, whatever the circumstances . . . is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries." *Id.* at 222–23.

> To overcome this presumption, the accused must bring forth, from cases other than the one involving the accused, evidence that the State used its peremptory challenges to dismiss all the members of a particular race from jury service. . . [o]nly proof of this nature would support a reasonable inference that African-Americans were being denied the right to serve on a petit jury in violation of the guarantees of the Fourteenth Amendment.

Michelle Mahoney, *The Future Viability of* Batson v. Kentucky *and the Practical Implications of* Purkett v. Elem, 16 REV. LITIG. 137, 143 (1997). Many courts, such as the Fifth Circuit in *United States v. Pearson*, observed that overcoming this burden of proof requires tremendous diligence on the part of the defendant. *See generally* United States v. Pearson, 448 F.2d 1207, 1214–17 (5th Cir. 1971) (discussing the application of the burden set forth in *Swain v. Alabama*). The court specifically asserted that this would "require [the] checking of the docket for a reasonable period of time for the names of defendants and their attorneys, investigation as to the race of the various defendants, the final composition of the petit jury and the manner in which each side exercised it peremptory challenges." *Id.* at 1217.

strikes.[116] Although the opinion of the Court made little, if any, practical difference in the elimination of African-Americans from juries, *Swain* was the first case to at least recognize that peremptory challenges could be subject to the Equal Protection Clause of the Fourteenth Amendment.[117]

4. The Burden of *Swain* Revisited in *Batson v. Kentucky*

Twenty years after *Swain*, the Supreme Court again evaluated the parameters surrounding a state's use of peremptory challenges in *Batson v. Kentucky*.[118] *Batson* became the leading case for assessing the constitutionality of a peremptory challenge.[119] The petitioner in *Batson* was an African-American male indicted on charges of second-degree burglary and receipt of stolen goods.[120] After excusing certain jurors for cause, the prosecutor used his peremptory challenges to strike all

116. *Id.* at 1216.

117. *Swain*, 308 U.S. at 224.

118. *See* Batson v. Kentucky, 476 U.S. 79, 99–100 (1986) (holding that a State's peremptory challenge would be deemed unconstitutional as violative of equal protection unless supported by a race neutral explanation). *See also* Cheryl A. C. Brown, *Challenging the Challenge: Twelve Years after* Batson, *Courts are Still Struggling to Fill in the Gaps left by the Supreme Court*, 28 U. BALT. L. REV. 379, 389–402 (1999) (discussing the Supreme Court opinion in *Batson v. Kentucky* and cases leading up to it and also highlighting the necessity of the precedent set by *Batson*); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 956–79 (1994) (discussing *Batson v. Kentucky* and the burden of showing a race-neutral explanation for a challenged peremptory strike and the possible expansion of equal protection beyond race, ethnicity and gender); Stephen R. DiPrima, *Selecting a Jury in Federal Criminal Trials after* Batson *and* McCollum, 95 COLUM. L. REV. 888, 903–13 (1995) (discussing the consequences of *Batson v. Kentucky* and suggesting further steps that should be taken to eliminate unfair practices in peremptory challenges); Audrey M. Fried, *Fulfilling the Promise of* Batson*: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1319–27 (1997) (discussing racially motivated peremptory challenges and arguing that a "No New Trial" Rule should be imposed so as not to grant defendants new trials because of an attorney's unethical peremptory strikes; Kirk Pittard, *Withstanding* Batson *Muster: What Constitutes a Neutral Explanation?*, 50 BAYLOR L. REV. 985, 990–98 (1998) (explaining *Batson v. Kentucky's* race-neutral explanation requirement while determining that a juror's race or gender may still tangentially play a role in the peremptory strike); Stephen I. Shaw, Batson v. Kentucky*: The Court's Response to the Problem of Discriminatory Use of Peremptory Challenges*, 36 CASE W. RES. L. REV. 581, 582 (1986) (discussing *Batson v. Kentucky* as the Supreme Court's response to racially motivated peremptory challenges).

119. *Batson*, 476 U.S. at 99–100. The majority opinion recognized that it was forced to re-examine the holding in *Swain* with respect to 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 exclude members of his race from the petit jury." *Id.* at 82. Ultimately, "the Supreme Court discarded that part of its *Swain* decision that imposed 'a crippling burden of proof' on defendants victimized by the use of peremptory challenges to exclude blacks from petit juries." Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 LITIG. 14, 15 (2004).

120. *Batson*, 476 U.S. at 82.

four African-American persons on the venire, resulting in an all-white jury.[121] The defense counsel moved to discharge the jury before swearing in, citing a violation of the defendant's constitutional rights.[122] However, the trial judge held that the parties were entitled to strike any members of the venire.[123] The judge fully denied the petitioner's motion, and the jury subsequently convicted the petitioner on both counts.[124] After the Kentucky Supreme Court affirmed the decision, the United States Supreme Court granted certiorari and reversed the lower courts, citing an equal protection violation.[125]

The United States Supreme Court began its analysis by citing *Strauder*'s holding that a defendant is in fact denied equal protection when members of his own race have intentionally been excluded from the jury.[126] The Court also noted that racially motivated peremptory challenges are unlawful because they deny the defendant the very unbiased right to judgment by his peers that the Constitution intended.[127] The Court reiterated the holding of *Strauder*, stating that racial discrimination in jury selection hurts both the accused and those who are denied the right to serve on a jury because of their race.[128] The

121. *Id.* at 83.

122. *Id.*

123. *Id.* The petitioner argued that the State violated his constitutional rights to an impartial jury "and to a jury drawn from a cross section of the community." *Id.* The trial court judge "conducted the initial phase" of voir dire and allowed for certain jurors to be excused for cause, which is in line with the authority granted by Kentucky's Rules of Criminal Procedure. Mahoney, *supra* note 115, at 145.

124. *Batson*, 476 U.S. at 83.

125. *Id.* at 84. The Court accepted the petitioner's Fourteenth Amendment argument and held that:

> [R]acial discrimination in selection of jurors harms not only the accused whose life and liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to impartially consider evidence presented at trial . . . . A person's race simply is unrelated to his fitness as a juror.
>
> Accordingly . . . the Equal Protection Clause forbids [a] prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

Id. at 87–89.

126. *Id.* at 85.

127. *Id.*

128. *Id.* at 87. The Court specifically opined:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to impartially consider evidence presented at a trial . . . . A person's race simply is "unrelated to his fitness as a juror."

Id. (quoting Thiel v. S. Railroad Co., 328 U.S. 217, 223–24 (1946)).

opinion also addressed the risk of jeopardizing the public perception of the justice system by allowing the State to use their challenges in the proposed discriminatory manner.[129] The Court expressed concern that by allowing race-based challenges, society might begin questioning the objectivity of the courts.[130]

The *Batson* opinion was an opportunity to revisit the flawed framework established in *Swain*, and the Court accordingly held that the Equal Protection Clause prohibits *all* racially-motivated peremptory strikes.[131] Two main principles formed the foundation of the opinion: (1) prosecutors' habitual abuse of peremptory challenges; and (2) the larger and more encompassing belief that racial discrimination by a state is altogether unacceptable.[132] The first principle, the overuse of race-based peremptory challenges, centered on the compulsive frequency with which prosecutors were striking certain races from the jury.[133] Even Justice White, who authored *Swain*, concurred with the majority, stating that *Swain* should have presented a better framework for the government's use of peremptory challenges.[134] The Court intended the second principle to contrast *Swain* by asserting that racial discrimination through the use of peremptory challenges by the State is unacceptable, regardless of frequency.[135] In reaching its conclusion, the

129. *Id.* Not only would allowing the strikes harm the defendant and certain races, but it "extends beyond that . . . to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* (citing McCray v. New York, 461 U.S. 961, 963 (1983); Ballard v. United States, 329 U.S. 187, 195 (1946)). *McCray v. New York* was a case in which an African-American man was accused of robbing a white man. *McCray*, 461 U.S. at 968. At the defendant's first trial, in which the jury was unable to reach a verdict, all three African-Americans on the jury voted for an acquittal. *Id.* At the second trial, the prosecutors used their peremptory challenges to remove all seven African-Americans who were on the panel of potential jurors, which resulted in the defendant's conviction. *Id.*

130. *Batson*, 476 U.S. at 87.

131. *Id.* at 84–85. "*Batson* withdraws permission for prosecutors to use race as a basis for peremptorily striking potential jurors, even if a prosecutor sees removing blacks as the best way to obtain a jury most sympathetic to the state's side in a given case." KENNEDY, *supra* note 81, at 204–05.; s*ee also* Kenneth J. Melilli, Batson *in Practice: What We Have Learned about* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 449–507 (1996) (discussing *Batson* and its progeny as well as the struggle to preserve the peremptory challenge, while also eliminating racial discrimination and finally questioning whether the peremptory challenge should in fact be preserved).

132. *Batson*, 476 U.S. at 85.

133. *Id.*

134. *Id.* at 101 (White, J., concurring).

135. KENNEDY, *supra* note 81, at 205. The racially motivated use of peremptory challenges is inappropriate "not only . . . when used to disenfranchise black potential jurors consistently, but also when used as a trial-related tactic in a single instance." *Id.* The *Batson* Court held that "[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions . . . [and] to dictate that several must

Court effectuated a three-step process to ensure the elimination of racially charged peremptory challenges.[136] The first step involved showing, through a prima facie case by the defendant, that there had been purposeful discrimination in the selection of the petit jury.[137] In order to establish this prima facie case, the defendant needed to prove that he was not only a member of a cognizable racial group, but also that the State exercised its peremptory challenges to remove members of the defendant's race.[138]

The second step shifted the burden to the State to give a race-neutral explanation for the peremptory challenge.[139] Although the prosecutor's standard was not arduous, it was insufficient to simply rebut the

suffer discrimination before one could object . . . would be inconsistent with the promise of equal protection for all." *Batson*, 476 U.S. at 95–96 (citing McCray v. New York, 461 U.S. 965 (1983) (alterations in original) (Marshall, J., dissenting from denial of certiorari)).

136. *Id.* at 96. The procedure for a challenge coming out of these cases, in detail are:

> 1. The opponent of the peremptory challenge must make a prima facie case of ethnic, racial, or gender discrimination, by disproportionate strikes, disparate treatment (in questioning, for example), a pattern of discriminatory treatment over time, or some other evidence.
>
> 2. The burden of production then shifts, and the proponent of the strike must offer a non-discriminatory (e.g. race neutral) explanation, which need not be "persuasive, or even plausible."
>
> 3. The trial court then "determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." Only at this step does "the persuasiveness of the justification" become relevant, and "implausible or fantastic justification may (and probably will) be found to be pretexts for purposeful discrimination."
>
> 4. If the trial court accepts the proponent's explanation, that determination will involve a credibility assessment, at least in part, and a reviewing court therefore will accord the trial court's ruling great deference.

Baccus-Lobel, *supra* note 119, at 19–20.

137. *Batson*, 476 U.S. at 96. Some cases have held that "striking a single African-American, at least where voir dire was limited, was sufficient to raise an inference of discrimination." Baccus-Lobel, *supra* note 119, at 19 (citing Morse v. Hanks, 172 F.3d 983, 985 (7th Cir. 1999)).

138. *Batson*, 476 U.S. at 96. "A prima facie case means an allegation supported by facts that, if left unrebutted, give rise to an inference that the allegation is true. Among the facts that might give rise to an inference of discrimination are a pattern of strikes against jurors of a given race or the prosecutor's statements and questions during voir dire." KENNEDY, *supra* note 81, at 205. The defendant must show that the facts presented "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. . . [this] raises the necessary inference of purposeful discrimination. *Batson*, 476 U.S. at 96–97; s*ee generally* United States v. Greene, 36 M.J. 274, 282 (C.M.A. 1993) (holding that a peremptory strike based on "ethnic sexual behavior" was in violation of the *Batson* requirements).

139. *Batson*, 476 U.S. at 97. Although this requirement seems to compromise the "peremptory character" of the challenge, the explanation offered by the State need not rise to the level "justifying [the] exercise of a challenge for cause." *Id.* However, the prosecutor cannot rebut the defendant's prima facie case merely by "denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections." *Id.* at 98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

defendant's challenge by stating that the jurors would have been more sympathetic to the defendant because of their common race.[140] The third and final step was for the trial court, based on the arguments from both the state and the defendant, to determine whether or not the peremptory challenge was in fact based purely on race.[141] The Court ultimately held that, according to the steps set forth, the failure of the prosecution to give a race-neutral reason for its actions warranted that the case be remanded for further proceedings.[142]

5. *Purkett v. Elem*: Persuasive and Plausible Motives Behind Peremptory Challenges?

In 1995, the Supreme Court tested and illuminated the *Batson* rule in *Purkett v. Elem.*[143] In *Purkett*, the State removed two African-American males from the jury panel in a case against an African-American respondent for alleged second-degree robbery in Missouri.[144] The respondent fulfilled the first step of *Batson*, making out a prima facie case of racial discrimination, when he filed his petition challenging the State's actions.[145] The justification given by the prosecutor for the dismissal of the jurors came into question when he explained his motives as relating to the hairstyles of the respective jury candidates.[146]

In determining whether the strikes were purposeful race discrimination, the Court concluded that the State's justification did not have to be persuasive, or even plausible, in order for the Court to move

140. *Id.* "When the prosecutor offers a nonracial explanation, the defendant can, of course, then seek to show that the nonracial explanation is a mere pretext. Ultimately, though, the defendant must persuade the judge that race played a part in the prosecutor's decision to strike the juror in question." KENNEDY, *supra* note 81, at 205–06.

141. *Batson*, 476 U.S. at 98.

142. *Id.* at 100.

143. *See generally* Purkett v. Elem, 514 U.S. 765 (1995) (discussing pretextual reasoning for peremptory challenges following the *Batson v. Kentucky* decision).

144. *Id.* at 766.

145. *Id.* at 767.

146. *Id.* at 766. The prosecutor's explanation of his strikes:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with the facial hair . . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.

Id. The trial court was apparently content with the prosecutor's response and, without further inquiry, empaneled a jury that ultimately convicted him of second-degree robbery. Mahoney, *supra* note 115, at 165.

on to the third and final step of a *Batson* challenge.[147] The Court held that a peremptory challenge based on a potential juror's long, unkempt hair, mustache, and beard fulfilled the State's burden of articulating a nondiscriminatory motive for the challenge.[148] In fact, the Court stated that the reason offered would be deemed race neutral unless the prosecutor's explanation inherently implied discriminatory intent.[149] By clarifying that the second *Batson* step only requires a race-neutral explanation (plausible or not) before moving into a analysis of that reason in step three, the Court shed light upon the application of a *Batson* challenge.[150] By further clarifying *Batson*'s requirement of non-discriminatory intent, both cases secured the right of potential jurors to be free from race-based peremptory challenges.[151]

6. *Batson*'s Application to Gender in *J.E.B. v. Alabama*, ex rel *T.B.*

The Supreme Court decision in *Batson* led to cases questioning the constitutionality of peremptory challenges based on gender.[152] Relying

147. *Purkett*, 514 U.S. at 768. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991)). At the second stage of a *Batson* challenge, a trial court judge may not choose to disbelieve a "silly or superstitious" reason for the strike as long as it is race-neutral. *Id.* Demanding a persuasive or plausible explanation at the second step "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.* (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993)).

148. *Id.* at 769. *See generally* Jason Hendren, *Peremptory Challenges after* Purkett v. Elem, 115 S. Ct. 1769 (1995): *How to Judge a Book By Its Cover Without Violating Equal Protection*, 19 U. ARK. LITTLE ROCK L.J. 249 (1997) (reviewing constitutional analysis of peremptory challenges and discussing the reasoning and consequences of the *Purkett* decision).

149. *Purkett*, 514 U.S. at 786.

150. *Id.*

151. *Id.*; *see generally Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a State's peremptory challenge would be deemed unconstitutional unless supported by a race neutral explanation).

152. *See generally* J.E.B. v. Alabama, *ex rel.* T.B., 511 U.S. 127 (1994) (discussing the State's use of gender as a basis for peremptory challenges). Historically, whether strikes were being used based solely on gender was not an issue because, like African-Americans, women were not permitted to serve on juries. Anna M. Scruggs, J.E.B. v. Alabama ex rel. T.B.*: Strike Two For The Peremptory Challenge*, 26 LOY. U. CHI. L.J. 549, 556 (1995). While African-Americans were given protection from this exclusionary use of peremptory challenges after *Batson*, until *J.E.B. v. Alabama*, gender-based challenges were not afforded this same scrutiny. *Id.* at 549. Women were not permitted to serve on juries until 1946, when in *Ballard v. United States*, 329 U.S. 187 (1946), the Supreme Court held that "purposeful and systematic exclusion of women from the jury venire in a federal case was inconsistent with congressional intent to make the jury a cross section of the community." *Id.* at 557 (quoting *Ballard*, 329 U.S. at 191–93). In *Ballard*, the Court opined:

> It is said . . . that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the

on *Batson*, in 1994, the Supreme Court reviewed *J.E.B. v. Alabama*, ex rel *T.B.*, and applied equal protection analysis.[153] In *J.E.B.*, the Court was confronted with the issue of whether the Equal Protection Clause called for the same level of scrutiny for both race-based and gender-based peremptory challenges.[154] The State of Alabama filed a complaint for paternity and child support against the petitioner, J.E.B.[155] The trial court initially assembled a panel of thirty-six potential jurors, twelve of whom were male.[156] Using nine of its ten available peremptory challenges, the State struck all of the remaining male jurors, leaving an all female jury.[157] Before the Supreme Court granted certiorari, both the trial court and the appellate court denied the petitioner's objection to the State's use of the peremptory challenges.[158]

The Court ultimately held that peremptory challenges based on gender were in violation of the Equal Protection Clause, because, like race, gender is an unlawful ground upon which to evaluate juror competence.[159] Responding to the State's argument that the strikes

> factors which tend to influence women are the same as those which influence the action of men – personality, background, economic status – and not sex. Yet it is not enough to say that women, when sitting as jurors neither act nor tend to act as a class. Men likewise do not act like a class . . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one has on the other is among the imponderables. To insulate the courtroom from either may not in a given case made an iota of difference.

Ballard, 329 U.S. at 193–94. Even after *Ballard*, some states continued to prevent women from serving on juries outright, or through structural conditions placed on the jury selection process. Scruggs, *supra*, at 557. These measures were not completely done away with until 1966 when Alabama, the only state to still hold this position, permitted women to serve. Shirley S. Abrahamson, *Justice and Juror*, 20 U. GA. L. REV. 257, 269 (1986).

153. *J.E.B.*, 511 U.S. at 128–29. "In *Batson v. Kentucky* . . . this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial." *Id.* at 128. The Court also stated that "although a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race,' . . . the 'defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.'" *Id.* (citing Batson v. Kentucky, 476 U.S.79, 85–86 (1986)).

154. *Id.* at 129. The issue, as worded in the opinion, concerned whether the Fourteenth Amendment "forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race." *Id.*

155. *Id.*

156. *Id.* After three jurors were removed for cause, only ten males remained in the pool. *Id.*

157. *Id.*

158. *Id.* at 129–30. Petitioner argued that the "logic and reasoning of *Batson v. Kentucky*, which prohibits peremptory strikes solely on the basis of race, similarly forbids intentional discrimination on the basis of gender." *Id.* at 129. The trial court however rejected this claim and found the petitioner to be the father of the child and therefore liable for child support. *Id.* The Alabama Court of Appeals affirmed the lower court's decision, and the Alabama Supreme Court refused to grant certiorari. *Id.* at 129–30.

159. Patricia Henley, *Improving the Jury System: Peremptory Challenges*, *available at*

centered on the belief that male jurors would have been more sympathetic to the defendant's case, the Court refused to allow the State to employ gender stereotypes.[160] In making its point, the Court maintained that the State failed to provide any rational, let alone persuasive, reasoning for its blatant, gender-based discrimination.[161] After moving through the historical propensity to exclude women from jury service, Justice Blackmun, writing for the majority, specifically compared gender-based discrimination to that based on race.[162] The reasons supporting the similar treatment of these classes centers on the Equal Protection Clause of the Constitution.[163] The Court cited to previous cases which had led to the treatment of gender as a suspect class, therefore requiring an exceedingly persuasive justification for any classification of this nature.[164]

---

http://www.uchastings.edu/plri/spr96tex/juryper.html (last visited Oct. 15, 2004). "[G]ender, like race, [is] an unconstitutional proxy for juror competence and impartiality." *Id.*

160. *J.E.B.*, 511 U.S. at 138 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)). The Court asserted that it would not "accept as a defense to gender-based peremptory challenges 'the very stereotypes the law condemns.'" *Id.* The State argued that its decision to strike all of the males from the jury was based upon:

> [T]he perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.

Id. at 138–39.

161. *Id.* at 139.

> Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box. Respondent seems to assume that gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender.

Id. at 139–40.

162. *Id.* at 140. Justice Blackmun writes that,

> [D]iscrimination in jury selection, whether based on race or gender causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings.

Id. (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)). "The message it [allowing the peremptory strikes] sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Id.* at 142.

163. *See id*. at 127.

164. Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that discriminatory treatment amongst sexes is based on fallacious impressions); Craig v. Boren, 429 U.S. 190 (1976) (stating that gender stereotypes are archaic misconceptions); Schlesinger v. Ballard, 419 U.S. 498

7. Why Religious Affiliation Should be Subject to the Same Scrutiny as Race and Gender

As *Batson* led to cases questioning the constitutionality of gender-based peremptory strikes, so did the Supreme Court's opinion in *J.E.B.* lead to cases regarding the permissibility of peremptory challenges based on religion.[165] Before examining religion-based peremptory challenges, it is important to recognize how the Supreme Court has protected religion in previous cases.[166] The Supreme Court has traditionally applied strict scrutiny to legislation that limits the free exercise of religion.[167] For a governmental act or policy to be narrowly tailored, and therefore pass strict scrutiny, it must entail the slightest possible amount of restriction in carrying out its purpose.[168] In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court ruled that if the objective of a law is to infringe upon or restrict religiously motivated practices, the law is not neutral, and is per se invalid unless coupled with a compelling governmental interest and is narrowly tailored to advance that interest.[169] In *Lukumi Babalu*, the Court applied strict

(1975) (holding that gender-based classifications are outdated and threaten government policies); Taylor v. Louisiana, 419 U.S. 522 (1975) (discussing the constitutionality of limiting jury service to specific groups). Treating gender as a suspect class is founded upon our Nation's "unfortunate history" of sexual discrimination, which is likened to racial discrimination. *Id.* at 136. In support of this treatment, the Court cites *Frontiero v. Richardson*:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil war slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right – which is itself "preservative of other basic civil and political rights" – until adoption of the Nineteenth Amendment half a century later.

Id. (citing Frontiero v. Richardson, 411 U.S. 677, 685 (1973)).

165. *See infra* Part II.C.8 (examining *State v. Davis* and *People v. Wheeler*, in which the Minnesota and California Supreme Courts consider peremptory challenges based on religion) and Parts III.A–B (exploring how different districts have dealt with peremptory challenges with regard to religious beliefs and affiliation).

166. *See infra* note 170 and accompanying text (citing to *Church of the Lukumi Babalu Aye v. City of Hialeah* for the proposition that laws that restrict religious practices are per se invalid unless narrowly tailored to advance a compelling government interest).

167. *See generally Lukumi Babalu*, 508 U.S. 520 (1993) (applying strict scrutiny to a governmental action concerning religion, and subsequently determining that the government's interest was not strong enough to warrant upholding the regulation).

168. Leaders, *supra* note 74, at 110. "In the case of peremptory strikes, the litigant can easily use the voir dire process to accurately ascertain the beliefs of the potential juror." *Id.* If the beliefs held by the potential juror prove to be prejudicial, then the juror can be removed for cause. *See* 28 U.S.C. § 1866(c)(2) (2000) (providing that prospective jurors may be "excluded by the court on the ground that such person may be unable to render impartial jury service . . . .").

169. *Lukumi Babalu*, 508 U.S. at 533.

scrutiny to specific city ordinances that infringed on the free exercise of religion.[170] The case specifically concerned the religious practices of the Santeria religion, which involves the ritualistic sacrifice of animals.[171] These sacrifices are traditionally performed on various occasions, including births, marriages, deaths, at the initiation of new members and priests, and for the cure of the sick.[172]

The congregants of the Santeria religion in this case were organized as a corporation under Florida law for the purpose of bringing the mostly secret practices of the religion out into the open.[173] In response to these plans, the City of Hialeah, Florida, adopted several ordinances prohibiting animal sacrifices and imposing fines and imprisonment on violators.[174] After both the district court and court of appeals upheld the ordinances as constitutional, the Supreme Court granted certiorari and found that because the laws were not neutral and targeted religion, they must undergo the highest level of scrutiny.[175]

This same strict scrutiny has been applied to all such governmental acts threatening an individual's free exercise of religion.[176] Applying strict scrutiny in the case of peremptory challenges would result in the Court being forced to weigh the least restrictive means for preserving the governmental interest in a fair trial.[177] It would likely be found that the best way to obtain impartiality would be by questioning a potential juror, and then removing him or her based upon any prejudice shown, as opposed to removing all jurors of a certain religious class.[178]

170. *Id.* at 546

171. *Id.* at 524. The Santeria religion, which originated in the 19th century, teaches that every person has a destiny from God "fulfilled with the aid and energy of the *orishas*." *Id*. "The basis of the Santeria religion is the nature of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice." *Id.* It is believed that "the *orishas* are powerful but not immortal. They depend for survival on the sacrifice." *Id*. at 525.

172. *Id.* at 525. "Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles." *Id*. After the animals are killed, they are "cooked and eaten, except after healing and death rituals." *Id.*

173. *Id.* at 525–26. The president of the petitioner church, Church of the Lukumi Babalu Aye, Inc., was one of the highest ranking officials in the Santeria religion. *Id*. at 525. The church acquired land in the City of Hialeah, Florida, and planned to further its initiative by establishing a worship center, cultural center, school and museum. *Id*. at 525–26.

174. *Id.* at 526–27.

175. *Id.* at 546. The Court held that in order to justify restricting religion, a law must advance a critical government interest and "must be narrowly tailored in pursuit of those interests." *Id.*

176. *Id.* at 547.

177. *Id.*

178. *See* J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 139 (1994) (holding that even if some measure of accuracy is present in using gender stereotypes, it is not constitutionally valid to rely on these generalizations).

8. State Court Cases Regarding Religion and Peremptory Challenges

Peremptory strikes based on religion have been questioned because they are not narrowly tailored under strict scrutiny analysis.[179] Two state supreme court cases have addressed whether to apply strict scrutiny to peremptory challenges based on religion.[180] This Part will begin with a discussion of *State v. Davis*, the Supreme Court of Minnesota decision stating that peremptory strikes based on religion do not violate the Equal Protection Clause.[181] Next, this Part will discuss Justice Thomas's dissent in the Supreme Court's denial of certiorari in *Davis v. Minnesota*.[182] Finally, in contrast to the above cases, this Part will discuss the Supreme Court of California's 1978 decision that a peremptory challenge based on any group bias, including religion, is unlawful under the Constitution.[183]

a. *State v. Davis*: The Supreme Court of Minnesota's Opinion

In August of 1993, the Supreme Court of Minnesota heard and ruled on *State v. Davis*.[184] The issue presented to the court was whether the *Batson* holding, which prohibited peremptory challenges based on race, should be extended to afford the same scrutiny to challenges based on

179. Leaders, *supra* note 74, at 109. Religion-based peremptory strikes are "based on stereotypical assumptions about the religious views of potential jurors. . . . Focusing on the actually held beliefs of venire members instead of inferring their beliefs from mere religious affiliation is a less restrictive alternative. *Id.*

180. *See generally* United States v. DeJesus, 347 F.3d 500 (3d. Cir. 2003) (drawing the distinction between unconstitutionally striking a juror on the basis of religious affiliation and constitutionally striking a juror on the basis of a heightened religious devotion); United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998) (examining whether *Batson* applies to religion, and noting the divergence in opinions among the courts); State v. Davis, 504 N.W.2d 767 (Minn. 1993) (discussing the prosecution's use of peremptory challenges in response to a potential juror's affiliation with the Jehovah's Witness faith).

181. The case was later appealed to the Supreme Court of the United States, which denied certiorari. *See infra* Part II.C.8.a (discussing the Supreme Court of Minnesota's opinion in *State v. Davis*); *see also Davis*, 504 N.W.2d 767 (discussing the prosecution's use of peremptory challenges in response to a potential juror's affiliation with the Jehovah's Witness faith).

182. *See infra* Part II.C.8.b (discussing Justice Thomas's dissent in the Supreme Court's denial of certiorari in *Davis v. Minnesota*); *see also* Davis v. Minnesota, 511 U.S. 1115 (1994) (Thomas, J., dissenting from denial of certiorari) (discussing the prosecution's use of a peremptory challenge in response to a potential juror's affiliation with the Jehovah's Witness faith).

183. *See infra* Part II.C.8.c (discussing the California Supreme Court opinion in *People v. Wheeler*); *see also* People v. Wheeler, 583 P.2d 748 (Cal. 1978) (holding that use of peremptory challenges based on any group bias is an equal protection violation).

184. *Davis*, 504 N.W.2d at 767. "In an unpublished opinion, the court of appeals concluded that because the peremptory strike was based on race-neutral grounds there was no equal protection violation, and, after reviewing the other claims of error, affirmed the defendant's conviction." *Id.* 767–68.

religion.[185] In *Davis*, the defendant was an African-American male charged with aggravated robbery.[186] During jury selection, the prosecution did not strike any jurors for cause, but did use one of its peremptory strikes to remove an African-American from the jury.[187] Defense counsel objected to this strike and asked for a race-neutral explanation from the prosecutor, who maintained that her choice had nothing to do with the race of the juror.[188] The prosecutor instead offered that her exercise of the peremptory strike was in response to the juror's religion.[189] Because of the prosecutor's perception that the Jehovah's Witness faith incorporated a reluctancy to judge others, she did not believe that the potential juror could carry out the tasks necessary as a member of the jury.[190] Defense counsel did not rebut the prosecutor's justification for the challenge, and the trial court subsequently ruled that the peremptory challenge would stand.[191]

The Minnesota Supreme Court began its analysis by examining the *Batson* line of cases discussed above.[192] The court then compared race-based and religion-based peremptory challenges, illuminating how each of these challenges could potentially impair the reliability of the jury.[193]

185. *Id.* at 767.

186. *Id.* at 768.

187. *Id.*

188. *Id.*

189. *Id.* The prosecutor explained:

> [I]t was highly significant to the State that the man was a Jahovah [sic] Witness. I have a great deal of familiarity with the sect of Jahovah's [sic] Witness. I would never, if I had a preemptory [sic] challenge left, strike or fail to strike a Jahovah [sic] Witness from my jury. In my experience that faith is very integral to their daily life in many ways, many Christians are not. That was re-enforced [sic] at least three times a week he goes to church for separate meetings. The Jahovah [sic] Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah [sic] Witness are reluctant to exercise authority over their fellow human beings in this Court House.

Id.

190. *Id.*

191. *Id.*

192. *See supra* Part II.C.2–5 (discussing the *Batson* line of cases dealing with peremptory challenges and race).

193. *Davis*, 504 N.W.2d at 769–70.

> If the life of the law were logic rather than experience, Batson might well be extended to include religious bias and, for that matter, an endless number of other biases. The question, however, is whether the peremptory strike has been purposefully employed to perpetuate religious bigotry to the extent that the institutional integrity of the jury has been impaired, and thus requiring further modification of the traditional peremptory challenge.

Id. The court notes that if it were to extend the peremptory challenge protection to religion, that the list would continue to grow, and eventually defeat the very purpose of a *peremptory* challenge by stating:

The court opined that a peremptory challenge based on religion is not as commonplace or flagrant as those used to discriminate against African-American jurors pre-*Batson*.[194] Using this as justification, the court reasoned that challenges based on religion do not have the same ubiquitously negative effect on juries as race.[195] Therefore, the court held that religion-based peremptory strikes should not be afforded the same protection.[196]

The court also based its opinion on the particular illusiveness of religious biases and the impediments to determining a potential juror's religious background or beliefs.[197] The court noted that a potential juror's religious beliefs may be the basis for his or her moral values, which leads to his or her societal perception on various matters.[198] However, the court argued that these societal views cannot be attributed solely to one's religion, and therefore a peremptory strike based on them cannot inevitably be the result of religious bias.[199] In addition, the court discussed the risks associated with the defendant's argument as they related to the veiled appearance associated with religion.[200] Although some denominations require certain clothing or other perceptible signs of affiliation, many do not, causing complication when inquiring into the religion of every peremptorily dismissed juror.[201]

> The claim that the [peremptory] rule is in hopeless conflict with the [Batson] challenge is frequently linked to the suggestion that the ban on jury discrimination must inevitably expand to prohibit not only jury selection based on race, but also jury selection based on religion, national origin, gender, language, disability, age, occupation, political party, and a host of other categories. The relationship between the two points is clear: the longer the list of prohibited categories, the less room there is for a lawful challenge other than a challenge for cause.

Id. n.2 (quoting Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?*, 92 COLUM. L. REV. 725 , 761 (1992)).

194. *Davis*, 504 N.W.2d at 771. While the court noted the well-documented trend of racial discrimination that led to *Batson*, it stated that there has not been a similar history of discrimination regarding religion. *Id.* at 770–71.

195. *Id.*

196. *Id.* The court reasoned:

> We are not aware [that] the peremptory [challenge] is being so misused [as it was with regard to racial discrimination], nor does the defendant make any such claim. No such problem is documented in appellate court decisions. . . . [T]here is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system.

Id. at 771.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* The court held that "[t]o extend *Batson* would complicate and erode the peremptory challenge procedure unnecessarily, and it would not serve to remedy any long-standing injustice

Upon consideration of the above, the court denied the defendant's objection to the use of peremptory challenges.[202]

b. Justice Thomas's Dissent in *Davis v. Minnesota*

In 1994, the Supreme Court of the United States denied the defendant's petition for certiorari in *Davis v. Minnesota*.[203] However, Justice Thomas's dissent, joined by Justice Scalia, offered a strong argument as to why the Court should not only have heard the case, but also should have reversed the decision denying the defendant's challenge.[204]

Justice Thomas began by acknowledging that the Supreme Court of Minnesota's basis for denial, that only race-based peremptory strikes are prohibited, is shattered by *J.E.B. v. Alabama*.[205] Using the rationale found in *J.E.B.*, Justice Thomas opined that there was no reason to deny the protection from *Batson* to all suspect classes, not only race and gender.[206] Justice Thomas further challenged the majority by recognizing that the refusal to extend the *Batson* protection is in essence choosing to not deal with the ramifications of *J.E.B.*[207] The dissenting opinion concluded with the realization and acknowledgement that subjecting peremptory challenges to equal protection analysis may result in the "doom of the strike altogether," but that it is appropriate, based on prior cases, to make this extension.[208]

perpetrated by the court system against specific individuals and classes, as *Batson* clearly does." *Id.*

202. *Id.*

203. *See generally* Davis v. Minnesota, 511 U.S. 1115 (1994) (dissent from denial of certiorari discussing the use of peremptory challenges based on religion); *see supra* Part II.C.8.a (discussing the Supreme Court of Minnesota's decision in *State v. Davis*).

204. *Id.* at 1115 (Thomas, J., dissenting from denial of certiorari).

205. *Id. See supra* Part II.C.6 (discussing J.E.B. v. Alabama, *ex rel.* T.B., 511 U.S. 127 (1994) (discussing *J.E.B. v. Alabama*, in which the Supreme Court extended its Equal Protection analysis under *Batson* to prohibit gender-based peremptory strikes).

206. *Davis v. Minnesota*, 511 U.S. at 1115.

> In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed "heightened" or "intermediate" scrutiny, *J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications—a category which presumably would include classifications based on religion.

Id.

207. *Id.*; *see also* Johnstone, *infra* note 257, at 447–48 ("By extending *Batson* beyond race, the Court left open the possibility of further extending scrutiny of peremptory challenges to other suspect classifications.").

208. *Davis*, 511 U.S. at 1115.

> While the denial of certiorari to a case arising from a strike based on a religious classification may indicate that the Court does not want to further extend *Batson*, the

c. The California Supreme Court's Decision in *People v. Wheeler*

In contrast to *State v. Davis*, in *People v. Wheeler*, the California Supreme Court held that challenges based on *any* group bias violates the Equal Protection Clause.[209] The defendants were two African-American men convicted of murdering a white grocery store owner in the course of a robbery.[210] During voir dire, the prosecutor struck every African-American from the venire, and the resulting all-white jury convicted the defendants.[211] The defense raised an objection to the removal of all of the African-Americans.[212] Although prior to the Supreme Court's decision in *Batson*, the California Supreme Court held that the removal of a specific class from the venire was unconstitutional.[213]

The lower court's conviction was reversed on the grounds that striking a potential juror on the basis of *any* group bias, including religion, violated state law.[214] The Supreme Court of California held

> Court has left itself open to such petitions on all of the grounds previously discussed. Although the Court may be able to draw theoretical lines among quasi-suspect classifications, it would seem that it will only be a matter of time before empirical arguments can be made about other classifications just as they have been made about race and gender. Even though racial minorities and women have suffered specific types of discrimination, it may also be that persons born out of wedlock can establish that they have been denied political rights or persons who are illegal aliens can show that discrimination against them is often a proxy for race just as gender can be. It is perhaps significant that in the Court's own statement that the peremptory challenge has not been eliminated, the Court points to the availability of classifications of individuals subjected to "rational basis" review as potential areas for litigants to explore in their use of the peremptory challenge, but it does not point to the availability of other quasi-suspect or inherently suspect groups.

Lisa Lee Mancini Harden, *The End of the Peremptory Challenge? The Implications of* J.E.B. v. Alabama *ex rel.* T.B. *for Jury Selection in Alabama*, 47 ALA. L. REV. 243, 260 (1995).

209. *See generally* People v. Wheeler, 583 P.2d 748 (Cal. 1978) (holding that the use of peremptory challenges based on any group bias is an equal protection violation).

210. *Id.* at 752.

211. *Id.*

212. *Id.* at 753–54. Defense counsel moved for a mistrial, stating that "seven Negroes . . . have been kicked off the jury by [the prosecutor], I make a motion for mistrial. It is apparent that it is a policy of the district attorney's office not to permit any Negroes on this jury." *Id.*

213. *Id.* at 761–62.

214. *Id.* The court cites several cases wherein the Supreme Court of the United States has held that an impartial jury is to be drawn from a "representative cross-section of the community." *Id.* at 759. From this, the court then opines that in order to achieve the appropriate cross-section, a jury will inevitably be made up of:

> [D]iverse and often overlapping groups defined by race, *religion*, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation, [and] that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to

that while peremptory challenges are most times appropriately motivated by biases such as prior arrests or victimizations, it is improper to allow a party to remove a juror based on a bias that has no specific relation to the case at bar.[215] When a potential juror is removed due to a bias founded on characteristics such as race, religion, or ethnicity, the court held that the very rationale behind a jury is defeated.[216] The purpose of a jury is to establish a representative group to judge the actions of the accused, and by allowing a peremptory strike based on any group bias, including religion, this demographic balance would be upset.[217] For this reason, the California Supreme Court reversed the conviction by the jury from which the prospective jurors had been removed.[218]

III. DISCUSSION

As in the state courts, there are varying opinions concerning religion and peremptory challenges among the circuits.[219] This Part will begin by introducing *United States v. Stafford*, a Seventh Circuit opinion written by Judge Posner, which, in dicta, insinuates that the court would not extend *Batson*'s constitutional protections to a peremptory strike based on the religious beliefs of a potential juror, but perhaps would extend the protection to religious affiliation.[220] Then, this Part will

> encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

Id. at 755 (emphasis added).

215. *Id.* at 761. Biases based on previous arrests or convictions, or whether a potential juror has been the victim of a crime are:

> [E]ssentially neutral with respect to the various groups represented on the venire: the characteristics on which they focus cut across many segments of our society—[t]hus both blacks and whites may have prior arrests, both rich and poor may have been crime victims, both young and old may have relatives on the police force, both men and women may believe strongly in law and order, and members of any group whatever may alienate a party by "bare looks and gestures." It follows that peremptory challenges predicated on such reasons do not significantly skew the population mix of the venire in one direction or another; rather, they promote the impartiality of the jury without destroying its representativeness.

Id.

216. *Id.*

217. *Id.*

218. *Id.* at 768.

219. *See infra* Parts III.A and III.B (discussing how the courts dealt with peremptory challenges with regard to religious beliefs in *United States v. Stafford,* and *United States v. DeJesus*). *See supra* Parts II.C.8.a–c (discussing the decisions regarding religion and peremptory challenges coming from the Supreme Courts of Minnesota and California).

220. *See infra* Part III.A (explaining the Seventh Circuit's opinion in *United States v. Stafford*, which held that a juror's religious convictions could be a race-neutral reason for using a

move into the recent Third Circuit decision, *United States v. DeJesus*, which also affirmed the notion that a peremptory strike exercised on a potential juror's heightened religious participation is not an equal protection violation.[221]

A. The Seventh Circuit's Take on Religion and Peremptory Challenges: United States v. Stafford

In late 1997, the Seventh Circuit Court of Appeals heard *United States v. Stafford*.[222] In this case, the two defendants were convicted of a variety of charges stemming from an advance-fee loan scam.[223] During voir dire, the government peremptorily removed the only African-American juror for reasons related to her religious beliefs.[224] The government backed its decision by explaining its concern that the potential juror, who testified to having strong religious convictions, would be sympathetic to the defendant.[225]

The court began its discussion like the court in *Davis*, exploring the Supreme Court's *Batson* analysis, and the feasibility of its application to religion.[226] *Batson* requires that the State provide a race-neutral explanation when challenged by a defendant in regard to the motive behind a peremptory challenge.[227] The court affirmed the trial court's finding that the reason given by the State, that her religious propensities would not allow her to perform her duties, was race-neutral and an acceptable basis for the peremptory strike.[228] However, the court also considered the possibility that religion could carry the same stigma as race and stated in dicta that there is a difference between striking a juror

peremptory challenge).

221. *See infra* Part III.B (discussing the Third Circuit's opinion in *United States v. DeJesus*, which held a peremptory strike based on religion is valid and constitutional); *see also DeJesus*, 347 F.3d 500, 509–11 (3d Cir. 2003) (discussing peremptory challenges exercised by the State to remove two jurors based on their degrees of religious involvement). *See supra* note 8 (introducing the idea that such a strike is not an equal protection violation).

222. *Stafford*, 136 F.3d at 1109.

223. *Id.* at 1111. An advance-fee loan scam is set up where the defendants make a "phony offer of a large loan on highly advantageous terms upon condition that the borrower pay a sizeable fee in advance. . . . [then] [t]he con men pocket the fee and abscond." *Id.*

224. *Id.* at 1113. During the questioning, the African-American juror said that she was "'very deeply involved with my church. I coordinate our homeless ministry program and have done so for the past seven years through our church.'" *Id.*

225. *Id.*

226. *Id.* at 1114.

227. *Id. See supra* Part II.C.4 (discussing *Batson v. Kentucky*).

228. *Stafford*, 136 F.3d at 1114. "When in response to a *Batson* challenge the prosecutor gives a race-neutral reason that persuades the judge, there is no basis for reversal on appeal unless the reason given is completely outlandish or there is other evidence which demonstrates its falsity. Neither condition is satisfied [here]." *Id.*

based on her religious affiliation and striking a juror based on her religious beliefs.[229] This discussion by the court alluded to its likely hesitance to grant *Batson*'s protections to peremptory strikes based on religion.[230]

B. United States v. DeJesus*: The Most Recent Look at Religion-Based Peremptory Challenges*

The Third Circuit's decision in *United States v. DeJesus* is a recent court of appeals affirmation that a peremptory strike based on religious beliefs is valid and constitutional.[231] In *DeJesus*, the defendant was charged with the illegal possession of a firearm after police, responding to the report of a stolen car, found him with a gun and two magazine clips.[232] During jury selection, the State used peremptory challenges to strike two African-American jurors who both spoke of their religious involvement and spiritual beliefs during voir dire.[233] In response, the defense counsel asserted a *Batson* challenge, claiming that the prosecution removed potential jurors on the basis of their race.[234] Consequently, the State was asked to articulate the reason for its strikes. The State rationalized both of the strikes, basing them on the religious

229. *Id.* The court stated in its opinion that:

> It is necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief. It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing; suppose for example that his religion taught that crimes should be left entirely to the justice of God. In between and most difficult to evaluate from the standpoint of *Batson* is a religious outlook that might make the prospective juror unusually reluctant, or unusually eager, to convict a criminal defendant.

Id.

230. *Id.*

231. United States v. DeJesus, 347 F.3d 500, 502 (3d Cir. 2003).

232. *Id.* The defendant's first trial ended in a mistrial because of the jury's inability to reach a verdict. *Id.* The following retrial resulted in the defendant's conviction and subsequent sentencing to 110 months in prison. *Id.*

233. *Id.* The voir dire process in this trial consisted first of a questionnaire distributed to and completed by the potential jurors. *Id.* This phase was followed by the more traditional questioning of the jurors, and then by the opportunity for the parties to exercise their peremptory challenges. *Id.* The first potential juror who was peremptorily removed stated that he had a cousin who had been murdered, but that: "he had learned to forgive the murderer," his hobbies involve "civic activities with his church," "he reads the Christian Book Dispatcher;" he "holds several biblical degrees," he "is a deacon and Sunday School teacher in the local church;" and he "sings in a couple of church choirs." *Id.* The second potential juror who was removed by a peremptory challenge stated during voir dire that: "he is an officer and trustee in his church," "he reads the Bible and related literature," and "his hobbies are church activities." *Id.*

234. *Id.*

inclinations of the two potential jurors and the prospect that their beliefs would affect their willingness to convict the defendant.[235]

In response to the State's justification, defense counsel urged the trial court to extend *Batson* by arguing that peremptory strikes on a potential juror's religion is just as violative of the Constitution as basing it on a juror's race.[236] The district court denied the defense's challenge and accepted the State's strikes based on the religious grounds given by the prosecutor.[237] The Third Circuit Court of Appeals affirmed the decision of the district court and held that the strikes were constitutional.[238]

In its opinion, the Third Circuit did note that a peremptory strike based on a potential juror's religious affiliation would violate the Equal Protection Clause.[239] Nevertheless, the court approved the State's argument that it had not exercised the peremptory challenges based on the jurors' religious affiliations, but rather on their heightened religious involvement.[240] Using this rationale, the court therefore affirmed the district court's approval of the State's peremptory challenges.[241]

IV. ANALYSIS

Based on the discussed cases and history related to religion and peremptory challenges, this Part will explain why the Supreme Court should afford religious affiliation strict scrutiny analysis when dealing with peremptory challenges.[242] This Part will also, however, address the concern regarding the potential eradication of the peremptory challenge as a litigation tool if this protection is granted.[243]

235. *Id.* at 502–03. The first juror was specifically struck based on his "high degree of religious involvement and his ability to forgive his cousin's murderer, both of which might make him reluctant to convict." *Id.* The second potential juror was removed from the jury because when he was brought in from the jury pool, he "looked the government's way and then turned his eyes away several times." *Id.* at 503. The state reasoned that this behavior "demonstrated a possible anti-government prejudice . . . [and that the juror's] fairly strong religious beliefs might prevent him from rendering judgment against another human being." *Id.*

236. *Id.*

237. *Id.* The district court's opinion stated that "while *Batson* may extend to protect against striking a potential juror based upon the juror's membership in a particular religious denomination having no relevance to the issues in the case, none of these jurors were struck by the government upon an impermissible ground." *Id.* at 504.

238. *Id.* at 510.

239. *Id.* The court stated that the defendant argued that the District Court "correctly assumed that a strike based on a juror's religious affiliation would be unconstitutional." *Id.* at 509.

240. *Id.* at 510.

241. *Id.* at 510–11.

242. *See supra* Parts II.B.1, II.C.7 (discussing religion as a suspect class and the suggested treatment of peremptory challenges based on religion).

243. *See infra* Part IV.B (explaining the potential effect of allowing peremptory challenges to

A. Why Peremptory Challenges Based on Religious Affiliation Are Improper

The use of peremptory challenges based on religious affiliation is flawed for several reasons.[244] First, such challenges violate the Equal Protection Clause.[245] Equal protection is founded upon the prohibition of the government treating classes of persons differently, or from merely treating individuals as members of a general class.[246] By allowing the use of generalizations or stereotypes, the government is in violation of the constitutional rights guaranteed to individuals.[247] *Batson* and *J.E.B.* held that peremptory challenges based on class generalizations were unconstitutional and struck down those based on race and sex.[248] Like race and gender, religious affiliation is a class upon which it is inappropriate to exercise peremptory challenges.[249]

Second, religion-based peremptory challenges are inappropriate because it is erroneous to assume that all members of a certain identifiable group share identical values, and therefore the strikes are not narrowly tailored.[250] Empirical evidence supports the notion that not all members of a certain religion adopt the views of the establishment.[251] For instance, while the common belief that all

be held up to equal protection analysis in all suspect class forums).

244. *See infra* notes 250–54 and accompanying text (maintaining that peremptory challenges, based on generalized views of religion, eliminate individual distinctions by assuming identical values amoung individuals in a group).

245. *See supra* Parts II.B.1, II.C.7 (examining religion as a suspect class and the suggested treatment of peremptory challenges based on religion).

246. Leaders, *supra* note 74, at 103. Equal protection analysis requires "that the government must treat citizens as individuals and not simply as components of a racial, religious, sexual, or national class." *Id. See generally* Larson v. Valente, 456 U.S. 228 (1982) (discussing the challenge of a Minnesota statute imposing reporting requirements for certain religious organizations).

247. Leaders, *supra* note 74, at 108. When a litigant ascribes moral, philosophical, political or social views to a potential juror merely because he or she fits into a religious group, "the potential juror is being treated as a component of his religion and not as an individual." *Id.*

248. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the intentional exclusion of African-Americans in a trial involving an African-American defendant was per se unconstitutional) and *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994) (opining that gender-based peremptory strikes violate the Equal Protection Clause of the Fourteenth Amendment); *see also supra* Part II.C.4 and Part II.C.6 (examining *Batson v. Kentucky* and *J.E.B. v. Alabama* ex rel. *T.B.* and the United States Supreme Court holdings that peremptory challenges based on race and gender are equal protection violations).

249. Barton, *supra* note 54, at 204–05.

250. *See generally* Leaders, *supra* note 74 (discussing the stereotypes associated with religion and the mistaken perceptions about religious groups).

251. *Id.* at 108. For example, while the Catholic faith is against the use of contraceptive, studies show that as much as eighty-four percent of its members disagree with and oppose this view. BRENDA MADDOX, THE POPE AND CONTRACEPTION: THE DIABOLICAL DOCTRINE, 29

Catholics are opposed to abortion is a characteristic of a significant number of Catholics, it is erroneous to attribute this belief to each and every one.[252] These generalizations suggest that religion-based peremptory challenges are not narrowly tailored because like in *J.E.B.*, there is essentially no support for the notion that the class membership alone is dispositive proof of a juror's potential biases.[253] Like race and gender, these types of peremptory challenges are impermissibly based on generalizations and stereotypes.[254]

In addition, religion-based peremptory challenges are harmful because they negatively affect the individual jurors removed from the jury by insulting their constitutional right to the freedom of religion.[255] The freedom of religion is a fundamental right that is guaranteed to all citizens of the United States, and allowing government actions affecting this right without applying strict scrutiny is violative of the Constitution.[256]

(1991); Gallup, The Gallup Poll: Public Opinion 1993 145 (Scholarly Resources, 1994). This fact goes to show that while religion may affect one's moral or social views, it certainly does not unconditionally control them. In addition, it is impractical to assume that all members of a particular religious order could in fact follow and observe all of the policies and rules of the religion. Leaders, *supra* note 74, at 108. For example,

> [T]he United Methodist Church has reduced all of the current and official policies adopted by the General Conference of the United Methodist Church to writing in The Book of Resolutions. The Book of Resolutions currently contains official positions on over two hundred subjects including: organ and tissue donation, school bussing, suicide, rights of workers, gun control, grand jury abuse, unemployment, and recognition of Cuba.

Id.

> In the case of race and sex, the fact upon which prediction is based, though not entirely free from difficulties, is relatively straightforward: it is a physical fact. To found a prediction on the basis of a person's religion, however, is to make reference to a fact of considerable uncertainty. Thus a person's religion may refer to something about his state of mind, to his relations with other persons or with an institution, to his external behavior, or to his cultural inheritance.

John H. Mansfield, *Peremptory Challenges to Jurors Based Upon or Affecting Religion*, 34 SETON HALL L. REV. 435, 472 (2004).

252. *See* Catholics for Contraception, *at* http://www.cath4choice.org/articles/c4cbrochurelong.asp (last visited Oct. 16, 2004) (offering information, support and literature for Catholics on how the Catholic religion and contraception can be reconciled).

253. Barton, *supra* note 54, at 209; *see also J.E.B. v. Alabama,* ex rel. *T.B.*, 511 U.S. 127 (1994) (holding gender-based peremptory challenges unconstitutional).

254. Barton, *supra* note 54, at 209. "The government has an interest in guaranteeing a fair trial, but the lack of evidence supporting religion-based peremptory challenges' role in supplying an impartial jury leads to the conclusion that such peremptories are not sufficiently narrowly tailored to fit the governmental interest." *Id.* at 210.

255. Leaders, *supra* note 74, at 108–09.

256. Barton, *supra* note 54, at 207. "A government religious classification which results in members of a religion being denied the opportunity to serve on a jury clearly constitutes a 'burden' on the free exercise of religion." *Id.* Allowing peremptory challenges based on

B. The Potential Elimination of Peremptory Challenges

Although various courts have offered strongly supported constitutional arguments for invalidating religion-based peremptory challenges, the practical ramifications of such a decision are somewhat staggering.[257] Allowing further restriction on the use of peremptory challenges would be another strike against the uninhibited use for which peremptory challenges were created.[258] This added restriction could eventually prevent the peremptory challenge from performing its primary function of ensuring an impartial jury, consequently rendering the judicial tool obsolete.[259]

With a growing number of classifications that could trigger suspicion under the Equal Protection Clause, granting religion this ultimate protection may start the peremptory challenge on a slippery slope, which may eventually result in abandonment of the peremptory challenge altogether.[260] Forcing the state to articulate a non-invidious motive for a peremptory challenge, while at the same time limiting its options, is not in tune with allowing parties to strike *peremptorily*.[261] Some courts have already noted that the continual extension of peremptory strike protection to an increasing number of suspect classes may have damaging repercussions on the life of the peremptory

religious affiliation is in effect "a form of state-sponsored group stereotype rooted in, and reflective of, historical prejudice." Lieutenant Colonel 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*, 2004 ARMY LAW. 10, 22 (2004). "Such strikes, like those based on race and gender, cause harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id*.

257. *See generally* Karl A. Menninger, *Proof of Religion in the Courtroom that Violates the Right to a Fair Trial*, 73 AM. JUR. 3d § 89 (2003) (discussing religion's relation to potential juror bias); Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090 (2001) (discussing how the actual religious beliefs of a member, as opposed to the doctrinal beliefs of the religion, make generalization difficult); A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the* Batson *Rule*, 1998 U. CHI. LEGAL F. 441 (recognizing the difficulty in correlating beliefs to specific religious affiliations in the fact of the infinite variations of each juror's religious experience); Leaders, *supra* note 74; Angela J. Mason, *Discrimination Based on Religion Affiliation: Another Nail in the Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493 (1995) (examining the potential for peremptory challenges to become obsolete by offering protection to religion).

258. Bell Chambers, *supra* note 73, at 608.

259. *Id.*; *see also* Mason, *supra* note 257, at 493, 536–37 (discussing the slippery slope by which the peremptory challenge may be eliminated).

260. Colb, *supra* note 29 at ¶ 39.

261. *Id.* at ¶ 39–40. "Once scrutiny and review are the rule rather than the exception, peremptory challenges may become simply watered down 'for cause' challenges, in which the reasons can be somewhat less persuasive but still permissible." *Id*. at ¶ 40.

strike.[262] However, it has also been noted that while peremptory challenges have been a steadfast part of our judicial system, their elimination may not be as negative as first thought.[263] The peremptory challenge has been argued to not effectively remove bias from the jury.[264] In fact some studies have shown that prosecutors peremptorily strike as many jurors that fit the perception of unwilling to convict as those actually willing to find the defendant guilty.[265] Ultimately, some argue that these inconsistencies render the peremptory challenge not as beneficial to the judicial system as first thought.[266] Therefore, although outlawing religion-based peremptory challenges could advance the downfall of this judicial tool, the consequences could be less serious than expected.[267]

262. A Florida appellate court case acknowledged this danger, stating "[this decision] marks the beginning of the end of the unfettered use of the peremptory challenge in this state." Alen v. State, 596 So.2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring). The court predicted that the decision, forbidding discriminatory peremptory strikes against African-Americans because of their race, would eventually extend to ban all forms of peremptory challenges, "whether based on race, ethnic origin, nationality, gender, religion, wealth, or age." *Id.* The court further opined, "it seems obvious that the peremptory challenge system, as we know it, is totally doomed." *Id.* at 1087. The Florida Supreme Court also recognized that the decision "may be characterized by some as another nail in the coffin of the peremptory challenge system." Joseph v. State, 636 So.2d 777, 781 (Fla. Dist. Ct. App. 1994).

263. *See* Jeffrey Abramson, *Abolishing the Peremptory, but Enlarging the Challenge for Cause*, *at* http://www.apa.udel.edu/apa/archive/newsletters.v96n2/law/abolish/asp (Spring 1997) (discussing the peremptory challenges' inability to eliminate bias).

> The peremptory system would be worth preserving only if there were credible evidence that it did more to remove bias from the jury (by eliminating prejudiced individuals) than to bring it in (by skewing dynamic deliberation across group lines). But one impressive empirical study of the pre-*Batson* era gave the peremptory challenge only a mixed review. Overall, it found the "collective performance of the attorneys . . . not impressive." Prosecutors were as likely to strike persons who ended up voting to convict as to acquit. Defense counsel did "slightly better." The researchers were mostly struck by the erratic benefits of peremptory challenges. Although on average the defense gained an advantage through peremptory challenges, that average was misleading because there was such disparity from case to case in the performance of counsel. These "adversarial inequities" did not paint a pretty picture of the larger public purposes served by peremptory challenges. The potential to imbalance the jury was great when one side was legally entitled to a greater number of peremptory challenges or simply had more luck or skill in using an equal number of them.

Id. at ¶ 16. (citing Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491, 513, 517–19, 528–29 (1978) and Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1082 (1995)_.

264. Abramson, *supra* note 263, at ¶ 16.

265. *Id.*

266. *Id.*

267. *See supra* notes 264–66 and accompanying text (explaining the limitations of the peremptory challenge).

IV. PROPOSAL

While state and federal courts have not yet reached a consensus on whether peremptory strikes based on religion are constitutional, there is a developing theme regarding the difference between religious affiliation and religious beliefs.[268] To reconcile the differing opinions among the courts, it is important that the Supreme Court grant certiorari on the issue and resolve the present ambiguities.[269]

When analyzed, it should be found that discrimination based on the religious affiliation of a potential juror is inappropriate, while the decision is not as apparent regarding a strike based on the strength of one's religious beliefs.[270] Some have compared the strength of religious beliefs to race and gender in terms of devotion or commitment.[271] Viewing one's religious conviction as opposed to religious affiliation is similar to considering a male juror's belief that women are unworthy of equal treatment, or a Caucasian juror who is a white supremacist.[272] Although both of these examples involve suspect classifications, using a peremptory strike to remove either juror is not

268. Colb, *supra* note 29, at ¶ 19. *See also* United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998) (discussing in dicta the use of peremptory challenges in relation to religious beliefs and affiliation); United States v. DeJesus, 347 F.3d 500 (N.J. 2003) (examining the use of peremptory challenges exercised by the State to remove two jurors based on their degrees of religious involvement).

269. *See supra* Part II.C.8.b (addressing the arguments of and questions posed by the dissent in the United States Supreme Court's denial of the defendant's petition for certiorari in *Davis v. Minnesota*).

270. Theresa Osterman Stevenson states that,

> [r]eligious affiliation is being viewed much the same as race or gender, while religious beliefs are being analyzed as much closer to the sorts of things upon which we have traditionally exercised a peremptory challenge. . . . A Muslim could not be struck from the trial of a Muslim terrorist simply because he is a Muslim, any more than a Catholic could be struck from a death penalty case simply because he is a Catholic . . . [t]he distinction is between the potential jurors' religious status and their belief in a particular tenet.

Theresa Osterman Stevenson, *Peremptory Challenges may Include Jurors' Religious Beliefs: Courts Distinguish Degree of Religious Belief from Religious Affiliation*, 29 A.B.A. LITIG. NEWS 1, 6 (2004).

271. Colb, *supra* note 29, at ¶ 33–38.

272. *Id.*

> [A] potential juror might describe himself as a member of the 'men's movement' who believes that women have encroached on male prerogatives and have turned masculine creatures into effeminate losers . . . [a]nother might describe herself as a women whose greatest loyalty is to women and who considers herself a woman first and a citizen second. She might spend most of her time engaging in activism connected to her commitment to women's empowerment.

Id. at ¶ 34.

inherently based on his or her class (i.e., race or gender).[273] Instead, it is based on the intensity and conviction with which he or she chooses to observe a belief, and the possibility that these beliefs could interfere with his or her participation as an unbiased juror.[274]

If it were apparent that a juror holds great conviction in his religious beliefs, no matter what his affiliation may be, it would probably be appropriate to exclude him or her based upon the bias he or she will bring to the jury.[275] Therefore, while it is probably not within the boundaries of the Constitution to exercise a peremptory challenge based on a juror's religious *affiliation*, the Supreme Court should set forth an opinion stating that it is acceptable to strike a juror based on his or her religious *beliefs*.[276]

V. CONCLUSION

There is a long history of discrimination in the selection of juries. It began with the complete exclusion of African-Americans from the venire through the use of statutes and local law. After this practice was outlawed following the inception of the Fourteenth Amendment, prosecutors began to rely on their peremptory challenges to create the same effect. However, the Supreme Court found that race-based peremptory challenges were unconstitutional and made it unlawful for prosecutors to continue the practice of exercising them in this manner. The Court furthered its stance on the discriminatory use of peremptory challenges with its more recent declaration that peremptory challenges are no longer permitted based on gender.

273. *Id.* at ¶ 33–38.

274. *Id.*

275. Mansfield, *supra* note 251, at 472–73.

> Depending on what is meant by the religion of the juror, the predictive value of the fact could be great or little. Thus, if a person had said that he had a religious belief in a God who saw no value in human law, the probability that the person would ignore the law given to him by the judge would be considerable, whereas if all that can be said that the juror is a 'member' of a particular church, one of whose officials has announced such a view as church doctrine, the probability would be less.

Id. See also U.S. v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998) (stating the difference between using a peremptory challenge based on a juror's religious beliefs and striking a juror based on that juror's religious affiliation); State v. Purcell, 18 P.3d 113 (Ariz. Ct. App. 2001) (holding that *Batson* extends to include peremptory strikes based upon religious affiliation); People v. Martin, 75 Cal. Rptr. 2d 147 (Cal. Ct. App. 1998) (discussing cases in which jurors have been stricken based on their religious beliefs); State v. Eason, 445 S.E.2d 917 (N.C. 1994) (examining when it is proper to strike a juror based on the juror's religious convictions).

276. *See* Mason, *supra* note 257, at 503 (stating that there has been little guidance about whether *Batson* should be extended to include religious membership); Larson v. Valente, 456 U.S. 228, 244–46 (1982) (discussing the application of strict scrutiny to religious affiliation).

The Supreme Court should extend this analysis and rule against the government's ability to exercise peremptory challenges based upon a potential juror's religion. Religion is commonly afforded the same protections as both race and gender, and it should be no different in the case of peremptory challenges. Because of the confusion surrounding the topic and the divergence in the various states and circuits, the Supreme Court should grant certiorari on the issue and opt to prohibit the further use of peremptory challenges to remove jurors based upon their religious affiliations and also address the issue of juror removal based on religious beliefs.